



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ELMI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Katya Melliush, UNON

Introduction

1. The Applicant is a former staff member of the United Nations Office at Nairobi. In his Application dated 21 March 2014, he contests the decision by the Assistant Secretary-General for Human Resources Management (ASG/OHRM), dated 27 February 2014, not to grant him a retroactive promotion for pension purposes as an exception under staff rule 12.3(b).

2. The Respondent filed a Reply on 15 May 2014 in which it is asserted that the Application is without merit and is not receivable.

Procedure

3. On 29 September 2014, by Order No. 215 (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 is not required in determining the preliminary issue of receivability and that it will 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 6 October 2014.

4. The Applicant filed his submissions on receivability on 30 September 2014.

Facts

5. The Applicant assumed the post of P-5 Chief of Human Resources Management Services (HRMS) at the United Nations Office in Nairobi (UNON) from 1 January 2005.

6. In April 2008, OHRM commissioned an independent consultant to conduct a comprehensive review of the post and grade structure of UNON's Division of Administrative Services to ensure that its resource structure is commensurate with its role as the central provider of human resources management.

7. The comparative report concluded that;

the Chief position of the Human Resource Management Service should be upgraded to a D-1; both UNOG and UNOV have D-1 Chiefs of HR, and the diversity of work, the difficulty or recruiting and retaining staff in this duty station, and diversity of appointment types and location, in addition to the volume of work, justifies a D-1 level position.

8. The UNON Administration put forward a budgetary proposal to the United Nations Headquarters in New York at the end of 2008 requesting for additional funds for the D-1 position but the request was refused by the Controller.

9. In 2011, a new request for upgrading the Chief of HRMS position of UNON to the D-1 level was resubmitted in the Secretary-General's 2012/2013 budget to the General Assembly. At the end of 2011, the General Assembly approved the request.

10. The newly upgraded D-1 position was then advertised on 9 January 2012. The Applicant applied for this post. The written test was conducted in September 2012. The interviews took place in April 2013 and he was selected for the post on 1 June 2013.

11. On 5 November 2013, the Applicant wrote to the ASG/OHRM to request retroactive promotion to the D-1 level as Chief of HRMS/UNON from 1 January 2012.

12. On 6 February 2014, the Applicant filed a request for management evaluation seeking the Administration to consider his application for retroactive promotion to 1 January 2012.

13. On 27 February 2014, the ASG/OHRM responded in writing to the Applicant's request for retroactive promotion. The ASG/OHRM declined to grant an exception to the staff rules as requested.

14. By letter dated 6 March 2014, the Chief of the Management Evaluation Unit (MEU) informed the Applicant that his request for management evaluation was moot.

Respondent's submissions

15. An application is receivable before the Dispute Tribunal only if an applicant has previously submitted the contested administrative decision for management evaluation where required in accordance with art. 8.1(c) of the Statute of the Dispute Tribunal.

16. On 5 November 2013, the Applicant submitted a request to the ASG/OHRM for exceptional approval for retroactive promotion to the D-1 level for pension purposes under staff rule 12.3(b). He subsequently submitted a management evaluation request on 6 February 2014 requesting management evaluation of the decision not to consider his request for retroactive promotion.

17. The ASG/OHRM's decision to deny the request constituted a separate administrative decision which must be the subject of a separate management evaluation request under staff rule 11.2(a).

18. The Applicant's management evaluation request contesting the failure to consider his request was rendered moot once the ASG/OHRM notified the Applicant of her decision to deny his request.

19. The Applicant was advised in writing of the effect of the ASG/OHRM's decision on his management evaluation request by the Chief of MEU in the management evaluation. Nevertheless, Counsel for the Applicant did not amend or resubmit the Applicant's management evaluation request after the ASG/OHRM's decision.

20. The Applicant has not submitted a management evaluation request of the ASG/OHRM's decision to deny his request for an exception to the staff rules. He was required to do so within 60 calendar days from the date upon which he received notification of the ASG/OHRM's decision, that is, by 28 April 2014.

21. As the Applicant has failed to request management evaluation of the contested decision the Application is not receivable.

Applicant's submissions

22. The Respondent erred in concluding that the memorandum dated 27 February 2014 constituted a fresh administrative decision.

23. On 6 February 2014, the Applicant filed a management evaluation request. The basis of this request was the decision not to consider a demand by the Applicant, made on 5 November 2013, to retroactively promote him to the position of D-1, Chief of Human Resources Management Service.

24. On 27 February 2014, 20 days after filing the MER and almost four months after the initial request had been made, the Administration took it upon its self to reply to the Applicant, expressly refusing his initial request.

25. The Applicant initially sought a management evaluation for the refusal not to consider his request for retroactive promotion made on 5 November 2013. The actual rejection of the Applicant's request is implicit in this refusal of the Administration.

26. Between 5 November 2013 and 27 February 2014, the Administration failed to reply to the Applicant. This complete lack of responsiveness can only be interpreted as a decision to refuse his request for retroactive promotion. Since the Applicant, prior to 27 February 2014, had not received the formal written notification, he was not in a position to challenge the explicit refusal to grant but rather the general failure of the Administration to consider his application positively.

27. The memorandum dated 27 February 2014 issued by the Administration can in no way be considered as constituting a separate administrative decision. Rather this document merely served to confirm the former implied determination to refuse his request.

28. The only consequence of this memorandum was to provide the Applicant with the reasoning behind the refusal. In *O'Donnell* 2014/UNDT/063, the Tribunal found that a later explanation detailing a previous decision from the Administration does not constitute in itself an administrative decision.

29. No additional management evaluation request is necessary as this would be a waste of time and resources for both the Applicant and the Administration.

30. This position is confirmed in the UNDT case of *Terragnolo* 2014/UNDT/005, where the Tribunal concluded that:

While [the Applicant] had received no response before he submitted his request for management evaluation, he subsequently received a response to his email of 7 May 2013 on 30 May 2013, which did not address his concern. The Tribunal finds that the Applicant could not be requested, after he received the response of 30 May 2013, to submit another request for management evaluation, since it merely confirmed the implicit decision, attributable to the Secretary-General that the Administration was not going to [accede to the Applicant's request].

31. Since the Applicant was not required to submit another management evaluation request, he effectively exhausted the internal remedies that were available to him and therefore the Application is receivable.

32. Counsel for the Applicant raises his concerns regarding the disclosure of e-mail communication between himself and the MEU. Such material in this case, Annex R/2 of the Respondent's submissions, remains privileged and should not be used to bolster the arguments of the Administration.

33. For the reasons above, the Applicant would submit that the submissions of the Respondent regarding its submissions of *ratione materiae* be rejected.

Considerations

Receivability

34. Article 8.1(c) of the Dispute Tribunal's Statute provides that an application shall be receivable if an applicant has previously submitted the requested administrative decision for management evaluation where required.

35. The Respondent challenges the receivability of this Application on the grounds that the ASG/OHRM's written decision of 27 February 2014 to deny the Applicant's request for retroactive promotion constituted a separate administrative decision which must be the subject of a separate management evaluation request

under staff rule 11.2(a). This is notwithstanding the fact that in his management evaluation request of 6 February 2014, the Applicant had asked the Administration to consider his application for retroactive promotion to 1 January 2012.

36. The Tribunal has carefully considered the parties' pleadings including the authorities cited by the Applicant and finds that the Respondent's submissions on receivability have no merit and are logically incoherent. The Tribunal does not consider it a mere coincidence that the ASG/OHRM delayed her response to the Applicant from 5 November 2013 to 27 February 2014. The ASG/OHRM's response came only 21 days after the Applicant's request for a management evaluation. Were it not for the request, it appears that the Applicant would have had to continue waiting for a response.

37. The Tribunal is of the view that in such circumstances, to require the Applicant to submit a new management evaluation request regarding the same subject matter of his retroactive promotion would amount, as correctly argued by the Applicant, to a waste of time and resources for both the Applicant and the Administration. The Respondent is essentially asking the Tribunal to sacrifice substance on the altar of form! The Applicant has to all intents and purposes complied with the requirements of art. 8.1 (c). The Administration has had an opportunity to evaluate his request and has refused it. The Applicant is now entitled to come before the Tribunal.

38. Regarding the issue of the disclosure of certain email communications between Counsel for the Applicant and the MEU, this will be fully canvassed in the Tribunal's judgment on the merits in this case.

JUDGMENT

39. In view of the foregoing, the Tribunal decides that this Application is receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 11th day of February 2015

Entered in the Register on this 11th day of February 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi