



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 4 June 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 nine months instead of two years (“the contested decision”) that is, from the expiration date of 20 June 2019 to 19 March 2020.
3. The Respondent filed his reply to the application on 8 July 2019 in which it is argued that the application is not receivable *ratione materiae*.

Summary of the relevant facts

4. By a Personnel Action (“PA”) form dated 20 February 2019, the Applicant’s appointment was renewed for nine months, from 20 June 2019 until 19 March 2020.¹
5. On 16 April 2019, the Applicant sought management evaluation of the contested decision.
6. In its response to the management evaluation request dated 28 May 2019, UNFPA upheld the contested decision.
7. On 2 July 2019, the Applicant received a new PA granting him a further extension of appointment until 31 March 2021.²
8. On 12 July 2020, the Applicant filed a rejoinder to the reply.

¹ Application, annex 2.

² Reply, annex 1.

Parties' submissions

Receivability

The Respondent

9. The application is not receivable *ratione materiae*. The contested decision has been superseded and rescinded by effect of the PA dated 2 July 2019. The Applicant has now been granted the full two year renewal of appointment. The contested decision of the PA dated 20 February 2019 has no legal effect on Applicant's terms of appointment or contract of employment.

The Applicant

10. The PA dated 2 July 2019 did not supersede or rescind the contested PA dated 20 February 2019 as nothing in its content explicitly or implicitly states so. The two PAs provide renewals for two different renewal periods. The contested PA grants renewal from 20 June 2019 to 19 March 2020 while the PA dated 2 July 2019 granted an extension of appointment from 20 March 2020 to 31 March 2021.

11. If the Tribunal were to follow the Respondent's argument and consider the contested PA rescinded while the new PA dated 2 July 2019 did not cover the period 20 June 2019 to 19 March 2020, it necessarily means that the Applicant was not covered by any PA for that period which is not the case.

12. The Respondent inadvertently admits the validity of the contested PA in terms of the period it covered. At the same time, the Respondent argues it was rescinded by a new PA dated 20 February 2019. Logically, this contradicts the uncontested fact that the Applicant continues to serve as an employee covered by the contested PA.

13. The Administration issued three PAs consecutively and gave different and inconsistent justifications for each. The inconsistencies prove that the reasons solely serve UNFPA's legal defense so as to avoid responsibility for UNFPA's Regional Director's wrongdoing.

14. The UNFPA Administration should not be allowed to arbitrarily issue multiple consecutive PAs to intimidate staff members from reporting wrongdoing and from seeking protection from retaliation knowing that the Administration can always evade judicial review of such decisions.

15. He suffered harm and damage from the issuance of the multiple PAs.

Considerations

Whether the Tribunal is competent to hear the application.

16. 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.

17. 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.

18. 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.

19. 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.³ 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.⁴

20. 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.

21. His assertion (in his submissions on the merits of this case) that he had a legitimate expectation of a two-year contract renewal 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 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.⁵

22. 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.⁶

23. The argument that the contested decision produced direct legal consequences affecting the Applicant's terms of appointment because it caused him "harm and damage" is wrongly premised since there can be no injury where there is no right.

24. 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.

³ Former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003); *Andati-Amwayi* 2010-UNAT-058; *Elasoud* UNDT/2010/111 confirmed by Judgment No. 2011-UNAT-173.

⁴ See generally *Fairweather* UNDT/2019/134 confirmed by *Fairweather* 2020-UNAT-1003.

⁵ *Muwambi* 2017-UNAT-780, para. 25.

⁶ *Igbinedion* 2014-UNAT-411, para. 26.

Whether the contested decision been rendered moot.

25. The Applicant's assertions that the PA dated 2 July 2019 did not supersede or rescind the contested PA dated 20 February 2019 as nothing in its content explicitly or implicitly states so and that the two PAs provide renewals for two different renewal periods are without merit. The two decisions concern the same issue (contract renewal). The 2 July 2019 renewal decision came up in the context of the Applicant's complaint over the short renewal period and by that decision his contractual period was extended for one year.

26. It is an established principle that where the Administration rescinds the contested decision during the proceedings, the Applicant's allegations may be moot unless he can prove that he still sustains an injury for which the Tribunal can award relief.⁷ 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.⁸

27. In keeping with the above legal principles, the Tribunal finds that the 2 July 2019 decision superseded that of 20 February 2019, and since the Applicant has not demonstrated how his rights remain adversely affected by the 20 February 2019 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

⁷ *Kallon* 2017-UNAT-742, para. 46, citing *Gehr* UNDT/2011/211.

⁸ *Ibid.*

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi