Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

SCHOOK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
none

Counsel for Respondent:
Adèle Grant, ALU, OHRM

The issues

1. By application received by the Joint Appeals Board (JAB) in New York on 9 February 2009, transferred to this Tribunal on 1 July 2009 and registered as UNDT-GVA-2009-47 upon order of change of venue from the New York Registry to the Geneva Registry on 5 August 2009, the Applicant contests the decision not to extend his fixed-term appointment beyond 31 December 2007.

Facts

2. The Applicant entered the service of the United Nations Interim Administration Mission in Kosovo (UNMIK) as Principal Deputy to the Special Representative of the Secretary-General at the Assistant Secretary-General level on 26 April 2006, on the basis of an appointment of limited duration. The Applicant's appointment was extended on two occasions, until 31 December 2007.

3. In the course of 2007, the Office of Internal Oversight Services (OIOS) conducted an investigation into allegations of misconduct by the Applicant. Moreover, OIOS, on behalf of the Ethics Office, conducted an investigation into alleged retaliation, implicating the Appellant. The exact terms of these investigations are not known to the Tribunal.

4. On 24 August 2007, the International Criminal Tribunal for the former Yugoslavia (ICTY) initiated an investigation into allegations of contempt of court by the Applicant and other individuals. On 22 October 2007, a limited waiver of the Applicant's immunity for certain specified matters related to the conduct of the investigation was granted by the Secretary-General.

5. On 15 December 2007, the Applicant was orally informed by the Under-Secretary-General for Peacekeeping Operations that his appointment would not be renewed beyond 31 December 2007 and was asked to return

to New York immediately. The Applicant left Kosovo on 17 December 2007.

6. The Applicant's service with the Organization was terminated on 31 December 2007, date of his separation.

7. Beginning of January 2008, the Applicant sought legal counsel with respect to his dispute with the UN, according to invoices of his attorney.

8. On 3 January 2008 a meeting was held between the Applicant and the Chef de Cabinet of the Secretary-General, in the presence of a note-taker (p. 66). The Applicant had requested the meeting in order to get information on why his appointment had not been renewed. According to the Note for File established by the note-taker, the Chef de Cabinet referred to "concerns over the negative publicity associated with the OIOS investigations and other issues which, it was felt, may have unconstructive implications at this politically very sensitive moment in Kosovo".

9. In March 2008, the Ethics Office formally informed the Applicant that no misconduct had been found on his part. The Applicant was further informed by letter dated 28 April 2008 that ICTY had not found any evidence corroborating the Applicant's involvement in the indictment.

10. By email dated 10 June 2008, the Department of Peacekeeping Operations (DPKO) transmitted a letter dated 27 May 2008 from the Acting Director, Investigations Division, OIOS to the Applicant, informing him that the OIOS investigation into allegations against him had been closed since no misconduct on his part had been found (p. 88-89 of the file).

11. On 14 July 2008, the Applicant sent a letter to the Secretary-General, (p. 30), seeking the Secretary-General's *action "to remedy the damage to my reputation and financial loss caused by the manner in which these investigations were conducted and by the non-extension of my contract"*.

His conclusion, in part, reads as follows: *"The decision not to renew my contract was vitiated by a lack of due process and tainted by prejudice. OIOS, the Secretariat, ICTY and DPKO all played a critical role that in the end has left me with a shattered professional reputation and financially challenged. Had I been extended, even month to month until the results of the investigations most of the damage would/could have been avoided […]"*.

12. The Acting Chief, Administrative Law Unit (ALU) responded by letter dated 30 December 2008, concluding that the Applicant's rights as a staff member have not been violated and that his case was handled in accordance with the Organization's rules and regulations, hence there was no basis for the Applicant's claim for compensation and payment of expenses. The letter also stated that ALU considered the matter to be closed.

13. On 4 February 2009, the Applicant sent an email to the Secretary of the JAB, New York, informing him of his intention to file an appeal stating that he received the letter mentioned above on 6 January 2009. He subsequently submitted his statement of appeal dated 5 February 2009 to the JAB, New York, where it was received on 9 February 2009. The Respondent submitted his reply on 2 April 2009 and the Applicant submitted his observations on the Respondent's reply on 21 June 2009 (p. 72 ff). The Respondent submitted his comments on the Applicant's observations by email of 9 October 2009, copied to the Applicant. The Applicant reacted to those comments by email of the same day.

14. By letter dated 26 October 2009, the parties were informed of the Tribunal's intention to decide on the case without oral hearing to which neither of the parties objected.

Contentions of the parties

15. On the arguments on receivability raised by the Respondent in his reply, the Applicant stressed *that "my complaints are all related to the fact that my appointment was not extended and the reasons and the manner in which this non-extension was handled"*. He further submitted that *"my appeal to the Secretary-General within the required deadline from the receipt of the letters from the OIOS and ICTY clearing me of any misconduct which was a significant development in my case and should constitute "exceptional circumstances""*. He noted, moreover, *"I did not appeal the fact that an investigation into allegations against me was conducted, but that this was used as the basis for non-extension of my appointment by the Secretary-General"*.

16. In his reply submitted on 2 April 2009, the Respondent raised issues of receivability *ratione materiae* and *ratione temporis* (p. 48 paragraph 5 and 6). He stressed that the Applicant had not complied with the mandatory requirement under Staff Rule 111.2 (a), since he did not submit a request for review of the decision he cites in his statement of appeal (the decision not to grant his claims).

17. The Respondent further noted that *"should the Joint Appeals Board take the view that the appeal's receivability should be judged on the basis of the other matters referred to in the Applicant's submissions (being the non-renewal of his appointment; the waiver of his immunity; and the conduct of the investigations into allegations against him), the Respondent would again submit that the appeal is not receivable":* the Respondent argues that with respect to the non-renewal of the Applicant's appointment and with respect to the waiver of his immunity, the Applicant did not comply with the time-limits stipulated by staff rule 111.2 (a). He also noted that the waiver as such is not appellable since it is not an administrative decision in the meaning of Staff Regulation 11.1, as it is not

a decision alleging the non-observance of the Applicant's terms of appointment. The Respondent further points out that the Applicant's complaints with respect to the conduct of the investigations are general in nature and do not relate to a particular administrative decision. Before entering into the arguments on the merits, the Respondent therefore requests the JAB (now the Tribunal) to declare the application non-receivable.

Considerations

18. The Tribunal notes that it is clear from the file that the matter in dispute is the decision not to extend the Applicant's appointment beyond 31 December 2007. Indeed, the Applicant had clarified in his statement of appeal and in his subsequent submissions that all his complaints relate to the fact that his appointment was not extended and the reasons and the manner in which this non-extension was handled. Hence, the Tribunal decides to limit its considerations on the administrative decision not to extend the Applicant's appointment beyond 31 December 2007 and to consider the other issues raised by the Applicant only in order to assess the receivability of the application.

19. In terms of receivablity, the Tribunal notes that since the contested decision dates back 15 December 2007 and the appeals procedure was initiated under the previous internal justice system, the relevant provisions to assess the receivability of the present application are former Staff Rule 111.2 (a) and (f).

20. 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"

while 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".

21. The Tribunal stresses that the decision that his appointment was not going to be extended beyond 31 December 2007 was orally communicated to the Applicant on 15 December 2007 and that it took the Applicant until 14 July 2008 to write to the Secretary-General in this respect. It hence notes that from the foregoing it would appear, *prima facie*, that the application is not receivable *ratione temporis* since the Applicant did not comply with the time-limit provided for in former Staff Rule 111.2 (a) with respect to the submission of the request for review.

22. The foregoing in mind, the Tribunal takes into account the Applicant's argument according to which the letters from the OIOS and ICTY clearing him of any misconduct constituted a significant development in his case, and as such "exceptional circumstances", justifying a waiver under former Staff rule 111.2 (f).

23. In this respect, the Tribunal takes into consideration the definition provided by the United Nations Administrative Tribunal (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 judgement 1054, *Obuyu* (2002)).

