UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/087
Judgment No.: UNDT/2017/046
Date: 27 June 2017
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NEWLAND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant held a permanent appointment with the United Nations, and was deployed in Mogadishu, Somalia, as Chief, Vehicles Plant and Equipment Services for the United Nations Support Office in Somalia (UNSOS) at the P-5 level until his separation on 30 November 2016.

Procedural History

2. On 30 November 2016, the Applicant filed two applications before this Tribunal. One was a substantive application challenging the Respondent's decision to retire him at the age of 60 instead of 62. The second application sought a suspension of action under art. 14 of the UNDT Rules of Procedure in respect of a decision to separate him from service on the same day.

3. The Management Evaluation Unit (MEU) had upheld the impugned decision of the Respondent on 15 November 2016.

4. Upon reading the applications for suspension of action and the substantive one, the Tribunal on the same day 30 November 2016 issued Order No. 494 (NBI/2016) granting the application for suspension of action. The Tribunal granted the injunction "pending informal consultation and resolution between the Parties or the determination of the substantive application in the event that mediation fails" and also set the matter down for a substantive hearing on 17 January 2017.

5. As at the time of filing the applications, the Applicant had commenced check-out procedures to separate from the Organization on mandatory retirement. He concluded the check-out process and proceeded on mandatory retirement by the time the orders granting him injunctive relief were made.

6. On 29 December 2016, the Respondent filed his reply to the application.

7. The Applicant made further submissions on 8 January 2017 contending that the Respondent had failed to comply with the terms of Order No. 494 (NBI/2016).

8. On 16 January 2017, the Respondent filed a motion seeking leave to file additional evidence to show that as at the date of the order for suspension of action, the Applicant had completed the processes towards his mandatory retirement and had checked-out. It is the Respondent's position that he had not flouted the Tribunal's orders in any way.

9. On 16 January 2017, the Tribunal issued Order No. 009 (NBI/2017) granting the Respondent's motion to file the additional documents for which he sought leave. The Tribunal also directed the Respondent to file the Applicant's Personnel Action forms for the period 2010-2016.

10. An oral hearing was held on 17 January 2017. The Applicant, who acted for himself and was not represented by counsel, testified; as did one witness called by the Respondent.

Submissions

Applicant

11. The crux of the Applicant's case is that the change from his Field Service appointment to one in the Professional category constituted a new appointment, which in turn reset the clock in respect of his retirement age from 60 to 62 years of age.

Respondent

12. The Respondent argues that this matter is not receivable. It is the Respondent's case that the Applicant has "always known" that he was to retire at the

age of 60, but waited until the eve of his retirement to query and later challenge the age of retirement that had been set for him.

Deliberations

13. The Tribunal must first consider whether, based on the facts on record, it has jurisdiction to consider the merits of this matter.

14. Staff rules 11.2(a) and (c) and 11.4 require a staff member to first approach the Secretary-General for the resolution of a dispute within sixty (60) days of being notified of the impugned decision. That is the threshold of receivability before MEU.

15. Article 8 of the Statute of the United Nations Dispute Tribunal stipulates that an application shall be receivable if "an applicant has previously submitted the contested administrative decision for management evaluation." In other words, relevant legislation makes management evaluation a *sine qua non*.

16. The threshold for receivability before this Tribunal is further defined in Articles 7 and 35 of its Rules of Procedure. Article 7.1 provides (emphasis added):

> Applications shall be submitted to the Dispute Tribunal through the Registrar within:
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> (a) *90 calendar days of the receipt by the applicant of the management evaluation*, as appropriate;
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> (b) *90 calendar days of the relevant deadline for the communication of a response to a management evaluation*, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or
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> (c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.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.[1] 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.[2] UNAT also affirms that an untimely request for management evaluation bars applications before the Tribunal even if management evaluation was actually received.[3] The question before the Tribunal therefore is whether or not the Applicant sought management evaluation within the stipulated timelines, so as to make his application receivable before the Tribunal. For this determination, it is necessary to establish when the impugned decision was made. In other words, what had triggered the running of time within which a request for management evaluation ought to be made in order to ensure that this Application would have legs upon which to stand?

17. Article 2.1(a) of the UNDT Statute empowers the Tribunal to hear and pass judgment on an application in which a competent individual challenges an administrative decision alleged to be in non-compliance with the terms of her/his appointment or contract of employment. An administrative decision is considered final when the Organization 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.[4]

18. The notion of "finality" in the procedure for judicial review of an administrative decision does not restrict the administration's wide competence to review and reverse its decisions. Where the decision is withdrawn, even during or after the management evaluation, an application for judicial review is discharged or becomes moot.[5] On the other hand, as long as the impugned decision is not

[1] *Cooke* 2012-UNAT-275 referring to *Mezoui* 2010-UNAT-043; *Tadonki* 2010-UNAT-00.
[2] *Rosana* 2012-UNAT-273.
[3] *Awan* 2015-UNAT-588 para 13-14.
[4] UN Administrative Tribunal Judgment No. 1157 *Andronov* (2003).
[5] *Gehr* 2013-UNAT-328; *Lackner* UNDT/2016/105, *Castelli* UNDT/2015/057.

withdrawn, the application for judicial review may proceed, notwithstanding administrative reconsiderations.[6]

19. 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[7] and whether it was issued by the appropriate authority and within the ambit of the powers that that authority has.[8]

20. 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 reiteration - or even explanation - of an earlier decision from the making of an entirely new administrative decision".[9]

21. The Applicant in this case seeks to challenge the communication he received from the Chief Human Resources Officer (CHRO) of the Mission on 21 September 2016 informing him that his retirement age is 60 years and not 62.

22. The record shows that the Applicant's Personnel Action forms have consistently listed his entry on duty (EOD) date as 16 December 1998. This date did

[6] 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).
[7] *Schook* 2010-UNAT-013; *Aliko* 2015-UNAT-539.
[8] *Ryan* UNDT/2010/174 para.58.
[9] 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.

not change, and was not reviewed even when the Applicant became a P-4 officer in 2010.[10]

23. The Applicant himself testified that he had "always known" that he was going to retire at the age of 60 on 30 November 2016.

24. Several Personnel Action forms were raised between 2010 and his date of retirement on 30 November 2016. The last Personnel Action form, it seems, was raised on 6 June 2016. This latest Personnel Action contained the same information as all the earlier ones with respect to the Applicant's EOD and retirement date. There is nothing on the record before this Tribunal to show that any of these documents were queried or challenged.

25. The Applicant's submissions show that his initial "informal" enquiries into a possible review of his retirement age only began in July 2016, and that his first formal query of the date was not until 13 August 2016.

26. It is difficult to imagine why the Applicant never thought to query the applicable position, or seek to have the mandatory retirement age in respect of himself reviewed, until five months before he was actually due to retire. Indeed, the Applicant has not sought to even challenge any of the Respondent's submissions on receivability.

27. While the Tribunal appreciates that a self-represented litigant may be handicapped in the handling of his case, particularly on technical aspects of the law, jurisdiction is an aspect of deliberation that a Tribunal must always be cognizant of and scrupulous about.

28. In the circumstances of this case, the Tribunal finds that the application before it is incompetent and irreceivable by reason of the effluxion of time.

[10] *See also* Respondent's Annex 9, Personnel Action of 1 June 2010.

29. Given the Tribunal's finding that the claim is not receivable because of the Applicant's failure to request management evaluation on time, the Tribunal will not deal with the merits or otherwise of the respective contentions of the Parties.

(*Signed*)

Judge Nkemdilim Izuako

Dated this 27th day of June 2017

Entered in the Register on this 27th day of June 2017

(*Signed*)

Abena Kwakye-Berko, Registrar, Nairobi