



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/054/T

Judgment No.: UNDT/2021/139

Date: 24 November 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MUGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Víctor Rodríguez

Counsel for Respondent:

Jonathan Croft, ALD/OHR, UN Secretariat

Lucienne Pierre, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), contests the Administration’s decisions to “suspend the consideration of her disciplinary process until such time the Applicant return to the employment of the Organization” following her retirement.

2. The application was initially filed with the Nairobi Registry of the Dispute Tribunal on 26 October 2020 and transferred to the New York Registry on 21 October 2021.

3. For the reasons below, the Tribunal finds that the application is not receivable and rejects it in its entirety.

Facts

4. On 22 November 2018, the Applicant retired from the Organization.

5. On 24 June 2019, Assistant Secretary-General for Human Resources (“ASG/OHR”) transmitted to the Applicant a report from the Office of Internal Oversight Services (“OIOS”) dated 31 December 2018 concerning an investigation into allegations of misconduct by the Applicant.

6. Given that the Applicant had separated before the resolution of the matter, the ASG/OHR informed the Applicant that a note would be placed on her Official Status File and gave her four weeks to respond on whether she wished to comment on the note.

7. The ASG/OHR further informed the Applicant that given the pending allegations against her, her name would be placed in the “Clear Check system”, which is a screening database accessible to the United Nations entities when conducting

recruitment exercises, in which it would be noted that the Applicant had separated on retirement with pending allegations of misconduct.

8. The Applicant was given a deadline to respond to this measure.

9. The Applicant provided the requested comments on 2 July 2019.

10. On 16 July 2019, the Applicant received an email from the Administrative Law Unit in which, on behalf of the ASG/OHR, she was asked to confirm that she was prepared to cooperate in the disciplinary process following the OIOS report. The Applicant responded in the affirmative.

11. By memorandum of 1 April 2020, the ASG/OHR informed the Applicant that she had decided to suspend the consideration of whether to initiate a disciplinary process until such time as she return to the employment of the Organization and that she would proceed to place the note referred to in her 24 June 2019 memorandum on the Applicant's Official Status File. The Applicant was further afforded a deadline to provide comments in relation to the note which would be placed on her Official Status File along with the note.

12. Finally, the ASG/OHR informed the Applicant that her name would not be included in the Clear Check database.

13. On 5 June 2020, the Applicant requested management evaluation of the 1 April 2020 decision. On 27 July 2020, the Applicant was informed that, following management evaluation, the Administration had decided to uphold the 1 April 2020 decision.

Consideration

Scope of the case

14. The Applicant contests two decisions: the decision not to complete a disciplinary process against her and the decision to place a note in her Official Status File.

15. As the Respondent challenges the receivability of the application, the Tribunal will preliminarily review this aspect of the case.

Non-initiation of a disciplinary process against the Applicant

16. The Appeals Tribunal's settled jurisprudence provides that to be capable of appeal, an administrative decision must produce direct legal consequences affecting a staff member's conditions of employment (see *Kennes* 2020-UNAT-1073, para. 40).

17. In *Kennes*, the Appeals Tribunal found that the Administration's decision not to complete a disciplinary process against a staff member and instead resume it should the staff member become a staff member again did not constitute an appealable administrative decision under art. 2.1 of the Dispute Tribunal's Statute (para. 44).

18. Moreover, in *Kennes*, the Appeals Tribunal agreed with the Dispute Tribunal's conclusion that the Administration has no duty to proceed with, and lacks the capacity to conduct, a disciplinary measure once a staff member has left the Organization, as its authority to complete a disciplinary process is predicated on the fact that a staff member has an ongoing employment relationship with the Organization (para. 45).

19. The Applicant claims that by requesting the Applicant's confirmation that she stood ready to cooperate in the disciplinary process, the Administration had, in fact, started the process which remains ongoing. She states that the Administration expressed its clear intention to act with respect to the allegation of misconduct against

the Applicant and that, in doing so, had raised the Applicant's legitimate expectation of a resolution.

20. The Tribunal finds this argument meritless.

21. Staff rule 10.3(a) states that no disciplinary sanction may be imposed following the completion of an investigation unless the concerned staff member has been notified, in writing, of the formal allegations of misconduct against him or her and given an opportunity to respond to these allegations.

22. Section 8.2(a) of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) also indicates that the disciplinary process is initiated with the issuance of written allegations of misconduct.

23. The record shows that no such written allegations were ever issued in relation to the Applicant. All the Administration did was inquire if the Applicant would be willing to cooperate with a disciplinary process.

24. Therefore, the Applicant cannot claim that the Administration had initiated a disciplinary process against her.

25. In any event, the Tribunal finds that *Kennes* applies *mutatis mutandis* to cases such as the present one, where the Administration, rather than suspending an ongoing disciplinary case, as in *Kennes*, decides not to even initiate the process.

26. Therefore, the Applicant had no right to force the Administration to complete a disciplinary process against her.

27. The Applicant further claims that, by suspending the consideration of initiating a disciplinary process, the Administration did not respect her right to due process.

28. In this respect, the Tribunal refers again to *Kennes*, where the Appeals Tribunal found that the applicant was not deprived of his due process rights, because he would have the opportunity to defend himself should he be employed again with the Administration.

29. The same principle applies in this case where the Administration decided to suspend the consideration of initiating a disciplinary process in relation to the Applicant should she be employed with the Organization in the future. Therefore, as in *Kennes*, the Applicant's due process rights have not been violated.

30. In light of the above, the Tribunal finds that the decision not to initiate a disciplinary process with respect to the Applicant did not impact her terms of employment and, as per *Kennes*, is not receivable *ratione materiae* as it does not concern an appealable decision under art. 2.1 of its Statute.

Placement of a note in the Applicant's Official Status File

31. The Applicant requests the removal of the note placed on her Official Status File along with "all other possible negative materials related to the Applicant".

32. 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, not a "future injury" (see *Lee* 2014-UNAT-481, para. 52).

33. The Appeals Tribunal has further found that a note placed in a staff member's Official Status File recording the Administration's decision not to complete a disciplinary process was not reviewable, because it did not produce direct legal consequences in the staff member's employment rights because it was merely informative in nature (*Kennes*, para. 49).

34. The note placed in the Applicant's Official Status File states, "[The Applicant] separated from service with the Organization effective 22 November 2018. At the time, a matter had not been resolved. Please contact the Office of Human Resources, at Headquarters, in the event that [the Applicant] should become employed as a staff member within the United Nations Common System in the future".

35. The Tribunal notes that, as in *Kennes*, this note is merely informative in nature and does therefore have no impact on the Applicant's terms of employment.

36. In light of this jurisprudence, the Applicant's request for removal of the note placed on her Official Status File is not receivable *ratione materiae*, because also this is not an appealable decision under art. 2.1 of its Statute.

37. The Applicant does not identify any other document which she deems to be "negative". The Tribunal therefore cannot review this aspect of her request.

Conclusion

38. The Tribunal rejects the application as not receivable.

(Signed)

Judge Joelle Adda

Dated this 24th day of November 2021

Entered in the Register on this 24th day of November 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York