UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/021
Judgment No.: UNDT/2012/104
Date: 9 July 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MANCO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Seth Levine, OSLA, UNON

Counsel for Respondent:
Miouly Pongnon, Office of the Director-General, UNON

Introduction

1. The Applicant is an Investigator with the United Nations Office of Internal Oversight Services (OIOS) in Nairobi, Kenya.

2. The Applicant is challenging the decision requiring him to either renounce his permanent resident status in New Zealand or apply for citizenship there should he wish to take up the offer of a P3 Investigator position in Nairobi.

Facts

3. On 9 February 2009 the Applicant was sent an Offer of Appointment regarding the P3 position of Legal Investigator with OIOS in Nairobi, a position which he took up on 20 May 2009. The Offer of Appointment stated the following: "Please be advised that should you transfer to or be appointed to United Nations Headquarters, New York on a long-term appointment in the future, in accordance with the Staff Regulations and Rules applicable to such situations, you will be

12. On 5 March 2012, the Respondent submitted an "expert report" on staff rul.51.5(c), pursuant to Case Management Order 026 (NBI/2012). The Applicant responded to this report on 12 March 2012.

Applicant's submissions

13. The Applicant disputes the MEU's contention that an administrative decision was taken on 22 March 2010. In his application, the Applicant states that no administrative decision was taken until 17 November 2011. He considers that the matter is therefore receivable *ratione temporis*.

14. The Applicant states that there is no legal basis to the policy requiring either the surrender of his permanent resident status or an application for citizenship in New Zealand. In his view this policy has been misapplied since 1953, as the requirement implemented by the Secretary General in 1954 (1954 IC) and replaced by ST/AI/2000/19 applies to non-United States staff members serving in the United States only.

15. The Applicant further states in his application that there is no General Assembly Resolution, Secretary General's Bulletin, Administrative Instruction, nor mention in the Staff Rules and Regulations of this policy other than in regard to staff members in the United States.

16. The Applicant also produced an interoffice memorandum of 4 August 2005 from the Office of Legal Affairs (OLA) to the Office of Human Resources Management (OHRM) both from the UN Secretariat, which stated that although this policy has been consistently applied to permanent resident status in any country of which the staff member is not a national, it "is not reflected in any current administrative issuance."

17. The Applicant is seeking a rescission of the decision to enforce this policy with regard to him, and discontinuance of its application in general. He states that the policy is unlawful and contrary to the terms and conditions of his employment.

Respondent's submissions

18. The Respondent submits that this application is not receivable *ratione temporis* in accordance with Article 8.3 of the UNDT Statute and staff rule 11.2(c). The Respondent states that the disputed administrative decision was taken on 22 March 2010, whereas the Applicant did not submit a request for a management evaluation until 17 January 2011.

19. The Respondent further states that even if a lack of response from HRMS/UNON concerning the policy is regarded as an administrative decision, as the letter to HRMS/UNON was dated 21 October 2010 the request for a management evaluation should have been filed with the MEU no later than 6 January 2011.

20. The Respondent submits that this matter is not receivable *ratione materiae*. The Applicant has not alleged that the disputed policy results in "noncompliance" with his terms of appointment, which the Respondent states would deprive the Tribunal of jurisdiction in accordance with Article 2.1(a) of the UNDT Statute. Further, the policy in question is, according to the Respondent, an integral term of the Applicant's appointment and does not constitute noncompliance with the terms of appointment.

21. The Respondent states that the authority for this policy exists and derives from the necessity for the Secretary-General to enforce staff rule 1.5, that the policy is informed by "the view of the General Assembly that international officials should be true representatives of the culture and personality of the country of which they were nationals", and that allowing staff members to change their nationality after recruitment would undermine the principle of geographic distribution of professional grade posts among member States. Moreover, the Respondent states that the policy has been uniformly applied since 1954, concurrent with staff regulation 1.1(c) which mandates the Secretary-General to enforce the policy with

regard to the Applicant. The Respondent states that the Tribunal should not create an unwarranted exception to this policy by granting the Applicant relief.

34. *Thiam* followed the decision of the UN Appeals Tribunal (UNAT) in *Schook* 2010-UNAT-013, a judgment reversing this Tribunal's previous decision regarding unwritten administrative decisions and the sixty days rule. The UNAT stated in *Schook*:

> "Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a "notification of the decision in writing", required by Rule 111.2 (a)..."

35. The UNAT further stated that the appeal was receivable, "because he had not been notified of any written administrative decision of his not continuing in service after 31 December 2007. We find that UNDT has completely ignored that

Respondent has undermined their argument that the request for a management evaluation of the permanent residency policy was time barred.

Whether the application is receivable ratione materiae

38. With regards to the Respondent's submission that this matter is not receivable *ratione materiae*, it is the Tribunal's view that although there may not be a specific reference to the fact that the policy is noncompliant with the Applicant's terms of appointment, there is a clear inference to this noncompliance by the Applicant's very challenge to the policy. The Applicant has also made it reasonably clear that he is challenging this particular policy. Where noncompliance is concerned, this is a matter to be decided on the merits of this case. This matter is receivable *ratione materiae.*

Conclusion

39. This application is receivable *ratione temporis* and *ratione materiae.*

(Signed)

Judge Vinod Boolell

Dated this 9th day of J.