



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/104
Judgment No.: UNDT/2009/067
Date: 18 November 2009
Original: English

Before: Judge Memooda Ebrahim-Carstens
Registry: New York
Registrar: Hafida Lahiouel

GABRIEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON EXTENSION OF TIME
AND MOTION TO DISMISS**

Counsel for applicant:
Francois Lorient

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. By letter dated 4 July 2009, the applicant filed her application with the United Nations Dispute Tribunal contesting the decision of the Secretary-General of 19 November 2008 to take no further action on her appeal against decisions to reassign her and to advertise her former post, thus abiding the recommendation of the Joint Appeals Board.

2. In her application, the applicant requests the Dispute Tribunal, *inter alia*, to find the application receivable, to rescind the decision of her reassignment, to order the completion of her performance evaluation, and to award compensatory and consequential damages. She also makes claims of harassment and abuse of authority against her former supervisor.

3. On 21 August 2009, the respondent raised objection to the application and filed well-articulated and reasoned arguments in a motion to dismiss the application on the grounds, *inter-alia*, that the application is not receivable as a matter of law because it is time-barred, the matter is not properly before the Dispute Tribunal and the applicant failed to provide any explanation for her untimely filing. I have set out a summary of the arguments advanced by the respondent in more detail at paragraph 8 below.

4. On 25 August 2009, I made the following Order in Chambers:

1. The applicant is to file and serve a response to the Motion to Dismiss by 5.00 pm on Monday, 31 August 2009.

2. The parties are thereafter to indicate in writing by Wednesday, 2 September 2009, whether the instant matter, the Motion to Dismiss, can be decided by the Judge on the papers; failing which the matter will be set down for hearing and argument on Friday, 4 September 2009.

5. On 28 August 2009, the applicant filed a document called “Applicant’s Comments on Motion to Dismiss”. Both parties thereafter indicated that the motion to dismiss could be decided on the papers. Having considered the papers before me,

these are my findings and rulings on the preliminary matters, preceded by a brief background to the case as it appears to me of record.

Background of the case

6. The record before me indicates the following brief background of this case:
 - a. on 19 November 2008, in agreement with the recommendation of the Joint Appeals Board, the Secretary-General wrote to the applicant, stating that no further action would be taken on her appeal against the decisions to reassign her and to advertise her former post;
 - b. having decided to appeal against this decision, the applicant made an application on 28 March 2009 for an extension of time to lodge her appeal with the United Nations Administrative Tribunal;
 - c. although the date of the application for a waiver of time limits to the Administrative Tribunal may be in dispute, it is evident from a response of the Executive Secretary of the Administrative Tribunal dated 19 May 2009, that the applicant was granted an extension of time until 30 June 2009;
 - d. the aforesaid letter of 19 May 2009 also advised the applicant that the Administrative Tribunal would not be accepting any new applications after 30 June 2009 and that all applications thereafter would have to be submitted to the new Dispute Tribunal, the contact information and registry address of which would be made available in due course;
 - e. by letter dated 4 July 2009, the applicant's counsel forwarded the applicant's appeal to the newly appointed Registrar of the Dispute Tribunal, apparently on the instructions of the Administrative Tribunal's Executive Secretary, requesting an acknowledgement of receipt together with the Rules of Procedure of the new Dispute Tribunal; and

f. the application was stamped as received by the Dispute Tribunal on 16 July 2009 and apparently only received by the respondent on 10 August 2009.

7. Aside from the above noted correspondence there was nothing further on the record before me to indicate any other extension of time requests or grants.

Respondent's submissions

8. In its Motion to Dismiss of 21 August 2009, the respondent, in summary, contended that:

a. Pursuant to the Secretary-General's Bulletin on transitional measures, (ST/SGB/2009/11, section 4.3) decisions taken by the Secretary-General between 2 April 2009 and 30 June 2009 and all decisions thereafter, may be challenged before the Dispute Tribunal. It follows that decisions prior to April 2009 stood to be challenged before the Administrative Tribunal, and therefore the applicant cannot contest a decision of 19 November 2008 before the Dispute Tribunal.

b. By letter dated 19 May 2009, the Administrative Tribunal granted the applicant an extension until 30 June 2009. The applicant failed to file her submission and therefore is time-barred before the Administrative Tribunal. Having failed to file her submission before the Administrative Tribunal in a timely manner, the applicant sought to remedy this by filing the application before the Dispute Tribunal. The application is therefore not properly before the Dispute Tribunal because it was time-barred before the Administrative Tribunal.

c. The application submitted to the Dispute Tribunal on 16 July 2009 is also not receivable because it is time-barred since the Statute of the Dispute Tribunal requires that applications be filed within 90 days of receipt of the contested administrative decision, i.e. the decision of 19

November 2008 which the applicant states she received on 21 November 2008.

- d. Furthermore, the waiver of time limit granted by the Administrative Tribunal, having expired on 30 June 2009, does not render the waiver of time limit to run anew before the Dispute Tribunal. The applicant failed to explain why the time limit of 30 June 2009 was not met and also to show why the Dispute Tribunal should accept her application despite the clear provision of the rules on time limits. The applicant failed to disclose any exceptional circumstances beyond her control that prevented her from the timely pursuit of her appeal.

Applicant submissions

9. The applicant's response to the motion of 28 August 2009 states that the respondent's motion to dismiss is:

“misinformed and without substance. It appears as a dilatory tactic by the Respondent to postpone its reply in this case, as seen through the Joint Appeals Board proceedings. During the JAB proceedings, it took the Respondent more than three months for an initial Respondent's Reply...The Respondent's substantive reply was produced only seven months later, on the 11th October 2007. It took 12 more months for the case to be heard by a JAB Panel, in September 2008, without inviting the applicant and her witnesses to depose.”

10. The applicant's response does not directly address the points raised by the respondent and apart from further argumentative statements, the response merely sets out a timeline indicating various alleged requests for waivers made of the Administrative Tribunal and listing several documents which were not attached to the response and which did not appear as a matter of record on the file.

11. Although the applicant set out a timeline, there was no evidence of the two alleged previous requests to the Administrative Tribunal for extensions of time. There is no request to the Dispute Tribunal for the additional period of extension from 1 to 15 July 2009. In other words, save for the applicant's averment that the

Tribunal “consider the application receivable”, there is no formal application for an extension of time currently before me.

The applicable law

12. In a recent judgment of this Tribunal, *Morsy* UNDT/2009/036, I set out the applicable law and its interpretation regarding time limits in great detail. I therefore do not intend to repeat it here suffice to say that in terms of its Statute, the Dispute Tribunal “may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases” (article 8.3). Furthermore, article 7.5 of the Rules of Procedure provides that in exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of time limits and that “[s]uch written request shall succinctly set out the exceptional circumstances that in the view of the applicant, justify the request”.

13. Therefore, the Dispute Tribunal may suspend, extend or waive time limits in an exceptional case—see the *Morsy* judgment, *supra*. The rules provide that in exceptional cases the applicant “may”, (not *shall*), submit a written request setting out the exceptional reasons she is relying on; whilst in terms of article 8.3 of the Statute, the Tribunal may suspend or waive the deadlines “*upon written request* by the applicant” (emphasis added).

The findings

14. I do not agree with the respondent’s point that the Tribunal has no jurisdiction in view of the Secretary General’s Bulletin on transitional measures. The Bulletin, promulgated on 24 June 2009, reads as follows:

“4.2 The United Nations Administrative Tribunal will continue to accept cases until 30 June 2009. Cases not decided by the United Nations Administrative Tribunal by 31 December 2009 will be transferred to the United Nations Dispute Tribunal as of 1 January 2010.

4.3 The United Nations Dispute Tribunal shall be operational as of 1 July 2009. Decisions made by the Secretary-General between 2 April 2009 and 30 June 2009 on appeals or disciplinary cases with or without consulting a Joint Disciplinary Committee may be challenged before the Tribunal.”

15. The Administrative Tribunal’s power to accept cases until 30 June 2009 includes the power to grant the necessary extensions of time upon application. The applicant was so granted an extension until 30 June 2009. In my view, section 4.3 merely states that decisions of the Secretary-General after 2 April 2009 “may” be challenged before the Dispute Tribunal; it does not exclude any decisions made prior to 2 April 2009 from being challenged before the Tribunal. It is also noted that the work of the Tribunal is regulated by the Statute, adopted by the General Assembly and while the Secretary-General’s bulletin is useful, it is not a superior instrument.

16. I am satisfied on the papers before me that the Administrative Tribunal granted the applicant an extension of time to file by 30 June 2009. There is no specific request to the Dispute Tribunal for the additional period from 1 to 16 July 2009 setting out reasons for the delay in terms of that envisaged by article 7.5 of the Rules of Procedure.

17. However, the respondent did not oppose the “Applicant’s comments on the Motion to Dismiss” of 28 August 2009 and consented that the matter be decided on the papers. In this respect, I must assume that the respondent does not deny the averments set out by applicant’s counsel in said comments. Furthermore, I take it that counsel for the applicant would not be misleading the Dispute Tribunal when he states that several extensions for time were requested and granted by the Administrative Tribunal prior to the final one expiring on 30 June 2009. It is also a matter of record that the applicant’s counsel was advised by the Administrative Tribunal in May 2009 that the contact information for the new Dispute Tribunal would be made available in due course which was clearly not done by end-June 2009. This necessitated counsel for the applicant having to contact Geneva without success, and eventually dispatching the application by post on 4 July 2009 to the newly

appointed Registrar of the Dispute Tribunal. The application was, at most, 16 days out of time as the application was date-stamped by the Dispute Tribunal on 16 July 2009.

18. As the applicant has, in any event, set out the circumstances surrounding her failure to apply for a waiver or extension in “Applicant’s comments on the Motion to Dismiss” of 28 August 2009, I do not find that in the peculiar circumstances of this particular case, the failure to file a formal application at the outset is fatally defective to the application.

19. Therefore, taking into account that the averments regarding previous extensions of time and the advice given by the Administrative Tribunal regarding the filing of the appeal are unchallenged, I find that on the facts of this specific case, particularly during the transition period when some confusion appears to have risen, this is an exceptional case deserving of the waiver and extension of the time limits. The Dispute Tribunal finds that this case is therefore receivable and the motion to dismiss is denied.

Additional matter of note

20. One additional matter which I believe it is necessary for me to raise is that the applicant’s papers did not only fall short of the required process for waiver, suspension or extension of time. Similarly, the substantive papers themselves, consisting of some 14 pages of argumentative narrative, in my view do not lend themselves to a speedy and just resolution of this dispute.

21. With regard to case management, article 19 of the Rules of Procedure states:

“The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.”

22. The application dated 1 July 2009 fails to set out clearly and concisely the contested decision, the facts relied upon (in short, concise, numerical paragraphs) and

a statement of issues in a useful manner. Furthermore, the applicant does not provide a clear list of witnesses to be called and instead requests the Tribunal “to designate one of its members or a neutral third party to receive depositions from the following key witnesses on the harassment”. It is not the role of the Tribunal to do this.

23. I find it appropriate in this case to issue such directions as may be necessary for a fair and just disposal of this case and I so order in the terms that follow.

IT IS ORDERED THAT—

24. The time limits are waived and the applicant is granted an extension to file her application, in accordance with the directions set out below, on or before 2 December 2009.

25. The applicant shall file and serve a revised application consisting of not more than 10 pages (excluding annexures) and clearly setting out:

- a. a chronological statement of the alleged facts upon which the applicant relies (each fact should be contained in a separate paragraph, so that each fact can be agreed upon or contested by the respondent);
- b. a list of the documents upon which the applicant relies (annexed as appropriate);
- c. a statement of the issues of law raised in the matter; and
- d. a list of witnesses to be called, if any, together with brief summaries of the evidence proposed to be adduced from each witnesses.

26. The respondent shall file and serve its reply to the revised application on or before 2 January 2010 consisting of not more than 10 pages (excluding annexures) and which shall include:

- a. a response to the statement of alleged facts, agreeing or contesting each fact and the reasons where appropriate;

- b. a list of the documents upon which the respondent relies (annexed as appropriate);
- c. a response to the statement of the issues of law provided by the applicant, and a statement of the issues of law raised by the respondent, if any; and
- d. a list of witnesses on which it proposes to rely, if any, together with a brief statement of the evidence to be adduced from said witnesses.

27. The Registry shall inform both parties of the date of a directions hearing following compliance with the orders set out above.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 18th day of November 2009

Entered in the Register on this 18th day of November 2009

(Signed)

Hafida Lahiouel, Registrar, New York