



Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

DUFRESNE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALD/OHR

Introduction

1. On 19 February 2018, the Applicant, a Principal Rule of Law Officer at the D-1 level, step 5, with the United Nations Assistance Missions in Somalia (“UNSOM”) filed the application in which she detailed the contested decision in two parts.

2. The Applicant contests firstly, that the Management Evaluation Unit (“MEU”) deemed her request for management evaluation “out of time”. The Applicant contends that her request for Management Evaluation was not “out of time” because there was no decision made on the substantive complaint raised in her request.

3. Secondly, the Applicant contests that the substantive complaint raised in her request for Management Evaluation remains unaddressed. That complaint was that the United Nations payroll HQ had made “numerous errors” regarding *inter alia* her contribution to the United Nations Joint Staff Pension Fund (“UNJSPF”) while she was on Special Leave Without Pay (“SLWOP”).

4. The case was initially assigned to Judge Nkemdilim Izuako under Case No. UNDT/NBI/2018/26.

5. On 28 March 2018, the Respondent filed his reply in which he submits that the application is not receivable because (a) it does not concern an appealable decision (*rationae materiae*), and (b) it is, in any event, time-barred (*ratione temporis*). Even if found receivable, the Respondent contends that the application is without merit.

6. By email of 16 November 2018, the Nairobi Registry informed the parties that the case had been transferred to the New York Registry for adjudication by the Tribunal in New York “to ensure judicial efficiency and the expeditious disposal of cases” as “the Tribunal [had] conducted a review of its docket and concluded that it was necessary to rebalance its Registries’ case load”.

7. On 16 December 2019, the case was reassigned to the undersigned Judge.

Consideration

8. In accordance with art. 19 of the Dispute Tribunal's Rules of Procedure, the Tribunal finds that "for the fair and expeditious disposal of the case and to do justice to the parties", it would be appropriate to handle the issues of receivability regarding the present case on a preliminary basis. If the Tribunal thereafter finds that the application is not receivable, it will reject it and dispose of the case without entering into a review of its merits.

9. In this regard, the Tribunal notes that under art. 2.1(a) of the Dispute Tribunal's Statute, "The Dispute Tribunal shall be competent to hear and pass judgement on an application ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment."

10. In a case like the present one where a staff member seeks to "formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment", staff rule 11.2 provides that for the application to be receivable by the UNDT, the Applicant must first have filed a request for management evaluation of the relevant decision as none of the listed exceptions apply. The time limit set by Staff Rule 11.2 for filing that request is within 60 calendar days from the date when the staff member received notification of the decision. Thus to be receivable, all claims and/or allegations must have undergone management evaluation or, at least, this must have been requested (see, for instance, *Aliko* 2015-UNAT-540, para. 38, and *Gnassou* 2018-UNAT-865, para. 30).

11. As for the definition of the contested administrative decision, it is well established by prior Judgements that the "statutory burden is placed upon an applicant to establish that the administrative decision in issue was in non-compliance with the

terms of his or her appointment or contract of employment. Such a burden cannot be met where the applicant fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on the applicant's contractual rights" (see *Haydar* 2018-UNAT-821, para. 13 and, similarly, for instance, *Planas* 2010-UNAT-049). At the same time, under Appeals Tribunal's consistent jurisprudence, the Dispute Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review" (see *Fasanella* 2017-UNAT-765, para. 20).

12. The Tribunal further observes that under the jurisprudence of the Appeals Tribunal, it is settled caselaw that "the Management Evaluation Unit's 'decision' ... is not an administrative decision subject to judicial review by the Dispute Tribunal. Rather, the judicially reviewable administrative decision is the underlying decision ... that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member" (see *Farzin* 2019-UNAT-917, para. 41, and similarly *Kalashnik* 2016-UNAT-661).

13. In light of the above, after closely perusing the casefile, in particular the application and the request for management evaluation, the Tribunal finds that the underlying decision that the Applicant appears to contest can—on a preliminary basis—be defined as the United Nations payroll's alleged decision to reject to take action on the Applicant's request to make a retroactive pension contribution to UNJSPF after her return from SLWOP.

14. In this regard, before proceeding any further with the matter, the Tribunal will need to know the parties' positions on when (if ever), how and by whom the decision identified at paragraph 13 above was taken.

15. In the alternative, if any of the parties find that the definition of the contested decision is incorrect, the Tribunal must know their views on what the contested administrative decision(s) then is/are and when (if ever), how and by whom this/these decision(s) was/were taken. Accordingly, the Tribunal will make the corresponding

orders thereon and subsequently decide on how the issue(s) of receivability is/are to be decided.

16. The undersigned Judge notes that as her current term with the Dispute Tribunal is limited to three months, the parties will be required to strictly cooperate with observing the deadlines set out in the Tribunal's orders.

17. In light of the above,

IT IS ORDERED THAT:

18. By **4:00 p.m. on Monday, 30 December 2019**, the Applicant is to confirm whether the contested decision can be defined as the United Nations payroll's alleged decision to reject to take action on the Applicant's request to make a retroactive pension contribution to UNJSPF after her return from SLWOP and when (if ever), how and by whom this decision was taken. If not, the Applicant is to succinctly and precisely define what decision(s) she wishes to contest and state when (if ever), how and by whom this/these decision(s) was/were taken;

19. By **4:00 p.m. on Monday, 6 January 2020**, the Respondent is to provide his response to the Applicant's 30 December 2019 submission;

20. The Tribunal will thereafter proceed to decide how the issue(s) of receivability is/are to be decided.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 17th day of December 2019