



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

FAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Cornelius Fischer, UNOG

Introduction

1. By application filed on 1 April 2016, the Applicant contests the “abolition of posts”. Under grounds for contesting the administrative decision, he refers to the decisions to:

- a. dismiss [him] from work and impose paid leave from 1 November 2015 to 31 January 2016,
- b. cut off [his] access to the electronic system of the organization and the shared files on the common drive as of 28 of October 2015,
- c. request [him] to clear [his] office before the end of [his] contract;
- d. communicate to external stakeholders [his] name as a staff member who was not selected without explicit permission by [him] and without the necessary measures to ensure confidentiality;
- e. install an automatic reply message unilaterally on [his] e-mail in the period 28 October – 2 December 2015, stating that [he had] left the organization;

and

- f. terminate [his] contract before its expiration date.

2. The Respondent filed his reply on 20 May 2016. The parties were convoked to a case management discussion, which took place on 10 January 2018.

Facts

3. The Applicant started to work as Programme Officer (P-3), Sustainable Development Mechanism (“SDM”), United Nations Framework Convention on Climate Change (“UNFCCC”), under a fixed term appointment, on 14 September 2008, which was renewed several times. His last FTA was from 14 March 2013 to 13 March 2016.

4. On 11 May 2015, the Director, SDM, UNFCCC, informed the staff about the start of a redeployment process to be implemented.

5. The Applicant's manager met with him on 28 October 2015 and informed him that his fixed-term appointment would be terminated. At that meeting, he was provided with an *Aide-mémoire for staff not offered a post in the new structure*, dated 28 October 2015, noting the following:

Today you have been informed that it was not possible to offer you a post in the new SDM organizational structure.

You will receive an official notification letter from AS/HRU on Thursday, 29 October 2015. In this letter you will be provided with information relating to:

- a. Termination date;
- b. Termination indemnification;
- c. Accrued annual leave;
- d. Repatriation travel and the shipment of your personal effects/removal of household goods (P staff)
- e. Repatriation grant (P staff).

...

4. Your three months' termination notice is effective 1 November 2015. During these three months you will be placed on Special Leave With Full Pay. This means that your last working day will be 30 October 2015 and your last day as a UNFCCC staff member will be 31 January 2016 ...

...

6. Further, by letter dated 28 October 2015, addressed and handed over to the Applicant on either 28 or 29 October 2015, the Coordinator, Administrative Services, noted the following:

Dear Mr. Fan,

This letter is in reference to the application you submitted for posts available under the seeking of interest process as a result of the restructuring of the Sustainable Development Mechanisms programme.

The skills matching process is complete and it is with utmost regret that I inform you that you have been unsuccessful in securing a position. The Executive Secretary is, therefore, in the unfortunate situation to have to terminate your fixed term appointment.

This letter serves as notice of the termination of your fixed-term appointment with the UNFCCC secretariat. Accordingly:

1. You will receive 3-months' termination notice in accordance with the Letter of Appointment and your appointment as a staff member of the UNFCCC secretariat will consequently end on 31st January 2016. As of that date, you will cease to have any contractual relationships with the UNFCCC secretariat.

2. Your last working day with the UNFCCC secretariat will be Friday 30 October 2015. For the period of your termination notice you will be placed on special leave with full pay, effective 1 November 2015.

...

7. On 28 December 2015, the Applicant requested management evaluation, *inter alia*, of the decision to dismiss him from work and to impose paid leave from 1 November 2015 to 31 January 2016 and to terminate his contract before its expiration date, both contained in the letter (of termination) "handed over to [him] on 28 October 2015"; of the decision to cut off his access to the electronic system and the shared files, communicated to him orally on 28 October 2015, as well as of the request to clear his office before the end of his contract, equally communicated to him orally on 28 October 2015.

8. The Management Evaluation Unit responded on 5 January 2016, stressing that his request was not receivable.

Parties' submissions

9. The Applicant's principal contentions are:

a. Contrary to what is argued by the Respondent, the official notice of the contested decision was received by him on 29 October and not on 28 October 2015; hence, his request for management evaluation was timely;

b. The official notification letter of 28 October 2015 was handed over to him by a Human Resources Officer on 29 October 2015; the fact that it stated that his access to UNFCCC email and network resources would be restricted as of 29 October 2015 is supportive that that was the date of the notification;

c. The *aide mémoire* handed over to him on 28 October 2015 stated that “[he] will receive an official notification letter from AS/HRU on Thursday 29 October 2015”, as such confirming that the official notification is 29 October 2015; the *aide mémoire* is not an official notification letter—it does not contain the name of the addressee, nor the details of the administrative decision, hence cannot be considered a valid official notification; without receiving the notification letter, it is impossible to understand the nature and details of the administrative decision, and to prepare the request for management evaluation;

d. He was denied access to his emails and files in his computer since 28 October 2015, which made it extremely difficult to prepare the application for management evaluation;

e. The application is receivable.

10. The Respondent’s principal contentions are:

a. The application is not receivable *ratione materiae*;

b. The Applicant himself stated in his request for management evaluation that the letter of termination was handed to him on 28 October 2015; at a meeting with his manager on that day, the Applicant was informed that his appointment would be terminated; he was also advised of the restriction to his access of the common electronic system, the requirement for him to clear his offices and that he would be placed on special leave with full pay; he was also given the *aide mémoire* on 28 October 2015; this further documented that he was actively informed on that date that his appointment would be terminated; he thus had actual knowledge of the contested decision and the related procedures on 28 October 2015; his request for management evaluation was thus time-barred;

c. His claims in respect to the procedures taken to implement the contested decision are merely the logistical details and direct consequences of the decision to terminate his FTA; they are not receivable *ratione materiae*.

Consideration

11. The Tribunal first has to determine whether the present application is receivable *ratione materiae*, namely whether the Applicant complied with the statutory time limits for requesting management evaluation.

12. The relevant provisions of Article 8.1 of the UNDT Statute provide:

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required.

13. Staff Rule 11.2(c) provides as follows:²

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

14. Article 8.3 of the UNDT Statute provides:

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

15. The Appeals Tribunal has consistently held that time limits have to be observed and enforced strictly (*Mezoui* 2010-UNAT-043; *Diab* 2015-UNAT-495; *Kissila* 2014-UNAT-470; *Afeworki* 2017-UNAT-794) and that failure to file a timely request for management evaluation leads to the application being irreceivable, *ratione materiae* (cf. *Eggesfield* 2014-UNAT-402; *Kazazi* 2015-UNAT-557). Reiterations or repetitions of the same administrative decision in

response to a staff member's communications do not reset the clock with respect to the applicable time limits in which the original decision is to be contested (*Sethia* 2010-UNAT-079; *Aliko* 2015-UNAT-539, *Staedtler* 2015-UNAT-546). Also, pursuant to art. 8.3 of its Statute, the Tribunal cannot waive or extend the deadline for management evaluation (cf. *Costa* 2010-UNAT-036; *Sethia* 2010-UNAT-079; *Ajdini et al.* 2011-UNAT-108).

16. The Tribunal further recalls the Appeals Tribunal's ruling that "staff members have to ensure that they are aware of Staff Regulations and Rules and the applicable procedures in the context of the administration of justice in the United Nations' internal justice system and that ignorance of the law is no excuse for missing deadlines" (*Staedtler* 2015-UNAT-546, *Amany* 2015-UNAT-521).

17. The Tribunal further notes that the Appeals Tribunal has 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" (cf. also *Kazazi* 2015-UNAT-557). It also observes that there is no longer an express stipulation in staff rule 11.2(c) that a valid notification must be given in writing. A notification of a contested decision can be either verbal (oral) and/or in writing (cf. *Jean* UNDT/2016/044).

18. The parties disagree as to the date the contested decision was notified to the Applicant and the Tribunal has to determine which of the communications triggered the running of the 60-day time limit for management evaluation. At the case management discussion, the Applicant said he had nothing further to say and did not wish to make any further filing, particularly on the relevant jurisprudence on matters of receivability.

19. While the Applicant submits on receivability that he was *officially* notified on 29 October 2015, the Respondent argues that the Applicant was notified on 28 October 2015 of the decision to terminate his FTA. Having filed his request for management evaluation on 28 December 2015, it would be time-barred by one day, in case the notification occurred on 28 October 2015.

20. While the Applicant himself states in his request for management evaluation and his application that he was informed of the termination of his FTA on 28 October 2015, he said that the contested decision was officially notified to him on 29 October 2015. However, he does not contest that on 28 October 2015, he was provided with the *aide mémoire* of the same date, which contains precise information as to the date of the termination of his contract and the special leave without pay period.

21. In his application to the Tribunal, the Applicant also admits that the decision to dismiss him from work and impose paid leave on him from 1 November to 31 January 2016 was contained in the termination letter, “which was handed over to [him] on the 28 October 2015”. He further noted that the decision to “cut off [his] access to the electronic system of the Organization and the shared files on the common drive as of 28 October 2015” was communicated to him orally on the 28 October 2015, as was the request to clear his office before the end of his contract. However, he considers that what counts is what he refers to as the “official notification”, that is, the letter, which he submits in front of the Tribunal was handed over to him on 29 October 2015.

22. It is uncontested by the Applicant that he was informed, unequivocally, on 28 October 2015, that his contract was going to be terminated effective 31 January 2016 and that he was being placed on special leave with full pay as of 1 November 2015. He was also unequivocally informed on that date that he would no longer have access to his emails and shared drives, and that he had to clear his office. In the letter of 28 October 2015, even if it was handed over to him on 29 October 2015, the suppositions informing the decision conveyed on 28 October 2015 had not altered; clearly, the intention of that second written communication was not to revisit the earlier decision (cf. *Afeworki* 2017-UNAT-794), communicated on 28 October 2015. Rather, that second communication dated 28 October 2015, assuming it was handed over to the Applicant only on 29 October 2015, was a mere reiteration of what had been notified to him orally, and in writing through the *aide mémoire*, on 28 October 2015.

23. Therefore, and independently from the question whether some of the sub-decisions contested by the Applicant were accessory to the decision to terminate his fixed-term appointment, the Tribunal has no choice other than to find that by filing his request for management evaluation on 28 December 2015, the Applicant was late by one day. The application is therefore not receivable *ratione materiae*.

24. Finally, the Tribunal notes that the decision to communicate his name to external stakeholders as a staff member who was not selected, as well as the decision to install an automatic reply message unilaterally on his email from 28 October to 2 December 2015, informing that he had left the Organization, are no administrative decisions for the purpose of art. 2.1(a) of the Tribunal's Statute.

Conclusion

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

The application is rejected.

(Signed)

Judge Rowan Downing

Dated this 12th day of January 2018

Entered in the Register on this 12th day of January 2018

(Signed)

René M. Vargas M., Registrar, Geneva