



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/061

Judgment No.: UNDT/2020/173

Date: 30 September 2020

Original: English

Before: Judge Francis Belle

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Alan Gutman, AAS/ALD/OHR

The Application and Procedural History

1. The Applicant was a Senior Protection Officer at the United Nations High Commissioner for Refugees (UNHCR).

Facts and Submissions

2. On 25 February 2019, the Office of Internal Oversight Services (OIOS) informed the Applicant that it has reviewed his reports dated 25 January and 7 February 2019. Specifically, these reports sought an independent assessment of possible misconduct by five named staff members of UNHCR, and the Applicant's contention that the Principal and Senior Legal Advisors were tainted by conflict of interest in their representation of the Organisation before the United Nations Dispute Tribunal (UNDT).

3. On 8 June 2019, the Applicant filed this application before the UNDT in Nairobi challenging the Respondent's decision to not investigate "manifest misconduct by senior officials in UNCHR."

4. It is the Applicant's case that he was "blacklisted" from positions within UNHCR, and that the decision to blacklist him was taken in retaliation of him challenging two selection processes. The Applicant formally complained to the High Commissioner of UNHCR, who responded on 4 February 2019 by informing the Applicant that he had referred the matter to the Office of Internal Oversight Services for investigation.

5. On 25 February 2019, OIOS took the position that as there were a number of applications pending before both the Dispute and Appeals Tribunals, it would be inappropriate for OIOS to commence investigation into the alleged blacklisting and retaliation. OIOS added that it conducted an initial assessment into the issues of conflict of interest raised by the Applicant and determined that it was within the purview of

UNHCR to internally assess and take any appropriate action.

6. On 26 June 2019, the Applicant filed a motion to consolidate this case with UNDT/NBI/2016/054, UNDT/NBI/2018/040 and UNDT/NBI/2018/083. On 3 July 2019, the Respondent filed submissions strenuously objecting to the motion for consolidation of this case with the other three matters.

7. On 12 July 2020, the Respondent filed his substantive reply to the application. The Respondent took the position that the application is not receivable on ground that a/ the Applicant has not sufficiently shown a nexus between the impugned decision and the terms of his employment with the Organisation; b/ that the correspondence from OIOS does not constitute an administrative decision; c/ that the Tribunal does not have the jurisdiction to review the impugned decision; and that d/ the Applicant has not identified a violation of his terms of appointment.

8. The Respondent further argues that the Applicant has not shown the impugned decision to be unlawful.

9. On 27 February 2020, the Applicant filed a motion for determination of this matter to be expedited and for accountability to be enforced as soon as possible. The Applicant took the view that an oral hearing was not necessary for proper determination of this matter.

Deliberations

10. The Applicant Mr Ross complains that he found out that he had been blacklisted by the former Director of Human Resources and now (at the time of filing) Inspector General of UNHCR and the Deputy Director of Human Resources of UNHCR.

11. The Applicant challenged the blacklisting in a request for management evaluation to the deputy High Commissioner of UNHCR. But he alleged that the Deputy High Commissioner of UNHCR blacklisted him for a second time.

12. The Applicant subsequently appealed the blacklisting and on 4 February 2019 the High Commissioner responded to the Applicant and informed him that the matter has been referred to OIOS.

13. On 25 February 2019, the Applicant received an email from OIOS informing him that the OIOS declined to investigate. On 28 February 2019, Mr Ben Swanson Director of the Investigation Division of OIOS, provided reasons for declining to investigate. He stated that it was “not a good idea” for OIOS to start investigating when the same issues are before the Tribunal and that with regard to the conflict of interest this matter is under the purview of UNHCR.

14. In response, the Respondent submits that the application is not receivable on several grounds.

15. These facts give rise to the following issues: Is the complaint against the OIOS receivable? Can the UNDT make any other useful order in the application?

16. The Tribunal determines that the Application is not receivable for the reasons that follow.

17. However, it is important to set out the Applicant’s argument in relation to the OIOS failure to investigate his complaint.

18. The Tribunal summarizes the Applicant’s argument to be that the Secretary General cannot claim that an investigation creates a conflict of interest since the UNDT does not conduct investigations. The UNDT follows the rules laid down in *Sanwidi* to examine how a decision was made and does not question the merits of the decision

itself.¹ Based on this reasoning, OIOS can proceed to conduct the investigation of the allegations he has made without in any way interfering with the matters before the tribunal.

19. But the Respondent argues, citing *Koda*,² that the jurisprudence of the UNDT and UNAT states that there is nothing that the Tribunal can do if the OIOS declines to act because the OIOS is an independent entity and cannot be ordered to investigate a matter by the Respondent.

20. Tribunal has determined that there is a distinction to be made on the argument that the SG cannot instruct OIOS to investigate a matter if OIOS has decided not to investigate.

21. This reasoning must be contrasted with the argument that OIOS actions cannot be impugned. The latter is not correct because a decision of the OIOS can be impugned if the decision adversely affects the legal rights of a staff member or former staff member etc.

22. In *Koda*, UNAT held that insofar as the contents and procedures of an individual report are concerned, the Secretary General has no power to influence or interfere with OIOS.³ Thus, the UNDT also has no jurisdiction to do so, as it can only review the Secretary General's administrative decisions. But this is a minor distinction; as OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.

23. However, what this means is that the decisions of OIOS can come under scrutiny, and would constitute an administrative decision, when it impacts on the legal rights of a member of staff or former member of staff who have standing before the

¹ 2011-UNAT-104.

² 2011-UNAT-130.

³ 2011-UNAT-130.

Tribunal. But the decision of OIOS not to investigate would not, in and of itself, be an administrative decision that can be appealed to the UNDT.

24. It may appear to be a somewhat circular argument that Mr Ross is unable to make a case against the administration because OIOS would not investigate the allegations, yet he has a legitimate right to make a complaint of harassment and/or retaliation and abuse of authority which can only be proved if it is investigated.

25. The reality is that his allegations of impropriety are being made against some of the very persons who would normally be called upon to investigate those allegations, so that the only alternative is to refer the case to OIOS, who in turn have refused to investigate. The Tribunal opines that the only option open to Mr Ross is to ask that the persons in UNHCR who would normally investigate the matters alleged to recuse themselves and allow other person to carry out an investigation. But there would still be doubt as to whether those persons could conduct a fair investigation. It is in the interest of both the parties to this dispute that these matters be properly investigated and determined.

26. OIOS' stance can be questioned; but to the extent that OIOS feels that Mr Ross has matters before the Tribunal in which some of the misconduct alleged has been raised, a finding of fact on any of those matters could affect the outcome of an investigation. It would therefore be pointless for OIOS to be pursuing an investigation which may be rendered moot by a decision of the Tribunal or UNAT.

27. If UNDT holds that there is evidence of blacklisting, which would put other administrative decisions into question, then the evidence submitted by Mr Ross in that case can be used to establish misconduct on the part of the UNHCR officials.

28. However, it is the Tribunal's view that the application challenging OIOS' decision not to investigate his allegation is, at present, misconceived. There is nothing to show that the decision being impugned in this application was improperly taken, or

that it was tainted by factors extraneous to the complaint. On the contrary, the Tribunal finds that OIOS acted properly in referring the matters complained about back to UNHCR for appropriate investigation and action.

29. The application is therefore not receivable.

ORDER

30. The application is DISMISSED.

(Signed)

Judge Francis Belle

Dated this 30th day of September 2020

Entered in the Register on this 30th day of September 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi