



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/038
UNDT/NY/2015/039
Judgment No.: UNDT/2016/025
Date: 23 March 2016
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

ASOMANING

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 25 June 2015, the Applicant, a former staff member with the United Nations Stabilization Mission in Haiti (“MINUSTAH”), filed two separate applications:

a. UNDT/NY/2015/038, which concerns the decisions not to renew her appointment to the post of Deputy Chief, Joint Operations Center (“JOC post”) and the “advertisement of [the JOC post] on a disqualifying basis”, i.e., on a recruit-from-roster basis;

b. UNDT/NY/2015/039, which was filed as a separate claim although it was in fact a motion for an extension of time in relation to Case No. UNDT/NY/2015/038. The Applicant submits that this separate case was filed to address “receivability objections raised by the Management Evaluation Unit in response to [the Applicant’s] management evaluation request”.

2. The Respondent submits that the cases are not receivable for the following reasons: (i) the Applicant failed to file her request for management evaluation within the applicable time limits, (ii) her claims are moot because, instead of being separated, the Applicant first went on sick leave and then accepted the position of Regional Administrative Officer at the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”), (iii) there was no final contestable decision in relation to the advertisement of the JOC post as it was a preparatory step in the selection exercise. The Respondent also submits that the Applicant’s claims are without merit.

Procedural history

3. On 25 June 2015, the Applicant submitted two separate filings as indicated above. The same day, the filings were transmitted to the Respondent together with a notice that the Respondent's reply to the application on the merits (Case No. UNDT/NY/2015/038) was due on 27 July 2015, whereas the Respondent's response to the motion for extension of time (Case No. UNDT/NY/2015/039) was due 6 July 2015.

4. The Respondent's replies were filed as instructed.

5. By Order No. 172 (NY/2015), dated 30 July 2015, the Tribunal directed the Applicant to file a submission addressing the issues of receivability raised in the Respondent's reply of 27 July 2015. The Applicant's submission in response to Order No. 172 was filed on 31 August 2015.

6. Given the common questions of fact and law raised in both cases, the Tribunal considered that the most expeditious and cost effective procedure for considering them was to make an order for combined proceedings and to issue a single consolidated judgment.

7. Accordingly, by Order No. 69 (NY/2016), dated 9 March 2016, the Tribunal directed the parties to file, by 21 March 2016, a submission showing cause why an order should not be made that the two cases be subject to an order for combined proceedings or, alternatively, indicating their consent to the making of the order.

8. On 11 March 2016, the parties filed a joint submission consenting to an order for combined proceedings.

Factual background

9. The Applicant joined the Organization in 1997. After a number of assignments in various duty stations, she joined MINUSTAH in 2012. She was initially recruited as a Human Resources Officer.

10. In 2013, the Applicant was transferred to the Civil Affairs Section in the context of downsizing at MINUSTAH, and, in early 2014, received a notice of non-renewal of her post due to its abolition. However, she was retained as part of the retention process and assigned against the JOC post.

11. The Applicant was concerned about the short-term nature of her assignment. Accordingly, the Office of Staff Legal Assistance (“OSLA”), acting on her behalf, filed a request for management evaluation on 25 July 2014, addressing a number of matters, including the short-term nature of the contract extension that she received in June 2014. The Applicant states that, after submitting her request for management evaluation, she continued to correspond with the Management Evaluation Unit (“MEU”), although they did not reply to her request of 25 July 2014.

12. On 5 December 2014, the Applicant signed an extension of contract form, entitled “Request for extension of appointment of international staff member” (“Request for Extension Form”). This is a standard form used for processing of extensions in missions. The Form stated that the Applicant’s contract was extended from 1 January 2014 to 28 February 2015. The Form also contained the following text: “The contract is renewed for two months, while the recruitment process takes place”.

13. On 5 December 2014—the same day the Applicant signed the Request for Extension Form (see para. 12 above)—she sent an email to MINUSTAH’s

Human Resources Section, the Director of Mission Support, and other officials stating (emphasis added):

Dear All,

Thanks for your continuing support with my case. My [first reporting officer, Mr. EJ] has just confirmed a 2-month contract extension through the end of February 2015 after an arduous 1.5 hour meeting where he affirmed that I have been performing well and proactively in several key areas. Unless you can do something to change the situation, I will live with this for now though *I do not agree with the approach which is firmly against the UN HR rules and regulations*, specifically on the following points:

1. I have been kept on 2/3-month contracts, and now a 2-month contract despite the fact that I am a long serving staff (almost 18 years) with good performance appraisals, and the post I am on is of a year's duration, and this is against the post matching guidelines following retrenchment. There is no labor law that supports incessant probationary periods!

2. My [first reporting officer] is insisting I take an arbitrary test he will design which will not afford me [Field Central Review Board] clearance in order to get future renewals.

3. *He keeps informing me that the post I am sitting on is to be advertised incessantly by Personnel* so he can get someone with operational experience despite the fact that the prior male incumbent did not have significant operational experience, and the JOC guidelines allow for scenarios where civilians can serve as Deputy Chief, and I actually do have some operational experience having been a head of office *It is illegal to advertise a post that is occupied.*

4. Despite my submission of a workplan, this has not been discussed in order for me to be able to join the one-year performance cycle in Inspira that every staff member is entitled to.

5. The short contracts unlawfully abridge my entitlements such as [education] grant, [home leave] and FV [unknown abbreviation] travels, etc.

If the situation has not changed by February, despite yours and the Ombudsperson's efforts, then I will be forced again to take up arms and pursue all the channels available to me through OSLA, MEU, other legal action and so on. ...

14. Throughout the period of December 2014 to February 2015, the Applicant continued her exchange of communications with various MINUSTAH officials regarding her contractual status.

15. On 28 January 2015, the JOC post was advertised on a recruit-from-roster basis. The closing date for applications was 12 February 2015.

16. On 10 February 2015, the Applicant's OSLA representative filed a further management evaluation request which would appear to have been incorrectly dated 11 July 2014. The management evaluation request identified the contested administrative decisions as follows:

Decision to displace me by:

- a) advertising my post, and doing so as a "recruit-from-roster" (from a roster that I am not on); and
- b) not renewing my contract.

17. By letter dated 18 February 2015, the Under-Secretary-General for Management informed the Applicant that, pursuant to staff rule 11.3(b)(ii), the Secretary-General decided to suspend the implementation of the decision not to renew the Applicant's contract and to extend her contract until 27 March 2015 pending completion of management evaluation. (Staff rule 11.3(b)(ii) provides that, in cases involving separation from service, a staff member may first request the Secretary-General to suspend the implementation of the contested decision pending completion of management evaluation.)

18. In or about early March 2015, the Applicant went on sick leave. The Respondent submits that, as of the date of the reply, the recruitment exercise for the JOC post remained incomplete as the Applicant's position continued to be financed against the JOC post.

19. By letter dated 25 March 2015, the Under-Secretary-General for Management replied to the Applicant's request for management evaluation, upholding the two contested decisions.

20. On 30 June 2015, the Applicant accepted an offer to transfer to the position of Regional Administrative Officer with MINUSCA.

Consideration

First case (UNDT/NY/2015/038)

21. The Respondent's primary receivability contention is based on the Request for Extension Form that the Applicant signed on 5 December 2014 and the exchanges between the Applicant and MINUSTAH management. The Request for Extension Form stated that her contract was extended from 1 January 2014 to 28 February 2015. It also contained a note stating: "The contract is renewed for two months, while the recruitment process takes place".

22. The Applicant submits that there was no final decision to not renew her contract or to advertise the post on 5 December 2014. She states that her subsequent email exchanges with MINUSTAH management indicated that these decisions were not final and that she was, in fact, given mixed messages throughout 2014 and early 2015 regarding the prospects of renewal. The Applicant submits that, even after the alleged 5 December 2014 non-renewal notice, she sought to informally resolve her contractual position with the assistance of the Office of the Ombudsman and Mediation Services, which should have resulted in suspension of the management evaluation deadline.

23. Having considered the parties' submissions and the record, the Tribunal finds that the Request for Extension Form, signed by the Applicant on 5 December 2014, was sufficiently clear in that the Applicant was on notice that

the JOC post was to be advertised and that her extension was only for two months whilst the recruitment process was being carried out.

24. On 5 December 2014, the same day the Applicant signed the Request for Extension Form, she sent an email to senior MINUSTAH management. This further confirms that she was aware that the JOC post would be advertised and that her contract was extended for a limited period of time only, while the recruitment process was being carried out.

25. The Tribunal finds that the 60-day time limit for the filing of a request for management evaluation under staff rule 11.2(c) commenced on 5 December 2014. The deadline for filing the request for management evaluation was 3 February 2015. She filed the request on 10 February 2015, which was out of time by seven days.

26. The Applicant has submitted that she sought to resolve her contractual status with the assistance of the Office of the Ombudsman and Mediation Services. However, the Applicant has placed no documents before the Tribunal clarifying the extent of any involvement of the Office of the Ombudsman after 5 December 2014. In any event, staff rule 11.2(c) clearly states that the deadline for a request for management evaluation “may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman”. There is no indication or submission that the Secretary-General extended the deadline in this case under staff rule 11.2(c).

27. The United Nations Appeals Tribunal has consistently held that the Dispute Tribunal does not have jurisdiction, pursuant to art. 8.3 of its Statute, to waive or extend the deadlines for management evaluation requests (see *Costa* 2010-UNAT-036; *Trajanovska* 2010-UNAT-074; *Sethia* 2010-UNAT-079; and *Ajdini et al.* 2011-UNAT-108). Reiterations or repetitions of the same administrative decision in response to the Applicant’s communications do not

reset the clock with respect to the applicable time limits in which the original decision is to be contested (*Sethia; Bernadel* 2011-UNAT-180; *Cremades* 2012-UNAT-271; *Aliko* 2015-UNAT-539).

28. In all the circumstances, the application in Case No. UNDT/NY/2015/038 is not receivable.

Second case (UNDT/NY/2015/039)

29. In Case No. UNDT/NY/2015/039, the Applicant submits that, if the Tribunal finds that her management evaluation request of 10 February 2010 was out of time, she would request that her application was filed in relation to her earlier management evaluation request of 25 July 2014.

30. However, the management evaluation of 25 June 2014 could not have possibly referred to the contested decisions that were made more than four months later, in December 2014.

31. Further, even if the Applicant's application of 25 June 2015 were to be based on her management evaluation request of 25 July 2014, it would be time-barred pursuant to art. 8.1(d)(i) of the Tribunal's Statute and staff rule 11.4(a). The deadline for the Administration's response to her 25 July 2014 expired in 45 calendar days (on 8 September 2014), following which she had 90 calendar days to file her application before the Tribunal (by 8 December 2014). Therefore, her application, filed on 25 June 2015, would be approximately seven months out of time.

32. Article 8.3 of the Statute states that the Tribunal "may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases".

33. Even if the Applicant were to claim that she acted in reliance on erroneous advice from OSLA, that alone could not bring the case within the ambit of an “exceptional case” as provided for by art. 8.3 of the Dispute Tribunal’s Statute (*Scheepers* 2012-UNAT-211).

34. The Tribunal sees no good reason why a proper application in relation to the management evaluation request of 25 July 2014 could not have been filed within the applicable time limits. Accordingly, even if the Tribunal were to accept that the relevant management evaluation request was submitted on 25 July 2014, the particular circumstances would not have warranted a waiver or suspension of the time limits set out in the Tribunal’s Statute.

35. In all the circumstances, the application in Case No. UNDT/NY/2015/039 is not receivable.

Observation

36. The Tribunal notes that these cases are distinguishable from the five cases decided in *Lemonnier* UNDT/2015/124, in which the Applicant was also represented by OSLA. In *Lemonnier*, the Tribunal ordered costs against the Applicant for manifest abuse of proceedings. However, each case has to be decided on its own facts and the mere filing of a second claim does not, without more, amount to a manifest abuse of process. There is a material difference in the manner in which proceedings have been initiated and conducted in these cases compared to *Lemonnier*. In *Lemonnier*, the Applicant filed multiple applications with contradictory submissions on receivability and relevant dates. The Tribunal considers that the applicable test as to whether there has been a manifest abuse of proceedings is not satisfied. Accordingly, it would not be appropriate to make an order for costs in these two cases.

Orders

37. Cases No. UNDT/NY/2015/038 and UNDT/NY/2015/039 are not receivable and are dismissed.

(Signed)

Judge Goolam Meeran

Dated this 23rd day of March 2016

Entered in the Register on this 23rd day of March 2016

(Signed)

Hafida Lahiouel, Registrar, New York