



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/064

Judgment
No.: UNDT/2016/217

Date: 13 December 2016

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUKTAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Alexandre Tavadian, UNHCR

Introduction

1. The Applicant is a staff member of the United Nations High Commissioner for Refugees (UNHCR).
2. On 23 August 2016, he filed an application with the Nairobi Registry of the United Nations Dispute Tribunal (UNDT) contesting a decision to deny him Special Post Allowance (SPA) for a period of nine months, 28 May 2014 to 28 February 2015.
3. The Respondent filed a reply on 26 September 2016 in which it was argued, *inter alia*, that the application is not receivable.
4. On 1 November 2016, the Applicant filed his observations on the Respondent's reply.

Facts

5. On 1 May 1992, the Applicant joined UNHCR as a Finance Clerk in the General Services category in Dadaab, Kenya.
6. On 7 January 2014, the UNHCR Office in Uganda requested the Applicant's temporary assignment for a period of six months as an Administrative/Finance Officer. The request was approved.
7. On 13 January 2014, the Applicant was assigned to the Ugandan operations as an Administrative/Finance Officer. His temporary assignment was extended several times until 28 February 2015.
8. On 27 July 2015, the UNHCR Representative in Uganda, Ms. Naimah Warsame, addressed a memorandum to the Personnel Administration and Payroll Section of the Division of Human Resources Management of UNHCR (PAPS/DHRM) in Budapest recommending the payment of SPA to the Applicant from 13 January 2014 to 28 January 2015.
9. DHRM did not approve the recommendation on the basis that the request was not timely and that the budget for the relevant period had been accounted for

and could not be reopened. On 15 October 2015, this information was conveyed to the Applicant through an email exchange with the Senior Finance Officer.

10. On 4 November 2015, the Applicant received from DHRM an email containing the content and reasons for the unfavorable decision.

11. In a memorandum dated 21 December 2015, Ms. Warsame reiterated her recommendation to pay the Applicant SPA. DHRM maintained its earlier decision, which was notified to the Applicant on 20 January 2016.

12. On 22 January 2016, the Applicant submitted a management evaluation request challenging the administrative decision denying him SPA.

13. On 7 July 2016, the UNHCR Deputy High Commissioner responded to the management evaluation request noting that the Applicant's grievance was time-barred. The Deputy High Commissioner observed that the Applicant was notified of the decision on 4 November 2015 and was therefore required to submit a management evaluation request within 60 days or no later than 3 January 2016. Consequently, the Deputy High Commissioner concluded that the Applicant's management evaluation request submitted on 22 January 2016 was not receivable.

14. The Deputy High Commissioner exercised her discretion and granted SPA for the period from 13 January 2014 to 27 May 2014 but not beyond that.

Respondent's submissions on receivability

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

a. The contested administrative decision is dated 4 November 2015. The Applicant's 60 calendar-day deadline to submit a management evaluation request expired on 3 January 2016. Nevertheless, the Applicant sent his management evaluation request on 22 January 2016, which is 19 days after the expiration of the deadline.

b. Consequently, his management evaluation request was time-barred and not receivable. This Tribunal cannot remedy this jurisdictional issue.

c. Even if the Applicant's management evaluation request had been filed within the prescribed time limit, his application on the merits would not have been receivable.

d. The response period for the management evaluation submitted by the Applicant expired on 7 March 2016. Therefore, the Applicant was required to file his application on the merits before this Tribunal within 90 days or no later than 6 June 2016. Instead, the Applicant filed his application on 23 August 2016.

e. The Deputy High Commissioner's decision dated 7 July 2016 replying to the Applicant's management evaluation request did not reset the Applicant's deadline to file an application before this tribunal because the decision was issued after the expiration of the Applicant's deadline to file a UNDT application.

f. Therefore, even if the Applicant's management evaluation request had been timely, his application would nevertheless not have been receivable.

Applicant's submissions on receivability

16. The Applicant's submissions on receivability are summarized hereunder:

a. The Respondent is incorrect when he states that he received the unfavorable decision on 4 November 2015. The Applicant submits that he received the contested decision on 15 October 2015 by email from Mr. Mohamed Qureshi, Senior Finance Officer.

b. On 15 October 2015, he wrote to Mr. Qureshi expressing his frustrations and giving the facts and justification for his SPA and his intention to request management evaluation. On the same day, Ms. Warsame intervened and requested that he resolve the matter by first exhausting the internal administrative channels before resorting to management evaluation.

c. On 21 December 2015, Ms. Warsame addressed a memorandum to PAPS/DHRM requesting for a review of his case.

d. On 20 January 2016, the Applicant received an email communication from Mr. Qureshi informing him that his request had been denied. It was on this basis that he requested for management evaluation on 22 January 2016.

e. The submission is within the timeline unless the High Commissioner does not recognize the UNHCR Uganda Country Representative's intervention.

f. The issue of whether the UNDT has authority to suspend or waive the deadlines for management evaluation does not arise in this case since he is within the deadline.

g. The correct date for the expiry of the deadline for management evaluation was 19 March 2016. The correct date for bringing an application before this Tribunal was within 90 days after his receipt of the management evaluation on 8 July 2016.

Considerations

17. The sole legal issue arising for consideration at this stage is whether the application is receivable. The contested decision is the decision to deny the applicant SPA from 28 May 2014 to 28 February 2015.

Applicable law

18. Staff rule 11.2(a) provides that a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

19. In accordance with staff rule 11.2(c), a request for a management evaluation shall not be receivable 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.

20. Mirroring UNDT Statute art. 8.1(i) b., staff rule 11.2(d) stipulates that 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.

21. Staff rule 11.4(a) stipulates that a staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the UNDT 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. The United Nations Appeals Tribunal (UNAT), however, in interpreting art. 8.1 of the UNDT Statute held in *Neault* 2013-UNAT-345:

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 UNDT.

When was the contested decision taken?

22. According to the respondent, the contested administrative decision is dated 4 November 2015 and therefore the Applicant's 60 calendar-day deadline to submit a management evaluation request expired on 3 January 2016. On the other hand, the Applicant submits that he received that decision on 15 October 2015 by email from Mr. Qureshi. However, he maintains that the decision subject to the present proceedings is the one dated 20 January 2016.

23. The documentary evidence on file shows that the Applicant, through email exchanges, received information about the decision denying him SPA on 15

October 2015 and contemplated filing “an appeal” (Applicant’s observations on the reply, Annex I). It is, however, not clear from the documents submitted to the UNDT in what form and to what extent the unfavourable decision was made available to him. On 4 November 2015, the content and reasons for the decision were sent to him by the Human Resources Associate (Application, Annex III). Ms. Warsame, addressed a memorandum to PAPS/DHRM on 21 December 2015 requesting for a review of the Applicant’s case. In the said memorandum, Ms. Warsame stated,

1. I wish to refer to my memorandum dated 27 July 2015 [...] on the above-mentioned subject, and request a review of the case based on the below information.

2. As indicated in my initial request, in order to assist Uganda Operation with the South Sudan continued emergency crisis which started in December 2013, [the Applicant] undertook a mission to Kampala from 13 January 2014 to 28 February 2015 to provide some administrative support to the operation.

3. It quickly became evident that a position of Administrative Officer was required and HQ Budget Committee approved the creation of position number 10022050, Administrative Officer, P3, Kampala effective 1 March 2014 [...]. The position was filled a couple of months later through fast-track arrangements.

4. However, administrative needs remained paramount due to the increased scope of the programme and it became necessary to retain the services of Mr. Muktar in addition to the incumbent of the Administrative Officer position, P3.

[...]

6. In light of the above, I wish to re-affirm our request for a positive review of our recommendation to grant [Applicant] Special Post Allowance (SPA) retroactively from 13 January 2014 to 28 February 2015, owing to the fact that [the Applicant] performed the Administrative functions admirably, and his contribution to the Uganda operation is highly regarded.¹

24. On 20 January 2016, the Applicant received an email from Mr. Qureshi informing him that the request for review of his SPA as advanced by Ms. Warsame had been denied (Application, Annex V). Two days later, on 22 January

¹ Annex IV to the application at page 5.

2016, he requested for management evaluation challenging the administrative decision denying him SPA (Application, Annex VI).²

25. The Applicant's argument is premised on his belief that the deadline for him to request for management evaluation runs only as of the receipt the decision of 20 January 2016. There is no factual or legal basis to support this view. Whereas it is unclear what was the exact content of the communication of 15 October 2015, the ambiguity as to whether the decision was fully communicated to him on 15 October or only on 4 November 2015 is irrelevant for the consideration of the Applicant's case. The Tribunal finds that, at the latest, the email received by the Applicant on 4 November demonstrates all the *indicia* of an administrative decision capable of being the subject of management evaluation: it has been issued by a competent organ; it unequivocally resolves the matter at hand; it was communicated to the Applicant in writing and it contains the reasoning. Notably, as indicated above, it was *ab initio* considered by the Applicant as a decision subject to a legal recourse, as such he understood *ab initio* the nature and the legal effect of the negative decision and thus was expected "to ensure that [he] is aware of the applicable procedure in the context of the administration of justice at the United Nations" (*Amany* 2015-UNAT-521, para. 18).

26. As the contested decision was communicated on 4 November 2015, the deadline for filing a request for management evaluation was within 60 days of 4 November 2015, that is, by 3 January 2016. According to the applicable rules, and consistent with the principle of expeditiousness in administrative proceedings, a request for reconsideration of the decision by the first instance administrative organ does not have a suspensive effect on the deadlines for management evaluation. As held repeatedly by UNAT, reiterations or repetitions of the same administrative decision in response to the Applicant's communications do not reset the clock with respect to the applicable time limits in which the original decision is to be contested (*Sethia* 2010-UNAT-079; *Bernadel* 2011-UNAT-180; *Cremades* 2012-UNAT-271; *Aliko* 2015-UNAT-539). This remains the rule notwithstanding on what level the request for reconsideration would be filed.

² Annex VI to the application.

27. As provided in staff rule 11.2(c), the deadline for requesting management evaluation may only 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, which is not the case here. The Applicant's request for management evaluation filed on 22 January 2016 was therefore outside the applicable time limits.

28. It falls to be noted that even if the Tribunal was to accept the argument that the Applicant received the contested decision on 20 January 2016, he would still be out of time for filing his application with the UNDT. In respect to the filing of an application before the UNDT, staff rule 11.4(a) requires that an application be filed 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). In the present case, the deadline specified under staff rule 11.2(d) for the management evaluation would be 7 March 2016 (since 6 March 2016 was a Sunday). The Applicant would therefore be normally required to have filed his application with the UNDT no later than 6 June 2016.

29. The Applicant filed his application on 23 August 2016, 78 days after the deadline for seeking judicial review before the UNDT. The management evaluation was communicated to him on 7 July 2016. As such he does not benefit from the UNAT interpretation of art. 8.1 of the UNDT Statute in *Neault*.

30. The only authority the UNDT has to suspend or waive the filing time limits is set forth in art. 8.3 of the UNDT Statute, which, as held by UNAT in *Cooke* 2012-UNAT-275, requires a prior "written request by the applicant".

29. Mr. Cooke did not submit a prior written request for waiver, as required by Article 8(3) of the UNDT Statute. Under Article 8(3) of the UNDT Statute, the applicant's submission of a written request for waiver is a prerequisite, or condition precedent, to the UNDT being competent to waive the filing deadline in Article 8(1).

The Applicant failed to make such a request in the present case.

Judgment

31. In view of its considerations above, the Tribunal finds and holds that the application is not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 13th day of December 2016

Entered in the Register on this 13th day of December 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi