



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

KALPOKAS TARI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**STRIKING OUT MANIFESTLY
INADMISSIBLE APPLICATION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
UN Women

Introduction

1. The Applicant is contesting the decision taken on 2 December 2013 by the United Nations Entity for Gender Equality and the Empowerment of Women (“UN Women”) to terminate her contract prior to its expiry.

Facts

2. On 28 February 2013, the Applicant was offered a “Service Contract as the National Project Coordinator – Partners Improving Markets (PIM) (Vanuatu) with [UN Women]”.

3. On 13 March 2013, the Applicant and Ms. Elzira Sagynbaeva, UN Women Representative & Regional Programme Director, signed Service Contract No. 2013-0007-001. The contract made it clear that due to the fact “that UN Women, being part of the United Nations, is not subject to and cannot be obliged to submit to local laws and regulations on labour-related matters [the] contract spells out all conditions of employment of the subscriber, as it cannot be supplemented by any other regulation”. The contract was for a fixed period of one year and took effect on 14 March 2013, expiring on 13 March 2014.

4. On 2 December 2013, the Applicant received a letter notifying her that her “contract with UN Women will be terminated with notice from 2 December 2013, and as required under the service contract guidelines, the contract end date will be 31 December 2013”.

5. The termination letter informed the Applicant that her separation was “taken after due consideration of the events that have happened ever since you joined UN Women in March 2013. As you are aware, issues of conduct, dedication to work, capacity and productivity levels were raised”. This statement indicates that the Applicant’s termination was for a reason relating to her alleged conduct,

capability and capacity to carry out the duties which she had been contracted to perform and not because of misconduct on her part.

Issues

6. The issues before the Tribunal are:
 - a. Whether the Tribunal is required to serve this claim on the Respondent and, having done so, to await the Respondent's reply;
 - b. Whether the Applicant have standing to bring this claim before the Tribunal;
 - c. If she has standing, whether the claim receivable.

Consideration

Applicable law

7. ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations) states:

Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

8. The Statute of the United Nations Dispute Tribunal states:

Article 2

1 The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute

...

Article 3

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

...

Article 8

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

9. The Rules of Procedure of the United Nations Dispute Tribunal state:

Article 8 Applications

...

4. After ascertaining that the requirements of the present article have been complied with, the Registrar shall transmit a copy of the application to the respondent and to any other party a judge considers appropriate. If the formal requirements of the article are not fulfilled, the Registrar may require the applicant to comply with the requirements of the article within a specified period of time. Once the corrections have been properly made, the Registrar shall transmit a copy of the application to the respondent.

...

Article 10 Reply

...

2. After ascertaining that the requirements of the present article have been complied with, the Registrar shall transmit a copy of the response to the applicant and to any other party a judge considers appropriate. If the formal requirements of the article are not fulfilled, the Registrar may require the respondent to comply with the requirements of the article within a specified period of time. Once the corrections have been properly made, the Registrar shall transmit a copy of the reply to the applicant.

Preliminary observation

10. Article 8.4 of the Tribunal's Rules of Procedure provides that "[a]fter ascertaining that the requirements of the present article have been complied with, the Registrar shall transmit a copy of the application to the respondent and to any other party a judge considers appropriate". Under art. 10 of the Tribunal's Rules of Procedure, the Respondent shall have 30 calendar days to submit a reply.

11. The Tribunal has regard not only to the plain words of the Statute and Rules of Procedure, but also to the expectations of the General Assembly in resolutions 66/237 and 67/241 that the Tribunal adopt effective measures in dealing with frivolous and manifestly inadmissible applications. In particular, para. 42 of General Assembly resolution 67/241 states:

42. [The General Assembly] *Recognizes* the importance of effective measures against the filing of frivolous applications [and] encourages the judges to make full use of those measures currently available to them

12. Consistent with the General Assembly's resolutions, the Tribunal has on several occasions considered matters of admissibility or receivability on a priority basis (see *Hunter* UNDT/2012/036, *Milich* UNDT/2013/007, and *Masytkanova* UNDT/2013/033).

13. It is clear from the facts provided by the Applicant that, in the circumstances of this case, the requirements of the Tribunal's Statute and the Rules of Procedure have not been complied with.

14. Further, under art. 19 of its Rules of Procedure, the Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

15. The Tribunal finds that the present case may properly be dealt with on a priority basis without first transmitting a copy of the application to the Respondent, or awaiting the Respondent's reply before taking any action to consider the claim.

Standing

16. The Applicant was recruited under a service contract (i.e., consultancy or individual contractor agreement) that included the following clauses:

3. STATUS, RIGHTS AND OBLIGATIONS OF THE SUBSCRIBER

The subscriber is not being considered in any respect as being a staff member of the UN Women (or other UN agency), and is covered neither by the UN Staff Rules and Regulations nor by the Convention on Privileges and Immunities. The subscriber recognizes and accepts the fact that the terms of employment are different from those, which apply to UN Women staff members under the UN Staff Rules and Regulations. The rights and obligations of the subscriber are strictly limited to the terms and conditions of this contract. Accordingly, the subscriber is not entitled to any benefit, payment, subsidy, compensation or pension from UN Women, except as expressly provided in this contract.

...

15. SETTLEMENT OF DISPUTES

Any claim or dispute relating to the interpretation or execution of the present contract, which cannot be settled amicably, will be settled by binding arbitration. UNCITRAL [United Nations Commission on International Trade Law] arbitration rules will apply. Binding

arbitration must in all cases be preceded by a conciliatory procedure under UNCITRAL rules.

17. For an applicant to have standing to appear before the Tribunal, an applicant is required to be a staff member, former staff member or someone making claims on behalf of an incapacitated or deceased staff member. The United Nations Appeals Tribunal in *di Giacomo* 2012-UNAT-249 and *Basenko* 2013-UNAT-316 affirmed the Dispute Tribunal's finding that the Tribunal was not competent to hear cases brought by parties that were not considered staff members as they did not meet a necessary condition for access to the Tribunal.

18. Paragraph 3 of the Applicant's service contract specifically states that under the terms of her employment she is not considered a staff member of UN Women and that she is not covered by the United Nations Staff Rules and Regulations.

19. Further, the Applicant's service contract specifically states that disputes related to her contract that cannot be resolved amicably shall be dealt with via binding arbitration under UNCITRAL rules.

20. The Tribunal has taken into account the clear language of the Applicant's service contract, the terms of which she accepted voluntarily prior to entering into service with UN Women, together with the Appeals Tribunal's rulings. In *Njadi* UNDT/2011/007, a case similar to this application, the Dispute Tribunal found that

18. ... the Tribunal is competent to hear complaints filed by United Nations staff members (international civil servants) under Article 3 of the Statute above. What must be determined, therefore, was whether, contractually speaking, the Applicant had the status of an international civil servant.

19. In his application, the Applicant stated that he had been hired by UNDP on a service contract [...and the] rules in this case ... indicate that persons recruited under this type of contract are not subject to the Staff Rules and do not have international civil servant status. Further, it is clear from the model service contract form that the contract ... clearly states that the signatory [to the service contract] is not a staff member within the meaning of the United Nations Staff Rules or an "official" within the meaning of the Convention of

13 February 1946 on the Privileges and Immunities of the United Nations.

20. In view of the foregoing, the Tribunal observed that the Applicant had no standing before the Tribunal under Article 3(1) of its Statute.

21. In *Ndjadi* 2012-UNAT-197, the Appeals Tribunal affirmed the Dispute Tribunal's finding that the applicant was not covered by the Staff Rules and Regulations and was therefore not to be considered a staff member. The Appeals Tribunal noted that the service contract required the applicant to pursue any claim flowing from his contract by seeking arbitration. Consequently, the Tribunal did not have any jurisdiction to review his application.

22. This finding effectively disposes of the application. However, the Tribunal finds it appropriate to observe that, even if this case had involved a staff member, it would still not have been receivable as explained below.

Receivability

23. Under art. 8.1 of the Dispute Tribunal's Statute, read together with staff rule 11.2(a), an applicant must, as a mandatory first step in cases that do not fall under staff rule 11.2(b), request management evaluation of the contested decision within 60 calendar days of the date of notification of the contested decision.

24. It is settled law that pursuant to art. 8.1(c) of the Tribunal's Statute, an application before the Tribunal will only be receivable, and the Tribunal will only have jurisdiction, if the applicant "previously submitted the contested administrative decision for management evaluation, where required". Under staff rule 11.2(b), the only instances where a request for management evaluation is not required concern decisions "taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process", neither of which are applicable to this case.

25. Even if the Applicant in this case were a staff member, having not complied with this mandatory requirement, her claim is not receivable.

Conclusion

26. This application is struck out as being inadmissible because the terms of the contract that the Applicant voluntarily entered into do not confer standing on her to bring her claim to the Tribunal. In the alternative, even if the Applicant were a staff member, her claim would not be receivable for failure to request management evaluation.

27. The application is manifestly inadmissible.

Order

28. The application is struck out.

(Signed)

Judge Goolam Meeran

Dated this 24th day of December 2013

Entered in the Register on this 24th day of December 2013

(Signed)

Hafida Lahiouel, Registrar, New York