UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/021
Judgment No.: UNDT/2012/104
Date: 9 July 2012
Original: English

**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

MANCO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT ON RECEIVABILITY

**Counsel for Applicant:**
Seth Levine, OSLA, UNON

**Counsel for Respondent:**
Miouly Pongnon, Office of the Director-General, UNON

**Introduction**

1. The Applicant is an Investigator with the United Nations Office of Internal Oversight Services (OIOS) in Nairobi, Kenya.

2. The Applicant is challenging the decision requiring him to either renounce his permanent resident status in New Zealand or apply for citizenship there should he wish to take up the offer of a P3 Investigator position in Nairobi.

**Facts**

3. On 9 February 2009 the Applicant was sent an Offer of Appointment regarding the P3 position of Legal Investigator with OIOS in Nairobi, a position which he took up on 20 May 2009. The Offer of Appointment stated the following: "Please be advised that should you transfer to or be appointed to United Nations Headquarters, New York on a long-term appointment in the future, in accordance with the Staff Regulations and Rules applicable to such situations, you will be required to become a citizen of New Zealand or renounce your permanent resident status."

4. On 12 March 2010, the Applicant was offered a P3 Investigator position in Nairobi. He received an email on 22 March 2010 from the Human Resources Management Services of the United Nations Office at Nairobi (HMRS/UNON) stating "As you may be aware, candidates selected for appointment in the Professional category and above, holding permanent residence in a country other than his or her country of nationality and who is granted a fixed term appointment of one year or longer, under the Staff Rules will have to renounce the permanent resident status or provide proof of application for citizenship prior to the appointment. Before we can proceed with processing the 2 year appointment, we would appreciate to receive satisfactory proof that you have either applied for citizenship or have renounced the permanent resident status in New Zealand."

5. This policy was reiterated to the Applicant by HRMS/UNON during a phone call on 26 March 2010. He was advised by HRMS/UNON that a mistake had been made in the original Offer of Appointment which did not contain the same policy as the email of 22 March 2010.

6. On 29 March 2010, the Applicant applied for New Zealand citizenship at a cost of NZ $460.

7. On 21 October 2010, the Office of Staff Legal Assistance (OSLA) wrote a letter on behalf of the Applicant to the Chief of HRMS/UNON, requesting reimbursement of NZ $460 and the discontinuance of this policy, both with regard to the Applicant and in general. The letter stated that the lack of a response within fourteen days would be treated as an "adverse administrative decision". The letter was sent to HRMS/UNON on 3 November 2010.

8. On 17 January 2011, the Applicant officially requested a management evaluation of the decision taken by HRMS/UNON in regard to the expenses incurred for his citizenship application and the insistence of HRMS/UNON to apply the policy to his situation.

9. The Management Evaluation Unit (MEU) responded to the Applicant on 3 March 2011, stating that he would be reimbursed NZ $460 by UNON. However, his request regarding the legality of the disputed policy was considered as not receivable. The MEU considered that the request for management evaluation of the application of this policy was time barred, as the administrative decision that could have been contested was taken on 22 March 2010.

10. The Applicant submitted his application to the Tribunal on 9 May 2011, and the Respondent was notified of this filing on 12 May 2011.

11. The Respondent filed a reply to the application on 13 June 2011, and the Applicant was notified of this on 14 June 2011.

12. On 5 March 2012, the Respondent submitted an "expert report" on staff rul.51.5(c), pursuant to Case Management Order 026 (NBI/2012). The Applicant responded to this report on 12 March 2012.

**Applicant's submissions**

13. The Applicant disputes the MEU's contention that an administrative decision was taken on 22 March 2010. In his application, the Applicant states that no administrative decision was taken until 17 November 2011. He considers that the matter is therefore receivable *ratione temporis*.

14. The Applicant states that there is no legal basis to the policy requiring either the surrender of his permanent resident status or an application for citizenship in New Zealand. In his view this policy has been misapplied since 1953, as the requirement implemented by the Secretary General in 1954 (1954 IC) and replaced by ST/AI/2000/19 applies to non-United States staff members serving in the United States only.

15. The Applicant further states in his application that there is no General Assembly Resolution, Secretary General's Bulletin, Administrative Instruction, nor mention in the Staff Rules and Regulations of this policy other than in regard to staff members in the United States.

16. The Applicant also produced an interoffice memorandum of 4 August 2005 from the Office of Legal Affairs (OLA) to the Office of Human Resources Management (OHRM) both from the UN Secretariat, which stated that although this policy has been consistently applied to permanent resident status in any country of which the staff member is not a national, it "is not reflected in any current administrative issuance."

17. The Applicant is seeking a rescission of the decision to enforce this policy with regard to him, and discontinuance of its application in general. He states that the policy is unlawful and contrary to the terms and conditions of his employment.

**Respondent's submissions**

18. The Respondent submits that this application is not receivable *ratione temporis* in accordance with Article 8.3 of the UNDT Statute and staff rule 11.2(c). The Respondent states that the disputed administrative decision was taken on 22 March 2010, whereas the Applicant did not submit a request for a management evaluation until 17 January 2011.

19. The Respondent further states that even if a lack of response from HRMS/UNON concerning the policy is regarded as an administrative decision, as the letter to HRMS/UNON was dated 21 October 2010 the request for a management evaluation should have been filed with the MEU no later than 6 January 2011.

20. The Respondent submits that this matter is not receivable *ratione materiae*. The Applicant has not alleged that the disputed policy results in "noncompliance" with his terms of appointment, which the Respondent states would deprive the Tribunal of jurisdiction in accordance with Article 2.1(a) of the UNDT Statute. Further, the policy in question is, according to the Respondent, an integral term of the Applicant's appointment and does not constitute noncompliance with the terms of appointment.

21. The Respondent states that the authority for this policy exists and derives from the necessity for the Secretary-General to enforce staff rule 1.5, that the policy is informed by "the view of the General Assembly that international officials should be true representatives of the culture and personality of the country of which they were nationals", and that allowing staff members to change their nationality after recruitment would undermine the principle of geographic distribution of professional grade posts among member States. Moreover, the Respondent states that the policy has been uniformly applied since 1954, concurrent with staff regulation 1.1(c) which mandates the Secretary-General to enforce the policy with regard to all staff members. The error contained in the Offer of Appointment of 9 February 2009 did not modify or suspend the application of this policy with

regard to the Applicant. The Respondent states that the Tribunal should not create an unwarranted exception to this policy by granting the Applicant relief.

22. Finally, the Respondent states that a staff member cannot file an appeal with the Tribunal seeking to change or improve legitimate terms of appointment. The Respondent maintains that the policy is valid, as it has not been displaced by another staff rule or regulation, and that the former Administrative Tribunal also confirmed its validity and viability in *Fischman*[1] and *Moawad*.[2]

**Consideration**

23. The issues for examination in this Application are:

a. The date upon which the administrative decision was taken, and;

b. Whether this application is receivable *ratione materiae*

*The date of the administrative decision*

24. The Respondent contends that the email of 22 March 2010 constitutes an administrative decision, leaving this matter not receivable *ratione temporis.* The Applicant maintains that no administrative decision was taken until 17 November 2010 and that this matter is, as a result, receivable.

25. In Judgment No. 1157, *Andronov* (2004), the former UN Administrative Tribunal held:

> "There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise

[1] UN Administrative Tribunal Judgment No. 326, *Fischman*, (1984).

[2] UN Administrative Tribunal Judgment No. 819, *Moawad*, (1997).

> individual case (individual administrative act), which produces direct legal consequences to the legal order...
>
> "... Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences."

26. No direct legal consequences were outlined by the email of 22 March 2010. The email stated the following: "Before we can proceed with processing the 2 year appointment, we would appreciate receive satisfactory proof that you have either applied for citizenship or have renounced the permanent residence status in New Zealand."

27. The Tribunal considers that the email was a mere request or a piece of advice to the Applicant with regard to the permanent residency policy, and not an administrative decision as envisaged by *Andronov*. The administration was merely advising the Applicant or requesting further information from him in order to be in a position to process and presumably finalise the two year appointment that was offered. There is no suggestion that the Tribunal can or should interpret the communication of 22 March 2010 about "processing" as an administrative decision which did impact or could potentially impact upon the Applicant's terms of employment.

28. The Applicant complied with the request and furnished evidence of his application for New Zealand citizenship. It is notable that between 29 March 2010 and 3 March 2011 there was no further communication from HRMS/UNON to the Applicant regarding this policy. It was never reiterated to the Applicant that he would have to surrender his permanent residency status in New Zealand should his application for citizenship be unsuccessful. The question for the Tribunal is how to construe this silent interval. Was the administration waiting for the Applicant to comply with the request, or was the silence an assumption that the Applicant had already complied?

29. In November 2010, presumably because of this silence, the Applicant took initiative to challenge the validity of the policy which, in his view, could not be sustained. The silence on the part of HRMS/UNON left the Applicant with no choice but to initiate action himself. In the letter dated 21 October 2010, sent on 3 November 2010, the Applicant states that a failure by HRMS/UNON to respond within 14 days would be construed as an "adverse administrative decision".

30. This second letter, sent on 3 November 2010, is the moment of challenge of the policy by the Applicant. Once the Applicant mounted this challenge, it was incumbent on the administration to follow up on his request, take a decision, and to inform him of this decision in a clear, timely and unequivocal manner. The failure of the administration to act, the ultimatum notwithstanding, amounts, in the view of the Tribunal, to an administrative decision that the Applicant was entitled to challenge.

31. Pursuant to staff rule 11.2(c), "[a] request for 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."

32. The Applicant officially requested a management evaluation on 17 January 2011. The administration contends that the management evaluation is time barred and therefore not receivable; either because the administrative decision was taken on 22 March 2010, or because the adverse administrative decision was taken 14 days after 21 October 2010 (instead of 14 days after 3 November 2010, as the Applicant submits).

33. In *Thiam* UNDT/2010/131, the Tribunal held that a written notification of an administrative decision must be sent to the staff member in order to establish precisely when the sixty day time limit within which a management evaluation can be requested starts to run.

34. *Thiam* followed the decision of the UN Appeals Tribunal (UNAT) in *Schook* 2010-UNAT-013, a judgment reversing this Tribunal's previous decision regarding unwritten administrative decisions and the sixty days rule. The UNAT stated in *Schook*:

> "Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a "notification of the decision in writing", required by Rule 111.2 (a)..."

35. The UNAT further stated that the appeal was receivable, "because he had not been notified of any written administrative decision of his not continuing in service after 31 December 2007. We find that UNDT has completely ignored that the time of two months, required by rule 111.2(a), begins to run 'from the date the staff member received notification of the decision in writing'."

36. The Respondent submits that the request for a management evaluation could also be time barred 14 days after 21 October 2010. However, the Tribunal considers that it is the date of communication of a letter which should take precedence, not the date of its writing. Nonetheless, in light of the above statement, the Tribunal considers that the failure of the administration to notify the Applicant in writing leaves this matter receivable *ratione temporis.*

37. Further, the fact that the MEU, in their management evaluation, partially adhered to the Applicant's requests by authorising the refunding him NZ $450 leaves a difficulty in how to construe the administration's insistence that the Applicant's challenge to the policy was time barred. In the eyes of the Respondent, the Applicant's request for a refund was also surely outside any delay running from 22 March 2010 or 21 October 2010. In refunding the Applicant, the

Respondent has undermined their argument that the request for a management evaluation of the permanent residency policy was time barred.

*Whether the application is receivable ratione materiae*

38. With regards to the Respondent's submission that this matter is not receivable *ratione materiae*, it is the Tribunal's view that although there may not be a specific reference to the fact that the policy is noncompliant with the Applicant's terms of appointment, there is a clear inference to this noncompliance by the Applicant's very challenge to the policy. The Applicant has also made it reasonably clear that he is challenging this particular policy. Where noncompliance is concerned, this is a matter to be decided on the merits of this case. This matter is receivable *ratione materiae.*

**Conclusion**

39. This application is receivable *ratione temporis* and *ratione materiae.*

*(Signed)*

Judge Vinod Boolell

Dated this 9th day of July 2012

Entered in the Register on this 9th day of July 2012

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi