



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

COKER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Sètondji Roland Adjovi

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the United Nations Mission in Liberia (UNMIL). He filed the current application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi on 23 March 2017 to challenge the decision by UNMIL's Chief Human Resources Officer (CHRO) to terminate his continuing appointment.
2. The Respondent filed a reply to the application on 24 April 2017 in which he asserted that the application is not receivable.
3. The Applicant filed a motion on 26 June 2017 seeking leave to file a response to the reply. By its Order No. 128 (NBI/2017), the Tribunal granted the Applicant's motion and directed him to submit a response on the issue of receivability.
4. The Applicant submitted his response on 28 July 2017.

Relevant facts

5. The following facts have been taken from the parties' pleadings and submissions in Case Nos. UNDT/NBI/2016/088 and UNDT/NBI/2017/025.
6. At the time of the Contested Decision, the Applicant was serving as a Civil Affairs Officer at the P-4 level in UNMIL's Joint Analysis and Operation Centre (JOAC).
7. He was granted a continuing appointment on 30 September 2014.
8. By its resolution 2239 (2015), the Security Council affirmed its intention to consider the possible withdrawal of UNMIL after the 30 June 2016 security transition to the Liberian authorities. Consequently, the Security Council decided to decrease UNMIL's authorized military and police strength by 30 June 2016 and requested that the Secretary-General streamline the activities of UNMIL across its civilian, police and military components in line with the security transition.

9. In line with the streamlining of UNMIL's structure as the Mission started to draw down, the Secretary-General proposed the abolishment of several posts in the Mission, generally, and JOAC, specifically, including that of one P-4, in his report A/70/719 (Budget for the United Nations Mission in Liberia for the period from 1 July 2016 to 30 June 2017) dated 8 February 2016. The General Assembly endorsed the proposed budget in its resolution 70/278 (Financing of the United Nations Mission in Liberia) dated 17 June 2016.

10. On 26 May 2016, the Applicant received a letter dated 24 May 2016 from the Director of Mission Support (DMS) informing him that his post had been proposed for abolition effective 1 July 2016 because of UNMIL's downsizing and that his contract would not be renewed beyond 30 June 2016.

11. On 30 June 2016, the Under-Secretary-General for Management (USG/DM) approved the termination of appointment for 15 UNMIL staff members, including the Applicant's, effective 30 June 2016.

12. On 12 July 2016, the Applicant received an inter-office memorandum from the UNMIL CHRO informing him that his appointment would be terminated effective 31 August 2016.

13. On 25 July 2016, the Applicant, represented by the Office of Staff Legal Assistance (OSLA), submitted a request for management evaluation to the Management Evaluation Unit (MEU) challenging the following administrative decisions: (i) the general decision to terminate the Applicant from the Organization; and (ii) the decision to terminate the Applicant effective 31 August 2016 rather than on 28 February 2017, as promised by the Administration (Contested Decisions).

14. The Applicant separated from service on 31 August 2016.

15. After MEU failed to respond timeously to the 25 July 2016 management evaluation request, OSLA filed an application with the Tribunal on 7 December 2016. This application was registered as Case No. UNDT/NBI/2016/088 in the Tribunal's records.

16. MEU subsequently responded to the Applicant's request for management evaluation on 21 December 2016.

17. The Respondent submitted a reply to the application in Case No. UNDT/NBI/2016/088 on 6 January 2017.

18. On 20 February 2017, OSLA informed the Tribunal's Registry in Nairobi that it was withdrawing from its representation of the Applicant in Case No. UNDT/NBI/2016/088.

19. On 23 March 2017, the Applicant, represented by Mr. Sètonджи Roland Adjovi, submitted an application to the Tribunal challenging the decision to terminate the Applicant's continuing appointment. This application was registered as Case No. UNDT/NBI/2017/025 in the Tribunal's records.

Issues

20. The issue for determination here is whether the application filed on 23 March 2017 is receivable pursuant to art. 8.1 of the UNDT Statute. The Respondent contends that the application is not receivable *rationae temporis* and due to the doctrine of *lis pendens*. The Tribunal will examine both of the Respondent's contentions in turn.

Considerations

Receivability rationae temporis

21. The Respondent submits that the application is not receivable *rationae temporis* because the application does not meet the 90-day filing deadline set out in art. 8.1(d) of the UNDT Statute. The Respondent's case is that the 90-day deadline starts to run from the Applicant's receipt of the management evaluation or from the date the management evaluation response period expires. If the management evaluation is received after the 45-day deadline, but before the expiration of the 90-day period, the receipt of the management evaluation will result in a new deadline for seeking judicial review. However, if the management

evaluation is received after the 90-day period, it will not reset the deadline for seeking judicial review.

22. Additionally, the Respondent submits that the Applicant requested management evaluation on 25 July 2016. The 45-day management evaluation period expired on 8 September 2016. Thus, the Applicant was required to file his application no later than 7 December 2016, which was the date he filed his first application. The management evaluation response received on 21 December 2016 did not re-set the clock. The Application was filed more than three months late and is therefore time-barred.

23. The Applicant concedes that the current application has been filed outside of the time limit in art. 8.1(d)(i)(b). He submits however that the provision and its interpretation do not do justice to the staff members who often do not have any legal background to navigate the complexity of the applicable law. He asserts that this interpretation favours an administration that would have failed to address the request from a staff member in violation of staff rule 11.2(d).

24. Since the Applicant has conceded that the application in Case No. UNDT/NBI/2017/025 was filed outside of the delay, there is no need for the Tribunal to deliberate on this issue further.

25. In relation to the Applicant's assertion that the interpretation of art. 8.1(d)(i)(b) is unfair to staff members because it favours an administration that has failed to address management evaluation requests in violation of staff rule 11.2(d), the Tribunal wishes to highlight the sage words of the United Nations Appeals Tribunal (the Appeals Tribunal) in *Kalashnik* 2016-UNAT-661 that:

However, Article 8 does not require that the Administration respond to the request for management evaluation in order for an application to be received by the UNDT. To the contrary, pursuant to Article 8(1)(d)(i)(b) of the UNDT Statute, an application shall be received by the UNDT despite the failure of the Administration to respond: "An application shall be receivable if ... [t]he application is filed ... [w]ithin 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided".

26. In view of the foregoing, the Tribunal concludes that this application is not receivable *rationae temporis* because the Applicant failed to comply with the 90-day filing deadline set out in art. 8.1(d) of the UNDT Statute.

Doctrine of lis pendens

27. The Respondent also submits that the application in Case No. UNDT/NBI/2017/025 is not receivable due to the doctrine of *lis pendens* because the Applicant has appealed the same administrative decision in Case No. UNDT/NBI/2016/088, which is currently pending before the Tribunal. The present application raises the same legal issues and is predicated on the same management evaluation as Case No. UNDT/NBI/2016/088. The Respondent's case is that the plain meaning of staff rule 11.4(a) is that a staff member may not file more than one application contesting the same administrative decision. Staff members do not have the right to bring the same complaint multiple times.

28. The Applicant affirms that he has two cases before the Tribunal. However, he submits that they present different arguments and prayers. On 7 December 2016, he filed a first case to challenge the failure of MEU to issue a decision on the termination of his contract. However, once he received the decision of MEU dated 21 December 2016, he filed the second case to challenge the outcome of the management evaluation. The initial case remains valid because it protects rights at the time which remain violated by the delay in the process, while the second case brings in further violations but on the merits. The Applicant prays for consolidation of his two cases to enable the Tribunal to consider the totality of his challenge of the decision to terminate his employment and his continuing appointment.

29. The question here is whether the Applicant is appealing the same administrative decision in Case Nos. UNDT/NBI/2016/088 and UNDT/NBI/2017/025.

30. In *Kalashnik* UNDT/2015/087, the Tribunal stated that:

The Tribunal also notes that the administrative decisions challenged by the Applicant concern precisely the same job

openings/administrative decisions challenged under case number UNDT/NY/2015/031 filed by the Applicant on 26 May 2015.

An applicant may not file multiple applications concerning the same administrative decision as this offends against the principle of *lis pendens* which disavows simultaneous parallel proceedings between the same parties, concerning the same subject matter and founded on the same cause of action.

31. Here, the Applicant is asserting that the two cases are different because the earlier one is challenging the delay in the process while this current one is challenging other violations. The Tribunal finds this assertion to be factually incorrect. The application in Case No. UNDT/NBI/2016/088 is not about delays. It is challenging administrative decisions that were described as a general decision to terminate the Applicant from the Organization and a decision to terminate him effective 31 August 2016 rather than on 28 February 2017.

32. Pursuant to staff regulation 4.1, each staff member, upon appointment, shall receive a letter of appointment. Staff regulation 4.5 prescribes that except for Under-Secretaries-General and Assistant Secretaries-General, other staff members shall be granted a temporary, fixed-term or continuing appointment. It is reasonable for the Tribunal to conclude at this stage that OSLA's description of the contested decision as the general decision to "terminate the Applicant from the Organization" should be read simply as a decision to "terminate the Applicant's appointment" since the nexus between a staff member and the Organization is a temporary, fixed-term or continuing appointment. The Tribunal notes that the Applicant in this case had been granted a continuing appointment. Thus, in more concise language, the Applicant is challenging the decision to terminate his continuing appointment as of 31 August 2016 in Case No. UNDT/NBI/2016/088. This is the same administrative decision that Case No. UNDT/NBI/2017/025 is challenging.

33. The Respondent correctly points out that the present Application raises the same legal issues and is predicated on the same management evaluation as Case No. UNDT/NBI/2016/088. Additionally, both cases are based on the same set of facts. Case No. UNDT/NBI/2017/025 replicates the arguments used in Case No. UNDT/NBI/2016/088.

34. Since Case No. UNDT/NBI/2017/025 is nothing but a replica of Case No. UNDT/NBI/2016/088, the Tribunal finds that it would be a waste of judicial resources to maintain Case No. UNDT/NBI/2017/025 on its docket.

Judgment

35. The application in Case No. UNDT/NBI/2017/025 is not receivable and is therefore dismissed.

(Signed)

Judge Nkemdilim Izuako

Dated this 16th day of August 2017

Entered in the Register on this 16th day of August 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi