UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/050
Judgment No.: UNDT/2010/054
Date: 31 March 2010
Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

AVINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for applicant:
Brian Gorlick, OSLA

Counsel for respondent:
Peri Johnson, UNDP
Teresa Lopez Posse, UNDP

Introduction

1. The applicant, a former Resident Representative with the United Nations Development Program (UNDP) seeks to appeal an administrative decision of the Secretary-General dated 10 January 2008 accepting the recommendations of the Disciplinary Committee (DC) that the applicant be separated from service. The Secretary-General decided that the applicant should be provided one-month's notice and two-months' termination indemnity, modifying the DC's recommendation that three-months' notice be given to him. The DC made its recommendations after finding that the applicant in the period 2000–2004, *inter alia*, deliberately misused the UN rental subsidy scheme; engaged in misrepresentation and false certification in connection with his application; abused his authority by involving a UNDP staff member and a UN Volunteer in the construction project involving his rental property; and abused tax exemption privileges.

2. The application is *prima facie* not receivable before the UN Dispute Tribunal as it was filed, without leave, on 2 February 2010 and relates to a decision taken on 10 January 2008. Furthermore, the application was not pending before the former UN Administrative Tribunal when it ceased operations on 31 December 2009 and accordingly, this is not a case transferred from the Administrative Tribunal. This judgment therefore relates to the question of receivability.

The facts

3. The applicant was charged by the UNDP management with serious misconduct on 6 July 2006, having been sent a copy of the Office of Audit and Performance Review investigation report on 28 March 2006, and was provided an opportunity to make comments thereon. He answered the charges in a number of further submissions which were unsatisfactory to management and the matter was referred to the DC on 13 November 2006. The DC provided a report on 4 October 2007 recommending, essentially, that the applicant be separated from service, a conclusion which the Secretary-General adopted on 10 January 2008.

4. The letter of 10 January 2008, sent on the Secretary-General's behalf by the Deputy Secretary-General, stated, in the final paragraph—

> In accordance with staff rule 110.4(d), any application you might wish to file in respect of the above decision should be submitted directly to the UN Administrative Tribunal. Your attention is drawn to specific time limitations which apply, as set out in Article 7 of the Administrative Tribunal's Statute. Information on the Administrative Tribunal can be found on the internet through a link at www.un.org/law, and can also be requested from the Tribunal by email at unat@un.org.

5. Article 7 of the Administrative Tribunal's Statute states, relevantly, that—

> 4. An application shall not be receivable unless it is filed within…ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant. If the circumstance rendering the application receivable by the Tribunal, pursuant to paragraphs 2 and 3 above, is anterior to the date of announcement of the first session of the Tribunal, the time limit of ninety days shall begin to run from that date.
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> …
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> 5. In any particular case, the Tribunal may decide to suspend the provisions regarding time limits.

(This power is also reflected in the Rules of the Administrative Tribunal, article 24 of which reads, "The Tribunal…may shorten or extend any time limit fixed by these rules".)

6. The applicant states that he received the decision on 15 January 2008, meaning that his application should have been filed by 15 April 2008. In the papers, counsel for the applicant states that extensions of the time limit in which the applicant was required to file his application were granted, first until 10 December 2008 and then subsequently on three occasions until 12 April 2009. I note that there is no supporting documentation on record concerning either the requests or the granting of the extensions of the time limits.

7. On 2 September 2008 the applicant wrote to the Administration requesting documents for his application to the Administrative Tribunal, noting "my application deadline is sept 10". (This request was copied to his Counsel who was at that time serving with the Panel of Counsel (the Former POC Counsel). The following day a UNDP representative requested clarification of what documentation he required, and the applicant responded on the same day asking for a copy of the entire file as he had moved from New York and had no files. Again, in this email he noted "time is short now". The following day, 4 September 2008, UNDP provided the applicant with an electronic version of his submission and asked whether he required further assistance, offering to deliver the documents to the Former POC Counsel. Communications ensued between UNDP staff and the Former POC Counsel, and it appears that on 5 September 2008 the UNDP staff met with the Former POC Counsel to provide copies of the documents the applicant would need for his application. In an email of even date, the Former POC Counsel said to the UNDP staff member, "I wanted to thank you so much for making things so easy for me!!! It was wonderful, and will help so much to finish [the applicant's] case."

8. The Former POC Counsel in her unsworn statement attached in support of the application for an extension of time states that the applicant received an extension of time to file his application from 12 April 2009 to "beyond the 30 June 2009" deadline. However, she did not provide particulars of who requested this extension or any evidence that it was granted, nor were such particulars provided by the applicant's current counsel.

9. On 22 June 2009 the applicant wrote to the Former POC Counsel enquiring "no word are u ok?", in reference to the status of his application to the Administrative Tribunal. He received a response on 25 June 2009, which stated, *inter alia*—

> [W]hen I went to submit your case to the Tribunal, it came out to be over 50 pages, and the cases are not supposed to be more than 10 pages long. As I mentioned to you…I was not able to submit it on time, since it required extensive editing. I got month to month extensions for the case, but … in February … failed to do so. It was

> only noticed the next month when it was time to ask for an extension again, so I had to get a suspension of the time limits. A suspension requires that the applicant not be at fault for missing the time limit – and you certainly are not. I have to put in the request for the suspension with the case, which I have managed to reduce to approx ten pages, and which has to be submitted on 30 June with another case. At that time I must explain why I submitted it late. It is up to the [Administrative Tribunal] to grant the suspension, but since not getting it in on time is certainly not your fault, it looks like it should go through without a problem. I am really sorry that I didn't get it in by the deadline, but as I mentioned to you at the time you sent it to me, if it required much editing, it would take a long time. At any rate, it will be in on 30 June.

10. On 7 September 2009 the applicant again wrote to the Former POC Counsel, asking her to "confirm that [the applicant's] case has been submitted" and noting that he was "extremely concerned" about it. In a second email of that day, he again wrote to the Former POC Counsel stating—

> [The applicant had] spoken with the lawyer who helped me on this case from vienna. she said we should write to the new head of the panel. i hope u have taken actions ... please tell me I am worried.

11. On 14 September 2009 the applicant again wrote to the Former POC Counsel, stating that "your silence is troubling. I will write to POC by end week to try and see what is going on if i do not hear from you soon. please let me know what the status of my application is soonest", and again on 16 October 2009, stating "i desperately need you to complete and submit, even as a placeholder. This is having very negative repercussions on me as until this is resolved i can not pursue key professional opportunities i am being approached for". He again wrote on 21 October 2009, requesting to "hear the status and that my application has finally been submitted…if you need help to get this done, can we seek that out together". There is no evidence that the applicant wrote to the Former POC Counsel or the Panel of Counsel office to follow up.

12. On 25 October 2009 he wrote again, asking her to "please confirm that my application will be filed and that it will be accepted. Please advise what more i can do to make this happen. you have missed many deadlines and left me unaware that this

had not been submitted in a timely manner. I am counting on you to rectify this situation". The applicant provided contact details for her to speak with him.

13. On 30 October 2009, the applicant again wrote to her, querying "what can i do to make this happen. i need this application submitted. can we get another lawyer to help. can i do more myself. please don't cost me my application and my professional reputation. Please get this done". He followed this with another email of 17 November 2009, querying again "can you tell me what is happening now? did you submit. can i have a copy of the work to date as well thanks".

14. In an email of 9 December 2009, the applicant essentially reiterated the request of 17 November 2009 to the Former POC Counsel, finally receiving on 12 January 2010; approximately two weeks before the application was lodged, what appeared to be the first response since June 2009. This response stated "[OSLA] is in the last stages of finalizing your case for transmission to the UNDT, but there are some annexes you mentioned that neither [the Former POC Counsel] nor [OSLA] can locate in the 1000 pages of annexes that [the respondent] gave me."

15. The application was filed on 2 February 2010 with the UN Dispute Tribunal.

Applicant's submissions

16. The applicant's submissions can be summarized as follows:

a. The failure to file the applicant's case with the UN Administrative Tribunal was the fault of the Former POC Counsel, not the applicant. The Former POC Counsel was a volunteer part-time counsel, who, due to a large number of cases, the difficulties of transition from the old system to the new and her own ill-health, failed to file the applicant's application.

b. The Former POC Counsel admits fault in a statement tendered with the applicant's application to the Dispute Tribunal, stating—

> The fault is entirely mine, and not the applicant's in any way…As a result of a protracted illness, my heavy case load, [the applicant] wrote, on my instruction, to the UNAT for an extension of the UNAT application deadline…[it] was first extended until 10 December 2008 and then subsequently on three occasions until 12 April 2009…we missed asking for an additional extension on time and I was told by the UNAT Executive Secretary that I needed to ask for a suspension of the deadline when I was ready to submit the case. The time limit in Mr. Avina's case was also extended beyond the 30 June 2009 dissolution of the Panel of Counsel.

c. The applicant attempted to remain updated with the progress of the preparation of the draft application, evident from his emails between 25 June 2009 and 12 January 2010. The Former POC Counsel failed to keep him or the Panel of Counsel (and later Office of Staff Legal Assistance) updated as to the application's status.

d. There was a considerable degree of informality in communications as to requests for and granting of extensions of time before the Administrative Tribunal.

e. It is in the interests of justice that the application be declared receivable by the Tribunal and the applicant be heard by the Tribunal in order to facilitate the Tribunal in getting to the truth of the matter.

Respondent's submissions

17. The respondent's submissions can be summarized as follows:

a. In the first place, no supporting documentation has been submitted by the applicant concerning his alleged requests to the now defunct Administrative Tribunal for the extension of the time limits and for the Tribunal's agreement to the granting of such extensions.

b. According to paragraph 45 of the UN General Assembly Resolution 63/253, the Dispute Tribunal has jurisdiction over cases transferred from the Administrative

Tribunal. The applicant's case was not pending before the Administrative Tribunal and thus it was not able to be transferred to the Dispute Tribunal.

c. Even if the applicant had have been entitled to submit his case to the Dispute Tribunal, he submitted it more than seven months after the Tribunal was operational, and more than two years after the contested decision was taken. There are no exceptional circumstances in the present case that could justify a further waiver of the time limits. There were no "exceptional circumstances" that were "beyond the control of the applicant", as required by the tests outlined in the Administrative Tribunal's jurisprudence—see e.g. Judgment No. 372 *Kayigambo* (1968), and subsequent applications of this reasoning.

d. The applicant has likewise failed to demonstrate that there are "exceptional reasons" justifying the delay; the applicant in the present case is "not caught in the transition" from the old system to the new so as to make it an exceptional case justifying a waiver. The applicant was aware of the time limits that applied to the filing of his application, and he did not take active steps to present his application within the prescribed time limits, or even within a reasonable timeframe despite the successive extensions he was granted.

e. The applicant was a very senior (D-2 level) former staff member and a lawyer in training who was personally very familiar with his case since he prepared his own submissions during the disciplinary process. Further, the arguments contained in the present application are similar to those included in his previous submissions of 2006 and 2007.

f. At the applicant's request, in 2008 the respondent made available to the applicant and the Former POC Counsel the full file of his case, including his previous submission, to assist him in the preparation of his appeal before the Administrative Tribunal.

Consideration

18. As a preliminary matter, in the process of deciding to determine the matter on the papers, I have given the parties adequate opportunity to make submissions; in the applicant's case, in both his initial submission and in providing a response to the respondent's motion to dismiss submission on receivability. Indeed, from the response to the respondent's submission, the applicant is clearly aware that "the matter of receivability may ultimately be decided without an oral hearing".

19. I address firstly the respondent's contention that the Tribunal does not have jurisdiction over this matter as there is no evidence that it was properly pending before the former UN Administrative Tribunal, and therefore capable of being transferred from it. I do not find this argument persuasive. As noted in *Gabriel* UNDT/2009/067, the Secretary-General's bulletin on Transitional Measures does not, in my view, exclude any decisions made prior to 2 April 2009 from being challenged before the Tribunal, if those applications are properly before the Tribunal. However, unlike in *Gabriel*, the applicant has filed the application some thirty weeks after the commencement of the Dispute Tribunal, rather than approximately two weeks, admitting also to having failed to apply for an extension or suspension between at least June 2009 and February 2010. Moreover, as the Administrative Tribunal had already granted extensions of time to the applicant, the matter was, in my view, pending before it.

20. Finding the Tribunal has jurisdiction, I will now consider whether leave should be granted for the applicant's late filing. The Statute and Rules of Procedure of the Dispute Tribunal confer on the Tribunal the power to extend time limits. The Tribunal is empowered to suspend or waive deadlines, only in exceptional cases, within a three-year limitation period (cf. articles 8.3–8.4 of the Dispute Tribunal's Statute and article 7.5 of its Rules of Procedure), which limitation period the current application is within. A request for suspension, waiver or extension of the time limits must set out the exceptional reasons which the applicant says justify the request. I have previously stated (*Morsy*, above, the application of which has been affirmed by the Tribunal—see e.g. *Rosca* UNDT/2009/052, *Sethia* UNDT/2010/037) that the case

and the reasons outlined in the request must be out of the ordinary, quite unusual, special, or uncommon; they need not, however, be unique, unprecedented or beyond the applicant's control.

21. The applicant has filed his application more than two years after the contested decision was made. There is no documentary evidence of any extension, waiver or suspension of time; indeed there is an admission that there was no formal extension or suspension beyond April 2009, and none at all beyond June 2009. However even if I am to take the applicant's case at its highest and find that despite the lack of a paper trail he had the necessary extensions up until at least 30 June 2009, I must now consider whether I should exercise my discretion in his favour granting him the necessary waiver or suspension. The applicant having filed a request outlining what he says are the exceptional reasons in his exceptional case, it is for me to determine whether the test is satisfied. The facts I consider salient in the present case are the following. In favour of the applicant's contention are the facts that he engaged the Former POC Counsel to assist him within a short time after receiving the notification of the Secretary-General's decision and that, at least from 22 June 2008, he followed-up his Counsel on several occasions. Against him are the facts that the contested decision occurred a substantial time (over two years) ago, that he at no stage attempted to contact either the Administrative Tribunal or Dispute Tribunal himself (despite having earlier taken a direct role in obtaining documents for his application), that as a senior official who had commenced working with the Organization seventeen years prior and who had already been through the disciplinary processes of the UN, he should have been adequately aware of the nature of this process, and that he had on various occasions indeed acknowledged his awareness of the importance of deadlines within the appeals process.

22. The Administrative Tribunal's Statute (like that of the Dispute Tribunal) did not require an applicant to have legal representation; applicants were able to access it directly, at no cost. If applicants filed an application that was not substantively correct, the application was not automatically invalidated, as the Rules of Procedure

provided that the applicant could be requested to make corrections (art 10). In the applicant's case, he says that, although he had counsel, counsel did not lodge his application timeously, despite his asking her on many occasions to—essentially, that his reliance, coupled with her failings, constitutes exceptional circumstances. In my view, for his argument to succeed, the applicant must show that his reliance was a reliance that was both absolute and reasonable.

23. Aside from generalisations, there is a serious lack or particularity in the reasons the applicant advances for his default. In order to support his application for an extension of time, the applicant has produced a number of e-mails between himself and the Former POC Counsel. One of the documents produced by the applicant is redacted by the deletion of some three lines with a black marker. The evidentiary value of such a document is therefore highly questionable.

24. Essentially, it is the applicant's case that the responsibility for the delay in bringing the claim rests solely with the Former POC Counsel rather than the applicant. His Former POC Counsel has provided an unsworn statement setting out the reasons for her inability to action the matter over a period of two years. The reasons given by the Former POC Counsel for her default in this case are extremely generalised, not supported by any independent evidence, and are not sufficient to satisfy the tribunal that she was unable to carry out her duties at any particular time, for any particular reason over the two year period.

25. The applicant too does not come out of the situation with an unblemished record due to his lack of action and failure to follow up the matter with the Panel of Counsel or the relevant tribunal. The applicant could easily have sought to engage alternate counsel or asked the Panel of Counsel for a reassignment of the case to another counsel. Indeed at the disciplinary level, the applicant had engaged the selfsame Former POC Counsel together with a private attorney.

26. This to my mind is therefore a case where the applicant's own explanation of the default is not convincing nor reasonable. To visit a litigant with the sins of his

attorney or representative, there must be some fault on the litigant's part. Regrettably, the litigant in an appropriate case is to bear the consequences of the professional negligence of his agent, (if that is the argument), particularly where the litigant himself has not been vigilant. Accordingly, because of the inaction of the applicant, I have less hesitation in visiting the sins of the Former POC Counsel on him, and that simply confirms me in the view that the applicant has failed to overcome the obstacle of giving a satisfactory explanation for his default.

27. The applicant indicated in September 2008 that he was aware of the deadlines for filing. The filing deadline had already been and was extended a number of times again from then. The applicant has not furnished any evidence other than a reference in the Former POC Counsel's statement to show that the deadline was extended from April 2009 until at least 30 June 2009, despite having been given opportunity to do so. In answer to the respondent taking up this point, the applicant's response merely stated that "under the former practice before the UN Administrative Tribunal, there was a considerable degree of informality in communications as to requests for and granting of extensions of time. This appears to have been the practice in this case". No evidence of such informal communications, such as references to conversations or informal emails, is before the Tribunal, despite opportunity to provide it having been given. Indeed, the statement is merely a general description of past practice which goes no way to proving whether the applicant's deadline was extended, or even whether representations were made that it would be.

28. The evidence the applicant has put forward shows that he did not contact the Former POC Counsel until 22 June 2009, enquiring simply "no word are u ok?". If the deadline was not extended from April 2009, then this follow-up would already have been out-of-time. Even if it was extended, and assuming this casual enquiry refers to his application, the applicant still did not contact the Former POC Counsel again after her response of 25 June 2009 until September 2009, nearly two and a half months later and well after even the "extended" filing deadline, seeking confirmation that the application had been filed.

29. This was not a case of an applicant who assumed that all he had to do was appoint counsel, and that the application would then be out of his hands entirely. The correspondence shows the applicant's awareness throughout both 2008 and 2009 of his responsibility in ensuring that his application was filed timeously. In light of his consciousness of the deadlines and their consequences, and recalling that a staff member genuinely concerned about safeguarding their rights is easily able to contact the Tribunal directly in order to do so, it strikes me that the applicant's behaviour can hardly be said to have exhibited either total reliance on his counsel, or vigilance in relation to his rights.

30. As I have previously stated (see *Morsy*, above) an applicant must show that he or she has not been negligent or forfeited the right to be heard by inaction or a lack of vigilance. I do not believe that the applicant has satisfied this requirement in this case. If it were solely the Former POC Counsel's responsibility to ensure his application was filed, the applicant's argument might be convincing. However, a staff member cannot be said to hand over unreservedly the responsibility for ensuring the lodgment of his application upon the appointment of counsel. I do not consider that it is necessarily unusual, special, or uncommon for a staff member to find that his rights have not been protected where he himself has not, fully aware of the consequences, taken any responsibility for them.

31. I do not consider that the facts are analogous to those of *Morsy*, where the applicant tried personally and persistently to obtain guidance from the Administrative Tribunal, before his application's deadline, and where the contested decision was a matter of months, not years, prior to his filing. I am not able to find that a waiver of the time limits in this matter is justified in the circumstances of such an inordinate delay and in the absence of convincing reasons.

32. In light of my findings, I do not consider that the interests of justice justify a waiver under article 35 of the Tribunal's Rules of Procedure.

33. As a final matter, I note that the applicant in his response to the respondent's motion, made an allegation that the Office of Audit and Investigations dealt in 2008 in an unrelated matter with wholly dissimilar facts with a senior UN staff member in "a suspiciously favourable manner which did not result in disciplinary proceedings". This allegation is unfounded and, more pertinently, irrelevant. The inclusion of such spurious argument in pleadings and submissions is not only unwarranted but plainly irrelevant.

Conclusion

34. On the basis of the above reasoning, I find that no extension or waiver should be granted. Accordingly, the application is rejected in its entirety.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 31st day of March 2010

Entered in the Register on this 31st day of March 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York