



Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

DUFRESNE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALD/OHR

Introduction

1. On 19 February 2018, the Applicant, a Principal Rule of Law Officer with the United Nations Assistance Mission in Somalia (“UNSOM”), filed the application in which she detailed the contested decision in two parts.

2. The Applicant contests firstly, that the Management Evaluation Unit deemed her request for management evaluation “out of time”. The Applicant contends that her request for management evaluation was not “out of time” because there was no decision made on the substantive complaint raised in her request.

3. Secondly, the Applicant contests that the substantive complaint raised in her request for management evaluation remains unaddressed. That complaint was that the United Nations Payroll Headquarters had made “numerous errors” regarding *inter alia* her contribution to the United Nations Joint Staff Pension Fund (“UNJSPF”) while she was on Special Leave Without Pay (“SLWOP”).

4. The case was initially filed in the Nairobi Registry and assigned to Judge Nkemdilim Izuako under Case No. UNDT/NBI/2018/26.

5. On 28 March 2018, the Respondent filed his reply in which he submits that the application is not receivable because (a) it does not concern an appealable decision, and (b) it is, in any event, time-barred. Even if found receivable, the Respondent contends that the application is without merit.

6. By email of 16 November 2018, the Nairobi Registry informed the parties that the case had been transferred to the New York Registry for adjudication by the Tribunal in New York “to ensure judicial efficiency and the expeditious disposal of cases” as “the Tribunal [had] conducted a review of its docket and concluded that it was necessary to rebalance its Registries’ case load”.

7. On 16 December 2019, the case was reassigned to the undersigned Judge.

8. In Order No. 178 (NY/2019) dated 17 December 2019, the Tribunal defined the contested administrative decision on a preliminary basis and instructed the parties to file their submissions in this regard.

9. Following the parties' submissions, by Order No. 9 (NY/2020) dated 15 January 2020, the Tribunal defined the contested administrative decision and ordered the parties to file their closing statements. They did so in following order: the Respondent (22 January 2020), the Applicant (29 January 2020) and the Respondent's final observations (3 February 2020).

10. The Tribunal notes that as the moving party on the issue of receivability, the Respondent was instructed to file his closing statement first and, in his final observations, simply stated that he "maintain[ed] his prior submissions on receivability".

11. For the reasons below, the application is rejected based on non-receivability.

Facts

12. Annexed to the application, the Applicant appended a range of emails dating from June to November 2017, and the following factual chronology is based thereon.

13. By email of 28 July 2017, a Human Resource Officer with the United Nations Support Office in Somalia ("UNSOS"), which has replaced the former United Nations Support Office for African Union Mission in Somalia ("UNSOA"), wrote a staff member in the Payroll and Disbursement Section (and another staff member) to raise the Applicant's issue with Payroll. The essence of the matter was that the Applicant wanted to retroactively pay her pension contribution for part of the period of time while she was on SLWOP as she had stopped making these payments at a certain moment during this leave period:

Dear [staff member with Payroll and the other staff member (names redacted)]

Above-named staff member [namely, the Applicant] exercised [SLWOP] for one year during the period 17 May 2016 through 16 May 2017. The staff member had opted to make the SLWOP period contributory service for pension purposes, and had indeed commenced payments through 30 September 2016. My understanding is that staff member did not make any further payments from October 2016 through end of the SLWOP period, 16 May 2017. Staff member is requesting if she can be exceptionally authorized to pay back post-facto her own + Organization's contribution for the period 1 October 2016 through 16 May 2017. If staff member's request is approved, she would then liaise with UNHQ Payroll on how to make the payments. We await your review and response.

14. By email of the same date (28 July 2017), the Payroll staff member wrote the Acting Chief of Payroll to seek his guidance on the Applicant's question:

Dear [Acting Chief of Payroll (name redacted)],

[The Applicant] was contributing towards Pension in 2016. She then stopped contributing towards pension in Oct 2016. She return[ed] to work in May 2017. She is interested in contributing for the missed period Oct 2016 to May 2017.

Please advise.

15. By email later the same date, the Acting Chief of Payroll responded to the Payroll staff member. He declined the Applicant's request to be allowed to make retroactive pension contributions and told the Payroll staff member to advise the Human Resource Officer accordingly:

Dear [Payroll staff member],

We cannot arrange for retroactive contributions at this stage, since UNJSPF's rules do not allow it. Please reply to [the Human Resources Officer] accordingly.

16. On 29 July 2017, the Payroll staff member wrote the Human Resource Officer—among others, copying in the Applicant—forwarding the Acting Chief of Payroll's email of 28 July 2017 in which he declined the Applicant's request for making retroactive pension contributions:

[Human Resources Officer],

Please see below reply from the Chief of Payroll. Retroactive contributions are not allowed. [The Applicant] was advised that these payments are time sensitive and have to be made concurrently.

17. In an email of 29 July 2017, the Human Resources Officer wrote to the Acting Chief of Payroll—among others, copying in the Applicant—requesting his assistance, once more, regarding the Applicant’s issue of retroactive payment of pension contribution while she was on SLWOP:

Dear [the Acting Chief of Payroll (name redacted)],

Thank you for the advice from Payroll’s perspective, and we appreciate your feedback. However, in order to be fair to the staff member, may we hear consideration from the Pension Fund itself? We understand the rules, but we also know that depending on the circumstances, there can be exceptions. In this case, the staff member had intention to make her SLWOP period contributory service and Payroll already received part of her payments up to September 2016. The staff member has advised that she stopped contributing because Payroll was using her funds for other purposes – you might want to comment on this.

Given the importance of Pension to staff members, it is only fair that the Pension Fund is allowed to consider the staff member’s request, and we will respect their decision. In this case, it appears Payroll has conveyed its own decision and not that of the Pension Fund.

We appreciate it may involve a lot of work on the part of Payroll in making retroactive adjustments, but since the staff member had every intention to pay, and made an effort to pay for some months, please allow the Pension Fund to review and respond to the staff member’s request for exceptional approval to pay post facto payments for her SLWOP period as demonstrated by her commitment to make payments for part of this period.

We await to hear from the Pension Fund colleagues.

Best regards,

[The Human Resources Officer (name redacted)]

18. In email of 31 July 2017, the Acting Chief of Payroll responded to the Human Resources Officer (it is not clear who was copied on this email). He rejected her request for assistance by arguing that Payroll has no competence in such matter:

Dear [The Human Resources Officer],

Your understanding is not correct, this is not an issue that we in Payroll have discretion in order to make a decision favorable to the staff member's request or not. UNJSPF's rules are clear that contributions during the SLWOP period should be made concurrently with the leave in question and no post-facto contributions are accepted. Through experience with inquiring UNJSPF's for similar cases in the past, we understand that they are adamant in enforcing this particular rule. The contributions in question are in relation to a period in 2016, which has already been reported to UNJSPF.

Please feel free to directly communicate with UNJSPF if you think you can have them revisit their position on this.

Concerning your reference that "...Payroll was using her funds for other purposes..." my colleague, who handled [the Applicant's] case, confirmed that she had explained to the staff member that all payments would be transferred towards her pension contributions, after making the necessary adjustments to correct for the recoveries that Umoja was automatically processing. Nevertheless, the staff member decided on her own to cease her contributions.

Best Regards

[the Acting Chief of Payroll]

19. The Human Resources Officer responded by email of the same date (31 July 2017)—among others, copying in the Applicant and apparently also forwarding the Acting Chief of Payroll's email of the same date—to confirm her understanding of the Acting Chief of Payroll's decision:

Dear [the Acting Chief of Payroll],

Thank you very much for taking the time to explain this case. From HR [presumably, Human Resources] and Payroll perspective, I understand your message.

Since the Pension Fund colleagues are in the loop on this conversation, we await to hear their comments concerning the staff member's request.

Best regards,

[The Human Resources Officer]

Consideration

The definition and timing of the contested administrative decision

20. The Respondent contends that the contested decision is Payroll's decision not to allow the Applicant to make retroactive pension contributions for the period of her SLWOP and that it was contained in the 31 July 2017 email from the Acting Chief of Payroll to the Human Resources Office.

21. The Applicant submits that the 31 July 2017 email did not constitute an administrative decision. Also, no decision was taken on 6 September 2017. This latter date instead related to "yet another request", when the Director of Mission Support ("DMS") of UNSOA asked Payroll how to proceed with a retroactive payment given, contrary to what the Acting Chief of Payroll stated in his 31 July 2017 email, that UNJSPF had clarified in August 2017 that such payment could be made.

22. The Applicant contends that it is therefore Payroll's "lack of action or decision" that is the contested decision because no response was given to the Applicant or to the fax from DMS of 6 September 2017. Neither did Payroll take action on "the substantive issues". Accordingly, the request for management evaluation was not beyond any deadline.

23. The Applicant submits that the email of 31 July 2017 was not a decision because Payroll stated that "this is not an issue [retroactive payments to UNJSPF] that we in Payroll have discretion in order to make a decision favorable to the staff member's request or not ... Please feel free to directly communicate with UNJSPF if you think you can have them revisit their position on this". Payroll therefore clearly stated that it was not their decision to make and instead left the matter open to be resolved by UNJSPF. The Applicant further notes that the Human Resources Officer's response also indicates that she was under the impression that the matter was not decided as she stated that, "Since the Pension Fund colleagues are in the loop on this conversation, we await to hear their comments concerning, the staff member's request".

24. The Applicant contends that she personally sought clarification from UNJSPF, who said that if Payroll would say there was an error, UNJSPF could receive the retroactive payment. The Applicant communicated this to Payroll, who simply did not answer. The lack of response at this time related also to the contention that Payroll had been using some of the Applicant's pension payments for other deductions unrelated to pension. The Applicant asserts that DMS's fax of 6 September 2017 was not an attempt at triggering an "alternate decision date" but rather a request to "prompt an answer from Payroll".

25. The Applicant argues that it was Payroll's "responsibility to provide an answer to the new and clarifying information from UNJSPF", which Payroll "prompted" the Applicant to follow up on, but Payroll did not respond. The Applicant contends that by this lack of response, "the United Nations system" cannot avoid "responsibilities towards a staff member, particularly regarding a material element of employment" such as "remuneration" and "appropriate payment of benefits". The Applicant states further that the refusal to address the "administrative errors identified in the [a]pplication allow Payroll to be unaccountable" and this cannot be allowed. Accordingly, the Applicant argues that the request for management review could not have passed any deadline.

26. The Tribunal notes that under art. 2.1(a) of the Dispute Tribunal's Statute, "The Dispute Tribunal shall be competent to hear and pass judgement on an application ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

27. In this regard, it follows from the Appeals Tribunal's consistent jurisprudence that the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review" (see *Fasanella* 2017-UNAT-765, para. 20).

28. As for the definition of the contested administrative decision, it is well established by the Appeals Tribunal that the “statutory burden is placed upon an applicant to establish that the administrative decision in issue was in non-compliance with the terms of his or her appointment or contract of employment. Such a burden cannot be met where the applicant fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant’s contractual rights” (see *Haydar* 2018-UNAT-821, para. 13 and, similarly, for instance, *Planas* 2010-UNAT-049).

29. At the same time, under the Appeals Tribunal’s consistent jurisprudence, the Dispute Tribunal has “the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review” (see *Fasanella* 2017-UNAT-765, para. 20).

30. The Appeals Tribunal has held that it is settled caselaw that “the Management Evaluation Unit’s ‘decision’ ... is not an administrative decision subject to judicial review by the Dispute Tribunal. Rather, the judicially reviewable administrative decision is the underlying decision ... that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member” (see *Farzin* 2019-UNAT-917, para. 41, and similarly *Kalashnik* 2016-UNAT-661).

31. In Order No. 178 (NY/2019) dated 17 December 2019, after closely perusing the case file, in particular the application and the request for management evaluation, the Tribunal found that the underlying decision that the Applicant appeared to contest could—on a preliminary basis—be defined as the United Nations Payroll’s alleged decision to reject to take action on the Applicant’s request to make a retroactive pension contribution to UNJSPF after her return from SLWOP.

32. Before proceeding any further with the matter, in Order No. 178 (NY/2019), the Tribunal therefore instructed the parties to submit their positions on when (if ever), how and by whom this decision was taken. In the alternative, if any of the parties found that this definition of the contested decision was incorrect, the Tribunal

directed them to present their views on what the contested administrative decision(s) then was/were and when (if ever), how and by whom this/these decision(s) was/were taken.

33. In response to Order No. 178 (NY/2019), the Applicant identified a date for the challenged decision that differed from the date of 31 July 2017 identified by the Respondent. That later date was 6 September 2017 when she alleged that a fax was sent from the DMS to the Field Personnel Division of the Department of Field Support (“FPD/DFS”). She contended that Payroll subsequently failed to respond to this fax.

34. The Applicant further submitted that there was a stream of correspondence on the matter that continued after 6 September 2017. Despite the differing dates advanced, the Applicant’s submission was essentially that no administrative decision was ever taken regarding her request for a retroactive payment of her pension contribution and that this effectively amounts to a *de facto* rejection of her request.

35. Responding to Order No. 178 (NY/2019), the Respondent submitted that an administrative decision regarding the Applicant’s request was indeed taken and communicated to the Applicant on 31 July 2017 by the Acting Chief of Payroll, following a request from a Human Resources Officer acting on behalf of the Applicant. By this decision, the Respondent contended that the Acting Chief of Payroll informed the Applicant that, “Payroll would not allow the Applicant to make retroactive pension contributions for the period of her [SLWOP]” and that this “notification was unambiguous and final”.

36. Following the parties’ submissions, in Order No. 9 (NY/2020) dated 15 January 2020, the Tribunal found that when the Acting Chief of Payroll emailed the Human Resources Officer on 31 July 2017, Payroll indeed made an administrative decision to reject to take action on the Applicant’s request to make a retroactive pension contribution to the UNJSPF. The Tribunal thereafter ordered the parties to file their closing statements on the issue of receivability.

37. After perusing the parties' closing statements, the Tribunal now confirms its previous reasoning and findings in Order No. 9 (NY/2020) regarding the definition of the contested administrative decision for the reasons set out below.

38. Under art. 2.1(a) of the Dispute Tribunal's Statute, the Appeals Tribunal has "consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must 'produce[...] direct legal consequences' [footnote: reference to Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V] affecting a staff member's terms and conditions of appointment; the administrative decision must 'have a direct impact on the terms of appointment or contract of employment of the individual staff member' [footnote: reference to *Andati-Amwayi* 2010-UNAT-058]" (see para. 49 of *Lee* 2014-UNAT-481 and endorsed in, for instance, *Farzin* 2019-UNAT-917).

39. To establish the date of such an administrative decision, the Appeals Tribunal has held, is "based on objective elements that both parties (Administration and staff member) can accurately determine". An applicant "may not unilaterally determine the date of the administrative decision by sending an [email] to the Administration expressing an ultimatum to adopt a decision" (see paras. 24 and 25 of *Rosana* 2012-UNAT-273 as affirmed in, for instance, *Newland* 2018-UNAT-820). Instead, "[t]he Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made (see para. 46 of *Staedler* 2015-UNAT-546 as affirmed in, for instance, *Ngoga* 2018-UNAT-823 and *Abu Nqairah* 2018-UNAT-854).

40. In the present case, the Tribunal notes that it follows from the facts that already on 29 July 2017 when copied in the Human Resources Officer's email, the Applicant was apprised of the Acting Chief of Payroll's decision that, "We cannot arrange for retroactive contributions at this stage, since UNJSPF's rules do not allow it". This decision was confirmed more in detail by the Acting Chief of Payroll on 31

July 2017 when he, *inter alia*, stated that “this is not an issue that we in Payroll have discretion in order to make a decision favorable to the staff member’s request or not”. He further explained that “UNJSPF’s rules are clear that contributions during the SLWOP period should be made concurrently with the leave in question and no post-facto contributions are accepted” and that “[t]hrough experience with inquiring UNJSPF’s for similar cases in the past, we understand that they are adamant in enforcing this particular rule”.

41. Based on the 29 and 31 July 2017 emails from the Acting Chief of Payroll, while not making any findings on the lawfulness of the communications, the Tribunal finds that an appealable administrative decision was indeed made because—in unequivocal terms and based on objective elements that both the Applicant and the Administration could accurately determine—the Applicant’s request to be permitted to make retroactive pension contributions was declined because the Acting Chief of Payroll stated that Payroll had no competence in the matter.

42. The Applicant has not denied that she received the Acting Chief of Payroll’s emails. Rather, she argues that these communications were not final decisions, since UNJSPF subsequently provided her with some new information, and when she then communicated this to Payroll, she did not receive any response.

43. Whether this presentation of events is correct or not (for instance, there is no evidence on file that Payroll was approached again to reconsider the decision), the Tribunal finds that it makes no difference to the present case. The implication of Payroll’s silence on the matter is simply a reiteration of its original decision, namely that Payroll would not make a pension retroactive payment for the Applicant. In line herewith, in the Applicant’s response to Order No. 178 (NY/2019), she also stated that there was “a continued lack of response and action by the United Nations payroll/FPD/DFS on these issues which in effect, is a decision to not allow me to make the retroactive pension payments”.

44. Under *Staedler*, the time therefore started “to run” from the “original decision” from Payroll, which was, at the very latest, at 31 July 2017, when the Acting Chief of Payroll’s email of that date was sent to the Applicant by the Human Resources Officer.

45. Accordingly, the contested administrative decision is defined as Payroll’s declination of the Applicant’s request to make retroactive pensions payment, which was dated no later than 31 July 2017.

Did the Applicant file the request for management evaluation within the mandatory deadline?

46. The Tribunal notes that staff rule 11.2(c) sets out a mandatory 60-day deadline for the staff member to file the management evaluation request after s/he has been notified of the relevant administrative decision:

... 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.

47. In addition, art. 8.3 of the Dispute Tribunal’s Statute provides that the Dispute Tribunal “shall not suspend or waive the deadlines for management evaluation”.

48. In the present case, the Applicant received the latest notification of the contested administrative decision on 31 July 2017 and the Ombudsman was not conducting any efforts for informal resolution of the dispute. Accordingly, the Applicant should have filed her management evaluation request within 60 days thereafter. When not counting the actual date (see art. 31(a) of the Rules of Procedure of the Dispute Tribunal), this means that this request should have been filed no later than 29 September 2017. As the request for management evaluation was only

submitted on 20 December 2017, it was evidently not filed within the required 60-day time limit.

49. Consequently, the management evaluation request was not receivable because the Applicant did not file a timely request for management evaluation of the contested decision.

Conclusion

50. The application is not receivable.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 4th day of February 2020

Entered in the Register on this 4th day of February 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York