



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/28/
UNAT/1686
Judgment No.: UNDT/2010/168
Date: 24 September 2010
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MUGENDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for applicant:

Duke Danquah, OSLA

Counsel for respondent:

Emily Langston, ALS/OHRM, UN Secretariat.

Introduction

1. The applicant entered the service of the International Criminal Tribunal for Rwanda (ICTR) in April 2002 as a Finance Assistant (GL-5) and worked on consecutive contracts until 31 August 2006 when he was separated from service.

2. On 31 July 2006, the Human Resources and Planning Section (HRPS) of ICTR verbally informed the applicant that his contract would not be renewed beyond that same day, but informed him that a one month extension would be sought for him until 31 August 2006, in order to give him notice. The decision was again communicated to the applicant in writing on 18 August 2006.

4. On 18 December 2006, the applicant wrote to the Secretary-General requesting a review of the administrative decision not to renew his contract and on 9 April 2007, he filed an incomplete Statement of Appeal with the Joint Appeals Board (JAB). He requested and was granted an extension of the time limit to file his appeal to 8 May 2007.

5. On 8 May 2007, the applicant submitted his Statement of Appeal to the JAB. The JAB submitted its report on 30 May 2008. In its report, the JAB rejected the applicant's pleas as time-barred and, thus, as not receivable.

6. On 31 July 2008, the Deputy Secretary-General noted the above finding and informed the applicant as follows:

“The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case. He accepts the findings and conclusion of the JAB and has decided to take no further action in this matter.”

7. On 30 April 2009, the applicant submitted the present Application to the former UN Administrative Tribunal. The respondent filed his Reply on 5 October 2009. On 4 February 2010, the case was transferred from the former UN Administrative Tribunal to the United Nations Dispute Tribunal.

8. On 27 May 2010, the Dispute Tribunal issued Order No. 097 (UNDT/2010) in which the parties were advised to file their written submissions on the question of waiver of time limits by or before, 30 June 2010. The applicant and the respondent filed the said submissions on 29 and 30 June 2010 respectively.

Applicant's Submissions

9. The applicant submits the following as the exceptional reasons justifying a waiver of the time limits in his case:

a. He made a credible attempt to inform the Secretary-General of his intention to request a review of the decision within the 60-day time limit. His intention to communicate his desire for the impugned decision to be considered by the Secretary-General was manifested in the letter he sent to the head of the local field office with a view to having the necessary review done.

b. As the representative of the Secretary-General in the field office, the head of the mission was empowered to receive communications destined for the Secretary-General and the Organization generally and he was duty-bound to forward such requests to the appropriate office for processing. Therefore, when he submitted his letter contesting the impugned decision to the head of mission on 26 September 2006, he had effectively fulfilled the task of submitting the request for review within the 60-day time limit. At worst, the applicant submits that he can only be accused of failing to follow strict procedure by not employing the standard request for review template for the letter to be sent directly to the Secretary-General.

c. It would defeat the ends of justice if his substantive rights were to be defeated simply because the Administration used a minor departure from procedure to deny the applicant his fundamental right to appeal.

d. His letter to the head of mission also served to notify the Organization that he was searching for the correct procedure to reach the Secretary-General about his desire to have the decision reconsidered. That notification immediately placed a burden on the head of mission to alert the applicant to his rights under the Staff Rules and the proper procedure to effectuate his expressed desire. Indeed, given the fact that he stood to lose his appointment with the Organization altogether, the head of mission was duty-bound to advise him as to the means to secure his fundamental rights. His inadvertent mistake should have been recognized by the Organization as a good faith effort and he should have been immediately referred to the Panel of Counsel office for proper legal assistance.

e. The combined effect of the circumstances that prevented his letter to the head of mission from being communicated to the Secretary-General to commence the appeal process amounted to “exceptional circumstances” within the meaning of the Staff Rules.

f. Upon receiving the letter of non-renewal on 14 August 2006, he replied on 17 August 2006 demanding the reasons for that decision. The President of the local Staff Association then followed that up with a request to the ICTR Registrar to meet with applicant to hear his request for review of the impugned decision to no avail. On 26 September 2006, he wrote directly to the Registrar explaining that since he had not been furnished with reasons for the non-extension of his contract, he had no option but to assume that he was slated for disciplinary action under staff rule 110.3(vii) so that he was entitled to be notified of any pending allegations or charges that had been made against him and that he never received any reply to his two letters.

g. The applicant submits that those two letters constituted an effective request to the Secretary-General to review the decision of

non-renewal. This means that as far back as 26 September 2006 - a point of time well within the 60-day time limit - he had effectively requested the Secretary-General to review the administrative decision not to renew his contract or at least clarify the purpose of the letter denying him a contract renewal. The fact that the ICTR Registrar and other Human Resources officials failed to communicate his intention to the Secretary-General cannot be held against him because he acted in good faith to communicate his intention to the appropriate sources.

Respondent's Submissions

10. The respondent's submissions on the question of waiver of time limits are:
 - a. The JAB correctly found that the applicant's appeal was time barred because the applicant failed to comply with the time limit specified in former staff rule 111.2(a) when filing his request for review of the decision of 18 August 2006.
 - b. There were no exceptional circumstances justifying the waiver of the time limits prescribed by former staff rule 111.2(a).
 - c. The Secretary-General's decision to accept the recommendation of the JAB that the appeal was time barred was objective, reasonable and did not constitute an abuse of his discretion.
 - d. The Application is time barred and therefore not receivable, because it was filed outside the 90 day time limit under Article 7(4) of the former UN Administrative Tribunal Statute.
 - e. Decisions made by the Secretary-General between 2 April 2009 and 30 June 2009 on appeals may be challenged before the Dispute Tribunal. There is no express provision for the transfer of matters that have been decided by the Secretary-General before 2 April 2009.

f. The present Application is not receivable because it was filed outside the 90 day time limit prescribed under Article 7(4) of the former UN Administrative Tribunal Statute. The applicant received notification of the Secretary-General's decision accepting the findings of the JAB on 31 July 2008. The applicant was therefore required to file his Application with the Administrative Tribunal by Wednesday, 31 October 2008. However, the applicant did not file the present Application until 30 April 2009, some five months after the expiration of the deadline.

g. No submissions were made by applicant to the effect that his personal situation prevented him from filing the Application of April 2009 in accordance with the time limits set out in Article 7(4) of the former UN Administrative Tribunal Statute. On the basis of the information before it, there is no record of the applicant having requested or having been granted an extension of time to submit his Application to the former UN Administrative Tribunal.

h. The applicant has not demonstrated the existence of an "exceptional case" which would warrant the waiver of the said time limits for filing the Application pursuant to Article 8(3) of the Statute of the Dispute Tribunal.

i. In light of the foregoing, the respondent submits that the present Application is time barred and not receivable, and, that waiver of the time limits is not warranted.

Judgment

11. In UNDT Judgment No. 037, *Sethia* (2010), the Tribunal set out the applicable law in determining whether the time limits imposed by the Statute of the Dispute Tribunal will be waived. In the present case, having considered the applicant's submissions, the Tribunal finds that they do not satisfy the requirement of "exceptional" in Article 8.3 of the Statute of the Dispute Tribunal. The applicant did

not abide by the time limits for filing his application with the JAB and subsequently, in his appeal against the JAB's findings, he also failed to abide by the time limits for filing his application with the former UN Administrative Tribunal. It is obvious that the applicant is not serious or diligent in pursuing his claims and this absence of diligence does not amount to exceptional circumstances. Having found the Application to be time-barred, the Tribunal rejects the Application in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 24th day of September 2010

Entered in the Register on this 24th day of September 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi