



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

GALLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member in the Investigations Division, Office of Internal Oversight Services, contests (i) his end-of-year performance appraisal for the evaluation period ending on 31 March 2013; and (ii) the decision of the rebuttal panel following his complaint regarding the content of his performance appraisal.

Relevant background

2. On 23 July 2013, the Applicant submitted a rebuttal of his annual appraisal report for the year ending on 31 March 2013. On 23 September 2013, he received the report of the Rebuttal Panel which found “that the procedure prescribed in [sec.] 10.1 of the [ST/AI/2010/5 (Performance Management and Development System)] regarding identifying and addressing performance shortcomings were generally complied with”.

3. On 30 September 2013, in compliance with the applicable deadline, the Applicant requested management evaluation of the findings of the Rebuttal Panel. On 21 February 2014, the Management Evaluation Unit (“MEU”), Department of Management, responded to the Applicant’s request by stating that it was not receivable as it did not constitute a reviewable administrative decision.

4. On 22 May 2014, the Applicant filed his application with the Tribunal and, on 5 June 2014, the Respondent filed a motion for leave to file a reply limited to receivability. As part of his motion, the Respondent submitted that the Applicant was not contesting a reviewable administrative decision and that he did not meet the 90-day time limit to file an appeal in accordance with art. 8.1(d) of the Dispute Tribunal’s Statute.

Applicant's response to the Respondent's reply

5. By Order No. 135 (NY/2014), dated 6 June 2014, the Tribunal ordered the Applicant to file a response to the Respondent's contentions on receivability.

6. On 13 June 2014, the Applicant filed the following response in relation to the two issues identified, namely:

Whether his claim concerned an administrative decision

a. The Applicant submits that the Respondent's argument that only administrative decisions that stem from any final performance appraisal may be appealed and not the decision of a rebuttal panel itself would be to deny a staff member access to the Tribunal;

b. Furthermore, there were a series of linked decisions that have had a very serious and damaging effect on the Applicant's career. These included the issuance of a Performance Improvement Plan without basis and a rebuttal panel that did not carry out adequate investigations into the matters before it. Finally, the Applicant submits that it would be fundamentally unjust if they could not be challenged before the Tribunal;

Whether his application is time-barred

c. The Applicant submits that he cannot be penalized for the MEU being dilatory in its obligation to comply with the relevant time limit to respond to his request;

d. He was complying with General Assembly resolution 62/228 whereby the Assembly emphasized that all possible steps be taken to avoid unnecessary litigation, and the importance of avoiding frivolous litigation;

e. *Neault* 2013-UNAT-345 did not address the situation such as the present where (i) the delay on the part of the MEU exceeded 90 days,

and (ii) the MEU had repeatedly informed the Applicant that a response to his request was imminent;

f. The Respondent should be estopped from seeking to rely on the MEU's failure in taking 153 days to notify him of their decision that his claim was not receivable.

7. The question for decision by the Tribunal regarding the timely filing of the claim is not whether the MEU was dilatory in its response but whether the Applicant complied with the necessary deadlines under the Tribunal's Statute and Rules of Procedure. If the Tribunal were to find that the claim was not time-barred it will then consider whether the issue raised is a contestable administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute.

Considerations

8. Article 8.1 of the Statute of the Dispute Tribunal provides, insofar as it is relevant to this case, that an application shall be receivable if it is filed within the following deadlines:

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; 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;

9. Article 7.1 of the Rules of Procedure of the Dispute Tribunal states as follows (emphasis added):

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;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

...

5. **In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above.** Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

10. The Dispute Tribunal and the United Nations Appeals Tribunal have consistently stressed the importance of complying with statutory deadlines which is paramount to ensuring certainty and the expeditious disposal of disputes in the workplace.

11. Staff rule 11.2(d) states that 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. Further, under staff rule 11.4(a), a staff member has the option to file an application before the Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management

evaluation or from the date of expiration of the deadline specified under staff rule 11.2(d), whichever is earlier.

12. The Applicant was stationed in New York. He filed his request for management evaluation on 30 September 2013. The 30-day period for a response by the MEU expired on 30 October 2013. Since there was no decision by the MEU within this period of 30 days, the further period of 90 days for filing an application with the Tribunal expired on 28 January 2014. The application was filed on 22 May 2014.

13. In *Neault* 2013-UNAT-345, the Appeals Tribunal dealt with a specific situation whereby the deadline to file an application before the Dispute Tribunal may be reset. The Appeals Tribunal ruled that “when the management evaluation is received after the deadline of 45 calendar days **but before the expiration of 90 days for seeking judicial review**, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the [Dispute Tribunal]” (emphasis added).

14. In his response to the Respondent’s motion on receivability, the Applicant accepts that the MEU’s response was sent well beyond the MEU statutory deadline of 30 October 2013 and nearly one full month beyond the 90-day deadline of 28 January 2014 for the filing of his application before the Tribunal. Consequently, the applicable time limits for the filing of his application were not reset within the meaning of the Appeals Tribunal’s jurisprudence in *Neault*.

15. The Applicant submits that the Respondent should be estopped from relying on the MEU’s own inaction to restrict his right to formulate an appeal before the Tribunal. He further submits that considering that there was a possibility that the matter would be resolved by the MEU, it would be a waste of resources for him to have filed an appeal absent a final resolution of the MEU process.

16. In *Costa* 2010-UNAT-036, 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. Article 8.3 states that the Tribunal may only, in exceptional cases and upon receiving a written request by an applicant, suspend or waive for a limited period of time the deadline by which an application has to be filed before it. Further, art. 7.5 of the Dispute Tribunal's Rules of Procedure states that when presented with an exceptional case, an applicant's "written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits ... shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request".

17. The Applicant did not file a written request that the applicable time limits be suspended pending his receipt of a response from the MEU, nor did he, upon receiving the MEU's response and prior to filing his appeal, file a request that the time limits be waived. As to whether the Tribunal would have considered that exceptional circumstances existed to warrant such an order is not material to this issue. The fact is that no such request was made. The Applicant was required, under staff rule 11.4(a), to file his application before the expiry of the requisite time limit of 28 January 2014. He did not do so.

18. The Tribunal finds that the Applicant has provided no exceptional circumstances warranting a suspension/waiver/extension of time for the filing of his application. Accordingly, the Tribunal has no jurisdiction to consider the claim.

19. In the circumstances, the Tribunal does not consider it necessary to deal with the alternative argument that the Applicant's claim is not a contestable administrative decision.

Judgment

20. The application is not receivable and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 19th day of June 2014

Entered in the Register on this 19th day of June 2014

(Signed)

Hafida Lahiouel, Registrar, New York