



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/003/R1
UNDT/NBI/2014/004/R1
UNDT/NBI/2014/005/R1
UNDT/NBI/2014/006/R1
Judgment No.: UNDT/2016/003
Date: 8 January 2016
Original: English

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. Following appeals by the Applicant against four judgments of the Dispute Tribunal (“UNDT”)¹ the United Nations Appeals Tribunal (“Appeals Tribunal”) remanded the cases back to the UNDT for consideration of two issues.²

Procedural History

2. The Applicant, a former staff member of the United Nations Support Mission in Libya (UNSMIL) had been employed on a series of temporary contracts for over one and a half years.

3. In January 2014, he filed four separate applications challenging the Administration’s decisions that he was not entitled to accrual of annual leave at the rate of two and a half days per month and the same relocation and assignment grants as staff members on fixed-term appointments.

4. The Respondent’s Replies asserted that the Applications were not receivable.

5. The Tribunal dealt with the cases on the papers having received the Applicant’s submissions on the issue of receivability and a copy of a relevant settlement agreement entered into between the Administration and the Applicant.

6. On 14 July 2014, the UNDT found that none of the Applications were receivable in Judgment Nos. UNDT/2014/095, UNDT/2014/096, UNDT/2014/097 and UNDT/2014/098.

7. On 12 September 2014, the Applicant filed appeals against the four UNDT Judgments.

8. In a single judgment, *Reid* 2015-UNAT-563, the Appeals Tribunal dealt

¹ *Reid* UNDT/2014/095, UNDT/2014/096, UNDT/2014/097 and UNDT/2014/098.

² *Reid* 2015-UNAT-563.

with the issues in each of the four cases. In relation to the rules governing entitlements for temporary staff members it stated:

We are satisfied that the UNDT did not have the competence to examine administrative and budgetary decisions taken by the General Assembly, including decisions on the entitlements to be accorded to different categories of staff members. Having regard to our referred-to jurisprudence, the Appeals Tribunal finds that the UNDT did not err in law or fail to exercise its jurisdiction in deeming [the Applicant's] challenge to the General Assembly resolutions not receivable. His appeal on the above issues is rejected.

9. In relation to the Applicant's criticism of the Administration's use of continual temporary contracts rather than placing him on a fixed-term appointment the Appeals Tribunal found that:

[...] the UNDT did not embark on an analysis of [the Applicant's] argument that the nature of a temporary contract vis-à-vis his actual appointment was not respected. Effectively, [the Applicant's] argument appears to have been rejected under cover of the paragraph in the UNDT Judgment which rejected his challenge to the General Assembly resolutions.

...

Furthermore, it is not apparent to this Tribunal, when the UNDT referred to: "[t]his however was the subject of the settlement agreement between the parties", whether the UNDT had in mind [the Applicant's] particular argument about the Administration not respecting the concept of temporary appointments.

10. The Appeals Tribunal held that: "The complaint made by [the Applicant] on this issue required factual findings in order to ascertain whether the claim was meritorious or otherwise. As this was not done, we are remanding this discrete issue to the UNDT, pursuant to Article 2(e) and (4)(b) of our Statute".

11. The Appeals Tribunal accepted the Applicant's complaint that the Dispute Tribunal had failed to address whether his appointment should have been converted to a fixed-term agreement and held that:

The discrete complaint as to the alleged failure to convert [the Applicant's] temporary appointment to a fixed-term appointment is remanded to the UNDT for it to make the necessary factual findings, that will allow it then to determine if it has competence to review the complaint and if so, whether there is merit in the complaint.

Issues

12. The two issues remanded for consideration by UNDT are:³
- (a) Whether the Applicant's temporary appointment was unlawful because ST/AI/2010/4/Rev.1 was not properly applied; and
 - (b) Whether his temporary appointment should have been converted to a fixed-term appointment.
13. These issues are common to each of the four cases filed by the Applicant. As they were considered and remanded as a single case by the Appeals Tribunal this Tribunal will consolidate them and consider them as a single case in this Judgment.

Facts

14. As recorded by the Appeals Tribunal, the facts taken from the judgments were not contested.
15. UNSMIL was established for an initial period of three months pursuant to Security Council resolution 2009 of 16 September 2011. 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 Section to offer technical assistance to Libyan authorities on

³ Ibid, paragraph 54.

arms control, weapons management and disarmament-related matters. It would be headed by a D-1 Chief DDR Adviser.

16. On 14 February 2012, the Applicant was offered a three-month temporary appointment as Senior Disarmament, Demobilization and Reintegration Adviser with UNSMIL 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.

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

18. On 31 December 2012, the Security Sector Advisory and Coordination Division (SSACD) Director, made a request for an exceptional extension of the Applicant's temporary appointment until 1 April 2013. The temporary appointment 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.

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

20. The Applicant was advised on 15 May 2013 that the job opening for the Principal Security Sector Reform Officer (D-1) post had been cancelled. He wrote to UNSMIL's Chief, Human Resources Officer (CHRO) on 16 May 2013 for information on the selection process for the post. The CHRO informed him the same day that the job opening was cancelled because the screening of the candidates by the Field Personnel Division of the Department of Field Support (FPD/DFS) did not yield a qualified candidate to fill the post.

21. On 29 May 2013, in an email to UNSMIL's 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).

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

23. 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 fixed-term appointments.

24. On 20 December 2013, the Applicant signed a settlement agreement with respect to the decision to cancel the job opening for the post of Principal Security Sector Reform Officer (D-1) and not to select him for the post.

Request for management evaluation

25. On 15 July 2013, the Applicant filed a request for management evaluation using the standard form provided by the Management Evaluation Unit (MEU). Under the heading “Administrative decisions to be evaluated” he stated:

There are a number of interrelated issues, principally:

- 1) Decision to cancel the competition for the post I currently occupy.
- 2) Decision not to apply the same conditions to me on a series of temporary appointments as to someone on a fixed term appointment [aside from the length of the appointment].

26. Under the heading “When was the decision taken/when did you become aware of it” he stated:

Regarding the decision to cancel recruitment for my position, it was sent at 8.20pm on 15 May 2013 and I became aware of it the next day [16 May 2013].

Regarding the decision not to grant him the same treatment as colleagues doing the same work as me, this was communicated to him 5 June 2013.

27. Under the heading “What remedy do you seek through management evaluation?” He stated:

Except for the time duration of the appointments, I want to receive the same benefits as if I had been on an FTA contract all this time. I want to recuperate the leave days that I did not receive as well as the assignment grant, relocation grants, mobility allowance and after-service health insurance. I want to be rostered as a D1 Principle SSR officer and I want moral damages for lost opportunity.

28. In the body of his submissions to MEU, the Applicant included a section on what he termed “non-respect of the nature of temporary contracts”. He alleged there was no justification for treating temporary appointments differently than fixed-term appointments when it comes to the accrual of annual leave etc. He said “it is important to note that in, my particular case... even the nature of the TAs as per UN rules... has not been respected. They are supposed to be for seasonal and short term surge work lasting less than one year”.

29. Neither of the two issues remanded for the consideration of the Tribunal was included in the list of administrative decisions which the Applicant requested the MEU to review.

The Applications

30. In four separate applications the Applicant contested the following decisions dated 5 June 2013: (i) entitlement to annual leave; (ii) entitlement to full relocation grant to Libya; (iii) entitlement to a full assignment grant; and (iv) entitlement to a full relocation grant to Canada.

31. Under the heading “Details of the contested decision” the Applicant stated further:

There were several other irregularities regarding my employment situation. I asked the Chief of Human Resources about discrimination in annual leave but...he [denied] me full allowances.... At the request of the MEU, I put all of these into one omnibus complaint initially submitted 15 July [to be within

deadlines].... A settlement has been agreed with the MEU on the part of the omnibus complaint regarding irregularities in the selection process but I have yet to receive a response on the other parts regarding “equal pay for equal work”. I have been told informally by my counsel for these negotiations that the MEU had informally told him that these entitlements relating to “equal pay for equal the Applicant work” need to be submitted separately.

32. In the “Summary of facts” included in the Application, the Applicant stated at paragraph 2:

09/04/12: I was asked if I wanted to extend one year on a FTA. I accepted the conditions and said yes. After waiting a few weeks for a written contract the [then] SRSG said he wanted to go through a formal recruitment process as he had with other positions- though I would likely be selected through that process. Since I was in a delicate situation I reluctantly accepted this process.

33. Under the heading “Grounds for contesting the administrative decision”, the Applicant listed: un-kept promise of conversion to fixed-term appointment, equal pay for equal work; Noblemaire principle, violations of policies governing use of temporary contracts, staff welfare and “nature of Temporary contracts”.

34. The Tribunal made two case management orders in each of the Applicant’s cases.

35. In Order Nos. 042 (NBI/2014), 043 (NBI/2014), 044 (NBI/2014) and 045 (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 the matter 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.

36. In his submissions filed in compliance with these orders, the Applicant addressed the Respondent’s submission that he had not identified or appealed any alleged decision not to honour an alleged promise to convert his contract to a fixed-term appointment. Regarding the unfulfilled promise to convert his appointment to a fixed-term appointment, he submitted that he had made the allegation in the first

paragraph of Section V of the “MEU Complaint and in para 2 of Section VII”. He referred to a string of emails annexed to his request for management evaluation. He stated “as the evidence makes clear, this agreement was broken and assurances were given for a competition for the D1 DDR, subsequently broken; and then for the D1 SSR post, also broken amidst many irregularities”.

37. He stated that the settlement agreement he had entered into with the Administration had to do with the irregularities in the selection process for the Principal Security Sector Reform Officer (D-1) post and nothing else.

38. On 27 March 2014, the Tribunal ordered the Respondent to file a copy of the settlement agreement entered into with the Applicant concerning his claim that he should have been granted a fixed-term appointment 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.

The Settlement Agreement

39. Following the intervention of MEU on 20 December 2013, the Applicant signed a release which acknowledged that the terms of the settlement were highly confidential and expressly agreed to maintain the confidentiality of the terms, amount and fact of the settlement.

40. Notwithstanding this confidentiality clause, both the Respondent and the Applicant referred to the settlement agreement in their submissions to the Dispute and Appeals Tribunals, effectively waiving confidentiality. The settlement agreement discharged the United Nations from all actions and suits arising from or by reason of the decision to cancel the job opening with UNSMIL and not to select him for the job opening.

Considerations

41. Pursuant to article 8 of the UNDT Statute:

1. An application shall be receivable if:

- (a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;
- (b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;
- (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and
- (d) The application is filed within the following deadlines; [...]

42. The Appeals Tribunal has stated repeatedly that management evaluation is a mandatory first step for an Applicant prior to the submission of an Application to the Dispute Tribunal and it is not open to the Tribunal to waive this requirement or make any exception to it.⁴

43. In *Costa* UNDT/2009/051, the Tribunal determined that it has no power to suspend or waive any deadlines for requesting or completing management evaluation, or administrative review, while it may decide to suspend or waive deadlines for filing an application with the UNDT. This reasoning was upheld by the Appeals Tribunal in *Costa* 2010-UNAT-036.

44. There is a difference between a contested administrative decision and the grounds relied on to impugn the decision.

45. To be the subject of a review by the Tribunal the substance of the administrative decision must be identified along with the dates of the decision, if known, and the decision maker, if known.

46. In the present cases, the Applicant requested MEU to review two administrative decisions: the cancellation of the recruitment process for the post, which he had occupied on a temporary appointment since 2012; and the failure of the Administration to offer him the same conditions on a series of temporary contracts as to someone on a fixed-term appointment.

⁴ *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Ajdini* 2011-UNAT-108.

47. In each of his four applications to the Tribunal, the Applicant identified the date of the contested administrative decisions as 5 June 2013, the decision was by a named official and the decision was to refuse to grant him specific allowances at the fixed-term appointment rate rather than the temporary appointment rate.

48. Although the Applicant raised the issue of the non-conversion of his temporary appointment to a fixed-term appointment, he did so as a ground for contesting the specified decisions. He did not identify that issue as a contested decision nor did he identify the date of that decision or the decision-maker either with the MEU or in his application to the Tribunal. He did not request management evaluation of that issue.

49. The Applicant's submissions in support of the receivability of his claims link the "unfulfilled promise" of conversion to a fixed-term appointment with the cancellation of the job opening for the fixed-term appointment to the Principal Security Sector Reform Officer (D-1) post. As stated in the agreed statement of facts, the Applicant agreed with the decision to hold a formal recruitment process for the fixed-term post to which he believed he was entitled.

Conclusion

50. The issue of whether the Applicant's temporary appointment was unlawful because ST/AI/2010/4/Rev.1 was not properly applied is not receivable as the Applicant did not identify it as a specific decision for which he requested management evaluation.

51. The issue of whether the Applicant's temporary appointment should have been converted to a fixed-term appointment was not the subject of a request for management evaluation and in any event was covered by the settlement agreement. It is therefore not receivable.

Decision

52. The Applications are dismissed in their entirety

(Signed)

Judge Coral Shaw

Dated this 3rd day of January 2016

Entered in the Register on this 3rd day of January 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi