



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

COOKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-Represented

Counsel for Respondent:
Jorge Ballesterro, UNICEF

Introduction

1. The Applicant, a national of Liberia, is a former staff member of the United Nations Children's Fund ("UNICEF") where he worked as Deputy Representative in the Malawi Country Office at the P4 level. He was summarily dismissed on charges of physical assault, sexual harassment and abuse of authority.

Facts

2. The Applicant initially worked as a National Officer for the UNICEF Country office in Liberia from 1992 to 1997. He then became a consultant with the UNICEF Operation Lifeline Sudan until 2000 when he worked for the UNICEF Country Programmes in Nigeria and Pakistan. In 2008 he joined the UNICEF Malawi Country Office.

3. Before the Applicant took his home leave in 2009 an incident occurred between him and the Malawi Country Office Representative at a meeting in which the Applicant's performance was discussed. During the meeting, the Applicant conveyed his frustrations to the Representative remarking that he felt that he was not appreciated in the office and that such lack of appreciation of people would sometimes push them to suicide.

4. On 14 August 2009, the Applicant took his home leave and while he was on leave, was instructed by the Regional Human Resources Officer that before returning to Malawi after his home leave, he should report to the United Nations Office at Nairobi (UNON) for medical clearance.

5. The Applicant complied with the directions and submitted himself for medical examination in Nairobi. While there, he received an email on 9 September 2009 which informed him that he was under investigation for "threats to kill certain UNICEF Staff in Malawi." Based on the investigations being conducted against the Applicant, the

email required him to attend an interview on 14 September 2009 in the Regional Human Resources Officer's office at the East and Southeast Asia Regional Office (ESARO), UNICEF, in Nairobi.

6. On 10 September 2009 the Applicant was medically cleared and declared fit for duty. Later that month, he was placed on administrative leave. In October 2009, the Applicant was diagnosed as being depressed and he began attending counselling sessions at a clinic and at his church in Liberia.

7. On 17 November 2009, the Deputy Director of the Office of Internal Audit released a report on the investigations conducted against the Applicant and on 8 December 2009, the Applicant, provided his comments on the investigation report. Thereafter, on 12 January 2010, the Applicant was charged with misconduct and was asked to file a response within 15 days of the receipt of the charge letter. This he did on 27 January 2010, by which time, the Applicant's state of depression had been exacerbated by the death of his father.

8. In a letter dated 15 April 2010 and signed by the Deputy Executive Director of UNICEF, the Applicant was summarily dismissed. The last paragraph of his dismissal letter which pronounced the decision to dismiss him stated as follows:

In light of the above, and taking into account the fact that there are three separate and substantiated charges against you and that each of them is of a particularly serious and grave nature, I have concluded that your actions constitute willful and serious misconduct and warrant dismissal in accordance with United Nations Staff Regulation 10.2. Your dismissal will take place with immediate effect on the date of receipt of this letter.

Following receipt of the dismissal letter, on 21 April 2010 and 29 June 2010 the Applicant wrote to the Executive Director of UNICEF seeking his intervention towards an amicable settlement, but did not receive any response. The Applicant then travelled to New York where he continued to make efforts at contact with UNICEF senior officials. On 26 July 2010, the Applicant faxed a copy of the letter he had earlier written to the Executive Director and a couple of days later, he was contacted by the

Chief, Policy and Administrative Law Section (“Chief/PALS”) who informed him that the Applicant’s correspondence had been referred to him and asked how he could assist the Applicant.

9. The Applicant informed the Chief/PALS that he wanted to meet with the Executive Director so as to discuss his dismissal. The Applicant was not granted audience with the Executive Director. Instead he received an email from the Chief/PALS on 8 September 2010, in which he was informed that the decision to summarily dismiss him was final. The said email conveyed that the only recourse available to the Applicant was by way of an appeal to the Dispute Tribunal. It further gave him details of the Ombudsman and Mediation Services and the Office of Staff Legal Assistance (“OSLA”) for possible assistance.

10. On 14 October 2010, the Applicant contacted OSLA and on 20 October 2010 OSLA responded that it could not assist him because in its opinion his intended application appeared to be time-barred. However OSLA advised the Applicant to file his Application with the Tribunal himself and provided him with the necessary forms for filing an application. Accordingly on 27 October 2010, the Applicant filed his case with the Tribunal.

11. On 29 October 2010 the Tribunal served the Application on the Respondent as required. The Respondent did not comply with the Tribunal’s Rules of Procedure which require that a reply must be filed within 30 calendar days from the date of receipt of the application.

12. On 14 December 2010, the Tribunal’s Registry wrote to the Respondent reminding him that the 30 days in which to file his reply had lapsed without the Tribunal having received any such reply. On the same date, the Respondent filed a motion requesting leave to re-enter the proceedings and also filed his late reply. The Respondent did not attach any supporting documents but relied on the Applicant’s annexes. He submitted that the Application was time-barred and that the Applicant had

failed to show exceptional circumstances warranting an extension of time to file his Application.

13. On 13 January 2011, the Tribunal issued an Order No. 004 (NBI/2011) on the Respondent's request to re-enter the proceedings. The Tribunal held that the Respondent had not met the requirement of exceptional circumstances under the Rules of Procedure, but that nonetheless it was in the overall interests of justice to allow the Respondent to participate in the proceedings.

14. On 1 December 2011, the Tribunal sent hearing notices for 8 December 2011. Upon receipt of the said notices, the Respondent, without leave of court, filed a document which he entitled "Submission regarding Tribunal's indication of a hearing." In the said document, he confirmed his attendance at the hearing and went further to move the court to enter Summary Judgment in the Respondent's favour. He additionally raised the preliminary issue of receivability of the case.

Respondent's submissions

15. The Respondent argued and submitted that:

- a. The Application was time-barred under staff rule 11.4(b)
- b. The Application was not receivable under art. 8.1(d)(ii) of the Tribunal Statute and ought to be rejected.
- c. The Applicant was an international professional staff member at the P4 level who worked for UNICEF since 2000; therefore he was fully aware of applicable laws governing his contractual relationship with UNICEF, including his right to contest adverse administrative decisions.
- d. The decision in *Morsy* UNDT/2009/036 is relevant in this case. It was held in *Morsy* that "an individual may by his own action or inaction forfeit his

right to be heard by failing to comply with time limits”. It upheld the equitable maxim that the law helps the vigilant.

e. The Respondent sought Summary Judgment under Article 9 of the Tribunal’s Rules of Procedure.

Applicant’s submissions

16. The Applicant argued and submitted that:

a. The Application was receivable.

b. The Application was filed late because the Applicant was ill with situational depression.

c. The Executive Director of UNICEF or his representatives ought to have informed and advised the Applicant as to the finality of the decision to summarily dismiss him and the avenues for recourse at an earlier time.

Consideration

Issues

17. Two issues arise to be addressed by the Tribunal at the present time. These are the Respondent’s Application for Summary Judgment and the question of receivability also raised by him.

Summary Judgment

18. Article 9 of the Tribunal’s Rules of Procedure provides that:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter

of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

At the hearing on 8 December 2011, the Respondent's Counsel argued that his client was entitled to Summary Judgment under Article 9. The Tribunal orally ruled on this issue and refused the prayer for Summary Judgment. In doing so, the Tribunal pointed out that Article 9 required Summary Judgment to be entered only where the material facts of a case were not in dispute and a party is entitled to judgment as a matter of law.

19. In the instant case, where the receivability of the Applicant's case is being challenged, the Tribunal cannot determine the facts of the Application on the merits or even consider if such facts are contested or not because the Respondent had up until these proceedings not joined issues with the Applicant on the merits of the case. Summary Judgment is a judgment on the merits and a party cannot ask for it when he has not filed any pleadings or in other words when he has not pleaded any facts. It is simply incongruous that the Respondent here should submit that he is entitled to Summary Judgment as a matter of law while he had not pleaded any facts.

Was the Application filed in time? Was the Application receivable?

20. Under art. 8.1(d)(ii) of the Statute and art. 7(1)(c) of the Rules of Procedure of the Dispute Tribunal, an application shall only be receivable in cases where management evaluation is not required, if it is filed within 90 calendar days of the applicant's receipt of the impugned administrative decision.

21. The Applicant's letter of dismissal was dated 15 April 2010 and he acknowledged receipt soon thereafter. In the light of art. 8.1(d)(ii) of the Statute and art. 7(1)(c) of the Rules of Procedure of the Dispute Tribunal, the Tribunal notes that the Applicant was due to file his Application by late July 2010. In other words, on the mere reading of the above provisions, it would appear that the Application was not filed in time. In the circumstances surrounding this Application, is it thereby rendered irreceivable?

22. It is not contested that the Applicant is not legally represented both in his Application and in these proceedings. It is also a matter of common acceptance by both parties that he could not get legal assistance from OSLA and that he has been out of employment for over 18 months. The Applicant had also been ill and had variously complained of his many problems especially financial ones. It must be recalled that on 15 April 2010, the Applicant was summarily dismissed with immediate effect. He received a dismissal letter which unfortunately did not advise him of his rights to and the mechanisms for challenging this most severe disciplinary sanction against him.

23. While addressing the Tribunal on the failure of UNICEF to advise the Applicant on the options open to him upon his summary dismissal, the Respondent's Counsel submitted that it was a mere oversight on the part of UNICEF. He argued that the said oversight was not fatal to the case of the Respondent. He further pointed out that at the time of sending a charge letter to the Applicant commencing disciplinary proceedings against him, UNICEF had in that letter promptly advised him of his due process rights under staff rule 10.3(a) of seeking legal assistance in preparing his response to the charges.

24. Although no staff regulation specifically provides for advising a staff member against whom disciplinary action has been taken of his rights and applicable mechanisms to challenge the said disciplinary action, it is the bounden responsibility of the Respondent or his agents to properly inform the affected individual in writing of these rights in the same correspondence that informs the staff member of the disciplinary action. UNICEF had the responsibility in this case to inform the Applicant of his rights and mechanisms for challenging his dismissal.

25. The Respondent's Counsel additionally submitted that the Applicant having been a P4 officer in UNICEF ought to have been aware of his legal rights and mechanisms for challenging his summary dismissal. The Tribunal is of the view that the Applicant's actual knowledge of his rights, responsibilities and procedures for challenging a disciplinary measure against him is absolutely essential. The Respondent

did not adduce evidence that the Applicant actually knew the appropriate channels for redressing his grievance but chose to ignore them.

26. The Tribunal observes that upon receipt of the email on 8 September 2010 informing the Applicant of his rights and recourse to the Internal Justice system, he contacted OSLA within a week and on receiving the reply from OSLA on 20 October 2010, the Applicant promptly filed his Application with the Tribunal on 27 October 2010. These are not the actions of an Applicant who would sleep on his rights, by failing to comply with time limits but rather the actions of one who did not have the knowledge and information of his rights in time.

27. In the draft General Assembly Resolution on the matter of Administration of Justice at the United Nations, the Fifth Committee stressed “the importance of ensuring access for all staff members to the new system of administration of justice regardless of their duty stations”¹. The Tribunal in view of these circumstances finds cause for concern as to the Applicant’s position with regard to his access to justice in this instance. Art. 19 of the Dispute Tribunal’s Rules of Procedure empowers the Tribunal *suo motu* to give directions for a fair and expeditious disposal of a case and to do justice to the parties. This Tribunal finds that this set of circumstances presents a situation in which it can exercise its powers under art. 19(1).

Applicant’s efforts for an amicable settlement with the Respondent

28. It is on record that on 21 April 2010 a few days after receipt of the dismissal letter, the Applicant wrote his first letter to the Executive Director seeking amicable solution to his predicament, however, he did not receive any response. He wrote again to the Executive Director on 29 June 2010. The Applicant’s second letter read in part as follows:

Sir, I am writing you as the head of the organization ascertain if you are fully aware of this position as the decision of my dismissal is contrary to my

¹ A/C.5/66/L.10 (Provisional), Sixty-Sixth session, Fifth Committee, Agenda Item 143, 23 December 2011 at paragraph 12

charge letter. *I feel it is crucial that you intervene so as to amicably resolve this matter* especially considering that the reasons given for my dismissal in Mr. Abdi's letter has no relationship nor does it tally with my charge letter. I look forward to hearing from you soon. (Emphasis added)

29. Having received no response, as soon as the Applicant recovered from his depression and was medically discharged by both his doctor and counsellor, he travelled to UNICEF Headquarters in New York from Liberia and made oral contact with UNICEF officials regarding his case. He was then advised to fax a copy of the letter he had previously written to the Executive Director for review and action. This he did by the afternoon of 26 July 2010. Two days later, the Chief/PALS called him while he was still in New York to ask what he really wanted. The Applicant informed him that he wanted to meet with the Executive Director. After this conversation, the Applicant called the Chief/PALS several times for more than two weeks but could not get through to him as the Chief/PALS was said to be on leave. A subsequent visit to UNICEF's New York Offices yielded no positive results as the Applicant was not allowed into the premises.

30. On 8 September 2010, the Chief/PALS finally replied and acknowledged the Applicant's letter and informed him that the administrative decision to summarily dismiss him was final and then also advised him of the appropriate legal mechanisms that he could have recourse to. It is noteworthy that the Applicant's first and second letters to the Executive Director were both written when the Applicant was still within the time limits for filing an application with the Tribunal.

31. Even if the Applicant had lacked the necessary language and expression to articulate his efforts in reaching out to the Respondent, the Tribunal recognizes that these were genuine attempts to bring the Respondent to the mediation table. Since mediation is a voluntary process, the consent of both parties is fundamental and it is incumbent upon either of the parties to a dispute to approach the other requesting mediation. It is either party's right to accept or refuse mediation. The party to whom mediation approaches are made has a duty to categorically accept or refuse, but not to

meet the request with silence or to delay his reply until time runs out for the other party. When a party therefore initiates mediation, it behoves the other party to respond promptly.

32. The General Assembly in various Resolutions had affirmed the necessity of informal conflict resolution mechanisms. In A/RES/62/228 (Administration of Justice at the United Nations) adopted on 22 December 2007, while creating the new system of Administration of Justice, it recognized that informal settlement is a crucial element of conflict resolution and emphasized that all possible use should be made of the informal system in order to avoid unnecessary litigation. It also reaffirmed “the importance of the general principle of exhausting administrative remedies before formal proceedings are instituted”.

33. Similarly and most recently, the General Assembly in the draft Resolution² stressed, at para. 17 “the importance of developing a culture of dialogue and amicable resolutions of dispute” rather than a “culture of litigation”. Although the General Assembly established the office of the Ombudsman specifically for informal resolution of conflict, mediation is initiated when one party approaches the other for this purpose or the Dispute Tribunal recommends it. It was proper for the Applicant to approach UNICEF for an amicable solution in this case.

Exceptional Circumstances

34. The circumstances already examined above raise the questions as to whether the Applicant was in a position to know the options open to him at the time he was summarily dismissed. While the Respondent properly advised the Applicant in the letter charging him with misconduct as to his options in making a defence to the charges, the same Respondent had most unfortunately failed to properly advise the Applicant upon his being summarily dismissed. This failure is fatal to the Respondent’s case on the issue of receivability of this Application. The said failure in the attendant

² *Supra*

circumstances served to deny the Applicant of the right to access to justice. In *Igunda* UNDT/2011/143, the Tribunal *suo motu* extended the time limits and ordered the filing of a better articulated application due to the fact that the Applicant did not have legal assistance and his confused Application was as a result of a lack of access to justice.

35. The Tribunal finds that, based on the facts before it, the Applicant made efforts to initiate mediation in time and that the Respondent ignored these approaches. It was incumbent on the Respondent to react to these approaches and to agree or to refuse mediation. It was not until 8 September 2010 that UNICEF properly advised the Applicant in writing of the finality of its decision on his dismissal and his rights to and mechanisms for challenging the impugned administrative decision. While UNICEF maintained silence in the face of the Applicant's overtures, the Respondent's action or inaction had in effect served to freeze time in which the Applicant could bring his Application before the Tribunal. This created a special circumstance as enunciated in *Morsy*.

36. Under art. 9(1) of the Dispute Tribunal's Rules of Procedure, the Tribunal is empowered to deem this case receivable. The foregoing provision was earlier applied by this Tribunal in order to re-admit the Respondent into the proceedings in this case when he had by his own inaction found himself effectively expelled from it, under art. 10.1 of the Tribunal's Rules of Procedure. Additionally, art. 35 of these Rules empowers the Tribunal to shorten or extend the time limits or waive any rule when the interests of justice so require.

Conclusion

37. Conclusively, the failure of UNICEF to react in time to the Applicant's mediation overtures and its failures to appropriately advise the Applicant in time about his rights and the mechanisms for challenging his summary dismissal constitute exceptional circumstances for which the Tribunal may waive the time limits for the

filing of this Application. The Tribunal under the circumstances holds that this Application presents special circumstances for which it may be entertained.

38. The Application is receivable. This Tribunal has jurisdiction to entertain it.

Case Management Directions

39. Both parties are required to provide the Registry, by or before **Friday, 13 January 2012**, with the following information:

a. Whether they intend to call any witnesses and should also clearly indicate the relevance of the evidence of each witness. Parties should also indicate the approximate time they may need for examination-in-chief of their witnesses.

b. The names and location of their witnesses.

40. It is the responsibility of the parties to ensure the availability of their respective witnesses.

41. A Notice of Hearing and Scheduling Order shall be transmitted by the Tribunal in due course. The case will be heard on the merits.

(Signed)

Judge Nkemdilim Izuako

Dated this 28 day of December 2011

Entered in the Register on this 28 day of December 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.