UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/068
Judgment No.: UNDT/2020/181
Date: 22 October 2020
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ARMAND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR
Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Movement Control Assistant at the FS-5 level working with the United Nations Support Office in Somalia ("UNSOS").[1]

2. By an application filed on 20 August 2020, he contests what he terms as "UNSOS Human Resources Section decision to await the outcome of any subsequent filings with the United Nations Dispute Tribunal ("UNDT") and the United Nations Appeals Tribunal ("UNAT") instead of properly exercising its legal authority of discretion pursuant to staff rule 3.18(c)(iii)".[2]

3. On 21 September 2020, the Respondent filed a motion to have receivability determined as a preliminary matter. On 22 September 2020, the Applicant filed a motion to strike out the said motion.

Facts

4. The Applicant joined UNSOS on 11 January 2016 in Somalia, where he still serves as a Movement Control Assistant.[3]

5. Since 2018, the Applicant has had proceedings in courts in Florida, the United States of America, relating to divorce with his spouse and child maintenance.[4]

6. On 2 April 2018, the Court in Miami-Dade County, Florida, granted a provisional order directing the Applicant to pay child maintenance. The calculations were made based on the monthly gross salary of the Applicant of USD22,125.91 and a net income of US D18,907.28, the amounts which, according to the Applicant, were mistakenly and grossly exaggerated.[5]

[1] Application, section I.
[2] Application, section V.
[3] Application, section VII, para 1.
[4] Application, section VII.
[5] Application, section VII, para. 9.

7. On 31 August 2018, the Organization directed the Applicant to comply immediately with the court order with regard to child maintenance.[6] The Applicant requested management evaluation, which was refused as not receivable, for the fact that the matter did not involve an administrative decision subject to management evaluation.[7]

8. During the period 2018-2019, the Applicant engaged in court processes in order to have the court decision reversed.

9. On 29 May 2020, the Applicant, requested UNSOS to exercise its discretion pursuant to staff rules 3.18(c) and 12.3(b) and "reduce the amount ordered by the court" taking into account his financial destitution, obligation to provide maintenance for his other children and all other relevant considerations.[8]

10. On 22 June 2020, UNSOS, among others, informed the Applicant that the exercise of discretion pursuant to staff rule 12.3(b) required that the Applicant not only identify his debts and other obligations, but also provide proof thereof.[9] Absent satisfactory proof, the Mission announced that it would address the competent Under Secretary-General to seek authorization to commence deductions.

11. The Applicant filed documents by way of the required proof on 2 July 2020.[10]

12. On 15 July 2020, in reference to the memorandum of 22 June 2020, the Applicant requested management evaluation of the "pending decision of UNSOS regarding his request for a discretionary application of staff rule 12.3(b) on compassionate and humanitarian grounds to modify the amount of child support that had been ordered by the court in Florida".[11]

[6] Ibid, para 9.
[7] Application annex 3, document pages 45-49.
[8] Application, annex 2, p. 8.
[9] Application, annex 1, p. 3, para. 11.
[10] Application, annex 2.
[11] Application, annex 3.

13. On 20 July 2020, UNSOS denied the Applicant's request for an advance salary payment and securing it against his future pension. On this occasion UNSOS also recalled that the Applicant had filed a request with the Management Evaluation Unit ("MEU") regarding a number of requests made in connection with his private legal obligations related to child maintenance orders and legal costs in the cause from proceedings before the Supreme Court of Florida. In this respect, UNSOS announced that it would "await the outcome of the review and any possible subsequent filings with the UNDT and UNAT".[12]

14. In connection with the 20 July 2020 UNSOS memorandum, the Applicant filed with MEU an addendum to the previous submission, stressing that it did not constitute a new evaluation request.[13] The MEU acknowledged having received this addendum on 22 July 2020.[14] On the merits, the MEU responded on 20 August 2020 that no decision on deductions from the Applicant's salary had been made as yet whereas UNSOS communication of 22 June 2020 could not be construed as an administrative decision pursuant to staff rule 11.2(a). Thus, the request was found not receivable.[15]

15. On 20 August 2020, the Applicant filed the present application.[16]

Submissions

Respondent's submissions

16. The Respondent submits that the Application is not receivable *ratione materiae.* The Applicant does not challenge an administrative decision under art. 2.1(a) of the UNDT Statute. The Applicant had submitted a request to UNSOS to exercise the discretion granted under staff rule 12.3(b) in order to reduce the amount of court child support payments to be deducted from his salary pursuant to staff rules 1.2(b) and 3.18(c)(iii); yet the Under Secretary-General for Management, Strategy, Policy and

[12] Application, annex 1, p.2.
[13] Application, annex 3, p. 40.
[14] Ibid, p. 16.
[15] Ibid, p. 2.
[16] Application, annex 1.

Compliance ("USG/DMSPC"), not UNSOS, has the delegated authority to approve deductions from a staff member's salary to fulfil private legal obligations.

17. The Respondent explains that on 20 August 2020, UNSOS referred the matter of the Applicant's court order child support payments to the USG/DMSPC for her consideration. There has been no decision to make salary deductions yet. Accordingly, the application is premature.

Applicant's submissions

18. The Applicant maintains that the application is receivable. Contrary to the Respondent's argument that the Applicant is not challenging an administrative decision, the Applicant opines that it is for the Tribunal to individualise and define the administrative decision being contested.[17] The Applicant argues that he is not challenging his obligation to provide child maintenance, but the Organization's decision not to act on his request while "awaiting the outcome of any possible subsequent filings with the UNDT and UNAT". The UNSOS decision not to exercise its discretion as per his request is clearly unlawful. It is not UNDT or UNAT to exercise the discretion accorded to the Organization.

19. Accordingly, the Applicant requests the Tribunal not to grant the Respondent's motion to have receivability determined as a preliminary matter.

Considerations

20. As a preliminary matter, the Tribunal notes that it is competent to adjudicate the merits only where the receivability requirement is satisfied. It is, accordingly, competent to consider a receivability issue on its own initiative, whether or not it has been raised by the parties.[18] In the present case the Tribunal found that the course proposed by the Respondent was justified by expediency.

[17] Applicant's motion to strike out the Respondent's motion to have receivability determined as a preliminary matter, para. 3.
[18] E.g., *O'Neill* 2011-UNAT-182, para. 31.

21. The Tribunal further confirms that it has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed".[19] At the same time, however, the Appeals Tribunal has also held that it is for the Applicant to identify an administrative decision capable of being reviewed.[20] It results that that the Tribunal's power to interpret an application serves to assist unrepresented applicants, who exhibit a genuine difficulty in articulating their claim. In the latter case applications must be interpreted *bonae fidei* to ascribe to them a sense consistent with the presumed intention and legal interest of the applicant[21], as it would not be in the interests of justice to hold them formalistically and technically to what they may or may not have pleaded. The Tribunal will not use this power to sanitize frivolous, impulsive or otherwise undisciplined submissions.

22. On this note, in reference to the Applicant's impugning the phrase about awaiting the outcome of processes initiated by him, the Tribunal remarks that an applicant should not necessarily expect the administration to reverse their decision during the pendency of the matter with which the applicant had already seized the hierarchy or the Tribunals. Whereas the appealed decision may be amended in the course of management evaluation[22] or even later, rendering the application moot[23], it is hardly impeachable that an administrative organ awaits the result of the review; opinions, moreover, have also been expressed that having discharged its duties the administrative organ becomes *functus officio*.[24] Succeeding, on the other hand, in an application in a matter already pending will likely be precluded by the state of *lis pendens*. The Applicant should bear this in mind and avoid repetitious filings. Moreover, the Applicant may wish to consider a contradiction between his complaint

[19] E.g., *Chaaban* 2016-UNAT-611, para. 18; *Fasanella* 2017-UNAT-765, para. 20.
[20] E.g., *Planas* 2010-UNAT-049 and *Reid* 2014-UNAT-419.
[21] *Ssewaguma et al* UNDT/2020/155, para. 18.
[22] See staff rule 11.4 (a), A staff member may file an application against a contested administrative decision, *whether or not it has been amended by any management evaluation* (emphasis added).
[23] e.g. *Gehr* 2013-UNAT-328.
[24] See, e.g., *Tavora-Jainchill* UNDT/2015/082; *Goodwin* UNDT/2012/126; *Miksch* UNDT/2020/059.

that the administration attempts to shift the responsibility for deciding his case onto the Tribunals who are not competent to exercise discretion under staff rule 3.18(c)(iii) and 12.3(b), and his request for remedial action in this application, where he demands of the UNDT to do precisely that.

23. However, in the effort to make the best sense of the application, when perusing the Applicant's outline of facts, his grounds of appeal and his additional contentions on receivability, the Tribunal notes, at the outset, that the Applicant is clearly not contesting a decision which the 20 July 2020 memorandum is actually about, that is, a refusal of a salary advance. Rather, it accepts that the crux of the Applicant's case turns on the issue of the alleged failure, or refusal, to respond to his requests, as he puts it, "to reduce the amount ordered to pay monthly", or, "to formalize the reduced amount the applicant must pay monthly into court accounts", which he identifies as the decision contained in a marked paragraph of the memorandum from 20 July 2020.[25] The Tribunal recalls that a request to modify the amount of child support to be paid had already been made on 29 May 2020 and resulted in management evaluation of 20 August 2020. The Tribunal will, therefore, consider that the current matter is the same as previously filed and recently evaluated by the administration, notwithstanding the erroneous indication of 20 July 2020 communication as a new administrative decision.

24. As concerns the question of whether the application, understood as outlined in the preceding paragraph, is receivable *ratione materiae*, it is recalled that the notion of an administrative decision in art. 2.1(a) of the UNDT Statute is being interpreted consistent with the one adopted in *Andronov*, which states that for the purpose of appealing an administrative decision it is considered final when the Organization decided to take a particular course of action, which produces direct legal consequences on the rights and obligations of a staff member as an individual.[26] Whereas it is accepted that an administrative decision may be implied, this being usually the case where the administration is not undertaking an action which is requested and which is

[25] Application, section V para, 1., section VII paras. 13, 14, 22; Applicant's "Motion to strike the Respondent's motion to have receivability determined as a preliminary matter" para. 10.
[26] Former UN Administrative Tribunal Judgment No. 1247, *Andronov* (2004), para V.

in its competence, any such acts are to be distinguished from those not having direct legal consequences.

25. The Tribunal finds that the present case does not involve an administrative decision in the above-stated sense. First and foremost, the United Nations administration is not competent to amend the content of a staff member's private obligations. The latter are created in the sphere of autonomous legal relations, subject to municipal laws. The Organization's competence in this connection is limited to deciding on motions for honouring municipal court orders as titles for deduction from staff member's emoluments, and on the extent of such deductions. Thus, the Applicant's request that the administration waive or decrease the amount of child support that had been ordered from him by the court in Florida could not be granted, as the Organization does not exercise discretion outside the process for determination of the deduction request. It is only at the point when the Organization moves to consider actual deductions, it may take into account all impediments and other moderating factors on the part of the staff member. [27]

26. The latter process in the Applicant's case has not yet produced a decision. In so far as UNSOS called upon the Applicant to comply with the court order under the sanction of deductions, these were prefatory, procedural acts and no deductions have been decided or effected. Rather, it is apparent that since 2018 the administration had been indulging the Applicant's claim as to the lack of finality of the court orders as well as granting him time to provide evidence relevant for any exemption. Indeed, it seems that the administration erroneously stated that the Applicant did not comply with the deadline - notwithstanding a degree of wordiness and repetitiveness of the Applicant's submission of 2 July 2020, it nevertheless *prima facie* contains information on point, which is capable of being assessed for its sufficiency and this fact should have been acknowledged. However, there were no undue delays and, anyway, the Applicant has no *gravamen* in complaining about delaying deductions from his salary. At present, in any event, the matter of deductions has been forwarded to the competent Under-

[27] See *Ozturk* 2018-UNAT-892.

Secretary-General for decision, where issues relevant to the Applicant's concerns may be considered.

27. The application is, therefore, not receivable for want of a reviewable administrative decision.

JUDGMENT

28. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 22nd day of October 2020

Entered in the Register on this 22nd day of October 2020

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi