



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko, Acting Registrar

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**JUDGMENT ON RECEIVABILITY**

---

**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a retired staff member of the United Nations Economic and Social Commission for Western Asia (“ESCWA”), filed an Application on 7 January 2013 alleging that:

- a. He was forced to sign a settlement agreement (“the agreement”) concerning the settlement of a previous case brought by him before the Dispute Tribunal in Case no. UNDT/GVA/2010/079. He claims that the agreement was imposed upon him under duress, threat and by extortion;
- b. ESCWA rejected his application for the position of Director, Economic Development and Globalization Division (EDGD), a position for which he had previously been rostered for; and
- c. ESCWA Administration continued to harass and discriminate against him by systematically obstructing his work.

2. The Respondent filed a Reply on 5 April 2013 in which it is argued that the Applicant’s claim is without merit and that his Application is not receivable.

3. On 18 April 2013 the Applicant filed a response to the Reply.

## **Factual Background**

4. On 29 March 2010, the Applicant filed an application with the Geneva Registry of the Dispute Tribunal, which was assigned Case No. UNDT/GVA/2010/79.

5. Following the filing of that application, the Applicant engaged in settlement discussions with the Administration under the auspices of the Ombudsman’s office. On 24 April 2010, the Applicant entered into the agreement with the Organization to the effect that he would withdraw all his claims,

demands, proceedings and/or appeals that he may have against the United Nations.

6. At paragraph 17 of the agreement, the Applicant acknowledged that he had entered into the agreement on his own free will and without duress.

7. On 27 April 2010, the Applicant informed the Geneva Registry that his case had been satisfactorily resolved through mediation conducted by the United Nations Office of the Ombudsman and Mediation Division and requested that it be closed. On 3 May 2010, a judgment was issued closing the case.

8. On 7 January 2013, the Applicant filed this Application challenging the validity of the agreement. The Application was served on the Respondent on 16 January 2013 and the Respondent filed a Reply on 5 April 2013 having been granted an extension of time to do so by the Tribunal.

#### **Applicant's case**

9. The Applicant's case is summarized as follows.

10. The ESCWA Administration harassed him to the point where he was forced to sign the agreement.

11. The agreement is unreasonable because it was imposed upon him under duress and threat.

12. Under the agreement, the ESCWA Administration decided not to issue him with a reference letter commensurate with recorded performance appraisals ("ePASes") thereby jeopardizing his future employment prospects. The Applicant submits that he finds it impossible to justify to future employers that the Organization he served for nearly 17 years would issue him with a recommendation letter not commensurate with his e-PAS evaluation.

13. The Administration kept adverse material about him in his official status file that will jeopardize his career prospects.

14. The very text of the agreement is oppressive and constitutes a continued act of harassment and discrimination against him and stands against the reconciliatory spirit of the Ombudsman's office.

15. Based on the foregoing, the Applicant seeks the following prayers:

- a. Removal of all adverse materials from his official status file.
- b. Retroactive payment of all forgone income under the agreement, including step increments.
- c. Protection from future retaliation, including possibility of obstructing his clearance procedure and the issuance of a reference letter in his favour commensurate with his e-PASes throughout his 17 years of service.
- d. Compensation equivalent to two years' salary for harassment, discrimination and violation of due process rights.

### **Respondent's case**

16. The Respondent's case is summarized as follows.

17. The Application is not receivable *ratione materiae* under art. 8.2 of the Statute of the Dispute Tribunal and staff rule 11.1(d), as the dispute between the Organization and the Applicant has been resolved by the agreement reached through mediation.

18. The Application is not receivable *ratione materiae* as the Applicant failed to follow the procedures for making a complaint of harassment and discrimination under section 5 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Applicant's failure to follow the procedures therein is a violation of the requirement to exhaust internal remedies, an established principle of administrative law.

19. An application is receivable before the Dispute Tribunal if an applicant has previously submitted the contested administrative decision for management evaluation,

20. The Applicant did not timely seek management evaluation of his claims. With respect to the claim of duress, he was required to submit his management evaluation request by 23 June 2010, 60 days after the date on which he entered into the settlement agreement (24 April 2010). Similarly, the Applicant did not timely seek management evaluation of the claim that ESCWA obstructed his work. The Applicant has not performed any official functions since 1 May 2010. At the latest, he was required to submit his management evaluation request by 30 June 2010.

21. The Applicant's claim of duress with regard to the agreement is also not receivable *ratione materiae*, as he does not challenge an administrative decision as defined under art. 2.1(a) of the Statute of the Dispute Tribunal. No administrative decision exists as the agreement is not, by itself, a unilateral decision taken by the Administration affecting the terms his appointment. Further, the Dispute Tribunal does not have competence to hear and pass judgment on the Applicant's allegations of duress during a mediation conducted under the auspices of the Office of the Ombudsman.

### **Issues**

22. The Tribunal restricts itself to the question of whether the Applicant's case is receivable in view of the settlement agreement reached between the Applicant and the Executive Secretary of UNESCWA on 24 April 2010.

## Consideration

### *Is this case receivable in view of the settlement agreement reached between the Applicant and the Executive Secretary of UNESCWA on 24 April 2010?*

23. Article 8.2 of the Statute of the Dispute Tribunal stipulates;

An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of the signing of the agreement.

24. The Applicant case is that ESCWA forced him to sign an agreement that is both harsh and prejudicial and that the agreement is unreasonable because it was imposed upon him under duress and threat.

25. The Respondent submits that under paragraph 17 of the agreement, the Applicant acknowledged that he signed the agreement of his own free will and without any duress. The Applicant subsequently communicated to the Dispute Tribunal and the Ethics Office and stated that his case had been satisfactorily resolved through mediation.

26. The Respondent also submits that the agreement has been implemented in full and that the Organization has complied with its obligations under the agreement. The Applicant has proffered no evidence to show that the Organization has breached the terms and conditions of the agreement. The Applicant has accepted the Organization's performance of its obligations, including his placement on Special Leave with Full Pay (SLWFP) and Special Leave with Partial Pay (SLWPP), renewal of his appointment for two years, and separation from service as of 24 August 2012.

27. The desirability of finality of disputes within the workplace cannot be gainsaid<sup>1</sup>. The Applicant is a senior staff member of the United Nations at the P-5 level. He signed an agreement and subsequently wrote to the Tribunal on 27 April 2010 and the Ethics Office on the same date indicating that the matter had been successfully resolved through Mediation. On 3 May 2010, the Tribunal issued a Judgment closing the case.

28. The Applicant has now returned to the Tribunal to allege that the agreement was imposed upon him by duress and threats. Where an Applicant alleges that an agreement was imposed upon him by duress, the burden lies on him or her to convince the Tribunal that such is the situation. No particulars have been tendered in support of this claim, no reference has been made either in his pleadings or other documents as to the nature of the threats. It is not known whether the alleged threats are physical or psychological. The Applicant in this case has not gone beyond merely making this assertion and therefore this claim must fail.

29. The view of the Tribunal is that where the subject matter of an application has been settled between parties through mediation leading to an agreement signed by both parties the said matter is *res judicata* and cannot be re-litigated without good cause.

30. The Tribunal finds the Applicant's acceptance of the implementation of the agreement, his failure to raise the allegations of duress until well after two years after the mediation and his failure to proffer any supporting evidence, can only lead to the conclusion that the Applicant's claim of duress is devoid of any merit.

### **Conclusion**

31. The Tribunal finds that the Application is not receivable and dismisses it in its entirety.

---

<sup>1</sup> See for example *El-Komy* UNDT/2013/122.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 23<sup>rd</sup> day of December 2013

Entered in the Register on this 23<sup>rd</sup> day of December 2013

*(Signed)*

Eric Muli, Officer-in-Charge, UNDT Nairobi