



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/002
Judgment No.: UNDT/2020/156
Date: 27 August 2020
Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TARABAY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Evelyn W. Kamau, OSLA

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, who was a staff member at the United Nations Economic and Social Commission for West Asia (“ESCWA”), is challenging the Administration’s refusal to grant her an *ex gratia* payment in lieu of Special Post Allowance (“SPA”) “in spite of her performing recognised additional responsibilities as UMOJA HR Partner for a period of more than two years” (“the impugned decision”). The Tribunal dismisses the application as not receivable *ratione materiae*.

Facts and Procedure

2. At the time of the impugned decision, the Applicant held a fixed-term appointment at the G-5 level, as a Human Resources (“HR”) Assistant at ESCWA.

3. On 8 January 2020, she filed an application contesting the impugned decision and, pursuant to the Tribunal’s Order, an amended application on 3 July 2020.¹

4. The Respondent was granted an extension of time to file a reply to the amended application by 23 July 2020 but did not do so. However, in his reply dated 6 February 2020, the Respondent had argued that the application was not receivable *ratione materiae* and *ratione temporis*.

5. On 5 June 2015, Johannes Kratzheller, ESCWA’s Chief, Human Resources Management Service (“HRMS”), requested Dominique Gagnon, Office of Human Resources Management (“OHRM”) – UMOJA Business Readiness Team, to approve the assignment of the role of “HR Partner All” to the Applicant and two other staff members. On the same date, Ms. Gagnon approved the mapping of the said role to the Applicant subject to completion of the HR Partner training programme.²

6. On 25 September 2015, the Applicant successfully completed the HR Partner

¹ To comply with the requirement to submit the application in the appropriate form and page limit as per UNDT Practice Direction No. 4.

² Amended application, annex 1.

training programme with honours.³

7. In August 2017, the Administration reclassified the Applicant's post to the G-6 level.⁴

8. On 27 February 2019, the Applicant requested Mr. Kratzheller to approve payment to her of a retroactive SPA to cover the period from June 2015 to August 2017.⁵

9. Mr. Kratzheller responded to the Applicant's request on 18 March 2019 informing her as follows:

As you know, ST/AI/1999/17 requires that in order for a staff member to be eligible for SPA, a post has to be advertised and the staff members should be competitively selected against it. In your case, there was no advertisement and no selection process took place. Therefore, unfortunately, no SPA can be paid in your case.⁶

10. On 11 June 2019, the Applicant submitted a claim to Ahmad Dik, Acting Director, Administrative Services Division at ESCWA, requesting an *ex gratia* payment in lieu of SPA pursuant to staff rule 12.3(b).⁷

11. Mr. Dik responded to the Applicant on 26 June 2019 informing her that she had failed to submit a request for management evaluation within the 60-day period provided for in staff rule 11.2(c) for the refusal to pay her an SPA and that the authority for extending the deadline for filing a request for management evaluation as well as for awarding an *ex gratia* payment is delegated to the Under-Secretary-General for the Department of Management Strategy, Policy and Compliance ("USG/DMSPC").⁸

³ Amended application, para. 32.

⁴ Amended application, annex 2.

⁵ Amended application, annex 3.

⁶ Ibid.

⁷ Amended application, annex 4.

⁸ Amended application, annex 5.

12. On 26 August 2019, the Applicant sought management evaluation of the impugned decision.⁹

The parties' submissions on receivability

The Respondent

13. The Applicant was notified of the decision in writing by email dated 26 June 2019. The 60-day time limit to request management evaluation of the alleged decision expired on Sunday, 25 August 2019. The Applicant requested management evaluation on Monday, 26 August 2019, one day late. Article 34(b) of the UNDT Rules of Procedure does not apply to the calculation of time limits under the Staff Rules. Accordingly, the Dispute Tribunal does not have competence to hear the application as the request for management evaluation was not timely submitted under staff rule 11.2.

14. As the Applicant is stationed outside New York, the 45-day time limit under staff rule 11 2(d) for the Secretary-General's response to be communicated in writing to the Applicant expired on Wednesday, 9 October 2019. The Secretary-General has not responded to the Applicant's request for management evaluation. The 90-day time limit to file the application under art. 8(l)(d)(i)b of the Statute expired on Tuesday, 7 January 2020. The Applicant filed her application on Wednesday, 8 January 2020, one day late. The Applicant did not make a written request for waiver or suspension of the time limit to file her application. Accordingly, the application is not receivable *ratione temporis*.

15. The Applicant does not contest an administrative decision. The Acting Director of the Administrative Services Division, did not purport to exercise any function or power in his correspondence of 26 June 2019 responding to the request for an *ex gratia* payment in lieu of SPA. The Acting Director informed Counsel for the Applicant that the authority to grant an *ex gratia* payment was delegated to the

⁹ Amended application, annex 6.

USG/DMSPC. The Acting Director expressly informed Counsel for the Applicant that he did not have the authority to respond to the request.

16. The Acting Director, Administrative Services Division, did not make any decision with respect to the Applicant's request for an *ex gratia* payment in lieu of SPA. The Applicant has not demonstrated that she acted upon the information provided by the Acting Director to her Counsel by making a request for an *ex gratia* payment directly to the USG/DMSPC. The Applicant's request for management evaluation cannot be construed as a request for an *ex gratia* payment as the purpose of management evaluation is to review contested administrative decisions, not to make administrative decisions.

The Applicant

17. The Respondent improperly interprets the scope of art. 34 of the UNDT Rules of Procedure which deals with the calculation of time limits. Article 34 provides, among others, that "the time limits prescribed in the rules of procedure: (a) Refer to calendar days and shall not include the day of the event from which the period runs; (b) Shall include the next working day of the Registry when the last day of the period is not a working day; ...".

18. The wording in art. 34 does not provide that only applications are to be considered and not any other submissions referred to in the Rules of Procedure. Indeed, the calculation of the time limits for the different submissions are inexplicably intertwined, such that how one calculates the time limits for one submission necessarily affects the start of the time limit of the submission that follows chronologically.

19. The Respondent's argument that art. 34(b) does not apply to the calculation of time limits under the Staff Rules inevitably means that the said art. would also not apply to applications since their time limit is also set out in the Staff Rules. Unless the wording of art. 34(b) expressly excludes the application of specific submissions, which it does not, due to the intertwined nature of the submissions in the formal

justice system, it cannot be read as excluding the calculation of time limits of a management evaluation request (“MER”). Therefore, since the deadline for filing the MER was Monday, 26 August 2019, the deadline for receiving the Management Evaluation Unit (“MEU”) response was Thursday, 10 October 2019, and thus the deadline for filing the application was Wednesday, 8 January 2020 – the day the application was filed. The application is thus receivable.

20. Contrary to the Respondent’s submissions, the Administration, through the actions of Mr. Dik made the decision not to pay the Applicant an *ex gratia* payment. A challengeable administrative decision thus exists and the application is receivable.

21. The authority of the Officer-in-Charge, Administrative Services Division, had been reviewed such that Mr. Dik’s predecessor had in March 2019 decided on the SPA request and the authority remained in June 2019 when Mr. Dik was serving as Acting Director. Mr. Dik’s email of 26 June 2019 was therefore a refusal to decide as opposed to him not having the delegated authority to make the decision. A decision was thus made based on which a request for management evaluation was submitted.

22. In light of the above, the Applicant submits that the MER and application were filed in a timely manner and that there was a decision not to pay the *ex gratia* payment.

Considerations

23. A key issue arising for determination in this case is whether the Acting Director, Administrative Services Division at ESCWA, Mr. Dik, had delegated authority to take the alleged impugned decision and whether the decision is reviewable.

24. ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules) establishes the regulatory framework for delegation of authority to heads of entity to implement specified aspects of the Staff Regulations and Rules and the Financial Regulations

and Rules.

25. Annex 1 of ST/SGB/2019/2 states that the authorization of *ex gratia* payments pursuant to financial regulation 5.11 and financial rule 105.12 is delegated to the USG/DMSPC effective 1 January 2019. The relevant parts read:

Regulation 5.11. The Secretary-General may make such *ex gratia* payments as are deemed to be necessary in the interest of the Organization, provided that a statement of such payments shall be submitted to the Board of Auditors with the financial statements.

Rule 105.12

Ex gratia payments may be made in cases where, although in the opinion of the United Nations Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization. A summary statement of all *ex gratia* payments shall be provided to the Board of Auditors not later than three months following the end of the financial period. The approval of the Secretary-General is required for all *ex gratia* payments.

26. Section 1.2 of ST/SGB/2019/2 states that all delegations of authority, including any limitations, will be issued and managed through an online portal. Relevant to this application are sections 2.5 and 2.6 which stipulate as follows:

2.5 All delegations of authority shall be made formally through the dedicated online portal. The authorities delegated shall be clearly stated and accepted by both the delegator and the delegatee, including that such delegation may be suspended, amended or revoked as provided in section 4.4 below. The delegation should include the description of the authority being delegated and any specific limitations imposed, including but not limited to restrictions on further subdelegation and essential segregations of duties where applicable. Delegatees shall inform themselves of the delegation and the relevant regulations, rules, policies, practices and standards applicable to any decision or action to be taken under the authority delegated and cannot claim ignorance of such in defence of any decision or action taken in the exercise of any delegated authority. The Department of Management Strategy, Policy and Compliance and the Department of Operational Support shall be available to support delegatees in this regard.

2.6 When an officer-in-charge or an officer ad interim is assigned to a function, the authorities of the official holding that function shall

automatically be delegated on a temporary basis to the officer-in-charge or the officer ad interim, unless otherwise specified formally by the official who designated the officer-in-charge or the officer ad interim.

27. In the response dated 26 June 2019, to the Applicant's 11 June 2019 claim for *ex gratia* payment in lieu of SPA, Mr. Dik informed the Applicant's Counsel that he did not have the delegated authority to award her an *ex gratia* payment.

28. The Applicant, however, argues,

It would thus appear that the authority of the Officer-in-Charge ASD had been reviewed such that Mr. Dik's predecessor had in March 2019 made a decision on the SPA request and the authority still remained in June 2019 when Mr. Dik was serving as Acting Director. Mr. Dik's email of 26 June 2019 was therefore a refusal to make a decision as opposed to him not having the delegated authority to make the decision.

29. The Applicant's argument is not sustainable because it is based on wrong interpretation and application of the relevant regulations and rules. The authority to grant an SPA, which, at Annex IV to ST/SGB/2019/2, is delegated to Heads of entity (D-1 and below) and which the Officer in Charge exercised in handling the SPA request is different from the authority to grant an *ex gratia* payment which the Applicant requested from Mr Dik, because according to Annex I above, that authority is delegated to the USG/DMSPC.

30. The Applicant does not provide any evidence to prove that the authority to award an *ex gratia* payment was at any point delegated from the USG/DMSPC to either the Officer-in-Charge or Mr. Dik as per sections 2.5 and 2.6 of ST/SGB/2019/2.

31. In this regard, the Tribunal is guided by United Nations Appeals Tribunal ("UNAT") jurisprudence that "...any mechanism used for the purpose of delegation of authority must contain a clear transmission of authority to the grantee concerning

the matter being delegated.”¹⁰ The burden is on the staff member to show that authority concerning the matter in dispute was transmitted.

32. In the absence of evidence of express transmission of authority the Tribunal is not satisfied with the Applicant’s assertion that Mr. Dik had delegated authority to grant the Applicant an *ex gratia* payment.

33. Mr. Dik correctly advised the Applicant to address her request for an *ex gratia* payment to the USG/DSMPC who had authority to take the decision. Mr. Dik’s memorandum is therefore not a refusal to take a decision as alluded to. Rather, it is advice directing the Applicant to forward her request to the appropriate and competent authority for a decision.

34. Article 2.1(a) of the UNDT Statute confers jurisdiction upon the UNDT to hear and pass judgment on an application 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 the alleged non-compliance.

35. The burden is on the Applicant to establish that there is an administrative decision that is in non-compliance with the terms of his or her appointment or contract of employment. As was held in *Farzin* 2019-UNAT-917, “an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member’s terms and conditions of appointment”¹¹.

36. When considering a reviewable decision, the Tribunal is called upon to consider, apart from the legal consequences, also the nature of the decision and the

¹⁰ *Bastet* 2015-UNAT-511, para. 49.

¹¹ Paragraph 38.

legal framework under which the decision was made.¹² In the instant case, the Tribunal agrees with the Respondent that the Acting Director of the Administrative Services Division did not purport to exercise any function or power in his correspondence of 26 June 2019 responding to the request for an *ex gratia* payment in lieu of SPA. He did not have the legal mandate to make the decision regarding the Applicant's request. The nature of his communication, advice to the Applicant's Counsel that the authority to grant an *ex gratia* payment was delegated to the USG/DMSPC, cannot be said to constitute an administrative decision nor does it produce any direct negative legal consequences on the Applicant's contract.

37. To qualify as an appealable administrative decision, the staff member must show that the impugned decision was taken by a competent and appropriate authority,¹³ as designated by relevant regulations, rules and administrative issuances.

38. The Tribunal must also find that the application is not challenging a reviewable decision because the communication from Mr Dik was not a final decision regarding the Applicant's request. Finality in the administrative decision is a requirement because it is only then that consequences arising therefrom can be ascertained. The UNAT dismissed the applicant's appeal in *Olowo-Okello* 2019-UNAT-967 finding, inter alia, that:

[...] the 25 July 2018 statement by the Administration, due to its nature, was not sufficient to qualify as an administrative decision directly affecting the terms of appointment or contract of employment...as required by Article 2(1) of the UNDT Statute. It was not a final decision made by the Administration and did not involve a decision with an adverse, certain and present impact on Mr. Olowo-Okello's status.¹⁴

In that application, Mr. Olowo-Okello was advised by the Administration through a statement made on 25 July 2018 that "a final decision on [his] case was to be taken

¹² *Andati-Amwayi* 2010-UNAT-058, para. 19, confirmed in *Lloret Alcaniz et al.* 2018-UNAT-840, para. 62.

¹³ *Olowo-Okello* 2019-UNAT-967, para. 39.

¹⁴ *Ibid.*, para. 37.

following the receipt of his comments”.¹⁵ Similarly, in the case at bar, the Applicant was advised that it is the USG/DMSPC who had authority to decide on her request. This was not a final decision.

39. The Applicant has failed to identify an administrative decision capable of being reviewed, that is, a final, specific decision taken by a competent authority having present and direct adverse impact on her contractual rights within the meaning of art. 2.1(a) of the UNDT Statute. In view of this finding, it is not necessary for the Tribunal to consider whether the application is not receivable *ratione temporis*.

Purpose of management evaluation

40. The starting point is, as pointed out by UNAT, that, a decision of the MEU is not an administrative decision subject to challenge but it is a mere instance of a reassessment of the original- and challengeable- administrative decision¹⁶. Its mandate is to receive management evaluation requests pursuant to Secretary-General’s Bulletin ST/SGB/2010/9 (Organization of the Department of Management).¹⁷

41. The Tribunal agrees with the Respondent that the Applicant's request for management evaluation cannot be construed as a request for an *ex gratia* payment. The role of the MEU in the formal justice system is to review contested administrative decisions so that remedial action may be taken in cases where management has made an error of judgment in arriving at a decision and thereby avoid judicial review of the decision.¹⁸ “It assures that there is an opportunity to quickly resolve a staff member’s complaint or dispute without the need for judicial intervention”.¹⁹

¹⁵ Paragraph 33.

¹⁶ *Tosi* 2019-UNAT-946, para. 40.

¹⁷ *Olowo-Okello* 2019-UNAT-967, para. 29.

¹⁸ *Pirnea* 2013-UNAT-311, para. 42.

¹⁹ *Olowo-Okello*, *op. cit.*

Judgment

42. The application is not receivable *ratione materiae* and is accordingly dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 27th day of August 2020

Entered in the Register on this 27th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi