



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

KIMUNGUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Hannington Amol

Counsel for the Respondent:
Christine Graham, ALS/OHRM

Introduction

1. The Applicant filed the current Application on 12 August 2014 to challenge the decision by the United Nations Office at Nairobi (UNON) to suspend him pending an investigation into alleged misconduct. He is claiming compensation for prejudice suffered; loss of income; costs and reinstatement in his previous position on “better terms”.

Procedural history

2. The Application was served on the Respondent on 12 August with a deadline of 12 September 2014 by which he was to file a Reply.

3. On 23 August 2014, the Respondent filed a motion seeking leave of the Tribunal to file a Reply limited to the issue of receivability and for the Tribunal to determine that issue as a preliminary matter.

4. On 4 September 2014, the Tribunal issued Order No.202 (NBI/2014) granting the Respondent’s Motion. The Tribunal also suspended the 12 September 2014 deadline for submission of the Respondent’s substantive Reply.

5. The Tribunal in the same Order directed the Applicant to submit his comments on the receivability issue by 21 September 2014.

6. The Applicant filed his reply on the issue of receivability on 20 September 2014.

Facts

7. The Applicant joined the Organization as a driver in the Division of Support Services Service (SSS), UNON, at the 20 level in 2009. He was on a fixed-term contract and was posted with the Somalia and Eritrea Monitoring Group (SEMG). He served in that position from 1 July 2009 until 15 July 2010.

8. On 18 January 2011, he signed a contract to serve as a consultant with UNON for a period of seven months. He was assigned to SEMG
9. On 22 February 2011, while on duty, the Applicant noticed that an official UN vehicle with registration number 105 UN 240K was missing from the parking lot where it had been stationed for several months. The vehicle was grounded and had not been scheduled for repairs.
10. The Applicant immediately enquired with his colleagues as to the vehicle's whereabouts but none of them knew of the whereabouts of the vehicle. He promptly informed his immediate supervisor of the incident who then advised him to contact the Department of Security and Safety Service (DSS) at UNON immediately. He complied.
11. Together with UNON DSS personnel, the Applicant and his colleagues conducted a search of the UNON premises but the car was not found.
12. The Applicant was then advised by UNON DSS to report the loss of the vehicle to the Diplomatic Police Unit of the Kenya Police at Gigij Nairobi, which he did.
13. The Kenya Police in liaison with UNON DSS initiated an investigation immediately. UNON DSS issued an Investigation Report (IR) dated 13 April 2011, implicating the Applicant in a "conspiracy to steal the vehicle. The IR went on to recommend that "appropriate administrative and legal action" be taken against the Applicant and others for their roles in the theft of the United Nations vehicle. Subsequently, UNON DSS together with the Applicant's supervisor informed him that he had been suspended pending the investigation.
14. In a report dated 18 October 2013, the Diplomatic Police Unit concluded that there was no evidence to connect the Applicant with the theft of the car. The material part of the report reads: "Our investigations therefore revealed no evidence to connect

[the Applicant] with the offence. All that has been confirmed is the fact that he reported the Vehicle was missing from where it had been parked”.

Issues

15. The only issue before the Tribunal is whether the Application filed by the Applicant on 12 August 2014 is receivable.

Submissions

Respondent

16. The Respondent submits that the Application is manifestly inadmissible on three grounds: (a) the Applicant was not a staff member at the time of the contested events, and the contested events are unrelated to his past service as a staff member (*ratione personae*); (b) the Applicant has not requested management evaluation of the contested decision (*ratione materiae*); and (c) the Application has been filed outside the time limit provided in article 8.1(d) of the UNDT Statute and the three year statute of limitation provided in article 8.4 of the UNDT Statute (*ratione temporis*).

Applicant

17. The Applicant submits that he was a staff member as at 2011 when the decision to suspend him was taken. Even though the term “consultant” is mentioned on the contract he signed in 2011 he was still an employee subject to the “rules and regulations governing the contract of employment”.

18. He had short term contracts that were successive following the expiry of another. His latest contract, as at 2012, was no exception but for the wording being changed to imply that the Applicant would now serve as a “consultant”. Therefore his “engagement never changed from that of a driver/chauffer, only that he was being moved from one agency to another with each new contract”.

19. In the event that the Applicant was an independent contractor and not an employee, then he should have been held responsible as an independent contractor instead of being suspended from employment.

Considerations

20. The fact that the Applicant was employed as a consultant when he signed a contract on 18 January 2011 cannot be disputed. The heading and preamble of the contract reads "CONTRACT FOR CONSULTANT" and "[c]ontract entered into between the United Nations and (hereinafter referred to as the Consultant) [the Applicant]", respectively. When a consultant or contractor enters into a contract with the Organization, he/she is made aware of the *General Conditions of Contracts for the Services of Consultants or Individual Contractors* (General Conditions). A look at the contract shows that before the Applicant signed, he acknowledged that he had read and accepted the conditions on the reverse side.

21. The General Conditions of the contract regulating the employment between the contractor and the Organization are issued by the General Legal Division of the Office of Legal Affairs. They are not the emanation of any United Nations Regulations, Rules or administrative issuances. Specifically stated in the General Conditions that the contractor shall have the legal status of contractor and shall not be regarded for any purposes as either a

Such letter is signed either by the Secretary-General or by an official in the name of the Secretary-General.

25. In *Gabaldon* 2011-UNAT-120, the United Nations Appeals Tribunal (UNAT) confirmed this view by holding:

[T]he legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf. The issuance of a letter of appointment cannot be regarded as a mere formality (*El Khatib*, Judgment No. 2010-UNAT-029).

26. This is not the case of the Applicant as he accepted and signed a contract governed by the General Conditions applicable to contractors. He was therefore a contractor and not a staff member of the Organization.

27. The Application is therefore not receivable *ratione personae*.

Further observations

28. Though the matter is not receivable, the Tribunal will still make some observations.

29. The Applicant was investigated as a staff member and, in the memorandum of 13 April 2011 addressed to the Director of the United Nations Support Office for AMISOM (UNSOA) by the UNON Deputy Chief of Security the Applicant is described as a staff member. It would appear that the status of the Applicant was misconceived by UNON DSS and probably by the Organization when his suspension was decided.

30. It took over two years for the investig

account the legal and financial aspects of granting access to existing dispute and appeals tribunals or establishing a separate dispute settlement mechanism. He proposed a two-stage process, consisting of an informal dispute resolution phase and an expedited arbitral proceeding in case the formal dispute resolution phase fails (paragraph 96).

The General Assembly requested the Secretary-General to present a

Decision

35. The Tribunal concludes that the Application is not receivable and is therefore