



AUAdministrativeTribunal@africa-union.org

CASE NO.: BC/OLC/2.13
JUDGMENT NO.: AUAT/2015/004

J. K., APPLICANT

v.

CHAIRPERSON OF THE AFRICAN UNION COMMISSION

JUDGMENT

Counsel for Applicant:
PRO SE

Counsel for Respondent:
ALIMAMY SESAY
ESTHER UWAZIE

This matter was first initiated on 13 September 1999 against the Secretary-General of the Organization of African Unity, now the Chairperson of the African Union Commission. The Tribunal notes, with regret, that the application could only be heard when the Tribunal convened at its September 2014 Session after a long period of inactivity.

JUDGMENT

BEFORE: Hon. Andrew NYIRENDA, Shaheda PEEROO and Aliou BA
DELIVERED BY: Hon. A. NYIRENDA

This matter is within a very narrow province but we should make clear that the implications are far reaching for both parties. The Applicant claims from the Respondent sums of money, following termination of employment after 22 years of continuous service. The Applicant was employed by the Respondent on 18 July 1966. In the communication that has been tendered by the Applicant and not disputed by the Respondent, the Applicant worked at various stations as assigned by the Respondent.

By letter of promotion of 6 May 1987, the Applicant was promoted to the position of Finance Officer, Grade P2, Step 1 at an annual salary of USD 12,600.00. The promotion was with effect from 4 May 1987. In a sudden twist of events, by an Internal Memorandum of 19 September 1988, the Respondent terminated the Applicant's employment. The memorandum is central to the matter. It is as follows:

This is to inform you that the General Secretariat is undergoing changes in order to strengthen its Management and Administrative capability. In particular, the Finance Department is being re-organised so as to maximise the efficiency with which to achieve its goals. Consequently, in the interest of efficient operations of the Department, your services will not be required. I, therefore, regret to inform you that your appointment will be terminated three months from the date of your receipt of this memo.

Obviously unsettled by this development, the Applicant engaged the Respondent in a series of letters, contesting the termination of his services. The first was dated 11 April 1990. The second letter was written on 20 April 1990. We believe this is the letter that best raised the Applicant's issues of contest. It is appropriate that we set it out:

I have the honour to refer to letter No. PF/656 dated 19th September, 1988 in which my appointment was terminated as a Finance Officer with the OAU – just over One year after I was promoted.

It will be recalled, Your Excellency, that I was first appointed on 18th July 1966. Therefore, after serving our Continental Organisation for more than 22 years, with loyalty and dedication, I was hoping to retire at the age of Sixty years. This was not due until 14th June 1995.

Nor was that all. In terminating my appointment, no consideration was given to the relevant provisions of the established Staff Rules and Staff Regulations contained in Document CM/896 XXX1 Rev. 5 Annex II/Rev. 1 adopted in Nairobi on 4th March 1979. In particular, Your Excellency, application of Provisions of Article 31 of the Staff Regulations were grossly misdirected. Article 31 (4)(i) states, and I quote, "Even in the case of serious misconduct, none of the disciplinary measures enumerated in (a), (c), (f),(g), (h) and (i) above shall be taken against a Staff Member before his case is submitted to the Disciplinary Board which shall give its opinion". Record have it that I had no case of any type let alone that had been submitted to the Disciplinary Board.

In view of the above, it is clear that there was a serious error in terminating my appointment.

On 23 September 1991, in a continued effort to be attended to, the Applicant resolved to refer his matter to the Ad Hoc Administrative Tribunal. The communication to the Tribunal was in the same words as his letter to the Respondent. The concluding paragraph which carries the prayer states:

It is for these reasons, Your Excellency, that I humbly appeal to the Honourable Tribunal to re-instate me in the service of the OAU. Equally, I appeal to the Honourable Tribunal to authorise payment of my salary and allowances for the period which I have been out of the service.

What is apparent to us is that despite the numerous letters from the Applicant, the Respondent ignored all of them. It was only on 29 October 1998, that E.G.W., Secretary of the OAU Ad Hoc Administrative Tribunal, responded to the Applicant's letter of 13 September 1991 asking the Applicant whether he still intended to pursue his application. The Applicant confirmed in writing that he was intent in having his matter determined by the Tribunal. There are a few specific issues that have been raised by the Applicant which he places before the Tribunal.

The first issue is that he considers that his 22 years service with the Respondent deserved recognition. In his plea, he served the Respondent with loyalty and due diligence. His services should therefore not have been abruptly terminated. The second issue is that at no point in those 22 years was he warned or even reprimanded for any wrongdoing. The Respondent did not have any basis for terminating his services.

Thirdly, the Applicant submits that his promotion, which came with the letter of 6 May 1987, was acknowledgement by the Respondent that he had performed his duties efficiently and therefore that the termination of his services, barely a year later, was a contradiction in terms.

Fourthly, the Applicant argues that the Respondent fell in error in not referring his matter to the Joint Administrative Committee of the Respondent for examination and opinion in accordance with Article 27(3) of the Respondent's Staff Regulations.

Lastly, the Applicant contends that in terminating his services the Respondent showed no concern about the Applicant's welfare, that of his family, and in particular, that of his children who were still in school.

The Respondent does not dispute that the Applicant's services were terminated on 19 September 1988 through the Internal Memorandum set out above. The explanation by the Respondent is the following and we quote from the Response:

- “(d) The complainant left the Organisation in accordance with the terms of Article 27, sub-paragraph (a) of the extant Staff Regulations (the Staff Rules and Regulations adopted on 4 March 1979 at the 32nd Ordinary Session of the Council of Ministers (see Annex 3). This was a case of normal and legitimate termination of appointment as prescribed by the texts and applied in the aftermath of the events that called for such a measure. Specifically, it was a case of restructuring leading to reduction of staff, which falls under the purview of the administrative authorities of the Organisation, a matter which in any case is not within the competence of the Tribunal to entertain (see Annex 4: Judgment 269 of the ILO Administrative Tribunal.
- (e) The complainant's separation from the Organisation in 1988 was not in connection with any wrongdoing or dereliction; and nothing in the case can justify such unwarranted confusion.....”

We should first deal with a procedural matter that has been raised by the Respondent, that is that the Application was submitted late and outside the period prescribed by the Statute of the Tribunal and the Rules of Procedure of the Tribunal. The Statute and the Rules of Procedure of the Tribunal require that an application, not connected with disciplinary matter, be submitted with the Tribunal within 30 days from the time an Applicant is notified of the final adverse decision of a competent authority of the Respondent. The entire procedure requires clarification and we endeavour to briefly do so.

The Staff Rules and Regulations applicable to the Applicant are those that were adopted in Nairobi on 4 March 1979. Article 43 of the Staff Rules provides as follows:

(a) An Administrative Tribunal shall be set up in the OAU to consider and decide on appeals submitted by staff members alleging non observance of the terms of appointment, including all provisions applicable under the Staff Rules and Regulations, or appeals against disciplinary measures and shall decide upon them.

(b) The procedure, composition and functioning of the Administrative Tribunal are as defined in the Staff Regulations.

The only mention of the Administrative Tribunal in the Staff Regulations is in Article 31(10)(i) on Disciplinary Measures. That Article provides:

The Disciplinary Board shall recommend to the Secretary General which disciplinary measure should be taken and shall justify its recommendation.

(i) If the staff member concerned considers that the Disciplinary measure imposed on him is unfair, he may apply to the Administrative Tribunal.

There was nothing else in the Staff Regulations laying down the procedure of the Tribunal. It is further pertinent to mention that there was no requirement under the relevant Staff Rules and Staff Regulations that the staff member should first engage and refer the matter complained of to an appropriate authority of the Respondent before referring the matter to the Tribunal.

The only place where the requirement of first referring a complaint to an appropriate authority of the Respondent is stated is in the Rules of Procedure of the Tribunal as well as in the Statute of the Tribunal. Article 11 paragraph 7 of the Rules of Procedure of the Tribunal provides as follows:

- (i) An application not connected with disciplinary matter shall not be receivable unless the staff member or the employee concerned has previously submitted a petition to the appropriate authority by registered delivery mail for the examination of his case;
- (ii) Within 30 days of receipt of the petition the appropriate authority shall notify the petitioner of its final decision;
- (iii) Silence by the appropriate authority during the 30 days following an applicant's filing a petition, shall be interpreted as an implied rejection of his request.
- (iv) The application instituting proceedings, shall be filled with the secretary within 30 days and this time shall be reckoned as from the days following the notification of the final and unfavourable decision to the applicant taken in this regard by the appropriate authority.

This provision is replicated in Article 13 on the Statute of the Tribunal. What is apparent from the provisions is that there is no time specified within which an Applicant should have approached the appropriate authority. It was therefore quite competent for the Applicant to engage the appropriate authority months or years after the termination of his services. Obviously, the Tribunal would be engaged, on the facts and circumstances of individual cases, to consider if the applicant took too long in taking up the case with the appropriate authority.

That said though, on a reading of the Statute and the Rules of Procedure of the Tribunal, once an applicant engages the appropriate authority of the Respondent on a matter, the clock is set and the Applicant has 30 days to wait for a response. Upon the expiry of the 30 days and in the event of receiving no decision or in the event of an unfavourable decision, the Applicant has a further 30 days within which to lodge an application with the Tribunal. In 1993, the position changed a little. In the Staff Regulations and Staff Rules of 1993, Document CM/Res.1425 (LVII), it was specifically provided in Article 62(a) of the Staff Rules as follows:

- (a) Any staff member wishing to appeal against an administrative decision concerning him shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision in question be reviewed, such a letter must be sent by registered mail if the staff member is serving outside the Headquarters, within thirty days from the date of contested decision. If the Secretary-General confirms the decision or if no reply is received by the staff member within thirty days, the staff member shall be entitled to file, within a further thirty days, an appeal with the Administrative Tribunal in the form prescribed in the Tribunal's Rules of Procedure, reproduced in a separate document.

This provision was obviously in hindsight and clearly intended to remedy the void in the previous Staff Regulations and Staff Rules. It was a significant change to which we should draw the attention of Respondent in the light of the arguments that have been advanced before us.

The Applicant started engaging the Respondent in April 1990. We have quoted the letter of 20 April 1990. He subsequently wrote several letters to the Respondent. The Respondent did not attend to the Applicant's letters as we observe earlier. As provided for in the Statute of the Tribunal and the Rules of Procedure of the Tribunal, silence by the Respondent should have been construed as adverse and the Applicant should have placed the matter before the Tribunal within 60 days from 20 April 1990. He did not until one year later. The delay was long, capable of bringing the application to rest. We will however go a little further and in this regards we consider whether the Applicant's case should have been referred to the Joint Administrative Committee pursuant to the existing Staff Regulations and Staff Rules. Of relevance is Article 27 and Article 31 of the Staff Regulations. Article 27(2) provides for termination of appointment. Paragraph 27(2) states:

(a)The Secretary General may terminate the appointment of a staff member by giving him three (3) month's written notice if he holds a permanent appointment or one (1) months' notice if he holds a fixed-term or probationary appointment, subject to the following conditions:

- (i) If the exigencies of the service so demand (budgetary reduction)

...

(b)The Secretary General may terminate the appointment of a staff member who hold a fixed-term of appointment prior to the expiration date for any of the reasons specified in paragraph (a) above or for such other reasons as may be specified in the letter of appointment or in the Staff Rules and Regulations.

Dismissal is provided for in Paragraph 27(3) where it is stated:

(3) No staff member shall be dismissed until the Joint Administrative Committee, set up for the purpose, has examined the matter, given its opinion and submitted a report.

On a clear reading of the provisions cited above, the Respondent had authority to terminate the services of a staff member or dismiss a staff member on any of the grounds stipulated in the Article. According to Article 27(2) (a) termination could be on account of exigencies of the service, including budgetary reduction. The grounds for dismissal are broadly set out in Article 31 of the Staff Regulations. That provision refers to “any serious misconduct.”

What comes out in the scheme of the applicable Staff Regulations and the Staff Rules is a distinction between termination of employment and dismissal. Under Article 27(3), it is only in cases of dismissal of a staff member that the matter must be referred to a Joint Administrative Committee, set up for that purpose.

The Internal Memorandum ending the Applicant’s engagement with the Respondent is detailed and clear on the reasons. The Applicant’s services were terminated because the Finance Department was being re-organised in order to generally strengthen the management and administration capability of the Respondent. The Respondent explains that there was a restructuring taking place at the time which resulted in several members of staff being laid off. The Applicant has not disputed this fact. We believe the Applicant’s case is mainly that he should not have been among those whose services were terminated because he had demonstrated exceptional capacity and ability as demonstrated by his promotion just one year before his services were terminated.

We can well appreciate the Applicant’s bewilderment and frustration; but the issue was not about the Applicant’s ability or capacity. It was in the process of restructuring that some positions fell by the way side and staff members who were in

those positions could no longer be retained. The Applicant was among those that could no longer be retained. We believe this is as far as we should go. In the final analysis we are clear in our findings that the Applicant's services were properly terminated. We would thus dismiss this Application.

We make an order that each party shall bear its own costs of the litigation.

PRONOUNCED this 26th day of October 2015 in Addis Ababa, Ethiopia.

/s/

HONORABLE JUSTICE ANDREW K. C. NYIRENDA SC, PRESIDENT

/s/

HONORABLE JUSTICE SHAHEDA PEEROO

/s/

HONORABLE JUSTICE ALIOU BA