



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/063

Judgment No.: UNDT/2011/137

Date: 1 August 2011

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NZAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON EXECUTION OF
JUDGMENT**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Philippe Sacher, UNHCR

Introduction

1. The Applicant joined the United Nations High Commissioner for Refugees (UNHCR) in January 1995 on a short term appointment as Secretary (GL4) in Nairobi, Kenya. In March 1996, her appointment was converted to a fixed-term appointment and she was appointed Social Services Clerk. In January 2000, the Applicant was appointed Senior Community Services Clerk and her appointment was converted to an Indefinite Appointment. She was promoted to the GL5 level in July 2000. In April 2001 she was promoted to the GL6 level and appointed as Community Services Assistant, a position that she encumbered until she separated from service on 5 May 2009.

Background

2. Some of the facts preceding the present Application are contained in former UN Administrative Tribunal Judgment No. 1420 dated 30 January 2009. In the said Judgment, the former UN Administrative Tribunal ordered the following in the Applicant's favour:

a. The UNHCR to bring to an end the Applicant's indefinite appointment with the appropriate termination indemnities, in accordance with the undertaking of the Secretary-General, or, if the Secretary-General decided in the interest of the Organization not to fulfil that obligation, fixed the compensation owed to the Applicant at the amount of one year's net base salary at the rate in effect on the date of the judgment, with interest payable at eight per cent per annum as from 90 days from the date of distribution of the Judgment until payment was effected.

b. In compensation for the moral damage suffered by the Applicant, the Tribunal ordered the Respondent to pay the Applicant an amount equal to six months' net base salary at the rate in effect on the date of the Judgment, with

interest payable at eight per cent per annum as from 90 days from the date of distribution of the Judgment until payment was effected.

3. The Respondent was notified of this Judgment on 20 February 2009. By email dated 19 April 2009, the Applicant was informed that, pursuant to staff regulation 9.3(a), the UNHCR Director of the Division of Human Resources Management (“Director/DHRM”) had decided to terminate her appointment with UNHCR in the interest of good administration and to pay her termination indemnities totalling 11.5 months of gross salary, at the rate in effect on the date of the UN Administrative Judgment, that is, 30 January 2009. In addition, UNHCR was also required to pay the Applicant an amount equivalent to six months net base salary, no later than 2 May 2009 as compensation for moral damages. The Applicant was further advised to confirm in writing that she would not contest this termination before 2 May 2009. On 21 April 2009, the Applicant contested this decision via email.

4. On 1 May 2009, the Director/DHRM informed the Applicant that her indefinite appointment had been terminated in the interest of the Organization pursuant to Staff Regulation 9.3 (a) and that the decision would become effective on the date of her receipt of the termination letter. She was also informed that she would receive a payment of three months’ salary in lieu of the notice period and that, in conformity with the Staff Regulations and Staff Rules and with the former UN Administrative Tribunal Judgment No. 1420, she was entitled to termination indemnities totalling 11.5 months of gross salary. Finally, the Applicant was advised that she could request that these measures be reviewed by the Secretary-General, in accordance with Staff Rule 111.2 (a), within two months of receipt of the notification.

5. The Applicant responded by email dated 5 May 2009. She informed the Director/DHRM that she had refused to accept the terms stipulated in his letter of 1 May 2009 as they did not “tally with the judgment as executed by the President of the UN Tribunal”. On 19 May 2009, the Applicant addressed a letter to the Director/DHRM in which she requested the Secretary-General’s review of the

measures outlined by the Director/DHRM on 1 May 2009.

6. On 21 May 2009, a UNHCR Human Resources Officer (“UNHCR/HRO”) drew the Applicant’s attention to the full wording of UN Administrative Tribunal Judgment No. 1420 and explained her entitlements vis-à-vis Staff Regulation 9.3 and Annex III to the Staff Regulations. The Applicant was also informed that her cheque for six months net base salary representing her compensation for moral damages had been issued and was awaiting her collection in Nairobi.

7. On 29 September 2009, the Applicant requested the UNHCR’s Ombudsman’s intervention in her case to request the UNHCR Administration to pay for medical bills incurred whilst she was still their employee, to effect payment as per the former UN Administrative Tribunal Judgment and to request that she be paid in US Dollars. On 17 November 2009, a UNHCR Human Resources Officer informed the Applicant and UNHCR’s Ombudsman as follows:

a. In accordance with the Staff Regulations and Staff Rules, the Applicant was entitled to 11.5 months of gross salary which corresponded to her total tenure with the Organisation of 14 years. In addition, the Director/DHRM had authorized an additional three months salary in lieu of notice. UNHCR had however not yet paid this amount because in the Applicant’s email of 5 May 2009, she had refused to accept those terms. That money was still pending with the UNHCR office.

b. As per the letter dated 21 May 2009, the Applicant’s cheque for compensation for moral damages equivalent to six months net base salary had been issued and was awaiting her collection.

c. As a result of the Applicant’s failure to collect the said cheque it had gone stale. The UNHCR Finance section had voided the cheque as a result for re-issuance of the same payment at a later date.

d. UNHCR needed to know when the Applicant would be able to collect

the cheque or whether she preferred for the funds to be paid into a bank account of her choice.

e. The Applicant had been placed on a combination of sick leave on half pay with annual leave for a period of nine months three weeks and six days from 16 October 2002 to 11 August 2003. As of 12 August 2003 she was placed on Special Leave Without Pay (SLWOP) since she had exhausted all her entitlements for sick leave on full and half pay.

f. On 6 October 2003, the Applicant was informed that she had been placed on SLWOP by the Human Resources Officer at that time and that she would have been entitled to retain the medical insurance during the period of special leave without pay, that is, from 12 August 2003 to 4 May 2009 provided that she had paid hers and the Organization's contributions for that period.

8. By email dated 2 December 2009, the Applicant's legal representative at the time, Ms. Errol Shaw, responded to the UNHCR Human Resources Officer as follows:

a. The Applicant's cheque for compensation for moral damages equivalent to six months net base salary should be forwarded to her in US Dollars, not in Kenyan Shillings due to her inability to return to Kenya given her medical condition.

b. The former UN Administrative Tribunal's award was for 12 months, not 11.5 months.

c. The additional three months salary in lieu of notice should be paid in US Dollars and the payment should be based on the termination date of 5 May 2009 not the 2003 base salary.

9. On 22 February 2010, the Applicant sent an email to UNHCR in which she gave her contact address details for the purposes of transmitting her cheque and reiterated that the medical bills pending for settlement were incurred whilst she still held a valid employment contract with UNHCR. The Human Resources Officer (HRO) responded on 22 February 2010 as follows:

a. UNHCR would proceed to pay the Applicant 12 months of termination indemnities (while agreeing that the correct calculations would be 11.5 months, the half month requested by the Applicant was paid considering the delay of the payment).

b. Six months of net base salary would be paid for moral compensation;

c. Three months of net salary would be paid in lieu of notice. The amounts would be paid in US dollars as per calculations based on data as at May 2009.

d. On the issue of the after-service health coverage, UNHCR awaited advice from competent services at Headquarters and would revert.

10. In a subsequent email on 23 February 2010, Ms. Stella Adu of UNHCR informed the Applicant that the cheque issued by the UNHCR office was a local cheque and that it was advisable that she open a United States Dollar account in the US so that UNHCR could make a bank transfer. On the same day, the Applicant stated that she did not hold a US Dollar bank account and should therefore be paid by cheque and transferred to her by UPS.

11. On 10 March 2010, the Applicant sent an email to another UNHCR/HRO in which she stated that she was still waiting for her cheque. On 5 April 2010, the Applicant requested the intervention of the UNHCR's Ombudsman's office for a second time.

12. On 23 June 2010, the Applicant addressed a letter to the Director/DHRM in which she sought the payment of interest occasioned by UNHCR's delay in complying with UN Administrative Tribunal Judgment No. 1420. The Officer-in-Charge, DHRM responded to the Applicant's letter on 21 July 2010 rejecting her request and stating that the UNHCR had effected the payment into the Applicant's son's bank account in Kenya Shillings on 22 April 2010 and that the matter should therefore be closed.

13. The payments were made as follows: (i) On 22 April 2010 payment of KES 2,915,024; (ii) On 10 June 2010 payment of KES 425,867 to which the Applicant acknowledged receipt of the latter on 26 June 2010.

14. In her Application dated 12 August 2010 (received by the Tribunal on 18 August 2010), the Applicant seeks the implementation of former UN Administrative Tribunal Judgment Number 1420.

15. On 15 September 2010, the Respondent filed a Reply in which it was submitted, *inter alia*, that the Application was time-barred due to the fact that payment was effected on 22 April 2010 and that the Applicant's claim should be subjected to management evaluation in accordance with Staff Rule 11.2.

16. On 25 October 2010, the Tribunal issued *Nzau*, Order No. 210 (NBI/2010), requiring the Applicant to file written submissions on the questions of waiver of time limits and on the requirement for management evaluation by 26 November 2010. The Applicant filed the said submissions on 1 November 2010.

Applicant's submissions on receivability

17. The Applicant's submissions may be summarized as follows:

- a. The Applicant requests for a waiver of the time limits in the interest of justice because of the bad faith shown by the Respondent.

b. There is need for an independent arbitrator because a management evaluation is bound to arrive at the same verdict, thereby, delaying justice.

c. If the UNHCR Administration had demonstrated good faith, they would have suggested that the Applicant request a management evaluation before the case was filed with the Tribunal. The Applicant submits that the Respondent had never offered any clarification or explanation on the issue of management evaluation.

Considerations

Requirement for management evaluation

18. In accordance with ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice), the former UN Administrative Tribunal transferred its pending cases to the United Nations Dispute Tribunal (“the Tribunal”) on 1 January 2010.

19. The Applicant seeks the implementation of former UN Administrative Tribunal Judgment Number 1420 issued on 30 January 2009. Article 2.7(b) of the Statute of the Dispute Tribunal provides that as a transitional measure, the Dispute Tribunal has competence to hear and pass judgment on a case transferred to it from the former UN Administrative Tribunal.

20. Article 11(3) of the Statute of the Dispute Tribunal provides that:

The Judgments of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal.

21. Article 32 (2) of the Dispute Tribunal’s Rules of Procedure provides that:

Once a Judgment is executable under article 11.3 of the Statute, either party may apply to the Dispute Tribunal for an order for execution of the

Judgment if the Judgment requires execution within a certain period of time and such execution has not been carried out.

22. Counsel for the Respondent contends that the present Application is time barred due to the fact that payment was effected on 22 April 2010 and that the Applicant's claim should have been subjected to management evaluation in accordance with Staff Rule 11.2. To reframe the Respondent's argument they are arguing that the time limits for filing Application in art. 7 of the Dispute Tribunal's Rules of Procedure are applicable in the present case. Is this the kind of decision that requires a management evaluation?

23. To require an applicant to request for management evaluation in an application for execution of judgment seems onerous. In the former UN Administrative Tribunal Judgment No. 1283 (2006), it was held that where an applicant has received a judgment in his/her favour but finds himself/herself in a situation where the Administration refuses to execute the judgment, it would not in keeping with good administration of justice to require such an applicant to start over with the entire procedural cycle as provided under article 7 of the Statute of the former UN Administrative Tribunal.

24. It is the view of this Tribunal that the ends of justice are not served but its processes stultified by requiring that an Applicant who had obtained judgment in his/her favour should seek management evaluation for enforcement or execution of the said judgment. Art. 32.2 of the Tribunal's Rules of Procedure clearly states that "once a judgment is executable...either party may apply to the Dispute Tribunal for an order for execution of judgment." Nowhere in the Rules is it mentioned that Article 7 be complied with before a party to a judgment may apply for its execution.

Conclusion

25. Evidence before the Tribunal which was confirmed by both parties is that the Respondent had already paid the Applicant as follows:

- a. The equivalent of 12 months gross salary as termination indemnities although it was worked out to be 11.5 months under staff regulation 9.3(a);
- b. The equivalent of six months salary as compensation for moral damages; and
- c. The equivalent of six months salary *ex gratia* based on goodwill.

These payments were effected on 22 April 2010.

26. The Applicant however contended that part of the Judgment of the former UN Administrative Tribunal in issue still remained unexecuted because the terms of the said Judgement included that eight per cent interest on the judgement sums be paid additionally if the payment was not made within 90 days of the issue of the Judgment.

27. The Respondent explained that following the receipt of the Judgment on 20 February 2009, a cheque was raised within time for payment of the Judgment sums to the Applicant who refused it and rather demanded that she be paid in US Dollars. This refusal by the Applicant to receive her cheque when it was ready for collection led to delay in payment. The matter was later resolved with the assistance of the UNHCR Ombudsman later in 2009 and early 2010.

28. It must be noted that the delay in the execution of the Judgment was caused by the Applicant's refusal to accept the terms of payment stipulated in the Respondent's letter dated 1 May 2009. She also did not provide the Respondent with her bank account details to enable a transfer of the monies due to her.

29. There was no duty on the Respondent to pay the Applicant in US Dollars when under her former contract of employment and throughout the course of her employment she had received her salaries in Kenya Shillings. It was not for the Applicant to direct or demand that she be paid her termination indemnities or one year's salary as the Respondent had been ordered in the Judgment to pay one or the

other. The Applicant in the same vein could not dictate that she be paid in US Dollars.

30. Having found that the monies awarded to the Applicant have been duly paid, the Tribunal rejects the Application in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 1st day of August 2011

Entered in the Register on this 1st day of August 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi