



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MERLAKU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member in the United Nations Stabilization Mission in Haiti (“MINUSTAH”), contests her separation from service following the non-extension of her contract. The Applicant alleges that the decision was unfair, unlawful, and discriminatory. The Applicant requests that she be assigned a suitable available position in any mission. She states that she passed the United Nations examination and has been placed on a roster of pre-approved candidates for three years.

2. On perusal of the application, the Tribunal noted that receivability was a point of contention in this case. On 19 August 2013, the Applicant had requested a management evaluation of the “expiration of [her] appointment”. On 4 October 2013, the Management Evaluation Unit (“MEU”) wrote to the Applicant, concluding that “in accordance with staff rule 11.2(c), given that you submitted your request for management evaluation beyond the 60 day deadline, your request for management evaluation is time-barred”.

3. On 13 January 2014, the Tribunal, in the interests of expeditiousness and judicial economy, issued Order No. 7 (NY/2014), directing the Respondent to file and serve his reply addressing only the matter of receivability of the application by 20 January 2014. The Applicant was ordered to file a response to the reply by 27 January 2014, “setting out in particular the reasons, if any, for the delay in filing for management evaluation and addressing whether any exceptional circumstances exist for not complying with the time limits”.

4. On 15 January 2014, the Respondent filed his reply addressing the matter of receivability of the application, as directed in Order No. 7 (NY/2014). The Respondent submits that the Applicant failed to file her request for management evaluation, as well as her application with the Tribunal, within the established time limits, and her application should therefore be dismissed as not receivable.

5. On 20 January 2014, the Applicant simply sent an email to the New York Registry, stating:

Dear UNDT Team Members,

I want to add my appreciation of the work of UNDT Team concerning my case. I particularly would like to thank you for your time and efforts you put to review my application.

The UN Personnel Section in Haiti has promised several times (by phone and email) that they will extend my contract, and this was the reason that I did not submit my case to MEU on time.

I had informed the MEU concerning this matter and they were aware of it (copy of email was provided to them). However, I was not satisfied with the MEU outcome and they advised me to proceed [with] my case with UNDT.

I thank you again, and I would kindly request if you could please re-consider my application.

6. No further submissions were filed by the Applicant.

Facts

7. The following is based on the parties' written submissions and the record.

8. The Applicant was employed by the United Nations since January 2000 and worked in MINUSTAH from 2004 until end of January 2013. The Applicant states that she was separated with effect from 31 January 2013, at which point she was at the FS-4 level. It is common cause that the Applicant received final written notification of her separation (dated 6 March 2013) on 15 March 2013. Pursuant to the notification received by the Applicant on 15 March 2013, her separation was processed with effect from 31 January 2013.

9. By memorandum dated 29 May 2012, the Director of Mission Support, MINUSTAH, informed the Applicant that, as result of a retrenchment exercise carried out by MINUSTAH, her post was no longer available and her fixed-term

appointment with MINUSTAH, which was to expire on 30 June 2012, would not be further extended. The memorandum stated:

MINUSTAH has completed the review of the offices involved in the retrenchment exercise, intended to effectively address the evolving operational requirements in Haiti, in line with MINUSTAH's 2012–13 budget proposal.

Due to non-availability of post, I regret to inform that your fixed-term appointment with MINUSTAH which expires on 30 June 2012 will not be further extended. In this regard, your separation from the Organization will be initiated and Human Resources Section will be forwarding the necessary separation forms and instructions.

However, kindly note that the Field Personnel Division in the Department of Field Support at the UN Headquarters will continue to explore possibilities for reassignment for staff members who wish to continue in the service of the United Nations either through (a) selection for those staff members who are on the Field Central Review Body roster or (b) provisional reassignment to other field missions pending consideration of application to job openings. Therefore, in the event that you are selected or provisionally reassigned to a position in another mission or UN Office by [close of business] 30 June 2012, your separation from the Organization will no longer be executed.

If you have not gone through a competitive process subject to the review of the Field Central Review Body, you are encouraged to apply to the generic job openings posted on Galaxy for which you are considered suitable. You are also highly encouraged to apply to other positions in organizations of the UN, including job openings in Inspira related to vacancies in HQ and Offices away from HQ for which you consider yourself suitable.

I am truly aware that the uncertainties of the retrenchment process have been stressful and unsettling for everyone involved, and I would like to thank you for your understanding and patience while the process was underway. Please be reassured that the decision not to extend your contract with MINUSTAH is not a reflection of your performance.

10. On 8 June 2012, the Applicant received an email from MINUSTAH Human Resources Office advising her of the separation and checkout procedures.

11. However, by email dated 13 June 2012, she was informed that she would be “Temporarily retained through end of maternity”. On 20 June 2012, she was further notified via email by the Officer-in-Charge, Field Personnel Operations Service, DFS, that her

separation is not going to be implemented as stated in the attached memo dated 29 May 2012. Your fixed term appointment will be extended by MINUSTAH to cover the period of your sick leave and maternity leave. Please be assured that FPD continues to explore possibilities for longer-term reassignment in another mission.

It is common cause that at this time the Applicant was on sick leave as of 24 April 2012, and remained on that status until 12 August 2012, at which point she went on maternity leave until 3 December 2012.

12. On 18 December 2012, the Applicant’s supervisor requested MINUSTAH Personnel Section to extend the Applicant’s contract for a one-year period.

13. That same day, the International Staff Unit, MINUSTAH, responded to the Applicant’s email of 14 December 2012 in which she had advised them of her doctor’s recommendation to take additional sick leave days. The International Staff Unit, MINUSTAH, informed the Applicant that the mission could approve “an interim extension of one month pending the result of your sick leave certification”. The email stated:

If you are cleared to return to work or believe you will be, we will inform FPD to pursue placement possibilities in other missions as a downsize/retrenched staff member. We will also pursue the possibility of internal placement in MINUSTAH.

14. On 4 January 2013, the Applicant received an email from the Personnel Section, MINUSTAH, advising her that her current contract would expire on 31 January 2013, and that the Section is “going to work on [her] renewal”.

15. On 8 January 2013, the Applicant signed a letter of appointment with an effective date of 1 January 2013 for one month, being the aforementioned interim

extension pending certification of sick leave by the Medical Services Division at Headquarters.

16. The Medical Services Division having apparently informed MINUSTAH on 1 March 2013 that her further sick leave would not be certified, the Applicant was informed by notice dated 6 March 2013 and received on 15 March 2013 that MINUSTAH would proceed with her check-out as per the memorandum of 29 May 2012. The written notification received by the Applicant on 15 March 2013 is quoted in the MEU's letter of 4 October 2014, and its relevant paragraph stated that MINUSTAH would

proceed with your check out and separation as indicated in the DMS memo dated 29 May 2012. We also add that efforts to match you to existing suitable vacant posts in MINUSTAH have not been successful and that the mission will continue to go through a downsizing process in 2013–2014.

17. The Applicant's separation was processed with effect from 31 January 2013.

18. It appears from the documents provided by the Applicant (including two emails of 26 March 2013) that around late March 2013 or early April 2013 she was also considered for a new job opening (Administrative Assistant, FS-5 level) in MINUSTAH, for which she was recommended as a preferred candidate "considering her previous experience with MINUSTAH", but was not selected.

19. By an email dated 9 May 2013, the Applicant wrote to DPKO on the subject: "MINUSTAH—Personnel Section irregularities, Gender discrimination". She copied the MEU on that email. This email was not provided to the Tribunal.

20. On 12 June 2013, the MEU requested, in reference to the Applicant's email of 9 May 2013, that if she intended to file a management evaluation request, she should submit a request form along with any pertinent documentation.

21. According to the MEU, it followed up on 15 August 2013, observing that it had received no further communications from the Applicant since 12 June 2013.

The Applicant was requested to:

Kindly confirm that you understand that the MEU does not consider it [i.e., her 9 May 2013 email] a proper request for management evaluation, if the generic email address is copied on communications clearly addressed to the USG/DPKO, without a clear statement to request management evaluation. Please respond ... by no later than [close of business] Wednesday, 21 August 2013. Notwithstanding the foregoing, the Secretary-General expressly reserves the right to raise the issues of receivability and competence, as deemed appropriate.

22. The Applicant replied on 16 August 2013 that she had not received the earlier email of 12 June 2013 and would submit the request for management evaluation.

23. On 19 August 2013, the Applicant submitted her request for management evaluation, in which she identified the contested decision as the “expiration of appointment”, stating that “the decision was taken on January 2013 and I was aware on March 2013”. The Applicant further stated in her request for management evaluation that she discussed the matter with her “supervisor(s)/decision maker” in “Dec. 2012, Jan. 2013, March 2013, April 2013, May 2013, June 2013, July 2013”, and that she felt discriminated on the basis of her gender because “all decisions were taken during the period while [she] was pregnant and on maternity leave”.

24. On 4 October 2013, the Chief of the MEU replied to the Applicant’s request for management evaluation, concluding that “in accordance with staff rule 11.2(c), given that you submitted your request for management evaluation beyond the sixty-day deadline, your request for management evaluation is time-barred”. In its consideration, the MEU gave the Applicant the benefit of the doubt and considered that she was notified of the decision on three dates (29 May 2012, 18 December 2012, and 4 January 2013), finding that the Applicant was nevertheless

time-barred in each instance and failed to identify any exceptional circumstances for the late filing.

Consideration

25. Whilst, in fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing, the General Assembly has requested in its resolution 66/237, adopted on 24 December 2011, that the Dispute Tribunal and the Appeals Tribunal review their procedures in regard to the dismissal of “manifestly inadmissible cases”. It is a matter of record that the Dispute Tribunal, even prior to the aforesaid resolution 66/237, entertained and continues to deal with matters of admissibility or receivability on a priority basis in appropriate cases, and also render summary judgments in appropriate cases under art. 9 of the Rules of Procedure.

26. In the instant case, the Applicant faces a preliminary hurdle with respect to the timeliness of her request for management evaluation and, accordingly, the receivability of her application.

Date of the contested decision

27. The original decision not to extend the Applicant’s contract beyond 30 June 2012 was made on 29 May 2012, at which time she was on sick leave from 24 April 2012 until 12 August 2012, and thereafter on maternity leave from 13 August 2012 to 3 December 2012. Shortly after the end of the Applicant’s maternity leave, her supervisor requested on 18 December 2012 that the Applicant’s contract be extended for one year. However, MINUSTAH extended the Applicant’s contract for one month, until 31 January 2013, but also pending the certification of her sick leave, in compliance with the undertaking made on 20 June 2012 that the Applicant’s fixed-term appointment would be extended by MINUSTAH to cover the period of her sick leave and maternity leave. The Tribunal notes that this was in

accordance with sec. 8 of ST/AI/2005/2 (Family leave, maternity leave and paternity leave).

28. Upon receipt of the notification of non-certification of further sick leave from the Medical Services Division in early March 2013, the Applicant was thereafter advised by written notification dated 6 March 2013 and received by her on 15 March 2013 that MINUSTAH would proceed with her check-out and separation.

29. Therefore, the Tribunal finds that the decision of 6 March 2013, received by the Applicant on 15 March 2013, constituted the contested administrative decision in this case, from which the applicable time limits started to run.

Application before the Tribunal

30. The Respondent submits that the present application is time-barred as the Applicant failed to timeously file both (i) her request for management evaluation and (ii) her application with the Tribunal. The Tribunal will first dispose of the issue of timeliness of her application, and then turn to her request for management evaluation.

31. The Applicant was notified of the outcome of management evaluation on 4 October 2013. Pursuant to art. 8.1(d)(i) of the Tribunal's Statute and staff rule 11.4(a), the deadline for filing an application expired on Thursday, 2 January 2014.

32. The Applicant first attempted to file her application on 2 December 2013 by an email to the New York Registry. However, apparently due to the size of the attachments to the Applicant's email, the application was not received. On 21 and 27 December 2013, the Applicant sent further emails to the New York Registry, stating, *inter alia*, that she "was not able to access the eFiling portal due to technical problems" and that she was concerned that due to the large size of the attachments to her emails they were not delivered. The Applicant attached a copy of her application to her email of 27 December 2013, which was received by

the New York Registry. Following the Applicant's several unsuccessful attempts at filing her application via the eFiling portal, on 6 January 2014, the New York Registry uploaded her application to the eFiling portal on an exceptional basis.

33. Accordingly, although the application was uploaded by the Registry to the eFiling portal on 6 January 2014, the Tribunal is satisfied that the Applicant had attempted to submit her application on 2 December 2013 and successfully re-submitted it on 27 December 2013. Therefore, the application with the Tribunal was filed within 90 calendar days of the date of notification of the outcome of management evaluation.

34. The Tribunal will now turn to the Applicant's request for management evaluation.

Management evaluation request

35. The Respondent states that, considering that the Applicant has identified the date of written notification of the contested decision as 15 March 2013, her request for management evaluation should have been submitted by 14 May 2013. However, it was submitted on 19 August 2013, three months after the expiration of the time limit, and thus her case is time-barred.

36. The Applicant states in her application that, on 15 March 2013, she received the final separation decision dated 6 March 2013, informing her that MINUSTAH was proceeding with her checkout and separation and that efforts to match her to existing suitable posts were not successful. The Applicant had 60 calendar days thereafter to submit a request for management evaluation. Thus, her request for management evaluation was due on 14 May 2013. It is common cause that the Applicant's request for management evaluation was submitted only on 19 August 2013, three months after the expiration of the time limit.

37. The Applicant indicates in her application and acknowledges in her communication to the Tribunal of 20 January 2014 that she failed to submit her request for management evaluation on time, albeit she states that it was because “[t]he UN Personnel Section in Haiti has promised several times (by phone and email) that they will extend my contract, and this was the reason that I did not submit my case to MEU on time”. Whilst the Applicant clearly concedes that her request for management evaluation, submitted on 19 August 2013, was out of time, she states, in effect, that she was late as a result of her reliance on some promises made by MINUSTAH. However, no evidence has been offered to the Tribunal of legally binding promises by the Administration during the material period of 15 March 2013 to 19 August 2013 to extend the Applicant’s contract beyond 31 January 2013. Instead, the emails of 26 March 2013, provided by the Applicant, indicate that she was considered for at least one new job opening (Administrative Assistant, FS-5 level) for which she was recommended as a preferred candidate “considering her previous experience with MINUSTAH”.

38. In any event, staff rule 11.2(c) states that the deadline for requesting management evaluation “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”. There is no contention in this case that there was any form of informal resolution process through the Office of the Ombudsman during the relevant time period that could lead the Tribunal to infer the Secretary-General’s implicit extension of the deadline for the management evaluation request for the period of informal resolution (*Wu* 2013-UNAT-306).

39. The Applicant had 60 days to submit her request for management evaluation after being notified of the decision on 15 March 2013, which she failed to do. The Appeals Tribunal has stated in a number of cases that time limits, including those pertaining to management evaluation requests, are to be enforced strictly (*Mezoui* 2010-UNAT-043), and that the Dispute Tribunal generally “has no jurisdiction to waive deadlines for management evaluation” (*Ajdini* 2011-UNAT-

108). Further, staff members are presumed to know the Staff Rules, particularly those pertaining to their basic rights, such as the right of appeal (*Diagne et al.* 2010-UNAT-067; *Jennings* 2011-UNAT-184; *Muratore* 2012-UNAT-191; *Christensen* 2012-UNAT-218).

40. The Applicant having failed to comply with the deadline for the filing of her request for management evaluation, her application is time-barred. Accordingly, the Tribunal finds that the present application is not receivable.

Conclusion

41. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 20th day of May 2014

Entered in the Register on this 20th day of May 2014

(Signed)

Hafida Lahiouel, Registrar, New York