



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SVEDLING

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Alan Gutman, ALS/OHRM
Elizabeth Gall, ALS/OHRM

Introduction

1. The Applicant is a Rigging Supervisor at the United Nations Mission for the Referendum in Western Sahara (MINURSO). In his Application dated 9 March 2015, the Applicant contests the decision to refuse his application for an *ex gratia* payment in lieu of retroactive Special Post Allowance (SPA) from October 2012 to September 2013.

2. The Respondent filed a Reply to the Application on 10 April 2015. He argued that the Application is not receivable *rationae materiae* as the Applicant had failed to request management evaluation of the contested decision.

3. On 5 May 2015, by Order No. 148 (NBI/2015), the Applicant was directed to file his submissions in response to the issue of receivability by 19 May 2015. He filed the said submissions on 7 May 2015.

4. The Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, has determined that an oral hearing is not required in determining the preliminary issue of receivability and will rely on the Parties' pleadings and written submissions.

Facts

5. These uncontested facts are derived from the Application.

6. The Applicant joined MINURSO as an FS-4 Radio Operator in 2010. Aside from his role as Radio Operator, the Applicant was assigned responsibilities as a Rigging Unit Supervisor. The Applicant was given additional tasks over and above that which he had been initially contracted to undertake.

7. In June 2013, the Applicant met representatives of the Field Personnel Division who were visiting MINURSO. The issue of the Applicant's dual functions was raised and it was agreed that the Applicant be granted SPA from FS-4 to FS-5 to financially compensate him for these extra responsibilities.

8. The Applicant failed to receive any form of extra payment for his additional function as Rigger Unit Supervisor. He continued to request this payment and, on 6 September 2013, received assurances that such a payment would be processed by Ms. Chloe Saimpert Labbe, Human Resources Officer, Field Personnel Division. Despite such assurances, the Applicant failed to receive the additional payment.

9. On 27 January 2014, the Applicant received notification from Ms. Amina Noordin, Chief Human Resources Officer, MINURSO, that his SPA would be approved before the cut-off date for February 2014 payroll. Despite such assurances and the express promise, the Applicant failed to receive the additional payment.

10. On 14 March 2014, Mr. Dennis Cameron, Officer-in-Charge, Mission Support, MINURSO, sought permission from Mr. Chaste Abimana, Chief, Personnel Operations, Field Personnel Division, to seek retroactive SPA for the Applicant.

11. On 16 July 2014, the Applicant again requested an update regarding the SPA from Ms. Labbe. On this occasion Ms. Labbe informed the Applicant that “we are working on it but the situation is very complex since now I understand that the CMS in MINURSO does not support the request for retroactive SPA”.

12. Despite further requests for clarification, the Applicant failed to receive any further information. On 3 September 2014 the Applicant filed a management evaluation request (MER) challenging this non-payment.

13. On 13 January 2015, the Management Evaluation Unit (MEU) rendered its decision refusing the Applicant’s request.

Respondent’s submissions on receivability

14. The Application is not receivable as the Applicant failed to request management evaluation of the contested decision as required under staff rule 11.2(c) and art. 8.1(c) of the Statute of the Dispute Tribunal.

15. The submission of a request for management evaluation is a mandatory first step that must be followed before an applicant may have recourse to the Dispute Tribunal to appeal against an administrative decision that falls within the scope of staff rule 11.2(a).

16. The decision contested by the Applicant in his Application is not the same as that which he contested in his request for management evaluation. In his request for management evaluation, the Applicant contested the “decision to not approve SPA retroactively” from October 2012. The Under-Secretary-General for Management evaluated this decision. The management evaluation upheld the identified decision on the basis that the requirements for the grant of an SPA under staff rule 3.10 and ST/AI/2003/3 (Special Post Allowance for Field Mission Staff) were not met.

17. In his Application, the Applicant contests a different decision, an alleged decision not to grant an *ex gratia* payment *in lieu of* an SPA. The Applicant relies upon staff rule 12.3(b) which grants the Secretary-General discretion to make exceptions to the Staff Rules. The Secretary-General’s power to grant exceptions under staff rule 12.3(b) is delegated to the Assistant Secretary-General for Human Resources Management (ASG/OHRM).

18. The Applicant’s request for management evaluation neither contests a decision not to grant an exception under staff rule 12.3(b) nor does the Applicant identify any request from him to the ASG/OHRM for an exception, or a decision by the ASG/OHRM upon such a request.

19. The Applicant has failed to request management of the decision he contests in his Application. He is required to do so under staff rule 11.2(a). As such, the Dispute Tribunal does not have jurisdiction *ratione materiae* under art. 8.1(c) of the Statute.

Applicant’s submissions on receivability

20. The Respondent erred in concluding that the Applicant is required to submit a new MER.

21. On 3 September 2014, the Applicant filed an MER following the decision not to approve his request for SPA.

22. On 13 January 2015, the MEU decided to uphold the decision not to grant retroactive SPA.

23. A request for management evaluation must generally be predicated upon the condition that the impugned decision is stated in precise terms. It can be understood, however, that one administrative decision is implied by another administrative decision, which an applicant has actually submitted for management evaluation.

24. In this case, the Applicant initially sought management evaluation for the refusal not to consider his request for SPA. The actual rejection of the Applicant's request implicitly includes the Administration's refusal to consider a discretionary payment in lieu of SPA.

25. The Applicant submits that no additional MER is necessary as this would be a waste of time and resources for both the Applicant and the Administration. To support this contention, the Applicant cites the Tribunal's pronouncement in *Elmi*¹.

26. Since the Applicant was not required to submit another MER, he effectively exhausted the internal remedies that were available to him and therefore the application is receivable.

Considerations

27. 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.

28. The Respondent challenges the receivability of this Application on the grounds that the decision contested by the Applicant in his Application is not the same as that which he contested in his request for management evaluation. In his

¹ Judgment No. UNDT/2015/013 at para. 37.

request for management evaluation, the Applicant contested the decision to not approve SPA retroactively from October 2012. In his Application, the Applicant contests a different decision, an alleged decision not to grant an *ex gratia* payment *in lieu of* an SPA.

29. In response, the Applicant submits that he initially sought management evaluation for the refusal not to consider his request for SPA and that the actual rejection of his request implicitly includes the Administration's refusal to "consider a discretionary payment in lieu of SPA". He further submits that no additional MER is necessary as this would be a waste of time and resources for both the Applicant and the Administration.

30. The legal bases for the grant of SPA are set out in staff rule 3.10 and ST/AI/2003/3. The aforementioned rules do not provide a legal basis for the grant of an *ex gratia* payment. Whilst it is not in doubt that the Administration has the discretionary power to make such *ex gratia* payments², the two issues should not be confused.

31. The Applicant, having been denied his request for SPA, ought to have filed a request for an *ex gratia* payment. The rule governing exceptions to the staff rules is staff rule 12.3(b) which provides that,

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

32. The Applicant submits that no additional MER is necessary as this would be a waste of time and resources for both the Applicant and the Administration. To support this contention, the Applicant cites the Tribunal's pronouncement in *Elmi*. The case of *Elmi* is distinguishable from the present case in several regards. Firstly, the applicant in *Elmi* submitted a request to the ASG/OHRM for exceptional approval for retroactive promotion to the D-1 level for pension

² See for example in Judgments No. UNDT/2010/060 *Sina* at paras. 48-49 and UNDT/2011/037 *Nzau* at para. 25 (c).

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 promotion³.

33. In the present case, the Applicant has neither submitted a request to the ASG/OHRM for exceptional grant of an *ex gratia* payment under staff rule 12.3(b) nor has he submitted an MER in respect to the same. The Applicant ought to pursue that course of action as he does not appear to be out of time to do so.

34. The Applicant has not complied with staff rule 11.2(a). As such, the Dispute Tribunal does not have jurisdiction *ratione materiae* under art. 8.1(c) of its Statute.

Decision

35. The Application is not receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 5th day of May 2016

Entered in the Register on this 5th day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

³ *Op. cit.*, para. 16.