Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

AUDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 23 December 2015, the Applicant, a former Principal Officer at the D-1 level in the Department for General Assembly and Conference Management ("DGACM"), filed an application contesting the decision to separate him from service upon the expiration of his fixed-term appointment on 31 December 2015.

2. The Respondent submits that the application is not receivable because the Applicant did not submit a request for management evaluation within 60 calendar days from the date on which he received notification of the contested decision, as required by staff rule 11.2(c). Should the Tribunal find the application receivable, the Respondent submits that it is without merit because the decision not to renew the Applicant's fixed-term appointment was a lawful exercise of discretion.

Facts

3. The parties agree that on 19 June 2013 a meeting took place between the Applicant, Mr. Tegegnework Gettu, who was the Under-Secretary-General, DGACM ("USG/DGACM") at the time, and Mr. Magel Abdelaziz, the Under-Secretary-General and Special Adviser to the Secretary-General on Africa. The Applicant submits that during the meeting, Mr. Gettu provided an express promise regarding the Applicant's future employment with the Organization. The Respondent disputes this claim.

4. By interoffice memorandum dated 27 September 2013 from Mr. Gettu, the Applicant was informed that effective 1 October 2013, he would be reassigned from his position to implement a project referred to as "Update and Digitization of the DGACM Compendium of Administrative Policies, Practices and Procedures

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11.

Preliminary issue: Order No. 301 (NY/2015)

23. As a preliminary issue, the Tribunal will consider the Applicant's submission regarding a statement made in Order No. 301 (NY/2015), issued by a different Judge of the Tribunal in Case No. UNDT/NY/2015/064, concerning notification of the contested decision.

24. At para. 29 of Order No. 301 (NY/2015), the Tribunal stated:

> The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention, the Applicant having filed the present application [for suspension of action pending management evaluation] approximately three weeks after the notification of the contested decision and less than four weeks before its implementation.

25. The Applicant submits that reference to the "notification of the contested decision" in this quotation means 12 November 2015 and that the Tribunal has therefore already determined the date of notification.

26. The Respondent submits that Order No. 301 (NY/2015) did not make a finding that the application in the present case is receivable. He notes that the Order was made in relation to the Applicant's request for suspension of action of the contested decision, and submits that it does not constitute a final determination on the receivability or merits of the contested decision. In deciding whether to grant a request for suspension of action, the Dispute Tribunal only makes a *prima facie*

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31. Article 8.3 of the Dispute Tribunal's Statute specifically states that the Tribunal "shall not suspend or waive the deadlines for management evaluation." The Appeals Tribunal has reiterated the Tribunal's lack of jurisdiction in this regard on a number of occasions (see, most recently, *Survo* 2016-UNAT-644, paras. 31 and 32).

32. The Tribunal has also held that repetitions of the same administrative decision in response to an applicant's communication do not reset the clock with respect to the applicable time limits in which the original decision is to be contested (*Aliko* 2015-UNAT-539, para. 35; *Kazazi* 2015-UNAT-557, para. 31).

33. It has been stipulated by the parties that on 2 October 2015, the Applicant was verbally informed by the ASG/DGACM that his fixed-term appointment would not be renewed when it expired on 31 December 2015. However, the parties disagree on whether this was the date on which the 60 day time limit for requesting management evaluation under staff rule 11.2(c) began to run. If the Tribunal finds that the date of notification of the contested decision was 2 October 2015, the Applicant's request for management evaluation, submitted on 2 December 2015 was one day late, and his application to the Tribunal will not be receivable. If the Tribunal finds that the date of notification is 12 November 2015, i.e. the date he was informed of the decision in writing, then the application is receivable and the Tribunal can proceed to consider the merits of the case. The parties have cited a number of authorities regarding notification, however, the Tribunal does not consider any of them to be determinative of the issue in question.

Review of authorities cited by the parties

34. The Respondent cites *Gusarova* UNDT/2013/072 in support of his submission that, in contrast to the former staff rule, staff rule 11.2(c) does not require a staff member to receive written notification of an administrative decision in order for the time limit to start to run. In *Gusarova,* the Dispute Tribunal stated:

37. The Tribunal has considered *Manco* 2013-UNAT-342, in which the Appeals Tribunal cited *Schook* and *Bernadel* 2011-UNAT-180 as authority for the principle that notification must be provided in writing before the time limit for requesting management evaluation begins to run. However, both *Schook* and *Bernadel* interpreted former staff rule 111.2(a) rather than staff rule 11.2(c) and are therefore not of relevance to the present case. In *Manco*, the Appeals Tribunal did not comment on the clear difference between the two provisions, namely the omission from staff rule 11.2(c) of the words "in writing." In addition, *Manco* concerned an implied decision—failure

40. The jurisprudence is neatly summarized in *Awan*. A staff member contested an implied decision of UNICEF not to provide him "safety and functional immunity" from criminal proceedings. In upholding the Dispute Tribunal's judgment that the case was not receivable, the Appeals Tribunal affirmed previous judgments in which it had set out tests for determining the date of notification of an implied administrative decision. The Appeals Tribunal stated (emphasis added):

> 19. *With an implied administrative decision*, the Dispute Tribunal must determine the date on which the staff member knew or reasonably should have known of the decision he or she contests [citing, by way of footnote, *Rosana* 2012-UNAT-273 and *Chahrour* 2014-UNAT-406, para. 31]. Stated another way, the Dispute Tribunal must determine the date of *the implied decision* based "on objective elements that both parties (Administration and staff member) can accurately determine" [citing *Terragnolo* 2015-UNAT-566, para. 36; *Rosana* 2012-UNAT-273, para. 25; *Collas* 2014-UNAT-473, para. 40].

41. The Tribunal considers that the tests cited by the Respondent regarding when a staff member knew or reasonably should have known of a decision and objective elements that both parties can accurately determine are applicable to determining the date of notification of an *implied* decision, as is made clear in para. 19 of *Awan* (see also the use of square brackets at (see

that he had been formally notified by his former counsel that the Office of Staff Legal Assistance would not be assisting him in any appeal.

43. In these circumstances, the Appeals Tribunal stated that "Onana's contention that he did not receive the said UNDT Judgment or any notification from the UNDT Registry does not persuade this Tribunal, since it would be senseless to rely just on a formality to ignore Onana's actual knowledge of the UNDT Judgment." The Tribunal considers that the facts and legal issues arising in *Onana*

Merits of the application

50. The Applicant submits that he had a legitimate expectation of renewal of his appointment, that the reasons given for the non-renewal are not supported by the facts, and that the decision was tainted by bias, prejudice, and discrimiET2s(p8.91n64(e)4(, a)c)4(.)4(r

informed the Applicant that he would like to bring his own team into his new Office, including appointing a new Chief of Office in place of the Applicant, and in return *promised that the Applicant would continue as the Chief of Office until he has found another position*, and *that his appointment would not be terminated for as long as he stays in DGACM*. In addition, Mr. Gettu discussed the possibility of moving laterally to another position within DGACM, and offered to assist in finding another position outside DGACM, to the degree that he would bring the job applicatio

Was the reason given for the decision not to renew the Applicant's appointment supported by the facts?

65. Both parties have cited the jurisprudence of the Appeals Tribunal which states that "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (*Islam* 2011-UNAT-115, para. 29).

66. The Applicant submits, essentially, that the reason given for the decision not to renew his fixed-term appointment is not supported by the facts. He states that he was informed by Ms. Pollard on 2 October 2015 that his appointment would not be renewed beyond 31 December 2015 "because his initial assignment was ad-hoc and

completing it. However, these submissions are irrelevant in that there is no evidence that the Applicant was separated due to unsatisfactory performance in relation to the Compendium Project.

70. The Applicant further notes that he performed a number of other tasks throughout 2015. The Respondent does not dispute that the Applicant carried out a number of other tasks, as recorded by his First Reporting Officer in his performance assessment for the 2014–2015 performance cycle but states that these were temporary, *ad hoc* assignments. The Respondent states that these assignments did not give rise to an organizational need to renew the Applicant's appointment.

71. In *Kacan* 2015-UNAT-582, the Tribunal found that, in the absence of an express promise of renewal of appointment, and having failed to establish improper motives or discrimination, the decision not to renew a staff member's fixed-term appointment was a legitimate exercise of the Administration's discretion, based on the operational realities of the office concerned, and the fact that the staff member's services were no longer necessary.

72. The Tribunal finds that the official reason given to the Applicant for the non-renewal of his fixed-term appointment, i.e. "due to the completion of your assignment on [the Compendium Project]" is sufficiently supported by the weight of the credible evidence.

Is there any evidence that the contested decision was motivated by bias, prejudice, discrimination or other extraneous considerations?

73. The Applicant submits that "the conduct of DGACM has all the markings of an ill-motivated and unlawful action, based on an abuse of discretion including bias, prejudice, and other discrimination against the Applicant." He submits that Mr. Gettu "not only wanted [him] out as Chief of Office [of the USG/DGACM], but also out of DGACM" and "out of the Secretariat altogether" and that this is evident from Mr. Gettu's comment on his performance assessment for the 2013–2014 performance

cycle in which he stated that the Applicant "needs to focus on his job and creatively find out what best fits his talents and skills in the organization." The Respondent submits that these comments were intended to provide guidance to the Applicant and no more, and that they do not demonstrate a desire to remove the Applicant.

74. The Applicant further submits that it is "not surprising that Ms. Pollard had not kept her previous appointments [with him] to discuss a work plan for the [2015–2016] performance cycle, for she would not have been able to contend so easily that the Applicant had no work to do and still not establish a work plan for him." He alleges that Ms. Pollard "purposely has opted not to fulfil her duty as a First Reporting Officer … for the sole purpose of making up the reason for separating the Applicant upon the expiration of his appointment." The Respondent submits that these submissions are without merit.

75. Having considered the Applicant's contentions, and the evidence on record, the Tribunal does not consider that the Applicant has met his burden of proving that the non-renewal of his appointment was motived by bias, prejudice, discrimination, or other extraneous considerations. The comments from Mr. Gettu on the Applicant's 2013–2014 performance appraisal are not sufficient to establish an improper motive. Nor are the allegations regarding the delay in creating a work plan for the Applicant, even if established. In the absence of sufficient evidence, there is no basis for concluding that the contested decision was improperly motivated.

Conclusion

76. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(*Signed*)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of August 2016

Entered in the Register on this 26th day of August 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York