



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BAKAMBA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Elizabeth Gall, UNDP

Introduction

1. The Applicant is a former Monitoring and Evaluation Analyst (“MEA”) at the National Officer (“NO”) B level, working with the United Nations Development Programme (“UNDP”) in Kinshasa, the Democratic Republic of the Congo (“DRC”).¹

2. By an application filed on 21 December 2021, he challenges UNDP’s decision to terminate his fixed-term appointment (“FTA”) for facts anterior to that appointment pursuant to staff regulation 9.3(a)(v).²

3. The Respondent filed a reply on 19 January 2021 in which it is argued that the application is not receivable *ratione materiae* because the Applicant did not file a request for management evaluation within 60 days of the date of notification of the contested decision. It was also argued that should the application be found receivable, the decision to terminate the Applicant’s FTA for facts anterior, was proper.

Facts

4. Effective 1 July 2011 to 31 January 2017, the Applicant served on a service contract as a Programme Analyst. On 1 February 2017, he was appointed as a MEA at National Officer (“NO”)-A level and on 1 August 2021, he was promoted to MEA, NO-B level.³

5. On 5 March 2018, Mr. Thomas Kubuya, Head of Mission, International Emergency and Development Aid (“IEDA”)⁴, sent an email to the Applicant accusing him of receiving money (kickbacks) from several Non-Governmental Organizations (“NGOs”) that were implementing partners for the Humanitarian Fund.⁵ The Country-based Pooled Fund, also referred to as the Humanitarian Fund is led by the United Nations Office for the Coordination of Humanitarian Affairs (“UNOCHA”) and aims

¹ Application, section II.

² Reply, annex 6.

³ Reply, section VI, para.4.

⁴ IEDA is an international Non-Governmental Organization.

⁵ Investigation report, exhibit 2.

at making funds directly available to humanitarian partners operating in countries affected by natural disasters and armed conflict.⁶

6. Mr. Kubuya forwarded the email to the UNDP Office of Audit and Investigation (“OAI”)⁷ on 2 September 2018, and the OAI commenced investigations⁸ upon receipt of the allegations.

7. On 13 May 2019, OAI informed the Applicant that he was a subject of investigation involving allegations of receiving money from various partners.⁹

8. The Applicant was interviewed by OAI investigators on 29 May 2019, 13 August 2019 and on 5 February 2020.¹⁰ On 2 December 2020, OAI availed a copy of the draft investigation report to him and requested him to provide his comments and countervailing evidence by 12 December 2020.¹¹ The Applicant submitted his comments to the OAI on 12 December 2020.¹²

9. On 21 December 2020, the OAI produced their final investigation report, in which the investigators confirmed that on 13 March 2012, the Applicant had, through Western Union, received USD1,000 from Mr. Roger Lopkatchu, the then National Coordinator of the Association Locale pour le Development Integral (“ALDI”), a UNDP implementing partner. The money was given as a kickback for favouring ALDI in its selection for the DRC UNDP humanitarian fund project.¹³

10. On 26 October 2021, Mr. Dominic Sam, the Resident Representative, UNDP DRC, wrote to the Applicant informing him that the office had received the investigation report into the allegation of misconduct against him. By the same letter, Mr. Sam indicated that he had determined that the Applicant’s actions amounted to

⁶ Investigation report, exhibit 4.

⁷ Investigation report, exhibit 2.

⁸ Investigation report, para. 4.

⁹ Investigation report, exhibit 3.

¹⁰ Investigation report, para. 18.

¹¹ Investigation report, exhibit 30.

¹² Ibid., exhibit 31.

¹³ Reply, annex 1 (Investigation report).

misconduct and that had he become aware of the misconduct while the Applicant was under a service contract, the contract would have been terminated in conformity with articles 8 and 13 of the service contract No. P034/10 of 27 June 2011 and subsequent extensions.¹⁴

11. By email of 4 November 2021, Ms. Emily Chakavarika, UNDP, Office Human Resources/Business Partner (“BMS/OHR”), based on the Resident Representative’s letter of 26 October 2021, notified the Applicant that “UNDP BMS/OHR was of the view that had the Organization known of the misconduct he had committed prior to his appointment to his current post, he would have been considered unsuitable as a candidate for the post. The email also stated that such consideration could be the basis for a termination of the Applicant’s current appointment due to facts anterior in line with staff rule 9.6(c)(v). Ms. Chakavarika thus requested the Applicant to provide his comments about the matter not later than 15 November 2021.”¹⁵

12. On 15 November 2021, the Applicant provided his comments.¹⁶

13. On 15 December 2021, Ms. Angelique M. Crumbly, the UNDP Assistant Secretary-General, Assistant Administrator and Director Bureau for Management Services issued a termination letter to the Applicant, stating that:

Your Fixed-Term Appointment that expires on 31 July 2022 will be terminated with immediate effect pursuant to staff regulation 9.3(a)(v) which states that the Secretary-General may terminate the appointment of a staff member if facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should under the standards established in the Charter, have precluded his or her appointment.¹⁷

¹⁴ Reply, annex 4.

¹⁵ Reply, annex 5.

¹⁶ Reply, annex 5(a).

¹⁷ Reply, annex 6.

14. The Applicant separated from the service of the Organization with immediate effect on 15 December 2021.¹⁸

15. On 4 January 2022, Ms. Crumbly wrote to the Applicant informing him that he was cleared from allegations of misconduct as a staff member. She stated:

In reviewing the matter, I have confirmed that the alleged misconduct took place when you were a Service Contract holder, and not a staff member. As a consequence, your conduct was not governed by the UN Staff Regulations and Rules at that time. It follows that you cannot be subject to disciplinary action pursuant to those Regulations and Rules and consequently, you are cleared from all allegations of misconduct. Please note that this conclusion extends to the procedural aspect of this matter. My decision does not constitute a finding that you are not responsible for the procurement fraud as described above.¹⁹

Receivability

Respondent's submissions

16. The Respondent submits that the application is not receivable *ratione materiae* since the Applicant did not submit a request for management evaluation within 60 days of notification of the contested decision as required under staff rule 11.2(a). The decision to terminate his appointment for facts anterior constitutes an administrative decision affecting his contract of employment or terms of appointment under staff rule 11.2(a). It is not a disciplinary measure and does not fall within the indicated exceptions to the requirement of a management evaluation prior to filing an application before the United Nations Dispute Tribunal under staff rule 11.2(b).

17. It is further argued that the Applicant was not charged with misconduct, and that neither was a disciplinary process initiated nor a disciplinary measure taken against him after issuance of the Investigation Report. The Respondent sought to rely on *Gallo*²⁰, for the argument that any exception to the requirement of filing management

¹⁸ Application, section I.

¹⁹ Reply, annex 7.

²⁰ *Gallo* UNDT/2015/036.

evaluation request under staff rule 11.2(b) must be very strictly interpreted under the general principle of law *exceptio est strictissimae interpretationis* (an exception is of the strictest interpretation) and “cannot be extended to other administrative decisions than the ones expressly mentioned in the relevant legal provisions”. Therefore, as the contested decision is not a disciplinary measure, and at the time of the application, management evaluation has not been submitted, the present application is not receivable.

Applicant’s submissions

18. In response to the Respondent’s submissions on receivability, the Applicant pleads that he had not been made aware about mechanisms for contesting administrative or disciplinary measures and was therefore, ignorant about the requirement for seeking management evaluation. He questioned the fact that neither the Tribunal nor the Respondent advised him about this requirement in a timely manner, and yet they are seeking to rely on it to defeat his application.

Considerations

19. Staff rules 11.2 (a) and (b) provide thus.

(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.

20. It is not disputed that the impugned decision relates to facts anterior to the Applicant’s appointment. Also not in dispute is the fact that no disciplinary process

was initiated, and no disciplinary measure was taken against the Applicant after issuance of the Investigation Report.

21. It follows that the impugned decision was not a disciplinary measure but was an administrative decision affecting the Applicant's contract or terms of appointment under staff rule 11.2(a). The Applicant should have sought management evaluation before filing the application.

22. While the Applicant does not contest the above facts, he pleads ignorance of the rules relating to seeking management evaluation.

23. Staff members are, however, responsible for knowing the applicable regulations and rules and ensuring that they are complied with.²¹ The argument that the Respondent and the Tribunal should have advised the Applicant about the legal requirements is untenable since they are not under any obligation to so advise him.

24. Since to his admission the Applicant did not seek management evaluation before he filed this application, it is not receivable *ratione materiae*.

Conclusion

25. The application is dismissed as not receivable.

(Signed)

Judge Margaret Tibulya

Dated this 14th day of July 2022

²¹ *Dzuveronic* 2013-UNAT-338, para 31 ; *Jennings* 2011-UNAT-184, para 26.

Entered in the Register on this 14th day of July 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi