UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/046/ UNAT/1718
Judgment No.: UNDT/2010/184
Date: 15 October 2010
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

AMARILLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bernard Adams, OSLA

Counsel for respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat
Christine Graham, ALS/OHRM, UN Secretariat

Introduction

1. The applicant contests the Secretary-General's decision to place a letter of censure on his official status file following charges of sexual harassment against him, despite the recommendation of the Joint Disciplinary Committee ("JDC") that the charges be dropped. The applicant alleges that he was subjected to mobbing and discrimination based upon his social class, that he was denied due process, and that the respondent erred in the exercise of his broad discretion in relation to disciplinary matters. The applicant seeks withdrawal of the letter of censure and compensation of one year's net base salary for denial of due process. In his answer, the respondent submits as a preliminary matter that the application is not receivable because it is time-barred.

2. This application was received by the former United Nations Administrative Tribunal on 6 July 2009. This case was transferred to the Dispute Tribunal on 1 January 2010. In response to Case Management Order No. 132 (NY/2010), dated 25 May 2010, both parties requested the Dispute Tribunal to determine, as a preliminary matter, whether this application is receivable. Both parties were invited to file further submissions on receivability. On 8 and 11 October 2010, the Tribunal received a submission from the respondent and a confirmation from the applicant that he did not wish to make any further submissions. The application, the respondent's answer and subsequent submissions constitute the pleadings and the record in this case.

Background

3. The applicant joined the Organisation on 1 July 2004 as an Information Assistant at the G-7 level with the United Nations Information Center in Paraguay, which is part of the Department of Public Information. On 12 October 2005 a Communications Officer with the United Nations Development Programme filed a complaint against the applicant alleging sexual harassment and abuse of authority.

On 10 October 2006, following an investigation carried out by a two-member investigation panel appointed by the Assistant-Secretary-General for Human Resources Management, the applicant was formally charged with the sexual harassment of six women. The matter was subsequently referred to the JDC. In its report adopted on 7 October 2008 the JDC recommended that the charges against the applicant be dropped.

4. The Deputy Secretary-General transmitted a copy of the JDC report to the applicant by letter dated 11 November 2008, informing him that the Secretary-General had decided not to accept the recommendation of the JDC, choosing instead to admonish the applicant with a written censure. The Deputy Secretary-General's letter stated:

> The JDC considered that the present case was brought not because the evidence itself was sufficient to establish that the allegations more likely than not occurred, but because there were several complainants making allegations of the same type of misconduct. The JDC noted that the conduct described in a number of the allegations in this case were comments made by you in referring to a colleague or to a colleague's appearance. The JDC also noted that you generally admitted that you made such compliments or *piropos* in Spanish.
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> The JDC considered ST/AI/379 and noted that to classify conduct as sexual harassment, the conduct in question: (i) must be of a sexual nature; (ii) must be unwelcome; and (iii) must either interfere with work, or be made a condition of employment, or create an intimidating, hostile or offensive environment. The JDC considered that some of your remarks were of a sexual nature or could be perceived as such and that some individuals may have genuinely felt offended by such language. The JDC, however, did not believe that the third necessary element—that the conduct must be unwelcome—was present. The JDC considered that the notion of "unwelcome conduct" implies that the alleged offender knew or should have reasonably known that his/her conduct could be perceived as offensive by others.
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> The JDC noted, however, that you repeatedly failed to adequately perceive the reaction of your colleagues, in particular women, to your words and behaviour. In this respect, the JDC noted that many witnesses repeatedly stated that you "[were] not very aware

> that [your] behaviour bothered other people". The JDC also noted that it is well documented in the case files that when explicitly informed that your conduct or words were seen as offensive and unwelcome, you never repeated the act that was identified to you as objectionable. Consequently, the JDC unanimously found that the allegations in the present case were not supported by adequate evidence and unanimously recommended that the charges against you be dropped.
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> The Secretary-General has considered your case in the light of the JDC's report, as well as the entire record and totality of the circumstances, and has decided not to accept the conclusion of the JDC that your conduct did not violate the standards set out in paragraph 2 of ST/AI/379 on sexual harassment. …
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> Based on the available evidence, the Secretary-General is of the opinion that you knew or should have reasonably known that your comments or *piropos* could be perceived as offensive by others. In light of the foregoing, the Secretary-General considers that your actions in respect of the charges amount to misconduct, which warrants the imposition of a disciplinary sanction pursuant to Staff Rule 110.3(a). In light of this conclusion, the Secretary-General cannot accept the JDC's recommendation that the charges against you be dropped.
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> Accordingly, pursuant to the Secretary-General's discretionary authority in disciplinary matters, he has decided that you receive a written censure pursuant to Staff Rule 110.3(a)(i). The Secretary-General has decided that this letter shall serve as the letter of censure and that a copy of it should be placed on your official status file. Additionally, the Secretary-General has decided that you undertake gender sensitivity training as soon as possible. Accordingly, you are requested to advise the Office of Human Resources Management, within 90 days from the date of this decision letter, of your compliance in this regard.
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> In accordance with staff rule 110.4(d), any appeal you might wish to file in respect of the above decision should be submitted directly to the Administrative Tribunal.

5. It is common cause that the applicant was verbally informed of the letter of censure on 13 November 2008, although he alleges that he only received a copy of the letter by email on 1 December 2008. The letter was provided to the applicant only and not to his counsel.

6. The applicant subsequently filed an application with the former United Nations Administrative Tribunal. The application was dated 30 June 2009 and was received by the Administrative Tribunal on 6 July 2009. As the application was filed after the applicable time limit, attached to it was a letter from the applicant's counsel, dated 30 June 2009, stating:

> 1. The JDC hearings in [the applicant's case] concluded in June 2008 and right after that, Counsel and two members of the JDC Panel travelled to West Africa for a month of JDC hearings. The JDC report was sent to the Deputy Secretary-General on 7 October 2008. After one month, [the applicant] had not heard anything about the outcome. So he sent a written request to the JDC for a copy of the report on 10 November 2008. The JDC sent a copy of the report to him on 11 November 2008.
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> 2. On 13 November 2008, [the applicant] was verbally informed that the Deputy [Secretary-General], Ms. Migiro was going to send him a letter of censure regarding the sexual harassment allegations, despite the recommendation of the JDC that the charges against him be dropped. Then on 1 December 2008, he received by e-mail a copy of the censure letter, dated 11 November 2008.
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> 3. The Administration of Justice Unit normally copies the Panel of Counsel office when it sends decisions and reports to staff members. The Panel of Counsel staff then calculate the deadline for the staff member to submit an appeal and enter it into their database. In [the applicant's] case the Administration of Justice Unit made a mistake and did not copy either the Panel of Counsel office or Counsel. As a result, no deadline for an appeal was entered in the database.
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> 4. Since I retired from the United Nations, I spend most of the winter months in Florida, often in rural areas where there are forests, sub-tropical jungle, and large remnant of prairie, which offer interesting mountain bike trails. Communications by either cell phone or Internet is typically very poor. So, before I leave, I pass on urgent Panel of Counsel cases to other Counsel. The less urgent cases I take with me and I work on them as time and communications permit. The Panel of Counsel office routinely requests extension of deadlines for the less urgent cases because I am still working on them. Last winter I went to Texas, as well as Florida, so that I could do some desert bike riding. I mistakenly assumed that the Panel of Counsel would request extensions of the deadline for [the applicant] … They didn't make any request because there was no deadline in the database.

> 5. It would be grossly unfair to [the applicant] for his Application to be time barred because of errors by the Administration of Justice Unit and by Counsel. Consequently, I respectfully request that the Administrative Tribunal consider the Application of [the applicant].

Parties' submissions

7. The applicant requests that the Tribunal find the appeal receivable. In support of the request, the applicant attaches only the aforesaid letter from his counsel to explain the delay in filing the appeal. In short, his argument is that the notification of the contested decision was provided to the applicant only and, therefore, the Panel of Counsel did not enter the deadline for the appeal into its internal database and the deadline was subsequently missed. Furthermore, according to the applicant's counsel, counsel was under the mistaken assumption that his office (the Panel of Counsel) would request an extension of the deadline but failed to do so as it was not entered in the database.

8. With respect to the merits of his appeal, the applicant submits that the respondent failed to meet the required burden of proof and alleges that he was subjected to discrimination because "[t]he group of women who accused the Applicant really didn't like him because he has a really plain surname and un-impressive family background". The applicant further submits that he was denied due process because in its report the investigation panel allowed itself to draw a "legal conclusion that the Applicant was guilty of sexual harassment". The applicant submits that he was also denied due process because his supervisors failed to comply with the UN rules on performance evaluations: for instance, his performance appraisals for 2005 and 2006 were finalised only in 2007.

9. The respondent submits that the applicant had 90 days from the date of receipt of the letter of 11 November 2008 to file his application; however, it was filed on 30 June 2009, well past the deadline and therefore the appeal is time-barred. According to the respondent, there are no compelling reasons for suspension of the time limit. Because a copy of the letter was provided to the applicant, the Organisation had no

additional obligation to send a copy of the letter dated 11 November 2008 to the applicant's counsel.

Consideration and findings

10. Even if the Tribunal were to accept the applicant's submission that he only received the Deputy Secretary-General's letter of 11 November 2008 on 1 December 2008, he should have filed his application by 2 March 2009 since he had 90 days from the date of notification to appeal the decision (see art. 7.4 of the Statute of the former Administrative Tribunal). His application was dated 30 June 2009, or 120 days past the deadline, and it was received by the former Administrative Tribunal on 6 July 2009.

11. As the Dispute Tribunal stated in *Morsy* UNDT/2009/036, *Avina* UNDT/2010/054, and *Rosca* UNDT/2009/052, for the Tribunal to waive or suspend the deadlines stipulated in art. 8 of the Statute, the reasons outlined in a request for a waiver or suspension of time limits must show circumstances that are out of the ordinary, quite unusual, special, or uncommon; they need not be unique, unprecedented, or beyond the applicant's control. (For another line of authority on the meaning of "exceptional case" and "exceptional circumstances", which follows the test used by the former United Nations Administrative Tribunal that the reasons for the delay must be "beyond the control of the applicant", see *Samardzic et al.* UNDT/2010/019, *Barned* UNDT/2010/083, and *Osman* UNDT/2010/158. For reasons articulated in *Morsy* that need not be repeated here, I do not propose to follow this test.)

12. It is not in dispute that the applicant was aware of the contested decision as he was informed of it both orally and, more importantly, in writing. Moreover, on 10 November 2008 the applicant even sent a written request to the JDC asking for a copy of its report, which was provided to him on 11 November 2008. Yet, there is absolutely no explanation by the applicant for his own inaction following the

notification of the censure. Although it was the applicant's responsibility to diligently pursue his case, there is no evidence that he took any steps at all to pursue a timeous appeal or that he had difficulty in contacting his counsel of record following the notification of the contested decision. If he had any such difficulty, he could have sought to engage alternate counsel or requested the Panel of Counsel for reassignment of the case to another counsel. Nor has the applicant contended that he was precluded from filing the appeal by any reasons whatsoever other than those set out in his counsel's letter.

13. Further, there is nothing before the Tribunal to suggest that the Administration misled the applicant with respect to his rights to appeal the decision (see *Johnson* UNDT/2009/037); in fact, the contested letter dated 11 November 2008 specifically explained that "[i]n accordance with staff rule 110.4(d), any appeal you might wish to file in respect of the above decision should be submitted directly to the Administrative Tribunal".

14. As the Tribunal stated in *Morsy*, the applicant must show that he has not been negligent or forfeited the right to be heard by his inaction or lack of vigilance. In the final analysis, it was the responsibility of the applicant, who was informed of the status of his case, to give instructions to his counsel. It cannot be accepted that staff members hand over unreservedly the responsibility for ensuring the lodgment of an application upon the appointment of counsel (*Avina* UNDT/2010/054). There is no evidence before the Tribunal that the applicant took any steps to initiate his appeal within the applicable time limits or to seek an extension. The applicant was negligent and forfeited his right to be heard.

Conclusion

15. The application is time-barred because of the applicant's failure to file it within the statutory time limits. I find that the applicant did not act diligently with

respect to his case and there are no exceptional reasons that justify a waiver of the time limits. The application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 15th day of October 2010

Entered in the Register on this 15th day of October 2010

(*Signed*)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry