



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

GOMES da CONCEICAO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alejo Eiriz, UNFPA

Introduction

1. The Applicant contests the decision taken by the rebuttal panel regarding her 2009 performance as well as the decision by the Executive Director of the United Nations Population Fund (“UNFPA”) not to renew her fixed-term appointment beyond 9 September 2010.

2. As a preliminary matter, the Respondent contends that the application is not receivable under the Statute of the Dispute Tribunal as the Applicant failed to request management evaluation of either of these decisions within the prescribed time limits.

Relevant Facts

3. On 30 November 2006, the Applicant entered into service with UNFPA on a contract at the L-5 level. On 1 July 2009, the Applicant was provided with a P-5 level fixed-term appointment with a 9 August 2010 expiration date.

4. On 23 February 2010, the Applicant contacted the Office of the United Nations Ombudsman (“Ombudsman”) for the purpose of seeking assistance with the rebuttal of her performance evaluation particularly her desire to obtain an extension of her contract pending that process. The Ombudsman provided her with assistance through May 2010 at which time she filed her “Rebuttal Statement”.

5. On 24 May 2010, the Applicant submitted a “Rebuttal Statement” in reference to her performance evaluation for the year 2009.

6. On 21 June 2010, the Applicant was interviewed by members of the rebuttal panel following which she provided them with a list of potential staff members that could provide the panel with additional information regarding her performance.

7. On 30 June 2010, the Applicant was notified that her appointment would not be renewed beyond 9 August 2010. However, on 9 August 2010, her appointment

was extended until 9 September 2010 for the purpose of enabling UNFPA to complete the rebuttal process of the 2009 performance evaluation.

8. On 4 August 2010, the Applicant contacted the Ombudsman requesting that they assist her with obtaining an extension of the duration of her contract pending the findings of the rebuttal panel. On 9 August 2010, she was informed that her contract was extended for an additional month by which time the rebuttal process would be completed.

9. On 7 September 2010, the Applicant was notified of the 3 September 2010 decision of the rebuttal panel regarding her 24 May 2010 submission, which stated, *inter alia*, that “the ratings of the supervisor in a number of areas could not be validated”.

10. On 9 September 2010, the Applicant’s contract expired and was not renewed.

11. On 27 September 2010, the Organization informed the Applicant that changes would be made to her 2009 evaluation “as suggested in the report of the rebuttal panel”.

12. On 9 November 2010, the Applicant formulated a request for legal assistance with the Office of Staff Legal Assistance (“OSLA”). On 26 November 2010, following additional exchanges between the Applicant and OSLA, OSLA informed the Applicant that “the PAS rebuttal process you initiated is not the same as a request for Management Evaluation. A request for Management Evaluation of the decision to terminate your contract, however, would now be time barred. That decision can therefore no longer be challenged”.

13. On 3 December 2010, the Applicant submitted the present application. UNFPA submitted its reply on 7 January 2011, in which, in addition to responding to the merits of the case, it stated that the Application was not receivable due to the fact that the Applicant had not submitted a request for management evaluation of either contested decisions prior to submitting an appeal to the Dispute Tribunal.

14. On 17 September 2012, the Tribunal issued Order No. 191 (NY/2012) in which it requested that the Applicant address the Respondent's claim that her application was not receivable. The Tribunal further asked that both parties inform the Tribunal whether the issue of receivability could be dealt with on the papers. On 25 September 2012, the Respondent agreed to the issue of receivability being dealt with on the papers, whereas the Applicant stated that she disagreed with the Tribunal's request due to the close relationship and common origin between the issue of receivability and the decision being contested.

Applicant's submissions

15. The Applicant's principal contentions may be summarized as follows:

- a. The application is receivable due to the fact that at no time was she "informed about the existing mechanism of management evaluation at the UN", including by the Ombudsman's office whom she sought support from when she initially contested her evaluation;
- b. She has a right to contest her evaluation seeing that during the course of her employment with UNFPA, she "never received training on the existing evaluation mechanisms";
- c. The rebuttal panel did not respect the guidelines when reviewing the 2009 performance appraisal resulting in a biased result;
- d. The non-renewal of the contract was taken without regard to the actual performance and contributions. Furthermore, the practices of the supervisor, who took away "all the responsibilities defined in my job post" resulted in her being in a "weak position" following which she has to work much harder to demonstrate her competencies.

Respondent's submissions

16. The Respondent's principal contentions may be summarized as follows:
- a. The Applicant did not, as required by the Staff Rules, submit a request for management evaluation prior to filing the present application with the Tribunal thereby rendering her application not receivable;
 - b. In addition to not submitting her application in the correct venue, the Applicant also did not respect the imparted time limits in Staff Rule 11.2(c) that any request for management evaluation be submitted "within sixty calendar days from the date on which the staff member received notification of the administrative decision" being contested;
 - c. The Applicant does not provide any compelling evidence for her failure to follow the applicable rules for contesting the administrative decisions currently before the Tribunal. Furthermore, the separation letter provided to the Applicant contained all relevant information on how she could gain access to the applicable staff rules;
 - d. With respect to the merits, the Respondent submits that the Applicant neither identified how the Respondent departed from the applicable rebuttal policy nor that the non-renewal of her fixed-term contract was motivated by her performance evaluation rather than its expiry as a result of being a fixed-term appointment with no expectancy of renewal.

Consideration

Applicable law

17. Article 8.1 of the Dispute Tribunal's Statute states in part:

An application shall be receivable if:

...

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

18. Article 8.3 of the Dispute Tribunal's Statute states:

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

19. Article 9 of the Dispute Tribunal's Rules of Procedure states:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

20. Staff Rule 11.2, applicable at the time, states in part:

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

(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.

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within thirty calendar days of receipt of the request for

management evaluation if the staff member is stationed in New York, and within forty-five calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

Oral hearing

21. In response to Order No. 191 (NY/2012), the Applicant stated that she disagreed with the handling of the question of receivability on the papers. However, as part of her reply the Applicant does not put forth any legal argument that would indicate to the Tribunal a need for an oral hearing or that an oral hearing could provide either party with the opportunity to submit any additional evidence not already contained in the papers before it with regard to the question of receivability.

22. In the present case, the facts regarding the procedural steps taken by the Applicant to contest the impugned decisions are not under dispute and the Tribunal will therefore, per art. 9 of its Rules of Procedure, determine on its own initiative the question of receivability on the papers.

Receivability

23. Article. 8.1(c) of the Statute of the Dispute Tribunal, read in conjunction with staff rule 11.2(a), clearly states that an applicant wishing to contest an administrative decision, other than a decision taken by a technical body, must first submit a request for management evaluation of the contested decision prior to submitting an appeal with the Dispute Tribunal (see *Planas* 2010-UNAT-049, para. 23; *Ahmed* 2011-UNAT-153).

24. In response to Order No. 191 (NY/2012), the Applicant stated that the reason for which she did not request a management evaluation of the contested decisions was due to the fact that at no time during her service was she “informed of the existing mechanism of management evaluation at the UN” even though she pursued every avenue known to her at the time and that she cannot be held responsible for

the Organization's failure to provide her with all relevant information and training regarding the applicable judicial process.

25. In *Diagne et al.* 2010-UNAT-067, the Appeals Tribunal, in affirming the ruling of the Tribunal, stated that "ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules". Such jurisprudence, which was most recently again affirmed in the case of *Scheepers* 2012-UNAT-211, is not a principle which is unique to the Tribunal but rather a generally recognized legal principle in most judicial systems.

26. The Tribunal notes that the deadline to request management evaluation is sixty-days from the date upon which the staff member is notified of the contested administrative decision. In the present case, the latest administrative decision was the 3 September 2010 decision of the rebuttal panel which was notified to the Applicant on 7 September 2010. Consequently, had the Applicant filed a request for management evaluation rather than the present application in front of the Tribunal, any such request would have had to have been filed by 7 November 2010, a date which preceded the 3 December 2010 application currently with the Tribunal, to be considered receivable. It should also be noted that upon seeking advice from OSLA in November 2010, the Applicant was informed that she was out of time to complete the mandatory first step to contest either the findings of the rebuttal panel or the non-renewal of her contract, namely filing a request for management evaluation, a step she never undertook. Furthermore, at no time following the 3 September 2010 decision of the rebuttal panel did the Applicant seek an informal resolution of her case which could have suspended the applicable time limits in this matter.

27. Due to the fact that neither of the decisions contested by the Applicant was issued by a technical body and that she did not file a request for management evaluation, as required by the Statute of the Dispute Tribunal, prior to filing the present application before the Tribunal, this case is not receivable.

Conclusion

28. The application is rejected as not receivable.

(Signed)

Judge Alessandra Greceanu

Dated this 4th day of December 2012

Entered in the Register on this 4th day of December 2012

(Signed)

Hafida Lahiouel, Registrar, New York