



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/053
/UNAT/1539
Judgment No.: UNDT/2011/064
Date: 6 April 2011
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

HUNT-MATTES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Simon Cuthbert, Russell Jones & Walker

Counsel for Respondent:

Shelly Pitterman, UNHCR

Introduction

1. The Applicant, a former staff member of the United Nations High Commissioner for Refugees (“UNHCR”), filed an appeal with the former United Nations Administrative Tribunal (“the former UN Administrative Tribunal”) contesting the decisions by UNHCR not to renew her fixed-term appointment and not to grant her an indefinite contract upon her interagency transfer from the World Food Programme (“WFP”). This judgment focuses solely on the decision not to grant the Applicant an indefinite contract as the Respondent submits that this claim is not receivable because it is time-barred.

2. On 1 January 2010, this case was transferred to the Geneva Registry of the United Nations Dispute Tribunal (“the Tribunal”) in accordance with ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice). It was subsequently transferred to the Tribunal in Nairobi by Order No. 51 (GVA/2010).

3. The Tribunal, having noted the Respondent’s assertion in his reply of 24 January 2008 that this claim is not receivable, invited the parties to file supplementary documents and/or comments, in addition to their previous submissions, on the issue of receivability. The Parties however did not submit any supplementary documents or comments.

Relevant facts

4. The Applicant joined the United Nations in 1994 as a Human Rights Field Officer with the Office of the High Commissioner for Human Rights (“OHCHR”) in Rwanda. From February 1995 to January 1996, she served as a Crime Prevention and Criminal Justice Officer at the P-3 level for the United Nations Office in Vienna. Between 1996 and 1998, she worked for UNHCR in various capacities. Between

1998 and September 2003, she served with the WFP but during this period, she also served with the Joint United Nations Programme on HIV/AIDS (“UNAIDS”) on a reimbursable loan basis from WFP and with the Global Alliance for Improved Nutrition whilst remaining a staff member of WFP.

5. In 2003, UNHCR offered the Applicant a one year fixed-term appointment which she accepted. Consequently, on 2 September 2003, she returned to UNHCR as a Senior Investigation Officer at the P-4 level in the Investigation Unit of the Inspector General’s Office (“IGO”) on an inter-agency transfer from WFP.

6. On 8 September 2003, the Applicant followed up with the Division of Human Resources Management (“DHRM”) of UNHCR on her contractual status. On 8 October 2003, the Director/DHRM (“D/DHRM”), informed the Applicant that even though she had held an indefinite appointment with WFP, it was not possible under UNHCR’s normal policies to grant her an indefinite appointment. On the same day, the Applicant signed, with a written reservation, a Letter of Appointment that set out the terms of her one year fixed-term appointment.

7. On 20 November 2003, the Applicant sought administrative review of UNHCR’s decision, contained in the D/DHRM’s letter of 8 October 2003, not to grant her an indefinite contract. By a letter dated 10 December 2003, the Administrative Law Unit (“ALU”) informed the Applicant of its receipt of her request for administrative review on 9 December 2003 and of the following:

“If the Secretary-General replies to your request and you are not satisfied with the review of the administrative decision, you may appeal against the answer within one month of the receipt of that reply, pursuant to staff rule 111.2(a)(i). Likewise, if the Secretary-General does not reply to your request for review within two months of the receipt of your letter at this office, you may appeal against the original administrative decision within one month of the expiration

of the two-month period for review, i.e., three months from the 9 December 2003 receipt of your letter at this office, in accordance with staff rule 111.2(a)(ii).”

8. On 28 June 2004, the Applicant wrote to the D/DHRM seeking the “final decision” of UNHCR on three issues, including her right to an indefinite contract, which she wanted to appeal to the former UN Administrative Tribunal. On 25 October 2004, the Applicant submitted a request for administrative review of the decision by UNHCR to separate her from service while she was on sick leave as well as for a “series of actions and/or omissions which [were] detrimental to [her] future in the organization”. In this request for review, the Applicant informed the Secretary-General how she had been subjected to various forms of harassment in the Office of the Inspector General and that “the stress this engendered had prevented [her] from following-up, in a timely manner, the issue of the nature of [her] contract which [she] had brought to [his] attention late last year”.

9. By a letter dated 18 November 2004, the Administrative Law Unit (“ALU”) informed the Applicant of its receipt of her request for administrative review on 17 November 2004 and advised her of her right to appeal the original administrative decision three months from 17 November 2004 in the event that the Secretary-General did not respond to her request for review within two months. On 15 January 2005, she filed a statement of appeal with the former Joint Appeals Board (“JAB”) in relation to the non-renewal of her contract, workplace harassment, the assessment of her performance, the separation procedures and her contractual status.

10. The JAB, in its report of 31 August 2006, concluded that the Applicant’s appeal against the decision not to grant her an indefinite contract was inadmissible as she had failed to meet the deadline stipulated in former staff rule 111.2(a) and she had failed to provide a satisfactory explanation as to why she had not met the deadline to submit her statement of appeal. By a letter dated 27 October 2006, the Applicant was

informed by the then Under-Secretary-General for Management of the decision of the Secretary-General to accept the recommendation of the JAB to reject her appeal in its entirety.

11. The Applicant subsequently submitted the current application to the former UN Administrative Tribunal.

Applicant's submissions

12. The Applicant requests that the Tribunal find the claim receivable. She submitted a request for administrative review on 20 November 2003 but due to the psychological and professional stress she was subjected to from January 2004 onwards in the Office of the Inspector General, she was unable to follow-up, to find appropriate counsel and incapable of submitting a reasoned appeal. In this respect, she further contends that the Respondent had a duty of care to her to investigate her abuse of power and harassment complaints that were reported informally and formally in order to determine independent evidence of what the exceptional circumstances that prevented her compliance with the time limit. Thus, the Respondent's failure to follow-up on her complaints is not her responsibility and cannot be held against her.

13. The Applicant asserts that she requested reconsideration of her contractual status on 28 June 2004 but did not receive a response from UNHCR. She submits further that her earlier concern regarding her contractual status was overshadowed by a subsequent work-related accident and the non-renewal of her contract while she was on medical leave.

Respondent's submissions

14. The Respondent notes that the Applicant requested administrative review of the contested decision on 20 November 2003 but did not submit an appeal to the JAB

until almost one year later, 15 January 2005. The Respondent submits that she has not offered any acceptable explanation for her delay and has cited no exceptional circumstances that could have warranted a waiver of the time limit by the JAB, pursuant to staff rule 111.2(f). Consequently, the issue involving the award to the Applicant of a fixed-term appointment in lieu of an indefinite appointment in September 2003 is not receivable.

Considerations

15. Pursuant to former staff rule 111.2(a), a staff member was required to request an administrative review of a contested decision within two months from the date of being notified of the decision. The rule further stipulated that if the Secretary-General replied to the staff member's request, he or she could appeal against the answer within one month of the receipt of such reply. If the Secretary-General did not reply to the letter within one or two months, depending on the staff member's duty station, the staff member could appeal against the original administrative decision within one month of the expiration of the specified time limit.

16. Under former staff rule 111.2(f), an appeal to the JAB was not receivable unless the time limits specified in staff rule 111.2(a) had been met or had been waived in "exceptional circumstances" by the JAB.

17. Based on the 10 December 2003 letter from ALU, the Applicant should have filed an appeal with the JAB on or before 8 March 2004. The Tribunal notes that the Applicant has conceded in her various submissions that she failed to comply with the time limit set out in former staff rule 111.2(a). For example, in her statement of appeal, dated 15 January 2005, she stated that "[o]n 20 November 2003, I had requested the administrative review of UNHCR's decision not to endorse my indefinite contract...Regrettably, because of the psychological and professional stress I was subjected to from January 2004 onwards, I was unable to follow-up, to find

appropriate counsel and incapable of submitting a reasoned appeal”. In her application to the former UN Administrative Tribunal, she stated that she had earlier raised the issue of her contractual status for review “but had been prevented from pursuing in a timely manner, given the treatment [she] was subjected to in the Inspector General’s Office (IGO)”. Lastly, in her 30 July 2008 reply to the Respondent’s answer, she asserted that “the Respondent did not explore the issue of the exceptional circumstances and events that would have provided evidence that the circumstances and events were beyond the Applicant’s control to justify a delay in filing”.

18. Consequently, the only live issue for determination in this judgment is whether there were “exceptional circumstances” to warrant a waiver of the time limit. In this regard, the Tribunal has previously stated that “exceptional circumstances” must be something out of the ordinary, quite unusual, special, or uncommon and that they need not be unique, unprecedented or beyond the applicant’s control.¹

19. The Tribunal considers that the Applicant’s mere assertion that she was unable to follow-up and was incapable of submitting a reasoned appeal as a result of the psychological and professional stress she was subjected to from January 2004 onwards in the Office of the Inspector General, is inadequate to warrant a waiver of the time limits.

20. In the absence of any contrary evidence, the Tribunal accepts the Applicant’s private physician’s assessment that the Applicant “manifested symptoms indicating increasing levels of stress” but notes that her physician did not state that her stress incapacitated her or prevented her from functioning even partially. It is noteworthy that during the period between September 2003 and July 2004, the Applicant was able to function and reason fully as, according to her, she managed a caseload of 35

¹ *Morsy* UNDT/2009/036; *Sethia* UNDT/2010/037; *Avina* UNDT/2010/054; *Amarilla* UNDT/2010/184 and *Cooke* Order No. 004 (NBI/2011).

complex cases², produced investigation reports (at least three of which withstood the scrutiny of the UNHCR Legal Affairs Service and/or the Office of Legal Affairs (“OLA”)) and she was able to appear as a witness in several cases. Based on the Applicant’s submissions, it is difficult to fathom how she could function so well in the workplace between September 2003 and July 2004 and yet she was unable to function or reason adequately to follow up on a matter as crucial as her contractual status between December 2003 and March 2004. Under the circumstances, the Tribunal is unable to establish any causal relation between the state of health of the Applicant and her failure to file a timely application.

21. Additionally, the Tribunal finds the Applicant’s contention that the Respondent was responsible for establishing independent evidence of what the exceptional circumstances were in her case by conducting an investigation on her harassment complaint to be tenuous. It is an applicant’s responsibility to diligently pursue his/her case, and where he or she fails to do so, it is his/her responsibility to convince the Tribunal that exceptional circumstances did indeed exist. This is not a responsibility that the Tribunal is willing to delegate to the Respondent in this case.

22. Further, the Tribunal does not accept the Applicant’s explanation that a work-related accident and the non-renewal of her contract while she was on medical leave resulted in her inability to file a timely appeal. Based on the 10 December 2003 letter from ALU and the absence of a response from the Secretary-General on her request for administrative review, the Applicant had until 8 March 2004 to submit an appeal to the JAB. She was involved in the work-related accident on 22 July 2004 and placed on medical leave thereafter. Further, the decision not to renew her contract was communicated to her on 26 August 2004. The Tribunal notes that the work-related accident and the decision not to renew her contract transpired a number of months after her appeal should have been submitted and cannot, therefore, be used as

² The investigations related to: harassment, rape, sexual exploitation and abuse, corruption, embezzlement, theft, abuse of power, fraud, anti-government activities, visa fraud, racism, etc.

a crutch by the Applicant to establish “exceptional circumstances” in the current matter.

Conclusion

23. This particular claim is time-barred as a result of the Applicant’s failure to file an appeal to the JAB within the delay provided by the then existing rules and regulations. The Tribunal finds that the Applicant did not pursue her claim as diligently as she should have and she failed to provide proof that something out of the ordinary, quite unusual, special, or uncommon prevented her from doing so.

24. In light of the foregoing, this particular claim is dismissed.

(Signed)

Judge Vinod Boolell

Dated this 6th day of April 2011

Entered in the Register on this 6th day of April 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi