UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/007
Judgment No.: UNDT/2020/072/Corr.1
Date: 13 May 2020
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

RUSSO-GOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jameel Baasit, UNOPS

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 5 February 2019, the Applicant, a former Project Manager at the United Nations Office of Project Services ("UNOPS") on a fixed-term contract, filed the application in which he contests abolition of his post and the non-renewal of his appointment. The case was not assigned to a Judge of this Tribunal.

2. On 8 March 2019, the Respondent duly filed his reply, submitting that the application is not receivable and, in any event, without merit. The Respondent claims that the application is not receivable because the request for management evaluation regarding both contested decisions was filed after the 60-day time limit stipulated in staff rule 11.2(c). In essence, the Respondent contends that the Applicant was verbally notified about both contested decisions at a meeting on 25 October 2018, but only filed his request for management evaluation on 23 January 2019 (90 days later).

3. On 1 April 2020, the case was assigned to the undersigned Judge.

4. By Order No. 63 (NY/2020) dated 6 April 2020, the Tribunal ordered the Applicant to file a submission on the receivability of the application.

5. On 20 April 2020, the Applicant filed the submission, arguing that his appeals against the abolishment of his post and the non-renewal of his fixed-term appointment are both receivable as he was not informed of any of these decisions at the 25 October 2018 meeting. In the Applicant's submission, he, *inter alia*, makes reference to "pieces of evidence" being "available" regarding the 25 October 2018 meeting, including some "meeting minutes" and "a voice memo".

6. By Order No. 76 (NY/2020) dated 20 April 2020, the Tribunal ordered each of the parties to file (a) a submission providing an explanation about the events and circumstances around the 25 October 2018 meeting since they disagreed thereon and appending additional evidence as relevant by 22 April 2020 and (b) a closing statement by 27 April 2020 summarizing his submissions.

7. The parties duly filed their submissions on 22 April 2020 and, after some additional case management, also filed their closing statements on 27 April 2020.

8. For the reasons stated below, the Tribunal finds that the Applicant's claim regarding the abolition of his post is not receivable, while his claim concerning the non-renewal of his post is receivable.

Consideration

Scope of the case

9. The Appeals Tribunal has 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 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.

10. In the application, in addition to the decisions regarding the abolition of the post and the non-renewal of his fixed-term appointment, the Applicant also challenges, in what appears to be a separate third claim, "that he [was] retaliated [against], and his human rights were violated". The Tribunal notes that circumstances such as those described above cannot be defined as distinctive administrative decisions that are appealable under art. 2.1 of the Statute of the Dispute Tribunal, but rather constitute assertions and/or arguments in support of the other decisions under review.

11. Furthermore, while the Applicant described the second contested decision in the application as that of "good faith efforts" not being made to find him a new post after the abolition of his post, his submissions rather refer to the decision not to renew his post.

12. The Tribunal, in this regard, notes that under the jurisprudence of the Appeals Tribunal (see *Nouinou* 2019-UNAT-902, para. 31) and staff rule 9.6(e), the obligation for the Administration to undertake efforts to find an alternative post only extends to a situation where a staff member's appointment is terminated and not, as in the present case, where it is not renewed. The Applicant therefore has no right to any such treatment.

13. Accordingly, the Tribunal considers that the Applicant's second claim rightly concerns his non-renewal of his fixed-term appointment. In line herewith, the Tribunal notes that in the management evaluation of 30 January 2019, the Applicant's request for management evaluation was also interpreted as concerning this issue.

14. The judicial review of the present case is therefore limited to the contested decisions (a) to abolish his post and (b) not to renew his fixed-term appointment.

The applicable law and key issue of the case

15. Regarding issues such as those in the present case, namely abolition of post and non-renewal of a fixed-term appointment, a staff member must file a request for management evaluation "within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested" if the Administration has not extended the deadline due to ongoing mediation efforts according to staff rule 11.2.

16. The manner in which a staff member must be notified of the relevant administrative decision(s) was ruled upon by the Appeals Tribunal in *Auda* 2017-UNAT-746 (paras. 25-31). In effect, the Appeals Tribunal held that if a staff member with standing admits that s/he was verbally notified about the contested decision, then the time limit for management evaluation starts to run from that moment and not from the time of a subsequent follow-up written notification (previously, the Appeals Tribunal held that for the purpose of the time limit for management evaluation to

start, a notification had to be in writing; see, for instance, *Manco* 2013-UNAT-342, paras. 19-20).

17. The Appeals Tribunal further stated in *Auda* that it "has repeatedly ruled that the decisive moment of notification for purposes of Staff Rule 11.2(c)" is when all relevant facts were known, or should have reasonably been known". The Appeals Tribunal added that "the situation is … different from one involving an informal or casual verbal communication or one where the content of the verbal communication is disputed and the facts do not support a reasonable basis upon which to make the necessary findings of 'clear and unambiguous' and 'sufficient gravitas' ".

18. The key question herein to the issues of receivability is therefore whether the Applicant was appropriately notified of both contested decisions at the meeting on 25 October 2018 in accordance with *Auda* and staff rule 11.2(c). In this regard, the Tribunal notes that it is perplexed as to why no contemporary written record was made by the Administration of this meeting.

Was the Applicant notified of the abolition of his post at the 25 October 2018 meeting?

19. The Respondent (stated first as the moving party) in his closing statement on receivability fails to summarize any of his previous submissions about the Applicant being informed about his post being abolished at the 25 October 2018 meeting and that the Applicant admitted thereto in his application. Effectively, under Order No. 76 (NY/2020), the Respondent therefore abandoned his receivability claim as he had been ordered to summarize his submissions on receivability regarding the decision to abolish his post but did not do so.

20. The Applicant admits in the application that during the 25 October 2018 meeting, he was informed that "based on budget restriction, his post will be abolished". In the Applicant's closing statement, he intends to amend this admission as he now contends that at the 25 October 2018 meeting, he was informed that "there

is a possibility/risk (not a certitude which allow him to file a Management Evaluation Request) to abolish his post" and that "a certitude (not a risk) is required to file a case of Management Evaluation Request". As evidence, he refers to an email of the same date (25 October 2018), which was appended to the Applicant's 22 April 2020 submission from him to the Senior Portfolio Manager and the Chief of the Enterprise Project Management Office in which he indicated that, "[The Senior Portfolio Manager] -> said that is [sic] a possibility of [the Applicant] post abolishment [sic]". There is no evidence that the Senior Portfolio Manager and the Chief of the Enterprise Project Management Office ever endorsed, or even acknowledged, this summary.

21. At the outset, the Tribunal notes that even though, contrary to Order No. 76 (NY/2020), the Respondent failed to summarize his submissions on abolition of post, it is, nevertheless, required to examine its jurisdiction *sua sponte* (see, for instance, *O'Neill* 2011-UNAT-182 and *Harb* 2016-UNAT-643).

22. The Tribunal observes that the Applicant in his closing statement only amends the admission that he made in his application that he was informed of the abolition of his post at the 25 October 2018 meeting, where he presents the new pleading on "possibility/risk". This was contrary to the Tribunal's instructions provided in Order No. 76 (NY/2020) that "[t]he closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage".

23. The Tribunal also takes note of the 25 October 2018 email from the Applicant to the Senior Portfolio Manager and the Chief of the Enterprise Project Management Office, appended to the Applicant's 22 March 2020 submission and in which, in a sketchy manner, he intended to provide a summary of the meeting of the same date.

24. The Tribunal finds that this meeting summary, in the particular circumstances of the present case, is not adequately meticulous to now overturn the clear and explicit admission that he made in the application. When the Applicant filed the

application, he was evidently—and without any reservations—of the view that he was informed of the decision to abolish his post at the 25 October 2018 meeting, despite what he had previously stated in the email of the same date (25 October 2018). The Applicant's change of mind about what was said at the meeting therefore only occurred at the time of his closing statement and not at the relevant time of filing the management evaluation request.

25. Accordingly, the Tribunal rejects the Applicant's intended retraction of his earlier admission that he was informed of the decision to abolish of his post at the meeting of 25 October 2018.

26. Even if the Applicant had not been appropriately informed of the abolition decision at the 25 October 2018 meeting, the Tribunal, nevertheless, notes that the Appeals Tribunal in *Nouinou* 2019-UNAT-902, para. 37, found that the decision to abolish a certain post was not receivable and that the appealable decision was rather "the final decision not to renew her fixed-term appointment", indicating that it was "[t]he latter [decision], following on from the abolition, [that] was the administrative decision subject to judicial review".

27. Consequently, with reference to *Nouinou*, the Tribunal also finds that the abolition decision is not a decision that can be appealed separately in the present case as the decision not to renew the Applicant's contract is also under review in the present case.

28. The Tribunal finally notes that the Applicant in his submission of 22 April 2020 questioned the authority of the Senior Portfolio Manager and the Chief of the Enterprise Project Management Office to communicate information about this to him, but that this submission is not restated in the closing statement. The Applicant has effectively relinquished this point of submission. In any event, the Tribunal, however, observes that the Respondent in his submission of 22 April 2020 submitted that the Senior Portfolio Manager was the Applicant's "primary supervisor" and therefore authorized to inform the Applicant about the abolition of his post and, as evidence,

appended his performance appraisal records from 2017 and 2018 in which this is explicitly indicated. The Tribunal is convinced by, and therefore accepts, the Respondent's 22 April 2020 submission.

29. Accordingly, the Tribunal finds that in accordance with *Auda*, the Applicant has admitted that he was informed of the abolition of his post at the 25 October 2018 meeting. The Applicant's management evaluation request of 23 January 2019 was therefore filed too late in accordance with staff rule 11.2(c).

Was the Applicant notified of the non-renewal of his appointment at the 25 October 2018 meeting?

30. The Respondent in the closing statement (of 27 April 2020) submits that "the purpose" of the meeting on 25 October 2018 was to inform the Applicant of the non-renewal of his contract. As evidence, the Respondent refers to some written statements from the Senior Portfolio Manager and that the Chief of the Enterprise Project Management Office, specifically produced for the present proceedings and appended to his 22 April 2020 submission:

a. The Senior Portfolio Manager explains in an email exchange with Counsel for the Respondent on 25 January 2019 that, "I cannot remember exactly what I said but I am quite sure that I mentioned that I will forward the separation letter". The Senior Portfolio Manager also provided an additional answer, but this was in response to a leading question from Counsel for the Respondent and therefore, of no evidentiary value in this context;

b. The Chief of the Enterprise Project Management Office indicates in a signed statement dated 21 April 2020 that, "To my best recollection, [Senior Portfolio Manager] and I informed [the Applicant] that his contract was ending by a certain date. I do not recall the specific end date".

31. The Respondent further contends that some stipulations in the Applicant's management evaluation request imply that "he was informed of the non-renewal of

his contract" because "the Applicant acknowledged [therein] that he was to receive written notice of the decision reached in the 25 October 2018 meeting". Similarly, the Respondent submits that this can be deduced from the application as the Applicant "understood that the Administration was on 25 October 2018 verbally informing him of the non-renewal of his contract, and would later send a [separation] letter".

32. The Applicant submits that the Chief of the Enterprise Project Management Office in her signed statement dated 21 April 2020 merely "recalls" the content of the 25 October 2018 meeting, that her statement is "not supported by any shreds of evidence" and that it is "*non est factum*", which according to Merriam-Webster online legal dictionary means "a defense by way of denial of a deed (as the execution of a contract)".

33. The Applicant contends regarding the Senior Portfolio Manager's email of 25 January 2019 that he was "not in the loop on this written conversation (25 January 2019, an internal email exchange between [her and a counsel of the Respondent], therefore without having a chance to be informed and to comment on it".

34. First of all, the Tribunal notes that contrary to Order No. 76 (NY/2020), the Respondent only in the closing statement pleads (a) that the actual purpose of the meeting was to inform him of the non-renewal of his fixed-term appointment (previously, he simply stated that the Applicant was informed of this decision at the meeting, but nothing about this being its actual purpose) and (b) that the Applicant's writings in the management evaluation request and the application imply that he was informed of the non-renewal at the 25 October 2018 meeting.

35. The Tribunal notes that in the application, unlike the decision regarding the abolition of his post, the Applicant did not clearly and explicitly admit that he was informed of the non-renewal of his post. Also, in the abovementioned meeting summary of the same date (as set out in the 25 October 2018 email), no mention is made of any decision regarding the non-renewal of the Applicant's appointment; it is

only stated that it was agreed that the Applicant would receive a "written notification, with a minimum of two months in advance" if the Applicant's post were abolished.

36. The Tribunal further notes that under the test of *Auda*, all relevant facts must, or should have been known in a clear and unambiguous manner and with sufficient gravitas. Neither the Senior Portfolio Manager nor the Chief of the Enterprise Project Management Office, however, in any of their respective communications, unconditionally express that the Applicant was informed of the non-renewal of his post. Rather, both of them qualify their respective statements with disclaimers such as "I cannot remember exactly what I said but I am quite sure" or "[t]o my best recollection". Furthermore, the Tribunal notes both written statements were produced *ex post facto* for the purpose of the present proceedings and not at the time of the contested decision(s) and that their evidentiary weight is therefore limited, particularly considering that the Respondent has failed to produce any contemporary evidence.

37. Accordingly, with reference to *Auda*, the Tribunal finds that the Respondent has not proved that the Applicant was appropriately informed about the non-renewal of his fixed-term appointment at the 25 October 2018 meeting. Since no other communication regarding the non-renewal has been submitted in evidence except the separation letter dated 22 January 2019, the Applicant's request for management evaluation of 23 January 2019 was therefore timely pursuant to staff rule 11.2(c).

The Respondent's request for the Applicant to produce an audio recording to which he referred in his 20 April 2020 submission

38. On 24 April 2020, the Respondent requested that the Applicant produce an audio recording to which he referred in his 22 April 2020 submission. In the Respondent's subsequent closing statement, he submits that, "When a party fails to take reasonable efforts to disclose all relevant facts and information required for the Tribunal to make a fully informed decision, this Tribunal should draw an adverse inference against that party as a result. As this case hangs on a question of

receivability, it is telling that the Applicant has not produced the recording [in which] he purports to have the contents of a meeting that is central to his claim of receivability".

39. By the Registry's email of 24 April 2020 to the parties, the Tribunal rejected the Respondent's request, finding that it was not relevant. With reference to the above, the Tribunal reiterates this finding as the audio recordings would have made no difference to the present Judgment.

Conclusion

40. The Tribunal finds that the Applicant's claim regarding the abolition of his post is not receivable *ratione temporis*, while his claim concerning the non-renewal of his post is receivable.

Orders

41. By **4:00 p.m. on Wednesday, 27 May 2020**, the Applicant is to file his closing statement on the merits regarding the administrative decision not to renew his fixed-term appointment, which is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;

42. By **4:00 p.m. on Wednesday, 3 June 2020**, the Respondent is to file his closing statement responding to the Applicant's closing statement at a maximum length of five pages, using Times New Roman, font 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;

43. By **4:00 p.m. on Monday, 8 June 2020**, the Applicant is to file a statement of any final observations responding to the Respondent's closing statement. This statement of final observations by the Applicant must be a maximum of two pages,

using Times New Roman, font 12 and 1.5 line spacing. It must be solely based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage.

44. Unless otherwise ordered, on receipt of the aforementioned statements in this Order or at the expiration of the provided time limits, the Tribunal will adjudicate on the matter and deliver Judgment based on the papers filed on record.

(Signed)
Judge Alexander W. Hunter, Jr.
Dated this 13th day of May 2020

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

(Signed)
Nerea Suero Fontecha, Registrar