UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/097
Judgment No.: UNDT/2013/155
Date: 2 December 2013
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

A-ALI *and 45 others*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Lennox S. Hinds
Claire Gilchrist

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

Introduction

1. On 17 July 2013, Mr. Samir Ali and 45 staff members in the Meetings and Publishing Division of the Department for General Assembly and Conference Management ("DGACM") filed a consolidated application contesting the decision by Mr. Franz Baumann, Assistant Secretary-General, DGACM, to initiate recruitment of 19 candidates and indicating his intention to abolish 59 posts in the Publishing Section. The Respondent's reply, filed on 19 August 2013, submitted that the claims were not filed within time and were not receivable.

2. On 4 October 2013, in response to Order No. 235 (NY/2013), the Applicants submitted their response to the Respondent's submission regarding receivability stating that, since they did not receive notification of the outcome of their requests for management evaluation, their claims were not time barred.

3. At a preliminary hearing, held on 29 October 2013, the Tribunal heard evidence from Mr. Christian Rohde, Chief, Management Evaluation Unit ("MEU") on behalf of the Respondent and from Mr. Emad Hassanin; Mr. Michael Wright; and Mr. Edwin Enriquez on behalf of the Applicants. Following the hearing, each party produced documents requested by the Tribunal. Upon reviewing the documents and the evidence, the Tribunal decided that additional witnesses should appear in court on 26 November 2013 to answer certain questions. A sample of seven witnesses were identified: Mr. Saamir A-Ali; Ms. Daphne D. Cohen; Mr. Carl Corriette; Mr. Nigel Gittens; Mr. Curt Douglas Hampstead; Ms. Alla Pribytkova and Mr. Alex O'Keith Smith. The Tribunal also requested the attendance of Mr. John Saffir.

4. On 27 November 2013, the Tribunal heard evidence from Mr. A-Ali; Ms. Cohen; Mr. Hampstead; Mr. Smith and Mr. Saffir. The Tribunal did not consider it necessary, in view of the consistency of the witness' testimony, to hear from the other witnesses.

Relevant background

5. By United Nations Publications Board Directive, Section IX of Decision No. 2011/9, issued on 28 April 2011, all Secretariat entities were required to reduce:

> a. the number of publications by a minimum of 30% by consolidating multiple reports and by evaluating the impact and continued relevance of each report, including the status of the mandate;
>
> b. the length of reports by 10% by strictly complying with General Assembly specified word limits; and
>
> c. the hard copy distribution of reports, documents, and publications by 50% (2010 baseline) by replacing them with electronic versions by 2013.

6. On 6 June 2011, the Secretary-General submitted his budget for 2012–2013 to the General Assembly in which he proposed to abolish 41 posts within the Publishing Section as a result of the decision to reduce the volume of publications printed in-house and to introduce digital printing. The Secretary-General's budget was approved on 24 December 2011.

7. In December 2011, the Change Management Team submitted 61 recommendations to the Secretary-General for the realization of his organizational reforms. These recommendations included the promotion of the use of PaperSmart meetings; a reduction in the number of hardcopy publications being distributed; that heads of departments assess functions that could be consolidated and restructured; and that the Office of Human Resources Management encourage mobility for General Service staff.

8. On 12 April 2012, by Section II of resolution 66/257, the General Assembly requested that the Secretary-General submit *for its consideration and prior approval* any proposals or measures related to the implementation of the above recommendations.

9. During the course of 2012, staff representatives and management of DGACM held discussions regarding the future of the Publishing Section in view of its goal to reduce its staffing and budgetary levels as part of its move to a digital operation. Following the effects in October 2012 of super-storm Sandy, which damaged the Publishing Section's printing capabilities, these exchanges culminated in the circulation on, 19 December 2012, of a draft "Concept of Operations" paper. This paper indicated that the organizational evolution to a digital printing operation would be accelerated, and that the Publishing Section would be incorporated into the Meeting Management Section.

10. On 4 February 2013, the staff of the Publishing Section adopted a resolution rejecting the abolition of 59 posts within the Publishing Section, and expressed their concern that management had failed to retrain staff for new functions developed since 2009. They requested that DGACM discontinue the post of the "Newly Created Desk-top Publishing Unit" and instead add those functions to the duties of existing staff taking into account their long service with the Organization.

11. On 10 February 2013, DGACM announced that, due to the disruption and equipment damage suffered by the Publishing Section following super-storm Sandy, "[i]n the coming days, ten posts … will be posted on Inspira [the United Nations online recruitment system]. The incumbents of these posts will provide in-house printing services using digital equipment. Soon thereafter, as soon as the presently ongoing review by [the Office of Human Resources Management] is completed, nine more posts … will also be posted. The incumbents of these posts will provide distribution services". The first set of vacancy announcements for three of these posts was listed on Inspira the following day.

12. On 19 March 2013, 42 Applicants filed individual requests for management evaluation of the decision to initiate recruitment for nineteen candidates for the future operation of the Publishing Section. Each of the Applicants was represented by the same law firm with the email address for communication purposes

lawfirmshw@yahoo.com. These cases were registered by the MEU under reference nos MEU/192-13/R to MEU/233-13/R.

13. On 25 March 2013, Mr. Saffir, a staff member in the Meetings Support Section, DGACM, filed a separate application with the Dispute Tribunal contesting the decision to initiate the recruitment of 19 staff members. This was registered as Case. No. UNDT/NY/2013/017. He contended that this decision was part of an unapproved effort to reorganize the Publishing Section which included abolishing 59 of its posts. He also filed an application for interim relief seeking the suspension of the implementation of the contested decision pending a resolution of the proceedings on the merits. On 27 March 2013, the Tribunal (Judge Meeran), by Order No. 77 (NY/2013), directed the Repondent

> to suspend the implementation of the decision to conduct a recruitment exercise via Inspira, or by any other means whatsoever, for 19 new posts in the Publishing Section, DGACM for a period of 60 days from the date of this Order or pending a final determination of the substantive merits of the application, if sooner, or until such further Order as may be deemed appropriate by the Tribunal.

14. On 5 April 2013, the Acting Head of DGACM held a town hall meeting whereby he announced that the contested decision to initiate recruitment of nineteen candidates for the future operation of the Publishing Section had been rescinded.

15. On 9 Aril 2013, the MEU emailed Counsel for the Applicants, carbon copying ("cc") all the Applicants, stating "[p]lease refer to the attached letter concerning your clients' request for management evaluation. Kindly acknowledge receipt of this email". The MEU letter stated that taking into consideration DGACM's 5 April 2013 announcement, their "clients' requests for management evaluation [were rendered] moot. Accordingly, the MEU is proceeding to close your clients' files". Mr. Rhode's evidence was that the primary method of communication with staff members was by email and that when the official email response is sent, email read receipts are requested. The MEU received return read receipts from 30 of the 42 Applicants who requested management evaluation on 19 March 2013. The MEU did not receive

a read receipt from the Applicant's legal representatives. In view of the difference in the email systems used by the parties (yahoo for the Applicant's legal representatives and Lotus Notes for the MEU), it would appear that there is a possibility read receipts may not be transmittable between the email system used by the Applicants' legal representatives and the one used by the MEU.

16. On 9 April 2013, the MEU responded to a request for management evaluation by Mr. Saffir regarding the same contested decision. The MEU informed him that as a result of the 5 April 2013 announcement his request for management evaluation was rendered moot. Counsel for Mr. Saffir is the same as in the present case. Counsel submits that whilst the law firm was cc'ed on this communication they did not receive it until it was forwarded to them by Mr. Saffir that day. Just why and how, Counsel with conduct of both the *Saffir* request for management evaluation and that of the Applicant's in the present case, failed to make the connection between the two has not been explained. In any event, this was the earliest point at which they were put on notice of the MEU's decision.

17. On 11 April 2013, Counsel filed four additional requests for management evaluation on behalf of Applicants Messrs. Martinez, Fasanella, McKenzie and Maung, wishing to contest the 10 February 2013 decision. That same day, the MEU (Ms. Silverstein), and Counsel for the Applicants, using the same email address as on 9 April 2013, exchanged emails regarding the receipt and receivability by the MEU of the four additional requests for management evaluation. These emails are instructive and are reproduced below:

> 4:52 PM – From lawfirmshw@yahoo.com to MEU
>
> … We are hereby including three additional staff members and their forms to add them to the consolidated request, that is the appeal against Mr. Baumann's decision of 10 February 2013 …
>
> Claire Gilchrist
>
> _____
>
> 4:57 PM – From lawfirmshw@yahoo.com to MEU

> …here is a final staff member who is requesting management evaluation, to be added to the group request of 19 March 2013.
>
> …
>
> Best Regard,
>
> Claire Gilchrist
>
> _____
>
> 5:32 PM – From Ms. Silverstein to lawfirmshw@yahoo.com
>
> … the MEU does not have a mass claim process and therefore we cannot add your clients to a "consolidated request". As you might recall, **the issue at hand was found to be moot and closed accordingly on 9 April 2013.** [emphasis added]
>
> In the event that Messrs Fasanella, McKenzie and Maung wish to submit a separate request for management evaluation, we require that they submit a full request form, detailing which decision they challenge, on what date it was taken, providing legal arguments and so on.
>
> _____
>
> 6.19 PM – From lawfirmshw@yahoo.com to Ms. Silverstein
>
> We consider the requests to be duly filed and receivable in conformity with the rules. …
>
> Best Regard,
>
> Claire Gilchrist
>
> _____
>
> 6.50 PM – From Ms. Silverstein to lawfirmshw@yahoo.com
>
> The MEU does not deny that it is in possession of a full management evaluation request form in the case of A-Ali *et al*, which included 42 applicants. However, this request was not submitted on behalf of Messrs. Martinez, Fasanella, McKenzie and Maung.
>
> Since **the case of A-Ali *et al* has been closed,** we cannot simply add Messrs. Martinez, Fasanella, McKenzie and Maung to that case. [emphasis added]
>
> However, your clients have the right submit a request for management evaluation of their own.

18. The Tribunal observes that there was no difficulty with these email exchanges to the same email address of the Applicants legal representatives. The references to the cases of *A-Ali et al* being closed put Counsel on notice, yet again, that the MEU

had concluded its consideration and closed those cases. In the circumstances, it should have been apparent that if Counsel had not received notification, as they claim, at the very least there was a duty to enquire of the MEU as to why they considered *Ali et al.* closed if no such communication was received by the Applicants' authorized legal representatives.

19. On 17 July 2013, an application was filed with the Dispute Tribunal title *A-Ali et al*. on behalf of 46 Applicants: the 42 Applicants who had contested the 10 February 2013 decision on 19 March 2013, and to whom the 9 April 2013 email was addressed, as well as the four applicants who attempted to add their names to the consolidated MEU requests on 11 April 2013, which requests had been refused by the MEU for reasons which are apparent from the above string of email exchanges.

20. The Judge also has conduct of *Saffir* Case No. UNDT/NY/2013/017 and notes that, with the exception of pages 9 and 10 out of 11 which discuss the receivability of the application, the remainder of the application in *A-Ali and 45 others* appears to be a verbatim rendering of the application filed in *Saffir*. Accordingly, apart from coordinating the personal data of 46 Applicants, there was not a great deal of preparation that remained to be done to file the cases. Further, given the concern expressed by the Applicants about their job security, it is incomprehensible that between 46 staff members and their legal representatives there should have been such a combined lack of due diligence.

Consideration

Applicable law

21. ST/SGB/2013/3 Staff Rules and Staff Regulations of the United Nations dated 1 January 2013 states:

> **Rule 11.2**
>
> **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.
>
> …
>
> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.
>
> (d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York.

22. Article 8 of the Statute of the Dispute Tribunal provides:

> 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;

Oral testimony

23. The testimony of the Applicants' witnesses may be summarized in the following key points which appeared to have a degree of consistency:

a. They did not receive or did not recall having received a copy of the MEU decision.

b. They had engaged a competent firm of attorneys and were content to leave the matter in their capable hands.

c. They knew, in rather vague terms, that there was an issue but were not certain what it was but left their lawyers to deal with it.

d. They knew there were time limits but were not certain precisely what they were and relied on their lawyers.

e. The letter was addressed to their legal representatives and they were just copied into the correspondence for information. It was for the lawyers to handle the issue.

f. Many of them had in excess of 20 years of dedicated service in the United Nations and were extremely concerned and anxious at the prospect that they may lose their jobs and, given their ages and family commitments,

the prospect of obtaining alternative employment was uncertain and it would be difficult to make ends meet if they were unemployed.

g. They had only recently become aware of the fact that the Respondent was submitting that their claims were time-barred and hence not receivable.

h. They saw no reason to chase up progress with their lawyers in whom they had full confidence.

Application

24. The application was filed as a consolidated application and was named *A-Ali et al*. or, as referred in the present judgment, it was filed on behalf of *A-Ali and 45 others*. However, the application is drafted in the singular and refers only to the Applicant. In that vein, a review of the details of section VI. "Management Evaluation" of the application form used by the Applicant indicates that, with regard to the request for management evaluation, in response to the question: "Have you received a response" the form states "No". Nevertheless, the facts in the present case, including Mr. Ali's testimony, clearly indicate that Mr. A-Ali, the named Applicant, did in fact receive a response from the Management Evaluation Unit on 9 April 2013.

25. Further, the read receipts put it beyond doubt that 29 other Applicants also received notification of the MEU decision. As for the 12 in respect of whom no read receipts were sent, the Tribunal takes into account the fact that the email addresses used were the same as appear on their application forms. It is reasonable to infer that they were sent but they may not have been opened by these Applicants.

26. Rule 11.2(d) requires that the MEU communicate the outcome of a request for management evaluation to the staff member in writing and, as expressed by Mr. Rhode, this is accomplished using the means of communication identified by the staff member in the request for management evaluation form. The Tribunal reminds staff members that they are expected to monitor progress in relation to a request for management evaluation as well as the time limits for compliance with

statutory time limits. However, the Tribunal notes that in these cases the Applicants took the view that since they had engaged competent legal representatives their affairs would be taken care of.

27. The Judge shared with the witnesses his view that it was surprising, given the concern and anxiety expressed regarding their job security, that not a single of the 42 Applicants who had requested management evaluation contacted their legal representatives to chase up progress and, for those who had received or became aware that the MEU had closed their case, to enquire as to its implications and to have the filing of their claims expedited. None of the Applicants who gave evidence were able to explain why there was what may well be regarded as uncharacteristic behavior in not contacting their legal representatives for a progress report or to enquire if their claims were filed with the Tribunal. Instead there was no such contact for a period in excess of three months, and in most cases until they were requested to appear as witnesses–a period of seven months, during which the claim could have been filed and would have preserved their rights to file applications under art. 8 of the Dispute Tribunal Statute.

28. Staff rule 11.2, as applicable in these cases, states that the outcome of the request for management evaluation shall be communicated in writing to the staff member within the period of 30 days (45 days for staff members away from the United Nations Headquarters in New York). There is no evidence before the Tribunal that would suggest that the MEU did not respect the rules and that the Applicants did not receive a decision on the consolidated request for management evaluation. Given the fact that there was a consolidated request for management evaluation on behalf of 42 Applicants, the Tribunal finds that the Applicants received notification of the decision.

29. The Applicants legal representatives submit that they did not receive the 9 April 2013 email from the MEU and the decision was not communicated to them. In the circumstances, the appeal before the Dispute Tribunal was filed in time. They further submitted during the 26 November 2013 hearing, that while the email

exchanges of 11 April 2013 may have informed them that the MEU considered the *A-Ali et al.* requests for management valuation was closed, this did not constitute an official notice of the outcome of the Applicants requests for management evaluation. Finally, Counsel stated that in any event the "sins of the lawyer" should not be visited on the Applicants thereby resulting in their applications not being receivable.

30. The Tribunal considers that, following the communication from Mr. Saffir on 9 April 2013 and the 11 April 2013 exchange of emails between the MEU and the Applicants legal representatives, they were put on notice that a decision had been made and that the clock began ticking for calculation of the 90 calendar days' time limit for filings claims with the Tribunal. At no point prior to 17 July 2013 did either counsel, or any of the 46 Applicants, raise the question of the status of their pending legal proceedings. Based on the evidence before it, the Tribunal considers that, at the very least, the Applicants legal representatives knew, or should have known, that the requests for management evaluation were completed and "closed" on 11 April 2013. In any event, the MEU was only required to communicate the outcome of the requests for management evaluation to the Applicants in writing, which they did.

31. It cannot be accepted that, whilst claiming that they have abandoned all responsibility regarding the conduct of their cases to their legal representatives, the Applicants would at the same time be absolved of the consequences of the acts of the said legal representatives. Legal representatives act at the behest of their clients and not the other way around. The principle enunciated by the Appeals Tribunal in *Scheepers* 2012-UNAT-211 and *Powell* Order No. 96 (UNAT/2012) is that it is an applicant's responsibility to pursue her or his case and when the said applicant is represented by counsel he or she cannot be absolved of any error or oversight by counsel regarding the applicable time limits

MEU request filed on 11 April 2013

32. With regard to the four Applicants who attempted to attach their request for management evaluation after the 42 earlier cases had been closed, their situation is significantly different. As was stated by the MEU to the legal representatives on 11 April 2013, the MEU did not consider their applications to be properly filed and receivable and requested that, should they so wish, they should file new applications separate from the consolidated one for *A-Ali et al*.. Notwithstanding the clear guidance offered by Ms. Silverstein from the MEU to the Applicant's legal representatives, at no time did these four additional Applicants file new separate requests following the closure of the *A-Ali et al* requests for management evaluation. In the circumstances, they failed to comply with art. 8.1(c) of the Statute of the Tribunal which states that an application shall be receivable if "[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required". It was a mandatory requirement for these four staff members to request management evaluation within 60 days of the contested decision. They failed to do so.

33. The claims of Applicants Martinez, Fasanella, McKenzie and Maung are not receivable for failure to comply with the requirements of art. 8.1(c).

34. As much as the Tribunal sympathizes with all the Applicants in relation to their concerns about job security, it must recall that the Dispute and Appeals Tribunals have in several judgments ruled clearly and unequivocally that respect for the applicable time limits is of the utmost importance and that the time limits have to be strictly enforced.

Was there abuse of process

35. Article 10.6 of the Dispute Tribunal's Statute states that "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party".

36. Had due diligence been applied on the part of the Applicants and primarily on the part of their legal representatives all 46 claims would have been in compliance with the mandatory requirements under the Rules. As a consequence of this failure, the parties themselves, and the Tribunal, have incurred costs and expenditure of time and effort. The question that arises is whether the Tribunal has power, in these circumstances, to impose any sanction against the party in default.

37. Article 10.6 refers to the actions of a party and not to the parties' legal representatives. The Applicants who gave evidence to the Tribunal made it clear that they relied on their legal representatives to look after their interests, so the question arises as to whether there has been any abuse of process and, if so, whether the Applicants should be ordered to pay costs incurred as a result of default on the part of their representatives. The Tribunal considers that the test of what constitutes "abuse of process" is a stringent test and imports an element of contumelious conduct or deliberate and callous disregard for the Tribunal's proceedings. This is not the case here. It is no part of the purpose of this judgment to speculate as to how or what went wrong in this case that resulted in these Applicants losing the right to prosecute their cases. It was not deliberate on the part of the Applicants or their legal representatives and it was not due to error on the part of the Respondent. No order for costs will be made.

38. The Tribunal's Rules of Procedure do not make provision for the imposition of a sanction against either party for conduct which is frivolous, vexatious, negligent, unreasonable or otherwise misconceived. Until such time as the General Assembly considers it appropriate to amend the Statute and the Rules of Procedure of the Tribunals, the loss of a right is a salutary lesson to parties to observe the requirements under the Staff Rules, the Statute and Rules of Procedure of the Tribunals, and unnecessary costs will continue to be incurred.

Conclusion

39. The claims of all 46 staff members identified in the attached schedule are not receivable and are hereby dismissed.

(*Signed*)

Judge Goolam Meeran

Dated this 2nd day of December 2013

Entered in the Register on this 2nd day of December 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York