Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

KASHALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Sophie Parent, ALS/OHRM
Susan Maddox, ALS/OHRM

Introduction

1. The Applicant was a staff member of the former United Nations Organization Mission in the Democratic Republic of Congo (MONUC). He was employed as a Camp Manager Clerk at the GL-3 level.

2. On 17 April 2012, he filed the current Application before the United Nations Dispute Tribunal (UNDT) challenging the decision, taken on 27 May 2008, to summarily dismiss him for serious misconduct.

Facts

3. On 6 March 2006, the Special Investigation Unit (SIU) of MONUC released a report alleging that the Applicant had solicited money from local citizens in exchange for their employment as Daily Casual Workers.

4. On 30 August 2007, the case was referred to the Office of Human Resources Management (OHRM) by the Department of Field Support (DFS). In a memorandum dated 12 November 2007, OHRM charged the Applicant with misconduct for having improperly solicited and received monies from local citizens in exchange for their recruitment. The Applicant acknowledged receipt of the charges on 19 November 2007.

5. By emails dated 12 and 26 February 2008, the Applicant responded to the allegations of wrong doing and denied the charges.

6. By letter dated 27 May 2008, OHRM informed the Applicant that the Secretary-General had decided to summarily dismiss him for serious misconduct without compensation in lieu of notice or any termination indemnity. The Applicant acknowledged receipt of that letter on 12 June 2008 and was separated from service effective the same day.

7. The Applicant sent a letter to Ms. Catherine Pollard, Assistant Secretary-General (ASG), OHRM, dated 14 June 2008 to challenge the decision. Stamps entitled "RECEIVED" at the top and "ADMINISTRATIVE LAW UNIT" (ALU) at the bottom indicate that ALU received the letter on 8 July 2008.

8. On 11 July 2008, a letter emanating from the then Officer-in-Charge (OiC) of ALU/OHRM, was forwarded to the Chairperson of the New York Joint Disciplinary Committee (JDC). The letter reads:

> Please find attached a letter dated 14 June 2008, from [the Applicant], a former staff member of the United Nations Mission in the Democratic Republic of the Congo. We are forwarding these materials to the JDC as it appears that [the Applicant] presumes to appeal the decision to summarily dismiss him on account of his acts of misconduct.
>
> I would be grateful if you would inform the ALU on whether the JDC decides to treat the attached correspondence as an appeal so that we may have an opportunity to prepare a response on behalf of the Secretary-General.

9. The same day, the OiC, ALU/OHRM informed the Applicant that his case had been transmitted to the JDC. The letter reads:

> We refer to your letter of 14 June 2008 to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management, which was received by our office on 8 July 2008. Given that you contest the decision to summarily dismiss you on account of acts of misconduct, your letter and the supporting documentation attached to it have been forwarded to the Joint Disciplinary Committee (JDC), the office charged with dealing with such appeals. The JDC will contact you directly about any further developments in your case.

10. On 14 May 2012, the Respondent filed a motion requesting that the Tribunal determine the receivabiliy of the Application as a preliminary matter. On the same date the Respondent reiterated the receivability issue by submitting further pleadings.

On 16 May 2012, the Applicant was directed by the Tribunal in an email to respond to the Respondent's submissions on receivability by 30 May 2012, which he did. His submissions were solely on the merits of the Application with no reference to the issue of receivability.

11. On 25 September 2013, the Tribunal issued Order No. 214 (NBI/2013) instructing the Applicant to submit comments on the Respondent's averments on the issue of receivability by 16 October 2013. The Respondent was directed to submit any evidence that he had in his possession in relation to the forwarding of the Applicant's letter, dated 14 June 2008, to the Joint Disciplinary Committee (JDC) in New York.

12. The Applicant submitted a response on 15 October 2013. Once again, his submissions were solely on the merits of the Application and he said nothing about the issue of receivability. On 16 October 2013, the Respondent submitted the evidence required by the Tribunal pursuant to Order No. 214.

Issues

Was the appeal timely filed?

Respondent's submissions

13. The Respondent submits that the Application is not receivable *ratione temporis* since the Application was filed more than three years after the Applicant's receipt of the impugned administrative decision.

14. The Applicant should have requested the JDC to review the disciplinary measure imposed on him, as required by paragraph 24 of ST/AI/371 (Revised disciplinary measure and procedures), two months from receipt of the written notification of the measure.

15. The Applicant has not mentioned in his Application that he received any letter from the JDC nor has he submitted any evidence showing that he pursued the matter with the JDC after June 2008. The Respondent has no other information in its files relating to an appeal by the Applicant to the JDC.

16. The Applicant has not submitted any evidence that he corresponded with the JDC or that he filed a proper appeal with the JDC. It appears that the Applicant waited three and a half years to raise any enquiry about his case. The chronology of the facts submitted by the Applicant indicates that the Applicant did nothing from 16 June 2008 to 21 February 2012. It was the Applicant's responsibility to follow-up on the matter if he intended to contest the impugned decision.

17. Following the abolition of the JDC on 1 July 2009 by General Assembly resolution 63/253 and pursuant to section 3.2 of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice), any pending cases before the JDC were transferred directly to the United Nations Dispute Tribunal. According to the information provided to the Respondent at the time of the transition, the Applicant's case was not among these.

Considerations

18. It cannot be disputed that the Application submitted to the Tribunal was filed more than three years from the notification of the impugned decision to the Applicant. On a strict interpretation and application of article 8.4 of the Statute and article 7.6 of the Rules of Procedure of the Tribunal, an Application cannot be received if it is filed more than three years after the staff member’s receipt of the contested administrative decision.

19. The first issue that the Tribunal has to address is whether the Application filed with the Tribunal on 17 April 2012 is the first challenge of the decision to summarily dismiss the Applicant.

20. Under paragraph 24 of ST/AI/371/ it was the duty of the Applicant to file an appeal with the JDC within two months of the notification of the disciplinary measure meted out to him. Paragraph 24 was applicable where, as in the present case, the disciplinary measure of summary dismissal had already been imposed. The Tribunal notes however that paragraph 10 of ST/AI/371 provided for referral of a case by the ASG/OHRM to a JDC for advice as to the appropriate disciplinary measure where a disciplinary measure had not yet been imposed.

21. The Applicant did not comply with paragraph 24 of ST/AI/371. Instead he sent correspondence to the ASG/OHRM that was titled *recours* or "appeal". When the Applicant sent his letter indicating that he was having a *recours* against his dismissal to OHRM he labored under a misapprehension as to the rules governing appeals under ST/AI/371.

22. Once OHRM received the correspondence from the Applicant the ASG/OHRM could have informed him that the appeal should be directly filed with the JDC pursuant to paragraph 24 of ST/AI/371. There was no obligation on the ASG to refer the matter to the JDC in view of the fact that a disciplinary measure had already been imposed on the Applicant.

23. ALU/OHRM, in its role as the office within OHRM that manages appeals against administrative decisions, chose however to refer the matter to the JDC. In so doing, OHRM was clearly not acting pursuant to paragraph 24 of ST/AI/371. Rather OHRM acted as a benevolent messenger or postman for the Applicant by transmitting what it considered an appeal against the impugned decision to the JDC. The gesture of OHRM was commendable. The tenure of the letter of ALU/OHRM made it clear that OHRM was transmitting an appeal from the Applicant to the JDC. In the letter dated 11 July 2008, it is equally made clear that the Applicant was contesting the decision to summarily dismiss him and that his letter had been transmitted to the JDC. The Applicant was also informed that the JDC would contact him.

24. It is the considered view of the Tribunal that, notwithstanding that there was no proper filing of a request for a review of the decision to summarily dismiss him by the Applicant, the fact that his request to OHRM was treated, to all intents and purposes, as an appeal and forwarded to the JDC to be processed, should be deemed as and indeed was an appeal against the impugned decision. OHRM could have opted to do nothing and then the Applicant could have been penalized for his ignorance of the rules applicable to a review of a summary dismissal. However, to the extent that OHRM transmitted his appeal to the JDC and informed him of this action, the Tribunal considers that he had a right to rely on this information and deems this to be a proper request.

25. The Tribunal therefore concludes that once ALU/OHRM transmitted the Applicant's request, the JDC was properly seized of a request for review or appeal against the decision to summarily dismiss him, which should have proceeded to a determination. The absence of acknowledgment of the appeal or the absence of a response to the Applicant cannot and should not be interpreted to mean that the JDC was not in receipt of the appeal from OHRM. Obviously the appeal was never determined by the JDC and it can reasonably be inferred that at the time of the introduction of the new system of administration of justice the case was still pending before the JDC.

26. The Tribunal concludes therefore that the Application filed with the Tribunal on 17 April 2012 was not the Applicant's first challenge of the decision to summarily dismiss him. He filed a timely appeal in 2008, which should have been transferred from the JDC to UNDT in 2009.

Can the Tribunal assume jurisdiction?

27. Cases pending before the JDC were transferred to UNDT on 1 July 2009 in accordance with ST/SGB/2009/11. Unfortunately, the case of the Applicant never

found its way to the UNDT. This is made clear from paragraph 14 of the averments of the Respondent on the issue of receivability:

> On 1 July 2009, the JDC was abolished (General Assembly resolution A/RES/63/253). Pursuant to Section 3.2 of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice), any pending cases before the JDC were transferred directly to the United Nations Dispute Tribunal. According to the information provided to the Respondent at the time of the transition, the Applicant's case was not among these.

28. The Respondent is in a better position to inform the Tribunal about the transfer of cases and takes the averment of the Respondent on the non-transfer of the Applicant's case to Nairobi as a correct factual statement on this issue. The Tribunal appreciates the candor and stand of the Respondent in that respect.

29. The only conclusion is that the case is still pending. Can and should the UNDT Nairobi assume jurisdiction and proceed to a determination of the matter? In other words is the case still receivable by the Tribunal after more than three years? According to the Respondent the matter is hopelessly outside delay and he has quoted in support a number of first instance and appellate decisions in support of that proposition.

30. Under the former justice set up, a staff member who was facing a disciplinary charge had the right to seek review in a summary dismissal case after the decision to dismiss him/her had been imposed. The duty to adjudicate on disciplinary matters was thus left to the sole discretion of the administration subject to review by the JDC. In contrast to what obtained under the former regime currently sanctions are impose pursuant to whether summary dismissal or otherwise, and then the staff member seeks review from the UNDT pursuant to paragraph 3.3[1] of ST/SGB/2009/11.

[1] As of 1 July 2009, the Secretary-General will have the authority to impose disciplinary measures without the recommendation of a joint body. Such measures can be appealed by the staff member directly to the United Nations Dispute Tribunal, without first requesting a management evaluation.

31. In the preamble to General Assembly resolution 66/106 (Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal), specific reference is made to the principle of access to justice. The second paragraph of the preamble reads:

> *Whereas* the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations.

32. Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR) is couched in similar terms and reads: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". In a comment on Article 14 of the ICCPR, the Human Rights Committee in Geneva observed[2]: "Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice".

33. Providing for a right of appeal or review is not enough. There must in addition be an appropriate supervisory authority or a tribunal that would proceed to the determination of the review or appeal as well as the obligation and willingness of that supervisory body or tribunal to adjudicate on the matter. The silence or inaction of the supervisory body cannot be a justification to penalize a litigant.

34. The right to work is a fundamental right embodied in the International Covenant on Economic, Social and Cultural Rights. Article 6.1 of that Covenant reads: "The States Parties to the present Covenant recognize the right to work, which

[2] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right". To the extent that the right to work is a fundamental right, in the determination of this right, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (Article 8 of the Universal Declaration of Human Rights).

35. The present case involves a disciplinary matter, which is quasi criminal in nature[3]. The Applicant who has been self-represented all along was denied the right to have the disciplinary measure imposed on him reviewed by a supervisory body, the JDC. That denial has been compounded by the fact that his case was never transferred to the UNDT under the transitional measures provisions for determination. The file has been mislaid somewhere.

36. Under these exceptional circumstances, the Tribunal unhesitatingly considers that the decision to summarily dismiss the Applicant must be reviewed by the UNDT as this would have been the remedy open to the Applicant had his case been transferred pursuant to ST/SGB/2009/11. To invoke deadlines in such circumstances would be denying justice to an individual.

Decision

37. The Tribunal holds that the matter is receivable.

Further Observations

38. On 6 December 2013, the Tribunal advised the Applicant to seek the assistance of counsel in view of the novelty and complexity of the point at issue in relation to receivability.[4] Additionally, the Tribunal informed the Applicant of his options - that he could seek counsel from the Office of Staff Legal Assistance (OSLA) or a lawyer of his own choosing.

[3] *Borhom* UNDT/2011/067; *Ekofo* UNDT/2011/215 and *Nyambuza* UNDT/2012/139.
[4] Order No. 260 (NBI/2013).

39. OSLA declined to represent the Applicant. That decision was communicated to the Registry of the Tribunal on 5 February 2014.

40. It is a matter of immense regret that OSLA declined to represent the Applicant in this matter. Its submissions on what is essentially a novel point of law and fact before the UNDT could have served to assist the Applicant in comprehensively canvassing the issue of receivability after the Respondent chose to fall back on the oft beaten track of *ratione temporis* instead of exploring the real reasons for the late filing of the Application before the UNDT.

41. How OSLA manages its work and decides whom to represent is certainly a matter solely for OSLA to determine. It is trite, of course, that in making those decisions OSLA will be informed by the nature of the case, the grievance of the litigant and the duties of the Office within the internal justice mechanism. This is not a decision that is within the realm of the Tribunal's jurisdiction.

42. That said it behooves OSLA to recognize that where the Tribunal requests or directs the assistance and support of OSLA for a particular litigant such a request or direction is not made with any levity. It takes into consideration the facts of the case and its complexity.

43. Now that the General Assembly has at its 68th session approved a voluntary supplemental funding mechanism for staff legal assistance, the practice of declining representation for staff members and the criteria employed in so doing is likely to come into sharp focus.

44. It is perhaps time for serious thought to be given to the scope of OSLA's work vis-à-vis the duties of counsel serving within OSLA's umbrella as officers of the court.

(Signed)
Judge Vinod Boolell
Dated this 28th day of February 2014

Entered in the Register on this 28th day of February 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi