UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NBI/2017/133
	Judgment No.:	UNDT/2019/037
	Date:	7 March 2019
	Original:	English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AKILIMALI KAFACHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Thomas Jacob, UNDP

Introduction

1. The Applicant is a former Driver with the Office for Coordination of Humanitarian Affairs (OCHA), in Goma, the Democratic Republic of Congo (DRC).

2. On 17 September 2008, he joined the Organization on a United Nations Development Programme (UNDP) Letter of Appointment (LOA), at the G-2 level.

3. On 1 May 2017, he separated from the Organization.

4. On 31 December 2017, he filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting a decision not to pay him termination indemnities, which he identifies as taken on 7 June 2017 and reiterated on 19 December 2017.

5. The Respondent filed his reply on 3 February 2018, to which the Applicant was invited to comment by 4 March 2019 vide Order No. 026 (NBI/2019). The Applicant did not make any additional submissions.

Factual and procedural background

6. On 20 January 2017, Mr. Rein Paulsen, Head of Office (HoO), OCHA/DRC, announced the restructuring of OCHA/DRC to staff members and presented to them an organigram which reflected the new structure.

7. On 27 January 2017, Mr. Boureima Younoussa, Deputy Country Director-Operations, UNDP/DRC, informed the Applicant that his post had not been retained under the new OCHA/DRC structure.[1] The Applicant was therefore invited to vacancies.

Between 30 January 2017 and 31 March 2017, the Applicant participated in the

[1] Annex 2

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recruitment exercise whereby he applied to two vacant posts that had been advertised, but to no avail.[2]

8. On 7 March 2017, Ms. Amineta Blondin Beye, Human Resources Specialist (HRS), UNDP/DRC participated in a videoconference organized by OCHA/DRC for the benefit of the staff members affected by reorganization and informed them in general terms of separation entitlements and procedures.[3]

9. On 9 March 2017, Mr. Seraphin Kazadi, an Associate Humanitarian Affairs Officer, OCHA/DRC, sent an email to all OCHA/DRC staff members providing a link to a UNDP tool that enables its users to estimate the amount of separation benefits UNDP staff members may receive upon their separation from service.[4]

10. On the same day, Mr. Paulsen sent a clarification email to all OCHA DRC staff members stating:

> In answer to the messages going around concerning separation indemnities, by this message I would like to reaffirm that all separation entitlements will be paid in accordance with the United Nations Staff Regulations and Rules which were amended in January

the Applicant that his post had been abolished and that he would be separated from the Organization on 1 May 2017.[6]

12. On 31 May 2017, the Applicant received his final payslip which reflected payment of his unused accrued leave days but in which termination indemnities were not included.[7]

13. On 7 June 2017, the HoO, OCHA/DRC held a meeting with OCHA/DRC staff members during which he reaffirmed that pursuant to the terms of their letter of appointment, staff members on fixed-term appointments separated upon the expiration of their appointment were not eligible to receive termination indemnities. Even though presently the Applicant identifies 7 June 2017 as the date of the impugned decision, it is dubious whether he had participated in the meeting having separated by then from OCHA.[8]

14. On 8 and 29 June 2017, the Applicant and several other OCHA/DRC staff members sent a memorandum to, inter alia, the HoO, OCHA/DRC and the Country Director (CD), UNDP/DRC expressing their views regarding the non-payment of their termination indemnities. The Applicant, and other staff members listed as signatories, stated that this decision was in breach of staff rule 9.3(c) which states that [p]ayments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III.[9]

15. On 20 June 2017, the Applicant filed a management evaluation request (MER) of the decision not to award him termination indemnities which he claimed amounted to USD12,396.32 upon the expiration of his fixed-term appointment on 1 May 2017. The impugned decision was identified as one issued on 31 May 2017.[10]

[6] Annex 4 to the reply.
[7] Application para. 6.
[8] Application para. 4.
[9] Annex 6 and 7 to the reply.
[10] Annex 5 - application.

in Geneva and New York and the Ombudsman - Office of Mediation.[15]

20. On 25 October 2017, the Applicant filed a motion for an extension of time to file an application to the Dispute Tribunal. The date of the contested decision was indicated as 7 June 2017. On 3 November 2017, by Order No. 189 (NBI/2017) the setting the deadline to file the application by 2 January 2018 registered under Case No. UNDT/NBI/2017/096. In granting the motion the Tribunal held, among others:

As per the United Nations Staff Rules and Regulations, Annex III (d)(ii) no termination indemnity payments shall be made to a staff member on a fixed term appointment who separd0 G[(7)] TJET] TJETBT1 0 0 396.43 pbho

Considerations

Receivability

29. A starting point for the receivability issue is the identification of the contested decision. The Respondent seems to suggest that the Applicant should have contested decision communicated on 9 March 2017 that all separation entitlements will be paid in accordance with the United Nations Staff Regulations and Rules which were amended in January 2017 and that p , that is, communication sent by email by the OCHA HoO to staff. The Tribunal disagrees, for the following reasons:

30. It is recalled that in *Hamad*[18], the UNAT adopted the forme 47a57.991 48g Applic 3Tf1 ff

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apparatus.[20] Concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts, has been explained in the second sentence of the *Andronov* definition reproduced above. When it comes to the requirement of external effect, the UNAT made it explicit in *Andati-Amwayi*[21] that, in accordance with the UNDT Statute, the proceedings are concerned with decisions having impact not just on the legal order as a whole but on the terms of appointment or contract of employment of the staff member. What has proven to require

fect. In this regard, the *Andronov* definition was not explicit as to whether the UNAT jurisdiction extends over decisions which, albeit not expressing norms UNAT

to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be iden

freeze of the then-

the applications were not receivable *ratione materiae* because the contested decision was of a general order, in that the circle of persons to whom the salary freeze applied was not defined individually but by reference to the status and category of those persons within the Organisation, at a specific location and at a specific point in time.[23] However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

> monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it. As such, the Tribunal confirm[ed] its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.[24]

33. With minor variation, the UNAT restated the holding in *Tintukasiri et al.* in *Ovcharenko et al.,* where the appellants contested the Secretary-

pay post adjustment based on a multiplier promulgated by the ICSC. The UNAT found that the administrative decision not to pay the appellants their salary with the post adjustment increase, the execution of which was temporarily postponed, was a challengeable administrative decision, despite its general application because it had a direct impact on the actual salary of each of the appellants who filed their application after receiving their pay slips for the relevant period. [25] It was

[23] *Tintukasiri et al.* 2015-UNAT-526, paras. 35-37.
[24] Ibid., at para. 38.
[25] *Ovcharenko et al.* 2015-UNAT-530 at para. 30.

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meeting whether attended by the Applicant or not - allowed the Applicant to comprehend the position of the administration on the matter concerned.

39. The above considerations, however, have no bearing on the receivability of the present application. There is no question between the parties that the payslip of 31 May reflected a negative decision on the termination indemnity: the principle was foreshadowed in the communication form 9 March 2017 and confirmed, again in general terms, in the meeting of 7 June 2017. There was, in any event, one decision on the matter. Whether to take the date of 31 May or the date of 7 June 2017 as the communication triggering procedural deadlines, in accordance with staff rule 11.2(c), the Applicant had until August 2017 to submit his request for management evaluation. He submitted it on 20 June 2017, squarely within the time-limits. The refusal to conduct the management evaluation pertained to that same decision.

40. A slightly more complicated issue is posed by the decision issued as a result of reconsideration, one dated 19 December 2017. In this regard, the jurisprudence of the Appeals Tribunal confirms that for a new decision to be appealable, it must be submitted afresh for management evaluation, no matter if the reconsideration and the management evaluation would have been carried out on the same level and in the same office.[32] On the other hand, a mere reiteration of the previous decision, does not reset the clock.[33] In the absence of promulgated rules, or a set of established criteria for the , the determination whether a communication originating from the administration and pertaining to the same matter , or a fresh administrative decision, turns on the facts of the case. The practice of administration in this respect is not informative. The criteria and scope of cognizance in the process of reconsideration are unknown[34], the

[32] *Muhsen* 2017-UNAT-793.
[33] UNAdT Judgment No. 1211, *Muigai* (2005), para. III, affirmed in *Sethia* 2010-UNAT-079 and *Cremades* 2012-UNAT-271; also UNAdT Judgment No. 1301 (*Waiyaki* 2006) para. III.
[34] The jurisprudence held that repeated restatement, or explanation of the decision, upon request form the applicant did not constitute a fresh determination , *see Ryan* UNDT/2010/174. In *Aliko* 2015-UNAT-539, however, UNAT stated that a

facts:

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