Judgment No. 2019-UNAT-962

JUDGE KANWALDEEP SANDHU, PRESIDING.

Introduction

1. The Appellant is currently a Field Language Assistant with the United Nations Truce Supervision Organization (UNTSO). He join

Procedural Issues

6. The Appellant also raises several procedural or interlocutory matters in his appeal.

i) Oral Hearing

7. The Appellant requests an oral hearing before the Appeals Tribunal in order to call witnesses, including Ms. JS and the UNIFIL Chief of Human Resources, to question them

d) The MEU's failure to see the interview panel consisted of people "whose conduct has been seriously criticized" and ignored the manipulation of test results;

e) Druze underrepresentation and discrimination;

f) Whistle blower protections;

g) The obligation of the Secretary-General under General Assembly resolution 63/253; and

h) The Secretary-General's "trust deficit".

14. Article 31(1) of the Appeals Tribunal's Rules of Procedure allows additional pleadings "in exceptional circumstances". For adjournment applications, an adjournment has only been granted on an "exceptional basis".[5]

15. Article 18*bis* of our Rules of Procedure provides that the "President may, at any time, either on a motion of a party or on his or her own volition, issue any order which appears to be appropriate for the fair and expeditious management of the case and to do justice to the parties".

16. These provisions and jurisprudence speak of "exceptional" reasons and consideration of the prejudice to the Secretary-General in granting the motion as well as what is the fair and expeditious management of the case and justice to the parties. The Appellant has filed the motion late in the process. The Secretary-General filed his answer on 1 August 2019. The Appeals Tribunal advised the Appellant of the denial of his request for an oral hearing in September 2019. He was also aware that the appeal had been scheduled for an oral pronouncement to take place on 25 October 2019. Despite this, the Appellant waited until the last moment to file this motion. He has failed to provide a reason for the late motion and for seeking to obtain counsel at such a late stage of the proceedings. We cannot find "exceptional circumstances" here. Rather, granting an adjournment during deliberations and on the verge of pronouncing judgment would undermine the fair and expeditious management of the appeal.

[5] Harris v. Secretary-General of the United Nations, Order No. 324 (2018).

23. The Appellant then wrote to the UNIFIL Head of Mission on 24 December 2018 to request a waiver of the deadline for management evaluation for JOs 2016/038 and 2016/026. The UNIFIL Head of Mission informed him on 14 January 2019 that he did not have the authority to waive or extend management evaluation deadlines. The UNIFIL Head of Mission advised him to write to the MEU.

24. On 15 January 2019 and 19 February 2019, the Appellant e-mailed UNOMS seeking

filing technical support which evidenced he had technical difficulties electronically filing his application.

31. He also says the Dispute Tribunal failed to consider written evidence about the UNOMS' involvement. The three cases were submitted to the MEU for review in one request because they were mediated together. He sent requests to three different UNOMS staff members on 24 December 2018, but the Dispute Tribunal only considered his follow-up e-mail of 15 January 2019. His case should not be dismissed because of UNOMS' slow responsiveness. The mediation with UNOMS was in engagement until 10 December 2018. Per the Appeals Tribunal's jurisprudence in Wu,[7] his deadline started to run from the meeting that was proposed by Mr. Murad of UNOMS with UNIFIL DMS. He argues that his deadline to file an application should have been 19 February 2018 because he did not receive notice of the decision until 19 December 2017.

The Secretary-General's Answer

32. The Secretary-General requests the Appeals Tribunal to affirm the Judgment of the Dispute Tribunal and dismiss the appeal in its entirety. The Secretary-General argues that the Dispute Tribunal correctly found the application not receivable. Requesting a timely management evaluation is a mandatory first step in the appeal process. The Staff Regulations and Rules (ST/SGB/2018/1) require the request for management evaluation within "60 calendar days from the date on which the staff member received notification of the administrative decision to be contested" (Rule 11.2(a) and (c)). The Dispute Tribunal held the Appellant should have requested a management evaluation of the non-selection for JOs 2016/026 and 2016/038 by 17 February 2018. The Appellant incorrectly asserts he did not receive notification on 19 December 2017; however, this is inconsistent with the evidence. He also received an e-mail of 22 December 2017 informing him of the decision. At latest, he knew of the non-selection by 19 February 2018 when he e-mailed UNOMS referring to his non-selection. Even if counted from this later date, he filed a request for management evaluation out of time. He claim that he had requested a management evaluation late because he was trying to mediate the three cases together. However, he has not submitted adequate evidence of mediation. UNIFIL and the Appellant never agreed to mediate nor did UNIFIL ever participate in a

[7] Wu v. Secretary-General of the United Nations, Judgment No. 2013-UNAT-306/Corr.1.

Considerations

36. Regarding JOs 2016/038 and 2016/026, we find, based on the reasons below, the Dispute Tribunal did not err in finding that the Appellant's application was out of time and not receivable pursuant to Staff Rule 11.2.

37. Regarding JO 87684, we find, based on the reasons below, the Dispute Tribunal erred in finding the application was not receivable and we remand this application back to the Dispute Tribunal.

I. The Appellant's Application Re: JOs 2016/038 and JO 2016/026

38. The Dispute Tribunal found that the application regarding JO 2016/038 and JO 2016/026 was not receivable ratione materiae because he did not file a timely request for management evaluation as required by Staff Rules 11.2(a) and (c).

39. Article 2(1) of the Dispute Tribunal's Statute confers jurisdiction on that Tribunal to hear applications appealing administrative decisions. An application "is only receivable when a staff member has previously submitted the impugned administrative decision for management evaluation and the application is filed within the specified deadlines".[9] The Dispute Tribunal shall not suspend or waive

41.

Secretary-General expressly extended the management evaluation deadline or specified conditions for extending it. Nor is there evidence of an implied extension as referenced by the Appeals Tribunal in Wu where it noted that it is "arguably not unreasonable" for the Dispute Tribunal to infer that the Ombudsman's participation in those settlement negotiations amounted to the Secretary-General's implicit extension of the management evaluation deadline for the period of the negotiations. However, in Ngoga,[11] the Appeals Tribunal clarified that Wu did not establish a general principle that the Secretary-General's participation in settlement negotiations through UNOMS amounts to an implicit extension of the time limits to seek management evaluation.

45. In this instance, there were no settlement negotiations or mediation process conducted by UNOMS. The Appellant had made requests to UNOMS for assistance but there is no evidence that UNOMS commenced informal or formal mediation services. The Secretary-General did not participate in settlement discussions through UNOMS. Therefore, the circumstances here do not show an "implied" extension. The Appellant's requests for assistance from the UNOMS alone is not sufficient to extend the 60-day deadline.

46. Consequently, the Dispute Tribunal correctly held it had no jurisdiction to consider the application regarding JOs 2016/038 and JO 2016/026, as it was not receivable ratione materiae .

II. The Appellant's Application Re: JO 87864

47. For this JO, the Appellant submitted his request for management evaluation on 27 June 2018 within the 60-day deadline under Staff Rules 11.2(a) and (c).

48. Since the MEU's response was outside the 45 days provided for, Article 8(1)(d)(i)(b) of the Dispute Tribunal Statute provides that the deadline for the application to the Dispute Tribunal is 90 calendar days after the "expiry of the relevant response periodp txlant submitf14.8

49. On 15 January 2019, the Appellant sought and received an extension for filing from the Dispute Tribunal to 20 February 2019 on the basis that he "needed to concentrate on genuinely trying to find a mediated solution under the auspices of the ombudsman". The Appellant filed his application to the Dispute Tribunal by this extended deadline. However, the Dispute Tribunal subsequently reversed this extension in its Judgment on the basis that the Appellant failed to show exceptional circumstances that were beyond his control to support the extension. As a result of this reversal, the Appellant's application regarding JO 87684 was out of time and not receivable.

50. However, we find the Dispute Tribunal erred in reversing the extension that it had granted. In granting the Appellant the extension of time to file his application, the Dispute Tribunal found there were "exceptional circumstances" to do so which were set out in its Order of 6 February 2019, namely, i) the Applicant was self-represented, and, ii) he might not be conversant with the technical procedural requirements of formal litigation. The facts of the Appellant being self-represented and not conversant with formal litigation did not change.

51. In its subsequent Judgment, the Dispute Tribunal did not further consider these facts in reversing the extension but focused on the lack of mediation efforts. In its 6 February 2019 Order, the Dispute Tribunal found the Appellant

Judgment

54. The appeal regarding JOs 2016/038 and 2016/026 in Judgment No. UNDT/2019/043 is hereby dismissed.

55. The appeal regarding JO 87684 is upheld. Judgment No. UNDT/2019/043 is hereby vacated in part. With regard to JO 87684, the matter is remanded to the Dispute Tribunal to determine the application on its merits.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)