



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

TRAJANOVSKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

None

Counsel for Respondent:

Stephen Margetts, ALU/OHRM, UN Secretariat

Introduction

1. On 25 September 2009, the Applicant, a former staff member of the United Nations Interim Administration Mission in Kosovo (UNMIK), submitted an incomplete application, which was registered at the Geneva Registry of the United Nations Dispute Tribunal (UNDT). This was followed by a complete application filed on 28 September 2009 and a new application submitted on 16 October 2009. The Applicant thereby contested the administrative decision to terminate her fixed-term appointment with UNMIK effective 10 April 2009, which she was notified of by memorandum of the Civilian Personnel Section, UNMIK dated 8 April 2009.

Facts

2. The Applicant served in the United Nations Preventive Deployment Force in the former Yugoslav Republic of Macedonia (UNPREDEP) as an Administrative Assistant from September 1997 to June 1999.

3. In June 1999, the Applicant joined the Liaison Office of Skopje, UNMIK, where she worked as Administrative Assistant until 10 April 2009.

4. Each time the Applicant's appointment was extended she signed a letter of appointment, specifying:

“You are hereby offered a fixed-term appointment in the Secretariat of the United Nations, in accordance with the terms and conditions specified below, and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules... A copy of the Staff Regulations and the Staff Rules is transmitted herewith.”

5. By memorandum dated 8 April 2009, the Civilian Personnel Section, UNMIK, informed the Applicant that “[f]ollowing the last phase of the UNMIK retrenchment exercise ... the Secretary-General ha[d] decided to terminate [her] appointment ... in accordance with Staff Regulation 9.1”. It was further specified that the Applicant's appointment, which was initially valid up to 30 April 2009,

would be terminated on 10 April 2009. The Applicant received this memorandum on 9 April 2009.

6. By e-mail to the Civilian Personnel Section, UNMIK, and the Acting Chief, Mission Support, UNMIK, dated 9 April 2009, the Applicant conveyed her belief that her termination was discriminatory and in breach of her rights as a staff member.

7. On the same day, the Applicant transmitted a complaint to the Chief Personnel Officer, UNMIK. She thereby requested that an investigation be conducted and that the implementation of the decision be suspended “until the propriety of UNMIK Liaison Office comparative review process and [her] case can be determined”.

8. On 20 May 2009, the Applicant submitted a similar complaint to the newly appointed Director, Mission Support, UNMIK, challenging the termination of her appointment and requesting an investigation into the comparative review procedure that preceded it.

9. According to the Applicant, on 6 June 2009, she contacted the Office of the United Nations Ombudsman.

10. The Applicant made a request for management evaluation by letter dated 15 July 2009 and received at the Management Evaluation Unit (MEU), UN Secretariat, on 16 July 2009.

11. The day after, 17 July 2009, the Acting Chief, MEU, replied to the above request, informing the Applicant that her request was not receivable, for she had failed to file it within the 60-day time limit prescribed by staff rule 11.2 (c). The MEU reply included a paragraph reading:

“Pursuant to Chapter XI of the Staff Rules, any recourse in respect of the present determination may be addressed to the United Nations Dispute Tribunal (UNDT). If you elect to file an appeal before the UNDT, you must do so within 90 calendar days after receipt of this letter.”

12. On 25 September 2009, the Applicant submitted to the Office of Administration of Justice, UN Secretariat, an incomplete application contesting

the termination of her appointment. This application was transferred on the same day to the Geneva Registry of the Dispute Tribunal.

13. On 28 September 2009, the Applicant filed a complete application. Finally, on 16 October 2009, a new application, aimed against the same decision and dated 15 October 2009, was submitted to the Geneva Registry through the Office of Staff Legal Assistance (OSLA).

14. The Respondent filed his reply on 19 November 2009, addressing the issue of receivability, as expressly requested by the Tribunal.

15. The Respondent's reply was transmitted to the Applicant, who submitted comments thereon on 30 November 2009 and 1 December 2009.

Parties' contentions

16. The Applicant's principal contentions as regards the issue of receivability are:

- a. Following the decision to terminate the Applicant's appointment, she wrote on several occasions to UNMIK Senior Management, which provided no response. Despite the Applicant's having clearly stated her intention to challenge the decision, they failed to indicate to her that, in order to do so, she had to write directly to the Secretary-General requesting formal review. In this regard, the Applicant submits that, being evident to UNMIK Senior Management that she intended to challenge the contested decision, it was incumbent on them to guide her as to the appropriate procedures.
- b. While recognizing that as a staff member of the Organization she had the duty to familiarize herself with the Staff Regulations and Rules, this does not mitigate the Administration's obligation to advise or guide the staff member, "which would not be burdensome and serve the interests of justice in accordance with the principles of due diligence and good employership";

- c. Staff members are strongly encouraged to first try to solve a dispute through informal channels. As a first step, the Applicant attempted, promptly and repeatedly, to reach a solution with UNMIK management;
 - d. Whereas her request for management evaluation was not receivable as time-barred, the letter of MEU in response to it, dated 17 July 2010, stated that the Applicant could take her case to the UNDT within 90 days. The Applicant did file an application with the Tribunal within this deadline.
 - e. The Tribunal has held in judgment UNDT/2009/052, *Rosca*, that it has jurisdiction to waive time limits for management evaluation.
17. The Applicant therefore requests that the present application be declared receivable.
18. The Respondent's principal contentions on the matter of receivability are:
- a. The Applicant was notified of the contested decision on 9 April 2009. Pursuant to former staff rule 111.2 (a) any request for administrative review should have been made prior to 9 June 2009. The Applicant failed to request administrative review within this time frame;
 - b. Article 8, paragraph 3, of the UNDT statute provides: "The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation." The Tribunal has interpreted such prohibition as extending also to requests for administrative review under the former Staff Rules. It accordingly ruled that "the Tribunal has no jurisdiction to extend the deadlines for the filing of requests for either administrative review or management evaluation" (judgment UNDT/2009/051, *Costa*).
19. The Respondent hence requests that the application be dismissed on the grounds that it is not receivable.

Considerations

20. According to article 9 of the rules of procedure of the UNDT, the Tribunal may determine that summary judgment is appropriate, provided that there is no dispute as to the material facts and judgment is restricted to a matter of law. It may be particularly appropriate for issues related to the receivability of an application. The crucial question in this case, i.e. whether the application is time-barred, is such a matter of law.

21. Turning to the said key issue, former staff rule 111.2 (a), which was in force at the time the contested decision was made as well as when the request for administrative review thereof should have been submitted, provided that:

“A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing ...”

22. It follows that the Applicant, who received notification of the termination of her appointment on 9 April 2009, should have requested administrative review by the Secretary-General no later than 9 June 2009. She only sought management evaluation over a month after this date.

23. The Tribunal has recalled the importance of strictly observing the established time limits in contesting an administrative decision (see UNDT/2009/036, *Morsy*; UNDT/2010/019, *Samardzic et al.*).

24. Notwithstanding the foregoing, the Tribunal has already stated that, during the transition to the new system of administration of justice, it would be unfair if an Applicant lost the entitlement to seek a waiver of deadlines because his or her case was transferred to the Tribunal whose jurisdiction replaced that of the former Joint Appeals Board (see UNDT/2009/052, *Rosca*, paragraph 15). This may, *mutatis mutandis*, also be applied to the present case, in which the contested decision was conveyed to the Applicant under the former justice system. Therefore, during the transition, the Tribunal has jurisdiction to waive time limits imposed by the former Staff Rules.

25. In this connection, former staff rule 111.2 (f) foresaw that:

“An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.”

26. With regard to “exceptional circumstances”, the Tribunal stated in judgment UNDT/2010/019, *Samardzic et al.*:

“The former UNAT defined exceptional circumstances as those circumstances which are “beyond the control of the Appellant” (see judgement No. 372, *Kayigamba* (1986) and, generally, judgement No. 913, *Midaya* (1999) and judgement No. 1054, *Obuyu* (2002)). This definition rightly refers to the Appellant’s capacity to comply with the time limits. Whether circumstances are within or beyond the control of the Applicant should be assessed against individual standards, e.g. the Applicant’s educational level. All relevant facts have to be taken into account, e.g. technical problems, state of health, etc. No strict or general line can be drawn. Since it is in the Applicant’s interest to obtain a suspension, waiver or extension of time limits, the burden of proof is on the Applicant.”

27. The Applicant submits that she was not guided as to the proper procedure to impugn the decision to terminate her appointment, in spite of her having manifested her intention thereof. It is noteworthy, nevertheless, that the Applicant repeatedly signed letters of appointment, all of which included a paragraph referring to the Staff Regulations and Rules. In addition, by signing these letters, she certified that a copy of such Regulations and Rules had been transmitted to her. Since the Applicant served for more than eleven years within the Organization, she had ample opportunity to become familiar with the rules. Moreover, the Applicant herself acknowledged that, as a staff member, she was obliged to do so. In sum, it is nothing but reasonable to expect the Applicant to be acquainted with the rules that governed her employment, including those on time limits to request administrative review of administrative decisions (cf. UNDT/2009/052, *Rosca*, paragraph 34).

28. The Applicant stresses that the response by MEU, dated 17 July 2009, advised her that “any recourse in respect of the present determination may be addressed to the United Nations Dispute Tribunal (UNDT). If you elect to file an

appeal before the UNDT, you must do so within 90 calendar days after receipt of this letter”.

29. However, this statement is without prejudice the above-cited former staff rule 111.2 (f), according to which the failure to timely request the review by the Secretary-General of the contested decision entails in general the irreceivability of a subsequent appeal. The fact that the present application was filed within the time limits prescribed to this effect does not cure the previous failure to meet time limits at the earlier stage of administrative review or management evaluation.

30. The information provided by MEU in this regard was accurate and sufficiently clear. The Applicant was simply advised of her right to have the MEU findings reviewed by the Tribunal. By no means can she claim to have been misled by the Administration, or somehow induced to erroneously expect that UNDT would not take into account the lack of a timely request for administrative review or management evaluation.

31. Lastly, the Tribunal takes note that the Applicant, in her letter to MEU dated 15 July 2009, refers to the “state of affairs in the transition to a new administration of justice”, and regrets “that [she] was not in a position to seek [MEU’s] expertise earlier”, while hoping “that the exceptional circumstances that surrounded [her] would warrant a waiver” of the relevant time limits.

32. The transition to the new internal justice system, introduced as of 1 July 2009, may in no manner be regarded as an “exceptional circumstance”. Indeed, the passage to a new justice system had no impact on the Applicant’s ability to submit a timely request for review. This is obvious from the fact that the relevant period for the purpose of requesting administrative review – i.e. from the notification of the contested decision until the expiration of the time limit prescribed by former staff rule 111.2 (a), on 9 June 2009 – fell entirely under the former justice system. Hence, the change of scheme which occurred nearly a month later could not possibly have affected the Applicant’s ability to request review at that time.

33. In the absence of exceptional personal circumstances, no waiver of the time limits for requesting administrative review could be granted.

34. Concerning the Applicant's assertion that she contacted the Office of the Ombudsman on 6 June 2009, it should be noted that a mere contact would have had no impact on the time limit applicable to a request for administrative review.

35. Based on all the foregoing, the application at hand must be deemed irreceivable *ratione temporis*.

Conclusion

36. For the reasons stated above, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 24th day of February 2010

Entered in the Register on this 24th day of February 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva