



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/087

Judgment No.: UNDT/2014/041

Date: 15 April 2014

Original: English

Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko

von der SCHULENBERG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Francois Lorient, Esq.

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM

Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant was appointed Executive Representative of the Secretary General (ERSG) to the United Nations Integrated Peacebuilding Office (UNIPSIL) in Freetown, Sierra Leone, at the Assistant Secretary-General level in 2008.

2. The Applicant had three applications before this Tribunal relating to matters that arose during and at the end of his employment as ERSG/UNIPSIL.

3. The first, UNDT/NBI/2013/014, was filed on 15 April 2013. It contested the decision to close a complaint made against the Applicant after an investigation, and the decision to terminate or not extend his contract as ERSG/UNIPSIL. This application was judged to be not receivable in *von der Schulenberg* UNDT/2013/178 on the grounds that the challenge to the expiry/termination of his contract was out of time and the Applicant had not submitted a timely request for management evaluation of the decision to review or investigate the complaint against him.

4. The second Application, UNDT/NBI/2013/058, was filed on 15 August 2013 and replied to by the Respondent on 19 September 2013. It remains under consideration by the Tribunal.

5. This Judgment concerns the preliminary question of receivability of the Applicant's third Application filed on 29 November 2013.

The Pleadings

6. In this application, , the Applicant stated that the contested decisions were the "extraneous considerations, governmental pressures, fallacious arguments and ill-motivation governing SG Ban Ki-Moon's decisions, in 2012, not to select, not to extend, not to renew, not to reassign, not to re-appoint the Applicant in the expected UN senior position."

7. The Respondent submits that “the Application is not receivable, it is in part *res judicata* and it is without merit”

8. On 5 March 2014, the Tribunal issued Order No. 040 (NBI/2014) directing the Applicant “to respond to the Respondent’s claim that this application is not receivable”. The Tribunal added that the Applicant’s response “must, *inter alia*, identify by date and subject each of the contested decisions he alleges was governed by extraneous factors”.

9. On 14 March 2014, the Applicant responded to Order No. 40 (NBI/2014) by filing what he termed an “Exposé of Particulars Pursuant to Order No 40(NBI/2014)”.

10. He submits that this case is appointment related. It concerned the Secretary-General’s 2012 “undated and unwritten decision” rejecting the Applicant’s candidature for the position of Special Representative of the Secretary-General (SRSG) to the United Nations Support Mission in Libya (UNSMIL) and his reliance on extraneous considerations and political motives foreign to the interests of the United Nations. The Applicant also provided alleged reasons for the non-extension of his contract as ERSG/UNIPSIL before making specific allegations in relation to the appointment process for the SRSG/UNSMIL vacancy.

11. The Applicant alleges that the selection process and decision making for the SRSG post in Libya was tainted in that it was influenced by a Department of Field Support (DFS)/Office of Internal Oversight Services (OIOS) fact-finding report dated 5 June 2012 of which he was not aware. The Applicant further submits that there was impropriety in the selection exercise as a member of the selection panel had a conflict of interest; and that he should have been given priority consideration given that he was already in the service of the United Nations.

12. The Applicant further states that his Application was timely filed on 29 November 2013 because he only found that his candidature for the UNSMIL position had been rejected when the Respondent filed his reply to Case No. UNDT/NBI/2013/058 on 19 September 2013.

13. He rejects the Respondent's allegation that this Application is otherwise not receivable.

Considerations

14. An application may be rejected as not receivable on grounds that: the subject matter of the Application is not within the jurisdiction of the Tribunal; where the contested decision has not been referred to the Management Evaluation Unit (MEU) for management evaluation within the time frames stipulated by the staff rules and the Statue and Rules of the Tribunal; or where the application itself has been filed outside of the stipulated time frames.

15. There are three issues to be determined.

i. The Contested Decision

16. The Respondent alleges that the Applicant's challenge against the decision not to renew his appointment is *res judicata* because it raises the same issue raised in Case No. UNDT/NBI/2013/014 which was dismissed as not receivable by the Tribunal in *von der Schulenberg* UNDT/2013/78.

17. The Applicant argues that as he has appealed that judgment, it may be *sub judice* but it is not *res judicata*.

18. The main issue for the Tribunal is to identify the contested decision in this case and determine whether it is receivable.

19. A decision not to select a candidate for a post is an administrative decision within the jurisdiction of the Tribunal. On this ground the application is receivable.¹

ii. *Res Judicata*

20. The Tribunal finds that the Application is not *res judicata*. The issue in Case No. UNDT/NBI/2013/014 was the “decision of the Under-Secretary General for Field Support (USG/DFS) to dismiss the complaint of harassment and abuse of authority made against him under ST/SGB/2008/5 and the finding that the Complainant had acted in good faith.”

21. If, as alleged in the Applicant’s “Exposé”, the contested decision in this case is the rejection of his candidature for the post of SRSG/UNSMIL, this is a different administrative decision from that deemed to be not receivable in Case No. UNDT/NBI/2013/014.

iii. *The Management Evaluation*

22. The Applicant’s request to the Management Evaluation Unit for management evaluation in relation to the issues in this case was made on 7 October 2013. The decision to be evaluated was described by the Applicant as follows:

[T]he secret 2012 undated SG decision not to select, reassign, reappoint, nor renew nor extend Mr Michael von der Schulenburg’s employment contract with the United Nations.

23. The request then lists the “ill motivated, fallacious and extraneous considerations described in the UNDT’s Respondent’s Reply of 19 September 2013.” All of these alleged considerations relate to the Applicant’s contract as ESG in UNIPSIL. At no point in this letter does the Applicant refer to his application or

¹ *Andronov* Judgment No. 1157 (2003).

interview for the position of SRSG/UNSMIL, nor does it request an evaluation of an appointment decision.

24. The “Exposé” appears to the Tribunal to be an ill-advised attempt by the Applicant to re-define the contested decision in this Application as a non-appointment decision.

25. The Applicant has never requested management evaluation of the decision not to appoint him to the post of SRSG for the mission in Libya. For that reason alone the Application is not receivable as it is in breach of art. 8.1(c) of the Statute of the Tribunal.

26. The Respondent did not address the timeliness of this Application. The Tribunal has, however, examined the pleadings and associated documents to ascertain if the management evaluation which was requested by the Applicant in relation to this case, was submitted in time.

27. An applicant has 60 days to request a management evaluation of a decision from the date of the contested decision or the date when the Applicant had knowledge of the decision.²

28. That evaluation is a mandatory pre-requisite for a case to be properly brought to the Tribunal. The time limit for requesting management evaluation may not be waived or extended by the Tribunal.³

29. In both his Application and the “Exposé”, the Applicant alleges that he did not receive formal written notification of the decision that he had not been appointed to the Libya post. He says that he first came to know about the decision on 19

² Staff rule 11.2(a) and (c); art. 8.1(c) of the Statute of the UNDT. *Mezoui* 2010-UNAT-043; *Ibrahim* 2010-UNAT-069; *Samardzic et.al.* UNDT/2010/019; *Larkin* UNDT/2011/028.

³ *Costa* 2010-UNAT-036.

September 2013 when the Respondent filed his reply in Case No. UNDT/NBI/2013/058.

30. The Respondent's Reply makes no mention of the Applicant having been properly notified of the decision following the appointment, nor is there evidence of such notification in the Respondent's exhibits.

31. The Tribunal has therefore had to examine the record as a whole to determine when the Applicant first had knowledge of the decision not to appoint him.

32. The Applicant's two previous applications both specifically refer to the selection for the Libya post:

(i) In his Reply in Case No. UNDT/NBI/2013/014 on 22 May 2013, the Respondent responded to the allegations about the termination or non-renewal of the Applicant's appointment as ERSG/UNIPSIL and stated:

The Applicant was considered for another senior position at the USG level later in 2012. He was short listed for the position of SRSG for Libya and interviewed on August 2012. Following the interviews, the Applicant was recommended as the third-ranked candidate.

(ii) In his Reply to Case No. UNDT/NBI/2013/058, on 19 September 2013, the Respondent stated:

In a meeting with the Applicant held in March 2012, the Secretary General mentioned to the Applicant "that he would explore various possibilities on how to use [the Applicant's] expertise in the future." Consistent with this observation, the Applicant was short-listed and considered for appointment to the position of SRSG in Libya. Together with other candidates for the role, in August 2012, the

Applicant was interviewed for the position. Following the interviews, the Applicant was recommended as the third-ranked candidate for selection.

33. The Reply in Case No. UNDT/NBI/2013/058 effectively repeats the Respondent's submission about the selection for the Libya post in his 22 May 2013 Reply in Case No. UNDT/NBI/2013/014.

34. The Tribunal finds that the facts given to the Applicant in Case No. UNDT/NBI/2013/014 about the Libya post were of the same nature and quality as those repeated in Case No. UNDT/NBI/2013/058.

35. If the Applicant had sufficient knowledge of the decision to request a management evaluation of the decision to not appoint him as SRSG/UNSMIL after reading the 19 September 2013 Reply in Case No. UNDT/NBI/2013/058, he would also have had sufficient knowledge about decision after reading the reply in Case No. UNDT/NBI/2013/014.

36. The Tribunal holds that the Applicant had knowledge of the decision not to appoint him to the SRSG post on 22 May 2013 and that time for a request for management evaluation began to run from that date. As it was not requested until 7 October 2013, the request is well out of the 60 day time limit.

37. On this ground the Application is also not receivable.

Conclusion

38. The non-appointment of the Applicant to the position of SRSG/UNSMIL is not the contested decision in this Application.

39. Even if it were the subject matter, the Applicant has not made a timely request for management evaluation of that decision.

40. The Application is not receivable.

(signed)

Judge Coral Shaw

Dated this 15th day of April 2014

Entered in the Register on this 15th day of April 2014

(signed)

Abena Kwakye-Berko, Registrar, UNDT Nairobi