



Case No.: UNDT/NBI/2010/051

Judgment No.: UNDT/2011/217

Date: 29 December 2011

Introduction

1. The Applicant is a former staff member of the United Nations Environment Programme (UNEP) in the Department of Early Warning and Assessment (DEWA),

7. On both 26 May 2009 and 3 June 2009, the Applicant wrote emails to the Human Resources Officer requesting a meeting regarding the timely reclassification of her post. The Human Resources Officer responded on 11 June 2009, stating that the decision to re-classify posts rested with the UNEP/DEWA Director and that the Applicant should speak with him first regarding the reclassification of her post.

8. The Applicant's post was eventually reclassified on 26 June 2009 and advertised on Galaxy on 21 July 2009 with her retirement only a month away.

9. On 27 August 2009, the Applicant wrote a memorandum to the UNEP/DEWA Director regarding the untimely reclassification of her post and again received no response. She subsequently retired on 31 August 2009.

10. After her retirement, on 8 October 2009, the Applicant wrote a memorandum to the Director and Deputy Director of UNEP/DEWA regarding the reclassified post in which she stated that she looked forward to getting a response, be it negative or positive, by 20 October 2009.

11. When Applicant did not receive a response from UNEP/DEWA on 20 October 2009, she filed a request for management evaluation on 3 December 2009 challenging the 20 October 2009 non-written decision from the SMT in which UNEP/DEWA failed to upgrade her post in a timely manner before she retired and whereby she was denied a chance to apply and compete for the reclassified post.

12. On 15 January 2010, the Applicant received a response from the Chief of the Management Evaluation Unit (MEU) stating that her request for a management evaluation was denied for being filed out of time.

13. On 19 April 2010 the Applicant filed this Application.

14. On 14 May 2010, the Respondent filed a Motion for Dismissal arguing that the Application was not receivable because it does not challenge any decision which can be qualified as an administrative decision under art. 2 of the Statute of the Dispute

date for the presumed administrative decision affecting her contract of employment.

d. UNEP/DEWA management's refusal to abide by the policy it had

the Applicants term of service, would have had to be made well before the retirement date.

d. Even if it was accepted that the alleged 20 October 2009 decision not to upgrade Applicant's post is an administrative decision. The Applicant did not suffer any prejudice as she did not apply for the post in question.

e. The Applicant should have addressed the issue of her non-promotion before she retired as no reasonable staff member can expect to be promoted after retirement.

f. The Applicant did not request a management evaluation in time and this renders the application not receivable.

g. The Respondent's Counsel did not abuse the process by not responding within 30 days of receiving the Application. It was an oversight on his part and he had erred in good faith as he did not intend to sit on the evidence.

h. The Respondent has made the required response under art. 10 of the Rules of Procedure of the Tribunal, albeit titled "Motion for Dismissal", rather than "Reply". While this was oversight on part of the Respondent, it did not mean that the Respondent did not want to be part of the proceedings.

i. Where the Respondent's counsel had failed to comply with the provisions of art. 10 of the Rules of Procedure of the Tribunal, it was the responsibility of the Tribunal and its Registry to remind him to comply.

j. Excluding the Respondent from the proceedings would be a drastic step, as he has shown willingness to be part of these proceedings. In *Bertucci*², the Appeals Tribunal held that the Tribunal has no authority to exclude a party from proceedings.

² 2010-UNAT-062.

Considerations

20. In determining this Application, the main issues for examination are:
- a. Whether the Respondent ought to be excluded from the proceedings for failure to abide by the provision of art. 10 (1) of the Rules of Procedure of the Tribunal.
 - b. Whether the silence from UNEP/DEWA management towards the Applicant's several requests constitutes an implied administrative decision for which the Applicant may request a management evaluation and bring an application before the Tribunal.
 - c. In the absence of a definitive response to the Applicant's queries, at what time can it be assumed that UNEP/DEWA had made an administrative decision which affected the Applicant's contract of employment?

27. In *Lutta*³, the Tribunal examined the issue of a respondent who did not file a reply within the requisite time frame as mandated by art. 10. The Tribunal held that the Respondent who finds himself outside of the time limit for filing a reply should first seek the permission of the Tribunal to take part in the proceedings. This is so because by expelling himself due to his own delay, he would no longer be considered to be part of the proceedings.

28. In this case, the Respondent has neither filed a reply nor filed a Motion for Leave to participate in the Proceedings. It was only during the 21 November 2011 proceedings, 18 months after filing and proper service of the Application on the Respondent, that Counsel for the Respondent made an oral request to take part in the proceedings. Counsel had willfully chosen to disregard art. 10 of the Rules of Procedure of the Tribunal.

29. By his preposterous claim that the Registrar and the Judge owed him a duty to remind him of his obligations to his client, the Respondent's Counsel, sought, in the Tribunal's view, to provide an excuse for his own incompetence and lack of diligence. It must be clearly stated that no Counsel is owed a duty by the Tribunal to be reminded about the necessity of complying with procedural rules. Article 10(2) of the Rules of Procedure of the Tribunal does not require the Registrar to advise Counsel on the legal conduct of his/her case but only on the "formal requirements" of submitting a reply. Having filed a submission within the requisite time limit and titling it "Motion for Dismissal", art. 10(2) did not require the Registrar to advise Counsel for the Respondent that he should have titled the document "Reply" and to have ensured that his legal arguments amounted to a Respondent's Reply within the meaning of art. 10(1).

30. The Respondent had asked the Tribunal to dismiss this Application based on non-receivability. If the Tribunal were to rule that the Respondent's Motion is denied, then Respondent will have no fall back alternative, since up until the hearing on

³ UNDT/2009/060.

receivability he had not filed a reply therefore leaving him in a very precarious situation.

31. As was held in *Lutta*⁴,

order to apply and compete for the reclassified post. When none of these emails and first memorandum was responded to, the Applicant then wrote a final memorandum on 8 October 2009 setting the date of 20 October 2009 deadline by which in the absence of a response would constitute a denial of her requests.

36. The Applicant had countered that that the failure to respond is an administrative decision in itself because the Respondent had unilaterally failed to give effect to its own administrative policy. Further, that this failure had direct legal consequences for the Applicant who was not given an opportunity to apply for the post which she encumbered.

37. What is an administrative decision? In *Andronov*⁵, the former UN Administrative Tribunal defined an administrative decision for the purpose of formal contestation of same. In, *Andronov*, it was held first time decision

40. The Tribunal held that the Applicant had fulfilled the requirement of former staff rule 111.2 when he timely wrote to the Registrar of the ICTR rather than the Secretary-General as the said Registrar was to all intents and purposes the lawful representative of the Secretary-General at the ICTR.

41. The next step in this analysis is whether, after a staff member writes to the agent of the Secretary-General, and receives no response, an administrative decision must be presumed.

42. In *Andronov*, the former UN Administrative Tribunal had additionally decided that administrative decisions are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the

48. In spite of the Tribunal's disappointment with the posture taken by UNEP/DEWA management in ignoring the Applicant's letters, it cannot accept that the Applicant was entitled to set a date arbitrarily on which the Respondent's negative response would be presumed to be an implied administrative decision.

Is the Application Receivable?

49. The matter of receivability is governed by art. 8(1) of the Statute of the Dispute Tribunal, which provides:

An application shall be receivable if: (a) The Dispute Tribunal is competent to hear and pass judgment on the application, pursuant to article 2 of the present statute; (b) An applicant is eligible to file an application, pursuant to article 3 of the present statute; (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and (d) The application is filed within the following deadlines: (i) In cases where a management evaluation of the contested decision is required: a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission...

50. Staff Rule 11.2(a) and (c) also provide:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a) shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision . . . (c) [a] request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

51. On 31 August 2009, the date on which the Applicant retired, must be presumed to have been the date of the implied administrative decision. On 3 December 2009, she applied for a management evaluation, well outside the time frame mandated by staff rule 11.2(c). She received a response from the MEU on 15 January 2011, stating that her request was time barred. On 19 April 2010, the Applicant submitted this Application to the Tribunal.

52. From the records and foregoing determination of issues, the Tribunal holds that the Applicant's request for management evaluation was made out of time and under art. 8(3) of the Tribunal's Statute, the Tribunal cannot suspend or waive the deadlines for management evaluation.