



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

KISSILA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Bérengère Neyroud, ALS/OHRM

Introduction

1. The Applicant is a former staff member of the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, where she worked as a Team Assistant in the General Services category.

2. On 19 April 2013, she filed an Application contesting:

a. The non-payment of her Daily Subsistence Allowance (DSA) by the ICTR Administration for 116 Days during which she had been medically evacuated from her duty station in 2011;

b. The decision not to renew her appointment beyond 31 March 2012; and

c. The non- payment of her salaries since March 2012.

3. On 7 June 2013, the Respondent filed a Reply to the Application in which it was submitted *inter alia* that:

a. The Application is not receivable.

b. The non-payment of the Applicant's DSA is due to her own failure to submit the documents that are required for the release of any DSA entitlements.

c. The Applicant's claim regarding the non-payment of her salaries is without merit as the Applicant was separated from service on 31 March 2012. Her March salary has since been paid and no other salaries are owed to her.

Facts

4. On 28 July 2010 the Secretary-General presented his report on ICTR budget estimates for the biennium 2010-2011 to the General Assembly.¹ This

¹ A/65/178 (Revised estimates relating to the budget of the ICTR for the biennium 2010-2011).

budget report included, *inter alia*, details on the abolition of certain posts within the ICTR as from 31 December 2008 but which would continue to be funded as General Temporary Assistance (GTA) posts from 1 January to 30 June 2009.

5. The Applicant's abolished Administrative Clerk post was among these GTA funded posts.

6. On 31 May 2011, the Applicant received a memorandum from Mr. Omar Camara, Chief, Staff Administration Section at the ICTR informing her that her fixed-term appointment would not be extended beyond 30 June 2011 when it was due to expire.

7. On 28 June 2011, Dr. Nadine Magali Ufitiniema of the ICTR Clinic wrote to Ms. Carmen De Los Rios, Chief, Human Resources & Planning Section at the ICTR informing her that the Applicant had taken ill and had been medically evacuated from Arusha to Dar es Salaam.

8. Due to her medical evacuation, the Applicant's separation from service, which was to take effect on 30 June 2011, was suspended until such a time when the Human Resources section would be informed that her medical evacuation and medical leave had come to an end.

9. On 1 July 2011, the Applicant was issued with a fixed-term letter of appointment for a period of three months which was to expire without notice on 30 September 2011.

10. On 23 August 2011, Dr. Ufitiniema wrote to Ms. Sarah Kilemi, Chief, Department of Administrative Services Section (DASS) at the ICTR recommending that the Applicant be medically evacuated to Johannesburg, South Africa, for treatment. At her preference, the Applicant was instead evacuated to New Delhi, India.

11. As from 1 October 2011, the Applicant was issued with another letter of appointment for a fixed-term period of one month expiring without notice on 31 October 2011. Subsequently, her appointment was extended for a further period of two months due to expire without notice on 31 December 2011.

12. The Applicant was discharged from the hospital in India on 10 December 2011. The medical report issued to her indicated that she would be fit to return to work on 26 March 2012.

13. She was issued with a letter of appointment on 1 January 2012 for a fixed-term period of one month until 31 January 2012 but which was renewed for another period of one month to 29 February 2012.

14. On 1 March 2012, the Applicant's fixed term appointment was again extended for a period of one month to expire without notice on 31 March 2012.

15. On 17 March 2012, Ms. De Los Rios wrote to Dr. Ufitiniema informing her that the Applicant notified her that her treatment was "finished" though she would have to go back after three months for additional tests. Ms. De Los Rios then sought advice from Dr. Ufitiniema on the status of the Applicant's medical leave and on the need for additional extensions of her appointment given that from 1 July 2011 until 31 March 2012 her contract had been extended on medical grounds.

16. On 17 March 2012, Dr. Ufitiniema responded by stating that the Applicant's sick leave was up to 26 March 2012 and that she would resume work on 27 March 2012.

17. On 19 March 2012, Ms. De Los Rios again wrote to Dr. Ufitiniema seeking her "prompt action and advice" about additional extensions for the Applicant on medical grounds.

18. On the same date, Dr. Ufitiniema wrote to Dr. Agnes Pasquier Castro, Director, Medical Services Division in New York seeking advice on the possibility of extension of the Applicant's contract on medical grounds. She indicated that the Applicant had been retained on a temporary post due to her medical evacuation and that her contract was set to expire on 31 March 2012. She also stated that the Applicant's medical condition was "now good" and that she was scheduled to resume duties on 27 March 2012 and was to go back for medical follow up after three months.

19. On 20 March 2012, Dr. Castro responded by stating that once the Applicant was fit to return to work and did return to work, there would be no need to extend her contract for “medical reasons,” even if all treatments were not yet completed.

20. On 26 March 2012, Ms. Kilemi wrote to Dr. Ufitiniema informing her that in view of the response from New York, there would be no more extensions of the Applicant’s contract as there was no post for her.

21. Thereafter, the Applicant’s contract expired on 31 March 2012 and was not renewed.

22. On 2 October 2012, the Applicant wrote to the Registrar of the UNDT in Nairobi stating as follows:

I am intending to file an Application with UNDT in due course. Owing to the fact that I submitted my Request for Management Evaluation on 15 June 2012 and the MEU promised to release its report on 2 August 2012 of which it did not. The ninety (90) day required of me to file an Application with UNDT expires today 2 October 2012 and I have not yet received a report from MEU.

I am humbly requesting the UNDT to Extend Time Limit to file an Application pending the receipt of Management Evaluation Unit Report or whatever the date that the UNDT will propose or whichever comes first.

23. On 3 October 2012, the Registrar of the UNDT in Nairobi responded to the Applicant via email and advised her that as at that time, she was still within the prescribed time limit to file her Application and that there was no need then to apply for an extension of time.

24. On 9 February 2013, the Applicant again wrote to the UNDT Nairobi Registry seeking clarification as to the timelines applicable to her case and, on 19 April 2013 she filed her Application with the Tribunal.

25. On 6 July 2013, Ms. Charity Kagwi-Ndungu, Legal Officer, DASS, ICTR wrote to the Applicant informing her that she was entitled to DSA for the 106 days that she received medical treatment which translated to a total of USD 15,402. She was also informed thus:

As you are aware payment of DSA and related expenses must be supported by a claim filled in by the claimant attaching all supporting documents. However, as of today you have not submitted any claim. We therefore urge you to submit this claim (F10) as soon as possible in order to facilitate payment of your DSA entitlement [...].

The following documents will be required to accompany the F10-claim form:

A copy of the ticket you purchased and any other terminal expenses incurred in connection with the journey.

Boarding passes indicating the date of departure and the date of arrival in India and boarding passes indicating the date of departure and the date of arrival in Arusha.

A copy of your stamped passport indicating your departure from Arusha.

26. In the same communication, the Applicant was informed that her separation pay had been computed and paid to her bank account.

27. Pursuant to Order No.152 (NBI/2013) issued on 3 July 2013 the Tribunal scheduled a case management hearing for 13 August 2013. On 16 July 2013, the Applicant informed the Tribunal that owing to her medical condition she would be unable to attend the hearing. She therefore requested that the Tribunal proceed to determine the case in her absence pursuant to art. 17.2 of the Tribunal's Rules of Procedure.

28. On 18 July 2013, the Registry informed both parties that having reviewed the Applicant's submissions, the Tribunal had decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, not to hold an oral hearing in this case and that the matter would be decided on the basis of the parties' written pleadings.

Applicant's case

29. A summary of the Applicant's case as deduced from her written pleadings and documents annexed to her Application are summarized below.

30. She has not been formally informed of her separation from service and only found out that she was not on the payroll starting March 2012. She has not received any notification requiring her to check out after 31 March 2012.

31. The ICTR had a duty to issue her with a fresh separation notice. The separation notice issued to her on 31 May 2011 regarding the separation which was to take effect on 30 June 2011 can no longer be said to be a legitimate notice of separation since her contract had been renewed several times through to April 2012.

32. After 31 March 2012, the Applicant had an expectancy of renewal of her appointment in light of the several renewals that had been done consecutively since July 2011.

33. Her post had not been abolished as claimed by the Respondent.

34. Her DSA has been unlawfully withheld by the ICTR. The email sent to her on 6 July 2013 from Charity Kagwi informing her of her DSA entitlements and Separation benefits was only prepared as a defense technique to “blackmail” the UNDT to believe that the ICTR had exercised its duty properly.

35. Her salary payments from March 2012 have not been paid contrary to established procedures. Specifically, her salary for April 2012, which had been declared to be withheld, has not been released to her.

36. The Applicant claims that the UNDT was reluctant in providing guidance to her regarding the interpretation of the applicable guidelines to file an Application as well as on her request for extension of time to file her Application.

37. The Applicant therefore prays for the following remedies:

- a. Payment of all her outstanding DSA for the 116 days that she spent in India on medical evacuation.
- b. The release of her pending salaries since February 2012 to present.
- c. Reinstatement to service by the ICTR on medical grounds.
- d. Alternatively, since the ICTR is undergoing a downsizing exercise, if she is to be separated from service, then the ICTR should formally inform her so.

- e. The issuing of her pending Management Evaluation Report that she requested for on 15 June 2012.
- f. Payment of two years' net base salary for moral and psychological damages.

Respondent's case

38. The Respondent's case as deduced from the pleadings and documentary evidence is as summarized below.

39. The Application is not receivable because:

- a. The Applicant failed to seek management evaluation of two of the contested decisions within the required 60 day time limit; and
- b. The Applicant failed to file her Application before the Dispute Tribunal within the required 90 days after the expiry of the MEU response period.

40. The Application itself is without merit.

41. The delay in paying out the Applicant's DSA entitlements has been occasioned by the Applicant through her failure to submit the required documentation including an F.10 Travel Claim Form, her Passport and the relevant boarding passes required to process the payment.

42. The ICTR Administration has already confirmed to the Applicant that her DSA entitlements will be paid out to her as soon as she submits the requisite documents.

43. The decision not to renew the Applicant's fixed-term appointment beyond 31 March 2012 was lawful.

44. The Applicant was due to separate from the organization on 30 June 2011 but her separation formalities had to be suspended in view of her medical evacuation and incapacitation as at that time.

45. Subsequently, the Applicant's appointment was extended severally beyond 30 June 2011 for the sole purpose of allowing her to utilize her sick leave entitlements due to her medical condition. Her appointment was not extended beyond March 2012 as she had been deemed fit to work by her medical doctor and her medical leave was over.

46. There is no post for her to encumber at the ICTR as her post had already been abolished.

47. The Applicant was effectively separated from service on 31 March 2012 although she never completed the check-out process. On the basis of advice given by the Director of the Medical Services Division (MSD), the ICTR Administration determined that there was no further justification to extend her appointment beyond its expiry date of 31 March 2012.

48. In view of her separation on 31 March 2012, the Applicant was not entitled to any salary payments beyond that date as she is no longer a staff member. Her claim for salary payments after 31 March 2012 is therefore without merit.

49. With respect to her salary for March 2012, ICTR had withheld the same because the Applicant had not completed her check-out process. However on 6 June 2013, the ICTR Administration effected payment of her March 2012 salary even though she had not completed the check-out process. In light of this, the Applicant's contention with regard to the non-payment of her full separation entitlements, including her March 2012 salary, is moot.

50. In view of the foregoing, the Respondent requests the Tribunal to dismiss the Application.

Consideration

51. The preliminary legal issue arising for address by the Tribunal is the question of the receivability of the claims raised in the Application and whether the Applicant was given proper advice by the UNDT Registry regarding the applicable deadlines for filing her Application.

52. The Respondent submitted that for two of the contested decisions, the Applicant did not seek management evaluation within the required 60-day time limit although he did not identify which two these were. The Respondent also submitted that the Application was not filed with the Dispute Tribunal within 90 calendar days of the expiry of the response period for management evaluation under staff rule 11.4 (a).

53. On her part, the Applicant maintains that her Application is not time barred in light of the advice given to her by the UNDT Registrar on 3 October 2012 to the effect that at the time she was within the prescribed time limit to file her Application.

54. In assessing the probity of the advice given to the Applicant by the UNDT Registrar, it is on record that the Registrar, on 3 October 2012 advised the Applicant as follows:

Article 8.1(d)b of the Statute of the Tribunal which seems to apply to your situation reads as follows:

An application shall be receivable if:

[...]

(d) The application is filed within the following deadlines:

(i) In cases where management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

Since you appear to have filed a request for management evaluation on 15 June 2012, you are still within the prescribed time limit to file your application. There is therefore no need to apply for an extension of time.

55. From the foregoing, the Registrar correctly advised the Applicant that having filed her request for management evaluation on 15 June 2012, as at 3 October 2012, there was no need for her to request for extension of time as the prescribed 90 day time limit was not yet due.

56. Contrary to the Respondent's submission that two of the contested decisions were not submitted for management evaluation, the Tribunal notes that while the Respondent did not identify which two these were, all the three decisions contested by the Applicant were included in her request for management evaluation on 15 June 2012 but that the Management Evaluation Unit (MEU) did not respond to her request.

57. Given that the Applicant filed her request for management evaluation on 15 June 2012, the MEU had 45 calendar days within which to respond pursuant to art. 8.1(d) of the Statute of the Dispute Tribunal and art. 7.1(b) of the Tribunal's Rules of Procedure. In view of this, the Applicant's prayer for MEU to issue its report has been overtaken by time and events as the 45 day time limit for the MEU to respond is way overdue.

58. Where MEU does not reply to a request for management evaluation as happened in the instant case, art. 7.1(b) of the Tribunal's Rules of Procedure stipulates that an Application shall be filed within 90 calendar days of the expiry of the relevant deadline for a response to a management evaluation request.

59. Counting from 15 June 2012, the 45 day period for MEU to respond to the Applicant's request for management evaluation ran out on 30 July 2012. From that date, the Applicant then had exactly 90 days which ran up until 28 October 2012 to file her Application.

60. On 2 October 2012, the Applicant wrote to the UNDT Registry requesting an extension of time and the Registrar responded on 3 October 2012 informing her that she was still within the prescribed time limit to file her Application and that there was no need to ask for an extension. As at the date of the UNDT Registrar's advice to the Applicant, the 90 day time limit was still running. While the Registrar had no responsibility to advise the Applicant about time limits in her case, he had properly done so.

61. As a vigilant claimant, the Applicant ought to have known that the 90 day time limit was due to expire on 28 October 2012. She filed her Application on 19

April 2013, about five and a half months after the expiry of the applicable time limit.

62. As enunciated by the Appeals Tribunal in *Christensen*,² it is an Applicant's responsibility to ensure that he or she is aware of the applicable procedure in the context of the administration of justice at the United Nations and ignorance cannot be invoked as an excuse. The advice given to her by the Registrar should not have been interpreted as an infinite assurance that the Applicant would always have a limitless period within which to file her Application.

63. The importance of abiding by prescribed time-limits is well established in the jurisprudence of both the Dispute and Appeals Tribunals. Equally important is the need to strictly adhere to the stipulated procedural requirements prior to the commencement of formal litigation proceedings.

64. The Tribunal's jurisdiction to entertain any Application hinges squarely on the preliminary question of whether or not receivability criteria as provided for in both the Statute and the Rules of procedure have been met. Not having been submitted within the prescribed and required time limit, and in the absence of any exceptional circumstances, the Tribunal must find and hold that the Application and the claims contained therein are not receivable *ratione temporis*.

65. The Tribunal therefore cannot adjudicate this matter on the substantive arguments.

Conclusion

66. The Application is not receivable and is hereby dismissed.

² 2012-UNAT-218.

(Signed)

Judge Nkemdilim Izuako

Dated this 6th day of September 2013

Entered in the Register on this 6th day of September 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi.