



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/076

Judgment No.: UNDT/2014/099

Date: 17 July 2014

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SMITH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Daniel Trup, OSLA

Counsel for Respondent:

Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

The Application and Procedural History

1. The Applicant is contesting changes to his conditions of service as a result of General Assembly Resolution 65/248 (United Nations common system: report of the International Civil Service Commission) on the “harmonization of conditions of Service for Internationally Recruited Staff in Peacekeeping Operations and Special Political Missions”, of 24 December 2010, which he maintains resulted in the arbitrary discontinuance of his temporary assignment to a non-family duty station as of 1 October 2011, and thus breaching his acquired rights.

2. The Respondent filed his Reply to the Application on 16 January 2012. The Respondent’s principal contention is that the Application is not receivable as the “implementation of an administrative policy mandated by the General Assembly does not constitute a reviewable administrative decision under art. 2.1(a) of the Statute of the Dispute Tribunal”. As an ancillary point, the Respondent submits that the Applicant “has no acquired right to unchanged conditions of service”.

3. On 22 February 2012, the Tribunal issued Order No. 31 (NBI/2012) directing the Applicant to advise on: a) the completeness of the case record, as filed by the Parties respectively; b) the need for further disclosure pursuant to article 18 of the Rules of Procedure; c) whether an oral hearing of the matter is considered necessary, and the number and location of witnesses to be called if a hearing is thought necessary.

4. Both Parties responded to Order No. 31 (NBI/2012), indicating their satisfaction with the contents of the case record as filed. The Parties, however, disagreed on the need for a hearing. The Applicant submitted that the matter should be subject to an oral hearing, whereas the Respondent was content for it to be determined on the papers.

5. On 29 November 2013, the Tribunal issued Order No. 261 (NBI/2013) directing the Applicant to respond to the Respondent’s position on receivability. The

Tribunal also directed the Parties to file joint submissions on facts and issues and their views on the three separately filed applications being consolidated.

6. The Applicants filed their submissions on receivability on 6 December 2013.

7. On 10 January 2014, the Parties filed jointly filed submissions as directed in Order No. 261 (NBI/2013).

8. The Parties now consent to the matter being adjudicated on the basis of their written submissions.

FACTS AND SUBMISSIONS

9. The Applicant is a Field Service Officer (FSO) at the United Nations Stabilisation Mission in the Democratic Republic of Congo (MONUSCO). He has served on long-term temporary duty assignments (TDY) to various missions from his parent duty station, the United Nations Interim Force in Lebanon (UNIFIL), as an FSO.

10. Since the beginning of his employment with MONUSCO, the Applicant has been on “travel status” and in receipt of Mission Subsistence Allowance (MSA).

11. On 23 May 2011, the Applicant was offered a permanent appointment effective 30 June 2009 pursuant to the United Nations Staff Rules and Regulations. The Applicant accepted the offer of a permanent appointment on 23 June 2011.

12. The Respondent submits that the offer of a permanent appointment stated that a permanent appointment is subject to the provisions of the Staff Regulations and Staff Rules and their amendments.

13. Following the adoption of General Assembly resolution 63/250 (Human resources management) on 24 December 2008, provisional Staff Regulations and Rules were promulgated, effective 1 July 2009.

14. Under the provisional Staff Rules, former staff rule 103.21 was abolished and replaced with staff rule 4.8(b) which provides that “[a] change of official duty station shall take place when a staff member is assigned from a duty station to a United Nations field mission for a period exceeding three months”.

15. The provisional Staff Regulations and Rules also included transitional measures relevant to the continuation of FSO TDY assignments beyond 1 July 2009. As an exception to staff rule 4.8, staff rule 13.7(c) provided that staff members serving as FSOs on or after 30 June 2009 would be subject to the original conditions of service.

16. Following the adoption of General Assembly resolution 65/248 on 24 December 2010, the Secretary-General revised staff rule 13.7.¹ The provision limited the time-period during which FSOs can serve on TDY under the original conditions of service until 30 June 2011.

17. The Respondent submits, but the Applicant disputes, that under this Staff Rule, FSOs assigned to a non-family duty station for longer than three months, such as the Applicant, were effectively reassigned and installed along with the allowances and benefits applicable to the assigned duty station.

18. In the pamphlet “Transitional Measures and Implementation in Family and Non-Family Missions” of 6 July 2009, the FSOs were informed that the status quo would be maintained with regards to parent family duty stations. These conditions of service have been an entitlement of FSOs since the inception of the Field Service category. The reason for such conditions was that the FSOs represent a unique pool of experienced, multi-skilled and highly mobile individuals often sent at short notice to very challenging environments. This approach was reflected in the Applicant’s terms and conditions and in various assurances he received until 31 May 2011. This is contested by the Respondent.

¹ See ST/SGB/2011/1.

19. On 31 December 2010, the Secretary-General informed all staff in a broadcast message that the General Assembly had approved, inter alia, the International Civil Service Commission's recommendations on a harmonized approach to the compensation, allowances and benefits of staff across the United Nations common system assigned to non-family duty stations effective 1 July 2011. This included the designation of duty stations as family or non-family duty stations based on security criteria, payment of additional hardship allowance for staff serving in non-family locations, and paid travel for rest and recuperation purposes.

20. Given the apparent changes in the conditions of service for newly-appointed FSOs on long-term TDY assignments, requests for agreed termination of appointments were made an option for existing FSOs. The Applicant did not avail himself of this option neither did he sign for or agree to any changes in his conditions. This is contested by the Respondent. The Respondent submits, and the Applicant does not accept, that at the same time, all FSOs were allowed to remain on 'travel status' with payment of MSA from 1 July until 30 September 2011, pursuant to staff rule 4.8(b). This gave all FSOs time to consider whether to request an agreed termination or continue to serve the Organization under the new conditions of service.

21. The Respondent submits, and the Applicant does not accept, that transitional arrangements were likewise put in place to allow staff in the Professional category on detail assignment to a non-family mission on 30 June 2009 to remain on travel status with payment of MSA for the duration of the assignment period in effect on 30 June 2009. From 1 July 2009, with the exception of FSOs, all other staff members serving in non-family missions for a period exceeding three months were assigned in the non-family duty station with payment of post adjustment and related allowances and benefits applicable to the assigned duty station. The payment of MSA was discontinued.

22. The Respondent submits, and the Applicant does not accept, that the changes in the conditions of service of FSOs, including the Applicant, reflected the decisions

of the General Assembly which resulted in amendments to the Staff Rules, particularly staff rules 4.8(b) and 13.7.

23. On 27 May 2011, in order to implement the newly revised Staff Regulations and Rules, the Department of Field Support (DFS) issued “Guidelines for Implementation of General Assembly Resolution 65/248 on Harmonization of Conditions of Service for Internationally-Recruited Staff in Peacekeeping Operations and Special Political Missions” (Guidelines). The Guidelines mandated the termination of the FSO terms and conditions vis-à-vis their link with the family duty station where they had been previously assigned and ended their MSA.

24. On 31 May 2011, the Applicant received an e-mail from the Chief Civilian Personnel Officer (CCPO) of MONUSCO, informing him that his MSA payment was to be discontinued, following the implementation of the Guidelines.

25. On 21 July 2011, the Applicant filed a request for management evaluation asserting that the Guidelines violated his acquired rights insofar as it changed the conditions of service for FSOs in relation to their mission assignments, his travel status, and MSA payment while he received post adjustment, salary and related allowances applicable to his parent duty station.

26. On 9 September 2011, the Management Evaluation Unit informed the Applicant that his request for management evaluation was not receivable.

DELIBERATIONS

27. The jurisdiction of the United Nations Dispute Tribunal is set out in its Statute. Article 2 of the Statute affords the Tribunal the authority to hear and pass judgment on an application filed by an individual to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

28. This provision must be read together with article 8.2(e) of the Tribunal's Rules of Procedure, which requires an applicant to state "when and where the contested decision, if any, was taken (with the contested decision attached)".

29. The Respondent's principal contention is that the Applicant's challenge to the changes in his conditions of service is not receivable by the Tribunal. The implementation of an administrative policy mandated by the General Assembly does not constitute a reviewable administrative decision under article 2.1(a) of the Statute of the Dispute Tribunal.

30. The Applicant contends that the payment of MSA formed part of the terms and conditions of his contract. The abolition of the payment of MSA was at the discretion of the Secretary-General; payment of it was not proscribed by, or as a consequence of, General Assembly resolution 65/248.

31. The Applicant further asserts that General Assembly resolution 65/248 does not in any way override his legitimate expectation that payment of MSA would be honoured. It was the decision by the Secretary-General, and not the General Assembly, to abolish payment of the MSA with immediate effect and that this constitutes an administrative decision within the meaning of article 2.1 of the UNDT Statute.

32. The question for this Tribunal then is whether this discretionary authority of the Secretary-General further to, and implementing, a General Assembly resolution constitutes an "administrative decision" within the meaning of article 2 of the UNDT Statute.

33. The United Nations Appeals Tribunal has held in *Andati-Amwayi* 2010-UNAT-58 that:

[W]hat is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what

constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

34. What the Applicant is seeking to challenge is the Secretary-General's implementation of General Assembly resolution 65/248, which led to the discontinuation of payment of the MSA.

35. Decisions regarding the conditions of service and entitlements for all staff serving in the United Nations common system are within the exclusive domain of the General Assembly.²

36. In this case, the General Assembly made a decision to "harmonise" the terms and conditions of service of staff members across the United Nations system. Resolution 65/248 approved:

the recommendations of the Commission on the harmonization of the conditions of service of staff of the organizations of the United Nations common system serving in non-family duty stations, as contained in its annual report for 2010, subject to the provisions of the present resolution.

37. The new conditions of service that discontinues the application of the temporary assignment to a non-family duty station as of 1 October 2011, is not an emanation of the Secretary General's discretion.

² See paragraph 4 of the Preamble to A/RES/65/248 reaffirming the role of the General Assembly in approving conditions of service and entitlements for all staff serving in the organization of the United Nations common system.

38. This General Assembly decision was binding on the Secretary-General, and its implementation affected staff across the Organization.

39. These changes included the introduction of permanent appointments for eligible staff members, which Applicant was offered and signed on 23 June 2011.

40. The Tribunal finds that the Applicant is seeking to challenge a change to his terms and conditions of service, which the Secretary-General implemented pursuant to the General Assembly's directions.

41. The Tribunal has examined the papers in this matter from as many angles as has been raised by the Parties, and finds that this matter is materially outside its jurisdiction.

42. The Tribunal therefore cannot continue to adjudicate this matter and dismisses the Application in its entirety.

(signed)

Judge Vinod Boolell

Dated this 17th day of July 2014

Entered in the Register on this 17th day of July 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi