



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

THIAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Ibukunolu Alao Babajide

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1.

UNDT Proceedings

9. On 21 June 2010, the Tribunal held an oral hearing in this matter. The Applicant and the Respondent's counsel participated in the preliminary hearing in person in Nairobi. The Applicant's counsel and the Respondent's witness, the Acting Chief of ICTR's HRPS, participated via video conference.

10. Prior to the hearing, the Applicant had indicated that he would call three witnesses but during the hearing, his counsel informed the Tribunal that the Applicant's witnesses were unwilling or unable to attend and testify for him due to "either open or subtle intimidation".² The Applicant did not provide any evidence in support of his allegation of intimidation.

Applicant's submissions

11. The Applicant's principal contentions are:

(i) That his rights were violated and his career has been compromised as a result of violations in the process surrounding the evaluation of his performance, particularly since his appointment was not renewed on the basis of unsatisfactory performance.

(ii) That the non-renewal of his contract was improperly motivated due to the erroneous procedures used to appraise his performance.

(iii) That he delayed in seeking an administrative review of the non-renewal of his appointment as a result of the trauma, pain and suffering the decision caused him and that owing to these exceptional circumstances, his claim should be receivable.

² The same information was contained in the Applicant's Trial Statement, which was submitted to the Tribunal on 21 June 2010.

(iv) That he be given a lump sum payment in respect of his repatriation travel.

(v) That the Respondent abused his authority in failing to reimburse him for the cost of the ticket he used to travel from The Hague to Arusha after he was interviewed by OIOS and that the Respondent's failure to comply with the rules of the Organization resulted in the violation of his rights.

(vi) That his employment prospects with the Organization have been curtailed as a result of adverse findings against him contained in an "invalid" OIOS report.

12. In view of the foregoing, the Applicant requests the Tribunal to order the following remedial actions:

(i) That he be reinstated without loss of benefits or seniority and that he be paid all sums and emoluments that have been due to him since his separation.

(ii) In the event that reinstatement is not possible, that he be awarded appropriate compensation for actual, consequential and moral damages.

(iii) That he be reimbursed for the costs associated with his travel from The Hague to Arusha during the disciplinary proceedings.

(iii) To find that he has been subjected to prejudicial and discriminatory treatment, which has adversely affected his career and professional reputation.

(iv) To find that the decision to separate him was unreasonable and was made in bad faith.

(v) To find that his right to full and fair consideration have been violated as a result of procedural irregularities, bad faith and extraneous considerations.

Respondent's submissions

13. The Respondent's principal contentions are:

- (i) That the Applicant's claim concerning the non-renewal of his appointment is time-barred.
- (ii) That the ALU letter of 12 September 2008 and the JDC report are not open to appeal.
- (iii) That pursuant to the relevant staff rules, the Applicant is not entitled to receive the requested lump sum payments.
- (iv) That the Applicant failed to seek administrative review of the issues relating to the reimbursement of travel costs incurred during the disciplinary proceedings.

Legal issues

14. Based on the parties' written and oral submissions, the Tribunal deems the following to be the outstanding legal issues that need determination:

Issue 1:

15. Whether the application against the administrative decision of ICTR, which was communicated to the Applicant in a letter dated 4 February 2004 from HRPS, not to renew the Applicant's FTA beyond 8 March 2004, is time-barred and therefore not receivable.

16. In considering this issue, the Tribunal took into account the following relevant legal provisions:

17. Former Staff Rule 111.2 (a), which provided that:

A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

18. Former Staff Rule 111.2 (f), which provided that:

An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.

administrative review on 27 June 2008, which, the Tribunal notes, was more than four years after he had been notified of the decision not to renew his FTA. Further, he requested, in his Statement of Appeal to the JAB, that the Secretary-General “look into [his] matter outside of the rules”.

23. In view of the fact that the Applicant did not comply with the provisions of former staff rule 111.2(a), the Tribunal will proceed to consider whether there were exceptional circumstances that prevented him from complying with the stipulated timeline.

24. The Applicant explained in his request for review that the delay stemmed from the “utter shock that [his] unlawful termination caused [him] and the resultant trauma and pain and suffering”, and requested that the Secretary-General, in view of the circumstances of the case, exercise his discretionary authority with respect to the delay and to grant him redress. Further, in his Statement of Appeal, he requested that the JAB consider his case “as a fresh case and take as exceptional circumstances, the trauma and the disorientation that attended [his] separation as [he] was not in any position to rebut or apply against the UN-ICTR decision”.

25. Additionally, in a subsequent submission to the Tribunal, the Applicant stated that the “traumatic events surrounding [his] separation caused [him] an unusual and peculiar Syndrome caused by the deep feeling of unfairness and injustice of being removed unfairly”.

26. The Tribunal, upon taking note of the Applicant’s contention that his failure to submit a timely request for review was as a result of “an unusual and peculiar Syndrome”, decided to consider, in the interests of justice, that the Applicant may have inadvertently neglected to articulate his request in accordance with Article 7.5 of the UNDT Rules of Procedure. Consequently, by Order No. 31 dated 2 March 2010³, the Tribunal instructed the Applicant, pursuant to Article 19 of the UNDT

³ The Order was sent via the UN internal email system to the Applicant and his representative at their designated email addresses on 2 March 2010. There is no indication that these emails were not received.

staff member had failed to comply with the time limit stipulated in former staff rule 111.2 (a). The Appeals Tribunal stated that:

Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a “notification of the decision in writing”, required by Rule 111.2(a).

35. The Appeals Tribunal concluded, therefore, that:

The appeal was receivable because [Schook] had not been notified of any written administrative decision of his not continuing in service after 31 December 2007. We find that UNDT has completely ignored that the time of two months, required by rule 111.2(a) begins to run “from the date the staff member received notification of the decision in writing”.

36. In the present case, after the Applicant submitted his travel claim to ICTR on

38. The above notwithstanding, this claim is also receivable in that the Respondent's consistent disregard of the Applicant's multiple requests for reimbursement between 2002 and 2006 can only be characterized as negligence, which, in the Tribunal's view created exceptional circumstances beyond the Applicant's control, upon which a waiver of the time limit stipulated in staff rule 111.2(a) could be based. It would be fundamentally unjust for the Tribunal to rule otherwise when the Administration fails in its responsibility to communicate to the Applicant whether or not he is entitled to reimbursement. Accordingly, a determination will now be made on the merits of this particular claim.

39. Former staff rule 107.6⁶ specifies:

Before travel is undertaken it shall be authorized in writing. In exceptional cases, staff members may be authorized to travel on oral orders, but such oral authorization shall require written confirmation. A staff member shall be personally responsible for ascertaining that he or she has the proper authorization before commencing travel.

40. Based on this rule, the Applicant was apparently responsible for ensuring that he was authorized to purchase another ticket for his return travel from The Hague to Arusha on 22 December 2001. Thus, the issue for determination at this juncture is whether or not the Applicant was authorized to purchase the ticket he used on 22 December 2001.

41. According to the Applicant, his interview with OIOS was completed on 21 December 2001. The OIOS investigation team then insisted that he return to Arusha on 22 December 2001. In a memorandum dated 15 May 2003, addressed to the ICTR Registrar and copied to the OIOS Investigators the Applicant stated the following:

⁶ ST/SGB/1999/5 dated 3 June 1999.

Mr. [P] telephoned the airline company, KLM in order to request a change in the date of my return flight. He was advised that this was not possible. He was informed that I would need to buy a separate ticket as the ticket that I held contained travel restrictions that could not be changed. Mr. [P] then telephoned you in order to obtain your authorization for me to return earlier than agreed and to purchase a ticket out of my expense and personal funds. Following this telephone conversation with you, Mr. [P] instructed me to purchase the return ticket myself out of my personal funds and that I would be reimbursed upon my return to Arusha. This I did at the cost of about \$2,000.00.”

42. It is quite astonishing that the ICTR Registrar and the OIOS Investigator, who, according to the Applicant’s 15 May 2003 letter, authorized his purchase of the ticket, would remain silent under these circumstances and not bother to respond to the

Issue 3:

44. Whether the Applicant is entitled to receive lump sum payments in lieu of tickets for his repatriation from Tanzania to Mauritania and the shipment of his personal effects.

45. In considering this issue, the Tribunal took into account the following relevant legal provisions:

46. Former Staff Rule 107.1 (a) (vi), which provided that:

(a) Subject to the conditions laid down in these Rules, the United Nations shall pay the travel expenses of a staff member under the following circumstances:

(vi) On separation from service, as defined by article IX of the Staff Regulations and Chapter IX of the Staff Rules, and in accordance with the provisions of paragraph (c) below.

47. Section 10.1 of former Administrative Instruction ST/AI/2000/20, entitled *Lump-sum option for travel by air on home leave, family visit or education grant travel*, provided that:

For travel by air on home leave, family visit or education grant travel, staff members appointed under the 100 and 200 series of the Staff Rules may opt for a lump-sum payment in lieu of all entitlements related to the particular travel by air.

48. Section 10.1 of Administrative Instruction ST/AI/2006/4, entitled *Lump-sum option for travel on home leave, family visit or education grant travel and travel on repatriation or separation from service*, provided that:

For travel on home leave, family visit or education grant travel and travel on repatriation or separation from service, staff members appointed under the

100 and 200 series of the Staff Rules may opt for lump-sum payment in lieu of all entitlements related to the particular travel.

49. Pursuant to former Staff Rule 107.1 (a) (vi), the Organization provided the Applicant and his dependents with airline tickets for their repatriation from Arusha to Mauritania on 9 March 2004 but the Applicant did not use these airline tickets because he was “on training in Nairobi”.⁷ He therefore returned the tickets to the travel agency in 2005 and made continuous demands to ICTR for lump-sum payments instead.

50. The Applicant put forth the argument that Section 10.1 of ST/AI/2006/4, which came into force on 1 January 2007, should be applied to him because “the wording of the rule is not specific and explicit on when the exact date of separation is, in terms of whether it is the date that the UN ends a staff member’s contract or the date that the staff member departs from his duty post.” He further asserts that “the effective date of separation is capable of dual interpretation as either, when I obtained separation notice from ICTR in 2004 (favourable to UN-ICTR), or when all my separations [*sic*] issues are resolved in 2008 (favourable to me)”.

51. In view of the Applicant’s contentions in paragraph 45 above, the Tribunal considered it would be of value to deliberate briefly on whether the Applicant’s separation became effective prior to or subsequent to 1 January 2007. Pursuant to former Staff Rule 109.7 (a), which was applicable at the time the Applicant was informed of the non-renewal of his contract, fixed-term appointments, “expire automatically and without prior notice on the expiration date specified in the letter of appointment”. In the present case, the Applicant was initially recruited on a one-year fixed-term appointment, which was extended several times until he was informed by HRPS’ letter of 4 February 2004 that his appointment would not be renewed beyond 8 March 2004. In view of the fact that there was no further extension as of 8 March 2004, the Applicant’s appointment expired automatically on 8 March 2004 as specified in the letter of 4 February 2004.

⁷ See the Applicant’s letter to ICTR dated 20 November 2005.

52. The Applicant's separation therefore clearly became effective in March 2004, upon the expiration of his fixed-term appointment on 8 March 2004. The Tribunal therefore has no basis, in the rules of the Organization, to apply Section 10.1 of ST/AI/2006/4, which came into force on 1 January 2007, to the Applicant.

53. Based on the provisions of Section 10.1 of former ST/AI/2000/20, which was applicable at the time of the Applicant's separation on 8 March 2004, the Applicant was clearly not entitled to the lump-sum option upon his separation from service as this option was provided solely for home or family leave and education grant travel. He was entitled to have the Organization pay his travel expenses from his duty station to his place of recruitment or home leave, as applicable. This was adhered to by the Organization when he was issued airline tickets for himself and his family to be repatriated from Tanzania to Mauritania on 9 March 2004. The Applicant however did not travel to Mauritania but instead, returned the tickets to the travel agency in Nairobi and demanded a cash payment for them.

54. Accordingly, the Tribunal finds that the Applicant is not entitled to the payment of a lump sum for his repatriation travel from Tanzania to Mauritania and shipment because ST/AI/2006/4 is inapplicable in this case.

55. With respect to the issue of repatriation, the Respondent's counsel submitted an affidavit dated 17 January 2006, which had been sworn to by the Applicant, in relation to his relocation to Nairobi, Kenya⁸. The Applicant states in the affidavit that he has registered an internet service company in Nairobi and as such, he intends to live in Nairobi so as to carry on his business. Under former staff rule 107.1 (c)⁹ a staff member was allowed to go to another place, other than his or her place of recruitment, on separation.

⁸ The affidavit was submitted at the hearing and authenticated by the Applicant.

⁹ Which provides that "Under subparagraph (a)(vii) above, the United Nations shall pay the travel expenses of a staff member to the place of recruitment or, if the staff member had a probationary appointment or an appointment for a period of two years or longer or had completed less than two years of continuous service, to the place recognized as his or her home for the purpose of home leave under rule 105.3. Should a staff member, on separation, wish to go to any other place, the travel expenses borne by the United Nations shall not exceed the maximum amount that would have been payable on the basis of return transportation to the place of recruitment or home leave."

Case No. UNDT/NBI/2009/022

Judgment

