Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

BORG-OLIVIER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
George G. Irving

Counsel for respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The applicant, a former staff member of the United Nations Interim Administration Mission in Kosovo (UNMIK), contests the decision, which was notified to him on 25 April 2005, to discontinue the payment of his post adjustment and mobility and hardship allowance (MHA) with effect from 1 September 2004, when his reimbursable loan to UNMIK ended and he was hired directly by UNMIK under a fixed-term appointment.

2. The parties consented to this matter being determined on the papers.

Facts

3. From September 1997 to September 2000, the applicant served, under a fixed-term appointment, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), as Legal Adviser (D-1) in Gaza.

4. On 26 September 2000, the applicant was appointed on a one-year fixed-term appointment to serve as Legal Adviser (D-2) in UNMIK, on a reimbursable loan from UNRWA. At the time, the applicant agreed in writing to forego any right to be reabsorbed by UNRWA at the end of his assignment with UNMIK. However, since his salary was administered by UNRWA, he continued to receive the post adjustment payable for Gaza, as well as the applicable MHA. His fixed-term appointment was successively extended on a yearly basis.

5. In June 2003, towards the end of the applicant's third year of service with UNMIK, UNRWA indicated that it did not wish to extend the reimbursable loan arrangement beyond the expiration of the applicant's appointment with UNRWA on 31 August 2003. However, UNRWA finally agreed to extend the arrangement one last time until 31 August 2004.

6. By letter dated 2 August 2004, the Assistant Secretary-General (ASG) for Human Resources informed the Director of Administration, UNMIK, that given "UNRWA's unwillingness to agree to continue to block a post" for the applicant, there was no other option but to offer him a contract as a mission appointee with UNMIK. Noting that the applicant had "accepted each assignment and posting in

his career with full knowledge of the administrative constraints and implications", she asked the Director of Administration, UNMIK, to convey the decision to the applicant and confirm to him that it had been taken after consultation with the Executive Office of the Secretary-General.

7. On 31 August 2004, the applicant's contract with UNRWA expired. He continued to serve as Legal Adviser in UNMIK pending receipt of an offer of appointment from the Department of Peacekeeping Operations (DPKO).

8. By code cable dated 3 September 2004, the Special Representative of the Secretary-General in Kosovo requested the Under-Secretary-General for Peacekeeping Operations to make an offer of appointment to the applicant effective 1 September 2004 "under the 100 series". He added that "all efforts should be made" to provide the applicant the same level of earnings he had been receiving while on mission detail from UNRWA, including post adjustment and MHA.

9. On 13 September 2004, DPKO sent the applicant an offer of appointment for a fixed-term appointment (100 series) with UNMIK at the D-2 level. In accordance with the provisions of former staff rule 103.21, the offer provided for the payment of a mission subsistence allowance, but no post adjustment or MHA.

10. On 15 September 2004, the applicant requested DPKO to reconsider the terms of the offer to compensate for the loss of earnings resulting from the discontinuation of his post adjustment and MHA.

11. On 1 October 2004, DPKO responded to the applicant that "the entitlement to post adjustment [and MHA] does not exist if a person does not have a link to a parent duty station or UN Agency" and that as of 1 September 2004, upon his separation from UNRWA, UNMIK could only retain his services as a mission appointee, in which case no post adjustment and MHA were payable.

12. By letter dated 11 October 2004, the applicant sought the personal intervention of the Secretary-General to find an arrangement to allow him to continue receiving payment of post adjustment and MHA. On the same day, he also sent letters to DPKO and the Chef de Cabinet of the Secretary-General, seeking further assistance in the matter.

13. By fax dated 21 March 2005, DPKO informed the applicant that after consultation with the Office of Human Resources Management, there was "no administrative mechanism to grant [him] the entitlements to post adjustment and [MHA]" which he had been receiving while on mission detail from UNRWA. UNRWA had also declined on 14 March 2005 to extend his reimbursable loan. Accordingly, another offer of appointment was sent to the applicant, which he was given until 31 March 2005 to accept.

14. By email dated 25 April 2005, the ASG for Human Resources informed the applicant's then counsel that she had not been able to find an alternative arrangement for the applicant and that he had until 30 April to accept the offer previously sent to him.

15. On 27 April 2005, the applicant accepted the offer of appointment.

16. By letter dated 20 June 2005, received by the respondent on 5 July 2005, the applicant requested the Secretary-General to review the decision of the ASG for Human Resources dated 25 April 2005.

17. On 27 and 29 June 2005 respectively, the applicant signed his letters of appointment for the periods from 1 September 2004 to 31 August 2005 and from 1 September 2005 to 31 August 2006. He added on each letter the handwritten note "without prejudice".

18. On 4 October 2005, the applicant filed an appeal with the New York Joint Appeals Board (JAB).

19. On 2 October 2006, the JAB adopted its report and transmitted it to the Under-Secretary-General (USG) for Management. The JAB concluded *inter alia* that no promise had been made to the applicant that should his contract with UNRWA not be renewed, UNMIK would continue to pay him the same emoluments as when UNRWA administered him and that the decision to grant him a fixed-term appointment with UNMIK without the same emoluments as when he was on loan from UNRWA had been taken in compliance with the Staff Rules. The JAB therefore made no recommendation in support of the appeal.

20. Since the USG for Management did not take a decision on the JAB report within the one-month period stipulated in former staff rule 111.2 (p) and (q), a copy of the report was transmitted to the applicant on 2 November 2006.

21. By letter dated 11 January 2007 addressed to the Executive Secretary of the former United Nations Administrative Tribunal (UNAT), counsel for the applicant requested a three-month "extension of the deadline for filing the intended application", which deadline he calculated would be 2 February 2010. The reason for requesting such extension was "the absence of [his] client from New York and a trip to Brazil" which he had to take. The letter did not contain any information regarding the contested decision, except for the following chronology:

- Decision by the JAB: 18 September 2006
- Submission to USG Management: 2 October 2006; no decision yet taken
- Receipt of Report of the JAB Panel: 2 November 2006

22. By letter dated 12 January 2007, the former UNAT granted the applicant an extension of the time limit in which to file an application until 30 April 2007.

23. By letter dated 14 March 2007, received by the applicant on 19 March 2007, the USG for Management notified the applicant of the Secretary-General's decision to accept the JAB conclusions and take no further action on his case.

24. Counsel for the applicant subsequently requested four more extensions of the time limit in which to file an application, all of them granted by the former UNAT. The first one was dated 24 April 2007; it was for a three-month extension and based on the "need [for] more time for preparation of the application". The second one was dated 23 July 2007; it was also for a three-month extension, this time based on the fact that the applicant's counsel had "taken on also another case with urgent deadlines". The third one was dated 23 October 2007 and based on reported attempts by counsel "to negotiate a settlement in the matter (negotiations which would be more difficult if at the same time I am making the application to the AT)". The fourth request was dated 13 December 2007, for a one-month extension until 31 January 2008; no justification was provided.

25. By letter dated 20 January 2008, counsel for the applicant wrote again to the Administrative Tribunal, this time to request a suspension of the time limits, as follows:

> [A]s I told you recently, the case is still under negotiation, and – in order to avoid further requests for extension of the deadlines to file an application with the AT – I am herewith requesting, in line with Art. 7.5 of the Statute of the Tribunal, a suspension of the time limits, pending these negotiations.

26. By letter dated 21 January 2008, the Executive Secretary of the former UNAT notified the applicant of the decision of the President of the Tribunal "to suspend the time limits in the case until further notice".

27. On 30 June 2008, the applicant retired from service.

28. Pursuant to General Assembly resolution 63/253, the former UNAT ceased to accept new cases as of 1 July 2009 and was abolished as of 31 December 2009.

29. On 24 March 2010, the applicant retained new counsel to pursue his claim.

30. On 26 March 2010, the applicant filed a request for extension of time to file an application. The reason for requesting such extension was to allow the applicant's new counsel to obtain the necessary files, including the letter from UNAT granting suspension of the time limits which had then gone missing, and prepare the application.

31. On 30 March 2010, the Tribunal requested that the respondent submit comments on the above-mentioned request before making a decision.

32. On 13 April 2010, the respondent filed his comments. The respondent submitted that in the absence of evidence that the former UNAT had suspended the time limits, the applicant had been out of time for filing his appeal since 31 January 2008 and that there were no exceptional circumstances warranting a waiver of the time limits. He thus requested that the applicant's request for extension of time be dismissed.

33. On 14 April 2010, the applicant submitted to the Tribunal the letter dated 21 January 2008 from the former Administrative Tribunal granting him a suspension of the time limits "until further notice".

34. By its Order No. 46 (GVA/2010) of 16 April 2010, the Tribunal ordered the applicant to file his application on or before 14 May 2010. The order was made "without prejudice to the questions whether the [a]pplicant was correct in his understanding as to the expiry of the relevant time limit to file an application and whether the application [was] receivable".

35. On 14 May 2010, the applicant filed a full application with the Tribunal.

36. On 14 June 2010, the respondent filed his reply to the application.

37. By letter dated 16 June 2010, the Tribunal requested that the applicant submit observations on the respondent's reply and clarify which actions he had taken, if any, in connection with his case since he had retired on 30 June 2008.

38. On 6 July 2010, the applicant submitted his observations on the respondent's reply.

Parties' contentions

39. The applicant's principal contentions are:

a. The application is receivable. Even if the applicant did not file his request for administrative review within the prescribed time limits, this argument is rendered moot by virtue of the decision of the Secretary-General accepting the findings of the JAB in this respect;

b. The former Administrative Tribunal suspended the time limits for the filing of an application until further notice. Neither the applicant nor his counsel were advised of the facts that the former UNAT would cease to accept new applications as of 1 July 2009 and would be abolished as of 31 December 2009, or of the implications of these facts for the suspension of the time limits, which has never been rescinded or replaced with new instructions by the former UNAT. These are exceptional circumstances within the meaning of article 8.3;

c. On the assumption that the suspension of the time limit ceased as of the abolition of the former UNAT on 31 December 2009, the

applicant applied to the Dispute Tribunal for a further extension of time on 26 March 2010, i.e. within 90 days;

d. The applicant's former counsel proceeded in good faith to try and obtain a negotiated settlement. The discussions were unduly prolonged in part by changes in personnel within the Administration. Subsequently, the applicant was preoccupied with the sickness and death of close relatives in 2008 and 2009, and thus had to rely on his counsel. These circumstances are also exceptional circumstances warranting a waiver of the time limits;

e. The applicant relied on his counsel to finalise his application, which the latter did not do despite several reminders. The applicant should not suffer the consequences of any failure on the part of his counsel to apprehend the need to seek further leave under the rules governing the new system of justice;

f. The unilateral decision to change, after four years, the conditions of the applicant's appointment constituted a breach of contract. There was an agreement between DPKO and UNRWA that UNRWA would administer the applicant's salary for the duration of his assignment in Kosovo. UNRWA decision after four years to discontinue the arrangement was a *de facto* abrogation of prior commitments. While the United Nations Secretariat arguably could not compel UNRWA to comply, the United Nations had an obligation either to enforce the agreement with the applicant or find an acceptable alternative.

40. The respondent's principal contentions are:

a. The application is not receivable. The applicant received notice of the contested decision in the offer of appointment dated 13 September 2004, while his request for review was not received by the respondent until 5 July 2005. He thus failed to request administrative review within two months from the date he received notification of the decision in writing, as prescribed in former staff rule 111.2 (a);

b. The applicant claims that the decision he contests is one dated 25 April 2005, which he did not provide to the Tribunal. It appears, however, on the basis of the applicant's allegations, that this decision merely confirmed the terms of the offer of appointment of 13 September 2004;

c. Furthermore, since the former UNAT ceased to accept new cases from 1 July 2009, the last opportunity for the applicant to commence an appeal was on 30 June 2009. The applicant did not commence an appeal with the former UNAT and did not take any action to submit an application to the Tribunal prior to 26 March 2010. The applicant, a former Legal Adviser at the D-2 level, has not been vigilant in the prosecution of his appeal and has failed to act diligently. The applicant refers to efforts made to negotiate a resolution as a justification for his delay, but this is not a proper basis for an extension of time and it is not clear from the applicant's submission what was allegedly being negotiated and with whom;

d. The decision not to renew the applicant's appointment with UNRWA and thus to discontinue the reimbursable loan agreement was made by UNRWA, not by the respondent. Besides, the Tribunal has no jurisdiction over UNRWA;

e. The applicant did not demonstrate the existence of an agreement pursuant to which the Organization assured him that his appointment with UNRWA would be renewed; nor did the Organization give him assurances that the level of remuneration he received during his years of service on reimbursable loan would be maintained beyond that period;

f. The Organization offered the applicant an appointment in accordance with the Organization's rules and regulations concerning special mission assignments, which the applicant accepted. The applicant had no right to a particular level of remuneration based on previous contracts and was not entitled to

receive post adjustment or MHA under his appointment to a special mission pursuant to former staff rules 103.21 (a) and 103.7 (d) (iii).

Considerations

41. The respondent avers that the application is not receivable because the applicant failed to request administrative review within two months from the date he received notification of the decision in writing, i.e. 13 September 2004, as prescribed in former staff rule 111.2 (a). He submits that the decision of 25 April 2005, which he says was not provided to the Tribunal, is a purely confirmative decision.

42. The Tribunal notes, however, that the email of 25 April 2005 from the ASG for Human Resources—which the applicant did submit as annex 23 to his application—does not merely confirm a previous decision, but shows that in the meantime, efforts had been made by OHRM to find an alternative arrangement to accommodate the applicant and sets a new deadline for him to accept the offer. In the Tribunal's opinion, the decision of 25 April 2005 may thus be considered as a new decision, which would have had the effect of setting a new time limit for requesting administrative review. Since the applicant sent his request for review on 20 June 2005, he was within the two-month time limit prescribed in former staff rule 111.2 (a).

43. The applicant nonetheless failed to comply with other time limits. To be receivable, an application must normally be submitted within the time limits specified in the Tribunal's statute. Such time limits have to be strictly enforced (see for example the United Nations Appeals Tribunal's Judgment No. 2010-UNAT-043, *Mezoui)*.

44. Article 8.4 of the UNDT statute, which must be read in conjunction with article 8.3, provides that "an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision". In accordance with this provision, the three-year time limit cannot be extended, even in exceptional cases within the meaning of article 8.3 of the statute. Since the applicant contests a decision dated 25 April 2005, he had by far exceeded the 'absolute' three-year time limit when he first wrote to the Dispute

Tribunal on 26 March 2010 to request an extension of time to file his application. Even if the Tribunal were to consider that, in this case, the "contested administrative decision" within the meaning of the above-cited article 8.4 is the Secretary-General's decision on the JAB report, dated 14 March 2007 and communicated to the applicant on 19 March 2007, the application would still have been filed beyond the three-year time limit.

45. There are, however, additional provisions in the statute of the Dispute Tribunal regarding cases that were pending under the former system of administration of justice when the latter was abolished. Article 2.7 (b) of the statute thus enables the Tribunal to hear and pass judgment on "[a] case transferred to it from the United Nations Administrative Tribunal". In addition, section 4.2 of ST/SGB/2009/11, *Transitional measures related to the introduction of the new system of administration of justice*, prescribes that "[c]ases 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".

46. The crucial question is whether the applicant had a "case" before the former United Nations Administrative Tribunal that could have been transferred to the Dispute Tribunal. As a matter of fact, the applicant never filed an application with the Administrative Tribunal. The only actions taken before the Administrative Tribunal were to request repeated extensions of time, and eventually a suspension of the time limits, to file an application. The applicant never specified in his communications to the Administrative Tribunal what his future application would be about. The contested decision was never sent to the Court, nor was its content ever mentioned. The issues to be raised by the future application were completely unknown to the Administrative Tribunal until it was abolished. There was no case before it that could have been decided by 31 December 2009. For these reasons, the Tribunal considers that the applicant's requests for extension of time to the former Administrative Tribunal cannot be identified as a "case". Hence, the Dispute Tribunal is not competent to hear the applicant's case under the transitional measures either.

47. The Tribunal will nevertheless examine whether it would be in the interests of justice to declare the application receivable. In its Judgment

No. 2010-UNAT-043, *Mezoui*, the Appeals Tribunal considered that cases that were "directly in the path of the changeover" from the former system of administration of justice to the new one might be "grant[ed] some leeway" in terms of compliance with the various time limits, although this would have to be decided based on the specific circumstances of each case.

48. On the one hand, it is true and should not be overlooked that on 21 January 2008, the former Administrative Tribunal had accepted, pursuant to article 7.5 of its statute, to suspend the time limits for the applicant to file an application "until further notice" and that subsequently, it never revoked the suspension, nor notified the applicant that it would cease to accept new applications after 30 June 2009. On the other hand, the applicant's request for suspension of the time limits had been based on "negotiations" aimed at reaching an amicable settlement and avoiding formal litigation.

49. The papers provided by the applicant show that the so-called negotiations—which rather than negotiations appear to this Tribunal as unilateral and fruitless attempts by the applicant (i) to get third parties to intervene in his favour and (ii) to convince the Administration to reverse a decision already confirmed on several occasions—ended in June 2008, when the applicant retired. Therefore, from July 2008 onwards, it was the applicant's duty to pursue the matter by filing a proper application. The applicant seemed to be well aware of this obligation since he confirmed that during several visits to New York, he expressed to his then counsel the need to act on the pending application and requested him to do so by the end of 2008. Faced with the situation where his counsel failed to act on the filing, in spite of supposed numerous reminders, the applicant, as a former D-2 Legal Adviser, was certainly in a position to consider other alternatives, including a change of legal representative. Instead, the applicant failed to take any action to that effect for well over a year. While the applicant may have faced for some time a difficult family situation, the Tribunal holds the view that it would not have been unreasonable to expect him to revive the matter before the United Nations Administrative Tribunal rather sooner than later. The Tribunal considers that the applicant failed to act diligently at all material times in pursuing his claim and in so doing forfeited his rights to be heard.

50. Assuming that the applicant's former counsel is responsible for the delay in pursuing this case, the Tribunal previously held that it cannot and should not, except in rare situations, excuse an applicant for the failure of his or her counsel to successfully defend his or her case. In judicial proceedings, no distinction should normally be made between a party and its representative. Representation means that a party and its duly authorized counsel are regarded as a single entity. Except in cases where counsel would abuse his or her authority, all actions taken by counsel are to be attributed to the party he or she represents. (See Judgment No. UNDT/2010/102, *Abu-Hawaila)*.

51. Notwithstanding, even assuming in the applicant's favour that his application is receivable and for the purpose of disposing of the substantive issues raised, the Tribunal can add that there are not any valid grounds for contesting the respondent's decision to discontinue the payment of post adjustment and MHA to the applicant when his reimbursable loan from UNRWA to UNMIK ended and he was hired directly by UNMIK.

52. It is not disputed that the applicant's new appointment with UNMIK—after UNRWA decided to discontinue the reimbursable loan arrangement—was in accordance with the Organization's rules concerning special mission assignments, which specifically exclude payment of post adjustment and MHA.

53. Furthermore, the applicant did not produce evidence that a promise was made or that assurances were given by the UN to the effect that he would continue to receive post adjustment and MHA even if UNRWA decided to discontinue the reimbursable loan arrangement. Whilst it is true that DPKO "authorized" UNRWA to pay his salary and allowances at the D-2 level for the duration of his initial and subsequent assignments on reimbursable loan, this is not tantamount to making a commitment to the effect that UNRWA would continue the reimbursable loan arrangement each time the applicant's assignment with UNMIK was extended.

54. Finally, only UNRWA, not DPKO, could have made such a commitment to the applicant. If the applicant wanted to contest UNRWA decision not to renew his appointment and thus to discontinue the reimbursable loan, he should have availed himself of UNRWA internal recourse mechanisms. In any event, the

Dispute Tribunal is not competent to review decisions taken by UNRWA since UNRWA does not fall within its jurisdiction.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 30th day of August 2010

Entered in the Register on this 30th day of August 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva