



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ABASSA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (UNECA), working as an Agricultural Advisor in the Food Security and Sustainability Development Department (FSSDD) in Addis Ababa, Ethiopia.
2. The Applicant is challenging the decision not to select him for the position of Chief, Agricultural Production Systems Section (APSS), FSSDD/UNECA, alleging that he was not notified of the contested decision.

Facts

3. By correspondences dated 6, 7, 25 and 27 October and 2 November 2010 to the administration, the Applicant stated that he was not selected for the post of Chief of APSS. The Applicant also asserts that on 5 May 2010¹, he noticed Mr. Adama Coulibaly (Mr. Coulibaly), an external fellow, acting as Chief of APSS.
4. On 27 October 2010, the Applicant requested a management evaluation. On 15 December 2010, the Management Evaluation Unit (MEU) responded to the Applicant, stating that his request was not receivable because it was not sent within sixty days from the date on which the Applicant received notification of the administrative decision.
5. On 11 March 2011, on the date that his Application was due, the Applicant filed for an Extension of Time to File an Application, stating that he was seeking to mediate his claim with the Office of the Ombudsman.
6. On 18 March 2011, the Tribunal issued Order No. 029 (NBI/2011) granting the Applicant's request and allowing him until 15 April 2011 to file his Application.
7. On 14 April 2011, the Applicant sent an email request to the Tribunal seeking another extension of time to file his Application, stating that the mediation process was still underway and not completed. The Tribunal acknowledged receipt of this email on 15 April 2011 and informed the Applicant that the Judge assigned to his case would be notified regarding his request for another extension of time to file his Application.

¹ Application, para. 12.

8. On 15 May 2011, the Tribunal sent an email to the Applicant seeking to find out whether he had resolved the conflict through mediation, and whether his 14 April 2011 request for an extension of time was still relevant. The Applicant failed to respond to this email.

9. The Tribunal sent another email to the Applicant on 29 November 2011 asking him to inform the Tribunal of the status of the case by 2 December 2011. The Applicant responded on 2 December 2011, stating that the mediation services of the Office of the Ombudsman had produced no result as of 2 December 2012 and he was therefore ready to submit his Application.

10. The Applicant submitted his Application on 2 March 2012, and the Respondent was notified of this filing on 8 March 2012.

11. On 28 March 2012, the Respondent filed a Reply Limited to Receivability and for Consideration of Receivability as a Preliminary Issue.

12. The Tribunal gave the Applicant until 24 April 2012 to file a response to the Respondent's Reply on Receivability. To the date of this judgment, the Applicant has not challenged the Reply on Receivability.

The Applicant's submissions

13. In his Application, the Applicant states that he was not notified in writing of the administrative decision, i.e. the decision to hire someone else for the post of Chief of APSS. However, the Applicant states that in May 2010, an external fellow called Mr. Coulibaly showed up and started acting as Chief of the section.²

14. The Applicant also disputes the MEU's contention that he had acknowledged the transfer of leadership to Mr. Coulibaly and therefore as of that time, the timeline towards the sixty days in which the Applicant was to request a management evaluation started to run.

² Application, para. 12.

15. The Applicant requested an extension of time to file his Application, on 11 March 2011. He further attached a mediation notice from the Office of the Ombudsman, showing that he did indeed request mediation services.³

16. The Applicant is seeking a rescission of the decision to appoint Mr. Coulibaly as Chief, APSS, payment for moral and non-pecuniary damages as well as emotional hardship, and payment and adjustment of his pension entitlement had he been promoted to the post in 2007 when he applied for it.

The Respondent's submissions

17. Although the Respondent does not address the issue of the receivability of the Applicant's request for management evaluation, the Tribunal will address that issue as the MEU found that the Applicant's request was not receivable.⁴

18. The MEU considered the pertinent issue in respect to receivability of the management evaluation request to be the date on which the Applicant received notification of the selection decision. The Applicant contended that he was never formally notified of the contested decision in accordance to the provisions of ST/AI/2006/3/Rev.1, applicable at the time. However, the Respondent states that the Applicant became aware of the decision not to hire him on 5 May 2010 when, according to the Applicant himself, Mr. Coulibaly, an external fellow, showed up and started to act as Chief of APSS.

19. Notwithstanding the 5 May 2010 date, the MEU noted that Mr. Coulibaly took over as Chief of APSS on 1 June 2010 and that the Applicant sent an email to Mr. Coulibaly on 7 June 2010 scheduling a session for the transfer of the section to Mr. Coulibaly, thereby meaning that the Applicant was aware of the hiring decision.

20. The MEU finally noted that pursuant to staff rule 11.2(c), notification of the decision is not required to be in any particular form. The MEU found that the Applicant's request for management evaluation should therefore have been sent no later than close of business on 6 August 2010, however, the Applicant requested it on 6 October 2010, making it not receivable.

³ Application for Extension of Time to File an Application, para. VII.

⁴ See Management Evaluation, MEU/359-10/R (BW), 15 December 2010, Application annex 16.1.

21. The Respondent states that the Application was time barred because instead of the Applicant filing his Application on 15 April 2011, pursuant to Order No. 29 (NBI/2011), the Applicant informally corresponded with the Tribunal, seeking an extension of time by stating that the mediation process was not completed.

22. The Respondent states that granting *ex- parte* requests leads to prejudicing the opposing party and should not be granted absent exceptional circumstances.⁵

23. The Respondent states further that the *ex-parte* correspondence between the Registry and the Applicant during the period of 14 April until 2 December 2011 does not communicate any determination to extend the deadline of 15 April 2011 in which to file the Application.⁶

24. The Respondent goes on to state that although the Applicant communicated with the Tribunal on 2 December 2011, informing it that informal resolutions provided no results and he was ready to submit his Application, the Applicant did not inform the Tribunal as well that informal discussions between himself and the administration ended on 22 July 2011.⁷

25. The Respondent contends that there was no mediation, other than discussions between the Applicant and the Ombudsman's office to initiate mediation, and these discussions ended on 22 July 2011.

26. The Respondent therefore requests the Tribunal to find the Application not receivable *ratione temporis* under article 8 of the Tribunal's Statute because the Applicant failed to abide by the time imposed for filing his Application, pursuant to Order No. 29 (NBI/2011)

Consideration

27. In determining this Application, the main issues for examination are:

- a. Whether the request for Management Evaluation was timely made.
- b. Whether the Application was timely filed.

⁵ Reply on Receivability, para. 16.

⁶ Reply, para. 15.

⁷ Reply on Receivability, para. 10.

Whether the Applicant timely requested a management evaluation

28. Pursuant to staff rule 11.2(c), “[a] request for 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.”

29. The Applicant officially requested a management evaluation on 27 October 2010; however, there had been a series of communications initiated by the Applicant to the management prior to the request of the management evaluation. According to the MEU, the Applicant sent correspondence regarding the decision not to select him for the post of Chief, APSS, FSSDD.⁸

30. The Applicant contends that he was not officially notified of the selection decision in accordance with the provisions of section 9.5 of ST/AI/2006/3/Rev.1⁹, but that on 5 May 2010, he noticed Mr. Coulibaly, an external fellow, acting as Chief of APSS.

31. The administration contends that the management evaluation is time barred and therefore not receivable because, although the Applicant was not notified of the decision in writing, he became aware of the outcome of the selection process around 5 May 2010 when he [the Applicant] noticed Mr. Coulibaly acting as Chief of the section. Notwithstanding this, the administration further contends that for the purposes of provisional staff rule 11.2(c) “notification of the decision is not required to be in any particular form.”¹⁰

32. The Tribunal, in *Thiam* UNDT/2010/131¹¹ found that the administration must send a written notification of the administrative decision to the staff member in order to determine when the sixty-day time limit starts to run.

33. The Tribunal in *Thiam* agreed with the decision in *Schook* 2010-UNAT-013, in which the United Nations Appeals Tribunal (the UNAT) reversed a UNDT judgment which had rejected an application based on grounds that the applicant had failed to abide by the sixty-day

⁸ Management Evaluation, MEU/359-10/R (BW), 15 December 2010, Application annex 16.1.

⁹ Application, para. 14.

¹⁰ MEU/359-10/R (BW), Application annex 16.2.

¹¹ *Thiam*, UNDT/2010/031, para 37.

time limit to request a management evaluation. The UNAT stated: “Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a)¹² would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a notification of the decision in writing, required by Rule 111.2(a).”¹³

34. The UNAT concluded, therefore, that the appeal was receivable because Schook had not been notified of any written administrative decision of his not continuing in service after 31 December 2007. The UNAT stated, “[w]e find that UNDT has completely ignored that the time of two months, required by rule 111.2(a) begins to run from the date the staff member received notification of the decision in writing.”¹⁴

35. In light of the above stated precedents, the Tribunal finds that the Applicant was not formally notified of the administrative decision. The only official notification to the Applicant, that he was not selected for the post of Chief, APSS came in the form of the management evaluation report of 15 December 2010, in which the MEU stated that they took note that on 1 June 2010, Mr. Coulibaly, the selected candidate, took over the leadership of the section.¹⁵

36. In this case, the Applicant requested management evaluation on 27 October 2010. Before requesting the management evaluation, he had never been notified in writing of the administrative decision. On 15 December 2010, he received the management evaluation, in which he was officially notified of the administrative decision. The Applicant therefore requested a management evaluation before receiving an administrative decision. This Tribunal will therefore follow the reasoning in *Schook* and *Thiam* regarding the time line for requesting a management evaluation and finds that time started running for the purposes of the management evaluation, from the date on which he was officially notified of the decision, which is 15 December 2010.

¹² Former staff rule 111.2(a) was applicable in *Schook* whereas the corresponding staff rule 11.2(a) is applicable to the present Application.

¹³ *Schook*, para. 6. (internal citations omitted)

¹⁴ *Schook*, para. 12. (internal citations omitted)

¹⁵ Application, annex 16.1.

Whether the Application was timely filed

37. Now that the Tribunal has found that the management evaluation is receivable, next is the issue of whether the Application itself is timely filed and therefore receivable.

38. The Respondent's contention is that this Application is not receivable because the Applicant was granted an extension until 15 April 2011 to file his Application, yet he filed it on 2 March 2012, without following the Tribunal's Rules of Procedure in seeking additional extensions to submit the Application.

39. The Applicant sought an extension of time to file his Application as he wanted to first mediate his claim with the Office of the Ombudsman. He therefore filed a Motion to Extend Time to File Application on 11 March 2011, the date on which the Application was due.

40. The Tribunal granted the Applicant's motion and gave him until 15 April 2011 to file the Application. However, on 14 April 2011, the Applicant wrote an email to the Tribunal seeking more time before filing his Application as the mediation was still underway.

41. The Tribunal did acknowledge receipt of the Applicant's email and informed him that it would respond to him. On 15 May 2011, the Tribunal sent an email to the Applicant seeking to clarify whether he still needed the extension of time to file his Application. The Applicant never responded to this email.

42. Pursuant to staff rule 11.1(c), "the conduct of informal resolution by the Office of the Ombudsman, including mediation, may result in the extension of the deadlines applicable to management evaluation and to the filing of an application with the United Nations Dispute Tribunal . . ."

43. Further, according to staff rule 11.4(c), "[w]here mediation has been pursued by either party within the deadline for filing an application . . . and the mediation is deemed to have failed in accordance with the rules of procedure of the Mediation Division of the Office of the Ombudsman, the staff member may file an application with the Dispute Tribunal within ninety calendar days of the end of the mediation."

44. The Applicant only responded to the Tribunal after he was sent an email on 29 November 2011, giving a deadline to respond to the Tribunal by 2 December 2011 and inform the Tribunal on the status of the mediation. On 2 December 2011, the Applicant informed the Registry that the mediation services of the Ombudsman produced no results and as such he was ready to file his Application.

45. It is Respondent's contention that since the Applicant did not follow the rules and procedures for filing an extension of time, i.e. the Applicant informally sent an *ex-parte* e-mail to the Registry without serving the Respondent, the request for an extension of time should not be granted. Although staff rule 11.1(c) provides that mediation may result in the extension of the deadlines applicable to file an Application, the Tribunal must, however, be informed of the date on which the mediation became futile for the proper computation of time allowed for the Applicant to file his Application.

46. There are conflicting facts as to when the mediation ended. The Respondent contends that the discussions ended on 22 July 2011, whereas the Applicant, after much prodding from the Tribunal, states that mediation became futile on 2 December 2011, the date upon which the Applicant was given a deadline to respond to the Tribunal regarding the status of the mediation.

47. When the Respondent filed the Reply on Receivability, the Applicant was given until 24 April 2012 to challenge it. The Applicant has not done so. The Tribunal went further and sent an email to both parties on 24 May 2012, seeking a clarification as to when the Applicant was officially notified that the mediation was futile. The Tribunal gave both parties until close of business on 25 May 2012 to respond. The Applicant has responded and the Respondent responded after the deadline, and this is most regrettable.

48. The Tribunal will accept the Respondent's Reply on Receivability at face value as there has been no objection from the Applicant and find that the discussions ended on 22 July 2011.

49. There was a formal Reply filed by the Respondent, and the Applicant was given a chance to challenge it. The Applicant has failed to do so. The Tribunal finds that it has given the Applicant ample time and latitude to give information regarding whether the mediation

process took place and when it became futile. The Respondent informed the Tribunal that he was not aware of any on-going mediation process. It is not for the Tribunal to probe further into that statement. However, the Tribunal wants to emphasize that given the strict guidelines for filing of Applications provided for in the Statute, and bearing in mind that mediation suspends the running of time to file an Application, it becomes highly relevant to the Tribunal to be informed on request when mediation has started and when it ended.

50. The Respondent in his reply raised the issue of prejudice that may be caused when the Tribunal is faced with an *ex parte* application or motion for an extension of time by an applicant. There was no explanation of how an *ex parte* application or motion might prejudice the Respondent and the Tribunal finds this submission quite puzzling and unjustified.

51. Time limits or deadlines for filing an application are governed by article 8 of the Statute and article 7 of the Rules of Procedure of the Tribunal. Under article 8.3 of the Statute it is open to an Applicant to move the Tribunal in writing “to suspend or waive the deadlines” in “exceptional circumstances” for “a limited period time”. Article 7.5 of the Rules adds that the motion must be supported by brief reasons.

52. It is obvious from a reading of the above articles that it is for the Judge in the exercise of his or her discretion to consider whether the circumstances invoked by an applicant are really exceptional. If the circumstances are indeed exceptional, the Judge will then have to decide what length of time should be imparted to the applicant. In the exercise of that discretion, the Judge does not have to and is not compelled to give notice to or be enlightened or guided by the Respondent. At this stage there is nothing that may cause prejudice to the Respondent.

53. The jurisdiction of the Tribunal obeys three fundamental criteria. The Tribunal cannot exercise its jurisdiction unless the three criteria of jurisdiction *ratione personae*, jurisdiction *ratione materiae* and jurisdiction *ratione temporis* are present. Until these three criteria are satisfied the Tribunal is not in a position to exercise its jurisdiction and therefore there is no live issue before it. So when an applicant is moving for a waiver of a deadline to file a pleading, until that waiver is granted, the Tribunal is not seized of any matter. How then can it be argued that in the face of such *ex parte* motion the Respondent will suffer prejudice? Surely the Respondent is not suggesting that there is a rule of law that would require any

applicant who wants to file an *ex parte* motion to the Tribunal to first request authorization from the Respondent.

54. Prejudice may occur only if and when the relevant pleadings and documents are not communicated to the Respondent or where the Respondent is denied the right to be heard either orally or on paper. This Tribunal does not consider that there is a legal duty on it to seek the views of the Respondent when it is in presence of a motion for a waiver of time limits, especially to file an application. If that were to be so then it would amount to saying that the Tribunal should surrender its discretion in such matters to the whims, wishes or fiat of the Respondent or be subject to these whims, wishes and fiat.

55. In brief that would mean depleting the Tribunal of its sovereign powers to rule on *ex parte* motions or applications. The Tribunal is not prepared to condone or accept such a rule or practice, though it may exist in the mind of the Respondent, in the absence of a clear and explicit resolution of the General Assembly and incorporated in its Statute.

56. Notwithstanding the above discussion on *ex parte* communications, any Applicant that brings a case before the Tribunal has a responsibility to provide evidence that tips the case in his or her favor as the burden of proof lies with the Applicant. The Applicant in this case has failed to do.

Conclusion

57. The Application is not receivable *ratione temporis* and in the circumstances, the Tribunal has no jurisdiction to entertain it.

(Signed)

Judge Vinod Boolell
Dated this 6th day of June 2012

Entered in the Register on this 6th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi