



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

MELBIKSIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Marietta Hristovski, UNHCR

Jan Schrankel, UNHCR

Introduction

1. The Applicant, a former Associate Communications/Public Information Officer at the Office of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision by the Inspector’s General Office (“IGO”) and the Director of the Division of Human Resources (“DHR”) to refuse to provide answers to his questions regarding a former IGO investigation.

2. For the reasons set forth below, the application is dismissed as not receivable.

Facts and procedural background

3. The Applicant’s fixed-term appointment with UNHCR was due to expire on 31 December 2019. He went on special leave without pay (“SLWOP”) on 1 January 2020, and resigned effective 22 June 2020.

4. On 17 November 2019, the IGO received a complaint of possible prohibited conduct implicating the Applicant, which subsequently led to an investigation. The Applicant was interviewed, provided with a copy of the draft findings of the investigation, and given an opportunity to provide his comments on it, which he did on 10 and 15 March 2022.

5. On 29 March 2022, the Applicant received a letter from the Director, DHR, containing allegations of misconduct following an investigation report dated 15 March 2022 (INV/2020/029). In it, the Applicant was informed that, if established, the allegations against him would constitute misconduct under staff rule 10.1, and a failure of his obligations set out in staff regulation 1.2(a), (b), (e), and (f), as well as the Guidelines on the Personal Use of Social Media of UNHCR. The Applicant was further informed that, had he not previously resigned from his position, a disciplinary process and a charge of misconduct would follow, according to UNHCR/AI/2018/018. The Applicant was then invited to provide comments, relevant information and evidence, which would all be placed in his service records alongside the letter.

6. On 3 May 2022, the Applicant provided his comments to the letter of the Director, DHR.
7. On 16 May 2022, the Applicant followed up on his comments and asked if any further action was required on his side.
8. Following another exchange regarding legal framework and documentation, on 27 May 2022, the Executive Assistant to the Director, DHR, informed the Applicant that the letter dated 29 March 2022 and his comments dated 3 May 2022 were placed in his service records, and that no further action was needed from him.
9. By email dated 14 October 2022, the Applicant sought answers from IGO regarding the investigation into allegations of misconduct against him. Namely, the Applicant asked (i) what procedures were available for him to request IGO to rectify some allegedly factual inaccuracies in their investigation report; (ii) what was the email by which IGO was first alerted of the allegations against him; and (iii) when and how the witnesses proposed by the Applicant were considered in the investigation.
10. By email dated 31 October 2022, the IGO responded to the Applicant informing him that its involvement in his case had ended and that they were not in a position to respond to further inquiries.
11. By subsequent emails dated 31 October 2022 and 19 April 2023, the Applicant followed up on his original inquiry, and asked IGO to respond to his questions by 26 April 2023. No answer was provided.
12. On 10 June 2023, the Applicant requested management evaluation of the alleged decision to refuse to provide him answers regarding the IGO investigation. The request was supplemented on 15 June 2023.
13. By letter dated 3 July 2023, the Deputy High Commissioner decided that the Applicant's request for management evaluation was not receivable.
14. On 1 September 2023, the Applicant filed an application contesting the aforementioned decision.

15. On 26 October 2023, the Respondent filed his reply requesting, *inter alia*, that the application be dismissed as not receivable *ratione materiae* and *ratione temporis*.

Consideration

Receivability of the application

16. In his reply, the Respondent submits, *inter alia*, that the application is not receivable *ratione materiae* and *ratione temporis*. He claims that the alleged contested decision is not a reviewable administrative decision and that, even if it were, the request for management evaluation was filed after the statutory 60 calendar days' deadline from the date of the contested decision.

17. As per the applicable legal framework, an application is receivable *ratione materiae* if an applicant contests "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment", pursuant to art. 2.1 of the Tribunal's Statute, and if the applicant previously submitted the contested administrative decision for management evaluation, where required, in accordance with art. 8.1(c) of said Statute.

The alleged administrative decision

18. Art. 2 of the Tribunal's Statute provides the following in its relevant part:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

19. Pursuant to the jurisprudence of the United Nations Appeals Tribunal, an appealable administrative decision is a decision that has the capacity to produce direct legal consequences affecting a staff member's terms and conditions of employment (*Patkar* 2021-UNAT-1102, para. 22). In no uncertain terms:

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. (Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003); *Harb* 2016-UNAT-643, para. 25).

20. Accordingly,

Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision. What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not. (*Olowo-Okello* 2019-UNAT-967, para. 32)

21. In the present case, the Applicant is contesting the decision of IGO not to respond to his inquiries regarding a former investigation into allegations of misconduct against him.

22. The Tribunal agrees with the Respondent that the alleged contested decision does not carry the capacity to produce direct legal consequences affecting the Applicant's terms and conditions of employment.

23. Indeed, the lack of a response by IGO did not affect the Applicant in any way, nor was IGO obliged to respond to him. The investigation report had already been issued (15 March 2022) by the time the Applicant questioned some of its aspects in an email dated 14 October 2022. He never contested the investigation report or alleged an issue with it when he had the opportunity to comment on it, which was on 3 May 2022, namely over five months before his questioning started.

24. In fact, the decision that could have produce direct legal consequences affecting the Applicant is that to place the letter from the Director, DHR—dated 29 March 2022—in the Applicant’s service records, not the lack of response from IGO after it informed the Applicant that its involvement in his case had ceased.

25. However, to interpret that the actual contested decision is the one deriving from the letter dated 29 March 2022 is not possible in this case. It is very clear from the evidence on record that the Applicant’s issue relates to some alleged factual inaccuracies in the investigation report, the absence of information concerning the complaint against him, and the fact that some of the witnesses he proposed were allegedly not called to testify during the investigation. None of this supports that the Applicant had the intention of contesting the decision to place the 29 March 2022 letter in his service records.

26. Furthermore, since no disciplinary process was initiated following the issuance of the investigation report because the Applicant had resigned from the Organization, there is no other possible administrative decision to contest.

27. In this context, the Tribunal cannot interpret the contested decision in any broader term and must assess the receivability of the application based on the literal information provided by the Applicant himself.

28. As a result, the Tribunal finds that the identified administrative decision is not a reviewable administrative decision falling under its jurisdiction, thus rendering the application not receivable *ratione materiae*.

The management evaluation request

29. Pursuant to staff rule 11.2:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

30. Based on the applicable legal framework above, as well as on established jurisprudence of the Appeals Tribunal (*Ngoga* 2018-UNAT-823, para. 34; *Auda* 2017-UNAT-746, para. 33), a request for management evaluation is not receivable when submitted after the statutory 60 calendar days' deadline.

31. At the same time, under art. 8.3 of its Statute, the Dispute Tribunal has no jurisdiction to waive or suspend the time limits for management evaluation requests (*Dieng* 2019-UNAT-941, para. 30).

32. In the present case, the Applicant requested management evaluation of the alleged contested decision on 10 June 2023. The IGO issued its investigation report on 15 March 2022 and the Applicant's first asked for clarification by email of 14 October 2022. The fact that the Applicant created a deadline for IGO to respond to him did not bind the Administration to it, nor legally reset the clock for any statutory deadlines.

33. As correctly established by the Appeals Tribunal,

[The] reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines. Rather, the time window commences from the

date on which the original decision was made. For this reason, a staff member cannot delay the time for decision review by asking for reconsideration or confirmation of an administrative decision that had been communicated to him or her earlier. Neither can a staff member unilaterally determine the date of an administrative decision. (*Ahmad Mustafa et al.* 2021-UNAT-1126, para. 23; *Maha Fayek-Rezk* 2021-UNAT-1162, para. 28)

34. And,

An appellant may not unilaterally determine the date of the administrative decision by sending an e-mail to the Administration expressing an ultimatum to adopt a decision. If that were the case, no management review would ever be time-barred because the staff member could always prevent that possibility by simply sending an e-mail to the Administration stating that if his or her request is not analyzed by an arbitrarily chosen date it would be interpreted as an implied decision of refusal.

The date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine. (*Rosana* 2012-UNAT-273, paras.24-25)

35. Even if, for the sake of argument, it were accepted that the Applicant actually intended to contest the 29 March 2022 decision to place the investigation report in his service records, his request for management evaluation was also time-barred. To the extent that the Applicant intended to contest the findings of the investigation report issued on 15 March 2022, the same applies.

36. Indeed, there is no possible scenario where the Applicant's request for management evaluation of 10 June 2023 is found timely.

37. Thus, even if the alleged contested decision was indeed a reviewable administrative decision falling under the jurisdiction of this Tribunal, the Tribunal finds that the application would still be not receivable *ratione materiae* due to the second cumulative criteria required under art. 2.1 of its Statute not being met, i.e., the previous submission of a timely request for management evaluation.

Conclusion

38. In view of the foregoing, the Tribunal DECIDES to dismiss the application as not receivable.

(Signed)

Judge Sun Xiangzhuang

Dated this 30th day of January 2024

Entered in the Register on this 30th day of January 2024

(Signed)

René M. Vargas M., Registrar, Geneva