



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KUAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Bart Willemsen, UNICEF

Introduction

1. The Applicant is a former staff member of the United Nations Children's Fund (UNICEF). On 23 November 2015, he filed an application challenging what he describes as the termination of his fixed-term appointment. In his application, the Applicant made several allegations of bullying, harassment, intimidation and abuse of authority against his supervisor and the UNICEF Country Representative.

2. On 3 December 2015, the Respondent filed a motion requesting the Tribunal to consider the receivability of the application as a preliminary issue and to suspend the Respondent's deadline to submit his reply on the merits pending the Tribunal's consideration of the receivability of the application.

3. On 9 December 2015, the Respondent filed a reply to the application in which it was submitted, *inter alia*, that:

As to the lawfulness of the decision not to offer the Applicant an extension of his fixed-term appointment upon its expiration, without any prejudice to the Respondent's motion on receivability filed on 3 December 2015, the Respondent submits that the decision was put into effect upon the Applicant's written agreement not to contest the decision. Accordingly, the decision not to offer the Applicant an extension of his appointment upon its expiration was lawful.

4. On 11 December 2015, the Applicant, without seeking leave from the Tribunal, filed a submission titled "Clarification to the Respondent's Reply." On the same date, the Respondent filed a motion seeking leave to file a response to the Applicant's motion. The response was included as part of the Respondent's request.

5. On 21 December 2015, Judge Vinod Boolell who was then the presiding Judge, issued Order No. 393 (NBI/2015) in which he permitted the parties' filings of 11 December 2015 to be submitted for consideration.

6. On 17 November 2016, following consultation amongst the Nairobi Judges on equitable distribution of cases, the present matter was assigned to the docket of Judge Alexander W. Hunter, Jr.

7. On 3 January 2017, vide Order No. 001 (NBI/2017), the parties were informed that the Tribunal had decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing was not required in determining the preliminary issue of receivability in this case and that it would rely on the parties' pleadings and written submissions.

Factual Background

8. The Applicant joined UNICEF on 18 April 2007 as a Programme Assistant at the GS-5 level in Rumbek, Sudan (now South Sudan). On 26 September 2007 he was appointed as a Finance Assistant at the GS-6 level in Juba.

9. On 15 August 2013, the Applicant was placed on Special Leave Without Pay (SLWOP).

10. On 2 January 2015, the UNICEF South Sudan Country Office advertised three Operations Officer (NO-B) posts located in Bor, Bentiu and Malakal. The Applicant was successful in his application for the post in Bor and returned from SLWOP on 10 March 2015 to assume his duties as Operations Officer (NO-B) in Bor on a three-month appointment.

11. On 22 May 2015, the Applicant had a meeting with his supervisor, Mr. Benjamin Fisher, the Chief Field Officer in Bor. Mr. Fisher indicated that it was his view that the operations structure in place did not appear to warrant an Operations Officer (NO-B) and two Logistics Assistants.

12. On 23 and 25 May 2015, the Applicant sent emails alleging intimidation and bullying against his supervisor to Mr. Brian Nyakanda, Human Resources Specialist in Juba and copying other UNICEF staff.

13. On 8 and 9 June 2015, the Applicant held meetings with other UNICEF colleagues in Juba to discuss his concerns and complaint against Mr. Fisher.

14. The Applicant travelled back to Bor on 10 June 2015 and was informed by Ms. Omayma Ahmed, Human Resources Manager, that his appointment would be extended for three months and that he would be reassigned to Juba to support the Finance Section.

15. On 15 June 2015, Ms. Ahmed sent the Applicant three documents: a memorandum from the UNICEF Representative; a letter of appointment for a three-month period; and a copy of CF/EXD/2012-007 (Prohibition of Discrimination, Harassment, Sexual Harassment and Abuse of Authority).

16. On 12 July 2015, the Applicant wrote to UNICEF's Deputy Executive Director, Management, requesting management evaluation of several issues, namely:

- a. "the undue and unfair treatment meted upon [him] by [his] Supervisor Benjamin Samuel Fisher, CFO Bor" including intimidation and bullying;
- b. his victimization by UNICEF South Sudan Management in allegedly failing to apply UNICEF Rules and Regulations as stipulated in policy documents by siding with Mr. Fisher instead of objectively considering the complaints he had raised; and
- c. the administrative decision to abolish the need for his post just two months after he commenced working.

17. On 25 August 2015, the Deputy Executive Director, Management, informed the Applicant that his management evaluation request was not receivable as no decision to abolish the post of Operations Officer (NO-B) in Bor had been made.

Respondent's submissions on receivability

18. The Respondent made the following submissions in his motion dated 3 December 2015 requesting the Tribunal to consider the receivability of the application as a preliminary issue:

- a. On 29 August 2015, the Applicant signed a Separation Agreement in which he undertook not to appeal or otherwise contest the decision not to renew his appointment or any other decision connected thereto.
- b. The Applicant's description of the decision he disagrees with falls squarely within the terms of his undertaking in the Separation Agreement.
- c. After signing the Separation Agreement, the Applicant wrote to UNICEF's Deputy Executive Director, Management, indicating that he had reservations and stating that he would like to file an appeal against the decision with the United Nations Dispute Tribunal (UNDT). UNICEF thereupon requested the Applicant to clarify whether he no longer wanted to be bound by the Separation Agreement to which the Applicant replied:

I have agreed to be separated as per the terms and conditions of separation agreement. No more reservations and this is the end of my case with UNICEF. Therefore, the signed separation agreement should be considered binding on both parties and final.

Accordingly, the Applicant's assertion that he was forced to sign the Separation Agreement is without merit and the Respondent is of the view that the Applicant's decision to seek relief from the Tribunal borders on the frivolous.

- d. In the alternative, the Respondent submits that the Applicant did not request management evaluation of the decision he disagrees with.
- e. It is evident from his application that the Applicant disagrees with the non-renewal of his appointment upon its expiration on 10 September 2015 and while the Applicant filed a request for a management evaluation on 12 July 2015, this request was directed at an alleged decision to abolish

his post and UNICEF dismissed this request as irreceivable as no such decision had been made.

f. The Applicant indicates at section V of the application that the decision he disagrees with was made on 28 August 2015 while in section VI, he indicates that he received the reply to his request for management evaluation on 26 August 2015, which is before the decision was made that he now disagrees with in this application.

Applicant's submission

19. The Applicant, in his "Observations/Comment to respondent motion [...]," makes the following submissions:

- a. He will not comment further due to the fact that the comments of the Respondent border around the Separation Agreement.
- b. There was no justification or reason brought to his attention for the termination of his contract with UNICEF.
- c. He was forced to sign the Separation Agreement so that he could not dispute the decision not to renew his contract.
- d. The forced Separation Agreement should not be considered as a justification to nullify the United Nations Staff Rules and Regulations; Standard of Conduct for the International Civil Service as well as UNICEF's processes and procedures related to communication in the office.

Considerations

20. The sole legal issue arising for consideration at this stage is whether the application is receivable. In his application, the Applicant submits that he is contesting the decision to terminate his employment which was taken on 28 August 2015. He also made several allegations of bullying, harassment, intimidation and abuse of authority against his supervisor and the UNICEF Country Representative.

21. The Applicant submits that he requested management evaluation of the contested decision on 12 July 2015 and received a response to his request for management evaluation on 26 August 2015.

The applicable law

22. Staff rule 11.2(a) provides that a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

23. In accordance with staff rule 11.2(c), a request for a management evaluation shall not be receivable unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. The authority to conduct management evaluations in UNICEF has been delegated by the Executive Director to the Deputy Executive Director, Management.

24. Staff rule 11.4(a) stipulates that 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 UNDT 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.

Was the Applicant's employment terminated?

25. The undisputed facts before the Tribunal are that on 22 May 2015, the Applicant was informed by his supervisor that the operations structure in place did not warrant an Operations Officer, a position he encumbered at the time. Subsequent to that, the Applicant sent emails to other colleagues alleging intimidation and bullying against him by his supervisor. Following these emails, the Applicant travelled to Juba and held meetings on 8 and 9 June 2015 with other UNICEF colleagues to discuss his concerns and complaint against Mr. Fisher. On

10 June 2015, the Applicant was informed that his appointment would be extended for three months and that he would be reassigned to Juba to support the Finance Section.

26. On 15 June 2015, the Applicant received a memorandum from the UNICEF South Sudan Country Representative in which he was informed, *inter alia*, that:

- a. [I]f he wished to formally pursue his allegations against his supervisor that he should familiarize himself with the procedures set out in CF/EXD/2012-007.
- b. [H]is contract had expired and had not been terminated as alleged by him.
- c. [H]e should indicate whether he would accept the three months' new contract in the Finance Section in Juba.

It is evident from the foregoing that the Applicant's case is one of non-renewal of contract and not a termination which has different legal ramifications.

When was the contested decision taken?

27. The Applicant's contract expired on 10 September 2015. The uncontested evidence before the Tribunal is that on 29 August 2015, the Applicant signed a Separation Agreement. Notwithstanding his contention that he signed the said Agreement under duress, the Applicant must have been aware from this date that his contract would not be renewed beyond 10 September 2015.

28. In the present case, the Applicant failed to file a request for management evaluation of the non-renewal decision within the applicable deadline. This claim is not receivable.

The Applicant's claims of bullying, harassment, intimidation and abuse of authority against his supervisor and the UNICEF Country Representative.

29. In his application, the Applicant made several allegations of bullying, harassment, intimidation and abuse of authority against his supervisor and the UNICEF Country Representative.

30. With respect to the claims of bullying, harassment and intimidation against his supervisor, the Tribunal notes that the Applicant had made complaints to the UNICEF Human Resources Specialist in Juba on 23 and 25 May 2015. On 8 and 9 June 2015, he held meetings in Juba to discuss his concerns and complaint against his supervisor. On 15 June 2015, the Applicant was informed that if he wished to formally pursue his allegations against his supervisor that he should familiarize himself with the procedures set out in CF/EXD/2012-007.

31. At paragraph VII(2) of the application, the Applicant submits that he reported the case to the Ethics Office in New York and was advised to request for management evaluation due to the fact that the issues raised had to do with the management style of his supervisor. The Applicant, indeed, raised these issues in his request for management evaluation dated 12 July 2015. The management evaluation review dated 25 August 2015 did not address the issues of bullying, harassment and intimidation raised by the Applicant but only focused on the question of whether the Applicant's post had been abolished.

32. In *Nwuke* 2010-UNAT-099, the United Nations Appeals Tribunal (UNAT) held:

44. Nwuke did not strictly follow the correct proceedings to present his grievances under ST/SGB/2008/5. But neither did the Administration, which could have forwarded Nwuke's request to the competent authorities under ST/SGB/2008/5 to follow the proper procedures. Instead, the Administration addressed merely in the framework of its management evaluation what were considered the relevant facts of the case and found no discrimination. Despite that, the Administration decided that appropriate actions should be taken to ensure the integrity of the selection process, including the composition of the panel. Finally, in its letter of 3 August 2009, the Administration notified Nwuke that if he were dissatisfied with the

outcome of the evaluation, he could file an application against the administrative decision.

45. This course of action clearly reveals that in the view of the Administration, the issues arising from Nwuke's application had been investigated to the extent that time, circumstances, and lack of ECA staff permitted. It results that Nwuke was not compelled to follow further administrative procedures, because the Administration, in exercising its discretion, had already acted upon his application.

46. Given this, it seems senseless and quite a paradox to refer him back to the procedures under ST/SGB/2008/5. Essentially, Nwuke has already accomplished its requirements, and his situation and pleas have already been examined and evaluated by the Administration. Hence, the UNDT had competence and must conduct the judicial review of the Administration's decision, actions taken or failure to act.

33. In *Kadri* 2015-UNAT-512, UNAT held, *inter alia*, that:

28. However, that was not the only issue to be decided. Mr. Kadri made allegations in his application of continued harassment and discrimination. ...

29. Notwithstanding this, the UNDT restricted its decision to the issue of whether Mr. Kadri had been forced to sign the Settlement Agreement under duress. For whatever reason, the UNDT failed to deal with his claim of continued harassment and discrimination.

30. Mr. Kadri's right to due process entitled him to a fair hearing and a fully reasoned judgment of his application. We hold that the UNDT's omission to adjudge the whole of Mr. Kadri's application was a violation of his due process rights and constituted a procedural error such as to affect the decision of the case.[...] Such error necessitates the remand of the case to the UNDT for completion of the hearing.

34. In his management evaluation request, the Applicant stated that:

I travelled back to Bor on 10th June 2015 as it is the last day of my contract. I wrote to HR enquiring on the status of the Contract. The response was based on the issues raised that my contract will be renewed only for three months and should be moved to Juba to support Finance Office for the period of my contract. More information on the attached memo from Jonathan Veitch, UNICEF South Sudan Representative.

I have lost trust in UNICEF South Sudan Management because they took sides with Benjamin Samuel Fisher instead of addressing the complaint. The management have decided to victimize me by

renewing my contract for only three months as per directives from Benjamin Samuel Fisher and ignored the fact that in emergency duty station, the minimum contractual period is six months. In this office, all other colleagues were given a year's contract.

35. In respect of the allegation of abuse of authority filed against the UNICEF Country Representative, the Applicant submits in his application that he:

considered the Memo written to [Applicant] by Jonathan, UNICEF Representative in South Sudan on 15th June 2015 to be a total abuse of authority and interference to follow the existing UNICEF's structures, processes and procedures. This was because of his interest with Benjamin Samuel Fisher as his personal friend.

36. Analogous to *Nwuke*, in the present case, the Applicant had in his management evaluation request of 12 July 2015 already accomplished the requirements set out in CF/EXD/2012-007 in relation to his complaints of bullying, harassment, intimidation and abuse of authority against his supervisor and the UNICEF Country Representative. As held in *Kadri*, the Applicant is entitled to a fair hearing and a fully reasoned judgment of his application.

37. In accordance with staff rule 11.4(a), the Applicant was required to file an application with the UNDT in respect to those allegations within 90 calendar days of 26 August 2015, that is, by 24 November 2015.

38. As the present Application was filed on 23 November 2015, the Applicant's claims in relation to the allegations of bullying, harassment, intimidation and abuse of authority against his supervisor and the UNICEF Country Representative are properly before the Tribunal and are receivable.

Judgment

39. In view of its deliberations above, the Tribunal concludes:

a. The Applicant failed to file a request for management evaluation of the non-renewal decision within the applicable deadline. This claim is not receivable.

b. The Applicant's claims in relation to the allegations of bullying, harassment, intimidation and abuse of authority against his supervisor and the UNICEF Country Representative are receivable.

c. The Respondent shall file his substantive reply on the Applicant's allegations of bullying, harassment, intimidation and abuse of authority against his supervisor by close of business on 13 January 2017.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 6th day of January 2017

Entered in the Register on this 6th day of January 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi