



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/087

Judgment No.: UNDT/2014/041

Date: 15 April 2014

Original: English

Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kweku-Berko

vs. SCHULENBERG

v.

SECRETARY GENERAL
OF THE UNITED NATIONS

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Introduction

1. The Applicant was appointed Executive Representative of the Secretary General (ERSG) to the United Nations Integrated Peacebuilding Office (UNIPSIL) in Freetown, Sierra Leone, at the Assistant Secretary-General level in 2008.

2. The Applicant had three applications before this Tribunal relating to matters that arose during and at the end of his employment as ERSG/UNIPSIL.

3. The first, UNDT/NBI/2013/014, was filed on 15 April 2013. It contested the decision to close a complaint made against the Applicant after an investigation, and the decision to terminate or not extend his contract as ERSG/UNIPSIL. This application was judged to be not receivable in *von der Schulenberg* UNDT/2013/178 on the grounds that the challenge to the expiry/termination of his contract was out of time and the Applicant had not submitted a timely request for management evaluation of the decision to review or investigate the complaint against him.

4. The second Application, UNDT/NBI/2013/058, was filed on 15 August 2013 and replied to by the Respondent on 19 September 2013. It remains under consideration by the Tribunal.

5. This Judgment concerns the preliminary question of receivability of the Applicant's third Application filed on 29 November 2013.

The Pleadings

6. In this application, , the Applicant stated that the contested decisions were the "extraneous considerations, governmental pressures, fallacious arguments and ill-motivation governing SG Ban Ki-Moon's decisions, in 2012, not to select, not to extend, not to renew, not to reassign, not to re-appoint the Applicant in the expected UN senior position."

7. The Respondent submits that “the Application is not receivable, it is in part *res judicata* and it is without merit”

8. On 5 March 2014, the Tribunal issued Order No. 040 (NBI/2014) directing the Applicant “to respond to the Respondent’s claim that this application is not receivable”. The Tribunal added that the Applicant’s response “must, *inter alia*, identify by date and subject each of the contested decisions he alleges was governed by extraneous factors”.

9. On 14 March 2014, the Applicant responded to Order No. 40 (NBI/2014) by filing what he termed an “Expos É of Particulars Pursuant to Order No 40(NBI/2014)”.

10. He submits that this case is appointment related. It concerned the Secretary-General’s 2012 “undated and unwritten decision” rejecting the Applicant’s candidature for the position of Special Representative of the Secretary-General (SRSG) to the United Nations Support Mission in Libya (UNSMIL) and his reliance on extraneous considerations and political motives foreign to the interests of the United Nations. The Applicant also provided alleged reasons for the non-extension of his contract as ERSG/UNIPSIL before making specific allegations in relation to the appointment process for the SRSG/UNSMIL vacancy.

11. The Applicant alleges that the selection process and decision making for the SRSG post in Libya was tainted in that it was influenced by a Department of Field Support (DFS)/Office of Internal Oversight Services (OIOS) fact-finding report dated 5 June 2012 of which he was not aware. The Applicant further submits that there was impropriety in the selection exercise as a member of the selection panel had a conflict of interest; and that he should have been given priority consideration given that he was already in the service of the United Nations.

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19. A decision not to select a candidate for a post is an administrative decision within the jurisdiction of the Tribunal. On this ground the application is receivable.¹

ii. Res Judicata

20. The Tribunal finds that the Application is not *res judicata*

September 2013 when the Respondent filed his reply in Case No. UNDT/NBI/2013/058.

30. The Respondent's Reply makes no mention of the Applicant having been properly notified of the decision following the appointment, nor is there evidence of such notification in the Respondent's exhibits.

31. The Tribunal has therefore had to examine the record as a whole to determine when the Applicant first had knowledge of the decision not to appoint him.

32. The Applicant's two previous applications both specifically refer to the selection for the Libya post:

(i) In his Reply in Case No. UNDT/NBI/2013/014 on 22 May 2013, the Respondent responded to the allegations about the termination or non-renewal of the Applicant's appointment as ERSG/UNIPSIL and stated:

The Applicant was considered for another senior position at the USG level later in 2012. He was short listed for the position of SRSG for Libya and interviewed on August 2012. Following the interviews, the Applicant was recommended as the third-ranked candidate.

(ii) In his Reply to Case No. UNDT/NBI/2013/058, on 19 September 2013, the Respondent stated:

In a meeting with the Applicant held in March 2012, the Secretary General mentioned t

40. The Application is not receivable.

(signed)

Judge Coral Shaw

Dated this 15th day of April 2014

Entered in the Register on this 15th day of April 2014

(signed)

Abena Kwakye-Berko, Registrar, UNDT Nairobi