UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/026
Judgment No.: UNDT/2012/184
Date: 21 November 2012
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

McCLUSKEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision of the High Commissioner to retract the offer of an enhanced separation package on 29 September 2011 and requests its rescission.

Facts

2. From 1 November 2006 up to his separation from service on 30 September 2011, the Applicant worked for UNHCR on several consecutive short fixed-term appointments at the Division of Information Systems and Telecommunications ("DIST"). The initial appointment was not awarded through a competitive selection process and thus not endorsed by the Appointments, Postings and Promotions Committee.

3. At the end of April 2010, all DIST staff members were formally notified of the restructuring of the Division and the reorganization process.

4. By IOM/FOM No. 039/2010 dated 7 July 2010, the Deputy High Commissioner informed UNHCR staff members of special measures to mitigate the impact of the restructuring of DIST on staff affected by a change in the status of their positions. One of the measures provided for was the extension until 30 June 2011 of fixed-term appointments expiring on or before 31 December 2010, with the agreement of the staff members concerned.

5. By email dated 9 July 2010, the Director of DIST asked all DIST staff, including the Applicant, whether they agreed to the extension of their fixed-term appointments until 30 June 2011.

6. On 13 July 2010, the Applicant agreed to his contract's extension. On the same day, the Director of DIST advised the Applicant that he was not eligible for a contract extension, since he was on a temporary and not a fixed-term appointment.

7. However, the Applicant's short fixed-term appointment was subsequently extended for six months from 1 January 2011 until 30 June 2011.

8. On 19 January 2011, the Director of DIST forwarded an email from the Director of the Division of Human Resources Management ("DHRM") to UNHCR staff informing that , as the implementation of the DIST reform needs more time, "all fixed[-]term appointments (FTAs)" would be further extended from 1 July 2011 until 30 September 2011.

9. By IOM No. 016/2011/FOM No. 017/2011 dated 1 March 2011, the Director of DHRM informed UNHCR staff of additional mitigating measures amongst which was an enhanced agreed separation package for staff members holding fixed-term appointments for more than five years.

10. By email to the Director of DHRM dated 5 May 2011, the Applicant requested the extension of his contract through 30 September 2011 in line with the above-mentioned email of 19 January 2011.

11. On 29 May 2011, following meetings with the Applicant, the Director acknowledged that his email of 19 January 2011 "could have given [the Applicant] the impression that, even though [he had] been renewed on short fixed[-]term appointments of less than one year (i.e. [he was] not appointed through the APPC), [his] contract would be extended like other fixed[-]term appointments from 1 July to 30 September 2011". He further proposed two options to the Applicant: a) an extension of his contract through 30 September 2011, but on Special Leave With Full Pay (SLWFP) because there was no assignment available for him or a position against which to charge his salary, or b) the implementation of an agreed separation effective 30 June 2011 with associated indemnities.

12. By email dated 1 June 2011, the Applicant requested an extension of his contract through 30 September 2011. He also asked for "equality and alignment with the rest of the DIST FTA contract holders who have had their contracts already extended till the end of September 2011."

13. By email dated 6 June 2011, the Director of DHRM informed the Applicant that his short fixed-term appointment would be extended to 30 September 2011 and that the extension was being made without any expectation of subsequent renewal or conversion. He further informed the Applicant that he would be placed on SLWFP.

14. On 7 and 16 June 2011, the Applicant asked DHRM for the calculation of an enhanced separation package. This was provided to him on 21 June 2011 and the calculation was based on a separation effective 30 June 2011.

15. On 27 June 2011, the Applicant signed a letter of appointment from 1 July to 30 September 2011. As a result, effective 1 July 2011, he was placed on SLWFP.

16. By Memorandum dated 22 September 2011, the Director of DHRM informed the Applicant that he would be separated on 30 September 2011, given that no assignment had been identified for him in the context of the DIST transition, and that he had not been selected for a new position. He further communicated to the Applicant that he had exceptionally agreed to provide him with a separation payment in recognition of the length of his service with the Organization.

17. On 27 September 2011, the Applicant wrote to DHRM to inquire about the necessary steps to secure the enhanced separation package offered to him on 21 June 2011. On 27 and 29 September, DHRM responded to the Applicant that as he had not accepted the package and had chosen the extension of his contract instead, he was no longer entitled to it. He would only be entitled to the termination indemnities the Director of DHRM exceptionally granted to him in his memorandum of 22 September 2011.

18. Also on 29 September 2011, the contracts of four staff members, who had been notified of the non-extension of their appointments beyond 30 September 2011 alike the Applicant, were offered contract extensions until 30 November 2011 on a SLWFP basis. In this context, the said staff members were also advised that the calculation for a voluntary separation would be revised.

19. On 30 September 2011, the Applicant was separated from service.

20. On 23 November 2011, the Applicant requested management evaluation of the decision to retract the offer of an enhanced separation package.

21. By email dated 2 April 2012, the Respondent informed the Applicant that he would "not be able to provide [the Applicant] with the outcome of the management evaluation until the week ending 20 April 2012."

22. On 3 April 2012, the Applicant requested an extension of time to file an application, which was rejected by the Tribunal on 4 April 2012.

23. On 9 April 2012, the Applicant filed the present application and the Respondent filed his reply on 10 May 2012.

24. By Order No. 136 (GVA/2012) of 27 August 2012, the Dispute Tribunal informed the parties that it considered that the case could be dealt with on the papers, without a hearing, and gave them one week to file objections, if any. Neither party objected to a judgment being rendered on the papers and without a hearing.

Parties' submissions

25. The Applicant's principal contentions are:

a. The decision to withdraw the offer of the enhanced separation package—while the Administration did not retract the enhanced separation packages of four of his colleagues who were in a similar position, but recalculated the offer based on their new separation dates—breached his right to equal treatment;

b. Since there was no justification for such a distinction in treatment, the contested decision is arbitrary and unsupported by the Staff Rules and Regulations.

26. The Respondent's principal contentions are:

a. The application is not receivable *ratione temporis* as well as *ratione materiae*;

i. Pursuant to article 8.1(d)(i)b. of the Statute of the Dispute Tribunal, an application shall be filed within 90 days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters, and 45 calendar days for other offices. As the Applicant was stationed in Geneva, i.e. UNHCR Headquarters, where the dispute arose, the response period for management evaluation should be 30 days, i.e. up to 23 December 2011 and an application should have been filed on or before 22 March 2012;

ii. Pursuant to article 2.1(a) of the Statute of the Dispute Tribunal, only an administrative decision shall be appealed. In this case, the Applicant took the decision not the Respondent. In connection with the restructuring of DIST he was offered different options. The Applicant chose the extension of his contract through the end of September 2011 with SLWFP and signed a letter of appointment. He did not accept the offer of an agreed separation effective 30 June 2011 including the enhanced separation package. Upon opting for his contract's extension, the separation package offer lapsed;

b. The application is also not founded;

i. The Applicant was not eligible to receive an enhanced separation package, neither the one offered nor a new one, for he was not holding a fixed-term appointment for more than five years. The Applicant's entry on duty date was 1 November 2006 and not 1 April 2005 as erroneously indicated in the estimate provided to him;

ii. An enhanced separation package is based on an agreed separation. It would not be in the interest of the Organization to grant the Applicant this package although his contract had already been extended as an alternative option to an agreed separation;

iii. The Applicant's claim about an alleged breach of his right to equal treatment is without merit. The previous Judgment *McCluskey* UNDT/2012/060—related to the non-extension of his contract—stipulated that he was not in a similar position to the four other staff members he referred to. He is neither in a similar position to them now. The Applicant, unlike his colleagues, had not accrued five years of service at the date of his separation on 30 September 2011. Moreover, whereas the Applicant was separated on 30 September 2011, his colleagues were granted a contract extension until the end of November 2011. In this context the recalculated separation packages were negotiated with these colleagues.

Consideration

Receivability

27. The Respondent argued that the application is not receivable *ratione materiae* as the Applicant did not contest an administrative decision. Pursuant to article 2.1(a) of the Statute of the Dispute Tribunal, the Tribunal has jurisdiction to hear and pass judgement on an application filed by an individual to appeal "an administrative decision" that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

28. According to the case law of the United Nations Administrative Tribunal, an administrative decision is defined as follows:

> "a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. 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." (Judgement No. 1157, *Andronov* (2003); see also *Tabari* 2010-UNAT-030).

29. Furthermore, the United Nations Appeals Tribunal has also identified an administrative decision as a "unilateral decision with direct legal consequences." (*Tabari* 2011-UNAT-177).

30. In the instant case, the Applicant contests "the decision to retract the offer of an enhanced separation package". On 29 September 2011, DHRM informed the Applicant that the offer for the enhanced agreed separation package was no longer valid as he did not accept it. The Respondent also advised the Applicant that, "at this stage, … the administration [was] not offering the Applicant an agreed termination".

31. It is true that it was the Applicant who chose one of two options when he signed the letter of appointment on 27 June 2012. At the same time, it was the administration that explicitly rejected the Applicant's request for an enhanced separation package on 29 September 2011. This rejection has direct legal consequences on the Applicant's individual rights and, as a result, the administration's decision has to be considered as an individual administrative decision. The present application is receivable *ratione materiae*.

32. Regarding the receivability *ratione temporis*, the established case law of this Tribunal and that of the Appeals Tribunal is that time limits for contesting administrative decisions are well known and must be adhered to strictly. They are set by the legislator to ensure the stability of a legal situation arising from an administrative decision. Therefore it is crucial to observe the time limits provided by the Statute of the Dispute Tribunal (e.g. *Mezoui* 2010-UNAT-043,

Ibrahim 2010-UNAT-069, *Christensen* 2012-UNAT-218 as well as *Odio-Benito* UNDT/2011/019 and *Czaran* UNDT/2012/133).

33. Pursuant to staff rule 11.4(a), a staff member may file an application against a contested administrative decision with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the response period for the management evaluation, whichever is earlier. Article 8.1(d)(i)b., stipulates that the response period shall be 30 calendar days for disputes arising at headquarters and 45 days for other offices. Staff rule 11.2(d) clarifies that the response period for staff member stationed in New York is 30 days and 45 days for staff member stationed outside of New York.

34. By memorandum dated 24 July 2009, the United Nations Under-Secretary-General for Management delegated the authority to carry out the functions of management evaluation, governed by staff rule 11.2, to the Deputy High Commissioner of UNHCR. By IOM/FOM 034/2009 dated 1 July 2009, the Officer-in-Charge, DHRM, informed all UNHCR staff members of this delegation of authority.

35. In footnote 2 of the IOM/FOM in question, it is stated that "all references to the 'Secretary General' in [s]taff [r]ules 11.2 and 11.3 are to be read as 'the Deputy High Commissioner'". Said IOM/FOM further states that "[t]he decision of the Deputy High Commissioner will constitute the management evaluation and will be communicated to a staff member in Geneva within 30 calendar days, and to a staff member in the field within 45 calendar days, of receipt of the request". As the Applicant was stationed in Geneva at the time of the contested decision, the response period for management evaluation was of 30 calendar days in the case at hand. Since the Applicant requested management evaluation on 23 November 2011, the response period expired on 26 December 2011. Therefore, the application had to be filed by 26 March 2012 at the latest, whereas the Applicant filed it on 9 April 2012. Hence, the application is time-barred and not receivable.

Merits

36. While the application fails on receivability, it also has no merits.

37. The Applicant argued that he had a right to be treated like his fellow colleagues as they were all in the same administrative and contractual situation. The Applicant was advised that he was not entitled to the enhanced separation package, whereas the contracts of his four colleagues were extended and they were offered recalculated separation packages. The Applicant argued that this unequal treatment was unjustified and thus unlawful and arbitrary.

38. In *Tabari* 2011-UNAT-177, the Appeals Tribunal held that "[s]ince Aristotle, the principle of equality means equal treatment of equals; it also means unequal treatment of unequals".

39. Also the former UN Administrative Tribunal declared that "[t]he principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike" (see Judgment No. 268, *Mendez* (1981); Judgment No. 1221, *Sharma* (2004)).

40. It is undisputed that the Applicant, unlike his four colleagues, had not accrued five years of service with UNHCR as of his date of separation on 30 September 2011. Therefore, his contractual situation is different to that of his four colleagues.

41. It is within the discretion of the Administration to differentiate between staff members who had accrued five years of service and those who had not. In this distinction there is no arbitrariness, as previously found by this Tribunal (see *McCluskey* UNDT/2012/60, paras. 39-44).

42. As the Applicant was not in an equal administrative and contractual situation with respect to his four colleagues, there was no breach of the principle of equality.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 21st November 2012

Entered in the Register on this 21st November 2012

(*Signed*)

René M. Vargas M., Registrar, Geneva