



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

KIMUNGUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Hanningtone Amol

Counsel for the Respondent:
Christine Graham, ALS/OHRM

Introduction

1. The Applicant filed the current Application on 12 August 2014 to challenge the decision by the United Nations Office at Nairobi (UNON) to suspend him pending an investigation into alleged misconduct. He is claiming compensation for prejudice suffered; loss of income; costs and reinstatement in his previous position on “better terms”.

Procedural history

2. The Application was served on the Respondent on 12 August with a deadline of 12 September 2014 by which he was to file a Reply.

3. On 23 August 2014, the Respondent filed a motion seeking leave of the Tribunal to file a Reply limited to receivability and for the Tribunal to determine that issue as a preliminary matter.

4. On 4 September 2014, the Tribunal issued Order No.202 (NBI/2014) granting the Respondent’s Motion. The Tribunal also suspended the 12 September 2014 deadline for submission of the Respondent’s substantive Reply.

5. The Tribunal in the same Order directed the Applicant to submit his comments on the receivability issue by 21 September 2014.

6. The Applicant filed his reply on the issue of receivability on 20 September 2014.

Facts

7. The Applicant joined the Organization as a driver in the Division of Support Services Service (SSS), UNON, at the G-2 level in 2009. He was on a fixed-term contract and was posted with the Somalia and Eritrea Monitoring Group (SEMG). He served in that position from 1 July 2009 until 15 July 2010.

8. On 18 January 2011, he signed a contract to serve as a consultant with UNON for a period of seven months. He was assigned to SEMG

9. On 22 February 2011, while on duty, the Applicant noticed that an official UN vehicle with registration number 105 UN 240K was missing from the parking lot where it had been stationed for several months. The vehicle was grounded and had not been scheduled for repairs.

10. The Applicant immediately enquired with his colleagues as to the vehicle's whereabouts but none of them knew of the whereabouts of the vehicle. He promptly informed his immediate supervisor of the incident who then advised him to contact the Department of Security and Safety Service (DSS) at UNON immediately. He complied.

11. Together with UNON DSS personnel, the Applicant and his colleagues conducted a search of the UNON premises but the car was not found.

12. The Applicant was then advised by UNON DSS to report the loss of the vehicle to the Diplomatic Police Unit of the Kenya Police at Gigiri, Nairobi, which he did.

13. The Kenya Police in liaison with UNON DSS initiated an investigation immediately. UNON DSS issued an Investigation Report (IR) dated 13 April 2011, implicating the Applicant in a "conspiracy" to steal the vehicle. The IR went on to recommend that "appropriate administrative and legal action" be taken against the Applicant and others for their roles in the theft of the United Nations vehicle. Subsequently, UNON DSS together with the Applicant's supervisor informed him that he had been suspended pending the investigation.

14. In a report dated 18 October 2013, the Diplomatic Police Unit concluded that there was no evidence to connect the Applicant with the theft of the car. The material part of the report reads: "Our investigations therefore revealed no evidence to connect

[the Applicant] with the offence. All that has been confirmed is the fact that he reported the Vehicle was missing from where it had been parked”.

Issues

15. The only issue before the Tribunal is whether the Application filed by the Applicant on 12 August 2014 is receivable.

Submissions

Respondent

16. The Respondent submits that the Application is manifestly inadmissible on three grounds: (a) the Applicant was not a staff member at the time of the contested events, and the contested events are unrelated to his past service as a staff member (*ratione personae*); (b) the Applicant has not requested management evaluation of the contested decision (*ratione materiae*); and (c) the Application has been filed outside the time limit provided in article 8.1(d) of the UNDT Statute, and the three year statute of limitation provided in article 8.4 of the UNDT Statute (*ratione temporis*).

Applicant

17. The Applicant submits that he was a staff member as at 2011 when the decision to suspend him was taken. Even if the term “consultant” is mentioned on the contract he signed in 2011 he was still an employee subject to the “rules and regulations governing the contract of employment”.

18. He had short term contracts that were “successive following the expiry of another. His latest contract, as at 2011, was no exception but for the wording being changed to imply that the Applicant would now serve as a “consultant””. Therefore his “engagement never changed from that of a driver/chauffer, only that he was being moved from one agency to another with each new contract”.

19. In the event that the Applicant was an independent contractor and not an employee, then he should have been held responsible as an independent contractor instead of being suspended from employment.

Considerations

20. The fact that the Applicant was employed as a consultant when he signed a contract on 18 January 2011 cannot be disputed. The heading and preamble of the contract reads “CONTRACT FOR CONSULTANT” and “[c]ontract entered into between the United Nations and (hereinafter referred to as the Consultant) [the Applicant]”, respectively. When a consultant or contractor enters into a contract with the Organization, he/she is made aware of the *General Conditions of Contracts for the Services of Consultants or Individual Contractors* (General Conditions). A look at the contract shows that before the Applicant signed, he acknowledged that he had read and accepted the conditions on the reverse side.

21. The General Conditions of the contract regulating the employment between the contractor and the Organization are drafted by the General Legal Division of the Office of Legal Affairs. They are not the emanation of any United Nations Regulations, Rules or administrative issuances. It is specifically stated in the General Conditions that the contractor shall have the legal status of a contractor and shall not be regarded for any purposes as either a staff member of the Organization under the Staff Regulations and Rules or as an official of the Organization for the purposes of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946..

22. The jurisdiction of the Tribunal is governed by article 2 read together with article 3.1 of the UNDT Statute. Article 2 provides:

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 noncompliance 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 administrative issuances in force at the time of alleged non-compliance;
- (b) To appeal an administrative decision imposing a disciplinary measure;
- (c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

23. Article 3.1 of the UNDT Statute provides that an application under article 2, paragraph 1, of the Statute may be filed by:

- (a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds or programmes;
- (b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
- (c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

24. It is clear from the above that the Tribunal is only competent to hear cases filed by staff members, former staff members or persons making claims in the name of an incapacitated or deceased staff member. With respect to individuals who should be regarded as a staff members the Tribunal refers to the decision in *Turner* UNDT/2010/170, where it was stated that:

It is clear that the Charter requires that staff members be “appointed” by the Secretary-General (or those to whom this power has been delegated). The hallmark of a staff relationship is “appointment”, and this is done through a letter of appointment pursuant to staff regulation 4.1. The Staff Regulations apply to all staff members of the Secretariat, within the meaning of Article 97 of the Charter, whose employment relationship and contractual link with the Organization are through a letter of appointment issued pursuant to regulations promulgated by the General Assembly.

Such letter is signed either by the Secretary-General or by an official in the name of the Secretary-General.

25. In *Gabaldon* 2011-UNAT-120, the United Nations Appeals Tribunal (UNAT) confirmed this view by holding:

[T]he legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf. The issuance of a letter of appointment cannot be regarded as a mere formality (*El Khatib*, Judgment No. 2010-UNAT-029).

26. This is not the case of the Applicant as he accepted and signed a contract governed by the General Conditions applicable to contractors. He was therefore a contractor and not a staff member of the Organization.

27. The Application is therefore not receivable *ratione personae*.

Further observations

28. Though the matter is not receivable, the Tribunal will still make some observations.

29. The Applicant was investigated as a staff member and, in the memorandum of 13 April 2011 addressed to the Director of the United Nations Support Office for AMISOM (UNSOA) by the UNON Deputy Chief of Security the Applicant is described as a staff member. It would appear that the status of the Applicant was misconceived by UNON DSS and probably by the Organization when his suspension was decided.

30. It took over two years for the investigation to be completed. Even though the Applicant was cleared by the Police Report in October 2013 it was not until 15 May 2014 that he was informed that the case was closed and that there was no evidence of any misconduct against him. Such a long delay in completing an investigation coupled with the suspension in the absence of probable cause or reasonable suspicion would afford an arguable case if he could have access to a court of law.

31. Now that the Applicant has been cleared of any breach of the terms of his contract the parties, and more particularly the Organization, would be well advised to engage in an amicable settlement or refer the matter to arbitration as provided by clause 16 of the General Conditions.

The mechanism for settling disputes in the case of contractors

32. The Organization employs a number of consultants and contractors. This category of workers has no access to the United Nations Dispute Tribunal and their only remedy is to make use of the provisions appearing in the General Conditions of their contract on Settlement of Disputes. Where a dispute arises between a contractor and the employer, the matter may be settled amicably and “the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law (“UNCITRAL”), or according to such other procedure as may be agreed between the Parties in writing”. In case the matter is not settled amicably through the procedure of conciliation then it “shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining”.

33. The Tribunal notes that the mechanism for settling disputes referred to above may not be easily accessible to individual contractors especially those stationed in field locations. It may be complex and even costly. The question may be asked as to how many of these contractors can afford to make use of the above mechanism and how many are actually aware of the mechanism. The Tribunal will here refer to the observations made by the Joint Inspection Unit in a report prepared in 2012¹:

The General Assembly recognized this issue and put forward the question as to whether or not it would be appropriate to grant consultants and individual contractors access to existing internal justice mechanisms or to set up a separate justice system for that purpose. The Secretary-General submitted a proposal for recourse mechanisms for non-staff personnel to Member States, taking into

¹ Review of Individual Consultancies in the United Nations System, JIU/REP/2012/5.

account the legal and financial aspects of granting access to existing dispute and appeals tribunals or establishing a separate dispute settlement mechanism. He proposed a two-stage process, consisting of an informal dispute resolution phase and an expedited arbitral proceeding in case the informal dispute resolution phase fails (paragraph 96).

The General Assembly requested the Secretary-General to present a report at its 67th session further elaborating on the proposed mechanism and including an analysis of the policy and financial implications should individual contractors and consultants covered by the proposed expedited arbitration procedures be granted access to mediation under the existing informal system. The Secretary-General presented the said report². At the completion of this review, the final decision of the General Assembly was pending (paragraph 97).

34. It is a disturbing state of affairs that individual contractors cannot have access to a justice system as staff members considering that the functions they perform are generally no different from those performed by staff members. In its report, the Joint Inspection Unit made a valuable and pertinent suggestion:

The Inspector is of the opinion that consultants and other non-staff personnel, who represent a significant part of the workforce of the United Nations system organizations, deserve an accessible and effective justice system appropriate to their specific situation. It would be difficult to propose a “one-size-fits-all solution” for this issue; however, there is need to consider, discuss, and find the best solution possible. The assumption that setting up an internal justice system for non-staff personnel would increase the case load may not be accurate in practice. Taking into account developing experiences and new attempts in this regard, organizations should consider finding appropriate solutions. Organizations should, at least, consider establishing informal/voluntary/administrative internal dispute resolution mechanisms that can be used before resorting to formal external processes.

² General Assembly resolutions 65/247, 63/250 and 61/244.

Decision

35. The Tribunal concludes that the Application is not receivable and is therefore dismissed in its entirety.

(Signed)

Judge Vinod Boolell
Dated this 22nd day of December 2014

Entered in the Register on this 22nd day of December 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi