



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

BASTET

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Francois Lorient

Counsel for Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. This is a judgment on a preliminary issue regarding the receivability of an application dated 27 October 2010 in which the Applicant contests the decision to dismiss him from service.

Relevant Facts

2. On 22 February 2010, the Applicant was charged with misconduct by the Office of Human Resources Management (“OHRM”) for “knowingly submitting inaccurate claims for rental subsidy allowance to the Organization and certifying the accuracy of such claims”.

3. On 28 April 2010, OHRM informed the Applicant that in light of its findings in the present case it had decided to impose on him the disciplinary measure of dismissal from service.

4. On 13 September 2010, the Applicant filed a request for a waiver and extension of time to file an application which, pursuant to art. 8 of the Statute of the Dispute Tribunal, should have been filed on or before 28 July 2010, for the purpose of contesting his dismissal from service.

5. On 30 September 2010, the Respondent, in response to Order No. 250 (NY/2010) dated 17 September, filed his response. The Respondent objected to the Applicant’s request submitting that the Applicant had failed to establish the existence of exceptional circumstances which precluded him from filing his appeal on time.

6. By Order No. 263 (NY/2010) dated 14 October 2010, the Tribunal (Judge Carstens) determined that the Applicant’s case presented “exceptional reasons justifying an extension of time”. The Applicant was ordered to submit his application by 27 October 2010.

7. On 6 June 2011, the Applicant filed a motion seeking to adduce “corroborative evidence on substantive issues of facts and law, and to strike the Respondent’s false evidence; on 10 June 2011 he refilled his original application; and on 27 June 2011 he filed of an updated application with annexes. On 11 July 2011, the Respondent, in response to the Applicant’s filings, submitted a request to have the receivability of the application considered as a preliminary issue as there was no “record of any application on the merits [having been] filed within the time limit set by Order No. 263 (NY/2010)”.

8. On 4 June 2012, the undersigned Judge was assigned to the present case.

9. On 8 August 2012, the Tribunal issued Order No. 162 (NY/2012) for the purpose of assessing whether the Applicant’s application was filed by the time limit of 27 October 2010 granted in Order No. 263 (NY/2010). The Applicant was ordered to produce to the Tribunal, *inter alia*, “[a]ll relevant evidence and/or technical explanations for the application having been sent by email on 27 October 2010”. The Applicant was also ordered to re-file his application using the standard form for applications as well as address the Respondent’s claim that his application was not receivable.

10. On 3 September 2012, the Applicant re-submitted his application using the revised form that was put in place by the Tribunal on 1 July 2011. The next day, the Applicant filed his submission on the question of receivability stating that he agreed that this issue could be handled on the papers. The Applicant, as ordered by the Tribunal, also submitted a word document entitled: “exhibit-B-Full_Header_application_sent_to_UNDT_27_oct_ 2010_from_F._Loriot [1].doc”. The document contained the header information of the Applicant’s 27 October 2010 email transmitting his original application to the Registry of the Tribunal, as well as the Respondent, in the present matter.

11. On 17 September 2012, the Respondent, in response to Order No. 162 (NY/2012) filed his response to the Applicant’s submissions on receivability.

In addition to reiterating his position on the question of receivability, the Respondent submitted that the Applicant had, rather than refilling his application using the applicable form as ordered by the Tribunal, filed an updated application which contained new facts and legal issues.

12. On 19 September 2012, the Applicant filed a motion to strike the portions of the Respondent's 17 September 2010 filing which addressed issues other than the one of receivability.

13. On 25 September 2012, the Respondent filed a submission stating that the Applicant had failed to comply with the explicit terms of Order No. 162 (NY/2012) and that he had impermissibly added new facts and legal issues into his application.

14. On 8 October 2012, the Applicant filed an additional submission in response to Order No. 162 (NY/2012), whereby he stated that Order No. 263 (NY/2010) had "already confirmed [the] receivability of this case; hence the contentious issue [was] one of expedition and receipt of the 27 October 2010 application, and not on receivability of the matter itself".

Consideration

15. In light of all the documents filed by the parties regarding the issue of receivability, the Tribunal is of the view that the matter can be handled on the papers.

16. The Tribunal observes that, as part of his submissions, the Respondent submits that the Applicant's application is not receivable. It is the normal practice of the Tribunal to consider and adjudicate claims of receivability as a preliminary matter before it reviews the merits of the case (see also the United Nations Appeals Tribunal Judgment in *Pellet* 2010-UNAT-073). This practice is reasoned by a wish to preserve judicial economy and unnecessary litigation. Accordingly, pursuant to art. 19 of the Statute of the Dispute Tribunal, in order to ensure a fair and expeditious disposal of the case and do justice to the parties, the Tribunal will proceed to consider the

question of receivability as a preliminary issue before reviewing the merits of the case.

17. The issue of receivability raised by the Respondent is whether the application was filed by the 27 October 2010 time limit set in Order No. 263 (NY/2010) by which the Tribunal granted the Applicant's request for a waiver and extension of the time to file his application. In essence, the Respondent contends that the evidence produced by the Applicant on 10 June 2011 is not an adequate proof that his application was filed in time.

18. On 3 September 2012, the Applicant, in response to Order No. 162 (NY/2012), forwarded all the documents contained in the email that had originally been sent to the Tribunal on 27 October 2010. The Applicant also provided the Tribunal with metadata from the email header which contained an electronic stamp reflecting that the email had been transmitted to the Registry of the Tribunal, as well as the Respondent, in the present matter, on 27 October 2010.

19. Taking into consideration the parties' submissions on the question of receivability, it is apparent to the Tribunal that the evidence produced by the Applicant provides conclusive evidence that his application was transmitted to the Tribunal by the time limit set in Order No. 263 (NY/2010).

20. The Applicant's application was transmitted to the Tribunal using the appropriate protocols in place at the time and the reason its receipt was not recorded in the Tribunal's files, as well as not transmitted to the Respondent, was due to a technical problem rather than the Applicant not abiding by the time limit set by the Tribunal.

21. The Tribunal notes the Respondent's 17 September 2012 and 25 September 2012 submissions in which he submits that the Applicant added new facts and legal issues in the application that was re-submitted on 3 September 2012 in response to Order No. 162 (NY/2012). This issue, while important, is separate from the question of receivability being adjudicated by the present judgment and will be

addressed as part of an upcoming case management discussion during which the Tribunal will attempt to crystallize the issues properly before the Tribunal. The Tribunal underlines that neither party is permitted to submit any new facts or legal submissions without first having been explicitly granted leave from the Tribunal.

Conclusion

22. The application is not time-barred and is receivable.

(Signed)

Judge Alessandra Greceanu

Dated this 11th day of December 2012

Entered in the Register on this 11th day of December 2012

(Signed)

Hafida Lahiouel, Registrar, New York