UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/072
Judgment No.: UNDT/2010/102
Date: 03 June 2010
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

ABU-HAWAILA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Amal Oummih, OSLA

Counsel for respondent:
Simone Parchment, WFP

Introduction

1. On 22 February 2010, the applicant, a former local staff member of the World Food Programme (WFP) in Amman, Jordan, filed with the United Nations Dispute Tribunal (UNDT) an application against the decision to separate him from service.

Facts

2. The applicant joined WFP in 1999 as a driver on a fixed-term appointment, in Amman, Jordan. In December 2006, he suffered a back injury while on duty. This injury became the reason for extended periods of sick leave until his separation in July 2009.

3. By e-mail dated 18 March 2009, WFP informed the UN Medical Services Division at UN Headquarters, New York, that the applicant "ha[d] not been able to work for long periods of time due to an extended illness" and therefore "propose[d] his case for a disability benefit".

4. By e-mail dated 3 April 2009, the UN Medical Services Division informed WFP that the applicant was found not eligible for a disability benefit because he had "not exhausted all the means of treatment for his medical condition", i.e. surgery.

5. By letter dated 31 May 2009, the WFP Office in Amman informed the applicant that he was not eligible for a disability benefit. In the same letter, the Office informed him that the Regional Bureau had not made any recommendation for the renewal of his contract, which was due to expire on 30 June 2009.

6. Effective 1 July 2009, the applicant's appointment, which was due to expire on 30 June 2009, was extended for one month until 31 July 2009 to cover the duration of the applicant's certified sick leave.

7. According to the applicant, on 26 July 2009, he dropped off a medical certificate at the WFP Office in Amman for an additional two-week period of sick leave starting that day. According to the respondent, WFP received copies of medical reports dated 14 July 2009 during the first week of August 2009, i.e. after

the applicant's appointment had already expired, as well as a copy of a medical report dated 26 July 2009 on 26 January 2010.

8. On 28 July 2009, the Officer-in-Charge (OiC), WFP Office in Amman, reportedly called the applicant to inform him that he did not need to submit additional medical reports as his contract would expire at the end of the month.

9. On 29 July 2009, the applicant received a memorandum dated 21 July 2009 from the OiC, WFP Office in Amman, entitled "Your mutually agreed to separation from the Programme" [*sic*]. The OiC notified the applicant that she had "approved [his] Agreed-Upon separation from the Programme under UN Staff Regulation 9.3 (a) (vi)" and that his last day of service would be 31 October 2009. She further informed him that he would receive as termination indemnity "10 years and one month net base salary as defined in UN Staff Rule 9.8 … (JOD 6,158.35); additional 50% termination indemnity in accordance with Staff regulation 9.3 (d) (JOD 3,079.18); three months pay in lieu of notice (JOD 2,182.25)" [*sic*].

10. By letter dated 17 September 2009, the applicant requested a management evaluation of the decision to separate him from service.

11. By letter dated 29 September 2009, the WFP General Counsel acknowledged receipt of the applicant's request for a management evaluation and informed him that the matter was under consideration and that he would receive a reply "not later than 3 November 2009", i.e. within the 45 days' response period provided for in the Staff Rules. No reply was however sent to the applicant.

12. By letter dated 24 November 2009 marked "**PRIVILEGED & CONFIDENTIAL** FOR SETTLEMENT PURPOSES ONLY" (emphasis in the original), the WFP General Counsel, making reference to the applicant's request for a management evaluation, noted among other things that "the preliminary assessment of the evidence show[ed] that [his] appointment was not terminated, but merely expired" and that "the decision not to renew [his] fixed-term contract was properly taken". However, the General Counsel further noted that the applicant had "previously turned down an offer of mutually agreed separation … in connection with the expiry of [his] contract" and that "in light of [his many

years of service", WFP was "willing to make that offer available to [him] again". The applicant was requested to provide an answer within 14 days.

13. At the request of counsel for the applicant, the respondent consented to an extension of time until 28 December 2009 for the applicant to consider the above-mentioned settlement offer.

14. In an e-mail dated 22 December 2009, counsel for the applicant requested that the WFP Legal Office provide her with the "letter of termination or other notification of separation" sent to the applicant.

15. On the same day, the WFP Legal Office responded to counsel for the applicant that "[d]ue to the abolition of his post, his contract was not extended past 31 July 2009".

16. By e-mail dated 24 December 2009, counsel for the applicant requested that the WFP Legal Office provide clarifications as to the circumstances leading to the applicant's separation, noting inconsistencies in WFP communications in this respect.

17. By e-mail dated 29 December 2009, the WFP Legal Office reiterated that the applicant "was separated from WFP on 31 July 2009 due to the expiration of his fixed-term appointment" and further to the abolition of his post. It added that the applicant's contract was extended until 30 June 2009 pending determination of his eligibility for a disability benefit, then until 31 July 2009 "solely for the purpose of allowing him to utilize his sick leave entitlement", which "ended mid-July". Finally, it noted that, absent a response from the applicant on the settlement offer by the end of the day, WFP would consider that it had been rejected.

18. By e-mail dated 31 December 2009, counsel for the applicant responded to WFP that she was "confident that by next week, we would have the opportunity to properly respond to the [settlement] offer". WFP requested in turn to receive a response to the offer by no later than 8 January 2010, which deadline was subsequently extended to 17 February 2010 at the applicant's initiative.

19. On 17 February 2010, having received no response to the settlement offer, the respondent sent a reminder to counsel for the applicant.

20. On 22 February 2010, counsel for the applicant filed an application with the Tribunal against the decision to separate the applicant from service. Attached to the application and referred to as the respondent's response to the applicant's request for a management evaluation was the confidential settlement offer dated 24 November 2009.

21. On 24 February 2010, still having received no response on the settlement offer, the respondent informed counsel for the applicant "that the matter would proceed to management evaluation".

22. Also on 24 February 2010, the Tribunal forwarded to the respondent the application and gave him until 26 March 2010 to submit its reply.

23. On 26 March 2010, counsel for the respondent filed a "motion to dismiss application" on the grounds that that it "is not receivable by the Tribunal as the applicant has not yet received a response to his request for management evaluation" and "therefore has not exhausted all remedies available to him under the UN Staff Regulations and Rules". The respondent further objected to the applicant's disclosure to the Tribunal of the confidential settlement offer of 24 November 2009.

24. At the directions hearing that was held on 15 April 2010, the presiding Judge drew the parties' attention to the fact that since the time limit for the management evaluation was 3 November 2009, the application, which was filed on 22 February 2010, should have been filed on or before 1 February 2010, and therefore might be time-barred. The parties agreed to the Judge's proposal to suspend the proceedings for two weeks to give them another possibility to reach an informal settlement. The proceedings were thus suspended until 29 April 2010, which deadline was subsequently extended until 13 May 2010 at the parties' request.

25. By letter dated 13 May 2010, counsel for the respondent informed the Tribunal that the parties had been unable to come to an agreement.

26. By e-mail dated 14 May 2010, counsel for the applicant filed with the Tribunal, on her own motion, a "memorandum of law on receivability", in which she argued that the application should be deemed receivable *ratione temporis*.

27. On 21 May 2010, at the request of the Tribunal, counsel for the respondent filed comments on the above-mentioned submission.

28. On 26 May 2010, counsel for the applicant filed, again on her own motion, a document entitled "Clarification of applicant's submission of 14 May 2010", whereby she withdrew most of the arguments contained in her previous submission but reiterated that the application had been filed in a timely manner.

Parties' contentions

29. On receivability, the applicant's principal contentions, as contained in his counsel's submission of 14 May 2010, are:

a. The application is receivable as the deadline for filing it was extended due to the ongoing settlement negotiations with the parties. Settlement negotiations started shortly after the applicant submitted a request for a management evaluation and ended at the earliest on 24 November 2009, or at the latest on 8 December 2009. Therefore, the application of 22 February 2010 was timely filed as it was filed within 90 days of the respondent's final offer;

b. Additionally, it is clear from the respondent's submission of 26 March 2010 that "the request for management evaluation was held in abeyance pending the outcome of settlement negotiations, at the end of which the respondent would have 45 days to conduct a management evaluation if the negotiations failed". The respondent's evaluation would then "have been due at the earliest on 8 January 2010 (i.e. 45 days from 24 November 2009), or at the latest on 22 January 2010". In these circumstances, the application was also filed 90 days of the expiration of the deadline for the Secretary-General's response;

c. The applicant concedes that settlement negotiations are different from both availing oneself of the services of the Office of the Ombudsman and resorting to mediation as required by the UNDT statute and the Staff Rules. However, considering the spirit of the rules and the intent of the General Assembly, the applicant submits

that "when the Secretary-General chooses to engage in settlement negotiations with a staff member rather than to respond to that staff member's request for a management evaluation, then that staff member should be legally entitled to rely on the good faith of the Secretary-General and the Secretary-General should be estopped from later asserting the claim is time-barred";

d. Alternatively, the Dispute Tribunal should waive the filing deadline for the application due to exceptional circumstances. This is an exceptional case within the meaning of article 8.3 of the UNDT statute as both parties were operating under the presumption that the settlement negotiations tolled the time limit for the Secretary-General to file a response to the request for a management evaluation. If this presumption was accurate, it would in turn toll the time limit for filing an application with the Tribunal. If it was not, then both parties were operating under a mistaken presumption of law. The deadline for the filing of the application should be waived as the applicant, in delaying his application pending settlement negotiations, was relying on the good faith of the Secretary-General, who himself was relying on a mistaken understanding of law;

e. The circumstances of the instant case are also exceptional because the time limit to file an application with the UNDT is not clear. The language used in staff rule 11.4 (a) is indeed inconsistent with the language used in article 8.1 (d) of the UNDT statute;

f. The applicant should not lose his right to seek redress for the violation of his rights due to a procedural error committed by counsel provided by OSLA. The applicant worked for the Organization as a driver and has very limited knowledge of the English language and therefore consistently relied on others to guide and assist him through the process;

g. The application is receivable because a finding to the contrary would result in irreparable harm to the applicant as the applicant has high likelihood of success on the merits.

30. In response to the above, the respondent's principal contentions, as contained in his submission of 21 May 2010, can be summarized as follows:

a. The application is not receivable because, as raised by the Tribunal, it was filed after the statutory time limit had expired;

b. The direct settlement negotiations in which the parties engaged did not have the effect of extending the statutory time limits for application because the parties did not use the services of either the Office of the Ombudsman or the Mediation Division as required by the rules;

c. Furthermore, contrary to the applicant's claims, informal resolution discussions did not commence until 24 November 2009, i.e. after the deadline for the response to the applicant's request for management evaluation had already expired. Therefore the deadline for the response to the applicant's request for a management evaluation could not be tolled by events that occurred after it had already expired;

d. Also, informal resolution discussions concluded unsuccessfully on 17 February 2010, and not on 24 November 2009 or 8 December 2009, as claimed by the applicant. Should the Tribunal accept the applicant's arguments that the deadline for the response to his request for a management evaluation was tolled by the informal discussions between the parties, then the application is not receivable because it was filed before the time limit for the administration's response to the request for a management evaluation expired;

e. The time limits for contesting administrative decisions are well known and are of vital importance for ensuring the stability of the situation created by an administrative decision and the proper functioning of the Administration, as consistently held by the

former United Nations Administrative Tribunal. In the case at hand, the applicant has failed to demonstrate the existence of exceptional circumstances that would warrant a waiver of the applicable time limits;

31. Further to the respondent's submission summarized above, counsel for the applicant made another filing whereby she withdrew most of the arguments contained in her previous submission, on the grounds that counsel for the respondent rightfully pointed out that settlement negotiations only started on 24 November 2009 and ended on 17 February 2010. She nevertheless reiterated that the application had been filed in a timely manner for the following reasons:

a. The applicant filed his request for a management evaluation (MER) on 19 September 2009. The respondent had until 3 November 2009 to respond to it but did not do so until 24 November 2009. Pursuant to staff rule 11.4 (a) and article 8.1 of the Tribunal's statute, "the deadline for filing an application would either have been 1 February 2010 (90 days after the expiry of the MER response period) or 22 February 2010 (90 days after the respondent's response…)";

b. The letter of 24 November 2009 had all marks of an evaluation review made in response to the applicant's request for management evaluation. The application was therefore timely filed on 22 February 2010 as it was within 90 days of receiving the response to the request for a management evaluation;

c. Alternatively, the time limits for filing the application were tolled during settlement negotiations, which ended on 17 February 2010. Under this scenario, the application was also timely filed.

Considerations

32. While WFP recognized the jurisdiction of the International Labour Organization Administrative Tribunal, this case is properly before the UNDT since the appointment of the applicant, as a locally recruited staff member working in a field office, is administered by the United Nations Development

Programme and his terms of appointment are governed by the UN Staff Regulations and Rules.

33. Turning to the receivability *ratione temporis* of the application, article 8, paragraph 1, of the UNDT statute provides that:

> "1. An application shall be receivable if:
> …
> (*d*) The application is filed within the following deadlines:
> (i) In cases where a management evaluation of the contested decision is required:
> *a.* Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or
> *b*. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;
> …
> (iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (*d*) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division."

34. Also of relevance in this case are the following staff rules:

Provisional staff rule 11.1, "Informal resolution":

> "(c) The conduct of informal resolution by the Office of the Ombudsman, including mediation, may result in the extension of the deadlines applicable to management evaluation and to the filing of an application with the United Nations Dispute Tribunal, as specified in staff rules 11.2 (c) and (d) and 11.4 (c) below."

Provisional staff rule 11.4, "United Nations Dispute Tribunal"

> "(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.
> …
> (c) Where mediation has been pursued by either party within the deadline for filing an application with the United Nations Dispute

> Tribunal specified in staff rule 11.4 (a) or (b) and the mediation is deemed to have failed in accordance with the rules of procedure of the Mediation Division of the Office of the Ombudsman, the staff member may file an application with the Dispute Tribunal within ninety calendar days of the end of the mediation."

35. The applicant's main argument is that the respondent's letter of 24 November 2009 was the Administration's response to the applicant's request for a management evaluation; therefore, the application was timely filed on 22 February 2010, as it was exactly within 90 days of the Administration's response. Alternatively, the applicant argues that the time limits for filing the application were tolled by the settlement negotiations, which ended on 17 February 2010.

36. The Tribunal finds that the respondent's letter of 24 November 2009 cannot be considered as the "response by management" within the meaning of article 8.1 of the UNDT statute or as the "outcome of the management evaluation" pursuant to provisional staff rule 11.4. Whereas both expressions clearly refer to a final decision on a request for management evaluation, the respondent's letter of 24 November 2009 was clearly and unequivocally marked "**PRIVILEGED & CONFIDENTIAL** FOR SETTLEMENT PURPOSES ONLY" (emphasis in the original). While the letter did make a reference to the applicant's request for a management evaluation, it was only by way of introduction to the settlement offer contained in the said letter. The indication "FOR SETTLEMENT PURPOSES ONLY" in block capitals at the top of the letter left no room for interpretation as to the purpose of this letter, which was not to respond to the applicant's request for a management evaluation.

37. In addition, the respondent's letter of 24 November 2009 does not contain any decision with respect to the applicant's request, whilst this is the main purpose of the management evaluation procedure. Finally, the letter does not contain any guidance as to the available legal remedies, as is usually the case in the response to a request for management evaluation.

38. As regards the production of the letter of 24 November 2009 with the application, the Tribunal feels bound to remind parties that pursuant to article 7.2 (c) of its statute, article 15.7 of the Tribunal's rules of procedure provides that:

> "All documents prepared for and oral statements made during any informal conflict-resolution process or mediation are absolutely privileged and confidential and shall never be disclosed to the Dispute Tribunal. No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Dispute Tribunal."

39. Since the Tribunal found that the letter of 24 November 2009 was not, and could not be mistaken for, a response to a request for a management evaluation, it could save for another day the question of whether the time limit to file an application with the Tribunal would start to run anew if the Administration were to respond to a request for a management evaluation *after* the expiry of the relevant response period for the management evaluation. Because of the important implications this issue may have in other cases, the Tribunal nevertheless makes the following observation.

40. There is indeed an inconsistency between article 8.1 (d) (i) of the UNDT statute and staff rule 11.4 (a). In accordance with the said article, in order to be receivable, an application must be filed either within 90 days of the applicant's receipt of the Administration' response to his or her request for a management evaluation or within 90 days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. As for provisional staff rule 11.4 (a), it requires that the application be filed *by the earlier* of these two dates.

41. There is no question that the UNDT statute is legislation of higher level than the Staff Rules and that in case of contradiction or inconsistency, the former must prevail over the latter. Accordingly, and regardless of staff rule 11.4 (a), the Tribunal considers that the time limit to file an application would start to run anew if the Administration were to respond to a request for a management evaluation *after* the expiry of the relevant response period for the management evaluation.

42. The Tribunal must also reject the applicant's subsidiary argument, i.e. that the time limits for filing the application were tolled by the settlement negotiations, which ended on 17 February 2010.

43. The above-quoted provisions of the UNDT statute and provisional Staff Rules clearly set out that informal resolution may result in the extension of the

deadlines for filing an application with the UNDT only if such informal resolution is conducted by the Office of the Ombudsman.

44. The Tribunal is not convinced by the applicant's contention that any sort of informal discussions between the parties, outside any legal or procedural framework, should have the same effect on time limits as informal resolution conducted by the Office of the Ombudsman pursuant to established rules and procedures. Encouraging informal dispute resolution, as the General Assembly did and as the Tribunal often does, is not tantamount to saying that the legal consequences attached to any type of informal resolution should be the same no matter how it is conducted and who conducts it. If it were so, it would often be difficult, if not impossible, for the Tribunal to ascertain whether or not an applicant has complied with time limits.

45. Finally, the Tribunal did not find any exceptional circumstances that would warrant a waiver of the time limits in this case.

46. According to article 8, paragraph 3, of the UNDT statute, the Tribunal may suspend or waive the deadlines to file an application "only in exceptional cases". Article 7, paragraph 5, of the UNDT rules of procedure provides that an applicant may seek suspension, waiver or extension of the time limits "in exceptional cases"; the request shall set out the "exceptional circumstances" that justify it.

47. In judgment UNDT/2010/019, *Samardzic et al.,* the Tribunal emphasized the importance of time limits in general. With regard to exceptions, it stated:

> "29. It is necessary to recall that time limits are connected to individual action, i.e. submitting an application for legal remedy within a fixed time frame. Therefore, exceptions to the prescribed time limits must also be related to the individual conditions and circumstances of the person seeking legal remedy, not to the characteristics of the application. Of course, all relevant factors have to be considered (see UNDT/2009/036, *Morsy*). However, relevant factors for an Applicant's failure to act within the prescribed time limits are confined to his individual capacities. Factors like the prospects of success on the merits and the importance of the case are extraneous to the requirement to submit an application within the prescribed time limits and should not be taken into account at this level. Thus, the "exceptional cases" mentioned in article 8, paragraph 3, of the UNDT statute also refer

> to the Applicant's personal situation and not to the characteristics of the application.
>
> 30. In other words, exceptional cases arise from exceptional personal circumstances. 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."

48. In its judgment No. 2010-UNAT-029, *El-Khatib*, the UN Appeals Tribunal, like the UNDT in *Samardzic et al.* and in other cases, also upheld the definition of "exceptional circumstances" adopted by the former UN Administrative Tribunal by stating that:

> "14. … According to the jurisprudence of the former [Administrative] Tribunal, applications submitted after the expiration of the time limits for filing appeals were time-barred, except in cases where the applicant set out "exceptional circumstances" beyond his or her control that prevented the applicant from exercising the right to appeal in a timely manner… Article 7, paragraph 2, of the rules of procedure of the present Appeals Tribunal replicates this jurisprudence by providing that: 'In exceptional cases, an appellant may submit a written request to the Appeals Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1. The written request shall succinctly set out the exceptional reasons that, in the view of the appellant, justify the request.'"

49. As regards exceptional circumstances in the case at hand, two of the applicant's initial arguments have become moot since, as admitted by counsel for the applicant, they were based on errors of fact. There only remain two: first, the applicant should not lose his right to seek redress for the violation of his rights due to a procedural error committed by counsel provided by OSLA, and second, the applicant has "a high likelihood of success on the merits". The latter must be rejected for the reasons explained in *Samardzic et al*.

50. As regards the former, the Tribunal cannot and should not, except in rare situations, excuse an applicant for the failure of his or her counsel to successfully defend his or her case. In judicial proceedings, no distinction should normally be made between a party and its representative. Representation means that a party and its duly authorized counsel are regarded as a single entity. Except in cases where counsel would abuse his or her authority, all actions taken by counsel are to be attributed to the party he or she represents.

51. In this case, the application is time-barred because of the failure of counsel for the applicant to file it within the statutory time limits. Whilst it is regrettable that the applicant must bear the consequences thereof, this is not an exceptional circumstance warranting the waiver of the time limits.

Conclusion

52. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 3rd day of June 2010

Entered in the Register on this 3rd day of June 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva