



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TANIFUM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Sètonджи, Roland Adjovi

Counsel for the Respondent:

Lucienne Pierre, AAS/ALD/OHR

Natalie Camila Puchalka, AAS/ALD/OHR

Background

1. The Applicant is a former Acting Chief, Translation and Editorial Section (“TES”), at the United Nations Office at Nairobi (“UNON”). On 25 June 2019, he filed an application contesting the decision (“Sanction Letter”) of the Under-Secretary-General for Management Strategy, Policy and Compliance, that had he remained a staff member, a disciplinary measure of at least separation from service with compensation in lieu of notice and without termination indemnity would have been imposed (“the contested decision”). The Sanction Letter was placed in the Applicant’s Official Status File.

2. The Respondent replied to the application on 1 August 2019.

3. On 9 October 2020, the Respondent filed a motion requesting the Tribunal to determine receivability as a preliminary matter.

4. The Applicant filed a response to the motion on 13 October 2020.

Summary of the relevant facts

5. The Applicant commenced service with the United Nations International Criminal Tribunal for Rwanda (“UNICTR”) in February 2000 and took early retirement in December 2015. On 14 September 2016, he started on a temporary appointment at the P-5 level as Acting Chief of TES, Department of Conferences Services, UNON.

6. On 27 April 2018, the Investigations Division (“ID”) of the Office of Internal Oversight Services (“OIOS”) received a report of suspected misconduct implicating the Applicant.¹

7. By memorandum, dated 30 September 2018, Mr. Ben Swanson, Director, ID/OIOS, referred the Applicant’s case to then Office of Human Resources

¹ Reply, annex 1.

Management (“OHRM”), now the Office of Human Resources (“OHR”), for appropriate action.²

8. The Applicant separated from the Organization on 14 September 2018 upon the expiration of his appointment.

9. On 2 November 2018, the Assistant Secretary-General/OHRM informed the Applicant that they were considering pursuing the allegations against him through the disciplinary process and sought his agreement to cooperate in the process.³

10. On 23 November 2018, the Applicant agreed to cooperate with the disciplinary process.⁴

11. By memorandum dated 10 January 2019, formal allegations of misconduct were issued to the Applicant.⁵

12. By e-mail dated 26 February 2019, the Applicant submitted his comments on the allegations of misconduct.⁶

13. By letter dated 21 March 2019, the Applicant was informed of the contested decision.⁷

Parties’ submissions

Receivability

The Respondent

14. The application was filed late in respect of the contested decision. The Applicant received the contested decision on 25 March 2019. The deadline for filing

² Ibid.

³ Application, annex 2.

⁴ Application, annex 3.

⁵ Reply, annex 6.

⁶ Reply, annex 8.

⁷ Application, annex 6.

the application was 23 June 2019. As 23 June 2019 was a Sunday, the deadline for filing the application was on Monday, 24 June 2019. However, the Applicant did not file an application until 25 June 2019, a day after the deadline.

15. In the application, the Applicant acknowledges that the contested decision was sent to him on 25 March 2019 and that he noticed the message sent to him on 26 March 2019. Even if the Applicant considered 26 March 2019 to have been the date of receipt of the contested decision, the deadline for filing the application would have been Monday, 24 June 2019.

16. The Applicant did not request an extension of the deadline for filing his application and he was legally represented.

The Applicant

17. On 1 August 2019, the Respondent submitted his reply, stating that he does not challenge receivability and presented arguments in response on the merits of the case. After the Tribunal called a case management discussion to prepare for the trial, the Respondent surprisingly filed a motion on receivability, more than a year later, despite his earlier statement that he did not challenge it therefore admitting that the application was receivable.

18. The Respondent should be declared time-barred to raise the challenge this late in the procedure and his earlier behavior, namely not challenging the receivability from the beginning, should be held against him.

19. The principle of *forum prorogatum* in the practice of the International Court of Justice (“ICJ”), where a Defendant State’s failure to raise a jurisdictional challenge will be considered as a consent to the jurisdiction of the Court applies in this case.

20. The failure to consider this case on its merits would lead to an injustice and would discourage other staff members from being so cooperative with the disciplinary

process. Judicial economy would have best been served by a timely challenge of the receivability of the application.

21. The Applicant prays the Tribunal to dismiss the Respondent's motion in its entirety and to consider his application as receivable. Alternatively, the Applicant prays the Tribunal to join the receivability to the merits and to decide on it at the end of the trial.

22. The Applicant also seeks leave to remain anonymous, considering the risk of reputation damage that this case would cause to him, personally and professionally, especially if he is connected to an allegation that he did not have the chance to defend himself against fully through a judicial process.

Considerations

23. Article 8.1(d)(ii) of the Dispute Tribunal's Statute provides that an application is receivable if filed within 90 calendar days of the staff member's receipt of the administrative decision, in cases where a management evaluation of the contested decision is not required.

24. The fact that the Applicant received the contested decision on 25 March 2019 is not disputed. Going by that date, the 90 days' deadline for filing the application was on 23 June 2019, but since 23 June 2019 fell on a Sunday, the deadline was on Monday, 24 June 2019.⁸

25. The fact that this application was filed on 25 June 2019, a day after the deadline, is not disputed. The contested decision was sent to the Applicant on 25 March 2019, though he maintains that he saw it on 26 March 2019. Even if the Applicant considered 26 March 2019 to have been the date of receipt of the contested decision, the deadline for filing the application would still have been Monday, 24 June 2019.

⁸ Article 34(b) of the UNDT Rules of Procedure.

26. The Applicant does not dispute the facts as stated by the Respondent, but maintains that since the Respondent initially indicated that he does not challenge the receivability of the application, fairness dictates that the application be found to be receivable. The Respondent should be declared time-barred since he is raising the challenge one year into the process.

27. The receivability of an application is governed by statute and time limits are strictly enforced without regard to the merits of the case.⁹ The argument that the Respondent should be considered to have consented to the jurisdiction of the Court since he failed to raise the jurisdictional challenge in time is unsustainable since the law doesn't prescribe the time within which to raise the challenge.

28. Similarly, the argument that the interest of justice would be served by accepting the application as receivable on exceptional grounds, which are that the Applicant only allowed the disciplinary procedure to continue in the interest of justice with the hope that he would be cleared, but that the wrong assessment of the evidence by the Respondent led to this application, is without merit since a determination on receivability must be made without regard to the merits of the case.¹⁰ Moreover, the Dispute Tribunal cannot waive the deadline for filing time on its own motion.¹¹

29. It is trite law that the United Nations is governed by its internal rules and regulations and not the laws of any other Organization unless it adopts such laws as part of its internal law. The principle of *forum prorogatum*, which is alleged by the Applicant to exist in the practice of the ICJ, is not part of the internal law of the United Nations.

30. Considering the undisputed fact that the application was filed a day late and since the Applicant did not request an extension of the deadline for filing it, the

⁹ *Al-Mulla* 2013-UNAT-394, para. 13.

¹⁰ *Cooke* 2013-UNAT-380, para. 9.

¹¹ *Cooke* 2012-UNAT-275, para. 33.

Tribunal agrees with the Respondent that the application is not receivable *ratione temporis* and it is dismissed.

31. Article 11.6 of the UNDT Statute and art. 26 of the UNDT Rules of Procedure require publication and transparency of UNDT judgments. This judgment on receivability makes no mention of the specific details of the allegations against the Applicant and therefore the Applicant's argument that the publication of his name in this judgment will cause him reputational damage is not sustainable.

(Signed)

Judge Margaret Tibulya

Dated this 16th day of October 2020

Entered in the Register on this 16th day of October 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi