UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/019
Judgment No.: UNDT/2020/008
Date: 17 January 2020
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

KERBY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Inter-Regional Adviser with the Department for Economic and Social Affairs ("DESA"), contests the Administration's decision not to renew his fixed-term appointment beyond 30 September 2017.

2. The Respondent submits that the application is not receivable since the Applicant failed to request a management evaluation of the contested decision within the 60-day time limit under staff rule 11.2(c).

3. For the reasons below, the Tribunal finds that the application is not receivable.

Facts

4. The Applicant served as an Inter-Regional Adviser with DESA until his separation from the Organization on 30 September 2017. The Applicant states that his appointment had been renewed on a yearly basis until 1 January 2016, after which his appointment was extended for shorter periods of time.

5. By email of 31 March 2017, the Chief of Human Resources Management, DESA informed the Applicant that his appointment had been renewed for another six months until 30 September 2017 on an exceptional basis and that this would be the final renewal.

6. On 4 April 2017, a meeting was held between the Applicant and the Director of his Division. The issues raised at the meeting included "confirmation to Mr. Kerby that this is the final extension of his contract". During the meeting, the Director reiterated that she was "very serious" that this was the final extension of the Applicant's appointment given that DESA decided to refocus the work of Inter-Regional Advisers and that he should not be starting new activities. The Applicant asked about a newly advertised Inter-Regional Adviser post and the Director explained the steps to be taken for the recruitment of that post.

7. On 8 April 2017, the Applicant accepted a fixed-term appointment of six months from 1 April 2017 through 30 September 2017 by signing a letter of appointment dated 4 April 2017. The letter noted that "[t]his is the final renewal of appointment".

8. On 14 September 2017, the Chief of Human Resources Management, DESA sent a memorandum titled, "preliminary notification of contract expiration". The Chief, by this memorandum, reiterated that as stated in the 4 April 2017 letter of appointment, a fixed-term appointment carries no expectation of renewal. He further reminded the Applicant that his letter of appointment included a clause that "[t]his is a final renewal of [fixed-term appointment]". It was in this context that the Chief expressly stated in the memorandum that there was no requirement for the information given therein to be sent to the Applicant. However, it was considered to be a good practice to give him advance notice and thereby enable him to finalize the work at hand and to complete all separation formalities which would follow shortly.

9. On 13 November 2017, the Applicant requested a management evaluation of the decision not to renew his appointment beyond 30 September 2017.

10. On 29 January 2018, the Applicant received a management evaluation which upheld the contested decision.

11. On 26 April 2018, the Applicant filed the present application.

Considerations

12. The Respondent submits that the application is not receivable since the Applicant failed to request a management evaluation of the contested decision within the 60-day time limit under staff rule 11.2(c). The Respondent submits that the contested decision was notified to the Applicant on 31 March 2017, which was reiterated in the meeting held on 4 April 2017 and confirmed in his letter of appointment that he signed on 8 April 2017. In contrast, the Applicant claims that he

was notified of the contested decision on 14 September 2017 when he received a memorandum titled, "preliminary notification of contract expiration".

13. Under staff rule 11.2(c), the statutory time limit for requesting a management evaluation is within 60 days from the notification of the contested decision. Article 8.1 of the Dispute Tribunal's Statute provides that the application is receivable if the contested administrative decision has previously been submitted for management evaluation, where required.

14. The United Nations Appeals Tribunal ("the Appeals Tribunal")'s jurisprudence has established that "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine" (*Rosana* 2012-UNAT-273, para. 25, affirmed in *Newland* 2018-UNAT-820, para. 34). When a contested decision is a non-renewal decision, the Appeals Tribunal has held that such a decision "must be given in writing and must be given with some degree of gravitas". This is required because such a decision is "perhaps the most significant administrative decision affecting a staff member and is not a decision casually communicated" (*Babiker* 2016-UNAT-672, paras. 35, 38).

15. In light of the foregoing, the critical question to be determined by the Tribunal is when, or at what date, the Applicant was notified of the contested decision within the meaning of staff rule 11.2(c).

16. The Tribunal agrees with the Respondent that the Applicant was notified of the contested decision on 31 March 2017. It is important to note that this email communication came from the Chief of Human Resources Management, DESA. Moreover, it clearly and unambiguously communicated to the Applicant that his appointment would be renewed until 30 September 2017 only and that this would be a final renewal. Therefore, as required by the Appeals Tribunal, the decision was notified in writing and "with some degree of gravitas". This decision was further reiterated in the meeting held between the Applicant and the Director of his Division

on 4 April 2017 and confirmed in the Applicant's letter of appointment which he signed on 8 April 2017.

17. Therefore, the communication on 14 September 2017 was merely a reiteration of the contested non-renewal decision which the Applicant had already been notified of since 31 March 2017. Under the clear jurisprudence of the Appeals Tribunal, the reiteration of an administrative decision does not reset the clock with respect to the statutory timelines; rather, the time starts to run from the date the original decision was made (*Sethia* 2010-UNAT-079; *Odio-Benito* 2012-UNAT-196; *Staedtler* 2015-UNAT-546, *Kazazi* 2015-UNAT-557).

18. The Applicant argues that the 31 March 2017 decision was not a final administrative decision since the non-renewal decision communicated to him on 14 September 2017 was a result of his unsuccessful application for the newly advertised Inter-Regional Adviser position.

19. The Tribunal finds that this argument is without merit. The 31 March 2017 communication makes no reference to a newly advertised Inter-Regional Adviser position. While this new position was discussed in the meeting held on 4 April 2017, it was discussed as a separate matter in response to the Applicant's inquiry. There is no evidence that the 31 March 2017 decision was conditioned on the outcome of the recruitment for a new position.

20. Further, even if there was a possibility that the non-renewal decision would have been rescinded had the Applicant been selected for a new position, such possibility does not detract from the finality of the decision communicated on 31 March 2017. A subsequent decision to rescind the earlier non-renewal decision would have been simply a new administrative decision.

21. The Applicant further argues that the reference in the 31 March 2017 communication and in the 4 April 2017 letter of appointment to the "final renewal" of his appointment did not, *per se*, convey the finality of a true non-renewal decision.

According to the Applicant, this did not follow because his earlier letters of appointment also included a statement that each appointment was a final renewal, and yet his appointment was renewed several times after these prior notifications of a "final renewal".

22. The Tribunal finds that this argument is also without merit. It was not simply the notation of a "final renewal" in the most recent letter of appointment that communicated the non-renewal decision to the Applicant. As discussed above, the 31 March 2017 communication clearly notified the Applicant of the contested non-renewal decision, and this decision was further reiterated and confirmed in the meeting held on 4 April 2017 and by the letter of appointment signed on 8 April 2017.

23. The Applicant was notified of his final renewal in writing and with a substantial degree of gravitas on 31 March 2017. Any notion the Applicant may have had that this was not a notice to be taken seriously could not have prevailed based on the clear wording of that notice. The possibility of such a misunderstanding was entirely eliminated by the clarification given, at the 4 April 2017 meeting, as to the finality of the non-renewal notification.

24. Accordingly, the Applicant's request for management evaluation on 13 November 2017 was filed more than 60 days after the notification of the decision on 31 March 2017. Therefore, the Tribunal finds that the present application is not receivable on the ground that the Applicant failed to request a management evaluation of the contested decision within the 60-day time limit as required under staff rule 11.2(c).

Conclusion

25. The Tribunal rejects the application as not receivable.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 17th day of January 2020

Entered in the Register on this 17th day of January 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York