



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/049
Judgment No.: UNDT/2011/043
Date: 2 March 2011
Original: English

Before: Judge Nkemdilim Izuako
Registry: Nairobi
Registrar: Jean-Pelé Fomété

ZEWDU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Esther Shamash, OSLA

Counsel for Respondent:
Steven Dietrich ALS/OHRM, UN Secretariat

This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (UNECA) in Addis Ababa, Ethiopia. In his Application dated 26 March 2010, the Applicant is contesting an administrative decision dated 26 September 2001 transferring him out of the UNECA Security and Safety Section (“UNECA/SSS”).

2. On 29 April 2010, the Respondent filed a Reply in which he submitted, *inter alia*, that the Application was time-barred and that the decision to transfer the Applicant was an appropriate and lawful exercise of the Respondent’s discretionary authority. On 25 October 2010, the Tribunal therefore ordered the Applicant to file his written submissions on the question of waiver of time limits by 26 November 2010. The Applicant filed the said submissions on 24 November 2010.

Respondent’s Submissions

3. The Respondent submits the following arguments on the issue of receivability:

a. The Application in this matter was filed more than nine years after the receipt of the contested decision to transfer the Applicant out of UNECA/SSS.

b. Article 8(4) of the Statute of the Dispute Tribunal bars the Applicant from contesting the administrative decision to include a memorandum dated 29 August 2001 in his official status file. The Applicant had knowledge of the contents of the memorandum and its presence upon his review of his official status file on 13 March 2003 and on 20 July 2006 and is thus beyond the three year statute of limitation. The Respondent further submits that the contested memorandum is referenced in a 28 September 2001 memorandum which informed the Applicant of his lateral transfer.

c. By failing to request a review of the contested memoranda within the time limits specified in the former Staff Rules and the Statute of the Dispute

Tribunal, the Applicant has forfeited his right to challenge the material before the Dispute Tribunal and the forfeit is not subject to waiver.

d. Review by the Management Evaluation Unit (MEU) of the contested decision does not serve to estop the Respondent from raising matters of receivability and does not serve to grant the Dispute Tribunal jurisdiction to review a matter which is otherwise barred by Article 8(4) of the Statute of the Dispute Tribunal.

Applicant's Submissions

4. The Applicant submissions are summarized below:

a. The decision made by the Secretary-General not to waive the deadline for management evaluation is of itself an administrative decision capable of review. Having found that this decision is reviewable, the Applicant requests the Tribunal to find that, given the circumstances of this case, this decision was wholly unreasonable and to rescind that decision. The administrative decision to transfer him and other staff members was a direct result of their joint complaint directed at the acts and omissions of the then Officer-in-Charge of UNECA/SSS, which carried all the relevant indicia of retaliation.

b. In the autumn of 2000, together with seven of his colleagues at UNECA, he lodged a formal complaint about the then Officer-in-Charge of UNECA/SSS. On 29 August 2001, Mr. Patrick Chimya, Chief of the Conference and General Services Division (CGSD), UNECA, transferred him and his co-petitioners out of the Security Section. UNECA management further stated that the complainants would not be eligible to apply for or transfer to any vacant posts in UNECA/SSS again.

c. On 28 September 2001, he was transferred to the print shop. Nine years later, he is still there. Having been transferred to the print shop, he did not lodge any further complaints regarding what he thought was retaliation, neither did he attempt to challenge this administrative decision. Instead, he

opted to 'keep his head down', fearful that any complaints on his part would prompt further retaliation.

d. He looked through his personal file on 13 March 2003 and did not see the memoranda in the file at that time. On 20 July 2006, he requested to see his personal file once again. He was allowed to do so on 28 July 2006. Once again, he did not see the memoranda in the file at that time.

e. Between 20 and 26 July 2006, an investigation was conducted by Mr. Mario Cianci, Human Resources Officer at the Executive Office in the Department of Safety and Security. Mr. Cianci reported these events back to UNHQ in New York and recommended that the Office of Internal Oversight Services (OIOS) conduct an investigation regarding the allegations made about Mr. Olokodana, and that OIC/SSS review the cases of the seven petitioners, the Applicant among them. Mr. Cianci emphasized that an official investigation would have to be conducted quickly as Mr. Olokodana was due to retire less than six months later.

f. Mr. Cianci's report was forwarded to Mr. Abdoulie Janneh, the UNECA Executive Secretary, on 31 August 2006. UNECA management failed to take action. There was no investigation of Mr. Olokodana neither was the Applicant nor the other complainants moved back to UNECA/SSS. In January 2007, Mr. Olokodana retired at G-7 level step 15, no investigation having been initiated.

g. In 2007, Mr. Patrick Chimya, who had been responsible for transferring the Applicant and his co-petitioners out of the Security Section in alleged retaliation for their complaint, passed away. It was only then that the Applicant felt secure enough to appeal for help. In 2009, he once again requested permission to look at his personal file and this time he saw the memoranda.

h. On 24 November 2009, many years after he was required according to the rules, to challenge the decision to transfer him to the print shop, the

Applicant requested management evaluation of this decision, and requested that the adverse material relating to this decision be removed from his file. The Secretary-General determined that any appeal against the decision to transfer the Applicant to the print shop was now time-barred. He did, however, permit the Applicant to make further representations regarding the fact that adverse material had been put on his file, and to comment on it.

i. Being a low-level, national staff member and the holder of a fixed-term appointment which can be allowed to expire without reasons, he was at the time genuinely fearful that any further opposition to Senior Management in UNECA would prompt further and more severe retaliation to the effect that he would lose his job and thereby the means to care for his family.

j. At the time of his transfer, the Ethics Office had not been established and no administrative issuance had been promulgated to offer protection against harassment and/or the abuse of authority.

k. He had experienced first-hand the result of presenting a legitimate formal complaint and that it was entirely reasonable for him to assume that a request for administrative review, effectively a second complaint about the acts and omissions of Senior Management which had already retaliated against him once, could be the end of his career with the Organization. The fact that no protection was available against any further retaliation was not within his control.

l. In hindsight, his fear of further retaliation was justified because in 2006, an independent investigation had identified serious shortcomings and wrongdoings within UNECA Senior Management and had condemned the wrongful transfers. It was recommended that a formal investigation be initiated into the conduct of the Officer-in-Charge of UNECA Security but no action was undertaken despite a specific request in a memorandum from the Under-Secretary-General, Department of Safety and Security (“USG/UNDSS”) to the Executive Secretary of UNECA. Despite a clear

recommendation from UNHQ, it seemed unlikely in the extreme that UNECA Management would have seriously and in good faith considered a request he made for administrative review of the decision to transfer him out of the security section.

m. UNECA Management has effectively conceded that the initial decision to transfer him was unlawful and that sometime after he requested management evaluation, UNECA Management took steps to remove the memoranda of 29 August 2001 and 24 September 2001, which described the decision to transfer him from his official status file. In so doing he contends that UNECA Management has implicitly recognized the unlawful nature of these memoranda.

n. In these exceptional circumstances, it was reasonable that he chose not to proceed to request administrative review of the decision to transfer him until he felt he could complain safely. The fear of severe retaliation, including the loss of his career and livelihood, given the absence of any mechanism for effective protection, was not a circumstance within his control. Accordingly, it was unreasonable for the Secretary-General not to grant a waiver of the time-limits.

o. This is an exceptionally egregious case. He was unable to pursue his case in a timely manner because he was rightfully afraid to do so having experienced, first-hand, the result of challenging UNECA Senior Management.

p. The question of whether circumstances are beyond an applicant's control should be assessed against individual standards, such as an applicant's level of education. The Applicant submits that he is not a well-educated person. He was treated very badly by UNECA Management after making his first complaint and he was justifiably afraid to complain again.

q. In view of the foregoing, therefore, the Applicant requests the Tribunal to find: that it is competent to review a decision made by the Secretary-General not to waive the time limit for management evaluation; that the exceptional circumstances in this case prevented him from pursuing his claim in a timely manner; and that under these circumstances, the Secretary-General's decision not to waive the time limit for management evaluation in his case was unreasonable.

Considerations

5. In certain national jurisdictions, limitations of time are tolled under certain circumstances, which means that time will not run during the tolling period, for example, where the aggrieved party is a minor. Generally, for the statute of limitations to commence, time runs from the earliest time that legal action could have been brought. Every fact required to commence an action must be in existence before time begins to run. Applicants have a duty to pursue their causes of action promptly. Delay can cause considerable uncertainty and inconvenience not only for the Respondent but for third parties as well. Over time, evidence of all sorts can be corrupted or disappear, memories may fade, crime scenes are changed and companies may destroy records.

6. The Applicant asserts that the decision made by the Secretary-General not to waive the deadline for management evaluation is, of itself, an administrative decision capable of review and that the exceptional circumstances that prevented him from requesting administrative review of the contested decision were his fear of retaliation from UNECA management and the absence of an administrative issuance to offer protection against harassment and/or the abuse of authority. In this respect, the Tribunal observes that ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) was promulgated on 1 March 2008. The Applicant's request for management evaluation was filed on 24 November 2009, over one year and eight months after the coming into effect of the said administrative issuance. The Tribunal further observes that the request for

management evaluation was filed four months after the UNDT came into existence in July 2009.

7. Finally, it is the Applicant's submission that Mr. Chimya, who had been responsible for transferring him and his co-petitioners out of the Security Section in alleged retaliation for their complaint, passed away in 2007. Why then did the Applicant not request for administrative review of the contested decision at that time? The Applicant waited for almost two years after the passing of the cause of his fear before commencing his legal action. A reasonable and prudent staff member should have been more diligent in pursuing his cause of action.

8. In view of the foregoing, the well-known maxim of the law of equity, "equity aids the vigilant, not those who slumber on their rights" or to phrase it differently, "delay defeats equity," is applicable in this case since applicants have a duty to pursue their causes of action promptly. The Tribunal further observes that at all material times, the Administration had other bodies such as the Joint Appeals Board in existence which dealt with conflict resolution. The Tribunal finds that the Applicant's fears of retaliation due to the non-existence of administrative machinery to protect him are therefore not justified.

9. In *Costa*¹, the Appeals Tribunal held that the Dispute Tribunal does not have the power to suspend or waive any deadline in relation to management evaluation as Article 8(3) of the UNDT statute plainly states that the Dispute Tribunal shall not suspend or waive the deadlines for management evaluation. In *Sethia*², the Appeals Tribunal reaffirmed its decision in *Costa* adding that the Dispute Tribunal does not have the power under Article 8(3) of the Statute of the Dispute Tribunal to suspend or waive the deadlines for requesting administrative review under the old system of internal justice. Article 8(4) of the Statute of the Dispute Tribunal states that an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

1 2010-UNAT-036.

2 2010-UNAT-079.

10. The facts in this case are distinguishable from those in *Schook*³ where the applicant did not receive a notification of the contested decision in writing. By his own admission, the Applicant in this case was aware of the decision to transfer him out of UNECA/SSS as early as 29 August 2001 when the Chief/CGSD transferred him and his co-petitioners out of the Security Section. In other words, every fact required to commence an action was in existence at that time and time had begun to run.

Conclusion

11. The Applicant did not make a request for administrative review of the contested decision within the two-month time limit set out under former staff rule 111.2(a). This Application is not receivable as it was filed more than the three years stipulated under Article 8(4) of the Statute of the Dispute Tribunal after the Applicant's receipt of the contested administrative decision. In addition, the facts in this case would not have justified the tolling of the limitations of time and would only cause considerable uncertainty and inconvenience not only for the Respondent but for third parties such as other staff members in the UNECA Safety and Security Section. The Tribunal finds that this Application is time-barred and not receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 2nd day of March 2011

Entered in the Register on this 2nd day of March 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi