UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/2010/044
Judgment No.: UNDT/2012/026
Date: 15 February 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BALOGUN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Melissa Bullen, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Economic Commission for Africa (ECA), filed an Application with the United Nations Dispute Tribunal (UNDT) contesting the decision of ECA not to pay him termination indemnity, pursuant to Staff Regulations and 200-series rules regarding payment of termination indemnity, following the non-renewal of his fixed-term contract on 31 December 2002.

Facts

2. On 26 August 1983, the Applicant entered the service of the United Nations on a one-year intermediate-term appointment as Regional Adviser in the Public Administration and Management Section of ECA at the L-5, step 1 level, under the 200-series of the Staff Rules. On 1 May 1992, the Applicant's appointment was converted to a fixed-term contract and in January 1996, his post was reclassified to L-6.

3. On 8 January 2002, some Regional Advisers, including the Applicant, sent a letter to the Human Resource Service Section (HRSS) regarding rumours about non-renewal of their contracts, asking that due process be followed in determining which contracts should be terminated.

4. On 10 January 2002, HRSS informed all the Regional Advisers that ECA was undertaking a review of regional advisory services.

5. On 4 April 2002, the Executive Secretary of ECA held a meeting with all the Regional Advisers to explain the rationale for the review of the regional advisory services. In this regard, on 19 June 2002, the Executive Secretary informed the Regional Advisers that those whose appointments would not be extended past 31 December 2002 would be notified accordingly at the end of September 2002.

6. On 30 September 2002, the Applicant and five other Regional Advisers were notified in writing that their contracts would not be renewed beyond 31

December 2002, when their fixed-term contracts were due to expire, following the review conducted at ECA in 2002.

7. On 10 December 2002, the Applicant requested the Joint Appeals Board (JAB) in New York to suspend the implementation of the decision of the Executive Secretary. On 24 December 2002, the JAB recommended that the request for suspension of action be denied.

8. The Applicant thereafter filed an appeal with the JAB on 29 January 2003, contesting the decision of ECA not to renew his contract. The JAB issued its recommendation on 2 September 2003, finding no evidence that the Applicant had a reasonable and legal expectancy for further employment. A copy of the JAB recommendation was transmitted to the Applicant on 10 September 2003.

9. On 7 October 2003, the Applicant filed an application before the former UN Administrative Tribunal requesting *inter-alia*, the setting aside of the contents of the JAB report including to direct that the decision not to renew his contract beyond 31 December 2002 be rescinded, an award of moral damages equivalent to two years' net base salary, and that the Secretary-General investigate alleged charges of abuse of office and ethical violations by the ECA.

10. On 22 July 2005, the former UN Administrative Tribunal issued Judgment No. 1232, finding that fixed-term contracts do not carry any right of renewal, but that exceptions to this rule could be warranted by countervailing circumstances such as an express promise to renew the contract; abuse of discretion; or discriminatory acts against the staff member. However, the former UN Administrative Tribunal found that the Applicant failed to carry the burden of proof in establishing such countervailing circumstances. The Tribunal rejected the Applicant's application in its entirety.

11. On 31 October 2005, the Applicant filed a second application with the former UN Administrative Tribunal, requesting, in accordance with article 12 of the Statute of that Tribunal, the revision of Judgment No. 1232. The Applicant's main contentions were that since receiving Judgment No. 1232, he was made aware of a new fact entitling him to a new judgment. This new fact was that he

had been pushed out of his post to make room for a Visiting Fellow, and that before appointing the Visiting Fellow, the post was never properly advertised. The Respondent countered that the Applicant failed to introduce any fact of a decisive nature which was unknown to the Tribunal and to the Applicant at the time of rendering Judgment No. 1232 and accordingly, the Applicant's request for revision of Judgment should be denied.

12. On 21 November 2007, the former UN Administrative Tribunal issued Judgment No. 1350, holding that the fact that there was a new Visiting Fellow, even if a new fact to the Applicant, was not a new fact within the meaning of article 12 of the Statute of the former UN Administrative Tribunal, and could have been discovered with due diligence. The Tribunal rejected the Applicant's second application in its entirety.

13. On 11 March 2008, the Applicant filed a third application and requested again, in accordance with article 12, the revision of Judgment No. 1232 and Judgment 1350, contending that: he had discovered "new material evidence" which warranted the revision of the Judgments, that JAB had not fairly considered all pertinent facts in his case, and that his rights were violated by the non-renewal of his fixed-term appointment. The Respondent asserted in his reply that the Applicant had not introduced any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgment No. 1232 was delivered, and that the Applicant's request for revision of the Judgments was without merit as the Applicant was attempting to re-litigate the case.

14. The former UN Administrative Tribunal rendered Judgment No. 1434 on 31 July 2009, finding that a mere restatement of claims, even though made in a new language and with changed emphasis, cannot be a basis for the revision of Judgment.[1] That Tribunal, again, rejected the third application in its entirety.

15. By letter dated 23 October 2009 to the Management Evaluation Unit, the Applicant requested a management evaluation and the prompt payment of his termination benefits. The Respondent replied on 20 November 2009 stating that in

[1] *Citing* UN Administrative Tribunal Judgment No. 1055, *Al-Jassani* (2002).

accordance with the Staff Rules which applied at the time the contested decision was made, the Applicant was not entitled to termination indemnity, and in any event, the request was not receivable as it was already time-barred since the two month limitation period had lapsed for evaluating the administrative decision.

16. On 8 February 2010, the Applicant submitted the present Application to the UNDT asking the Tribunal to find, *inter alia*, that the Application is receivable, that the Applicant was forcefully separated from his job, that the Respondent should pay him termination indemnity equivalent to 12 months' gross salary and to award him moral damages equivalent to six months' net base salary, or higher.

17. On 11 March 2010, the Respondent submitted his Reply. The Respondent requested that the Tribunal deem the Application non-receivable and dismiss it in its entirety based on the fact that the Applicant is attempting to re-argue before UNDT his cases already adjudicated by the former UN Administrative Tribunal.

18. On 16 March 2010, the Applicant wrote an email to the UNDT stressing that his Application before this Tribunal is "[n]ot about wrongful/rightful termination . . . [but] simply about the UN's obligations under the Staff Regulations and 200-series rules regarding payment of termination indemnity for my 15-year uninterrupted and meritorious service".

The Applicant's submissions

19. The Applicant submits the following:

a. The Tribunal should find that the Application is receivable under articles 2.1(a), 3.1(b) and 8(a), (b), (c), (d)(i)(a) of its Statute.

b. That the Management Evaluation Unit erred by assuming the Applicant was obliged to contest the decision to pay his termination indemnity.

c. That he could not have asked that his termination indemnity be paid while still challenging the fairness and legality of the termination decision.

d. That he acted within the rules when he contested the decision to terminate him and should not be penalized for exercising his rights as a staff member of the UN Secretariat.

e. At the time he was "forcefully" separated from service, staff regulations 1.1(e), 9.1(b) and 9.3(a), staff rules 209.2(a), 208.5(a) and 209.5 regarding termination indemnity were in effect.

f. Finally, the Applicant acknowledges that the former UN Administrative Tribunal judgments are *res judicata* and remain binding on all the parties. The Applicant's main contention therefore is that the Organization should meet its outstanding obligation to pay him termination indemnity.

The Respondent's submissions

20. The Respondent submits the following:

a. The Respondent contends that this case is appropriate for summary judgment, especially on matters of law such as the issue of receivability.

b. That the Applicant's appointment was not terminated, but rather was not renewed beyond its expiration date of 31 December 2002, and is therefore not entitled to termination indemnity.

c. That the Applicant should have timely requested a management evaluation if he was dissatisfied with non-payment of termination indemnity, following the decision not to extend his contract beyond 31 December 2002.

d. The Applicant made no applications for waiver of extension of the time limits to seek management evaluation but instead seeks to contort the date of the decision to 30 September 2009.

e. That this Application seeks to re-litigate the cases brought by the Applicant before the former UN Administrative Tribunal and the doctrine of *res judicata* applies, therefore the Application should be rejected in its entirety.

f. Notwithstanding the *res judicata* doctrine, this Application is nonetheless irreceivable and should be rejected in its entirety.

Considerations

21. In determining this Application, the main issues for examination are:

a. Whether this Application is time-barred and therefore non-receivable.

b. Whether this Application is an abuse of process requiring an order for costs against the Applicant.

Whether this Application is time barred and therefore non-receivable

22. As the Applicant's fixed-term contract expired on 31 December 2002, the issue of receivability will be analyzed under the Staff Rules applicable at the time (ST/SGB/2002/1).

23. Former staff rule 111.2(a) provided: "A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; *such letter must be sent within two months from the date the staff member received notification of the decision in writing"*. (Emphasis added).

24. The Applicant contends that this Tribunal should find his Application receivable under articles 2.1(a), 3.1(b), and 8(a), (b), (c), (d)(i)(a) of its Statute. Article 2.1(a) of UNDT Statute states that the Tribunal shall be competent to hear

and pass judgments on an application filed by an individual, as provided in article 3, paragraph 1. Article 3.1(b) provides that a former UN staff member can file an application with the UNDT. Article 8 provides that an application is receivable if timely filed and provides the timelines for requesting management evaluation in cases where management evaluation of the contested decision is required.

25. Specifically, article 8.1(d)(i)(a) states, "[i]n cases where a management evaluation of the contested decision is required [an application shall be receivable if filed within] 90 calendar days of the applicant's receipt of the response by management to his or her submission . . ."

26. In the present case, the Applicant received notification in writing on 30 September 2002 that his fixed-term contract would not be renewed. The Applicant should therefore have requested a management review by the end of November 2002. The Applicant did not do so.

