



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

KIFLE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON CASE MANAGEMENT

Counsel for Applicant:

Miller Wanjala Bwire

Cecil L. Kuyo

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations Mission in the Republic of South Sudan (UNMISS). He filed the current Application on 11 February 2013 challenging the decisions not to: (i) renew his appointment with UNMISS beyond 30 September 2012 and (ii) reinstate him to his original post of Strategic Planning Officer when he was transitioned from the United Nations Mission in Sudan (UNMIS) to UNMISS on 8 July 2012.

2. The Respondent submitted a Reply on 24 June 2013, which was served on the Applicant on 25 June 2013.

3. By Order No. 187 (NBI/2013), the parties were directed to consult each other and inform the Tribunal whether they were prepared to consider the option of mediation. The Respondent informed the Tribunal on 30 September 2013 that mediation of the dispute is not feasible and requested that the matter be adjudicated on the merits. The Applicant did not comply with Order No. 187.

4. Pursuant to Order No. 225 (NBI/2013), the Tribunal held a case management hearing on 31 October 2013, which was attended in person by the Applicant and his Counsel and Counsel for the Respondent.

Outcome of case management hearing

Receivability

5. The Respondent submitted that the following issues are not properly before the Tribunal as the Applicant had not submitted them for management evaluation prior to filing his Application with the Tribunal:

- a) The Applicant's claim of December 2010 and July 2011 against his reassignment; and
- b) The Applicant's claims against the selection process for State Coordinator that took place at the end of 2011.

6. Further, the Respondent submitted that the Applicant's challenge against the termination of his appointment as of 31 December 2011 is not receivable because he had withdrawn his request for management evaluation regarding said issue and the Administration had never implemented the decision since his appointment was renewed until 30 September 2012.

7. During the hearing, the Applicant's Counsel had no comment on the receivability issues even though the same issues had been raised by the Respondent in his Reply. The Applicant's Counsel undertook to submit a response on receivability within a fortnight (**14 November 2013**) of the case management hearing.

Issues

8. The Respondent submitted that the only issues for determination by the Tribunal are:

- a) Whether the decision not to renew the Applicant's fixed-term appointment beyond 30 September 2012 was lawful; and
- b) Whether the Applicant had a right to be re-assigned to another position upon expiry of his appointment outside the normal staff selection process.

9. The Applicant submitted that the following are the issues for determination by the Tribunal:

- a) Whether his movement from the post of Strategic Planning Officer to State Coordinator in UNMISS was lawful;
- b) The status of the Strategic Planning Officer post when he was assigned to the post of State Coordinator;
- c) Whether he had a right of return to the Strategic Planning Officer post upon the expiry of his tenure and/or the abolition of the State Coordinator post;
- d) Whether it was lawful for UNMISS to terminate or fail to renew his contract based on his unsuccessful interview for the State Coordinator post;

- e) Whether it was lawful for UNMISS to advertise the Strategic Planning Officer post when he was still engaged as such but was on a provisional/temporary assignment as State Coordinator;
- f) Whether it was lawful for UNMISS to communicate his termination on or about 29 December 2011 without giving him a month's notice prior to termination;
- g) Whether there is a difference in the job description in the post of State Coordinator either at UNMIS or UNMISS;
- h) Whether the post of State Coordinator was in actual fact abolished;
- i) Whether it was lawful for UNMISS to advertise the post of State Coordinator when he was still incumbent;
- j) Whether UNMISS abused its discretion and acted unlawfully in terminating his contract; and
- k) Whether he is entitled to the remedies he is seeking.

10. The Tribunal will specify the issues for determination upon receipt of the Applicant's response on receivability.

Remedies

11. The Applicant indicated that the remedies he is seeking are:
- a) reinstatement to the employment of UNMISS without loss of benefits; or
 - b) payment of damages equated at the salary he was earning; and
 - c) Costs for bringing the present action.

Submission of supplementary documents

12. The Applicant's Counsel undertook to submit supplementary documents to the Tribunal within a fortnight (**14 November 2013**).

13. The Tribunal decided that the Respondent would submit supplementary documents, if necessary, after reviewing the Applicant's submissions.

Witnesses

14. The Applicant's Counsel indicated that he would call witnesses, including the Applicant. He undertook to provide the Tribunal with a list of witnesses and a synopsis of their evidence by **4 November 2013**.

15. The Respondent indicated that he would call one or two witnesses depending on whom the Applicant decided to call. The Tribunal decided that the Respondent's witness list and synopsis of evidence, if any, would be submitted after submission of the Applicant's list on 4 November 2013.

Hearing on the merits

16. The Tribunal set down 21 to 23 January 2014 as tentative dates for a hearing on the merits.

Communication with the Tribunal

17. Noting that the Applicant, who was initially self-represented, had retained the services of Counsel, the Tribunal requested that the Applicant allow Counsel to have full carriage of the case. In this respect, the Tribunal informed the Applicant that all communication with the Tribunal should be submitted by Counsel and that if there is anything he wants the Tribunal to be apprised of, he should inform Counsel who will then direct it to the Tribunal on his behalf.

Further case management

18. The Applicant's Counsel did not file any submissions on 4 November 2013 as directed. Instead, on 12 November he sent the following via email to the Nairobi Registry:

Dear Registry,

The order of the Tribunal of 31st October 2013 is yet to be posted on the e Registry.

Kindly, **urgently** capture the contents thereof to me, I wish to ensure compliance with the Tribunal's directions with all possible precision.

19. On 21 November 2013, the Applicant wrote to the Registry to enquire about the status of his case and to confirm whether his Counsel had indeed requested a "postponement" to file the submissions that were due on 14 November 2013. The Registry informed him that no submissions had been filed by Counsel.

20. On 25 November 2013, the Applicant filed a submission entitled "statement of [the Applicant]" in which he merely re-states and re-argues the submissions in his Application. Attached to his statement as annexes were: his e-PASes for 2009-2010, 2010-2011, 2011-2012 and a Special Performance Report for 1 December 2010 to 30 March 2011 and 1 April 2011 to 8 July 2011; a vacancy announcement for the post of State Coordinator (UNMISS); an UNMIS internal reorganization chart dated 8 August 2010; and an interoffice memorandum dated 7 November 1975 on movement of staff.

21. The Tribunal has taken careful note of the fact that the Applicant's Counsel sent his email to the Registry eight days **after** the expiry of his 4 November 2013 deadline. He then failed to submit his response on receivability and the supplementary documents on 14 November 2013 as directed. Counsel's non-compliance with the orders of the Tribunal is a matter of grave concern. It is also a matter of grave concern that Counsel has failed to engage in any further follow up in this matter and seems not to be communicating with his client as he should be especially in light of the Tribunal's directions at the case management hearing regarding communication.

22. The Tribunal considers Counsel's request of 12 November 2013, seeking the Tribunal's oral orders to be captured and posted in the e-Filing portal for his use, to be highly irregular, presumptuous and amounts to an avenue to justify his own laches in not complying with the Tribunal's orders. In national jurisdictions, counsel appearing in cases take notes and use them to make their submissions to the Court. Counsel does not and should not rely on the Bench for additional assistance once an order has been made unless there is any matter that needs clarification. This is certainly not the case here.

23. In view of the fact that it would be unjust for the Tribunal to allow Counsel's conduct to negatively impact on the Applicant, the Tribunal, pursuant to art. 19 of the UNDT Rules of Procedure, decides as follows:

It is hereby ordered that:

24. The hearing that had been tentatively scheduled for 21 – 23 January 2014 is cancelled.

25. The Applicant's Counsel is to submit to the Registry, a response on the receivability issues raised by the Respondent in his Reply dated 24 June 2013 and reiterated during the case management hearing on 31 October 2013, **no later than 23 January 2014**. If this response is not received on 23 January 2014 as ordered, the Tribunal will make a determination on the basis of the Respondent's submissions.

26. The Applicant's Counsel is to submit to the Registry, **no later than 23 January 2014**, an explanation as to the relevance of the documents submitted by the Applicant on 25 November 2013. Upon receipt of Counsel's submissions, the Tribunal will make a determination as to the admissibility of this evidence.

27. Further orders for the conduct of this case will be communicated to the parties upon the Applicant's Counsel's compliance with the current order.

(Signed)

Judge Vinod Boolell

Dated this 16th day of January 2014

Entered in the Register on this 16th day of January 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi