



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GLAVIND

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 staff member of the United Nations Office at Nairobi (UNON). In her Application dated 21 March 2014, she is contesting the decision by the Assistant Secretary-General for Human Resources Management (ASG/OHRM), dated 27 February 2014, “to refuse her application for retroactive promotion commencing January 2012” (the Contested Decision).

Procedural history

2. The Application was served on the Respondent on 24 March 2014 with a reply date of 24 April 2014. On 11 April 2014, the Respondent submitted a Motion for extension of time to file a Reply. The Tribunal, by its Order No. 077 (NBI/2014), granted the Respondent an extension of time until 15 May 2014.

3. The Respondent filed a Reply on 15 May 2014 in which he asserted that the Application was not receivable *ratione materiae* as the Applicant had failed to request management evaluation of the Contested Decision.

4. By Order No. 187 (NBI/2014), the parties were informed that the Tribunal had decided not to hold an oral hearing in determining the preliminary issue of receivability. Consequently, the Applicant was directed to file her submissions in response to the issue of receivability by 4 September 2014.

5. The Applicant filed her submissions on receivability on 31 July 2014.

Facts

6. The Applicant served as the Chief of the UNON Human Resource Management Service (HRMS) from 1 May 2000 to 30 April 2004. She was appointed to the post of Chief of Support Services Service (SSS) at UNON at the P-5 level effective 1 May 2004.

7. During the period of August through November 2008, a consultant, working under the direction of UNON and OHRM/Department of Management

(DM), undertook a comprehensive review¹ of the post and grade structure of UNON's Office of the Director General (ODG), the Division of Administrative Services (DAS)², the Security & Safety Service (SSS) and the United Nations Information Center (UNIC) to ensure that UNON's resource structure was commensurate with its role as the central service provider for the global network of operations of the Nairobi-based offices. The consultant was also tasked with submitting proposals to UNON and OHRM/DM for the realignment of the structures and grade levels at UNON, taking into account those of similar United Nations offices in Geneva and Vienna.

8. The consultant's report recommended that the services provided by the Central Support Service (currently SSS) should be organized under the supervision of a Chief at the D-1 level who would report to the Director of DAS.

9. UNON put forward the SSS position at the D-1 level in its 2010/2011 budget proposal, which was submitted to United Nations Headquarters at the end of 2008. UNON's budget request was supported by the ASG/OHRM³.

10. In 2009, UNON was informed that the Controller had not approved the upgrade of the Applicant's position to the D-1 level in the 2010/2011 budget. In 2011, UNON tendered another request for the upgrading of the Chief of SSS to the D-1 level in its 2012/2013 budget submission. At the end of 2011, the General Assembly approved the request.

11. The newly upgraded D-1 position was 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 she was selected for the post on 1 June 2013.

12. On 5 November 2013, the Applicant wrote to the ASG/OHRM to request "exceptional approval of promotion to the D1 level effective 1 January 2012 for pension purposes only".

¹ This review was recommended in an April 2008 report issued by an OHRM Monitoring Team that visited Nairobi from 15-25 September 2007.

² SSS falls under the management/supervision of DAS.

³ Interoffice memorandum dated 26 January 2009 from the ASG/OHRM to the USG/DM.

13. On 7 February 2014, the Applicant requested management evaluation of the decision not to consider her request for retroactive promotion commencing 1 January 2012.

14. By a letter dated 27 February 2014, the ASG/OHRM informed the Applicant, *inter alia*, that:

In section 10.2 of ST/AI/2010/3 on the Staff Selection system, when a staff member is selected for a position that entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions. The effective date of your promotion to the D-1 level was therefore correctly made following the decision to select you for the position.

I noted that as you had received a special post allowance to the D-1 level prior to the completion of the selection process, you received equal pay for the work of equal value. Bearing this and the above in mind and in the absence of any administrative error, I regret that I am not in a position to agree to your request to retroactively promote you to the D-1 level effective 1 January 2012 for pension purposes only.

15. By letter dated 6 March 2014, the Chief of the Management Evaluation Unit (MEU) informed the Applicant that her request for management evaluation was moot due to the ASG/OHRM's letter of 27 February 2014 and time-barred because the decision to promote her had been taken on 1 June 2013. Thus, her request for management evaluation should have been sent within 60 calendar days of 1 June 2013.

Respondent's submissions on receivability

16. Pursuant to art. 8.1(c) of the Statute of the Dispute Tribunal, an application is receivable before the Dispute Tribunal only if an applicant has previously submitted the contested administrative decision for management evaluation where required.

17. 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). She subsequently submitted a management evaluation request on 7 February 2014 requesting management evaluation of the decision not to consider her request for retroactive promotion.

18. The ASG/OHRM's decision to deny the Applicant's request constituted a separate administrative decision, which should have been the subject of a separate management evaluation request under staff rule 11.2(a). The Applicant's management evaluation request of 7 February 2014 was rendered moot once the ASG/OHRM notified the Applicant of her decision to deny her request.

19. The Applicant was advised in writing of the effect of the ASG/OHRM's decision on her management evaluation request by the Chief of MEU but 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 her request for an exception to the staff rules although she was required to do so within 60 calendar days from the date upon which she 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. On 7 February 2014, the Applicant filed a management evaluation request premised on the decision not to consider her demand, made on 5 November 2013, to retroactively promote her to the position of D-1, Chief of SSS.

23. Furthermore, it can be understood that one administrative decision is implied by another administrative decision, which an applicant has actually submitted for management evaluation. In this matter, the Applicant initially sought management evaluation of the refusal to consider her 5 November 2013 request for retroactive promotion. The actual rejection of the Applicant's request is implicit in this refusal of the Administration.

24. 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 her request for retroactive promotion. Since the Applicant, prior to 27 February 2014, had not received the formal written notification, she was not in a position to challenge the explicit refusal to grant but rather the general failure of the Administration to consider her application positively.

25. The ASG/OHRM's memorandum dated 27 February 2014 cannot be considered as constituting a separate administrative decision. Rather this document merely served to confirm the former implied determination to refuse her request.

26. The only consequence of this memorandum was to provide the Applicant with the reasoning behind the refusal. In *O'Donnell* UNDT/2014/063, the Tribunal found that a later explanation detailing a previous decision from the Administration does not constitute in itself an administrative decision. This position is confirmed in the UNDT case of *Terragnolo* UNDT/2014/005, 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].

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

28. Since the Applicant was not required to submit another management evaluation request, she effectively exhausted the internal remedies that were available to her and therefore the Application is receivable and the Respondent's submissions in this respect should be rejected.

Issues

29. The only issue for determination in this judgment is the receivability of the Applicant's application of 21 March 2014.

Considerations

30. Pursuant to art. 8.1(c) of the Statute of the Dispute Tribunal, the jurisdiction of the Dispute Tribunal can only be invoked in certain cases if a contested administrative decision has been previously submitted for management evaluation. Thus, a mandatory first step for an applicant, prior to the submission of an application to the Dispute Tribunal, is to request management evaluation of the contested administrative decision.

31. Staff rule 11.2(a) provides in relevant part that a staff member wishing to formally contest an administrative decision shall, as a first step, submit a request for management evaluation to the Secretary-General.

32. In the present matter, the Respondent challenges the receivability of the Application on the grounds that the ASG/OHRM's written decision of 27 February 2015 constituted a separate administrative decision that should have been the subject of a separate management evaluation request under staff rule 11.2(a).

33. The former United Nations Administrative Tribunal held in *Andronov*⁴ that:

Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions.

⁴ Judgment No. 1157 (2003).

34. In *Tabari* 2010-UNAT-030, the United Nations Appeals Tribunal (UNAT) held that not taking a decision is also a decision and in *Tabari* 2011-UNAT-177, it held that:

The absence of any response on the part of the UNRWA Administration to that request for hazard pay constitutes an appealable administrative decision because it is considered an implied unilateral decision with direct legal consequences. Consequently, that decision is subject to judicial review under Article 2(1) of the Statute of the Appeals Tribunal.

35. In *Chahrour* 2014-UNAT-406, UNAT held that:

Based on the undisputed fact that the Agency did not afford Mr. Chahrour written notice at the time of its decision not to consider him for the post of Registrar when the incumbent resigned on 10 February 2010, the UNRWA Dispute Tribunal properly characterized the Agency's decision as an implied decision.⁵

To determine the date by which a staff member must seek decision review of an implied decision, it is incumbent on the UNRWA Dispute Tribunal to first establish the date on which the staff member knew or reasonably should have known of the implied decision. After considering all the facts, the UNRWA DT determined that 16 July 2010 was the date Mr. Chahrour knew or reasonably should have known of the implied decision.

36. In the present matter, the Applicant did not receive a written response to her request of 5 November 2013 until 27 February 2014. By the time the Applicant filed her 7 February 2014 request for management evaluation, she had waited approximately 90 days for a written response. The Tribunal finds that the 90-day waiting period for a written response to the Applicant's request was reasonable and that the ASG/OHRM's failure to respond within 90 days constituted an appealable implied administrative decision. Thus, the ASG/OHRM's written decision of 27 February 2015 was not a separate administrative decision but merely a reiteration and explanation of her implied decision.

⁵ See Al Surkhi 2013-UNAT-304, quoting former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

37. The record shows that after waiting for a response for 90 days, the Applicant requested management evaluation of the implied decision not to consider her application for retroactive promotion commencing 1 January 2012. Although the Management Evaluation Unit subsequently decided that her request was moot and time-barred, this does not negate the fact that she did, in actuality, seek management evaluation of the Contested Decision. The Tribunal rejects the Respondent's submission that the 27 February 2014 letter should have been the subject of a separate management evaluation request under staff rule 11.2(a) because the decision contained therein had already been submitted for management evaluation.

38. This Tribunal wishes to reiterate the views of Izuako J that were espoused in *Elmi* UNDT/2015/013:

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.

JUDGMENT

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

(Signed)

Judge Vinod Boolell

Dated this 17th day of February 2015

Entered in the Register on this 17th day of February 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi