



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/082

Judgment No.: UNDT/2017/041

Date: 12 June 2017

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SAID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Nicholas C. Christikos

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant retired from service at the United Nations in February 2007.
2. On 3 November 2016, he filed an Application with the United Nations Dispute Tribunal (UNDT/Tribunal) in Nairobi challenging the contents of an email, dated 16 May 2016, from the Director of the Field Personnel Division (FPD) of the Department of Field Support (DFS) in which the Applicant was informed that his requests for compensation at the G-5 level, prior to his retirement from United Nations Truce Supervision Organization (UNTSO) on 28 February 2007, will not be reviewed any further.
3. The Respondent filed a reply to the application on 5 December 2016.

Facts

4. The Applicant entered into service of the United Nations as a National Security Guard with UNTSO, in Jerusalem, in June 1982 at the G-2 level. In 1987, he was promoted to the G-3 level.
5. On 27 July 2004, the Applicant was made the supervisor for National Security Officers at UNTSO.
6. In October 2004, all UNTSO security posts were reviewed. Following the review, the Applicant's functions as supervisor for National Security Officers was slated for reclassification.
7. In January 2007, the reclassification of the post of National Security Sergeant was approved at the G-5 level effective 1 September 2006.
8. UNTSO advertised the newly reclassified post on 16 January 2007. The Applicant applied and was shortlisted.

9. On 19 February 2007, the Applicant wrote to the UNTSO Chief of Staff, claiming that he had been deprived of the newly reclassified Security Sergeant position and that he should be appointed to the position outside the regular process. On 22 February 2007, the Officer in Charge of the Civilian Personnel Section responded and explained that the newly reclassified position had to be advertised in accordance with section 4 of ST/AI/1998/9, and attached a copy of the classification notice received from the Office of Human Resources Management (OHRM).

10. On 28 February 2007, before the recruitment process for the Security Sergeant position was completed, the Applicant retired and separated from service. UNTSO exceptionally processed the Applicant's application and considered him for the vacancy.

11. The recruitment process was completed on 8 July 2007. The Applicant was selected for the position, but recommended for promotion to the G-4 level because the rules in force at the time did not allow for promotion by two grades higher than that encumbered by a staff member.

12. On 31 October 2007, he was notified of his retroactive promotion to the G-4 level from 1 September 2006 through to his retirement on 28 February 2007. On 6 November 2007, a "Promotion through Reclassification" Personnel Action was raised and the Applicant was paid salary adjustments to reflect the retroactive promotion.

13. The Applicant wrote to the UNTSO Chief Human Resources Officer (CHRO) on 20 April 2015 requesting a copy of the official classification notice and information necessary to make a classification appeal. On 6 May 2015, the UNTSO CHRO replied. She reiterated that UNTSO and the Office of Human Resources Management (OHRM) had agreed that the effective date for the classification for all general service posts was 1 September 2006 and noted that the Applicant had been promoted to the G-4 level on an exceptional basis after his retirement.

14. On 23 December 2015, the Applicant wrote to the Under-Secretary-General, DFS, stating that he did not receive the classification notice until 23 September 2015. He claimed that he was entitled to be paid at the G-5 level for two and a half years prior to his retirement.

15. On 16 May 2016, the Applicant received an email from the Director, FPD. The reply referred to the 6 May 2015 letter as a comprehensive response to the Applicant's requests and stated that there was no basis for further review or action.

16. On 15 June 2016, the Applicant requested management evaluation of the 16 May 2016 email.

17. Following the filing of this Application on 3 November 2016, the Applicant filed a motion for this matter to be transferred so that it is heard and determined at the United Nations Dispute Tribunal in New York.

Considerations

18. On the basis of the facts before it, and particularly considering the effluxion of time, does the Tribunal have jurisdiction to consider this matter on its merits?

19. The Statute of the United Nations Dispute Tribunal provides in art. 8:

1. An application shall be receivable if:

[...]

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

20. With regard to timelines within which a staff member may submit such request, Staff rule 11.2(c) provides:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

21. It is settled law that timelines as stipulated in article 7.1(a) of the UNDT Rules of Procedure and article 8.1 of the UNDT Statute must be strictly observed. The United Nations Appeals Tribunal (UNAT) has clearly and consistently pronounced on the necessity of strict adherence to filing deadlines.¹ If a request for management evaluation is time-barred, the application before the UNDT is not receivable because the UNDT Statute forbids waiver of time limits for management evaluation.² UNAT has also affirmed that an untimely request for management evaluation bars applications before the Tribunal even if management evaluation was actually received.³

22. Article 8.4 of the Tribunal's Statute stipulates that an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

23. The material question before the Tribunal at this point, therefore, is whether the Applicant complied with the timelines as stipulated by applicable legislation when he filed this Application.

24. Did the Applicant seek management evaluation within the time allowed, so as to make his application receivable before the Tribunal?

25. The Application is filed as a challenge against an email from the Director of FPD/DFS dated 16 May 2016, in which the Applicant was informed that there would be no further review of his request for compensation at the G-5 level.

26. The Applicant had been formally notified of his retroactive promotion to the G-4 level on 31 October 2007, and received a Personnel Action to that effect on 6 November 2007.

27. Nearly eight years later, on 20 April 2015, the Applicant wrote to the Respondent requesting a copy of the official classification notice. The Respondent

¹ *Cooke* 2012-UNAT-275 referring to *Mezoui* 2010-UNAT-043; *Tadonki* 2010-UNAT-00.

² *Rosana* 2012-UNAT-273.

³ *Awan* 2015-UNAT-588 para 13-14.

replied on 6 May 2015 and reminded the Applicant that he was provided with a copy of the classification notice on 22 February 2007 and informed him also that the effective date for classification of all reviewed national posts was 1 September 2006.

28. The principle governing the issue of whether a reiteration of a decision already made constitutes a new decision for the purposes of article 7.1(a) of the UNDT Rules of Procedure and article 8.1(d)(i) of the UNDT Statute was laid down in *Ryan* UNDT/2010/174. The Tribunal there said:

When a staff member has submitted requests to the Administration on several occasions, only the first decision of refusal is appealable, and this appeal must be lodged within the time limits which run from the moment of the first decision of refusal. Subsequent decisions of refusal by the Administration are merely confirmative decisions that cannot be appealed. It is only when the staff member's new request is accompanied by new circumstances that the Administration must review it and the ensuing decision cannot be considered as a confirmative decision (see for example judgment No. 1301 (2006) of the former UN Administrative Tribunal, as well as judgment UNDT/2010/155, *Borg-Oliver*, by this Tribunal). In the case at hand, the Applicant does not mention any new circumstances subsequent to the decision of 16 October 2003 that could have obliged the Administration to take a new decision.

29. The Tribunal in *Bernadel* UNDT/2010/210 similarly held⁴:

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". In Judgment No. 1301, *Waiyaki* (2006), para. III, the UN Administrative Tribunal also drew a distinction between "simple reiteration—or even explanation—of an

⁴ See also *Sethia* 2010-UNAT-079.

earlier decision from the making of an entirely new administrative decision”.

30. On the facts of the present case, the Applicant was informed in February 2007 that his promotion must follow a competitive recruitment process. The contention that he should have been promoted to the G-5 level at the time could and should have been challenged when the Applicant received formal notification of his retroactive promotion in October/November 2007. He did not. He also did not challenge the Respondent’s letter of 6 May 2015.

31. The Tribunal finds and holds that the FPD/DFS response of 16 May 2016 was a reiteration of the previous decisions and correspondence received by the Applicant.

32. The Application is therefore not receivable, and is accordingly refused.

33. The Applicant’s Motion for Change of Venue is also refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 12th day of June 2017

Entered in the Register on this 12th day of June 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi