



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

ZHAO SUN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-Represented

Counsel for Respondent:
Kong Leong Toh, UNOPS

Introduction

1. The Applicant, a General Service staff member with the United Nations Office for Project Services (“UNOPS”) in Beijing, China, contests the decision to give her a limited extension of her contract to 30 June 2013 and to abolish her post on this date.

2. The Applicant submits that as a United Nations staff member since 2004, she should have been offered a permanent contract and UNOPS should therefore compensate her for her lost benefits and other losses. Furthermore, the Applicant submits that since she will be aged 55 on 30 June 2013, the decision violates the practice applied in the host country where she understood that the employer is not allowed to terminate the contract of any employee when he/she is at age 55.

3. The Respondent resists all of the Applicant’s claims asserting that there was no illegality in the decisions which were based on sound business and organizational requirements.

4. The Respondent submits that the Applicant did not request management evaluation of the contested decision and that therefore, her application is not receivable. Nevertheless, the Respondent indicated that it did not intend to rely on the Applicant’s failure to request management evaluation before filing the Application, because her action in contacting Office of Staff Legal Assistance (“OSLA”) on or before 24 January 2013 showed that the Applicant intended to contest in a timely manner the decisions to abolish her post and not extend her contract.

Relevant background

5. On 20 September 2004, the Applicant entered into a Special Services Agreement (“SSA”) with the United Nations Development Program (“UNDP”), China to commence work as a Portfolio Assistant with UNOPS, China for a period of 1 month and 11 days, from 20 September to 31 October 2004. The SSA states in

paragraph 1 that “the [Applicant] shall be considered as having the legal status of an independent contractor and as being an expert on Mission for the purpose of the Convention on the Privileges and Immunities of the United Nations, the [Applicant] shall not be considered in any respect as being a staff member of the United Nations or of UNDP”. The Applicant’s SSA was extended on two occasions, under the same terms as the original SSA, until 31 December 2004.

6. From 1 January 2005 to 13 January 2005, the Applicant was also paid \$2,396.43 for working 9 days.

7. On 14 January 2005, the Applicant entered into a one-year 100 series fixed-term contract as a GS-4 Portfolio Assistant with UNOPS, China

8. On 17 May 2010, the Director, Human Resources (“HR”), sent an email to UNOPS staff reminding them that they should make the necessary request by contacting UNOPS if they felt that they met the eligibility criteria under ST/SGB/2009/10 for consideration for conversion to a permanent appointment.

9. As of 30 June 2009, the Applicant would have been employed with UNOPS for 53 months under the 100 series contract with effect from 15 January 2005. Furthermore, even if the 20 September 2004 to 14 January 2005 period were to be included, the Applicant would have been employed with UNOPS for a period of 57 months which is still less than the 60 month (5 years) requirements for conversion to a permanent appointment. Accordingly the Applicant’s claim that she should have been offered a permanent appointment fails because she did not meet the eligibility criteria under ST/SGB/2009/10.

10. On 3 and 10 December 2012, the Applicant sent an email to a UNOPS HR staff member inquiring about the extension of her contract. In her 10 December 2012 email, she states “I have been [working] for the UNOPS China office since the Sept. 2004”.

11. On 11 December 2012, the Applicant was informed that “her contract will only be extended for six months and her position [would] be abolished after this”. That same day Ms. Bianca Auping-Kamps, Regional Coordinator, Asia Pacific

Office, UNOPS, Bangkok sought clarification on some of the concerns the Applicant raised regarding the six month extension of her contract, the abolishment of her post as well as whether she was entitled to a permanent appointment.

12. On 19 December 2012, Ms. Auping-Kamps informed the Applicant that she was only able to provide her with a 6 month contract extension, after which her current position would be abolished and that she would be separated from UNOPS on 30 June 2013.

13. On 17 January 2013, an email was sent to the Applicant attaching a 9 January 2013 letter from Mr. Wang Yue, the Regional Director, UNOPS Asia Pacific Office, providing written notification to her that her position will be abolished on 30 June 2013.

14. Between 17 January and 24 January 2013, the Applicant contacted OSLA seeking legal assistance following which OSLA contacted the Respondent to discuss the matter. The Tribunal has no information about these discussions.

15. On 2 April 2013, the Applicant filed the present application. The New York Registry informed the Applicant that her application was incomplete as it was missing Annex 1 and her request for management evaluation of the contested decision.

16. The Applicant responded to the Registry on 3 April 2013 stating that she had already sent an email to the Executive Director UNOPS requesting a management evaluation of the decision.

17. The Registry promptly acknowledged her application and transmitted it to the Respondent.

18. The Applicant stated that she was informed of the contested decision on 11 December 2012, but received the formal notification on 17 January 2013. She stated that, as a self-represented staff member, she was not aware of how to request management evaluation and that she was unable to obtain assistance from OSLA. It is clear that until she received the Respondent's reply on 2 May 2013, she was not

aware of the fact that OSLA had contacted UNOPS on her behalf and that, as a concession, the Respondent had decided to treat this approach by OSLA as satisfying the requirements governing an application for management evaluation and this accounted of the detailed and sympathetic response from Mr. Jan Mattsson, UNOPS Executive Director.

19. On 4 April 2013, the Applicant emailed the Executive Director, UNOPS requesting a management evaluation.

20. On 1 May 2013, Mr. Jan Mattsson, wrote to the Applicant providing a full explanation and reasons for refusing her request for management evaluation. The Respondent's reply to the present application was filed with the Tribunal the following day on 2 May 2013.

Consideration

21. In his reply, the Respondent stated that he would not “rely on the Applicant’s failure to request management evaluation because the Applicant’s contacting OSLA on or before 24 January 2013 shows that the Applicant likely intended to contest in a timely manner the decisions to abolish her post and not extend her contract”.

22. Pursuant to art. 8.1 of the Statute of the Dispute Tribunal, read together with staff rule 11.2(a), an applicant must, as a mandatory first step in cases that do not fall under staff rule 11.2(b), request management evaluation of a contested decision before filing an application with the Dispute Tribunal.

23. UNOPS: A guide to resolving disputes, which is not materially different to Staff Rule 11.2, states in part:

IV. Administration of justice — the formal system

If a staff member considers that there has been an administrative decision that violates his or her rights as an employee of UNOPS, the staff member can contest such a decision through the formal mechanism. Contesting a decision involves a number of steps, with specific deadlines. It is important for anyone wishing to contest a decision to be aware of these steps and deadlines.

Management Evaluation (this step is applicable to administrative decisions other than the imposition of a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2)

As a first step in the formal system, a staff member who wishes to contest an administrative decision (other than the imposition of a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2) will have to request a management evaluation. This has to occur no more than 60 days after the staff member was notified of the contested decision. This initial review, which normally should be concluded within 45 days, will assess whether the contested decision was made in accordance with the rules. If it is determined that an improper decision has been made, Management will ensure that the decision is changed or that an appropriate remedy is provided. In some cases, alternative means of arriving at a settlement, such as mediation, may be found. The purpose of this step is to give management a chance to correct itself or provide acceptable remedies in cases where there has been flawed decision-making, and to reduce the number of cases that need to proceed to formal litigation. A management evaluation is not required if the contested decision concerns the imposition of a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2. In such cases, an application can be made directly to the UN Dispute Tribunal.

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How do I appeal a decision?

Management Evaluation (this step is applicable to administrative decisions other than the imposition of a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2)

- Should you decide to formally contest a decision, the first step is to request a management evaluation. This should be done in a letter addressed to the UNOPS Executive Director with a copy to the head of the region or office where you work.
- Timeline: The request for a management evaluation must be done within 60 calendar days of the time you received notification of the administrative decision you are contesting.
- In your letter, explain clearly the decision you wish to contest, who made the decision and when, how it violates your rights and why you believe the decision was improper or unlawful.

24. The facts in the present case clearly show that on 17 January 2013 the Applicant received a letter dated 9 January 2013 informing her that her position was to be abolished on 30 June 2013. Therefore, the 60 calendar day time limit by

which the Applicant was required to file a request for management evaluation was 18 March 2013. The Applicant has conceded that she did not file her request for management evaluation until after filing her application with the Tribunal, on 4 April 2013. It is plain that on those facts the request for management evaluation was filed out of time.

25. It is settled law that the Tribunal has no jurisdiction to waive the time limits for requests for management evaluation or requests for administrative review”. Nevertheless, the Tribunal notes that in the present case, upon receiving the Applicant’s request for management evaluation, UNOPS waived the 60 days requirement on the bases of her communication with OSLA who in turn contacted UNOPS. They proceeded to review her request as if it were made within 60 days of notification.

26. This case is to be distinguished from *Simmons* UNDT/2013/15 where the Tribunal found that the Management Evaluation Unit accepted the request for management evaluation after a written request to and response from the Applicant as to the existence of exceptional circumstances which warranted a waiver of the time limits in that case.

27. In the present case, UNOPS’ response to the Applicant’s request for management evaluation does not contain any such waiver of the applicable time limits. Furthermore, when discussing whether the Applicant should be treated as a permanent staff member they actually state that “any claim to a permanent appointment submitted in 2013 is not receivable because it is outside the time limit set out in UN Staff Rule 11.2(c)”.

Conclusion

28. The Application is not receivable and is hereby dismissed.

(Signed)

Judge Goolam Meeran

Dated this 11th day of October 2013

Entered in the Register on this 11th day of October 2013

(Signed)

Hafida Lahiouel, Registrar, New York