24. The Tribunal also takes note of judgement UNDT/2009/036 *Morsy* dated 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.

25. The Tribunal finally takes note of judgement UNDT/2009/051 *Costa*, dated 21 October 2009, where it is concluded that pursuant to Article 8.3 of the UNDT Statute, the Tribunal does not even have jurisdiction to extend the deadlines for the filing of requests for administrative review under the former system of administration of justice. This question can be left open here, since there are no "exceptional circumstances" to be found in the case at hand.

26. 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. It therefore considers that normally, exceptional circumstances cannot be found in cases in which the Applicant, out of his/her free will, decides to wait until a certain incident occurs which, in the Applicant's assessment, increases the likelihood that the appeal will be successful, to take the decision if yes or no he/she will request the review of a decision notified to him/her at an earlier stage.

27. This is exactly what happened in the present case: the Applicant, who - according to his own declarations - had understood at the meeting with the Chef de Cabinet on 3 January 2008 that there was a link between the allegations against him and the decision not to renew his appointment, awaited the outcome of the various investigations before he took the decision to submit his case for review to the Secretary-General. The Tribunal expresses its view that nothing prevented the Applicant to submit a request for review of the decision not to extend his appointment beyond 31

December 2007 within the two-month time-limit after this decision had been conveyed to him, which would have been cautious and his obligation in order to safeguard his rights under former Chapter XI of the Staff Rules. The Tribunal finds that this analysis was even more compelling in the present case, in view of the Applicant's background and status and of the fact that in early 2008, he had consulted an attorney in this matter, as reflected in the invoices submitted by the Applicant.

28. Hence, the Tribunal concludes that the decision to await the outcome of the investigations was taken out of the Applicant's free will and cannot be construed as exceptional circumstances justifying a waiver of the time-limits under former Staff Rule 111.2 (f).

29. The foregoing notwithstanding, the Tribunal emphasises that the Respondent did not raise the issue of receivability in his response to the Applicant's letter to the Secretary-General but only in his reply dated 2 April 2009 to the statement of appeal and finds that the Respondent was not precluded to invoke the time-bar at such a late stage.

30. In this respect, UNAT judgement n° 552 *Szenttornyay* (1992) concludes that by giving an Applicant the assurance - in writing - that notwithstanding the delays he would use to explore all possible administrative remedies before having recourse to judicial bodies, the issue of time-limits would not be raised, the Respondent is precluded to assert the time-bar of the application subsequently in front of UNAT. Hence, UNAT decided to suspend the time-limits required under Article 7.4 of its Statute.

31. While the Tribunal agrees with UNAT's assessment that there may be circumstances in which the Respondent - by his own actions - may be precluded to invoke the time-bar of an application, the circumstances of the present case do not allow such a conclusion: indeed, the Tribunal notes that the Respondent stressed that he had not understood the Applicant's letter to the Secretary-General to be a request for review under Staff Rule 111.2 (a). While the Tribunal finds that the terms of the Applicant's letter were clear and could only be understood as a request for review, it also notes that the

overall structure of ALU's response to that letter indicates that ALU had indeed not identified that the letter was meant to be a request for review. It notes, in particular, that not only no mention was made as to the receivability – which is, generally, at least mentioned in a standard sentence reserving the Administration's right to invoke receivability issues at a later stage - but also that the standard sentence providing instructions concerning the time-limits for an appeal was not appended to ALU's response. In view of the foregoing, the Tribunal stresses that the Respondent's assertion that it had not understood the Applicant's letter as a request for review was – though regrettable – credible. The fact that the Acting Chief, ALU did not invoke receivability issues in her response was a logical consequence of her misinterpretation of the actual nature of the Applicant's letter to the Secretary-General. Hence, in the present case, no action or behaviour on the part of the Respondent can be found which would preclude him to invoke the time-bar of the application.

Conclusion

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

(*Signed*)

Judge Thomas Laker

Dated this 4th day of November 2009

Entered in the Register on this 4th day of November 2009

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva