



Case No.: UNDT/NY/2011/051

Judgment No.: UNDT/2013/015

Date: 11 February 2013

Introduction

1. This Judgment concerns three distinctively separate claims filed in a single application. They are being dealt with together for reasons of judicial economy.

2. The Applicant, a Programme Budget Officer at the P-3 level with the Office of Programme Planning, Budget and Account (“OPPBA”), Department of Management, filed an application on 15 June 2011 alleging that:

a. She was not selected for a position at the P-4 level in OPPBA (advertised by vacancy announcement VA-09-ADM-DM-OPPBA-422344-R-New York);

b. Her candidacy for a position at the P-4 level in the Office for the Coordination of Humanitarian Affairs (“OCHA”) was unlawfully disrupted by the withdrawal of the vacancy (advertised by vacancy announcement VA-09-ADM OCHA-421839-R-Multiple D/S); and

c. Her electronic performance evaluation system (“e-PAS”) reports for 2007–2008 and 2008–2009 were not completed in a timely manner.

3. In addition to submitting that all the Applicant’s claims are without merit, the Respondent contends that none of them are receivable. Since this Judgment only concerns the question of the receivability of the Applicant’s claims, it is not necessary, at this stage, to deal at any length with the factual issues relating to the merits of the application.

4. By Order No. 24 (NY/2012) dated 7 February 2012, the Tribunal gave leave to the Applicant to comment on the Respondent's submissions regarding receivability. These submissions were filed on 21 March 2012.

5. Having regard to the particular circumstances of this case, the Tribunal decided to render judgment on the preliminary question of receivability without holding a hearing.

Consideration

The Applicant's candidacy for the vacancy with OPPBA

The scope of the claim of non-receivability

6. The Respondent submits that this claim is time-barred because the Applicant failed to request management evaluation of the contested decision in a timely manner. It is noted that, when the Management Evaluation Unit ("MEU") granted

7. Clearly the waiver of the time limit for management evaluation was carried out by the MEU, which was entrusted with the task assigned to it in the Staff Rules. The Respondent is now, in effect, challenging the MEU's initial decision to grant leave to the Applicant's request for a time extension; a decision which the Under-Secretary-General for Management subsequently affirmed by providing the Applicant with a substantive response to her request for management evaluation in the management evaluation letter dated 15 March 2011. Given the fact that the MEU accepted the request for a management evaluation and acted upon it, the issue for consideration is whether it is for the Tribunal to question the action of a body over which it has no supervisory control. Does art. 8.3 oblige or empower the Tribunal to review the decision of the MEU to extend time? This question is to be considered in three parts:

- a. Is the Respondent bound by the MEU's decision and estopped from raising the issue of the exercise of discretion by the MEU to extend time?
- b. If not, by waiving the deadline for the Applicant to file her request for management evaluation, did the MEU exercise its authority in a manner that nevertheless made the Respondent bound by this decision?
- c. What impact, if any, had the MEU's decision to extend time given the Tribunal's duty under art.8 of its Statute dealing with the receivability of claims?

Is the Respondent bound by the MEU's decision under the doctrines of waiver and estoppel?

8. The Respondent has defined the role of the MEU in ST/SGB/2010/9 (Organization of the Department of Management) dated 6 December 2010. The MEU is an integral part of the Department of Management, and therefore also the Secretariat of the United Nations. According to sec. 10.1, the Chief of the MEU is

11. It follows from sec. 10 of ST/SGB/2010/9 that the MEU is the unit responsible for handling the process related to management evaluation in the Secretariat. The MEU is to conduct “impartial and objective evaluations of administrative decisions contested by staff members” and to make “recommendation to the Under-Secretary-General for Management on the outcome of the management evaluations”. Amongst the MEU’s other du

Amar UNDT/2011/040, *Applicant* UNDT/2011/054, *Villamorán* UNDT/2011/126, *Manco* UNDT/2012/135 and *Korotina* UNDT/2012/178).

15. Under staff rule 12.3(b), it would appear that—as an exception to the Staff Rules—the Respondent has the power to extend the time limits set out in staff rule 11.2(c) in other situations than the specific reference to informal resolution efforts by the Ombudsman, provided that the other mandatory requirements described in staff rule 12.3(b) are satisfied. Accordingly, for the MEU to do so, it could be argued that the Respondent would be required to have properly delegated his authority to grant such exception to the MEU, which the Under-Secretary-General of Management also appears to imply in her management evaluation letter.

16. Given that the MEU is the entity in the Secretariat charged with handling the process of management evaluation under sec. 10 of ST/SGB/2010/9, there would be no reason to believe that the MEU would not possess delegated authority to extend a deadline for filing the request for management evaluation and properly to act on behalf of the Under-Secretary-General for Management and the Respondent. Under the law of agency, the MEU would appear to have the apparent, or ostensible, authority to deal with issues regarding the handling of management evaluation requests on behalf of the Respondent, including the grant of exceptions to sec. 10.2(d) and thereby extend the time limit to situations other than those where a case is pending before the Ombudsman. In a case such as the present, it would therefore not matter whether the Respondent, as a matter of fact, has delegated the authority to grant such exception or not because the Respondent would in any event be bound by the decision of the MEU.

The powers conferred under the Statute of the Dispute Tribunal to grant a time extension for filing a request for management evaluation

17. In view of the United Nations A limiim

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(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

20. The relevant requirements of art. 8 of the Statute of the Dispute Tribunal have all been satisfied in this case in that: (a) the Tribunal has competence to consider this application under art. 2 of the Statute; (b) the Applicant was eligible to file it; (c) she previously submitted the contested decision for management evaluation; the MEU considered it; and (d) the Under-Secretary-General of Management provided her management evaluation on 15 March 2011 and the application was filed within 90 days of the receipt of the response from the MEU. These requirements regarding receivability having been satisfied, there is no requirement for the Tribunal to waive any deadlines or to make further enquiries regarding the timeliness of requests to the MEU. If the Tribunal were to decide in favour of the Respondent and determine that the claim is not receivable notwithstanding the fact that the requirements in art. 8.1 of the Statute have been met, this would involve a reading into the plain words of the Statute the additional words "requests for". In other words, the statutory language "deadlines for management evaluation" would have to be read as "deadlines *for requests* for management evaluation" (emphasis added). However, in *Scott* 2012-UNAT-225, the Appeals Tribunal would appear to counter any such inclusion when it ruled that written norms are primarily to be understood according to their literal

terms (in law, this is also sometimes referred to as the plain meaning rule) as it stated that (para. 28):

The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

21. It is the Tribunal's view that art. 8.3 of the Statute of the Dispute Tribunal

employment with the United Nations. However, before being able to file a request for management evaluation, s/he is seriously injured in the line of duty and enters into a coma. S/he cannot file her/his request for management evaluation within the mandatory 60 days' time limit. Should s/he be shut out? This could not possibly have been the intention behind art. 8.3 since the General Assembly could not have intended that a staff member should be shut out from exercising her/his rights where exceptional and/or compassionate circumstances warrant a waiver. A procedural bar may have legitimate and sensible policy objectives, but the General Assembly could not, and would not, have contemplated that it could, or should, be used to unfairly deprive a staff member from a judicial determination of the substantive merits of her claim.

23. The primary purpose of a management evaluation is to provide the Administration with a second opportunity to review its decision and to right an apparently wrongful act. The injunction against waiving the deadlines was never intended as a technical knock out blow to prevent the first stage of an administrative review, nor was it intended to frustrate the legitimate rights of a staff member to challenge its administrative decision, as in this case. It is directed to the timely filing of a claim to the Dispute Tribunal based on the 30 or 45 days' time limit within which the MEU has to complete and provide a decision.

24. If the Applicant failed to file a claim within 90 days of receipt of the management evaluation letter or of the expiry of the relevant response period for the management evaluation if no response to the request was provided, the Tribunal shall consider its power under art. 8.3 (see *O'Neill* 2011-UNAT-182). This is not the case here. The requirements as to time limits having been satisfied by the Applicant in this case, art. 8.3 does not come into play. The Tribunal has no supervisory function over the actions or decisions of the MEU or the Under-Secretary-General of Management and nothing in art. 8 suggests otherwise. The claim is receivable because it is filed within 90 days of the Applicant receiving

the decision on her request for management evaluation and the MEU acted under what it considered to be its delegated authority, as affirmed by Under-Secretary-General of Management in the management evaluation letter.

Conclusion

25. The Tribunal accordingly finds that the Applicant's application is receivable with regard to her appeal against the decision not to select her for a post with OPPBA.

The withdrawal of the vacancy with OCHA

26. The same arguments and conclusions regarding the timeliness of the Applicant's request for management evaluation applies to this case. However, the Respondent contends that the application in relation to the vacancy with OCHA is not receivable because the vacancy was withdrawn and the decision to do so was of "general application" and therefore not an appealable administrative decision. The Respondent submits that the withdrawal was "a policy decision made following consideration of the competing demands placed on the OCHA office by its mandate and the limited budgetary resources available to the office to implement and achieve its objectives".

27. Article 2.1(a) of the Statute of the Dispute Tribunal describes the type of administrative decision that the Tribunal is competent to review as follows:

... an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

28. In *Andati-Amwayi* 2010-UNAT-058, the Appeals Tribunal dealt with the issue of what constitutes a contestable decision pursuant to art. 2.1(a) of the Statute of

explored by the Tribunal in considering the merits of the claim. It is not an issue to be struck out on a preliminary point of receivability. The claim is receivable. The contention that it is not receivable is misconceived.

31.

Conclusion

35. The Tribunal finds that, pursuant to art. 2.1(a) of the Statute of the Dispute Tribunal, the Applicant's claims regarding:

- a. Her candidacy for the vacancy with OPPBA is receivable;
- b. The decision by OCHA to withdraw the vacancy in Jerusalem is receivable; and

36. The timeliness of her e-PAS reports for 2007-2008 and 2008-2009 is subject to the doctrine of *res judicata* and therefore not receivable.

(Signed)

Judge Goolam Meeran

Dated this 11th day of February 2013

Entered in the Register on this 11th day of February 2013

(Signed)

Hafida Lahiouel, Registrar, New York