



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MULIPI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Thomas Jacob, UNDP

Introduction

1. The Applicant is a former staff member of the Office for the Coordination of Humanitarian Affairs (OCHA) in the Democratic Republic of the Congo (DRC).
2. On 31 December 2017, he filed an application contesting the decision not to pay him termination indemnities.

Facts

3. On 15 July 2008, the Applicant joined OCHA in DRC as an Administrative Clerk at the G-4 level, on a fixed-term appointment administered by the United Nations Development Programme (UNDP).
4. On 20 January 2017, an all OCHA DRC staff members' meeting took place where the Head of Office, OCHA, DRC discussed an upcoming restructuring of OCHA, DRC.
5. By letter dated 27 January 2017, the Deputy Country Director-Operations, UNDP Country Office DRC informed the Applicant that his post had not been retained in the new OCHA DRC staffing structure. The Applicant was therefore invited to participate in a "job fair" process in which he was encouraged to apply to a maximum of two vacancies.¹
6. By letter dated 30 March 2017, the Deputy Country Director-Operations, UNDP Country Office DRC informed the Applicant that he had not been successful in the "job fair". He was also informed that his fixed-term appointment, which was due to expire on 31 March 2017, would be extended by one month to 30 April 2017 following which he would be separated from service, effective 1 May 2017.²

¹ Application, annex 2.

² Application, annex 3.

7. On 1 May 2017, the Applicant separated from service. On 31 May 2017, he received his last payment, which was his accrued annual leave days.³

8. On 7 June 2017, the Head of Office, OCHA DRC held a meeting with OCHA DRC staff members during which he announced that, pursuant to the terms of their letters of appointment, separating staff members would not receive termination indemnities.

9. On 20 August 2017, the Applicant requested management evaluation of the decision not to pay him termination indemnities upon his separation.

10. By email dated 18 September 2017, the Human Resources Business Partner (HRBP) Regional Bureau for Africa (RBA), Office of Human Resources (OHR) informed the Applicant that UNDP would reconsider the decision that he was not eligible to receive termination indemnities following his separation from service.

11. By letter dated 2 October 2017, the Assistant Administrator and Director, Bureau for Management Services, replied to the Applicant's request for management evaluation. The Applicant's request was considered moot in light of UNDP's decision of 18 September 2017 to reconsider whether to award him termination indemnities.

12. By email dated 19 December 2017, the HRBP, RBA, OHR informed the Applicant that the Organization had determined that he was not eligible to receive termination indemnities upon the expiration of his fixed-term appointment on 30 April 2017.

13. On 31 December 2017, the Applicant filed the present application.

14. On 9 January 2018, the Respondent filed a motion for summary judgment challenging the receivability of the present application.

³ Application, annex 4.

Applicant's Submissions

15. The UNDP policy on “Agreed Separation Arrangements” should have been applied to the Applicant considering that his post was abolished as a consequence of a restructuring exercise. This policy provides that “agreed separations may still be granted even in cases of non-renewal of contract of eligible long serving fixed-term 100-series staff members converted into FTA on 1 July 2009”.

16. During a meeting that took place in March 2017 with all staff to discuss the restructuring exercise, the Organization gave reasonable assurances to the staff affected by this exercise concerning the payment of termination indemnities which were due to be calculated in accordance with their seniority. An agreement was also signed between OCHA and UNDP in relation to the agreed separation arrangements to minimize the negative impact on the staff members affected by the restructuring exercise. The Organization, however, failed to apply its own policies.

17. The Applicant's contractual rights were breached because the Organization failed to inform him of agreed separation arrangements prior to his separation. While the approval of an agreed termination is not an acquired right, the review of the eligibility of each staff member affected by the exercise prior to his/her separation from service, is an inalienable right.

18. The Applicant requests the Tribunal *inter alia* to rescind the contested decision and to order the Organization to pay him his termination indemnities, along with interest, in the amount of two years net salary for material damages and seven months salary for moral damages.

Respondent's Submissions

19. The application is not receivable *ratione materiae*. Considering that the Applicant received his final payslip on 19 May 2017, the 60 calendar days' time limit by which the Applicant was required to submit his request for management evaluation ran from that date and thus expired on 18 July 2017. Even considering

that the contested decision was taken on 7 June 2017, the 60 calendar days' time limit by which the Applicant was required to submit his request for management evaluation, expired on 6 August 2017. Therefore, the Applicant's request for management evaluation filed on 20 August 2017 is time-barred.

20. The Organization's response of 3 October 2017 to the Applicant's request for management evaluation did not waive the statutory requirement regarding the time-limit for requesting management evaluation. Rather, the response to the Applicant's request solely served the purpose of informing him that in light of the OHR's 18 September 2017 notification that it had set aside the contested decision, the Applicant's request for management evaluation was moot.

21. Since the Applicant's request for management evaluation was filed out of time, there is no need for the Tribunal to consider the merits of the present application. The Respondent requests the Tribunal to dismiss this matter in its entirety.

Considerations

22. The Tribunal has jurisdiction to consider applications only against an administrative decision for which an applicant has timely requested management evaluation, when required.⁴

23. With respect to the deadline to request management evaluation, staff rule 11.2(c) provides:

A request for 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. 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 (emphasis added).

⁴ *Eggesfield* 2014-UNAT-402.

24. The Tribunal also recalls the established jurisprudence of the Appeals Tribunal, according to which statutory time limits have to be strictly enforced.⁵

25. Furthermore, pursuant to art. 8.3 of its Statute, and equally to the established jurisprudence of the Appeals Tribunal, the Dispute Tribunal has no discretion to waive the deadline for management evaluation or administrative review.⁶

26. Regarding the Respondent's argument that the contested decision transpired from a payslip which had not contained termination indemnity, the Tribunal holds that a fact that an implied negative administrative decision has been taken and communicated must convincingly result from the circumstances. As noted by UNAT, "the date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine"⁷ while "the Appeals Tribunal is mindful of the fact that staff members are unlikely to be conversant with separation formalities"⁸. For a payslip to be accepted as such communication, the matter would need to have been obvious under the staff rules or established practice or have specifically arisen between the parties.

27. While the Applicant invokes a UNDP policy and some agreements concerning agreed separation, there is no indication that he was privy to them; to the contrary, the Applicant posits that he was unaware of any agreed separation arrangements prior to his separation. There is also no indication that prior to receiving his payslip the termination indemnity had been promised to him, as in *Ahmed*, discussed with him, or even that he had requested it. Moreover, it is common knowledge, and indeed part of the caseload of the Tribunal, that separation payments are often made with delays and in installments; specifically, as demonstrated by Annex 4 to the application which bears the date of 31 May, there is no agreement as to the date of the last payment on account of separation

⁵ *Mezoui* 2010-UNAT-043; *Laeijendecker* 2011-UNAT-158; *Romman* 2013-UNAT-308.

⁶ *Costa* 2010-UNAT-036; *Rahman* 2012-UNAT-260; *Roig* 2013-UNAT-368; *Egglesfield* 2014-UNAT-402.

⁷ *Rosana* 2012-UNAT-273; *Kazazi* 2015-UNAT-557.

⁸ *Ahmed* 2013-UNAT-386, at para. 21.

entitlements. As such, based on the facts before it, the Tribunal has no grounds to accept that the payslip from 19 May would have informed the Applicant that termination indemnity was denied to him. The Applicant indicates that the contested decision was taken on 7 June 2017 when OCHA, DRC staff members were informed during a meeting with the Head of Office that separating staff members would not receive termination indemnities. While this might not be the moment when the decision was taken, the Tribunal accepts that only this information allowed the Applicant to comprehend the position of the administration on the matter concerned.

28. The above considerations, however, have no bearing on the receivability of the present application. Taking the date of 7 June 2017 as a trigger for procedural deadlines, in accordance with the time-limits provided by staff rule 11.2(c), the Applicant had until 6 August 2017 to submit his request for management evaluation. Consequently, the Applicant's request dated 20 August 2017 is time-barred and his application before the Tribunal is not receivable *ratione materiae*.

29. The finding that the present application is not receivable is without prejudice to the Applicant's right to challenge the 19 December 2017 decision in relation to the reconsideration of his claim for payment of termination indemnities, by properly following procedures pursuant to staff rule 11.2 (c).

Conclusion

30. In view of the foregoing, the present application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 22nd day of January 2018

Entered in the Register on this 22nd day of January 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi