UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/005
Judgment No.: UNDT/2014/039
Date: 11 April 2014
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SPRAUTEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
George Irving

Counsel for Respondent:
Salman Haq, UNOPS

Introduction

1. On 20 January 2012, the Applicant, a former staff member of the United Nations Office for Project Services ("UNOPS"), who was employed by the Organization for over 20 years until his separation from service in February 2009, filed an application contesting the decision not to pay him a termination indemnity after his separation from UNOPS. This decision was communicated to the Applicant on 31 August 2011 by the UNOPS General Counsel in compliance with *Sprauten* UNDT/2011/094, which ordered, *inter alia*, that UNOPS determine by 1 September 2011 "whether [the Applicant] was wrongly deprived of a standard enhanced separation package of 18 months' net base salary" (see para. 87 of *Sprauten* UNDT/2011/094).

2. On 2 February 2012, the Respondent filed a motion for leave to file a reply limited to the question of the receivability of the application. In this motion, the Respondent contended that the Applicant's application is time-barred and requested leave to first file submissions regarding the receivability of the application and to later file submissions regarding the merits of the application, if the Tribunal were to find the application receivable.

3. By Order No. 18 (NY/2012), dated 3 February 2012, the Tribunal granted leave to the Respondent to file and serve a reply limited to the issue of receivability. The Tribunal also allowed the Applicant to file and serve a response to the reply on receivability. Both parties duly filed their submissions.

4. With respect to the receivability of the present application, the Applicant submits, *inter alia*, that the Dispute Tribunal in *Sprauten* UNDT/2011/094 on compensation correctly ordered the Respondent "to determine whether the Applicant was wrongly deprived of his entitlement … and to notify the Applicant by 1 September 2011 of its determination". The Applicant states that the Tribunal's

order, and the Respondent's resultant decision of 31 August 2011, gave rise to a new decision based on new legal considerations resulting in a new determination, which the Applicant timeously challenged through a new request for management evaluation. The Applicant submits that, although it relates back to his prior period of service, the decision being contested was clearly articulated on 31 August 2011, in writing, by the Respondent pursuant to a specific order of the Tribunal. He further states that, in matters of compensation involving staff members who have separated from service, it has been the Tribunal's consistent practice to examine the applicant's termination entitlements along with other financial factors in assessing appropriate compensation. It would be incorrect to place undue restrictions on the ability of the Tribunal to assess appropriate compensation on the basis that every element of compensation must be the subject of a separate and distinct request for management evaluation. The Applicant submits that following the decision to sustain the Applicant's separation from service but to compensate him for the consequences of his non-selection, it is necessary to determine the Applicant's entitlements.

5. The Respondent submits that the application is not receivable. The Respondent states, *inter alia*, that the Applicant was provided with a written decision on 30 March 2009 that no separation entitlement would be paid and did not request administrative review or management evaluation of the decision within the required timeframe. His claims are therefore time-barred. The Respondent further submits that the Dispute Tribunal appears to have been "left with the wrong impression" that the Respondent had relied on erroneous considerations, when UNOPS did not in fact do so. Specifically, the Dispute Tribunal appears to have connected the initial refusal to pay separation entitlements with the circumstances linked to the Copenhagen post, whereas the said refusal was due to the circumstances linked to the Johannesburg post, with regard to which the Respondent's position was affirmed by the United Nations Appeals Tribunal. The Respondent submits that

the restatement of the claims made in March 2009 does not stop the relevant deadline from running and does not give rise to a new administrative decision.

Background

6. On 6 May 2010, the Dispute Tribunal (Judge Adams) issued *Sprauten* UNDT/2010/087, which joined together for purposes of determining liability two separate cases of the Applicant: Case No. UNDT/NY/2009/085/JAB/2009/049 (Case 1: the Applicant's non-selection for a portfolio manager post in Copenhagen) and Case No. UNDT/NY/2009/118 (Case 2: whether it was lawful for UNOPS to withdraw its subsequent offer to the Applicant concerning a post in Johannesburg). Judge Adams concluded as follows:

> … As to case 1 [Copenhagen post] –
>
> The panel recommendation cannot stand and the decision of [the Appointment and Promotion Board], based as it was upon a fatally flawed process, was in breach of the applicant's contractual rights to have his candidacy adequately and properly considered.
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> … As to case 2 [Johannesburg post] –
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> The respondent was in breach of its contract with the applicant to appoint him to the post in Johannesburg at P-4 for the term of six months.

7. As regards the Applicant's "separation package", in *Sprauten* UNDT/2010/087, Judge Adams stated as follows:

> I mention, as a footnote, that when the applicant then secured such a position [i.e. the Johannesburg post], parallel to the discussions concerning his start date, the parties were also engaged in negotiations concerning the possibility of a "separation package" for the applicant. This would not make sense unless both parties acted under the assumption that although negotiations about the start date were on foot, the applicant was still employed.

8. On 19 April 2011, the Appeals Tribunal issued *Sprauten* 2011-UNAT-111, in which it annulled the Dispute Tribunal's Judgment of 6 May 2010 regarding Case 2

(Johannesburg post), finding that the Applicant never unconditionally accepted the offer for the Johannesburg post made to him. The Appeals Tribunal found that the Dispute Tribunal erred in finding that the withdrawal of the offer for the Johannesburg post was a breach of contract and that the harm suffered as a result should be compensated. The Appeals Tribunal accordingly rejected the Applicant's claims regarding the Johannesburg post.

9. However, no appeal was filed regarding Judge Adams' judgment in relation to Case 1 (Copenhagen post).

10. On 1 June 2011, the Dispute Tribunal (Judge Kaman) issued *Sprauten* UNDT/2011/094 regarding the compensation to be awarded for the irregularities found by Judge Adams in relation to Case 1 (Copenhagen post). Regarding the Applicants "separation package" the Tribunal noted as follows:

> 80. In his submission of 7 September 2010, the Applicant adds a claim for two years' net base salary concerning "his entitlement to a standard enhanced separation package of 18 months termination indemnity base salary" as "[t]his compensation was never paid since the UNOPS argued (wrongly) that he had been offered a post but had rejected it".
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> 81. The Tribunal makes the specific finding that the Applicant was not offered the Post and did not reject assuming the Post, and orders the Respondent to determine whether the Applicant was wrongly deprived of his entitlement to a standard enhanced separation package of 18 months termination indemnity base salary.

11. The Dispute Tribunal (Judge Kaman) concluded her judgment by awarding the Applicant compensation in the amount of nine months' net base salary, including six months' net base salary as non-pecuniary compensation for the substantial and unwarranted irregularities in the selection process for the Copenhagen post (Case 1) and three months' net base salary for the related stress. The Dispute Tribunal (Judge Kaman) also made further orders as follows:

> 86. Noting that the Tribunal has not received fully elaborated arguments on the issue of termination indemnity, the Tribunal considers that this is a matter that can now be most expeditiously rectified by the Respondent.
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> 87. By 1 September 2011, the Respondent shall determine whether the Applicant was wrongly deprived of his entitlement to a standard enhanced separation package of 18 months' net base salary as termination indemnity and to notify the Applicant by 1 September 2011 of its determination and make payment of the termination indemnity if warranted, including interest backdated as appropriate.
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> 88. This order is without prejudice to the Applicant in later filing an appeal of the determination of the Respondent on termination indemnity, if necessary.

12. On 31 August 2011, referring to *Sprauten* UNDT/2011/094, the General Counsel for UNOPS wrote to the Applicant as follows:

> … [the General Counsel] note[s] from the above-quoted paragraphs 80–81 that [the Applicant's] submissions to [the Dispute Tribunal] regarding compensation apparently left [the Dispute Tribunal] with the wrong impression that UNOPS had made its determination regarding separation packages on the basis that [the Applicant] had been offered the Copenhagen post. [The Dispute Tribunal] stated in the judgment [citing para. 86 of UNDT/2011/094 as set out above]. [The General Counsel] just point[s] out the UNOPS decision regarding separation packages was due to [the Applicant] having been offered (and [his] not accepting—see [2011-UNAT-111]) the Johannesburg, not the Copenhagen post. To use the language of paragraph 81 of [UNDT/2011/094]: UNOPS never made any decision regarding [the Applicant's] entitlements on the assumption that [he] had been offered the Post (i.e. the Copenhagen post).

> … For ease of reference, [the General Counsel] attach[es] herewith a copy of the e-mail from … UNOPS Human Resources to [the Applicant] dated 30 March 2009 setting out UNOPS' decision regarding separation packages. [The General Counsel] note[s] that [UNOPS Human Resources] also stated that: "[the Applicant] is not entitled to any termination indemnity under the UN Staff Regulations and Rules (independently of the abovementioned HR Framework [which established "separation packages"] because, as was also noted in the Executive Director's letter, [the Applicant's] appointment was not terminated".
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> … To return to paragraph 87 of [*Sprauten* UNDT/2011/094]: in view of the above, [the Applicant was] not "wrongly deprived of any entitlement to a standard separation package of 18 months' net base salary as termination indemnity".
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> … Since the actual decision was already made in 2009 on the basis of clearly-established facts, [the General Counsel] would like to note that nothing in this letter is to be construed as a waiver of the time limits set out in the UN Staff Regulations and Rules. I note that the [Appeals Tribunal] stated in *Sethia* 2010-UNAT-079 that a mere restatement of a staff member's earlier claim does not give rise to a new administrative decision restarting the time period to contest the decision.
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> … Finally, I note that the [Appeals Tribunal] reiterated in *Ajdini et al.* 2011-UNAT-108 that the [Dispute Tribunal] has no jurisdiction to waive deadlines for management evaluation or administrative review. Presumably, the [Dispute Tribunal] in this case made its order not appreciating—this issue not having been argued by [the Applicant]—that a written decision on this specific issue had already been conveyed in March 2009.

13. Attached to the General Counsel's 31 August 2011 letter was an email of 30 March 2009 from UNOPS Human Resources to the Applicant, stating:

> While the Human Resources Framework For Transition (UNOPS Organizational Directive No. 11/2nd Revision, 28 December 2006) provides for termination indemnities and separation payments to be made to "individuals whose posts are abolished and who do not secure alternate employment with UNOPS", [the Applicant does] not fall within the foregoing description.
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> As noted in the Executive Director's letter to [the Applicant] dated 27 March 2009, UNOPS' preferred outcome, as evidenced by

> the unconditional written offer to [the Applicant] dated 19 December 2008 was to have [him] as part of the AFO [Africa Regional Office] team with effect from 1 February 2009. When [the Applicant] chose not to accept that offer [for Johannesburg post], UNOPS extended both the time for acceptance and the starting date to 1 March 2009. But since [the Applicant] chose not to accept UNOPS' offers, UNOPS had no choice but to seek an alternate candidate.
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> Because UNOPS actually offered [the Applicant] another post, a P-4 level post which [the Applicant himself] applied for—but [the Applicant] later decided not to accept it, [the Applicant] cannot be considered an individual who did not secure alternate employment with UNOPS, but are instead an individual who refused alternate employment with UNOPS after securing it.
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> Moreover, you are not entitled to any termination indemnity under the UN Staff Regulations and Rules (independently of the abovementioned HR Framework) because, as was also noted in the Executive Director's letter, your appointment was not terminated. Instead, your appointment simply expired, after you chose not to accept UNOPS' offer of the abovementioned P-4 level post.

14. On 31 September 2011, the Applicant filed a request for management evaluation "of the decision communicated to the Applicant on 31 August 2011 by the UNOPS General Counsel … constituting a negative reply to the order of the United Nations Dispute Tribunal in *Sprauten* UNDT/2011/094 that UNOPS determine by 1 September 2011 whether [the Applicant] was wrongly deprived of a standard enhanced separation package of 18 months' net base salary".

15. The Secretary-General appealed *Sprauten* UNDT/2011/094. On 16 March 2012, the Appeals Tribunal rendered *Sprauten* 2012-UNAT-219, in which the Secretary-General's main point on appeal was the award of compensation in the amount of six months' net base salary for non-pecuniary loss caused by the irregularities in relation to the Copenhagen post (Case 1). In *Sprauten* 2012-UNAT-219, the Appeals Tribunal dismissed the Secretary-General's appeal and affirmed *Sprauten* UNDT/2011/094.

Consideration

16. Under art. 19 of its Rules of Procedure, the Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties. The Appeals Tribunal has held that the Tribunal may consider the receivability of an application as a preliminary issue, (see *Pellet* 2010-UNAT-073 and *Saka* 2010-UNAT-075). Should the Tribunal find an application not receivable, it will dismiss this application and not proceed with the consideration of the merits of the case before it.

17. In *Sprauten* UNDT/2011/094, the Tribunal ordered the Respondent to determine, by 1 September 2011, in view of the Tribunal's findings, whether the Applicant was wrongly deprived of his entitlement to a standard enhanced separation package. *Sprauten* UNDT/2011/094 was appealed by the Respondent with respect to the award of compensation in the amount of six months' net base salary for the substantial and unwarranted irregularities in the selection process, which award was affirmed by the Appeals Tribunal in *Sprauten* 2012-UNAT-219. The Dispute Tribunal's order in para. 87 of *Sprauten* UNDT/2011/094 was apparently not appealed by the Respondent, and in any event was not vacated by the Appeals Tribunal. Following *Sprauten* UNDT/2011/094, which is an executable Judgment, the Respondent was therefore required to make a determination as to whether the Applicant was entitled to a standard enhanced separation package.

18. On 31 August 2011, the Respondent made a decision, pursuant to para. 87 of *Sprauten* UNDT/2011/094, that the Applicant was not wrongly deprived of his entitlement to a standard enhanced separation package. The Respondent's determination of 31 August 2011 was made pursuant to para. 87 of *Sprauten* UNDT/2011/094.

19. One month later, on 31 September 2011, the Applicant filed a request for management evaluation "of the decision communicated to the Applicant on 31 August 2011 by the UNOPS General Counsel … constituting a negative reply to the order of the United Nations Dispute Tribunal in Judgment No. UNDT/2011/094 that UNOPS determine by 1 September 2011 whether [the Applicant] was wrongly deprived of a standard enhanced separation package of 18 months' net base salary".

20. The Respondent contends that the application is not receivable as the decision of 31 August 2011 was a reiteration of the decision given to the Applicant on 30 March 2009. The Tribunal does not agree. The decision of 31 August 2011 was made, or should have been made, pursuant to the directions and order of the Tribunal in *Sprauten* UNDT/2011/094 (see paras. 87–88), and it thus cannot be viewed as a mere reiteration of the decision dated 30 March 2009. The purpose of the Tribunal's order in para. 87 of *Sprauten* UNDT/2011/094 was to direct the Administration to make a new administrative decision regarding the Applicant's entitlement to a standard enhanced separation package, taking into account relevant factors and considerations. Thus, the decision of 31 August 2011 constituted a separate administrative decision that the Applicant now contests.

21. Notably, in para. 88 of *Sprauten* UNDT/2011/094 the Tribunal specifically stated that the Tribunal's order in para. 87 of that Judgment was "without prejudice to the Applicant in later filing an appeal of the determination of the Respondent on termination indemnity, if necessary". That order was not vacated by the Appeals Tribunal, and it is clearly the basis upon which the Applicant is pursuing this case.

22. In view of the above considerations, the Tribunal finds that the present application is receivable.

23. In the Tribunal's considered view, the present case is amenable to amicable resolution. The Tribunal is of the view that if both parties take a reasonable, pragmatic, and fair-minded approach, amicable resolution of this matter is within

their reach. The parties are to consider seriously whether informal dispute resolution is possible, and promptly advise the Tribunal in the event they wish to attempt it.

24. The present Judgment is without prejudice to any findings the Tribunal may reach in respect of the merits of the Applicants claims.

Conclusion

25. In all the circumstances, the Tribunal finds that this application is receivable.

26. By **Monday, 12 May 2014**, the parties are ordered to file a joint submission stating whether they agree to attempt resolving this case informally. If the parties are unable to pursue informal resolution, the Tribunal will issue further orders as it deems appropriate.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 11th day of April 2014

Entered in the Register on this 11th day of April 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York