



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

David B. Markowitz, Markowitz, Herbold, Glade & Mehlhaf, P.C
Stacy Owen, Markowitz, Herbold, Glade & Mehlhaf, P.C

Counsel for the Respondent:

Kong Leong Toh, UNOPS
Benedetta Audia, UNOPS

Introduction

1. The Applicant is a former staff member of the United Nations Office for Project Services (“UNOPS”) based in Jerusalem where she worked as Director, Jerusalem Operations Center (“JOC”) on a Fixed Term Contract at the P5 level.
2. She is contesting three decisions namely:
 - a. The decision to give her a six month fixed-term contract instead of 12 months (“Decision 1”) which she came to know about on 17 January 2011;
 - b. The decision to uphold overall performance evaluation after the rebuttal process which she was notified on 29 July 2011 (“Decision 2”); and
 - c. The decisions not to renew her fixed-term contract and to place her on special leave which she was notified on 26 April 2011 (“Decision 3”).
3. The Applicant filed her Application contesting Decision 1 on 26 September 2011. The Application was served on the Respondent on 27 September 2011 and required to Reply by 28 October 2011. On 10 October 2011, the Respondent contested the receivability of the Application.
4. On 19 and 20 December 2011 the Applicant filed her Applications contesting Decisions 2 and 3 respectively.
5. The Tribunal held a Case Management Hearing on 19 January 2012 and issued Order No. 013 (NBI/2012) having found that all the three Applications arose from the same course of events. The Applicant was ordered to file comprehensive and structured pleadings traversing all three Applications by 10 February 2012.
6. The Applicant having complied with the Case Management Orders, the Respondent filed his Reply on 1 March 2012 contesting the receivability of Decisions 1 and 3. The Applicant filed her response to the Respondent’s Reply on 25 April 2012.

7. The Applicant applied for anonymity with regards to any publication arising from this Application due to fears for her personal security in her current duty station. The Respondent did not object. The Tribunal grants the Applicant anonymity in relation to the publication of this judgment.

Facts relating to Decision 1

8. On 21 December 2010 the Regional Director Europe and Middle East Region who was the Applicant's supervisor sent the Applicant an email whose subject was: "Follow up to our debriefing on Thursday 16 December (Ramallah)". The last paragraph of the email read:

Finally, as your contract is up for renewal at the end of January, it is recommended to renew your contract for six months during which we hope these issues will be tackled and resolved before further extension is considered.

9. On or about 10 January 2011, the Applicant sought the assistance of the Ombudsman for Funds and Programmes in resolving the dispute between her and the Organization. The Respondent participated in the mediation efforts.

10. On 17 January 2011, the Applicant received her Personnel Action Report ("PAR") dated 13 January 2011. The PAR revealed that the Applicant's contract was renewed from 1 February 2011 to 31 July 2011. This meant that the actual decision to renew her Fixed-Term Appointment for six months instead of twelve months was made on 13 January 2011 and the Applicant only became aware of this fact on 17 January 2011 when she received her PAR.

11. On 7 March 2011 the Applicant requested management evaluation of the decision and she received a response on 28 March 2011 which was in favour of the Organization.

12. The Applicant filed her Application with the Tribunal on 26 September 2011.

Issues regarding Decision 1

13. The issues to be determined regarding the receivability of Decision 1 are:
- a. At what point did time begin to run for the Applicant to file her Application with the Tribunal in light of the involvement of the Ombudsman in her case? In particular:
 - (i) Did the parties seek mediation of their dispute?
 - (ii) Was mediation sought within the deadlines for filing an Application?
 - (iii) When did mediation break down?

Respondent's submissions

14. The Respondent submitted that:
- a. The Application contesting Decision 1 was not receivable *rationae temporis* and the Applicant has not shown any extenuating circumstances to waive time limits;
 - b. The Ombudsman's intervention and efforts to resolve the dispute did not constitute mediation sufficient to trigger the Application of Article 8(1)(d)(iv) of the Statute;
 - c. Informal resolution (excluding mediation) is not an exception to UNDT deadlines;
 - d. The discussions held between the Applicant, the Respondent and the Office of the Ombudsman do not constitute any form of informal resolution effort;
 - e. Notice from the Office of the Ombudsman does not evidence informal resolution; and

f. Assuming that there was an effort at informal resolution sufficient to adjust the UNDT deadlines, any such effort “broke down” on 26 or 29 April 2011.

Applicant’s submissions

15. The Applicant submitted that her Application contesting Decision 1 is receivable because:

a. She was engaged actively in informal dispute resolution with the Office of the Ombudsman;

b. Provisional staff rule 11.1(c) provides that informal resolution by the Office of the Ombudsman may result in extension of the deadline for management evaluation and filing an application with the Dispute Tribunal;

c. Based upon the Applicant’s engagement with the Office of the Ombudsman, and that office’s interventions at the highest level with the UNOPS Executive Office, the Applicant came to understand that all filing deadlines were tolled for the time period during which informal resolution of her ongoing dispute with UNOPS was being undertaken; and

d. Efforts at informal resolution broke down on 30 June 2011, when the Applicant was notified by UNOPS that she was not selected for an internal position she had applied for pursuant to efforts at informal resolution by the Ombudsman’s Office.

Consideration on receivability of Decision 1

Issue 1: What is the effect of the Intervention of the Office of the United Nations Ombudsman and Mediation Service on time limits?

16. The purport of staff rule 11.4 (c) is that where a party to a dispute seeks mediation of the matter within the deadline for filing an application and the mediation

is deemed to have failed in accordance with the rules of procedure of the Mediation Division of the Office of the Ombudsman, the staff member may file an application with the Dispute Tribunal within 90 calendar days of the end of the mediation.

17. Article 8 of the Statute provides *inter alia* that an Application is receivable if it is filed within specified deadlines, in particular, 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.

18. The Tribunal is mindful that, notwithstanding the above 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. However, due to the nature of receivability matters, the Tribunal must determine the dates and extent of the involvement of the Mediation Division in the Applicant's case.

19. The Applicant had provided evidence of the relevant communication showing the periods when she was engaged with the Mediation Division with respect to Decision 1.

20. The Respondent too, submitted in evidence relevant correspondence between the Mediation Division and UNOPS senior managers.

21. In *Schepeers* UNDT/2011/074 the Tribunal stated that:

With respect to informal resolution of disputes, it is envisaged by the provisional Staff Rules that deadlines for the filing of an application with the Tribunal may be extended only in cases in which such informal resolution is carried out through the Office of the Ombudsman...Consultations with OSLA and attempts to informally resolve the matter directly with management, without involvement of the Office of the Ombudsman, generally will not amount to an

exceptional circumstance for the purpose of a waiver of the time limits.

22. The Appeals Tribunal in *Abu-Hawaila* 2011-UNAT-118 held that only informal resolution made through the Office of the Ombudsman may serve to freeze time. The Tribunal stated:

This Tribunal also holds that the exceptional suspension of time limits provided for under Article 8(1) of the UNDT Statute and provisional Staff Rule 11.1 *applies only to informal dispute resolution conducted through the Office of the Ombudsman. The suspension of time limits cannot be extended by analogy to other informal dispute resolution procedures, precisely because of its exceptional character.* Exceptions to time limits and deadlines must be interpreted strictly and are not subject to extension by analogy. (Emphasis Added)

23. The correct position therefore is that if a party to a dispute makes mediation overtures within the applicable time lines for filing an Application and the other party consents to participation in the mediation process then the time limit for filing an Application is suspended and begins to run when the mediation has broken down.

24. When mediation overtures are made by one party but the other party refuses, the time limit for filing an Application does not run until the refusal is communicated to the other party unambiguously.

Did the parties seek mediation of their dispute?

25. Based on the documentary evidence submitted by both parties, the Tribunal finds that by 10 January 2011, the Applicant sought the services of the Ombudsman and the Respondent agreed to mediation of their dispute.

26. The Tribunal finds that the Applicant began the process by requesting the Ombudsman to engage with the Respondent about 'the shortened contract extension of her fixed-term contract and the Respondent participated in these negotiations by offering alternatives to the dispute.

27. The Tribunal therefore finds that the parties sought mediation of their dispute.

Was mediation sought within the deadlines for filing an Application?

28. The Applicant received the outcome of management evaluation on 28 March 2011; therefore the deadline for filing an Application with the Tribunal was 26 June 2011.

29. The Applicant first made contact with the Consultant Ombudsman for the Funds and Programmes on 10 January 2011 which was still within the time frame for the Applicant to file her Application with the Tribunal. The Tribunal therefore finds that the Office of the Ombudsman was seized of the matter and as such mediation was sought within the deadline for filing Applications.

When did mediation break down?

30. The documentary evidence submitted by the Parties shows that the Ombudsman's engagement was extended for a period of 6 months. The discussions with the Ombudsman included the possibility of the Applicant being considered for other positions at UNOPS and as such she submitted her job application for a specific position ("Brussels post") which she was believed to be suitable for.

31. The Respondent's argument that mediation broke down on 26 April 2011¹ is untenable because on 24 May 2011, the Ombudsman wrote to the Applicant with progress made in the process and intimating her that UNOPS thought that the Brussels post which she had applied for would be a good match for her.

32. While mediation was on-going, the Applicant received on 30 June 2011, a regret email from UNOPS Human Resources Associate informing her that she was unsuccessful for the Brussels post. By this email, mediation effectively broke down, since it was hoped that the selection of the Applicant for the position would have resolved the dispute. Pursuant to Article 8 of the Statute, the 90 days for filing the Application before the Tribunal commenced on 1 July 2011 and expired on 28 September 2011.

¹ The date on which the Applicant received notification of Decision 3

33. The Application contesting Decision 1 was filed on 26 September 2011. This was within the 90 days' time limit. The said Application is therefore receivable.

Facts relating to Decision 3

34. In a letter dated 19 April 2011, the Executive Director of UNOPS wrote to the Applicant styling the subject: "Notification of (1) non-renewal of your contract when it expires on 31 July 2011; and (2) placement on special leave with Full Pay with effect from 1 May 2011." The Applicant received this letter on 26 April 2011.

35. The Applicant sought management evaluation of this decision on 12 August 2011 and received a response from management evaluation on 23 September 2011.

Respondent's submissions

36. The Respondent submitted:

- a. That the request for management evaluation contesting decision 3 was sent outside the 60 day period set out in staff rule 11.2 (c);
- b. That the deadline for management evaluation was not extended by the Secretary-General pending informal resolution efforts; and
- c. The Tribunal may not waive deadlines for management evaluation requests.

Applicant's submissions

37. The Applicant submitted:

- a. The application contesting Decision 3 is receivable because the Applicant was engaged actively in informal dispute resolution with the Office of the Ombudsman starting from January 2011 and continuing through the summer;

- b. Staff rule 11.2(c) provides that informal resolution by the Office of the Ombudsman may result in extension of the deadline to request management evaluation;
- c. She received notification on 26 April 2011 of the Respondent's intention not to extend her contract yet the notification failed to inform her of how to seek legal redress and that it was not the formal administrative decision;
- d. She received a formal notice upon receiving her separation letter on 17 June 2011, as such it became the notice of administrative decision; and
- e. Alternatively that the Tribunal finds that the decision of 26 April 2011 came as shock to the Applicant which left her despondent for two weeks coupled with challenges of relocating from her duty station.

Issue regarding Decision 3

- 38. The issues to be determined regarding the receivability of Decision 3 is:
 - a. Did the Applicant request management evaluation of Decision 3 within the applicable deadlines?

Management Evaluation

- 39. Staff Rule 11.2²
 - (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.

² See ST/SGB/2011/1 (Staff Rules and Regulations)

(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.

Did the Applicant request management evaluation of Decision 3 within the Applicable deadlines?

40. The Applicant requested management evaluation of Decision 3 on 12 August 2011 and received a response from management evaluation on 23 September 2011.

41. The Applicant's argument that the letter dated 19 April 2011 was merely a notification of intention to terminate is untenable because paragraph 2 of the letter clearly states "I have decided not to renew your contract when it expires on 31 July 2011." This is a clear indication by the Executive Director of his decision not to renew the Applicant's contract. UNOPS intention conveyed in the letter was clear and as such cannot be construed as an intention but rather a decision.

42. The Applicant's request for management evaluation should have been filed by 25 June 2011. However the Applicant filed her request 49 days past the required time limit.

43. The Tribunal finds that Decision 3 is not receivable.

Conclusion

44. The Tribunal holds that of the two decisions whose receivability are contested by the Respondent, Decision 1 is receivable.

45. Decision 3 is not receivable and shall accordingly not be entertained.

(Signed)

Judge Nkemdilim Izuako

Dated this 17th day of January 2013

Entered in the Register on this 17th day of January 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.