Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MASYLKANOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:

Introduction

1. The Applicant, a former staff member of the United Nations Assistance Mission in Afghanistan ("UNAMA"), contests the decision to disband and not reinstate the fact-finding panel formed in February 2012 to investigate her allegations of harassment and abuse of authority by her supervisor in 2011 when she served under a temporary appointment with UNAMA. The Applicant alleges that she is subject to "deliberate attempts to prevent a transparent and fair

6.

9. She was notified on 20 February 2012 that her temporary appointment would not be extended beyond 5 March 2012.

10. The Respondent submits that, on 29 February 2012, a fact-finding panel was formed to investigate the Applicant's claims of harassment and abuse of authority.

11. On 5 March 2012, the Applicant's contract expired and she was separated.

12. On 15 March 2012, the Applicant filed a request for management evaluation of "[t]he decision not to renew [her] temporary appointment upon its expiration on 5 March 2012". She filed an application with the Tribunal against the same decision on 11 July 2012 (Case No. UNDT/NY/2012/063).

13. The Applicant submits that, on 17 April 2012, almost two months after its formation and five months after the CDO made its recommendation, she was informed of the creation of the fact-finding panel to investigate her claims of abuse of authority and harassment. The Applicant was interviewed by the panel on 26 April 2012, and alleges that she was the only one interviewed. She states that she was told that the panel would revert back to her in two or three weeks, but this never happened.

14. On 17 July 2012, Mr. Calzada sent an email to the Applicant stating that the work of the fact-finding panel was "held in abeyance following challenges to the composition of the Panel, and other procedural questions raised by [the Applicant's supervisor]". Mr. Calzada stated that "[t]hese issues required an evaluation of the [f]act [f]inding [p]anel [p]rocess from the legal standpoint, which is currently under consideration" and pending which "the workings of the [p]anel have necessarily been held in abeyance".

15. On 18 July 2012, the Applicant sent an email to Mr. Calzada seeking clarification with regard to the circumstances of the decision to hold the work of the panel in abeyance and asking when it would resume its work.

16. It appears that no further information was provided to the Applicant in response to her email of 18 July 2012, despite her follow-up emails to the Chief of Staff of UNAMA on 16 October and 9 November 2012.

17. On 7 December 2012, the Applicant filed the present application with the Dispute Tribunal.

18. On 6 January 2013, UNAMA convened a new fact-finding panel, of which the Applicant was informed on the same date by a letter from the Special Representative of the Secretary-General. Subsequent to this, the Applicant received two notifications of further changes to the composition of the panel's membership on 17 January and 17 February 2013.

Consideration

19. Whilst, in fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing, the General Assembly has requested in its resolution 66/237, adopted on 24 December 2011, that both the Dispute Tribunal and the United Nations Appeals Tribunal review their procedures in regard to the dismissal of "manifestly inadmissible cases". It is a matter of record that the Dispute Tribunal has, with a view to fast tracking cases, entertained matters of admissibility or receivability on a priority basis in appropriate cases, and similarly rendered summary judgments under art. 9 of the Rules of Procedure.

20. In the instant case, the Applicant faces preliminary hurdles with regard to the receivability of her application, as explained below.

Contested decision

21. In this application filed on 10 December 2012, the Applicant challenges the Respondent's disbanding of, and failure to reinstate, the fact-finding panel formed to investigate her allegations of harassment and abuse of authority against her supervisor. Although the record indicates earlier complaints of harassment and abuse of authority, including a signed letter of support from several local staff members at the duty station discussing the "ill treatment" of the Applicant by her supervisor, the Applicant formally filed the complaint in November 2011.

22. Within a month following the filing of the present application with the Tribunal, UNAMA convened a new fact-finding panel on 6 January 2013. The Tribunal notes that the membership of the newly reconstituted panel has again changed and there is no indication as to when its work will commence or be completed. Although the Tribunal is unaware of any provisions regarding the time within which the functions of such panels should be completed, due process requires that this be done within a reasonable time.

23. By this application the Applicant prayed for the reconstitution of the fact-finding panel and recommencement of its work. The Tribunal notes that the Respondent has reinstated the fact-finding panel to investigate the Applicant's allegations. In the circumstances, this application is therefore moot, and need not be entertained.

24. However, the finding that the application is moot does not mean that the Tribunal does or does not condone the reinstatement and reconstitution of the panel. Whilst indeed the Tribunal agrees that a new fact-finding panel has

appropriate appeal procedures are followed, to make findings on the propriety of the original decision to constitute, disband and reconstitute the panel, and any consequences that may flow from any resultant delays. (The Tribunal notes the Applicant's submission that the disbanding and reconstitution of the panel may eventually be proven to be linked to Case No. UNDT/NY/2012/063, although she submits it may merit a separate application.)

Requirement of request for management evaluation

25. Although this application may be dealt with on the above finding, the Tribunal finds it necessary to deal with a misguided submission by the Applicant. The Applicant filed a request for management evaluation on 15 March 2012, regarding "[t]he decision not to renew [her] temporary appointment upon its expiration on 5 March 2012". The Applicant contends that she did not have to file for management evaluation for the current application (if, indeed, it is to be treated as a separate decision), as under staff rule 11.2, the requirement of management evaluation applies only to current staff members and not former staff members.

26. Article 2.1 of the Tribunal's Statute states:

> **Article 2**
>
> 1. The Dispute Tribunal shall be comyi7.095 0 TDyi7 for ment tass[(m)7.7(a7ces th14.6(

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

27. Article 8.1 of the Tribunal's Statute states:

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required[.]

28. Staff Rule 11.2 (Management evaluation) states:

Rule 11.2

Management evaluation

(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.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty 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.

29. Staff Rule 11.4(a) (United Nations Dispute Tribunal) states:

> **Rule 11.4**
>
> **United Nations Dispute Tribunal**
>
> (a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2(d), whichever is earlier.

30. The Staff Rules codify the terms of employment (rights and obligations) of the staff members and the Organization. Former staff members who utilize the formal system of justice to "appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Tribunal's Statute), do so by relying on the rights they acquired as staff members. When asserting the rights they acquired whilst employed by the Organization, former staff members cannot at the same time refuse to follow the appeal procedures that those rights are subject to under the same Staff Rules. For this reason, provisions of Staff Rules governing appeal procedures apply to former staff members as well. Otherwise, following the Applicant's interpretation, under the Staff Rules she would have no right of access to the Dispute Tribunal as staff rule 11.4 would not apply to her because it only refers to "staff members" and not "former staff members".

31.

Observation

34. The Tribunal notes that there is apparently a new panel investigating the Applicant's complaint of harassment and abuse of authority. The Tribunal further notes that an unjustified delay in an investigation may have a continuing effect on the rights of the affected staff member and the Applicant may have a right, in due course and following proper appeal procedures, to contest the Administration's handling of her complaint, including any unjustified delays and procedural irregularities should she believe that they resulted in a breach of her rights.

Conclusion

35. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 26th day of February 2013

Entered in the Register on this 26th day of February 2013

(Signed)

Hafida Lahiouel, Registrar, New York