



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/093

Judgment No.: UNDT/2018/102

Date: 11 October 2018

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SOLOMON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON
RECEIVABILITY**

Counsel for the Applicant:

Daniel Achach, Ocheing, Achach & Kaino Advocates

Counsel for the Respondent:

Lauren Alaie, UNDP

INTRODUCTION

1. At the time of the application, the Applicant served as a Logistics Assistant with the United Nations Development Programme (UNDP). She held a fixed term appointment at the G-5 level, and was based in Nairobi, Kenya.

PROCEDURAL HISTORY

2. On 28 November 2016, the Applicant filed this application with the United Nations Dispute Tribunal in Nairobi, challenging the Respondent's decision to withhold her terminal dues.

The Applicant contests the decision of 29 March 2016 "to withhold her terminal dues on the grounds that there were Investigations continuing against her [*sic*"]". The Applicant alleges that the "action and/or inaction of the Office of Audit and Investigation has caused and continues to cause [the Applicant] great suffering and distress".

In her Application, the Applicant is seeking "1. Conclusion of all Investigations against [the Applicant] and/or Exonerations from all allegations brought against her. 2. Immediate release of her terminal due(s). 3. Payment of Pension Monies due. 4. A declaration that the pending investigation are illegal and infringes on [the Applicant's] legitimate expectation that the Investigation would be timely and just [*sic*"]".

3. The Respondent filed his Reply to the application on 18 May 2017.

4. The Respondent maintains that this application is non-receivable as the Applicant has not identified an administrative decision that affords a jurisdictional basis for appeal to the United Nations Dispute Tribunal (UNDT), and the Applicant has not filed a request for management evaluation prior to the present application.

5. On 3 September 2018, the parties were informed that this matter had been transferred to the docket of Judge Alexander W. Hunter, Jr.

6. The Tribunal has carefully reviewed the parties' submissions and determined that this matter can be properly adjudicated on the basis of the written submissions before it.

FACTS

7. The Applicant joined UNDP on 1 April 2006 as a Logistics Assistant. She held a fixed term appointment at the G-5 level with the UNDP Country Office (the Office/CO) in Kenya.

8. In March 2015, the Office of Audit and Investigations (OAI) identified evidence suggesting that the Applicant had colluded with UNDP vendors to commit procurement fraud.

9. On 26 March 2015, OAI informed the Applicant that she was being investigated. The subject notification letter stated that OAI was conducting an investigation into allegations that the Applicant:

“[...] colluded with UNDP vendor/s and/or engaged in anticompetitive schemes in relation to UNDP procurements;

Demanded and/or received commission/s (kickback/s) in the form of a financial or other benefit/s from UNDP vendor/s, either directly or via the use of an agent/s;

Failed to disclose to UNDP the receipt of a financial or other benefit/s, provided to [the Applicant] by a vendor/s either directly or via an agent/s;

Misrepresented facts or omitted material information to UNDP, in order to obtain a financial benefit from UNDP;

Took action/s or omission/s to avoid or deviate from UNDP Financial Regulations, Rules and Procedures; and

Abetted, concealed and/or conspired in any of the above actions, including an act or omission, bringing UNDP into disrepute”.

10. On 18 November 2015, the Applicant was notified that she was the subject of an investigation concerning further allegations including that she:

[...] failed to disclose an interest or relationship with a third party who might benefit from decisions in which the staff member takes part; favoritism in the award of a contract to a third party;

Utilized [her] office or knowledge gained from [her] official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those [she] favour and/or that [she] utilized [her] office for personal reasons to prejudice the positions of those [she] did not favour;

Failed to disclose actual or potential conflicts of interest to UNDP;
and

Abetted, concealed and/or conspired in any of the above actions,
including any act or omission, bringing UNDP into disrepute”.

11. On 2 December 2015, the Applicant wrote to the Resident Representative (RR) for advice on her early retirement options given that she had “been experiencing a lot of challenges with [her] health”.

12. On 7 January 2016, the RR informed the Applicant that while the Office was prepared to support her in dealing with her health issues and advised her that if she does avail herself of early retirement “since [she] is a subject of an ongoing investigation, the country office will be requested to withhold payment of [her] final entitlements, until such time the investigation is finalized and closed”.

13. On 8 January 2016, the Applicant replied:

I was aware of the office withholding my entitlements until such time when the investigation is over and a report handed over to the office on course of action for all subjects. My plan retirement was actually based over the next two years or so. Since moving to Procurement, I am much better in terms of health and stress and my other factors. I had therefore, hoped that the office could extend my contract in my current position and based on the investigative report and I can start preparing for my early retirement then [*sic*].

14. By letter dated 29 February 2016, the Applicant submitted her resignation to Mr. Michel Balima, then-Resident Representative, UNDP Kenya giving one-month notice and indicating that her “last working day will be 31 March 2016”. In the letter, the Applicant stated she was resigning “due to personal reasons”.

15. On 4 March 2016, the Resident Representative acknowledged the Applicant’s resignation stating “it is with regret that I acknowledge and accept your resignation from UNDP Kenya effective 31 March 2016”. The Resident Representative further informed the Applicant that “payment of [her] final entitlements is subject to a number of clearances. Please consult with Human Resources for further information on separation formalities”.

16. On 21 March 2016, the Applicant received a letter from Ms. Catherine Masaka, Deputy Country Director, Operations, UNDP Kenya detailing the administrative procedures of the separation process including that “final settlement will only be paid upon submission of a duly completed and signed clearance form”.

17. On 29 March 2016, Ms. Maria-Threase Keating, the then-Country Director, UNDP Kenya wrote to the Applicant informing her that “[a]s you are aware, your resignation comes at a time when the Office of Audit and Investigation (OAI) is in the processes of reviewing certain transactions at the CO and have invited you as a Subject in their investigation. In this respect, management has consulted Legal office on the matter and the response given was that the CO should temporarily withhold your final entitlements until such a time as you are cleared by OAI”. The Country Director further explained that this was consistent with the response provided to the Applicant by the former Resident Representative on 7 January 2016 and the Applicant’s acknowledgement of 8 January 2016.

18. On 31 March 2016, the Applicant was separated from the service of the UNDP, Kenya.

19. On 27 May 2016, Mr. Charles Njenga, then-counsel to the Applicant wrote to the Senior Legal Advisor requesting information on the status of the investigation and about the release of the Applicant’s final entitlements.

20. On 3 June 2016, the Senior Legal Advisor replied that due to the complexity of the investigation more time was needed in order to present the Applicant with a draft investigation report for her comments. With respect to the final entitlements, the Senior Legal Advisor advised that the Organization was not in a position to release such payment until a determination was made, based on the findings of the investigation, that there was no indebtedness to the Organization.

21. On 22 June 2016, the then-Counsel to Applicant replied to the Senior Legal Advisor raising the same issues and indicating that the Applicant intended to “escalate the matter to the next level”.

22. On 28 November 2016, the Applicant filed her application with the United Nations Dispute Tribunal.

23. On 1 May 2017, OAI sent the Applicant a copy of the draft investigation report and requested her comments on the findings contained therein. The Applicant was given thirty days to submit her response and any countervailing evidence.

24. On 2 October 2018, this Tribunal requested, in a case management order, the following from the parties:

The Tribunal requires the parties to provide written responses to the following questions:

Has the investigation been completed;

What did the Office of Audit and Investigations (OAI) find and recommend;

File with the Tribunal a copy of the summary memo or full report of OAI; and

Has the Applicant been paid all or part of her final entitlements?

25. On 5 October 2018, the Respondent replied in relevant part as follows:

The OAI Investigation Report was finalized on 22 June 2017. The...OAI found and recommended that the allegations against the Applicant were substantiated.... The Applicant has not been paid her final entitlements. As established in the OAI Investigation Report, a loss of approximately US\$ 12,253.00 on the part of UNDP was found to have resulted from the actions of the Applicant. Partial recovery of this amount has been effected against the Applicant's entitlements. The parties remain in *inter partes* negotiations regarding the resolution of the issues between them, including as it regards the balance of the entitlements.

26. The Applicant has not replied.

SUBMISSIONS

Applicant

27. It is the Applicant's contention that the Respondent has acted in contravention of section 83 of the UNDP Legal Framework Addressing Non-Compliance with UN Standards of Conduct which requires investigations to be completed within six months unless it is certified to be a complicated case.

28. As this case has not been certified as complex by OAI, the prolonged investigative period cannot be justified and has caused the Applicant anxiety, blood pressure problems and humiliation, and delayed the release of her final entitlements.

Respondent

29. The Respondent's case is that the application should be dismissed because the Applicant has not identified an administrative decision that confers jurisdiction for this appeal to the UNDT.

30. Additionally, the Applicant has failed to submit a request for management evaluation as required by staff rule 11.2(a) and article 8 of the Statute of the United Nations Dispute Tribunal. Therefore, the Tribunal has no jurisdiction to

consider the application before it because the Applicant has failed to satisfy that statutory prerequisite.

CONSIDERATIONS

A. Is the Applicant's challenge to the decision to temporarily withhold her final entitlements receivable *ratione materiae*?

31. In her application to the Tribunal, the Applicant describes the contested decision as the “[w]ithholding of her terminal dues on the grounds that there were Investigations continuing against her [*sic*]”.

32. The decision to temporarily withhold the Applicant's final entitlements pending the completion of the investigation by OAI into allegations of fraud, collusion, conflict of interest and misuse of authority is not receivable since it does not constitute an appealable administrative decision within the meaning of Article 2.1 (a) of the Statute of the UN Dispute Tribunal. At that point in the investigation, the Applicant did not lose any rights owing to her as a separated staff member because the investigation was still in progress.

33. Article 2.1 (a) of the Statute of the UN Dispute Tribunal establishes that:

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 [...]”.

34. In this regard, the jurisprudence of the UN Appeals Tribunal, UNDT and former UN Administrative Tribunal, has consistently held that¹

[a]n administrative decision is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. [...] Administrative decisions are therefore characterized by the fact that they are taken by the Administration,

¹ See Judgment No. 2013-UNAT-304, quoting the former Administrative Tribunal Judgment No. 1157 (2003), *Andronov*.

they are unilateral and of individual application, and they carry direct legal consequences.

35. The application is not receivable, *ratione materiae*, since the contested “decision” does not have direct legal consequences for the Applicant. Additionally, the Applicant took the decision to resign, notwithstanding being advised that in doing so a suspension on the processing of her final entitlements would occur pending clearance of the issue of any financial indebtedness as a result of the allegations against her. The circumstances the Applicant complains of are therefore largely a consequence of her own action in resigning. The Administration’s action in suspending the processing and payment of the Applicant’s final entitlements during the course of the ongoing investigation was merely a temporary measure to enable an administrative decision to hold the Applicant liable for any financial loss incurred by the Organization as a result of a finding of misconduct.

36. Additionally, this appeal is non-receivable because the Applicant failed to submit a request for management review identifying an administrative decision which would thereby afford the Administration an opportunity to consider the matter.

37. Article 8 of the Statute of the UNDT states that:

1. An application shall be receivable if [...]

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

38. In turn, staff rule 11.2(a) provides that:

a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision.

39. And once an “administrative decision” is properly identified, staff rule 11.2(c) further provides that the request:

shall not be receivable by the Secretary-General unless it is sent within sixty (60) calendar days from the date on which the staff member received notification of the administrative decision to be contested.

40. The Applicant identifies the decision she is contesting as the decision taken by the Country Director on 29 March 2016 to “withhold [her] terminal

dues". The Applicant further acknowledges that she was notified of this decision on 29 March 2016. As per staff rule 11.2(c), it was incumbent upon her to submit her request for management evaluation of that decision within the statutory sixty-day timeframe, i.e. by 28 May 2016. The Applicant, although represented by counsel, did not submit a request for management evaluation. In her application, the Applicant herself concedes that she did not file a management evaluation request concerning the decision to withhold her final entitlements pending clearance from OAI.

41. The decision of 29 March 2016 was unequivocal. It was, in fact, confirmation of what the Applicant had already been told in the email from the Resident Representative on 7 January 2016. Further, the 29 March 2016 decision explained the reasons for the temporary withholding of her final entitlements and the fact that it was contingent on completion of the OAI investigation. As such, the Applicant was fully informed of both the decision and the reasons for it and was, from that date, in a position to challenge the lawfulness of the decision

42. The Applicant was required to request a management evaluation of the contested decision but she did not do so. Having failed to take the mandatory first step of requesting a management evaluation, the Applicant does not have access to the Dispute Tribunal's jurisdiction.²

43. In light of the above, this application is not receivable as the Applicant did not submit a request for management evaluation as required by staff rule 11.2(a) and article 8.1(c) of the UNDT Statute.

Conclusion

44. In view of the foregoing, this Tribunal rejects this application as not being receivable.

² *Planas* 2010-UNAT-049). In cases such as *Syed*, 2010-UNAT-061, *Kovacevic* 2010-UNAT-071, *Trajanovska* 2010-UNAT-074 and *Jennings* 2011-UNAT-184, the United Nations Appeals Tribunal (UNAT), has dismissed appeals due to the Applicant's failure to request management evaluation of the decisions they were contesting.

(Signed)

Judge Alexander W. Hunter, Jr
Dated this 11th day of October 2018

Entered in the Register on this 11th day of October 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi