

RULING OF THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

MAY 2012

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

CSAT APL//16(No.2)

IN THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

IN THE MATTER OF:

M O  
Applicant

and

THE COMMONWEALTH SECRETARIAT  
Respondent

Before Mr Christopher Jeans Q.C., President

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RULING ON PROCEDURAL ISSUE

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INTRODUCTION

1. On 26th August 2011, the Tribunal (comprising Justice Mehra, Justice Ukeje and myself as President) issued a judgment in this matter.

2. On 25th October 2011, the Tribunal received by e-mail and faximile from the Applicant's representatives, Denning solicitors, a document headed, in bold typescript,

**"Application for the review of the Tribunal's determination dated 26th August 2011"**

The document sets out grounds for review in seven numbered paragraphs. It was not manually signed but bore in bold typescript at the foot the words

**"Denning Solicitors**

**For the Applicant"**

The document was also undated. It was however received with an unsigned letter from Denning Solicitors dated 28th July 2011. The letter stated:

**"...please find enclosed an application for the review of the Tribunal's determination dated 26th August 2011"** .

The date on the letter (28th July 2011) was obviously an error since that date pre-dates the judgment.

3. A hard copy of the purported application for review (as I will call it for want of a neutral expression) was received and stamped by the Tribunal on 26th October 2011.
4. The validity of the purported application for review has been questioned.
5. On 15th November 2011 I gave directions for the resolution of the issues arising as follows:

“2. Having regard to the relevant provisions of the Statute and Rules of the Tribunal, I direct and order that the parties make written representations to me as follows:

(i) whether there is a valid application for review bearing in mind that the application document submitted is unsigned and undated

(ii) whether the application (if otherwise valid) was made within the time limit prescribed by Article XI.5 of the Tribunal Statute

(iii) whether if an (otherwise valid) application for review was submitted after the expiry of the period prescribed by Article XI.5 time should be enlarged under Article XI.6 or Rule 23.1 of the Tribunal Rules.

3. The Applicant shall submit her written representations within twenty one (21) days of the date of the letter of service of this order. Thereafter, the Respondent shall submit its written Answer within twenty one (21) days from the date of the letter of service of the Applicant's representations. The Applicant shall have twenty one (21) days from the date of the letter of service of the Respondent's Answer to file a Reply.

4. On the basis of the submissions received, I shall, as soon as possible thereafter make a ruling and give further Directions as to the future course of the proceedings in the matter.”

6. The Applicant, through Denning Solicitors, made written submissions on 5th December 2011. The Respondent made written submissions by way of Answer on 20th December 2011. The Applicant made submissions in Reply on 27th February 2012 (for which an extension of time was retrospectively granted). The Respondent, at the Tribunal's invitation, then submitted at Rejoinder on 16th April 2012.

7. I am very grateful for the parties' respective submissions.

The key provisions of the Statute

8. Paragraphs 5 to 8 of Article XI the Statute of the Commonwealth Secretariat Arbitral Tribunal provide as follows:

“5. A party to a case in which judgment has been delivered who challenges the judgment on the ground that the Tribunal has exceeded or failed to exercise its jurisdiction or competence, or has erred on a question of fact or law or both, or that there has been a fundamental error in procedure which has resulted in a failure of justice or that the Tribunal has acted unreasonably having regard to the material placed before it, may apply to the Tribunal, within a period of 60 days after the judgment was delivered, for a review of the judgment.

6. Where the limitation period for an application for revision or review has expired the Tribunal may, in the interests of justice, enlarge time for the application to be submitted, where exceptional circumstances led to the failure to file an application within time.

7. An application to review a judgment under paragraph 5 shall contain a statement of the grounds on which the allegation of error of law or fact or unreasonableness is based and shall set out the legal and factual arguments in support of the application.

8. The President shall constitute a panel comprising five members who did not sit on the initial panel that delivered the judgment in question, to sit as a Review Board to review the judgment.”

9. I should state at the outset that it is in my view clear that it is for me as President to determine the validity or otherwise of the purported application. The obligation under paragraph 8 to constitute a panel is that of the President alone. In the absence of specific provisions in the Statute or Rules of Procedure it follows, in my view, that it must be for the President to decide whether the condition for convening a panel has been met: namely the making of a valid and timeous application for review. This is also in line with Rule 1.1 of the Rules of the Tribunal which provides that it is for the President to direct the work of the Tribunal.

10. In making such a determination I am not, of course, dealing in any way with the substantive merits of the purported application for review, but only with whether it is formally valid, that is to say whether it constitutes an “application” for review so as to trigger the obligation to convene a review panel under Article XI paragraph 8 .

Consideration of the issue

11. It is common ground between the parties that if the purported application for review was otherwise valid it was made within “a period of 60 days after the judgment was delivered” for the purposes of Article XI paragraph 5. I accept that in accordance with the accepted normal practice of the Tribunal (and the Respondent’s concession) public holidays are not counted in the computation of time. This would in itself be sufficient to render the document timeous, even if the application were to be treated as made when the hard copy was received on 26th October 2011, since a Bank Holiday fell on 29th August 2011. I therefore need not consider any possible arguments about the validity or timing of service by e-mail or facsimile or about any days other than Bank Holidays which might arguably be excluded from the computation.

12. The sole issue is therefore whether the purported application is valid, even though it is unsigned (at least in the manual sense) and undated.

13. The principal contentions of the parties on this point are sufficiently concise for me to set them out fully.

14. The Applicant contends as follows:

“The Application was electronically signed and dated

2. The Application was served by email, by fax and by post. The Application itself bears the name of the Applicant’s solicitors, identifying the author of the Application. Furthermore the application was served by email and by fax, electronic methods of service.

3. Despite no date being physically present on the Application, the Applicant submits that the absence of such a minor detail should not hinder the Tribunal in reviewing the substantial issues that the Applicant has put before it. Tribunal should accept the application as being dated on the day that it was sent.”

15. The Respondent contends as follows:

“The Respondent submits that there is not a valid Review application before the Tribunal due to the patent defects on the face of the purported application, namely the absence of a date or signature. The Procedural Rules of the Tribunal clearly require explicitly, or in the alternative, implicitly that a document filed by a party to proceedings is signed and dated. In this regard reliance is placed on the several instances cited in the Tribunal Procedural Rules relating to the requirements of signature and dating, namely, at Chapter III, Rule 5 (7), Rule 6 (4), Rule 7 (3), and Rule 8(3). Accordingly, it is respectfully submitted that the general regime of the Tribunal Procedural Rules is to ensure that documents to be filed are signed and dated. This regime the Respondent submits, applies mutatis mutandis to the filing of a Review application.

The impact of the application being unsigned and undated renders the application invalid. The requirement for a signature ensures the integrity of the process by attributing the document filed to the relevant party in question while also ensuring its

authenticity. The requirement to date a document is essential to ensure that the document on its face demonstrates that it complies with the relevant time limits for filing which in this case was 60 days from the date of judgment being rendered. The Respondent respectfully submits that the absence of compliance with these procedural requirements is fatal to the validity of the Review application. In particular, the absence of a date on the physical application itself means that the application cannot be taken to have been filed properly within the relevant time period. Therefore, given that more than 60 days has elapsed since the delivery of the original judgment it is now too late for the Applicant to file a Review application in the absence of the Tribunal's approval under Procedural Rule 23.1.

In support of the above contentions, the Respondent respectfully relies on the reported decision of *Corbett v Secretary-General of the United Nations* (UNDT/2011/195) in which the United Nations Dispute Tribunal upheld the Respondent's objections in respect of the receivability of the Applicant's 'unsworn and unsigned' statements.

Turning now to address the Applicant's submissions of 5 December 2012, the Respondent does not agree that the Review application was electronically signed as there is no electronic signature of the Applicant on the face of the attached Review application but simply a type block of the name of the Applicant's Solicitors. Furthermore, even though the Applicant's cover letter to the Review application was dated, this fact does not in the Respondent's view cure the defect as the cover letter was curiously dated '28 July 2011' which is evidently a further error on the part of the Applicant as the CSAT judgment forming the actual basis for the Review application was not rendered until 26 August 2011. In any event, and without prejudice to the foregoing, the Respondent further submits that the physical Review application itself and not the cover letter is required to be signed and it was not.

Finally, the Applicant submits that providing a date on the Review application is 'a minor detail' that 'should not hinder the Tribunal in reviewing the substantial issues that the Applicant has put before it'. The Respondent invites the Tribunal to reject this submission on the basis that it is fundamentally flawed in law. In support thereof, the Respondent respectfully relies on Paragraph 17 of the reported decision of *Fedoroff v Secretary-General of the United Nations* (UNDT/2010/016) which states:

'Whether a claim is presented within time goes to the jurisdiction of the Tribunal. Therefore it is of fundamental importance that any issues relation to the timeous presentation of a claim are determined as a first step. If it is decided that the claim was not presented in time, the Tribunal will have no jurisdiction to consider the case on its merits'.

Accordingly, in light of the *Fedoroff* decision, the Respondent respectfully submits that it is not open to the Tribunal to accede to the submission of the Applicant to simply disregard the legal consequences of an 'undated review application' as on a 'minor detail' and to move to the merits of her Review application."

16. Neither the Statute nor the Rules of Procedure lay down any explicit requirements as to the form in which an application for review must be made.

17. The Respondent refers to a number of rules which require other documents to be signed: Rule 5(7) relating to the original application, Rule 6(4) relating to the Answer, Rule 7(3) relating to the Reply and 8(3) relating to the Rejoinder. It argues that the "general regime" of the Rules of Procedure is to ensure that documents filed out of time signed (and, the Respondent says, dated though this is not explicitly required in the cited rules). The Respondent argues that this applies "mutatis mutandis" to the making of a review application.

Signature

18. As noted above, the Rules of Procedure contain express requirements that certain other forms of pleading or submission must be signed. I do not consider that it is to be implied that an application for review must itself be signed.

19. If anything, the absence of any specific provision for signature of a review application (either in Article XI of the Statute or in the Rules of Procedure) points the other way. Since the Rules of Procedure make specific provision for signature of other documents, the omission so to provide in the case of a review application appears deliberate. .

20. There appears to be no principle of the law of the international civil service which mandates signature of all applications. The formal documentary requirements of each international tribunal must therefore be a matter for each individual tribunal and its constitutional and procedural rules.

21. The Corbett case cited by the Respondent concerned the exercise of discretion in the United Nations Dispute Tribunal. The Dispute Tribunal in that case declined to admit unsigned statements, which had been filed late and without the Dispute Tribunal's leave. The Dispute Tribunal did not lay down or identify any general principle (either for the Dispute Tribunal itself or international tribunals generally) that all documents submitted to a tribunal must be signed. I am satisfied that there is no such general principle.

22. I therefore conclude that neither the Statute nor the Rules of Procedure require, expressly or implicitly, that an application for review must be signed in order to constitute a valid application.

23. It is not therefore necessary to address the further question whether the block-typed entry at the foot of the document

“Denning solicitors  
For the Applicant”

could constitute a “signature”, if a signature were required.

Date

24. In the absence of any express provision in the Statute or Rules I do not consider that it is possible to imply a requirement that an application for review be dated (or that if dated, the application or any covering letter must be dated correctly).

Is there an “application” for review?

25. It is nonetheless necessary to consider whether the document submitted satisfies the requirements of being an “application” for review. There could plainly be cases where even though no specific requirement has been infringed, informality, ambiguity or other factors lead to the conclusion that what has been presented, whilst intended to be an application, is not (objectively) an “application” for the purposes of Article XI paragraphs 5 to 8

26. In the present case I am satisfied that the document submitted by the Applicant was an “application” for review, triggering the requirements of Article XI paragraph 8 of the Statute. It is titled “Application for the review of the Tribunal’s determination...” and sufficiently identifies the judgment at issue; it sets out grounds falling within Article XI paragraph 5 (though of course I am not concerned with the substantive merits of those grounds) and it states at the foot that it is issued by solicitors “for the Applicant”, being the solicitors who have acted previously for her in this matter. Objectively, this amounts to an “application”.

Conclusion

27. In all the circumstances I am satisfied that there has been a valid application for review and that it was made within the specified time limit.

28. Therefore I will now, in accordance with paragraph 8 of Article XI of the Statute, “constitute a panel comprising five members who did not sit on the named panel that determined the judgment in question to sit as a Review Board” which will “review the judgment” accordingly.

Given on this 21 day of May 2012

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CHRISTOPHER JEANS Q.C., President