Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

WU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Miouly Pongnon, Senior Legal Advisor, UNON

Introduction

1. The Applicant, a former staff member of the United Nations Office at Nairobi ("UNON"), contests a decision taken on 10 June 2011 ("the impugned decision") stating that he was ineligible for:

a. Payment of a non-removal allowance in lieu of removal costs in respect to his separation from service on retirement;

b. Payment of a non-removal allowance for the remaining 46 months in respect to his transfer from the United Nations Office at Geneva ("UNOG") to UNON in April 2010; and

c. Entitlement to unaccompanied shipment in respect to his repatriation travel upon retirement as he took a ticket option.

2. The Applicant had on 15 June 2011 consulted the Ombudsman's Nairobi Office in an attempt to resolve the issue through informal procedure. On 17 June 2012, the Ombudsman convened a meeting between the Applicant and UNON's Chief, Staff Administration Section ("Chief/SAS") in order to reach an informal solution. The attempt at informal resolution of the issue was unsuccessful and the Applicant subsequently wrote to the Secretary-General on 15 August 2011 requesting management evaluation of the impugned decision. A return receipt submitted as part of the case records shows that the Applicant's email was received by the Secretary-General on 15 August 2011.

3. On 17 October 2011, the Applicant wrote to the Management Evaluation Unit (MEU) seeking clarification as to whether he was entitled to file an application with the Tribunal since 45 days had elapsed from the date he had sought management evaluation of the impugned decision. The MEU wrote to the Applicant on 20 October 2011 advising him that they had no record of any correspondence from him prior to 17 October 2011 and requested him to send a copy of the impugned decision. The MEU also advised the Applicant that in accordance with staff rule 11.2, the 45-day period for evaluating the impugned decision would begin to run from the date the requested information was received. The Applicant transmitted the required information on 21 October 2011.

4. On 8 November 2011, the MEU informed the Applicant that his request for management evaluation was time-barred and was therefore not receivable. The reasons cited by the MEU included, *inter alia*, that "a staff member's preference to resort to negotiation with the Administration does not absolve him/her from the obligation to comply with the deadline stipulated in the staff rules."

5. The Applicant filed the present Application on 8 December 2011.

6. The Application was transmitted to the Respondent on 13 December 2011 with a deadline of 13 January 2012 by which to file a Reply. The Application was transmitted using the eFiling portal of the Tribunal's Court Case Management System ("CCMS").

7. Counsel for the Respondent had previously sought clarification from the Tribunal's Registrar on 24 October 2010, on the proper means of service of submissions to the Dispute Tribunal. On 2 November 2011, Counsel was advised that the Tribunal now requires parties to utilize the eFiling portal.

8. On 16 December 2011, Counsel for the Respondent informed the Tribunal that she had not received the Application. On 20 December 2011, the Tribunal again advised Counsel for the Respondent that she was required to create an eFiling profile to access the case records as had been done by other Counsel for the Respondent in all of the Organization's offices around the world.

9. On 20 December 2011, Counsel for the Respondent informed the Tribunal that she had,

> elected not to create an e-filing account at this time owing to certain noted limitations with that system and the fact that e-filing is not a compulsory [sic] pursuant to the UNDT Rules of Procedure.
>
> […]
> Consequently, until such time an official order issues from a judge of the Tribunal disposing of the formal application indicating that e-filing is compulsory pursuant to the UNDT Rules or Statute, please note that I will not be in a position to create an e-filing account. Accordingly, I would be grateful if the Registry would, consistent with the extant UNDT Rules of Procedure, transmit to me as soon as possible, either by e-mail or by hand, a coy [sic]of Mr. Wu's application filed with the Registry on or about 8 December 2011.

10. On 21 December 2011, the Tribunal informed Counsel for the Respondent that it considered that the Application had been properly transmitted to her on 13 December 2011 and that the deadline to file a Reply by or before 13 January 2012 still applied.

11. On 13 January 2012, Counsel for the Respondent filed an "Application for Declaratory Order in respect of Articles 8.3, 8.4 and 10.1 of the UNDT Rules of Procedure". In the said Application, Counsel for the Respondent sought a declaratory Order of the Tribunal indicating the responsibilities and rights of the parties in respect of the provisions of arts. 8(3), 8(4) and 10(1) of the UNDT Rules of Procedure regarding the acceptable means of filing and receiving submissions with the Tribunal through its Registry offices. The Respondent's Counsel submitted that the plain meaning of the provisions of arts. 8(3), 8(4) and 10(1) of the Tribunal's Rules of Procedure do not require that parties file or receive case documents using electronic means or an eFiling portal in CCMS.

12. The Respondent's Counsel also sought a direction from the Tribunal requiring the Nairobi Registry to transmit to her, outside of CCMS, a copy of Mr. Wu's Application.

13. On 20 January 2012, the Tribunal issued Order No. 012 (NBI/2012) in which it declared as follows:

> a. The Respondent in his capacity as the Chief Administrative Officer of the Organization has pioneered, supported and encouraged efforts to increase the efficiency of the internal administration of justice.
>
> b. His agents and representatives are properly equipped to be part and parcel of the milestones reached in this regard and must represent his interests in carrying out their duties. It is therefore not the place of Counsel to go against the publicly stated position of the Respondent by refusing or rejecting the CCMS.
>
> c. The Secretary-General has sanctioned the CCMS and all Counsel within the Organization have received adequate notice and been offered training in order that the system can be used to improve the filing and accessing of case-related documents by parties appearing before the Dispute and Appeals Tribunals.
>
> d. As a result of Counsel for the Respondent's decision not to create an eFiling account, she had failed to access the Application and to file a Reply within the

requisite time limit required by art. 10 of the Tribunal's Rules of Procedure. This meant that by operation of procedural law, the Respondent was not entitled to take part in the proceedings except with the leave of the Tribunal.

e. The Tribunal, however, in the interests of justice as provided for art. 35 of the Tribunal's Rules, exercised its discretion and granted the Respondent a further period of one month to file a Reply, namely by 20 February 2012.

14. In spite of the said declaratory Order of the Tribunal and its indulgence in granting the Respondent's Counsel a gratuitous extension of 30 days, the Respondent's response was not filed as ordered. On 24 February 2012, the Applicant informed the Tribunal that he had not received the Respondent's Reply and therefore requested a copy so as to enable him to make observations. The Tribunal replied on the same day informing the Applicant that the Tribunal had not received the Respondent's Reply and that he would be advised on the next procedural steps.

15. On 26 February 2012, the Respondent's counsel sent an email to the Tribunal stating:

> Please note that through sheer inadvertence, I missed the 20 February 2012 deadline the Tribunal had set for the filing of Respondent's reply. I had failed to carry the date in my electronic calendar.
>
> I have prepared an application to open the record to permit the late filing of Respondents (sic) Reply as well as the Respondent's Reply, which submissions will be finalized and ready to be filed on CCMS on Monday, 27 February 2011 (sic). Alternatively, if the Tribunal is not disposed to entertain an application to open the record to allow for the late filing of Respondent's Reply, I would be grateful if you would communicate the Tribunal's wishes in this regard.
>
> I wish to express my apologies to the Tribunal and Mr. Wu for delay caused by my oversight.

16. On 2 March 2012, the Respondent filed a Motion entitled "Respondent's Application to file late Reply and participate in proceedings".

17. On 21 March 2012, the Tribunal issued Order No. 032 (NBI/2012) refusing the Respondent's request to file a late reply and participate in the proceedings and informed the parties that it would be issuing a default judgment in this case.

Applicant's case

18. The Applicant's case is summarized below:

a. Contrary to the MEU's letter dated 8 November 2011, his request for management evaluation was not time-barred because he had engaged the Ombudsman's Nairobi office from 17 June 2011 in an attempt to resolve the issue informally.

b. As provided for in staff rule 7.16(j)(iii), he is entitled to the payment of a non-removal element of the mobility and hardship allowance, since he did not opt for full removal.

c. As provided for in sections 5.2 and 6 of ST/AI/2007/1, "Mobility and hardship scheme", the non removal allowance shall be paid on a monthly basis and adjustments of payment shall be made as a result of change of duty station, change of dependency status, promotion, completion of five years' consecutive service at the duty station, period on special leave or separation.

d. Since he is entitled to full removal but opted for non-removal, he is entitled to the payment of a non-removal allowance for the remaining 46 months in respect to his transfer from UNOG to UNON in 2010.

e. As provided for in staff rule 7.15, he is entitled to reimbursement for unaccompanied shipment in respect to his repatriation travel upon retirement.

19. For the reasons stated above, the Applicant requests the Tribunal to order:

a. That the Respondent pay him the non-removal element in lieu of removal costs in respect to his separation from service on retirement;

b. That payment of non-removal allowance for the remaining 46 months in respect to his transfer from UNOG to UNON in April 2010 be made to him.

c. That he be paid the entitlements to unaccompanied shipment in respect to his repatriation travel upon retirement; and

d. Payment of interest.

Considerations

20. The legal issues arising for determination are:

a. Whether this Application is receivable.

b. Whether the Tribunal can on its own Motion enter a default judgment in this case.

c. Whether the Applicant is entitled to the reliefs sought.

Receivability

21. One of the documents annexed to the Application is a letter dated 8 November 2011 in which the MEU informed the Applicant that his request for management evaluation was not receivable because the final date he became aware of the final decision by the Administration in respect to his claims was 10 June 2011. Pursuant to staff rule 11.2(c), the Applicant was therefore required to file a request for management evaluation by 9 August 2011.

22. The Applicant argues that contrary to MEU's letter dated 8 November 2011, his request for management evaluation was not time-barred because he had engaged the Ombudsman's Nairobi office from 17 June 2011 in an attempt to resolve the issue informally. Annexed to the Application is a meeting invitation from the Ombudsman's office inviting the Applicant and the UNON Chief, Staff Administration Section to a meeting scheduled for 17 June 2011. In his submissions the Applicant stated that the meeting of 17 June 2011 failed to resolve the issue and he subsequently, on 15 August 2011, wrote to the MEU requesting a review of the contested decisions.

23. Staff rule 11.2(c) provides that a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

24. Can it be argued that the deadline for requesting a management evaluation was effectively extended by the Secretary-General in the circumstances? The Tribunal's answer

is, yes! This is because during the period that the Ombudsman was seized of the matter, time would cease to run. In accordance with ST/SGB/2002/12, "Office of the Ombudsman — appointment and terms of reference of the Ombudsman", the Office of the Ombudsman was established in the Office of the Secretary-General to make available the services of an impartial and independent person to address the employment-related problems of staff members. The Ombudsman is appointed by the Secretary-General to represent him for the purposes of facilitating conflict resolution, using any appropriate means for the primary objective of settling conflicts between parties, and obviate recourse to the formal grievance process. During the two-day period that the Ombudsman was seized of the matter, that is, 15 to 17 June 2011, the deadline was effectively extended for the purposes of staff rule 11.2(c).

25. The 60-day timeline in this case should have begun to run from 17 June 2011, the date when the attempt at informal resolution of the dispute by the Ombudsman failed. The Applicant therefore, as provided for in staff rule 11.2(c), had up to 17 August 2011 to file his request for management evaluation. Having filed his request for management evaluation on 15 August 2011, his request was made within 60 days and was receivable by the MEU. In deciding that it was not, the MEU was in error.

Default Judgment

26. A default judgment under our Rules of Procedure is entered against a party who has failed to submit a response or defence to a claim brought against him by an applicant. Where the Respondent fails to submit an answer and consequently defend the action within a prescribed period of time, the Tribunal can on the application of the Applicant or on its own Motion enter default judgment.

27. The United Nations Appeals Tribunal (UNAT) rendered its judgment in *Bertucci* 2011-UNAT-121 on 11 March 2011 where it held that the Statute of the Dispute Tribunal does not provide for the sanction of the exclusion of a party to the proceedings from participating in the event of the refusal of the said party to comply with an order for the disclosure of evidence.[1] UNAT concluded that the UNDT in the circumstances was not entitled to exclude the Respondent Secretary-General from taking part in the proceedings as this violated the right of the said Secretary-General to be heard.

[1] At para 51.

28. The issues arising in the present case can be distinguished from those in *Bertucci*. The issue here is the statutory obligation of the Respondent to submit a reply to an application within a prescribed period of time and the consequence of non-compliance with this obligation. Article 10.1 of the UNDT Rules of Procedure provides that "a respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, *except with the permission* of the Dispute Tribunal." (Emphasis added).

29. *Bertucci* dealt with the non-compliance by the Respondent with an Order of the Tribunal to produce evidence. Neither the Tribunal's Statute nor the Rules of Procedure provide expressly that a party can be excluded from proceedings for non-compliance with an Order of the Tribunal to produce or disclose evidence. In the present case, the issue is the timely submission of a reply to an application. Under the Rules of Procedure, a reply is a mandatory requirement which the Respondent must fulfil in order to be part of the proceedings. Article 10 specifically provides that the Respondent's reply shall be submitted within 30 calendar days from the date of receipt of the Application by the Respondent. The rule further provides that a failure to do so strips the Respondent of the entitlement to take part in the proceedings unless he is permitted to do so by leave of the Tribunal. In spite of failing to send in a reply within the prescribed time period, Counsel for the Respondent was granted an extension of time even though she had not sought the Tribunal's leave. This gratuitous grant of a 30-day extension of time was done in the interest of justice under Art 19 of the ROP, so as to comply with the mandatory requirement of filing a reply to the Application. Counsel chose not to comply with the order and subsequently failed, even at the second opportunity, to submit a reply within the extended time period.

30. The Respondent's Counsel has not offered any credible reasons for this failure except to inform the Tribunal that, after being granted an extension by the Tribunal on its own Motion, she did not record the date set by the Tribunal in her electronic calendar.

31. Whereas UNAT held in *Bertucci* that the Statute of the UNDT does not provide for any sanction for the exclusion of one party in the event of a refusal to comply with an order requiring disclosure of evidence; in the present case, art 10.1 of the UNDT Rules of Procedure does in fact provide for such a sanction where the Respondent does not file a reply.

32. The matter of the Respondent's right to a defence or in fact of any party against whom an action is brought is a fundamental principle in law. Where, however, the Respondent acts

contrary to what is statutorily prescribed and consequently hampers the Applicant's rights to a fair and expeditious hearing by failing to file a reply as required, he effectively puts himself outside the proceedings and loses the right to defend. Not only did Counsel for the Respondent initially refuse to take part in the proceedings because submissions were being filed and submitted through the eFiling portal, she further failed to comply with the Tribunal's Order granting her an extension of 30 days. This failure, in the circumstances is not only fatal to the Respondent's case but also an abuse of the process of the Tribunal.

33. In the circumstances, the Tribunal is entitled to enter, on its own Motion, a default judgment in this case. This means that in the present case, the Tribunal shall rely on the facts as presented by the Applicant and apply the relevant law to these facts.

Is the Applicant entitled to the reliefs sought?

i. Payment of non-removal element in lieu of removal costs in respect to his separation from service on retirement.

34. The law applicable on payment of the non-removal element in lieu of removal costs in respect to the Applicant's separation from service on retirement is ST/SGB/2011/1, "Staff Rules and Staff Regulations of the United Nations" which took effect on 1 January 2011. Staff rule 7.16(h) provides as follows:

> (h) An entitlement to payment for the non-removal of personal effects and the non-removal element of the mobility and hardship allowance, in lieu of removal costs, shall arise with respect to internationally recruited staff members holding a fixed-term or continuing appointment, provided that the staff member did not have an entitlement to or did not opt for full removal of household goods under staff rule 7.16 (b), under the following conditions:
>
> (i) On initial appointment, provided that the staff member is expected to serve at the new duty station for a period of one year or longer;
>
> (ii) On change of duty station, provided that the staff member is expected to serve at the new duty station for a period of one year or longer;
>
> (iii) On separation from service, provided that the staff member had an appointment of one year or longer or had completed not less than one year of continuous service.

> The non-removal allowance shall be payable under conditions established by the Secretary-General and be limited to a period of five years at one duty station.

35. According to documentary evidence before the Tribunal, the Applicant did not opt for full removal of household goods under staff rule 7.16(b). The Tribunal therefore finds that upon his separation from service on retirement, the Applicant was entitled to payment of the non-removal of personal effects and the non removal element of the mobility and hardship allowance.

ii. Payment of non-removal allowance for the remaining 46 months in respect to his transfer from UNOG to UNON in April 2010.

36. The law applicable at the material time with respect to payment of a non-removal allowance for what the Applicant described as the remaining 46 months in respect to his transfer from UNOG to UNON in April 2010 was ST/AI/2007/1. Section 4.2 of ST/AI/2007/1 provides as follows:

> Payment of the non-removal allowance is limited to a period of five years of consecutive service at one duty station. No exceptions can be made to this provision.

37. The Applicant transferred from UNOG to UNON in April 2010. He separated from service on retirement on 30 June 2011. In accordance with section 4.2, the Applicant was not entitled to the payment of an additional 46 months of non-removal allowance in respect to his transfer from UNOG to UNON in April 2010 as he did not work for the required minimum of five years. Having served in UNON for only 14 months, he is not entitled to this arm of his claim.

iii. Entitlement to unaccompanied shipment in respect to the Applicant's repatriation travel upon retirement.

38. The law applicable in respect to the Applicant's entitlement to unaccompanied shipment with regard to his repatriation travel upon retirement is staff rule 7.15. Staff rule 7.15(i) provides as follows:

> (i) (i) On travel on appointment or assignment for one year or longer or when an assignment is extended for a total period of one year or longer, on transfer to another duty station or on separation from service of

> a staff member, charges for the shipment of personal effects and household goods by the most economical means may be reimbursed up to a maximum amount established by the Secretary-General;
>
> (ii) The entitlement to payment for the non-removal of personal effects is defined in staff rule 7.16 (h) and shall arise with respect to internationally recruited staff members who hold a fixed-term or continuing appointment under the following circumstances: the staff member was entitled to but did not opt for removal or the staff member was not entitled to removal.

39. The preceding reveals that the Applicant is entitled to payment for charges incurred in the shipment of his personal effects and household goods. The documentary evidence reveals that on 26 May 2011, UNON's Chief/SAS had informed the Applicant that he was entitled to this payment. Again on 6 June 2011, UNON's Chief, Travel, Shipping and Visa Unit informed the Applicant that he was entitled to shipment of his personal effects and to excess baggage and it is therefore unclear why he is making a claim for the same. The Tribunal for the avoidance of doubt finds that the Applicant is entitled to this claim.

Findings

40. The Tribunal's findings therefore are:

a. The Applicant's request for management evaluation was receivable and the MEU erred in deciding that it was not.

b. The Tribunal is entitled to enter, on its own motion, a default judgment in this case.

c. Upon his separation from service on retirement, the Applicant was entitled to payment of the non-removal of personal effects and the non removal element of the mobility and hardship allowance.

d. The Applicant is not entitled to the payment of an additional 46 months of non-removal allowance in respect to his transfer from UNOG to UNON in April 2010.

e. The Applicant is entitled to payment for charges incurred in the shipment of his personal effects, household goods and excess baggage.

Conclusion and Orders.

41. In view of its findings above, the Tribunal orders the Respondent to pay the Applicant for:

a. The non-removal of personal effects and the non removal element of the mobility and hardship allowance.

b. The charges, as conceded by the Respondent since May 2011, incurred in the shipment of his personal effects, household goods and excess baggage.

c. Interest at the applicable U.S. prime rate from the date of filing of this Application to the date the judgment becomes executable in respect only to the non-removal of personal effects and the non-removal element of the mobility and hardship allowance.

(Signed)

Judge Nkemdilim Izuako

Dated this 24th day of May 2012

Entered in the Register on this 24th day of May 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi