

Introduction

1. The Applicant, a national of Liberia, is a former staff member of the United Nations Children's Fund ("UNICEF") where he worked as Deputy Representative in the Malawi Country Office at the P4 level. He was summarily dismissed on charges of physical assault, sexual harassment and abuse of authority.

Facts

2. The Applicant initially worked as a National Officer for the UNICEF Country office in Liberia from 1992 to 1997. He then became a consultant with the UNICEF Operation Lifeline Sudan until 2000 when he worked for the UNICEF Country Programmes in Nigeria and Pakistan. In 2008 he joined the UNICEF Malawi Country Office.

3. Before the Applicant took his home leave in 2009 an incident occurred between him and the Malawi Country Office Representative at a meeting in which the Applicant's performance was discussed. During the meeting, the Applicant conveyed his frustrations to the Representative remarking that he felt that he was not appreciated in the office and that such lack of appreciation of people would sometimes push them to suicide.

4. On 14 August 2009, the Applicant took his home leave and while he was on leave, was instructed by the Regional Human Resources Officer that before returning to Malawi after his home leave, he should report to the United Nations Office at Nairobi (UNON) for medical clearance.

5. The Applicant complied with the directions and submitted himself for medical examination in Nairobi. While there, he received an email on 9 September 2009 which informed him that he was under investigation for "threats to kill certain UNICEF Staff in Malawi." Based on the investigations being conducted against the Applicant, the

email required him to attend an interview on 14 September 2009 in the Regional Human Resources Officer's office at the East and Southeast Asia Regional Office (ESARO), UNICEF, in Nairobi.

6. On 10 September 2009 the Applicant was medically cleared and declared fit for duty. Later that month, he was placed on administrative leave. In October 2009, the

Chief, Policy and Administrative Law Section (“Chief/PALS”) who informed him that the Applicant’s correspondence had been referred to him and asked how he could assist the Applicant.

9. The Applicant informed the Chief/PALS that he wanted to meet with the Executive Director so as to discuss his dismissal. The Applicant was not granted audience with the Executive Director. Instead he received an email from the Chief/PALS on 8 September 2010, in which he was informed that the decision to summarily dismiss him was final. The said email conveyed that the only recourse available to the Applicant was by way of an appeal to the Dispute Tribunal. It further gave him details of the Ombudsman and Mediation Services and the Office of Staff Legal Assistance (“OSLA”) for possible assistance.

10. On 14 October 2010, the Applicant contacted OSLA and on 20 October 2010 OSLA responded that it could not assist him because in its opinion his intended application appeared to be time-barred. However OSLA advised the Applicant to file his Application with the Tribunal himself and provided him with the necessary forms for filing an application. Accordingly on 27 October 2010, the Applicant filed his case with the Tribunal.

11. On 29 October 2010 the Tribunal served the Application on the Respondent as required. The Respondent did not comply with the Tribunal’s Rules of Procedure which require that a reply must be filed within 30 calendar days from the date of receipt of the application.

12. On 14 December 2010, the Tribunal’s Registry wrote to the Respondent reminding him that the 30 days in which to file his reply had lapsed without the Tribunal having received any such reply. On the same date, the Respondent filed a motion requesting leave to re-enter the proceedings and also filed his late reply. The Respondent did not attach any supporting documents but relied on the Applicant’s annexes. He submitted that the Application was time-barred and that the Applicant had

of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

At the hearing on 8 December 2011, the Respondent's Counsel argued that his client was entitled to Summary Judgment under Article 9. The Tribunal orally ruled on this issue and refused the prayer for Summary Judgment. In doing so, the Tribunal pointed out that Article 9 required Summary Judgment to be entered only where the material facts of a case were not in dispute and a party is entitled to judgment as a matter of law.

19. In the instant case, where the receivability of the Applicant's case is being challenged, the Tribunal cannot determine the facts of the Application on the merits or even consider if such facts are contested or not because the Respondent had up until these proceedings not joined issues with the Applicant on the merits of the case. Summary Judgment is a judgment on the merits and a party cannot ask for it when he has not filed any pleadings or in other words when he has not pleaded any facts. It is simply incongruous that the Respondent here should submit that he is entitled to Summary Judgment as a matter of law while he had not pleaded any facts.

Was the Application filed in time? Was the Application receivable?

22. It is not contested that the Applicant is not legally represented both in his Application and in these proceedings. It is also a matter of common acceptance by both parties that he could not get legal assistance from OSLA and that he has been out of employment for over 18 months. The Applicant had also been ill and had variously complained of his many problems especially financial ones. It must be recalled that on 15 April 2010, the Applicant was summarily dismissed with immediate effect. He received a dismissal letter which unfortunately did not advise him of his rights to and the mechanisms for challenging this most severe disciplinary sanction against him.

23. While addressing the Tribunal on the failure of UNICEF to advise the Applicant on the options open to him upon his summary dismissal, the Respondent's Counsel submitted that it was a mere oversight on the part of UNICEF. He argued that the said oversight was not fatal to the case of the Respondent. He further pointed out that at the time of sending a charge letter to the Applicant commencing disciplinary proceedings against him, UNICEF had in that letter promptly advised him of his due process rights under staff rule 10.3(a) of seeking legal assistance in preparing his response to the charges.

24. Although no staff regulation specifically provides for advising a staff member against whom disciplinary action has been taken of his rights and applicable mechanisms to challenge the said disciplinary action, it is the bounden responsibility of the Respondent or his agents to properly inform the affected individual in writing of these rights in the same correspondence that informs the staff member of the disciplinary action. UNICEF had the responsibility in this case to inform the Applicant of his rights and mechanisms for challenging his dismissal.

25. The Respondent's Counsel additionally submitted that the Applicant having been a P4 officer in UNICEF ought to have been aware of his legal rights and mechanisms for challenging his summary dismissal. The Tribunal is of the view that the Applicant's actual knowledge of his rights, responsibilities and procedures for challenging a disciplinary measure against him is absolutely essential. The Respondent

did not adduce evidence that the Applicant actually knew the appropriate channels for redressing his grievance but chose to ignore them.

26. The Tribunal observes that upon receipt of the email on 8 September 2010 informing the Applicant of his rights and recourse to the Internal Justice system, he contacted OSLA within a week and on receiving the reply from OSLA on 20 October 2010, the Applicant promptly filed his Application with the Tribunal on 27 October 2010. These are not the actions of an Applicant who would sleep on his rights, by failing to comply with time limits but rather the actions of one who did not have the knowledge and information of his rights in time.

27.

charge letter. *I feel it is crucial that you intervene so as to amicably resolve this matter* especially considering that the reasons given for my dismissal in Mr. Abdi's letter has no relationship nor does it tally with my charge letter. I look forward to hearing from you soon. (Emphasis added)

29. Having received no response, as soon as the Applicant recovered from his depression and was medically discharged by both his doctor and counsellor, he travelled to UNICEF Headquarters in New York from Liberia and made oral contact with UNICEF officials regarding his case. He was then advised to fax a copy of the letter he had previously written to the Executive Director for review and action. This he did by the afternoon of 26 July 2010. Two days later, the Chief/PALS called him while he was still in New York to ask what he really wanted. The Applicant informed him that he wanted to meet with the Executive Director. After this conversation, the Applicant called the Chief/PALS several times for more than two weeks but could not get through to him as the Chief/PALS was said to be on leave. A subsequent visit to UNICEF's New York Offices yielded no positive results as the Applicant was not allowed into the premises.

30. On 8 September 2010, the Chief/PALS finally replied and acknowledged the Applicant's letter and informed him that the administrative decision to summarily dismiss him was final and then also advised him of the appropriate legal mechanisms that he could have recourse to. It is noteworthy that the Applicant's first and second letters to the Executive Director were both written when the Applicant was still within the time limits for filing an application with the Tribunal.

31. Even if the Applicant had lacked the necessary language and expression to articulate his efforts in reaching out to the Respondent, the Tribunal recognizes that these were genuine attempts to bring the Respondent to the mediation table. Since mediation is a voluntary process, the consent of both parties is fundamental and it is incumbent upon either of the parties to a dispute to approach the other requesting mediation. It is either party's right to accept or refuse mediation. The party to whom mediation approaches are made has a duty to categorically accept or refuse, but not to

meet the request with silence or to delay his reply until time runs out for the other party. When a party therefore initiates mediation, it behoves the other party to respond promptly.

32. The General Assembly in various Resolutions had affirmed the necessity of informal conflict resolution mechanisms. In A/RES/62/228 (Administration of Justice at the United Nations) adopted on 22 December 2007, while creating the new system of Administration of Justice, it recognized that informal settlement is a crucial element of conflict resolution and emphasized that all possible use should be made of the informal system in order to avoid unnecessary litigation. It also reaffirmed “the importance of the general principle of exhausting administrative remedies before formal proceedings are instituted”.

33. Similarly and most recently, the General Assembly in the draft Resolution² stressed, at para. 17 “the importance of developing a culture of dialogue and amicable resolutions of dispute” rather than a “culture of litigation”. Although the General Assembly established the office of the Ombudsman specifically for informal resolution of conflict, mediation is initiated when one party approaches the other for this purpose or the Dispute Tribunal recommends it. It was proper for the Applicant to approach UNICEF for an amicable solution in this case.

Exceptional Circumstances

34. The circumstances already examined above raise the questions as to whether the Applicant was in a position to know the options open to him at the time he was summarily dismissed. While the Respondent properly advised the Applicant in the letter charging him with misconduct as to

circumstances served to deny the Applicant of the right to access to justice. In *Igunda*

filing of this Application. The Tribunal under the circumstances holds that this Application presents special circumstances for which it may be entertained.

38. The Application is receivable. This Tribunal has jurisdiction to entertain it.

Case Management Directions

39. Both parties are required to provide the Registry, by or before **Friday, 13 January 2012**, with the following information:

- a. Whether they intend to call any witnesses and should also clearly indicate the relevance of the evidence of each witness. Parties should also indicate the approximate time they may n