UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/002
Judgment No.: UNDT/2017/011
Date: 3 March 2017
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AFEWORKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the Regional Service Centre in Entebbe (RSCE).

2. On 28 December 2015, she filed an application with the Dispute Tribunal contesting the non-extension of her fixed-term appointment.

3. The Respondent filed a reply to the application on 8 February 2016.

4. This case has been assigned to Judge Agnieszka Klonowiecka-Milart who commenced her tenure as Judge in Nairobi effective 4 July 2016.

Facts

5. The following facts are undisputed and demonstrated by documents on file:

6. The Applicant has been a staff member of the Organization since 16 August 2001, serving as an administrative assistant in various peacekeeping missions.

7. On 1 July 2013, she was reassigned as an Administrative Assistant at the FS-4 level to the Travel Unit of the RSCE. Her last fixed-term appointment was from 1 July 2014 till 30 June 2015.

8. The Applicant requested, and was granted, special leave without pay (SLWOP) from 21 October 2013 through 30 June 2015, i.e., through the end of her appointment.

9. By a circular dated 3 March 2015, RSCE staff, including the Applicant, were informed of a retrenchment exercise whereupon that 75 Field Service staff posts were going to be converted to national posts for the financial year commencing 1 July 2015. Accordingly, 75 Field Service appointments were therefore not going to be renewed beyond 30 June 2015. The proposed staffing structure was submitted for review and approval by the General Assembly. In anticipation of the approval of the

proposed staffing structure, a comparative review process was to be conducted to determine which posts would and would not survive the nationalisation exercise.[1]

10. By a circular dated 5 March 2015, the RSCE staff received further information about the process, its criteria and projected timeline. Among others, staff were informed that the results of the comparative review would be communicated by individual letters and that termination notices were subject to appeal/challenge through the Management Evaluation Unit (MEU). Staff members were directed to the Office of Staff Legal Assistance for advice.[2] A further circular dated 12 March 2015 informed of the evaluation criteria for the comparative review.[3]

11. On 13 May 2015, the Applicant was informed through a letter from the Chief RSCE that following completion of the comparative review process, her fixed-term appointment was not going to be extended beyond 30 June 2015.[4]

12. On 25 June 2015, the Chief RSCE informed all staff by email that the Fifth Committee of the General Assembly among other matters, "decided to implement the nationalisation plan for RSC in a phased manner, over a 2-year period, by nationalizing 34 FS (50 per cent) in 2015/2016, and a further 34 posts in 2016/2017. In light of this decision a review of affected staff is being conducted and notifications will be sent shortly". It also communicated that for that reason the RSCE's own plan to temporarily extend 40 FS positions through December 2015 to ease the impact of nationalization was no longer being pursued.[5]

13. On 30 June 2015, the Applicant was again informed through a formal letter that her fixed-term appointment was not to be renewed beyond that date.[6]

14. The Applicant sought management evaluation of the decision on 28 August 2015.

[1] Applicant's Annex 3.
[2] Applicant's Annex 4.
[3] Applicant's Annex 5.
[4] Applicant's Annex 8.
[5] Applicant's Annex 9.
[6] Applicant's Annex 10.

15. On 30 September 2015, MEU found the Applicant's request for review time-barred as the deadline for it had started running from the first notification of non-renewal on 13 May 2015. It nevertheless addressed the merits of the Applicant's complaint, finding that the Applicant suffered no prejudice in the comparative review process that led to the impugned decision.

Submissions on Receivability

Respondent

16. The Respondent takes the position that the application before the Tribunal is time-barred because the Applicant did not seek management evaluation within the 60 days of being notified on 13 May 2015 of her imminent separation; that the impugned decision was final even as of that date.

17. The Respondent submits that a review in relation to persons working as travel assistants at FS-4 level was not "comparative" because all these posts were abolished in a broad stroke. A "further review" announced by the Chief RSCE to staff did not concern posts at the FS-4 level, and was therefore not applicable to the Applicant.

Applicant

18. The Applicant contends that the notice of separation she received on 13 May 2015 "was based only on the assumption that 75 FS posts were to be abolished" subject to a comparative review process. The second notification, which was given by way of email from the Chief RSCE to all RSCE, on 25 June 2015, came under "very different circumstances." In that second notification, the Chief RSCE informed staff that "a review of affected staff is being conducted and notifications will be sent shortly."

19. That review took place between 25 and 30 June 2015.

20. It is the Applicant's case, therefore, that she was properly notified of the decision not to renew her appointment on 30 June 2015, so that time for management evaluation can only begin to run from that date.

Considerations

21. The Statute of the United Nations Dispute Tribunal provides in art. 8:

> 1. An application shall be receivable if:
> […]
> (*c*) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

22. Staff rule 11.2(c) on the timeline within which a staff member should submit a request reads:

> A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

23. It is settled law that timelines as stipulated in article 7.1(a) of the UNDT Rules of Procedure and article 8.1of the Statute must be strictly observed. The United Nations Appeals Tribunal (UNAT) has consistently stressed the necessity of strict adherence to filing deadlines.[7] If the request for management evaluation is time-barred, the application before the UNDT is not receivable because the UNDT Statute forbids the waiving of time limits for management evaluation.[8] UNAT also affirms that an untimely request for management evaluation bars applications before the Tribunal even if management evaluation was actually received.[9]

24. The question before the Tribunal therefore is whether or not the Applicant sought management evaluation within the stipulated timelines, so as to make her application receivable before the Tribunal. For this determination, it is necessary to establish which of the communications made by the UN Administration triggered the

[7] *Cooke* 2012-UNAT-275 referring to *Mezoui* 2010-UNAT-043; *Tadonki* 2010-UNAT-00.
[8] *Rosana* 2012-UNAT-273.
[9] *Awan* 2015-UNAT-588 para 13-14.

running of the deadline to request management evaluation and, consequentially, the deadline for judicial review.

25. It is settled law that for the purpose of appealing an administrative decision it is considered final when the Organisation decides to take a particular course of action, which has direct legal consequences on the rights and obligations of a staff member as an individual.[10]

26. The notion of "finality" in the procedure for judicial review of an administrative decision does not collide with the administration's wide competence to review and reverse its decisions. At this junction, where the decision is withdrawn, even during or after the management evaluation, an application for judicial review becomes moot.[11] On the other hand, as long as the impugned decision is not withdrawn, the application for judicial review may proceed, notwithstanding administrative reconsiderations.[12]

27. In situations involving multiple representations from the administration concerning generally the same subject matter, a determination as to when a final decision was made turns on the facts of the case. The jurisprudence has primarily examined whether the communication had the required form[13] and whether it was issued by the appropriate authority and within the ambit of the powers that that authority has.[14] Further, it has examined whether, pursuant to its content, the decision was categorical or tentative. In applying this criterion, the jurisprudence is consistent in that repeated restatements of the original decision will not alter the deadline for a challenge against the impugned decision and draws a distinction between "simple

[10] UN Administrative Tribunal Judgment No. 1157 *Andronov* (2003).
[11] *Gehr* 2013-UNAT-328; *Lackner* UNDT/2016/105, *Castelli* UNDT/2015/057.
[12] Staff rule 11.4 (a) A staff member may file an application against a contested administrative decision, *whether or not it has been amended by any management evaluation*, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier (emphasis added).
[13] *Shook* 2010-UNAT-013; *Aliko* 2015-UNAT-539.
[14] *Ryan* UNDT/2010/174 para.58.

reiteration - or even explanation - of an earlier decision from the making of an entirely new administrative decision".[15]

28. In this respect, in *Borg-Oliver* UNDT/2010/155, the UNDT accepted that no final decision was taken when the Administration only made an offer of appointment, one which was not accepted by the applicant.

29. Conversely, in *Ryan* UNDT/2010/174, the Tribunal found:

> 56. Finally, whereas the Applicant holds that the decisions of 20 January and 16 October 2003 were not final decisions starting from which the time limits began to run, but rather conditional decisions that depend on UNMIK advertising his post in accordance with the instructions given by DPKO, it is clear from the memorandum of 20 January 2003 and the fax dated 16 October 2003 that the decision by DPKO to refuse the request for a change in grade for the Applicant was a final decision.

30. Similarly, in *Bernadel* UNDT/2010/210 the UNDT stressed that notwithstanding subsequent reviews and reiterations of an unfavourable decision:

> 27. […]The language of that [original] letter should have left no doubt in the mind of the Applicant that the final decision on her request had been rendered.[…] Further, the procedure and the deadline for the filing of a request for administrative review were clearly stated in the former Staff Rules.

31. In the same vein, in *Aliko* 2015-UNAT-539 UNAT confirmed that once a decision was communicated in no uncertain terms, a review of the applicant's case, even when undertaken on the motion of the administration and involving additional information, did not reset the clock with respect to the applicable time limits in which the original decision is to be contested.

32. On the facts of the present case, the Applicant was informed of the Respondent's decision to not renew her appointment on 13 May 2015 by the notice of

[15] UN Administrative Tribunal Judgment No. 1301, *Waiyaki* (2006) and UN Administrative Tribunal Judgment No. 1211, *Muigai* (2005); *see also Sethia* 2010-UNAT-079, *Cremades* 2012-UNAT-271, *Bernadel* UNDT/2010/210.

separation. The terms of the notice of separation are unequivocal, it indicates that it was based upon the completion of the comparative review and nothing in it suggests that the decision was preliminary or conditional. Any "assumptions" underpinning this decision are irrelevant because they did not enter its content. The circular of 5 March 2015 had instructed of the process for appeal, therefore the Applicant was expected "to ensure that [he] is aware of the applicable procedure in the context of the administration of justice at the United Nations".[16]

33. Whereas the Applicant submits that the email of 25 June 2015 to all RSCE staff constituted "very different circumstances", this is inaccurate. The email from 25 June 2015 confirms that the nationalization of posts will be implemented. It does not suggest that decisions on separation already communicated were thereby withdrawn or suspended. Moreover, at no place does it suggest that the results of the comparative review were rendered immaterial – clearly, the Administration could not be conducting a comparative review of posts to be abolished as of 1 July 2015 on 25 June 2015. As such, this email does not generate direct legal consequences for individual staff members. Rather, the only conclusion that may have been reasonably drawn from it was about a possibility of postponement of the nationalization exercise, a process that, as noted by the Applicant, may have resulted in a withdrawal or postponement of the separation notices in relation to a group of the staff; unfortunately, it did not encompass the Applicant. As such, in relation to the Applicant the notice from 30 June 2015 merely affirms that the earlier decision remained in force.

34. The Applicant directs her claim against the procedure and results of the comparative review (and even earlier alleged omission to convert her post into a permanent one). With this regard, the process was completed and the Applicant was notified on 13 May 2015 of its results, and time for a challenge of that decision began to run on that date.

[16] *Amany* 2015-UNAT-521.

Judgment

35. The Tribunal finds that the application is late in light of staff rule 11.2(c), not receivable, and therefore dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 3rd day of March 2017

Entered in the Register on this 3rd day of March 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi