



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

REID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM

Sarahi Lim Baró, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Support Mission in Libya (UNSMIL) who was employed on a series of temporary contracts for over one and a half years. In his Application dated 2 January 2014, amended on 31 January 2014, he avers that he was entitled to accrue annual leave at the rate of two and a half days per month rather than at the rate of one and a half days per month allotted to staff members on temporary contracts.

2. The Respondent filed a Reply on 21 February 2014 in which it is asserted that the Applicant accrued one and a half days of annual leave per month in accordance with staff rule 5.1(a) and that the Application is not receivable.

3. On 10 March 2014, by Order No. 042 (NBI/2014), the parties were informed that the Tribunal had decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing was not required in determining this case and that it would rely on the parties' pleadings and written submissions. The Applicant was also directed to file his submissions in response to the issue of receivability by Wednesday, 19 March 2014.

4. The Applicant filed his submissions on receivability on 19 March 2014.

5. On 27 March 2014, the Tribunal ordered the Respondent to file a copy of a settlement agreement entered into with the Applicant concerning his claim that he should have been appointed to a Fixed-Term Appointment (FTA) following the conduct of a selection exercise for a D-1 position. The Respondent filed a copy of the said agreement on 28 March 2014.

Facts

6. UNSMIL was established for an initial period of three months pursuant to Security Council resolution 2009 of 16 September 2011.

7. The Secretary-General's budget report (A/66/354/Add.6) for UNSMIL was issued on 15 November 2011. In paragraph 17 of the report, the Secretary-

General proposed staffing requirements which included four positions in the Disarmament, Demobilization and Reintegration (DDR) Section to offer technical assistance to Libyan authorities on arms control, weapons management and disarmament-related matters. It would be headed by a D-1 Chief DDR Adviser.

8. On 14 February 2012, the Applicant was offered a three-month temporary appointment (TA) as Senior DDR Adviser at the D-1 level expiring on 18 May 2012. This temporary appointment was subsequently extended for three-month periods on 19 May 2012, 19 August 2012 and on 19 November 2012.

9. On 15 December 2012, a position specific job opening for the D-1 Principal Security Sector Reform Officer was issued.

10. 31 December 2012, the Security Sector Advisory and Coordination Division (SSACD) Director, made a request for an exceptional extension of the Applicant's TA until 1 April 2013. The TA was then extended from 18 February until 1 April 2013 for one month and 15 days, from 2 April to 12 May 2013 for one month and 11 days and from 13 May to 30 August 2013 for three months and 12 days.

11. During the course of his employment the Applicant received the same annual leave entitlements granted to all staff serving under temporary appointments.

12. On 29 May 2013, in an email to UNSMIL's Chief, Human Resources Officer (CHRO) the Applicant asked questions about his relocation and assignment grants, annual leave, home leave, post assignment and health coverage. He received a response to his questions on 5 June 2013 advising that temporary appointments are administered in accordance with ST/AI/2010/4/Rev. 1 (Administration of temporary appointments).

13. On the same date, the Applicant emailed the CHRO asking for advice about the appropriate person to pursue his claims with.

14. On 15 July 2013, the Applicant filed a request for management evaluation of the decisions to cancel the selection process for the post of Principal Security

Sector Officer and the failure to apply to him the same conditions of service as those offered to staff members on FTAs.

Applicant's submissions

15. The Applicant submitted that he was offered and accepted conversion to an FTA but this offer was then reneged upon.

16. The relevant Administrative Instruction, Staff Regulations and Rules distinguish and discriminate between staff members on FTAs and those on TAs in terms of annual leave. The discrimination in allowances means that the Applicant paid the same staff assessment as other D-1 colleagues on FTAs but his net compensation was slightly less than that of a P-4. Further, taking into account the discrimination in leave days, his net compensation was about the same as that of a P-3 at the same step for a comparable period of time.

17. He relies on *Castelli*, UNDT/2009/75 and 2010-UNAT-037. In the latter case, the Appeals Tribunal criticised the use of 364-day contracts in order to avoid paying entitlements to a staff member.

18. The distinction between allowances paid to staff members on TAs and those on FTA is in violation of the principle of "equal pay for equal work" enshrined in art. 23.2 of the Universal Declaration of Human Rights and art. 7(a)(i) of the International Covenant on Economic, Social and Cultural Rights. He referred to *Chen* 2011-UNAT-107 and *Tabari* 2010-UNAT-030.

19. The Noblemaire Principle is supposed to guide the United Nations' remuneration policy as confirmed in *Muthuswami et al* 2010-UNAT-034.

20. The nature of TAs as stipulated in ST/AI/2010/4/Rev.1 has not been respected as they are supposed to be for seasonal and short-term/surge work lasting less than one year.

21. The use of TAs puts staff safety and well-being at risk since annual leave is supposed to be for the staff member to take time off from work for personal

reasons and for the purposes of health, rest and recreation. Staff members on TAs get less time off than their colleagues on FTAs despite their stressful jobs.

22. In view of the foregoing, the Applicant requests the Tribunal to award him full compensation for 18 days' salary, allowances and Organization's contributions amounting to USD 11,053 plus any applicable interest.

Respondent's submissions

23. The Respondent submitted that the Application is not receivable as the Applicant failed to allege a breach of the Staff Regulations, Staff Rules or his terms of appointment. There is no basis in law to question the validity of staff rule 5.1 (a) under art. 2.1 (a) of the Dispute Tribunal's Statute.

24. From 1 July 2009, the General Assembly introduced three types of appointments where it decided that staff serving on TAs should not receive the same entitlements as staff members on FTAs.

25. The Applicant received the entitlements to annual leave applicable to staff on TAs in accordance with the mandate of the General Assembly, the Staff Regulations, Staff Rules and ST/AI/2010/4/Rev.1. He signed a letter of appointment in which he accepted the terms and conditions of his employment contract as specified in the Staff Regulations and Staff Rules including staff rule 5.1(a).

26. The Applicant does not allege that the terms of his appointment were not observed.

27. The Applicant entered into a settlement agreement concerning his claim that he should have been appointed to an FTA following the conduct of a selection exercise. His claim is not receivable since he has released the Organization from any liability for any failure not to appoint him to a fixed-term position. The Applicant is accordingly estopped from raising any issues concerning allegations of a right to appointment to an FTA in this case.

28. The principles enunciated in *Castelli* UNDT/2009/075 upheld in 2010-UNAT-037 are irrelevant to the Applicant's case as is his reliance on *Chen*.

29. The Applicant's reliance on the principle of "equal pay for equal work" has no application to his case as he is comparing his contractual rights with staff members who are under different contracts of employment. Where a staff member is appointed to a TA, he or she does not fall within the same class of staff members as those appointed on FTAs. Equal treatment in these cases demands that in both instances, the contractual provisions of the respective contracts are enforced.

30. The Noblemaire principle is not applicable to the Applicant's claim as it does not cover entitlements such as annual leave.

31. For these reasons, the Respondent requests that the Application be dismissed.

Considerations

Receivability

32. The competence of the Tribunal is determined by the provisions of art. 2.1(a) of the Statute:

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) 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 the alleged non-compliance;

33. To determine whether this Application is receivable, the Tribunal must examine the substance of the Applicant's claims to determine if they fall within the competence of the Tribunal.

34. The Applicant does not deny that he received the leave entitlements he was due as a staff member on temporary appointments but asserts that the rules on annual leave entitlements discriminate against staff members engaged on continuous temporary contracts.

35. Prior to 2009 the entitlement to annual leave by United Nations staff members on appointments of limited duration under staff rule 301.1(a)(ii) was governed by section 5.1 of ST/AI/2001/2 (Appointments of Limited Duration). Appointments for activities of limited duration were intended for peacekeeping and peacemaking, and humanitarian, technical cooperation and emergency operations. Such appointments were granted to staff members appointed to serve at special missions or field locations where OHRM had specifically authorized the use of LD appointments. Under this AI, annual leave accrued at the rate of two and one half days for each complete calendar month of continuous service.

36. In *Castelli* UNDT/2009/075, the Tribunal considered the entitlement of staff members on temporary contracts to relocation grants. On appeal UNAT held that a continuous employment for a period of one year or longer gives rise to an entitlement to a relocation grant regardless of whether it was single period or consecutive period of employment. *Castelli* did not concern entitlements to annual leave and the staff member in that case was on a fixed-term appointment under the previous regime of Staff Rules. For these reasons it may be distinguished from this case.

37. In 2008 in A/63/298 (Detailed proposals for streamlining United Nations contractual arrangements: a way forward), the Secretary-General set out a proposal to reorganise United Nations contractual entitlements under a single set of staff rules. The proposal introduced the concept of temporary, fixed-term and continuing contracts. The General Assembly addressed the proposals in A/Res/63/250 (Human resources management) adopted on 24 December 2008. Materially in articles 2.7 and 2.8 it decided that:

...temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs

related to field operations and special projects with finite mandates;

Also decides that staff on temporary contracts would be eligible to receive only the following benefits and allowances: post adjustment; rental subsidy; hazard pay; hardship allowance; the daily subsistence allowance portion of the assignment grant; leave (depending on the length of contract); home leave (per classification of duty station); and limited shipment allowance;

38. ST/SGB/2009/7 (Provisional staff rules) established a new regime of appointments and contracts which included temporary appointments. Section 5.1(a) of this Bulletin established that a staff member who holds a temporary appointment shall accrue annual leave while in full pay status at the rate of one and a half days per month. Section 5.1(b) established that a staff member holding a continuing or fixed-term appointment shall accrue annual leave at the rate of two and a half days per month.

39. ST/AI/2010/4 established terms to apply to staff members on TAs. This was abolished and replaced by ST/AI/2010/4/Rev. 1. The provisional staff rules were abolished and replaced by ST/SGB/2010/6. However, both the new rules and the revised administrative instruction maintained the same wording on annual leave for temporary, continuing and fixed-term appointments.

40. The effect of these changes is that since 2009, the Staff Rules have stipulated that staff on temporary appointments accrue annual leave at the rate of one and a half days per month instead of the previous two and a half days per month. Any unutilized accrued annual leave by the end of the temporary appointment may be commuted into a sum of money up to a maximum of 18 days. The section also covers the effect of successive temporary appointments on leave entitlements.

41. In A/65/202 (Provisional staff rules) dated 20 August 2010, the Secretary-General provided information to the General Assembly on the provisional staff rules to implement the new contractual arrangements. In paragraph 11, he specifically referred to temporary appointments as follows:

Chapter III, on salaries and related allowances, reflects the harmonization of conditions of service... and in particular the new compensation package for staff on temporary appointments, who will receive reduced benefits and entitlements in comparison with staff on fixed term and continuing appointments... In particular, staff on temporary allowance will not receive annual within-grade increments, language allowance, education grant, mobility allowance, non-removal element of the mobility and hardship allowance, repatriation grant or special post allowance.

42. Resolution A/Res/63/250 of the General Assembly, based on the information provided by the Secretary-General on the new Staff Rules, is evidence that the changes to the Rules implemented a deliberate and considered policy change by the General Assembly to the nature and entitlements of staff members on temporary contracts. The effect of the changes was to render obsolete previous rules and any case law that had specifically evolved from them. The new rules on annual leave do not contemplate any difference between entitlements to leave by reason of the total period of service as opposed to the type of contract a staff member is employed on. They specifically refer to successive temporary contracts.

43. It is clear from his submissions that the gravamen of the Applicant's case is that the changes to the Human Resources regime and the rules which apply to staff since 2010 discriminate against staff members engaged for extended periods on TAs. He alleges the Rules are in breach of principles of equal pay for equal work and the Noblemaire principle. He does not allege in this case that the rules were incorrectly applied to him.

44. In *Tabari* 2011-UNAT-177 it was held that the general principle of "equal pay for equal work" enshrined as a right under Article 23(2) of the Universal Declaration of Human Rights does not prevent the legislative body or the Administration from establishing different treatment for different categories of workers or staff members, if the distinction is made on the basis of lawful goals.

45. The Applicant is critical of the Administration's use of continual temporary contracts which led to his lengthy engagement on TAs rather than placing him on a fixed-term appointment that would have entitled him to the

allowances and increased leave that accrue from such an appointment. The Tribunal accepts that the extended use of the temporary appointments was the reason for the disparity in leave entitlements between the Applicant and staff members on fixed term contracts and that this negatively affected the Applicant.

46. However, in this Application the Applicant is effectively asking the Tribunal to find that the Rules on annual leave for temporary employees are unlawful. Those rules were based on resolutions of the General Assembly. Pursuant to art. 2 of the UNDT Statute, the Tribunal's jurisdiction is limited to a review of the Respondent's application of the Organization's regulations, rules and administrative issuances. The Tribunal has not been vested with the power to review General Assembly resolutions.

47. The Application is not receivable and is dismissed.

(Signed)

Judge Coral Shaw

Dated this 14th day of July 2014

Entered in the Register on this 14th day of July 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi