UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/074/ JAB/2009/028
Judgment No.: UNDT/2010/016
Date: 28 January 2010
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

FEDOROFF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Duke Danquah, OSLA

Counsel for respondent:
Stephen Margetts, ALU

Introduction

1. The applicant's supervisor had promised her, without lawful authority, that she could carry over to the next leave year her annual leave days in excess of the 60-day limit as at 31 March 2008. However, the applicant was subsequently informed by the Department of Economic and Social Affairs (DESA) that she would not be allowed to do this. The applicant filed an application requesting compensation for the lost days. The respondent submitted that the application was time-barred.

Background

2. The applicant had been employed as a United Nations Secretariat staff member on a permanent contract as a senior programme officer at the P-5 level from 6 May 1989. The expected date of her retirement was 30 September 2008. However, she was given a one-month extension to 31 October 2008 at which point she retired from service. At the time of her retirement, the applicant was working in DESA.

3. Upon the applicant's retirement, an issue arose regarding remuneration in respect of six and a half days of annual leave. By a memorandum dated 28 October 2008 from the Chief of the Executive Office of DESA, the Administration refused to compensate the applicant for the contested annual leave days. On 19 January 2009, the applicant filed a request for administrative review of the decision not to pay her.

4. By a letter dated 26 February 2009, the applicant was informed by the Administrative Law Unit that her request for review was not receivable because it was out of time under staff rule 111.2(a). The applicant submitted an appeal to the Joint Appeals Board (JAB) on 26 March 2009.

5. In accordance with former staff rule 105.1(a), staff members accrue annual leave at the rate of six weeks per year. There is provision for annual leave to be carried over into the next leave year up to a maximum of 12 weeks (60 working

days). The only exception provided for under former staff rule 105.1(c) is for staff who are serving on a mission. The applicant was not.

6. It was common ground that the applicant's supervisor promised her that annual leave days in excess of the 60-day limit as at 31 March 2008 could be used up in the following leave year (i.e., after 1 April 2008) as a special arrangement in view of what the supervisor and the applicant considered to be special circumstances relating to the needs of the Organization. 1 April 2008 is the cut-off date for carry-over of annual leave days—all days above 60 annual leave days are lost, and the applicant had 68 days as of 31 March 2008 (and, therefore, lost eight of them on 1 April 2008). The applicant asserts that she understood that she would be subsequently allowed to use the eight annual leave days that did not get carried over.

7. However, when she tried to use the promised eight days, her Executive Office told her that she could not do that because she had lost those days on 1 April 2008. At the time of the applicant's separation on 31 October 2008, she had 53.5 annual leave days. The applicant maintained that she was entitled to separate with the balance of 60 annual leave days. Therefore, the applicant filed an application requesting compensation for six and a half days to bring her balance to 60 days as of the date of her separation.

Issues in contention

8. The principal issues of contention between the parties related to the strict application of the rules which do not permit a staff member to carry over more than 60 days into the following leave year. The applicant contends that notwithstanding the strict rule she was entitled to carry over leave in excess of 60 days because her supervisor had promised that she could do so. It is her case that she was precluded from taking annual leave because of the important and urgent tasks that were assigned to her by her supervisor. However, there was an important preliminary issue relating to the application of the time limits relevant to this case.

The case for the applicant

9. The applicant's submission can be summarised as follows:

a. She was entitled to carry over annual leave days in excess of 60 in April 2008 since she was prevented from exercising any annual leave in January–March 2008 because of the constraints that were imposed on her by the management. The Organization was the sole beneficiary of the circumstances that prevented the applicant from exercising her right to enjoy the leave days. The applicant was entitled to take the eight days annual leave after 1 April 2008 and have them charged to the annual leave accrued prior to 1 April 2008. Therefore, the applicant was entitled to retire from the Organization with an overall total of 60 days annual leave accrued. Because the applicant had 53.5 annual leave days at the time of her separation, she should be compensated for six and a half annual leave days.

b. The applicant said that she was not aware of the existence of a time limit to contest the administrative decision. The Administration had an obligation to provide notice and alert the applicant of the need to take timely preemptive measures to protect her fundamental rights. This was not done in this case. Although it is technically correct that the applicant was late in commencing her appeal process, the Administration should bear some responsibility for its failure to advise the applicant of her staff rights.

The case for the respondent

10. The respondent resisted the claim on the following grounds:

a. The claim was not receivable because it was not submitted within the two-month time limit provided for under former staff rule 111.2(a).

b. The applicant failed to show "exceptional circumstances" under former staff rule 111.2(f) which provides that an appeal against an administrative decision shall not be receivable unless the time limits have been met or, under "exceptional circumstances", waived. The respondent submitted that the applicant had not provided any facts or matters of substance which might be regarded as exceptional. The respondent further argued that following receipt by the applicant of the letter dated 28 October 2008, she had more than sufficient time to submit her appeal to the JAB.

c. The appeal was not in relation to an administrative decision since it involved the proper application of former staff rule 105.1(c).

d. In any event, the applicant was not prevented by the pressure of work from using up any excess leave before 31 March 2008.

Comment on the litigation

11. The JAB was unable to deal with this matter prior to 1 July 2009, on which date the appeal was transferred to the United Nations Dispute Tribunal.

12. At the beginning of the hearing held on 27 August 2009, I raised a question relating to the principle of proportionality in litigation over a matter of six and a half days of unpaid annual leave which counsel agreed was, in monetary value, no more than USD3,500–4,000. The litigation costs to the United Nations exceeded, by far, the sum of money involved. Counsel were asked if there were matters of principle or some other substantive reason for proceeding when the option of mediation was available. Counsel for the applicant was amenable to settlement discussions but counsel for the respondent had no instruction to do so for reasons which became clear as the hearing proceeded.

13. In the absence of any jurisdictional issue relating to the applicable time limits and given the fact that the applicant relied on a promise made by her supervisor,

subsequently supported by the Director, I would have been prepared to consider whether the respondent should be estopped from relying on the strict application of the rule. In the event and given the Tribunal's factual findings this question did not arise for consideration.

The law on receivability

14. Former staff rule 111.2(f) provided as follows:

> 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.

15. This rule governed the limitation period at the material time. It should be noted that the particular test for waiving the time limit of two months was a finding that there were "exceptional circumstances".

16. This rule is similar to but not identical to article 8.3 of the Statute of the Dispute Tribunal, which provides that

> [t]he 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. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

17. Whether a claim is presented within time goes to the jurisdiction of the Tribunal. Therefore it is of fundamental importance that any issues relating to the timeous presentation of a claim are determined as a first step. If it is decided that the claim was not presented in time, the Tribunal will have no jurisdiction to consider the case on its merits. In some circumstances an examination and determination of the question whether it could reasonably and fairly be said that the facts and circumstances render this case exceptional will require a consideration by the Tribunal of the evidence relating to the merits of the claim. The extent to which an exploration of these factual matters is necessary is a matter for the judgment of the Tribunal.

18. Had this application been considered prior to 1 July 2009, it would have been subject to the restricted interpretation given by the Administrative Tribunal in a number of judgments that "exceptional circumstances" are circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review or appeal within the prescribed time. However the JAB did not consider this appeal and it was transferred to the Dispute Tribunal to consider. This raises the question as to what is the proper test to be applied in considering whether the time limit should be waived. Should it be the test of "exceptional *circumstances*" under former staff rule 111.2(f) or the test of "only in exceptional *cases*" under article 8.3? The answer is straightforward and is to be found in staff regulation 11.1(a) which provides that the Dispute Tribunal shall "under conditions prescribed in its statute and rules" hear and render judgment.

19. Accordingly, the correct test to apply in this case is under article 8.3 of the Statute of the Dispute Tribunal which gives discretion to the Tribunal "to suspend or waive the deadlines for a limited period of time and only in exceptional cases". In my opinion, this test is intended to give the Tribunal an unfettered discretion to decide first what in the particular case could constitute "a limited period of time" and second whether given the totality of the evidence and circumstances it could be said that this is an "exceptional case".

The hearing

20. As previously mentioned, determination of whether the case is exceptional may require a consideration by the Tribunal of the evidence relating to the merits of the claim.

21. Evidence was given by the applicant as well as by the Chief of the Executive Office of DESA. The Tribunal heard evidence relating to the circumstances under which the applicant was working and the explanations which were provided in support of her contention that she was precluded from taking the excess leave before the end of the leave year.

22. The respondent's witness (Chief of the Executive Office of DESA) also provided evidence about the applicant's leave record and the importance of strictly applying the rules regarding accumulation of leave days. Given the finding in relation to the preliminary question of receivability in relation to the time limits it is not necessary to record in detail the evidence that was given. A summary will suffice. However, such evidence proved to be important in making factual findings both as to the reasons and circumstances which resulted in the appeal being out of time as well as full appreciation of those factors that may be relevant in assessing whether this was the exceptional case contemplated by article 8.3 of the Statute, it being common ground that the claim was presented out of time.

The test of "exceptional case"

23. The factors which may assist the Tribunal in deciding if this is an exceptional case are as follows:

a. What was the applicant's state of knowledge of the time limit for appealing the administrative decision?

b. Was any ignorance or mistaken belief in relation to any matter that was essential to the bringing of the complaint or appeal itself reasonable? Any such ignorance or mistaken belief is not normally considered to be reasonable if it arose as a result of fault on the part of the applicant or her advisers in not making the necessary enquiries which would have been reasonable for them to make.

c. Was there a wholly understandable misapprehension of the law through no fault of hers or her advisers?

d. Were there crucial facts not known to the applicant which caused her to be out of time?

e. Was there a physical impediment like ill health or some other special circumstance which constituted a barrier to the timeous presentation of the claim?

f. Was there any substantial failure on the part of the applicant or her adviser?

g. Was there any misrepresentation by the respondent about any matter relevant to the question of time limits?

h. Were the parties actively engaged in a conciliation or mediation process which, understandably and with justification on both sides, caused the case to go out of time?

i. Did the applicant act diligently, at all material times, in pursuing her claim?

j. Did the applicant or her advisers make a conscious decision, for whatever reason, including tactical, to delay or postpone the lodging of the appeal?

k. Was the totality of the circumstances and events which caused or contributed to the appeal being presented out of time beyond the control of the applicant and her advisers?

l. Even if it was within the control of the applicant to request the review within time was it nevertheless excusable in the particular circumstances of the case that she delayed in filing her application in time?

m. What is the actual prejudice or harm to the respondent if the time limit was waived?

n. Is a fair hearing possible notwithstanding the lapse of time?

o. What would constitute a "limited period" in the circumstances of the particular case?

24. In considering the above questions in light of the evidence in this case could it reasonably be said that this is an "exceptional case"? This is pre-eminently an issue of fact for the decision-making Tribunal. The Judge will bear in mind the importance that is placed on time limits being complied with in the interests of good administration. At the same time the Judge will remind himself that time limits are not intended to operate to the disadvantage of staff members or to constitute a trap or a means of catching them out when they did all that could reasonably be expected of them and furthermore when they acted in good faith.

25. The facts and circumstances that themselves caused or contributed to the appeal being out of time will have to be given considerable weight in reaching a final assessment.

26. The test involves the application of a discretionary power. In my view, this is a two-stage process:

a. The Tribunal must first decide if this is an exceptional case. If it is not, that would be the end of the matter.

b. If it is exceptional, the Tribunal should decide, in the exercise of its discretion, whether it would be just and equitable to suspend or to waive the time limit.

The Tribunal's findings

27. The applicant agreed that she was aware of the fact that there was a strict rule that prevented accrued annual leave in excess of 60 days from being transferred to the following leave year. It was her case that there were special circumstances which were indeed exceptional and related directly to her commitment to the United Nations.

28. The decision that she would forfeit the excess days was communicated to her by a document that she received in April 2008. She took no action in relation to that because she relied on the promise made to her by her supervisor that she would be allowed to use the excess leave prior to retirement.

29. The applicant and her supervisor came to an arrangement completely outside the staff rules that notwithstanding the fact that the official records showed that she had lost the excess days she would nevertheless be permitted to take them as paid leave before her retirement. This unofficial and highly irregular arrangement only came to light when the applicant's request for a further extension of her appointment was refused and it became known that she had taken leave that was not officially authorised.

30. On 16 October 2008, the Director, Office for ECOSOC Support and Coordination, DESA, wrote to the Executive Officer, DESA, asking her to return the days which the applicant had lost. In effect, this amounted to a request to approve payment for six and a half days in respect of the excess "lost" leave days.

31. By a memorandum dated 28 October 2008, the Executive Officer did not approve the request.

32. On 19 January 2009, the applicant filed a request for administrative review of the 28 October 2008 decision. This request was received on 26 January 2009. It was out of time irrespective of whether the earlier date of April 2008 was taken or the later date when she received the letter of 28 October 2008. There are two possible dates for calculating when time began to run:

a. A date in April 2008 when the applicant was informed in writing that she would be permitted to carry over only 60 days from the previous leave year, thereby losing eight days. She was evasive in answering questions about her receipt of this document. I find that she did receive it. Her request for administrative review should have been made within two months of receipt. She did not make the request

because she knew that the rule was strictly applied. In any event, in collusion with her supervisor she believed that she would not lose these days which would be taken unofficially.

b. 28 October 2008 when she received the response from the Executive Officer for DESA to the effect that she had no authority to take six and a half days paid leave and that notwithstanding the request by her Director that these days should be "returned" they would not be.

33. I find as fact that the applicant knew in March and April 2008 that she was not permitted to carry over the excess leave which, at the time, was eight days. An examination of the applicant's leave records demonstrates that in previous years she managed to keep accrued annual leave below the 60-day limit at the end of the leave year. Contrary to her evidence, it is clear from the records for 2003–2008 provided by the respondent that she did not lose any leave during the period for which records were produced, although her annual leave balance fluctuated around 60 days in that time period. I find that the applicant made a conscious decision in April 2008 not to challenge the application of the rule because of the arrangement she had reached with her supervisor. Therefore, time should have run from April 2008. However, whichever date is taken, the request was out of time.

34. The applicant was concerned to secure an extension of her appointment beyond her normal retirement age. She sought legal advice at some point in the first or second week of December 2008. Whilst professional legal privilege prevented an examination of what legal advice she received, it is inconceivable that she would not have known about the time limit. She said in the course of a series of evasive answers on the question of her knowledge of time limits that she thought that it was four months. Her evasiveness was in not giving a direct answer and in shifting the focus on to other matters of dispute which were not part of this case. I find as fact that she knew that her appeal against the administrative decision should be presented within two months, but she decided to concentrate on other matters.

35. There was some dispute as to whether the applicant's supervisor made an actual promise that she could have the excess days or merely promised to make a request to the appropriate manager. No such request was made to the Executive Officer prior to the letter of 16 October 2008 by the Director. Neither the supervisor nor the Director had the authority to promise the carry-over of excess leave. The Tribunal did not hear any evidence from the supervisor or the Director. However, the Tribunal heard evidence which it accepted that the applicant's Director knew that there was no basis upon which an exception could be made and he said so to the Chief of the Executive Office of DESA. I find that he did not wish to give the applicant the bad news himself and left it to the Chief of the Executive Office to do so. The Tribunal heard evidence that it was not uncommon for directors and others in management positions to pass the buck to the executive offices in their departments.

36. The applicant's evidence that as Officer-in-Charge she could not take leave when her supervisor was away from the office was contradicted by the documentary evidence which showed that she had in the past taken leave whilst her supervisor was absent. Furthermore, the documentary evidence showed that the applicant could have taken leave to the extent of the days in excess of 60 during the months of February and March 2008. She had, in collusion with her supervisor, taken a conscious decision not to use up the excess leave knowing that in keeping with the arrangement with her supervisor she would be able to take those days in the leave year beginning April 2008, albeit unofficially.

37. The staff rule governing the carry-over of excess leave has been strictly applied over a number of years. It was submitted by the respondent and not disputed by the applicant that any exception to this rule would have to be made pursuant to former staff rule 112.2.

38. The policy and rationale for a consistent application of the rule is to be found in a memorandum dated 6 December 1977 from the Chief of the Rules and Personnel Manual Section of the Office of Personnel Services:

> Staff Rule 105.1(c) has been consistently applied in a strict manner. No exceptions will be made to allow accumulation of more than 12 weeks of annual leave, unless the staff member is on mission, as stipulated in the rule. The necessity for strict observation of this rule is fairly obvious. In view of the generous leave entitlement and possible exigencies of service occurring during a leave year, it is not uncommon for staff to be unable to take their entire leave of six weeks, in any one year. For this reason, accumulation will be allowed, but only up to a total of 12 weeks. Within this maximum limit, staff members are expected to be able to arrange their leave schedules in such a way that within the span of two years, they would at least utilize excess days of leave in the interest of both their own health and the efficiency of service. The rule therefore makes it mandatory that any accumulation beyond 12 weeks is normally liable to forfeiture.

Assessment and conclusion

39. The question whether the applicant satisfies the test that this is an "exceptional case" is a question of fact to be decided by the Tribunal. The word "exceptional" simply means something out of the ordinary. The Tribunal is required to consider the totality of the facts and circumstances including the reasons and causes as to why or how the time limit was not complied with (see paragraph 23). Application of the jurisprudence of the United Nations Administrative Tribunal, requiring a finding that the circumstances were beyond the control of the applicant, would, in my judgment, be a restrictive and unjustified interpretation placed on the plain words of the Statute of the Dispute Tribunal. It is undoubtedly a very important factor to weigh in the scales but it is not the only factor. The concept itself admits of the possibility that there would be occasions when the strict application of a time limit may give rise to manifest injustice. At the same time it is necessary for purposes of good administration and to discourage the bringing of stale claims that a time limit should be stipulated. Where the facts and circumstances of the case are out of the ordinary it could reasonably provide a justification for a failure to adhere to the time limit. The rules provide an escape clause. This approach is consistent with international jurisprudence in relation to time limits and the exceptions to be made before a claim is accepted or, in UN terminology, is regarded as "receivable".

40. I consider that it is good practice to advise staff members of time limits but failure to do so could not in itself constitute a ground for the Tribunal to suspend or waive a time limit. Furthermore, I find that this claim did not go out of time because the applicant was ignorant of the time limit, but as a result of a deliberate decision taken for reasons which she regarded, at the time, as being in her best interest.

41. Given the factual findings based on the oral and documentary evidence before the Tribunal I find that the applicant has not shown that this was an "exceptional case".

42. The application is not receivable and is accordingly dismissed.

Applicant's submission of 4 November 2009

43. On 4 November 2009, the applicant filed an additional submission entitled "Applicant's submission on the denial of her request for remuneration", seeking compensation for 25 days of work performed in December 2008, after her retirement. In this submission, the applicant contended that she was asked to work in December 2008 to "salvage desperate situation facing the office" and that, although her contract was not extended, and she was denied compensation for her work, the Organization "cannot escape responsibility for recompensing the applicant merely on the ground that she lacks a formal contract on which to base her claim".

44. I make no comments on the merits of this issue. It is not before me.

45. This application to add a new cause of action is wholly misconceived. It did not at any stage form part of this case. In fact, during the hearing the applicant and her counsel intimated that they were contemplating or had actually commenced a challenge to the decision not to extend her contract beyond October 2008. Furthermore, they stated that they were taking action in relation to the 25 days of work which she had done after the termination of her employment and for which she received no remuneration. They made it clear that the instant case was in relation to the six and a half days leave and none other.

46. The applicant repeatedly emphasised her commitment and the fact that she had done unpaid work to help the Organization because her successor had not been appointed. She said that there was important work to be completed. Supporting evidence was requested as part of her argument that her dedication was a relevant and exceptional factor to be taken into account with respect to her doing work to help the Organization at a time when she could have submitted her claim. The essential facts remain that: (i) this new matter was not part of the present claim when filed with the Tribunal, (ii) no application was made to amend the claim, (iii) the applicant and her counsel stated at the hearing that the case was about the six and a half days leave, and (iv) there was no request for an administrative review or management evaluation with respect to this additional matter.

47. The applicant's attempt to introduce a new cause of action through the back door is misconceived and is refused.

Additional matters

48. It is clear from the evidence that some supervisors and directors may be remiss in failing to implement the strict rule regarding the carry-over of annual leave. The day-to-day management of annual leave must be left to the local managers. However, the evidence which emerged in this case suggests that private arrangements that are inconsistent with the rules may well be taking place. Furthermore, there would appear to be, on the part of some supervisors a reluctance to make clear and authoritative decisions which may court unpopularity with the staff member. Instead it is left to the executive office to deliver the bad news. Evidence of such failures and display of weak management not only frustrate the underlying policy but leaves open the risk of abuse of the annual leave system.

49. The Secretary-General may consider that further guidance should be issued to include sanctions for non-compliance on the part of supervisors and managers who have responsibility for administering the rules of the Organization.

Conclusion

50. The appeal is out of time. This is not an "exceptional case" within the meaning of art. 8.3 of the Statute of the Dispute Tribunal. The purported amendment dated 4 November 2009 is misconceived.

51. The application is dismissed.

(*Signed*)

Judge Goolam Meeran

Dated this 28th day of January 2010

Entered in the Register on this 28th day of January 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York