



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

O’SULLIVAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Rishi Gulati

Counsel for Respondent:

Bart Willemsen, UNICEF

Introduction

1. By application emailed on 12 September 2018 and filed on 13 September 2018, the Applicant, a staff member of the United Nations International Children’s Fund (“UNICEF”), challenges the “denial of [her] request to the Executive Director of [UNICEF] made on 3 May 2018 seeking an extension of time to file a Management Evaluation (the “Extension Request”)”.

2. The Applicant asserts that on 3 May 2018, she requested the Executive Director, UNICEF, to grant her an extension of time to submit a management evaluation against her 2017 performance appraisal. She then claims that:

UNICEF did not respond to the Extension Request until 27 June 2018, where UNICEF’s representative apologised for the delay in responding but effectively stating that the Applicant was not entitled to a [management evaluation] in the circumstances.

3. The Applicant describes her challenge as follows:

First, the refusal to grant an extension to the conduct of the [management evaluation] is challenged; and second, the decision effectively denying the Applicant the opportunity to seek a [management evaluation] is further contested.

4. The application was served on the Respondent on 18 September 2018, and he submitted his reply on 21 September 2018, challenging the receivability of the application.

Consideration

5. Before advancing the application, the Tribunal may, in the interest of judicial economy, first consider if the matter is receivable before it (see *Gehr* 2013-UNAT-313, *Christensen* 2013-UNAT-335).

6. Article 8 of the Statute of United Nations Dispute Tribunal governs the receivability of matters before it, relevantly providing that:

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

(ii) In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision;

....

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

7. It follows that a staff member must request management evaluation of the impugned decision before he or she can challenge it before the Tribunal, unless management evaluation is not required by the rules.

8. Pursuant to staff rules 11.2(a) and (b), management evaluation is required except when the administrative decision that the staff member seeks to challenge was taken "pursuant to advice obtained from technical bodies, as determined by the Secretary-General" or follows the completion of a disciplinary process. It is clear that the present case does not fall under any of these two exceptions.

9. The Applicant stated the following in her application form in respect of a question therein directed to management evaluation of the impugned decision (section VI of the application form):

1. Have you requested a management evaluation of the contested decision? The denial of the Extension Request means that a [management evaluation] has not been possible so far.

10. The contested decision in this case is the alleged refusal to grant an extension of time to file a request for management evaluation of a decision related to the performance evaluation of the Applicant. It does not concern a challenge against the performance evaluation itself. That would be a different decision. Unfortunately, the Applicant has confused the two matters in the answer given in the above question.

11. There is no doubt here, as recognized by the Applicant, that the decision she seeks to impugn cannot be challenged directly before the Tribunal and that the Applicant did not yet request management evaluation. Without considering whether the impugned decision is an administrative decision within the definition of art. 2 of the Tribunal's Statute, the Tribunal finds that it has no jurisdiction to entertain the application. The application is thus not receivable *ratione materiae*.

12. Further, if the Applicant is seeking an extension of time, by waiver or suspension, to file a request for management evaluation of the decision in respect of her performance evaluation, the Tribunal does not have jurisdiction to deal with such matter. This is made clear in unambiguous language by the last sentence of art. 8.3 of the Tribunal's Statutes (quoted above), which provides that "[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation".

13. The Tribunal further provides the following brief consideration of the orders sought by the Applicant, which she formulated as follows:

- a. The UNDT set aside the Impugned Decision dated 27 June 2018;

b. The UNDT require UNICEF to conduct a management evaluation in respect of the Applicant's relevant claims concerning her challenge to the purported 2017 Achieve;

c. The UNDT order that the Applicant may file her claims on the merits to the Executive Director of UNICEF within 60 days of returning to her duties;

d. The UNDT order that an independent and impartial investigation be carried out by the OIAI expeditiously; and

e. Reserve costs until such times as the merits are determined.

14. For the reasons expressed above, the relief in paras. 13.a, 13.b and 13.c above cannot be granted. The relief sought in para. 13.d cannot be granted either, as there is no substantive decision validly before the Tribunal in respect of such. It is not part of the impugned decision on any view and cannot be considered. As to para. 13.e, in the circumstances of this application there is no consideration of costs.

15. It is unfortunate that the Applicant, and those advising her, did not first consider the specific preconditions that must be met for an application to be receivable, as well as the limitations on the nature of the relief that can be granted.

16. The present ruling shall not preclude a valid application later being made.

Conclusion

17. In view of the foregoing, the application is dismissed as not being receivable on any view.

(Signed)

Judge Rowan Downing

Dated this 24th day of September 2018

Entered in the Register on this 24th day of September 2018

(Signed)

René M. Vargas M., Registrar, Geneva