UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2011/029 UNDT/GVA/2011/030 UNDT/GVA/2011/031 UNDT/GVA/2011/032 UNDT/GVA/2011/033
Judgment No.:	UNDT/2011/118
Date:	30 June 2011
Original:	English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

FETAHU *ET AL*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Albatros Rexhaj

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. By applications submitted on 27 June 2011 under article 13 of the Rules of Procedure, five Applicants currently serving with the United Nations Interim Administration Mission in Kosovo ("UNMIK") request the Tribunal to suspend the implementation of the decision not to renew their fixed-term appointments beyond 30 June 2011.

Facts

2. The Applicants have been working since 1999 respectively as Locksmith, Carpenter, Plumber, Central Heating Operator and Painter with the Engineering Section, UNMIK.

3. On 19 January 2011, the Division of Mission Support ("DMS") invited a number of UNMIK staff members, including the Applicants, to a meeting held on the same day in order to brief them on the downsizing foreseen for 1 July 2011. DMS announced that a number of posts in the Engineering Section would be abolished and their functions outsourced as a cost-saving measure. A Central Review Panel ("CRP") was to review the situation and make recommendations as to which posts should be abolished.

4. On 9 March 2011, each Applicant received a memorandum from the Chief of Mission Support ("CMS"), dated 21 February 2011 and titled "Completion of Appointment with UNMIK", advising them that their respective appointments with UNMIK would not be extended beyond close of business 30 June 2011. The memorandum specified that a comparative review had been undertaken by a CRP and that the Special Representative of the Secretary-General ("SRSG") had approved the deliberations and recommendations of the CRP.

5. Shortly thereafter, the Applicants contacted the Vienna Regional Ombudsman. On 31 March 2011, the Regional Ombusdman wrote to one of the

Applicants enquiring about his availability and a phone number in order to call him. The latter replied by email on 4 April 2011 proposing a date and time and some practicalities concerning the communication. On the same day, the Regional Ombudsman answered; she agreed on the date and spelled out her availabilities in terms of time, asking the Applicant to tell her his preferred time and provide a phone number.

6. On 14 April 2011, the Applicants had a meeting with the CMS, among others, on the completion of their appointment. Furthermore, on 29 March 2011, they sent a memorandum to the SRSG. In his reply dated 18 April 2011, the latter stated that the downsizing and restructuring phase that UNMIK was going through was "unavoidable" and that eight national posts in the Engineering Section would be abolished in UNMIK 2011/2012 budget, since the technical functions of the posts would be outsourced as a cost-saving measure.

7. On 29 April 2011, the Applicants addressed a letter to the Director, Field Personnel Division, Department of Field Support ("FPD/DFS"), in New York, the subject of which read "Appeal on completion of Appointment with UNMIK". The Applicants sought "protection of [their] rights, which [were] in [their] opinion, violated". They explained, *inter alia*, that the CMS, UNMIK, informed them in the meeting on staff downsizing held on 19 January 2011 that, "due to budget cuts and other austerity measures, [their] jobs [would] be taken over by an external contractor" and that when asked "what if the … UNMIK staff … prove to be more cost efficient to the [O]rganization than the external contractor", they were told that in such case they would keep their jobs. The Applicants asserted that they had discussed the matter with a number of UNMIK officials, including their direct supervisor in the Engineering Section, the CMS and the SRSG. They specifically requested the Director of FPD/DFS that he contribute "to having a formal review of the decision on downsizing, that is, having it revoked".

8. In reply, the Office of the Field Personnel Division sent an email on 10 May 2011 stating that the Applicants' request was being reviewed in coordination with the mission and that they would revert as soon as possible.

9. On 23 June 2011, each of the Applicants requested from the Management Evaluation Unit ("MEU") a management evaluation and suspension of the implementation under staff rule 11.3(b)(ii) of the decision of "termination of employment effective 30 June 2011".

10. MEU acknowledged receipt on the same day and informed the Applicants that the review of their suspension of action request was underway and that they would revert to them in that regard shortly.

11. On 27 June 2011, Counsel for the Applicants filed the present application for suspension of action before the Tribunal.

Parties' submissions

12. The Applicants have submitted a number of arguments in support of their substantive claims. Concerning the issue of receivability, the Applicants' primary contention is that contrary to the Respondent's claim, the matter was presented to the Ombudsman. The Vienna office acknowledged receipt of the case on 31 March 2011 whereas on 4 April the Ombudsman had the first direct contact with the Applicants. The informal process was concluded on 10 June 2011.

13. The Respondent has submitted a number of arguments in support of his substantive claims. Concerning the issue of receivability, the Respondent's primary contentions may be summarized as follows:

a. The Tribunal has consistently held that failure to submit a request for management evaluation in a timely manner renders any application for suspension of action pending management evaluation not receivable. Yet, the Applicants, while claiming that they received written notification of

the contested decision on 9 March 2011, did not request management evaluation until 23 June, otherwise said, over six weeks late;

b. The Respondent does not dispute the Applicants' allegation that they consulted the Ombudsman concerning their claim. However, whereas staff rule 11.2(c) provides that "[t]he deadline [for management evaluation] may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General", the matter was never submitted by the parties to the Ombudsman, nor did the Secretary-General extend the deadline for management evaluation. Hence, the deadline was not extended and the Applicants' request for management evaluation was filed out of time (see *Shetto* UNDT/2010/177).

Consideration

14. As a preliminary issue, the Tribunal has to determine the receivability of the application at hand. Staff rule 11.2 provides:

> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

15. It follows from article 2.2 of the Statute of the Dispute Tribunal and article 13.1 of its Rules of Procedure read in conjunction with the above staff rule that a request for suspension of action during the pendency of the management evaluation may only be receivable if a request for management evaluation has been submitted in due time.

16. The Applicants' requests for management evaluation to MEU were submitted after the applicable deadline had already expired. As a matter of fact,

the Applicants affirm having received the notification of the contested decision on 9 March 2011. In light of the 60-day time limit set out in staff rule 11.2(c), the deadline for presenting the corresponding request for management evaluation—the mandatory first step in the formal contestation of an administrative decision—ended on 9 May 2011. The Applicants did not submit their request to MEU until 23 June 2011.

17. In this context, the question arises of whether the condition of submitting a request for management evaluation could be regarded as fulfilled, considering that the Applicants addressed a series of requests for reconsideration or review to various officials in the Administration.

18. The Tribunal has ruled in *Behluli* UNDT/2011/052 that:

> 31. While the Applicant is entitled to argue that the Administration should not be excessively formalistic and insist that every request for review must without fail be addressed to the Secretary-General in order to be treated as such, the request must, on the other hand be sufficiently clear for its recipient to see that it is in fact a request for review, in other words the first mandatory phase of the appeal procedure laid down in … staff rule 111.2(a), and as such, must be forwarded to the Secretary-General.

19. The Tribunal has therefore found that in very specific circumstances an applicant might be deemed to have complied with the "first mandatory phase of the appeal procedure" even though he or she sent no formal request for review to the competent authority designated to, and entrusted with, its examination.

20. Having said that, this constitutes an exception to the general and well-established rule, embodied in staff rule 11.2(a), that "[a] staff member wishing to formally contest an administrative decision … shall, as a first step, submit *to the Secretary-General* in writing a request for a management evaluation of the administrative decision" (emphasis added). As such, this exception is to be interpreted in a strict manner.

21. As stated by the Appeals Tribunal in *Diagne et al.* 2010-UNAT-067, "ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules".

22. In the present case the Applicants wrote promptly to many UNMIK officials. They started by requesting reconsideration of the non-renewal of their contracts to the very person who signed the memorandum notifying them of the decision. However, as stated in *Behluli*, this can only be seen as a simple request of reconsideration by the decision-maker. The Applicants, nevertheless, conveyed their concerns to higher officials in UNMIK, including the most senior staff member of the mission, the SRSG. Not satisfied by his answer, they later brought the matter to FPD/DFS, in Headquarters.

23. Whilst it is not called into question that the Applicants were active and diligent in bringing their concerns and grievances to higher authorities, and whilst the Applicants did refer to their request as an "appeal" of the impugned decision and specified they sought "formal review" of it after explaining the reasons why they considered it to be in violation of their rights, the Tribunal does not consider that the standard required to envisage an exception to the regular sending of a request for management evaluation to the Secretary-General within the statutory time limits is met in the case at hand.

24. Accordingly, the Applicants exceeded the mandatory time limit for requesting management evaluation of the contested decision. Their legal action is thus time-barred, unless the Secretary-General extended the deadline pending efforts for informal resolution conducted by the Office of the Ombudsman.

25. In this regard, the Applicants submit that they contacted the Vienna Regional Ombudsman immediately after receiving the contested decision and that she was involved in addressing their situation until 10 June 2011.

26. According to staff rule 11.2(c), the 60-day deadline for sending the request for management evaluation "may be extended by the Secretary-General pending

efforts for informal resolution conducted by the Office of the Ombudsman …". The Tribunal thus needs to ascertain whether the above-mentioned deadline has been preserved in the instant case as a result of the Regional Ombudsman's intervention.

27. By essence, the idea of "efforts for informal resolution" implies that the parties engage in some sort of common action with the shared aim of finding a solution to the dispute opposing them. However, from the material made available to the Tribunal in this case, it is only possible to infer that the Applicants contacted the Regional Ombudsman at some point in or before April 2011 and some emails were exchanged with a view to arrange a phone call with her. Nothing indicates that the Organization and the staff members actually entered into negotiations under the auspices of the Regional Ombudsman. It cannot be inferred either that the Regional Ombudsman deployed any concrete action to bring the parties together into discussions or at the very least to contact the Administration to tackle the Applicants' problem. Against this background, it cannot be said that the parties were involved in efforts for informal resolution.

28. For the reasons set forth above, the present application for suspension of action is declared irreceivable as time-barred.

Conclusion

29. In view of the foregoing, the Tribunal DECIDES:

The application for suspension of action is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 30th day of June 2011

Entered in the Register on this 30th day of June 2011

(*Signed*)

Víctor Rodríguez, Registrar, Geneva