UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2021/061
Judgment No.: UNDT/2022/003
Date: 13 January 2022
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

SONI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Matthias Schuster, UNICEF
Alister Cumming, UNICEF

Introduction

1. The Applicant contests his separation from service on the grounds of constructive dismissal and coerced resignation by the United Nations Children's Fund ("UNICEF").

Facts and procedural background

2. The Applicant joined UNICEF on 1 December 2020, as an external candidate, after a selection process conducted by the UNICEF India Country Office ("ICO") Team for the post of Social Policy Specialist.

3. After two incidents on 15 and 16 March 2021, over which the Applicant felt he was personally humiliated by his Chief of Field Office ("CFO"), the Applicant sent her a resignation email on 17 March 2021. He claimed that after many instances of abuse of authority, administrative lapses, misconduct in day-to-day transactions, misguidance on fund utilization, and consistent deprivation of the Social Policy, Monitoring and Evaluation ("SPME Program"), he felt coerced to resign.

4. On the same day, the CFO replied to the email offering a meeting with the Applicant to discuss and remedy the situation. The Applicant claims that despite assurances during the meeting that he would get the requisite support for at least five to six months, this did not materialize, and his work environment did not improve.

5. On 30 April and 3 May 2021, the Applicant took Family Emergency Leave due to COVID-related issues and, on 17 May 2021, he was on Uncertified Sick Leave. During both periods, the Applicant was assigned tasks and deadlines, which he interpreted as punishment.

6. On 18 May 2021, the Applicant reiterated his resignation, which was accepted by the ICO Representative on 23 May 2021.

7. On 26 May 2021, the Applicant reached out to the Chief, Human Resources, UNICEF India, to inquire about internal mechanisms at his disposal in relation to accountability, ethical issues, mediation, and redressal and whether these could be actioned after his separation from service.

8. On 28 May 2021, the Applicant addressed a detailed email to the Office of the Ombudsman for United Nations Funds and Programmes, the UNICEF Ethics Office and the Office of Internal Audit and Investigations ("OIAI"), UNICEF, about his situation.

9. On 4 June 2021, the Applicant separated from UNICEF.

10. On 7 July 2021, a Mediation Specialist, Office of the Ombudsman for United Nations Funds and Programmes, underlined to the Applicant that the rules of the organization did not allow for reinstatement. The Mediation Specialist requested the Applicant to acknowledge this information and confirm if he was nevertheless still willing to engage in mediation.

11. On 9 July 2021, the Applicant formally requested legal assistance from the Office of Staff Legal Assistance ("OSLA"), for which he received a negative reply on 27July 2021.

12. On 2 August 2021, the Applicant requested management evaluation of what he construed as constructive dismissal by UNICEF arising from an inharmonious work environment and a lack of support that compelled him to resign.

13. After a follow-up email from the Applicant, OIAI responded on 6 August 2021 that it had not received an official complaint from him as the exchanges he had submitted indicated that he had entered discussions with the Ombudsman for informal resolution. Accordingly, the Applicant was advised of the correct procedure for the formal process of reporting possible prohibited conduct and that after that, OIAI would assess if the reported conduct amounted to misconduct.

14. On 10 August 2021, the Applicant followed-up with OIAI on the required documentation to start a formal process of investigation.

15. On 31 August 2021, the Applicant's management evaluation request ("MER") was rejected as not receivable on the grounds that it had not been filed within the mandatory deadline and that it did not contest an administrative decision.

16. On 16 November 2021, the Applicant filed an application before this Tribunal for the reasons mentioned in para. 1 above.

17. On 24 November 2021, the Respondent, who had until 30 December 2021 to file his reply, filed a motion to have receivability determined as a preliminary matter arguing that the application should be dismissed for lack of receivability *ratione materiae* pursuant to arts. 9 and 19 of the Tribunal's Rules of Procedure.

18. On the same day, the Tribunal instructed the Applicant to respond to the motion, which he did on 6 December 2021.

19. On 7 December 2021, the present case was assigned to the undersigned Judge.

20. By Order No. 183 (GVA/2021) of 20 December 2021, the Tribunal suspended the Respondent's deadline to file his reply on the merits pending its decision on the Respondent's motion on receivability.

Parties' submissions on receivability

21. The Applicant's principal contentions are:

a. He has an exceptional case that should not be examined solely based on receivability and should be granted an exemption in the name of justice pursuant to art. 19 of the Tribunal's Rules of Procedure;

b. He requested OSLA's assistance on 9 July 2021, well within his MER deadline, i.e., 17 July 2021. His MER was filed out of time due to lapses from OSLA and its delay in providing the Applicant with legal advice. The Applicant should not be denied access to justice over OSLA's mistake;

c. The Applicant has been diligently and actively seeking a solution from the ICO and UN offices since before his separation from service, i.e., since 26 May 2021, having reached out to Human Resources, the Ombudsman, the UNICEF Ethics Office, OIAI and OSLA. The Applicant was not provided the stipulated mandatory orientation and training pursuant to staff rule 1.3(b). Without any type of guidance from the Administration, he should not be hold at fault for not knowing his options and their limits;

d. The Chief, Human Resources, UNICEF, should have halted the separation from service process rather than just accepting the Applicant's coerced resignation. Had senior authorities intervened after being made aware of the negative environment in which the Applicant was working, his separation from service would not have occurred; and

e. The application should be examined on a matter of law and on the merits.

22. The Respondent's principal contentions are:

a. The application is not receivable *ratione materiae* because the Applicant did not submit a timely MER, nor did he identify an appealable administrative decision;

b. The separation from service was initiated by the Applicant himself and, therefore, there was no unilateral decision taken by the Administration. As such, there is no appealable decision to contest;

c. Even if there was an appealable administrative decision, the Applicant failed to file his MER within the statutory deadline. According to staff rule 11.2(c), the Applicant had 60 calendar days from the contested decision to request management evaluation, which he failed to do. Thus, pursuant to art. 8(1)(c) of the Tribunal's Statute, the application is not receivable;

d. MER time limits apply to both explicit and implicit administrative decisions. According to UNAT's jurisprudence regarding constructive dismissals, as established in *Koda* 2011-UNAT-130, it is necessary to determine the date on which a staff member knew or reasonably should have known of the decision open to challenge; this determination must be based on objective elements that both parties can accurately determine. Even if a decision had been made to constructively dismiss the Applicant, he must have been aware of it by the date of his resignation, i.e., 18 May 2021 and he should have requested management evaluation by 17 July 2021 rather than on 2 August 2021. Accordingly, the Applicant's request for having the date of separation from service count as the date of his appealable administrative decision is without grounds; and

e. A staff member has a duty to be aware of all relevant rules and deadlines. An error or delay by OSLA to provide legal assistance does not exempt a staff member of the rules regarding statutory time limits.

Consideration

Whether the Tribunal can issue a summary judgment on receivability

23. Art. 9 of the Tribunal's Rules of Procedure provides:

> A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

24. Pursuant to the provision above and to established jurisprudence, the Dispute Tribunal can choose to issue a summary judgment without taking any argument or evidence from the parties as the Tribunal's Statute prevents it from receiving a case that is not receivable (see *Faust* 2016-UNAT-695).

25. Likewise, art. 19 of the Tribunal's Rules of Procedure provides that it may issue any order or direction that is appropriate for the fair and expeditious disposal of the case. In addition, as established in *Ngoma-Mabiala* 2013-UNAT-361, such provision allows the Tribunal to deal with issues of receivability as a preliminary matter in the interest of judicial economy.

26. Therefore, the Tribunal can examine and rule upon the matter of receivability as a preliminary matter through a summary judgment in the interest of fairness and judicial economy.

Whether the application is receivable

27. In this case, as it will be explained below, the record and timeline unequivocally demonstrate that the request for management evaluation was filed out of time and that there are no exceptional circumstances justifying missing the applicable deadline. Consequently, the application is not receivable *ratione materiae*.

28. Arts. 8.1(c) and 8.1(d)(i) of the Dispute Tribunal's Statute provide that an application is receivable if the Applicant has previously timely submitted the contested administrative decision for management evaluation.

29. Concurrently, staff rule 11.2(c) provides that a request for management evaluation is not receivable "unless it is sent within 60 calendar days from the date on which the staff member receives notification of the administrative decision to be contested".

30. It follows that, when examining compliance with staff rule 11.2(c), it is crucial to determine the date at which the deadline therein starts to run. In matters arising from an implied administrative decision, such as one derived from a constructive dismissal, that determination is not a straight-forward exercise. However, it is well-established in the jurisprudence that the date of a contested implied administrative decision must be determined as that on which a staff member knew or reasonably should have known about it (see *Awan* 2015-UNAT-588; *Bernadel* 2011-UNAT-180 and *Chahrour* 2012-UNAT-406).

