



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/057

Judgment No.: UNDT/2013/008

Date: 23 January 2013

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

OBINO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (“ECA”) in Addis Ababa. On 15 Jun 2010, the Applicant in the present case and Applicant Kodre¹ filed Applications with the Dispute Tribunal (“the Tribunal”) in Nairobi contesting the decision of the Secretary-General to implement a decision by the Chairman of the International Civil Service Commission (“ICSC”) to reclassify the Addis Ababa and the Nairobi duty stations, respectively, from category “C” to “B” (“the Contested Decision”). The Contested Decision was notified to staff members in Addis Ababa on 22 December 2009 and to the staff members in Nairobi on 5 January 2010.

Procedural history

2. The Applications were served on the Respondent on 16 June 2010. On 18 June 2010, the Respondent filed a Motion to change venue pursuant to art. 4.9 of the Tribunal’s Statute and articles 19 and 28.2 of its Rules of Procedure on the grounds that a conflict of interest existed for the judges serving at the Nairobi duty station in light of the fact that the Applications challenged the decision to reclassify the Nairobi and Addis Ababa duty stations.

3. On 17 July 2010, the Respondent submitted his Reply and on 20 July 2010, the matter of *Kodre* was transferred to the Dispute Tribunal in New York.

4. On 8 September 2010, the then President of the Dispute Tribunal, Judge Thomas Laker, sought clarification from the Respondent as to whether his motion of 18 June 2010 was in relation to a change of venue under art. 6.2 of the Rules of Procedure or whether it related to a recusal of a judge under art. 4.9 of the Statute and art. 28.2 of the Rules of Procedure.

5. On 14 September 2010, the Respondent clarified that he was seeking the recusal of the judges serving in Nairobi on the grounds of a conflict of interest and a change of venue.

¹ Case No. UNDT/NY/2010/084.

6. By Order No. 075 (GVA/2010) dated 28 September 2010, the then President of the Dispute Tribunal rejected the Respondent's Motion for change of venue and recusal.

7. On 17 February 2011, the Respondent filed a Motion for change of venue for purposes of Joinder, pursuant to articles 6.2 and 19 of the Rules of Procedure of the Tribunal, requesting that the venue be changed from the Tribunal in Nairobi to the one in New York for purposes of joining this matter with the case of *Kodre*. The Respondent submitted that a change in venue, combined with a joinder of the two cases, would save costs and time, prevent duplication of evidence, ensure consistency in judgments and promote judicial economy. This Motion was rejected by the Tribunal in Order No. 016 (NBI/2011) dated 18 February 2011.

8. In response to a query from the Registry, the Applicant indicated on 19 January 2011 that in the event the Tribunal decided to hold a hearing, he did not intend to call any witnesses in support of his case. The Respondent indicated that he would call the Chief of the Human Resources Policies Division at the ICSC as a witness. In light of the extensive documentation on the ICSC submitted by the Parties, the Tribunal decided that there was no need for a hearing and proceeded to deal with the matter on the papers.

Facts

9. During the relevant period, the Applicant was employed on a fixed-term appointment as a Communications Officer with ECA. His duty station was Addis Ababa.

10. On 22 December 2009, the then Executive Secretary of ECA ("the ES/ECA") advised all ECA staff per interoffice memorandum of the intention of the ICSC to change the classification for Addis Ababa from hardship class C to class B, effective 1 January 2010. He advised the staff that he had established a working group to prepare a submission that would form the basis of an appeal to ICSC to reconsider the planned reclassification. He also advised the staff that he had written to the Chairman of the ICSC requesting a suspension of the reclassification until the ECA submission on the matter had been reviewed.

11. ECA's request for suspension was rejected by the ICSC Chairman and on 1 January 2010, the hardship classification for the Addis Ababa duty station was changed from C to B.

12. On 25 February 2010, the Applicant filed a request for management evaluation. By a memorandum dated 15 March 2010, the Applicant's then counsel was informed by the Management Evaluation Unit ("MEU") that the request was not receivable because the Contested Decision was not an administrative decision within the meaning of art. 2 of the Statute of the Tribunal.

13. The Applicant filed the current application on 15 June 2010.

Issues

14. The following are the issues for determination in this matter:

- a. The scope of the Application;
- b. Whether the Contested Decision is an administrative decision pursuant to art. 2 of the Statute of the Tribunal; and
- c. If it is an administrative decision, whether it was proper for the Secretary-General to implement the decision of the ICSC.

