



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Isaac Endeley

LAGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Elizabeth Gall, BMS/OLS, UNDP

Introduction

1. By application dated 4 April 2022, the Applicant contests the “[i]mplicit and continued denial by [the United Nations Development Programme (“UNDP”)] to conduct an occupational health evaluation after the reported and objective exposure to toxic contaminants in the workplace”.

2. On 5 May 2022, the Respondent filed a reply challenging the receivability of the application.

Issues

3. Having considered the parties’ submissions, the Tribunal deems it appropriate to determine, as a preliminary matter, whether the application is receivable since receivability is a requirement for the Dispute Tribunal to have jurisdiction of, and therefore be competent in, a specific case (see art. 8 of the Statute of the Dispute Tribunal, and also the Appeals Tribunal in, for instance, *Barud* 2020-UNAT-998 and *O’Neill* 2011-UNAT-182).

Facts

4. The Applicant was initially appointed on 12 January 2017 as a Project Manager at the P-4 level at UNDP’s Regional Hub in Panama City. He was subsequently elected as a staff representative and served as Co-Chair of the Staff Association. On 20 November 2020, he and another staff representative requested UNDP’s Office of Audit and Investigations (“OAI”) to conduct an investigation into various matters including allegations of gross negligence by UNDP’s senior management for exposing staff to toxic substances at the workplace. On 27 May 2021, OAI informed the Applicant that a formal investigation was not warranted.

5. On 26 July 2021, the Applicant requested a management evaluation of OAI’s decision not to investigate the allegations of misconduct by UNDP’s senior

management. He also sought a management evaluation of UNDP's failure to take action to create a safe and healthy work environment ("first request for management evaluation"). On 1 September 2021, the Applicant was notified that his request was not receivable *ratione materiae*, as the contested decision by OAI did not affect the terms of his employment and was not susceptible to management evaluation. The Applicant was also notified that the other part of his request was not receivable *ratione personae*, as he did not have standing to submit the request in his capacity as a staff representative. He did not file an application before the Dispute Tribunal following the outcome of the first request for management evaluation.

6. On 23 November 2021, the Applicant separated from the Organization upon the expiration of his fixed-term appointment. On the same date, he submitted a renewed request for management evaluation of "the implied administrative decision of UNDP's failure to take timely corrective action to restore a safe and healthy work environment and to determine the impact of the exposure to contamination for [the Applicant]" ("second request for management evaluation"). On 3 January 2022, the Applicant was notified that his second request for management evaluation was not receivable due to his failure to identify an implied administrative decision that had arisen during the 60-day period immediately before his submission of the request. In other words, the request was time-barred.

Applicant's submissions

7. The Applicant's principal contentions may be summarized as follows:

a. He alleges that on several occasions during the course of his employment with UNDP, he requested his supervisors to provide information on the possible consequences of the exposure to toxic contaminants at the workplace and to conduct an occupational health evaluation, but that his requests were ignored. He now requests the Tribunal to order UNDP "to conduct the occupational health evaluation of all affected personnel" at the UNDP's Regional Hub in Panama in order to determine the impact on them of

the exposure to specific toxic contaminants and to “put in place the corresponding measure to compensate each staff member”. In the alternative, the Applicant requests a declaration that UNDP has exposed him to toxic contaminants at the workplace and has failed to comply with its duty of care towards him. He also requests moral damages for the “high personal cost” resulting from the lack of response from the UNDP management;

b. The Applicant submits that the contested decision in this case is the implied administrative decision by UNDP not to conduct an occupational health evaluation of the Applicant after the objectively proven exposure to toxic contaminants at his workplace. He states that despite his repeated requests to the UNDP senior management to have this issue addressed, it was only on “the last day of [his] appointment” that he was made aware of the decision. He maintains that the implied decision directly affected the terms of his appointment and that in filing the application, he is asserting his individual rights covered under the terms of his employment contract and not acting as a representative on behalf of other staff.

Respondent’s submissions

8. The Respondent’s principal contentions can be summarized as follows:

a. On his part, the Respondent submits that the application is not receivable on two grounds. First, he argues that the Applicant has not identified an implied administrative decision that was taken within the applicable time limits under staff rule 11.2(c). This should normally involve an implied rejection of a specific request for an occupational health evaluation that was made by the Applicant on a specified date, to a named UNDP official, and that remained unanswered in the 60-day period prior to the filing of the Applicant’s second request for management evaluation on 23 November 2021;

b. The Respondent also challenges the application on the basis that the contested implied decision does not qualify as an administrative decision under art. 2(1)(a) of the Statute of the Dispute Tribunal as it does not have any direct legal consequences on the terms of the Applicant's appointment. In addition, the Respondent states that the Applicant seeks to challenge the contested implied decision in his former capacity as a staff representative and not in his individual capacity as a former staff member.

Considerations

Receivability

9. Article 2(1) of the Tribunal's Statute sets out the requirements for judicial review of a contested administrative decision while art. 8 establishes the receivability criteria. Pursuant to art. 8(c), an applicant must previously have submitted the contested administrative decision for management evaluation, where required, before filing an application before the Tribunal. Staff rules 11.2(c) and 11.4(d) also establish the deadlines for requesting a management evaluation and for filing an application.

10. Article 8(3) of the Tribunal's Statute provides, in part, that the Tribunal "shall not suspend, waive or extend the deadlines for decision review" and the Appeals Tribunal has strictly enforced this prohibition (see, for instance, *Chahrour* 2014-UNAT-406, para. 26, and also *Al Surkhi et al.* 2013-UNAT-304 and *Ajdini et al.* 2011-UNAT-108).

11. It is well established in the jurisprudence of the Appeals Tribunal that a staff member may challenge an implied administrative decision that arises from the Organization's silence in response to a specific complaint or request by the staff member, where such an implied decision has direct legal consequences (see, for instance, *Larreia* 2020-UNAT-1004, para. 34; *Cohen* 2017-UNAT-716, para. 37; *Terragnolo* 2015-UNAT-566, para. 34; and *Tabari* 2010-UNAT-030, para. 23). Moreover, "[t]he date of an [implied] administrative decision is based on objective

elements that both parties (Administration and staff member) can accurately determine” (see, for instance, *Rosana* 2012-UNAT-273, para. 25).

12. However, an applicant before the Tribunal is required to clearly identify the administrative decision which is contested and to provide evidence with sufficient particularity of any specific instance in which he or she made a request and the Administration had denied or ignored such a request. An applicant also has the statutory burden to establish that the contested administrative decision was in non-compliance with the terms of his or her appointment or contract of employment. Such a burden cannot be met where the applicant fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on his or her contractual rights. (See, for instance, *Adnan-Tolon* 2019-UNAT-970, para. 28; *Argyrou* 2019-UNAT-969, para. 32; *Haydar* 2018-UNAT-821; and *Planas* 2010-UNAT-049).

13. In the case at bar, while the application contains general references to requests made to officials, the Applicant has not provided any evidence that he made a specific request for an occupational health evaluation that was addressed to a named official on a specified date. The Applicant’s averments that he repeatedly raised the matter over a four-year period are insufficient. He has not precisely identified any occasion when he raised the matter in his individual capacity as a staff member, with whom, where, and to what effect. He has also not shown that the Administration failed to take action on any such request in the 60 days leading up to 23 November 2021 when he filed the second request for management evaluation. As held by the Appeals Tribunal in *Argyrou*, “the alleged existence of a continuous wrong cannot of itself be perceived as an implied administrative decision” (see para. 33).

14. The Tribunal recalls that it does not have jurisdiction to hear and determine all matters in respect of which a staff member may feel aggrieved. The Tribunal must ensure that there is an administrative decision that is alleged to be in non-compliance with the staff member’s terms of appointment or his or her contract of employment, as provided for in art. 2.1(a) of the Tribunal’s Statute. Such decision must be

unilaterally taken by the Administration, be directed to the staff member, and have direct legal consequences for the staff member. See, for instance, *Lloret Alcaniz et al.* 2018-UNAT-840, para. 61 and *Adnan-Tolon* UNDT/2019/056, para. 7.

15. The Tribunal therefore finds that absent any identifiable administrative decision, the application is not receivable *ratione materiae*. There is no identified unilateral decision of individual application that carried direct legal consequences for the Applicant. The need to identify a specific administrative decision is obviously necessary for the purpose of determining when the 60-day time limit for management evaluation in terms of staff rule 11.2(c) commenced.

Conclusion

16. In view of the foregoing, the Tribunal DECIDES to reject the application as not receivable.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 12th day of June 2023

Entered in the Register on this 12th day of June 2023

(Signed)

Isaac Endeley, Registrar, New York