



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/027

Judgment No.: UNDT/2022/012

Date: 11 February 2022

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

IZIRAREN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Endah Ayuningsih Indini, OSLA

Counsel for Respondent:

Angela Arroyo, UNDP

Introduction

1. The Applicant, a former staff member of the United Nations Development Programme (“UNDP”) appealed the “resignation from [the Applicant’s national Government] as condition for extension of Fixed Term Appointment beyond 6 August 2021”.

2. The Respondent replied that the application is not receivable *ratione materiae* and, in any event, without merit.

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

Facts and procedural history

4. The Applicant joined UNDP on a fixed-term appointment on 7 August 2017. His appointment was renewed for an initial period of two years until 2020 and then for an additional period of one year, until 6 August 2021, on which date it expired and he separated from the Organization.

5. Since his initial appointment, the Applicant was on special leave without pay with his national government.

6. On 13 April 2021, a Human Resources Associate of UNDP emailed the Applicant to seek clarification as to his current connection with his national government.

7. On 14 April 2021, the Applicant replied by email confirming that he continued to be on unpaid leave with his government.

8. On 15 April 2021, a Senior Human Resources Advisor of UNDP replied to the Applicant as follows:

...

You will complete four years on unpaid leave status with your government as of August 2021. We have no record of you requesting approval of extension from the Director, OHR beyond the initial 2 year period. Four years is the maximum time permissible for an individual to maintain a relationship with their government while employed under an appointment with UNDP. We have consulted with the Ethics Office and confirmed that before any contract extension may be considered you will need to tender your resignation from your government. You cannot maintain both affiliations.

We look forward to hearing from you on your decision to either resign from the government or leave UNDP at the end of your current contract period.

...

9. On 27 April 2021, the Director of the Office of Human Resources, Bureau of Management Services of UNDP (“Director/HR”) also informed the Applicant that before any contract extension be considered, he would need to resign from his government. The Applicant was further advised that if he were unable to provide the documentation concerning his resignation, UNDP could “not guarantee that [his] fixed-term appointment will continue to be renewed”.

10. On 6 May 2021, the Applicant requested management evaluation of the Director/HR’s decision “that before any contract extension may be considered [he] will need to tender [his] resignation from [his] government”.

11. On 1 June 2021, the Applicant requested management evaluation of the decision “of not renewing his Fixed Term Appointment beyond 6 August 2021 should he fail to tender his resignation from Ministry of Foreign Affairs of [national government]”.

12. On 16 June 2021, at the completion of the management evaluation, UNDP upheld its decision to require the Applicant to resign from his national government as a condition to renew his fixed-term appointment.

13. On 16 July 2021, the Applicant received a notice of separation.

Consideration

14. Given the Respondent's challenge to the receivability of the application, the Tribunal deems it appropriate to determine this question as a preliminary matter.

15. The Respondent submits that the Applicant did not contest the decision not to renew his fixed-term appointment in his requests for management evaluation and that the determination regarding his continued employment by his national government is not a contestable administrative decision.

16. In light of the Respondent's objections, the Tribunal will first determine what is the contested administrative decision to then examine whether the appeal against it is receivable.

What is the contested administrative decision?

17. The Respondent notes that the Applicant could not have contested the non-extension of his fixed-term appointment in his requests for management evaluation because he was only notified of the decision not to renew his fixed-term appointment on 13 July 2021, after he had submitted them, and provided with the separation letter on 16 July 2021.

18. The Respondent further avers that the Applicant's decision not to request management evaluation of the non-renewal decision was intentional given that he had been represented by professional counsel at the management evaluation stage.

19. The Applicant responds that he requested management evaluation of the non-renewal of his fixed-term appointment in his 1 June 2021 request for management evaluation, where he defined the contested decision as: "not renewing his fixed-term

appointment beyond 6 August 2021 should he fail to tender his resignation from Ministry of Foreign Affairs of [national government]”.

20. He further recalls that in his response to the management evaluation request, the Respondent upheld the “decision to impose the condition of resignation for the Applicant’s extension of appointment” while not addressing the Applicant’s request for the renewal of his appointment as remedy.

21. The Applicant finally states that the decision not to renew his appointment was taken on 27 April 2021 by means of an email by the Director/HR.

22. In this respect, the Tribunal notes that in the application, the Applicant, who as the Respondent rightfully states, is represented by legal counsel, identifies the contested administrative decision to impose on the Applicant, as the condition for the extension of his fixed-term appointment, to resign from his national government.

23. Moreover, the Applicant clearly identifies the 27 April 2021 email from the Director/HR as the contested administrative decision both in his application and in his requests for management evaluations.

24. The 27 April 2021 email informs the Applicant that following consultations with UNDP’s Ethics Office, it was not considered advisable to consider any further contract extensions before he tendered his resignation from his national government. Moreover, the email further notes that a fixed-term appointment carries no expectation of renewal and therefore, even if he were to fulfill the condition, there was no guarantee that the appointment would be extended.

25. Thereafter, on 16 July 2021, the Applicant received his separation letter informing him of the non-extension of his fixed-term appointment beyond 6 August 2021.

26. In light of this evidence, the Tribunal finds that the 27 April 2021 did not constitute a decision not to renew the Applicant's appointment but rather informed him of the Administration's decision to maintain the condition attached to any consideration of the extension of his appointment.

27. The Applicant claims that para. 30 of his 1 June 2021 request for management evaluation clearly constitutes a challenge to the decision not to renew his fixed-term appointment.

28. The Tribunal notes that para. 30 of the 1 June 2021 request for management evaluation identifies the remedy sought by the Applicant and reads: "[...] [the Applicant] respectfully requests that the decision to subject him to mandatory resignation as condition for the renewal of his fixed term appointment be rescinded and that his appointment extended (sic.) beyond 6 August 2021 for 2 years as requested by [the Applicant's] supervisor".

29. The Tribunal concludes from this language that while the Applicant requests the extension of his fixed-term appointment, he identifies the condition of his resignation from his national government as the decision he seeks to have rescinded.

30. Moreover, the Tribunal notes that in his 16 June 2021 management evaluation, the Respondent upheld the contested decision which it identified as the decision to require the Applicant to resign from his national government.

31. The Tribunal is also not persuaded that the 27 April 2021 can be interpreted as a decision not to renew the Applicant's fixed-term appointment. Rather, this email is a confirmation that any eventual decision on the extension of the Applicant's appointment is predicated on his resignation from his national government. It further clarifies that even a resignation would not guarantee the extension of the appointment.

32. The only reasonable conclusion from this language is that at the time of the email, the decision on the renewal of the Applicant's appointment was yet to be made.

33. Therefore, when the Applicant sought management evaluation of the imposition of a condition to the extension of his fixed-term appointment, he did not contest the actual non-extension of his appointment which was yet to be taken at that time.

Is the appeal of the contested decision receivable?

34. 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.

35. As determined above, the Applicant did not seek management evaluation of the non-extension of his fixed-term appointment before he filed the present application. Accordingly, any appeal of the non-renewal of the Applicant's appointment would not be receivable *ratione materiae*.

36. With respect to the challenge to the condition of the Applicant's resignation from his national government, the Tribunal recalls that under art. 2.1(a) of its Statute, it "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".

37. 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).

38. In the present case, the imposition of the condition of resignation did not in itself have a direct legal impact on the Applicant's terms of employment. By its own definition, this condition was only meant to have an effect on the eventual decision concerning the extension of the Applicant's appointment.

39. This does not mean that the imposition of the condition of the Applicant's resignation was not capable of judicial review. The Applicant would have been able to request the Tribunal's review of its legality in the context of an appeal against the non-renewal decision.

40. However, in the current application, the Applicant failed to challenge the final decision not to extend his appointment. Therefore, he failed to challenge an administrative decision in the sense of art. 2.1(a) of the Tribunal's Statute and therefore, the application falls outside the competence of the Tribunal.

Conclusion

41. The application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 11th day of February 2022

Entered in the Register on this 11th day of February 2022

(Signed)

Nerea Suero Fontecha, Registrar, New York