



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

FIALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON RECEIVABILITY

Counsel for applicant:
George G. Irving

Counsel for respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By an application dated 1 April 2010, the Applicant, a staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), is contesting the decision not to revise her recruitment level from FS-4 to FS-5 with effect from 1 June 2006 when she was appointed to MONUC.

2. By a reply dated 6 May 2010, the Respondent requested that the application be dismissed for the following reasons:

- a. The 2009 review was not an administrative decision but rather a confirmation that the decision to recruit the Applicant at the FS-4 level in 2006 was correct. Since the decision was taken in 2006 and not in 2009, the current appeal is time-barred. The Applicant cannot seek reconsideration of a decision taken almost 4 years ago;
- b. The Applicant cannot seek a waiver of the time limit in this case as it was established in *Costa v. Secretary-General*¹ that the Tribunal does not have the power to waive the time limits for requests for administrative review.
- c. Even if the 2009 review is appealable, the Applicant failed to bring her application within the time limits specified under Article 8(1)(d)(i) of the Statute of the United Nations Dispute Tribunal (UNDT Statute). Following the management evaluation decision, she had until 1 March 2010 to bring her application but she failed to do so.

3. By Order No. 73 dated 7 May 2010, the parties were invited to inform the Tribunal if they were prepared to consider a mediated settlement. As the Respondent did not consider that mediation was a viable option for resolution of this matter, a

¹ UNDT Judgment No. 2009/51.

preliminary hearing was held on 27 May 2010 pursuant to Order No. 73. The Applicant, her representative, and the Respondent's representative were present at the hearing via audio link.

4. At the preliminary hearing, and in a subsequent filing dated 10 June 2010, the Applicant submitted that her application is receivable. She clarified that she is appealing the 2009 decision of the Field Personnel Division/Department of Field Support (FPD/DFS) that she was properly recruited at the FS-4 level in 2006. Additionally, the Applicant submitted that she filed her application in a timely manner since, due to her sick leave, she was granted an extension to 1 April 2010 by the Tribunal, which she complied with.

5. At the preliminary hearing, and in a subsequent filing dated 24 June 2010, the Respondent maintained his position that the application is not receivable.

Considerations

6. The primary issue for determination is whether the Applicant's application of 1 April 2010 is receivable. To reach a determination on receivability, it will be necessary for the Tribunal to look at the following core issues:

Is the 2009 decision, upon which the current application is based, an appealable administrative decision under Article 2.1 (a) of the UNDT Statute.

7. The Applicant submits that she is appealing the 2009 decision of FPD/DFS that she was properly recruited at the FS-4 level in 2006.

8. The Respondent submits that the 2009 review was not an administrative decision but rather a confirmation that the decision to recruit the Applicant at the FS-4 level in 2006 was correct. Thus, since the decision was taken in 2006 and not in 2009, the current appeal is time-barred.

9. Article 2(1)(a) of the UNDT Statute provides that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual:

To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

10. In *Teferra*², the Tribunal stated that, “[g]iven the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken”. This view is endorsed in the current case.

11. The Applicant, by a memorandum dated 15 April 2007, requested a revision/correction of her entry level. This was within a year of her recruitment to MONUC on 1 June 2006. She received a response from FPD/DFS on 28 September 2007 stating that she had been properly recruited at the FS-4 level. She did not appeal this decision but rather made a concerted effort to retrieve archival records relating to her recruitment as she, and the MONUC officials involved in her recruitment, felt the decision had been based on a fundamental administrative error. As a result of these efforts, it appears that the Applicant was able to locate new evidence to substantiate her claim of an administrative error.

12. By a facsimile dated 22 February 2009, the Director of Mission Support (DMS), MONUC, requested that FPD/DFS re-open the matter based on the fact that

² UNDT Judgment No. 2009/090.

new evidence had been obtained by the Applicant indicating that there may have been an administrative error in her recruitment. The Tribunal notes that the record contains an unsigned facsimile dated 27 February 2009 from FPD/DFS to the DMS/MONUC stating that after a careful review of the relevant recruitment material, FPD could not grant the Applicant's request as she had been properly recruited at the FS-4 level. Based on a 4 September 2009 memorandum from the Management Evaluation Unit (MEU) to FPD/DFS, it appears that this 27 February 2009 facsimile was never received by MONUC.

13. According to the Applicant, while MONUC was pursuing her case with FPD/DFS in 2009, she authorized the former Panel of Counsel to raise the matter with the Chief of Operations of FPD/DFS, which resulted in four months of silence. By an email dated 29 June 2009, a representative from the Panel of Counsel informed her that FPD/DFS had confirmed that it was not in a position to revise her recruitment level as she had, in fact, been interviewed and selected for an FS-4 position in 2006.

14. Based on the chronology of events in this case, which have been set out in paragraphs 10 -12 above, the Tribunal considers that FPD/DFS' decision, which was communicated to the Applicant by the Panel of Counsel on 29 June 2009, is not merely a confirmation of the 2006 decision as the Respondent avers. It is a new administrative decision in its own right due to the fact that FPD/DFS had been requested by MONUC to review its 2006 decision in light of new evidence that had been discovered by the Applicant. In other words, the 2009 decision was based on facts that were wholly different from the facts used to make the determination in the 2006 decision. Thus, the decision that was communicated on 29 June 2009 is an appealable administrative decision under Article 2(1)(a) of the UNDT Statute.

Is the Applicant's claim relating to the 2009 decision time-barred?

15. The Respondent submits that even if the 2009 review is appealable, the Applicant failed to bring her application within the time limits specified under Article 8(1)(d)(i) of the UNDT Statute.

16. Pursuant to Article 8(1)(d)(1), in cases where a management evaluation of the contested decision is required, an application shall be **receivable** if filed within 90 calendar days of the applicant's receipt of the response by management to his or her submission.

17. The Applicant requested management evaluation of the 29 June 2009 decision on 29 August 2009. The Management Evaluation Unit responded to her request on 30 November 2009. Thus, pursuant to the provisions of to Article 8(1)(d)(1), she had until 28 February 2010 to submit an application to the UNDT.

18. By an application dated 26 February 2010, the Applicant requested an extension of the time limit within which to file her application due to illness. By Order No. 45, dated 18 March 2010, she was instructed to submit, by 23 March 2010, a medical certificate or report in support of her request for an extension of the time limit.

19. The Applicant complied with Order No. 45 on 18 March 2010.

20. Pursuant to Article 8(3) of the UNDT Statute³, on 19 March 2010, the Tribunal, in Order No. 048, granted the Applicant an extension to 1 April 2010 to file her application. On 1 April 2010, she filed her application, which was subsequently served on the Respondent on 6 April 2010.

³ This provision states, "The Dispute 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. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation."

21. In view of the above, the Applicant did file her application on time. Her claim relating to the 2009 decision is therefore not time-barred.

22. In view of the decision of the foregoing, a discussion of the applicability and/or relevance of *Costa v. Secretary-General* is not necessary.

Conclusions

23. In light of the considerations above, the Tribunal concludes that the current application is receivable. Accordingly, for the fair and expeditious management of this case it is **hereby ordered that** on or before 30 August 2010 the Parties shall:

- a. Inform the Tribunal whether they intend to submit supplementary documents, in addition to that already filed, indicating the relevance of this evidence for the Tribunal's consideration.
- b. Inform the Tribunal whether they consider that this case is suitable for consideration on the documents or whether they consider that an oral hearing is necessary.
- c. Submit to the Tribunal a joint/agreed statement, of no more than three (3) pages, identifying precisely the relevant facts, the legal issues to be determined by the Tribunal and the remedies being sought. In the event that the parties are unable to agree on a joint statement, they are to submit separate statements instead.

24. Upon the Parties' compliance with the orders given above, the Tribunal will provide additional directions in relation to the conduct of this case.

(Signed)

Judge Vinod Boolell

Dated this 20th day of July 2010

Entered in the Register on this 20th day of July 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi