UNITED NATIONS DISPUTE TRIBUNAL

Cases No.:	UNDT/GVA/2009/099 UNDT/GVA/2009/100 UNDT/GVA/2009/101 UNDT/GVA/2009/102 UNDT/GVA/2009/103
Judgment No.:	UNDT/2010/019
Date:	29 January 2010
Original:	English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

SAMARDZIC	APPLICANT 1
TADIC-MIHALJCIC	APPLICANT 2
MITROVIC	APPLICANT 3
MARTIC	APPLICANT 4
KOVACEVIC	APPLICANT 5

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicants:
None

Counsel for Respondent:
Josianne Muc, ALU/OHRM, UN Secretariat

Introduction

1. On 29 November 2009, the Applicants, all former staff members of the United Nations Office in Belgrade (UNOB), filed an application to appeal the decisions dated 8 April 2009 to terminate, with effect from 10 April 2009, their fixed-term appointments which were due to expire on 30 April 2009.

Facts

2. The five Applicants entered the service of the United Nations between May 1992 and July 2002, as local staff members in various parts of the former Yugoslavia.

3. Effective 1 July 2003, all of them were transferred from the former United Nations Mission in Bosnia Herzegovina (UNMIBH) to the United Nations Interim Administration Mission in Kosovo (UNMIK), while their duty station remained Belgrade.

4. The Applicants held fixed-term appointments (100 Series of the Staff Rules then in effect), which were continuously renewed for periods ranging from three months to one year.

5. Each time the Applicants' appointments were extended, they signed new letters of appointment, which specified:

> "I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and in the Staff Rules. I have been made acquainted with these Regulations and Rules, a copy of which has been transmitted to me with this letter of appointment."

6. By letters dated 8 April 2009, the Applicants were informed that "[f]ollowing the last phase of UNMIK retrenchment exercise … the Secretary-General [had] decided to terminate [their] appointment[s] with the United Nations, in accordance with [s]taff [r]egulation 9.1", with effect from 10 April 2009.

7. By email dated 21 July 2009 sent on behalf of the five Applicants, Applicant 1 sent a letter to the Assistant Secretary-General for Human Resources Management, requesting clarifications regarding the decision to terminate their appointments.

8. On 18 September 2009, the Applicants sent the Secretary-General a letter signed by them on 15 and 16 September 2009 respectively, to request a management evaluation of the decision to terminate their appointments.

9. By letter dated 6 November 2009, the Management Evaluation Unit (MEU), UN Secretariat, replied to the Applicants' "joint request for administrative review dated 21 July 2009" and to their request for management evaluation "dated 15 September 2009". In its reply, the MEU informed the Applicants that their "request [was] not receivable because the time limit for filing a request for either administrative review or management evaluation [had] expired".

10. On 29 November 2009, the Applicants filed an application before the United Nations Dispute Tribunal (UNDT).

11. On 8 January 2010, the Respondent submitted his reply and moved the Tribunal to make a "preliminary determination" into the issue of receivability of the applications.

12. On 14 January 2010, the Registry transmitted a copy of the Respondent's reply to the Applicants, informed them of the Tribunal's determination that summary judgment was appropriate and invited them to submit observations thereon by 25 January 2010. None of the Applicants, however, submitted observations.

Parties' contentions

13. As regards the receivability of their applications, the Applicants' principal contentions are:

(i) They were not aware of the time limits for requesting administrative review of the contested decision;

(ii) They never "received any employee termination advice note telling [them] that [they had] two months to appeal from the date of the receipt, let alone on what staff rule [they] could make such an appeal".

14. The Respondent's principal contentions are:

(i) The appeal is not receivable as the Applicants failed to submit a request for administrative review within the two months specified in former staff rule 111.2(a) or to file a request for management evaluation within the sixty calendar days specified in provisional staff rule 11.2;

(ii) As upheld by the Tribunal in judgment UNDT/2009/51, *Costa*, the Tribunal does not have jurisdiction to waive the deadlines for the filing of requests for administrative review pursuant to former staff rule 111.2(f);

(iii) Even if the Tribunal were to consider that it has jurisdiction to waive the time limits specified in former staff rule 111.2(a) pursuant to former staff rule 111.2(f), there are no exceptional circumstances in the cases at hand that would warrant such waiver;

(iv) The Applicants' ignorance of the time limits for appeal does not constitute "exceptional circumstances";

(v) Pursuant to article 8.3 of the UNDT statute, the Tribunal does not have authority to suspend or waive the deadlines for management evaluation;

(vi) The former United Nations Administrative Tribunal (UNAT) consistently reaffirmed the importance of complying with prescribed time limits.

Considerations

15. Since most of the facts and all legal issues are the same in the five cases, the Tribunal decided to dispose of them in a single judgment.

16. According to article 9 of the rules of procedure of the UNDT, which are based on article 7.2 of the UNDT statute, the Tribunal may determine 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 – whether the applications are time-barred – is such a matter of law.

17. Former staff rule 111.2 (a) provided 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."

18. Former staff rule 111.2 (f) read:

> "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."

19. Concerning the contested decisions dated 8 April 2009, the two-month time limit had ended in June 2009. Therefore, the Applicants' first written submission, dated 21 July 2009, was already late, and so was their formal request for management evaluation dated 15 and 16 September 2009. It follows that the Applicants did not comply with the time limits then in effect.

20. Time limits for contesting administrative decisions are well known and widespread instruments. They are imposed by the legislator in order to ensure the stability of a legal situation resulting from an administrative decision. This concern for stability explains why, in administrative law, time limits for contesting such decisions are, on the one hand, usually fairly short (an extended time limit would have the effect of "looming as a black cloud" over the definitive nature of these situations) and, on the other hand, applied with rigour (see Walid Abla, *Les conditions de recevabilité de la requête devant les tribunaux administratifs de l'O.N.U. et de l'O.I.T.* (Pédone, 1991, p. 213)). Whereas the situation may be different in employment and contract law (cf. UNDT/2009/052, *Rosca,* paragraph 48), administrative law regulates the relationship between administrative authorities and their constituents. International administrative law is the law which regulates the relationship between inter-governmental organizations and their staff members. The major tool for an organization to act vis-à-vis its staff members is the administrative decision. As a consequence, the Tribunal's mandate is related to individual applications to appeal administrative decisions (see article 2, paragraph 1 (a) and (b), of the UNDT statute).

21. Jurisdictions in which action must be commenced within a couple of months of an alleged breach are widespread, at least in continental law systems but also at the international level. They all have in common to be administrative jurisdictions, either national or international, which apply strict time limits usually calculated in terms of days or months.

22. As an example, the following table indicates time limits provided for in some national and international systems:

	Request for administrative review	**Application to administrative tribunal**
National		
France	2 months	2 months
Germany	1 month	1 month
Mexico	15 working days	45 days
Spain	1 month	2 months
International		
European Union	3 months	3 months
World Bank	120 days	120 days
ILO	6 months	90 days
IFAD	2 months / 1 month	90 days

23. It follows from the foregoing that the time limits in the United Nations justice system are neither unique nor exceptionally restrictive. 60 calendar days to request administrative review (see provisional staff rule 11.2 (c), *Management evaluation*) and 90 calendar days to file an appeal before the Tribunal (see article 8, paragraph 1 (d) (i) a. and b., of the UNDT statute) remain, compared to other national and international jurisdictions, within a reasonable frame.

24. Time limits not only exist, but have also been upheld by judicial review. Thus, the International Labour Organisation Administrative Tribunal (ILOAT) held in its judgment No. 2722 (2008):

> "As the Tribunal has repeatedly stated, for example in Judgments 602, 1106, 1466 and 2463, time limits are an objective matter of fact and it should not entertain a complaint filed out of time, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar. As recalled in Judgment 1466, the only exceptions to this rule that the Tribunal has allowed are where the complainant has been prevented by vis major from learning of the impugned decision in good time (see Judgment 21), or where the organisation by misleading the complainant or concealing some paper from him or her has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith (see Judgment 752)."

25. In the same spirit, the World Bank Administrative Tribunal stated in its decision No. 151 (1996):

> "In *Agerschou* (Decision No. 114 [1992], para. 42), the Tribunal emphasized the importance of the time limit prescribed by Article II of the Statute 'for a smooth functioning of both the Bank and the Tribunal'… Time limits are not prescribed in the interest of the Respondent alone. Rather, they have a wide purpose. They are prescribed as a means of organizing judicial proceedings in a reasonable manner. Their object is to prevent unnecessary delays in the settlement of disputes. As such they are of a mandatory nature and are enforced by courts in the public interest."

26. Also, the former United Nations Administrative Tribunal (UNAT) underlined the importance of time limits and their implementation, for example in its judgement No. 953, *Ya'coub* (2000):

> "The purpose of time-limits in regard to internal remedies is to preserve the stability of the position in law of the parties (see ILOAT Judgement No. 602, in re Decroix (1984)). Even if extensions for

> equitable considerations are possible, this happens very rarely and must be carefully justified. Otherwise the purpose of time-limits would be totally defeated."

27. Finally, the Dispute Tribunal has also already justified time limits. It is stated in UNDT/2009/036, *Morsy*:

> "There is no doubt that review or appeal proceedings must be timeously instituted in the pursuit and desirability that finality is reached regarding the validity of an administrative action. Time limits exist for reasons of certainty and expeditious disposal of disputes in the workplace. An individual may by his own action or inaction forfeit his right to be heard by failing to comply with time limits, for the maxim *vigilantibus et non dormientibus legis subveniunt* (the law aids those who are vigilant and not those who are asleep) will surely apply."

28. According to article 8, paragraph 3, of the UNDT statute, the Tribunal may suspend or waive the deadlines to file an application "only in exceptional cases". Article 7, paragraph 5, of the UNDT rules of procedure provides that an Applicant may seek suspension, waiver or extension of the time limits "in exceptional cases"; the request shall set out the "exceptional circumstances" that justify it.

29. It is necessary to recall that time limits are connected to individual action, i.e. submitting an application for legal remedy within a fixed time frame. Therefore, exceptions to the prescribed time limits must also be related to the individual conditions and circumstances of the person seeking legal remedy, not to the characteristics of the application. Of course, all relevant factors have to be considered (see UNDT/2009/036, *Morsy*). However, relevant factors for an Applicant's failure to act within the prescribed time limits are confined to his individual capacities. Factors like the prospects of success on the merits and the importance of the case are extraneous to the requirement to submit an application within the prescribed time limits and should not be taken into account at this level. Thus, the "exceptional cases" mentioned in article 8, paragraph 3, of the UNDT statute also refer to the Applicant's personal situation and not to the characteristics of the application.

30. In other words, exceptional cases arise from exceptional personal circumstances. The former UNAT defined exceptional circumstances as those

circumstances which are "beyond the control of the Appellant" (see judgement No. 372, *Kayigamba* (1986) and, generally, judgement No. 913, *Midaya* (1999) and judgement No. 1054, *Obuyu* (2002)). This definition rightly refers to the Appellant's capacity to comply with the time limits. Whether circumstances are within or beyond the control of the Applicant should be assessed against individual standards, e.g. the Applicant's educational level. All relevant facts have to be taken into account, e.g. technical problems, state of health, etc. No strict or general line can be drawn. Since it is in the Applicant's interest to obtain a suspension, waiver or extension of time limits, the burden of proof is on the Applicant.

31. The Tribunal has already stated that, during the transition to the new system of administration of justice, it would be unfair if an Applicant lost the entitlement to seek a waiver of deadlines because his or her case was transferred to the Tribunal whose jurisdiction replaced that of the former Joint Appeals Board (see UNDT/2009/052, *Rosca*, paragraph 15). This may, mutatis mutandis, also be applied to the present case, in which the contested decisions of 8 April 2009 were conveyed to the Applicants under the former justice system. Therefore, during the transition, the Tribunal has jurisdiction to waive time limits imposed by the former staff rules.

32. The Applicants' alleged ignorance of the time limits does not constitute an "exceptional circumstance". Each Applicant repeatedly signed letters of appointment, all of which included a paragraph referring to the Staff Regulations and Rules. By signing these letters, the Applicants certified that they had been made acquainted with these Regulations and Rules and, in addition, that a copy of such Regulations and Rules had been transmitted to them with the letter of appointment. Since the Applicants all served for a long period of time, they all had numerous opportunities to become familiar with the rules. In case some of the Applicants did not understand English, they also had numerous opportunities to request a translation. In sum, it is not fanciful to expect these staff members to know the rules that applied to their employment (cf. UNDT/2009/052*, Rosca*, paragraph 34).

33. Furthermore, the rules on time limits, including the consequences of non-compliance with them, are not difficult to understand. Former staff rule 111.2 (f) clearly provided that, in general, an "appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met". The time limits themselves were clear. Therefore, every staff member can easily realize that an appeal must be submitted within the prescribed time limits and that non-compliance may lead to the case being rejected (cf. UNDT/2009/052*, Rosca*, paragraph 35).

Conclusion

34. In view of the foregoing, the Tribunal DECIDES:

The applications are rejected.

(*Signed*)

Judge Thomas Laker

Dated this 29th day of January 2010

Entered in the Register on this 29th day of January 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva