UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2010/001/ UNAT/1054
Judgment No.:	UNDT/2011/202
Date:	29 November 2011
Original:	English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BANGOURA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON APPLICATION FOR EXECUTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Introduction

1. On 28 February 1999, the Applicant filed an Application with the former UN Administrative Tribunal, which matter was decided in his favour on 21 November 2001 (Judgment No. 1029).

2. On 25 June 2009, the Applicant filed the present application with the former UN Administrative Tribunal. He seeks the execution of part of Judgment No. 1029 and compensation for the moral injury caused as the result of the non-execution of that Judgment, as well as damages and interest for the delay in the settlement of his claim of defamation.[1]

3. On 1 January 2010, this case was transferred to the Nairobi Registry of the United Nations Dispute Tribunal (UNDT) in accordance with ST/SGB/2009/11 on Transitional Measures Related to the Introduction of the New System of Administration of Justice.

Facts

4. The Applicant was employed by the United Nations International Drug Control Programme (UNDCP) on a series of fixed-term appointments between January 1992 and January 1997. In October 1994, the Applicant was assigned to Abidjan, Ivory Coast, and on 24 December 1994 to the UNDCP regional office in Nairobi, Kenya.

5. In 1996, the Applicant's post at UNDCP was abolished. A few short-term extensions were granted but the Applicant's contract was ultimately not renewed beyond 31 January 1997.

6. On 5 January 1997, The Washington Post published an article referring to the Applicant by name and making a number of allegations against him which ultimately proved to be false and unfounded. On 9 January 1997, as a result of the article in The

[1] Introductory Application on Appeal, 25 June 2009, paragraph 12.

Washington Post, the Applicant was suspended on full pay pending expiry of his contract.

7. On the same day, Mr. Fred Eckhard, the Acting Spokesman for the (then new) Secretary-General Kofi Annan, made an announcement at a press conference, referring to these allegations of "mismanagement and misconduct" and stating that the Applicant had been placed on administrative leave and that his contract would not be renewed. The Judgment referred to this press conference as a "press briefing".

8. The Applicant sought a review of these decisions and on 6 April 1997, he lodged an appeal with the former Joint Appeals Board (JAB), contesting not only the decisions to suspend him, and not to renew his contract, but also regarding the withholding of his final payments and the defamatory remarks made about him at the press conference.

9. The JAB submitted its report on 3 July 1998. The panel concluded that the Respondent had, through his Acting Spokesman, made defamatory statements about the Applicant, and that placing him on special leave with full pay ("SLWLP") was an arbitrary and improper use of discretion. The panel further noted that the decision not to renew the Applicant's contract and place him on SLWLP was the result of allegations of misconduct to which the Applicant had not been given a chance to respond, and that no disciplinary process had been initiated nor any disciplinary action taken against him.

10. The Secretary-General did not accept the findings of the JAB, and the Applicant appealed to the former UN Administrative Tribunal. Judgment No. 1029 resulted in the following disposition:

> For the foregoing reasons, the Tribunal:
>
> 1. Decides that both the decision to terminate the Applicant's contract and the decision to place him on special leave are tainted by abuse of power;
>
> 2. That the Applicant is therefore entitled to one year's net base salary by way of compensation, that being the proper reparation due him;

3. Decides, further, that since his reputation has suffered serious injury as a result of information disseminated in a United Nations press briefing, the Applicant is entitled to reparation for the moral injury suffered, in the form of, on the one hand, financial compensation in the amount of 50,000 United States dollars, and, on the other, publication of the pronouncements of this judgement in a United Nations press briefing within three months of the judgement;

4. Decides that the Administration cannot continue to withhold the sums due the Applicant and must therefore pay them to him;

5. Rejects all other pleas.[2]

11. Although dated 21 November 2001, Judgment No. 1029 was not issued to the parties until 13 March 2002. The sums due to the Applicant were disbursed to him, in accordance with the disposition cited above.

12. On 13 September 2002, the Respondent issued the following Press Release:

> UNITED NATIONS ADMINISTRATIVE TRIBUNAL RENDERS JUDGEMENT IN FAVOUR OF FORMER STAFF MEMBER
>
> In March of this year, the United Nations Administrative Tribunal communicated to the Administration its judgment in the case of Mr. Bangoura. Mr. Bangoura worked for the United Nations International Drug Control Programme, Vienna, under a series of fixed-term contracts. The Tribunal found that the Organization's decision not to continue his employment was tainted by abuse of power on the part of the Administration. It also criticized the discussion of Mr. Bangoura's case by the Administration at the Organization's press briefing in January 1997. The Tribunal ordered the Administration to compensate Mr. Bangoura $50,000 for the injuries he suffered, including injury to his reputation, and to publish the pronouncements of the judgement in a press release.
>
> Attached to this press release is the text of United Nations Administrative Tribunal Judgement No. 1029, in French and in English. The French version of the judgement is the official version.[3]

[2] UN Administrative Tribunal Judgment No. 1029, *Bangoura* (2001), para. XXII.
[3] Press Release ORG/1358.

13. It appears that the Applicant was not satisfied with the outcome of his case because between April 2002 and October 2008 he raised the matter with various arms of the Respondent Organisation to no avail. Ultimately, he filed the present Application.

Issues

14. The Applicant asserts that Judgment No. 1029 of the former UN Administrative Tribunal was not executed in its entirety. Specifically, the Respondent failed to implement the requirement in para. XXII (3) for the "publication of the pronouncements of this judgement in a United Nations press briefing within three months of the judgement." He contends that the issuance of the entire judgment to the press was in contravention of the decision itself. He further argues that the summary of the Judgment presented a false impression of the substance thereof. Finally, he argues that the Press Release was issued 10 months after the Judgment was issued, constituting in itself a violation of the Judgment and a further act of defamation.

15. The Respondent contends that the Judgment was implemented in full and that the Applicant's claim has, therefore, no substance. He further argues that, even if the claim has some merit in principle, it is not receivable *ratione materiae* because the former UN Administrative Tribunal did not have the power to deal with requests for execution of judgments. The Respondent cites the former UN Administrative Tribunal Judgment No. 1283, *Mbarushimana* (2006) in support of this contention. The Respondent does not address the issue of the delayed issuance of the Press Release.

16. The Respondent further submits that the Applicant's claim for moral damages arising out of further defamation in the publication of the Judgment and Press Release are matters which are *res judicata* and cannot be re-litigated.

Consideration

17. The principal subject matter of the Application is a complaint that the Respondent did not fully 'execute'—that is, carry out—the terms of Judgment No. 1029 of the former

UN Administrative Tribunal. However, the Applicant also raises a number of general complaints of defamation in the course of his pleadings, all stemming from the original wrongful statements made by Mr. Eckhard on 9 January 1997. The Tribunal must consider whether or not such matters have already been settled by judicial decision and cannot, therefore, be re-litigated.

Res judicata

18. Whilst the former UN Administrative Tribunal which examined the Applicant's complaints in detail concluded that it "did not have jurisdiction to consider complaints regarding defamation", it did in fact conclude that as a result of the remarks made in the press briefing the Applicant's "reputation has suffered serious injury" and "the Applicant is entitled to reparation for the moral injury suffered."[4]

19. It is the view of this Tribunal that the issues raised by the Applicant regarding harm to his reputation stem from the same cause of action—though he may couch it in other terms—and as such, are *res judicata*. The Applicant does not have the right to bring the same complaints again. The Tribunal does not doubt that the Applicant suffered immense reputational damage as a result of the Respondent's conduct but he has been compensated and the matter is now closed.

Execution of the Judgment

20. Before considering whether or not the present Application for execution is receivable *ratione materiae* and *ratione temporis*, it is necessary to consider the facts in light of the disposition made in Judgment No. 1029 and to decide whether, as the Respondent asserts, the Judgment has indeed been fully implemented.

21. The former UN Administrative Tribunal directed that the Respondent publish the pronouncements of its Judgment "in a press briefing". The Respondent, after some delay, issued the Press Release, cited above, in which the Judgment was summarised. The full

[4] *Bangoura* (2001), para. XXII.

Judgment was also appended. This Tribunal disagrees with the Applicant's contention that the Press Release distorted the meaning of the Judgment and finds that his complaint that the publication of the full Judgment was in some way damaging to the Applicant is of no merit. The judgments of the former UN Administrative Tribunal are public documents in any event, and the Applicant cannot expect to have the written reasons behind a decision omitted from the record.

22. However, this Tribunal does not consider that the issuance of a Press Release—that is, a written document—amounts to "publication of the pronouncements of this judgment in a United Nations press briefing…" as required by Judgment No. 1029. It is of note that following the printing of the impugned article in The Washington Post, the Respondent made his defamatory remarks about the Applicant in a "press briefing" or press conference, at which members of the press were physically present and were able to ask questions. It is a straightforward matter of interpretation and in the context of Judgment No. 1029, in which it was stated that "in light of the great publicity given to briefings by the Spokesman for the Secretary-General…" there can only be one logical conclusion: the former UN Administrative Tribunal expected that the Applicant would be absolved in precisely the same manner as he had been impeached—through a public announcement at a press "briefing".

23. It follows, therefore, that by issuing a Press Release, the Respondent failed to comply with the Judgment of the former UN Administrative Tribunal and as a result the full execution of that Judgment has been outstanding until now.

Receivability *ratione materiae*

24. The next issue, then, is whether or not the Dispute Tribunal has the jurisdiction to deal with the matters arising from the non-execution of judgments of the former UN Administrative Tribunal.

25. In most if not all judicial systems it is usual for parties to return a matter to court if a judgment has not been followed through. However, the Respondent argues that the

former UN Administrative Tribunal had no power to deal with such a situation and that, as this Application derives from a judgment of the former UN Administrative Tribunal, this Tribunal has no such power either.

26. It is true that the Statute of the former UN Administrative Tribunal did not mention such a power specifically, whereas art. 32 (2) of the Statute of the Dispute Tribunal provides for precisely this in the new regime. Are we then to believe that the former UN Administrative Tribunal did not have power to deal with matters related to the non-execution of its own judgments?

27. In *Mbarushimana* (2006), the former UN Administrative Tribunal concluded that it did not have the power to "give the Applicant what he wants". However, the principal reason given for this was not that the Statute of the former UN Administrative Tribunal was silent on the issue, but the factual reality that it could not conceive of how it could "*really oblige* the Administration" to carry out the terms of its judgments in any other way than by providing such terms in the first place:

> As the Tribunal understands the situation, its Judgements are binding on the Administration … Thus the Tribunal must rely on the mandatory nature of its first decision and on the conscience of the Administration. The mandatory character of the Tribunal's decisions is the cornerstone of the judicial system of the United Nations. Without that, the Tribunal would have merely an advisory function, and the Secretary-General would be judge and party at the same time, which was exactly what the General Assembly wanted to avoid when it created the Tribunal. At present, the Tribunal cannot recall any order that has not been carried out by the Administration, and it hopes that it will never have such a painful experience.[5]

28. This Tribunal is not bound by this majority opinion and does not agree that the former UN Administrative Tribunal did not have the power to deal with requests for execution of judgments. As cited in the dissenting opinion in that case, the International Court of Justice took the view that:

[5] *Mbarushimana* (2006) para. X.

> [T]he Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions. According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute" (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1954*, p. 53).

29. If the Administration refuses to accept the binding nature of a judgment of the Tribunal, the Tribunal must uphold its own integrity. The International Labour Organisation Administrative Tribunal (ILOAT) has had no compunction[6] in doing this and there is no reason why the former UN Administrative Tribunal could not do the same. This Tribunal adopts and endorses the dissenting opinion of Brigitte Stern in *Mbarushimana* (2001) in its entirety. In the absence of any provision for the execution of judgments in the Statute of the former UN Administrative Tribunal, should this Tribunal conclude that a party would have been without a remedy and would have to remain content with a judgment whose effect would have been only academic? This the Tribunal cannot countenance.

30. It is, therefore, firmly the view of this Tribunal that the former UN Administrative Tribunal *did* have the inherent power to deal with execution of judgments, notwithstanding its own pronouncements to the contrary, and even though the Statute of the Administrative Tribunal was silent on this point. As this case was transferred to the present Dispute Tribunal as a result of the transitional measures set out in ST/SGB/2009/11, this Tribunal concludes that it does have jurisdiction *ratione materiae* to deal with the present case.

Receivability *ratione temporis*

31. Since the Statute of the former UN Administrative Tribunal made no mention of execution of judgments, there is no specific time-limit for making such an application set

[6] See, for example, ILOAT Judgment No. 2178 (2003).

out therein. Indeed, even under the Statute of the Dispute Tribunal, which does deal with execution of judgments, no specific time-limit is prescribed:

> Once a judgement is executable under article 11, paragraph 3, of the present statute, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out.[7]

32. This wording is reflected in art. 32 (2) of the Tribunal's Rules of Procedure. There is, therefore, no clear rule as to when an application for execution of a judgment might become time-barred.

33. What then, is the appropriate time limit in which a party may apply to the Tribunal for execution of a judgment? In this case, Judgment No. 1029 was communicated to the parties—at the latest—in March 2002. Execution, or implementation, of the Judgment ought to have occurred within a reasonable time after it became executable. Implementation of that part of the disposition requiring a press briefing ought properly to have been done within three months—that is, by 13 June 2002. At that time, the Applicant had every right to demand execution and indeed, he did apply to the former UN Administrative Tribunal on 2 April 2002 requesting exactly that. There is no record on file of any response to the Applicant from the Administrative Tribunal—indeed, it appears that this request was simply ignored.

34. By letter dated 17 July 2002, Mr. Ralph Zacklin, Assistant Secretary-General of the Office of Legal Affairs, wrote to the Applicant informing him that the Judgment had been implemented and there was no room for further negotiation. The letter stated that "the Administration has fully implemented the decision of the Tribunal. The judgement was published and you were paid the amounts awarded." Clearly at that time, the Respondent was of the view that publication of the Judgment through the ordinary channels was sufficient to execute paragraph XXII (3) of the Judgment. However, at some time between 17 July and 13 September, the Respondent must have woken up to the reference to a press briefing, and so issued Press Release ORG/1358.

[7] Dispute Tribunal Statute, art.12.4.

35. It seems to this Tribunal that the Applicant was entitled to request execution of the Judgment and he did so in April 2002. He raised the matter again with the Under-Secretary-General for Management in May 2003, and he again wrote to the former UN Administrative Tribunal on 2 November 2003, referring to his request for execution of 2 April 2002. His pleas appear to have run up against a brick wall, and apart from occasional letters to the Ombudsman's office—which also appear to have been ignored—no further formal action was taken by the Applicant until 25 June 2009, when the present Application was filed.

36. Notwithstanding the long time that has passed since Judgment No. 1029 became executable, this Tribunal is of the view that a party who has a judgment in his favour cannot be left without a remedy through absolutely no fault of his own, and particularly not if the law itself was not clear on the issue of jurisdiction. In this case, the Applicant did try to raise the matter with the former Administrative Tribunal, but his pleas were not answered. In the meantime, the Judgment remained, and remains only partially executed.

37. Can this Tribunal, at this late stage, order the execution of Judgment No. 1029? As stated above in paragraph 30, any tribunal, even in the absence of any specific provision, must have the inherent power to ensure that its own orders or judgments are executed. And though the present case deals with a judgment of the former UN Administrative Tribunal, it is still open to this Tribunal to make an appropriate order for the fair and expeditious disposal of the case pursuant to art. 19 of the Rules of Procedure, and bearing in mind art. 36, which permits that "all matters not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal…"

Conclusion

38. For the reasons stated above, the Tribunal orders the Respondent to execute Judgment No. 1029 of the former UN Administrative Tribunal by holding a press briefing in which his Spokesman gives the particulars of both Judgment No. 1029 and the present Judgment, within one month following the date on which the present Judgment becomes executable.

39. The Applicant is also claiming compensation for moral injury caused as a result of the non-execution of part of Judgment No. 1029. This head of damage is distinct from the other heads of damage which were previously awarded by the former Administrative Tribunal. Although the Administration executed part of the Judgment by paying the Applicant the compensation he was awarded therein, they did not execute as they should have done that part of the Judgment requiring them to hold a press "briefing". They slept on that for six months, and even then, they did not hold a press briefing, but as stated earlier, when they woke up they merely issued a Press Release.

40. Generally a party with a judgment in his favour is entitled to execution within a reasonable time, failing which he is substantially deprived of the benefit of the Judgment in his favour. In the present case, the failure to fully execute the Judgment has deprived the Applicant of complete redress for the wrong done to him for a period of nearly 10 years. Although this Tribunal is now ordering proper execution and this should amount to some form of redress for the damaged reputation of the Applicant, it cannot be said that this is a complete remedy since so much time has passed. In these circumstances, this Tribunal feels that the prayer for damages for non-execution is fully justified and awards the Applicant the sum of $10,000 under this head.

(Signed)

Judge Vinod Boolell

Dated this 29th day of November 2011

Entered in the Register on this 29th day of November 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi