



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

GUPTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, ALS/OHRM

Nicole Wynn, ALS/OHRM

Introduction

1. By application filed on 20 October 2015 with the Nairobi Registry and later transferred to the Geneva Registry, the Applicant, a Supply Officer (P-4) with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”), contests the decision to prorate the second instalment of the lump-sum portion of his assignment grant to Kinshasa.

Relevant Facts

2. On 13 December 2011, the Applicant was reassigned from the United Nations Support Office for the African Union Mission in Somalia in Nairobi to the United Nations Organization Mission in the Democratic Republic of the Congo (“MONUSCO”) in Kinshasa, as a Supply Officer (P-4). Upon his arrival in Kinshasa, the Applicant was paid an assignment grant that included a daily subsistence allowance (“DSA”) for thirty days and a lump-sum of one month net base salary, in accordance with secs. 2.1 and 3.7(a) of Administrative Instruction ST/AI/2012/1 (Assignment grant).

3. On 1 August 2012, the Applicant’s appointment was renewed through 31 July 2013 and, on 1 August 2013, it was further renewed through 30 June 2014.

4. By memorandum of 16 December 2013 to the Chief Human Resources Officer, MONUSCO, the Applicant requested payment of the second instalment of the lump-sum portion of his assignment grant (“second instalment of assignment grant”), effective 13 December 2013.

5. On 31 December 2013, before any payment was made, the Applicant was reassigned within MONUSCO from Kinshasa to Goma, effective 10 January 2014. On 18 March 2014, he received an assignment grant for his reassignment to Goma.

6. By email of 4 November 2014, the Manager, Civilian Benefits and Payroll Service Line, Regional Service Centre Entebbe (“RSCE”), informed the Applicant that he did not qualify for a second instalment of his assignment grant given that he had not completed the required three-year period of service at the duty station.

7. On 12 November 2014, the Applicant had a phone conversation with the Manager, Civilian Benefits and Payroll Service Line, RSCE, whereby he informed the RSCE that he worked for 18 days beyond his second anniversary of service in Kinshasa. Following these discussions, the RSCE granted the Applicant a pro rata payment of the second instalment of his assignment grant in the amount of USD911,58 as “one month pro-rated amount”. On 21 November 2014, this amount was credited to the Applicant’s bank account.

8. On 11 December 2014, the Applicant wrote to the Chief Human Resources Officer, MONUSCO, requesting full payment of the second instalment of his assignment grant.

9. By email of 30 December 2014, the Chief Human Resources Officer, MONUSCO, referred the Applicant back to RSCE noting that “all entitlements are processed by RSCE”, and copied her email to the Manager, Civilian Benefits and Payroll Service Line, RSCE, stating also in it that “this serves as a reminder requesting that [RSCE] review [the Applicant’s] case”.

10. By email of 2 January 2015, the Manager, Civilian Benefits and Payroll Service Line, RSCE, responded to the Applicant that he considered the matter “closed”, and that a review of the case as requested was not warranted in the absence of any new reason being raised.

11. By email of the same day, the Applicant requested the Manager, Civilian Benefits and Payroll Service Line, RSCE, to reconsider his request to receive a full payment of the second instalment of his assignment grant, and to “advise him on the higher authority whom [he] should approach for justice” in case he continued to disagree with his request.

12. By email of 7 January 2015, the Manager, Civilian Benefits and Payroll Service Line, RSCE, advised the Applicant to “contact MONUSCO HR, Goma (in copy of this message) for [his] further guidance on this matter”.

13. By email of the same day, the Applicant wrote the following to the Chief Human Resources Officer, MONUSCO:

I regret to notify that this matter regarding entitlement of 2nd Assignment Grant in my respect has been going on since Dec[ember] 2013.

Vide your email dated 30 Dec[ember] 2014, you had indicated that the case shall be reviewed at the RSCE, specifically Mr. Martin Ojjerro. However, as per the trail email below from Mr. Martin, he has directed me again to contact MONUSCO HR, Goma for further guidance on the matter.

May I kindly request you to provide guidance on the subject as whom should I approach in the matter.

14. By email of 19 January 2015, the Chief Human Resources Officer, MONUSCO, responded to the Applicant that “[she] had written to [the Field Personnel Division] with [his] case” and “as soon as [she] get their ruling [she] will forward it to [him]”.

15. By email of 12 February 2015, the Human Resources Services, MONUSCO, in Goma, further confirmed that the matter was closed.

16. On 3 March 2015, the Applicant submitted a request for management evaluation of the decision to prorate the second instalment of his assignment grant (“First request for management evaluation”). This request was dismissed by the Management Evaluation Unit (“MEU”) on 21 July 2015, on the ground that it was time-barred and, therefore, irreceivable. The MEU further found that the Applicant was not entitled to a second lump-sum payment, even prorated, as his appointment was due to expire on 30 June 2014, which made it less than three years.

17. On 20 October 2015, the Applicant submitted his application to the Tribunal.

18. By motion of 13 November 2015, the Respondent requested the Tribunal to rule on the receivability of the application as a preliminary issue (“Respondent’s motion on receivability”). He also submitted his reply on 19 November 2015.

19. On 21 November 2015, the Applicant responded to the Respondent’s motion on receivability and, on 24 November 2015, he filed additional submissions in response to the Respondent’s reply.

20. By email of 1 December 2015 the Manager, Civilian Benefits and Payroll Service Line, RSCE, informed the Applicant that administrative action was taken to recover the amount of USD911,58 paid to him on 21 November 2014 “given that [the Office of Human Resources Management] did not support RSCE request for waiver of eligibility for the second lump-sum payment under [...] [s]taff [r]ule 7.14 and Section 3.7 of ST/AI/2012/1”. By email of 21 January 2016 a Human Resources Assistant, Civilian Benefits and Payroll Service Line, RSCE, further informed the Applicant that recovery would be made from his January 2016 salary.

21. On 25 January 2016, the Applicant requested management evaluation of the decision to recover the prorated payment of the second instalment of his assignment grant, made to him on 21 November 2014, and reiterated his request to receive *full* payment (“Second request for management evaluation”).

22. On 11 March 2016, the Secretary-General rejected the Applicant’s second request for management evaluation, and upheld the decision of the RSCE to recover payment of the prorated second lump-sum amount of the Applicant’s assignment grant.

23. By Order No. 167 (NBI/2016) of 23 March 2016, the case was transferred from the Nairobi Registry to the Geneva Registry where it was registered under Case No. UNDT/GVA/2016/011 and assigned to the undersigned Judge.

24. On 6 May 2016, the Applicant filed additional submissions “in view of recent development in the case”.

Parties' submissions

25. The Applicant's principal contentions are:

a. His first request for management evaluation was not time-barred as the final decision regarding his request for full payment of the second instalment of his assignment grant was taken and notified to him on 12 February 2015;

b. His application before the Tribunal is not time-barred as the one-day delay in filing his application was due to "oversight and workload"; Furthermore, it should be considered in light of the Administration's undue delay in considering his claim and responding to his request for management evaluation;

c. He is entitled to *full* payment of the second instalment of his assignment grant under secs. 3.7(b) and 6.7 of ST/AI/2012/1 given that his reassignment from Kinshasa to Goma was due to a restructuring within MONUSCO and, therefore, for circumstances beyond his control. As the Secretary-General has used his discretion under sec. 6.7 to grant an exception to prorated payments provided by sec. 6.6 to a number of colleagues similarly affected by MONUSCO's restructuring, his case should be treated in the same way;

d. Consequently, the Applicant requests the Tribunal to grant him *full* payment of the second instalment of his assignment grant, less the prorated amount of USD911,58 already paid to him on 21 November 2014.

26. The Respondent's principal contentions are:

a. The application is irreceivable *rationae temporis* because the application was filed more than 90 days after the Applicant was notified of the outcome of his first request for management evaluation;

b. The application is also irreceivable on the ground that the Applicant sought management evaluation more than 60 days after he was notified of

the contested decision; in this respect, the Respondent submits that the contested decision was communicated in writing to the Applicant on 4 November 2014 and implemented on 21 November 2014 when the Applicant was paid the prorated lump-sum amount; and

c. In any event, the Applicant was not entitled to a second instalment of his assignment grant to Kinshasa because his assignment at this duty station was never expected to be for three years or longer, as required by sec. 3.7(b) of ST/AI/2012/1.

Consideration

27. At the outset, the Tribunal recalls that the application it is seised of concerns the decision to prorate the second instalment of the Applicant's assignment grant. The subsequent decision to recover the amount of the prorated payment made constitutes a separate administrative decision that the Applicant ought to challenge through another application before the Tribunal, if he deems it appropriate. Such decision cannot be submitted to the Tribunal's review through additional submissions in the instant case and, therefore, falls outside the Tribunal's jurisdiction.

28. It is noted that the decision to prorate the second instalment of the Applicant's assignment grant was, to some extent, superseded by the subsequent decision to recover the payment made in that respect. However, the Tribunal considers that an examination of the application remains warranted given that the application seeks to challenge the initial decision to deny the Applicant's claim for *full* payment of the second instalment of his assignment grant, and that the Applicant did not obtain the relief he sought through the subsequent decision.

29. As a preliminary matter, the Tribunal must first examine the receivability of the application as it relates directly to its jurisdiction. In this connection, the issues that the Tribunal has to consider are:

a. Did the Applicant submit his request for management evaluation within 60 days of receipt of notification of the contested decision?

b. If yes, did he file his claim with the Tribunal within 90 days of receipt of the management evaluation?

30. Pursuant to staff rule 11.2 and art. 8.1(ii)(c) of the Tribunal's Statute, for an application to be receivable, the applicant must first submit a request for management evaluation within the applicable time limit, which is "60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

31. Pursuant to art. 8.3 of the Tribunal's Statute, "[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation". Consequently, an application before the Dispute Tribunal is not receivable if the underlying request for management evaluation was itself time-barred (*Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Adjini et al.* 2011-UNAT-108). Also, it is established jurisprudence that time limits for formal contestation are to be strictly enforced (see *Mezoui* 2010-UNAT-043, *Al Mulla* 2013-UNAT-394, *Samuel Thambiah* 2013-UNAT-385, *Romman* 2013-UNAT-308, *Kissila* 2014-UNAT-470 and *Kouadio* 2015-UNAT-558).

32. Art. 8.1(d)(i)(a) of the Tribunal's Statute also requires that an application be filed "within 90 calendar days of the applicant's receipt of the response by management to his or her submission".

33. The parties disagree as to the date of the contested decision. The Applicant argues that it was taken by the Human Resources Service, MONUSCO, in Goma on 12 February 2015. The Respondent rather submits that it was taken by the RSCE on 4 November 2014 and implemented on 21 November 2014.

34. In this connection, the Appeals Tribunal held in *Rosana* 2012-UNAT-273 that "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".

35. The documentary evidence shows that the Applicant was informed on 4 November 2014 that he did not qualify for a second instalment of his assignment grant. Following a series of communications between the Applicant

and RSCE, the latter decided to pay the Applicant a prorated amount of the second instalment of his assignment grant, and paid it into the Applicant's bank account on 21 November 2014. According to an email of 2 January 2015 from the Manager, Civilian Benefits and Payroll Service Line, RSCE, the Applicant submitted a payment request form and signed a "written undertaking" to receive the prorated payment. That being said, the documents do not clearly establish that the prorated payment was made following an agreement between the Applicant and RSCE, or that the Applicant was explicitly informed that he would receive a prorated payment prior to such payment being made. In any event, there can be no doubt that the Applicant was made aware of the decision to deny his claim for *full* payment of the second instalment of his assignment grant when he received a prorated payment on 21 November 2014. The Applicant had 60 days from 21 November 2014 to request management evaluation. He failed to do so.

36. The email of 12 February 2015 from the Human Resources Service of MONUSCO was merely a reiteration of the original decision denying the Applicant's request to be paid the full amount of the second instalment of his assignment. The long standing jurisprudence of the Appeals Tribunal is that the reiteration of an original administrative decision does not reset the clock with respect to statutory time limits, which started to run from the date of the original decision (*Sethia* 2010-UNAT-079, *Aliko* 2015-UNAT-539, *Kazazi* 2015-UNAT-557).

37. It follows that the application is not receivable *ratione materiae* (*Egglesfield* 2014-UNAT-402), and that the Tribunal does not have jurisdiction to consider the respective contentions of the parties on the merits of the case.

38. The application is also not receivable *ratione temporis*. The MEU responded to the Applicant's first request for management evaluation on 21 July 2015, and the Applicant filed his application on 20 October 2015, that is one day after the expiry of the 90-day deadline set forth in art. 8.1(d)(i)(a) of the Tribunal's Statute. In an email of 23 July 2015, the Applicant clearly acknowledged that the time limit to file an application before the Tribunal started to run from 21 July 2015. The Tribunal does not deem appropriate in the instant case to consider the

Applicant's request to waive the time limit for submitting his application as the application is, in any event, irreceivable *ratione materiae*.

Conclusion

39. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Rowan Downing

Dated this 18th day of November 2016

Entered in the Register on this 18th day of November 2016

(Signed)

René M. Vargas M., Registrar, Geneva