



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/003

Judgment No.: UNDT/2013/030

Date: 25 February 2013

Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

CHARLES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the Procurement Division of the Department of Management in New York, applied for a P-3 level temporary position advertised in October 2011. As part of the selection process, he was required to sit a written test. However, the Administration refused to accept his answers to the test on the basis that they were submitted after the specified deadline, which the Applicant disputes.

2. The parties are also in dispute as to whether the present application is receivable in view of the Applicant's withdrawal of the request for management evaluation and subsequent request to reinstate it approximately nine months later.

3. At a hearing on both receivability of the application and its substantive merits, held on 21 February 2013, the Tribunal heard evidence from the Applicant as well as from Ms. Safia Boly, then Special Assistant to the Assistant Secretary-General for Central Support Services, Department of Management. Neither Ms. Boly nor the Applicant set out to mislead the Tribunal. Instead, there seemed to be a fundamental difference of interpretation and understanding of the email communications relating to the arrangements for the written exercise.

Facts

4. The Applicant applied for a temporary job vacancy at the P-3 level on 5 October 2011.

5. On Friday, 18 November 2011, the Applicant received an email from Ms. Boly, the hiring manager. The email stated that the Applicant was short-listed to take a written exercise that "will last up to 2 hours". He was asked to indicate his

availability “to undergo a written exercise between Monday and Wednesday of next week [i.e., the week of 21 to 25 November 2011]”.

6. The Applicant replied on Friday, 18 November 2011, stating that, although he would be on vacation from 21 to 25 November 2011, he “can make arrangements to undertake the written exercise from 10 a.m. to 12 p.m. on Wednesday, 23 November 2011”.

7. Ms. Boly testified that she understood the Applicant’s email of 18 November 2011 to mean that the Applicant would be available to sit the test during the time indicated, i.e., commencing the test at 10 a.m. and finishing at 12 p.m.

8. On 21–23 November 2011, the following emails were sent to all candidates for the position, including the Applicant:

a. an email sent at 5:22 p.m. on Monday, 21 November 2011, stating (emphasis added):

Subject: Your application for the Secretary of the PARC (date and time for the written exercise)

Dear applicant, please note that the written exercise for the above position *will be administered on Wednesday[,]* 23 November 2011, at 9:30 a.m. ([New York] time).

b. an email sent at 9:10 a.m. on 22 November 2011, stating (emphasis in original):

Subject: Fw: Your application for the Secretary of the PARC (date and time for the written exercise)

Dear applicant,

Some of you have requested clarification on the way the exercise will be conducted. This is to confirm that it will be administered by email. So you should look for an email from me at the time indicated in my earlier email to you.

c. an email sent at 9:31 a.m. on 23 November 2011, attaching the written exercise and stating:

Subject: Written exercise

Dear applicant,

Please find attached the written exercise for you to take within the next two hours. When you are finished, please send the response in a word format back to me by email.

The written exercise attached to the email of 9:31 a.m. provided the following instructions:

Written exercises should be completed in no more than 2 hours from the receipt of the email and should be returned in a word format[.]

Responses received 2 hours after notification by email will be rejected.

d. an email sent at 9:38 a.m. on 23 November 2011, stating:

Subject: Written exercise (500 words to all questions)

Dear all,

Some of you have requested clarification: it is 500 words for all questions.

Good luck.

9. The Applicant states that he did not check his emails on 21 and 22 November 2011. He only accessed his email inbox from his vacation location at about 10:15 a.m. on Wednesday, 23 November 2011. He opened the email with the written exercise instructions at 10:25 a.m.

10. The Applicant submitted his answers to the written exercise at 12:18 p.m. The Applicant testified that he considered that he was required to submit his answers within two hours of the opening of the email with the test, i.e., before 12:25 p.m.

11. Ms. Boly testified that in her view the instructions were clear in that all candidates had two hours from notification of the email containing the written exercise. She added that, in view of the Applicant's indicated availability at 10 a.m., she would have accepted his answers to the exercise by 12 p.m. Ms. Boly further stated that the instructions were applied strictly and consistently not only with respect to the Applicant, but also with respect to other candidates for the position. For instance, one of the candidates was 20 minutes late for his interview with the selection panel and was disqualified on that basis. The purpose of this was to ensure that deadlines were complied with and that everyone was placed on an equal footing. According to Ms. Boly, while she now had to answer the challenge put forward by the Applicant, had she allowed him not to comply with the issued deadlines and instructions she would have had to answer challenges put forward by the other candidates who complied with the instructions.

12. The Applicant was subsequently informed that his answers were received after the two hours indicated in the instructions and therefore could not be accepted.

13. On 27 December 2011, the Applicant filed a request for management evaluation of the decision not to accept his answers to the written exercise.

14. As was indicated in the Management Evaluation Unit's acknowledgment of receipt of his request, the deadline for the Administration's response was to expire on 27 January 2012, following which the 90-day deadline for filing an application with the Tribunal would start to run. No response to the Applicant's request for management evaluation was provided by the deadline of 27 January 2012.

15. On 12 February 2012, the Applicant communicated to the Management Evaluation Unit that he was withdrawing his request for management evaluation as he "do[es] not think it is worth the effort to pursue" the present case and another matter he had pending with the Unit at the time. He provided an explanation as to why he was withdrawing his request.

16. The issue concerning his request to withdraw has occupied time and effort on the part of both sides. This was a pointless exercise since the response period of 30 calendar days for the Management Evaluation Unit had expired on 27 January 2012. The withdrawal of the request for management evaluation and the subsequent attempt at reinstatement had no legal effect.

17. Approximately nine months later, on 16 November 2012, the Applicant attempted to reinstate his request for management evaluation of the contested decision with the Management Evaluation Unit. His request was refused in December 2012 and, on 9 January 2013, he filed the present application with the Tribunal.

Consideration

Receivability

18. Pursuant to art. 8.1 of the Statute of the Dispute Tribunal, read together with staff rule 11.2(a), an applicant must, as a mandatory first step in cases that do not fall under staff rule 11.2(b), request management evaluation of a contested decision before filing an application with the Dispute Tribunal (*Planas* 2010-UNAT-049).

19. The Applicant's management evaluation request was received by the Administration on 28 December 2011 and, pursuant to staff rule 11.2(d), its response was due in 30 calendar days, or by 27 January 2012 at the latest. However, no response was provided by the Management Evaluation Unit by the deadline.

20. Under art. 8.1(d)(i)(b) of the Tribunal's Statute, the Applicant was required to file his application with the Tribunal within 90 calendar days of "of the expiry of the relevant response period for the management evaluation" since no response to his request was provided by the established deadline.

21. Therefore, the only issue before the Tribunal with regard to the question of receivability is whether the Applicant filed his claim within 90 days of the ending of the period that the Administration had to respond to his request for management evaluation. Although the parties' submission focused, in large part, on the Applicant's attempt to reinstate his request for management evaluation, that issue was and is irrelevant and need not be addressed. The Applicant's withdrawal of his request for management evaluation on 12 February 2012 had no legal effect as time for the Administration's management evaluation of his request expired on 27 January 2012.

22. Accordingly, the Applicant was required to file his application to the Tribunal within 90 calendar days of 27 January 2012. He filed the present application with the Tribunal on 9 January 2013, more than eight months after the expiration of the applicable time limit. The Tribunal is bound to consider whether a waiver or suspension of the time limits is warranted in this case under art. 8.3 of its Statute.

23. The Applicant stated to the Tribunal that the decision to withdraw the case was based on two considerations: the main factor was to bring his ongoing disputes with the Organization to an end in the hope of an amicable resolution, and, additionally, to follow the advice he received from doctors, colleagues, and family. The Applicant stated in cross-examination that, while his doctor did not tell him not to file the present case with the Tribunal, the doctor indicated to him that it would be best for the Applicant not to pursue stressful activities. The Applicant said that he was well aware of the applicable time limits.

24. In *Morsy* UNDT/2009/036, the Tribunal made the following findings with regard to the meaning of "exceptional":

What is required is a conspectus of all relevant factors before the Tribunal to ascertain in each case whether it is exceptional or whether

there are exceptional reasons in the ordinary sense, to justify a waiver or suspension of time; exceptional simply meaning something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered.

