



AUAdministrativeTribunal@africa-union.org

CASE NO.: BC/OLC/1.47
JUDGMENT NO.: AUAT/2015/007

T.T., APPLICANT

v.

CHAIRPERSON OF THE AFRICAN UNION COMMISSION

JUDGMENT

Counsel for Applicant:
ZEBENE FIKRU

Counsel for Respondent:
ALIMAMY SESAY
ESTHER UWAZIE

This matter was first initiated in January 2010. 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. S. PEEROO

The applicant, a national of Togo, was assigned a permanent post in the OAU on 1 July 1985. He had allegedly committed certain offences while he was working as Finance and Administrative Officer in the AU Office at Yaoundé in Cameroon. On 20 July 2007, he appeared before the Joint Disciplinary Board to answer five charges of misconduct. The Board made its report to the Chairperson in accordance with Article 59 of the Staff Rules. By letter dated 2 October 2007 (**Annex II**) Management, through the Director of Administration and Human Resource Development, dismissed the applicant from the services of the African Union Commission with immediate effect, pursuant to Article 60 (b) (vi) of the Staff Rules, on the ground that he was guilty of misconduct on all the five charges.

On that same day the applicant appealed to the Chairperson of the Commission against the decision to dismiss him as per **Annex III**.

The Chairperson of the Commission reversed his own decision approving the dismissal. It is common ground that the applicant's appeal was considered by the Chairperson who, in an Interoffice Memorandum dated 31 March 2008 (**Annex IV**) on the subject entitled: "*Decision regarding the disciplinary measure taken against [T.T.]*", directed the Deputy Chairperson to take the necessary measures to implement his decision to:

"(i) rescind the decision to dismiss [T.T.], Assistant Accountant, now serving at the headquarters of the Commission;

(ii) transform the sanction of dismissal into down-grading sanction effective from the date of the dismissal decision together with denial of promotion for one year; and to reinstate the officer in his post with his rights and duties;

(iii) pay the officer's monthly salaries from the date of the dismissal decision up to this date, together with all the entitlements relating to his new grade;

(iv) ask Madam Director of Administration to examine with the concerned officer, the documents mentioned in his

appeal submission to see, as she had indicated, how the sums of money imputed against the officer could be reviewed downwards, and report to me on action taken within one week”.

In that letter, the Deputy Chairperson was further asked to ensure that “*the measures listed above are implemented forthwith this very day of signature of the present decision*” [Emphasis added].

The Deputy Chairperson did not comply with the decision of the Chairperson communicated to him in the Interoffice Memorandum dated 31 March 2008. On 30 April 2008, the new Chairperson of the Commission accepted and confirmed the decision of the former Chairperson; through the Chief of Staff, Bureau of the Chairperson, the new Chairperson showed his concern that the instructions of the former Chairperson had been disobeyed and directed the Deputy Chairperson to implement at once the instructions issued by the former Chairperson for reinstatement of the applicant; and urged that he would not entertain any further disobedience of his instructions - (vide **Annex V**). A copy of all the relevant correspondences was attached for the necessary action to be taken by the Deputy Chairperson.

On 28 July 2008, in an Interoffice Memorandum bearing reference File No. BC/C/1109/.08, the Chief of Staff of the Bureau of the Chairperson again imparted to the Deputy Chairperson the details of the decision taken in relation to the applicant. He requested the Deputy Chairperson to direct the Director of Administration and Human Resource Development to carry out the instructions of the then and the previous Chairperson as contained in the latter’s Memo dated 31 March 2008. A copy of the correspondence dated 28 July 2008, (**Annex VI**), was sent by the Chief of Staff, Bureau of the Chairperson, to the applicant.

As nothing happened, on 26 March 2009, the applicant requested the Director of Administration and Human Resource Development Division to reinstate him, and to pay him his salaries and other entitlements as had been decided by the previous Chairperson, and confirmed and endorsed by the then Chairperson (**Annex VII**). The applicant made the same request to the Deputy Chairperson on 30 March 2009

(Annex VIII). He further contacted the previous and then Director of Administration and Human Resource as well as the Deputy Chief of Staff in the Office of the Deputy Chairperson, pressing for his reinstatement as per the decision of the Chairperson of the AU Commission.

Further, according to the applicant he was on 30 May 2009 invited to a meeting where his reinstatement was considered by a panel chaired by the then Director of Administration and Human Resources. The applicant avers that though he was given to understand that his reinstatement would be forthcoming, nothing happened. At one time, realising that the Office of the Deputy Chairperson had no intention of implementing the decision to reinstate him the applicant brought his application to the Administrative Tribunal which by then had a Secretary to receive his application. The applicant's case before the Tribunal is therefore against the non-implementation of the decision of the Chairperson to reinstate him.

The Tribunal makes it clear that it is not concerned with the guilt or otherwise of the applicant in relation to the charges against him or with the review of the sums of money imputed against the applicant as the Chairperson had suggested in his decision. This tribunal will only deal with the non-implementation of the decision of the Chairperson to reinstate the applicant.

The applicant is alleging violation of Article 65 of the Staff Rules. Article 65 imposes a duty on the Secretary-General, now the Chairperson of the AU, who heads the AU Commission, to take all necessary measures to implement the Staff Rules, and to notify staff members of all administrative measures taken in that respect. The applicant asserts that the officers of the respondent acted improperly by not implementing the decision of the Chairperson dated 31 March 2008 that was issued reversing the decision to dismiss him from service and imposing a lesser sanction on him. The non-implementation of the decision has caused humiliation and damages to him and his family. He itemised these claims as follows:

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|---|----------------|
| (1) Loss of 30 months salaries and entitlements | USD 117,432.75 |
| (2) Education allowance | USD 58,500.00 |

(3) Total staff pension contribution	USD 18,554.55
(4) Interest for 30 months (USD 18,554.55 x 40%)	USD 7,421.82
(5) Lawyer's fee (20% of the amount claimed by the applicant)	
(6) Moral and material damages	USD 200,000.00
(7) Reinstatement	

The applicant finally prays the Tribunal to:

1. Order the respondent to implement the decision taken on 31 March 2008 on File No. BC/C/232/03.08 by the former Chairperson of the Commission for the reinstatement of the applicant effective from the date of his dismissal;
2. Rule that the respondent acted improperly by not implementing the specific decision issued by the former Chairperson;
3. Order the respondent to pay to the applicant unpaid salaries for thirty (30) months, plus all the entitlements due to him, including the moral and material damage incurred and lawyer's fee, effective from the date of dismissal up to this date, amounting to a total sum of USD 482,295.74.
4. Order the respondent to pay to the applicant the entire contribution pension due to him from the respondent from the date of his dismissal to the day of his application [USD 18,554.55], plus all the interest accruing to him [USD 7,421.82] from the American Life Insurance Company (ALICO).

In the respondent's Answer, while resisting the application on the merit, a preliminary objection is raised on the ground that the application cannot be entertained for being time-barred, being in contravention with the provision in Article 11 (7) of the Rules of Procedure of the Tribunal as well as Rule 62 (a) of the Staff Rules "requiring the applicant to file his petition with the Tribunal within 30 days following the receipt or non-receipt of an appeal decision from the Chairperson".

The reference by the respondent to Article 62 (a) of the Staff Rules as being applicable at the time of the decision to dismiss the applicant is not correct as that Article applies to an administrative decision whereas the decision in question was a disciplinary decision.

The Tribunal finds it pertinent to make certain observations here. A clear distinction is made between an administrative decision and a disciplinary decision

both in the Rules of Procedure of the Administrative Tribunal and in the Staff Rules. The appeal procedure in respect of each of these two types of decision is also distinct as far as the time frame is concerned. In that respect, in Chapter XII of the Staff Rules under the heading “Appeals”, Article 62 (a) sets out the procedure that should be adopted by a staff member wishing to appeal against an administrative decision concerning him. As a first step, within thirty days from the contested decision the staff member has to apply in writing to the Chairperson for a review of the administrative decision in issue. If the Chairperson confirms the decision against the staff member or if the staff member does not receive a reply within thirty days, he or she may within a further thirty days file an appeal with the Administrative Tribunal as prescribed in the Tribunal Rules of Procedure.

The procedure to be followed by a staff member who is dissatisfied with a disciplinary decision is found in Chapter XI of the Staff Rules, under Article 59. Following the holding of disciplinary proceedings against a staff member, the Joint Disciplinary Board sends a report containing its findings and recommendations to the Secretary-General, now the Chairperson, who then takes the necessary decision. From the provision of Article 59 (m) of the Staff Rules, it is clear that if the Chairperson communicates an unfavourable decision to the staff-member, the latter has a right of appeal against that decision in accordance with Article 27 of the Staff Regulations. That Article, under the heading “The Administrative Tribunal”, provides as follows:

(a) The Administrative Tribunal established by the Council of Ministers shall be competent to hear appeals submitted by staff members or their beneficiaries, alleging violation of the terms of appointment, including all applicable provisions of the Staff Rules and Regulations, or appealing against disciplinary measure.

(b) The Statutes and Rules of Procedure of the Administrative Tribunal, as established by the Council of Ministers, are contained in a separate document.

Now, Chapter III of the Rules of Procedure of the Administrative Tribunal under **Article 11 (7)** provides as follows:

- 7 (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 re-examination of his case;
- (ii) Within 30 days of the 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 this request;
- (iv) The application instituting proceedings, shall be filed with the Secretary within 30 days and this time limit shall be reckoned as from the days following notification of the final and unfavourable decision to the applicant taken in this regard by the appropriate authority. [Emphasis added].

In the instant case, upon being notified of the disciplinary decision severing him from service, the applicant had the right to appeal in accordance with Article 27 of the Staff Regulations, as provided under Article 59 (m) of the Staff Rules. He could have followed the procedure as provided under Article 11 (7) (iv) and appeal to the Tribunal within 30 days of that final and unfavourable decision dismissing him. The applicant did not do so. On the same day that he received notification of his dismissal he filed an appeal to the Chairperson of the AU Commission. It would have been advisable for the Chairperson in the circumstances to inform the applicant that instead of coming to him he should go to the Tribunal within 30 days from that day. However, the facts show that the Chairperson accepted to deal with the matter, and he dealt with it. This therefore shows not only that the Chairperson having accepted to deal with the matter amounts to a waiver of the objection regarding the time limit to appeal to the Tribunal but also that as far as the applicant was concerned there was no longer an unfavourable decision dismissing him for him to appeal to the Tribunal.

Now, the fact remains that the Chairperson had reversed the decision to dismiss the applicant. Without saying more, the Tribunal considers that that was an

exercise of discretion by the person in authority in the circumstances of the case, following representations made by the applicant. Such a course of action by the applicant and the result that followed, although contested by the respondent, cannot be taken against the applicant or to his detriment.

From then on the applicant was waiting for the implementation of the decision to reinstate him. As set out above, there were several communications in that respect until on 30 May 2009 the applicant was invited to a meeting where his reinstatement was considered by a panel chaired by the then Director of Administration and Human Resources of the respondent. According to the applicant, he was given to understand that he would be reinstated. He waited but saw nothing forthcoming. The question that arises is when does time start running for him now that it was an administrative matter. For the Staff Rules to apply, time starts running from a decision, and after there has been a request for a review of the administrative decision. Here, the Director of Administration and Human Resources after having had a meeting with the applicant did not give a decision to him. Since no decision was made, we cannot therefore strictly hold Article 62 (a) against him. Nonetheless, the applicant was required under the Rules of Procedure to petition the respondent to re-examine the case, in other words, to approach the respondent before going to the Tribunal. There is no time within which such petition should be sent by the applicant under Article 11(7)(i). Although we acknowledge that this is a requirement, the applicant came directly to the Tribunal without first petitioning the respondent in accordance with the above rule. The question that arises is whether we should receive the application. This application was brought to the Tribunal in January 2010 following the meeting called by the respondent on 30 May 2009. After that meeting, the applicant waited for the outcome of the meeting, which never came. We can understand the frustration of the applicant and why he did not return to the respondent. He realized that he was not getting anywhere with the respondent. He instead came directly to the Tribunal. We consider that this is an exceptional case given the history of it, where the Tribunal may exercise its discretion to waive the requirement of first petitioning the respondent. We accordingly do so.

For all the above reasons, the preliminary objection of the respondent is overruled.

As regards the merits of the application, the respondent denied the applicant's "allegations". It is averred that the application is baseless, frivolous, vexatious and without any legal merit and should be struck out, and the claims for damages dismissed with costs. It was submitted on behalf of the respondent that the applicant's main argument, that Management had refused to execute the decision to reinstate him, is flawed. According to the respondent, the memo dated 31 March 2008 issued by the Chairperson to the Deputy Chairperson did not contain a decision but a directive for the Deputy Chairperson to act upon to reinstate the applicant by taking the necessary measures; that until the Deputy Chairperson had considered the directive and come up with a decision, the applicant had no enforceable right. It was further contended that the directive was actually acted upon by the Deputy Chairperson who "urged that the former Chairperson '*rescind the decision to reinstate [T.T.]*' as the Deputy Chairperson did not agree with the Chairperson regarding the substitution of a dismissal with disciplinary measures such as demotion and denial of promotion for a year, which he considered was "a direct admission" that the applicant was guilty. It was also contended that both the former Chairperson and Deputy Chairperson left office without actually making any decision on applicant's appeal. Hence there is no decision that the applicant can rely on in support of his case.

The Tribunal does not agree that the memo dated 31 March 2008 from the Chairperson to the Deputy Chairperson did not contain a decision for the Deputy Chairperson to comply with. The Tribunal considers that such a submission from the respondent is misconceived. The respondent Commission is an organisation that is headed by its Chairperson. Pursuant to Articles 25 (iv) and 26 (b) of the Staff Regulations, and Article 59 (m) of the Staff Rules, only the Secretary General, now the Chairperson, can take the decision following disciplinary action against a staff member. In the circumstances, after considering the applicant's appeal the Chairperson gave reasons for reversing his previous decision representing

Management's decision and for imposing a downgrading sanction. Amongst his considerations was the fact that there were discrepancies and irregularities in the procedure adopted. The measures that the Chairperson took when deciding the applicant's appeal were within the powers given to him under the Staff Rules. Further, in his memo dated 15 April 2008, the Deputy Chairperson did not only recognise that the Chairperson had taken a decision but he also knew very well that he had to implement that decision. He made the subject of his memorandum dated 15 April 2008 to the Chairperson to read: "*Rescinding Management Decision on [T.T.]*". He ended the memo with a request to the Chairperson to rescind his decision to reinstate the applicant, as he did not agree with the decision that the Chairperson had taken. The Deputy Chairperson did not comply with the Chairperson's decision and took the liberty in his aforesaid memorandum of 15th April 2008 to state that the object of his memo was to submit, for the Chairperson's re-consideration, and "*to advise and bring to light the dire consequences of reversing*" the decision of the Joint Disciplinary Board.

The Tribunal rejects the proposition put forward on behalf of the respondent that it was the Deputy Chairperson who had to take the decision following the Chairperson's memorandum of 31 March 2008 addressed to him. It was the person in authority and who was at the head of the respondent Commission who had taken the decision in question and it was incumbent on all the officers of the respondent Commission to implement that decision. It is clear that the Chairperson, while reversing the dismissal penalty and inflicting a lesser one, had also asked for an examination of the documents referred to by the applicant in his appeal regarding the sums of money imputed against the applicant. It appears that the officers concerned did not do anything. Whether they agreed with the decision of the Chairperson or not, it was not good enough for the officers concerned to simply do nothing. If they are at fault in doing nothing they necessarily render answerable the respondent. By acting in that way following an Administrative decision of the Chairperson in favour of the applicant, the officers acted improperly when not implementing the lesser disciplinary measures taken by the former Chairperson against the applicant under Article 60. This has caused prejudice to the applicant for

which the respondent has to shoulder vicariously. Failure to implement the decision has resulted in the applicant not being able to continue in the service of the African Union.

The applicant therefore succeeds in his application.

It is however clear that, given the applicant's age and the number of years that have elapsed since the complaint arose, reinstatement is not being envisaged or pressed.

The applicant and Counsel appearing for him have not been very clear concerning the fourth prayer where the Tribunal is asked to order the respondent to pay to the applicant the entire contribution pension due to him from the respondent from the date of his dismissal to the day of his application, as well as the interest due to him from the American Life Insurance Company, that is item (3) relating to staff pension contribution and item (4) relating to interest for 30 months. It can only stand to reason that once the staff member is separated from service his pension contribution would stop. Further, the Tribunal makes no pronouncement regarding the interest that the applicant is claiming as being due from the insurance company, which is not a party to this case. These items are not due or claimable and are therefore rejected. What has come out in evidence is that at the time of the applicant's separation from the service, he was informed in letter dated 2 October 2007 that he would be paid his separation benefits which included, inter alia, his total contribution to the AUC pension scheme, less all monies that he owed the organisation. In these circumstances, the Tribunal orders the respondent to pay to the applicant his total contribution to the AUC pension scheme that was due as per the above letter in the event that this is still due to him.

The claim in the sum of USD 482,295.74 in the third prayer of the applicant does not reflect the total sum of the items of compensation listed by him and as set out above. Be that as it may, item (3) and item (4) have been rejected. As regards the rest of the claims, and the amounts prayed for, the applicant has not only not been able to substantiate them, but the Tribunal finds the sums claimed to be grossly exaggerated. Further, no indication has been given to the Tribunal in

relation to mitigation of damages as to how the applicant occupied himself following his dismissal from service.

After taking into account all the circumstances and the situation of the applicant at the time of his separation from the service, the Tribunal considers that it is fair and reasonable to allow him a global sum of USD 5,000.00 for all prejudice suffered by him.

We order the respondent to pay costs of the application to the applicant in the sum of USD 500.00.

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