UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/056
Judgment No.: UNDT/2013/060
Date: 27 March 2013
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MUNUVE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Abbas Alihussein Esmail, Advocate

Counsel for the Respondent:
Katya Melluish, UNON

Introduction

1. The Applicant, a Stock Clerk at the G-3 level in the Mail, Pouch and Archives Unit, Facilities Management and Travel Service ("FMTS"), United Nations Office at Nairobi ("UNON"), filed an application on 25 October 2012 in which he contests the failure to grant him adequate compensation for higher level duties he performed between 2006 and 2010.

2. The Respondent filed a reply on 13 December 2012 in which it is argued that the Applicant's claim is without merit and that the application is not receivable.

3. On 27 January 2013, the Applicant filed a response to the reply having been granted leave and an extension of time to do so by the Tribunal on 18 December 2012.

4. This Judgment addresses the question of receivability of the Applicant's claim and the Tribunal will at this juncture deal only with the issues relating to this question and not with the merits of the application. Further, having regard to the particular circumstances of this case, the Tribunal has decided to render judgment on the preliminary question of receivability without holding a hearing.

Facts

5. On 20 March 2012, the Applicant, whose post had by then been reclassified to the GS-3 level, was informed that he would be granted retrospective Special Post Allowance ("SPA") at the GS-4 level effective 1 May 2010 and at the GS-3 level from 10 November 2009 to 7 February 2010 ("the contested decision").

6. On 17 May 2012, the Applicant requested for a management evaluation of the contested decision.

7. In a letter dated 1 August 2012, the Management Evaluation Unit ("MEU") informed the Applicant that having examined the facts of his case and applied the

relevant law to those facts, the Secretary-General had decided to uphold the contested decision.

8. The present application was filed on 25 October 2012.

9. The Respondent filed a reply on 13 December 2012 in which it is argued that the application is not receivable.

10. On 27 January 2013, the Applicant filed a response to the reply in which he maintains that the application is receivable.

Respondent's submissions

11. The Respondent's submissions on receivability are as follows:

a. The Applicant, with the assistance of the Office of Staff Legal Assistance ("OSLA"), negotiated a settlement agreement with the Respondent whereby he would be granted retrospective SPA at the GS-4 level effective 1 May 2010 to 31 August 2010 and at the GS-3 level from 10 November 2009 to 7 February 2010, in consideration for which the Applicant would not pursue any claim against the Respondent through the internal justice system.

b. Article 8.2 of the Statute of the Tribunal provides that an application shall not be receivable if the dispute arising from the contested administrative decision has been resolved by an agreement reached through mediation.

c. The settlement agreement reached between the Applicant and the Respondent amounts to "an agreement reached through mediation" and that by seeking "to go behind that to the Dispute Tribunal is unconscionable and an abuse of process."

d. The Applicant is estopped in equity from pursuing his claim. The agreement in the present case was not documented as a formal settlement or mediation agreement but the Respondent has proof of the agreement by way of correspondence between the parties. The Respondent submits that he has relied to his detriment on the agreement reached with the Applicant by granting him SPA on an exceptional basis.

e. The Respondent avers that proof of the negotiated agreement rather than the discussions preempting such an agreement are not privileged and may be viewed by the Tribunal in circumstances such as the present case.

f. The application is not receivable *ratione temporis* or *ratione materiae.* The Respondent submits that the Applicant pins his application on the decision said to have been taken on 20 March 2012, at the same time, he also seeks to contest the failure to grant him adequate compensation for duties he performed between 2006 and 2010. The Respondent submits that the Applicant seeks to use the decision of 20 March 2012 as a "prop on which to hang a number of general complaints about his remuneration dating back as long as six years" and that this is an abuse of process.

g. Any challenge regarding the non-payment of SPA prior to 10 November 2009 is out of time since that was not the subject of the review which resulted in the contested decision.

h. Any challenge to the classification of his post is not receivable *ratione materiae.* Insofar as the Applicant contests that his post was wrongly classified, the matter fell to be argued under ST/AI/1998/9 (System for the Classification of Posts), not by virtue of Chapter XI of the Staff Rules.

Applicant's submissions

12. The Applicant's submissions on receivability are as follows:

a. There has never been any settlement agreement arrived at between the parties through mediation or any other process where the Applicant agreed to accept the retroactive compensation granted on 20 March 2012 as a bar to pursuing any claim against the Respondent through the justice system.

b. Through OSLA, he was pursuing his right to equal pay for work of equal value performed since March 2006. At no point did he instruct OSLA to enter into any settlement or consent where he waived his right to pursue any claim against the Respondent in consideration for the contested decision of 20 March 2012.

c. The Respondent unilaterally took the decision to grant compensation on 20 March 2012. At no point, prior to payment, was the Applicant informed of the Respondent's decision to enable him to voice his acceptance or rejection of the decision.

d. It is the Applicant's case that it was not until certain personnel actions dated 20 March 2012 were effected that he got to know of the compensation. Apart from those personnel actions, no other document was ever submitted to the Applicant communicating the decision or the considerations taken into account before arriving at the decision. A memorandum which the Applicant was supposed to have received before 31 March 2012 was never transmitted to him.

e. The Respondent's argument that it is an abuse of process to peg the failure to grant SPA on the contested decision of 20 March 2012 is not sustainable because the contested decision of 20 March 2012 is itself

recognition that there was a systemic failure, dating back three years, to recognize the duties and responsibilities he had carried out.

f. The Applicant submits that he had faith in the internal administrative mechanisms of the United Nations and that he resorted to using informal means of dispute resolution to resolve the issue of compensation from 2006 to 2012. When his efforts failed, he sought assistance from OSLA to articulate and intervene on his behalf with the Administration. The instructions he gave OSLA were to seek compensation for the higher level duties that he had performed since 2006.

g. The Applicant submits that, despite the assertion that his case had been comprehensively reviewed in 2011, the UNON Administration went ahead and further granted retroactive compensation for the period between 10 November 2009 and 7 February 2010 and 1 May 2010 to 31 August 2010. This was a clear indication that the review undertaken by the administration in 2011 was not comprehensive.

h. The Applicant submits that by taking the contested decision to grant him compensation in 2012, the Administration was conceding that he was unfairly denied compensation for prolonged durations during which he was performing higher level duties than the duties outlined under his contract.

i. The decision taken in March 2012 to compensate him was a fresh administrative decision taken after the Applicant used formal channels through OSLA to ventilate his issues. The Applicant submits that all his efforts were geared towards resolving the dispute through informal means of conflict resolution at all times hence he used all channels possible including OSLA to intervene on his behalf. It is at the point

when OSLA's efforts failed to satisfy the Applicant that he sought management evaluation.

j. The Applicant submits that in approaching the Dispute Tribunal, he is not seeking to challenge the classification of his post.

Consideration

13. On 20 March 2012, the Applicant was informed that he would be granted retrospective SPA at the GS-4 level effective 1 May 2010 to 31 August 2010 and at the GS-3 level from 10 November 2009 to 7 February 2010. The Applicant challenges this decision on the grounds that he should have been awarded higher compensation to include the higher level duties that he undertook during the period 2006 to 2010.

14. The Respondent challenges the receivability of the application on the grounds that the Applicant, with the assistance of OSLA, negotiated a settlement agreement with the Respondent whereby in consideration of the retrospective SPA payments, he would not pursue any claim against the Respondent through the internal justice system.

15. Counsel for the Respondent further submits that pursuant to art. 8.2 of the Statute of the Tribunal, an application shall not be receivable if the dispute arising from the contested administrative decision has been resolved by an agreement reached through mediation. The entire text of art. 8.2 is reproduced below for ease of reference:

> An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation

> agreement or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of the signing of the agreement.

Did the Applicant and the Respondent resolve the dispute arising from the contested administrative decision by an agreement reached through mediation?

16. In interpreting the words in the Tribunal's Statute and Rules of Procedure, it is trite law that such words should be given their plain meaning. Where different interpretations of the words are possible, formal rules of construction can be applied to determine what the intention of the said Statute and Rules was including a review of the General Assembly resolutions establishing the Tribunal. The Tribunal's Statute and Rules of Procedure must also be interpreted in a manner consistent with the United Nations Charter.

17. Paragraphs 11 to 18 of General Assembly resolution A/RES/61/261 of 4 April 2007, which set up the internal justice system, provides as follows in respect to the informal system of resolving disputes.

> 11. Recognizes that the informal resolution of conflict is a crucial element of the system of administration of justice, and emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation;
>
> 12. Decides to create a single integrated and decentralized Office of the Ombudsman for the United Nations Secretariat, funds and programmes;
>
> 13. Requests the Secretary-General to identify three posts for the Office of the Ombudsman for Geneva, Vienna and Nairobi;
>
> 14. Emphasizes the need for the Ombudsman to encourage staff to seek resolution through the informal system;
>
> 15. Affirms mediation as an important component of an effective and efficient informal system of administration of justice that should be available to any party to the conflict at any time before a matter proceeds to final judgement;
>
> 16. Decides to formally establish a Mediation Division located at Headquarters within the Office of the United Nations Ombudsman

> to provide formal mediation services for the United Nations Secretariat, funds and programmes;
>
> 17. Stresses that once parties have reached an agreement through mediation they are precluded from litigating claims covered by the agreement and that parties should be able to bring an action in the formal system to enforce the implementation of that agreement;
>
> 18. Emphasizes the role of the Ombudsman to report on broad systemic issues that he or she identifies, as well as those that are brought to his or her attention;

18. From the foregoing, it is instructive that the General Assembly conceived the concept of mediation in the context of a resolution of conflict been conducted by the Office of the Ombudsman. Paragraph 16 of General Assembly Resolution 61/261 established the Mediation Division within the Office of the Ombudsman. It is in this context that the words found in art. 8.2 of the Statute of the Dispute Tribunal appear, that is, at para. 17 where it is stressed that once parties have reached an agreement through mediation, they are precluded from litigating claims covered by the agreement.

19. The Mediation Division defines "mediation" as follows,

> An informal process in which a trained neutral person, known as a mediator, assists the parties to work toward a resolution of a dispute with the parties themselves remaining in control of the final decision…The agreement of all parties to a dispute is required for mediation to proceed[1].

20. Article 15 of the Tribunal's Rules of Procedure is titled "Referral to mediation". Article 15.2 provides as follows:

> Where the judge proposes, and the parties consent to mediation, the Tribunal shall send the case to the Mediation Division in the Ombudsman's Office for consideration.

21. In determining whether the Applicant and the Respondent resolved the dispute arising from the contested decision through "an agreement reached through

[1] UN Ombudsman and Mediation services mediation principles and guidelines of 7 July 2010.

mediation" as expressed in art. 8.2 of the Statute of the Tribunal, the Tribunal takes the following factors into account:

a. The informal resolution of conflict is a crucial element of the system of administration of justice and all possible use should be made of the informal system in order to avoid unnecessary litigation.

b. "Mediation" in the United Nations requires the involvement of a trained, neutral person from the Mediation Division of the Office of the Ombudsman to assist the parties to work towards a resolution of their dispute.

c. The agreement of all parties to a dispute is required for mediation to proceed.

d. A plain reading of the full text of art. 8.2 requires that a mediated agreement must be reduced in to writing and signed by the parties as otherwise it would be inconceivable how the implementation of such an agreement would be enforced as provided for in the latter part of art. 8.2 of the Statute of the Dispute Tribunal.

22. In view of the foregoing, the Tribunal finds and holds that the Applicant and the Respondent did not resolve the dispute arising from the contested administrative decision through mediation as envisioned by art. 8.2 of the Statute of the Tribunal. What transpired, upon careful scrutiny of the facts of the case, bears more similarity to negotiations conducted with a view to informally resolving the dispute and to avoid litigation. No written and signed agreement between the parties as a result of a successful mediation has been exhibited by the Respondent. Proof of the alleged settlement agreement between the parties by way of correspondence will not suffice. The argument that the Applicant cannot challenge the non-payment of SPA prior to 10 November 2009 cannot be determined at this point in time.

23. The Tribunal accordingly finds that the application contesting the failure to grant the Applicant adequate compensation for the higher level duties he performed between 2006 and 2010 is receivable.

24. It is also noteworthy that in their review letter dated 1 August 2012, the MEU concluded that the contested decision was receivable having been submitted within the required 60 days of notification of the decision.

Conclusion/Judgment

25. The Tribunal finds that, pursuant to art. 2.1(a) of the Statute of the Dispute Tribunal, the Applicant's claim in which he contests the failure to grant him adequate compensation for higher level duties he performed between 2006 and 2010 is receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 27th day of March 2013

Entered in the Register on this 27th day of March 2013

(Signed)

Jean-Pelé Fomété , Registrar, Nairobi