UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/004/ UNAT/1571
Judgment No.: UNDT/2010/210
Date: 3 December 2010
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

BERNADEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Jeppe Christensen

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former General Service level staff member in the Office of the High Commissioner for Human Rights ("OHCHR"), contests the decision not to grant her retroactive special post allowance ("SPA") to the P-2 level for the period of 1997 to 1998. The Applicant requests compensation for work performed at the professional level during that period, as well as compensation for emotional distress she allegedly suffered for eleven years prior to the filing of her appeal.

2. The Respondent submits that the contested decision was expressed in a letter dated 3 August 2001 from the Chief of Administration, OHCHR, and the claim is therefore time-barred as the Applicant's request for administrative review, dated 2 May 2005, was made out of time. The Applicant avers that her application is receivable as the final decision subject to appeal was expressed in a letter of the High Commissioner for Human Rights dated 30 March 2005.

3. A case management hearing was held on 7 May 2010 and two case management orders were subsequently issued: Order No. 117 (NY/2010) (13 May 2010) and Order No. 295 (NY/2010) (9 November 2010). As the material facts were common cause, the parties agreed to adopt the facts as set out in the JAB report. The application, the Respondent's reply and subsequent submissions constitute the pleadings and the record in this case. With the consent of the parties, this case was decided on the papers before the Tribunal and in light of the oral submissions made at the case management hearing.

Facts

4. The Applicant joined the Organisation in 1979 and received a permanent appointment in 1981. She moved to the New York Office of OHCHR in 1991. On 1 July 1992 she was promoted to the G-6 level as Information and Liaison Assistant. Upon the reclassification of her post to the G-7 level effective 1 January 1996, the

Applicant received an SPA for the period of 1 January to 31 October 1996. On 1 November 1996 she was promoted to the G-7 level, step IX, and retained this level until her retirement on 30 August 2006. She subsequently received several short-term appointments for temporary assistance, the most recent of which expired on 7 December 2007.

5. The first request to grant the Applicant a retroactive SPA was made on 13 August 1997. The request was made on behalf of the Applicant by the then Director of the New York Office, Centre for Human Rights/High Commissioner for Human Rights, under cover of facsimile to the then Officer-in-Charge of the Centre for Human Rights. The request stated:

> As you are aware, since the departure of [name of a staff member] from [the New York Office], [the Applicant] has been officially assisting me, at the professional level, in the discharge of the functions of the New York Office. [The Applicant] has, *inter alia*, represented [the New York Office] at meetings of the Task Force on the Great Lakes which has been established by the Secretary-General. She has attended, as the representative of HC/Centre for Human Rights, all the meetings of both the Inter-Departmental Committee on Charter Repertory and the Working Group of the Committee, and has reported on discussions that took place at such meetings.
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> Moreover, [the Applicant] has given briefings on human rights to College Students who visit the United Nations in the framework of the Group Programme of DPI. Since 1993, she has also briefed, on a yearly basis, College students in preparation for the National High School Model United Nations … .
>
> In compliance with [s]taff rule No. 103.11(c) … I would like to request that a retroactive Special Post Allowance … at the P2 level be granted to [the Applicant].

6. Thereafter the Applicant—by email dated 4 May 1998, addressed to the Special Assistant, Office of the Assistant Secretary-General, Office of Human Resources Management ("OHRM")—provided further information regarding her work responsibilities and requested consideration of placing her, retroactively, on an SPA.

7. On 20 May 1998 the Applicant was informed by memorandum from the Chief, Overseas Service Cluster, Operational Services Division, OHRM, that, "at the moment", OHRM was unable to support her request for an SPA, but "once the classified job description is available, should it be evident that [she] had been fulfilling those functions then [she] would be eligible for consideration for an SPA upon recommendation of the Head of [her] Office". The Tribunal therefore accepts that no final decision concerning the Applicant's request was made at this time and the matter remained open.

8. On 24 June and 22 September 1999 and on 21 March 2000 the Applicant sent communications to the Chief of Administration and Deputy High Commissioner for Human Rights, OHCHR, requesting to be updated on the status of the request.

9. On 31 March 2000 the Deputy High Commissioner informed the Applicant by letter that he had asked the Administrative Section of OHCHR to prepare a reply to her request "based on the relevant rules and regulations".

10. The Applicant sent follow-up communications to the Administrative Officer, OHCHR, on 12 April and 21 November 2000 and on 18 January and 7 February 2001, seeking information about "OHCHR's decision" on the matter.

11. On 3 August 2001 the Chief of Administration, OHCHR, wrote to the Director of the New York Office of OHCHR, referring to the "long outstanding case for a request to grant retroactive SPA to the P-2 level" to the Applicant. The letter expressed regret that the Director's predecessor and the Applicant had not received a reply to their request earlier. The letter concluded that, after an extensive review, the Administration found it impossible to accede to the request to grant the Applicant retroactive SPA for the period of 1997 to 1998. The letter further stated (emphasis omitted):

> [T]o summarize the situation: the elements of regular junior professional functions which had been identified in connection with the reclassification of [the Applicant's] post did nor carry sufficient

> weight for the post to be reclassified to a professional level. The description of her functions recognized some overlap with junior professional duties but this was found to be normal for a G-7 level post. With regard to the request for an SPA made by [the Director of the New York Office, OHCHR] the additional assistance which [the Applicant] was giving him in the discharge of the functions of the New York Office, as well as some representative duties at meetings of Inter-Departmental bodies, and some additional briefings to College students, do not add up to meeting the requirements of staff rule 103.11, to the effect that the staff member had taken over the full duties and functions of a vacant professional post at the New York Office. Consequently, the [Centre for Human Rights] at the time, and the OHCHR Management of today are unable to support the request for an SPA at the P-2 level for [the Applicant].
>
> I wish to seize the occasion to recognize the commitment of [the Applicant] to the OHCHR. In reviewing her file in connection with this case I have noticed how well her performance is being rated by her supervisors, and I can also state from the Administrative Section's side that we have an excellent working relationship with her. I regret that obligatory provisions of our rules have prevented OHCHR to accede to [the Director's] request. I should appreciate it if you would share this letter with her.

12. Although this letter was not sent directly to the Applicant, because it was in response to the Director's request, she admits that at some point after receiving the letter the Director called her to his office to discuss the letter and shared a copy with her.

13. On 15 April 2002 the Applicant wrote to the Chief of Administration, OHCHR, acknowledging receipt of a copy of the letter of 3 August 2001 from her supervisor, disputing the Administration's summary of her case as expressed in the letter, and asking that her case be reconsidered.

14. On 24 October 2002 the Applicant sent an email to the Chief of Administration, OHCHR, referring to her prior communication of 15 April 2002 and requesting to be updated on the matter. She sent a further memorandum on 23 December 2003 to the Officer-in-Charge, Operational Services Division of OHRM, requesting for an update. In this memorandum, the Applicant requested further

reconsideration of her case and stated that "[i]n [her] several discussions with Officials in Geneva, [she] was led to understand that if OHRM were able to find a 'technical' way to grant [her] request, it would be approved". The Applicant sought OHRM's assistance in making this possible.

15. On 19 March 2004 the Head of the Human Resources Unit, OHCHR, Geneva, wrote to the Applicant confirming that OHCHR was not in a position to agree to her request for an SPA. The Applicant responded on 30 March 2004, offering supporting arguments as to why she should be granted an SPA. The Applicant concluded the letter by requesting OHCHR to reconsider her case on an urgent basis.

16. By letter dated 5 May 2004, the Head of the Human Resources Unit, OHCHR, Geneva, responded to the Applicant's request for reconsideration of her case and reaffirmed that OHCHR was not in a position to accede to her request.

17. On 29 November 2004 the Applicant addressed an email to the High Commissioner for Human Rights, requesting the latter's intervention and stating that her case had not been satisfactorily resolved for the past seven years. On 21 December 2004 the Applicant sent another email to the High Commissioner, reminding her of her request for intervention.

18. On 24 January 2005 the Applicant sent a further email to the High Commissioner, stating:

> Please allow me to inform you that I had a conversation with [the Chief of Administration, OHCHR] last week regarding my request for compensation that dates back to 1997, and he recommended that I bring the matter before the [JAB] as the matter cannot be resolved within OHCHR.
>
> By this email, I would like to respectfully inform you that I will submit the case to the JAB.

19. On 30 March 2005 the High Commissioner for Human Rights informed the Applicant in writing that after reviewing her file, she saw no grounds on which she could intervene on the Applicant's behalf. The High Commissioner's letter stated:

> I have reviewed your file and in particular the Human Resources Unit's letters dated 5 [May] and 19 March 2004. I regret to inform you that I do not see any grounds on which I can intervene on your behalf. As a result, I am afraid I must consider this matter closed.

20. The Applicant requested administrative review of the decision not to compensate her for functions performed at the professional level by letter dated 2 May 2005, addressed to the Secretary-General. The Applicant subsequently filed an appeal with the JAB. The JAB issued its report on 7 December 2006, concluding that the appeal was not receivable and that there were no valid grounds for going into the merits of the case.

21. By letter dated 2 March 2007 the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her of the Secretary-General's decision to accept the findings of the JAB. This letter stated:

> The JAB first considered the issue of receivability. The JAB reviewed the relevant legal provisions and the communications concerning your request for an SPA. The JAB concluded that the 3 August 2001 communication was the Administration's official reply and that you did not submit a request for administrative review in respect of it. The JAB noted that you pursued various indirect channels to reverse the Administration's decision but did not write to the Secretary-General in a timely manner. The JAB found that you submitted your request for administrative review on 2 May 2005, "more than four years after the administrative decision of 3 August 2001". The JAB also stated that it disagreed with your assertion that the High Commissioner's letter dated 30 March 2005 is the contested decision and found that your letter to the High Commissioner was a personal appeal for her intervention. Although empowered to waive time-limits if you had submitted exceptional circumstances, the JAB found that you did not submit evidence of this. In light of the foregoing, the JAB unanimously concluded that the appeal is not receivable and that there are no valid grounds for going into the merits of the case. The JAB recommended that the Secretary-General take no further action in this case.
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> The Secretary-General accepts the JAB's findings and conclusions and regrets to inform you that in accordance with its unanimous recommendation, he has decided to take no further action in this case.

22. On 31 January 2008 the Applicant filed an application with the UN Administrative Tribunal. On 1 January 2010 the matter was transferred to the Dispute Tribunal.

Applicant's submissions

23. The Applicant's submissions may be summarised as follows:

a. The JAB and the Administration erred in finding that the contested decision was that contained in the letter dated 3 August 2001 from the Chief of Administration, OHCHR. The letter dated 3 August 2001 did not indicate that it was the final decision with respect to her request and did not advise her of her right to appeal it.

b. The Administration of OHCHR, including the Chief of Personnel, continued to communicate with the Applicant with respect to her request after 3 August 2001. The final decision was therefore that expressed in the High Commissioner's letter to the Applicant dated 30 March 2005. Following receipt of that letter, the Applicant proceeded with a formal appeal. Therefore, the contested decision is the High Commissioner's letter to the Applicant dated 30 March 2005 and hence the appeal was submitted within the prescribed time limits.

c. The Applicant assumed the functions of a professional level post because the Director of the New York Office had no professionals to call on to carry out those necessary functions. She performed professional level duties for a substantial period of time without any additional compensation.

Respondent's submissions

24. The Respondent's submissions may be summarised as follows:

a. The Applicant's appeal is time-barred. The Applicant did not submit any evidence of exceptional circumstances that would warrant a waiver of the time limit. The administrative decision to deny the Applicant an SPA was taken in 2001 and she was informed of it by letter dated 3 August 2001. The Applicant had until 3 October 2001 to request administrative review of the decision contained in that letter. Instead, the Applicant requested administrative review almost four years later, on 2 May 2005. The High Commissioner's letter of 30 March 2005 was only a response to the Applicant's personal appeal to her to intervene in the Applicant's case.

b. Should the Tribunal find this application to be receivable, the Applicant is not entitled to compensation as she failed to demonstrate that she fulfilled the conditions required for consideration for an SPA. The Applicant did not show that she discharged the full duties and responsibilities of a higher level post. Additionally, there was no professional post within the New York Office of OHCHR against which the Applicant's performance could have been assessed.

c. Payment of an SPA is within the discretion of the Secretary-General. The Applicant's situation did not warrant this discretion to be exercised in her favour due to the incidental nature of the few higher level duties that she discharged.

Consideration and findings

25. While the Respondent submits that the administrative decision was communicated to the Applicant on or about 3 August 2001, the Applicant contends that the decision expressed in the letter was not final because she had subsequent

exchanges with the Administration about the matter. Further, the Applicant submits that the letter was not addressed to her, although she acknowledged in her written pleadings and at the case management hearing that she had received a copy of the letter from her supervisor.

26. The Respondent does not seek to argue—correctly, in my view—that any of the decisions prior to the letter dated 3 August 2001 constituted a final administrative decision in this case. The Tribunal finds that the matter was under consideration by the Administration between August 1997 and August 2001.

27. Having considered the parties' submissions and the contemporaneous records before it, the Tribunal finds that the final decision concerning the Applicant's request was that expressed in the letter dated 3 August 2001, stating that "obligatory provisions of our rules have prevented OHCHR to accede to [the Director's] request [for an SPA]". The language of that letter should have left no doubt in the mind of the Applicant that the final decision on her request had been rendered. It is instructive that in her subsequent communications on the matter the Applicant was requesting "reconsideration" of the decision. Further, the procedure and the deadline for the filing of a request for administrative review were clearly stated in the former Staff Rules (see former staff rule 111.2(a) (Appeals)), which were applicable at the time and formed part of the Applicant's contract of employment.

28. The precise date on which the Applicant was given the aforesaid letter is unclear, although it was, at the latest, on or before 15 April 2002, as the Applicant referred to it in her letter of that date. Under these circumstances, the Tribunal cannot accept that 3 August 2001 should be considered as the date of written notification of the decision under former staff rule 111.2(a). However, it is an admitted fact that although not addressed to her, a copy of the letter of 3 August 2001 was provided to the Applicant by the Director of the New York Office pursuant to the request of the Chief of Administration (her letter stated, "I should appreciate it if you would share this letter with [the Applicant]"). The Tribunal therefore finds that there was

compliance with the requirement in former staff rule 111.2(a), constituting proper notification. In light of the uncertainty as to the exact date when the letter was provided to the Applicant—and to avoid any prejudice to the Applicant and to give her the benefit of the doubt—the Tribunal will accept that, although the actual final administrative decision was made, at the latest, on 3 August 2001, for the purpose of calculating the time limits for the request for administrative review, the decision was notified to the Applicant on 15 April 2002.

29. The parties are in agreement that the Applicant filed her request for administrative review on 2 May 2005, three years after 15 April 2002. This request was therefore well out of time as, pursuant to former staff rule 111.2(a), the Applicant had only two months from the date of notification of the decision to file her request for administrative review.

30. In any event, the Tribunal notes that the letter to the Applicant from the Head of the Human Resources Unit, OHCHR, dated 19 March 2004, reiterated the decision to deny the Applicant's request for an SPA and clearly reconfirmed the notification of the decision made in August 2001. The Applicant replied to the letter on 30 March 2004, referring to it by date and confirming, in effect, that she received it in March 2004. The Applicant's request for administrative review, dated 2 May 2005, was made more than one year after March 2004. Even taking 19 March 2004 (and not 15 April 2002) as the date of the administrative decision, her request for administrative review was out of time.

31. Reiterations of the same decision in response to a staff member's repeated requests to reconsider the matter do not reset the clock. Therefore, the Applicant's subsequent communications with the Administration seeking reconsideration of the decision do not render this application receivable. As the former UN Administrative Tribunal stated in Judgment No. 1211, *Muigai* (2005), para. III, "the Administration's response to [a] renewed request would not constitute a *new* administrative decision which would restart the counting of time" as "allowing for such a renewed request to

restart the running of time would effectively negate any case from being time-barred, as a new letter to the Respondent would elicit a response which would then be considered a new administrative decision". In Judgment No. 1301, *Waiyaki* (2006), para. III, the UN Administrative Tribunal also drew a distinction between "simple reiteration—or even explanation—of an earlier decision from the making of an entirely new administrative decision". I agree, in principle, with these pronouncements of the UN Administrative Tribunal and I am not persuaded by the Applicant's argument that the contested decision was that expressed in the High Commissioner's letter dated 30 March 2005. That letter was in response to the Applicant's request that the High Commissioner intervene in the matter. Whether or not the High Commissioner should have or was legally obligated to intervene at that stage was not the subject matter of the Applicant's request for administrative review and is plainly not what this case is about.

32. As the Appeals Tribunal held in *Costa* 2010-UNAT-036 (approving *Costa* UNDT/2009/051), the Dispute Tribunal does not have the power to waive or suspend the time limits for requests for administrative review or management evaluation. I note that the Statute of the Dispute Tribunal (see art. 8.1), as well as the Staff Rules (see staff rule 11.2), draw a clear distinction between *requests* for administrative review and management evaluation, on the one hand, and the actual administrative review and management evaluations, on the other. Requests for review or evaluation and the actual reviews and evaluations have different sets of deadlines and it appears unclear whether the limitations in art. 8.3 of the Statute were intended to apply to the deadlines for *requests* for review or evaluation. However, the Appeals Tribunal's judgment in *Costa* is the law on the issue and, under *Costa*, this application is plainly not receivable. I will add, nevertheless, that even if I were permitted to consider whether the deadlines in this case should be waived, the Applicant has failed to provide any exceptional circumstances justifying the delay in her filing of the request for administrative review.

Conclusion

33. The Applicant failed to file a timeous request for administrative review and this application is therefore not receivable. The application is rejected in its entirety.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 3rd day of December 2010

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

(*Signed*)

Santiago Villalpando, Registrar, UNDT, New York