



ATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/102
Order No.: 306 (NBI/2015) Corr.
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Date: 30 September 2015
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SIRI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION DURING
THE PROCEEDINGS**

**AND ON A MOTION FOR A STAY OF
PROCEEDINGS**

Counsel for the Applicant:

Nicole Washienko, OSLA
Alexandre Tavadian, OSLA

Counsel for the Respondent:

Alister Cumming, ALS/OHRM
Steven Dietrich, ALS/OHRM

9. Following a competitive recruitment process and separation from UNRWA, the Applicant joined the United Nations Secretariat on 12 November

15. On 25 September 2015, the Management Evaluation Unit (MEU) rejected the Applicant's request regarding the separation decision and also rejected the Applicant's request regarding the recruitment decision.

Respondent's submissions on receivability

16. The Respondent challenged the Applicant's submission that the Respondent is estopped from raising receivability at this stage and submitted for his part that the said argument is without merit. He continued that the Under-Secretary-General for Management's letter of 25 September 2015 notifying the Applicant of the Secretary-General's decision to uphold the decision to separate the Applicant, expressly states *ih*

The Secretary-General expressly reserves the right to raise the issue of receivability at any subsequent hearing of this matter.

Accordingly, the Respondent may raise the matter of receivability at this stage.

17. The Respondent further argued that the Dispute Tribunal is not competent to order the reliefs sought by the Applicant. He pointed out that under art. 10. 2 of the Dispute Tribunal's Statute, the Tribunal may order temporary relief by suspending the implementation of a contested administrative decision during the proceedings, except in cases of appointment, promotion or termination.

18. According to him the present matter concerns a case of appointment. The Applicant challenges a decision to separate him from service on the grounds of mandatory retirement. Separation from service necessarily involves a decision involving appointment. The decision to undertake a recruitment process also involves appointment. Accordingly, the Dispute Tribunal lacks jurisdiction to order the suspension of the implementation of the contested decisions.

19. The Respondent's second submission with regard to receivability relates to time lines. He argued that the Application is not receivable *ih*

20. In tracing the facts of the case, he pointed out that on 10 February 2015, the Director, FPD/DFS notified the Applicant that her team had investigated and wished to confirm that his retirement date is at age 60 on 30 September 2015. This

notification was clear and unambiguous. The time for filing a request for management evaluation therefore began to run when the Applicant was first notified that his mandatory retirement date would be 30 September 2015, that is, on 10 February 2015.

21. The Applicant should therefore have submitted a request for management evaluation within 60 days, that is, no later than 11 April 2015. Instead he waited until 13 August 2015.

22. Also on 10 February 2015, the Administration issued a letter of appointment to the Applicant, renewing his appointment until 30 September 2015. The Applicant signed this letter of 17 March 2015, with no reservation or caveat. Accordingly, the issuance of the letter in February 2015 shows that the decision notified to the Applicant on 10 February 2015 was final. Even if the 10 February 2015 notification was not final, then by the time of his signing the letter of appointment, the Applicant knew that he was to separate from service on 30 September 2015.

23. This decision was merely reiterated on 15 July 2015 and 27 July 2015. However, reiterated decisions, even when questioned by the Applicant, do not reset the time limits for requesting management evaluation.

24. It was clear that the decision had already been taken and was final. Even if the Applicant had a basis to believe that the matter was still under consideration that would not absolve him from his responsibility to comply with the statutory time limits.

25. With regard to the Applicant's challenge of the ongoing recruitment process for his post, the Respondent argued that the Applicant has made no submissions on the legality of the decision to commence a recruitment process beyond the assertion that, because the decision to separate him is unlawful, so must be the recruitment process. The Applicant is seeking to circumvent the time limits by challenging a separate decision to recruit a Director of Mission Support to replace him. As the Applicant may not challenge the separation decision, he may not attempt to challenge it through an appeal against a related decision.

26. In relation to the same issue, the Applicant has not identified a final administrative decision.

27. The Applicant has provided no authority for the proposition that a decision to start a recruitment process is a contestable decision. In *Iu* 2013-UNAT-378, the United Nations Appeals Tribunal (the Appeals Tribunal) held that there is only one administrative decision that completes the selection process. The selection procedure ends with the selection of the successful candidate, and it is this administrative decision that may be contested. All other decisions within the selection procedure are preparation for the final selection and do not amount to a contestable administrative decision.

28. This aspect of the Application is not receivable, since a decision to initiate recruitment is not an “administrative decision” subject to review by the Dispute

Considerations on receivability

31. Firstly, regarding the issue of time lines for bringing the Application challenging the decision as to the Applicant's retirement date, having carefully reviewed the wording of the 10 February 2015 email from Ms. Kapilashrami to the Applicant, the Tribunal is persuaded that the Administration had not made a

35. In view of the foregoing, the Tribunal finds and holds that the present case is receivable.

Applicant's submissions on the merits

a. Application for grant of Stay of Proceedings Pursuant to Art. 19 and 36 of the Rules of Procedure

36. In *Vbi* 2011-UNAT-160, the Appeals Tribunal held that where the

working days prior to the date of his separation as required under art. 14.3 of the Rules of Procedure.

41. In the same manner, the Applicant also seeks to suspend the recruitment process undertaken in relation to his post but again was unable to file an Application for suspension of action under art. 14, five working days prior to the likely finalization of this process as required under art. 14.3 of the Rules of Procedure.

42. The Applicant's separation will occur before the UNDT will have sufficient time to adjudicate the Application for suspension of action under art. 14 of the UNDT Rules of Procedure. Since the Job Opening for the Applicant's post closed approximately one and a half months ago, after being advertised for a mere twelve days, it is also likely that the recruitment process for this post will be finalized before the Tribunal will have time to adjudicate the Application for

46. The mandatory retirement age of any staff member employed by an international organization that is part of the United Nations Common System depends on the following two factors: (a) entry on duty date (EOD); and (b) employing entity.

47. Until recently, for a majority of organizations that are part of the United Nations Common System, the mandatory age of separation was 60 years of age for staff whose service began prior to 1 January 1990 and 62 for those who were

51. Regulation 9.2 applies exclusively to staff members of the United Nations Secretariat. This provision does not mention or otherwise refer to staff members of other international organizations within the United Nations Common System.

52. The term “appointment” is not defined in the Staff Rules and Regulations. However, several provisions assist in determining when an appointment occurs within the meaning of Staff Rules and Regulations.

53. Staff regulation 4.1 and staff rule 4.1 make it clear that the term “appointment” refers to appointments in the United Nations Secretariat.

54. In applying staff regulation 9.2, one must determine the age of a current staff member’s mandatory retirement age on the basis of his EOD date with the United Nations Secretariat. Staff regulation 9.2 does not allow the Administration to take into consideration the EOD dates with other organizations within the United Nations Common System. Upon accepting an appointment with the UN

Case No. UNDT/NBI/2015/102

Order No. 306

General may, in the interest of the Organization, extend this age limit in exceptional cases.

65. Accordingly, a staff member's mandatory age of retirement is determined on the basis of the staff member's initial appointment or entry into duty in the United Nations Common System and covers the period of the staff member's continuous service. Where a break in service interrupts a staff member's continuity of service, the staff member's reappointment is considered a new appointment under staff rule 4.17. For purposes of staff regulation 9.2, the period of continuous service commences from the date of the staff member's reappointment.

66. The Applicant's reimbursable loan from UNRWA to the United Nations Secretariat, which covered the period from 1 February 2007 to 11 November 2009, and his subsequent transfer on 12 November 2009 was in accordance with staff rule 4.9(a), which provides:

Inter-organization movements are defined in and shall be governed by an inter-organization agreement among the organizations applying the United Nations common system of salaries and allowances.

67. Accordingly, the Applicant's movement was governed by the Inter-Organization Mobility Accord to which UNRWA is a party.

68. The Applicant expressly agreed to a transfer, on 12 November 2009. During the hearing, the Applicant sought to argue that his agreement was not related to this particular transfer from UNRWA to MINURCAT. However, the surrounding circumstances – his selection for the Director of Mission Support position and his previous loans to MINURCAT – make it clear that his signature could only have related to his transfer from UNRWA to MINURCAT.

69. Article 5.1 of the Accord, which applies to transfers provides:

Service in the Releasing Organization shall be counted for all purposes, including credit towards within-grade increments, as if it had been made in the Receiving Organization at the duty station(s) where he/she actually served.

74. While the Applicant's IMIS PAs containing the erroneous EOD entries have since been rectified, these PAs, by themselves, are mere administrative tools and not a record of his rights and entitlements as a staff member, and therefore cannot create such a right in and of themselves. These IMIS PAs are neither sufficient to overcome the official documentary record of the Applicant's reimbursable loan and subsequent transfer from UNRWA in line with the provisions of the Accord. Neither can it be used as a justification not to apply the Organization's policy on retirement age in the Applicant's case.

75. The Applicant claims that he was explicitly separated from UNRWA upon accepting an appointment with the United Nations Secretariat. While the term "separation" was used by UNRWA in the Applicant's administrative details for its own administrative purposes, this cannot change the fact that the Applicant was transferred, as agreed to by the Applicant himself and by UNRWA, without any break in the continuity of the Applicant's United Nations

78. Furthermore, there is a limit to the extent that staff members may request a **pb** review, made years later, of the circumstances surrounding their separation from service.

79. Where a staff member does not appeal their “transfer” and seek to be formally recognized as having “separated” at the time of such occurrence, they cannot later argue that their transfer cannot be relied on in subsequent decisions. Accordingly, the Applicant cannot now claim that his transfer in 2009, which did not involve any resignation or break in service and where his UNRWA entitlements such as annual leave and home leave service credits were carried over to the United Nations Secretariat, interrupted his continuous service with the Organization.

80. The Applicant cannot claim that he had no legitimate expectation that his retirement age was at 62 years. A claim of legitimate expectation can only arise out of a firm commitment. For a legitimate expectation to arise, the Administration must make an express promise to the staff member which the staff member then relies upon to his or her detriment. The Applicant bases his claim of legitimate expectation on a PA form from UNRWA showing that he had been separated, the fact that he made a written declaration under staff regulation 1.1(b) and his IMIS record. None of these supersede the plain terms of staff regulation 9.2 and article 5.1 of the Accord.

81. In any event, the Applicant’s assertion that he relied on his EOD date in his IMIS record is undermined by his inability to explain to the Dispute Tribunal the meaning of the various EOD dates shown on his personnel action forms. If the Applicant is unable to describe the meaning of these dates, then he was not in a position to rely on them as a clear expression of the Administration’s position. Furthermore, the Applicant was unable to point to any IMIS record which showed a retirement date, or any other communication, that expressly showed his retirement date as 30 September 2017.

82. Furthermore, he clearly must have understood that the EOD dates on his PA were incorrect. The EOD dates incorrectly showed that he joined the United Nations Common System on 1 February 2007. The Applicant was on a

reimbursable loan from UNRWA to MINURCAT at that time. Accordingly, his EOD date in the United Nations Common System was his appointment date with UNRWA, that is, 30 November 1989. It is not credible for the Applicant to maintain that he thought his appointment date in the United Nations Common

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86. In relation to the challenge to the decision to separate the Applicant from service, there is no situation of urgency in this case. The requirement of particular urgency is not satisfied if the urgency was self-created or caused by the staff member seeking relief.

87. The Applicant was notified of the decision on 10 February 2015. Instead of challenging the unequivocal and final decision at that time, he chose to wait six months before challenging the decision before the MEU.

88. In relation to the decision to undertake a recruitment process, the process is ongoing. The evaluation of candidates is still ongoing and no selection of a candidate to fill the position has been made yet. Currently, short-listed candidates for this and similar vacancies at the same level are being assessed. Selection is not imminent and there is therefore no urgency.

89. The contested Job Opening was posted on 4 August 2015, with a closing date of 16 August 2015. Accordingly, more than six weeks have lapsed between the posting and the date of the Application. The Applicant was entitled to challenge the contested decision earlier, but instead chose to wait. Accordingly, any urgency was created by his own actions.

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90. Any harm suffered by the Applicant can be compensated financially. Furthermore, as the Applicant has known his mandatory retirement date since 10 February 2015, and the need to recruit to replace him, he has had ample time to mitigate any damage he may suffer. Accordingly, the Applicant has failed to establish irreparable harm.

Considerations

91. Article 10.2 of the Statute of the Dispute Tribunal stipulates:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative

decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

92. Article 14 of the Tribunal's Rules of Procedure under which the instant Applications are brought makes near-identical provision as follows:

At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

93. Based on the foregoing provisions, the Tribunal has the power to order suspension of a decision only if all three cumulative conditions, namely prima facie unlawfulness, particular urgency and irreparable damage, are fulfilled. It is well-

96. The Applicant placed before the Tribunal a letter from UNJSPF dated 1 February 2010 stating that he separated from UNRWA on secondment to MINURCAT on 11 November 2009. Also before the Tribunal is a PA form from UNRWA stating that the Applicant had separated from the Organization on secondment and that the said separation became effective on 12 November 2009.

97. It has also been argued on behalf of the Applicant that all the Personnel Action forms raised and issued by the Secretariat with regard to his employment (r)-8(a)-3(te)-3(8'76[(M)-

102. Although both parties to this Application argued their issues extensively and cited several legal authorities in support, this Tribunal having perused them has decided that no good would be done at the level of this interlocutory Application by delving into an examination of the authorities cited.

103. On a proper examination of the arguments however, the Tribunal is persuaded that there is a triable issue before it and that the Applicant has discharged the burden of showing that a ~~fit~~ case arises here deserving the full determination of the Tribunal. The Tribunal also finds that the other statutory requirements of urgency and irreparable harm have been satisfied in accordance with art. 10.2 of the Statute of the Dispute Tribunal and art. 14 of the Rules of Procedure.

Conclusion

104. In view of the foregoing, the motion for interim measures is successful.

105. The decision to separate him from service on the basis of mandatory retirement and the decision to undertake a recruitment process in relation to his post are suspended until the determination of the case on the merits.

106. The Tribunal shall issue an order setting an accelerated hearing date for the Application for early November 2015.

(S~~g~~)

Judge Nkemdilim Izuako

Dated this 30th day of September 2015

Entered in the Register on this 30th day of September 2015

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Abena Kwakye-Berko, Registrar, Nairobi