



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

AREERAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

OSLA

Counsel for Respondent:

Alan Gutman, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a GS-6 Facilities Management Assistant with the Economic and Social Commission for Asia and the Pacific (“ESCAP”). By an application filed on 4 December 2017, the Applicant contests an asserted decision to pay him a salary which is not equal to that of other GS-6 staff in Bangkok.

Facts

2. The Applicant signed a letter of appointment on 14 September 2017, which provided that he would be employed in the Secretariat of the United Nations at the level of GS-6, step IV, from 30 August 2017. His gross salary was to be THB1,278,818. He received his first payslip on 25 September 2017, with a pay date of 30 September 2017. He asserts that then he first discovered that there were separate pay scales for staff at the same level, depending upon when they commenced as staff members.

3. On 9 October 2017, the Applicant requested management evaluation of the contested decision and on 2 November 2017, the Management Evaluation Unit replied to his request, which was considered not receivable.

4. In his application, the Applicant seeks rescission of the decision, payment of the difference between his salary and the salary of the pre-1 March 2012 colleagues at the same level from the beginning of his contract, and the pre-1 March 2012 salary going forward.

5. The Applicant correctly anticipated that there may be an issue concerning the receivability of his application, addressing such in his application. The Respondent raised the issue as a threshold issue in his reply filed on 8 January 2018. Following the filing of the reply, the Applicant was given an opportunity to file a rejoinder by 1 May 2019. No rejoinder was filed.

Parties' submissions

6. The Applicant's principal contentions are:

a. The Applicant has asserted that there was a decision which directly affects his terms of appointment within the meaning of art. 2.1(a) of the Statute of the Tribunal. He has referred to *Pedicelli* 2015-UNAT-555 noting that it is relevant to the matter before the Tribunal, asserting that “notwithstanding a finding that the Secretary-General had no discretion in the implementation of an ICSC decision, the negative impact of that decision still rendered it capable of review.” In particular, he has referred to the following part of the decision:

[I]t is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an “administrative decision” falling within the scope of Article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.

b. The Applicant goes on to assert that “to find otherwise would be to render decisions regarding fundamental contractual rights of staff members immune from any review regardless of the circumstances”;

c. Further, or in the alternative, the Applicant has submitted that the decision is *ultra vires*, as the Secretary-General is asserted to have no discretion and must implement the decision of the ICSC, with no consideration, then the rule of law is absent from the Organization. The Applicant points to the receipt of his monthly payslip as being the evidence of the implementation of the decision to apply a secondary pay scale, referring to Judgment *Tintukasiri et al.* UNDT/2014/026, confirmed on appeal, which provides that:

It is only at the occasion of individual applications against the monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale

without rescinding it. As such, the Tribunal confirms its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.

d. The Applicant states that he is not challenging the 2011 or 2012 decision to generally implement the secondary salary scale, but rather the specific implementation by the Secretary-General of the unequal salary scale to him, the existence of which he did not know until he received his first salary.

7. The Respondent's principal contentions are:

a. The application is not receivable on the basis that the alleged contested decision is not a decision within the meaning of art. 2 of the Tribunal's Statute. The Applicant is receiving the salary to which he agreed on 11 July 2017, upon him signing the offer of appointment, which included the precise salary to be paid and is the basis of the terms of the contract of employment, insofar as it relates to the salary. Thus, there has been no decision which has varied the terms and conditions of the legal regime covering the employment of the Applicant;

b. The former UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003) provides that an "administrative decision" is a unilateral decision taken by the Administration in a precise individual case which produces direct legal consequences to the legal order. The Applicant's September 2017 salary statement does not reflect a unilateral decision and introduced no change to the legal order;

c. The payslip/statement accurately reflects the agreed salary and is in accordance with the salary scale applicable to the Applicant. It does not reflect any unilateral decision by the Organization. The Applicant neither asserts or establishes that the salary in the statement deviates from the salary jointly agreed by the parties during the offer and acceptance of the Applicant's appointment; and

d. The different salary scales had been published and were available to be viewed on the internet.

Consideration

8. The Applicant believes that he has received unequal treatment, been discriminated against and has suffered financial injury as a consequence of receiving a lesser salary than his GS-6 colleagues who were recruited prior to 1 March 2012.

9. There are two salary scales which have been applied. The salary scale effective from 1 January 2015 is applicable to all staff recruited to the General Services category at the Bangkok duty station on or after 1 March 2012. This salary scale was recommended to the General Assembly by the International Civil Service Commission (ICSC) as a consequence of a survey undertaken which found that salaries in the General Services category were higher than comparators by 27.2 per cent in Bangkok. The ICSC determined that it should apply what is known as the Flemming principle as its guide for recommending the level of salaries. This principle provides that the conditions of service for locally recruited staff within the United Nations should reflect the best prevailing local conditions found for similar work at the city of a mission or post.

10. The second salary scale applies to those who were recruited prior to 1 March 2012. It is an exceptional pay scale to address the issue of acquired rights of the staff engaged with the Organization in Bangkok prior to 1 March 2012, as a reduction in salary for such staff would have an impact upon them through a change in the contractual relationship in respect of the quantification of their salary, whereas newly recruited staff would be engaged under the revised salary scale, as had been determined and adopted by the General Assembly. New prospective staff may decide not to accept the salary offered by the revised salary scale, whereas existing staff as at 1 March 2012 have certain acquired rights in respect of their salary as a result of their already being in service prior to the salary scale reduction.

11. The Tribunal notes that the Applicant is asserting rights which he does not have. Insofar as he asserts that there is a decision which negatively affects his terms of appointment, this cannot be sustained. His terms of appointment were set by specific agreement and were not impacted in any manner by any decision which was implemented in January 2015 or were disclosed to him when he received his first payslip. He agreed to certain terms and conditions in the letter of appointment signed by him on 14 September 2017. The salary scale applied to his appointment was that published and applicable. He appears to be asserting that he has in some manner the same acquired rights as those who had been working for the Organization before 1 March 2012 and who, as a consequence were not subject to the reduction of salary of 27.2 per cent.

12. An acquired right, is an acquired contractual right. It is predicated upon the existence of a contractual relationship at the time that the acquired right is in some manner impacted by a unilateral decision of the Organization. In this matter, the Applicant had no such contractual relationship at the relevant time and there has been no change in his salary, or contractual terms from those offered and agreed by him with the Respondent. Any rights which may be acquired by him can only run from the time of the commencement of his contractual relationship, and not before. He has no privity of contract in respect of the staff members who were engaged prior to the introduction of the new salary scale. He cannot assert that such rights are attached to his contract.

13. Further, the assertion that the decision is *ultra vires* must also fail. The Respondent is correct in that the payslip the Applicant received was an outcome of the agreement he had entered into with the Organization, on the basis of the salary scale in force for those who entered its service on or after 1 March 2012. It was no evidence of a decision to change his agreed salary.

14. The Tribunal notes that the Appeals Tribunal in its Judgment *Al Surkhi et al.* 2013-UNAT-304 clearly adopted the definition of an “administrative decision” as developed by the former UN Administrative Tribunal in Judgment No. 1157, *Andronov* (2003), namely that:

[i]t is acceptable by all administrative law systems, that an “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. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or 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.

15. Applying the test of *Andronov*, as the Tribunal is bound to do, there simply was no decision of the type claimed. There was no unilateral decision which had a direct legal consequence upon the existing contractual rights of the Applicant. His rights were as agreed with the Organization in his letter of appointment and remained unaltered.

16. The Applicant’s complaint about decisions which may result in there not being equal pay for equal work in breach of the Universal Declaration of Human Rights is not a matter which can be considered by this Tribunal unless it may be related directly to an administrative decision in respect of which the Applicant has a right to challenge. No such appealable decision exists in respect of which the Applicant has any rights to bring before the Tribunal.

17. The Tribunal is an administrative review Tribunal and is not to be equated with that of a domestic labour court or tribunal where it may be possible to independently challenge a situation where there could be unequal payment for equal work. This Tribunal deals with only a very limited type of applications, as has been determined by the General Assembly to be appropriate for the staff engaged within the United Nations.

Conclusion

18. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed as irreceivable.

(Signed)

Judge Rowan Downing

Dated this 21st day of May 2019

Entered in the Register on this 21st day of May 2019

(Signed)

René M. Vargas M., Registrar, Geneva