



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

CABEIA CHYS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Brown, UNHCR

Introduction

1. By application submitted via email on 1 February 2016 and completed on 15 February 2016, the Applicant, a staff member of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision by the High Commissioner not to promote him from the P-4 to the P-5 level during the 2013 Promotions Session.

2. On 23 March 2016, the Respondent submitted his reply on the receivability of the application and, on 1 April 2016, the Applicant responded, as directed by Order No. 39 (GVA/2016) of 7 March 2016.

Facts

3. On 5 February 2014, the High Commissioner promulgated the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) (“Promotions Policy”).

4. By memorandum dated 17 October 2014 and distributed to all UNHCR staff members via email on 20 October 2014, the High Commissioner published the list of promoted staff members. The Applicant was not among them.

5. By email of 21 October 2014, the Applicant requested the Assignments and Promotions Section, Division of Human Resources Management (“Promotions Secretariat”), to provide him the documentation considered by the Senior Promotions Panel (“Panel”) regarding his candidacy.

6. By email of 29 October 2014, the Promotions Secretariat responded to the Applicant’s request, transmitting to him his fact sheet as reviewed by the Panel. It further informed the Applicant of the reason for his non-selection (namely that his overall ranking placed him outside the margin of 200% of the number of slots allocated for promotion to the P-5 level), and explained to him the procedure for seeking recourse, including the requirement to submit a written and fully documented application “no later than four weeks after the receipt of [the 29 October 2014] message”.

7. By email of the same date, the Applicant requested to be provided with the specific criteria against which he was assessed and which he did not meet.

8. By email of 6 November 2014, the Promotions Secretariat reiterated and elaborated the explanations regarding the methodology followed by the Panel members during the second round of review, including the absence of minutes for that round.

9. By email of 13 November 2014, the Applicant insisted on being provided with minutes of deliberations of his case, asserting that other candidates had received the same.

10. By email of 18 November 2014, the Promotions Secretariat provided further information to the Applicant regarding the absence of minutes for the second round and a clarification that those staff members who received minutes had advanced to the third round, during which the Panel members assessed the remaining candidates collectively in a meeting. The email further clarified that the Applicant's candidacy was not retained for the third round as his overall rating was 152nd among the 170 candidates.

11. By email of 24 November 2014, the Applicant requested the "scores" he had received from the Panel members during the second round.

12. By email of 26 November 2014, the Promotions Secretariat reiterated its previous explanations regarding the second round ranking and provided the Applicant with his individual rankings by the Panel members.

13. By email of 28 November 2014, the Applicant submitted an application for recourse, which was not dated.

14. By email of 11 December 2014, the Promotions Secretariat informed the Applicant that his recourse application was sent after the four-week deadline set by the Promotions Policy and therefore could not be received. He was further informed that this did "not affect [his] right to formally contest the non-promotion decision in the context of the Internal Justice System".

15. By email of 12 December 2014, the Applicant replied referring to the series of emails described in paras. 5 to 12 above and claimed that “the last information which is also documentation ... is dated 26 November 2014” and that the recourse was therefore submitted within the prescribed time limit. The Applicant did not receive any response to this email.

16. The Panel met from 19 through 23 January 2015 to consider recourse applications submitted by staff members in accordance with sec. 5.13 of the Promotions Policy. According to the minutes of the Panel meeting, applications received after the deadlines set forth in the Promotions Policy were not presented to the Panel.

17. By an all-staff message of 3 March 2015, the High Commissioner announced his decisions on promotions following the Recourse Session.

18. On 1 May 2015, the Applicant submitted a request for management evaluation of the decision not to promote him to the P-5 level.

19. By email of 1 June 2015, the Office of the Deputy High Commissioner informed the Applicant that his request for management evaluation, received on 1 May 2015, was still under consideration. The message clarified that it was “without prejudice to [the Applicant’s] right to file an appeal with the United Nations Dispute Tribunal (UNDT), and drew the Applicant’s attention “to the time limits for such filing in accordance with Article 8 of the UNDT Statute [...] and Staff Rule 11.4(a)”.

20. According to the Respondent’s submissions, the Applicant was informed on 27 August 2015 that he would not receive a response to his request for management evaluation before the deadline to submit an application before the Tribunal expired on 29 August 2015. He was also informed that the new Deputy High Commissioner in principle wished to respond to all pending requests for management evaluations and offered, if the Applicant wished not to file an application before the Tribunal at that stage, to enter into mediation in order to extend the Applicant’s deadline to submit an application with the Tribunal while at the same time allowing the new Deputy High Commissioner the opportunity to review and respond to his request

for management evaluation. The Applicant confirmed that he did not wish to pursue an application at this stage and agreed to the suggestion.

21. On 28 August 2015, the Applicant and the Organization entered into mediation under the auspices of the UNHCR Ombudsman.

22. By memorandum of 26 October 2015, transmitted by email to the Applicant on 30 October 2015, the Deputy High Commissioner responded to the Applicant's request for management evaluation. The Deputy High Commissioner's response referred to the mediation under the auspices of the UNHCR Ombudsman and stated that "[i]t is [the Deputy High Commissioner]'s understanding that, in accordance to standing jurisprudence, the decision on management evaluation resets [the Applicant's] deadline to file an application with the UNDT". The Deputy High Commissioner found that the request was time-barred and, therefore, not receivable, but nevertheless examined it on the merits "on an exceptional basis and as a matter of administrative discretion", and upheld the contested decision.

23. On 1 February 2016, the Applicant submitted an incomplete application to the Tribunal, which was completed on 15 February 2016.

Parties' submissions

24. The Applicant's principal contentions are:

a. The recourse application, submitted on 28 November 2014, was timely as the four-week deadline started to run from 26 November 2014, when the Applicant's exchanges of emails with the Promotions Secretariat to obtain the necessary documentation for filing his application were concluded. The Administration was required to address his recourse application and it created confusion in not responding to his email of 12 December 2014 explaining why the application was timely;

b. The request for management evaluation, submitted on 1 May 2015, should be deemed receivable as the Administration, who did not respond to it within the applicable 30-day deadline, initiated a mediation process in order

to extend the deadline to file an application before the Dispute Tribunal and, indeed, used its discretion to consider the merits of the request;

c. The application was formally submitted on 1 February 2016 but the Applicant attempted to file it on Saturday 30 January 2016 without success as he experienced technical difficulties which could not be immediately resolved during the week-end. Taking into account 30 January 2016 as the filing date of the application, it was filed timely as the Applicant received a scan copy of the response to his request for management evaluation on 30 October 2015 and an original on 10 November 2015. The time limit started to run from the receipt of the original version of the decision.

25. The Respondent's principal contentions are:

a. The application, which was submitted on 1 February 2016, is not receivable *ratione temporis* as it was filed three days after the expiry of the 90-day statutory time limit;

b. In any event, the application is not receivable because the underlying request for management evaluation was time-barred. The Applicant was notified of the decision not to promote him on 20 October 2014 and, therefore, had until 19 December 2014 to submit a request for management evaluation, which he failed to do;

c. Furthermore, the High Commissioner did not take a new contestable decision on the Applicant's promotion following the Recourse Session as his recourse application was not receivable. Indeed, the Applicant received the documentation submitted to, and considered by, the Panel on 29 October 2014. He submitted his recourse application on 28 November 2014, two days after the 30-day time limit had expired. The Applicant received no indication that the Promotions Secretariat would reconsider its position following the Applicant's email of 12 December 2014. In any event, the Applicant still had an opportunity at that time to challenge his non-promotion in the formal justice system;

d. The Deputy High Commissioner did not waive UNHCR's right to challenge the receivability of the request for management evaluation when informing the Applicant on 1 June 2015 that his request for management evaluation was still under consideration, as it did for several other staff members, nor in considering the merits of the Applicant's request as a matter of courtesy.

Consideration

26. Pursuant to sec. 5.13.1 of the Promotions Policy, staff members may, without prejudice to their right to formally contest the initial non-promotion decision in the internal justice system, seek recourse "on the basis that some documentation relating to the period under review that may have had an impact on the final recommendation was not available at the time of the review". The procedure for seeking recourse is described in sec. 5.13.2, which provides:

Staff members considering recourse shall be provided, upon request to the Panel Secretary within two weeks after the publication of decisions, documentation submitted to, and considered by the Panel. A staff member who chooses to seek recourse shall submit a written and fully documented application for recourse no later than four weeks after receipt of the documentation.

27. Decisions in respect of recourse applications are taken following the procedure set forth in sec. 5.13.3, which provides:

There will be a recourse session following the main promotions session to examine all recourse applications. [...] The minutes and the recommendations of each Panel will be submitted to the High Commissioner for decision. A written explanation of the relevant Panel's determination of the recourse process (the minutes pertaining to each individual staff member's application for recourse) will be provided to the staff member by the Panel's secretariat.

28. As to the internal justice system, staff rule 11.2 provides:

(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. This deadline 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.

29. In turn, an application before the Dispute Tribunal is receivable if, *inter alia*, the applicant has previously submitted the contested administrative decision for management evaluation, and the application is filed “[w]ithin 90 calendar days of the applicant’s receipt of the response by management to his or her submission” (art. 8(1)(d)(i)(a) of the Tribunal’s Statute).

30. Both the Appeals Tribunal and the Dispute Tribunal have stressed the importance of compliance with mandatory statutory deadlines (see, e.g., *Mezoui* 2010-UNAT-043, *Ibrahim* 2010-UNAT-069, *Christensen* 2012-UNAT-218, *Odito-Benito* UNDT/2011/019, *Larkin* UNDT/2011/028).

31. It is also established that art. 8(3) of the Tribunal’s Statute prevents the Tribunal from extending the deadline for filing a request for management evaluation with the Secretary-General (see, e.g., *Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Adjini et al.* 2011-UNAT-108). Consequently, an application before the Dispute Tribunal is not receivable if the underlying request for management evaluation was itself time-barred.

32. In view of the foregoing, the Tribunal has first to consider whether the request for management evaluation was filed in a timely manner, that is, within 60 calendar days from the Applicant’s receipt of the notification of the contested administrative decision. In this respect, the Tribunal stresses that the contested decision in the present case is the High Commissioner’s decision not to promote the Applicant to the P-5 level. The question at issue is whether this decision was notified to the Applicant on 20 October 2014, when the High Commissioner announced, through

his 17 October 2014 memorandum, his initial decision on promotions, or on 3 March 2015, when the High Commissioner announced, through his 2 March 2015 memorandum, his decision on promotions upon recourse.

33. As this tribunal previously held in *Khan* UNDT/2016/005, the right to seek recourse against non-promotion decisions provided for in the Promotions Policy is not mandatory, but optional. Consequently, UNHCR staff members may either challenge immediately a decision on non-promotion through a request for management evaluation, or first submit a recourse application, within four weeks, in which case the deadline to file a request for management evaluation starts from the decision on recourse. If no recourse is sought within the four-week time period, the staff member is deemed to have waived his or her right to seek recourse, and the initial decision on promotion, which becomes final, can only be contested through a request for management evaluation.

34. In the present case, the Applicant received “the documentation submitted to, and considered by, the [...] Panel”, namely his fact sheet, on 29 October 2014, at which time the deadline to submit an application for recourse started to run pursuant to sec. 5.13.2 of the Promotions Policy. This deadline was explicitly mentioned to the Applicant in the email sent by the Promotions Secretariat on 29 October 2014. The fact that the Applicant subsequently sought to receive additional information and documentation as to how his candidacy was considered and questioned the fact that the Panel may have had additional documentation in its possession did not reset the clock or suspend the deadline to submit his recourse application. The Applicant submitted his recourse application on 28 November 2014, which is two days after the four-week deadline set out in sec. 5.13.2 of the Promotions Policy. By that time, his right to seek recourse had elapsed. Consequently, the Applicant’s application for recourse was not considered by the Panel.

35. In view of the circumstances recalled above, the Tribunal finds that the contested decision in the present case is the High Commissioner’s decision of 17 October 2014, which considered the Applicant’s candidacy for promotion at the P-5 level, notified to the Applicant on 20 October 2014. This decision was not subject to any further review or superseded by a new one. Indeed, the decision of 2

March 2015 did not consider the Applicant's recourse application on the merits as it was filed out of time, which left the original decision of 17 October 2014 undisturbed. The Tribunal finds that the decision of 2 March 2015, which rejected the Applicant's recourse application for procedural defect, did not create a new right for the Applicant to challenge the original, substantive, decision not to promote him to the P-5 level and, therefore, cannot be considered for the purpose of art. 8(1)(d)(i)(a) of the Tribunal's Statute.

36. Likewise, the Tribunal finds that the Applicant's filing of a recourse application after the deadline set forth in sec. 5.13.2 of the Promotions Policy had no bearing on the time limit to challenge the initial decision on his promotion, which started to run on 20 October 2014. In this respect, the Tribunal previously held in *Khan* that "the filing of a recourse application that does not comply with the four-week deadline does not suspend the time limit to file a request for management evaluation of the original decision, which the applicant seeks to contest. To find otherwise would allow any staff member to re-open the deadline for management evaluation at any time, simply by filing a late application for recourse."

37. In view of the foregoing, the Tribunal finds that the decision on non-promotion insofar as the Applicant is concerned was notified to him on 20 October 2014 and not subject to any further review. The Applicant's request for management evaluation, submitted on 1 May 2015, was thus time-barred.

38. The Tribunal further finds that the Deputy High Commissioner did not waive the time limit to submit the request for management evaluation by initiating a mediation process to consider the Applicant's request and by considering its merits as a matter of courtesy. As submitted by the Respondent, the consideration of the Applicant's request for management evaluation included that of its receivability. The Deputy High Commissioner explicitly clarified that she considered the Applicant's request, although not receivable, "on an exceptional basis and as a matter of administrative discretion, without waiving UNHCR's right to challenge the receivability of the request for management evaluation at a later stage". The fact that the Deputy High Commissioner mentioned that "the decision on management evaluation resets [the Applicant's] deadline to file an application with the UNDT"

shall not be interpreted as a waiver either. In the context, it clearly meant that the Applicant was not bound by the time limit set forth in art. 8(1)(d)(i)(b) of the Tribunal's Statute, which provides that the deadline to submit an application before the Tribunal starts to run from the expiry of the response period for the management evaluation if no response to the request was provided.

39. Therefore, the application before the Tribunal is irreceivable, *ratione materiae* (*Eggesfield* 2014-UNAT-402).

40. In any event, the application is also irreceivable *ratione temporis* as it was filed four days after the expiry of the 90-day statutory deadline set forth in art. 8(1)(d)(i)(a) of the Tribunal's Statute.

41. The Applicant was notified of the decision on his request for management evaluation on 30 October 2015. In this respect, the Tribunal finds that the sending of a scanned copy of the decision is sufficient to satisfy the requirement of art. 8(1)(d)(i)(a) of the Tribunal's Statute and to trigger the deadline to submit an application before the Tribunal. The fact that an original was later given to the Applicant does not reset the clock.

42. The Applicant filed his application before the Tribunal on 1 February 2016, that is four days after the applicable deadline which expired on 28 January 2016. In this connection, the Applicant alleges that he attempted to submit an application on 30 January 2016 but due to difficulties with his internet connection which could not be resolved during the weekend, he was unsuccessful. The Tribunal notes that on 30 January 2016, the deadline for the Applicant to submit an application with the Tribunal had already elapsed. Furthermore, the Applicant did not adduce any evidence of his attempt to file an application on 30 January 2016 and the Tribunal has no record of such. The first communication with the Geneva Registry was made on 1 February 2016 and did not mention any previous attempt to file an application.

Conclusion

43. In view of the foregoing, the Tribunal REJECTS the application.

(Signed)

Judge Rowan Downing

Dated this 30th day of January 2018

Entered in the Register on this 30th day of January 2018

(Signed)

René M. Vargas M., Registrar, Geneva