



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/021

Judgment No.: UNDT/2012/159

Date: 31 October 2012

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Jorge Ballesterro, UNICEF

Introduction

1. The Applicant is the Chief of Child Survival and Development in United Nations Children's Fund ("UNICEF") Kampala. On 6 April 2012 he filed two Applications with the United Nations Dispute Tribunal ("The Tribunal"). In Application 1, the Applicant challenged the imposition of a disciplinary measure of demotion and the issuance of a reprimand. In Application 2, he challenged the Organization's decision to retain him on a P-4 level after he had been selected for a P-5 position in UNICEF Uganda office; his non-selection for a P-5 post in UNICEF Tanzania; the failure to issue him with a written notice of abolition of a post that he held in UNICEF Malawi as well as the refusal by the UNICEF Malawi Country Representative to sign his travel authorization.

2. In Reply, the Respondent requested the Tribunal to consider as a preliminary issue the receivability of the following matters:

- a. The issuance of a reprimand (Application 1);
- b. Refusal of the UNICEF Representative in Malawi to sign the Applicant's travel authorization to join the UNICEF Uganda Office (Application 2);
- c. Keeping the Applicant on a P-4 contract after he had accepted a P-5 position (Application 2);
- d. Failure to issue a written notice of abolition of post (Application 2) and
- e. Non selection for the UNICEF post in Tanzania. (Application 2).

3. Order No. 118 (NBI/2012) on Case Management dated 6 September 2012 required the Applicant to respond to the receivability issues raised by the Respondent. Subsequently it came to the attention of the Tribunal that the Applicant had written to the Tribunal on 13 February 2012 asking for information about time limits in the light of a request by UNICEF for the Ombudsman to initiate discussions with him.

4. As a result of this information, the Tribunal called a case management hearing on 25 September 2012. The Respondent advised that it was not aware of the Applicant's letter to the Tribunal. The Tribunal Ordered the Parties to file further submissions and all relevant documents relating to the receivability of the Applicant's claims.

5. The Applicant has requested that his Application be considered confidentially. A final decision on this will be made before the substantive judgment is published, however for the purposes of this preliminary ruling the names of the Applicant and all other persons named in the proceedings will not be published.

The Issues

6. The main legal issues to be resolved at this stage are:

a. Did the Applicant request management evaluation for each of the non-disciplinary matters he now contests?

b. When did time begin to run for the Applicant to file a claim with the Tribunal in light of the involvement of the Ombudsman in his case? In particular:

(i) Did the parties seek mediation of their dispute?

(ii) Was mediation sought within the deadlines for the filing of the Application?

(iii) When did mediation break down?

Facts relating to the preliminary issue of receivability

7. The Applicant's post with UNICEF, Malawi as Chief of Health and Nutrition was earmarked for abolition on 31 December 2011, the same date on which his fixed term contract was to expire. He was informed of this in May 2011 and began applying for other employment openings. On or about June 2011 the Office of Internal Audit ("OIA") released its investigation report into an allegation of sexual exploitation filed against the Applicant by a woman ("Ms. H") with whom he had had a relationship in December 2010.

8. On 4 August 2012 the Applicant was offered the post of Chief of Child Survival and Development in Uganda at P5 level. He accepted the offer on 16 August 2011 with an agreed starting date of 19 September 2011.

9. The Applicant was to leave Malawi for Kampala on 17 September 2011 to take up his new post. However the Malawi Country Representative declined to approve his travel authorization. In a letter dated 21 September 2011, the UNICEF Officer in Charge ("OIC"), Division of Human Resources ("DHR") required the Applicant to take a paternity test as a condition for his transfer to his new post in Uganda.

10. On 25 August 2011 in response to the June 2011 investigation report, the Director HR issued a reprimand to the Applicant for alleged misconduct. The reprimand also made paternity testing a condition for his re-assignment and promotion to Uganda. The Applicant was informed of this decision on 30 August 2011.

11. On 29 September 2011, the Applicant requested a Management Evaluation. In his letter he contested the conditions placed on his re-assignment, the issuance of a

reprimand, the refusal by UNICEF Country Representative to sign his travel authorization, keeping him on a P-4 contract after he had accepted a P-5 position, the failure to issue him with a notice of abolition of post and non-selection for the UNICEF Tanzania post.

12. On 29 September 2011 the request was acknowledged in a letter from the Chief, Policy and Administrative Law Section (“PALS”) of UNICEF which said “I acknowledge receipt of your communication dated 29 September 2011, requesting a Management Evaluation of administrative decisions made by the Division of Human Resources following the investigation of the sexual exploitation case brought against you ...”

13. The OIC HR Division wrote to the Applicant stating that, “...I assume that the attachment of your message to Ms. K (*the OIC/DHR*) will form an integral part of your request-please confirm this also.” In response to the enquiry the Applicant reiterated that he wanted the entire documentation that he had cited to be part of his request for management evaluation. He said:

I am hereby confirming that I would like all the communications that I have made on this case including the latest letter to Ms. K in response to the confidential letter to me - herein attached - and the entirety of the investigation file to form part of my request for management evaluation

14. On 25 October 2011 the Recruitment and Staff section of the DHR informed the Applicant that the position of Chief of Health in Tanzania, for which he had applied and been interviewed, had been cancelled.

15. In a decision dated 13 November 2011, the Deputy Executive Director (“DED”) who was the head of the Management Evaluation in UNICEF asked the administration to re-issue the reprimand without mention of the paternity test. Additionally on 16 November 2011 the Applicant was informed that his reassignment and promotion to Uganda had been suspended until the outcome of OIA

investigations into recent allegations of assault on Ms. H that had been made against him.

16. The Applicant remained in Malawi at the P-4 level between September and December 2011. On 21 December 2011, he was re-issued with another P4 contract running from 1 January to 31 March 2012.

17. In an email to the Applicant dated 1 February 2012, a Consultant Ombudsman said "...[T]he Funds and Programmes Ombudsman and I have been speaking about your situation and would like to call you this afternoon" . The Applicant replied that he would be happy to talk to him.

18. On 6 February 2012 the Applicant wrote to the Consultant Ombudsman to thank him for his call and assistance in the resolution of the matter and asked for clarification of four questions. Their written communications continued on 9, 12 and 15 February 2012. On 16 February 2012, the Applicant wrote to the Consultant Ombudsman informing him that he wished to decline the proposal by the Organization.

19. The Applicant wrote the following email to the Tribunal on 13 February to enquire about time limits:

Subject: Urgent query on time limit

Dear Madam/Sir,

I am hereby seeking information on time limit. I got the outcome of management evaluation on 15 November 2011, reversing an administrative decision. UNICEF has asked the ombudsman to initiate discussions with me on the matter. Would this mean that mediation has started, whereby time limit will start counting from the day the discussion will break down as stated in the relevant article?

I looking forward to hearing from you

Best regards, [Applicant]

20. On 15 February 2012, the Applicant requested a comparative analysis of the candidates interviewed for the Tanzania post. In response, on 16 February 2012 the Human Resources Specialist informed him that as the interview exercise conducted did not yield a successful candidate the vacancy was cancelled and due to the unique skill set of the position, would be filled from a direct placement of a candidate picked from the ‘talent group.’

21. On 9 March 2012, the Applicant was informed by the DED that as a result of the charges of misconduct against him (assault), a decision had been reached to demote him by one level from P5 to P4 with two years deferment of which he would not be eligible for promotion. He was then directed to take up his re-assignment to Uganda on a P4 level.

22. The Applicant filed a claim with the Tribunal on 6 April 2012.

Respondent’s submissions

23. The Respondent submits that with the exception of the imposition of the disciplinary sanction of demotion for misconduct, none of the other claims are receivable *rationae temporis* and/or *rationae materiae* as the Applicant failed to request waiver or suspension of the time limits and has not provided evidence of any exceptional circumstances that may have prevented him from complying with the required deadline.

a. The challenge to the reprimand is time barred since the Applicant did not file his Application within the requisite period after receiving the outcome of management evaluation; and that the issuance of a reprimand was not part of the request for Management Evaluation thus not receivable;

b. The challenge to the refusal by the UNICEF Representative to sign the Applicant’s Travel Authorization is time barred because the Applicant did not

request Management Evaluation for that issue; the contested decision is not an administrative decision; and it did not form part of his request for Management Evaluation thus not receivable;

c. The challenge to the decision to keep the Applicant on a P-4 contract after he had accepted a P-5 Position is time barred and not receivable because the Applicant did not request management evaluation for this issue;

d. The challenge to the failure to issue a written notice of the abolition of the Applicant's Malawi post is moot, time barred and not receivable because the Applicant did not request management evaluation for this issue;

e. The challenge to the non-selection of the Applicant for the post in Tanzania is moot, time barred and not receivable because the Applicant did not request management evaluation for this issue;

f. Additionally, the Organization's request for the Ombudsman to contact the Applicant in February 2012 was not an effort at mediation since there were no negotiation efforts, rather he was invited to informally discuss with the Applicant his disciplinary case before UNICEF made the final recommendations; and

g. That no mediation was intended and that UNICEF sought the ombudsman to discuss management's decision of disciplinary sanction of demotion yet to be imposed and to get the Applicant to accept responsibility so as to avoid litigation.

Applicant's submissions

24. The Applicant submits that he contested all the claims in his request for management evaluation. He adds that his request consisted of all the decisions as well as correspondence between himself and the DHR. Any issue therefore which was not

expressly clarified in the request could be found in the relevant correspondence accompanying his request.

25. The Applicant contends that his discussions with the Ombudsman was on the continuum of events surrounding his matters before UNICEF including a mediation effort aimed at negotiating an agreement with the Applicant to accept the disciplinary sanction yet to be issued against him by the Organization.

Considerations on receivability

Issue 1: Management Evaluation

26. Staff rule 11.2 (a) provides that a staff member who wishes to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment shall first submit a request for management evaluation of the administrative decision.

27. The Applicant filed a comprehensive request for management evaluation on 29 September 2011 with the Chief PALS/UNICEF. In light of that request and taking into account the Applicant's submissions, the Tribunal finds that the Applicant requested management evaluation of each of the issues and administrative decisions challenged by him, which the Respondent has alleged as not receivable. The Applicant expressly confirmed the scope of his request to the OIC/DHR.

Issue 2: The effect of the intervention of the Ombudsman on time limits

28. The question for the Tribunal is whether the intervention of the Ombudsman affected the time limits for filing the Application with the Tribunal?

29. The relevant parts of Article 8 of the Statute provide that an Application is receivable if it is filed within specified deadlines, however 8(1)(d)(iv) states:

Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under [the specified deadlines] but did not reach an agreement, the Application is filed within 90 days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

30. The Tribunal is mindful that, notwithstanding this provision in the Statute, Article 15(7) of the Rules of Procedure imposes an absolute prohibition on the mention of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Tribunal. Because the challenge to receivability requires the Tribunal to determine the dates and extent of the involvement of the Ombudsman in the Applicant's case the Tribunal requested the parties to submit evidence that would otherwise be treated as absolutely privileged and confidential. No objection was raised to this disclosure by either party.

Did the parties seek mediation of their dispute?

31. On the basis of the documentary evidence submitted by the parties, the Tribunal finds that by 1 February 2012 the Respondent sought and the Applicant agreed to mediation of their dispute.

32. There is no evidence that a formal mediation agreement was signed but, without disclosing the contents of confidential correspondence between the Ombudsman and the Applicant, the Tribunal finds that the Respondent began the process by requesting the Ombudsman to negotiate with the Applicant about the proposed disciplinary measure of demotion.

33. However the ambit of the oral and written discussions between the Ombudsman and the Applicant extended beyond this single issue. This was because the demotion was intrinsically linked to all the other matters that were disputed by the Applicant. The Tribunal therefore finds that the parties sought mediation of their dispute.

Was mediation sought within the deadlines for the filing of the Application?

34. The Applicant received the outcome of management evaluation report on 16 November 2011. The deadline for filing an Application with the Tribunal was therefore 17 February 2012.

35. The Ombudsman first contacted the Applicant on 1 February 2012, which was still in the time frame for the Applicant to file his Application with the Tribunal. The Tribunal finds that mediation was sought within the deadline for filing applications.

When did mediation break down?

36. The documentary evidence shows that the Ombudsman's engagement was extended over a number of days. As evidenced by the Applicant's letter, by 16 February 2012 the mediation had broken down. Pursuant to Article 8 of the Statute, the 90 days for filing the Application in the Tribunal commenced on 17 February 2012 and expired on 17 May 2012.

37. The Application was filed on 6 April 2012. This was well within the 90 days' time limit. The Application is therefore receivable.

38. The demotion issue is a disciplinary matter and does not require to be submitted for management evaluation. Article 8 (1)(d) (ii) of the Statute requires that it be filed within 90 days of the administrative decision being made and the Applicant complied with this time limit.

Conclusion

39. The Tribunal finds that the Applicant submitted the issues he is contesting for management evaluation as required by the rules, and the subsequent Application to the Tribunal was filed within time.

40. The Applicant's challenge to each of the five decisions listed in paragraph 2 above is receivable.

Case Management Directions

41. Having found the Application receivable, the Tribunal makes the following Orders:

a. The Respondent is to file further details about the decision not to select the Applicant for the Tanzania post. This information should include the findings of fact which were material to the decision; the evidence on which the findings of fact were based; the reasons for the decision and all of the documentation in the possession and control of the decision maker which is relevant to the review of the decision by **Friday, 30 November 2012**;

b. The Applicant is to respond to the Respondent's version of the contested and non-contested facts, by agreeing or providing his version of the facts on the chronology of events to (Annex 1 Respondent's response to Order 124) by **Wednesday, 31 December 2012**;

c. The parties are to file a list of the witnesses they intend to call, with a concise summary of the witness statements as well as an approximation of the time that each witness is expected to take during examination in chief. Should there be any witnesses who are expected to testify remotely, parties are kindly requested to provide the Registry with each witness' contact details as per the attached *Witness Information Form* by **Wednesday, 31 December 2012**;

d. The hearing will be held from **26 to 29 March 2013**. The parties and their witnesses are expected to be available on the said dates.

(Signed)

Judge Coral Shaw

Dated this 31st day of October 2012

Entered in the Register on this 31st day of October 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.