



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/006
Order No.: 064 (NBI/2012)
Date: 4 May 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

SAID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICATION FOR
SUMMARY JUDGMENT AND CASE
MANAGEMENT**

Counsel for the Applicant:

Miles Hastie, OSLA

Counsel for the Respondent:

Jorge A. Ballesteros, UNICEF

Introduction

1. On 14 February 2011, the Applicant, a staff member of the United Nations Economic Commission for Africa (UNECA), filed an application before the United Nations Dispute Tribunal (UNDT), contesting the decision not to renew his appointment.

2. The Registry acknowledged receipt of the Application on 21 February 2011. Pursuant to Article 10 of the Tribunal's Rules of Procedure, the Application was transmitted to the Respondent for Reply by 22 March 2011.

3. On 14 April 2011, Counsel for the Applicant advised the Registry that he had not received the Respondent's Reply. On the following day, 15 April 2011, the Registry contacted the Respondent to find out whether a Reply had been submitted. The Respondent responded on the same day by email, attaching his Reply dated 22 March 2011 and advising that he had indeed sent it to both the Tribunal and the Applicant on that date.

4. On 15 April 2011, Counsel for the Applicant filed a Motion for Summary Judgment.

5. On 19 April 2011, the Respondent filed his response to the Applicant's motion for summary judgment.

Applicant's arguments for summary judgment

6. The Applicant moves the Tribunal to determine this case by summary judgment, in accordance with Article 9 of the Tribunal's Rules of Procedure.

7. The Applicant submits that the Respondent did not file his Reply within the statutory time limit of 30 calendar days, as per Article 10.1 of the UNDT Rules of Procedure. The Applicant observes that the Respondent did not seek leave to re-enter the proceedings and did not bring forward "any exceptional circumstances" which could

have explained the late filing of his Reply. He further submits that if the Respondent anticipated delays in filing his Reply he should have promptly sought leave for an extension of time before the lapse of the deadline, which he has not.

8. The Applicant further observes that, in a number of respects, the facts of the case are similar to those that were presented to the Tribunal in *Cooke* UNDT/NBI/2010/073 which resulted in Order No. 004 (NBI/2011). In the *Cooke* case, the Respondent also failed to submit his Reply within the statutory time limit and claimed that its late filing was the result of an oversight. The Tribunal held that such leave would need to be granted pursuant to Article 8.3 of the UNDT Statute and Article 35 of the Rules of Procedure, permitting the granting of leave to re-enter the proceedings “only in exceptional cases”. In the same way, the United Nations Appeals Tribunal has taken a firm stance on time limits.

9. Last but not least, the Applicant avers that there is no dispute as to the material facts of the case.

10. The Applicant moves the Tribunal to grant his motion as he has suffered enormously from the termination of his career at UNICEF and the Respondent has delayed the review of his case by over 50 days.

Respondent’s reply to the Applicant’s Motion for Summary Judgment.

11. In reply to the Applicant’s Motion for Summary Judgment dated 19 April 2011, the Respondent submits that his Reply was filed within the time limit, on 22 March 2011 but a mistake was made by sending the reply to the wrong email address of the Tribunal (UNDT.Nairobi@un.org instead of UNDT.Nairobi@unon.org).

12. The Respondent notes, however, that the Applicant was correctly spelled (osla@un.org) and is not aware of the reasons why the communication did not reach OSLA. The Respondent attached a copy of the message sent which confirms this.

13. With regards to the Applicant's request for summary judgment, the Respondent states that he has no objection to this Motion, accepting that there is no dispute as the material facts of the case.

Consideration

14. Article 10.1 of the Rules of Procedure provides:

The respondent's reply shall be submitted within 30 calendar days of the date of receipt of the application by the respondent. The signed original reply and the annexes thereto shall be submitted together. The document may be transmitted electronically. A respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, except with the permission of the Dispute Tribunal.

15. In *Cooke*, Judge Izuako stated that "[t]he only available remedy for a Respondent who has not filed a Reply in time is to request for an extension of the time limit to submit a Reply."¹ However, the present case is a little different from the *Cooke* case, because here, the Respondent did *attempt* to file a Reply within the time limits—he just made a careless clerical error.

16. The Tribunal has, as an overriding objective, to serve the interests of justice. The Tribunal does not condone the carelessness of the Respondent—and notes that it is the same Counsel in the present case as in *Cooke*—but questions the fairness of either refusing to admit the Reply or not permitting the Respondent to participate in proceedings. That such a small error should have such significant consequences for the Respondent Organization seems disproportionate and irrational.

17. The Tribunal does not, therefore, grant the Applicant's Motion to refuse the Respondent leave to file a Reply. Indeed, the Tribunal does not consider that the Respondent need file a formal request for leave: Rule 10.1 gives the Tribunal the discretion to permit a Respondent to participate, and, in any event, this is not a case entirely analogous with *Cooke*.

¹ UNDT/2011/004, paragraph 7.

Is Summary Judgment appropriate in this case?

18. Article 9 of the Rules of Procedure states:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

19. Notwithstanding the submissions of the Parties—and in particular the Respondent’s statement that he has no objection to the granting of summary judgment—the Tribunal does not consider this case to be one in which the Applicant is entitled to judgment “as a matter of law”. Summary judgment is default judgment, and this is not a case where the factual matters, let alone the legal issues, are straightforward or clearly in favour of the Applicant.

20. Ultimately it is for the Tribunal to consider the facts and the law to determine the outcome of the case so as to do justice in all the circumstances of the case.

21. The Applicant’s Motion for Summary Judgment is therefore dismissed.

22. The Tribunal must nonetheless decide whether an oral hearing is appropriate or whether the matter can be dealt with on the papers.

23. To ensure the expeditious management of proceedings, the Parties are hereby directed to clarify certain matters, as outlined below.

IT IS ORDERED THAT:

24. The Applicant’s Motion for Summary Judgment is dismissed.

25. The Respondent is permitted to participate in proceedings and his Reply is admitted thereto.

26. The Parties are to submit to the Tribunal, **by Friday 18 May 2012 at 1700 hours (Nairobi time, UTC +3)**:

(a) Responses to the following questions on evidence:

(i) Are the Parties content that all documents filed with the Tribunal should unreservedly be part of the case as evidence?

(ii) In addition to the documents already filed, do the Parties wish to submit any supplementary documentary evidence? If the answer to this is yes, the Parties are to file such evidence.

(b) Any application for discovery of documents, pursuant to Article 18 of the Rules of Procedure.

27. Regarding a possible hearing, **by Friday 18 May 2012 at 1700 hours (Nairobi time, UTC +3)**, the Parties must:

(a) Indicate whether or not they consider a hearing to be necessary in this case; and

(b) if so, indicate whether they intend to call witnesses as well as indicate clearly the relevance of the evidence of each witness; and

(c) communicate the names of their proposed witnesses and full contact details (fixed line telephone number/email) to the Registry; and

(d) indicate approximately the amount of time they may need for the examination-in-chief of each of their witnesses, as appropriate.

28. The Registry shall consider the Parties' responses and indicate in due course whether a hearing will be held.

(Signed)

Judge Vinod Boolell
Dated this 4th day of May 2012

Entered in the Register on this 4th day of May 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi