



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

OMWANDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Alister Cumming, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 27 June 2016, the Applicant, a former staff member in the United Nations Department of Safety and Security (“DSS”), filed an application identifying the contested decision(s) as follows:

1. Due Process: Applicant has not been informed how termination indemnity payments due to the Applicant were done and the reasons for denial of the payments.
2. Failure to Act: The [Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”)] has failed to act on the issue of denial of payment as raised by the Applicant.
3. Non-remittance of the termination indemnity payments due to the Applicant.
4. Harassment and Discrimination: DSS has continued harassing and discriminating against the Applicant by giving conflicting information and false expectation regarding the payments and the decision to stop the payments.

2. On the same day, the Registry of the Dispute Tribunal transmitted the application to the Respondent with a direction to file a reply by 5:00 p.m. on Wednesday, 27 July 2016.

3. On 7 July 2016, the Respondent filed a motion for leave to file a reply limited to receivability.

Background

4. The following background of facts can be discerned from the application and the Respondent’s motion for leave to file a reply limited to receivability.

5. The Applicant commenced service with DSS on 10 October 2005 as a Security Officer in Nairobi, Kenya, following which he resigned on 18 February 2008, having been appointed as a Security Officer with DSS in New York commencing 19 February 2008.

6. On 25 November 2015, the United Nations Staff Pension Committee notified the Applicant of the determination of his incapacity for further service and consequent entitlement to disability benefit under art. 33 of the Regulations of the United Nations Joint Staff Pension Fund (“UNJSPF”).

7. On 1 December 2015, the ASG/OHRM notified the Applicant that the Secretary-General had decided to terminate his fixed-term appointment under staff regulation 9.3(a)(iii).

8. On 4 February 2016, the Applicant’s duties were terminated on medical grounds, with termination indemnity and compensation of one month in lieu of notice under staff rule 9.7(d).

9. The Applicant resides in Kenya. During April and May 2016, the Applicant made several enquiries by email regarding his terminal payments. On 20 May 2016, at 10:55 a.m., the Applicant was advised by email that there was no outstanding payment due to him with regard to the termination indemnity, and in fact that there was an overpayment which he had to reimburse. Later on the same day at 3:31 p.m., the Applicant received an email from the same individual that he was due a termination indemnity in the sum of USD773.24. It was clarified that the overpayment related to a dependency allowance the Applicant had received. The monthly disability payment from the UNJSPF had still not been finalized.

10. On 24 June 2016, the Applicant submitted a request for management evaluation of decisions identified as follows:

1. Due process: The [ASG/OHRM] has denied me due process by not responding to me when I requested her to investigate the reasons for DSS Executive Office denying my indemnity. OHRM has not explained how calculations were made to deny me payments for separation.
2. Withholding of information regarding my termination indemnity and denial of termination indemnity.
3. Harassment and discrimination by continued delay/refusal of funds remittance.

4. Retaliation by DSS.

11. By letter dated 27 June 2016, the Management Evaluation Unit (“MEU”) acknowledged receipt of the Applicant’s request for management evaluation. The MEU noted that the General Assembly has emphasized the importance of informal conflict resolution and that it would identify possible options for informal resolution. The MEU further noted that, pursuant to staff rule 11.2(d), the management evaluation is to be completed within 30 days, or by 28 July 2016, and that

pursuant to Staff Rule 11.4(a), the 90-day deadline for filing an application to the United Nations Dispute Tribunal, should you wish to do so, will start to run from 27 July 2016, or the date on which the management evaluation was completed, if earlier, unless the deadline has been extended by the Secretary-General to facilitate efforts for informal resolution under the auspices of the Office of the Ombudsman.

12. At 1:31 p.m. on 27 June 2016, the Applicant filed the application on the merits.

13. At 4:50 p.m. on 27 June 2016, by email to the Registry, the Applicant requested the withdrawal of his application, stating that he will “wait for an amicable solution from the UN. If the UN and I do not find a solution to this important issue, I shall file a new case”.

14. At 8:18 p.m. on 27 June 2016, the Applicant filed a submission requesting that the Tribunal proceed with his case “as a matter of urgency and exceptional circumstances since the Applicant is currently sick and in serious financial needs”. By contemporaneous email to the Registry, the Applicant confirmed that he wished to “recall” his earlier email requesting the withdrawal of this case.

Consideration

Summary judgment

15. Article 9 of the Dispute Tribunal's Rules of Procedure provides:

Article 9 Summary judgement

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

16. Given the receivability issue arising in the present matter, the Tribunal considers it appropriate to dispose of this case by way of summary judgment.

Receivability

17. Staff rules 11.2 and 11.4 set out the mandatory requirements regarding management evaluation and the applicable timelines for filing an application on the merits, as follows (emphasis added):

Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York ... The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

...

Rule 11.4

United Nations Dispute Tribunal

(a) *A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.*

18. The Dispute Tribunal's Statute reiterates that an application is receivable only if management evaluation has been requested, and following receipt of MEU's response or upon expiry of the requisite period for MEU's response (emphasis added):

Article 8

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

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

(i) In cases where a 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 the 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;

...

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. *The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.*

19. The Dispute Tribunal's Rules of Procedure provide, insofar as relevant:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; ...

20. In para. 51 of General Assembly resolution 62/228 (Administration of justice at the United Nations), the Assembly reaffirmed "the importance of the general principle of exhausting administrative remedies before formal proceedings are instituted".

21. The Appeals Tribunal has held that the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary (*Nagayoshi* 2015-UNAT-498, para 36; *Pirnea* 2013-UNAT-311, para. 42).

22. In *Planas* UNDT/2009/070 (not appealed), the Tribunal dismissed an application as not receivable, stating:

14. ... in terms of receivability of an application before the Tribunal it is not sufficient merely to initiate the management evaluation procedure. Applicants have to await, in general, the outcome of this administrative review before they may submit an application to the Tribunal. Only when no response to a request for management evaluation is provided within the time limits of article 8.1(d)(i)(b), a direct application to the Tribunal is receivable. A "response" in that sense is characterized by a decision from the Management Evaluation Unit which obviously has not yet been taken.

23. The Applicant requested management evaluation on 24 June 2016. On 27 June 2016, the MEU provided the Applicant with a letter acknowledging receipt of his request for management evaluation. This communication was clearly

not a “response, reflecting the outcome of the management evaluation” within the meaning of staff rule 11.2(d) or “the outcome of the management evaluation” within the meaning of staff rule 11.4(a). As at the date of this summary judgment, the parties have not provided evidence that the MEU has completed its management evaluation and the time limit for completing such a response has not yet expired.

24. A matter cannot be before the MEU and the Dispute Tribunal simultaneously, except where an applicant files a request for suspension of action during management evaluation pursuant to art. 2.2 of the Tribunal’s Statute and art. 13 of its Rules of Procedure. In the present case, it is not disputed that the Applicant has filed an application on the merits before receiving a response reflecting the outcome of his request for management evaluation, and before the time limit for providing such a response has expired. As noted by the Appeals Tribunal in *Nagayoshi* and *Pirnea*, the management evaluation process provides the Administration an opportunity to resolve disputes before they reach the Dispute Tribunal. Allowing applicants to circumvent this process and file applications with the Tribunal before the deadline for a response to a request for management evaluation has passed would contravene the Tribunal’s Statute and Rules of Procedure, undermine the time lines set out in the Staff Rules, and would be contrary to the intentions of the General Assembly.

25. For the foregoing reasons, the application must be dismissed as premature and not receivable. In accordance with staff rule 11.4(a), the Applicant may file an application on the merits when he receives the outcome of his request for management evaluation or upon the expiry of the deadline specified under staff rule 11.2(d), whichever is earlier. In light of the summary judgment herein, the Respondent’s motion for leave to file a reply limited to receivability falls away.

Observation

26. This matter is primarily about the Applicant’s entitlements to termination indemnity and the processing of his disability benefits. It would be regrettable if this matter ended up in costly and prolonged litigation before the Tribunal, considering all

its particular circumstances, the nature of the claim, the sums involved, the exchanges generated between the Applicant and the Administration, and the attendant costs of potential litigation to both parties and the Tribunal. In the Tribunal's considered view, the issues arising in the present case appear amenable to informal and amicable resolution, and there is no good reason for the Administration and staff member to wait until the institution of formal proceedings to attempt such informal resolution. The Tribunal notes that in its letter to the Applicant dated 27 June 2016, the MEU acknowledged the importance of informal conflict resolution and stated that it would identify possible options for informal resolution in this case. The Applicant too has indicated a willingness to resolve this issue amicably in his recalled notice of withdrawal of 27 June 2016. The Tribunal commends any endeavours or efforts that the parties may make in this regard.

Conclusion

27. The application in Case No. UNDT/NY/2016/029 being premature and not receivable is hereby dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 8th day of July 2016

Entered in the Register on this 8th day of July 2016

(Signed)

Hafida Lahiouel, Registrar, New York