UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/094
Judgment No.: UNDT/2018/047
Date: 4 April 2018
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KHISA

v.

Introduction

1. The Applicant is a former staff member of the United Nations Mission in South Sudan ("UNMISS"). She filed the current application on 17 October 2017, with the United Nations Dispute Tribunal (UNDT/the Tribunal), challenging the decision of the Under-Secretary-General for Management ("USG/DM") to impose on her the disciplinary measure of separation from service with compensation and the recovery of 2,822.37 South Sudanese Pounds from her final entitlements.

2. The Respondent filed a motion for summary judgment and reply on 27 October 2017 in which he asserts that the application is not receivable and should be rejected by the Tribunal.

3. By Order No. 022 (NBI/2018), dated 6 March 2018, the Tribunal instructed the Applicant to file a response to the Respondent's motion for summary judgment by 27 March 2018.

4. On 25 March 2018, the Applicant filed a motion for a waiver on receivability.

Facts

5. The Applicant entered service with the Organization on 4 November 2006. She was serving as an Associate Child Protection Officer at the time of her separation from service in December 2016.

6. On 20 March 2015, the Office of Internal Oversight Services (OIOS) received a report of possible misconduct implicating the Applicant and another UNMISS staff member.

7. After an investigation, OIOS concluded in a report dated 16 June 2016 that the established facts constitu(a)3( )-10(r)-7(e)346g-350(f)12(i) 20 frou150(po)-20(2016)-10(t)-2(o)- c

8. By a memorandum dated 7 October 2016, OHRM informed the Applicant of the allegations of misconduct against her and gave her two weeks within which to submit a response to the allegations. The Applicant submitted her comments on 25 October 2016.

9. On 20 December 2016, the Applicant signed an acknowledgment of receipt of a letter dated 15 December 2016 from the Officer-in-Charge of the Office of Human Resources Management, Mr. Victor Kisob. The letter informed the Applicant that the USG/DM, on behalf of the Secretary-General, had decided to separate her from service with compensation in lieu of notice and without termination indemnity and to recover of 2,822.37 South Sudanese Pounds from her final entitlements.

10. The Applicant was subsequently separated from service in December 2016 and on 17 October 2017, she filed the current application contesting the decision she received on 20 December 2016.

Respondent's case

11. The Respondent's case is that the application is not receivable because:

a. The Applicant filed it ten months after she was informed of the contested administrative decision on 20 December 2016. She failed to comply with the mandatory 90-day limit set by art. 8.1(d)(ii) of the UNDT Statute.

b. Additionally, the Applicant failed to request a suspension or waiver of the time limit prior to its expiration. Relying on *Thiam* 2011-UNAT-144, the Respondent submits that a request to suspend or waive the time limit to file an appeal must be made before the deadline to file an appeal lapses. Additionally, relying on *Nikwigize* 2017-UNAT-731, the Respondent submits that the

c.

c. It is not good managerial practice for the United Nations to cover itself with the "cloak" of non receivability in the face of allegations that "border on human rights violations against staff members".

Considerations

14. The only question before the Tribunal in this judgment is the receivability of the current application due entirely to the Applicant's failure to file it within the applicable time limits.

15. Regarding the general requirement that a staff member who wishes to contest an administrative decision must first submit a request for review to the relevant management evaluation unit, the fact that a disciplinary measure was imposed on the Applicant meant that she was not required to first request management evaluation before coming to the Tribunal.

16. Staff rule 11.2(b) provides that a staff member contesting an administrative decision taken pursuant to advice obtained from technical bodies or to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 is not required to request management evaluation.

17. Even so, there are time limits for bringing applications before the Tribunal. Pursuant to art. 8.1(d)(ii), an application shall be receivable by the Dispute Tribunal if the applicant files his/her application within 90 calendar days of receipt of the administrative decision where no management evaluation of the contested decision is required.

18. While the Applicant was not required to request management evaluation before filing this application, she was, however, required to file her application with UNDT within 90 calendar days of receiving the contested decision.

19. Having received the contested decision on 20 December 2016, she was required to file her application by 20 March 2017. The Applicant submits that although the 90 days elapsed before she filed her UNDT application, she is still seeking a review of the contested decision because there were exceptional circumstances that prevented her from complying with the requirements of art.

8.1(d)(ii). Her submission on the exceptional circumstances have been set out at paragraph 12 above.

20. Can the Tribunal suspend or waive the deadline set out in art. 8.1(d)(ii) of the UNDT Statute as requested by the Applicant in her 25 March motion?

21. Article 8.3 of the UNDT Statute 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.

22. Article 7.5 of the UNDT Rules of Procedure states:

> 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

application or appeal. Thus, the UNDT erred when it appeared to suggest that a waiver could be requested "as part of the belated application" (*emphasis added*).

26. In other words, an applicant is required to file a motion or application for suspension, waiver, or extension of time limit before he/she files a substantive application with the Dispute Tribunal. He/she cannot file the motion for suspension, waiver, or extension of time limit as part of his/her substantive application or afterwards.

27. The Appeals Tribunal has consistently held that the Dispute Tribunal must "recognize, respect and abide by" the jurisprudence of the Appeals Tribunal because the principle of stare decisis creates foreseeable and predictable results within the internal justice system.[2] In light of the foregoing, this Tribunal is bound to apply the Appeals Tribunal's pronouncements in *Thiam* and *Nikwigize* strictly.

28. The Applicant's 25 March 2018 motion for waiver fails to comply with the stringent requirement pronounced by the Appeal's Tribunal in *Thiam* because it was not filed prior to the filing of her substantive application but more than five months after the fact. Additionally, the Applicant's passing mention of receivability in her 17 October 2017 application cannot be construed as a motion for waiver because it contravenes the ruling in *Nikwigize*.

29. While the Applicant pleads that her long stay in hospital over pregnancy-related problems amounted to exceptional circumstances, she admits that she received the letter of 15 December 2016 imposing disciplinary sanction on her on 20 December 2016.

30. Even though there is evidence that the Applicant was admitted in hospital on 2 January 2017, she was discharged on 29 May 2017. She brought this application only on 17 October 2017 – nearly five months after her discharge from hospital. Clearly, the Applicant cannot avail herself of the plea of exceptional circumstances for her failure to bring her application within time.

[2] *Igbinedion* 2014-UNAT-410; *Hepworth* 2015-UNAT-503.

31. The Appeals Tribunal has consistently and strictly enforced the time limits for filing applications and appeals simply because strict adherence to filing deadlines assures the timely hearing of cases and rendering of judgments.[3]

Judgment

32. The Application is not receivable and is accordingly dismissed in its entirety.

(Signed)
Judge Nkemdilim Izuako

Dated this 4th day of April 2018

Entered in the Register on this 4th day of April 2018

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi

[3] *Mezoui* 2010-UNAT-043; *Kissila* 2014-UNAT-470.