



Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Gall, ALD/OHR, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 20 December 2018, the Applicant, a staff member with the United Nations Secretariat, filed the application to contest the Administration's decisions (a) not to transfer him to a position outside his section, (b) not to recognize his indefinite training instructor certification, and (c) the alleged failure to protect him from further retaliation. The Applicant submits that the Administration failed to implement the recommendations from the Ethics Office by these contested actions.

2. In the reply, the Respondent submits that the application is not receivable with regard to the alleged failure to protect the Applicant from further retaliation since it is not a contestable administrative decision that has direct and adverse impact on his terms of appointment. Concerning the other two decisions, the Respondent submits that the application is without merit as the Administration has accepted and fully implemented the Ethics Office's recommendations.

3. For the reasons below, the Tribunal rejects the application.

Facts

4. In December 2013, the Applicant submitted a request for protection against retaliation to the Ethics Office. The Ethics Office initially concluded that the matter did not raise a *prima facie* case of retaliation.

5. In June 2016, the Applicant obtained a new document in support of his claim of retaliation filed in 2013 and submitted it to the Ethics Office. Based on this new evidence, the Ethics Office concluded that the matter raised a *prima facie* case of retaliation and referred the case to the Office of Internal Oversight Services ("OIOS") for investigation.

6. On 15 November 2017, the Ethics Office informed the Applicant that, following the investigation by OIOS, it concluded that he was retaliated against for reporting misconduct when he was transferred out of his unit at the time. Pursuant to

sec. 8.5 of ST/SGB/2017/2 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), the Ethics Office recommended the following four remedial actions to the Head of the Applicant's department:

- a. Efforts be made, in consultation with the Applicant, to transfer him to one of the specialized units in his section or to another position in his department for which he may be suitable as soon as practicable (the first recommendation);
- b. The status of the Applicant's training instructor certification be clarified. If the certification expired under the applicable administrative framework, the Applicant be allowed to initiate the required process to obtain its reactivation (the second recommendation);
- c. All managers in the Applicant's section be provided with appropriate training on the Organization's policy on protection against retaliation (the third recommendation);
- d. All necessary measures be taken to ensure the Applicant's protection from any further retaliation, particularly from those staff members who were involved in the retaliatory transfer of the Applicant (the fourth recommendation).

7. The Ethics Office also recommended the referral of the Applicant's supervisor, who played a significant role in the retaliatory transfer of the Applicant, for possible disciplinary procedures or other action that may be warranted.

8. On 20 December 2017, the Head of the Applicant's department informed the Applicant that he reviewed the report from the Ethics Office and that the supervisor against whom the Applicant complained was no longer in his chain of command. The Head of department also told the Applicant that he is encouraged to apply for other specialized assignments as well as mission assignments as relevant.

9. On 15 March 2018, the Ethics Office referred the Applicant's case to the Secretary-General under sec. 8.8 of ST/SGB/2017/2/Rev.1 since the first, second and third recommendations were not implemented. Noting the Head of department's commitment to ensure that the Applicant be protected from any further retaliation, the Ethics Office considered that the fourth recommendation was accepted by the Head of the Applicant's department.

10. On 26 June 2018, the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") provided the Applicant with a written decision on the remedial action recommendations of the Ethics Office under sec. 8.8 of ST/SGB/2017/2/Rev.1. It was noted that the fourth remedial action recommendation had already been accepted and implemented. With respect to the first, second, and third recommendation, the ASG/OHRM confirmed as follows:

a. The recommendation that all efforts be made, in consultation with the Applicant, to transfer him to one of the specialized units in his section or to another position in his department for which he is qualified, is accepted, and it will be implemented in cooperation with his department, giving regard to the availability of suitable positions and his expressed interest;

b. The Applicant's certification in question had lapsed and his department confirmed that he is free to apply to be requalified. Therefore, this recommendation was implemented;

c. Training on the retaliation policy for all managers in the Applicant's section was held and therefore this recommendation was implemented.

11. On 18 July 2018, the Applicant met with a manager in his section and was offered two potential positions in the section's specialized units.

12. On 24 August 2018, the Applicant requested management evaluation of the decisions (a) not to transfer him out of his section, (b) to consider his training instructor certification expired, and (c) the alleged failure to protect him from further retaliation.

13. By letter dated 24 December 2018, the Under-Secretary-General for Management informed the Applicant that the contested decisions were upheld.

Consideration

Request for anonymity

14. The Applicant requests that confidentiality be granted to him on the ground that the present case is related to protection granted to him against retaliation for reporting misconduct under ST/SGB/2017/2, which provides, at sec. 3, that the Administration has the duty “to protect the confidentiality of the individual’s identity and all communications through those channels to the maximum extent possible”.

15. Article 11.6 of the Dispute Tribunal’s Statute and art. 26 of its Rules of Procedure provide that the judgments of the Dispute Tribunal shall protect personal data and shall be made available by the Registry of the Dispute Tribunal. The Appeals Tribunal has held in this regard that “the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability” (*Lee* 2014-UNAT-481, para. 34). The Appeals Tribunal’s practice establishes that the principle of publicity can only be departed from where the applicant shows “greater need than any other litigant for confidentiality” (*Pirnea* 2014-UNAT-456, para. 20) and that it is for the party making the claim of confidentiality to establish the grounds upon which the claim is based (*Bertucci* 2011-UNAT-121, para. 46).

16. In the present case, the Tribunal is persuaded by the Applicant’s contention that the confidentiality of his identity should be protected under ST/SGB/2017/2 and thus grants the request for anonymity.

Scope of review and receivability

17. In this case, one of the decisions the Applicant challenges is the Administration’s alleged failure to protect him from further retaliation. He claims that other than ensuring that the supervisor he complained of is no longer in his chain of

command, no steps were taken to ensure protection from further retaliation by other managers in his section.

18. The Tribunal notes that one of the recommendations from the Ethics Office is “[a]ll necessary measures be taken to ensure the Applicant’s protection from any further retaliation”. Therefore, he is contesting the alleged non-action of the Administration on one of the recommendations from the Ethics Office in accordance with sec. 10 of ST/SGB/2017/2. The Administration’s action or non-action on the recommendations from the Ethics Office is a contestable administrative decision “if it has direct legal consequences affecting the terms and conditions of appointment”. This requirement is consistent with the Appeals Tribunal’s jurisprudence. The Appeals Tribunal has consistently held that the key characteristics of an administrative decision subject to judicial review is that the decision must “produce direct legal consequences” affecting a staff member’s terms or conditions of appointment (see, for example, *Ngokeng* 2014-UNAT-460, para. 27, *Lee* 2014-UNAT-481, para. 49).

19. The Respondent submits that the alleged failure to protect the Applicant from further retaliation does not give rise to a contestable administrative decision under art. 2.1(a) of the Dispute Tribunal’s Statute and therefore this claim is not receivable since the Applicant has not identified any specific decision that has had a direct and adverse impact on his terms of appointment. The Respondent does not challenge the receivability of the other claims.

20. By Order No. 42 (NY/2020), the Tribunal directed the Applicant to respond to the Respondent’s claim on receivability. In response, the Applicant argues that his section is a “closed ecosystem” where almost all members spend their whole career until retirement and therefore as long as he remains in his section, he would not be protected from further retaliation.

21. As far as the Applicant’s claim is related to his transfer request, that is a separate matter concerning the first recommendation from the Ethics Office. The Applicant submits that nothing was done with regard to other managers in his section,

but this was addressed in the third recommendation from the Ethics Office that required training on the retaliation policy for all managers in his section. The Applicant otherwise did not identify any specific decision that has direct impact on his terms of appointments. The Applicant says that given the nature of his section (i.e., “closed ecosystem”), he would not be protected from further retaliation as long as he remains in his section, but as the Appeals Tribunal held in *Lee*, at para. 52, a contested decision “must have a ‘direct’ impact and not a future injury”. The Applicant also presents his non-selection for promotion or specialized assignments in the past years as evidence of the Administration’s failure to protect him from further retaliation, but these non-selection decisions are distinct administrative decisions that must be contested separately.

22. Therefore, the Tribunal finds that the alleged failure to protect the Applicant from further retaliation is not a contestable administrative decision as it does not have legal consequences on his terms of employment. Therefore, this part of the Applicant’s case is not receivable.

23. Accordingly, the remaining issue as identified by the Applicant is whether the Administration failed to implement the recommendations from the Ethics Office by not transferring him to a position outside his section and by not recognizing his indefinite training instructor certification.

24. Additionally, the Tribunal notes that while the Applicant did not specifically identify this as a contested decision, he also submits that his supervisor was not referred to the ASG/OHRM for possible disciplinary procedures, in reference to the Ethics Office’s recommendation that the Applicant’s supervisor, who played a significant role in the retaliatory transfer of the Applicant, be referred for possible disciplinary procedures or other action that may be warranted in this case.

25. Noting that the Applicant raised this issue in his management evaluation request and it was addressed in the response to his management evaluation request, the Tribunal will review this issue as well. This issue can be reviewed as “the Dispute Tribunal has the inherent power to individualize and define the administrative

decision challenged by an applicant and to identify the subject(s) of judicial review” (*Fasanella* 2017-UNAT-765, para. 20).

Whether the Administration failed to implement the recommendations from the Ethics Office

26. In light of the foregoing, the Tribunal will decide whether the Administration failed to implement the recommendations from the Ethics Office: (a) by not transferring the Applicant to a position outside his section; (b) by not recognizing his indefinite training instructor certification; and (c) by not referring his supervisor for possible disciplinary procedures. In reviewing the Secretary-General’s exercise of discretion in this matter, the Tribunal is to follow the well-established standard of review as provided in *Sanwidi* 2010-UNAT-084, para. 40:

... When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

Transfer of the Applicant

27. The Tribunal recalls that the Ethics Office recommended that efforts be made, in consultation with the Applicant, to transfer him to one of the specialized units in his section or to another position in his department for which he may be suitable as soon as practicable.

28. It is undisputed that the Administration offered the Applicant a transfer to two vacant suitable positions in the specialized units of the Applicant’s section and the Applicant declined the transfer offer on the basis that he would still remain under the authority of his section chief, who was involved in retaliation against him, and that he preferred to be assigned to a position outside his section. The Respondent explained

convincingly in the reply why it was not feasible to offer the Applicant a position outside his section.

29. The Applicant does not submit that the Administration offered positions that were not suitable for him. The Tribunal understands that the Applicant prefers to be transferred to a position outside his section, but the Ethics Office's recommendation only required that "efforts be made", in consultation with the Applicant, to transfer him to either a position in the specialized units in his section or to another position in his department. According to the recommendation, the Applicant had no right to be transferred to a position outside his section.

30. Accordingly, the Tribunal finds that the Administration implemented the recommendation from the Ethics Office in this matter.

The Applicant's training instructor certification

31. The Tribunal recalls that the Ethics Office recommended that the status of the Applicant's certification be clarified. If the certification had expired under the applicable administrative framework, the Applicant was to be allowed to initiate the required process to obtain its reactivation.

32. The Applicant's certification was issued in May 2008. The Applicant submits that his training instructor certification was issued indefinitely and therefore the Administration should honor his "acquired rights".

33. The Respondent submits that the departmental manual was revised in October 2012, and under the revised manual, the training instructor certification in question was only valid for three years. In November 2013, a training instructor course was offered and yet the Applicant did not take this course and thus was not recertified. Therefore, the Applicant's certification expired on 31 December 2013. The Respondent further submits that the Administration confirmed that the Applicant was free to apply to requalify as a training instructor under the departmental manual.

34. The Tribunal notes that under the departmental manual, paras. 4.27-4.28, the initial certification is valid for three years, and an instructor seeking recertification must comply with the recertification process as outlined in the manual. The Administration clarified that the Applicant's certification lapsed and confirmed that he is allowed to apply to requalify as an instructor. The Ethics Office did not recommend that the Applicant's certification issued in 2008 be honoured indefinitely.

35. Accordingly, the Tribunal finds that the Administration implemented the recommendation from the Ethics Office in this matter.

Referral of the Applicant's supervisor for disciplinary procedures

36. The Tribunal recalls that the Ethics Office recommended the referral of the Applicant's supervisor, who played a significant role in the retaliatory transfer of the Applicant, for possible disciplinary procedures or other action that may be warranted in this case.

37. The Tribunal notes, in regard to the Applicant's management evaluation request, that the Administration informed the Applicant that his supervisor had been counseled by the Director of his Division and had attended a series of managerial trainings as directed.

38. The Applicant submits that his supervisor was not referred to the ASG/OHRM for possible disciplinary procedures and that the Director who counseled his supervisor was a previous section chief, who was identified by the Ethics Office to have contributed to retaliating against him.

39. The Tribunal agrees with the Respondent that the recommendation from the Ethics Office did not require the referral of the Applicant's supervisor for possible disciplinary procedures, but allowed for either the referral for possible disciplinary procedures or other action that could be warranted. The Applicant may disagree with the Secretary-General's exercise of discretion in this matter, but there is no evidence that it was inappropriately undertaken.

40. Accordingly, the Tribunal finds that the Administration appropriately implemented the recommendation from the Ethics Office in this regard.

Conclusion

41. The request for anonymity is granted. All previously published orders in this case will be removed from the Tribunal's website. All orders and submissions in this case shall be filed confidentially in the Tribunal's register.

42. The Tribunal rejects the present application.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 20th day of April 2020

Entered in the Register on this 20th day of April 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York