Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ROSANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Seth Levine, OSLA

Counsel for Respondent:
Arnold Kreilhuber, Legal Officer, UNEP

Introduction

1. The Applicant is a former staff member of the United Nations Environment Programme (UNEP) in the Department of Early Warning and Assessment (DEWA), where she was employed for 13 years. She retired from service on 31 August 2009.

2. The Applicant is contesting an unwritten, administrative decision in which UNEP/DEWA failed to upgrade her post from G5 level to G6 level in time for her to compete for it before her retirement date.

Facts

3. On 16 April 1991, the Applicant joined UNEP/DEWA as a Programme Assistant. Her last position at UNEP/DEWA before she retired was Programme Assistant at the G5 level.

4. In 2008, the UNEP Administration took a decision to reclassify several posts to higher levels so as to reflect the corresponding higher workload undertaken by staff members encumbering such posts. The Applicant encumbered one of such posts.

5. On 14 January 2009 at a Senior Management Team (SMT) meeting, the issues of impending retirees and the reclassification of their posts prior to their retirement were discussed. The SMT decided that any future reclassification of posts would be advertised on Galaxy at least six month's prior to the relevant staff member's retirement date[1].

6. On 25 February 2009, the Applicant wrote an email to the UNEP/DEWA Director requesting for the timely reclassification of her post, or in the alternative, an extension of her contract so as to be able to apply and compete for the post. The Applicant did not receive any response to her written request from UNEP/DEWA.

[1] Briefing note to DEWA staff: SMT retreat 14-16 January, 2009, Windsor Hotel, Nairobi, p. 2, para 2.

7. On both 26 May 2009 and 3 June 2009, the Applicant wrote emails to the Human Resources Officer requesting a meeting regarding the timely reclassification of her post. The Human Resources Officer responded on 11 June 2009, stating that the decision to re-classify posts rested with the UNEP/DEWA Director and that the Applicant should speak with him first regarding the reclassification of her post.

8. The Applicant's post was eventually reclassified on 26 June 2009 and advertised on Galaxy on 21 July 2009 with her retirement only a month away.

9. On 27 August 2009, the Applicant wrote a memorandum to the UNEP/DEWA Director regarding the untimely reclassification of her post and again received no response. She subsequently retired on 31 August 2009.

10. After her retirement, on 8 October 2009, the Applicant wrote a memorandum to the Director and Deputy Director of UNEP/DEWA regarding the reclassified post in which she stated that she looked forward to getting a response, be it negative or positive, by 20 October 2009.

11. When Applicant did not receive a response from UNEP/DEWA on 20 October 2009, she filed a request for management evaluation on 3 December 2009 challenging the 20 October 2009 non-written decision from the SMT in which UNEP/DEWA failed to upgrade her post in a timely manner before she retired and whereby she was denied a chance to apply and compete for the reclassified post.

12. On 15 January 2010, the Applicant received a response from the Chief of the Management Evaluation Unit (MEU) stating that her request for a management evaluation was denied for being filed out of time.

13. On 19 April 2010 the Applicant filed this Application.

14. On 14 May 2010, the Respondent filed a Motion for Dismissal arguing that the Application was not receivable because it does not challenge any decision which can be qualified as an administrative decision under art. 2 of the Statute of the Dispute

Tribunal. Further, that the Application did not meet the requirements set out by art. 8(1) of the Statute.

15. On 26 October 2010, the Tribunal issued Order No. 213 (NBI/2010) requiring the Applicant to file her written submissions on the question of receivability. The Applicant complied with the Tribunal's Order and filed a response to the Motion for Dismissal requesting the Tribunal to deny the Motion and for the Respondent to be excluded from the proceedings for failure to abide by art. 10 of the Rules of Procedure of the Tribunal.

16. On 20 May 2011, the Tribunal issued Order No. 035 (NBI/2011), setting this matter down for a hearing on the issue of receivability for 25 July 2011. Before the hearing date, the Applicant sought adjournments and on 10 August 2011, the Respondent filed a Motion requesting that the case be determined without an oral hearing or, in the alternative, the Tribunal make a determination as to the receivability of the Application. The Applicant filed a response on the same day, requesting that the question of receivability should be determined at an oral hearing.

17. On 22 August 2011, the Tribunal issued Order No. 103 (NBI/2011) setting the matter down for hearing to determine the issue of receivability. The hearing was held on 21 November 2011.

Applicant's Case

18. The Applicant's case is as follows:

a. The Application is receivable because UNEP/DEWA never issued an administrative decision upon which the application is based.

b. The Applicant was denied an opportunity to apply and compete for the reclassified post before her retirement.

c. UNEP/DEWA management having ignored every inquiry and request of the Applicant regarding the reclassification of her post, she was entitled to set a

date for the presumed administrative decision affecting her contract of employment.

d. UNEP/DEWA management's refusal to abide by the policy it had adopted, and the Applicant's reliance on the legitimate expectation created by the said policy, caused her harm because the Applicant retired on a lower level post.

e. The Respondent has put nothing by way of factual background or substantive response in regards to the Application and has therefore no standing. The Respondent's failure to file a Reply within thirty days of receipt of the Application and failure to plead any facts renders him devoid of party status and therefore his Motion for Dismissal is not properly before the Tribunal and should be disregarded in its entirety. Further, the Respondent has not even filed for leave to participate in the proceedings, notwithstanding the absence of a Reply.

Respondent's Case

19. The Respondent's case in his Motion for Dismissal is that:

a. The Application is not receivable because it did not challenge a particular decision which can be qualified as an administrative decision under art. 2 of the Statute of the Dispute Tribunal.

b. The 20 October 2009 date does not represent the date on which the impugned administrative decision was taken as it is actually a fictional date set by the Applicant herself. The imposition of an ultimatum by the Applicant does not qualify the date in question as the proper date of an administrative decision in accordance with the terms of the Statute of the Dispute Tribunal.

c. It can be inferred that since the Applicant retired on 31 August 2009, any administrative decision concerning a possible promotion, or extension of

the Applicants term of service, would have had to be made well before the retirement date.

d. Even if it was accepted that the alleged 20 October 2009 decision not to upgrade Applicant's post is an administrative decision. The Applicant did not suffer any prejudice as she did not apply for the post in question.

e. The Applicant should have addressed the issue of her non-promotion before she retired as no reasonable staff member can expect to be promoted after retirement.

f. The Applicant did not request a management evaluation in time and this renders the application not receivable.

g. The Respondent's Counsel did not abuse the process by not responding within 30 days of receiving the Application. It was an oversight on his part and he had erred in good faith as he did not intend to sit on the evidence.

h. The Respondent has made the required response under art. 10 of the Rules of Procedure of the Tribunal, albeit titled "Motion for Dismissal", rather than "Reply". While this was oversight on part of the Respondent, it did not mean that the Respondent did not want to be part of the proceedings.

i. Where the Respondent's counsel had failed to comply with the provisions of art. 10 of the Rules of Procedure of the Tribunal, it was the responsibility of the Tribunal and its Registry to remind him to comply.

j. Excluding the Respondent from the proceedings would be a drastic step, as he has shown willingness to be part of these proceedings. In *Bertucci*[2], the Appeals Tribunal held that the Tribunal has no authority to exclude a party from proceedings.

[2] 2010-UNAT-062.

Considerations

20. In determining this Application, the main issues for examination are:

a. Whether the Respondent ought to be excluded from the proceedings for failure to abide by the provision of art. 10 (1) of the Rules of Procedure of the Tribunal.

b. Whether the silence from UNEP/DEWA management towards the Applicant's several requests constitutes an implied administrative decision for which the Applicant may request a management evaluation and bring an application before the Tribunal.

c. In the absence of a definitive response to the Applicant's queries, at what time can it be assumed that UNEP/DEWA had made an administrative decision which affected the Applicant's contract of employment?

d. Whether this Application is receivable.

Should the Respondent be excluded from the proceedings for failure to abide by the provision of art. 10(1) of the Rules of Procedure of the Tribunal?

21. Article 10(1) of the Rules of Procedure of the Tribunal provides that the Respondent shall submit a reply within thirty calendar days from the date of receipt of the application, and that a respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings except with the leave of the Tribunal.

22. The Applicant had submitted that that the wording of art. 10 calls for a mandatory exclusion since there is a presumption in favor of exclusion when the Respondent fails to abide by the requirement of the said article. Further, according to the Applicant, the Respondent had not filed for leave to participate in the proceedings notwithstanding the absence of a reply. The Applicant contented that the administration of justice cannot function if such conduct is sanctioned as there is a danger of prejudice

to the Applicant as a direct consequence of the Respondent's failure to abide by the provisions of art. 10(1).

23. The Respondent on the other hand argued that his Motion to Dismiss should be accepted by the Tribunal as a reply, especially since it was filed within the time mandated by art. 10(1). The Respondent further argued that it is the Registrar's duty to inform him in any event when he did not comply with art. 10(2) and to request his compliance within a specific time frame. Additionally, during the 21 November 2011 proceedings, the Respondent's Counsel had made an oral request to be allowed to rejoin the proceedings should the Tribunal find that the Respondent ought to be excluded from the same.

24. The Respondent cited the case of *Bertucci* for the proposition that the Appeals Tribunal had held that a Tribunal has no authority to exclude a party from proceedings even where the party refused to comply with an Order of the said Tribunal. He argued further that the exclusion is a severe step in light of art. 10 of the Rules of Procedure of the Tribunal.

25. The case of *Bertucci* as cited by Respondent's Counsel is irrelevant here. The Respondent submitted that in *Bertucci*, the respondent in that case refused to file submissions and it was decided that he could participate in the proceedings.

26. The correct position was that the Tribunal excluded the respondent from the proceedings in the *Bertucci* case due to his disobedience of its Orders to produce evidence. That situation is not analogous to the failure by a respondent to file a reply as stipulated under art. 10 of the Rules of Procedure of the Tribunal. A respondent who finds himself such a situation is solely and effectively excluded from the proceedings by his own negligence to file a reply in time. He is not excluded by the Tribunal but by the operation of law.

27. In *Lutta*[3], the Tribunal examined the issue of a respondent who did not file a reply within the requisite time frame as mandated by art. 10. The Tribunal held that the Respondent who finds himself outside of the time limit for filing a reply should first seek the permission of the Tribunal to take part in the proceedings. This is so because by expelling himself due to his own delay, he would no longer be considered to be part of the proceedings.

28. In this case, the Respondent has neither filed a reply nor filed a Motion for Leave to participate in the Proceedings. It was only during the 21 November 2011 proceedings, 18 months after filing and proper service of the Application on the Respondent, that Counsel for the Respondent made an oral request to take part in the proceedings. Counsel had willfully chosen to disregard art. 10 of the Rules of Procedure of the Tribunal.

29. By his preposterous claim that the Registrar and the Judge owed him a duty to remind him of his obligations to his client, the Respondent's Counsel, sought, in the Tribunal's view, to provide an excuse for his own incompetence and lack of diligence. It must be clearly stated that no Counsel is owed a duty by the Tribunal to be reminded about the necessity of complying with procedural rules. Article 10(2) of the Rules of Procedure of the Tribunal does not require the Registrar to advise Counsel on the legal conduct of his/her case but only on the "formal requirements" of submitting a reply. Having filed a submission within the requisite time limit and titling it "Motion for Dismissal", art. 10(2) did not require the Registrar to advise Counsel for the Respondent that he should have titled the document "Reply" and to have ensured that his legal arguments amounted to a Respondent's Reply within the meaning of art. 10(1).

30. The Respondent had asked the Tribunal to dismiss this Application based on non-receivability. If the Tribunal were to rule that the Respondent's Motion is denied, then Respondent will have no fall back alternative, since up until the hearing on

[3] UNDT/2009/060.

receivability he had not filed a reply therefore leaving him in a very precarious situation.

31. As was held in *Lutta*[4], there are two stages that should be followed in the application of art. 10(1), namely the requirement to obtain the Tribunal's leave to rejoin the proceedings and then if leave is granted, the filing of a Reply. In other words, the Respondent must first seek permission to be allowed to re-enter the proceedings, and if the Tribunal allows that, then the next step is for the Tribunal to determine whether the Respondent should be allowed to file a reply according to a specified time frame.

32. Having considered the circumstances, the Tribunal entirely in its own discretion hereby readmits the Respondent as a party in the proceedings.

Did silence from UNEP/DEWA management constitute an implied administrative decision for which the Applicant may request management evaluation and bring an application before the Tribunal?

33. The core of the Respondent's case is that the Application is not receivable because there was no administrative decision as defined under art. 2(1)(a) of the Statute of the Dispute Tribunal.

34. Article 2(1) (a) provides:

> The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

35. The Applicant had sent several emails and two memoranda to the UNEP/DEWA management requesting for a timely reclassification of her post to enable her to take advantage of the said reclassification before her impending retirement. She also requested, in the alternative, an extension of her retirement date in

[4] At para. 2.4.

order to apply and compete for the reclassified post. When none of these emails and first memorandum was responded to, the Applicant then wrote a final memorandum on 8 October 2009 setting the date of 20 October 2009 deadline by which in the absence of a response would constitute a denial of her requests.

36. The Applicant had countered that that the failure to respond is an administrative decision in itself because the Respondent had unilaterally failed to give effect to its own administrative policy. Further, that this failure had direct legal consequences for the Applicant who was not given an opportunity to apply for the post which she encumbered.

37. What is an administrative decision? In *Andronov*[5], the former UN Administrative Tribunal defined an administrative decision for the purpose of formal contestation of same. In, *Andronov*, it was held that an administrative decision is one which is unilaterally taken by the administration in a precise individual case, with direct legal consequences for the Applicant. The view in *Andronov* has been variously endorsed in several subsequent cases albeit sometimes with modifications.

38. The decision not to reclassify the Applicant's post in time or to extend her contract so as to enable her to apply for it is an administrative decision. This had legal consequences on the Applicant because she did not retire at the G6 level and, therefore, cannot receive the pension benefits associated with retiring at that level.

39. In the case of *Gebre*[6], the Applicant had similarly made several efforts seeking the review of an impugned administrative decision. His correspondences were met with silence by the office of the Assistant Secretary-General, International Criminal Tribunal for Rwanda (ICTR). When time had statutorily run out for sending his request to the Secretary-General, he was finally advised that he had been sending his letters to the wrong official and that his matter had already become time barred.

[5] Former UN Administrative Tribunal Judgment No. 1157 (2003).
[6] UNDT/2011/140.

40. The Tribunal held that the Applicant had fulfilled the requirement of former staff rule 111.2 when he timely wrote to the Registrar of the ICTR rather than the Secretary-General as the said Registrar was to all intents and purposes the lawful representative of the Secretary-General at the ICTR.

41. The next step in this analysis is whether, after a staff member writes to the agent of the Secretary-General, and receives no response, an administrative decision must be presumed.

42. In *Andronov*, the former UN Administrative Tribunal had additionally decided that administrative decisions are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. The unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions.

43. In light of the foregoing, the Tribunal holds that the silence from UNEP/DEWA management is an implied administrative decision. It was after writing to UNEP/DEWA management several times regarding her post and not getting a response that the Applicant finally took the step of filing for a management evaluation on 3 November 2009.

44. The Tribunal holds that the silence from UNEP/DEWA management reveals an employer-employee relationship with a regrettable lack of communication from the employer, an act which cannot be condoned by this Tribunal. An employee is required to respond to his/her employer's reasonable inquiries, questions or concerns relating to his employment. In the same way, an employer is expected to respond to an employee's reasonable questions, inquiries and concerns regarding the employment contract.

In the absence of a definitive response to the Applicant's queries, at what time can it be presumed that UNEP/DEWA had made an administrative decision which affected the Applicant's contract of employment?

45. It is on record that the Applicant's written inquiries and requests before her retirement concerning the reclassification of her post, or a possible extension of her contract were completely ignored by UNEP/DEWA. The Respondent's Counsel had argued that there was no administrative decision which the Applicant could contest. Additionally, that the Applicant could not impose an ultimatum on UNEP/DEWA management, setting the 20 October 2009 date for a response and then proceeding to treat that date as the date of an administrative decision refusing her requests.

46. The Applicant's Counsel had contended that the Applicant had written to all the relevant officials in an effort to provoke a response. When no response was forthcoming, the Applicant, whose legal rights and contract of employment had been affected by the said failure to respond, took the option of setting a date by which she would deem the Respondent's silence as a denial of her inquiries and requests. The Applicant had a legitimate expectation and, in the circumstances, was correctly entitled to set the said date. She communicated this to the Respondent. UNEP/DEWA management cannot simply ignore or resist taking a decision and by so doing avoid any consequences arising therefrom.

47. The Tribunal notes that although the Applicant had been diligent in writing and approaching UNEP/DEWA management without getting any response, she would have been right to regard her retirement date of 31 August 2009 as the conclusive date of the impugned administrative decision. This is because a reasonable staff member must be aware that after retirement, both an opportunity to aspire to any post advertised in her unit or the getting of an extension of her contract would be impossible. In other words, the Applicant must know that although it was in bad taste and unprofessional for UNEP/DEWA management to ignore her letters, she stood no chance of receiving a favorable administrative decision after her retirement. For purposes of the calculation of time, therefore, her retirement date ought to have served as the implied date on which an administrative decision was made.

48. In spite of the Tribunal's disappointment with the posture taken by UNEP/DEWA management in ignoring the Applicant's letters, it cannot accept that the Applicant was entitled to set a date arbitrarily on which the Respondent's negative response would be presumed to be an implied administrative decision.

Is the Application Receivable?

49. The matter of receivability is governed by art. 8(1) of the Statute of the Dispute Tribunal, which provides:

> An application shall be receivable if: (*a*) The Dispute Tribunal is competent to hear and pass judgment on the application, pursuant to article 2 of the present statute; (*b*) An applicant is eligible to file an application, pursuant to article 3 of the present statute; (*c*) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and (*d*) The application is filed within the following deadlines: (i) In cases where a management evaluation of the contested decision is required: *a.* Within 90 calendar days of the applicant's receipt of the response by management to his or her submission…

50. Staff Rule 11.2(a) and (c) also provide:

> A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a) shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision . . . (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.

51. On 31 August 2009, the date on which the Applicant retired, must be presumed to have been the date of the implied administrative decision. On 3 December 2009, she applied for a management evaluation, well outside the time frame mandated by staff rule 11.2(c). She received a response from the MEU on 15 January 2011, stating that her request was time barred. On 19 April 2010, the Applicant submitted this Application to the Tribunal.

52. From the records and foregoing determination of issues, the Tribunal holds that the Applicant's request for management evaluation was made out of time and under art. 8(3) of the Tribunal's Statute, the Tribunal cannot suspend or waive the deadlines for management evaluation.

Conclusion

53. The Application is not receivable. In the circumstances, this Tribunal has no jurisdiction to entertain it.

(Signed)

Judge Nkemdilim Izuako

Dated this 29 day of December 2011

Entered in the Register on this 29 day of December 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.