



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Peter A. Gallo, Esq.

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 20 February 2018, the Applicant, an Investigator at the P-4 level in the Investigations Division of the Office of Internal Oversight Services (“ID/OIOS”), filed an application in which he contests the rejection of the request he made for a transfer.

2. On 21 February 2018, the Registry acknowledged receipt of the application and transmitted it to the Respondent in accordance with art. 8.4 of the Rules of Procedure, instructing him to file a reply by 23 March 2018. The Registry further noted that the case had been assigned to Judge Ebrahim-Carstens.

3. On 27 February 2018, the Respondent filed a motion for summary judgment, contending, *inter alia*, that,

... The Application is manifestly not receivable. First, the Application fails to identify a specific decision under appeal. Second, the Application is time-barred. The Applicant filed his Application after the expiry of the 90-day statutory deadline. The Application should be summarily dismissed.

4. After undertaking various case management steps, Judge Ebrahim-Carstens’ tenure with the Dispute Tribunal ended on 30 June 2019. The following day (on 1 July 2019), the case was reassigned to the undersigned Judge.

5. By Order No. 105 (NY/2019) dated 11 July 2019, the Tribunal noted that, as a preliminary matter, it would first adjudicate on the receivability of the application and that the Applicant would therefore be provided with the opportunity to provide his observations, if any, to the Respondent’s claims on this issue. Thereafter, unless otherwise requested by any of the parties, the Tribunal would intend to determine the issue of receivability on the papers before it. The Applicant was therefore ordered to

provide his comments, if any, to the Respondent's receivability claims by 3 September 2019. The Applicant filed his observations within the prescribed time limits.

Parties' submissions

6. In the Respondent's motion for summary judgment of 27 February 2018, he claims that the application is not receivable because (a) it does not concern an appealable administrative decision (*ratione materiae*) and (b) it is time-barred (*ratione temporis*).

7. The Respondent submits that the application is time-barred because, in accordance with art. 8.1(d)(i)(a) of the Dispute Tribunal's Statute, his application was to be filed within the statutory deadline of 90 calendar days from his receipt of the response to his request for management evaluation. Since the Applicant received the outcome to his request for management evaluation on 20 November 2017, the 90-calendar-day period for filing an application expired on 18 February 2018, and the application was filed on 20 February 2018, this deadline was not respected.

8. The Respondent further submits that statutory deadlines are to be strictly enforced (*Mezoui* 2010-UNAT-043, *Ibrahim* 2010-UNAT-069, *Christensen* 2012-UNAT-218, *Odito-Benito* UNDT/2011/019, and *Larkin* UNDT/2011/028), that the sending of a scanned copy of a response to a request for management evaluation is sufficient to trigger the deadline for filing an application (*Cabeia Chys* UNDT/2018/012, para. 41), and that the degree of lateness of the application is irrelevant to the determination of a statutory time-bar (*Rüger* 2016-UNAT-693).

9. Responding to the Respondent's claims that the application is not receivable, the Applicant submits that the Respondent's arguments as to receivability are

mutually contradictory and that staff members have the right to be treated with dignity and respect and managers have responsibilities to maintain a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority. The Applicant contends that in view of the management of the Office of Internal Oversight Services' ("OIOS") failure to address documented instances of serious mismanagement, unprofessionalism and unethical conduct in its Investigation Division, the application is based on a legitimate request regarding a matter that affected his rights under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). Moreover, the Applicant was motivated to make that request for a documented medical reason that was known to the Under-Secretary-General for Internal Oversight Services ("USG/OIOS").

10. The Applicant submits that had the USG/OIOS made a decision whether the Applicant should be transferred, this would have been a decision that impacted the terms of the Applicant's appointment or the contract of employment. The USG/OIOS's failure to address the Applicant's request within a reasonable period of time must be a deemed decision not to take the action requested therein, but the Applicant cannot determine when a deemed decision was made. Even if the Applicant had crystallized such a request by seeking management evaluation, nothing prevented the decision-maker from transferring the Applicant to another post, even after the Management Evaluation Unit ("MEU") had issued their usual dismissal.

11. The Applicant contends that no "last possible date" on which a deemed decision could have been made exists for which reason no 90-day statutory deadline can expire. Had the OIOS wished to do so, the Office could have reassigned the Applicant even after the application had been filed. The evidence makes it very clear that the OIOS did not wish to do so, and that it was the intention to force the Applicant out of the Organization altogether. This was an established practice in the

OIOS and has been facilitated by the complicity of various offices in the former Department of Management.

12. The Applicant submits that the implications for any staff member reporting abuses of managerial authority to the OIOS are as clear as they are dissuasive. In the present case, however, the question has been rendered moot. The Applicant has made repeated attempts to uphold the Staff Regulations and Rules without success. When the Applicant worked outside the Investigation Division, the Organization found his work most satisfactory, but despite knowledge of what this was doing to his health, the OIOS insisted that he remained in a hostile working environment. To exacerbate this, the OIOS insisted that he be subject to the supervision of managers known to have been promoted despite a poor performance record themselves, and who had a history of used “performance management” measures selectively for a patently ulterior motive.

13. The Applicant contends that the application was rendered moot on 10 December 2018 when the Applicant was summarily dismissed. The opportunity to transfer him—at no cost to either the finances or the reputation of the OIOS—has therefore been lost. The Applicant argues that this application stands as evidence that the Applicant struggled to take all possible steps to minimize the harassment he received, and that the Organization was manifestly unwilling to accommodate him, even when that could have been done at no cost. The Applicant states that he is still pursuing Case No. UNDT/NY/2015/063, but to pursue two historical applications would be superfluous and would unnecessarily add to the caseload of the Tribunal, but that leaves the disposal of the matter entirely to the discretion of the Tribunal.

Consideration

On receivability ratione temporis

14. The Tribunal notes that pursuant to art. 8.1(d)(i)(a) of the Dispute Tribunal's Statute, "An application shall be receivable if ... The application is filed within the following deadlines ... In cases where a management evaluation of the contested decision is required ... Within 90 calendar days of the applicant's receipt of the response by management to his or her submission".

15. Under staff rule 11.2(a), in the present case, the Applicant would be required to request management evaluation before filing his application with the Dispute Tribunal because his case is not covered by any of the exceptions stated in staff rule 11.2(b), namely if the case concerns (a) "an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General" in ST/AI/2018/7 (Technical bodies), or (b) "a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process".

16. From the written evidence submitted by the Respondent follows that, on 20 November 2017 at 11:53 a.m., the MEU emailed the Applicant the management evaluation response. According to art. 8.1(d)(i)(a) of the Dispute Tribunal's Statute, the Applicant was therefore in receipt of the response and obliged to file his application with the Dispute Tribunal within 90 calendar days of that date, which would mean no later than 18 February 2018 (when not counting the date when he received the response as per art. 34(a) of the Rules of Procedure of the Dispute Tribunal). However, the Applicant only filed his application with the Dispute

Tribunal on 20 February 2018 at 12:39 a.m. and therefore more than a day after the expiry of the statutory 90-calendar-day deadline.

17. Under art. 8.3 of the Statute of the Dispute Tribunal, the 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”. However, under the consistent jurisprudence of the Appeals Tribunal, such request for a suspension or waiver of the time-limit to file application must be filed before expiration of the relevant time-limit (see, for instance, *Thiam* 2011-UNAT-144, *Cooke* 2012-UNAT-275, *Czaran* 2013-UNAT-373, and *Shehadeh* 2016-UNAT-689).

18. In the present case, the Applicant never submitted any written request for waiver or suspension of the deadline for filing his application. Rather, in his application he erroneously stated that he received the response to his management evaluation request “[o]n or about 22 November 2017”. Subsequently, after the Respondent filed in evidence a copy of the MEU’s 20 November 2017 email to the Applicant to which the management evaluation response was appended, he never, for all that, challenged the veracity of this copy or otherwise questioned its date. It even follows from the written evidence submitted by the Respondent that, in accordance with a return receipt of the MEU’s email, the Applicant actually read the email from MEU later the same day (20 November 2017 at 12:29 p.m.).

19. Accordingly, the Tribunal finds that the application was filed too late and is not receivable *ratione temporis* in accordance with art. 8.1(d)(i)(a) of the Dispute Tribunal’s Statute.

Other matters regarding receivability

20. Having found the application time-barred, it is therefore not necessary for the Tribunal to examine whether the application is not receivable for other reasons, including whether the application does not concern an appealable administrative decision under art. 2.1(a) of the Statute of the Dispute Tribunal or, as submitted by the Applicant, is moot.

Conclusion

21. In light of the foregoing, the application is rejected as not receivable.

(Signed)

Judge Joelle Adda

Dated this 9th day of September 2019

Entered in the Register on this 9th day of September 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York