



UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.: UNDT/NY/2021/021
UNDT/NY/2021/024
Judgment No.: UNDT/2021/084
Date: 16 July 2021
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

OVCHARENKO et al.

KUTNER et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
George Irving

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat
Clementine Foizel, ALD/OHR, UN Secretariat

Introduction

1. The Applicants, staff members of the Department of General Assembly and Conference Management (“DGACM”) appealed “unilateral change in the individual workload standards for translation and self-revision”.

2. The Respondent moved the Tribunal to determine the receivability of the application as a preliminary matter, arguing that the challenged decision was not a final administrative decision and that the applications are therefore not receivable.

3. For the reasons set out below, the Tribunal finds that the applications do not concern an appealable administrative decision in accordance art. 2.1(a) of the Dispute Tribunal’s Statute and are therefore not receivable *ratione materiae*.

Facts and procedural history

4. On 31 December 2020, the General Assembly adopted resolution 75/252 (Questions relating to the proposed programme budget for 2021) (“the General Assembly resolution”) in which it decided to increase the workload standards for the translation services to 5.8 pages per day (see para. 8).

5. On 8 April 2021, the Under-Secretary-General for DGACM (“the USG/DGACM”) held a townhall meeting with DGACM staff in which he discussed the implementation of the General Assembly resolution.

6. On 26 April 2021, the Applicants requested management evaluation of “[t]he decision of the USG /DGACM of 8 April 2021 conveyed to staff at a town hall meeting that he had decided as of 1 May 2021 to implement the recommendation of the Working Group on the implementation of the increase of workload standards/or the translation services approved by General Assembly in resolution 75/252 as of 1 May 2021 by

increasing the daily workload of translators to 5.8 pages and of self-revisers to 6.4 pages”.

7. On 29 April 2021, the request for management evaluation was rejected as not receivable on the grounds that the 8 April 2021 announcement did not directly affect the Applicants’ terms of appointment, because the decision to increase the translation and revision workloads had not been implemented into the Applicants’ workplans.

8. On 21 May 2021, 34 Applicants filed an application contesting the “unilateral change in the individual workload standards for translation and self-revision” of 8 April 2021. The case was registered with Case No. UNDT/NY/2021/021.

9. On 4 June 2021, another 68 Applicants filed an application, contesting the same decision. The case was registered with Case No. UNDT/NY/2021/024.

10. By email from the Registry of 7 June 2021, the Tribunal informed the parties that the two cases would be managed jointly.

11. On 7 June 2021, the Respondent moved the Tribunal to determine the receivability of Case No. UNDT/NY/2021/021 as a preliminary matter and, on 21 June 2021, he further objected to the receivability of Case No. UNDT/NY/2021/024.

Consideration

12. Given the Respondent’s challenge to the receivability of the applications, the Tribunal deems it appropriate to determine this question as a preliminary matter.

13. The Respondent objects that the Applicants failed to meet their burden of showing that the contested decision violated their terms of appointment.

14. He states that the 8 April 2021 announcement does not constitute a final administrative decision, because it merely identified DGACM’s strategy on how to

implement the General Assembly resolution. Therefore, this announcement was a preliminary step in the development of the Department's workplan which, in turn, is a step in the management of staff performance. The Respondent recalls that preparatory steps do not constitute final and, therefore, reviewable administrative decisions.

15. The Respondent further submits that the Applicants' speculation as to the possible negative effects, which may arise from the USG's strategy, are not properly within the Tribunal's jurisdiction and recalls that the announcement made on 8 April 2021 was applied generally to all affected staff and would only be challengeable once it is individualized to the Applicants in the form of an administrative decision.

16. The Applicants aver, in sum, that in deciding to increase the workload for self-revision to 6.4 pages per day, the Administration had exceeded the General Assembly's mandate. These new requirements will affect, in the Applicants' views, their performance evaluation and "contractual decisions".

17. The Applicants affirm that these new standards are reflected in their performance documents. Therefore, they submit that "[i]n case of non-compliance, the performance evaluation of staff is deemed no longer satisfactory, and staff members can be and are fired for this reason".

18. In response to the Respondent's receivability arguments, the Applicants contend that the Tribunal is competent to review the Administration's exercise of discretion in implementing the General Assembly resolution.

19. They state that the managerial decision to apply translation service standards to individual performance goals is itself an appealable discretionary decision, as is the decision to unilaterally increase the workload standards for self-revision.

20. They further argue that in *Lloret-Alcaniz et al.* 2018-UNAT-840, the Appeals Tribunal held that the implementation of General Assembly resolutions involved an administrative decision with an adverse impact.

21. They further argue that the decision to impose new translation standards on the Applicants is not theoretical and directly affects their terms and conditions of employment.

22. To show that the 8 April 2021 announcement has been implemented related to the concerned staff members on an individual basis, the Applicants point to an email dated 1 April 2021 from the Chief of Language Services confirming that the implementation date of the new workload standards would be 1 May 2021. On 3 May 2021, the Chief of the French Translation Service emailed her colleagues that the new productivity standards would be entered into the official translation assignment records system, reflecting the implementation of the new standard for all staff.

23. To further demonstrate the practical effect of these changes, the Applicants submitted the translation records for one of the Applicants. The records for February 2021 indicate an average productivity of 130.34 percent, whereas in May 2021 it had fallen to 86.77 percent. This shows, in the Applicants' view, that had the standard not changed, the performance of this particular Applicant would remain above 100 percent as his productivity in May 2021 was of 5.03 pages. The change of calculation in the official translation assignment record system is clear evidence of implementation.

24. The Applicants provide further records to show the implementation of the decision as of May 2021.

25. The Applicants argue that the introduction of the new higher standards will result in averages of less than 100 percent, which is cause for a grading of partially

unsatisfactory performance or unsatisfactory performance, which, in turn, may lead to non-extensions or terminations of the concerned staff members' appointment.

26. The Applicants state that, while in the past year up to March 2021, most staff met or exceeded the old standard, this can now be expected to change.

27. According to the Applicants, the translation services are one occupational area where output can be empirically measured and these measurements have been and will continue to be used to make decisions on contractual status. If changes in the job requirements cannot be challenged, staff would arguably be precluded from raising the legality of such a decision at a later time. For that reason, the decision to unilaterally impose new requirements not mandated by the General Assembly and without proper staff/management consultation should be deemed an appealable administrative decision.

Legal framework

28. Under art. 2.1(a) of the Dispute Tribunal's Statute, the Tribunal "is competent to hear and pass judgment on applications" against administrative decisions "alleged to be in non-compliance with the terms of appointments or the contract of employment".

29. The Appeals Tribunal has consistently held that preparatory steps or actions can only be reviewed by the Dispute Tribunal in the context of an appeal against a final decision of the Administration that has direct legal consequences in the individual's terms of employment (see, for instance, *Nguyen-Kropp & Postica* 2015-UNAT-509, paras. 31-33; *Gnassou* 2018-UNAT-865, para. 31).

30. The Tribunal further notes that pursuant to staff rule 11.2(a) and art. 8.1(c) of the Dispute Tribunal's Statute, an applicant wishing to challenge an administrative decision before the Tribunal must first submit it for management evaluation.

Discussion

31. In the instant case, it is undisputed that the measures announced by the USG/DGACM on 8 April 2021 were meant to be implemented on 1 May 2021. The annexes submitted by the Applicants to demonstrate the implementation of the measures announced on 8 April 2021 are from May 2021 onward.

32. It is noteworthy that the 29 April 2021 management evaluation alerts the Applicants that the 26 April 2021 request for management evaluation is not receivable because the new translation standards announced on 8 April 2021 “have not been incorporated in individual workplans at this time”.

33. The Tribunal agrees that the request for management evaluation of the 8 April 2021 announcement was premature as, by that date, there was no individualization of the measures decided by the USG/DGACM to the individual Applicants. Therefore, at that time, the announced measures were a preparatory step and did not have a direct adverse impact on the Applicants’ terms of employment.

34. However, there is no evidence that the Applicants submitted subsequent requests for management evaluation. Therefore, any implementation of the 8 April 2021 measures occurred after the 26 April 2021 request for management evaluation and the 29 April 2021 response from the Management Evaluation Unit are beyond the scope of this case as they were not submitted for management evaluation as per staff rule 11.2(a) and art. 8.1(c) of the Tribunal’s Statute.

35. The applications are therefore not receivable *ratione materiae*.

Conclusion

36. The applications are dismissed.

(Signed)

Judge Joelle Adda

Dated this 16th day of July 2021

Entered in the Register on this 16th day of July 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York