



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

WEEKS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Emuobohwo Mudiaga Odje

Counsel for the Respondent:
Thomas Elftmann, UNDP

Introduction

1. The Applicant was a former staff member of the then United Nations Development Fund for Women (UNIFEM) whose appointment was administered by the United Nations Development Programme (UNDP). He filed the current Application on 9 October 2013 to challenge a “termination process in August 2012” that was initiated by UNIFEM/UNDP.

2. The Applicant is seeking payment of accrued salaries, pension contributions and interest on the pension contributions. He is also seeking a clear definition as to his contractual status vis-à-vis the Organization.

Procedural history

3. The Application, which was filed on 9 October 2013¹, was served on the Respondent the same day with a response date of 12 November 2013. This deadline was subsequently extended to 4 December 2013 to provide the Applicant with an opportunity to submit additional supporting documents.

4. In his Reply, the Respondent raised the issue of receivability and moved the Tribunal to reject the Application in its entirety on the basis that it was not receivable.

5. By an email dated 14 December 2013, the Applicant sought leave to respond to the Respondent’s Reply.

6. By Order No. 263 dated 18 December 2013, the Tribunal granted the Applicant’s motion to respond to the Respondent’s Reply. He complied on 31 December 2013.

¹ The Applicant initially filed an incomplete application on 8 August 2013. On 9 October 2013, he finally filed an application that complied with the requirements of article 8 of the UNDT Rules of Procedure.

Facts

7. The Applicant entered into service with UNIFEM on 15 July 2002 in Lagos, Nigeria on a 100 series fixed term appointment as an Administrative Assistant at the G-5 level. His letter of appointment was issued by UNDP. The expiry of his last appointment was 30 June 2008.

8. By a memorandum dated 20 May 2008, the Applicant informed the UNIFEM Country Representative in Abuja, Nigeria, of his resignation from UNIFEM. Additionally, he attached a request to proceed on annual leave for 2 weeks.

9. By a letter dated 23 May 2008, the UNIFEM Regional Programme Director acknowledged UNIFEM's receipt of the Applicant's resignation letter and requested that he provide the office with a written hand over note at his "earliest convenience".

10. According to the Applicant, he returned to the office soon thereafter to comply with the Regional Programme Director's request for the handover note. He met with the Country Representative who took his identification card and security pass and told him that UNIFEM would be in touch with him as soon as a decision was taken on the matter. In light of the turn of events, he did not submit a handover note.

11. In July 2010, the General Assembly created UN Women after merging the Division for the Advancement (DAW), the International Research and Training Institute for the Advancement of Women (INSTRAW), the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) and the United Nations Development Fund for Women (UNIFEM).

12. On 30 April 2012, the Applicant wrote to the UN Women Regional Office in Dakar, Senegal, to complain about the "stoppage of [his] monthly salary and systematic delay in [his] disengagement process" from UNIFEM since "May 2008 up till date". He then requested that his "accrued salary cheques be issued for [his] collection" pending UNIFEM's deliberation of the issue. This letter was copied to the

Chief of the Africa Division, UN Women, in New York and the Country Representative in Abuja, Nigeria.

13. On 18 July 2012, he forwarded his 30 April 2012 letter to the Chief of the Africa Division, UN Women, in New York. She responded to the Applicant on 13 August 2012 as follows:

To the best of my knowledge your entitlements were paid at the time of your resignation through the local UNDP country office – who are responsible for processing such payments to staff upon their separation from the UN.

I am however continuing to find out from our Senegal Office to confirm and will let you know if I get further information.

14. On 18 August 2012, a UNDP staff member informed the Applicant that:

I am not aware of any outstanding cheque for you. UNDP just received instruction for termination & action taken in August 2012 in ATLAS effective May 21, 2008 which has created serious administrative challenge for us. Recall that you have received May, 2008 salary in full that means you have some amount to return to the organization.

As UNDP did not receive clear instructions from UNWOMEN whether to terminate or otherwise until now, the system continued to calculate salary for you until you were put on non-payment group. All the drafts after May 2008 were deposited & credited to UNWOMEN COA before they became stale.

15. Between August and October 2012, the Applicant wrote persistently to the Chief of the Africa Division demanding payment of his salary that had not been paid from May 2008 “up to date because [he] was instructed to handover [his] ID card and Security pass when [he] was still on duty [...]”.

16. By letters dated 26 October and 21 December 2012, addressed to the Secretary-General, the Applicant complained of UN Women’s refusal to accept his resignation and the violation of his rights by the issuance of a termination notice. He requested payment of his accrued salaries, interest on his accrued pension fund contributions and a salary advance. The Applicant asserts that he sent these 2 letters

to the Secretary-General by FedEx² but did not receive any response. He submitted delivery notices from the FedEx website indicating that 2 envelopes had been delivered to an address in New York on 5 November 2012 and 11 February 2013. The delivery notices do not however indicate the name of the sender nor the specific addresses to which the deliveries were made.

17. The Applicant filed the current Application on 9 October 2013.

Issues

18. The Tribunal has to decide whether the current Application is receivable. To make this determination, the Tribunal will look at: (i) whether there was an administrative decision³; (ii) whether the Applicant complied with the timeline for administrative review; and (iii) whether he complied with the timeline for filing an application to the Tribunal.

Considerations

Administrative decision

19. The issue here is whether the Applicant's claim is an appealable administrative decision within the meaning of article 2.1 of the UNDT Statute.

20. Article 2.1 of the Tribunal's Statute states:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant

² A company that provides package delivery services to more than 220 countries.

³ Effective 1 July 2009, staff members have to request management evaluation instead of administrative review.

administrative issuances in force at the time of alleged non-compliance.

21. In Judgment No. 1157, *Andronov* (2003), the former United Nations Administrative Tribunal defined an administrative decision as follows:

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences [...]

22. The record shows that on 20 May 2008, the Applicant submitted a letter to UNIFEM, which stated the following:

I wish to submit the resignation of my appointment from the United Nations service, as UNIFEM Finance Assistant, UNIFEM Regional Anglophone West Africa office, Abuja. My decision to resign from my appointment is to further my education and to also focus on my professional development.

My resignation takes effect from Wednesday 21 May, 2008 and will run for the 30 days period which will elapse on 1 July, 2008 to comply with the 30 (Thirty) days written notice. Also I will request to proceed on a 2 (two) weeks annual leave to enable me settle some pressing personal issues (See the attached completed annual leave request).

23. Without waiting for a response from UNIFEM on his resignation or his leave request, the Applicant immediately proceeded to take annual leave and give effect to his resignation letter. On 23 May 2008, the UNIFEM Regional Programme Director acknowledged UNIFEM's receipt of the Applicant's resignation letter and stated:

However, considering your sudden departure from office and subsequent submission of your letter of resignation coupled with an application for 15 working days leave that terminates on 15 June

2008, UNIFEM office requests that you come to the office at your earliest convenience and hand over officially to the office before embarking on your leave.

The office wishes to have in a written handover note the status of our finances: including funds available under our various Projects: **Regional Framework, CID 4 NARF, CIDA SEEDS, EC/UN**, cheques at your disposal on behalf of partners and others, pending payments and documentations before the acceptance of your resignation and approval of leave.

The finalization of these financial processes is of utmost importance to UNIFEM, and we request that you let us have this vital information in a handover note as soon as possible [...].

24. Upon receipt of the 23 May letter, the Applicant went to the UNIFEM office to prepare the hand over note but instead, he was asked to turn in his identification card and security pass to the Country Representative, which he did. The Applicant never returned to work at the UNIFEM office in Lagos after this incident and did not follow up on his separation until April 2012 when he wrote to UNIFEM complaining about the “stoppage of his monthly salary” since May 2008 and demanding payment of his “accrued salaries”.

25. Although UNIFEM did not issue a formal communication to the Applicant accepting his resignation, the Tribunal considers that by taking possession of the Applicant’s identification card and his security pass in 2008 and not insisting further on the submission of a handover note, UNIFEM indicated its acceptance of the Applicant’s resignation unconditionally and clearly. The Tribunal is of the considered view that the Applicant also understood this to be UNIFEM’s acceptance of his resignation because he took no steps whatsoever to resume his duties. Thus, the Tribunal holds that there has been no contract of employment between the Applicant and UNIFEM since the day that the Applicant returned his identification card and security pass to the UNIFEM Country Representative and that the Applicant ceased to be a UNIFEM staff member on that day.

26. For the sake of argument, the Tribunal shall assume that UNIFEM failed to accept the Applicant’s resignation. The fact remains that he never performed any

duties for UNIFEM between 20 May 2008 and April 2012 and therefore logically he cannot aspire to any salaries or any other form of monetary compensation. Should the Tribunal remind the Applicant and his Counsel of the basic principle of “no work no pay”?

27. The Tribunal is intrigued by the fact that the Applicant is not now alleging nonpayment of salaries, pension benefits and entitlements prior to May 2008 when he was in fact a staff member of UNIFEM but is rather alleging that he was still “on duty” after May 2008 but was unable to work because UNIFEM had divested him of his identification card and security pass. The Tribunal finds this to be a very odd position for the Applicant to take especially when he has shown no evidence that he protested the seizure of his identification card and security pass in any way or that he made even a minimal effort to return to work after his 2 weeks of annual leave in June 2008. Evidently, he was very content with the status quo until 2012 when he decided, for reasons known only to him, that he was owed salary for May 2008 onwards.

28. Although UNIFEM/UN Women subsequently took a decision to process the Applicant’s separation from service in 2012, the Tribunal concludes that this is not an appealable administrative decision in accordance with article 2.1 of the UNDT Statute in that the Applicant no longer had a contract of employment with the Organization. Since the Applicant had effectively ceased to be a staff member of UNIFEM in 2008 as a result of his resignation, UNIFEM’s 2012 decision to finally record his separation from service did not have any direct legal consequences on him.

29. The Tribunal has taken note of and is quite disappointed by the Respondent’s submission that:

Due to an administrative oversight, the Applicant’s resignation and a related separation from service were only recorded in the Respondent’s accounting system on 8 August 2012. Notwithstanding the salary payment until 1 June 2008, the resignation and the Applicant’s separation from service were recorded effective as of 21 May 2008.

30. It is troubling that UNIFEM failed to formalize the administrative processes for the Applicant's separation for almost four years. This is not good managerial practice. It would be the duty of the Organization to investigate this serious case of negligence at management level.

Administrative review

31. Did the Applicant seek administrative review and/or management evaluation of the contested administrative decision in accordance with the Staff Rules?

32. Pursuant to former staff rule 111.2(a), a staff member was required to request an administrative review of a contested decision within two months from the date of being notified of the decision. The rule further stipulated that if the Secretary-General replied to the staff member's request, he or she could appeal against the answer within one month of the receipt of such reply. If the Secretary-General did not reply to the letter within one or two months, depending on the staff member's duty station, the staff member could appeal against the original administrative decision within one month of the expiration of the specified time limit.

33. Since the Applicant is alleging that he was unable to perform his duties because the UNIFEM Country Representative seized his identification card and his security pass, he should have submitted a request for administrative review sometime in July 2008 but he did not do so. Even if the Tribunal was minded to accept this as a tangible reason for the Applicant's failure to work after 20 May 2008, the Applicant would still have to overcome the hurdle of his failure to protest the Country Representative's action within the two month time frame that was set out in former staff rule 111.2(a).

34. The United Nations Appeals Tribunal (UNAT) has stated repeatedly that administrative review, which is now a request for management evaluation in the new internal justice system, is a mandatory first step for an Applicant prior to the

submission of an Application to the Dispute Tribunal and it is not open to the Tribunal to waive this requirement or make any exception to it.⁴

35. The Tribunal in *Costa* UNDT/2009/051 determined that it has no power to suspend or waive any deadlines for requesting or completing management evaluation, or administrative review, while it may decide to suspend or waive deadlines for filing an application with the UNDT. This reasoning was upheld by UNAT in *Costa* 2010-UNAT-036. In the present matter, this Tribunal sees no need to depart from this *stare decisis*.

36. Although the Applicant is now alleging that the administrative decision he is contesting is UNIFEM's decision in August 2012 to finally record his separation from service, the Tribunal does not accept this as this as a contestable administrative decision as discussed earlier. Further, even though the Applicant seems to have submitted a request for management evaluation of UNIFEM's 2012 decision, this request was sent after the 60 day delay set out in staff rule 11.2(c) and is therefore time-barred.

UNDT Application

37. Did the Applicant file his Application to the Dispute Tribunal in accordance with the timeline set out in the UNDT Statute?

38. Article 8.4 of the UNDT Statute stipulates that:

Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

39. This Application has been filed more than five years after the Applicant's receipt of the contested administrative decision. The provisions of article 8.4 of the UNDT Statute clearly place a bar on the Tribunal's ability to consider the Application.

⁴ *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Ajdini* 2011-UNAT-108.

Costs

40. Article 10.6 of the UNDT Statute grants this Tribunal the authority to award costs against a party who has manifestly abused the proceedings. The Tribunal is of the considered view that the Applicant, by the filing of this frivolous Application, has manifestly abused the proceedings. The Tribunal should order costs against him in the amount of USD1,000 but unfortunately he is no longer a staff member of the Organization so this is not a feasible option.

Observations

Submissions

41. Upon receipt of the Respondent's Reply, the Tribunal provided the Applicant with an opportunity to provide his comments on the Reply generally and specifically on the issue of receivability that had been raised therein. Instead of clear and concise submissions that would assist the Tribunal in its considerations, Counsel for the Applicant, Mr. Mudiaga Odje, decided to submit flowery prose, such as the following, that neither added value nor had a basis in law:

7. Respondent's counsel then sought to ask Applicant to ingest palliatives for the bureaucratic short comings, inefficiency, frustration and anxiety caused by the staff/bureaucracy of the Organization whose duty it is to give the requisite notices of acceptance to the Applicant with flip flop, rickety and somersaulting submissions.

42. Unfortunately, a great portion of Mr. Mudiaga Odje's submissions were not useful, appropriate or comprehensible in that they failed to articulate the issues and highlight the rules and regulations upon which his arguments were based. While Counsel may deem it necessary to showcase his command of the English language, he should bear in mind that when the Tribunal seeks comments from parties on issues, any submissions that are filed are expected to be succinct, meaningful and relevant.

Conduct of the Applicant

43. The Applicant has been writing repeatedly to the Registry demanding a ruling from the Tribunal⁵ and a salary advance⁶.

44. The Tribunal wishes to express grave concern at the way Mr. Mudiago Odje has decided to conduct this case. It is unclear whether Counsel is unwilling or unable to advise the Applicant as regards his role vis-à-vis the Tribunal. The Tribunal is at a complete loss to understand why a client who is represented by Counsel should be communicating directly with the Registry and making demands of the Tribunal by email. The Tribunal would have expected from Counsel a minimum of decorum in compliance with his duties towards the Tribunal to have advised the Applicant of the proper protocol to be followed by a person appearing before a court of law. It is the responsibility of Counsel to take matters in hand by filing a motion to address the Applicant's concerns. The Applicant should not be left to his own devices to figure out how to address the Tribunal. Unfortunately the Code of Conduct for Lawyers has not yet been approved by the General Assembly. Had the Code been in force the Tribunal would have shown no hesitation in taking appropriate action against Counsel appearing in this case for allowing the Applicant to approach the Tribunal unbridled and allowing him to believe that the Tribunal is at his beck and call.

Decision

45. The Tribunal concludes that the Application is not receivable and is therefore dismissed, in its entirety, with prejudice.

(Signed)

Judge Vinod Boolell

Dated this 25th day of June 2014

⁵ The Applicant sent emails on 5 March, 4 April, 15 April, 10 June and 17 June 2014. The Registry advised him on 5 March 2014 that the Tribunal would issue directives in due course.

⁶ The Applicant sent emails on 10 June and 17 June 2014.

Entered in the Register on this 25th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi