UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/30
Judgment No.: UNDT/2009/057
Date: 30 October 2009
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

DIAGNE, M. (Applicant 1)
DIAGNE, A. (Applicant 2)
DIEME, I. (Applicant 3)
(DIAGNE ET AL.)

v.

SECRETARY-GENERAL OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen

Counsel for Respondent:
Shelly Pitterman, Director, DHRM, UNHCR

The issues

1. By application submitted to the Joint Appeals Board (JAB) in New York on 19 February 2009, the Applicants contest *"The administrative decision dated 23 September 2005 by […] the [former] Regional Representative of UNHCR in Dakar, Senegal, notifying [Applicants] that their permanent appointments would be terminated effective 31 December 2005"*.

Facts

2. The Applicants entered the services of the United Nations High Commissioner for Refugees (UNHCR) in Senegal as Security Guards at the GL-1 level in June 1999, on the basis of short-term appointments. Their appointments were converted to indefinite appointments in January 2000.

3. By letter dated 23 September 2005, the Applicants were notified that in view of a new security plan for Senegal, their indefinite contracts with UNHCR would terminate on 31 December 2005. They were informed that in accordance with former Staff Rule 109.3 (a), they were entitled to three months' written notice and to termination indemnity as provided for in Staff Regulation 9.3 and its annex III.

4. The Applicants' appointments were terminated on 31 December 2005, date of their separation from the Organization.

5. By letter dated 20 January 2006, the Applicants requested the Inspector General of Employment Affairs (*Inspecteur de Travail*) of Senegal to initiate arbitration with respect to the termination of their appointments with UNHCR, Dakar.

6. On 8 March 2006, the Applicants sent a letter to the Resident Coordinator of Operational Activities of the UN system in Dakar requesting his support to ensure the Applicants reintegration. The Applicants' local lawyer also requested the reintegration of the Applicants, by letter dated 9 March 2006 to the High Commissioner for Refugees.

7. On 18 April 2006, the Inspector General of Employment Affairs of Senegal issued an official record on a failed attempt for conciliation between the

Applicants and the High Commissioner for Refugees, at which UNHCR did not appear.

8. By letter dated 16 August 2007 and signed by the three Applicants, the Applicants requested the Secretary-General to review the decision to terminate their permanent appointment with effect 31 December 2005.

9. On 31 October 2007 and upon the Applicants' request, UNHCR was summoned to appear before the local Labour Court (*Tribunal du Travail Hors Classe de Dakar*) for a hearing (*citation a comparaître*) on 9 November 2007. UNHCR did not appear at the hearing.

10. On 10 November 2007 and having received no answer to the letter of 16 August 2007, Applicant 1 sent another letter to the Secretary-General, in the same terms as the letter dated 16 August 2007, but only signed by him.

11. On 2 May 2008, the Chief, Administrative Law Unit (ALU) responded to Applicant 1's letter dated 10 November 2007, informing him that his claim is time-barred and therefore not receivable since Applicant 1 failed to submit the request for review within the time-limit provided for in former Staff Rule 111.2 (a). The letter further indicates *"If you wish to file an appeal with the New York Joint Appeals Board, in accordance with staff rule 111.2 (a), you must do so no later than two months from the date this letter is received"*.

12. Applicants' Counsel submitted the statement of appeal to the JAB in New York on 19 February 2009. It was transferred to the Geneva JAB on 3 March 2009. The Respondent submitted his reply on 20 May 2009.

13. As per the Secretary-General's Bulletin ST/SGB/2009/11 dated 24 June 2009, the appeal was transferred to the United Nations Dispute Tribunal (UNDT) on 1 July 2009.

14. On 7 September 2009, the parties were informed that the Judge in charge of the examination of the application intended to decide on the case by summary judgment under Article 9 of the UNDT Rules of Procedure (RoP). No objections were made.

Parties' arguments on receivability

The Applicants

15. While the Applicants concede that they did not respect the time-limits provided for under former Staff Rule 111.2 (a), they provide that they have demonstrated exceptional circumstances in the terms of former Staff Rule 111.2 (f), warranting a waiver of the time-limits stipulated in former Staff Rule 111.2 (a).

16. Applicants' Counsel submits that in the letter of notification dated 23 September 2005, Applicants were not notified of their contractual rights to challenge the decision and that the Applicants were not aware of the proper recourse available under the Staff Rules and Regulations. He holds that the Applicants did not realize that it was the notification they would have to challenge, rather than the actual termination of their appointment on 31 December 2005. Hence, Applicants took action only after the implementation of the decision to terminate their appointment, i.e. after 1 January 2006.

17. Applicants' Counsel concedes that the Inspector General of Employment Affairs was not the proper avenue to challenge the decision to terminate the Applicants' appointments – however, it is the Counsel's view that the Applicants' immediate action vis-à-vis the Inspector after their appointments had been terminated demonstrates that they applied due diligence in order to safeguard their rights.

18. The Counsel further notes that on 8 March 2006 – i.e. a little over the two-month time-limit after their appointments had been terminated - the Applicants wrote to the Resident Coordinator, which – though again not the right avenue – was another demonstration of the Applicant's due diligence and good faith. He notes that there is no evidence that UNHCR ever responded to that letter or that it had been forwarded to the Secretary-General or the Office of Human Resources Management (OHRM). The Counsel notes that the due diligence was again manifested by the local Counsel's letter dated 9 March 2006 to the UNHCR Office in Dakar.

19. The Counsel at the same time suggests that UNHCR, on its part, showed bad faith by not showing up in front of the local authorities. He stresses that after the failure of UNHCR to appear at the conciliation hearing, Applicants were awaiting the formal procedure on the matter before the local courts.

20. The Counsel expresses his view that *"albeit the Applicants repeatedly chose the wrong avenue for recourse, they did make a good faith attempt to resolve the issue and request a rescission of the termination of their contracts",* while *"UNHCR never responded to the Applicants, let alone make any effort to pro-actively seek conciliation in the matter".* The Counsel considers that UNHCR also failed to interpret in good faith the Applicants' different requests to UNHCR and should have forwarded them to the Secretary-General.

21. The Counsel notes that the only response received from the Administration was the letter dated 2 May 2008 from ALU - redacted in English - and that the Applicants' level of English did not allow them to understand the terms of that letter.

22. The Counsel respectfully submits that although the Applicants' *"letters to UNCHR were dated 8 and 9 March 2006, the fact that they considered the actual separation the "decision" and the good faith attempt to resolve the matter through the local authorities warrants a waiver of the time-limit for the – initial – requests for administrative review dated 8 and 9 March 2006. The fact that UNHCR failed to respond to the Applicants letters, let alone provide notification of receipt and the time-limits for an appeal once the Secretary-General does not respond, cannot be held against Applicants to argue they did not adhere to the time-limits of Staff Rule 111.2 (a)".* He notes that it would be unfair and unreasonable to expect from the Applicants to be aware that their contractual relationship with UNHCR was not governed by local laws hence not subject to local jurisdiction, since the Applicants were locally recruited, uneducated and not legally skilled.

The Respondent

23. The Respondent recalls that former Staff Rule 111.2 (a) provides that "A *staff member wishing to appeal an administrative decision pursuant to Staff Regulation 11.1 shall, as a first step, address a letter to the Secretary-General*

requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

24. The Respondent argues that the Applicants did not meet the mandatory time-limits prescribed in former Staff Rule 111.2 (a), since they first received notice that their appointments would terminate by letter dated 23 September 2005, hence the deadline to submit a request for review under former Staff Rule 111.2 (a) was 23 November 2005. The Respondent stresses that by submitting their request to the Secretary-General only on 16 August 2007 – and subsequently on 10 November 2007 - the Applicants failed to comply with former Staff Rule 111.2 (a) hence the appeal is not receivable. The Respondent further notes that the letter dated 10 November 2007 is written and signed by one of the Applicants only and nothing suggests that this request for review also came from the two other Applicants, since he was not officially representing them.

25. The Respondent further argues that the Applicants did not file their appeal before 19 February 2009, i.e. more than one year after they submitted their request for administrative review and as such, well over the prescribed time-limit.

26. The Respondent further notes that former Staff Rule 111.2 (f) provides *"an appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal"*. He also recalls that the United Nations Administrative Tribunal (UNAT) has defined "exceptional circumstances" in the meaning of former Staff Rule 111.2 (f) as *"any circumstances beyond control of the Applicant which prevented him from submitting a request for review and filing an appeal in time"*.

27. The Respondent notes that UNAT has always held that ignorance of the law is no excuse and could not constitute exceptional circumstances and that staff members - particularly those who have been employed by the UN for a long time - should be familiar with the rules governing their terms of appointment and are bound to know the laws applicable to them.

28. The Respondent argues that in the present case, the Applicants had been working for UNHCR since 1999 and that they should have been familiar with the

rules and procedures in place to contest an administrative decision. The Respondent holds that this is even more so since the Applicants' respective letters of appointment specifically referred to the former Staff Rules and Regulations and that the Applicants signed these letters, acknowledging that they had become familiar with the former Staff Rules and Regulations.

29. With respect to the silence of the Administration on the request for review, the Respondent notes that the Applicants *"cannot rely on UNHCR not having responded to them, since UNHCR had no obligation to do so according to Staff Rule 111.2 (a) (ii) and it was their responsibility to safeguard and pursue their individual rights within the procedures and time-limits under Staff Rule 111.2"*.

30. Concerning the Administration's failure to comply with national judicial proceedings, the Respondent recalls Section 2 of the 1946 Convention on the Privileges and Immunities of the United Nations which provides that *"The United nations, its property and assets wherever located and by whosoever held, shall enjoy immunity from every form of legal process (...)"*. He notes that since UNHCR as a subsidiary organ of the General Assembly and as an integral part of the United Nations, benefits from the provisions under this Convention and hence is exempt from appearing before local courts.

31. The Respondent finally holds that the insufficient knowledge of English by the Applicants *"cannot constitute a valid argument to justify the non-compliance with the mandatory time-limits to submit an appeal"*. He also notes that Applicant 1 indicated in his fact sheet that he has got "working knowledge" of English.

32. Hence, the Respondent concludes that the Applicants' requests for administrative review were time-barred and that their appeal is not receivable *ratione temporis* and should be rejected.

Considerations

33. According to art. 9 of the UNDT RoP, which are based on art. 7.2 of the Statute of the UNDT Statute, the Tribunal may determine, on its own initiative, that summary judgment is appropriate. This may usually happen when there is no dispute as to the material facts and judgment is restricted to a matter of law. It

may be even more appropriate for issues related to the receivability of an application. The crucial question in this case – the time-bar of the application – is such a matter of law.

34. Therefore, and in view of all the elements on file, the Tribunal focuses its consideration on the time-bar of the application of 19 February 2009.

35. In this respect, the Tribunal stresses that since the administrative decisions subject of the present application date back to September 2005 and have been appealed in February 2009, the relevant provisions to assess the time-bar are former Staff Rule 111.2 (a) and (f).

36. Former **Staff Rule 111.2 (a)** provides that

> *"A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing [...]*
>
> *(i) If the Secretary-General replies to the staff member's letter , he or she may appeal against the answer within one month of the receipt of such reply;*
>
> *(ii) If the Secretary-General does not reply to the letter within one month in respect of a staff member stationed in New York or within two months in respect of a staff member stationed elsewhere, the staff member may appeal against the original administrative decision within one month of the expiration of the time-limit specified in this subparagraph for the Secretary-General's reply."*

37. Former **Staff Rule 111.2 (f)** reads

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

38. The Tribunal recalls that it appears that the three Applicants had sent a common request for review to the Secretary-General on 16 August 2007, to which

no response was received from ALU. The Tribunal further takes note that the second request for review dated 10 November 2007 was only signed by Applicant 1, but not by Applicant 2 and 3. As such, only Applicant 1 received a response to his letter dated 10 November 2007 from ALU, while Applicant 2 and 3 received no response from ALU at all. The Tribunal recalls that all Applicants subsequently submitted their statement of appeal to the JAB in New York on 19 February 2009.

Applicant 1

39. The Tribunal notes that Applicant 1 received a response to his second request for review (i.e. the letter dated 10 November 2007), by letter from ALU dated 2 May 2008, indicating *"If you wish to file an appeal with the New York Joint Appeals Board, in accordance with staff rule 111.2 (a), you must do so no later than two months from the date this letter is received"*. The Tribunal is aware that former Staff Rule 111.2 (a) (i) provides not for a two, but a one month deadline to submit a statement of appeal after receipt of a response from the Secretary- General. It also stresses that it does not know when ALU's response was received by Applicant 1; however, in the absence of countervailing evidence it could not but conclude that it must have been within reasonable time.

40. The Tribunal stresses that in any case and independently if the one- or the two-month deadline is applied - by submitting the statement of appeal only on 19 February 2009 to the JAB, the application with respect to Applicant 1 is – *prima facie* – time-barred.

41. The Tribunal cannot find any exceptional circumstances in the terms of former Staff Rule 111.2 (f) which may justify a waiver of the time-limit for the submission of the statement of appeal to the JAB.

42. In this respect, the Tribunal took note of the definition provided by UNAT, according to which "exceptional circumstances" for the purpose of former Staff Rule 111.2 (f) are circumstances which are *"beyond the control of the Applicant"*. (cf. UNAT Judgement n° 372, *Kayigamba* (1986) and, generally, n° 913, *Midaya* (1999) and n°1054, *Obuyu* (2002)).

43. The Tribunal took also note of judgement UNDT/2009/036 *Morsy* of 16 October 2009, in which in reference to Article 8.3 of the UNDT Statute and Article 7.5 of the UNDT RoP it was stressed that the notion of "exceptional case" has a wider definition and cannot be equated with the old definition of "exceptional circumstances" as provided by UNAT. The Tribunal reiterates that since in the present case, the relevant provisions to assess the *receivability ratione temporis* of the application are former Staff Rule 111.2 (a) and (f), the question whether statutory time-limits can be waived is to be considered exclusively under the terms of former Staff Rule 111.2 (f), because this was the applicable law until 30 June 2009, thus covering completely the period of time at stake in the present case. Therefore, the rulings of judgement UNDT/2009/036 *Morsy* have to remain out of consideration.

44. The Tribunal stresses that it adheres to the above-referenced definition provided by the UNAT for exceptional circumstances under former Staff Rule 111.2 (f) as circumstances beyond the control of the Applicant.

45. In this respect, the Tribunal considers that the argument according to which Applicant 1 did not have sufficient knowledge of the English language to understand the terms of the letter dated 2 May 2008 from ALU is not tenable and cannot justify a waiver under former Staff Rule 111.2 (f): the Tribunal stresses that in Applicant 1's fact sheet, it is clearly indicated that he has got "working knowledge" of English. The Tribunal deems that if Applicant 1 considered nevertheless that he was not able to understand the meaning of the letter from ALU, it was above all his own obligation to act upon receipt of the letter from ALU, which clearly related to his pending case. Thus, it was his duty to seek a translation of the letter in order to be able to safeguard his rights under former Chapter XI of the Staff Rules and Regulations. Not having done so in due time incriminates Applicant 1.

Applicants 2 and 3

46. Considering that their request for review to the Secretary-General dated 16 August 2007 remained unanswered and in view of former Staff Rule 111.2 (a), the Applicants had thus until 16 November 2007 to submit their statement of appeal to the JAB. The Tribunal notes that by submitting the application only on 19

February 2009, the Applicants fell short of the statutory time-limits and the application with respect to Applicant 2 and 3 is therefore time-barred. The fact that they may not have been aware of these provisions does not establish any "exceptional circumstances". Apart from the fact that at least Applicant 2 had acknowledged that he had become familiar with the Staff Rules and Regulations by signing his letter of appointment, ignorance of the law is in general no excuse and each staff member is bound to know the laws which are applicable to him (cf. UNAT Judgment n° 1185 *Van Leeuwen* (2004)).

47. In view of the foregoing and since there are no further elements which may constitute exceptional circumstances in the terms of former Staff Rule 111.2 (f), the Tribunal concludes it is not justified to waive the time-limit stipulated in former Staff Rule 111.2 (a) (i) and (ii) in the present case and that the application dated 19 February 2009 is therefore time-barred with respect to the three Applicants. The Tribunal notes that the Respondent's behaviour between 2005 and 2007 is of no relevance in this respect. Therefore, the Tribunal does not deal with it.

Conclusion

48. The application is dismissed since it is not receivable.

(*Signed*)

Judge Thomas Laker

Dated this 30th day of October 2009

Entered in the Register on this 30th day of October 2009

(*Signed*)

Víctor Rodríguez, Registrar, Geneva