Scope of the Application

15. The issues here are: (i) whether the Application relates to the reclassification of both the Addis Ababa and Nairobi duty stations or whether it relates solely to the Addis Ababa duty station; and (ii) if the Application is in relation to both duty stations, does the Applicant have the requisite standing.

Applicant's submissions

16. The Applicant submits that the Respondent's contention that he is challenging a decision to reclassify the Nairobi and Addis Ababa duty stations is inaccurate and misleading because his substantive application does not refer to the Nairobi duty station even once. The Applicant notes that in paragraph 1 of his substantive Application, he clearly indicates that he is contesting the decision to

implement the ICSC decision “to upgrade the Addis Ababa duty station from Hardship Class C to hardship Class B, effective 1 January 2010”.

Respondent’s submissions

17. The Respondent rejects the Applicant’s contention that his Application relates solely to the Addis Ababa duty station. The Respondent claims that the Applicant’s position is factually at odds with the Application forms he submitted to the Tribunal on 15 June 2010 because in paragraph 1, section III of the Application form defining the scope of the Application, the Applicant stated that the contested decision was the Secretary-General’s decision to implement the ICSC decision to reclassify “the Nairobi and Addis Ababa duty stations from category C to B”.

18. The Respondent argues that in light of the clear statement of appeal presented by the Applicant, it is disingenuous of the Applicant to now claim that he was not also challenging the conditions of service at the Nairobi duty station in his submission.

19. The Respondent submits further that the stipulation limiting the scope of the Application appears for the first time in the Applicant’s submission of 15 September 2010 and is therefore not properly before the Tribunal and cannot be deemed to be an amendment to the Application because the Applicant did not seek leave of the Tribunal to amend. Further, the Respondent argues that the stipulation made by the Applicant has not been the subject of an order or finding of the Tribunal.

Considerations

20. On 14 June 2010, the Applicant’s counsel submitted a brief application form and a detailed application narrative to the Nairobi Registry. Counsel indicated in his email that the submission was incomplete due to the absence of the relevant annexes. On 15 June 2010, Counsel submitted the annexes and the application form again.

21. Paragraph 1 of the application narrative stated specifically that he was contesting the decision taken by the Secretary-General to implement the decision of the ICSC to upgrade “the **Addis Ababa duty station** from Hardship Class C to Hardship Class B, effective 1 January 2010” (*emphasis added*). The narrative then went on to detail how the Contested Decision would affect staff members in the Addis Ababa duty station. No mention was made of the Nairobi duty station.

22. However, the application form indicated at section III that the decision being contested was the decision of the Secretary-General to implement the ICSC decision reclassifying “the **Nairobi and Addis Ababa duty stations** from category ‘C’ to ‘B’ (*emphasis added*).

23. In the face of these conflicting statements, the then President of the Tribunal held in Order No. 075 that the Applicant could have no interest in contesting a decision related to Nairobi, a duty station with which he had no relation and that it was “only logical” that the application related solely to Addis Ababa. Consequently, the then President held that the Application was in relation solely to the decision to reclassify the Addis Ababa duty station.

24. In light of the ruling in Order No. 075, this Tribunal finds that since the scope of the Application has been the subject of a previous order of the Tribunal, there is no need for additional considerations or a new ruling.

Whether the Contested Decision is an administrative decision of the Secretary-General of the United Nations pursuant to article 2.1(a) of the Statute of the United Nations Dispute Tribunal

Respondent’s submissions

25. The Respondent submits that the Applicant is not challenging an administrative decision within the meaning of art. 2.1(a) of the Tribunal’s Statute and as such, the Application is not receivable.

26. In this regard, the Respondent argues that the Application does not identify a specific administrative decision, or an implied administrative decision taken by the Respondent, which had directly impacted on his legal rights, or which has

produced direct legal consequences to the legal order. While the decision of the ICSC has an impact on the entitlements and allowances of the Applicant, it is not *per se* in violation of a legal right of the Applicant or a change in the legal order applying to the Applicant.

27. Additionally, the Respondent contends that the decision to reclassify the Nairobi duty station is not a decision of the Respondent because the reclassification decision, which is akin to an administrative act, was issued by the ICSC pursuant to its authority to “establish such classification under its established methodology as approved by the General Assembly, in its resolution 44/198, Section E, paragraph 1”. Further, he contends that in accordance with art. 6 of its statute, the ICSC is responsible to the General Assembly and is fully independent of the Respondent.

28. The Respondent further submits that the Respondent has no discretion with respect to implementing ICSC decisions and that an administrative decision may only be taken when the Respondent has the discretion and power to choose among alternatives. In the instant case no such discretion has been vested in the Respondent.

Applicant's submissions

29. The Applicant submits that he is challenging the Secretary-General's decision to implement a decision of the ICSC to reclassify the Addis Ababa duty station. Additionally, he claims that the Secretary-General failed to request the ICSC to reconsider its decision, thereby failing in his obligations as the Chief Administrative Officer vis-à-vis the Addis Ababa duty station to accord full legal and judicial protection. Thus, the Secretary-General's failure to request reconsideration and his implementation of the decision constitutes an “implied” administrative decision within the terms of art. 2 of the Tribunal's Statute.

30. The Applicant argues that while decisions of the ICSC may be of a mandatory nature, the Secretary-General is required to exercise a particular level of care in implementing said decisions, in particular if such decisions would have an immediate impact on the terms of appointment of staff members of the United

Nations. In this respect, he submits that the Contested Decision has substantial impact on the remuneration and entitlements of staff members in the Addis Ababa duty station.

31. Additionally, the Secretary-General's failure was in violation of his obligation to exercise due diligence in the observation of the contractual rights of the Applicant, which includes an obligation to ensure that decisions of the ICSC that affect the terms of appointment of staff members have been arrived at in accordance with the Rules and Statute of the ICSC.

Considerations

32. Article 2.1(a) of the Statute of the Tribunal (UNDT Statute) provides that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General of the United Nations:

To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance [...].

33. In *Andati-Amwayi* 2010-UNAT-058, the United Nations Appeals Tribunal ("Appeals Tribunal") held that:

What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

34. The current Application appears to be challenging the Secretary-General's decision to implement a reclassification decision made by the ICSC with respect to the Addis Ababa duty station. However, after a careful review of the nature of the decision being challenged and the legal framework under which it was made, the Tribunal finds that the fundamental decision being contested in this case is actually the ICSC decision to reclassify the Addis Ababa duty station.

35. Thus, the crux of the issue is whether the ICSC's actions or omissions can be deemed to be that of the Secretary-General and therefore of the Administration.

36. In *Cherif* 2011-UNAT-165, the Appeals Tribunal held that its mandate is limited to situations where "a staff member is contesting the application of an administrative decision, usually taken on behalf of the Secretary-General". Similarly, the jurisdiction of the UNDT is governed by its Statute. Article 2.1 allows an individual to challenge an administrative decision of the Secretary-General that impacts on the contract of employment of that individual. Article 2.5 of the Statute also provides for applications to be filed against specialized agencies brought into relationship with the Organisation in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations ("the Charter"). This is subject to an agreement between the agency and the Secretary-General.

37. The ICSC was established by the United Nations General Assembly as an independent expert body.² Pursuant to General Assembly resolution 3357 (XXIX) of 18 December 1974, its mandate is to regulate and coordinate the conditions of service of staff in the United Nations common system, while promoting and maintaining high standards in the international civil service.

38. Article 1.1 of the Statute sets out the mandate of the ICSC as follows:

The General Assembly of the United Nations establishes, in accordance with the present statute, an International Civil Service Commission (hereinafter referred to as the Commission) for the regulation and coordination of the conditions of service of the United Nations common system.

39. Pursuant to art. 11 of the ICSC Statute, the ICSC shall establish (*emphasis added*):

(a) The methods by which the principles for determining conditions of service should be applied;

² General Assembly resolutions 3042 (XXVII) (United Nations salary system), adopted on 19 December 1972, and 3357 (XXIX) (Statute of the International Civil Service Commission), adopted on 18 December 1974.

- (b) Rates of allowances and benefits, other than pensions and those referred to in article 10(c), the conditions of entitlement thereto and standards of travel;
- (c) The classification of duty stations for the purpose of applying post adjustments.

40. The General Assembly, in its resolution 53/221 (Human resources management), adopted on 7 April 1999, reaffirmed its support for the integrity and independence of the international civil service.

41. Pursuant to art. 6 of the Statute of the ICSC, its members shall “perform their functions in full independence and with impartiality; they shall not seek or receive instructions from any Government, or from any secretariat or staff association of an organization in the United Nations common system”.

42. It is noteworthy that while the ICSC only makes recommendations to the General Assembly on salary scales, post adjustment, allowances and benefits, staff assessment and the “broad principles for the determination of the conditions of service of the staff” pursuant to art. 10 of its Statute, it is charged specifically with “establishing” the classification of duty stations under art. 11. Additionally, pursuant to art. 25 of the ICSC Statute, decisions of the ICSC shall be applied by each organization concerned with effect from a date to be “determined by the Commission”,

43. Also noteworthy is the fact that in resolution 67/241 (Administration of Justice at the United Nations), the General Assembly reaffirmed that “the decisions of the International Civil Service Commission are binding on the Secretary-General and on the Organization”.

44. Apparently, the ICSC is not an agency within the meaning of the Charter. It is a special creature emanating from a resolution of the General Assembly vested with a specific mandate as prescribed by its statute. The question that should be addressed is whether the ICSC is answerable to the Secretary-General.

45. Given the structure and mandate of the ICSC the Tribunal cannot conclude that the ICSC is answerable to the Secretary-General. Though it may communicate

its recommendations on conditions of service to the Secretary-General these will still have to be approved by the General Assembly and it is to the General Assembly that the ICSC is answerable and accountable.

46. Consequently, the Tribunal cannot impute the decisions of an independent entity, such as the ICSC, to the Secretary-General due to the different roles they play vis-à-vis the United Nations and its staff members.

47. In light of the very precise wording in articles 11 and 25 of the ICSC Statute and in A/67/241, the Tribunal finds that the Secretary-General has not been vested with any discretionary authority with respect to the implementation of ICSC decisions. The Tribunal is therefore inclined to accept the Respondent's argument that since the Secretary-General has no discretionary authority in this respect, his implementation of the ICSC reclassification is not an administrative decision under art. 2 of the Tribunal's Statute.

48. In view of the fact that art. 2.1(a) of the UNDT Statute expressly states that the Tribunal is competent to hear and pass judgment on an application filed by an individual "against the Secretary-General of the United Nations"; the Tribunal cannot extend its jurisdiction to include decisions made by the ICSC, regardless of how those decisions are couched to appear like decisions of the Secretary-General.

49. Additionally, in Judgment No. 1157, *Andronov* (2003), the former United Nations Administrative Tribunal defined an administrative decision 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 and 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 [...]

50. The direct consequences therefore stemming from such administrative decision, as per art. 2.1 of the Statute of the UNDT would as a matter of course relate to the Applicant's terms of appointment or his contract of employment. The Applicant therefore bears the onus to show that (1) the contested decision was firstly taken by Administration; (2) that it was taken unilaterally and was of individual application; and that (3) it directly impacted on his appointment or contract of employment.

51. Further, in *Andati-Amwayi* 2010-UNAT-058, the Appeals Tribunal held that:

[...] In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

52. The Tribunal finds that the ICSC does not have the power or mandate to decide on the individual conditions of service of each staff member. Rather the role of the ICSC is to study and recommend broadly the conditions of service of particular categories of staff members depending on a number of criteria. A change in the status to a higher level of a duty station obviously results in a reduction of the pay packet of a staff member. But the allowances relating to hardship is not a fixed term of the employment contract and is subject to changes depending on conditions prevailing in a duty station.

53. In the present case, the Applicant contends that the implementation of the reclassification decision has substantial impact on the remuneration and entitlements of staff members in the Addis Ababa duty station. He did not place any evidence before the Tribunal to show that the contested decision was taken solely with respect to him or that the legal consequences therein affected only him.

54. Noting that Article 2.1 of the Statute of the UNDT provides that the Tribunal is “competent to hear and pass judgment on an application...to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”, the Tribunal finds that the decision is of general application because while it resulted in direct legal consequences, it was not a decision taken in a precise individual case i.e. the Applicant’s case.

55. In light of the foregoing, the Tribunal concludes that the Applicant is not challenging an administrative decision within the meaning of art. 2.1(a) of the Tribunal’s Statute.

If it is an administrative decision, whether the Secretary-General exercised due diligence in implementing the reclassification of the ICSC

56. In view of the Tribunal’s conclusion that the Contested Decision does not amount to an administrative decision under art. 2 of the UNDT Statute, the issue of whether the Secretary-General exercised due diligence does not arise.

Conclusion

57. In light of the foregoing, the Tribunal concludes that the current Application is not receivable and is therefore rejected.

Signed

Judge Vinod Boolell

Dated this 23rd day of January 2013

Entered in the Register on this 23rd day of January 2013

Signed

Jean-Pelé Fomété, Registrar, Nairobi