

Judgment No. 2018-UNAT-820



Counsel for Mr. Newland:

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JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/046, rendered by the United Nations Dispute Tribunal (UNDT) in Nairobi on 27 June 2017, in the case of *Newland v. Secretary-General of the United Nations*. Mr. Percy Junior Newland filed the appeal on 27 August 2017, and the Secretary-General filed an answer on 31 October 2017.

Facts and Procedure

2. Mr. Newland held a permanent appointment with the United Nations, and was deployed in Mogadishu, Somalia, as Chief, Vehicles Plant and Equipment Services (Chief Transport Officer) for the United Nations Support Office in Somalia (UNSOS) at the P-4 level until his separation on 30 November 2016. He joined the United Nations on 16 December 1988 as a Vehicle Mechanic in the Field Service category at the FS3/Step 1 level on a one-year fixed-term appointment with the United Nations Interim Force in Lebanon (UNIFIL). On 12 September 1989, Mr. Newland resigned retroactively to take up a new appointment in the Field Service category as a vehicle mechanic with UNIFIL at the FS3/Step 1 level for a fixed-term contract of one year, effective from 1 June 1989. On

4. Mr. Newland responded to the memorandum by e-mail dated 13 August 2016 asking for clarification and querying whether his mandatory retirement age was indeed age 60 in light of the fact that his appointment with the Organization had been changed twice since 1988. He stated: "As I draw nearer to what I know as my mandatory age of retirement (60) and I make preparation for it, could you please clarify with [the Field Personnel Division] if this is indeed correct."

5. On 21 September 2016, the Chief Human Resources Officer replied and referred Mr. Newland to Staff Regulation 9.2 which then provided:

Staff members shall not be retained in active service beyond the age of 60 years or, if appointed between 1 January 1990 and 31 December 2013, beyond the age of 62 years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases.

She advised Mr. Newland that he had entered duty on 16 December 1988 at the Field Service level and was reappointed on 1 June 1989, again in the Field Service category and that his move to the professional category in 2010 was a promotion rather than a separation and reappointment. As a result, pursuant to Staff Regulation 9.2, his mandatory age of separation was 60.

6. On 27 September 2016, Mr. Newland signed several documents in relation to his retirement and separation from service.

7. On 28 September 2016, Mr. Newland submitted a request for management evaluation of the determination of his mandatory retirement age.

8. Mr. Newland commenced his check-out on 3 November 2016.

9. The Management Evaluation Unit (MEU) issued its decision on 15 November 2016. The MEU found, *inter alia*, Mr. Newland's request for management evaluation to be receivable as it considered his e-mail dated 13 August 2016 to the Chief Human Resources Officer to be the first time he had raised the question of his retirement age to the Administration and that his request for a management evaluation was submitted within the 60-day period as required by Staff Rule 11.2(c). However, the MEU upheld the contested decision on the merits. In the letter it is recorded that the Secretary-General expressly reserved the right to raise the issue of receivability at any subsequent hearing of the matter.

10. On 17 November 2016, Mr. Newland was paid a relocation grant in the amount of USD 10,000 in relation to his separation from the Organization.

11. On 30 November 2016, Mr. Newland filed two applications before the UNDT. One was a substantive application challenging the decision to retire him at the age of 60 instead of 62. The second application sought a suspension of action under Article 14 of the UNDT Rules of Procedure in respect of the decision to separate him from service on the same day.

12. The UNDT on the same day issued Order No. 494 (NBI/2016) granting the application for suspension of action pending informal consultation and resolution between the parties or the determination of the substantive application if mediation failed. In its judgment on the application for suspension of action, the UNDT noted that the purpose of an application for suspension of action is to maintain (or to restore) the *status quo* and thereby to regulate the position between the parties to the substantive application pending its final adjudication. The UNDT noted that to succeed in the application for suspension of action, Mr. Newland was required to establish a *prima facie* right, that it was urgent for the UNDT to intervene, and that without intervention, the Respondent's action or decision would cause irreparable damage. The UNDT held that Mr. Newland had established that the requirements for relief had been met. Most importantly, in paragraphs 16 and 17 of the judgment on the suspension of action, it concluded:

... The matter is clearly urgent, given that the Applicant will be separated from service of the United Nations today but for an injunction against that decision by [the Dispute] Tribunal.

... The [Dispute] Tribunal is also persuaded by the Applicant's arguments on the irreparable harm that will be caused if the impugned decision is not stayed.

13. On that basis, the UNDT issued the injunction in the following terms:¹

... The Application for Suspension of Action SUCCEEDS and is GRANTED pending informal consultation and resolution between the Parties or the determination of the substantive application in the event that mediation fails.

14. The UNDT set the matter down for a substantive hearing on 17 January 2017.

¹ *Newland v. Secretary-General of the United Nations*, UNDT Order No. 494 (NBI/2016), para. 20 (emphasis in original omitted).

15. On 29 December 2016, the Secretary-General filed his reply to the application. Mr. Newland made further submissions on 8 January 2017 contending that the Secretary-General had failed to comply with the terms of Order No. 494 (NBI/2016). On 16 January 2017, the Secretary-General filed a motion seeking leave to file additional evidence to show that as at the date of the order for suspension of action, Mr. Newland had completed the processes towards his mandatory retirement and had checked out. He contended that he had not flouted the UNDT's orders in any way. On 16 January 2017, the UNDT issued Order No. 009 (NBI/2017) granting the motion to file the additional documents and directing the Secretary-General to file Mr. Newland's Personnel Action forms for the period 2010-2016. An oral hearing was held on 17 January 2017.

16. On 16 March 2017, Mr. Newland submitted the required documents for his retirement to United Nations Headquarters. On 20 March 2017, he notified UNSOS Human Resources that he had done so and asked for his post-separation benefits and entitlements to be processed and his retirement process to be concluded. On 28 March 2017, a Legal Officer in the Office of Human Resources Management (OHRM) informed Mr. Newland that the Organization was unable to process his post-separation entitlements as Order No. 494 (NBI/2016) required maintaining the *status quo* existing at the time of the issuance of the Order. Mr. Newland replied on the same day, stating that maintaining the *status quo* required his reinstatement. In the alternative, he requested the Organization to put him on administrative leave with pay or finalize his retirement and pay out his pension benefits and ensure his medical insurance coverage. The Legal Officer responded that for his benefits to be processed, Mr. Newland should request the Dispute Tribunal to rescind the Order. In response to concerns raised by Mr. Newland, the Acting Assistant Secretary-G842.5(03 Tc.0864 Tw[(co

of 60 on 30 November 2016 and yet did not query or challenge any of the Personnel Action forms until July 2016. The UNDT, therefore, held th

erred and did not exercise the jurisdiction vested in it when it failed to take any action to enforce compliance with the ordered stay of action despite his repeated requests to this effect. Because of this failure, he did not receive his salary, pension or medical coverage for nine months.

21. Mr. Newland requests the Appeals Tribunal to grant the appeal and vacate the UNDT Judgment. In addition, he seeks the following relief: (1) full salary and associated entitlements for the period from 1 December 2016 to 27 June 2017 for the period UNDT Order No. 494 (NBI/2016) “should have been in force”; (2) damages equal to seven months of gross salary for “emotional distress and harm as a result of heightened anxiety” due to the “non-implementation” of the Order during the same period; (3) gross salary and other entitlements from 1 July 2017 to 30 November 2018 should the Appeals Tribunal find in his favour on the merits of the case that his retirement age should have been calculated at 62; (4) damages equal to 17 months’ gross salary and all other entitlements from 1 July 2017 to 30 November 2018 for irreparable harm due to loss of economic opportunity, decreased pension contribution, damage to professional reputation, career prospects, harm to health, and for emotional distress; (5) damages from

and at the same time, claim that he was re-employed in 2010 in order to circumvent his date of mandatory separation due to age.

24. Contrary to his assertion, Mr. Newland was fully aware that his mandatory retirement age was 60, as demonstrated, *inter alia*, by his e-mail to the Chief Human Resources Officer dated 13 August 2016 and his testimony before the UNDT.

25. Mr. Newland had several opportunities to challenge his mandatory separation date including when he was allegedly re-employed in 2010. If Personnel Action forms were, in and of themselves, not considered as sufficient to demonstrate his objective awareness of his mandatory retirement age, the memorandum dated 11 July 2016 certainly constituted sufficient notification triggering the time limit to seek administrative review which Mr. Newland failed to request in time. Instead, he waited for a month after the receipt of the memorandum to contact the Chief Human Resources Officer to query the date of his mandatory retirement. Such repeated correspondence with the Administration does not, in accordance with the Appeals Tribunal's jurisprudence, restart or extend the time limits to seek management evaluation.

26. Mr. Newland is not entitled to any remuneration for the period from 1 December 2016 to 27 June 2017 as he himself had proceeded to separate for retirement as of 1 December 2016. Moreover, Mr. Newland is not entitled to any compensation as a result of the alleged "non-implementation" of UNDT Order No. 494 (NBI/2016). In accordance with the Order, the Administration was compelled, and did indeed proceed, to maintain the *status quo* by suspending all actions about Mr. Newland's separation until there would be either an internal resolution of the contested decision or a determination of the substantive application although the decision had already been implemented. Therefore, the Administration was not able to process Mr. Newland's benefits and entitlements while the Order remained in effect. When the UNDT entered its Judgment on 27 June 2017 dismissing his application and thereby nullifying the Order, the Administration proceeded to finalize his separation benefits. In addition, the Administration, where possible, processed all documents received and paid all benefits and entitlements prior to the Order of 30 November 2016 and any other outstanding payment was suspended upon receipt of the Order. Mr. Ne

27. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

28. The primary issue for consideration and determination is whether the UNDT erred in its finding that Mr. Newland's a

doing so.⁴ It is settled case law that requesting management evaluation is a mandatory first step.

30. The Judgment of the UNDT is not clear or precise about what it regarded as the administrative decision in question and the date upon which Mr. Newland was notified of it, and thus the date that triggered the 60-day time period. The UNDT focused rather on the fact that Mr. Newland had prior knowledge of his retirement age as it appeared on Personnel Action forms and his concession in his e-mail of 13 August 2016 that he knew he was due to retire at age 60.

31. To resolve the question of whether the application was receivable it is necessary to determine the date on which Mr. Newland was notified of the administrative decision to action and process his retirement.⁵ The time period to request management evaluation began to run from that date. In so far as Mr. Newland claimed to be entitled to retire at 62, whatever his prior knowledge or the content of the Personnel Action forms, it was the administrative decision to process his retirement at 60 which adversely affected his rights and expectations. The decision to process his retirement at 60 brought into contention his true legal entitlement, which he was legitimately permitted to contest in accordance with his understanding of the relevant rules and regulations applicable to his individual situation.

32. There are two communications to Mr. Newland which could possibly constitute the relevant notification of the decision to process Mr. Newland's retirement from service. The first is the memorandum of 11 July 2016 from the UNSOS Chief Human Resources Officer, in which Mr. Newland was advised that he would reach his mandatory retirement age of 60 on 22 November 2016 and would thus be required to separate from the Organization on 30 November 2016. The second is the e-mail of 21 September 2016 in which the UNSOS Chief Human Resources Officer informed Mr. Newland of Staff Regulation 9.2 and the legal basis for his separation. If the applicable notification is the memorandum of

⁴ *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335, para. 19.

⁵ An administrative decision is a unilateral decision taken by the Administration in an individual case which produces direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, are unilateral, of individual application, and carry direct legal consequences. The key characteristic of an administrative decision subject to judicial review is that the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member. See, e.g., *Reid v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-563, para. 32, citing Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

11 July 2016, received by Mr. Newland on 15 July 2015, then the application to the UNDT was not receivable since management evaluation had to be requested by 16 September 2016 and was in fact only requested on 28 September 2016. If the notification is held to be the e-mail of 21 September 2016, then the request for management evaluation was timeous and the UNDT erred in holding Mr. Newland's application to be not receivable.

33. The memorandum of 11 July 2016 gave instructions and attached various documents pertaining to Mr. Newland's separation from service and repatriation to his home country. We accept that the Personnel Action forms cannot be construed as adequately notifying Mr. Newland of the relevant administrative decision to process his retirement and separation from service. However, the memorandum of 11 July 2016 certainly did. It informed Mr. Newland unequivocally that his mandatory retirement age was 60 and that he would be separated from service on 30 November 2016. It therefore triggered the time limit to seek management evaluation. Mr. Newland, however, waited for almost a month after the receipt of the memorandum before sending the e-mail of 13 August 2016 to the Chief Human Resources

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39. The UNDT made no express ruling in relation to the application filed by Mr. Newland on 12 April 2017 alleging that the Secretary-General was in non-compliance and seeking appropriate relief. It accordingly failed to exercise the jurisdiction vested in it, as contemplated in Article 2(1)(b) of the Appeals Tribunal Statute.

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43. The Administration's conduct undoubtedly caused Mr. Newland stress, anxiety and humiliation. Mr. Newland avers that he was le

Judgment

45. The appeal against the decision of the UNDT