



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

LEX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

George Irving

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. On 22 October 2010, the Applicant filed an application with the Dispute Tribunal contesting a decision dated 14 April 2010 not to select her for a post at the P-5 level in the Inspection and Evaluation Division (“IED”), Office of Internal Oversight Services (“OIOS”).

2. On 22 November 2010, the Respondent filed and served his reply in which he contends that the application is without merit. As a preliminary matter, the Respondent submits that the application is not receivable *ratione materiae* as “the contested communication of 14 April 2010 is not the final decision regarding the selection process”, but “represents a recommendation which was preliminary to the administrative decision not to select another candidate for the post and as such is not contestable before the Tribunal”. The Respondent further avers that the Applicant only requested a management evaluation of the communication of 14 April 2010 but not of the actual selection decision dated 12 July 2010, and that under art. 8 of the Statute of the Dispute Tribunal, the review of the Tribunal is therefore limited to this communication.

3. This case was initially assigned to a former judge of the Dispute Tribunal Judge Kaman. On 30 June 2011, Judge Kaman’s tenure expired, and the case was subsequently reassigned to the undersigned Judge.

Determining the receivability of the application

4. 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”.

5. Article 8.1(c) of the Statute of the Tribunal, provides that an application shall be receivable if “[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required” (see also the United Nations

Appeals Tribunal's judgment in *Syed* 2010-UNAT-061). In general, before submitting an application to the Dispute Tribunal, a mandatory first step for an applicant is to request a management evaluation of the contested administrative decision. In terms of staff rule 11.2(b), management evaluation is not required for administrative decisions taken pursuant to advice obtained from technical bodies or following the completion of a disciplinary process. However, since the present case does not involve any such situations, submitting the administrative decision to management evaluation is therefore obligatory.

6. Another basic requirement for an applicant is to clearly identify the administrative decision under appeal, otherwise the application is not receivable. The Dispute Tribunal in *Planas* UNDT/2009/086 (affirmed by the United Nations Appeals Tribunal in *Planas* 2010-UNAT-049) at para. 17 stated that:

In this regard, the Tribunal recalls the long-standing jurisprudence of [the former United Nations Administrative Tribunal] which states that: "It is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one's interest is predicated upon the condition that the impugned decision is stated in precise terms"(Judgement No. 1329 (2007)).

7. However, in a given case, it could be perceived that one administrative decision is implied by another administrative decision, which an applicant has actually submitted for management evaluation (see, for instance, *Andati-Amwayi* 2010-UNAT-058.

8. Pursuant to art. 19 of the Statute of the Dispute Tribunal, in order to ensure a fair and expeditious disposal of the case and do justice to the parties (see also *Pellet* 2010-UNAT-073), the Tribunal finds it appropriate to first determine the Respondent's claim that the application is not receivable before entering into a review of the merits of the case.

Facts relevant to the issue of receivability

9. The following facts are primarily based on the outline provided by the Management Evaluation Unit (“the MEU”) in the management evaluation dated 21 July 2010. It is noted that the Respondent has not contested these facts while the Applicant has not commented on them. For the purpose of determining the preliminary claim on receivability, they are therefore accepted as presented in the management evaluation with the modification that, insofar as they prove relevant to the substantive case of the Applicant, she may possibly later challenge them.

10. On 1 July 2009, the vacancy announcement for the relevant post of Chief of Section (09-PGM-OIOS-421039-R-New York) (“the Post”) was advertised on Galaxy, the former online United Nations jobsite, to which the Applicant subsequently applied. On 5 August 2009, the list of candidates who applied by the 30 day mark (“30-day candidates”) was released to the Programme Manager, the Acting Director of IED/OIOS.

11. All 30-day candidates, including the Applicant, were interviewed for the Post, the interview of the Applicant having been held on 11 February 2010. However, neither the Applicant nor any of the other 30-day candidates were afterwards recommended for the Post.

12. By email dated 14 April 2010, upon enquiry by some of the candidates, the Programme Manager informed all the 30-day candidates, including the Applicant, that they had not been recommended for the Post.

13. On 14 June 2010, the Applicant submitted a request for management evaluation of the decision not to select her for the Post to the MEU.

14. On 12 July 2010, the relevant review board of the OIOS endorsed the recommended list for the Post and, on 13 July 2010, the Under-Secretary-General (“USG”) of OIOS selected a 60-day candidate, whom the selection panel had recommended for the Post.

15. On 21 July 2010, the MEU issued its review in which it concluded, as a general matter, “that the decision not to select [the Applicant] for the Post was appropriate in the circumstances”, a determination which it based on an extensive analysis of the merits of the Applicant’s case. As a preliminary issue, the MEU decided that the Applicant’s request was receivable because “on 14 April 2010 [the Applicant was] advised that [she was] not recommended for the post”. The MEU further stated that, “although the selection process had not yet been completed at the time [the Applicant] submitted [her] request for management evaluation, the final decision in [her] case had already been made and communicated to [her]” and that, “[i]n any event, the MEU was subsequently informed that the process was finalized and an external candidate was selected for the post on 13 July 2010”.

Consideration

16. In essence, the Respondent claims that the application is not receivable because: (a) the MEU only reviewed the initial recommendation of the Programme Manager and not the ultimate selection decision of the USG/OIOS; and (b) such recommendation is not a contestable administrative decision under art. 2.1(a) of the Statute of the Tribunal.

17. The decision not to recommend the Applicant, of necessity and in finality, meant she would not be selected, the one decision being an integral part of the other, also, the one, confirming the other. For the Respondent’s above argument to succeed, would require that the MEU had not, either actually or impliedly, reviewed the USG/OIOS’s final selection decision.

18. In the present case, it follows from the management evaluation that the MEU, as a preliminary issue, found that the Applicant’s request for management evaluation was receivable, *inter alia*, because the MEU had been informed of the USG/OIOS’s ultimate selection decision of 13 July 2010. As a result, with direct reference to the USG’s decision, the MEU thereafter undertook a thorough analysis of the merits of the Applicant’s case, eventually leading to her request for evaluation being dismissed.

19. Accordingly, the Tribunal finds that the Applicant has clearly identified the administrative decision that she wishes to contest under art. 2.1(a) of the Statute of the Tribunal and *Planas* UNDT/2009/086, namely the decision not to select her for the Post. The fact that her Counsel states in the application that the contested decision was dated 14 April 2010 (the day of her being advised of her non-selection) and not 13 July 2010 (the date of the OIOS/USG's ultimate selection decision) does not make any difference as the latter decision is merely confirming the former and can be perceived as being impliedly contested in the application.

20. The Tribunal further finds that the USG/OIOS's ultimate selection decision has undergone management evaluation as required by art. 8.1(c) of the Statute. This is unmistakably evidenced by the management evaluation in which the MEU made direct reference to the ultimate selection decision of 13 July 2010 and based its decision thereon, making the question of whether this decision is implied moot.

Conclusion

21. The Respondent's claim that the application is not receivable is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 14th day of October 2011

Entered in the Register on this 14th day of October 2011

(Signed)

Hafida Lahiouel, Registrar, New York