UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/114
UNDT/NBI/2015/035
Judgment No.: UNDT/2015/094
Date: 7 October 2015
Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TORKORNOO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Miles Hastie, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a former staff member who served as Chief Transport Officer in the United Nations Mission in Liberia (UNMIL) at the P5 level. He challenges the decision dated 29 May 2014 not to renew his fixed term contract.

Procedural history

2. On 18 June 2014, the Applicant requested management evaluation of the non-renewal decision and the "downsizing" of his post from P5 to P4 (MER1).[1] On 23 June, he filed an application for suspension of action of the non-renewal decision to the Dispute Tribunal, which was granted on 30 June[2].

3. The Management Evaluation Unit (MEU) rejected MER1 on 3 October 2014 and informed the Applicant that it had received documentation regarding the classification of his post from the Field Personnel Division of the Department of Field Support (FPD/DFS) in August and September 2014.

4. The Applicant was provided with a copy of the classification review decision on 9 October, and on 15 October he submitted a classification appeal pursuant to ST/AI/1998/6 (System for the classification of posts). He did not receive a response to his appeal.

5. The Applicant filed his first Application on 19 December 2014[3]. He alleged that the administrative decision of non-renewal was unlawful because his post was reclassified downwards and: (i) the Organisation failed to conduct proper classification, classification review and classification appeal before taking the classification and separation decisions; (ii) the Organisation failed to place him on a P4 post or "outside ordinary processes"; and (iii) the decision was influenced by extraneous considerations. On the same day, he also submitted a management

[1] This request, which was submitted when the Applicant was self-represented, was subsequently supplemented with additional submissions by the Office of Staff Legal Assistance (OSLA) on 19 and 23 June 2014.
[2] See Order No. 168 (NBI/2014).
[3] Case No. UNDT/NBI/2014/114.

evaluation request addressing the Administration's failure to address his classification appeal (MER2).

6. In reply[4], the Respondent alleged, *inter alia*, that the claim of the alleged failure of the Administration to address the Applicant's classification appeal is not receivable *rationae materiae* as the Applicant failed to wait for the 45 day period for management evaluation to expire prior to filing his Application and that the Applicant had not exhausted internal remedies because there has been no final decision of the Classification Appeals Committee (CAC).

7. On 2 February 2015, MEU rejected MER2.

8. The Applicant filed a second Application on 9 February 2015[5] which repeated the allegations in the first Application but added a reference to the first request for management evaluation response received from the Management Evaluation Unit (MEU) on 3 October 2014.

9. On 9 March 2015, the Applicant filed a motion to consolidate the two applications. He submitted that he had filed the second application to meet possible receivability objections of the Administration. If the Applications are consolidated, the receivability questions may simply be ignored, resulting in efficiencies for the Tribunal and parties.

10. The Respondent replied that the Application for consolidation should be rejected. In reliance on *Saka* 2010-UNAT-075 he requested that the Tribunal first determine the receivability of the two Applications separately as, "it would not serve judicial economy to consolidate cases where the claims are not receivable".

Considerations on Consolidation

11. *Saka* concerned the timeliness of a single challenge and is distinguishable on the facts. In any event the Appeals Tribunal stated at para 21 that "[t]here is no error in considering the merits of a case at the same time as receivability, but judicial economy is usually - but not always better served by considering time

[4] The Respondent's Reply was submitted on 22 January 2015.
[5] Case No. UNDT/NBI/2015/035.

issues first". The Tribunal observes that an order for consolidation would not absolve it from considering the Respondent's submission on receivability.

12. Pursuant to art.19 of its Rules of Procedure, the Tribunal may at any time issue an order or give any direction which appears to be appropriate for the fair and expeditious disposal of a case and do justice to the parties. Based on *Yapa* Order No. 67 (UNAT/2011), when deciding to consolidate cases the Tribunal may consider whether the cases involve a common set of facts and whether consolidation would serve judicial economy and consistency without affecting or changing the rights of the parties.

13. There is no dispute that these two cases have a common set of facts. The only difference between the first and second application is that the second followed and included reference to the response to MER2. Both Applications raise the same issues of receivability.

14. Neither party gave any reasons why nor how consolidation of the two Applications would affect or change their rights. The Tribunal finds that consolidation would not have any effect on their rights as each application is virtually identical and each party will have the opportunity to have its case fully considered both as to receivability and on the merits albeit in one judgment.

15. The Motion to consolidate the two cases is granted. In this judgment, the Tribunal will consider the receivability of each Application.

Receivability

16. The Tribunal does not accept the Applicant's submission that if the two Applications are consolidated the receivability question "may simply be ignored".

17. The Tribunal cannot ignore issues of receivability. Even if not raised by the parties, the Tribunal has a responsibility to do so to ensure that cases it hears are properly receivable.[6]

[6] *Pellet* 2010-UNAT-073.

First Application

18. The impugned administrative decision in the first Application was described by the Applicant as the "non-renewal of appointment" dated 29 May 2014. Of the three grounds relied on for the unlawfulness of the non-renewal decision one alleged failures in the process of classification. In particular: the "failure of the Organisation to conduct proper classification, classification review, classification appeal before taking classification separation decision".

Respondent's submissions

19. The Respondent quite correctly did not challenge the receivability of the challenge to the decision of non-renewal in the first Application. It was an administrative decision which may be reviewed by the Tribunal and the Application was timely.

20. First, the Respondent submitted that the claim of the alleged failure of the Administration to address the Applicant's classification appeal is not receivable *rationae materiae.* It is not ripe for adjudication because the Applicant failed to wait for the 45 day period for management evaluation prior to filing the application to the Tribunal.

21. Secondly, the Respondent submitted that the Applicant must exhaust the internal administrative remedies under sections 5 and 6 of ST/AI/1998/9 (System for Classification of posts), prior to filing an application before the Dispute Tribunal. He has not exhausted his remedies because there has been no final decision of the CAC. The Applicant must wait until his request under section 6 of ST/AI/1998/9 is processed and the entire procedure completed before he may challenge the decision before the Dispute Tribunal.

Applicant's submissions

22. The Applicant agrees with the first of the Respondent's submissions with the caveat that one is only required to await a management evaluation response if one was required to seek management evaluation. He submitted that where there

is a specialized mechanism for recourse for a staff member's protection which is not honoured by the Administration, it cannot argue that its failure must be subjected to a different recourse mechanism.

23. The Applicant submitted that he filed a timely classification appeal to the CAC. He rejects the Respondent's argument which would have the effect that the Applicant must wait forever and beyond prescribed time limits that have been breached before seeking recourse.

Considerations

24. The documents filed with the Application show that, as well as challenging the non-renewal of his contract, the Applicant challenged the processes adopted to reclassify his post including the consideration of his classification appeal to the CAC based on alleged procedural and substantive irregularities in the classification process which he filed on 15 October 2014.

25. The Applicant pleads that he has received no information pertaining to that appeal. The classification appeal process has not been completed.

26. The Respondent states as a matter of fact that a report was submitted on the Applicant's appeal to the Secretary of the CAC on 19 November 2014. The next step in the procedure will be for the Secretary of the CAC to submit a copy of the report to the Applicant for his comments. His comments will be provided to the Field Personnel Division of the Department of Field Support (FPD/DFS), which will have two weeks to comment.

27. In the light of these submissions, the Tribunal proceeds on the factual basis that as yet, no decision has been made on the Applicant's appeal to the CAC.

28. The Applicant's arguments on receivability are supported by *Fuentes* UNDT-2010-064 and *Fuentes* 2011-UNAT-105. In that case the Appellant appealed to the CAC against the decision not to reclassify her post under section 5 of ST/AI/1998/9. She received no answer to her appeal. She did not request a

review of the administrative decision as required by former staff rule 111.2(a)[7] but filed a claim directly with the UNDT.

29. At first instance, in answer to the Administration's case that the Applicant had not challenged the non-response from the CAC within the time limit specified in staff rule 111.2(a), the Dispute Tribunal held that administrative instruction ST/AI/1998/9 was intended to create a special procedure to challenge a refusal to reclassify a post and that staff rule 111.2(a) was not applicable.

> An appeal by a staff member to the Classification Appeals Committee, or to any other Appeals Committee, such as JAB, must be considered a procedure intended to safeguard the staff member's interests, and such a committee, once the appeal is referred to it, must be considered obligated to make a recommendation in that regard. If we say that when the administration fails to follow up a classification appeal it has implicitly denied that appeal, we are effectively saying that the administration may ignore the recommendation of the Classification Appeals Committee. That is obviously contrary to [ST/AI/1998/9].
>
> Section 6.14 of Administrative Instruction ST/AI/1998/9 reads as follows:
>
> "The Assistant Secretary-General, OHRM, or the Head of Office, as appropriate, shall take the final decision on the appeal. A copy of the final decision shall be communicated promptly to the appellant, together with a copy of the report of the Appeals Committee. Any further recourse against the decision shall be submitted to the United Nations Administrative Tribunal."

30. The Tribunal continued.

> Thus, as the Committee gave no ruling, no implicit decision can be inferred, and the applicant was within her rights in applying, as she did, to the United Nations Administrative Tribunal to have the refusal to reclassify her post overturned

31. In *Fuentes* 2011-UNAT-105, the Appeals Tribunal confirmed this decision. It stated:

[7] See current staff rule 11.2(a) relating to management evaluation requests.

> The UNDT correctly pointed out that it is this special procedure for classification under ST/AI/1998/9 and not Rule 111(2)(a) of the former Staff Rules that applies.

32. These authorities confirm that a failure to decide an appeal against classification of a post encumbered by the Applicant is an administrative decision which may be subject to review by the Tribunal without the necessity for the Applicant to have recourse to management evaluation.

Conclusion

33. The whole of the first Application is receivable. This finding effectively renders the second Application redundant, however for the sake of completeness the receivability of the challenges in that Application are addressed below.

Second Application

34. The impugned administrative decision described in the second Application is similar to the first but includes reference to the Applicant's appeal against the classification decision. It reads, "Non-renewal of appointment and failure to conduct proper classification review (including appeal)".

35. It also refers to the steps taken by the Applicant to have the decision reviewed by MEU. On 19 December 2014, over one year since filing the classification appeal, the Applicant sought management evaluation of the decision to not take action (or to delay action) on the appeal.

36. MEU responded on 2 February 2015. It concluded there was no evidence of a decision not to take action or to delay action on the appeal therefore the request for review was not receivable.

37. The Applicant filed his second Application with the Tribunal on 9 February 2015.

Respondent's Submissions

38. In his reply to the second Application, the Respondent alleged that the issue of non-renewal in that Application was not receivable because the claim was time barred. It had been filed more than 90 days after 3 October 2014, the date on which the Applicant received the management evaluation of the 29 May 2014 non-renewal decision.

39. The Respondent alleged that the allegation of the Administration's failure to address the Applicants classification appeal is not receivable *rationae materiae* as the Applicant had failed to exhaust his internal administrative remedies prior to filing an application before the Dispute Tribunal. The Respondent contends that he must first receive a final decision from CAC in order for a challenge to be receivable.

Considerations

40. The Applicant's challenge to the non-renewal of his appointment in the second Application is clearly out of time and is not receivable.

41. The Respondent correctly does not challenge the receivability of the part of the Application that relates to the failure of the CAC to take action or the delay to any action on the Applicant's appeal against reclassification of his post. Even if, contrary to the above findings a request for management evaluation were mandatory, then the Applicant fulfilled this condition before making the second application.

42. The Respondent maintains his position that the classification decision is not receivable *rationae materiae.* For the reasons given above, this submission is rejected.

43. The challenge to the classification process in the second Application is receivable. The challenge to the non-renewal decision in the second Application is not receivable.

Conclusions

44. The Tribunal finds that the Applicant's challenge to the non-renewal of his contract due to re-classification is receivable. The Applicant's challenge to the failure of the CAC to take action or to delay action on the Applicant's appeal against reclassification of his post which is interrelated with the first decision is also receivable.

(Signed)

Judge Coral Shaw

Dated this 7th day of October 2015

Entered in the Register on this 7th day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi