



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KETO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Abbé Jolles

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is an Information Technology Assistant with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). In his Application filed on 17 May 2015, he is contesting an 18 March 2015 decision which reassigned him to West Bouar in the Central African Republic notwithstanding a pending promotion.

2. The Respondent filed a Reply on 19 June 2015. In the said Reply, he submitted that the Application is not receivable.

3. On 8 September 2015, the Tribunal issued Order No. 273 (NBI/2015) notifying the Parties that, pursuant to art. 16.1 of the Dispute Tribunal's Rules of Procedure, an oral hearing was not necessary to determine the preliminary objection on the ground of receivability and that it would rely on the Parties' written pleadings for that purpose. The Applicant was also invited to file submissions on the issue of receivability by 30 September 2015.

4. The Applicant filed the said submissions on 29 September 2015.

Facts

5. The Applicant is a member of the Geospatial, Information and Telecommunications Technology Section (GITTS) of MINUSCA.

6. On 22 July 2014, GITTS was scheduled to hold a staff meeting. The agenda of the said meeting which is annexed to the Respondent's Reply showed that staff deployment to the sectors was one of the items for discussion.

7. A copy of the GITTS Deployment Plan dated 27 July 2014 was also annexed to the Respondent's Reply. This plan proposed that the Applicant be reassigned to Bouar.

8. On 31 July 2014, the Chief, GITTS sent an inter-office memorandum to the Director of Mission Support (DMS) seeking his approval to reassign the Applicant to Bouar. The DMS signed the memorandum on the same day. The next day 1 August 2014, the Applicant's First Reporting Officer sent the memorandum between the Chief of GITTS and the DMS to the Applicant.

9. Between 9 August 2014 and 12 January 2015, the Applicant was absent from the Mission for a combination of reasons relating to rest and recuperation and sick leave.

10. On 15 and 16 January 2015, the Applicant met with the Chief of GITTS to discuss the issue of his reassignment to Bouar. The Chief of GITTS also wrote to the Applicant on 17 January 2015 further explaining the basis for the decision to reassign him. Additionally, the Applicant met with the Chief Human Resources Officer (CHRO) on 19 February 2015, at which time the CHRO explained why the Organization needed him in Bouar.

11. By letter dated 23 January 2015, the Applicant made a *pro se* request for management evaluation concerning the selection for two FS-6 level posts in MINUSCA and the decision to transfer him to the Bouar duty station from Bangui.

12. On 18 March 2015, the MINUSCA CHRO wrote to the Applicant, asking him to make the appropriate administrative arrangements for his reassignment to Bouar.

13. The Applicant retained Counsel and, on 14 April 2015, the Applicant's Counsel again requested management evaluation of the decision contained in the 18 March 2015 memorandum.

Respondent's submissions on receivability

14. The Respondent made the following submissions on the issue of receivability:

- a. The Application is not receivable *ratione temporis* because the Applicant was notified of the contested decision on 1 August 2014. The

Applicant should have submitted a request for management evaluation within 60 days of 1 August 2014, that is, no later than 29 September 2014. However, he did not seek management evaluation until 29 January 2015. Accordingly, the Dispute Tribunal lacks jurisdiction to hear this aspect of the Applicant's appeal.

b. On 18 March 2015, the Chief of GITTS wrote to the Applicant, asking him to make the appropriate administrative arrangements for his reassignment to Bouar. This memorandum did not convey a new decision, and did not restart the statutory time limit for requesting management evaluation. The memorandum merely repeated the decision already made and notified to the Applicant on 1 August 2014.

c. The Applicant acknowledged that he was notified of the decision to reassign him prior to 18 March 2015. This followed clearly from his request for management evaluation dated 23 January 2015. In that request, the Applicant challenged the decision to reassign him, and included a copy of the memorandum dated 31 July 2014, in which the DMS approved the decision to reassign him to Bouar. Logically, for the Applicant to have requested management evaluation of the decision to reassign him to Bouar on 23 January 2015, he must accept that the decision had been made prior to that date. He may not now claim that the decision was not taken until March 2015.

Applicant's submissions on receivability

15. The Applicant's submissions on the issue of receivability are summarized below:

a. In April 2014, Terry McDougal, the Applicant's then direct supervisor, recommended that the Applicant be promoted to the F-6 level at the Bangui duty station.

b. The 18 March decision was the first written notice that a decision had been made to transfer him notwithstanding his pending promotion. He contested the decision within 30 days of the 18 March notice by filing a challenge before the MEU on 4 April 2015.

c. There was no 1 August 2014 notice of reassignment. The deployment memorandum referred to by the Respondent between Michael Hanrahan and Widmark Valme sought approval to transfer the Applicant. At the time of the memorandum, Mr. McDougal's April 2014 promotion request remained pending. Thus there was no final decision for the Applicant to contest.

d. All memos and emails leading up to the 18 March 2015 contestable administrative decision were simply requests for administrative decisions. A request is not a contestable administrative decision and is not receivable. Thus, the Applicant's time limits commenced on 18 March 2015. Time limits can only be enforced against a written decision.

Considerations

16. Two critical questions that arise for determining the question of receivability in this case are, what is/are the administrative decision contested and when were the contested administrative decisions taken?

What is/are the contested administrative decisions?

17. In his Application filed on 17 May 2015, the Applicant submits that he is contesting an 18 March 2015 decision which reassigned him to West Bouar in the Central African Republic notwithstanding a pending promotion. The Applicant claimed that the transfer was ordered by the MINUSCA CHRO on 18 March 2015 to take effect on 31 March 2015.

18. The Applicant submitted two management evaluation requests (MER) to the MEU. The first was a *pro se* request made on 23 January 2015 and the second was

submitted by his Counsel on 14 April 2015. Both requests referred to the reassignment to Bouar from Bangui. In the 23 January 2015 letter to MEU, the Applicant wrote:

In addition to the above, the Chief of the CITS section makes arbitrary decisions to transfer staff from one duty station to another without even any discussion with the staff member or Human Resources. He arbitrarily decided to transfer me to Bouar from Bangui where I have been working for the last 2 years without discussing with me other than writing a memo to the Director Mission Support which I attach herewith. Due to the lack of dialogue in the section I would like to seek your intervention before things get out of hand as this has become a one man show with all the decisions made by him.

19. In his second MER submitted by his Counsel on 14 April 2015, the Applicant challenged the decision contained in the 18 March 2015 memorandum, namely, the MINUSCA CHRO's memorandum to the Applicant asking him to make the appropriate administrative arrangements for his reassignment to Bouar.

20. From the foregoing, it is clear that the contested administrative decision here is the decision to reassign the Applicant from Bangui to Bouar.

When was the contested administrative decision taken?

21. In *Schook*¹, the United Nations Appeals Tribunal (UNAT) held that a written decision is necessary if the time-limits are to be correctly calculated and that time for appealing a decision starts running from the date the staff member received notification of the decision.

22. In some cases, even though an Agency does not expressly notify an applicant of a decision, that decision can be properly characterized as an implied decision of which the applicant has knowledge having regard to the surrounding circumstances. To determine the date by which a staff member must seek decision review of an implied administrative decision, it is incumbent on the Dispute Tribunal to first

¹ 2010-UNAT-013, para. 6.

establish the date on which the staff member knew or reasonably should have known of the implied decision².

23. It is well established that on 1 August 2014, the Applicant was sent a copy of the inter-office memorandum of the Chief of GITTS seeking the approval of the DMS to reassign the Applicant and others to Bouar. The memorandum made a provision for the DMS to sign on it either granting the sought approval or denying it. The DMS put his signature on the request without indicating whether the approval was being granted or denied.

24. Having argued that his receipt of the inter-office memorandum between the two senior officers did not constitute the receipt of an administrative decision, it cannot however be ignored that the Applicant regarded that unclear memorandum as at least an implied administrative decision to reassign him to Bouar. This is evident from his MER of 23 January 2015 which is in evidence before the Tribunal.

25. As stipulated in arts. 8.1(c) and 8.3 of its Statute, an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation and the Dispute Tribunal cannot suspend or waive the deadlines for management evaluation.

26. The Tribunal finds that when he received the inter-office memorandum of 31 July 2014 which was sent to him the next day 1 August 2014, the Applicant understood that the Chief of GITTS had taken an adverse administrative decision concerning him. He stated as much when he made a MER on 23 January 2015. Since it was his understanding at the time that an unfair administrative decision to reassign him to Bouar had been taken, the time to challenge that administrative decision began to run from that date. The Applicant should have submitted a MER within 60 days of 1 August 2014, that is, no later than 30 September 2014 but he only did so on 23 January 2015.

² See for example, *Chahrour* 2014-UNAT-406, paras. 30 and 31.

Judgment

27. The Application is refused for being not receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 31st day of May 2016

Entered in the Register on this 31st day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi