

Case No. UNDT/NBI/2010/072

Order No.: 013 (NBI/2013)

Parties' submissions

Applicant's submissions

7. The Applicant submits that although it is evident from the parties' submissions that there remains a dispute as to the facts of the case, the Tribunal must

dispute as to the facts for the purposes of the motion, in other words where there is no need to determine any factual controversy in order to decide whether the moving party is entitled to judgment as a matter of law”.

11. The Respondent refutes the Applicant’s allegation that admissions were obtained from him “in flagrant violation of his right to due process” as being factually incorrect. The Respondent submits that with regard to disciplinary matters, the due process rights of United Nations Secretariat staff members, such as the Applicant, are set out in paragraph 6 of ST/AI/371 (Revised disciplinary measures and procedures) and that the right to counsel attaches only after a staff member has been charged with misconduct. Consequently, the Respondent submits that the facts underlying the Applicant’s motion remain in dispute and as such, he is not entitled to have this motion granted.

12. The Respondent further contends that *Buendia et al* relates to the interpretation of UNDP administrative issuances and procedures, which are different from those applicable to Secretariat staff members. Additionally, as a decision of the Tribunal with respect to a case involving UNDP staff members, the *ratio decidendi* of *Buendia et al* may be raised by counsel in support of the Applicant’s position but is not the rule of law that must be applied to other cases before the Tribunal.

Considerations

13. Under art. 9 of the Rules of Procedure of the Tribunal, to succeed in a motion for summary judgment, a party must show that: (i) there is no dispute as to the material facts of the case; and (ii) he/she is entitled to judgment as a matter of law.

14. Summary judgment is a default judgment, which basically acknowledges that there are no disputes of fact that need to be resolved by a trial. Ultimately, it is for the Tribunal to consider the facts and the law to determine the outcome of the case to ensure that justice is achieved in all the circumstances of the case.

15. The record clearly indicates that the present case is not one where the factual matters, let alone the legal issues, are straightforward or are clearly in favour of the Applicant.

16. Additionally, the Applicant relies heavily on *Buendia et al* in arguing his case for summary judgment. In this respect, he submits that the principle derived from *Buendia et al* is that in the context of a review of a disciplinary sanction, where there is a fundamental flaw in the disciplinary process, judgment should be entered in favour of the applicant as a matter of law. The Tribunal does not agree with the Applicant's broad interpretation of *Buendia et al*.

16. In *Buendia et al*, the Tribunal's conclusion that it could not "uphold the findings and conclusions of a disciplinary process that was fundamentally flawed in that it failed to uphold the applicant's rights to due process", was based specifically on the fact that the Applicants had made admissions to the investigators at a time when they had not been notified that they had actually become the subjects of an investigation that had been initiated against the Resident Representative based on their complaints. This was not the case in the present matter since the Applicant was aware that he was the subject of the investigation for a specific act right from the outset. At any rate, whether there has been a denial of due process cannot be decided on the basis of a summary judgment but must be assessed in the overall context of the case and in the light of all the evidence.

17. Due to the fact that the Tribunal has on previous occasions emphasized that disciplinary cases are quasi-criminal in nature¹, it would be inappropriate for this Tribunal to liberally interpret *Buendia et al* as the Applicant is urging and enter judgment in his favor as a matter of law without the benefit of a hearing. As in criminal cases before national courts, the Tribunal finds that summary judgment has no place in disciplinary matters and if used, should be done sparingly.

¹ *Borhom* UNDT/2011/067; *Ekofu* UNDT/2011/215 and *Nyambuza* UNDT/2012/139.

18. Consequently, the Tribunal does not consider this case to be one in which the Applicant is entitled to judgment “as a matter of law”.

Decision

19. The Applicant’s Motion for Summary Judgment is therefore dismissed.

(Signed)