



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

JOCONDO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for applicant:

Victor Rodriguez

Counsel for respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former employee of the Office for the Coordination of Humanitarian Affairs (“OCHA”) who was assigned to Port-au Prince, Haiti, as the Head of the OCHA Office at the D-1 level.

2. On 24 June 2011, the Applicant requested management evaluation of the decision to grant him a fixed-term appointment as Head of the OCHA Regional Office in Dakar, Senegal, at the P-5 level, once his fixed-term appointment expired on 24 August 2011, instead of an appointment at an equivalent D-1 level elsewhere. On 15 August 2011, he forwarded an additional submission to the Management Evaluation Unit (“MEU”) contesting the decision to abolish his post as Head of the Haiti OCHA Office at the D-1 level as well as the decision contained in his 24 June 2011 communication. He did not receive a substantive response to either of his requests from MEU.

3. On 28 December 2011, the Applicant filed a Motion for Extension of Time to file an Application. This Motion was served on the Respondent on 6 January 2012 and he was invited to provide a response by 20 January 2012. On 25 January 2012, the United Nations Dispute Tribunal (“the Tribunal”), by Order No. 15 (NBI/2012), granted the Applicant an extension of time to file his Application.

4. On 11 February 2012, the Applicant filed the current Application with the Tribunal contesting the decisions to: (i) offer him an appointment at the P-5 level instead of at the D-1 level, and the related decisions; (ii) move him from Haiti to Dakar; and (iii) abolish his D-1 post at the end of his last fixed-term contract, 24 August 2011.

5. The Respondent filed his Reply on 19 March 2012.

Preliminary Issue:

6. The Respondent asserts that the Applicant failed to submit the decision to reassign him from Haiti to Dakar for management evaluation and as such, his Application on this particular decision is not receivable. The Respondent also asserts that even if the Applicant's management evaluation requests of June and August 2011 had referred to the reassignment decision, his request would have been out of time in view of the fact that the decision was taken in November 2010.

7. The Applicant submits that he requested management evaluation of the decision to reassign him from Haiti to Dakar on 24 June and 15 August 2011. The Applicant submits that the decision is receivable *rationae temporis* because it was a "continuing act". He also submits that when the idea of reassigning him to Dakar was first floated in November 2010, he conditioned his acceptance of the reassignment to OCHA upgrading the post in Dakar to the D-1 level and that OCHA promised to take the necessary actions to address the matter.

Considerations

8. The first issue to be addressed is whether the Applicant requested management evaluation of the decision to reassign him from Haiti to Dakar. Staff rule 11.2(a) provides that a staff member seeking to formally contest an administrative decision shall, as a first step, request management evaluation of the decision.

9. In June and August 2011, the Applicant submitted requests for management evaluation to the MEU. In both requests, he indicated that he was contesting the "decision to grant him a fixed term appointment as Head of the OCHA Regional Office in Dakar, Senegal, at the P-5 level, once his fixed term appointment expired on 24 August 2011 [...]". In view of the fact that granting him a fixed-term appointment in Dakar necessarily entailed a change of duty station/reassignment from Haiti, where he was working, to Dakar, the Tribunal concludes that the grant of an appointment to Dakar and the reassignment to Dakar are one and the same issue. Thus, he requested management evaluation of the decision to reassign him from Haiti to Dakar.

10. Is the Applicant's request for management evaluation of his reassignment time-barred? The Tribunal is of the view that it is not.

11. Based on the chronology of this case, it is evident that a decision was not taken in November 2010 to reassign the Applicant from Haiti to Dakar, as asserted by the Respondent. According to the Respondent's Reply, in late November or early December 2010, the Deputy Director of the OCHA Coordination Response Division ("CRD") "proposed" that the Applicant be reassigned to Dakar at the P-5 level for the remaining period of his fixed-term appointment. However, in order to accommodate the Applicant, "it was agreed that OCHA would seek an upgrade of [the Dakar] post to the D-1 level". Was this "proposal" an "administrative decision" within the meaning of Article 2 of the UNDT Statute? Categorically, the answer is no.

12. In Judgment No. 1157, *Andronov* (2003), the former United Nations Administrative Tribunal defined an administrative decision as follows:

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences [...]

13. The November 2010 discussion between the Applicant and the Deputy Director, CRD, obviously failed to create an administrative decision in that no definite determination was made by the Deputy Director to reassign the Applicant to Dakar and as such, there were no direct legal consequences to the existing legal order for the Applicant i.e. the Applicant was to remain in Haiti at the D-1 level until such time as OCHA was able to obtain an upgrade of the Dakar post to D-1.

14. In accordance with this November 2010 agreement, the Under-Secretary-General of OCHA ("USG/OCHA") wrote to the Assistant Secretary-General for

Programme Planning, Budgets and Accounts, and Controller (“the Controller) on 6 December 2010 to request approval of the upgrade of the Dakar post to the D-1 level to accommodate the Applicant for medical reasons. On 28 December 2010, the Controller rejected the upgrade request.

15. On 7 February 2011, the USG/OCHA informed the Applicant that the upgrade request had been rejected. The USG/OCHA nonetheless asked the Applicant to “consider” taking up the post at the P-5 level. By email dated 8 February 2011, the Applicant informed the USG/OCHA that he wished to go back to Haiti as his acceptance of the post in Dakar had been contingent upon the upgrading of the post to the D-1 level.

16. On 25 February 2011, the Applicant accepted an offer of a temporary assignment to the Dakar post at the D-1 level.

17. According to the Respondent’s Reply, the Applicant met with the Director and Deputy Director of CRD in 8 April 2011. As a result of these meetings, OCHA “believed the Applicant had accepted the Offer and that his future with OCHA after the expiry of his fixed-term appointment at the D-1 level had been resolved”. On 25 April 2011, the Director/CRD sent an email to the Applicant confirming the offer to appoint him to the Dakar post at the P-5 level upon the expiry of his Haiti appointment on 24 August 2011.

18. The Tribunal considers that up until 7 February 2011, the Applicant and OCHA were still discussing the dynamics of his contractual status for the Dakar post. The Applicant had clearly indicated that he was not willing to take the Dakar post at the P-5 level and OCHA was making efforts to meet his conditions. **At this point** there was no administrative decision taken by the Administration within the meaning of Article 2 of the UNDT Statute. On 23 February 2011, the matter appeared to have been resolved when the OCHA Human Resources Unit formally offered the Applicant a temporary assignment until 24 August 2011 at the D-1 level. Since it was

at the D-1 level, the Applicant apparently had nothing to contest because his issue was in relation to being offered an appointment in Dakar at the P-5 level.

19. Thus it was not until 25 April 2011, when the Director/CRD emailed the Applicant that he had an actual administrative decision to contest.

20. Staff rule 11.2(c) requires that a staff member request management evaluation of an administrative decision within sixty calendar days from the date on which the staff member received notification of the contested decision.

21. The administrative decision the Applicant is contesting was dated 25 April 2011 and he requested management evaluation of the decision on 24 June 2011, which is within the delay prescribed by staff rule 11.2(c). Accordingly, the Tribunal concludes that the Applicant's request for management evaluation of his reassignment is not time-barred.

Decision

22. In view of the foregoing, the Tribunal concludes that the Application challenging the decision to reassign the Applicant from Haiti to Dakar is receivable.

(Signed)

Judge Vinod Boolell

Dated this 3rd day of December 2012

Entered in the Register on this 3rd day of December 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi