Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON APPLICANT'S MOTION FOR DIRECTIONS, REFERRAL FOR ACCOUNTABILITY

Counsel for the Applicant:
Miles Hastie, OSLA
Seth Levine, OSLA

Counsel for the Respondent:
Miouly Pongnon, Senior Legal Adviser, UNON

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

Introduction

1. The Applicant joined the Joint Medical Services (JMS) at the United Nations Office at Nairobi (UNON) on 8 June 2010 pursuant to an Agreement between UNON and the members of the United Nations Country Team Somalia (UNCT) dated 5 March 2010. Her fixed-term appointment was subsequently renewed up to 6 June 2012.

Facts

2. At approximately 4.00 p.m. (Nairobi time) on 6 June 2012, an official of UNON's Human Resources Management Service hand-delivered a memorandum dated 6 June 2012 notifying the Applicant of the expiry and non-renewal of her fixed-term appointment. The memorandum is reproduced below:

> Effective today, please be advised that your fixed-term appointment expired on its stated expiry date of 6 June 2012. As you may be aware, your appointment as a Medical Officer at UNON was made in furtherance of the terms of a certain Letter Agreement dated 5 March 2010 between UNON and the Members of the United Nations Country Team Somalia. It has been decided that this Agreement will not be continued beyond 30 June 2012. Accordingly, UNON is not in a position to renew your appointment...

3. Upon receipt of this memorandum, the Applicant immediately consulted

contested decision pending the outcome of management evaluation. The Tribunal further informed the parties that a reasoned and written decision would be issued by Friday, 15 June 2012.

6. On 13 June 2012, the Tribunal issued Order No. 081 (NBI/2012) in which it set down in writing the said oral Judgment and consequential orders.

7. On 15 June 2012, the Tribunal published Judgment No. UNDT/2012/091 in which it granted the Application for suspension of action pending management evaluation.

8.

2012. On 19 June 2012, the Tribunal requested the DAS/UNON to participate in the hearing via teleconference on 21 June 2012. The DAS/UNON responded on the same date and informed the Tribunal that he would be driving back to Nairobi on 21 June 2012 and that due to safety considerations; he would not be able to take part in a teleconference.

11. On 18 June 2012, the UN Somalia Resident Coordinator/ Humanitarian Coordinator, informed the Tribunal that he would not be able to attend the hearing due to previously scheduled commitments.

12. On 18 June 2012, the Director General of UNON requested the Tribunal to reschedule her attendance at the Hearing to 21 June 2012. The request was granted.

13. The Respondent filed a Reply to the Accountability Motion on 18 June 2012.

14. The Tribunal held hearings on the Accountability Motion on 19 and 21 June 2012. The Tribunal received live evidence from the Applicant, the Director General of UNON, the Chief Medical Officer, UNON and the Chief, Human Resources Management Service, UNON.

15. On 21 June 2012, the Nairobi Staff Union (NSU) filed an application to file a friend-of-court brief. The Respondent filed objections to the application on 26 June 2012. On 12 July 2012, the Tribunal granted the NSU's application. The brief was filed on 20 July 2012.

16. The Parties were ordered to file their closing submissions by Friday, 29 June 2012. The Respondent and the Applicant filed the said submissions on 29 June 2012 and 1 July 2012 respectively.

Applicant's testimony

17. The Applicant's testimony at the hearing of the Accountability Motion on 19 June 2012 is summarised below.

18. Since the granting of the Application for suspension of action, she attempted to return to work at JMS/UNON on three occasions. The first attempt was on Friday, 8 June 2012. She arrived at the office after close of business to hand over some patient notes to a colleague.

19. Her second attempt was on 12 June 2012. She arrived at the office some minutes before 9.00 a.m. and found her First Reporting Officer (FRO), the Chief Medical Officer, UNON, having a meeting. She informed her FRO that she was returning to work and was told to wait for the meeting to end. At the end of the meeting, the FRO informed her that she had received no communication that the Applicant could return to work. Her FRO handed her a slip of paper which had the Respondent's Counsel's phone number and office address written on it. The FRO informed her that Counsel for the Respondent wanted to see her and had advised that the Applicant had no legal grounds for being in the office. She told her FRO that she preferred that Counsel for the Respondent talk to her own Counsel instead.

20. The Applicant decided against going to the office of the Respondent's Counsel as instructed but eventually called the said Counsel for the Respondent who told her over the phone that she had been informed that the Applicant refused to come to her office to see her and further that she had no legal grounds for being in the office and that she had to obey her instructions. The Applicant ended the conversation when the Counsel for the Respondent's temper started to rise.

21. The Applicant's third attempt to return to work was on 13 June 2012. She went to the UNON main cafeteria and found her FRO having a meeting with other work colleagues. They had a private conversation away from the other colleagues. Her FRO informed her that she was not authorized to return to work. This was her last attempt to return to the office. On the same day she received an email from her FRO requiring her to return all of UNON's assets in her possession including her official laptop computer.

22. Since 6 June 2012, the UNON administration had taken several steps to separate her from service. On the morning of 7 June 2012, she received several

emails from various departments requesting her to clear from them administratively.

The Chief Medical Officer's testimony.

23. The following is a summary of the Chief Medical Officer's testimony from the hearing of the Accountability Motion on 19 June 2012.

24. She saw the Tribunal's Order on the Applicant's suspension of action Application when she returned to the office on 10 June 2012.

25. When the Applicant turned up at the office on 12 June 2012, she did not understand why as she (FRO) had received information from UNON management that the suspension of action order was under dispute. The Applicant had found her having a meeting. After the meeting, she told the Applicant to see UNON's Legal Counsel or at least phone her since, according to Counsel, UNON disputed the suspension of action order.

26. She was advised by UNON's Legal Counsel that the Applicant was not expected to report to work since her contract had expired, she would not be remunerated and therefore her reporting to work was pointless.

27. UNON's Legal Counsel had advised her that the Orders of the Tribunal in this case were illegal.

The Director General's testimin

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31. UNON's Legal Counsel had advised her that the Tribunal's orders were illegal and therefore UNON was allowed to not implement the suspension of action order while an appeal to the UN Appeals Tribunal (UNAT) was sought.

32. When questioned by the Tribunal as to whether UNON's Legal Counsel had acted professionally in instructing that the Applicant, without the knowledge of the Applicant's own Counsel, come to the said UNON Legal Counsel's office to see the UNON Counsel after the Tribunal had made the order of suspension of action and to further instruct the Applicant to hand over her duties and leave UNON premises in spite of the orders of the Tribunal, the witness asked for time to get full briefing as to what had transpired and to appropriately give an answer.

33. The witness on 29 June filed an affidavit which is summarized thus:

34. After the hearing in which she had testified orally on 21 June 2012, she undertook a review of the facts in this case. UNON officials, including the Chief Medical Officer, the Chief, Staff Administration Section and UNON's Legal Counsel informed her that on the morning of Tuesday, 12 June 2012, the Applicant sought to return to duty at UNON/JMS. The Chief Medical Officer was said to h[illegible]

37. It was told to the Director-General that the sole intent of the proposed

077 (NBI/2012). On 12 June 2012, following Order No. 077 (NBI/2012) and the oral and written orders of 6 June 2012, the Applicant reported for work. She was barred from assuming her duties.

45. On 13 June 2012, following the oral decision recorded in Order No. 81 (NBI/2012), the Applicant again reported for work. She was again turned away.

46. Counsel for the Applicant on 14 June 2012 wrote to Counsel for the Respondent, pointing out the prevailing legal position that, regardless of whether the Respondent disagreed with the Tribunal's orders, and indeed, regardless of whether the Respondent had already launched an appeal, he was obliged to give effect to them, until overturned.

47. The Respondent's representatives did not respond with any information indicating an intention to comply with any of the Tribunal's Orders. Instead, the Administration indicated that it was still effecting a lawful separation of the Applicant.

48. The Applicant perceives non-compliance with judicial orders to be a serious matter, if it has occurred. Accordingly, the Appl

51. Such a situation cannot lead to a sustainable judicial system and would only result in anarchy.

52. UNAT Judgment in Villamoran 2011-UNAT-160 defines the applicable law in this case and the Respondent's interpretation of UN General Assembly Resolution 66/237 of 9 February 2012 is unsustainable since if the Respondent is correct, suspension of action applications will cease to have any meaning. Further, the said Resolution has no bearing on appeals of interlocutory orders.

53. The Applicant proposes that the Respondent be given two days to demonstrate compliance with the Tribunal's orders and if the Respondent declines, that the Tribunal should issue an order pursuant to art. 10(8) of its Statute referring the matter to the Secretary-General for action to enforce accountability.

54. The standing to invoke art. 10(8) is vested solely in the Tribunal. The Applicant has no particular interest in the referral of any individual to the Secretary-General for accountability but she has a duty in bringing to the attention of the Tribunal, a failure to comply with its orders as they impact on her.

55. The timing of the referral is appropriate and the Respondent's argument that it is premature to order referral is unsustainable.

Submissions by the Respondent's Counsel

56. The Respondent's submissions on the Accountability Motion are summarized below.

57. There is no legal basis for a referral to the Secretary-General for the enforcement of accountability pursuant to art. 10(8) of the Tribunal's Statute.

58. There was no wilful intent by any of UNON's officials to disrespect the lawful orders issued by the Tribunal.

59. The reason that UNON had taken the decision to forestall implementation of the suspension of action order was in reliance on legal advice indicating that there was a good faith basis for UNON to forestall implementation of the

Tribunal's suspension of action as it was issued beyond the competence of the Tribunal. This was because the decision not to renew the Applicant's appointment had already been implemented before the Tribunal issued the suspension order.

60. The decision not to renew the Applicant's fixed term appointment was implemented effective as of the close of business at 4:30 p.m. on 6 June 2012, the stated date of expiry. Consequently, in order to grant the measure of relief that the Applicant seeks in the Accountability Motion, it is necessary for the Tribunal to clearly indicate in a restated order what affirmative actions are required of UNON to suspend the effects of the non-renewal decision.

61. UNON had already implemented the non-renewal decision and could not comply with the Tribunal's orders.

62. UNON does not legally have a duty to comply with the Tribunal's orders until the 60-day expiry period for filing appeals had expired.

63. The Tribunal's orders exceeded its jurisdiction.

64. Pursuant to General Assembly Resolution 66/237, "Administration of Justice at the United Nations", during the pendency of the appeal's period, UNON has a legal right to suspend the execution of the Tribunal's orders as it believes that the Tribunal acted in excess of its jurisdiction.

65. The application of the NSU to file a friend-of-court brief should be denied because it has not intoned in what way its participation will assist the Tribunal in its deliberation in this case. The NSU's participation will not be in the nature of an impartial submission that is to provide expertise to the Tribunal as it considers the legal issues implicated in suspension of action or in the Accountability Motion.

66. There is no legitimate role to be played by the NSU in the context of the suspension of action application or in respect of the Accountability Motion. There are no particular issues of law on which the NSU possesses specialised expertise that is beyond the knowledge of this Tribunal or the Counsel already before it.

67. In this case, the participation of the NSU was instigated by the Applicant who seeks their intervention to bolster her legal arguments. As such, whilst the NSU has approached this Tribunal in the robes of a friend -of-court, in reality, it is seeking to intervene in this matter. Pursuant to art. 22 of the Tribunal's Rules of Procedure, only a party who has recourse to the Tribunal may seek to intervene in a case. The NSU has no such standing to intervene.

NSU's friend-of-court brief

68. The NSU's friend-of-court brief is summarized below.

a. UNON's decision to ignore orders of the Tribunal potentially impacts on all staff members based in Nairobi or administered by UNON.

b. The failure by the Organization to abide by the Tribunal's rulings may lead to an atmosphere of fear among staff members who will feel that the Organization can get away with any wrong doing. This is a violation of basic human rights which are guaranteed under the United Nations Charter.

c. The NSU could assist the Tribunal by taking up the matter with other relevant organs of the United Nations including the General Assembly.

d. The NSU requests the Tribunal to reaffirm the confidence of staff members in the internal justice system by sending a signal to all managers and staff in UNON that due process must be followed.

Considerations

69. The following are the legal issues arising for consideration in this case:

a. The meaning of contempt in administrative (civil) proceedings.

b. Referral under art. 10(8) of the UNDT Statute.

c. Is this a proper matter for referral to the Secretary-General?

d. Were the orders of the Tribunal impossible to comply with?

f. The role of the Respondent's Counsel and a party's "belief" that a

73. In AbboudUNDT/2010/030/R, Adams J held that the Tribunal has power to punish where contempt is found.

> It follows from possession of the jurisdiction to deal with a staff member for contempt that the Tribunal must have the power to punish where that contempt is found. This jurisdiction is not related to, nor is it concerned with, that exercised by the Secretary-General under Chapter X of ST/SGB/2009/7 for misconduct, although there can be no doubt (as I have already suggested) that wilful interference with or obstruction of the processes of the Tribunal, will also amount to misconduct and, in many cases, serious misconduct.

74. Adams J went on further to describe the procedure of dealing with a staff member found to be in contempt of the Tribunal.

> As has been noted, the Rules of Procedure of the Tribunal do not deal with the issue of contempt. Since it affects the rights of the accused staff member, the procedures must be careful to ensure procedural fairness and a transparent process. The sanctions that could be imposed, of course, can only affect the staff member's contract one way or another but should be spelled out. The Rules of Procedure are established by plenary agreement of the judges of the Tribunal and are subject to the approval of the General Assembly.

75. The learned Judge proposed that the Tribunal has discretion in determining whether to proceed by way of contempt or with regard to the provisions of art. 10(8) of the Statute of the Dispute Tribunal.

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potentially serious as to require the personal attention of the Secretary-General, even if the matter can appropriately be delegated to another official. A factor such as where the official concerned is directly accountable to the Secretary-General, mediates in favour of referral.

78. The Redesign Panel on the United Nations system of administration of justice who had extensively studied the then prevailing internal justice system within the Organization, found it greatly wanting and recommended its total reform and overhaul.

79. In its Report A/61/205 of 28 July 2006, the Redesign Panel concluded that establishing a professionalized, independent and adequately resourced internal justice system was critical because only such a system could generate and sustain certainty and predictability, and thus enjoy the confidence of managers, staff members and other stakeholders. A justice system is only as good as the level of respect and confidence it commands.

80. The Redesign Panel was also of the view that establishing a professionalized system of in

accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency[3].

83. The new internal justice system cannot "enjoy the confidence of managers, staff members and other stakeholders" when it finds itself confronted with a situation where its orders are disobeyed by parties appearing before it. Such a situation, as correctly summed up by Counsel for the Applicant, "cannot lead to a sustainable judicial system and would only result in anarchy." No person or

86. The Applicant was employed by UNON under a memorandum of agreement between UNON and the UNCT Somalia. The terms of the agreement provided that the said agreement would be reviewed from year to year by the parties to it and that either party may terminate the agreement with a six months' notice to the other party. Meanwhile the Applicant who had served under the said agreement on a fixed term contract for more than one year had problems with her supervisor and by November 2011 had filed a harassment complaint against the said supervisor.

87. Whilst her complaint had never been addressed by UNON management, her contract expiration date was approaching. A Human Resources Officer had assured the Applicant that since she was not given a thirty-day notice of non-renewal, her contract would likely be renewed. On 6 June 2012, her fixed term contract expiry date, she went to work as usual and worked until 4pm when a Human Resources Officer came to hand her a hard copy of notice of non-renewal of her contract. UNON counsel argued before the Tribunal that while UNON was not required to give the notice of non-renewal in law and did not need to follow its own guidelines for giving thirty days' notice, it had elected nevertheless to give the Applicant a thirty minutes' notice as UNON business hours closed at 4.30 p.m. and her contract expired at close of business.

88. This puerile argument and the course of action adopted betrayed what the Respondent's agents in this case believed was a well thought out strategy for preventing the Applicant from seeking management evaluation or the intervention of the Tribunal for a suspension of the impugned decision.

89. Since it is clear that what UNON management was out to achieve was, to present both the Secretary-General on whose behalf any management evaluation is undertaken and the Tribunal which could order a suspension of the impugned decision, with a fait accompli; its actions in this regard reeked dangerously and unashamedly of bad faith. That bad faith was further exacerbated by the fact that the Applicant's harassment complaint filed more than six months before her contract expired was never addressed and appears indeed to have effectively been swept under the carpet.

90. Upon an application filed urgently about one hour after receiving the notice of non-renewal, the Tribunal granted a temporary suspension of action ex parte on the same day and heard the matter inter partes three days after the application was made. Judgment was immediately entered in favour of the Applicant as a suspension of the impugned decision pending management evaluation was ordered.

91. UNON management while disregarding the authority of UNAT in Villamoran on the duty of parties to comply wi

Were the orders of the Tribunal in this case impossible to comply with?

95. It is a well-established principle of law and equity that the court does not make an order in vain. It was argued on behalf of UNON that at the time the Tribunal's interim orders were made on 6 June 2012 suspending the impugned decision not to renew the Applicant's contract; the decision had already been implemented.

96. The issue of implementation was fully addressed in the judgment granting suspension of action in this case and for that reason, the Tribunal will not revisit the issue. Suffice it however to re-emphasize that no implementation of the said decision could begin until business commenced on 7 June 2012 which was the day following the expiry of the Applican

counsel is charged with a higher duty than others who are parties or witnesses before the Tribunal.

100. Counsel must uphold two duties, the duty to the client and the duty to the court as its officer. Counsel primarily owes a duty to court. This Tribunal in Amar UNDT/2011/040 held that the proper place of Counsel appearing before the Tribunal is that of an officer of court whose first duty is to guide the court and to honestly advise his or her clients with a view of achieving the just determination of the case. On the part of the Tribunal, its role is that of an impartial arbiter and it must dispense even handed justice. Where there are mistakes of law, it would be up to the Appeals Tribunal to correct them.

101. Counsel is bound by ethical rules of the Staff Regulations and Staff Rules including the professional ethics that govern legal practitioners in the jurisdiction where he/she was licensed to practice law. There is ample authority on the duty of Counsel to court. A few are set out below for purposes of elucidation and clarity.

102. In North v Foley[4], a court in the United States of America held that the advice of an attorney to his client to disobey an order of court should attract more serious punishment for the attorney than for the client who was in actual disobedience of the order based on the attorney's advice.

103. In the instant case, the Respondent's Counsel had advised her client and further argued that UNON does not have a legal duty to comply with the

which a legal Counsel representing the Secretary-General actually advises and argues that "her belief" that the Tribunal exceeded its jurisdiction entitled her to advise UNON to disobey the Tribunal's orders.

105. In other words, the beliefs, opinions, views or wishes of the Respondent's Counsel assume sufficient importance as to override an order of the Tribunal. The clear and dangerous message that this state of affairs, if allowed, conveys is that the Respondent's Counsel constitutes a Court superior to the Dispute Tribunal and the UN Appeals Tribunal and can overrule the authority of Villamoran.

106. It is trite law that even if Counsel should believe that the Court order is incorrect he/she must still comply promptly or risk the imposition of sanction. In Leber v. United States ex rel Fleming[5] the Court held that should he attempt to convince the court that his advice to disregard a ruling was given in good faith, it will not save him from liability, for the question of motive or intent for advising violation is irrelevant in this instance. An explanation of this result is that there cannot be good faith in such a situation because good faith requires the attorney to submit the question to the court for its determination. Of course, if an order has been issued and objections or motions overruled, then that particular court has already determined the question. What is normally contemplated is that Counsel reserves his point for appeal, rather than resist the order.

107. Counsel did not bother to maintain the status quo before deciding to advice disobedience of the Tribunal's Order. The argument that counsel was intending to appeal and therefore could alter the status quo is, to say the least, farfetched. A Court Order can only be reversed by an appellate Court. Counsel cannot take the law into their own hands and settle the clients rights according to his/her notion of what is right.

108. In State v Nathan,[6] the United States Supreme Court had decided that:

> The disobedience of any order, judgment or decree of a court having jurisdiction to issue it is contempt of that court, however erroneous or improvident the issuing of it may have been. Such an

[5] 170 F 881(9th Circle 1909).
[6] 49 S.C. 199, 27 S.E. 52 (1896).

> order is obligatory until reversed by an appellate court or until corrected or discharged by the court which made it.

109. In its judgment rendered in November 2011 in the case of Villamoran, UNAT held that art. 8(6) of the Rules of Procedure of the Appeals Tribunal which provides for the suspension of the execution of a contested judgment does not apply to interlocutory appeals. It was clearly stated at paragraph 18 that:

> It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.

110. As had been previously stated in this judgment, the Respondent's Counsel had not only advised UNON to disobey the orders of this Tribunal but had also unprofessionally exhibited a personal interest in the matter when she bypassed the Applicant's Counsel and instructed the Applicant to hand over her duties and to leave the UNON premises.

111. Testimony to this effect was given by the Applicant herself before the Tribunal. Although the Respondent's Counsel was present throughout the proceedings, she did not offer to testify to rebut the Applicant's version of the facts. Instead, in an affidavit filed one week afterwards on behalf of the Director General, it was deposed that the Applicant had become unruly in her office and that it was for this reason that it became necessary for the Respondent's Counsel to intervene. This version is completely at variance with not only the Applicant's testimony but also the testimony of the Applicant's supervisor before the Tribunal.

112. The Tribunal can only conclude from the facts before it that the facts as deposed to in the UNON Director General's affidavit were an afterthought told to the Director General to explain away conduct that should never have been engaged in. Not only were the Respondent's Counsel's actions towards the Applicant intimidating and unwarranted, they were disrespectful to the Tribunal and the Organization and amounted to an abuse of her position as UNON's legal adviser.

113. Such brazen contempt for the rule of law is certainly not expected of a legal officer who represents the Secretary-General of the United Nations!

Role of the Director General of UNON

114. The Director General of UNON has overall authority in all decisions and actions taken by the UNON management. This means that she is accountable for such actions and decisions.

115. In evidence, she had told the Tribunal that she acted on legal advice in deciding that UNON would disobey the orders of the Tribunal. That may well be so. It must be borne in mind that the Director General as an Under Secretary-General occupies a prime leadership position within the Organization. The critical question here is whether a person occupying so exalted an office and who has come with a wealth of experience garnered in the course of previous high offices would need any kind of legal advice to justify the disobedience of the orders of a properly constituted Court or Tribunal.

116. The choice to comply with the legal advice of a legal officer without proper and sufficient briefing on the facts and issues, as it emerged during the Director General's testimony at the Tribunal, over and against the orders of the Tribunal is a matter for which the Director General must bear responsibility.

117. Since 21 June 2012 when she appeared before the Tribunal in this Accountability Motion, the Director General has had more than sufficient time to revisit, review and seek further legal advice on UNON's position in this case and to decide that UNON would toe the path of the rule of law. Nothing shows or suggests that she has done so. Instead she has continued to lead UNON management to wallow in its disobedience and impunity.ti

Applicant's contract was taken and a ridiculous thirty minutes' notice given with a rush made to implement her separation in total disregard of the Tribunal's orders. The Director General bears full responsibility for this state of affairs.

119. Additionally, the Director General is accountable for the unprofessional conduct and high-handedness exhibited in this case by UNON's Legal Counsel under her watch.

(Signed)

Judge Nkemdilim Izuako
Dated this 31st day of July 2012

Entered in the Register on this 31st day of July 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi