



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MKHABELA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Elizabeth Gall, MBS/OLS, UNDP

Introduction

1. The Applicant is a former Coordination Specialist, National Officer, C level, at the United Nations Resident Coordinator Office (“RCO”), United Nations Development Programme (“UNDP”), Mbabane, Eswatini.¹

2. By an application filed on 27 July 2021, she contests the decision by the Resident Coordinator (“RC”) to deviate from the agreed Transition Plan (“TP”) for restructuring the RCO Eswatini.² The application was accompanied by a request to waive the time limit.³

3. The application was served on the Respondent on 11 August 2021 with a deadline to file his reply by 13 September 2021.

4. On 18 August 2021, the Respondent filed a motion in which he requests that the Tribunal should determine the receivability of the application as a preliminary matter pursuant to arts. 9 and 19 of the UNDT Rules of Procedure. In the motion, the Respondent argues that the application is not receivable *ratione temporis* and *ratione materiae*.

5. By Order No. 170 (NBI/2021), the Tribunal directed the Applicant to state whether her intent was to challenge the decision to deviate from the Transition Plan, or the resulting decision on non-extension of her appointment, or both, and to present arguments regarding receivability of the application accordingly. On 26 August 2021, the Applicant clarified that the application was directed against the decision to deviate from the Transition Plan.

¹ Application, section I.

² Application, Section V, Applicant’s response to Order No. 170 (NBI/2021), filed on 26 August 2021.

³ Application, section VII, para. 7.

Facts

6. During the period from 22 April to May 2019, the UNDP Resident Coordinator informed the Applicant about the change in the Eswatini RCO Transition Plan and held discussions with her about the impact it would have upon the position that she encumbered.⁴

7. On 20 October 2019, the Applicant wrote to the RC for an engagement on how to resolve her grievances relating to the changes to the Transition Plan. On 21 October 2019, the RCO replied that since her managerial decision was being challenged, the matter should be elevated to the Management Evaluation Unit.⁵

8. On 29 November 2019, the Resident Representative, UNDP, notified the Applicant of the non-renewal of her appointment effective 31 December 2019.⁶

9. On 30 December 2019, the Applicant requested management evaluation of what she termed as an “irregular change in the Transition Plan”.⁷ On 11 February 2020, the Management Evaluation Unit informed the Applicant that her request was submitted outside the statutory time-frame set out in staff rule 11.2(c), and thus, was time-barred.⁸

Submissions

Respondent’s submissions

10. The Respondent submits that the application is not receivable both *ratione temporis* and *ratione materiae*.

11. With regard to *ratione temporis*, the Respondent submits that the Applicant submitted her management evaluation request on 30 December 2019 and received a response of her request on 11 February 2020. The 90-day time limit to file an

⁴ Application, section V, para. 1, annex 4, annex 9 p.1

⁵ Application, annex 5.

⁶ Application, annex 6.

⁷ Application, annex 7.

⁸ Application, annex 9.

application before the Dispute Tribunal as per art. 8(1)(d)(i) of the Tribunal's Statute expired on 11 May 2020. The Dispute Tribunal received the application on 27 July 2021, one year, two months and 16 days late.

12. The Respondent also invites the Tribunal to reject the Applicant's request for a waiver of the time limit, as she has not demonstrated any exceptional circumstances to justify such a waiver.

13. On the prong of receivability *ratione materiae*, the Respondent advances two arguments.

14. First, the Applicant did not submit her management evaluation request within 60 days of notification of the contested decision as she was required to do under staff rule 11.2(c). The Applicant admits that she became aware of the change to the Transition Plan on 5 May 2019, following which she arranged a meeting with the RC to discuss the matter later in May 2019. Taking 31 May 2019 as the date of notification, the Applicant was required to submit her management evaluation request on 30 July 2019. She submitted her request on 30 December 2019, five months late. Even assuming that the date of notification was when the RC specifically advised her to submit a management evaluation request on 21 October 2019, the Applicant also missed the 60-day delay.

15. Second, the Applicant does not challenge an administrative decision under art. 2(1)(a) of the UNDT Statute. The contested decision is a decision about the posts to be established in the new structure of the RCO Eswatini, in particular to the RC's alleged deviation from the Transition Plan. This decision did not have any direct impact upon the Applicant's fixed-term appointment. Whereas the Applicant has reiterated that she does not contest the decision not to renew her appointment which was communicated to her by letter dated 29 November 2019.

Applicant's submissions

16. The Applicant maintains that her application is receivable. The Respondent's argument pertains to form rather than the substance of the dispute. The Applicant contends that the Respondent will suffer no prejudice if the matter is heard on its merits.

17. While admitting that she did not file her application on time, the Applicant submits that there are exceptional circumstances in her case. She documents that she contracted the Covid-19 virus and maintains that she was in isolation for "some time". Further, as a result of the manner in which she was separated from her employment, she suffered deep depression for months. The two being the main reasons why she could not file her application on time.⁹

18. Accordingly, the Applicant requests the Tribunal not to grant the Respondent's motion to have receivability determined as a preliminary matter.

Considerations

19. The Tribunal advises the Applicant that in the recourse to the internal formal justice system, a degree of formality is to be expected, and complied with, in the process. As a preliminary matter, the Tribunal is competent to adjudicate the merits only where the receivability requirement is satisfied. It is, accordingly, competent to consider a receivability issue on its own initiative, whether or not it has been raised by the parties.¹⁰ Moreover, receivability is determined by strict rules, in the application of which the Dispute Tribunal exercises no discretion, among them the requirement that the decision have direct impact on an applicant's terms of employment and the requirement of a timely request for management evaluation. It is only where the strict requirements are fulfilled that it would be open to the Tribunal to entertain a question of waiver of the time limit for the application. These requirements are not fulfilled in the present case.

20. The Tribunal agrees with the Respondent that the application is not receivable

⁹ Applicant's response to Order No. 170 (NBI/2021), filed on 26 August 2021, para. 7.

¹⁰ E.g., *O'Neill* 2011-UNAT-182, para. 31.

ratione materiae. It is firmly established in the jurisprudence that applications against decisions having no direct impact on the applicant's terms of employment are not receivable; among them, various decisions on restructuring and reorganization leading to abolishment of post are considered prefatory acts, the validity of which could only be challenged before the Tribunals in the context of an application against a non-renewal of appointment.¹¹ The impugned decision to depart from the terms of the Transition Plan constituted such a prefatory act; as such, the application is not receivable.

21. The Tribunal also agrees with the Respondent that the application is not receivable *ratione temporis*. It is recalled that, pursuant to staff rule 11.2(c), a staff member wishing to contest an administrative decision before the Dispute Tribunal must submit the contested decision for management evaluation within a deadline of 60 days from the notification. For reasons stated by the Respondent and reproduced in paragraph 14 above, the Applicant's request for management evaluation was late by 5 months. The Tribunal is not competent to extend or waive deadlines pertinent to the administrative stage of the proceedings.¹²

JUDGMENT

22. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 2nd day of September 2021

¹¹ See *Lee* 2014-UNAT-481; *Loeber* 2018-UNAT-844.

¹² *Rosana* 2012-UNAT-273.

Entered in the Register on this 2nd day of September 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi