UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/021
Judgment No.: UNDT/2024/024
Date: 25 April 2024
Original: English

Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

MARCHETTI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON

RECEIVABILITY

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Halil Göksan, ALD/OHR, UN Secretariat

Introduction

1. On 10 July 2023, the Applicant, an Administrative Assistant based in New York with the Department of Global Communications ("DGC") in the United Nations Secretariat, filed the application in which she contests the "[d]ecision not to grant [her] request under staff rule 3.17 for increase of step".

2. On 18 July 2023, the Respondent filed a motion for summary judgment in which he, in essence, requested the Dispute Tribunal: (a) to grant his motion, (b) to dismiss the application in its entirety as not receivable, and (c) to suspend the Respondent's deadline to file a reply pending the Tribunal's determination of the motion.

3. By Order No. 059 (NY/2023) dated 20 July 2023, the Duty Judge granted the Respondent's 18 July 2023 motion in part and suspended the deadline for the Respondent's reply until further notice from the Tribunal. In addition, the Applicant was ordered to file a response to the Respondent's submissions on receivability by 16 August 2023. Finally, the Duty Judge instructed the parties that unless otherwise ordered, the Tribunal would subsequently adjudicate on the issue of receivability, including the Respondent's motion on summary judgment, and deliver Judgment based on the papers filed on record.

4. On 3 August 2023, the Applicant filed his submissions as per Order No. 059 (NY/2023).

5. On 1 April 2024, the case was assigned to the undersigned Judge.

6. On 9 April 2024, a case management discussion ("CMD") was held to discuss the further proceedings at which Counsel for the parties were present. Both Counsel confirmed that no further submissions were necessary for the Tribunal to decide the issue of receivability.

Facts

7. At the time of the contested decision, the Applicant was a staff member employed at the G-5 level, step 6, with the Secretariat in New York.

8. On 30 June 2017, the Applicant was separated at the G-6 level, step 7, and on 17 August 2018, reappointed at the G-5 level, step 7, with the Africa Section in DGC. On 8 June 2019, the Applicant separated at the G-5 level, step 7.

9. In December 2021, the Applicant was presented with an offer of appointment for her position at the G-5 level, step 6.

10. On 8 December 2021, the Applicant emailed a Human Resources Partner and stated she had "noticed that the Editorial Assistant, G5 position, is offered at step VI … If I recall well, before I joined the Africa Section, the DGC issued an Offer for a temporary appointment, G5 level, at step VII", copying in a screenshot of the relevant document.

11. On the same date (8 December 2021), the Human Resources Partner emailed the Applicant in response and indicated that "I understand we would normally honor previous step only when former staff is reappointed within 1 year of separation and your cob [unknown abbreviation] was 7 June 2019 which is more than 2 years ago. As per [United Nations] guidelines, step 6 is the maximum we can offer now".

12. Later the same date (8 December 2021), the Applicant emailed the Human Resources Partner and stated that:

> I do understand that my COB [unknown abbreviation] was more than 2 years ago. I also believe that step VII was offered before I acquired additional experience which should be beneficial for the work[.] I will perform in the same department for which I worked before. I am not asking to consider the experience after I joined the Africa Section and until June 2019 but the one the DGC assessed as fair at the time I joined the Africa Section. Somehow it seems that I am going back[wards] instead of forward; that my experience and qualifications over the years instead of making me better off make me worse off. It also feels contradictory that despite the additional experience gained within the

> DGC, the original step offered by the DGC in August 2018 is not maintained, but downgraded.
>
> Should I understand from your response that the step cannot be reviewed?

13. On 25 January 2022, the Applicant entered on duty as per her letter of appointment, which she signed on 31 January 2022. In this letter of appointment, the Applicant's level was indicated as, "G-5 Step 06".

14. On 30 December 2022, the Applicant emailed the Human Resources Partner indicating that:

> Under Staff Rule 3.17, I am claiming step VII in my reappointment as it is consistent with the step VII granted in August 2018 by the same department. It is noted that in both cases the situation relates to temporary appointments at the same level (G5) and by the same department (DGC).
>
> Under the contract (LOA) dated 25 January 2022, the Administration seems to disregard [its] previous determination which placed the staff member in a higher step (VII) based on the experience, qualifications, and years of service. The current situation not only contradicts the precedent and the previous decision made by the same department but inflicts a "capitis diminution" to the staff member who -after being initially placed on step VII in August 2018- earned 9 months of additional experience.
>
> My step determination disregards the additional experience earned by the staff member in the same department; and downgrades the staff member, making her worse off under a lower step while the Organization takes advantage of the experience and knowledge of a seasoned staff member who serves in the highest capacity.
>
> Submitting this formal claim, the staff member requests the revision and readjustment of the step to reflect step VII.
>
> In case of negative response, the staff requests reasoning and guidance that lead to the determination of step VI instead of the precedent step VII.

15. On 18 January 2023, a Human Resources Officer emailed the Applicant and stated that:

> Despite raising this question during your onboarding and after receiving the same explanation as below, you accepted the offer made to you on 10 December 2021. You have also not contested this decision within the timeframe specified in SR [presumably, the staff rules]. 11.2 although it would not alter our position.
>
> Please note that you have been reappointed with DGC on 25 January 2022 following separation from DOS cob [presumably, meaning close of business] 7 June 2019 (i.e. after break-in-service of more than 1 year).
>
> As per [United Nations] guidelines on the determination of level and step on recruitment, the maximum step allowed for a new appointment at your level is VI, therefore, DGC is not in position to make an exception to your case.
>
> Reference to [staff rule] 4.17 (b), "(…) the terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments.

16. On 15 March 2023, the Applicant sought management evaluation of the contested decision.

Consideration

Receivability

Parties' submissions

17. The Respondent's submissions may be summarized as follows:

a. The application is manifestly "not receivable because the Applicant did not request management evaluation within the 60-day statutory period of Staff Rule 11.2(c)".

b. The Organization initially "informed the Applicant of her step-in-grade on 8 December 2021, when it offered her a [temporary appointment]". Later, effective 25 January 2022, the Applicant "entered on duty, implicitly acknowledging the terms and conditions of her [temporary appointment],

including her step-in-grade". The 60-calendar-day period for requesting management evaluation therefore "objectively started with her entry on duty and expired on 25 March 2022", referring to the Appeals Tribunal in *Rosana* 2012-UNAT-273, para. 25; *Jean* 2017-UNAT-743, para. 24; *Handy* 2020-UNAT-1044, para. 26. Even "if the 60-calendar-day period for requesting management evaluation were to start on 31 January 2022, when the Applicant signed her [letter of appointment], it would have expired on 31 March 2022".

c. The Applicant "requested management evaluation on 15 March 2023, almost one year later". The Dispute Tribunal "cannot waive this requirement under Article 8(3) of its Statute", also referring to *Lara Sahyoun* 2021-UNAT-1149, para. 30.

d. The Applicant's "correspondence with a human resources officer [on] 30 December 2022, and the subsequent response on 18 January 2023 did not reset the deadline for the Applicant to request management evaluation". It is "well-established that a mere reiteration of a decision already made does not constitute a new decision" referring to *Staedtler* 2015-UNAT-546, para. 46; *Sethia* 2010-UNAT-079, para. 20; *Kazazi* 2015-UNAT-557, para. 31; *Wesslund* 2019-UNAT-959, paras. 27-32.

e. As the Dispute Tribunal "has explained" in *Said* UNDT/2017/041 (see, para. 29):

> Reiterations of the same decision in response to a staff member's repeated requests to reconsider the matter do not reset the clock. Therefore, the Applicant's subsequent communications with the Administration seeking reconsideration of the decision do not render this application receivable. As the former UN Administrative Tribunal stated in Judgment No. 1211, Muigai (2005), para. III, "the Administration's response to [a] renewed request would not constitute a new administrative decision which would restart the counting of time" as "allowing for such a renewed request to restart the running of time would effectively negate any case from being time-barred, as a new

> letter to the Respondent would elicit a response which would then be considered a new administrative decision.

f. The Applicant's "reading of former Staff Rule 3.17 on retroactivity of payments (current Staff Rule 3.15) has no legal merit". The present case "does not concern the non-receipt of an allowance, grant, or other payment", but the Applicant's "disagreement with the step-in-grade that she accepted in January 2022". The Appeals Tribunal has "never held that former Staff Rule 3.17 extends the period of time for requesting management evaluation of such a decision by one year". The "deadline for seeking management evaluation of an entry-level is the same as any other administrative decision", referring to *Avramoski* 2020-UNAT-987, para. 46; *Omwanda* 2019-UNAT-906, para. 34.

18. The Applicant's submissions may be summarized as follows:

a. The Applicant "took up her functions" on 25 January 2022 and "made a request under staff rule 3.17" for payment at the step 7 on 30 December 2022. This was "well within the one year deadline for a written claim as set out in staff rule 3.17 (now staff rule 3.15)".

b. The Management Evaluation Unit ("MEU") took the position that "staff members are required to contest determination of their step within 60 days from assuming their functions because this is the date upon which they are aware of their step determination".

c. If it "were the case that a staff member's entitlements were settled upon assuming functions triggering a 60 day deadline to contest any mistake in their calculation this would have the effect of robbing then staff rule 3.17 of any meaning". Staff rules "derive from orders of the General Assembly, it is not available to the Administration to unilaterally derogate from them in such a manner".

d. The MEU relied on the Dispute Tribunal's judgment in *Ho* UNDT/2017/038. This was a summary judgment, and in which "an individual who contested the decision regarding her step calculation four years after she had taken up her functions and after she had resigned". The applicant in *Ho* had "never made a written claim under staff rule 3.17 for her step to be recalculated", and the staff rule 3.17 was not at issue. Instead, "the only issue was to calculate when the implied administrative decision had been taken". The facts in *Ho* "can be very clearly distinguished from the instant case as it did not address a claim made under 3.17".

e. The Appeals Tribunal's judgment in *Sethia* 2010-UNAT-079 "specifically dealt with a challenge to the step allocated on recruitment". The staff member "was recruited in March 2000 and sought review of his step level in December 2000 in conformity with staff rule 3.17". The request for an increase in step "was refused on 9 February 2001", and "much later", the staff member "sought to challenge the Administration's refusal to amend his step". Under staff rule 111.2(a) then in force, the staff member "was obliged to make his request to the Secretary-General for administrative review within two months". The Appeals Tribunal upheld the judgment of the Dispute Tribunal that "the contested decision regarding [the staff member's] entry level upon his appointment was communicated to him on 9 February 2001". Importantly, "the deadline was not found to have run from the date of recruitment or acceptance of the offer but from the date of the Administration's response to his 3.17 request". It was the staff member's "inaction after receiving the response to that 3.17 request that rendered the case time barred".

f. *Sethia* "represents a clear precedent that staff members can make a written claim for recalculation of their step under staff rule 3.17 within one year of assuming their functions". The "60 day deadline for management evaluation runs from the determination of the written claim under staff rule 3.17".

g. In the Appeals Tribunal's judgment of *Mizerska-Dyba* 2018-UNAT-831, the "precise same issue was addressed" as the staff member "sought uplift in her step under staff rule 3.17". Her request was "found to be too late since the Appellant cannot succeed on a claim for "retroactive monetary compensation" where the claim was made several years after the "initial payment". The Appeals Tribunal "at no stage suggested that a 60 day time limit ran from the date the staff member took up their functions".

h. These Appeals Tribunal's "precedents take priority over [the Dispute Tribunal's] summary judgment finding in *Ho*".

i. The position taken by the MEU that "staff members cannot make a 3.17 claim regarding the calculation of step, is in direct contradiction" to the Secretary-General's pleadings in the Dispute Tribunal's case of *Basanta Rodriguez* UNDT/2014/050 in which "the introduction of a new guidance policy for the calculation of language staff level on initial appointment" was addressed. A "decision was made that the guidance would be applied retroactively to staff recruited in the year prior to its introduction", and in pleadings to the Dispute Tribunal, the Secretary-General "explained this rationale as, "[a]ccording to the Respondent, staff rule 3.17 (concerning retroactive payments) allows staff members to seek review of entitlements and payments provided to them within a year of the payments being made. In line with this policy, the Administration determined that staff recruited within a year of the implementation of the Guidelines should be entitled to have their entry level reviewed".

j. It should "not be available to the Administration to alter their interpretation of staff rule 3.17 depending on the nature of the claim before them". The "consistent application of the staff rules across the organisation is the only way to avoid arbitrary decision making". The "Administration's stated

position to this Tribunal is that staff can seek alteration of their step by written claim within one year from the date they take up their functions". This "is precisely what the Applicant has done". Since "the Applicant cannot expect consistent positions be taken by the Administration on receivability the position taken by the decision maker (though not adopted in the management evaluation) will be addressed".

k. The Administration "takes the position that acceptance of the offer of appointment forecloses any later challenge", but this "did not foreclose her raising the issue of step calculation at a later stage". It is "settled law that entering into a contract which is not in conformity with the Staff Rules does not bar a staff member from seeking to vary its terms and seek judicial review should such a request be refused".

l. The Administration also suggests a 60-day deadline ran from communications with the Applicant that occurred before she had accepted the offer of appointment". Staff regulation 4.1 indicates "that a person only becomes a [United Nations] staff member, therefore having standing to contest an administrative decision, upon receiving a letter of appointment". The Appeals Tribunal in *Gabaldon* 2011-UNAT-120 found that "standing in the formal justice system accrues when a staff member has accepted a letter of appointment and fulfilled all the conditions therein". It follows that at the time of the communications relied on by the Administration, "the Applicant had no standing to contest an administrative decision". Only "administrative decisions taken in relation to a staff [member's] contract of employment can be contested by way of management evaluation request". It follows that "no deadline can run from a communication when the Applicant had no contract of employment and was not a staff member".

m. The Appeals Tribunal's judgments in *Avramoski* 2020-UNAT-987 and *Omwanda* 2019-UNAT-906, on which the Respondent relies, "addressed the

[entry of duty, "EOD"] date entered for the relevant staff members following a break in service". Both "staff members in those cases sought to contest the calculation of a termination indemnity but were found to in effect be actually litigating a much earlier decision to impose a break in service entering a new EOD date". Both "staff members in these cases sought to litigate the issue years later". Neither of the cases "address a claim for a benefit or entitlement to which staff rule 3.17 (currently 3.15) applies", and they "were reviewed in relation to an entirely different legal framework" and therefore "simply not applicable to the current issue".

n. The Respondent seeks to suggest that "staff rule 3.17 (currently 3.15) does not apply to step upon recruitment". This position is "asserted without any jurisprudential support". On "all occasions that [the Appeals Tribunal has] considered the calculation of step upon recruitment they have found that staff rule 3.17 (currently 3.15) applied". The Respondent "suggests that all entitlements are set at the moment of recruitment and must be contested immediately". The "Tribunals have long held that the Administration may correct its own mistakes in terms of contracts entered into", and it "follows that a staff member may apply staff rule 3.17 (currently 3.15) to try to resolve such errors in their favor" which is "indeed, the very purpose of the staff rule". The "limitation in time being in order to ensure certainty for the accounts of the Organisation".

o. The Respondent's "motion for summary Judgment makes no explanation for why [the Office of Human Resources] interpreted the staff rule on retroactive payments as specifically applying to calculation of step upon recruitment yet here they seek to argue that it does not and instead a 60 day time limit runs from when a staff member enters on duty".

p. In *Mizerska-Dyba* 2018-UNAT-831, the International Tribunal for the Law of the Sea ("ITLOS") "had an identical staff rule on retroactive payments". In that case "the Administration again interpreted the rule as allowing reconsideration of step within the first year of employment". This was the position taken by ITLOS's Joint Appeals Board ("JAB") and endorsed by the Appeals Tribunal (see, para. 23):

> … The JAB did not err in concluding that ITLOS Staff Rule 3.17 applied to a request for review of entry level and therefore excluded all claims relating to the determination of [the Appellant's] step-in-grade. When a staff member joins ITLOS, his or her salary is determined in accordance with the relevant grade and, within the grade, the relevant step. This matter is governed by ITLOS Staff Rule 3.17 which applies to a situation of underpayment due to an alleged error or mistake by the Administration arising at the date of entry on duty of a staff member. ITLOS Staff Rule 3.17 establishes a time limit of one year for the staff member to request correction of a possible error. [The Appellant's] step was determined upon recruitment, so if an error had occurred, it would have occurred in 2007 and not in 2016. Since the time limit in ITLOS Staff Rule 3.17 applies to requests for review of entry level, [the Appellant] should have requested the correction of the alleged error within one year from her initial appointment.

q. This was "not just the position adopted and approved by [the Appeals Tribunal], the above quote is from the Administration's submissions to the [the Appeals Tribunal] regarding how the Staff Rule on retroactive payments applies to requests to alter step".

r. It should "not be available to the Administration to interpret staff rules in an arbitrary fashion to seek to procedurally block meritorious claims". A "consistent approach demands that they adopt the same approach to the Applicant's request for retroactive reconsideration of her step within the first year of employment".

s. The Applicant "quite correctly made a written claim for the entitlement she considered that she had not received and did so within the one-year time limit", and her "request for management evaluation was made within the subsequent 60 day deadline".

The relevant legal framework

19. Staff rule 11.2(c) provides that "[a] request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested". It is further stipulated that "[t]his deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General". The Dispute Tribunal, however, "shall not suspend or waive the deadlines for management evaluation" pursuant to art. 8.3 of its Statute.

20. Under the jurisprudence of the Appeals Tribunal, the notification of the contested decision occurs when the staff member receives the decision in writing (see, for instance, *Manco* 2013-UNAT-342, para. 20, and *Seyfollahzadeh* 2016-UNAT-620, para. 26). The Appeals Tribunal has also "consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made" (see, *Staedler* 2015-UNAT-546, para. 46, and similarly in, for instance, *Aliko* 2015-UNAT-539, *Kazazi* 2015-UNAT-557, *Thambiah* 2013-UNAT-385, *Cooke* 2012-UNAT-275, *Sethia* 2010-UNAT-079, and *Shayoun* 2021-UNAT-1149).

21. At the same time, former staff rule 3.17(b) on retroactivity of payments (now staff rule 3.15) provides that:

> (b) Staff members who have not been receiving an allowance, grant or other payment to which they are entitled shall not receive retroactively such allowance, grant or payment unless the staff members have made a written claim within one year following the date

> on which the staff member would have been entitled to the initial payment, except in the case of the cancellation or modification of the staff rule governing eligibility, in which case the written claim must be made within three months following the date of such cancellation or modification.

Was the Applicant's 15 March 2023 request for management evaluation filed in a timely manner?

22. It is not disputed that the request for management evaluation was filed after expiry of the period provided for under staff rule 11.2(c).

23. The Applicant's argument that the former staff rule 3.17(b) (now staff rule 3.15) was/is relevant for purposes of computation of the time within which she should have sought management evaluation is flawed. The former staff rule 3.17(b) (now staff rule 3.15)relates to retroactivity of payments, and not to the issue of increase of step which is what her application is about.The Appeals Tribunal's jurisprudence which was cited by the Applicant, namely *Sethia* and *Mizerska-Dyba*, does not support the assertion that staff rule 3.15 (former staff rule 3.17(b)) is relevant for purposes of computation of time.

24. Based on the forgoing, the Tribunal finds that the request for management evaluation was not filed in a timely manner.

Conclusion

25. The application is not receivable because the Applicant did not request management evaluation within the 60-day statutory period of Staff Rule 11.2(c). It stands dismissed.

Summary judgment

26. With this judgment on receivability, the Respondent's 18 July 2023 request for summary judgment has been rendered moot.

(Signed)

Judge Margaret Tibulya
Dated this 25th day of April 2024

Entered in the Register on this 25th day of April 2024

(Signed)

Isaac Endeley, Registrar, New York