



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KIARIE-NYOIKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Alexandra Muniafu, Muniafu & Company Advocates

Counsel for the Respondent:

Philippe Sacher, UNHCR

Introduction

1. The Applicant was employed in Nairobi, Kenya, by the office of the United Nations High Commissioner for Refugees (UNHCR) in July 1993. She held a series of appointments until January 2000, when her Fixed Term Appointment was converted to an Indefinite Appointment. Following an investigation into allegations of corruption in refugee processing, the Applicant underwent disciplinary proceedings and was prosecuted in the Kenyan Courts and following the disciplinary proceedings, she was summarily dismissed from service on 24 September 2004. She was later acquitted in the Kenyan Courts.

2. The Applicant challenged her summary dismissal at the former UN Administrative Tribunal and obtained a judgment, with an award of compensation for delay occasioned by management in the amount of 25,000 USD. After her acquittal in the Kenyan courts, she filed an Application for Revision/Interpretation of Judgment with the United Nations Dispute Tribunal (UNDT).

Facts

3. Following allegations of corruption in refugee processing in the Nairobi office of UNHCR, in September 2000 an investigation was conducted by the UNHCR Inspector General. The Kenyan Police also conducted an inquiry into the allegations.

4. As a result of these investigations, the Applicant was placed on special leave with full pay (SLWFP) from 7 March to 7 May 2001, when she was placed on special leave without pay (SLWOP). On 19 April 2001, the Applicant was arrested by Kenyan Police and charged in a Kenyan Court with various criminal offences including extortion of funds from refugees, fraud and making death threats. On 22 December 2003, the Applicant was charged with misconduct arising from the same facts by UNHCR.

5. On 28 January and 27 February 2004, the Applicant responded to the charges of misconduct and denied the allegations in their entirety. Despite her denial, the Secretary-General decided to summarily dismiss the Applicant from service effective 27 September 2004 on the grounds of repeatedly extorting money from refugees for services which were free of charge and making murder threats.

6. The Applicant requested a Joint Disciplinary Committee (JDC) review of the Secretary-General's decision on 22 November 2004. Following a hearing, the JDC upheld the summary dismissal on 20 July 2005 and on 22 July 2005 the Secretary-General agreed with the JDC's findings and conclusions. The Applicant thereafter filed an appeal with the former UN Administrative Tribunal on 31 October 2005.

7. On 8 October 2008, the former UN Administrative Tribunal issued Judgment No. 1394 (2004) in which it ordered UNHCR to pay to the Applicant USD 25,000 with interest payable at eight per cent per annum as from 90 days from the date of distribution of the judgment until payment was made. Payment of USD 25,000 to the staff member was effected on 4 December 2008. The former UN Administrative Tribunal awarded the USD 25,000 compensation on the basis of UNHCR not concluding the investigation against Applicant in a timely fashion, and that the Organization should bear the financial consequences of such delay.

8. Sometime in 2009, the Applicant, by rulings numbered CMCR Nos. 850 and 852 of 2001 of the Kenyan Chief Magistrates Court, was acquitted of the charges of extortion of funds from refugees and making death threats.

9. On 7 October 2010, the Applicant requested the Dispute Tribunal to grant an extension of time to file an application. The request was served on the Respondent on 8 December 2010. Counsel for the Respondent filed comments on the Applicant's request on 22 November 2010. In his submission, the Respondent challenged the receivability of the proposed application.

10. On 20 May 2011, the Tribunal issued Order No. 039 (NBI/2011) setting this matter down for a hearing on the issue of receivability for 27 July 2011. The Applicant applied for an adjournment on 8 July 2011 due to the unavailability of her Counsel.

11. On 22 July 2011, the Applicant filed an “Application for Interpretation/Application for Revision of Judgment”. The Application was served on the Respondent on 27 July 2011.

12. On 24 August 2011, the Tribunal issued Order No. 105 (NBI/2011) setting this matter down for a hearing to determine the issue of receivability. The hearing was held on 16 November 2011.

The Applicant’s Case

13. The Applicant’s case is as follows:

- a. She seeks a review of former UN Administrative Tribunal Judgment No. 1394 (2004).
- b. The Applicant seeks a breakdown of the USD 25,000 awarded to her in that case.
- c. The Applicant submits that she is entitled to a termination indemnity which was not paid to her at the time of her summary dismissal.
- d. The Applicant is seeking a review of the wordings in a suspension notice given to her where she had been suspended on grounds of criminal misconduct. The Applicant avers that the wording is prejudicial to her. She submits that she cannot seek employment or travel around the world because of this state of affairs.

The Respondent’s Case

14. The Respondent’s case is summarized below:

- a. The former UN Administrative Tribunal Judgment No. 1394 of 8 October 2008 ordered the Organization to pay USD 25,000 with interest. The said Judgment was fully effected by UNHCR on 4 December 2008.
- b. This new Application has been filed with the Tribunal almost two years following the full implementation of the afore-mentioned Judgment.
- c. The Applicant has failed to identify any relevant administrative decision of which she has requested judicial review, but even if the Applicant had done so, the further procedural requirements have not been met.
- d. The Applicant has neither requested management evaluation of any potential administrative decision nor has she respected the applicable time limits.
- e. The Tribunal has no jurisdiction to revise judgments of the former UN Administrative Tribunal. The *Fagundes*, 2010-UNAT-057 and *Piskolti*, 2011-UNAT-106, judgments address this issue stating that neither the Dispute Tribunal nor the UN Appeals Tribunal has been conferred powers to review decisions of the former UN Administrative Tribunal.
- f. In respect to termination indemnities and with reference to the former Staff Rules applicable at the time, Annex 3 thereof states that no indemnity payments shall be made to a staff member who is summarily dismissed.
- g. The Application is not receivable.

Considerations

15. In determining this Application, the main issues for examination are:
 - a. Whether this is a proper case for revision of judgment.
 - b. Whether the Tribunal can revise judgments of the former UN Administrative Tribunal.

- c. Whether the Applicant was entitled to a termination indemnity.
- d. Whether the Tribunal can Order the Respondent to reword the Applicant's suspension notice.
- e. Whether this was a proper Application to bring in the circumstances of this case?

Revision of Judgments

16. The Applicant filed a confused Application. It was not clear whether she wanted an interpretation or revision of a judgment. At the hearing, the Applicant clarified that she was requesting revision of former UN Administrative Tribunal Judgment No. 1394 (2004).

17. The applicable law governing revision of judgments is art. 29 of the Tribunal's Rules of Procedure which provides as follows:

- 1. Either party may apply to the Dispute Tribunal for a revision of a judgement on the basis of the discovery of a decisive fact that was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence.
- 2. An application for revision must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

18. If an applicant discovers a material fact that was unknown to the former UN Administrative Tribunal and to him/her at the time of judgment, an applicant may file an application for review of the judgment within 30 days of the discovery of the fact and within one year of the date of the judgment.

19. A decisive or material fact is one that was not known at the time the judgment was given. That fact must be of significant weight such that its application to the case should lead to a revision of the judgment¹.

20. At the hearing, the Applicant failed to articulate what decisive new fact she had discovered to substantiate her Application for revision of judgment. As previously stated, the Applicant was summarily dismissed as a result of charges of extortion of funds from refugees, fraud and making death threats. These allegations resulted in the arrest of the Applicant and criminal charges being brought against her in a Kenyan Court.

21. Even if the Tribunal were to consider the Kenyan Court rulings to be material and decisive facts, the second condition to be fulfilled in an application for revision is that it be filed within 30 days of its discovery and within one year of the judgment. A perusal of the entire case reveals that the Applicant was acquitted of criminal charges sometime in 2009 but only sought an extension to file an application based on that fact on 7 October 2010, almost two years after the former UN Administrative Tribunal's judgment.

22. The question arises as to whether the Applicant's acquittal on the criminal charges amounted to the discovery of a decisive or material fact in her case before the former United Nations Administrative Tribunal. The answer of course is No. An acquittal does not constitute a decisive or material fact under art. 29 of the Rules of Procedure. In order to qualify for a revision of judgment, a new fact, which is decisive and which if known to the Tribunal at the time of rendering its judgment would have changed the outcome of the case due to its materiality, must exist although unknown to the Applicant and the Tribunal at that time.

23. Even if a new and material fact had been discovered after the former United Nations Administrative Tribunal judgment was rendered, the Applicant still failed to

¹ See for example former UN Administrative Tribunal Judgment No. 1120, *Kamoun* (2003).

meet the requirement for filing the request for revision of the judgment within 30 days of the discovery of the new fact and within one year of the judgment.

The Appeals Tribunal Judgments in Fagundes and Piskolti

24. According to sec. 4 of ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice), the Dispute Tribunal succeeded the former UN Administrative Tribunal and became the successor of the former UN Administrative Tribunal. Cases not decided by the former UN Administrative Tribunal by 31 December 2009 were transferred to the Dispute Tribunal as of 1 January 2010.

25. Article 7(b) of the Statute of the Dispute Tribunal provides that the Tribunal shall be competent to hear and pass judgment on a case transferred to it from the former UN Administrative Tribunal. All the cases that were receivable before the former UN Administrative Tribunal are receivable before the Dispute Tribunal. Article 12 of the Statute of the former UN Administrative Tribunal provided as follows in respect of revision of its judgments:

The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement...

26. In view of the foregoing, the present Application for revision of judgment of the former UN Administrative Tribunal would have been receivable before the former UN Administrative Tribunal had there been a discovery of a new and decisive material fact and if the application was filed within the applicable time limits.

27. The Appeals Tribunal in *Fagundes* and *Piskolti* held that neither the Dispute Tribunal nor the Appeals Tribunal have been conferred powers to revise decisions of the former UN Administrative Tribunal. With the utmost respect, and in view of its

analysis above, the Tribunal finds that these holdings are incorrect. Even though not expressly stated in the Statute and Rules of Procedure of the Tribunal, the Dispute Tribunal has power to revise the judgments of the former UN Administrative Tribunal, being its successor and subject to compliance with the provisions of art. 29 of the Tribunal's Rules of Procedure.

Termination Indemnity

28. It is the Applicant's contention that she is entitled to a termination indemnity which was not paid to her at the time of her summary dismissal. Annex 3 of the former Staff Rules, which was applicable at the material time, states that no termination indemnity is payable to a staff member who was dismissed from service. The Applicant's plea in this respect must therefore fail since her summary dismissal has not been withdrawn by the Secretary-General.

Rewording of the Applicant's suspension notice

29. The Applicant is seeking a review of the wording of a suspension notice which refers to criminal misconduct. The Applicant asserts that these words are prejudicial to her. There is nothing in the Statute of the Tribunal or its Rules of Procedure that allows for this Tribunal to grant such a plea in these circumstances.

Was this a proper Application to bring in the circumstances of this case?

30. The Applicant was summarily dismissed as a result of allegations of extortion of funds from refugees, fraud and making death threats. These allegations also resulted in the arrest of the Applicant and criminal charges being brought against her in a Kenyan Court. The Applicant was subsequently acquitted of all charges.

31. A summary dismissal is the most severe sanction that the Organization can impose on a staff member. It is in effect a death sentence to a person's professional career. Taking into account the fact that the Kenyan Court had acquitted the Applicant of the criminal charges that formed the basis for her dismissal, the Applicant is well advised to seek legal redress in accordance with the relevant rules for removal of

adverse materials from her personnel records or for any other remedy she considers appropriate. The Applicant should bear in mind that in accordance with art. 8.4 of the Statute of the Dispute Tribunal, no application shall be receivable if filed more than three years after a cause of action arose.

32. The Application for revision of former UN Administrative Tribunal Judgment No. 1394 (2004) was not the proper application to file given all the circumstances of this case

Conclusion

33. The Application is not receivable.

(Signed)

Judge Nkemdilim Izuako

Dated this 6th day of January 2012

Entered in the Register on this 6th day of January 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi.