
Case No.: UNDT/NY/2010/069
Judgment No. UNDT/2011/139
Date: 42Tw -6.286 -1.0019 Tw -<hgu: N
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

CHARLES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision taken by the Officer-in-Charge, Sabbatical Leave Programme (“Programme Officer-in-Charge”), Office of Human Resources Management (“OHRM”), not to submit or forward his application for sabbatical leave to the Sabbatical Leave Selection Committee (“the Committee”). The Applicant contends that the Programme Officer-in-Charge ventured outside her discretionary authority by not forwarding his application to the Committee, thus violating his terms of appointment. The Applicant submits that he has suffered significant delay in the completion of his studies and mental distress, which he seeks compensation.

2. On 8 March 2011, the Tribunal held a case management hearing in New York, at which the Applicant, his Counsel and Counsel for the Respondent were present. Counsel confirmed that in their shared opinion, there were no outstanding matters which would prevent the Tribunal from coming to a decision on the merits of the case on the papers already before it, and the Tribunal deemed it appropriate to do so.

Facts

3. On 15 November 2009, the Applicant, staff member of the Procurement Division, Office of Central Support Services, Department of Management of the United Nations, submitted an application for sabbatical leave, for a five-month period.

4. By email dated 16 November 2009, the Programme Officer-in-Charge’s Assistant acknowledged receipt of the application. The email requested the Applicant to provide the formal endorsement of his application from the Director of the Procurement Division (“the Director”) by 17 November 2009, the deadline for the submission of applications for the 2010 cycle of the Sabbatical Leave Programme.

5. On 16 November 2009, the Applicant’s immediate supervisor, the Chief, Logistics and Transportation, Procurement Division (“the Supervisor”), sent an email to the Director, advising that:

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Respondent's submissions

17. The Respondent's principal contentions may be summarised as follows:

a. The application is not receivable as an administrative decision exists within the meaning of art. 2.1(a) of the Statute of the Tribunal and of staff rule 11.4(a). The alleged decision was, in fact, a simple verification by the Programme Officer-in-Charge as to whether the Applicant's application for sabbatical leave met all the requirements set out in paras. 4 and 5 of ST/IC/2009/33. The Respondent submits that undertaking such pre-screening procedure involves no discretionary power by the Administration and should not be considered an administrative decision affecting the Applicant's terms of appointment or contract of employment. An administrative decision is a decision taken by the Administration in a precise individual case that has a direct legal effect on an individual's rights and obligations and there is no such administrative decision in the present case. Sabbatical leave is a benefit and not an entitlement of staff members of the Organisation. Accordingly, no legal effect flows from the actions taken during the pre-screening procedure of applications for the Sabbatical Leave Programme, to determine if an application is complete or not, and the alleged decision has no direct effect on the Applicant's rights and obligations;

b. The evaluation to be undertaken by the Committee and the ASG, OHRM, under sec. 4.2(b) of ST/AI/2000/could only be undertaken based on a proposed work schedule. In the present

Case

Consideration

Preliminary matter

18. At the case management hearing on 8 March 2011, Counsel for the Applicant confirmed to the Tribunal that the Applicant did not contest the failure to grant special leave to him in the same time period, which was a separate administrative decision raised in his request for management evaluation. Accordingly, matter is not considered in the present Judgment.

Receivability

19. The Respondent's first contention is that the impugned decision does not satisfy the definition of an administrative decision as "a decision taken by the administration in a precise individual case that has a direct legal effect on an individual's rights and obligations", citing the cases of *Hocking, Jarvis, McIntyre*

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Review of exercise of discretion

Requirement to evaluate applications

29. ST/AI/2000/4 (Sabbatical leave programme) states:

4.1 Eligible staff members interested in the programme shall submit an application in accordance with the detailed provisions contained in the annual information circular on the sabbatical leave programme.

4.2 Applications shall be evaluated on the basis of the following criteria:

(a) Importance of the study. The element shall be assessed on the basis of the importance of the issue in the proposed field of study and its relevance to the current and future work of the United Nations and to the current or future responsibilities of the applicant;

(b) Feasibility of the proposed study and whether it can be undertaken and completed within the proposed period of the sabbatical leave;

(c) Appropriateness of the planned methodology;

(d) Quality of the proposal, demonstrating awareness of the latest developments in the area of study;

stated in ST/AI/2000/4 by whom it must be done; finally, the ASG, OHRM, assisted by a selection committee, must review and make final selections.

31. Sections 1.2 and 4.1 of ST/AI/2000/4 refer to the annual information circular on the Sabbatical Leave Programme. Paragraph 6 of ST/IC/2009/33, the relevant circular at the time in question, states:

All proposals will be evaluated by a selection committee on the basis of the criteria set out in administrative instruction ST/AI/2000/4. The terms of the proposal shall be binding for the staff member. Late or incomplete applications will not be considered.

32. Thus, although ST/AI/2000/4 does not specify who is to “evaluate” the application, ST/IC/2009/33 defines the evaluation of the proposal as a responsibility of the Committee. This specification, read in light of the sequence suggested by ST/AI/2000/4 and sheer common sense, suggests that applications are evaluated by the Committee, and then reviewed and decided on by the ASG, OHRM.

33. Despite the seemingly absolute wording of the phrases “applications shall be evaluated” in sec. 4.2 of ST/AI/2000/4, and “all proposals” in para. 6 of ST/IC/2009/33, there is a specific caveat—namely “late or incomplete applications”—which will “not be considered”. Paragraph 6 of ST/IC/2009/33, however, does not specify who should determine whether an application is late or incomplete, and no express provision of either ST/AI/2000/4 or ST/IC/2009/4 attributes any power to this effect to the Programme Officer-in-Charge.

Was the Applicant’s application incomplete?

34. In order to assess whether the Applicant’s application for sabbatical leave was incomplete, it is necessary to refer to the requirements for such applications as contained in the relevant instruments. Section 4.1 of ST/AI/2000/4 uses mandatory language, stating that staff members “submit an application in accordance with the detailed provisions contained in the annual information circular”. ST/IC/2009/33 sets out the requirements of these detailed provisions in paras. 4 and 5:

4. Each application must include the following documents:
- (a) Application form contained in annex I to the ... circular;
 - (b) Proposal describing the research project;
 - (c) Written endorsement by the head of department or office or chief mission support responsible for the work of the applicant during the proposed research or study project, which must be attached;
 - (d) Two signed letters of recommendation;
 - (e) Written correspondence on potential acceptance from the proposed sabbatical institution.

Applicants are requested to submit all of the above documents through their respective head of department or office or chief mission support to the Officer-in-Charge, Sabbatical leave programme, Room M-14033E, Learning, Development and Human Resources Services Division, Office of Human Resources Management, New York, NY 10017, by 17 November 2009.

5. The proposal, which should not exceed four pages, should contain the following information:
- (a) Title of the research or study project;
 - (b) Field of the research or study project;
 - (c) Rationale for the research or study project;
 - (d) Relationship of the research or study project to the work of the individual and to the work of the Organization;
 - (e) Outline of the topic or topics to be covered;
 - (f) Study or research activities;
 - (g) Detailed methodology;
 - (h) Schedule of work of the research or study project, with an indication of any preparatory work already accomplished;
 - (i) Usefulness of the expected outcome of the research or study project and its practical implications for the individual and the Organisation.

35. An incomplete application may therefore be one which is missing one of the documents specified in para. 4 (e.g., application form, proposal, letters of recommendations). An application may also be considered incomplete if it is missing key information as described in para. 5, such as the outline, activities, or methodology

of the proposed research or study project. However, the fact that an application contains minimal information in response to the requirements of paras. 4 and 5 does not necessarily mean that it shall be considered complete. There may be cases where an application, while formally containing the documents and information described above, is substantively incomplete, that is, where it does not contain information of a sufficient or reasonable quality for a decision to be made on the basis of what is submitted. An example of this might be where the information described in para. 5 is provided in too brief a manner to be useful, is irrelevant or incompatible with the application.

36. In the present case, the Applicant submitted an application on 15 November 2009 for sabbatical leave for a five-month period. There is no dispute that the proposal initially complied with the requirements of ST/IC/2009/33. However, when the Applicant was refused authorisation to take five months' sabbatical leave, he sought to amend the duration to one month. He was directed by the Supervisor to amend his application to reflect the shortening of the authorised duration. The Programme Officer-in-Charge put the Applicant on notice that his application required an "amended proposal, along with the letter of endorsement [from the Director]", and he was given an extension of the deadline to provide these. Shortly thereafter on the same day, the Director provided the letter of endorsement. The Applicant sought once again to amend the duration of his leave (from one month to two), but, despite being reminded again on 20 November 2009 that he was required to submit an amended schedule of work as part of his submitted proposal, he did not do so.

37. The schedule of work that was submitted with the final application related to a five-month sabbatical leave, but the Applicant, by that stage, applying for leave of one or two months' duration. The proposal and therefore the application, did not merely lack a correct schedule of work; it contained a schedule of work that was inconsistent with what he was asking for. Accordingly, the party tasked with evaluating the application or proposal would not have been able to come to a decision that the Applicant's specific application for sabbatical leave was justified, as certain

41. ST/AI/2000/4 does not outline the powers obligations of the Programme Officer-in-Charge. ST/IC/2009/3 mentions only that documents are to be submitted to the Programme Officer-in-Charge. Neither was any evidence led of the delegation of authority to the Programme Officer-in-Charge to determine whether applications are either late or incomplete. Although the wording of para. 6 of ST/2009/33 states that such applications “will not be considered” it must be for the Committee to undertake at least a preliminary consideration and make the assessment of which applications comply and which will be considered on their merits.

42. According to the Respondent’s unchallenged submission, the Committee is composed of six members and meets only once a year for one day, during which it must consider all applications for that year. It may therefore be impractical that the administrative framework of the Sabbatical Leave Programme does not allow the Programme Officer-in-Charge to make a determination whether an application is incomplete, even if it clearly does not contain the information necessary for the Committee to undertake an evaluation. However, the absence of a proper delegation of authority to the Programme Officer-in-Charge to make determinations of substantive incompleteness, or a clear direction in the legislative instruments, no conclusion is available other than that the Programme Officer-in-Charge should have forwarded the application for evaluation to the Committee. Accordingly, the Tribunal finds that, on the facts, the determination that the application was incomplete and should not be forwarded for consideration was not within the Programme Officer-in-Charge’s power, and was in breach of the Applicant’s terms of appointment—specifically, his right to have his application forwarded to the Committee and the ASG, OHRM.

Loss resulting from the breach

43. The Tribunal must now determine the prejudice suffered by the Applicant as a result of the Programme Officer-in-Charge’s failure to forward his application for sabbatical leave to the Committee.

44. As explained by the Tribunal above, the application submitted by the Applicant lacked a compatible schedule of work relating to his proposed leave, required for a proper assessment of the application. Without a relevant schedule of work, a proposal cannot be properly assessed as either meritorious or not. The Applicant's application for sabbatical leave was therefore so manifestly incomplete that it would have been outside the bounds of reasonableness for the decision-maker to determine it to be complete. A decision-maker cannot determine an application for sabbatical leave as complete if the proposal does not contain essential information such as a schedule of work which is necessary for a decision on the application to be made.

45. In *Antaki* 2010-UNAT-095, the United Nations Appeals Tribunal determined that, "Not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages" (see para. 20). In light of the finding that no consideration or informed evaluation of the Applicant's application for sabbatical leave would have been possible, the Applicant cannot be said to have suffered loss from the decision of the Programme Officer-in-Charge not to forward his application to the Committee. Moreover, the Applicant has not made any suggestion or argument that her decision was tainted by bad faith, unfairness, unreasonableness, illegality, irrationality, bias, capriciousness or arbitrariness (see *Sanjiv* 2010-UNAT-084), such that any resultant loss would have been attributable to the Respondent.

45. As the Tribunal has found that no consideration or informed evaluation of the Applicant's application for sabbatical leave would have been possible even if it had been forwarded, it finds no basis for an award of damages for alleged delay in the completion of his studies and for mental distress.

46. Although the above is sufficient for the determination of this case, for the sake of completeness the Tribunal will consider whether the outcome would have been different if the application had been evaluated. ST/AI/2000/4 requires that applications be evaluated on the basis of, *inter alia*, the "[f]easibility of the proposed study and

whether it can be undertaken and completed within the proposed period of the sabbatical leave". The Applicant's proposal to complete a five-month programme (as specified in his schedule of work) within a one or two-month period appears to be unreasonable. Whilst it is not for the Tribunal to substitute its assessment for that of the Committee, the Tribunal considers that it is unlikely that a reasonable decision-maker could arrive at the determination the Applicant sought on this basis. On the facts, the Tribunal assesses