



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/052
(UNAT 1696)
Judgment No.: UNDT/2010/198
Date: 19 November 2010
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

ZIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, United Nations Secretariat

Introduction

1. On 28 May 2009, the Applicant, a former staff member of the United Nations Interim Administration Mission in Kosovo (“UNMIK”), filed an application with the former United Nations Administrative Tribunal contesting the decision of the Secretary-General of 11 July 2008 to accept the conclusions of the Joint Appeals Board (“JAB”) and reject his appeal as time-barred.

2. Pursuant to the transitional measures set out in General Assembly resolution 63/253, the application, which was pending before the Administrative Tribunal, was transferred to the United Nations Dispute Tribunal on 1 January 2010.

Facts

3. The Applicant entered the service of UNMIK in January 2000 as a Civil Affairs specialist. He left the service in December 2008, having reached the mandatory retirement age.

4. By email of 5 June 2006, the Applicant was informed that he had been selected to take up the post of UNMIK Municipal Representative to the Municipal Hub of Gjilan/Gnjilane with effect from 1 July 2006.

5. On 19 June 2006, the Applicant was orally informed that he would not be taking up duties as UNMIK Municipal Representative to the Municipal Hub of Gjilan/Gnjilane. On 22 June 2006, he had a meeting on this subject with the Director, Civil Administration and, following that meeting, on 24 June 2006, he sent her an email expressing his disagreement with the above-mentioned decision and asking her to reconsider it. The Director, Civil Administration replied, on the same day, that she was maintaining her decision.

6. By memorandum dated 28 June 2006, the Director, Civil Administration informed the Director of Administration that written and oral complaints had been received, notably from the Organization for Security and Cooperation in Europe (“OSCE”) and the UNMIK security and police services, concerning the

Applicant's professional conduct. She added that, knowing that relations between the Applicant and the operational partners of UNMIK were strained, she could not jeopardise operational efficiency in the handover of UNMIK's responsibilities for the municipality to OSCE by appointing the Applicant as UNMIK Municipal Representative to the Municipal Hub of Gjilan/Gnjilane. Consequently, she had decided to redeploy him to another unit.

7. By memorandum also dated 28 June 2006, the Executive Office of the Division of Civil Administration informed the staff of the Division, including the Applicant, that he was being redeployed to another unit in the Division. By a memorandum sent on the same day to the Director, Civil Administration, the Applicant contested the procedure followed in deciding to redeploy him, and stated that he would take up his duties as UNMIK Municipal Representative to the Municipal Hub of Gjilan/Gnjilane on 1 July 2006 in accordance with the instructions dated 5 June 2006.

8. By memorandum dated 12 July 2006, the Director of Administration informed the Applicant that the Director, Civil Administration had full authority to redeploy staff according to the requirements of the service and that, therefore, the decision of which he had been notified on 28 June was maintained.

9. By email dated 2 August 2006, the Director, Civil Administration informed the Applicant of her decision to redeploy him to the Kosovo Property Agency.

10. By email dated 15 September 2006, the Applicant referred his case to the Ombudsman, requesting an investigation and asking for disciplinary proceedings to be taken against the Director, Civil Administration.

11. On 4 October 2006, the Applicant wrote to the Secretary-General requesting "re-instatement as UNMIK Municipal Representative (MR)-Hub Gjilan/Gnjilane Region".

12. On 5 January 2007 the Applicant filed an incomplete statement of appeal with the JAB and on 5 February 2007 he filed a complete statement of appeal.

13. In its report adopted in early April 2008, the JAB concluded that the Applicant had failed to comply with the two-month time limit laid down in staff rule 111.2(a) in which to request the Secretary-General to review the contested decision, and found that no exceptional circumstances existed to justify a waiver of the time limit. It therefore rejected the appeal as time-barred.

14. By letter of 11 July 2008, the Deputy Secretary-General forwarded a copy of the JAB report to the Applicant, and notified him of the Secretary-General's decision to accept the conclusions of the JAB and reject his appeal.

15. On 28 May 2009, having requested and obtained five extensions of time from the Administrative Tribunal, the Applicant filed an application appealing against the decision of the Secretary-General dated 11 July 2008.

16. On 4 December 2009, having requested and obtained two extensions of time from the Administrative Tribunal, the Respondent submitted his answer to the application.

17. As the case could not be decided by the Administrative Tribunal before its abolition on 31 December 2009, it was transferred to the United Nations Dispute Tribunal on 1 January 2010.

18. On 22 March 2010, the Applicant submitted observations on the answer of the Respondent. By letter of 26 March 2010, the Tribunal forwarded the said observations to the Respondent and informed the parties, who expressed no objections, that it did not consider a hearing necessary in this case. Also on 26 March 2010, the Applicant filed a motion to change the venue of the case from Geneva to New York.

19. By Order No. 38 (GVA/2010) of 29 March 2010, the Judge assigned to the case dismissed the Applicant's motion for a change of venue.

20. By letter of 3 November 2010, the Tribunal requested that the parties submit a copy of the Applicant's letter of 4 October 2006 to the Secretary-General, which was missing from the record.

21. On 9 November 2010, Counsel for the Applicant submitted the above-mentioned letter to the Tribunal together with additional comments.

Parties' contentions

22. Concerning receivability, the Applicant's contentions are:

a. The application is receivable. If he did not submit his request for review within the prescribed time limit, this was because he was prevented from doing so by events beyond his control. Staff rule 111.2(f) must therefore apply;

b. First, the Applicant was denied access to his office from 28 June to 25 July 2006, and was therefore unable to consult the documents he needed to draft his request for review. Furthermore, over a three-month period, he was hastily redeployed to a number of posts, and therefore did not have either an office or a computer with which to begin the appeal procedure. From the moment he voiced his opposition to the contested decision, he was subjected to harassment so serious that his psychological health was adversely affected;

c. He tried all means of resolving the problem by conciliation, including writing to the Ombudsman. The effect of that appeal to the Ombudsman was to suspend the 60-day time limit for making a request to the Secretary-General to review the contested decision, in accordance with former staff rule 111.2;

23. The Respondent's contentions are:

a. The Applicant is time-barred because he failed to comply with the time limit of two months laid down in staff rule 111.2(a) in which to request the Secretary-General to review the contested decision. He should have written to the Secretary-General by 28 August 2006 at the latest, instead of which he waited until 4 October 2006, more than one month after the time limit had expired;

b. The Applicant has not shown any exceptional circumstances that would justify waiver of the two-month time limit mentioned above. While the Applicant maintains that he did not have access to his office from 28 June to 25 July 2006, his attendance records for that period do not show any absence apart from one half-day of leave on 21 July 2006;

c. The Applicant's argument that his letter to the Ombudsman operated to suspend the time limit for writing to the Secretary-General is unfounded. The Secretary-General's bulletin dated 24 October 2002 on the Office of the Ombudsman contains no provision of the sort, but merely provides that: "the Ombudsman may request the [JAB] to extend the normal time limit for filing an appeal within the framework of staff rule 111.2", which the Ombudsman did not do in the present case. Furthermore, the Applicant did not ask the Ombudsman to act as mediator and to suspend the time limit for appeal, but only to carry out an investigation and take disciplinary proceedings against the Director, Civil Administration. Lastly, by the time the Applicant wrote to the Ombudsman the time limit for writing to the Secretary-General had already expired.

Judgment

24. The Tribunal considers that there is no need for a hearing in the present case, and, since the parties have raised no objections, gives its Judgment on the basis of the written pleadings.

25. The Applicant contests the decision informing him that he would not be taking up duties as UNMIK Municipal Representative to the Municipal Hub of Gjilan/Gnjilane. Staff rule 111.2 in effect at the time the events took place provided:

(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.

...

(f) 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.

26. It follows from the above provisions that, in sending his request for review to the Secretary-General on 4 October 2006, the Applicant, who had been notified of the contested decision orally on 19 June 2006 and in writing on 24 June 2006, failed to comply with the two-month time limit laid down in staff rule 111.2(a) cited above. That request was therefore time-barred.

27. The Applicant nonetheless contends that staff rule 111.2(f), cited above, should apply to his case, as the delay in presenting his request for review was due to events that prevented him from doing so within the time limit allowed.

28. The Appeals Tribunal, the present Tribunal and the former United Nations Administrative Tribunal have defined the notion of “exceptional circumstances” as circumstances beyond the Applicant’s control, which prevented him from exercising his right of appeal in a timely manner (see, for example, Judgment 2010-UNAT-029, *El-Khatib*, of the Appeals Tribunal; Judgments UNDT/2010/083, *Barned*, and UNDT/2010/102, *Abu-Hawaila*, of the present Tribunal; and Judgment No. 1301 (2006) of the former Administrative Tribunal).

29. While the Applicant maintains that he was denied access to his office from 28 June to 25 July 2006, the Tribunal finds, on the one hand, that he has offered no evidence for that allegation, and, on the other, that even if that allegation were proven, it would not explain why he was unable to submit his request for review after 25 July 2006 but within the time limit allowed.

30. In addition, as for the Applicant’s efforts to find an informal solution, including by contacting the Ombudsman, the Tribunal can only repeat what it stated in its Judgment UNDT/2010/174, *Ryan*:

Whereas the Applicant holds, contrary to what the Secretary-General considered, that his request for review is not time-barred since, to obtain satisfaction, he opted for dialogue rather than dispute, and it was only when dialogue failed that he instituted a formal procedure, it should be recalled that the search for an agreement does not normally have the effect of suspending the time limits for the filing of an internal appeal or an appeal with

the Tribunal, and that this does not in any case constitute exceptional circumstances (see for example judgments No. 1211, *Muigai* (2004), and 1386 (2008) of the former UN Administrative Tribunal; and judgment UNDT/2010/102, *Abu-Hawaila*, by this Tribunal).

31. Besides, contrary to what the Applicant maintains, the Tribunal finds that former staff rule 111.2 does not provide, in any way, that referral to the Ombudsman has the effect of suspending the two-month time limit laid down in subparagraph a) of that rule. Even supposing the Applicant had intended to refer to the provisions applicable to staff of the United Nations Development Programme, this argument is unavailing where he is concerned.

32. The Tribunal considers, therefore, that the Applicant has failed to establish that he was prevented by exceptional circumstances from submitting his request for review within the two-month time limit laid down by the Staff Rules in force at the time.

33. As a consequence of the foregoing, the application is irreceivable as it is time-barred.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 19th day of November 2010

Entered in the Register on this 19th day of November 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva