



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/020
Judgment No.: UNDT/2020/138
Date: 7 August 2020
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

WENZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Alex Haines

Counsel for Respondent:
Kevin Browning, UNICEF
Matthias Schuster, UNICEF

Introduction

1. On 24 June 2020, the Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”) filed an application contesting the following decisions that she claims took place after she suffered a security incident while on official mission with UNICEF in April 2018:

- a. Failure to maintain a work environment free from sexual harassment and abuse;
- b. Failure to take necessary safety and security arrangements to prevent or adequately respond to gender-related security incidents;
- c. Failure to uphold the highest standard of integrity in regard to the determination of the Applicant’s conditions of employment;
- d. Failure to ensure the effective participation of the Applicant in resolving issues related to staff welfare, including conditions of work, general conditions of life and other human resources policies.

2. On 13 July 2020, the Tribunal granted the Respondent’s motion to have the receivability of the application determined as a preliminary matter.

3. For the reasons stated below, the Tribunal finds that the application is non-receivable both *ratione temporis* and *ratione materiae*.

Relevant procedural history

4. On 20 May 2020, the Tribunal granted the Applicant’s motion for an extension of deadline to file the application until 17 June 2020.

5. On 16 June 2020, the Tribunal granted the Applicant a further extension of deadline until 4.00 p.m. on 24 June 2020 and informed her that no further extensions of deadline would be granted.

6. The Applicant filed her application at 10.40 p.m. New York time on 24 June 2020.

Considerations

Receivability ratione temporis

7. The Respondent claims that despite having been granted two extensions of deadline and despite being represented by counsel, the Applicant failed to file the application within the prescribed deadline by 4.00 p.m. on 24 June 2020, missing the deadline by 6 hours and 40 minutes.

8. The Respondent argues in this regard that the Applicant failed to request an additional extension of time before the prescribed deadline lapsed and did not provide exceptional reasons for the delay.

9. The Applicant responds that the delay in submitting the application was caused by exceptional circumstances. He explains that the Applicant's mental health, which she claims is attributable to the Respondent, made it impossible for her to instruct her counsel. In particular, the Applicant states that she wished to review the application prior to filing and to file it herself. Accordingly, counsel for the Applicant did not have instructions to proceed. Having regard to the professional obligations incumbent upon barristers, counsel was thus not in a position to intervene and file the application by 4.00 p.m. on the day of the deadline.

10. The Applicant further argues that dismissing the application as time-barred would disproportionately impact her right to access to justice. As the delay is of a mere 6 hours and 40 minutes, the Applicant submits that the Respondent suffers no prejudice.

11. Alternatively, the Applicant submits that her mental state was incapacitating. Therefore, as a person making claims on behalf of an incapacitated staff member, counsel had one calendar year to submit the application as per art. 7.2 of the Tribunal's Rules of Procedure.

12. Article 8.3 of the Tribunal's Statute provides that the Tribunal "may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases".

13. The Appeals Tribunal in *Khisa* (2018-UNAT-883) recalled in para. 17 its well settled jurisprudence stating that a request for the waiver of a deadline to the Dispute Tribunal must ordinarily be lodged before the expiration of the deadline. In this case, the Applicant's professional counsel, by his own admission, was well aware that the Applicant would not be able to meet the filing deadline as he encountered difficulties in getting instructions from her. Contrary to his assertion, it was his professional duty to promptly notify the Tribunal and request relief. However, he failed not only to promptly inform the Tribunal of his client's inability to meet the deadline but also to provide any reason for it in the application itself.

14. The Tribunal further recalls the jurisprudence of the Appeals Tribunal that it will strictly enforce the time limits (*Mezoui* 2010-UNAT-043, para. 21), and that the degree of lateness is irrelevant once the deadline has been missed (*Rüger* 2016-UNAT-693, para. 18).

15. Therefore, the Tribunal is not satisfied that the exceptional circumstances prevented the Applicant from timely requesting an additional waiver of the deadline to file the application. Absent exceptional circumstances, the Tribunal is barred from waiving the deadline for the filing of the application.

16. The Tribunal further finds that the Applicant's argument that counsel is in fact representing an incapacitated person under art. 7.2 of the Tribunal's Rules of Procedure and therefore has one calendar year to submit the application is disingenuous. Counsel in this case is not acting in representation of an incapacitated person but rather as legal

representative under art. 12.1 of the Tribunal's Rules of Procedure as reflected in the legal representation authorization form signed by the Applicant on 10 June 2020. Moreover, as counsel himself explains, the Applicant did in fact eventually provide instructions.

17. Finally, the Applicant submits that the Tribunal has discretion to extend a time limit or waive any deadline when the interests of justice so require in reference to art. 35 of the Tribunal's Rules of Procedure. He argues that "Due to ethical and moral integrity of the UN, considering the extent of suffering the applicant has endured because of the horrific act which took place while performing her official duties, a delay of a few hours does not justify the inadmissibility of the applicant's entire case, which articulates years of mistreatment by the Organization. It is in the interest [of] justice for the Applicant's case to be receivable and the time limit ought to be extended".

18. Article 35 of the Tribunal's Rules of Procedure does indeed grant it discretion to modify deadlines in the interest of justice. However, the Applicant disregards the fact that this rule is subject to the conditions of art. 8.3 of the Tribunal's Statute being met, that is, where exceptional circumstances exist. As discussed above, the Applicant has failed to show such exceptional circumstances in this case and the Tribunal is therefore unable to grant a further waiver of the deadline.

Receivability ratione materiae

19. The Respondent submits that the application is not receivable *ratione materiae* on four grounds: a) the Applicant has failed to identify a specific administrative decision taken or omitted that had a direct adverse impact on the Applicant's terms of appointment or contract of employment; b) the Applicant has failed to submit a timely request for management evaluation; and c) the Applicant contests matters that were not raised in her request for management evaluation. The Tribunal will review these challenges in turn.

a. The Applicant failed to identify a specific administrative decision

20. The Respondent argues that the Applicant has failed to identify any specific administrative decision within the meaning of the Staff Regulations and Rules, the Tribunal's Statute, or the jurisprudence of the Tribunal—either in her request for management evaluation or in the application—that has had an adverse impact on the terms and conditions of her appointment. He submits that the Applicant merely expresses her dissatisfaction with the general course of conduct taken by UNICEF.

21. The Tribunal finds that while the articulation of the four categories of alleged implied decisions by the Applicant may indeed seem vague, the Applicant further provides examples of actions by UNICEF officials which in her submission represent the contested implied decisions. The Tribunal is satisfied that these examples provide enough information to identify the challenged decisions if the application had been receivable. Whether these actions or inactions breached the Applicant's rights would have been a matter for a review on the merits, had the application been receivable.

b. The Applicant has failed to submit a timely request for management evaluation

22. The Respondent submits, *inter alia*, that the Applicant failed to timely request management evaluation of the contested implied decisions. He argues that the Applicant knew or should have known at the latest in February 2019, when she met with personnel of the Ethics Office and the Division of Human Resources to raise her concerns about the alleged lack of assistance, that she was dissatisfied with UNICEF's response. However, the Applicant only submitted her request for management evaluation on 20 January 2020, that is, beyond the statutory 60-day deadline.

23. The Respondent states further that the fact that he provided the Applicant with a response to her 20 January 2020 request for management evaluation could not cure her failure to seek timely management evaluation.

24. The Applicant responds that the Respondent is barred from raising the issue of receivability at this stage given that he did not object to the timeliness when he provided his response.

25. The Applicant further submits that while she met with the personnel of the Ethics Office and the Division of Human Resources in early 2019, the exchanges with UNICEF continued thereafter with several UNICEF officials who reassured the Applicant that she would be provided with the required care and support.

26. Further, the Applicant recalls that she entered mediation with UNICEF in November 2019.

27. The Tribunal notes that in the application, the Applicant lists a number of instances which she identifies as implied decisions violating UNICEF's duty of care vis-à-vis the Applicant. These instances range from late 2018 to October 2019, as does the supporting documentary evidence.

28. For instance, with respect to the first allegation that UNICEF breached its obligation to ensure adequate safety and security measures while the Applicant was on official mission, the Applicant refers to an email correspondence with UNICEF's Executive Director and a request for a copy of the incident report, all dating April 2019.

29. With respect to the second allegation that UNICEF failed to provide a work environment free from sexual abuse, the Applicant refers to her hardships when returning to work in May 2018 and UNICEF's alleged inadequate response. She further refers to her repeated appeals to her supervisor to undertake necessary measures in the last quarter of 2018.

30. With respect to her third claim that UNICEF failed to take due consideration of the Applicant's contractual situation, she refers to the meetings she held with the UNICEF's Ethics Adviser and personnel from the Division of Human Resources in February and March 2019.

31. Finally, with respect to her fourth allegation that UNICEF failed to provide social protection, the Applicant does not specify any particular instance of implied decision stating that UNICEF did not discuss the continuation of her employment and withheld information about her entitlements.

32. The Applicant further submits that her performance review of October 2019 failed to account for her personal situation.

33. In light of these submissions, by her own admission, the Applicant was aware between 2018 and October 2019 of UNICEF's alleged implied administrative decisions with which she disagreed.

34. However, despite identifying alleged implied administrative decisions that she deemed in violation of her contractual rights from 2018 to October 2019, and despite numerous exchanges with UNICEF officials in this respect during that period of time, the Applicant did not file her request for management evaluation until 20 January 2020. Therefore, the contested implied administrative decisions identified up to October 2019 were not timely submitted for management evaluation within the statutory 60-day deadline.

35. The Tribunal notes further that the parties both acknowledge that they engaged in mediation in November 2019. However, it does not appear that a waiver of the deadline for requesting management evaluation was subsequently granted in application of staff rule 11.2(d).

36. In light of the above, the Tribunal finds that the Applicant did not submit a request for management evaluation of the implied decisions identified in the application within the statutory 60-day deadline. The application is therefore non-receivable *ratione materiae*.

37. The Applicant's argument that the Respondent is barred from raising the issue of receivability because he did not address it at the management evaluation stage is unpersuasive given that the Tribunal has no jurisdiction to waive deadlines for

management evaluation (see for instance *Roig* 2013-UNAT-368, para. 17). Moreover, the Dispute Tribunal is competent to review its own jurisdiction *proprio motu* (see for instance *O'Neill* 2011-UNAT-182, para. 31). Therefore, whether the Respondent properly addressed this issue at the management evaluation is irrelevant.

c. The Applicant contests matters that were not raised in her request for management evaluation

38. The Respondent, in essence, argues that the alleged administrative decisions identified in the Applicant's request for management evaluation differ from those articulated in the application.

39. The Tribunal reviewed both the request for management evaluation and the application and is satisfied that while articulated differently, both submissions basically refer to the same instances that the Applicant identifies as implied administrative decisions. Whether such courses of action were in breach of the Applicant's contractual rights would have been a matter for review on the merits if the application had been receivable.

Conclusion

40. The application is dismissed as not receivable.

(Signed)

Judge Joelle Adda

Dated this 7th day of August 2020

Entered in the Register on this 7th day of August 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York