27. The Applicant nonetheless asks this Tribunal to find that his Application is receivable, contending that he did request a management evaluation within a month of receiving Judgment No. 1434, or at the end of August 2009. The Applicant's interpretation of former staff rule 111.2(a) is flawed. The impugned decision was made on 30 September 2002. Even if this Tribunal applied a liberal view as to when the impugned decision was made, then the Tribunal could take 31 December 2002, the date that the Applicant's fixed-term contract expired, as the date of the administrative decision. On this date, 31 December 2002, the Applicant was no longer in the employ of the Organization and had two months, pursuant to the staff rule 111.2(a) to file for management review. The Applicant chose to file for management evaluation over seven-and-a-half years after he was separated from service.

28. Pursuant to article 8.3 of the Statute of the Tribunal: "The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation"[2]. Furthermore, the request for management evaluation, when it is required, is

[2] *Rosana* UNDT/2011/217; *Costa* UNDT/2009/151.

mandatory, not optional.[3] In light of the foregoing, this Tribunal finds that this Application is not receivable because it is time-barred.

29. Notwithstanding the fact that this Application is time-barred, the issue of termination indemnity is also barred by the doctrine of *res judicata*. Though the Applicant may couch this Application in different terms from his previous applications, it is still *res judicata*. The Applicant does not have the right to bring the same complaints again.[4]

Whether this Application is an abuse of process requiring an order for costs against the Applicant

30. Article 10.6 of the Statute of the Tribunal provides that "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party".

31. In this case, the Applicant filed three applications with the former UN Administrative Tribunal and one application with UNDT, all applications being based on the same issues arising from the same facts. The former UN Administrative Tribunal rendered its first Judgment against the Applicant, finding that he had no reasonable expectation of the renewal of his fixed-term contract, and dismissed the application in its entirety. The Applicant went on to file two more applications, and received the same ruling in each of them.

32. The UN Administrative Tribunal, in Judgment No. 1234 stated that the fact that the Applicant was unhappy with the outcome of his [JAB] appeal does not justify impugning the professionalism and neutrality of the JAB. In Judgment No. 1350, the UN Administrative Tribunal stated that "[i]t is abundantly clear that only another review of the original case, resulting in a different outcome, would give the Applicant satisfaction . . . however, the Applicant is not entitled to a different outcome".

[3] *Caldarone* UNDT/2009/035.
[4] *Bangoura* UNDT/2011/202.

33. The Applicant went ahead and has now filed a fourth application with UNDT, based on the same facts and raising the same issues as the three previous applications with the former UN Administrative Tribunal. The former UN Administrative Tribunal ruled against the Applicant in all three cases reasoning that the Applicant had no reasonable expectation for a renewal of his fixed-term contract, and even though there could be exceptions to this rule, the Applicant failed to meet his burden of proof to show any countervailing circumstances. The former UN Administrative Tribunal ruled that the doctrine of *res judicata* applied to the two preceding applications and dismissed them in their entirety.

34. The Tribunal in *Meron* UNDT/2010/051, giving deference to the United Nations Appeals Tribunal (UNAT)'s *Shanks* 2010-UNAT-026 ruling, stressed the importance of the authority of a finality of a judgment while citing the Administrative Tribunal of the International Labour Organization, which stated:

> "As the Administrative Tribunal of the International Labour Organization observed in Judgment 1824, *In re Sethi* (No. 4), the authority of a final judgment – *res judicata* – cannot be so readily set aside. The party who loses can not re-litigate his or her case. There must be an end to litigation and the stability of the judicial process requires that final judgments by an appellate court be set aside only on limited grounds and for the gravest of reasons . . ."

35. It is of utmost importance to the Tribunal that matters are heard and ruled on their merits. The issue that the Applicant now raises in this Application had already been decided on the merits in Judgment No. 1232 of the former UN Administrative Tribunal. The Applicant has had his day in court, but still insists on making applications based on the same issues arising from the same facts. The Tribunal finds this to be a burden on the Tribunal's resources. This Tribunal now has to make the fourth ruling in a series of rulings based on the same cause of action, with judgments already rendered against the Applicant. This form of abuse of proceedings will not be tolerated by the Tribunal.

36. This Tribunal finds that the Applicant has abused the proceedings and costs should be awarded against him, pursuant to article 10.6 of the Statute of the Tribunal. The Tribunal is aware that the Applicant is no longer a staff member of the Organization and that it may be very difficult, if not impossible, to recover

these costs from him. The above notwithstanding, the Tribunal still believes that where there is a glaring situation of abuse of its process, as a matter of principle, the litigant must be visited with such sanctions provided by the Statute.

Conclusion

37. The Application is not receivable and is dismissed in its entirety. Further, the Applicant must pay costs for abuse of process of the court.

Order

38. The Applicant is ordered to pay 500 USD for abuse of process of the court.

(Signed)
Judge Vinod Boolell

Dated this 15th day of February 2011

Entered in the Register on this 15th day of February 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi