



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DIENG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Mariam Munang, OSLA

Counsel for the Respondent:

Alister Cumming, ALS/OHRM

Introduction

1. On 7 November 2018, the Applicant, a staff member of the United Nations-African Union Mission in Darfur (UNAMID), filed an application with the United Nations Dispute Tribunal (UNDT) in Nairobi. The Applicant contests the decision to reassign him as Senior Political Affairs Officer at the same level within UNAMID.

Facts

2. The Applicant joined the Organization as a Human Rights Officer at the P-2 level on 14 July 2000. He was later appointed to several positions in the United Nations Mission in Sierra Leone and the United Nations Operation in Cote d'Ivoire. On 23 February 2009, the Applicant was appointed as Senior Child Protection Advisor at the P-5 level in UNAMID.

3. By memorandum dated 4 April 2018, the Joint Special Representative UNAMID, informed the Applicant that he would be reassigned from the UNAMID Child Protection Unit (CPU) to the Office of the Joint Special Representative (OJSR) as a Senior Political Affairs Officer. The Applicant was informed that his reassignment was effective 8 April 2018 and that he would maintain his current grade and level, as well as his contractual status.

4. On 1 June 2018¹, the Applicant requested management evaluation of the decision to reassign him from the Child Protection Unit to the Office of the Joint Special Representative. The Applicant submitted supplementary information to the Management Evaluation Unit (MEU) on 2, 3, and 7 June 2018.

5. By memorandum dated 17 October 2018, MEU replied to the Applicant's request for management evaluation. The contested decision was upheld.

¹ Reference is made to paragraph 20 of the Application.

6. By letter dated 21 October 2018, the Applicant was informed of the decision not to renew his fixed-term appointment beyond 31 December 2018.

7. On 7 November 2018, the Applicant filed a separate request for management evaluation challenging the non-renewal of his appointment.

8. On 7 November 2018, the Applicant filed the present application with the Tribunal.

9. On 14 December 2018, the Respondent filed his reply to the application.

Applicant's submissions

10. The decision to remove him as Chief of the CPU was motivated by bad faith. Considering that there were allegations of misconduct against him and performance concerns, the decision to reassign him was done to circumvent the relevant rules and procedures that deal with alleged misconduct and performance management.

11. His reassignment to the Office of the JSR was not genuinely in the interest of the Organization. It appears that there was no intention to engage him in a meaningful way to contribute to the work of that Office.

12. The Applicant requests to be reinstated as Senior Child Protection Adviser and he also requests compensation for material and moral damages.

Respondent's submissions

13. The application is not receivable *ratione temporis*. The Applicant failed to submit his application to the Tribunal within the mandatory time-limits.

14. The decision to reassign the Applicant was lawful. The new position was at the Applicant's grade, the responsibilities involved corresponded to his level, the functions to be performed were commensurate with his competence and skills, and he had substantial experience in the field.

15. There was no intention to evade an investigation into alleged misconduct and there was no intention to evade the performance management system.

16. Since the decision to reassign the Applicant was lawful, there is no basis to return him to the P-5 position within the Child Protection Unit. Furthermore, the Applicant has provided no evidence of any harm.

Considerations

Receivability

17. The preliminary issue arising for consideration is the receivability of the present application. Article 2.6 of the Statute of the UNDT provides that in the event of a dispute as to whether the Tribunal has competence under the said statute, the Tribunal shall decide on the matter. In *Christensen* 2013-UNAT-335, the United Nations Appeals Tribunal (“the Appeals Tribunal”) confirmed that legal position when it held that “the UNDT is competent to review its own competence or jurisdiction in accordance with Article 2(6) of its Statute” when determining the receivability of an application.

18. Generally, except in cases where a disciplinary or non-disciplinary action is taken against a staff member following a disciplinary process or where the administrative decision complained of is based on the advice of a technical body, any individual who has *locus standi* before the Tribunal is required to first request management evaluation before bringing an application.

19. Art. 8.1 (i) of the UNDT Statute provides that in cases where a management evaluation of the contested decision is required, an application shall be receivable if it is filed within the following time-limits:

- 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.

20. The Applicant indicated in his application that he requested management evaluation of the contested decision on 1 June 2018. The response period for management evaluation was therefore 45 days from that date, that is by 16 July 2018. Since on that date, the Applicant had not yet received a response to his request for management evaluation, the time-limit for bringing an application to the Tribunal started to run. The Applicant then had until 14 October 2018, that is 90 days later, to file his application with the Tribunal. However, he did not file his application until 7 November 2018, well beyond the deadline prescribed by the UNDT's Statute.

21. Although the Applicant submitted supplementary information to MEU after 1 June 2018, he did not seek management evaluation of any other administrative decision and therefore, the date of the submission of his request for management evaluation was 1 June 2018 and the time-limits started to run from that date.

22. While the Tribunal notes that the Applicant received a response to his request for management evaluation on 17 October 2018, this response does not reset the clock for filing an application with the UNDT as it was received after the expiration of the 90-day period. This reasoning has been reiterated by the Appeals Tribunal in *Lemonnier* 2015-UNAT-679 as follows:

... The ratio of both judgments [*Neault* and *Gallo*] is that where a response to a management request is not received, a staff member has 90 days from when the response was due to file an application to the UNDT. When a response is received but after the expiration of that 90-day period, as in this case, the receipt of the response does not reset the clock for filing an application with the UNDT...

23. The Appeals Tribunal has reiterated in its jurisprudence² that it is the staff member's responsibility to ensure that he or she is aware of the applicable

² *Jennings* 2011-UNAT-184

procedure in the context of the administration of justice at the United Nations and that ignorance cannot be invoked as an excuse. This principle is even more relevant in cases in which the Applicant is represented by counsel as in the present case.

Conclusion

24. In view of the foregoing, this application is struck out for not being brought within time, therefore rendering it not receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of January 2019

Entered in the Register on this 30th day of January 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi