UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/013
Judgment No.: UNDT/2020/052
Date: 13 April 2020
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

ATOME

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 28 February 2018, the Applicant filed the application in which he contests (a) the decision not to reassign him, and (b) the decision not to select him for the position as "Chief, Life Support and General Supply" in the United Nations Mission for Justice Support in Haiti ("MINUJUSTH") with job reference number "84917".

2. On 2 April 2018, the Respondent filed his reply in which he submits that the application is not receivable, and in any event, without merit.

3. On 10 April 2018, the Applicant filed a "response" to the reply without prior approval from the Tribunal, addressing the substantive arguments contained therein, but not those regarding receivability.

4. On 27 July 2018, the Applicant filed another "response to the Respondent's answer dated 25 June 2018". The Tribunal notes that this response refers to a United Nations Appeals Tribunal Case No. 2018-1170, in which the raised issues do not correspond to those raised in the application, and that, in the present case, there is no "answer" from the Respondent dated 25 June 2018 on file.

5. On 21 November 2019, the case was assigned to the undersigned Judge.

6. By Order No. 47 (NY/2020) dated 9 March 2020, the Tribunal stated that it would handle the receivability issues on a preliminary basis and, by 18 March 2020, ordered the Respondent to file his final submissions on receivability and, as relevant, attach corresponding documentation and, by 30 March 2020, the Applicant to file his final observation thereon. The parties duly did so.

The Applicant's last name

7. When perusing the case file, the Tribunal notes that in some documents on record, the Administration indicates the Applicant's last name as his first name. By Order No. 47 (NY/2020), the Tribunal therefore instructed (a) the Applicant to confirm what his last name is, and (b) the Respondent to confirm that the Applicant's confirmed first and last names match the Organization's records. The parties did so and indicated that the Applicant's last name indeed is what is stated on the front page of the present Judgment.

Consideration

Scope of the case

8. The Appeals Tribunal has consistently held that an applicant must "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 para. 13 of *Haydar* 2018-UNAT-821). The Appeals Tribunal has further held 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". When defining the issues of a case, the Appeals Tribunal has further held that "the Dispute Tribunal may consider the application as a whole" (see *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23).

9. In the application, the Applicant described the contested decision as follows:

> - [Field Personnel Division, Department of Field Support ("FPD/ DFS")] - Unfair selection against [job reference] - ID # 84917 "Chief, Life Support and General Supply – MINUJUSTH. Despite my seniority on the function and incumbent of the post, a female candidate at P3 level was selected despite no previous experience in the job, what is a favoritism.

- [FPD/DFS] - Following my claim under [Management Evaluation Unit ("MEU")]/1128-17/R, as a partial resolution, for the lateral reassignment, I was asked to sign[…]a "release form" with [the United Nations ("UN")] to consider me for a lateral reassignment and put me on administrative leave without pay without pay and within 45 days, if no placement, to not pursue the claim. Unfortunately I was not placed in administrative leave without pay (no notification) and no proof that UN tried the lateral reassignment.

10. In light thereof, the Tribunal identifies the following two administrative decisions, namely (a) the decision not to reassign him, and (b) the decision not to select him for the position as "Chief, Life Support and General Supply" in MINUJUSTH with job reference number "84917".

Receivability

11. It is trite law that for substantive issues such as those of the present case, for the application to be receivable, an applicant must first request management evaluation of the contested administrative decision(s) in accordance with staff rule 11.2(a), which, provides that:

> … A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

12. The Respondent, in essence, submits that the application is not receivable because the Applicant effectively withdrew his management evaluation requests for both of the contested decisions. In response thereto, the Applicant solely submits that, "Following the application posted in the system, I confirm all statements provided to the court and reaffirm having been unfairly treated with a loss of my job and additionally the support expected from either MEU or the Organization supposedly granted not evidenced in the course of the claim".

The reassignment decision

Respondent's submissions in summary

13. The Respondent submits that the Applicant signed a "Release Form" at the management evaluation stage by which he allegedly withdrew his request for management evaluation following a settlement agreement between the Administration and him. In para. 4 of the Release Form, the Applicant waived the jurisdiction of the Dispute Tribunal, and the right to recourse in the formal justice system may be waived by a staff member.

14. The Respondent contends that the Dispute Tribunal is "not the proper forum for the Applicant to seek enforcement of the terms of the Release Form". There is "no provision in the Dispute Tribunal's Statute or Rules of Procedure conferring jurisdiction to the Dispute Tribunal over the enforcement of a Release Form signed by a staff member at the management evaluation stage". Article 8.2 of the Dispute Tribunal's Statute and art. 7.4 of the Dispute Tribunal's Rules of Procedure "deal with the enforcement of an agreement reached through mediation, and the Release Form is not an agreement reached through mediation".

15. The Respondent submits that the Release Form sets out the Applicant's obligation pursuant to a mutual agreement between the parties. Mutual agreements are an essential feature of good employment relations in the Organization. In the absence of duress, the Dispute Tribunal does not interfere in such agreements.

16. The Respondent contends that the mutual agreement between the parties was reached following a proposal by the MEU to the Applicant and the Under-Secretary-General for Management ("the USG/DM"). The USG/DM approved the proposal, and, on 20 November 2017, instructed the Department of Field Support ("DFS") to implement the proposal. On 18 December 2017, DFS advised the MEU that it had implemented the proposal.

Facts

17. The Tribunal observes from the Applicant's request for management evaluation dated 28 August 2017 that he challenged the alleged decision to deny him "eligibility for being considered for the lateral reassignment [footnote omitted] under [the Under Secretary-General] Authority which was never disseminated in [the United Nations Stabilisation Mission in Haiti]".

18. It follows from a "Settlement Proposal" dated 13 October 2017 from the Chief of the MEU to the USG/DM that the MEU proposed that the parties settle their dispute according to an agreement that had been reached with the Applicant as follows:

> In the interest of settlement, the MEU recommends that [the Applicant's] service limitation to MINUSTAH be exceptionally lifted so that he may be included in the list of staff for consideration for lateral reassignment for a period of one and a half months. In order to give effect to such settlement, [the Applicant] will be placed on [Special Leave Without Pay ("SLWOP")] during the period of such consideration. The staff member has agreed to settle his case on this basis.

19. From the Release Form dated 17 November 2017, which only the Applicant signed, it follows that with reference to his management evaluation request, the Applicant endorsed the settlement agreement reached between him and the Administration:

> I, [name of the Applicant] (print your name) for and in consideration of the decision to find me eligible for lateral reassignment for a period of one and a half month during which time period I will be placed exceptionally on [SLWOP] ("the Consideration") and further acknowledging that placement on the list for consideration for lateral reassignment for a period of one and a half month does not guarantee me a position and that in the event of a placement, I will have the same service limitation to the new mission until such time as I am selected to a new position following Field Central Review Board endorsement or roster recruitment,

> …
>
> (4) Agree that by accepting the Consideration, I will not pursue any further action or recourse regarding the matters referred to in the Request, including any appeal to the United Nations Dispute Tribunal concerning any of the decisions/issues raised in the Request;
>
> …

20. In an interoffice memorandum dated 20 November 2017 from the Director of the Office of the USG/DM to the Director of the Field Personnel Division of the Department of Field Support ("FPD/DFS"), it was stated that the USG/DM had approved the settlement agreement and FPD/DFS was requested to implement it:

> … In this context, the Secretary-General has decided that, upon receipt of the present memorandum, [the Applicant] shall be deemed eligible for consideration for lateral reassignment for a period of one month and a half. [The Applicant] will be retroactively placed on [SLWOP] from the period of his separation until the conclusion of the one-and-a-half-month period of consideration. In the event of placement, [the Applicant] will continue to have an appointment limited to service in the new mission until such time as he is selected to a position pursuant to a FRCB endorsement or roster recruitment.
>
> … In view of the above, I am requesting your assistance to ensure prompt implementation of this decision within 30 days upon the date of this memorandum and to keep this office, with a copy to meu@un.org. informed when it is implemented.

21. In response, by email of 18 December 2017, an FPD/DFS staff member informed MEU that the Applicant was, in effect, being considered for reassignment to other missions, although no mention is made of him being placed on SLWOP:

> This is to inform you that [the Applicant's] name has been included in the list of downsized staff (COSMOS) circulated to the missions, for consideration. In the information provided, it is stated that [the Applicant's] appointment is limited and that if the staff member is reassigned to another mission, his appointment will be limited to the receiving mission until he is recruited based on his FCRB roster membership.

Did the Applicant withdraw his request for management evaluation regarding the non-reassignment decision and is his claim therefore not receivable?

22. Article 2.1(a) of the Dispute Tribunal's Statute states what type of administrative decision can be appealed:

> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance;

23. If a settlement agreement is reached between the Administration and a staff member concerning her/his rights of employment, such agreement by itself conveys rights and obligations to her/him regarding her/his terms of appointment. A staff member can therefore appeal any administrative decision that s/he alleges in non-compliance therewith.

24. The question for the Tribunal to examine is therefore first whether such agreement was reached as a matter of fact. As relevant to the present case, this can be done by (a) both parties signing the same written agreement, or (b) according to the general principle of contract law, one party making an offer and the other party accepting it on unconditional terms.

25. The Tribunal notes that the Release Form was only signed by the Applicant. It is therefore to be examined whether an agreement was completed by offer and unconditional acceptance.

26. The Tribunal observes that the terms set out in the Settlement Proposal are, for all intents and purposes, fully reflected in the Release Form and that by signing the Release Form the Applicant therefore also unconditionally accepted the terms of the offer. Also, in the Release Form is stipulated "(print your name)", which suggests that the Administration provided the Applicant with the blank document and then

requested him to insert his name and sign it. This also indicates that the Administration made an offer, which was then accepted by the Applicant by inserting his name and signing it. The Tribunal therefore finds that on the preponderance of the evidence, it has been substantiated that the Administration made an offer that the Applicant subsequently accepted unconditionally.

27. From the Settlement Proposal and the Release Form, then follows that the agreement was that the Applicant would withdraw his management evaluation request in exchange for him (a) being considered for reassignment and (b) granted SLWOP for one and a half months. Satisfaction with both these terms would therefore be essential to the Administration's compliance with the settlement agreement and therefore also to the Applicant's obligation to withdraw his request.

28. From the subsequent email from FPD/DFS of 18 December 2017 follows that, at least, the part of the consideration for lateral reassignment was provided to the Applicant. No mention is made of the SLWOP, and in the Applicant's application, he submits that he was not given such SLWOP. The Applicant, however, has not provided any evidence, or otherwise substantiated, that the SLWOP was not given to him. On the balance of probability, with particular reference to the interoffice memorandum dated 20 November 2017 by which it was requested to give the Applicant the SLWOP, the Tribunal finds that the Administration complied with its side of the bargain, for which reason the Applicant also was obligated to withdraw his management evaluation request under the settlement agreement.

29. As the Applicant had effectively withdrawn his request for management evaluation, the application is not receivable *ratione materiae* under staff 11.2(a).

Non-selection

Respondent's submissions in summary

30. The Respondent submits that the contested decision has not been a subject of a management evaluation as required under staff rule 11.2. By withdrawing his request for management evaluation, the Applicant relinquished his right to challenge the contested decision, and the Dispute Tribunal therefore has no jurisdiction to review the contested decision.

Facts

31. The parties agree that the Applicant was not selected to the relevant post with MINUJUSTH.

32. When contending that the Applicant withdrew his request for management evaluation, the Respondent refers to an email exchange between the Applicant and a MEU staff member (the Respondent explains, and the Tribunal accepts, that the name in the MEU staff member's personal United Nations email address is different from the name stated in the body text of the email because that the latter is simply a calling name for the same person) from 8 to 13 November 2017.

33. The subject line in all the emails is, "request for management evaluation – [the Applicant's last name] #1". In the Applicant's email of 13 November 2017, he withdrew a case before the MEU as follows:

> Hi [calling name of the MEU staff member],
>
> Hope you had an excellent relaxing week end.
>
> Leaving other concerns aside, since I happen to understand that gender had prevailed in the selection process ending with a female candidate recruitment, hereby I do request to withdraw the case related to the non-selection on post Chief Unit, Life support and general supply[.]
>
> Again thank you for your time and assistance.

> Thanks and regards,
>
> [Name of the Applicant]

34. In the MEU staff member's email response of the same date (13 November 2017), she confirmed the withdrawal as follows:

> Hi [name of the Applicant]
>
> Thank you for your email requesting withdrawal of your request. Please consider this our official reply acknowledging your request. We will close your request on our end. I will contact you when I have news on your other request.
>
> Kind regards,
>
> [Calling name of the MEU staff member]

Did the Applicant withdraw his request for management evaluation regarding the non-selection decision and is his claim therefore not receivable?

35. From the case file, it follows that the Applicant and the MEU staff member did not correspond any further on the matter. In this regard, the Respondent has submitted that even though nowhere in the email exchange any reference is made to a case number with the MEU or the specific job reference number that the alleged withdrawal concerns, the email exchange indeed concerns the Applicant's application for the post as "Chief, Life Support and General Supply" in MINUJUSTH with job reference number "84917".

36. The Tribunal therefore needs to examine whether the withdrawal indeed did concern the impugned non-selection decision.

37. The Applicant has not objected to the Respondent's submission that his 13 November 2017 email concerned the contested non-renewal decision. It evidently follows from this email that the Applicant "withdraws his case" and this understanding was confirmed by the MEU by its email of the same date. Subsequently, it appears from the case record that the Applicant did not object thereto

as no further email correspondence between the MEU and him has been annexed. The Respondent has further confirmed that the MEU staff member had been assigned to the case by the MEU Chief and therefore authorized to decide on the withdrawal.

38. The Tribunal therefore finds that as a matter of fact, the Applicant has withdrawn his management evaluation request as no formal requirements as such applies in this regard. The Tribunal, however, is surprised by the informality by which MEU communicates such an important administrative decision as a withdrawal of a case, and to avoid a similar situation in the future, would recommend it to do so in a more precise and official manner.

39. As the Applicant has effectively withdrawn his request for management evaluation, the application is not receivable *ratione materiae* under staff 11.2(a).

Conclusion

40. The application is rejected as not receivable.

(Signed)

Judge Joelle Adda

Dated this 13th day of April 2020

Entered in the Register on this 13th day of April 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York