



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICANT'S MOTION FOR
SUMMARY JUDGMENT**

Counsel for applicant:

Seth Levine, OSLA

Counsel for respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations Operation in Côte d'Ivoire ("UNOCI"). On 19 October 2010, he filed an Application with the Dispute Tribunal ("the Tribunal") to contest the decision of 3 August 2010 by the Under-Secretary-General for the Department of Management ("USG/DM") to summarily dismiss him from service for serious misconduct ("the Contested Decision").

2. The Respondent submitted a Reply on 23 November 2010.

3. On 8 February 2011, the Applicant filed a Motion for summary judgment, which was served on the Respondent on 10 February 2011. On 25 February 2011, the Respondent filed a Motion for directions in response to the Applicant's Motion for summary judgment. The Respondent's motion included brief submissions on the motion for summary judgment and a request that the Applicant's motion be rejected without the need for further submissions.

4. The Tribunal issued Case Management Order No. 071 (NBI/2012), dated 21 May 2012, with the general objective of assessing the readiness of the case for a hearing. To this end, the Order directed the Parties to provide information on witnesses and supplementary documentary evidence.

5. The Respondent submitted a response to Order No. 071 on 4 June 2012. In a response dated 5 June 2012, the Applicant complied with the directives in Order No. 071 and reiterated his request for summary judgment.

6. After reviewing the submissions of the parties, the Tribunal did not deem an additional submission from the Respondent to be necessary.

Parties' submissions

Applicant's submissions

7. The Applicant submits that although it is evident from the parties' submissions that there remains a dispute as to the facts of the case, the Tribunal must be competent to enter summary judgment on the basis that an applicant's right to due process has been so compromised that the findings and conclusions of the disciplinary process which provided the framework for the sanctions imposed cannot be allowed to stand. In this respect he contends that summary judgment should be granted in his favour on the basis that the disciplinary process he underwent was fundamentally flawed because it failed to respect his "fundamental right to due process, in particular his right to seek the assistance of counsel, once he had been identified as a suspect of serious misconduct".

8. The Applicant further claims that the principle that derives from *Buendia et al* UNDT/2010/176 is that in the context of a review of a sanction, where the Tribunal finds that the applicant's due process rights have been compromised through a disciplinary process that was fundamentally flawed, judgment in favour of the applicant is appropriate and the sanction imposed must be rescinded without the Tribunal venturing into a factual examination to determine whether the applicant had in fact committed the alleged misconduct.

9. The Applicant argues that the approach adopted in *Buendia et al* will ensure a fair and expeditious disposal of the case by obviating the need for a full hearing on the merits of the case and thereby saving considerable resources.

Respondent's submissions

10. The Respondent submits that pursuant to *Abboud* UNDT/2009/015, it is appropriate for the Tribunal to apply art. 9 of its Rules of Procedure when "there is no

dispute as to the facts for the purposes of the motion, in other words where there is no need to determine any factual controversy in order to decide whether the moving party is entitled to judgment as a matter of law”.

11. The Respondent refutes the Applicant’s allegation that admissions were obtained from him “in flagrant violation of his right to due process” as being factually incorrect. The Respondent submits that with regard to disciplinary matters, the due process rights of United Nations Secretariat staff members, such as the Applicant, are set out in paragraph 6 of ST/AI/371 (Revised disciplinary measures and procedures) and that the right to counsel attaches only after a staff member has been charged with misconduct. Consequently, the Respondent submits that the facts underlying the Applicant’s motion remain in dispute and as such, he is not entitled to have this motion granted.

12. The Respondent further contends that *Buendia et al* relates to the interpretation of UNDP administrative issuances and procedures, which are different from those applicable to Secretariat staff members. Additionally, as a decision of the Tribunal with respect to a case involving UNDP staff members, the *ratio decidendi* of *Buendia et al* may be raised by counsel in support of the Applicant’s position but is not the rule of law that must be applied to other cases before the Tribunal.

Considerations

13. Under art. 9 of the Rules of Procedure of the Tribunal, to succeed in a motion for summary judgment, a party must show that: (i) there is no dispute as to the material facts of the case; and (ii) he/she is entitled to judgment as a matter of law.

14. Summary judgment is a default judgment, which basically acknowledges that there are no disputes of fact that need to be resolved by a trial. Ultimately, it is for the Tribunal to consider the facts and the law to determine the outcome of the case to ensure that justice is achieved in all the circumstances of the case.

15. The record clearly indicates that the present case is not one where the factual matters, let alone the legal issues, are straightforward or are clearly in favour of the Applicant.

16. Additionally, the Applicant relies heavily on *Buendia et al* in arguing his case for summary judgment. In this respect, he submits that the principle derived from *Buendia et al* is that in the context of a review of a disciplinary sanction, where there is a fundamental flaw in the disciplinary process, judgment should be entered in favour of the applicant as a matter of law. The Tribunal does not agree with the Applicant's broad interpretation of *Buendia et al*.

16. In *Buendia et al*, the Tribunal's conclusion that it could not "uphold the findings and conclusions of a disciplinary process that was fundamentally flawed in that it failed to uphold the applicant's rights to due process", was based specifically on the fact that the Applicants had made admissions to the investigators at a time when they had not been notified that they had actually become the subjects of an investigation that had been initiated against the Resident Representative based on their complaints. This was not the case in the present matter since the Applicant was aware that he was the subject of the investigation for a specific act right from the outset. At any rate, whether there has been a denial of due process cannot be decided on the basis of a summary judgment but must be assessed in the overall context of the case and in the light of all the evidence.

17. Due to the fact that the Tribunal has on previous occasions emphasized that disciplinary cases are quasi-criminal in nature¹, it would be inappropriate for this Tribunal to liberally interpret *Buendia et al* as the Applicant is urging and enter judgment in his favor as a matter of law without the benefit of a hearing. As in criminal cases before national courts, the Tribunal finds that summary judgment has no place in disciplinary matters and if used, should be done sparingly.

¹ *Borhom* UNDT/2011/067; *Ekofu* UNDT/2011/215 and *Nyambuza* UNDT/2012/139.

18. Consequently, the Tribunal does not consider this case to be one in which the Applicant is entitled to judgment “as a matter of law”.

Decision

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

(Signed)

Judge Vinod Boolell

Dated this 17th day of January 2013

Entered in the Register on this 17th day of January 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi