
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/008

Judgment No.: UNDT/2016/110

Date: 16 August 2016

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

NIKWIGIZE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Introduction

1. On 12 March 2016, the Applicant, a former Senior Prog

Facts and procedural history

3. By memorandum dated 25 August 2015, it was alleged that the Applicant had engaged in misconduct by submitting to the Organization in or about 2011 and 2012, one or more education grant claims and/or related documentation that contained false, misleading, inaccurate and/or incorrect information, signatures and/or stamps.

4. By memorandum dated 25 September 2015, the Applicant submitted his comments on the allegations of misconduct stating, *inter alia*, that:

í The OIOS report has assessed thoroughly the various submissions for education grant claims. [The Applicant] accepts that the P-41 Form submitted for [JN] for 2010-2011 was false as well as the one submitted for [K and K] for the first term 2011-2012 í õ.

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to Johannesburg on 3 February 2016 and arrived the following day.
[í]

í It took [him] more than one month to settle in Johannesburg and be connected to internet. Immediately, [he] started preparing the Application that [he] submitted to UNDT on 12 March 2016.

í For all these reasons, [he] maintain[s] [his] appeal to accept [his] request to waive the 90 daysø requirement.

15. On 13 June 2016, as per Order No. 124 (NY/2016), the Respondent filed his response in which he contended that for no õpersuasive reasonsö, the application was filed õpatently out of timeö and that his alleged late filing should be deemed time-barred.

16. By Order No. 150 (NY/2106) dated 23 June 2016, the Tribunal ordered the parties to file any closing submissions on the issue of receivability by 22 July 2016. On 18 July 2016, the Respondent filed his closing statement. The Applicant did not file a closing statement.

17. The Respondentø principal contentions may be summarized as follows:

a. Staff Rule 11.2(b) provides that õ[a] staff member wishing to formally contest [í] a decision taken at Headquarters in New York to impose a disciplinary [í] measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluationö;

b. Article 8.1(d)(ii) of the Statute of the Dispute Tribunal provides that, in cases where a management evaluation of the contested decision is not required, an application shall be receivable if it is filed õwithin 90 calendar days of the applicantø receipt of the administrative decisionö. Similarly, art. 7.1(c) of the Tribunalø Rules of Procedure states that applications shall be filed within õ90 calendar days of the receipt by the applicant of the

participated in a different case before the Tribunal (Case No. UNDT/NY/2015/025), including by filing a closing submission on 22 January 2016. The fact that the Applicant was able to file a submission to the Tribunal (albeit in a different case) during the filing window for contesting his dismissal would appear to preclude an argument that it was impossible for him to comply with the time limits in the instant case.

on receivability

18. The Applicant's principal contentions may be summarized as follows:
 - a. On 3 June 2015, the Applicant filed a complaint to the Assistant-Secretary-General for Human Resources Management (ASG/OHRM) requesting a review and an investigation for racial discrimination incidents in the OHRLLS since 2012. Only 6 months later, on 18 December 2015, the Applicant received a response from the ASG/OHRM which, according to the Applicant, did not address the key issues raised in the complaint. On 16 February 2016, the Applicant submitted the same complaint to the Management Evaluation Unit for review and investigation. The Applicant received a response on 8 March 2016 in which the decision of the ASG/OHRM not to investigate on the matter was confirmed;
 - b. The Applicant's dismissal did not abide to Staff Rules on the dismissal of a staff member as not all processes leading to formal dismissal, including discussions on the OIOS findings, informal resolution of the incidents, including through mediation, further review of the disciplinary action by the Management Evaluation Unit, and possibly, request the assistance of the Staff Association, had been exhausted;
 - c. In the context of staff rule 11.2(b), the Respondent misinterpreted the concept of a staff member not being required to request a management

evaluation, which means that the staff member against whom a disciplinary action is taken is not obliged to abide by the procedures of management evaluation or informal resolution. However

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

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5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not

27. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a) and (b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment (art. 2.1 of the Statute) and TBT500053004F>304953004F>304953004F>304((59/F1 12 Tf1 0 0 1 395.4F>33n1048

30. The Applicant is challenging the decision to dismiss him from service which according to staff rules 9.6 and 10.2(a)(ix) is a disciplinary measure. Furthermore, according to staff rule 10.3(c), a staff member against whom disciplinary or non-disciplinary measures pursuant to art. 10.2 have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the

only filed after the expiration of the statutory time limit to file an application 29 February 2016, but was filed almost a month after the filing of the application on the merits.

34. In *Thiam* 2011-UNAT-144, para 18, which is applicable *mutatis mutandis* to the present case, the Appeals Tribunal decided that:

This Court can exercise its discretion under Article 7 of the [Appeals Tribunal's] Statute upon written application for suspension, waiver, or extension of time limit by an appellant *prior* to the filing of an appeal.

35. Moreover, after reviewing the reasons provided by the Applicant, the Tribunal considers that they do not represent exceptional circumstances to justify the delay in filing the application for the following reasons:

a. An appeal against a disciplinary decision can be filed directly before the Dispute Tribunal any time after receiving the notification of the decision and until the expiration of the mandatory deadline of 90 days from the day of notification. The disciplinary decision of dismissal was communicated to him on 30 November 2015, and none of the subsequent correspondence and/or other filings before the MEU or OHRM in anyway modified this decision and thereby gave rise to a new decision. The management evaluation request filed

any exceptional circumstances beyond his control prevented him from filing a motion to request a waiver/suspension of the deadline to file the application on the merits and/or the appeal against the dismissal. Moreover, there is no evidence to support the Applicant's allegations that "the settlement in South Africa was not easy and the access to information and technology was only possible on 11 March 2016". Furthermore, Practice Direction No. 5 of the Dispute Tribunal, sec. 11, allows parties, if electronic means are not available, to file submissions by post (or by hand, if relevant). The Applicant provided no evidence that he was impeded from forwarding the motion and/or application by post.

36. The Tribunal concludes that the motion to waive the deadline for filing the application was to be filed on or before 29 February 2016, notably the expiration of the deadline, and there were no exceptional circumstances to justify the delay in filing both the motion and the application. The 90-day time limit for staff members or former staff members to submit an application after the notification of a disciplinary measure is sufficiently long to allow them to address any factual and/or legal issues. (see *Czaran* UNDT/2012/133, upheld by the Appeals Tribunal in *Czaran* 2013-UNAT-373). Furthermore, even if the Applicant absolutely required more than 90 days to submitting his application, he could and should have diligently applied for an extension of time to file the application either before his departure from New York or before the e

38. Consequently, in the light of the above,