



Before: Judge Sean Wallace
Registry: Nairobi
Registrar: René M. Vargas M., Officer-in-Charge

ABBAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Hydar Majook

Counsel for the Respondent:

Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Facts And Procedure

1. On 5 June 2023, the Applicant, a former Supply Assistant working with the United Nations Mission in South Sudan (“UNMISS”), filed an application contesting the Administration’s decision to separate him from service due to misconduct.

2. On 13 June 2023, the Respondent filed a motion requesting the Tribunal to: (i) dismiss the application as not receivable; and (ii) suspend the Respondent’s deadline for the filing of the reply pending the determination of the motion.

3. By Order No. 113 (NBI/2023), issued on 27 June 2023, the Tribunal partially granted the Respondent’s motion. The deadline for the Respondent’s reply was suspended pending the determination of the motion. By the same Order, the Tribunal also directed the Applicant to file a rejoinder on the issue of receivability by or before 10 July 2023.

4. The Applicant complied and filed his submissions pursuant to Order No. 113 (NBI/2023) on 8 July 2023. In his submissions, for the first time, the Applicant’s Counsel, without providing any proof, indicated that the Applicant is incapacitated and sought to rely on art. 7.6 of the UNDT Rules of Procedure to argue that he had three years to file his application.

5. On 5 October 2023, the Tribunal issued Order No. 155 (NBI/2023) and directed the Applicant to submit supporting documentation on his claim of incapacity and referred him to the Office of Staff Legal Assistance (“OSLA”). By the same Order, the Tribunal directed the Respondent to submit a copy of the contested decision and clearly clarify the ground on which the Applicant was separated from service.

6. On 12 October 2023, the Respondent responded to Order No. 155 (NBI/2023), indicating that the Applicant was separated from service for misconduct. The Respondent provided a copy of the sanction letter dated 11 March 2022.

7. On 6 November 2023, the Applicant’s Counsel filed a request for extension of time of one week to avail proof of the Applicant’s incapacitation. The Counsel also requested the Tribunal to direct the Respondent to avail a copy of the contested administrative decision.

8. On 7 November 2023, the Tribunal granted the Applicant’s Counsel’s request and directed him to file the above evidence on or before 13 November 2023. The Tribunal also informed Counsel for the Applicant that the Respondent had filed a copy of the contested decision on 12 October 2023 and it was accessible through the e-filing portal.

9. On 13 November 2023, the Applicant filed a copy of a medical report, indicating that he had an X-ray of his lower limb on 8 June 2022 showing a simple linear fracture of the tibia and dislocation of the ankle joint. The Applicant also filed a document titled “Applicant file a Comments on outcome investigation dated on 11/March/2022”.

Submissions

Respondent’s submissions

10. The Respondent contends that the application is not receivable based on three grounds: (i) the Applicant did not request management evaluation of the contested decision; (ii) there is no administrative decision being contested; and (iii) the application is time-barred.

11. On the first ground, relying on *Mkhabela* UNDT/2021/103, para. 19, the Respondent submits that failure to seek management evaluation is a fatal omission because, as explained by the Dispute Tribunal, “receivability is determined by strict rules, in the application of which the Dispute Tribunal exercises no discretion, among them ... the requirement of a timely request for management evaluation.” Here, the Applicant admits that he has not sought management evaluation. (see Application, section VI). In view of the above, and in the absence of a request for management

evaluation, the application in its entirety is not receivable *ratione materiae* and should be dismissed.

12. On the second point, the Respondent argues that the Applicant contests conduct but not an administrative decision. The Applicant admits that the purposed contested decision is “abusive behavior”. The application then goes on to describe such alleged conduct. Conduct is not an administrative decision. Challenges to conduct are not receivable *ratione materiae* and must be pursued in the first instance in accordance with ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority). *Adnan-Tolon* 2019-UNAT-970, paras. 35-39. The Respondent emphasizes that since the Applicant contests alleged conduct without first following the process prescribed by law, the application is not receivable *ratione materiae* and should be dismissed.

13. Furthermore, the Respondent contends that the application is time-barred and should be dismissed as not receivable *ratione temporis*. Under the UNDT Statute, an application is only receivable if it is filed in compliance with prescribed time limits. As applicable here, the Applicant was required to file the application “[w]ithin 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided.” Here, the Applicant admits that the purported contested decision was notified to him in June 2022. The application was filed one year later and is, therefore, time-barred.

Applicant’s submissions

14. Whereas the Respondent raises three grounds for non-receivability of the application, the Applicant, without addressing each ground separately, maintains that his application is receivable. (Applicant’s response to Order No. 113 (NBI/2023), filed on 6 July 2023).

15. He argues that the application was filed within the time limits in accordance with art. 8.4 of the UNDT Statute and art. 7.2 of the UNDT Rules of Procedure. (*Id.*, paras.

21-22). That means that the application will be receivable up to the period of three years after receiving the administrative decision.

Consideration

16. Examining the merits of the Respondent's motion is difficult in that the Applicant has not clarified the nature of the challenged termination decision nor even submitted a copy of the decision. The termination decision submitted by the Respondent does not accord with the Applicant's allegation that the decision was made on 1 April 2022 and arose from an incident in September 2021. Instead, that termination decision was made on 11 March 2022 and rose from an incident on 2 October 2019 in which the Applicant allegedly drove a United Nations vehicle while under the influence of alcohol and damaged that vehicle.

17. To the extent that the termination decision was for reasons other than disciplinary, the Respondent correctly points out that the Statute of the United Nations Dispute Tribunal requires that, to be receivable, the Applicant must have "previously submitted the contested administrative decision for management evaluation ..." (*Id.*, art. 8.1(c)). The Applicant does not really discuss this issue in his reply but admitted in the application that he had not requested management evaluation. (See, application, para. VI.1). Thus, the application would be not receivable on this basis.

18. To the extent the termination was a disciplinary decision (the one set forth in the Respondent's annex 2), the jurisprudence is clear that management evaluation is not required. (Staff rule 11.2(b)). Thus, the deadline for filing an application to challenge that decision was 90 days from the receipt by the Applicant of the administrative decision. (See, the Statute of the United Nations Dispute Tribunal, art. 8(d)(ii) and Rules of Procedure of the United Nations Dispute Tribunal, art. 7.1(c)).

19. In this case, the Applicant states that the decision was made on "01/04/22". He alleges that he first became aware of the decision "at the end of June 2022." (See,

application, paras. V.4-5). In his response to the Respondent's motion, he clarifies that he "was informed officially by UNMISS HR on 30 of June 2022." (Response, para. 3).

20. If so, the deadline would be 90 days for the receipt of the decision, or 28 September 2022. Having been filed on 5 June 2023, the application would not be receivable as time-barred.

21. However, the Applicant argues that the appropriate deadline is three years as set forth in art. 8.4 of the Statute of the Dispute Tribunal and Rule 7.6 of the Tribunal's Rules of Procedure. The Tribunal observes that these provisions do not establish a deadline of general applicability. They are expressly related to (and limit) art. 8.3 of the Tribunal Statute, which in turn permits the Tribunal, upon written request by the applicant, to suspend or waive "the deadlines for a limited period of time and only in exceptional circumstances." In this case, there has been no request to suspend or waive the deadlines nor any presentation of exceptional circumstances. Thus, art. 8.4 and Rule 7.6 do not apply.

22. The Applicant also seeks to rely on the extended one-year deadline for claims "filed by any person making claims in the name of an incapacitated or deceased staff member". (See, Statute art. 8.1(d)(iii) and Rules of Procedure 7.2.) In support of this argument, the Applicant claims "I mentioned on the application that Mr. Abbas he is an incapacitated." (Response, para.7). However, the application lacks any reference to incapacity at all.

23. The application does say that the Applicant "knows basic English language in oral" and "don't know how to read well." (Application, paras. 1 and 9). However, limited reading or foreign language capacity is far from "incapacity".

24. Although, the term "incapacitated" is not defined in the Statute of the Dispute Tribunal, "[a] plain and ordinary definition of 'incapacitated' comes from the Merriam-Webster Dictionary as 'deprived of capacity or natural power; made incapable of or unfit for normal functioning'. (*Giles III* 2021-UNAT-1106, para. 57). In the context of

art. 8.1(d)(iii), it seems clear that the term refers to a staff member who is unable to bring a claim on their own behalf, just like if they were deceased. It implies an inability to manage one's own legal affairs, usually due to mental health reasons.

25. Furthermore, when directed to submit documentation of his incapacity, the Applicant provided only a report that he suffered a broken leg and dislocated ankle, from which he has made a good recovery. The medical report does not indicate that the Applicant was incapacitated by his leg injury.

26. In addition, the application attaches a Legal Representative Authorization Form signed by the Applicant on 9 May 2023. If he was able to authorize Mr. Hydar Majook to act as his legal representative, he was not incapacitated.

27. Moreover, this Tribunal has examined and rejected a request to apply the extended deadline when the record showed that the staff member was not mentally incapacitated. (*Wenz*, UNDT/2020/020, paras. 11 and 16). Thus, the extended one-year deadline does not apply.

28. Therefore, the 90-day deadline applies in this case and was not met. In conclusion, if the challenged decision was not a disciplinary matter and required management evaluation, it is not receivable for failure to request management evaluation. On the other hand, if the challenged decision was a disciplinary matter, then it is not receivable as time-barred. Either way, the case is not receivable.

Judgment

29. The application is dismissed as not receivable.

(Signed)

Judge Sean Wallace

Dated this 16th day of November 2023

Case No. UNDT/NBI/2023/048

Judgment No. UNDT/2023/126

Entered in the Register on this 16th day of November 2023

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi