



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

WU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Miouly Pongnon, Senior Legal Advisor, UNON

Introduction

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requisite time limit required by art. 10 of the Tribunal's Rules of Procedure. This meant that by operation of procedural law, the Respondent was not entitled to take part in the proceedings except with the leave of the Tribunal.

e. The Tribunal, however, in the interests of justice as provided for art. 35 of the Tribunal's Rules, exercised its discretion and granted the Respondent a further period of one month to file a Reply, namely by 20 February 2012.

14. In spite of the said declaratory Order of the Tribunal and its indulgence in granting the Respondent's Counsel a gratuitous extension of 30 days, the Respondent's response was not filed as ordered. On 24 February 2012, the Applicant informed the Tribunal that he had not received the Respondent's Reply and therefore requested a copy so as to enable him to make observations. The Tribunal replied on the same day informing the Applicant that the Tribunal had not received the Respondent's Reply and that he would be advised on the next procedural steps.

15. On 26 February 2012, the Respondent's counsel sent an email to the Tribunal stating:

Please note that through sheer inadvertence, I missed the 20 February 2012 deadline the Tribunal had set for the filing of Respondent's reply. I had failed to carry the date in my electronic calendar.

I have prepared an application to open the record to permit the late filing of Respondents (sic) Reply as well as the Respondent's Reply, which submissions will be finalized and ready to be filed on CCMS on Monday, 27 February 2011 (sic). Alternatively, if the Tribunal is not disposed to entertain an application to open the record to allow for the late filing of Respondent's Reply, I would be grateful if you would communicate the Tribunal's wishes in this regard.

I wish to express my apologies to the Tribunal and Mr. Wu for delay caused by my oversight.

16. On 2 March 2012, the Respondent filed a Motion entitled "Respondent's Application to file late Reply and participate in proceedings".

17. On 21 March 2012, the Tribunal issued Order No. 032 (NBI/2012) refusing the Respondent's request to file a late reply and participate in the proceedings and informed the parties that it would be issuing a default judgment in this case.

Applicant's case

18. The Applicant's case is summarized below:

a. Contrary to the MEU's letter dated 8 November 2011, his request for management evaluation was not time-barred because he had engaged the Ombudsman's Nairobi office from 17 June 2011 in an attempt to resolve the issue informally.

b. As provided for in staff rule 7.16(j)(iii), he is entitled to the payment of a non-removal element of the mobility and hardship allowance, since he did not opt for full removal.

c. As provided for in sections 5.2 and 6 of ST/AI/2007/1, "Mobility and hardship scheme", the non removal allowance shall be paid on a monthly basis and adjustments of payment shall be made as a result of change of duty station, change of dependency status, promotion, completion of five years' consecutive service at the duty station, period on special leave or separation.

d. Since he is entitled to full removal but opted for non-removal, he is entitled to the payment of a non-removal allowance for the remaining 46 months in respect to his transfer from UNOG to UNON in 2010.

e. As provided for in staff rule 7.15, he is entitled to reimbursement for unaccompanied ship.2(euc.5254s)oAt2.8(n6(sp)-5.6t6(i)6.2()-5.3 s)-4.6(o-5.1, his.8(p)-5.1(etri1(n)-4.57)-

Considerations

20. The legal issues arising for determination are:
 - a. Whether this Application is receivable.
 - b. Whether the Tribunal can on its own Motion enter a default judgment in this case.
 - c. Whether the Applicant is entitled to the reliefs sought.

Receivability

21. One of the documents annexed to the Application is a letter dated 8 November 2011 in which the MEU informed the Applicant that his request for management evaluation was not receivable because the final date he became aware of the final decision by the Administration in respect to his claims was 10 June 2011. Pursuant to staff rule 11.2(c), the Applicant was therefore required to file a request for management evaluation by 9 August 2011.

28. The issues arising in the present case can be distinguished from those in *Bertucci*. The issue here is the statutory obligation of the Respondent to submit a reply to an application within a prescribed period of time and the consequence of non-compliance with this obligation. Article 10.1 of the UNDT Rules of Procedure provides that “a respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, *except with the permission* of the Dispute Tribunal.” (Emphasis added).

29. *Bertucci* dealt with the non-compliance by the Respondent with an Order of the Tribunal to produce evidence. Neither the Tribunal’s Statute nor the Rules of Procedure provide expressly that a party can be excluded from proceedings for non-compliance with an Order of the Tribunal to produce or disclose evidence. In the present case, the issue is the timely submission of a reply to an application. Under the Rules of Procedure, a reply is a mandatory requirement which the Respondent must fulfil in order to be part of the proceedings. Article 10 specifically provides that the Respondent’s reply shall be submitted within 30 calendar days from the date of receipt of the Application by the Respondent. The rule further provides that a failure to do so strips the Respondent of the entitlement to take part e a

contrary to what is statutorily prescribed and consequently hampers the Applicant's rights to a fair and expeditious hearing by failing to file a reply as required, he effectively puts himself outside the proceedings and loses the right to defend. Not only did Counsel for the Respondent initially refuse to take part in the proceedings because submissions were being filed and submitted through the eFiling portal, she further failed to comply with the Tribunal's Order granting her an extension of 30 days. This failure, in the circumstances is not only fatal to the Respondent's case but a495dail1nei2940005 Tc20159 Tw n of p of r2(oc)trn5.3(T5.3(r4)6.0(u

a staff member, charges for the shipment of personal effects and household goods by the most economical means may be reimbursed up to a maximum amount established by the Secretary-General;

(ii) The entitlement to payment for the non-removal of personal effects is defined in staff rule 7.16 (h) and shall arise with respect to internationally recruited staff members who hold a fixed-term or continuing appointment under the following circumstances: the staff member was entitled to but did not opt for removal or the staff member was not entitled to removal.

39. The preceding reveals that the Applicant is entitled to payment for charges incurred in the shipment of his personal effects and household goods. The documentary evidence reveals that on 26 May 2011, UNON's Chief/SAS had informed the Applicant that he was entitled to this payment. Again on 6 June 2011, UNON's Chief, Travel, Shipping and Visa Unit informed the Applicant that he was entitled to shipment of his personal effects and to excess baggage and it is therefore unclear why he is making a claim for the same. The Tribunal for the avoidance of doubt finds that the Applicant is entitled to this claim.

Findings

40. The Tribunal's findings therefore are:

- a. The Applicant's request for management evaluation was receivable and the MEU erred in deciding that it was not.
- b. The Tribunal is entitled to enter, on its own motion, a default judgment in this case.
- c. Upon his separation from service on retirement, the Applicant was entitled to payment of the non-removal of personal effects and the non removal element of the mobility and hardship allowance.
- d. The Applicant is not entitled to the payment of an additional 46 months of non-removal allowance in respect to his transfer from UNOG to UNON in April 2010.
- e. The Applicant is entitled to payment for charges incurred in the shipment of his personal effects, household goods and excess baggage.

Conclusion and Orders.

41. In view of its findings above, the Tribunal orders the Respondent to pay the Applicant for:

- a. The non-removal of personal effects and the non removal element of the mobility and hardship allowance.
- b. The charges, as conceded by the Respondent since May 2011, incurred in the shipment of his personal effects, household goods and excess baggage.
- c. Interest at the applicable U.S. prime rate from the date of filing of this