UNITED NATIONS DISPUTE TRIBUNAL

Cases No.: UNDT/NY/2019/093
UNDT/NY/2020/027
Judgment No.: UNDT/2020/197
Date: 23 November 2020
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

POSTICA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Thad M. Guyer

Counsel for Respondent:
Nusrat Chagtai, ALD/OHR, UN Secretariat
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 19 November 2019, the Applicant filed an application contesting "the decision taken by the [Office of Internal Oversight Services ("OIOS")] to propose the 'redeployment of one post of Senior investigator (P-5) from the New York Investigations Office to the Nairobi Investigations Office to serve as Chief of Office, in view of the increasing workload and the need to strengthen the management of that office', which was included in the OIOS proposed program budget for 2020 […]". This case was registered under Case No. UNDT/NY/2019/093 ("first application").

2. In the Respondent's 19 December 2019 reply, he opposed that the application is not receivable *ratione materiae* and, in any event, without merit.

3. On 28 June 2020, the Applicant filed another application contesting the decisions "initiated and/or taken by OIOS to (a) move his post to Nairobi, (b) to require his involuntary transfer from New York to Nairobi or suffer loss of his position in OIOS, and (c) the failure by OIOS to timely implement the [United Nations Office in Nairobi's] Medical Service's written decision notifying OIOS that Applicant is not medically certified for transfer or move to Nairobi". This case was registered under Case No. UNDT/NY/2020/027 ("second application").

4. On 12 August 2020, the Respondent replied that the application was not receivable *ratione materiae* and, in any event, without merit.

Consideration

5. On 11 February 2020, OIOS notified the Applicant that the request to transfer the post he was currently encumbering to Nairobi had been approved by the General Assembly. Accordingly, the Applicant was informed that he was expected to report for duty in Nairobi as soon as he obtained his medical clearance but no later than 1 July 2020.

6. On 18 May 2020, the Officer in Charge of the Joint Medical Service in Nairobi informed OIOS that the Applicant was not medically cleared for transfer to Nairobi.

7. In his 12 August 2020 reply, the Respondent states that no decision, actual or implied, has been taken to implement the Applicant's reassignment given the medical determination that he is currently unfit to be redeployed to Nairobi.

8. The Respondent further notes that the Applicant failed to request management evaluation of the "failure by OIOS to timely implement the […] Medical Service decision […]".

9. At the Tribunal's request, on 19 November 2020, the Respondent further confirmed that the Applicant has not been reassigned to Nairobi and that there have been no changes in his functions, as he continues to serve as Senior Investigator in OIOS' office in New York at the P-5 level.

10. In an additional submission filed on 20 November 2020, the Applicant states that the Respondent's representation of the Applicant's functions is incomplete and misleading and requests oral evidence.

11. At the same time, the Applicant acknowledges that he remains assigned to the OIOS office in New-York with his P-5 permanent post.

12. Article 2.1(a) of the Tribunal's Statute states that the Dispute Tribunal has jurisdiction to pass judgment on:

> … 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 alleged non- compliance …

13. The Appeals Tribunal's well-established jurisprudence provides that an administrative decision is only capable of judicial review when it produces direct legal consequences in the applicant's terms of appointment (see, for instance, *Hassanin* 2017-UNAT-759, para. 37).

14. As a preliminary matter, the Tribunal notes that in the first application, the Applicant appeals the proposal to transfer his post to Nairobi while in the second application, the Applicant appeals, among others, the actual decision to move his post to Nairobi. The Tribunal understands that the second application subsumes the first with regards to the decision to transfer the Applicant and his post to Nairobi and will review this decision in the context of the second application.

15. The record in these cases shows that the Administration's decision to redeploy the Applicant to Nairobi was subject to the condition that he be medically cleared. As the applicant expressly mentions in his motion filed on 20 November 2020 that "he holds a permanent appointment and has not yet been assigned to Nairobi due to his medical unfitness for that tropical duty station", this condition has not been met to date, consequently, the decision has not been implemented. Therefore, none of the challenged administrative decisions have yielded any direct legal consequences in the Applicant's terms of appointment, which remain unchanged. The applications are therefore non-receivable *ratione materiae*.

16. Moreover, art. 8.1(c) of the Tribunal's Statute provides that the Dispute Tribunal will have competence to review challenges of administrative decisions if the applicant has previously sought management evaluation of said decision.

17. Pursuant to art. 8.1(d)(i)(b), the Management Evaluation Unit has a 30-day deadline to respond to requests for management evaluation at Headquarters. Therefore, the deadline to appeal such decision before the Dispute Tribunal starts once the 30-day deadline has elapsed.

18. The Applicant requested management evaluation of the alleged "failure by OIOS to timely implement the [United Nations Office in Nairobi's] Medical Service's written decision notifying OIOS that Applicant is not medically certified for transfer or move to Nairobi" on 25 June 2020 and received the response from the Management Evaluation Unit on 15 July 2020. However, the Applicant appealed this administrative decision before the Tribunal on 29 June 2020. Therefore, his appeal was premature.

19. With respect to the Applicant's contentions regarding the nature of the work currently assigned to him in OIOS, the Tribunal notes that this is entirely outside the scope of the applications currently under review. As stated above, the decisions under review in this process concern the Applicant's transfer to the OIOS Nairobi office. Should the Applicant wish to contest other administrative decisions pertaining to his employment, he may do so within the procedures established in the Tribunal's Statute and Rules of Procedure.

20. In light of the above,

Conclusion

21. The applications are rejected.

(Signed)
Judge Joelle Adda
Dated this 23rd day of November 2020

Entered in the Register on this 23rd day of November 2020

(Signed)
Nerea Suero Fontecha, Registrar, New York