



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

YAKOVLEV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. This judgment concerns an application, filed by a former staff member of the United Nations, who had been convicted and imprisoned in the United States for having committed fraud against the Organization from 1993 to 2005 during his service as a Procurement Officer. The Applicant is now requesting the Tribunal to rescind the decision of the Administration to dismiss his belated request (made six years after the expiry of the applicable time limit) to proceed, on an exceptional basis, with payments of a number of entitlements due to him upon separation.

2. The Applicant asserts that there were exceptional circumstances beyond his control that made it impossible for him to claim all of his entitlements within the two-year time limit. These exceptional circumstances are fully set out below in the press release issued by the United States Attorney for the Southern District of New York on 8 August 2005:

FORMER U.N. PROCUREMENT OFFICER PLEADS GUILTY TO FEDERAL CHARGES ARISING FROM HIS RECEIPT OF HUNDREDS OF THOUSANDS OF DOLLARS FROM FOREIGN COMPANIES DOING BUSINESS WITH THE U.N.

DAVID N. KELLEY, the United States Attorney for the Southern District of New York, announced that United States District Judge WILLIAM H. PAULEY accepted the guilty plea today in Manhattan federal court of ALEXANDER YAKOVLEV, a former employee of the United Nations, to conspiracy, wire fraud and money laundering charges arising from YAKOVLEV's receipt of at least several hundred thousand dollars from foreign companies in connection with the performance of his duties as a procurement officer at the United Nations between 1993 and 2005.

This guilty plea stems from the United States Attorney's Office's long term investigation of the United Nations Oil-for-Food Program. As charged in the criminal Information filed today, in 2000, YAKOVLEV, while working as a procurement officer at the United Nations, established the company Moxycyco, Ltd. to facilitate the illicit and secret payment of money to him by foreign companies seeking to secure contracts to provide goods and services to the United Nations.

Thereafter, YAKOVLEV received wire transfers sent to bank accounts in 2 Antigua and Switzerland from foreign companies in exchange for providing information to companies about United Nations contracts that were up for bid and for assisting companies to obtain United Nations contracts. The Information charges that YAKOVLEV received wire transfers from, among others: “foreign company 1”, for providing that company with information from the United Nations regarding a bid for contracts related to the airlifting of United Nations supplies to foreign countries; and “foreign company 2” and “foreign company 3” in return for his assistance in helping those companies obtain contracts with other companies that engaged in business with the United Nations.

The Information further charges that in 1996, YAKOVLEV, as part of his scheme to defraud the United Nations of his full and faithful services as a procurement officer, faxed from New York to a representative of a foreign company information related to that company’s bid for an inspection contract under the United Nations’ Oil for- Food Program.

YAKOVLEV pled guilty to one count of conspiracy to commit wire fraud, one count of wire fraud, and one count of money laundering, each of which carries a maximum sentence of 20 years in prison and a maximum fine of \$250,000 or twice the gross gain or loss resulting from the offense.

...

Background

3. The Applicant served as a Procurement Officer in the United Nations Secretariat from 20 August 1985 until his resignation on 21 June 2005. On 3 August 2005, shortly before he could relocate to his home country, the Applicant was arrested by the United States authorities. Following his guilty plea, as outlined in the aforementioned press release, he was sentenced in December 2010 to a term of imprisonment of time served and to supervised release in the United States for two years, until January 2013.

4. On 2 May 2013, the Applicant made a request to the Office of Human Resources Management (“OHRM”), for payment of repatriation grant, return travel and unaccompanied shipment/removal of expenses for himself and his wife. These

benefits are normally payable to staff members upon separation pursuant to ST/AI/2000/5 (Repatriation grant) and former Staff rules 107.4(b), 107.28 and 109.5(h) (ST/SGB/2002/1).

5. On 21 June 2013, OHRM denied the request stating that his entitlements had expired on 21 June 2007. OHRM informed the Applicant that the Staff Rules and policy of the Organization, applicable at the relevant time, provided that entitlements to repatriation grant (Staff rules 109.5(h) and sec. 7.1 of ST/AI/2000/5), return travel (Staff rule 107.4(b)) and removal expenses (Staff rule 107.28(c)) shall cease if no claim (accompanied with evidence of relocation) has been submitted within two years after the effective date of separation. In the Applicant's case, this was on 21 June 2005.

6. The Applicant requested OHRM to reconsider his request on an exceptional basis, submitting that the delay in claiming his separation entitlements was due to what he described were "insurmountable circumstances" that were beyond his control. He added that he had "absolutely no means to support [himself and his] wife" and that he trusted "[his] 20-year service to the Organization deserves a credit, especially that [he did] not request anything outside of what [he] and every UN staffer is entitled to".

7. On 16 July 2013, OHRM denied the request for an exception under Staff rule 12.3(b) (request for exception) as follows:

OHRM has reviewed your case and noted the contents of your email of 21 June 2013. OHRM has indicated that they would not be in a position to approve your request for repatriation grant on an exceptional basis. Regarding your travel to Russia, OHRM indicated that they might consider it only if you could prove that you cannot afford to buy your own ticket and also one for your wife.

Please advise if you can provide proof that you have no financial means to travel to Russia.

8. The same day, without addressing OHRM's request to furnish information that would enable them to assess if an exception should be granted, the Applicant

responded to OHRM stating that he had no option but to bring a case before the Tribunal.

9. The Tribunal notes that the Applicant did have a clear option if he was genuinely seeking an exception to be made, at least in relation to return travel to Russia, and that was by providing the information requested by OHRM.

10. On 23 July 2013, the Applicant requested management evaluation of OHRM's refusal to grant his request for repatriation, benefits and allowances. On 27 August 2013, the Management Evaluation Unit ("MEU"), on behalf of the Secretary-General, upheld the decision of 21 June 2013 not to grant the Applicant repatriation and return travel entitlements.

11. The Applicant indicated in his application that he sought assistance from the Office of Staff Legal Assistance who declined, on 21 October 2013, to represent him as it fully supported the Administration's decision.

12. On 7 November 2013, the Applicant filed this application, requesting the payments of entitlements he submits he is "entitled to after serving the Organization for 20 years" on grounds that "the circumstances which precluded [him] from filing his application on time were beyond [his] control and fall under *force major (sic)* circumstances".

Issues

13. The issues before the Tribunal are:

- a. Whether the Respondent is correct in submitting that the Applicant lacks standing to bring this claim before the Tribunal;

b. Whether the Administration's discretion in denying the request for an exception was properly and lawfully exercised;

c. Whether the Applicant manifestly abused the proceedings before the Tribunal and, if so, whether costs should be ordered under art. 10.6. of the Statute of the Tribunal.

Applicable law

14. Former Staff rule 109.5(h) (ST/SGB/2002/1), applicable at the time of the Applicant's separation in June 2005 states:

(h) Entitlement to the repatriation grant *shall cease if no claim has been submitted within two years after the effective date of separation* (emphasis added).

15. Sec. 7.1 of ST/AI/2000/5 (Repatriation grant) provides that:

Pursuant to staff rules 109.5 (h) and 209.6 (h), *entitlement to repatriation grant shall cease if no claim*, with evidence of relocation as defined by sections 4.3 or 6.3 above, has been *submitted within two years* after the effective date of separation (emphasis added).

16. Former Staff rule 107.4(b) (ST/SGB/2002/1), in relation to return travel, states:

(b) Entitlement to return travel expenses shall cease if travel has not commenced within two years after the date of separation. However, in accordance with rule 104.10 (d), where both husband and wife are staff members and the spouse who separates first is entitled to return travel expenses, his or her entitlement shall not cease until two years after the date of separation of the other spouse.

17. Removal expenses are dealt with in former Staff rule 107.28(c), which provides that:

(c) On separation from service, entitlement to unaccompanied shipment expenses under rule 107.21 (h) and (i) or removal expenses under rule 107.27 shall cease if the shipment or removal has not

commenced within two years after the date of separation. However, in accordance with rule 104.10 (d), where both husband and wife are staff members and the spouse who separates first is entitled to unaccompanied shipment or removal expenses, his or her entitlement shall not cease until two years after the date of separation of the other spouse.

18. Staff rule 12.3(b) (which is identical in wording to former Staff rule 112.2(b)) states:

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

19. Force majeure applies to events which are considered unpredictable and uncontrollable, rendering the performance of obligations impossible. This is usually due to causes that are completely outside individual control, commonly natural disasters, and that could not be avoided in good faith and through the exercise of due care.

20. Article 10.6 of the Tribunal's Statute states:

Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

21. The issue regarding an award of costs has received some judicial attention by the United Nations Appeals Tribunal ("UNAT"). The following principles have emerged to date. Before the UNDT can lawfully award costs against a party, it shall make a determination on the evidence that there was a wrong or improper use of the proceedings before the court (*Bi Bea* 2013-UNAT-270). However, the exercise of power to award costs was found not to be warranted where an applicant may have been misguided into believing that he could bring the matter before the UNDT (*Balogun* 2012-UNAT-278). Costs may also be awarded against an applicant who

presented a frivolous or outrageous claim before the Tribunal (*Ishak* 2011-UNAT-152).

Consideration

Does the Applicant have personal standing to bring the claim before the Tribunal?

22. The Respondent submits that the Applicant's entitlements automatically expired in June 2007, thus no longer existed when the Applicant contacted the Organization nearly six years later to claim those entitlements. As those entitlements no longer exist under the terms of his appointment, the Applicant has no standing as a former staff member to challenge the denial of those entitlements before the Dispute Tribunal.

23. The Tribunal finds the Respondent's claim of non-receivability based on the Applicant's lack of personal standing unconvincing. Article 3.1 of the Statute of the Dispute Tribunal states that an application under the Statute may be filed by "any former staff member of the United Nations". There are no provisions in the Tribunal's Statute that limit the personal standing of an applicant to rights or entitlements under the Staff Rules that are not "extinguished". Further, to argue non-receivability on the basis of lack of standing is to confuse it with issues regarding the exercise of any discretion and the substantive merits of the claim.

24. The Respondent's submission ignores the letter and intent of the specific provision on requests for exception under Staff rule 12.3(b) (which is identical in wording to former Staff rule 112.2(b)), which does not contain any language that limits the application of the rule to current staff members or former staff members in respect of entitlements that have not expired. An interpretation that would result in the unlawful distinction between current and former staff members is not tenable, as the rule clearly intends to cover valid and legitimate exceptional circumstances that precluded all staff from exercising a right arising from their contract of employment. The suggested restrictive approach would not only go against the possibility

contemplated under Staff rule 12.3(b) that a right or entitlement can be revived if the Administration opts to do so, but will also be contrary to the facts of the case which demonstrate that the Administration conceded that an exception could be made on humanitarian grounds if the Applicant proved his impecuniosity, which may equate to an exceptional circumstance justifying waiver of the time limit.

25. The Tribunal finds that Staff rule 12.3(b) encompasses exceptions that allow waiver of time limits provided for in the Staff Rules. The Respondent's contention that the Applicant does not have *locus standi* is without merit.

Was the Administration's discretion in denying the request for an exception under Staff rule 12.3(b) properly exercised?

26. The Tribunal notes that, by considering payment of the Applicant and his wife's travel to Russia for humanitarian reasons, the Administration conceded that an exception could be made in the Applicant's case although limited to their travel to Russia.

27. The Applicant asserts that there were exceptional circumstances in his case that were beyond his control and that made it impossible for him to claim all of his entitlements within the two-year time limit, namely his arrest and subsequent sentence.

28. The principle "*nemo auditur propriam turpitudinem allegans*" (which may be translated as "no one can be heard to invoke their own turpitude") is of direct application in the present case. The Applicant alleges his own turpitude against the Organization as a ground for not having been able to comply with the Rules. This principle is sometimes expressed as a doctrine of "clean hands", which is related to requirements of equity and good faith, and which requires that a party claiming equitable relief or asserting an equitable defense has itself acted in accordance with equitable principles.

29. Notwithstanding his arrest in 2005 and contrary to his claim that he could no longer deal with administrative matters since then, the Applicant did maintain contact with OHRM, as evidenced by a communication dated 18 April 2006 relating to visa issues. The Applicant therefore had ample opportunity to request a deferment of payment of his separation entitlements. He opted not to do so.

30. Although the Administration quite properly considered that the Applicant did not provide particulars amounting to exceptional circumstances, the Organization informed the Applicant that it would still be amenable to consider payment of extinguished entitlements in relation to repatriation travel on humanitarian grounds, if he brought proof of his lack of financial means to return to his home country. The Applicant neither answered OHRM queries nor provided the necessary documentation to support his claim that he had “absolutely no means to support himself and his wife in Russia”. He effectively refused to prove that he was impecunious and thus obtain payment of the cost of his and his wife’s return travel on an exceptional basis. Instead he chose to bring the matter before the Tribunal whilst the administration stood ready to reconsider its decision in relation to the travel of the Applicant and his wife back to Russia.

31. In the circumstances, the Applicant has failed to persuade the Tribunal that the circumstances of his case were such as to warrant a waiver or exception to the time limitations for claiming his separation entitlements. Further, the Applicant cannot on the one hand request payment of extinguished separation entitlements and, at the same time, refuse to meet the condition for a possible consideration of an exception, namely proof of impecuniosity.

32. The Tribunal finds that the Applicant has not established that the Respondent’s decision to refuse to grant him an exception under Staff rule 12.3(b) was unlawful.

Is the application an abuse of process?

33. On the basis of the above mentioned facts and evidence, the Tribunal finds that the Applicant has clearly abused the proceedings before the Tribunal. His application before the Tribunal amounts to an abuse of process.

34. The Applicant completely misled the Tribunal. He omitted, rather conveniently, to provide the Tribunal with relevant facts for it to make a determination as to whether the payments of his entitlement should have been granted by the Administration on an exceptional basis. The information was omitted by the Applicant in his application but was provided by the Respondent in his reply and further evidenced by documents annexed to it.

35. The Applicant chose deliberately to omit disclosing information with respect to the very same factors that led the Administration to exercise its discretion in dismissing his belated request for payment. Those factors include:

- a. His knowledge, as evidenced by his resignation letter of 21 June 2005, that there were allegations against him of violation of the Organization's Staff Rules. There were neither exceptional circumstances, nor *force majeure*, at the time that prevented him from complying with the Rules as he was fully aware that it was only a matter of time before he may have been arrested and possibly convicted;
- b. His communication with OHRM in April 2006 (whilst he argued before the Tribunal that he was absolutely not in the position, due to "circumstances beyond [his] control and *force major (sic)* circumstances") to contact OHRM to request either a waiver of the time limit applicable to the payment of his entitlements upon separation or the payment of those entitlements before June 2007;
- c. His criminal activity against the same Organization he was to serve with the highest standards of efficiency and integrity, as requested by the Charter of

the United Nations, the Staff rules and regulations and the Status, basic rights and duties of United Nations Staff Members (ST/SGB/2002/13).

36. The Applicant chose to ignore the administration's willingness to consider, for humanitarian reasons, the payment of his travel back to the Russian Federation prior to filing his application before the Tribunal. In fact, not only did he ignore completely this surprisingly generous humanitarian gesture by the Administration, but he responded that he was left with no choice but to file a claim with the Dispute Tribunal. The Applicant however clearly had another choice. He could have complied with the Administration's request for proof that he was impecunious and thus obtain payment of the cost of his and his wife's return travel on an exceptional basis, unless of course he had reasons not to comply. By choosing to bring the matter before the Tribunal whilst the administration stood ready to reconsider its decision, at least partly, the Applicant used up valuable resources and time that would otherwise have been devoted to other more urgent matters pending before the Tribunal.

37. Lastly, the Applicant's reliance on his incarceration as *force majeure* is not accepted and the invocation of such argument with respect to his particular situation is not only disingenuous but above all frivolous and wholly unreasonable. There were no unpredictable or uncontrollable events that would have prevented the Applicant from filing his claim with OHRM. It was highly foreseeable that his fraudulent activities would have resulted in his arrest and conviction for financial crimes he committed for over a decade against the same Organization he now submits should grant him financial entitlements. It is highly arguable that the Applicant's fraudulent conduct in the discharge of his official duties constituted a fundamental breach of the implied term of trust and confidence thus disentitling him to any benefit under the contract.

38. As correctly stated by the Respondent,

[The] criminal acts of the Applicant, and his subsequent conviction for those acts, are not circumstances that amount to *force majeure*.

The Black's Law Dictionary defines *force majeure* as "superior or irresistible force". The concept of *force majeure* therefore excludes the malfeasance of a party to a contract. The Applicant's arrest, conviction and subsequent sentence were the direct and predicable outcome of his malfeasance while employed as a Procurement Officer with the United Nations.

39. This is not only a frivolous claim, that took up time and resources to judicially address, but arguably vexatious. The Applicant engaged in criminal activity against the Organization voluntarily and his arrest, conviction and sentence are the direct and predictable result of his acts and misconduct. The only element of unpredictability was whether he would be caught, when he would be arrested and possibly the length of his sentence. None of these factors prevented him from making the necessary application to the Organization, within the time limit of two years, seeking a deferment of any entitlements, which the United Nations may possibly have considered under the circumstances, pending completion of his sentence.

40. Furthermore, requesting the Tribunal in those circumstances to grant a request the Applicant argued he is entitled to after serving the Organization for 20 years on grounds that he has no financial means, is just simply outrageous and vexatious. The Applicant had defrauded the United Nations and had accumulated several hundreds of thousands of US dollars. How much of those ill-gotten gains are still under his control is not known. However, the United Nations is entitled to seek evidence of his impecuniosity before exercising a discretion which, in the circumstances of this case, would be wholly exceptional and arguably lead to public concern.

41. The Tribunal finds that the Applicant has manifestly abused the proceedings before it and an award of costs is appropriate under art. 10.6 of the Statute.

Conclusion

42. The application is rejected;

43. The Applicant is ordered to pay costs in the sum of USD 5,000 for abuse of process.

(Signed)

Judge Goolam Meeran

Dated this 14th day of April 2014

Entered in the Register on this 14th day of April 2014

(Signed)

Hafida Lahiouel, Registrar, New York