



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/002/R1

Judgment
No.: UNDT/2016/211

Date: 1 December 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KADRI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant was a staff member of the United Nations Economic and Social Commission for Western Asia (ESCWA) from 24 August 2002 until 24 August 2012.

2. On 29 March 2010, he filed an application with the Geneva Registry of the United Nations Dispute Tribunal (UNDT), which was assigned Case No. UNDT/GVA/2010/079.

3. Following the filing of that application, the Applicant engaged in settlement discussions with the Administration coordinated by the Ombudsman's office. On 24 April 2010, the Applicant entered into a Settlement Agreement with the Organization.

4. On 27 April 2010, he applied to the UNDT in Geneva for a withdrawal of Case No. UNDT/GVA/2010/079 which he had earlier filed as it had been satisfactorily resolved through mediation. The said case was struck out on 3 May 2010 in Judgment No. UNDT/2010/079.

5. Nearly three years later and specifically on 7 January 2013, the Applicant filed another application alleging that he had signed the Settlement Agreement under duress, that ESCWA had rejected his application for a position of Director, Economic Development and Globalization Division (EDGD) for which he had previously been rostered and that the ESCWA Administration continued to harass and discriminate against him.

6. The Dispute Tribunal sitting in Nairobi which was seized of this latest application heard it and issued a judgment¹ on the matter on 23 December 2013. The Tribunal held that where the subject matter of an application had been settled between parties through mediation leading to an agreement signed by both parties, the said matter was *res judicata* and cannot be re-litigated.

¹ Judgment No. UNDT/2013/177.

7. The Tribunal also held that the Applicant's acceptance of the implementation of the agreement, his failure to raise the allegations of duress until well after two years after the mediation including his failure to proffer any evidence in support of his allegation could only lead to the conclusion that the allegation was devoid of any merit.

8. The Applicant subsequently appealed that judgment and on 26 February 2015, the United Nations Appeals Tribunal (UNAT) allowed the appeal² in part and remanded the case to the Dispute Tribunal to make a decision on the Applicant's claim of continued harassment and discrimination.

9. The Tribunal commenced a re-hearing of the Application on 2 August 2016.

10. The Tribunal adjourned the hearing of the matter to 27 September 2016 and ordered the Applicant to seek the assistance of the Office of Staff Legal Assistance (OSLA) to file amended pleadings and witness statements by 12 August 2016.³

11. On 5 September 2016, the Applicant, by way of motion, sought to continue to represent himself and asked for one week's extension of time to file amended pleadings as ordered.

12. On 21 September 2016, the Tribunal granted the Applicant leave to make the late submissions which he did on 27 September 2016. The Respondent filed a Reply to the amended Application on 30 September 2016.

13. The Tribunal continued the hearing of the Application on 5 October 2016.

The Applicant's case

14. The Applicant's case is summarized below.

a. It was not stipulated in the Settlement Agreement between the Applicant and the Respondent that he be barred from reapplying for posts

² Judgment No. 2015-UNAT-512.

³ Order No. 404 (NBI/2016).

in ESCWA. The Applicant had applied for a post in the Economic Development and Globalization Division, D-1 (11-ECO-ESCWA-19813-R-BEIRUT) and was not selected.

b. The Settlement Agreement stipulated that he could encumber any position in the United Nations including ESCWA. The idea that he was welcome to apply elsewhere in the United Nations but not to ESCWA was neither communicated to him verbally nor in writing.

c. He was personally disliked, targeted and discriminated against by the former Under-Secretary-General and by the management of ESCWA because of his human rights-related report writing, the fact that he was a staff representative and what he knew about them. The interpretation of the Settlement Agreement by ESCWA was biased.

d. In his witness statement Dr. Juraj Riecan, who served on the hiring panel, indicated that the Applicant was not screened and could not be shortlisted. His name was removed from the list of shortlisted candidates by the ESCWA Administration.

e. The Applicant's personnel file in ESCWA contained adverse material and reprimand memoranda citing him for insubordination, planning a revolt against the United Nations, violating the code of ethics and behaviour, gross negligence, disrespect for the Organization and mockery of and disrespect for his supervisor and top United Nations management. The Settlement Agreement was self-contradictory therefore in stipulating that he could be rehired at ESCWA or anywhere else within or outside the United Nations.

f. The Settlement Agreement was reached in good faith to end and compensate him for the harassment and discrimination to which he was subjected. It ought to have included a clause to remove the adverse material from his personnel file. The reprimands and accusations in the file were part of the harassment that he endured and for which he was compensated when he relinquished his claims against the Respondent.

g. The decision to not consider him at all for the posts to which he had applied or for any future posts at ESCWA because of the adverse material on his personnel file is a violation of the Charter of the United Nations which demand that recruitment be free of bias or discrimination.

h. The Tribunal should order the Administration to remove adverse material from his personnel file as failure to do so is a breach of the Settlement Agreement not to provide negative information to prospective employers.

The Respondent's case

15. The Respondent's case is summarized hereunder:

a. The Applicant entered into a Settlement Agreement with the Organization of his own free will.

b. By the terms of the Settlement Agreement, the Applicant agreed to take Special Leave with Full Pay (SLWFP) for the duration of his fixed term appointment, which was due to expire on 23 August 2010. In order to bridge him through early retirement and for pension purposes, his appointment was extended from 24 August 2010 to 23 August 2012 during which period he was on Special Leave with Partial Pay (SLWPP).

c. The terms of the Settlement Agreement clearly showed that the reason why the Applicant was not to separate from service with ESCWA on 23 August 2010, was to ensure that he remained an employee until he reached early retirement age. It was not contemplated that he would return to active service with ESCWA. The Settlement Agreement envisages that the Applicant would not perform any official functions in ESCWA and that the position he had been encumbering would be advertised and filled.

d. Paragraph 14 of the Settlement Agreement implies that the Applicant is free to accept offers of appointment within the United Nations Common System except ESCWA.

e. The Applicant's claim that he was not considered for the position in the Economic Development and Globalization Division is incorrect. His job application was considered together with all other job applicants. Due to the Settlement Agreement, his job application was not considered beyond the initial review and the Applicant did not make the shortlist.

f. The Applicant's assertion that the adverse information on his Official Status File (OSF) will negatively affect his chances for employment in ESCWA or anywhere in the United Nations is untrue. All OSFs are treated confidentially and hiring managers do not have access to OSFs for purposes of recruitment nor is a job applicant's OSF reviewed as part of the Organization's selection system.

g. The Applicant's assertion that the Settlement Agreement was reached to compensate him for harassment and discrimination is incorrect. The purpose of the Settlement Agreement was to reach an amicable solution between the Applicant and the Organization, thereby seeking to avoid litigation and further negative impact on the working environment.

Considerations

16. On 26 February 2015, in the Applicant's appeal against the judgment of this Tribunal, UNAT⁴ remanded this case back to the UNDT on the ground that the Tribunal failed to deal with the Applicant's claim of continued harassment and discrimination and that this failure had denied him his due process rights.

17. In view of UNAT's observations, the legal issue arising for consideration in the present case is whether the Applicant suffered any continued harassment and discrimination subsequent to the Settlement Agreement entered into with ESCWA. In the light of this, the Tribunal invited the Applicant to amend his pleadings in order to better articulate the continued harassment and discrimination he alleged to have suffered. On 21 September 2016, the Applicant filed his amended pleadings.

⁴ Judgment No. 2015-UNAT-512.

18. Having read the amended pleadings, it is clear that the gravamen of the Applicant's case on the claim of continued harassment and discrimination is that he was unfairly excluded from competing for a D-1 level post in the ESCWA Economic Development and Globalization Division and that his OSF contains adverse materials that imperil any efforts to secure future employment in ESCWA or elsewhere in the United Nations.

The Settlement Agreement

19. Article 15.7 of the Dispute Tribunal's Rules of Procedure provides that all oral discussions and documents made during mediation are confidential and should not be disclosed to the Tribunal. Mention also should not be made with respect to mediation efforts in pleadings, documents or oral submissions at the Tribunal.

20. In spite of the provisions of the said art. 15.7, in the instant case, the Applicant has tendered the Settlement Agreement in evidence. Not only did the Respondent not object to its admission into evidence, both parties have gone on to freely discuss and dispute the purport and intent of that Settlement Agreement which they had signed on 24 April 2010 to bring to an end the first Application filed on 29 March 2010.

21. As already stated above, the Applicant's claim is that under the terms of the said Settlement Agreement he could apply for future positions in ESCWA and that his exclusion from being fully considered subsequently in a position at ESCWA constituted continued harassment and discrimination. This claim is the crux of this remanded case.

22. Although neither of the parties has properly cited or sought to rely on art. 7.4 of the UNDT Rules of Procedure, The Tribunal finds that in order to determine the allegations of continued harassment and discrimination here, it must recognize that the Applicant is asking the Tribunal to order the implementation of what he understands to be the true meaning of the said Settlement Agreement.

23. In other words, the Applicant's interpretation of the Settlement Agreement which he signed with ESCWA management on 24 April 2010 is that he ought to

have been shortlisted and interviewed for the new position at ESCWA to which he applied in May 2011. His interpretation of the Settlement Agreement also includes that all adverse material in his OSF were to be removed. The facts that he was not invited to interview for the position and that adverse materials were not removed from his OSF form the basis of his claim of continued harassment and discrimination.

24. The said Article 7.4 provides:

Where an application is filed to enforce the implementation of an agreement reached through mediation, the application shall be receivable if filed within 90 calendar days of the last day for implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after 30 calendar days from the date of the signing of the agreement.

Did the Applicant bring this action within the applicable time limits? Is this claim concerning the terms of the Settlement Agreement receivable in the light of Article 7.4?

25. The said art. 7.4 requires that any application seeking to enforce the terms of a settlement agreement must be filed within 90 calendar days of the last day for implementation as specified in the agreement and where dates for the implementation are not stated, the application must be filed within thirty calendar days of the signing of the settlement agreement.

26. An examination of the Settlement Agreement between the parties shows that no date was stipulated for its implementation. Any application challenging it must therefore be brought within 30 days following its signing by the parties. The facts of the case are that while the said agreement was signed by the parties on 24 April 2010, the application challenging its meaning and implementation was filed nearly two years later in January 2013. The Applicant is accordingly out of time and his Application to enforce what he claims to be the true meaning of the Settlement Agreement is not receivable.

27. In relation to the Applicant's claims that certain adverse materials in his OSF will imperil his efforts to secure future employment in ESCWA or elsewhere in the United Nations, not only has the Applicant provided scant evidence but a

consideration of this issue will also require an interpretation of the Settlement Agreement between the parties.

28. The Applicant had submitted that according to Dr. Riecan's witness statement, he (Applicant) was not screened and was removed from the shortlist for the advertised D-1 level post by the Administration. The Respondent in reply submitted that the Applicant's job application was considered together with all other job applicants and that the Applicant did not make the shortlist due to the terms of the said Settlement Agreement.

29. Further, ST/AI/292 (Filing of adverse materials in personnel records), provides clear guidelines on the filing of adverse materials in OSF and the Applicant has legal recourse on having such materials expunged from his records. Insofar as this Application concerns what uses the adverse materials on the Applicant's OSF could be put to by the Administration with regard to the terms of the Settlement Agreement, the claim is not receivable.

Judgment

30. In view of its considerations above, the Tribunal:

- a. Finds and holds that the Applicant's claims of continued harassment and discrimination by ESCWA Administration based on the terms of the Settlement Agreement is not receivable having been filed out of time.
- b. This Application fails in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 1st day of December 2016

Entered in the Register on this 1st day of December 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi