
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/059

Judgment No.: UNDT/2013/004

Date: 17 January 2013

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar:

Introduction

1. The Applicant is a former staff member of the United Nations Office for Project Services (“UNOPS”) based in Jerusalem where she worked as Director, Jerusalem Operations Center (“JOC”) on a Fixed Term Contract at the P5 level.
2. She is contesting three decisions namely:
 - a. The decision to give her a six month fixed-term contract instead of 12 months (“Decision 1”) which she came to know about on 17 January 2011;
 - b. The decision to uphold overall performance evaluation after the rebuttal process which she was notified on 29 July 2011 (“Decision 2”); and
 - c. The decisions not to renew her fixed-term contract and to place her on special leave which she was notified on 26 April 2011 (“Decision 3”).
3. The Applicant filed her Application contesting Decision 1 on 26 September 2011. The Application was served on the Respondent on 27 September 2011 and required to Reply by 28 October 2011. On 10 October 2011, the Respondent contested the receivability of the Application.
4. On 19 and 20 December 2011 the Applicant filed her Applications contesting Decisions 2 and 3 respectively.
5. The Tribunal held a Case Management Hearing on 19 January 2012 and issued Order No. 013 (NBI/2012) having found that all the three Applications arose from the same course of events. The Applicant was ordered to file comprehensive and structured pleadings traversing all three Applications by 10 February 2012.
6. The Applicant having complied with the Case Management Orders, the Respondent filed his Reply on 1 March 2012 contesting the receivability of Decisions 1 and 3. The Applicant filed her response to the Respondent’s Reply on 25 April 2012.

7. The Applicant applied for anonymity with regards to any publication arising from this Application due to fears for her personal security in her current duty station. The Respondent did not object. The Tribunal grants the Applicant anonymity in relation to the publication of this judgment.

Facts relating to Decision 1

8. On 21 December 2010 the Regional Director Europe and Middle East Region who was the Applicant's supervisor sent the Applicant an email whose subject was: "Follow up to our debriefing on Thursday 16 December (Ramallah)". The last paragraph of the email read:

Finally, as your contract is up for renewal at the end of January, it is recommended to renew your contract for six months during which we hope these issues will be tackled and resolved before further extension is considered.

9. On or about 10 January 2011 the Regional Director Europe and Middle East Region sent the Applicant an email whose subject was: "Further extension of your contract". The last paragraph of the email read:

Issues regarding Decision 1

13. The issues to be determined regarding the receivability of Decision 1 are:
- a. At what point did time begin to run for the Applicant to file her Application with the Tribunal in light of the involvement of the Ombudsman in her case? In particular:
 - (i) Did the parties seek mediation of their dispute?
 - (ii) Was mediation sought within the deadlines for filing an Application?
 - (iii) When did mediation break down?

Respondent's submissions

14. The Respondent submitted that:
- a. The Application contesting Decision 1 was not receivable *rationae temporis* and the Applicant has not shown any extenuating circumstances to waive time limits;
 - b. The Ombudsman's intervention and efforts to resolve the dispute did not constitute mediation sufficient to trigger the Application of Article 8(1)(d)(iv) of the Statute;
 - c. Informal resolution (excluding mediation) is not an exception to UNDT deadlines;
 - d. The discussions held between the Applicant, the Respondent and the Office of the Ombudsman do not constitute any form of informal resolution effort;
 - e. Notice from the Office of the Ombudsman does not evidence informal resolution; and

f. Assuming that there was an effort at informal resolution sufficient to adjust the UNDT deadlines, any such effort “broke down” on 26 or 29 April 2011.

Applicant’s submissions

15. The Applicant submitted that her Application contesting Decision 1 is receivable because:

a. She was engaged actively in informal dispute resolution with the Office of the Ombudsman;

b. Provisional staff rule 11.1(c) provides that informal resolution by the Office of the Ombudsman may result in extension of the deadline for management evaluation and filing an application with the Dispute Tribunal;

c. Based upon the Applicant’s engagement with the Office of the Ombudsman, and that office’s interventions at the highest level with the UNOPS Executive Offices

exceptional circumstance for the purpose of a waiver of the time limits.

22. The Appeals Tribunal in *Abu-Hawaila* 2011-UNAT-118 held that only informal resolution made through the Office of the Ombudsman may serve to freeze time. The Tribunal stated:

This Tribunal also holds that the exceptional suspension of time limits provided for under Article 8(1) of the UNDT Statute and provisional Staff Rule 11.1 *applies only to informal dispute resolution conducted through the Office of the Ombudsman. The suspension of time limits cannot be extended by analogy to other informal dispute resolution procedures, precisely because of its exceptional character.* Exceptions to time limits and deadlines must be interpreted strictly and are not subject to extension by analogy. (Emphasis Added)

23. The correct position therefore is that if a party to a dispute makes mediation overtures within the applicable time lines for filing an Application and the other party consents to participation in the mediation process then the time limit for filing an Application is suspended and begins to run when the mediation has broken down.

24. When mediation overtures are made by one party but the other party refuses, the time limit for filing an Application does not run until the refusal is communicated to the other party unambiguously.

Did the parties seek mediation of their dispute?

Was mediation sought within the deadlines for filing an Application?

28. The Applicant received the outcome of management evaluation on 28 March 2011; therefore the deadline for filing an Application with the Tribunal was 26 June 2011.

29. The Applicant first made contact with the Consultant Ombudsman for the Funds and Programmes on 10 January 2011 which was still within the time frame for the Applicant to file her Application with the Tribunal. The Tribunal therefore finds that the Office of the Ombudsman was seized of the matter and as such mediation was sought within the deadline for filing Applications.

When did mediation break down?

30. The documentary evidence submitted by the Parties shows that the Ombudsman's engagement was extended for a period of 6 months. The discussions with the Ombudsman included the possibility of the Applicant being considered for other positions at UNOPS and as such she submitted her job application for a specific position ("Brussels post") which she was believed to be suitable for.

31. The Respondent's argument that mediation broke down on 26 April 2011¹ is untenable because on 24 May 2011, the Ombudsman wrote to the Applicant with progress made in the process and intimating her that UNOPS thought that the Brussels post which she had applied for would be a good match for her.

32. While mediation was on-going, the Applicant received on 30 June 2011, a regret email from UNOPS Human Resources Associate informing her that she was unsuccessful for the Brussels post. By this email, mediation effectively broke down, since it was hoped that the selection of the Applicant for the position would have resolved the dispute. Pursuant to Area.9(diation e\$)4.68 -10 To86or the tPt

33. The Application contesting Decision 1 was filed on 26 September 2011. This was within the 90 days' time limit. The said Application is therefore receivable.

Facts relating to Decision 3

34. In a letter dated 19 April 2011, the Executive Director of UNOPS wrote to the Applicant styling the subject: "Notification of (1) non-renewal of your contract when it expires on 31 July 2011; and (2) placement on special leave with Full Pay with effect from 1 May 2011." The Applicant received this letter on 26 April 2011.

35. The Applicant sought management evaluation of this decision on 12 August 2011 and received a response from management evaluation on 23 September 2011.

Respondent's submissions

36. The Respondent submitted:

a. That the request for management evaluation contesting decision 3 was sent outside the 60 day period set out in staff rule 11.2 (c);

b. That the deD.00To [(gdo)8nr8(dga)-1.1(1 of your cation of this deTa1bf55 0 t2-T.uea126 0

b. Staff rule 11.2(c) provides that info

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

Did the Applicant request management evaluation of Decision 3 within the Applicable deadlines?

40. The Applicant requested management evaluation of Decision 3 on 12 August 2011 and received a response from management evaluation on 23 September 2011.

41. The Applicant's argument that the letter dated 19 April 2011 was merely a notification of intention to terminate is untenable because paragraph 2 of the letter clearly states "I have decided not to renew your contract when it expires on 31 July 2011." This is a clear indication by the Executive Director of his decision not to renew the Applicant's contract. UNOPS intention conveyed in the letter was clear and as such cannot be construed as an intention but rather a decision.

42. The Applicant's request for management evaluation should have been filed by 25 June 2011. However the Applicant filed her request 49 days past the required time limit.

43. The Tribunal finds that Decision 3 is not receivable.

Conclusion

44. The Tribunal holds that of the two decisions whose receivability are contested by the Respondent, Decision 1 is receivable.

45. Decision 3 is not receivable and shall accordingly not be entertained.

(Signed)

Judge Nkemdilim Izuako

Dated this 17th day of January 2013

Entered in the Register on this 17th day of January 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.