Judgment No. 2019-UNAT-970

Counsel for Mr. Adnan-Tolon: Flogaitis Spyridon

Counsel for Secretary-General: Patricia C. Aragonés

JUDGE KANWALDEEP SANDHU, PRESIDING.

Introduction

1. Mr. Ahmet Adnan-Tolon (the "Appellant") applied to the United Nations Dispute Tribunal (the "Dispute Tribunal") for official acknowledgment of the additional hours of work and monetary compensation. In its Judgment, the Dispute Tribunal dismissed his application on the basis that none of his claims were receivable, primarily, because there was no specific, reviewable administrative decision. The Appellant appeals the Dispute Tribunal's Judgment. For the reasons set out below, we dismiss the appeal.

Legislative Mandate

2. In cases of receivability, the relevant legal framework is set out in Article 8(1) of the Dispute Tribunal Statute and Staff Rule 11.2, which provides that the first step for a staff member formally contesting an administrative decision is to submit to the Secretary-General a written request for a management evaluation of the administrative decision. This requires an "administrative decision".

3. The Staff Rule also sets out specific deadlines for filing the request for a management evaluation from the date of notification of the administrative decision. Article 8 of the Dispute Tribunal Statute provides that an application to the Dispute Tribunal is receivable if the applicant has previously submitted the contested administrative decision for management evaluation, where required.

Issue

2. The issue in the appeal is whether the Dispute Tribunal erred on questions of jurisdiction, procedure, law or fact when it held the Appellant's application was not receivable for failure to identify a specific administrative decision.

3. As a preliminary matter, the Secretary General objects to the additional documentary evidence attached to the Appellant's appeal in annexes 1, 2, 3, 10, 11 and 12. They consist of i) a 13 May 2019 letter regarding the Appellant's request for transfer, ii) two performance appraisals, iii) two e-mails dated 6 March 2018 and 11 May 2017, iv) minutes of a Procurement staff meeting on 11 April 2014 and v) various e-mails sent by him after normal working hours (the "Additional

Evidence"). The Secretary General says the Additional Evidence was not part of the record before the Dispute Tribunal.

4. Article 2(5) of the Statute of the United Nations Appeals Tribunal (the "Statute") provides that "(i)n exceptional circumstances, … the Appeals Tribunal … may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings". The Appeals Tribunal has consistently held that additional evidence may not be accepted on appeal if it could have been presented before the Dispute Tribunal.[1] The

8. In 2006, a post within the Procurement Section was redeployed to the Finance Section

considered that the Appellant's management evaluation request had not been filed in a timely manner, as he had failed to file such a request within 60 days from the date on which he became aware of, or should have reasonably known, the decision not to compensate him for his overtime work. The MEU also found that the Appellant's request was not receivable as it related to his allegations of systemic understaffing.

12. On 8 October 2018, the Appellant filed an application with the Dispute Tribunal alleging breach of contract by the UNFICYP Administration in violation of Staff Rule 3.11 (Overtime and compensatory time off) and UNFICYP's Administrative Circular No. 2010-006 (Conditions governing compensation for overtime work). He also alleged that he had been subjected to harassment and abuse of authority by the current and former CMS in violation of Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) (Bulletin). He further challenged the failure to complete his 2017-2018 performance evaluation by his Second Reporting Officer within the applicable deadline in violation of Administrative Instruction ST/AI/2010/5 (Performance Management and Development System). The Appellant sought official acknowledgement of the additional hours of work that he had performed since 17 March 2014 and monetary compensation in respect thereof. But he did not request any remedy in respect of his harassment and performance evaluation claims.

13. In its Summary Judgment now under appeal, the Dispute Tribunal dismissed the Appellant's application, concluding that none of his claims were receivable *ratione materiae*. The Dispute Tribunal found that the Appellant had failed to identify any specific decision taken by the UNFICYP Administration in respect of his alleged overtime work. Regarding the Appellant's harassment and abuse of authority claim, the Dispute Tribunal held that the Bulletin set out a separate process for investigation into allegations of harassment and abuse of authority, and that the Dispute Tribunal did not have jurisdiction to conduct such an investigation. The Dispute Tribunal likewise dismissed as not receivable the Appellant's claim of delays in the completion of his performance evaluation, because there was no reviewable decision stemming from the said performance evaluation and the Appellant had not raised any issue related to his performance appraisal in his management evaluation request.

14. The Appellant appealed on 10 June 2019, and the Secretary-General filed his answer on 13 August 2019.

Submissions

The Appellant's Submissions

15. The Appellant submits that the Dispute Tribunal failed to exercise jurisdiction vested in it, erred on a question of law and erred on a question of fact resulting in a manifestly unreasonable decision.

16. First, the Appellant says the Organization breached its contract with him but does not explain what specific breaches of his contract occurred.

17. Second, he says the Dispute Tribunal erred in law when it concluded that the Appellant had failed to identify any specific decision in respect of his alleged overtime work. The Appellant says he was contesting the "continuous, implicit, negative [a]dministrative acts of the Management" towards him, the UNFICYP Administration's repetitive verbal refusal to acknowledge his overtime work, and the failure of the supervisor to officially request him to work overtime despite his insistent verbal requests to receive overtime compensation. Moreover, the failure by the UNFICYP Administration to implement the approved staffing table of nine posts for the Procurement Section constituted an implied administrative decision. These are "challengeable implied administrative decisions", because they produced a direct and legal effect on his contract as well as adverse consequences on his health. While the CMS instructed the Appellant and others not to work additional hours at a meeting on 25 November 2016, that instruction was breached subsequently by the repetitive orders to the Appellant to finish the work before he could leave the office, and he was "forced" to continue to work overtime without any compensation.

18. The Appellant alleges that the UNFICYP Administration has been taking advantage of his overtime work without providing him with any compensation over the years in violation of its responsibility to establish a normal working week for its employees. As the "professional malpractice" is "continuous", the Dispute Tribunal should have permitted an "effective toll[ing]" of the applicable time limits to allow the Appellant to present his claims and such a tolling is "intuitively deemed justified".

19. Third, the Appellant says the Dispute Tribunal failed to exercise the jurisdiction vested in it by declaring his complaint of harassment and abuse of authority against the CMS as not receivable. It should be noted that, in his e-mail dated 6 March 2018, the Appellant submits the

Secretary-General notes that the Appellant has submitted, for the first time on appeal, a copy of the e-mail of 6 March 2018, though he referred to it in his Dispute Tribunal application. Nonetheless, this submission does not change the fact that he did not file a written complaint pursuant to the Bulletin.

25. The Dispute Tribunal further correctly concluded that the Appellant's claim regarding the delay in the completion of his performance evaluation appraisal was not receivable. The Secretary-General notes, and we agree, that the Appellant does not challenge the Dispute Tribunal's holding in this regard.

26. The Secretary-General requests that the Appeals Tribunal dismiss the present appeal and affirm the impugned Judgment.

Considerations

Was there an appealable administrative decision in respect of the Appellant's alleged overtime work?

27. We find the Dispute Tribunal did not err in finding that the Appellant failed to identify an administrative decision in respect of his alleged overtime as required by Article 2(1)(a) of the Dispute Tribunal Statute.

28. Article 2(1)(a) gives the Dispute Tribunal jurisdiction to hear and pass judgment on an application 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. An applicant has the statutory burden to establish that the administrative decision in issue 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.[4]

[4] *Haydar v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-821, para. 13.

29. When determining what is an "administrative decision", the key characteristic "is that the decision must 'produce ... direct legal consequences' affecting a staff member's terms and conditions of appointment". [5] In certain instances, an administrative decision can be "implied" and "not taking a decision is also an administrative decision challengeable before the United Nations Appeals Tribunal", [6] in which case, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".[7]

30. The Appellant says that an administrative decision can arise from the "continuous, implicit, negative" acts of the management. He says that he continued to work overtime over the years, but the UNFICYP Administration failed to acknowledge it by requesting monetary compensation or compensatory time off on his behalf. It does not seem to be disputed that the Appellant may have worked overtime over the years like others in his department due to staffing issues. However, this does not amount to an administrative decision by any objective measure. He has not provided evidence to show that UNFICYP requested overtime specifically for the Appellant nor that the Appellant requested UNFICYP for compensation for overtime and the request was denied. He says they "knew" he worked overtime, but knowledge or lack of action alone is not sufficient to constitute an administrative decision.

31. There must be a specific, recognizable decision, declaration or ruling made by the Administration (express or implied) that can then be challenged and on which the MEU deadlines can be imposed. The decisions of the UNFICYP Administration to redeploy staff and not to reverse the redeployment are decisions of general application that may have indirect impact on the Appellant's working conditions, but they did not produce direct legal consequences, individually, to the Appellant's terms of employment.

[5] *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49, citing former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V. See also *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.

[6] *ary-t6Wuon*

32. Further, to hold that an administrative decision can be "continuous" would make application of the deadlines in Staff Rule 11.2 unwieldy as it would be difficult to ever know when an administrative decision was made and when the deadline for a request for

37. The Appellant did not follow either the informal or formal process as required by the Bulletin. As stated by the Appeals Tribunal previously, if a staff member has been subjected to acts of harassment and abuse of authority over several years, there is "a contractual entitlement to request that his allegations are addressed. That entitlement, and the procedural path he is obliged to take to bring his complaint to his employer, is set out in the Secretary-General's Bulletin ST/SGB/2008/5 on the 'Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority'."[9]

38. The Appellant did not follow that procedural