UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/051
Judgment No.: UNDT/2013/015
Date: 11 February 2013
Original: English

Before: Judge Meeran

Registry: New York

Registrar: Hafida Lahiouel

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

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 the Applicant leave to file the request, the time limit had already expired. The Respondent explained that, in response to the Applicant claiming "exceptional medical circumstances", the MEU decided to accept the request on an "exceptional" basis. In the management evaluation letter dated 15 March 2011, Ms. Angela Kane, the Under-Secretary-General of Management describes the issue as follows (emphasis added):

> As a preliminary matter of procedure, [the MEU] took note that the contested decision was communicated to [the Applicant] on 8 October 2010. In accordance with provisional Staff Rule 11.2, [her] request should have been submitted on or before 7 December 2010. The MEU took note however that on 15 February 2011, [she] submitted additional facts and documentation regarding the reasons for the delay in submitting [her] management evaluation request. Upon analysis of [her] submission in this regard, *the MEU confirmed the existence of exceptional circumstances which warranted a waiver of the time limits in [her] case*.

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

"accountable to the Director of the Office of the Under-Secretary-General for Management", who in turn is answerable and accountable to the Respondent, the Chief Administrative Officer of the Organization under art. 97 of the Charter of the United Nations, including the Department of Management of the Secretariat. The Respondent is vicariously liable for the actions of the MEU. It is ironic that the Respondent should now resile from the natural and foreseeable consequences of a decision taken by the MEU.

9. If the MEU, as an integral part of the Secretariat, has already effectively declared the request for management evaluation receivable under its own time limits, the Respondent is estopped, when the same claim is pending before the Dispute Tribunal, from arguing the opposite position under the doctrines of waiver and estoppel (see *Egglesfield* UNDT/2013/006, paras. 37–40). The fact that the Under-Secretary-General of Management in her management evaluation dated 15 March 2011 stated that "[the Respondent] expressly reserves the right to raise the issue of receivability at any subsequent hearing of this matter" does not insulate the Respondent from challenge when it is clear that this sentence is a standard clause in all management evaluations and is repeated as a mantra without reference as to its relevance to a particular case or a particular issue in a case.

The independent authority of the MEU to waive its deadlines

10. However, even if the Respondent were not estopped from arguing that the Applicant's request for management evaluation is now time-barred, the question remains whether, under the Staff Rules, the MEU can be deemed to have delegated authority to extend time limits in any circumstances other than those specifically provided for in sec. 10.2 (d) of ST/SGB/2010/9 and whether the Respondent is therefore now bound by its decision to do so. It is noted that the MEU's decision, in the present case, was subsequently approved by the Under-Secretary-General of Management.

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 duties, sec. 10.2(d) of ST/SGB/2010/9 provides that it has power to make recommendations to the Under-Secretary-General for Management on extending "the deadlines for filing requests for management evaluation by staff members pending efforts for informal resolution by the Office of the Ombudsman".

12. Section 10 of ST/SGB/2010/9 read together with staff rule 11.2(c) provides that the Respondent has delegated the authority to extend the 60 days' deadline for filing the request for management evaluation where informal resolution efforts of the Ombudsman are pending. It does not follow automatically that the MEU is also authorised to extend this deadline in other situations on an "exceptional" basis as the MEU did in this case. Therefore further exploration of the issue is required to make sense of this exceptional decision.

13. It follows from staff rule 12.3(b) that the Respondent may always make exceptions to the Staff Rules, including to staff rule 11.2(c), insofar as:

> … such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

14. It is only reasonable to conclude that the Respondent's authority to make exceptions to the Staff Rules, which are promulgated by the Respondent himself, extends to administrative issuances, such as ST/SGB/2010/9, that are ranked lower in the legal hierarchy than the Staff Rules (see, for instance, *Hastings* UNDT/2009/030,

Amar UNDT/2011/040, *Applicant* UNDT/2011/054, *Villamoran* 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 Appeals Tribunal's ("UNAT") judgment in *Costa* 2010-UNAT-036, it may be necessary for completeness to examine whether

the ruling in *Costa* is applicable to this case. By affirming the Dispute Tribunal's judgment in *Costa* UNDT/2009/051, the Appeals Tribunal ruled that art. 8.3 of the Statute of the Dispute Tribunal precludes the Tribunal from waiving the time limits *for requests* for management evaluation. However, art. 8.3 does not include the words "for requests" for management evaluation. It merely provides that:

> 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.

18. However, in this case, the issue at stake is not whether the Dispute Tribunal may waive the deadlines for management evaluation, but whether the MEU may waive or extend the deadline *for requests for management evaluation* which is essentially a matter for the MEU and not the Tribunal, since it is not the Tribunal which is being asked to waive this deadline. The Respondent is bound by the decision of the MEU as affirmed by the Under-Secretary-General of Management. The Tribunal notes that this situation is not covered by the Statute or the Rules of Procedure of the Dispute Tribunal, which have as their objective the regulation of the authority and power of the Dispute Tribunal and the legal proceedings before it and not the Respondent's internal administrative procedures, including the time limits *for filing a request for management evaluation* to the MEU, the latter being covered by staff rule 11.2(c).

19. In considering the relevance of the Judgment in *Costa* to the facts and issues in this case, it is important to bear in mind that the issue of receivability of an application is governed by art. 8 of the Statute of the Dispute Tribunal, which so far as it is material provides that:

> 1. An application shall be receivable if:
>
> (a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

> (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 applies to those cases where the requirements as to the time limits stipulated in art. 8.1(d)(i)(a) and (b), as well as (ii) and, arguably, (iii) and also (iv), have not been met so that the issue of a waiver could have been applied under the first sentence of art. 8.3. However, the second sentence of art. 8.3 makes it clear that such power is not to be exercised to suspend or waive the deadlines for management evaluation. The injunction not to waive or suspend is directed at the Tribunal and not the MEU and it relates to the response period of 30 or 45 days as required under art. 8.1(d)(i)(a) and (b), which refers to the relevant response period *for* management evaluation. Significantly, art. 8.3 refers only to deadlines *for* management evaluation and not to *requests for* management evaluation. The consistency in the use of the particular words in art. 8.1(a), (b) and (d)(1) and art. 8.3 is not accidental, but intentional.

22. An examination of the following hypothetical situation will tend to support the wisdom and fairness of the MEU waiver of the time limit for requesting management evaluation in this case, which it considered exceptional. Take the extreme case of a staff member, who serves in a peacekeeping mission under extremely dangerous conditions and who, in good faith and for credible reasons, disagrees with an administrative decision affecting her/his rights under her

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

the Dispute Tribunal and provides that such decision must have "a direct impact on the terms of appointment or contract of employment of the individual staff member". The Appeals Tribunal further explained that:

> … In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.
>
> … What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

29. It is not in dispute that the Applicant was eligible for the relevant post in that she had already been placed on the generic roster of suitable candidates for such a post and that she had explicitly expressed her interest in the vacancy for such a post in Jerusalem. It therefore follows that the administrative decision to withdraw the vacancy in Jerusalem had a direct impact on her rights under the terms of her appointment or contract of employment in that she would otherwise have been an eligible candidate with favourable prospects of being appointed to this particular post.

30. The finding of direct impact of the Applicant's rights, as a United Nations staff member under art. 2.1(a) of the Dispute Tribunal, for a full and fair consideration relates to the Applicant's contention that the withdrawal was not a result of budgetary reasons but related to her individual circumstances, namely what she alleges as the "abuse of authority, retaliation, unfair influence, sabotage and for obstruction of opportunity for promotion" that was "suddenly stalled through non-documentary communication behind the scenes between [the Assistant Secretary-General for Central Support Services ("the ASG/OCSS")] and [the former Under-Secretary-General for OCHA] (both English men) once the ASG/OCSS and the Director of OPPBA became involved". Whether this is correct or not has to be further

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. Consequently, the Tribunal finds that the claim regarding the withdrawal of the vacancy in OCHA is receivable pursuant to art. 2.1 (a) of the Dispute Tribunal's Statute and *Andati-Amwayi*.

The timeliness of the Applicant's e-PAS reports for 2007–2008 and 2008–2009

32. The Respondent contends that the allegations of abuse and harassment by the Administration were rejected in two earlier cases before the Dispute Tribunal, namely *Simmons* UNDT/2011/084 and *Simmons* UNDT/2011/085, adding that she was raising the same allegations again without providing any evidential support for her claims. However, in her response dated 21 March 2012 to the Respondent's reply, the Applicant fails to comment on these submissions and challenge that her claim was not subject to the doctrine of *res judicata*.

33. In *Simmons* UNDT/2011/084, para. 3(a)(i), the Tribunal stated that, in that Judgment, the issue of "[t]he preparation and/or completion of the Applicant's e-PAS reports for 2007–2008 and 2008–2009" were to be dealt with. Eventually, the Tribunal decided to award "the sum of USD500 for the delay in her e-PAS report for 2007–2008, the sum of USD3,000 for the delay in her e-PAS report for 2008–2009 and for the resulting stress caused on the Applicant". In *Simmons* 2012-UNAT-221, the Appeal Tribunal subsequently modified the total sum of USD3,500 to three months' net base salary in effect on 31 March 2009.

34. The Tribunal therefore finds that the issue of delay in preparation and completion of the e-PAS reports has been already adjudicated upon by the Dispute Tribunal and the Appeals Tribunal and that it is not competent to reassess the matter under the doctrine of *res judicata*.

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