



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

REID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM

Sarahi Lim Baró, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Support Mission in Libya (UNSMIL) who was employed on a series of temporary contracts for over one and a half years. In his Application dated 2 January 2014, amended on 31 January 2014, he avers that he was entitled to receive a full assignment grant. It is the Applicant's case that he did not receive 30 days of Daily Subsistence Allowance (DSA) and post adjustment amounting to USD11,002.11.

2. The Respondent filed a Reply on 21 February 2014 in which it is asserted that the entitlement to only the DSA portion of the assignment grant forms part of the terms of the Applicant's temporary appointment in accordance with staff rule 7.14(d) and that the Application is not receivable.

Procedure

3. On 11 March 2014, by Order No. 043 (NBI/2014), the parties were informed that the Tribunal had decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing was not required in determining this case and that it would rely on the parties' pleadings and written submissions. The Applicant was also directed to file his submissions in response to the issue of receivability by Wednesday, 19 March 2014.

4. The Applicant filed his submissions on receivability on 19 March 2014.

5. On 27 March 2014, the Tribunal ordered the Respondent to file a copy of a settlement agreement entered into with the Applicant concerning his claim that he should have been appointed to a Fixed-Term Appointment (FTA) following the conduct of a selection exercise for a D-1 position. The Respondent filed a copy of the said agreement on 28 March 2014.

Facts

6. UNSMIL was established for an initial period of three months pursuant to Security Council resolution 2009 of 16 September 2011.

7. The Secretary-General's Budget report (A/66/354/Add.6) for UNSMIL was issued on 15 November 2011. In paragraph 17 of the report, the Secretary-General proposed staffing requirements which included four positions in the Disarmament, Demobilization and Reintegration (DDR) Section to offer technical assistance to Libyan authorities on arms control, weapons management and disarmament-related matters. It would be headed by a D-1 Chief DDR Adviser.

8. On 14 February 2012, the Applicant was offered a three-month Temporary Appointment (TA) as Senior DDR Adviser at the D-1 level expiring on 18 May 2012. On 6 March and 26 April 2012, he received payments totaling USD6,300 advance on 30 days' DSA.

9. The Applicant's TA was subsequently extended for three-month periods on 19 May 2012, 19 August 2012 and on 19 November 2012.

10. On 15 December 2012, a position specific job opening for the D-1 Principal Security Sector Reform Officer was issued.

11. On 31 December 2012, the Security Sector Advisory and Coordination Division (SSACD) Director made a request for an exceptional extension of the Applicant's TA until 1 April 2013. The TA was then extended from 18 February until 1 April 2013 for one month and 15 days, from 2 April to 12 May 2013 for one month and 11 days and from 13 May to 30 August 2013 for three months and 12 days.

12. On 29 May 2013, in an email to UNSMIL's Chief Human Resources Officer (CHRO) the Applicant asked questions about his relocation and assignment grants, annual leave, home leave, post assignment and health coverage. He received a response to his questions on 5 June 2013 advising that temporary appointments are administered in accordance with attached ST/AI/2010/4Rev.1 (Administration of temporary appointments).

13. On the same date, the Applicant wrote an in email asking the CHRO for advice about the appropriate person to pursue his claims with.

14. On 15 July 2013, the Applicant filed a request for management evaluation of the decisions to cancel the selection process for the post of Principal Security Sector Officer and the failure to apply to him the same conditions of service as those offered to staff members on FTAs.

Applicant's submissions

15. The Applicant submitted that he was offered and accepted conversion to an FTA but this offer was then renegeed upon.

16. The relevant Administrative Instruction, Staff Regulations and Rules distinguish and discriminate between staff members on FTAs and those on TAs in terms of assignment grant. The discrimination in allowances means that the Applicant paid the same staff assessment as other D-1 colleagues on FTAs but his net compensation was slightly less than that of a P-4. Further, taking into account the discrimination in leave days, his net compensation was about the same as that of a P-3 at the same step for a comparable period of time.

17. The distinction between allowance paid to staff members on TAs and those on FTA is in violation of the principle of "equal pay for equal work" enshrined in art. 23.2 of the Universal Declaration of Human Rights and art. 7(a)(i) of the International Covenant on Economic, Social and Cultural Rights. He referred to *Chen* 2011-UNAT-107 and *Tabari* 2010-UNAT-030.

18. The Noblemaire Principle is supposed to guide the United Nations' remuneration policy as confirmed in *Muthuswami et al* 2010-UNAT-034.

19. The nature of TAs as stipulated in ST/AI/2010/4/Rev.1 has not been respected as they are supposed to be for seasonal and short-term/surge work lasting less than one year.

20. To demand the same assignment grant as staff on FTAs is not to confuse the two types of appointment since the essential element, the temporary nature of

the contract remains intact. The Applicant further submits that the International Labour Organization, the World Health Organization and the World Intellectual Property Organization are all part of the United Nations Common System, and all have the categories of “fixed-term” and ‘temporary” but they do not discriminate between the two in terms of benefits, salaries and net remuneration for the same work.

21. In view of the foregoing, the Applicant requests the Tribunal to award him the additional one month’s salary plus post adjustment of assignment grant that he would have received on an FTA after 364 days of continuous service amounting to USD 11,002.11 plus interest.

Respondent’s submissions

22. The Respondent submitted that the Application is not receivable as the Applicant failed to allege a breach of the Staff Regulations, Staff Rules or his terms of appointment and that he did not submit a request for management evaluation in a timely manner.

23. From 1 July 2009, the General Assembly introduced three types of appointments where it decided that staff serving on TAs should not receive the same entitlements as staff members on FTAs.

24. Section 11.1(a) of ST/AI/2010/4/Rev.1 states that staff on temporary appointments are only entitled to the DSA portion of the assignment grant in accordance with staff rule 7.14(d).

25. The Applicant received the portion of the assignment grant applicable to staff on temporary appointments in accordance with the mandate of the General Assembly, the Staff Regulations, Staff Rules and ST/AI/2010/4/Rev.1. He signed letters of appointment in which he accepted the terms and conditions of his employment contract as specified in the Staff Regulations and Staff Rules including staff rule 7.14(d).

26. The Applicant entered into a settlement agreement concerning his claim that he should have been appointed to an FTA following the conduct of a selection

exercise. His claim is not receivable since he has released the Organization from any liability for any failure not to appoint him to a fixed-term position. The Applicant is accordingly estopped from raising any issues concerning allegations of a right to appointment to a FTA in this case.

27. The principles enunciated in *Castelli* UNDT/2009/075 upheld in 2010-UNAT-037 are irrelevant to the Applicant's case as is his reliance on *Chen*.

28. The Applicant's reliance on the principle of "equal pay for equal work" has no application to his case as he is comparing his contractual rights with staff members who are under different contracts of employment. Where a staff member is appointed to a TA, he or she does not fall within the same class of staff members as those appointed on FTAs. Equal treatment in these cases demands that in both instances, the contractual provisions of the respective contracts are enforced.

29. The rationale in *McCluskey*, 2013-UNAT-332 applies in this case. As the Applicant was appointed on a temporary appointment, he does not fall within the same class of staff members as those appointed on a fixed-term appointment. He had been appointed in different circumstances under different rules.

30. The Noblemaire principle is not applicable to the Applicant's claim as it does not cover entitlements such as assignment grants.

31. For these reasons, the Respondent requests that the Application be dismissed.

Considerations

Receivability

32. The competence of the Tribunal is determined by the provisions of art. 2.1 (a) of the Statute:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract ” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

33. To determine whether this claim is receivable, the Tribunal must examine the substance of the Applicant’s Application to determine if it falls within the competence of the Tribunal.

34. The Applicant does not deny that he received the assignment grant that he was due as a staff member on a temporary appointment but alleges that the rules on assignment grants discriminate against staff members engaged on continuous temporary contracts.

Assignment grant entitlements for staff members on temporary appointments

35. In 2008, in A/63/298 (Detailed proposals for streamlining United Nations contractual arrangements: a way forward), the Secretary-General proposed to streamline United Nations contractual entitlements under a single set of staff rules. The proposal introduced the concept of temporary, fixed-term and continuing contracts. The General Assembly addressed the proposals in A/Res/63/250. Materially in articles 2.7 and 2.8 it decided that:

...temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates;

Also decides that staff on temporary contracts would be eligible to receive only the following benefits and allowances: post adjustment; rental subsidy; hazard pay; hardship allowance; the daily subsistence allowance portion of the assignment grant; leave (depending on the length of contract); home leave (per classification of duty station); and limited shipment allowance;

36. ST/AI/2010/4 established terms to apply to staff members on Temporary Appointments. This was abolished and replaced by ST/AI/2010/4/Rev. 1. The provisional staff rules were abolished and replaced by ST/SGB/2010/6.

37. Section 11.1 (a) of ST/AI/2010/4/Rev.1 governs travel related entitlements of staff members on TAs:

Section 11

Travel-related entitlements

11.1 A staff member who holds a temporary appointment serving in posts subject to international recruitment as defined in staff rule 4.5 may be eligible, if not recruited at the duty station or from within commuting distance from the duty station, for the following travel-related entitlements in accordance with the applicable staff rules and the conditions specified in the present administrative instruction:

(a) The daily subsistence allowance portion of the assignment grant in accordance with staff rule 7.14 (d);

38. The effect of this section is that staff on temporary appointments are entitled to the assignment grant stipulated in staff rule 7.14(d). Staff rule 7.14(d) stipulates:

Rule 7.14

Assignment grant

Definition and computation of the grant

(a) The assignment grant is intended to provide staff with a reasonable amount of cash at the beginning of an assignment for costs incurred as a result of the appointment or assignment and is based on the assumption that the main expenses of installation are incurred at the outset of an assignment.

(b) The assignment grant consists of two portions:

(i) The daily subsistence allowance portion, which shall be equivalent to:

a. Thirty days of daily subsistence allowance at the daily rate applicable under subparagraph (c)(i) below; and

b. Thirty days of daily subsistence allowance at half the daily rate in respect of each eligible family member for whom travel expenses have been paid by the United Nations under staff rules 7.2 (d)(i) - iii);

...

(d) A staff member holding a temporary appointment who travels at United Nations expense pursuant to staff rule 7.1 (a)(i) above shall be paid only the daily subsistence allowance portion of the assignment grant for himself or herself only as specified in subparagraph (b)(i) above.

39. In his report A/65/202 dated 20 August 2010, the Secretary-General provided information to the General Assembly on the provisional staff rules to implement the new contractual arrangements. In paragraph 11 he specifically referred to temporary appointments as follows:

Chapter III, on salaries and related allowances, reflects the harmonization of conditions of service... and in particular the new compensation package for staff on temporary appointments, who will receive reduced benefits and entitlements in comparison with staff on fixed term and continuing appointments... In particular, staff on temporary appointment will not receive annual within-grade increments, language allowance, education grant, mobility allowance, non-removal element of the mobility and hardship allowance, repatriation grant or special post allowance.

40. A/Res/63/250 of the General Assembly, based on the information provided by the Secretary-General about the new Staff Rules, is evidence that the changes to the Rules implemented a deliberate and considered policy change by the General Assembly to the nature and entitlements of staff members on temporary contracts. The effect of the changes was to render obsolete previous rules and any case law that had specifically evolved from them.

41. In *Castelli* UNDT/2009/075, the Tribunal considered the entitlement of staff members on temporary contracts to relocation grants. On appeal UNAT held that a continuous employment for a period of one year or longer gives rise to an entitlement to a relocation grant regardless of whether it was single period or consecutive period of employment. *Castelli* did not concern entitlements to an assignment grant and the staff member in that case was on a fixed-term appointment. For these reasons it may be distinguished from this case.

42. It is clear from his submission that the gravamen of the Applicant's case is that the changes to the Human Resources regime and the rules which apply to staff since 2010 discriminate against staff members engaged for extended periods on TAs. He alleges the Rules are in breach of principles of equal pay for equal work and the Noblemaire principle. He does not allege in this case that the rules were incorrectly applied to him.

43. In *Tabari* 2011-UNAT-177 it was held that the general principle of "equal pay for equal work" enshrined as a right under art. 23.2 of the Universal Declaration of Human Rights does not prevent the legislative body or the Administration from establishing different treatment for different categories of workers or staff members, if the distinction is made on the basis of lawful goals.

44. The Applicant is critical of the Administration's use of continual temporary contracts which led to his lengthy engagement on TAs rather than placing him on a fixed-term agreement that would have entitled him to the allowances and increased leave that accrue from such an appointment. The Tribunal accepts that the extended use of the temporary appointments was the reason for the disparity in the amount of assignment grant that the Applicant was entitled to and that this negatively affected the Applicant.

45. However, in this Application the Applicant is effectively asking the Tribunal to find that the Rules on assignment grants for staff members on temporary appointments are unlawful. Those rules were based on resolutions of the General Assembly. Pursuant to art. 2 of the UNDT Statute the Tribunal's jurisdiction is limited to a review of the Respondent's application of the Organization's regulations, rules and administrative issuances. The Tribunal has not been vested with the power to review General Assembly resolutions.

46. The Application is not receivable and is dismissed.

(Signed)

Judge Coral Shaw

Dated this 14th day of July 2014

Entered in the Register on this 14th day of July 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi