



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/050
Judgment No.: UNDT/2020/102
Date: 29 June 2020
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ENG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR

Introduction

1. The Applicant filed the current application to contest the Administration's refusal to retroactively change her entry on duty ("EOD") date with the United Nations Common System ("UNCS") from 30 July 2008 to 15 October 1996. She is seeking rescission of the decision, reinstatement of her original EOD in the UNCS, reimbursement of any monies recovered, moral damages in the amount of USD50,000 and costs for expenses associated with the pursuit of her claim.

Facts

2. The facts below are based on the parties' pleadings and additional submissions.

3. The Applicant joined the United Nations on 15 October 1996 on a short-term contract. She resigned on 31 May 1998 but was reappointed in August 2001. Between August 2001 and July 2008, she served with the United Nations Secretariat on various types of appointments, which were punctuated with several breaks-in-service and separations. She was separated from service on 29 July 2008 and reappointed on 30 July 2008 with the United Nations Mission in Sudan ("UNMIS") on a fixed-term appointment ("FTA"). This appointment was limited to service with UNMIS.¹

4. In June 2011, while still serving in UNMIS, the Applicant accepted an appointment with the United Nations Environment Programme ("UNEP") at the P-5 level, effective 18 July 2011.² The Chief, Staff Administration Section, United Nations Office at Nairobi ("UNON"), advised the Applicant on 28 August 2011 to resign from UNMIS for two reasons: (i) to formalize her choice to be "reappointed" instead of "transferred" to UNEP; and (ii) to prevent her from having two overlapping appointments.³ On 29 August 2011, the Applicant signed a memorandum of

¹ Applicant's submission in response to Order No. 110 (NBI/2019), annex A/4.; Respondent's reply, annex 2.

² Respondent's reply, annex R/4, annex A/5, Applicant's submission in response to Order No. 110 (NBI/2019), annex A/4.

³ Respondent's reply, annex R/8.

understanding opting to carry over her annual leave balance from UNMIS to UNEP.⁴ On 1 September 2011, the Applicant submitted a resignation letter with retroactive effect to 17 July 2011 that stated *inter alia* that she wanted: her recruitment to UNEP to be considered a reappointment and for UNMIS to separate her.⁵

5. On 13 September 2011, the Department of Field Support (“DFS”) noted in the Applicant’s file that she had been separated upon resignation on 17 July 2011 and reappointed to UNEP effective 18 July 2011. This notation was changed on 9 December 2011 to read “transfer to other UNCS org for mobility purposes”.⁶ On 5 January 2012, a personnel action form was raised to grant the Applicant mobility following her reappointment to UNEP.⁷

6. The Applicant was selected for a position with the United Nations Mission in Kosovo (“UNMIK”) and on 1 February 2014, was transferred from UNEP to UNMIK.⁸ Subsequently she was reassigned to the United Nations Mission in Liberia.⁹ Umoja generated a personnel action form regarding her promotion on 21 October 2016 that indicated her EOD UN Secretariat and EOD UN common system as 30 July 2008.¹⁰

7. Between December 2016 and 26 January 2017, the Applicant communicated with the UNMIL Human Resources Section, which in turn communicated with DFS, regarding the resetting of her EOD UNCS and UNS dates from 30 July 2008 to 15 October 1996. On 26 January 2017, DFS explained that the change in the Applicant’s EOD date related to her multiple separations and reappointments and that clarification had to be sought as to whether the EOD date should be changed to reflect her last reappointment on 18 July 2011.¹¹

8. On 27 February 2017, the Applicant requested management evaluation of the

⁴ Application, annex 8.

⁵ Ibid.

⁶ Applicant’s submission in response to Order No. 110 (NBI/2019), annex A/4.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid., annex 5.

¹⁰ Respondent’s reply, annex R/11.

¹¹ Application, annex 1.

decision to change her EOD UNCS from 15 October 1996 to 30 July 2008.¹² In a response dated 24 March 2017, the Management Evaluation Unit (“MEU”), rejected the Applicant’s request as irreceivable on the basis that the request was filed outside the 60-day delay in staff rule 11.2(a) and that there was no reviewable administrative decision.¹³

9. The Applicant filed an application against the refusal to correct her EOD UNCS date on 15 May 2017. The Respondent filed a reply on 4 July 2017.

10. It is noted that on 15 August 2017, the Applicant filed an application on the merits contesting the decisions to retroactively change her EOD date in the United Nations Common System to 18 July 2011 and to recover the resulting overpayments of mobility allowance. This case, registered as UNDT/NBI/2017/069, has been concluded through settlement.

Receivability

Respondent’s case

11. The application is not receivable *ratione materiae and ratione temporis* for the following reasons:

a. The change in the Applicant’s EOD dates is not an administrative decision within the meaning of art. 2.1(a) of the UNDT Statute because it has not produced any legal consequences directly affecting the Applicant’s terms of appointment or employment contract.¹⁴ The Applicant has not produced any evidence that any of her benefits and entitlements have been adversely affected by the change in the EOD date. The Dispute Tribunal cannot speculate about events or facts that have not yet taken place.¹⁵

b. Should the change in the EOD date be deemed an administrative

¹² Ibid., annex 2.

¹³ Ibid., annex 3.

¹⁴ Cf *Avramoski* 2020-UNAT-987, paras. 41-43.

¹⁵ Cf *Valimaki-Erk* UNDT/2012/004, para 35.

decision by the Tribunal, then the Applicant failed to submit a timely request for management evaluation. She was notified of the contested decision on 21 October 2016 by an automatic Umoja notification of her promotion to Chief of Staff, D-1 and should have requested managed evaluation by 20 December 2016. The Applicant erroneously relies on an email communication from DFS dated 27 January 2017 as the date of notification. This email was merely a response to the Applicant's request for clarification and did not reset the time limit for management evaluation.

c. Still relying on *Avramoski*,¹⁶ the Respondent submits that the application is also not receivable under art. 8.4 of the Dispute Tribunal Statute because the Applicant did not file this application challenging her 18 July 2011 reappointment until almost six years later.

Applicant's case

12. The application is receivable for the following reasons:

a. The contested decision is an appealable administrative decision in the sense contemplated by UNAT in *Lee*¹⁷ because it had a direct and negative impact on the Applicant in that there was an intention to recover payment of a mobility allowance as a result of the change of EOD date. The recovery was contested in another application that has now been settled and withdrawn. Thus, the refusal to rectify the change initiated by the Administration constitutes an appealable administrative decision.¹⁸ The EOD date has implications for pension calculations, termination indemnity and in the treatment afforded in cases of organizational downsizing, which occurs repeatedly in peacekeeping missions.

b. The United Nations Appeals Tribunal ("UNAT") has held that an

¹⁶ *Avramoski* 2020-UNAT-987, paras. 44-48, 50.

¹⁷ *Lee* 2014-UNAT-481, para. 49.

¹⁸ *Tabari* 2010-UNAT-030.

administrative decision has to be in writing to enable the parties and the Tribunals to identify and correctly calculate the date the applicable time limits start to run.¹⁹ Further, the UNAT affirmed that a response denying correction of a past anomaly is a new administrative decision triggering new time limits.²⁰ The Applicant is not contesting the personnel action form generated by Umoja but rather the response of a designated official to the request that an electronically generated change in her record be rectified. Without an explanation of why the change occurred, including the policy basis for the decision, there was no final administrative decision. The Applicant submitted a timely request for management evaluation once she received a reasoned response to her request for rectification; thus, the situation at paragraphs 44-48 of *Avramoski* does not apply.

Considerations

13. The Tribunal recalls that data input in the human resources management system may, in certain circumstances, become the expression of an administrative decision. It, however, reiterates that spotting the “EOD” date on personnel action notifications is not obvious, neither is the meaning of it clear and unambiguous. The relevant administrative decision triggering the time limits here is the distinct and separate decision refusing to change the EOD date.²¹ Therefore, the application is within the prescribed time-limits.

14. Regarding the question of receivability *ratione materiae* of claims to having the EOD date corrected, this Tribunal held in *Avramoski*:

Where the entry is incorrect, however, there is a discord which may misinform administrative decisions which rely on it (for example calculation of entitlements) as well as the staff member as to his or her status, for example regarding the applicable regime of mandatory retirement age.²² As a matter of principle, a staff member may, therefore, have legal interest in having the entry corrected. The

¹⁹ *Roig* UNDT/2012/146 citing *Schook* 2010-UNAT-013.

²⁰ *Elmi* 2016-UNAT-704.

²¹ *Eng* Order No. 193 (NBI/2017), at para 35.

²² *Siri* Order No. 306 (NBI/2015) Corr. 1.

Respondent maintains that the Applicant did not identify any benefits that have actually been negatively affected as a result of determining her EOD date [...]. As a matter of law, however, they may be numerous, including: eligibility for continuous appointment, accrual of various entitlements, regime determining retirement age and access to after service health insurance. The Tribunal will therefore examine the question on the merits.²³

15. This position was consistent with the one expressed by the former United Nations Administrative Tribunal, which operated on the same definition of administrative decision as presently UNAT and UNDT, i.e., *Andronov*²⁴, and which allowed correction of a record in relation to EOD date as a receivable matter in and of itself.²⁵

16. The Appeals Tribunal in *Avramoski*²⁶ disagreed. Whereas it invoked the definition of “administrative decision” as set out in *Andronov*, it found lack of receivability under art. 2 of the UNDT statute because:

41. [T]here was no evidence before the Dispute Tribunal that the EOD date or the refusal to amend it had a direct impact or legal consequences on the Appellant’s terms of appointment or contract of employment.

42. [I]f the EOD date entry in 2008 had “no unlawful impact on the Applicant’s terms of appointment including all her benefits and entitlements”, it follows that the refusal to amend that date would also have no impact. As there was no direct impact or legal consequences to either the EOD date or the refusal to amend it, neither can be an “administrative decision” as per *Lee* [...].

²³ *Avramoski* UNDT/2019/085.

²⁴ United Nations Administrative Tribunal Judgment No. 1157 (2003).

²⁵ United Nations Administrative Tribunal Judgment No.1135 para XXVI.

²⁶ 2020-UNAT-987.

17. In essence, the Appeals Tribunal equalled receivability of a matter concerning entry of data in the official record with a prefatory/preparatory act contemplated in *Lee*.

²⁷ As a consequence, a decision refusing to correct an EOD date is not appealable as such; a staff member may only appeal when an incorrect entry misinforms a decision causing concrete negative consequence for the terms of appointment or contract.

18. In the present case, the Applicant indeed does not derive negative consequences from the putative error in the EOD date other than those already settled in case UNDT/NBI/2017/069.

19. It follows that the application is not receivable.

Judgment

20. The application is accordingly dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 29th day of June 2020

Entered in the Register on this this 29th day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

²⁷ 2014-UNAT-481.