



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Katrina Waiters, UNFPA

Background

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”) serving as Representative at the UNFPA Oman Country Office (“CO/Oman”) within the Arab States Regional Office (“ASRO”) at the P-5 level.
2. On 14 February 2019, he filed an application with the United Nations Dispute Tribunal in Nairobi challenging the Respondent’s decision to renew his fixed term appointment (“FTA”) by three months instead of two years (“the contested decision”) that is, from the expiration date of 19 March to 19 June 2019.
3. The Respondent filed his reply to the application on 22 March 2019 in which it is argued that the application is not receivable *ratione materiae*.

Summary of the relevant facts

4. On 1 November 2018, the Applicant was informed of the extension of his appointment. He noticed that the Personnel Action (“PA”) form dated 31 October 2018 regarding the renewal of his appointment indicated a renewal for three months, until 19 June 2019.¹
5. On 2 November 2018, the Applicant contacted Mr. Luay Shabaneh, Regional Director (“RD”)/ASRO, who informed him that the justification for the length of his appointment extension was linked to the establishment of a new office in Abu Dhabi which would immediately abolish the post in Oman.²
6. On 5 November 2018, the Applicant wrote to the Director, *ad interim*, of UNFPA’s Department of Human Resources (“DHR”), Mr. Arturo Pagan, requesting him to take action to renew his appointment for two years as was usually the case. Mr. Pagan advised the Applicant to discuss the issue with Mr. Shabaneh.³

¹ Application, annexes 1 and 2.

² Application, annex 8.

³ Application, annex 9.

7. The Applicant again contacted Mr. Shabaneh on 8 November 2018 who informed him that he would consult with DHR and revert.⁴

8. On 10 December 2018, the Applicant sought management evaluation of the contested decision.

9. On 20 February 2019, the Applicant received a new PA granting him a further extension of appointment until 19 March 2020.⁵

10. On 25 May 2020, the Applicant filed submissions on the issue of receivability pursuant to Order No. 093 (NBI/2020).

Parties' submissions

Receivability

The Respondent

11. The application is not receivable *ratione materiae*. The contested decision has been superseded and rescinded by effect of the second PA dated 20 February 2019.

12. The Applicant now has a one year renewal of appointment rather than three months. The contested decision has no legal effect on the Applicant's terms of appointment or contract of employment. Accordingly, the Dispute Tribunal does not have jurisdiction to receive the application.

The Applicant

13. Any decision vitiated by bias, bad faith, retaliatory or abusive of authority is receivable and reviewable by the Tribunal. The Tribunal may examine the circumstances surrounding a decision to determine whether it was tainted by abuse of authority.

⁴ Application, annex 10.

⁵ Reply, annex 1.

14. What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision.

15. The decision dated 20 February 2019 did not supersede or rescind the contested decision dated 31 October 2018 as nothing in its content explicitly or implicitly stated so.

16. The two decisions provide renewals for two different renewal periods. The first contested decision granted renewals from 19 March to 19 June 2019 while the other granted renewal from 20 June 2019 to 19 March 2020. Since the renewals cover different periods, they can't supersede or rescind the contested decision in this case. This is also applicable to the third decision dated 2 July 2019 which granted an extension of appointment from 20 March 2020 to 31 March 2021.

17. He had a legitimate expectation of a two-year contract renewal at a time.

18. The contested decision produced direct legal consequences affecting his terms of appointment because it caused irreparable damage to his professional reputation. His short contract renewals negatively affected his rotation and resulted in his non-selection for nine posts that he applied for in the 2019 rotation because no reasonable rotation panel will consider a candidate with a 12-month contract while the minimum regulatory requirement to serve in any post is two years. His health also suffered and he "potentially" lost his pension rights.

Considerations

Whether the Tribunal is competent to hear the application.

19. Article 2.1(a) of the UNDT Statute provides that:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in noncompliance 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 non-compliance.

20. The Applicant holds an FTA which, under the UNFPA Personnel and Procedures Manual, Personnel Policies and Procedures, (“PPM”), does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of length of service.

21. The decision to extend the contract for a shorter period than the Applicant expected cannot be said to be in noncompliance with his terms of appointment or the contract of employment which are that he had no expectancy, legal or otherwise, of renewal or conversion, irrespective of length of service. The Tribunal is not competent to hear and pass judgement on this application.

22. In addition to the above, for a decision to be challengeable under art. 2.1(a) of the UNDT Statute, it must be final and produce direct legal consequences to the legal order.⁶ Conversely, a decision that is final but produces no direct legal consequence on a staff member’s terms of appointment or the contract of employment is not receivable by the Tribunal.⁷

23. The impugned decision did not produce any direct legal consequence on the Applicant’s terms of appointment or his contract of employment since he had an FTA which did not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of length of service.

24. His assertion that he had a legitimate expectation of a two-year contract renewal “as was usually the case” runs counter to the clear and consistent jurisprudence of the Appeals Tribunal that the renewal of the appointment of a staff member on successive contracts does not, in and of itself, give grounds for an expectancy of renewal; unless

⁶ Former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003); *Andati-Amway* 2010-UNAT-058; *Elasoud* UNDT/2010/111 confirmed by Judgment No. 2011-UNAT-173.

⁷ See generally *Fairweather* UNDT/2019/134 confirmed by *Fairweather* 2020-UNAT-1003.

the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended. The jurisprudence requires this promise at least to be in writing.⁸

25. There is no indication that there was a firm commitment to renew revealed by the circumstances of the case, or a written promise which could have created a legitimate expectation.⁹

26. The argument that the contested decision produced direct legal consequences affecting the Applicant's terms of appointment because it caused irreparable damage to his professional reputation is wrongly premised since there can be no injury where there is no right.

27. The fact that after consultations took place between the Applicant and Mr. Shabaneh and Mr. Pagan further decisions were made means that the decision was not final.

28. The Tribunal finds that the decision did not produce any direct legal consequence on the Applicant's terms of appointment or his contract of employment, and so the Tribunal is not competent to hear and pass judgement on this application.

Whether the contested decision been rendered moot.

29. The Applicant's argument that the decisions of 31 October 2018 and 20 February 2019 provide renewals for two different renewal periods is without merit. The two decisions concern the same issue (contract renewal). The 20 February 2019 renewal decision came up in the context of the Applicant's complaint over the short renewal period and by that decision the period was extended for one year.

30. It is an established principle that where the Administration rescinds the contested decision during the proceedings, the Applicant's allegations may be moot

⁸ *Muwambi* 2017-UNAT-780, para. 25.

⁹ *Igbinedion* 2014-UNAT-411, para. 26.

unless he can prove that he still sustains an injury for which the Tribunal can award relief¹⁰. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect.¹¹

31. In keeping with the above legal principles, the Tribunal finds that the 20 February 2019 decision superseded that of 31 October 2018, and since the Applicant has not demonstrated how his rights remain adversely affected by the 31 October 2018 decision, and any remedy issued would have no concrete effect, the application is dismissed as irreceivable *ratione materiae*.

(Signed)

Judge Margaret Tibulya

Dated this 22nd day of October 2020

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

¹⁰ *Kallon* 2017-UNAT-742, para. 46, citing *Gehr* UNDT/2011/211.

¹¹ *Ibid.*