



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/049/T
Judgment No.: UNDT/2021/168
Date: 30 December 2021
Original: English

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

AIT SHAK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. On 27 February 2021, the Applicant, a Transport Assistant with the United Nations Mission for the Referendum in Western Sahara (“MINURSO”), filed an application contesting the decisions to: (a) deny his request for Special Post Allowance (“SPA”) from 27 March 2016 to 27 October 2017 (“SPA decision”); (b) not reclassify the post he encumbers (“Reclassification decision”); and (c) revise the Terms of References (ToRs) for his position (“ToRs decision”).

2. The Respondent replied that SPA decision and the Reclassification decision are not receivable and that the ToRs decision was lawful.

3. For the reasons stated below, the Tribunal finds that the application, insofar as it contests the SPA decision and the Reclassification decision, is not receivable. The Tribunal finds that the ToRs decision was lawful.

Background

4. The Applicant joined the Organization on 13 February 2013 as an Inventory and Supply Assistant at the General Service (“GS”) level, grade 4 (“GS-4”) in the Transport Section with the United Nations Mission for the Referendum in Western Sahara (“MINURSO”), where he worked in the Transport Warehouse Store.

5. On 10 March 2016, the Applicant was promoted to the GS level, grade 5 (“GS-5”) as a Transport Assistant, effective 1 April 2016.

6. On 16 March 2016, the Kingdom of Morocco expelled 84 United Nations staff members, including the Applicant’s supervisor. The supervisor and other 60 essential staff travelled to Spain on 20 March 2016, where they continued to perform their functions remotely.

7. As a result of the expulsion of these staff members, the Transport Section was understaffed. Therefore, the Applicant continued to work in the Transport Warehouse Store, performing some GS-4 level duties in addition to some of his GS-5 level tasks.

8. The Applicant worked with a GS-4 Inventory and Supply Assistant until November 2017 when this staff member went on sick leave followed by an early retirement in December 2019.

9. On 3 February 2020, MINURSO temporarily appointed another GS-4 staff member to the Transport Warehouse Store to work with the Applicant to clear the backlog pending the recruitment for the vacant GS-4 position.

10. MINURSO underwent a restructuring on 7 September 2017, which was implemented over the following years.

11. The Applicant relinquished all inventory and supply management duties in March 2020. He currently performs all the functions of the GS-5 Transport Assistant position in the Office of the Chief Transport Officer (“CTO”).

12. On 1 September 2020, the Applicant’s current supervisor, a Field Staff level (“FS”), grade 5 (“FS-5”) Transport Assistant, asked the Applicant to initiate his 2020/2021 workplan.

13. Between 3 September and 8 September 2020, the CTO, in consultation with the Applicant and the Chief Human Resources Officer (“CHRO”), discussed the need to update the ToRs for the Applicant’s position to document the new work processes and systems in line with the restructuring of the Transport Section.

14. On 15 September 2020, the CHRO sent the Applicant the revised ToRs for the Applicant’s position.

15. On 29 September 2020, the Applicant’s supervisor requested him to amend his workplan consistent with the revised ToRs but the Applicant refused because he claimed the ToRs were still in draft form.

16. On 1 October 2020, the CHRO sent the Applicant a memorandum attaching the revised ToRs and requested that the Applicant use it going forward.

17. On the same day, the Applicant requested a retroactive SPA for additional duties he had performed from 27 March 2016 to 27 October 2017.

18. On 2 October 2020, the CTO and the Applicant met to discuss the Applicant's objections to the ToR and his 2020/2021 workplan. During the meeting, the CHRO informed the Applicant that he was not eligible for SPA.

19. On 22 October 2020, the Applicant requested management evaluation of all the contested decisions.

20. On 2 December 2020, the Under-Secretary-General for the Department of Management, Strategy, Policy and Compliance informed the Applicant that the Secretary-General had upheld the contested decisions.

Considerations

SPA decision

21. The Applicant claims retroactive SPA for additional duties assigned to him during the period of 27 March 2016 to 27 October 2017, including covering for staff members who were on leave in the Transport Section.

22. The Respondent claims that the Applicant's SPA claim is not receivable as the Applicant missed the applicable one year deadline for filing a claim for a retroactive SPA.

23. In the Applicant's further submission dated 15 November 2021, he accepts that a request for retroactive SPA payments must be made within one year following the date on which the staff member would have been entitled to the initial payment. The Applicant, however, argues that "in [his] case, it was different that the mission assigned functions of other staff without respecting the formal procedure and transparency

issuing official TOR in 2016 but rather issuing the official TOR only on [2] October 2020”.

24. The Tribunal notes that staff rule 3.10(b) on SPA provides that a staff member holding a fixed-term or continuing appointment, who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months, may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level.

25. Staff rule 3.17 on retroactivity of payments further provides that a staff member, who has not been receiving an allowance to which he or she is entitled, shall not receive retroactively such allowance unless the staff member has made written claim within one year following the date on which the staff member would have been entitled to the initial payment (staff rule 3.17).

26. The Appeals Tribunal has confirmed that pursuant to staff rule 3.17(ii), a request for retroactive SPA payments must be made within one year following the date on which the staff member would have been entitled to the initial payment (see *Fitsum* 2017-UNAT-804).

27. The record clearly indicates that the Applicant has commendably worked with dedication, taking on additional duties when his team needed support due to understaffing. However, the Tribunal notes that in the Applicant’s request for SPA, dated 1 October 2020, he wrote that he had been performing the additional duties since 27 March 2016.

28. Pursuant to staff rule 3.10(b), if the requirements for SPA were met in the Applicant’s case, the Applicant would have been entitled to an initial payment after three months from March 2016 (i.e., July 2016). The deadline for the Applicant to retroactively request SPA would have therefore been July 2017. The Applicant did not request SPA until 1 October 2020.

29. Having reviewed the record, the Tribunal finds no evidence of procedural impropriety which would have affected the applicable deadline for the SPA claim as argued by the Applicant.

30. As the Applicant submitted his SPA claim three years too late, his claim is time-barred. Accordingly, the Applicant's challenge of the SPA decision is not receivable and cannot be reviewed by the Tribunal further on its merits.

Reclassification decision

31. The Applicant challenges the decision not to reclassify the GS-5 post he currently encumbers. The Applicant states that his post should be reclassified as he has been performing functions of a higher-level post of FS-5.

32. The Respondent submits that the Applicant's claim is not receivable as there has been no final administrative decision in relation to the Applicant's claim for reclassification of his post.

33. In the Applicant's further submission dated 15 November 2021, he submits that "requests for the classification or reclassification the initiation must be made from the manager and when if there is a restructuring in the mission or the job has not previously been classified and if it is classified, [Human Resources] office can provide the classified [job description] for the new [ToRs] but because there is no classification form P270 has been used and no request has been sent by [Human Resources] to Classification Unit in [the United Nations Headquarters], consequently, [the Applicant] cannot appeal following the procedure of classification appeal [...]".

34. The Tribunal notes that classification of posts is governed by ST/AI/1998/9 (System for the classification of posts). Section 1.3 of ST/AI/1998/9 provides that "[i]ncumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within the office and/or a General Assembly resolution may request the Office of Human Resources Management [...] to review the matter for appropriate action".

35. The record indicates that the Applicant did not request reclassification from Human Resources. It follows that the Applicant did not comply with sec. 1.3 of ST/AI/1998/9, which clearly places the burden on initiating review for reclassification on the incumbent of the post. As the Applicant never requested reclassification, there is no final administrative decision regarding reclassification. Without a final administrative decision regarding classification, the Dispute Tribunal lacks jurisdiction to adjudicate the Reclassification decision.

36. In light of the above, the Tribunal finds that the Applicant's challenge of the Reclassification decision is not receivable and cannot be reviewed further on its merits.

The ToRs decision

37. The Applicant contests the decision to revise the ToRs for his GS-5 Transport Assistant position.

38. As way of background, the Tribunal notes that in September 2020, the Applicant and his supervisor had discussions relating to the Applicant's 2020/2021 workplan. During these discussions, questions arose concerning whether the workplan to be used should be based on the Applicant's current roles and responsibilities or based on the generic Transport Assistant (G-5) vacancy announcement, which served as the basis for his selection to the position in 2016. Following these discussions, on 15 September 2020, a draft generic ToRs were prepared and sent to the Applicant for review, but the Applicant indicated on 29 September 2020 that he was unable to create a workplan based on the draft ToRs.

39. The Applicant argues that the revised ToRs constitute a change to his duties and responsibilities and are therefore unlawful. The Applicant contends that the amended ToRs do not reflect the duties and responsibilities listed on the job announcement for the Transport Assistant (G-5) position to which he was initially promoted to in 2016. As an example, the Applicant submits that in the job announcement for the Transport Assistant (G-5) position for which he was recruited,

he was responsible for four contracts with the amounts of USD300,000. In the amended ToRs, the Applicant would be responsible for more than USD2 million concerning services contracts, payments, purchasing goods and equipment of all the fleet in MINURSO.

40. The Respondent, on the other hand, contends that the decision to amend the Applicant's ToRs is lawful. The Respondent submits that the revised ToRs are consistent with the position description for which the Applicant was selected, and commensurate with his skills and experience.

41. The Tribunal notes at the outset that the Secretary-General has broad discretion to assign staff members to any of the activities or offices of the United Nations (see staff regulation 1.2(c) and *Hepworth* 2015-UNAT-503). The assignment of staff members comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate.

42. Based on the record, the Tribunal notes that following the September 2017 restructuring of the Transport Section, MINURSO revised the Applicant's ToRs in September 2020 in an attempt to better align the ToRs with new structure. The amended ToRs do indeed add new functions to the Applicant's duties and responsibilities as a G-5 level Transport Assistant as compared to the functions listed on the job announcement for the Transport Assistant (G-5) position to which he was initially promoted in 2016. These additional functions consist of budget reporting; data management; and requisitioning.

43. The Appeals Tribunal has held that assignment of a staff member to new functions is proper where the assigned functions are commensurate with the staff member's competence, skills and experience (see, for instance, *Al-Refaea* 2019-UNAT-971; *Chemingui* 2019-UNAT-930). The Tribunal finds that the Administration acted within the bounds of its discretion in finding that the additional functions correspond to the Applicant's level and are within the scope of the job description of his position as G-5 level Transport Assistant. The record demonstrated that the

Applicant has received training for the new functions. Moreover, the Applicant has, in fact, been successfully performing the functions in the amended ToRs according to his performance evaluations between 2016 and 2020 where his First Reporting Officer noted that the Applicant “easily achieved all goals”.

44. It follows that the decision to revise the Applicant’s ToRs is lawful as the Administration reasonably decided that the amended ToRs are commensurate with the Applicant’s level, competence, and skills.

Conclusion

45. In light of the foregoing, the application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 30th day of December 2021

Entered in the Register on this 30th day of December 2021

(Signed)

For:

Nerea Suero Fontecha, Registrar, New York