UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/034
Judgment No.: UNDT/2011/119
Date: 30 June 2011
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

TETOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

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

Introduction

1. By application submitted under article 13 of the Rules of Procedure on 27 June 2011, the Applicant, a staff member of the United Nations Interim Administration Mission in Kosovo ("UNMIK"), requests the Tribunal to suspend the implementation of the decision not to renew his fixed-term appointment beyond 30 June 2011.

Facts

2. The Applicant has been working since 1999 as an Architect 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 Applicant, to a meeting held on the same day in order to brief them on the downsizing of staff 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.

4. The Applicant had a meeting with the Chief of Mission Support ("CMS") on this issue on 26 January 2011. The following day he transmitted to the CMS a draft he had prepared with a view to this conversation, emphasizing that he could not understand the reasons and criteria (standards) used in the downsizing of the Engineering Section. He maintained that the Chief of the Section had made him promises that he would replace a colleague assigned to the Mitrovica region. The Applicant elaborated on numerous instances in which he considered he had contributed to reduce costs for UNMIK.

5. On 9 March 2011, the Applicant received a memorandum from the CMS, dated 21 February 2011 and titled "Completion of Appointment with UNMIK", advising him that his appointment 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 Comparative Review Panel ("CRP") and that the

Special Representative of the Secretary-General ("SRSG") had approved the deliberations and recommendations of the CPR.

6. On 10 March 2011, the Applicant wrote to the CMS expressing his disappointment that he had not yet received an answer to his request for criteria, standards and reasons used for the decision in his case. He, moreover, complained that he had received a standard letter which did not reflect the developments in his case in any aspect.

7. On 22 March 2011, the Applicant wrote to the SRSG, conveying his view that he had not been granted fair treatment and requesting him to take action.

8. On 30 March 2011, the Applicant addressed a memorandum to the SRSG, reiterating in substance the content of his communication to the CMS on 10 March 2011. He further emphasized the need for his expertise in the Engineering Section and recalled his positive contribution. He also asserted that the whole process had been, since the beginning, "suspicious, nontransparent and unfair" and asked the SRSG to "review and change his decisions".

9. By memorandum dated 15 April 2011 and received by the Applicant on 18 April, the SRSG responded that the downsizing and restructuring phase that UNMIK was going through was "unavoidable" and that the decision was based on the needs of the mission. He clarified that the CRP had determined that since there were no comparators for the seven encumbered national posts in the Engineering Section, there was no requirement for further evaluation. Also, he reiterated 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.

10. By email of 19 April 2011, the Applicant expressed his disagreement with the explanation provided by the SRSG and his intention to "follow up [his] Appeal at the Higher Instances".

11. On 26 April 2011, the Applicant addressed a memorandum to the Director, Field Personnel Division, Department of Field Support ("FPS/DFS"), the subject

of which read "Appeal on completion of Appointment with UNMIK". The Applicant pointed out that he had "already followed the chain of command inside UNMIK and [had] not [found] a concrete answer" to his situation. He reiterated his opinion that the letter of 21 February did not reflect his situation, for the abolition of the Architect posts had not gone through the CRP but was an ad hoc decision, and that his request for criteria, standards and reasons used for the abolishment of the Architect post had still not been given an answer. He asserted that he had received "promises" by the Administration which were not upheld.

12. Following a reminder by the Applicant, on 23 May 2011, the Director, FPD/DFS, advised him that his request was being reviewed in coordination with the mission and that he would revert as soon as possible.

13. On 23 June 2011, the Applicant addressed to the Management Evaluation Unit ("MEU") a request for management evaluation of the decision of "completion of appointment with UNMIK". He stated that the remedy he sought was the immediate suspension of action of the memorandum signed on 21 February 2011 by the then CMS, UNMIK.

14. On 27 June 2011, Applicant filed the present application for suspension of action before the Tribunal.

Parties' submissions

15. The Applicant submitted a number of arguments in support of his substantive claims, but none in support of the receivability of his application.

16. The Respondent submitted a number of arguments on the substantive claims. Concerning the issue of receivability, the Respondent's principal contention is that the Tribunal has consistently held that failure to submit a claim for management evaluation in a timely manner renders any application for suspension of action pending management evaluation not receivable. Although the Applicant received written notification of the contested decision on 9 March 2011, he did not request management evaluation until 23 June, over six weeks late. The

Applicant himself accepts in his application that his request for management evaluation was out of time.

Consideration

17. 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.

18. 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.

19. The Applicant's request for management evaluation to MEU was submitted after the applicable deadline had already expired. As a matter of fact, the Applicant affirms 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 Applicant did not submit his request to MEU until 23 June 2011.

20. 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 Applicant addressed a series of requests for reconsideration or review to various officials in the Administration.

21. 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.

22. 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.

23. 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.

24. 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".

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

26. Whilst it is not called into question that the Applicant was active and diligent in bringing his concerns and grievances to higher authorities, and whilst the Applicant did refer to his request as an "appeal" of the impugned decision and specified he sought having the decision changed, after explaining the reasons why

he considered it to be improper, 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.

27. Accordingly, the Applicant exceeded the mandatory time limit for requesting management evaluation of the contested decision.

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

Conclusion

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