



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/062

Judgment No.: UNDT/2010/037

Date: 1 March 2010

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

SETHIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

R.L. Rai

Counsel for Respondent:

Stephen Dietrich, ALU/OHRM

1. Introduction

1.1. The Applicant joined the International Criminal Tribunal for Rwanda (ICTR) on 14 March 2000 as an Administrative Assistant in the Office of the Registrar on secondment from the United Nations Development Programme (UNDP) office in New Delhi, India, at the FS-3 step 1 level.

1.2 On 21 December 2000, the Applicant sought review of his entry level. By memorandum dated 9 February 2001, the then Chief of Personnel in ICTR informed him that "in the absence of grade equivalencies for temporary conversion from General Services category, the determination of the level and grade of newly recruited staff was made on the basis of salary levels they had at their parent duty stations". The Chief of Personnel further advised the applicant that,

"this procedure was devised and implemented by OHRM. Consequently, the determination of [his] own level was based on the salary [he] had at that time in New Delhi. Therefore, we reiterate that the offer of appointment at ICTR at FS-3/I Level with the annual net earning of approximately US\$45,357.00 was correct and in accordance with prevailing procedure at that time".

1.3 In a memorandum dated 20 February 2001, the then Recruitment Officer in ICTR reiterated the statement of the then ICTR Chief of Personnel and advised the applicant to address his queries in relation to that matter to the Office of Human Resource Management (OHRM). The Applicant was subsequently promoted to the FS-4 level.

1.4 Effective 1 October 2006, the Applicant was promoted to the FS-5 level. On 13 March 2007, the Applicant retired. In 2008, the Applicant sought a review of his entry level. By email dated 7 February 2008, the Chief of the Division of Administrative Support Services in ICTR informed the Applicant that his entry level had been properly determined in February 2001 and that his request for review of the decision was not receivable as it was not made within the prescribed time-limits. On 28 March 2008, the Applicant sought administrative review of his entry level.

1.5 On 2 May 2008, the Administrative Law Unit informed the Applicant of the outcome of his request for administrative review. On 30 June 2008, the Applicant filed a Statement of Appeal with the now defunct New York Joint Appeals Board. The Respondent's Reply was filed on 2 September 2008. On 28 October 2008, the Applicant filed his observations on the Respondent's Reply.

1.6 On 17 September 2009, the parties in this case attended a Directions Hearing before the New York UNDT. The Applicant's counsel participated via teleconference from India. Following the Directions Hearing, Adams J of the New York UNDT made the following Orders:

- “1. The application is transferred to the Nairobi Registry of the Tribunal.
2. The Applicant by 24 September 2009 to provide a statement to the Nairobi Registry of the Tribunal setting out the evidence on which he relies to establish exceptional circumstances justifying waiver of the time limit prescribed by Staff Rule 111.2.
3. The Applicant by 24 September 2009 is to provide a written submission to the Nairobi Registry of the Tribunal setting out the reasons justifying waiver, including references to any decisions of the UNAT.
4. The Respondent by 1 October 2009 is to provide a statement to the Nairobi Registry of the Tribunal to refute and/or contradict the evidence on which the Applicant relies.”

1.7 On 27 January 2010, the Nairobi Registry of the UNDT, (by which time had become seised of the matter), informed the Parties as follows:

“Due to an oversight, it appears that your Motion for waiver of time limits was not transmitted to the Respondent for his comments prior to its determination by the Judge presiding over your case.

Please accept our apologies and our reassurance that this is not a common occurrence in the Registry. By copy of this email I am transmitting the Motion to the Respondent for his comments, if any.

As Article 35 of the UNDT Rules does not prescribe the timeline for Respondent's comments, the Respondent is directed to submit his comments, if any, by close of business 11 February 2010 to avoid further delays in proceeding with this matter.”

1.8 On 12 February 2010, the Respondent addressed an email to the Nairobi Registry of the UNDT advising, inter alia, as follows:

“Please note that the Respondent does not oppose the Applicant's motion for waiver of time limits to file an application to the Tribunal.

However, we reiterate our original position as already stated in our submission that the Applicant's substantive appeal is time-barred pursuant to former staff rule 111.2(a).”

1.9 The questions for determination are whether this Application is time-barred and, if so, whether the Applicant can justify a waiver of the time limits to file his Application out of time.

2. *Applicant’s submission on the exceptional circumstances justifying a waiver of time-limits*

2.1 The Applicant submits the following as the exceptional reasons that prevented him from filing his Application by 8 April 2001:

(i) That the atmosphere in ICTR was very tense and fearful in 2001 starting from January 2001 and that this was because in January/February 2001, the word had gone around of the possibility of non-renewal of contracts of certain staff based on racial discrimination.

(ii) That despite the intervention of the ICTR Staff Association, the contracts of six staff members were not renewed and ‘large number of staff’ felt it was due to racial discrimination and individual victimization.

(iii) That the very fact that an ICTR Representative had to issue a press statement on 17 May 2001 and the charges of racial discrimination goes to

prove that the atmosphere in ICTR in the preceding months was not at all normal, but very fearful and tense.

(iv) That it was not a local issue which was covered by the Local Press but the incident went right up to the Hague where the ICTR Spokeswoman had to respond to these allegations of racism.

(v) That the fact that the Registrar and the Chief of Human Resources in the ICTR agreed to give all staff members concerned the opportunity to present their cases with respect to correction of entry level and classification of posts demonstrates that it was realized that a sizeable number of staff did not feel satisfied by the way grades and steps were awarded.

(vi) That the Registrar reviewed his case in October 2006 and that this goes to prove that the Registrar did not think it was a time-barred case and that if at all the case was barred by limitation, it was revived by the review.

(vii) That the ICTR Chief of Human Resources again evaluated the Applicant's case in December 2006 and that this goes to prove that the former also did not think it was a time-barred case.

(viii) That on 7 March 2007, the Registrar promised the Applicant an impartial review of his case and that this goes to prove that even at that stage it was not a time-barred case.

3. *Applicable law*

3.1 Former Staff Rule 111.2 (a) described the first step required for a staff member to initiate an appeal process and provided, *inter alia*:

“(a) 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.”

3.2 Former Staff Rule 111.2 (f) provided that:

“(f) An appeal shall not be receivable unless the lime-limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.”

3.3 Rule 11.2, sub-paragraphs (a) and (c), of the current Staff Rules, in place since 1 July 2009, provides that:

“(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.”

3.4. The Secretary-General's Bulletin ST/SGB/2009/11 - *Transitional Measures Related to the Introduction of the New System of Administration of Justice*, dated 24 June 2009, clarifies, in sub-section 1.4, that:

“As of 1 July 2009, the United Nations Dispute Tribunal will be established as the first tier of the formal system of justice. For the purpose of determining the receivability of an application filed with the United Nations Dispute Tribunal, a staff member who has submitted a request for an administrative review of a contested administrative decision prior to 1 July 2009 shall be considered to have satisfied the requirement to submit a request for a management evaluation, as provided in article 8, paragraph 1 (c), of the statute of the United Nations Dispute Tribunal.”

3.5 Pursuant to Article 8.1 of the Statute of the United Nations Dispute Tribunal (“the Statute”) an application shall be receivable if, *inter alia*:

“(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.”

3.5 Article 8.3 of the Statute provides that:

“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. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.”

4. Considerations

4.1 The Tribunal notes that the Applicant was advised of the contested decision on 9 February 2001. However, the Applicant did not request administrative review until 28 March 2008, approximately seven years after the contested decision was conveyed to him. The Applicant claims that exceptional circumstances existed warranting the waiver of the time limits by the Tribunal. The Applicant contends that he did not submit a timely request for review based on, *inter alia*, the tense and fearful atmosphere that prevailed in the ICTR starting in January 2001.

4.2 In UNDT Judgment No. 062, *Rosca* (2009), Adams J held that the question of waiver of time limits applicable to transferred cases is governed by Article 8.3 of the Statute rather than by Staff Rule 111.2(f). I am inclined to agree with his holding in

this respect in *Rosca*. In the same case, Adams J adopted the test of “exceptional” as adopted by Ebrahim-Carstens J in UNDT Judgment No. 036, *Morsy* (2009):

“exceptional means, in substance, something out of the ordinary, quite unusual, special, or uncommon, rather than regular or routine or normally encountered but it need not be unique, unprecedented or very rare.”

4.3 It is clear from the provisions above and the Dispute Tribunal's jurisprudence that a request for an administrative review or management evaluation is mandatory in the present case. With regard to section 1.4 of ST/SGB/2009/11, the Applicant cannot be considered to have satisfied the requirement to submit a request for management evaluation as provided for in Article 8 paragraph 1 (c) of the Statute.

4.4 The circumstances described by the Applicant to justify the delay are untenable and, at best, subjective reasons upon which he had made the choice of not requesting administrative review within the prescribed time limits. The Applicant's reasons do not satisfy the requirement of “exceptional” in Article 8.3 of the Statute and as has been interpreted by the Tribunal in *Morsy* and *Rosca*. They do not also address the undue delay of over 7 years in requesting administrative review of the contested decision. The Tribunal is not convinced by the reasons advanced by the Applicant that “the atmosphere in ICTR was very tense and fearful”. The Applicant has evidently slept on his rights and has not been diligent in actively pursuing his case. This application therefore is an abuse of the process of this Tribunal.

4.5 The Tribunal reiterates the importance of complying with procedural rules as they are very important for ensuring the proper functioning of the Organization.

4.6 Having found the Application to be time-barred, the Tribunal rejects the Application in its entirety.



Judge Nkemdilim Izuako

Dated this 1st day of March 2010

Entered in the Register on this 1st day of March 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi.