



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

AWAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Chenayi Mutuma, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Security Officer with the Security and Safety Service (“SSS”) of the Department of Safety and Security (“DSS”) in New York, contests the decision not to select him for an S-4 level position advertised on 3 November 2010.

2. The Applicant was successful in his written examination and was invited to participate in a competency-based interview, to be held the very next day. The Applicant was found wanting in two of the required competencies, and thus not suitable for the position. The Applicant claims that he had only a one-day notice of the interview, which did not allow for proper preparation and deprived him of fair and full consideration. He seeks financial compensation as well as placement on the roster for S-4 positions and placement on a special post allowance at the S-4 level.

3. The Applicant was informed of the decision not to select him on 1 December 2011. He requested management evaluation of the contested decision on 13 January 2012 and received a response to it on 13 February 2012. His application to the Tribunal was received by the New York Registry at 5:53 p.m. on 14 May 2012.

4. The Respondent submits that the application is not receivable as it was filed after the filing deadline, which expired, at the latest, at 5 p.m. on 14 May 2012. The Respondent further submits that the application is without merit as the relevant selection rules were properly followed.

Procedural matters

5. On 23 May 2012, the Respondent filed a motion requesting that the Tribunal first consider the matter of receivability of the present application as a preliminary

issue. By Order No. 108 (NY/2012), dated 25 May 2012, the Tribunal directed both parties to file submissions on the issue of receivability. The Applicant filed his submission on 29 May 2012 and the Respondent filed his response on 5 June 2012.

6. On 14 June 2012, the Tribunal issued Order No. 119 (NY/2012), stating that the determination of whether the Applicant's case was receivable would require further consideration. The Tribunal directed the Respondent to file his full reply to the application and directed that the issue of receivability would thereafter be "among the issues to be considered by the Tribunal". The Respondent's reply was duly filed on 30 July 2012.

7. On 9 April 2013, the Tribunal issued Order No. 92 (NY/2013), directing the parties to file additional submissions, if any, by 18 April 2013. The Tribunal also instructed the parties to state whether they wished to have a hearing, failing which the Tribunal would proceed to consider the case on the papers. On 11 April 2013, the Respondent filed a submission stating that he had no objection to the case being decided on the papers as submitted. On 18 April 2013, the Applicant filed additional submissions with annexes, requesting also that a hearing be held in order to afford him the opportunity to present his case fully, including by the calling of witnesses.

8. The Redesign Panel on the United Nations system of administration of justice, established in 2006 to review and redesign the new system of administration of justice at the United Nations, observed in its report issued in 2006 that hearings "are a clear requirement in international standards whenever there are disputed issues of fact" and that, "to guarantee due process and to facilitate decisions, oral hearings should be promoted and accepted" (para. 10 of A/61/205 (Report of the Redesign Panel on the United Nations system of administration of justice), dated 28 July 2006). The Redesign Panel further recommended that the "United Nations Dispute Tribunal must have power to hold oral hearings and should be required to do so in any case involving disputed issues of fact" (see *Id.* at para. 92). Article 9 of the Tribunal's Statute provides that it shall decide whether the personal appearance

of the applicant or any other person is required at oral proceedings, which shall be held in public unless the Tribunal decides, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed. Article 16 of the Tribunal's Rules of Procedure provides that the judge hearing a case may hold oral hearings, which shall normally be held following an appeal against an administrative decision imposing a disciplinary measure. In the instant case, the Tribunal is satisfied that a hearing on the substantive issues is appropriate for the fair and expeditious disposal of the case and to do justice to the parties. However, as there is no dispute as to the facts regarding the preliminary point of receivability, the Tribunal shall proceed to render a decision on it herein, as was indicated in its previous orders.

Consideration

Scope of the case

9. Before considering the issue of receivability, it is necessary to identify the scope of the matter before the Tribunal (*Planas* 2010-UNAT-049, *O'Neill* 2011-UNAT-182). Pursuant to art. 8.1(c) of the Tribunal's Statute, the scope of the case is limited to the issue raised in the Applicant's request for management evaluation and in his application before the Tribunal, namely, his non-selection for the S-4 level post advertised on 3 November 2010. In his submissions before the Tribunal, the Applicant also referred to other selection exercises, including those to which he applied during the period of 2004 to 2008. In view of the scope of his case as articulated in his request for management evaluation and in the application before the Tribunal, both of which specifically identify the contested decision as his non-selection to the contested S-4 level post, the Applicant's ancillary claims fall outside the scope of this case. Any further comments on this aspect will be reserved for the substantive matter.

Applicable law concerning the issue of receivability

10. The Tribunal's Statute states:

Article 8

1. An application shall be receivable if:

...

(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[.]

11. The Tribunal's Rules of Procedure state:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

...

Article 34 Calculation of time limits

The time limits prescribed in the rules of procedure:

(a) Refer to calendar days and shall not include the day of the event from which the period runs;

(b) Shall include the next working day of the Registry when the last day of the period is not a working day;

(c) Shall be deemed to have been met if the documents in question were dispatched by reasonable means on the last day of the period.

12. For administrative purposes, the Tribunal adopted an "Information Note to Parties Appearing before the United Nations Dispute Tribunal", which provides on page 3 that the working hours of the New York Registry are 9 a.m. to 5 p.m.,

Monday through Friday. The Information Note also contains a notice on the cover page, stating:

Notice: The information contained in this note is subject to the Dispute Tribunal's Statute and Rules of Procedure, or any direction given by a Judge in a particular case. In the event of any perceived inconsistency, confirmation should be sought from the relevant Registrar in writing as to how the matter is to be administered.

Applicant's filing of the application

13. The Applicant submits that, having requested management evaluation on 13 January 2013, he received the Administration's response to it on 13 February 2012. This submission was not rebutted by the Respondent. Thus, the 90-day time period to file his application expired on 13 May 2012. As that day was a Sunday and therefore the Registry was closed, the Applicant had the day of 14 May 2012 to file his application (see art. 34(b) of the Rules of Procedure). The Registry's records in the eFiling portal indicate that the application was received by the Tribunal at 5:53 p.m. on Monday, 14 May 2012.

14. The Respondent submits that, because the application was received after the Registry's working hours (which end at 5 p.m.), the application is not receivable.

Meaning of calendar day

15. Article 34 of the Rules of Procedure provides that "[t]he time limits ... refer to calendar days" and that the time limits "[s]hall be deemed to have been met if the documents in question were dispatched by reasonable means on the last day of the period", taking into consideration that if the last day of the period is not a working day, the next working day is to be included in the period.

16. A calendar day is generally defined as a consecutive twenty-four hour day running from midnight to midnight (Black's Law Dictionary, p. 454 (9th ed. 2009)). In both common law as well as civil law jurisdictions, the term "calendar day" for

filing purposes is also generally understood as a full twenty-four hour period from midnight to midnight (see, e.g., *Lanni v. Grimes*, 173 Misc. 614, 18 N.Y.S.2d 322, 327 (1940); *Guillory v. Department of Transportation and Development, Division of Maintenance and Field Operations*, 450 So. 2d 1305, 1307 (1984); for an example of a civil law jurisdiction, see Code de procédure civile, art. 642 (Fr.)). The terms “working day” and “calendar day” are not synonymous. The Tribunal notes, in this regard, arts. 13 and 14 of its Rules of Procedure, approved by the General Assembly on 16 December 2009, which set out that applications for interim relief shall be considered “within five working days of the service of the application on the respondent”. The distinction between these terms, “working” and “calendar”, is certainly not new within the United Nations context;¹ in particular, the Staff Rules contain numerous references to the terms “working days” and “calendar days”.² It is well-settled that where the legislative body “borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed” (*Morissette v. United States*, 342 U.S. 246, 263 (1952)). Accordingly, the General Assembly, when adopting the Tribunal’s Statute on 24 December 2008 and approving the Tribunal’s Rules of Procedure on 16 December 2009, was presumably aware of the meaning of the terms “calendar day” and “working day”.

¹ See, e.g., ST/SGB/Staff Regulations/Rev.9 (Staff Regulations from 1975), ST/SGB/Staff Regulations/Rev.20 (Staff Regulations from 1989), ST/SGB/1998/20 (Staff Regulations from 1998), and ST/SGB/2009/6 (Staff Regulations from 2009) as established and amended by the General Assembly, referring in various parts to “working week” and “calendar year”.

² See various editions of the Staff Rules, referring to “working day” and “calendar day” in various contexts (e.g., ST/SGB/Staff Rules/1/Rev.9 (Staff Rules from 1997) and ST/SGB/2009/7 (Provisional Staff Rules from 2009)).

Effect of the last day of the time limit for the filing of an application falling on a non-working day

17. The time limit for the filing of an application is measured in calendar days (see art. 8 of the Statute), but if the last day of the calendar period falls on a non-working day, the Applicant has one additional day to file it. In view of the language of art. 34 of the Rules of Procedure, a question arises whether the filing on that additional filing day has to be done before the end of the *working* day or prior to the end of the *calendar* day. The Tribunal finds that, although this additional filing day is determined by identifying the “next working day of the Registry” (art. 34(b)), the actual time for the filing of an application on that day does not expire until midnight, i.e., the end of that calendar day. In other words, should the last day of the 90 calendar day period for the filing of an application fall on a non-working day, the last day for filing purposes is the next working day, with the applicant having a full calendar day to file his application. The reasons for this are as follows.

18. The purpose of art. 34(b) was not to limit the time of filing to the working hours of the Registry, but to merely assist in correctly determining the final filing day. For example, if the 90 calendar day deadline falls on a Saturday, and the following Monday happens to be a holiday, then the deadline for the filing of an application would move to the next working day of the Registry, which would be Tuesday, but the applicant would have before that Tuesday midnight to file the application.

19. Further, art. 34(c) of the Rules of Procedure provides that the time limits shall be deemed to have been met “if the documents in question were dispatched by reasonable means on the *last day* of the period”. Crucially, art. 34(a) states that time limits prescribed in the Rules “[r]efer to calendar days”. Thus, if a time limit of a certain number of days without more is mentioned in the Rules, the default reading is as in “calendar day”, unless specifically stated otherwise (art. 34(a)). Therefore, in view of art. 34(a), the phrase “the last day of the period” in art. 34(c) should be read

as “the last *calendar* day of the period”. This finding is further supported by the language of art. 8 of the Tribunal’s Statute, which is superior to the Rules and which requires that time limits for the filing of applications be counted in calendar days.

20. Thus, the use of the working day in art. 34(b) of the Rules of Procedure is merely a way to determine the final day for filing purposes, not to take away several hours from the period measured in calendar days pursuant to the Statute and the Rules.

The application was filed on time

21. Therefore, as the time for the filing of an application is stipulated in the Statute and the Rules of Procedure in calendar days, and in view of the findings above, it follows that the application had to be filed prior to the expiration of the last calendar day of the filing period. As the Applicant had 90 calendar days to file his application, he had until the end of the calendar day (i.e., before midnight) of Monday, 14 May 2012, to file it. The Applicant having filed his application several hours prior to the expiration of the statutory calendar day period, the Tribunal finds that the application is receivable.

22. The Tribunal notes that, when transmitting the application to the Respondent on 15 May 2012, the New York Registry notified the parties that the application was received by it on 15 May 2012; the application was in fact filed on 14 May 2012 and is receivable, as explained in the present Judgment.

De minimis nature of alleged delay

23. Further, even if the Registry’s closing time of 5 p.m. were to be taken as the applicable deadline, in the particular circumstances of the present case, a brief one-hour delay in the filing of the application could be considered to be *de minimis* (see World Bank Administrative Tribunal Decision No. 427, *BC* (2010)). This is in

light of the circumstances of this case, namely the absence of evidence to suggest that the Applicant was lax in the handling of this case; the admittedly confusing language of art. 34 of the Rules of Procedure, which required clarification and explanation in the present Judgment; and the Tribunal's finding that, in the circumstances of this case, the brief one-hour delay in filing this application, had such delay occurred in this case (which it did not, as explained above), would have caused no prejudice to the Respondent.

Conclusion

24. The Tribunal finds that the application is receivable.

25. Further directions as to the future conduct of this matter will be given by separate order.

(Signed)

Judge Ebrahim-Carstens

Dated this 24th day of April 2013

Entered in the Register on this 24th day of April 2013

(Signed)

Hafida Lahiouel, Registrar, New York