



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/114
UNDT/NBI/2015/035
Judgment No. UNDT/2015/094
Date: 7 October 2015
Original: English

Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye Berko

TORKORNOO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Miles Hastię OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a former staff member who served as Chief Transport Officer in the United Nations Mission in Liberia (UNMIL) at the P5 level. He challenges the decision dated 29 May 2014 not to renew his fixed term contract.

Procedural history

2. On 18 June 2014, the Applicant requested a management evaluation of the non-renewal decision and the “downsizing” of his post from P5 to P4 (MER1).¹ On 23 June, he filed an application for suspension of action of the non-renewal decision to the Dispute Tribunal, which was granted on 30² June

3. The Management Evaluation Unit (MEU) rejected MER1 on 3 October 2014 and informed the Applicant that it had received documentation regarding the

Parsonnel Division of the Department of the Fi

evaluation request addressing the Administration's failure to address his classification appeal (MER2).

6. In reply⁴, the Respondent alleged, inter alia, that the claim of the alleged failure of the Administration to address the Applicant's classification appeal is not receivable ratione materiae as the Applicant failed to wait for the 45 day period for management evaluation to expire prior to filing his Application and that the Applicant had not exhausted internal remedies because there has been no final decision of the Classification Appeals Committee (CAC).

7. On 2 February 2015, MEU rejected MER2.

8. The Applicant filed a second Application on 9 February 2015 which repeated the allegations in the first Application but added a reference to the first request for management evaluation response received from Management Evaluation Unit (MEU) on 3 October 2014.

9. On 9 March 2015, the Applicant filed a motion to consolidate the applications. He submitted that he had filed the second application to meet possible receivability objections of the Administration. If the Applications are consolidated, the receivability questions may simply be ignored, resulting in efficiencies for the Tribunal and parties.

10. The Respondent replied that the Application for consolidation should be rejected. In reliance on Saka 2010-UNAT-075 he requested that the Tribunal first determine the receivability of the two Applications separately as, "it would not serve judicial economy to consolidate cases where the claims are not receivable".

Considerations on Consolidation

11. Saka concerned the timeliness of a single challenge is distinguishable on the facts. In any event the Appeals Tribunal stated at para 21 that "[t]here is no error in considering the merits of a case at the same time as receivability, but judicial economy is usually but not always better served by considering time

⁴ The Respondent's Reply 4 6l7(r)e7(d)-7(e)1e

First Application

18. The impugned administrative decision in the first Application was described by the Applicant as the “~~no~~renewal of appointment” dated 29 May 2014. Of the three grounds relied on for the unlawfulness of the ~~renewal~~ decision one alleged failures in the process of classification. In particular: the “failure of the Organization to conduct proper classification, classification review, classification appeal before taking classification separation decision”.

Respondent’s submissions

19. The Respondent quite correctly did not challenge the receivability of the challenge to the ~~decision~~ decision of ~~no~~renewal in the first Application. It was an administrative decision which may be reviewed by the Tribunal and the Application was timely

20. First, ~~the~~ Respondent submitted that the claim of the alleged failure of the Administration to address ~~the~~ Applicant’s classification appeal is not receivable rationae materiae

is a specialized mechanism for recourse for a staff member's protection which is not honoured by the Administration. It cannot argue that its failure must be subjected to a different recourse mechanism

23. The Applicant submitted that he filed a timely classification appeal to the CAC. He rejects the Respondent's argument which would have the effect that the Applicant must wait forever and beyond prescribed time limits that have been breached before seeking recourse

Considerations

24. The documents filed with the Applicant show that, as well as challenging the non-renewal of his contract, the Applicant challenged the processes adopted to reclassify his post including the consideration of his classification appeal to the CAC based on alleged procedural and substantive irregularities in the classification process which he filed on 15 October 2014

25. The Applicant pleads that he has received no information pertaining to that appeal. The classification appeal process has not been completed

26. The Respondent states as a matter of fact that a report was submitted on the Applicant's appeal to the Secretary of the CAC on 19 November 2014. The next step in the procedure will be for the Secretary of the CAC to submit a copy of the report to the Applicant for his comments. His comments will be provided to the Field Personnel Division of the Department of Field Support (DPS), which will have two weeks to comment

27. In the light of these submissions, the Tribunal proceeds on the factual basis that as yet, no decision has been made on the Applicant's appeal to the CAC.

28. The Applicant's arguments on receivability are supported by Fuentes UNDT-2010-064 and Fuentes 2011-UNAT-105. In that case the Appellant appealed to the CAC against the decision not to reclassify her post under Section 5 of ST/AI/1998/9. She received no answer to her appeal. She did not request a

review of the administrative decision as required by ~~staff~~ rule 111.2(a) but filed a claim directly with the UNDT.

29. At first instance, in answer to the Administration's case that the Applicant had not challenged the ~~no~~ response from the CAC within the time limit specified in ~~staff~~ rule 111.2(a), the Dispute Tribunal held that administrative instruction ST/AI/1998/9 was intended to create a special procedure to ~~challenge~~ refusal to reclassify a post and ~~that~~ ~~staff~~ rule 111.2(a) was not applicable

An appeal by a staff member to the Classification Appeals Committee, or to any other Appeals Committee, such as JAB, must be considered a procedure intended to safeguard ~~staff~~ member's interests, and such a committee, once the appeal is referred to it, must be considered obligated to make a recommendation in that regard. If we say that when the administration fails to follow up a classification appeal it has implicitly denied that appeal, we are effectively saying that the administration may ignore the recommendation of the Classification Appeals Committee. That is obviously contrary to [ST/AI/1998/9].

Section 6.14 of Administrative Instruction ST/AI/1998/9 reads as follows:

"The Assistant Secretary

The UNDT correctly pointed out that it is a special procedure for classification under ST/AI/1998/9 and not Rule 111(2)(a) of the former Staff Rules that applies.

32. These authorities confirm that a failure to decide an appeal against classification of a post encumbered by the Applicant is an administrative decision which may be subject to review by the Tribunal without the necessity for the Applicant to have recourse to management evaluation.

Conclusion

33. The whole of the first Application is receivable. This finding effectively renders the second Application redundant, however, for the sake of completeness the receivability of the challenges in that Application are addressed below.

Second Application

34. The impugned administrative decision described in the second Application is similar to the first but includes reference to the Applicant's appeal against the classification decision. It reads, "Non-renewal of appointment and failure to conduct proper classification review (including appeal)".

35. It also refers to the steps taken by the Applicant to challenge the decision reviewed by MEU. On 19 December 2014, over one year since filing the classification appeal, the Applicant sought management evaluation of the decision to not

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Conclusions

44. The Tribunal finds that the Applicant's Challenge to the (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) contract due to reclass 638.1576(32 37.2 Tm [821 638.16 Tm [(c)-3(o)-11(n7 0.9981 0 0 Tf 0 0 0)26