UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/073
Judgment No.: UNDT/2013/090
Date: 26 June 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

CANDUSSO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member in the Department of Management, contests the decision of the Administration rejecting his request for compensation for lack of cafeteria facilities in the building located at 380 Madison Avenue (between 46th and 47th Streets on Madison Avenue), New York ("Madison Building"). The Applicant was among the staff members relocated to the Madison Building in connection with the Capital Master Plan ("CMP"), a large-scale, long-term renovation of the United Nations Headquarters Complex in New York. He was previously located in the United Nations Secretariat building in the Headquarters Complex, which has a cafeteria.

2. The Applicant submits that the cost of a cafeteria meal was a factor in determining the salary scale of General Service level staff members and as such is part of his contract of employment. The Applicant seeks reimbursement in the amount of USD2,403.26 (as of 10 March 2011) and a monthly stipend of USD133.52 until the cafeteria services are restored.

3. The Respondent submits that the Applicant's claim is not receivable as the application concerns neither a contractual right nor an administrative decision, as required by art. 2.1 of the Tribunal's Statute. The Respondent submits that the Applicant has no express, implied, or acquired contractual right to be placed in an office building with a cafeteria, and certainly none that creates an obligation on the part of the Administration to subsidize or reimburse meals.

4. The Respondent also submits that the complaint is time-barred because, while the relocation to the Madison Building occurred in September 2009, the Applicant requested administrative review more than one year and a half later, which period is well outside the statutory time frame of 60 days from the date of notification of the decision.

5. The Respondent further submits that the Applicant's claims are without merit. The Respondent states that staff members in the Madison Building enjoy access to the cafeteria facilities located at the United Nations Secretariat building as well as several other United Nations building in the area that are within walking distance of the Madison Building. Further, staff members may also access the cafeterias through a complimentary shuttle service that travels between the Madison Building and the United Nations Secretariat building. Therefore, there are no grounds for granting the request for reimbursement or a subsidy for food expenses. The Applicant on the other hand, whilst acknowledging the operational rationale for the relocation to the Madison Building, says it is unreasonable to expect staff to access existing facilities at the Secretariat building.

6. On 28 March 2013, the Tribunal issued Order No. 79 (NY/2013), directing the parties to file any additional submissions by 8 April 2013. The Tribunal also instructed the parties to state whether they wished to have a hearing, failing which the Tribunal would proceed to consider the case on the papers. On 8 April 2013, the Respondent filed a submission stating that he had no objection to the case being decided on the papers as submitted. The Applicant did not file any additional submissions or request for a hearing, and the Tribunal thereafter proceeded to consider the case on the papers before it.

Facts

7. In 2005, the International Civil Service Commission ("ICSC") conducted a comprehensive salary survey that resulted in the preparation of a report (Report ICSC/63/R.18, Survey of best prevailing conditions of employment for General Service, Security Service, Trades and Crafts, Language Teachers and Public Information Assistants categories in New York). According to the Respondent, the ICSC survey was intended to reflect the best prevailing conditions of employment at the United Nations Headquarters in New York for General Service

and related categories of staff and reflected a "snapshot" of data at the time of its collection.

8. The Applicant included in his application an excerpt of Report ICSC/63/R.18 which states:

> **3. Quantified non-cash benefits**
>
> 25. In accordance with the headquarters survey methodology, a number of non-cash benefits were quantified and added to salary for the purposes of salary scale construction.
>
> **Subsidized or free meals**
>
> 26. A total of 13 employers provided a subsidized cafeteria for their employees. Each of the three New York organizations has a cafeteria for which it provides space and facilities for a contractor: In accordance with the established practice, the benefit was evaluated based on the difference between the price of a meal taken by the surveyed employers in their company cafeteria and that of a comparable meal in the organizations' cafeterias, multiplied by the number of days in the employers' work year. Prices were compared for a meal consisting of a salad, a hot entree and a beverage. Such a meal was priced at $8.09 at the organizations' cafeterias. The [prices] of a cafeteria meal for the outside employers were all lower: from $4.15 to $8.00. The annual amounts added for those employers ranged from $20 to $875. One employer provided a complete cafeteria lunch at no cost to the employee. The estimated cost to the employer was $1,796 per employee per annum. For those employers that did not have a cafeteria, the difference between a common system cafeteria meal and that at a comparable outside cafeteria was deducted from those employers' remuneration amounts. All amounts were included in the database with the respective jobs matched. This benefit was treated as non-taxable.

9. The Applicant submits that, following the survey, a comparison of the price of meals locally available was made and the availability of the cafeteria at the Secretariat was apparently taken into account and formed a component of the salary for General Service staff members.

10. During the summer of 2009, a number of staff members from the Secretariat building and other locations were relocated to the Madison Building in order to

implement CMP. The Applicant submits that, as a result of CMP, a total of 1,900 staff members were moved to the Madison Building.

11. The Madison Building does not have a cafeteria and is located approximately five avenues and four streets (or approximately 0.8 miles) away from the cafeteria located in the Secretariat building. It is common cause that there is a complimentary shuttle service between the Headquarters Complex and the Madison Building, although the Applicant submits that the shuttle service is not an adequate remedial measure. The shuttle makes seven round trips each working day, with each trip apparently taking approximately 10 minutes. (The Tribunal notes that the complimentary shuttle service may have been phased out recently in view of the relocation of staff from the Madison Building back to the Headquarters Complex, however, it is common cause that the shuttle service was available at the material time.)

12. On 10 March 2011, the Applicant, in "[his] capacity as a staff representative of the United Nations Staff Union", requested financial reimbursement and stipend for members of Staff Union's Unit 30 (which the Applicant claims to represent), serving at the Madison Building. The Applicant claimed that the lack of a United Nations cafeteria facility within the Madison Avenue building, combined with the high cost of food in the area, deprived the staff members of Staff Union's Unit 30 of "their entitlements and [therefore] they are due financial compensation".

13. On 22 March 2011, the Under-Secretary-General, Department of Management, notified the Applicant that there were "no grounds to establish the compensation sought". The Under-Secretary-General stated that cafeteria services or meal-related benefits are not part of the conditions of service. Furthermore, United Nations cafeteria facilities remained open and were accessible to the Madison Building staff members, who could utilize the complimentary hourly shuttle service to travel between Madison Avenue and the Headquarters Complex. Therefore, the Administration found no grounds to establish the subsidy requested.

14. On 19 May 2011, the Applicant filed a request for management evaluation. He identified the contested decision as the decision to deny "staff serving at [the Madison Building] reimbursement for lack of cafeteria facilities".

15. By memorandum dated 2 June 2011 and received by the Applicant on 3 June 2011, the Management Evaluation Unit, Department of Management, advised him that his request was not receivable under staff rule 11.2(a) because staff members may only contest administrative decisions violating the rights prescribed in their contracts. The Management Evaluation Unit found no obligation on the part of the Administration to subsidize or reimburse staff for meals, regardless of the presence or absence of United Nations cafeteria facilities in buildings where staff members are located. The Management Evaluation Unit determined that there was no reviewable administrative decision, and that, therefore, it did not have jurisdiction to evaluate the Applicant's request.

Consideration

Receivability

Applicant's standing to file the present application

16. The Respondent submits that the present application is not receivable as the Applicant initially requested reimbursement and a stipend for a group of staff members in his capacity as a staff representative.

17. Article 2.1(a) of the Tribunal's Statute provides that the Tribunal is competent to hear and pass judgment on applications against administrative decisions "alleged to be in non-compliance with the terms of appointment or the contract of employment". Consequently, for the purposes of art. 2.1(a) of the Statute, it is not sufficient for an applicant to merely state that there was an administrative decision that she or he disagrees with. As the Tribunal held in a number of cases, to have standing before the Tribunal, a staff member must show

that the contested administrative decision affects her or his legal rights (*Jaen* UNDT/2010/165, *Nyakossi* UNDT/2011/101, *Warintarawat* UNDT/2011/053).

18. It is a general principle of law that a litigant must have legal capacity and legal standing in order to invoke the jurisdiction of a court or a tribunal. A party who litigates must show that he has sufficient interest in the matter, the basic ingredient of which is that a party must show that he has a right or interest at stake. A litigant will have legal standing if the right on which he bases his claim is one that this individual personally enjoys or if he has a sufficient interest in the person or persons whose rights he seeks to protect (*Hunter* UNDT/2012/036).

19. Generally speaking, an individual may file a claim in his own name or in a representative capacity. The only representative capacity envisaged by art. 3.1(c) of the Tribunal's Statute is for applications filed on behalf of incapacitated and deceased staff members. Under art. 2.1(a) of the Tribunal's Statute, the Applicant does not have standing to intercede in a contractual relationship that exists between other staff members and the Organization by filing applications on their behalf and contesting the alleged non-compliance with their terms of appointment and contracts of employment. The decision to contest an administrative decision alleged to be in non-compliance with the terms of appointment or the contract of employment is an individual right and it is for each staff member to make, although various applicants may file jointly for the sake of judicial economy.

20. Although the wording of the Applicant's request of 10 March 2011 indicates that he indeed made that initial request in his capacity as a staff representative, the Tribunal finds that his request for management evaluation and the application to the Tribunal made it clear that he was making claims in relation to his own rights. In effect, the Applicant asserted a private right while also endeavoring to prevent what he alleged was a public wrong.

21. The Tribunal finds that the Applicant has standing to contest the alleged breach of his own rights.

Whether the contested decision may be appealed

22. The Respondent also submits that the decision not to grant reimbursement and a stipend "was a decision of general application to all staff members located at [the Madison Building]". The Respondent says that the present matter concerns neither an enforceable contractual right nor an administrative decision that can be appealed.

23. For the purposes of standing it is irrelevant whether the decision applies to other staff members and not just the Applicant. The only relevant question is whether the application concerns an administrative decision "alleged to be in non-compliance with the terms of appointment or the contract of employment" of the Applicant (art. 2.1 of the Statute). The Applicant, who is a staff member, clearly alleges that the contested decision to deny reimbursement and stipend was in breach of his alleged legal right to have the full value of his salary paid to him, in lieu of the benefit of a subsidized cafeteria. This claim is therefore sufficient to satisfy the requirements of art. 2.1 of the Statute.

Whether the application is time-barred

24. The Respondent argues that the application is time-barred as the relocation to the Madison Building took place on 1 September 2009, and yet the Applicant's request for management evaluation was filed almost two years later, well outside the 60 calendar days required by staff rule 11.2(c). The Respondent's submission is misconceived. The Applicant is not contesting the decision to relocate him to the Madison Building, but the decision of 22 March 2011 denying his subsequent request for reimbursement and monthly stipend. The Tribunal finds that the request for management evaluation and the present application before the Tribunal were filed

within the applicable time limits after notification of the contested decision to the Applicant.

25. With regard to the timing of the Applicant's request for management evaluation and the timing of the present application, the Tribunal notes that, for the purpose of claims regarding incorrect calculation of salary, payslips constitute administrative decisions that may be appealed (Administrative Tribunal of the International Labour Organization ("ILOAT") Judgment No. 1408, *Frints-Humblet* (1995); *Ihekwaba* UNDT/2010/043). Each time salary is paid at the end of the month, an administrative decision in respect of the calculations relating to that period is made. However, as each payslip constitutes an administrative decision, the time limits with respect to contesting each one of them must be complied with. Therefore, the question of how far back in time the Applicant would be able to go in seeking recovery payments would be an issue that would arise in the determination of appropriate relief in the event he prevails on the merits.

Exhaustion of remedies

26. The Respondent further submits that issues of reimbursement for conditions of service that staff believe are not the best prevailing conditions should be presented by the Staff Union before the United Nations International Civil Servants' Federation ("UNISERV"), of which the Staff Union is a member, and the Staff-Management Coordination Committee. The Respondent submits that UNISERV is a member of the working group established by the ICSC to review the conditions of service of the General Service category and make recommendations to the ICSC. According to the Respondent, matters of reimbursement for meals and stipend involve "policy determinations that are inherently political" and "[s]taff members cannot be allowed to substitute the review mechanism provided by UNISERV and the [Staff-Management Coordination Committee], and attempt to use the Tribunal as a lobbying mechanism to change their conditions of service".

27. Salary negotiations, adjustments, and other conditions of service are normally matters for collective bargaining. In this instance, it may well be that the Staff Union has already negotiated and agreed salaries, a component of which was the provision of cafeteria services, based on data collected in 2005. In any event, contrary to the Respondent's assertion, the Applicant is not lobbying the Tribunal for a change in his conditions of service; rather he is requesting that his agreed salary (i.e., the alleged entitlement) be paid to him in full, including the component of cafeteria services allegedly factored into the salary scale. He states that the lack of cafeteria services amounts to a unilateral change in his terms and conditions of service, namely, his contractual right to a full salary.

28. The Applicant alleges that the benefit derived from the cost of cafeteria meals is included in the methodology applied by the ICSC in determining his salary, and that the withdrawal of access to the subsidized United Nations cafeteria, which allegedly provides cheaper meals, must mean he is to be compensated for it financially to make up for the loss. The issue raised by the Applicant is a legal issue that concerns his contractual rights. If the Applicant claims breach of his contract, he is not required in this case, under the Tribunal's Statute, to first engage in consultative or review mechanisms through the Staff Union with UNISERV or with the Staff-Management Coordination Committee. Therefore, the Respondent's submission that the Applicant did not exhaust Staff Union-related review mechanisms cannot be sustained.

Conclusion on receivability

29. Therefore the Tribunal finds that the application is receivable with respect to the Applicant's claims against the decision of 22 March 2011, which he "allege[s] to be in non-compliance with [his] terms of appointment or the contract of employment" (art. 2.1 of the Statute).

Merits

Applicant's submission regarding rights and expectations

30. The Applicant, whilst not alleging any express statutory right, submits that not all staff rights are explicitly prescribed in the contract or relevant staff rules and that staff members may have "implied or acquired" rights deriving from the continuing and uniform conduct of the Administration such as, for example, a right to heating in winter or air conditioning in summer. Thus, the Applicant claims that the benefit attributable to the provision of cafeteria services, although not necessarily an express statutory or contractual right, constituted an essential component in assessing the level of his salary, thus giving him an "implied or acquired right" over time, or at the very least, a factual basis for a legitimate expectation based on a regular practice which he reasonably expected to continue.

31. The general principle of acquired rights is incorporated into staff regulation 12.1, which states that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members". The concept of acquired rights has been dealt with by various international tribunals. For instance, the former United Nations Administrative Tribunal Judgment No. 1253, *Ittah* (2005) included a concurring opinion by member Brigitte Stern, which provided a helpful analysis of the concept of acquired rights. The concurring opinion generally followed the approach taken by the World Bank Administrative Tribunal in Decision No. 1, *de Merode et al.* (1981) in assessing whether a right is acquired by making the distinction between fundamental or essential and non-fundamental or non-essential elements of the conditions of employment. The concurring opinion identified a number of factors in identifying an acquired right, including the nature of the right; the importance of the condition that it establishes in the staff member's decision to join the Organization; and whether its modification entailed "extremely grave consequences for the staff member, more serious than mere prejudice to his or her financial interests" (emphasis omitted)

(*Ittah*, concurring opinion, para. XVIII). The Administrative Tribunal of the International Labour Organization follows a similar approach in its analysis. For instance, in Judgment No. 3074 (2012), the ILOAT held that in order for there to be a breach of an acquired right, the alteration must relate to a fundamental and essential term of employment "in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on" (see also ILOAT Judgment No. 2682 (2008)).

32. It is unclear whether the Applicant uses the term "acquired right" in his application in the same sense that is given to it by various tribunals, as briefly described above. However, it cannot be argued in the Applicant's situation that access to a subsidized cafeteria is a fundamental and essential term of employment without which the Applicant would not have accepted his job with the Organization and the modification of which would entail "extremely grave consequences for [him], more serious than mere prejudice to his … financial interests". Nevertheless, it is clear that the Applicant considers access to a subsidized cafeteria to be a component of his salary structure, which, according to him, gives rise to a legal right or at least some form of legitimate expectation.

ICSC report

33. Although it appears from the parties' submissions that the ICSC report quoted above at para. 8 may have been used to determine the salary structure in 2005, the exact legal status of this report and the extent of its actual application are unclear. The Tribunal notes that any salary component relating to the provision of cafeteria services, whether conferring a certain right or giving rise to a legitimate expectation, is a variable and no doubt subject to adjustments from time to time. It cannot be reasonably expected that the cost of meals remains the same for years. The original survey itself was conducted in 2005 and, perhaps, is no longer a reliable reference. No authoritative document has been provided to the Tribunal by either party confirming whether and how this report was and is relied on for the purposes of

determining the level of compensation by the United Nations in New York. It is also unclear whether the variables associated with cafeteria services are indeed part of the current formula used for the calculation of the salary of General Service staff members and, if so, what the exact current value attached to them are.

34. Although the Tribunal directed the parties to file additional submissions by 8 April 2013, the Respondent filed only a brief one-page submission requesting the Tribunal to consider the case on the papers as submitted, and no submission was received from the Applicant. Having examined the matter on the papers filed, and in view of the findings below, the Tribunal finds that it need not come to a determinative conclusion whether the variables associated with cafeteria services are indeed part of the current formula used for the calculation of the salary of General Service staff. Having examined the matter, the Tribunal has determined that, even taking the Applicant's case at its highest—that is, accepting that a certain financial value relating to cafeteria services is indeed presently included as a component in his salary—the Applicant's claim cannot succeed, for reasons explained further below.

Acquiescence

35. A contract of employment is consensual and, generally, once the parties have agreed to the terms, neither party may unilaterally amend them unless the original contract provides for certain agreed variations. In terms of fairness and reasonableness, an employer may only vary the terms and conditions of employment if there is a valid reason for the change in the conditions of employment and the change must be brought about through a fair procedure. In other words, the variation must be based on a rationalization of an economic, technical or structural nature, and, procedurally, the employer must consult or negotiate depending on the nature of the change in the terms and conditions.

36. However, there may be situations where the employee consents to the variation, including through a waiver of a right (i.e., an express or implied abandonment of a right). Waiver in simple terms means that one of the parties by his words, actions or inaction, has evinced an intention not to enforce one or more of the rights conferred by his contract. Consent to the variation need not be express, and silence coupled with tacit acquiescence in the change may stop the parties from later denying the legality of the variation. If not expressly waived, a right may be impliedly waived by acquiescence or conduct that is inconsistent with the enforcement of the right on the part of the party entitled (*Egglesfield* UNDT/2013/006). A party to a contract may also be deemed to have waived his rights if it does not act within a reasonable time.

37. The Tribunal finds that the Applicant sought reimbursement and monthly stipend only in March 2011, more than one year and a half after the Organization moved a number of staff members, including those in Staff Union's Unit 30, to the Madison Building. The Respondent's reply indicates that the Applicant was among the staff members who were moved to the Madison Building in September 2009 (see paras. 2, 7, 19 of the reply), which submission the Applicant has not sought to rebut despite the opportunity to file additional submissions. If indeed the Applicant moved in September 2009, by his inaction for approximately one year and a half before raising his claim, he has acquiesced to the variation and accepted the alternative arrangements put in place.

Legitimate expectation, fulfillment and reasonableness

38. The Tribunal has also considered—accepting the Applicant's case at its highest, that is, that the value of access to cafeteria services was indeed included as a component of his salary and that he had a legitimate expectation—whether the Respondent put in place sufficient measures to compensate the Applicant for the loss that resulted from the move to the Madison Building.

39. A legitimate expectation can be created either through the application of a regular practice or through an express promise. Legitimate expectations may result in the creation of an enforceable legal right, although the application of the doctrine is subject to a number of qualifications (see *Sina* UNDT/2010/060 (affirmed on liability in *Sina* 2010-UNAT-094), *Zuñiga Rojas* UNDT/2010/218). Not only must the expectation be "legitimate" or have some reasonable basis, the fulfillment of the expectation must lie within the powers of the person or body creating the expectation. Furthermore, a decision that has the effect of taking away such an expectation must be shown to have been unfair, not merely adverse to the interests of the individual, and considerations of public policy could override an individual's legitimate expectations in appropriate circumstances.

40. Thus, even if the Applicant had a legitimate expectation, was this a practice which could reasonably be expected to continue since the fulfillment of such expectation by the Respondent was curtailed by the move to the Madison Building necessitated by the CMP requirements? Was the decision to relocate the Applicant to premises without a cafeteria, together with the alternative measures by the Respondent, not merely adverse to the interests of the Applicant, but also unfair and unreasonable?

41. The Respondent submits that the complimentary shuttle service is an adequate measure and that the Madison Building has kitchen facilities, such as a microwave, a refrigerator and a sink, which makes bringing food from home easier than in the Secretariat where such conveniences did not exist.

42. The Applicant submits, with regard to the shuttle service, that "this is not a fair replacement, [since] the shuttle service is hourly, very much limiting the possibility of using it, and [its] use takes an inordinate amount of time, making it impractical". He states that cafeteria services are less expensive than the commercial outlets and take less time to use, which is an important factor, considering that staff members have a limited approved time for lunch. The Applicant states that food

preparation facilities available in the Madison Building do not replace the convenience of having access to already prepared meals.

43. The Tribunal finds that, in view of the move to the Madison Building, which was necessitated by the CMP requirements, the Respondent put in place alternative measures that were not unreasonable or unfair. The complimentary shuttle service is a reasonable measure that allowed affected staff members to use the cafeteria services in the United Nations Headquarters building. The documents indicate that the shuttle ride takes approximately 10 minutes, which the Applicant has not sought to challenge. The Tribunal is not persuaded that the exercise of the option of eating at the United Nations Headquarters cafeteria would so greatly inconvenience a staff member located in the Madison Building as to render the arrangements put in place manifestly unreasonable.

44. Therefore, the Tribunal finds that the measures put in place by the Respondent in view of the CMP-related requirements with respect to the alleged right of access to the United Nations cafeteria facilities were not unreasonable or unfair.

45. In this instance, looking at all the circumstances, including the operational rationale for the move to the Madison Building and the inability of the Organization to fulfill the alleged expectation of a right to access a cafeteria in the Madison Building, the Tribunal finds that the above qualifications do not render the alternative arrangements unfair or unreasonable.

Conclusion

46. The Tribunal finds the present application receivable. The Tribunal finds that, having waited for approximately one year and a half to raise claims regarding the alleged lack of access to the United Nations cafeteria facilities, the Applicant acquiesced to the alternative arrangements put in place by the Respondent in view of the CMP-related requirements.

47. The Tribunal further finds that, in view of the CMP-related requirements that necessitated the move to the Madison Building, the remedial measures put in place by the Respondent in view of the CMP-related requirements were neither unreasonable nor unfair.

48. The Tribunal finds it appropriate to reiterate that, in the particular circumstances of this case, it was not necessary to conclusively determine whether the Applicant indeed has a legal right to a portion of his compensation being provided in the form of recompensable access to a subsidized cafeteria. In view of the findings above, taking the Applicant's case at its highest—i.e., even if he does have such a right and is entitled to monetary reimbursement if access to a subsidized cafeteria is not provided to him—it is the Tribunal's finding that the application stands to be dismissed for the reasons articulated above.

49. The application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 26th day of June 2013

Entered in the Register on this 26th day of June 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York