25. In *Fedoroff* UNDT/2010/016, the Tribunal identified a number of factors to be considered in applying the test of what is an “exceptional case”. The Tribunal stated:

23. The factors which may assist the Tribunal in deciding if this is an exceptional case are as follows:

a. What was the applicant’s state of knowledge of the time limit for appealing the administrative decision?

b. Was any ignorance or mistaken belief in relation to any matter that was essential to the bringing of the complaint or appeal itself reasonable? Any such ignorance or mistaken belief is not normally considered to be reasonable if it arose as a result of fault on the part of the applicant or her advisers in not making the necessary enquiries which would have been reasonable for them to make.

c. Was there a wholly understandable misapprehension of the law through no fault of hers or her advisers?

d. Were there crucial facts not known to the applicant which caused her to be out of time?

e. Was there a physical impediment like ill health or some other special circumstance which constituted a barrier to the timeous presentation of the claim?

f. Was there any substantial failure on the part of the applicant or her adviser?

g. Was there any misrepresentation by the respondent about any matter relevant to the question of time limits?

h. Were the parties actively engaged in a conciliation or mediation process which, understandably and with justification on both sides, caused the case to go out of time?

i. Did the applicant act diligently, at all material times, in pursuing her claim?

j. Did the applicant or her advisers make a conscious decision, for whatever reason, including tactical, to delay or postpone the lodging of the appeal?

k. Was the totality of the circumstances and events which caused or contributed to the appeal being presented out of time beyond the control of the applicant and her advisers?

l. Even if it was within the control of the applicant to request the review within time was it nevertheless excusable in the particular circumstances of the case that she delayed in filing her application in time?

m. What is the actual prejudice or harm to the respondent if the time limit was waived?

n. Is a fair hearing possible notwithstanding the lapse of time?

o. What would constitute a “limited period” in the circumstances of the particular case?

26. In considering the above questions in light of the evidence in this case could it reasonably be said that this is an “exceptional case”? This is pre-eminently an issue of fact for the decision-making Tribunal. The Judge will bear in mind the importance that is placed on time limits being complied with in the interests of good administration. At the same time, the Judge will remind herself or himself that time limits are not intended to operate to the disadvantage of staff members or to constitute a trap or a means of catching them out when they did all that could reasonably be expected of them and furthermore when they acted in good faith (*Fedoroff*). Severe stress, supported by evidence (preferably medical) could constitute a basis for finding of an “exceptional case” in appropriate circumstances.

27. The Tribunal finds that the Applicant has failed to demonstrate that this is an exceptional case warranting an extension, waiver, or suspension of the time limits. In particular, stress related to the adjudication process is a common element of any litigation and it does not, in and of itself, constitute an exceptional circumstance warranting a waiver or suspension of the time limits. The Applicant also failed to provide a persuasive explanation as to why it took him so long to file the present

application, in particular considering that the emails that constitute the key records in this case were in his possession since the moment the facts in this case arose.

28. As the United Nations Appeals Tribunal stated in *Mezoui* 2010-UNAT-043, time limits are to be enforced strictly. Much as the Tribunal approves of attempts to resolve disputes without a judicial determination and understands fully the Applicant's predicament, the present application, together with the oral evidence, does not provide an adequate basis to support a finding of exceptional circumstances or exceptional case warranting a waiver or extension of the applicable time limits (*Shakir* 2010-UNAT-056, *Diagne et al.* 2010-UNAT-067). Accordingly, the Tribunal finds the application time-barred and therefore not receivable.

Merits

29. Even if the present application were found receivable, it would not have prevailed on its merits.

30. Having agreed to undertake the written test, the onus was on the Applicant to check his emails for further instructions. He did not check his emails until 10:15 a.m. on 23 November 2011. His lack of awareness of the instructions prior to that time was due to his failure to open his emails in the working days preceding the date of the test.

31. Ms. Boly testified that, in view of his email of 18 November 2011, she would have accepted the Applicant's answers to the exercise had he submitted them by 12:00 p.m. that day. However, he submitted his answers at 12:18 p.m., and Ms. Boly declined to accept them as they were beyond the two-hour limit. It was not unreasonable on her part to take this decision.

32. The Tribunal finds that the actions of the Administration with respect to the written exercise were reasonable and lawful.

Conclusion

33. The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 25th day of February 2013

Entered in the Register on this 25th day of February 2013

(Signed)

Hafida Lahiouel, Registrar, New York