



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

NJENGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT STRIKING OUT
MANIFESTLY INADMISSIBLE
APPLICATION**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Fabrizio Mastrogirolamo, UNDP

Introduction

1. The Applicant filed the current Application on 28 May 2014 on behalf of his father, JNK. The Applicant is challenging the failure of the United Nations Development Programme (UNDP) to compensate JNK in accordance with appendix D of the Staff Rules for injuries he allegedly sustained while driving a United Nations vehicle.

Procedural history

2. The Application was served on the Respondent on 3 June 2014 with a deadline of 3 July 2014 for a Reply. Although the Tribunal may determine a matter on a priority basis without first transmitting a copy of the application to the Respondent or awaiting the Respondent's Reply before taking action to consider the claim, the Tribunal decided that in light of the distinctive circumstances of this case, it would be in the interest of justice to receive comments, if any, from the Respondent before proceeding.

3. On 6 June 2014, the Respondent filed a Motion to strike out the Application on the grounds that it is manifestly inadmissible.

4. In support of his Motion, the Respondent submits that since JNK was an independent contractor serving with the Organization under a Special Service Agreement, the Application is not receivable *ratione personae* pursuant to article 2, paragraph 1(a) and article 3, paragraphs 1(a) and (b) of the UNDT Statute, which establish that the Tribunal has jurisdiction to hear and pass judgment on applications relating to staff members or former staff members of the United Nations.

5. Further, the Respondent submits that pursuant to the Special Service Agreement, signed by JNK on 3 July 1998, any dispute arising out of the agreement is supposed to be submitted to arbitration if attempts at settlement by negotiation have failed.

6. In light of the documents submitted by the Parties, the Tribunal did not deem it necessary to receive comments from the Applicant on the Respondent's Motion.

Facts

7. JNK signed a Special Service Agreement¹ with UNDP on 3 July 1998 for the provision of services as a driver to the United Nations World Food Programme (WFP) from 1 July 1998 to 30 September 1998 in Mombasa, Kenya.

8. According to the Applicant, JNK was involved in a traffic accident on 31 July 1998 while driving a United Nations vehicle in Mombasa. As a result of the accident, JNK allegedly sustained a serious neck injury that has left him unable to work for the past fifteen years.

9. The Applicant further submits that on 21 January 1999, JNK applied for compensation in accordance with paragraph 6 of the Special Service Agreement. The Applicant claims he was informed on 29 April 2014 by a WFP Human Resources Officer that a response is still pending from the Advisory Board on Compensation Claims (ABCC).

Issues

10. The only issue before the Tribunal is whether the Application filed by the Applicant on 28 May 2014 on behalf of JNK who was employed on a Special Service Agreement by UNDP is inadmissible.

Considerations

11. Pursuant to article 3.1 of the UNDT Statute, 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 or programmes;

¹ Special Service Agreement No. WFP/CON/238/98.

- (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.

12. Accordingly, the Tribunal is only competent to hear complaints filed by staff members, former staff members or persons making claims in the name of an incapacitated or deceased staff member under article 3 of the Statute.

13. The Preamble of the Special Service Agreement signed by JNK on 3 July 1998 included the following clause:

STATUS OF THE SUBSCRIBER

The Subscriber shall be considered as having the legal status of an independent contractor. The Subscriber shall not be considered in any respect as being a staff member of UNDP.

14. Additionally, paragraph 10 of the Special Service Agreement stipulated the following:

Any dispute arising out of or in connexion with this agreement shall be submitted to arbitration in New York by a single arbitrator agreed to by both parties, if attempts at settlement by negotiation will have failed [...].

15. In *Turner* UNDT/2010/170, the Tribunal stated that:

It is clear that the Charter requires that staff members be “appointed” by the Secretary-General (or those to whom this power has been delegated). The hallmark of a staff relationship is “appointment”, and this is done through a letter of appointment pursuant to staff regulation 4.1. The Staff Regulations apply to all staff members of the Secretariat, within the meaning of Article 97 of the Charter, whose employment relationship and contractual link with the Organization are through a letter of appointment issued pursuant to regulations promulgated by the General Assembly. Such letter is signed either by the Secretary-General or by an official in the name of the Secretary-General.

16. In *Ndjadi* UNDT/2011/007, the Applicant similarly held a special service agreement. The Tribunal dismissed the application after concluding that:

18. [T]he 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 is actually a memorandum of understanding between UNDP and the signatory to the service contract, Article 3 whereof 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.

17. The Dispute Tribunal’s decision in *Ndjadi* was subsequently affirmed by the Appeals Tribunal in *Ndjadi* 2012-UNAT-197.

18. In the present matter, the Applicant states at paragraph 1 of his Application that JNK had the legal status of an independent contractor for the WFP Mombasa office. The record also includes a copy of JNK’s signed service agreement. Thus, there is no doubt that JNK was not a staff member of UNDP and as such, he has no standing to come before this Tribunal. The Tribunal therefore has no jurisdiction to consider this Application.

19. Noting paragraph 10 of the Special Service Agreement, the Tribunal urges the Applicant to employ best efforts to resolve his claim for compensation through amicable means such as a negotiated settlement. In the event that this is not possible, he may wish to pursue his claim through arbitration.

Decision

20. The Tribunal concludes that the Application is manifestly inadmissible and is therefore struck out in its entirety.

(Signed)

Judge Vinod Boolell
Dated this 17th day of June 2014

Entered in the Register on this 17th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi