



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/010/
UNAT/1595

Judgment No.: UNDT/2010/203

Date: 22 November 2010

Original: English

Before: Judge Marilyn J. Kaman
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

O'NEILL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Introduction

1. The matter before the UN Dispute Tribunal (“UNDT”) arises following the Applicant’s non-selection for a P-5 position as Section Chief, Peacekeeping Audit Service, Internal Audit Division (“IAD”), Office of Internal Oversight Services (“OIOS”) (Vacancy Announcement 408852). Another staff member was selected for the position, and the Applicant took the required steps of a) seeking administrative review of the decision not to select him for the post and b) submitting an appeal to the Joint Appeals Board (“JAB”).

2. Inexplicably, however, in its report no. 1942, the JAB *sua sponte* addressed as a formal issue before it the handling of a 26 June 2006 privileged and confidential letter (“Confidential Letter”) that the Applicant’s Counsel had sent to the Under-Secretary-General for OIOS (“USG”) regarding the pending JAB litigation, which Confidential Letter had been forwarded by the USG, without permission, to some OIOS staff members. The JAB refused the Applicant’s non-selection claim, but found that the Respondent owed the Applicant an apology for forwarding the Confidential Letter to staff members.

3. The Deputy Secretary-General (“DSG”) subsequently advised the Applicant of the decision to follow the recommendation of the JAB regarding affirmation of the non-selection decision, but rejected the issuance of an apology regarding the Confidential Letter, instead referring the Applicant for “any recourse” to the former UN Administrative Tribunal.

4. Following the JAB recommendation decision and the DSG’s letter, the Applicant filed an appeal with the former UN Administrative Tribunal, articulating the *only* issue on appeal before the Administrative Tribunal as being “whether the Respondent disclosed alleged confidential information and whether the Applicant suffered any consequential harm for which he is entitled to compensation”. Thus, the Applicant ostensibly abandoned before the Administrative Tribunal the original

grounds for his appeal before the JAB (the non-selection claim) and instead changed the basis of his appeal before the Administrative Tribunal to that of the Confidential Letter—an issue that had never been the subject of administrative review and that had not been formally preserved for appeal.

5. As to receivability of the matter pertaining to the Confidential Letter, the legal issue then may be framed as the following:

Where the JAB *sua sponte* issues a recommendation on an issue that had never been made the subject of prior administrative review and that had not been made the subject of appeal before JAB, but where the Respondent addresses the JAB's *sua sponte* recommendation in its administrative decision letter to the Applicant, is the new issue nevertheless receivable by the UNDT?

6. The present Judgment, thus, concerns both the receivability and the merits of the relief of a purported appeal against the decision to forward to certain staff members the Confidential Letter detailing the Applicant's non-selection case before the JAB.

The proceedings before the UNDT

7. Per 1 January 2010, the pres (o)8JAB. 15921361995(t T) T.184ial)JTJ .0(DD 0 Tud

to file and serve separate statements stating the legal issues and facts, which the parties subsequently did.

10. On 29 July 2010, the Registry informed the parties that the case had been re-assigned to the sitting Tribunal due to the departure of Judge Adams from the UNDT.

11. Based on the case record before it and since the contested administrative decision regarding the Confidential Letter did not appear to have undergone administrative review, in Order No. 249 (NY/2010) of 17 September 2010, the Tribunal directed the Applicant to file and serve a written submission on receivability, the Respondent to file and serve a response to the Applicant's submission and, finally, the Applicant to file and serve his observations to the Respondent's response. The Tribunal also noted that it *ex officio* examines the question of receivability. As the Applicant did not reply within the time limit stipulated in Order No. 249, he was directed to do so in Order No. 266 (NY/2010) of 5 October 2010. The parties subsequently filed and served the mentioned submissions in which they also agreed to the Tribunal *ex officio* examining the receivability issues.

Facts

12. On 17 September 2005, the Applicant applied to a vacant P-5 post of Section Chief, Peacekeeping Audit Service, IAD, OIOS. The Applicant was not selected for this position.

13. On 26 June 2006, Counsel for the Applicant forwarded a letter to the USG regarding "In the Matter of [name of the Applicant], staff member of the Internal Audit Division, P-5 Promotion Case Officer of Internal Oversight Services" (the Confidential Letter). On the top of the Confidential Letter was written, "**PRIVILEGED AND CONFIDENTIAL**" (emphasis in original). In the Confidential Letter, Counsel for the Applicant contested that the Applicant had not

been selected for some positions at the P-5 level, including 06-FIN-OIOS-408852-R-NEW YORK as “Chief of Field Section”, and outlined his positions in this regard.

14. In particular, the Confidential Letter expressed concern regarding the Applicant’s non-selection for several posts within OIOS at the P-5 level, due to alleged extraneous considerations and other procedural irregularities by OIOS management, including contended a pattern of discrimination against the Applicant and the promotion of candidates named in the Confidential Letter, who were ostensibly less-qualified than the Applicant for the posts in question.

15.

2006, does not meet, and will not pass, the standard test of time to the relevant JAB decisions and the jurisprudence of the UNAT [UN Administrative Tribunal] on such issues in the case law relating to the present matter.

18. The 24 July 2006 letter requesting administrative review makes no mention of the Confidential Letter, nor does it make any statement that the Confidential Letter was inappropriately handled by the USG. This can only be because, as the below facts recite, the USG only made its decision to release the Confidential Letter approximately three months *after* the Applicant made his request for administrative review of the non-selection decision.

19. On 24 August 2006, the Administrative Law Unit forwarded to the Applicant its administrative review decision in which the Applicant's request, in effect, was refused. The administrative review decision stated in an appended Interoffice Memorandum of 21 August 2006 from the OIOS that:

OIOS is of the view that the above recruitment [Vacancy Announcement No. 06-FIN-OIOS-408852-R-New York], which has already been implemented, was done in a fair and transparent manner in accordance with all applicable Personnel rules and regulations of the Organization. ...

20. The administrative review decision also does not make any mention of the Confidential Letter, or that it was in any manner inappropriately handled by the USG. Again, this can only be because, as the below facts recite, the USG only made its decision to release the Confidential Letter approximately two months *after* the Administrative Law Unit issued its 24 August 2006 administrative review decision.

21. In his 18 September 2006 "Request to file an Appeal Against an Administrative Decision" to the JAB, the Applicant identifies the contested administrative decision as "Administrative decision to promote [name of the

22. In the Applicant's 25 September 2006 statement of appeal to the JAB, the Applicant defines the question on appeal as:

... whether the recent P-5 promoti

Best Regards,
[USG, OIOS]

Cc: [names of four staff members]

25. In JAB report no. 1942 released on 8 November 2007, the Applicant's pleas are summarised as to include, in addition to some pleas concerning him not being selected for a position at the P-5 level, a plea regarding:

[12]e. that he be granted punitive damages for the Respondent's reprehensible conduct in forwarding confidential communications from Appellant's Counsel to colleagues in OIOS.

26. In its unanimous conclusion, the JAB dismissed the claim that the non-promotion decision(s) were unlawful, but also stated:

26.

counsel's "privileged and confidential" letter dated 26 June 2006 (...), notwithstanding the fact that the Applicant has concurrently (...) raised the issues of Applicant's staff selection process to the P-5 level and the release of counsel's 'privileged and confidential' letter dated 26 June 2006.

10. Accordingly, Applicant's request for administrative review, to wit, "administrative decision" within the meaning of the Statute was made on behalf of the Secretary-General within former Staff Regulation 11.1 (ST/SGB/2001/8), was made in substance by the Administrative Law Unit, to wit, exercising 'decision-making power'. It follows that there is an administrative decision on the issues raised in the Applicant's 24 July 2006 letter to the Secretary-General (...). Moreover, experience dictates that in the previous system of justice where the administration had been known not to respond and to wait for time limits to expire even when a staff member had notified it of an impending appeal, and then to rely on this as a bar to an appeal. The application of such a narrow test in Order No. 249 (NY/2010) often resulted in injustice and incongruity, as in cases where the administration failed to respond whilst time ran out.

...

14. It is reasonably evident that Order No. 249, paragraph 13, not compared with copy file, erred not to include and make reference to the vital fact of the administrative decision by the Administration which by letter dated 25 January 2008, signed by the Deputy Secretary-General, the Respondent (...), to the Applicant refused to implement the purport written apology as per the unanimous recommendation by the JAB. An issue of contention by the Applicant's appeal to UNAT/UNDT, as well as, the issue of the staff selection process to the P-5 level.

...

20. ... Applicant is of the view that the administrative decision on his promotion exercises to the P-5 level, submitted to the JAB and

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examine ex officio whether an appeal is receivable, so that the Tribunal does not improperly act outside the authority given to it by the General Assembly. This principle has been affirmed in *Ibewke* UNDT/2010/159, which held that "... the Tribunal may only examine the conformity of the decisions that form the subject-matter of a request for review submitted to the Secretary-General ...". The Tribunal also notes that under art. 2.6 of its Statute, "In the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Dispute Tribunal shall decide on the matter".

Receivability of the contested administrative decision identified by the Applicant: non-selection for P-5 post

40. Neither in his application to the former UN Administrative Tribunal, nor in his submissions to this Tribunal, has the Applicant identified the appealed decision as being the one not to select him for the P-5 post of Section Chief, Peacekeeping Audit Service, IAD, OIOS (which was included in his 24 July 2006 request for administrative review and included in his 25 September 2006 appeal to the JAB). Thus, the Applicant is time-barred from appealing this non-selection decision now.

Receivability of the sua sponte JAB recommendation regarding the Confidential Letter

41. Pursuant to art. 2.1(a) of its Statute, the Dispute Tribunal is competent to adjudicate "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

42. As appears from the facts outlined above, the only decision purportedly before this Tribunal is that concerning the USG's distribution of the Confidential Letter to some other OIOS staff members by her cover letter of 11 October 2006 (and attachments thereto).

43. A mandatory first step in any appeal process before the Dispute Tribunal is that the Applicant has requested either an administrative review or a management evaluation of the contested administrative decision, depending on when the decision

was taken. In the present case, a request for an administrative review was required, which follows from former staff rule 111.2(a) stating that:

A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 *shall*, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing. [Emphasis added.]

44. That a request for administrative review is mandatory has consistently been reaffirmed by the Dispute Tribunal. Based on this well-established principle, in *Crichlow* UNDT/2009/028, the Tribunal narrowed the scope of the Applicant's appeal. In *Parmar* UNDT/2010/006 it was stated that “[r]equests for administrative review and management evaluation are mandatory first steps in the appeal process (*Crichlow*, UNDT/2009/028)”. In *Ibewke*, the Tribunal declared that “the appeal [was] not admissible” regarding the issues raised by the Applicant that had not undergone administrative review. In line herewith, the UN Appeals Tribunal in *Syed* 2010-UNAT-061 “affirmed the UNDT’s judgment in all aspects”, including that “[t]he UNDT declined to review [the claims raised by the Applicant] on the grounds that they had not been included in his request for administrative review”.

45. The rationale behind the requirement of administrative review (or management evaluation) was enunciated by the Tribunal in *Caldarone* UNDT/2009/035 at para. 8.7, a ruling regarding an application for suspension of action, but its reasoning is nevertheless valid:

Article 13(1) of the Rules of Procedure read together with Article 2.2 of the Statute of the Tribunal clearly state that an application may be filed for suspension of action of a disputed administrative decision that is the subject of an ongoing management evaluation. Staff Rule 111.2(a) required a staff member to first request a review of the contested decision. These provisions must be interpreted in such a way as to give effect to the underlying philosophy embodied in them. The Tribunal takes the view that the underlying philosophy of these provisions is to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff

member the opportunity to request a suspension of the impugned decision pending an evaluation by management. The provisions cannot be interpreted to mean that management evaluation is optional. It is not.

46. The quoted passage from *Caldarone* is also quoted verbatim in *Nwuke* UNDT/2009/054.

47. The Tribunal in *Planas* UNDT/2009/070 (para. 14), while also referring to *Nwuke* and *Caldarone*, further specified that:

However, in terms of receivability of an application before the Tribunal it is not sufficient merely to initiate the management evaluation procedure. Applicants ha

Confidential Letter was only released on 11 October 2006, while the request for administrative review itself was dated 24 July 2006 (approximately three months earlier).

50. It is impossible to incorporate the USG's subsequent decision to release the Confidential Letter into the Applicant's 24 July 2006 request for administrative review of the P-5 non-selection decision. In other words, the 11 October 2006 decision to release the Confidential Letter cannot be subsumed within the language of the Applicant's request for administrative review regarding non-selection. As outlined in the procedural history above, the issue of the USG releasing this Confidential Letter is not mentioned at all, until it was referred to in the JAB report of 8 September 2007.

51. Thus, the Applicant's application is not receivable under art. 8.1(a) of the Statute.

Do the facts in this case merit a broader interpretation?

52. In the DSG's 25 January 2006 letter (following the JAB's recommendations), the DSG specifically notes that the Secretary-General decided not to adopt the JAB recommendation of issuing an apology for disclosure of the Confidential Letter, and the Applicant is specifically told that "*any* recourse" (emphasis added) in respect of the decision (regarding the DSG's rejection of the apology) should be addressed to the Administrative Tribunal.

53. In this regard, it could be argued that the DSG's statement—that "*any* recourse" should be directed to the Administrative Tribunal—constitutes an acceptance by the Respondent of the JAB *sua sponte* decision and a waiver of the requirement of administrative review. While the Applicant has not made this contention, since the Tribunal has *ex officio* examined the receivability of the appeal, it will also examine this aspect of the case.

54. The Applicant might have argued that the DSG's reference to "any recourse" not only covers the narrow issue of the apology, but all circumstances and possible remedies arising out of the need for an apology (e.g., monetary compensation for the alleged breach of confidentiality). By rejecting the issuance of an apology, then by implication, the Respondent therefore also rejected any contention that releasing the Confidential Letter was improper

55. The Applicant might also have argued that by using the "any recourse" language, the Respondent, in effect, granted the Applicant an exception from the administrative review prerequisite pursuant to former staff rule 112.2(b) which states that:

... Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

56. The Tribunal finds that such a broad interpretation cannot be made, for a number of reasons. First, the decision to distribute the Confidential Letter stands on its own. That is, it would need to be determined whether the Confidential Letter is indeed a privileged and confidential communication and, if so, was it improper for the USG to forward the Confidential Letter to the staff members named in her cover letter of 11 November 2006. Neither of the parties, nor has the JAB, addressed these issues at any time during the proceedings in the present case. Second, the assessment of these issues surrounding the Confidential Letter bears nothing in common with whether the Applicant should have been selected for the P-5 post or whether an apology was an appropriate remedy for the release of the Confidential Letter. Third, nothing in the DSG's letter indicates that the Respondent had ever considered making an exception under former staff rule 112.2(b); this contention would therefore be purely speculative.

regarding receivability cannot be made attributable to the DSG's 25 January 2008 letter.

Even if the Applicant's case