31. In this case, it is reasonable to conclude, on the one hand, that, at the earliest, the Applicant knew of the alleged implied contested decision to constructively dismiss him by the date he reiterated his resignation, i.e., 18 May 2021. On the other hand, at the latest, the Applicant had knowledge of the alleged implied contested decision on the date UNICEF accepted his resignation, i.e., 23 May 2021.

32. Accordingly, the Applicant should have filed his MER by 17 July 2021 or, at the latest, by 22 July 2021. Under either of these scenarios, however, the Applicant missed the MER deadline.

33. In this sense, the Tribunal cannot determine any other date as the date of the alleged decision to constructively dismiss the Applicant for the purpose of identifying an appealable administrative decision. Likewise, the Tribunal cannot surpass the fact that the Applicant missed the management evaluation deadline and that, consequently, does not fulfil a mandatory requirement to have his application found receivable.

Whether ignorance of the law can justify missing a deadline

34. The Applicant's arguments regarding lack of orientation and support for filing the MER on time, i.e., ignorance of the law, are equally unsupported.

35. The Tribunal's jurisprudence has stated on multiple occasions that ignorance of the law cannot be invoked as an excuse for missing deadlines. It is the staff member's responsibility to ensure that he is aware of the applicable procedures in the context of the administration of justice in the United Nations' internal justice system (see *Jennings* 2011-UNAT-184; *El-Saleh* 2015-UNAT-594; *Bezziccheri* 2015-UNAT-538 and *Abdellaoui* 2019-UNAT-929).

Whether there are grounds for waiving or extending the MER deadline

36. Art. 8.3 of the Statute of the Dispute Tribunal establishes that it may decide to suspend or waive the deadlines in exceptional cases upon written request by the Applicant. However, the Tribunal does not have such authority in relation to MER deadlines.

37. In this case, the Applicant filed his MER out of time and as noted above, the Tribunal cannot waive such deadline for the purpose of examining the case on the merits. Nonetheless, the Tribunal recalls that the Secretary-General has such authority.

38. Staff rules 11.1(c) and 11.2(c) provide that when there is informal resolution by the Office of Ombudsman, including mediation, the deadline to request management evaluation may be extended by the Secretary-General under specific conditions.

39. Concurrently, as per the Tribunal's jurisprudence, the exceptional suspension of time limits for management evaluation applies only to informal resolution processes conducted through the Office of the Ombudsman (see *Wu* 2013-UNAT-306 and *Egglesfield* 2014-UNAT-402).

40. Therefore, it is essential to understand if a mediation process was initiated in this case and to identify the date of its conclusion to examine whether there are any grounds supporting an MER deadline extension under staff rule 11.2(c).

41. The record shows that although the Applicant sought mediation from the Office of the Ombudsman for United Nations Funds and Programmes, a formal mediation process was never initiated. It also shows that the Applicant was informed by mediators of his options, particularly that the Organization's rules did not allow for reinstatement after mediation and that he was asked to confirm whether he would like to proceed with the mediation process.

42. Accordingly, there is no evidence that the Applicant's MER deadline was extended pursuant to staff rule 11.2(c).

43. Finally, the events recounted by the Applicant do not amount to exceptional circumstances justifying non-compliance with a mandatory deadline. The Applicant attempts to put responsibility on OSLA and the Administration for not having been able to file his MER within the deadline, but it is well established within the jurisprudence that only circumstances beyond the Applicant's control that would have prevented him from exercising his right in a timely manner may be

considered exceptional circumstances justifying a waiver of a statutory time limit (see *Cooke* 2021-UNAT-275; *ElSaleh* 2015-UNAT-594 and *Nikwigize* 2017-UNAT-731).

44. In this case, the Applicant's actions clearly demonstrate that he could have filed a request for management evaluation within the deadline as he was actively pursuing multiple UN redress mechanisms, e.g., the Ombudsman, OAIA and OSLA. Nothing exceptional, i.e., beyond his control, prevented him from seeking management evaluation as well.

45. Consequently, his argument of exceptional circumstances is not supported by the evidence on record.

Conclusion

46. In view of the foregoing, the Tribunal DECIDES to reject the application as not receivable *ratione materiae*.

(*Signed*)
Judge Teresa Bravo
Dated this 13th day of January 2022

Entered in the Register on this 13th day of January 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva