



Before: Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Yun Hwa Ko, UNFPA

Introduction

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”) serving as Representative at the UNFPA Oman Country Office (“CO Oman”) within the Arab States Regional Office (“ASRO”) at the P-5 level.

Procedural History

2. On 27 August 2021, the Applicant filed an application before the Tribunal to challenge the decision of the Director, Division for Human Resources (“DHR”) to designate the Deputy Regional Director (“DRD”), Arab State Regional Office (“ASRO”), as his supervisor for the 2021 performance appraisal. This application was registered as UNDT/NBI/2021/074.

3. The Respondent filed his reply on 28 September 2021, contesting the receivability of the application both *ratione materiae* and *ratione temporis*.

4. On 24 January 2022, the Applicant was invited to file a rejoinder limited to the issue of receivability by 31 January 2022.

5. On 31 January 2022, the Applicant filed a motion “for extension of time to comply” with the order to file rejoinder. In substance, the Applicant is seeking a stay of proceedings until 30 July 2022.

6. On 1 February 2022, the Tribunal issued Order No. 009 (NBI/2022) refusing the motion for suspension of proceedings. The Tribunal however extended the deadline for the filing of his submissions on receivability.

7. On 21 February 2022, the Applicant filed another motion for stay of proceedings on grounds identical to that of his previous motion for extension of time/suspension of proceedings.

8. This Judgment will address the Applicant’s second motion for suspension of proceedings and the receivability issues raised by the Respondent.

Considerations

The Applicant's Second Motion for Suspension of Proceedings

9. The Tribunal carefully considered the Applicant's second motion for a stay of proceedings. The Applicant's *ex parte* filing of his medical reports was given due regard.

10. At the outset, the Tribunal notes that the Applicant's motion was essentially a reiteration of his previously filed and dismissed motion.

11. In Order No. 009 (NBI/2022), the Tribunal stated that it was not required to seek the Applicant's response to the Respondent's submissions on receivability; and that, indeed, the Tribunal can properly rule on its jurisdiction *proprio motu* and following its own inquiry, with or without hearing the parties' submissions on whether the application is receivable.

12. This principle was also underscored in *Cherneva* UNDT/2021/101, where the Court held thus:

[t]he Tribunal has the competence to review an application's receivability even if the parties do not raise the issue because "it constitutes a matter of law and the Statute prevents the [Tribunal] from receiving a case which is actually non-receivable" (see *Christensen* 2013-UNAT-335, para. 21).

13. The Tribunal is aware of the Applicant's health conditions, which however - also considering time and effort expounded by the Applicant on every motion for extension of time - cannot be considered serious to the extent of preventing him to file brief submissions on the receivability issue.

14. The Tribunal finds that there are no grounds for it to revise or reconsider its previous ruling on the matter. The Applicant's motion is refused, and the Tribunal will proceed to rule on the receivability of this case.

Receivability

15. In this application, the Applicant impugns the decision of the DHR to designate the DRD/ASRO, as the Applicant's supervisor to assess his performance in 2021. In particular, he complains about the conflict of interest of the DRD, for the simple fact that she directly reports to the Regional Director ("RD") (whom the Applicant is litigating against), and therefore is vulnerable to the RD's even indirect influence. He asked the Administration to allow the Deputy Executive Director (Programs) to assume supervision, as allowed in the previous year.

16. The challenged decision constitutes the foundation of the final decision on the Applicant's Performance Appraisal and Development ("PAD"); it immediately, although indirectly, impacts the harmonious and trustful disposition to work by the Applicant.

17. The Respondent alleges - without giving evidence on it - that the RD's supervision of the DRD does not include and will specifically exclude the DRD's supervision of the Applicant's performance, but the Tribunal understands the Applicant's concerns that the situation in any case could impact the serenity of the Applicant at work.

18. The application is therefore receivable *ratione materiae*.

19. The Respondent submits that this application is time-barred because the impugned decision was clearly, but verbally, communicated to the Applicant on 15 February 2021, and the Applicant acknowledged that that decision had been made in an email to the Director of Human Resources on 17 February 2021.

20. The Applicant submits that the impugned decision was made on 16 April 2021 and communicated to him on 17 April 2021.

21. It is the Respondent's case on receivability that the communication in April was a reiteration of a decision made in February, which the Applicant is acknowledged to have understood.

22. The date of a contested administrative decision is based on objective elements that both parties can accurately determine.¹

23. Staff rule 11.2(c) does not explicitly require a written notification as a prerequisite to contest an administrative decision, if the verbal communication of the decision was not an informal or casual communication, if its content is not disputed, and if it was communicated in a clear and unambiguous way with sufficient gravitas, a verbal communication can be considered as a notification of a decision.²

24. The reiteration of an original administrative decision, even if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines.³

25. On the facts before it, the Tribunal is satisfied that the verbal decision conveyed to the Applicant was “clear and unambiguous” enough to have met the test laid down by the Appeals Tribunal in *Auda*. The Applicant’s repeated emails to the Respondent to express his disagreement with the impugned decision is evidence of the clarity of the decision. Time began to run from the date the decision was conveyed to him unambiguously.

Order

26. UNDT/NBI/2021/074 is dismissed as not receivable *ratione temporis*.

¹ *Rosana* 2012-UNAT-273.

² *See Auda* 2017-UNAT-746.

³ *Sethia* 2010-UNAT-079.

Case No. UNDT/NBI/2021/074

Judgment No. UNDT/2022/019

(Signed)

Francesco Buffa

Dated this 28th day of February 2022

Entered in the Register on this 28th day of February 2022

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi