



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/96

Judgment No.: UNDT/2011/112

Date: 24 June 2011

Original: English

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**Before:** Judge Coral Shaw

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

KAYED

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Helen T. Morris, OSLA

**Counsel for Respondent:**

Fabrizio Mastrogirolamo, UNDP

## **Introduction**

1. The Applicant filed an application before the Tribunal contesting the administrative decision not to select her for a position for which she had applied during a period of job fair and the subsequent decision to separate her from service.
2. The Applicant alleges that these decisions amounted to acts of retaliation, that she had been denied access to her interview report and that the investigation into allegations by her about a senior official was not independent.
3. The Respondent opposes the application both on substantive grounds and on the ground that it is not receivable. The parties agreed for the latter point to be determined as a preliminary decision and without the need for an oral hearing.

## **Facts**

4. The Applicant joined the Kuwait Country Office of the United Nations Development Programme (“UNDP”) in April 2003 as an Executive Associate at the G-6 level. In 2007, the UNDP Resident Representative and Resident Coordinator conducted a restructuring of the Kuwait Country Office in order to cut costs by cutting posts. The mechanism adopted to achieve this was a job fair and all affected staff members were required to apply for their positions at that exercise.
5. On 25 November 2007, during the period of restructure, the Applicant wrote a letter to the UNDP Administrator and the Assistant Administrator and Director, Regional Bureau for Arab States (“RBAS”) complaining about the Resident Representative and Resident Coordinator. She sought the postponement of the job fair. In the same month, the Applicant contacted the Office of the Joint Ombudsperson for UNDP, UNFPA, UNICEF, UNOPS and related funds and programmes.
6. Although the Applicant applied for the position she encumbered, she was not selected. On 16 January 2008, she was notified that she had not been selected

for the post and would be separated from service in three months time during which she could undertake a job search.

7. On 23 January 2008, the Applicant filed a formal complaint with the UNDP Office of Human Resources, Bureau of Management, accusing the Resident Representative and Resident Coordinator of harassment, abuse of authority and retaliation. An investigation was conducted into the Applicant's complaint.

8. On 4 March 2008, after she was advised of the administrative decision to separate her from service, she wrote to the Assistant Administrator and Director, RBAS, the then Deputy Assistant Administrator and Deputy Regional Director, RBAS, and the then Director, Office of Human Resources, Bureau of Management. She expressed her concerns about the job fair and made a number of allegations about the way in which the interview panel had conducted her interview. She wrote the following:

I am writing to you all following the letter received by the Director of OHR requesting me to do so to provide concerns regarding the change management process carried out at UNDP Kuwait in December 2007 which led to my dismissal.

9. She then wrote of the emotional toll the procedure had taken on her and went on to say:

Mr. [H.], [the then Director, Office of Human Resources, Bureau of Management], I am including you because first and foremost yourself and the RC/RR are the two sole individuals who [have] the right to review the panel's recommendation.

10. Next, addressing the Assistant Administrator and Director, RBAS, and the Deputy Assistant Administrator and Deputy Regional Director, RBAS, she referred to her "successful and efficient career ... ending with [her] and other colleague[s'] dismissal ([six] people in less than one year)". She then set out a list of criticisms of the job fair process and the conduct of the panel interview and ended by writing:

Justice delayed is justice denied. My professional career of 14 years serving the UN and livelihood is at stake. Moreover, to

accept being dismissed due to a deliberate act of retaliation is a bridge I will never be able to cross, I urge you to redress our grievances.

I wonder if the Secretary-General is aware of [the Resident Representative and Resident Coordinator]'s management and ethical violations and their repercussions to UNDP Kuwait image and reputation.

11. The Applicant received no reply to this letter and did not refer the matter to the Joint Appeals Board.

12. The Applicant's job research period was extended until 21 July 2008 as she opted to make use of her annual leave balance. She applied for agreed separation and was separated from the Organization effective 21 October 2008.

13. In December 2008, the Applicant was informed of the outcome of the investigation conducted regarding her complaint, which concluded that her allegations were not substantiated and exonerated the Resident Representative and Resident Coordinator of all the allegations made against her.

14. The Ombudsperson continued negotiations about the Applicant's case until June 2009, when she was notified that an informal resolution was unlikely.

15. On 23 June 2009, the Applicant submitted a request for administrative review of the contested decision to the Secretary-General.

16. On 28 August 2009, the Officer-in-Charge, Bureau of Management, UNDP, replied to the Applicant's request for administrative review. He indicated that her request was inadmissible as time-barred.

17. On 25 November 2009, the Applicant filed an application before this Tribunal.

#### **Parties' submissions**

18. The Applicant's principal contentions on receivability are:

a. Her written communications to the UNDP Administrator and the Assistant Administrator in November 2007 and March 2008 should be

construed as timely requests for administrative review within the framework of former staff rule 111.2(a);

b. She is not requesting the Tribunal to suspend or waive the time limits, but to apply the terms of reference of the Office of the Joint Ombudsperson in making a determination about whether she complied with the time limits required by former staff rule 111.2(a);

c. The terms of reference of the Joint Ombudsperson state:

The Ombudsperson may request the Joint Appeals Board to extend the normal time limit for filing an appeal within the framework of the staff rule 111.2; timely reference of the matter to the Ombudsperson suspends the two-month time limit specified in the Staff Rules for filing a formal request for review by the Administrator.

d. The responsibility to request an extension of time lay with the Ombudsperson as she relied exclusively on his authority. Once she had submitted the case to his office, she retained no authority or control over the case, how it was to proceed or the length of time the informal process would take. The time for filing the request for administrative review was suspended by the timely referral to the Ombudsperson;

e. The Tribunal has jurisdiction to consider the case by virtue of the fact that the time limit was tolled by the Applicant's involvement with the Office of the Joint Ombudsperson. This interpretation is consistent with the terms of reference of the Joint Ombudsperson and the intentions of the General Assembly in relation to the informal resolution of a conflict;

f. The Tribunal is competent to examine the implied decision of the Secretary-General not to waive the time limits notwithstanding exceptional circumstances beyond her control, i.e., she was actively engaged with the Office of the Joint Ombudsperson in an attempt to achieve an informal resolution of the dispute.

19. The Respondent's principal contentions on receivability are:
- a. The application is irreceivable *ratione temporis*. The Applicant was notified of the impugned decision on 16 January 2008. Therefore, in order to be admissible, the Applicant's request for administrative review should have been made by 15 March 2008. The Applicant's request dated 23 June 2009 was thus time-barred;
  - b. The Tribunal has no jurisdiction to waive the time limit in former staff rule 111.2(a). The Appeals Tribunal held in *Costa and Trajanovska*<sup>1</sup> that the time limits prescribed for administrative review cannot be waived by the Tribunal;
  - c. The Applicant failed to demonstrate any exceptional circumstances that could justify a waiver of the mandatory time-limit prescribed by former staff rule 111.2. In *Zia*<sup>2</sup> the Tribunal held that pursuant to former staff rule 111.2(a) a referral to the Ombudsman does not have the effect of suspending the two-month time limit established in the rule.

### **The issues**

20. In order to decide if this application is receivable it is necessary to canvass the following issues:
- a. Was the Applicant's letter of 25 November 2007 to the UNDP Administrator and the Assistant Administrator and Director, RBAS, a receivable request for administrative review?
  - b. Was the 4 March 2008 letter to the Assistant Administrator and Director, RBAS, the Deputy Assistant Administrator and Deputy Regional Director, RBAS, and the Director, Office of Human Resources, Bureau of Management, a receivable request for administrative review?

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<sup>1</sup> *Costa* 2010-UNAT-036, *Trajanovska* 2010-UNAT-074

<sup>2</sup> *Zia* UNDT/2010/198

- c. What is the effect of the terms of reference of the Office of the Joint Ombudsperson on the time limits of former staff rule 111.2?
- d. Was the request for administrative review filed within the time limits of former staff rule 111.2?

### **Considerations**

21. Former staff rule 111.2(a) states:

(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. The staff member shall submit a copy of the letter to the executive head of his or her department, office, fund or programme.

22. The requirements of this rule are mandatory in expression and, on their face, are mandatory in intent.

23. The first requirement of the rule is that the Applicant wishes to appeal against an administrative decision. Next, it shall be in a letter addressed to the Secretary-General and third it must be sent within two months of the notification of the decision in writing.

24. Neither of the administrative decisions of which the Applicant complains, that is the decision not to select her for a position and the decision to separate her, had been made when she sent the first letter on 25 November 2007. She therefore cannot have been appealing against the administrative decisions of 16 January 2008 and 21 October 2008. The first requirement of former staff rule 111.2 is not met. The Tribunal finds that the letter dated 25 November 2007 is not a request for administrative review in terms of the rule.

25. The letter dated 4 March 2008 was sent by the Applicant within the required two-month time period but it was not addressed to the Secretary-General.

However, the Tribunal considers that the requirement for the request to be sent to the Secretary-General is not necessarily a precondition for a proper request.<sup>3</sup>

26. If the Applicant's letter dated 4 March 2008 were properly filed with the Assistant Administrator of UNDP, in accordance with the practice of UNDP to conduct its own administrative review, that is not the end of the matter. The next question is whether the content of this letter amounted to a request for the review of an administrative decision.

27. There is no form or template for such requests. The writing of a letter is sufficient but the staff member must identify the administrative decision about which he or she wishes to complain in order to comply with former staff rule 111.2(a).

28. In spite of the Applicant's passing reference to her dismissal and the plea for her grievances to be addressed, the letter of 4 March 2008 is substantially about her concerns on the job fair process. She and her colleagues wanted an enquiry into the conduct of the process and the actions of one individual in particular.

29. The Tribunal has considered whether, notwithstanding the formal deficiencies of the Applicant's letter described above, she could be said to have substantially complied with her obligations when requesting an administrative review but, even giving the Applicant the benefit of the doubt, the Tribunal must reject this possibility.

30. The letter of 4 March 2008 could not trigger an administrative review as the Applicant did not state in clear terms that she was requesting for such a review nor did she specify which administrative decision was to be reviewed.

31. Furthermore, had the Applicant intended to formally contest an administrative decision at that stage, in the absence of any reply from the Administration she could have pursued her claim in filing an appeal before the

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<sup>3</sup> See *Behluli* UNDT/2011/052, para. 31



Joint Appeals Board in accordance with former staff rule 111.2(a)(ii). She did not do this.

32. Finally, the Applicant did make a properly addressed and specific request for administrative review on 23 June 2009. This is another indication that she did not intend to request an administrative review by her letter of 4 March 2008.

33. In view of the foregoing, the Tribunal finds that the 4 March 2008 letter was not a request for administrative review.

34. The third letter which was addressed to the Secretary-General was in proper form except that it was sent on 23 June 2009, more than a year after the administrative decision had been made. It was sent over 15 months out of time.

35. In *Costa* and other judgments<sup>4</sup>, the Appeals Tribunal has affirmed that pursuant to article 8.3 of the Dispute Tribunal's Statute, the Tribunal may suspend or waive the deadlines for the filing of applications imposed by the Statute and Rules of Procedure, but may not suspend or waive the deadlines in the Staff Rules concerning requests for administrative review or management evaluation.

36. The terms of reference for the Joint Ombudsperson relied on by the Applicant are an internal document produced by the Office of the Joint Ombudsperson for UNDP, UNFPA, UNICEF, UNOPS and related funds and programmes and they are inconsistent with the Staff Rules.

37. These terms of reference purport to suspend the two-month time limit specified in the former Staff Rules for filing a request for administrative review. However, there is no binding legislative provision which gives the Ombudsperson the power to suspend the operation of former staff rule 111.2(a). Accordingly, this provision has no effect.

38. In response to the Applicant's submission that the Secretary-General implicitly decided not to waive the time limits at the time she was engaged with the Ombudsperson, the Tribunal notes, as a matter of fact, that she did not request the suspension of the time limit within which she could request an administrative

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<sup>4</sup>*Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Adjini et al.* 2011-UNAT-108

review. In the absence of a request, the Administration could not have made any decision, actual or implied, to waive the time limits.

39. In summary the Tribunal is obliged to find that it has no jurisdiction to waive or extend the time in which an applicant may request an administrative review, whatever the circumstances of the case. There is no basis in the former Staff Rules for finding that time should only be calculated from the end of the involvement of the Ombudsperson. Nor does the Tribunal have jurisdiction to decide whether there were exceptional circumstances which led to the Applicant's delay in making the request.

40. On each of the issues the Tribunal finds that:

a. The Applicant's letter of 25 November 2007 to the UNDP Administrator and the Assistant Administrator and Director, RBAS, was not a receivable request for administrative review;

b. The 4 March 2008 letter to the Assistant Administrator and Director, RBAS, the Deputy Assistant Administrator and Deputy Regional Director, RBAS, and the Director, Office of Human Resources, Bureau of Management, was not a receivable request for administrative review;

c. The terms of reference of the Office of the Joint Ombudsperson have no effect on the time limits in former staff rule 111.2(a);

d. The Applicant's request for administrative review dated 23 June 2009 was filed outside the time limit established in former staff rule 111.2(a).

41. The Tribunal concludes that the application is not receivable.

### **Conclusion**

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

The application is rejected.

### **Observations of the Tribunal**

43. There are two matters arising from this case about which the Tribunal makes the following observations:

1. The wording of the terms of reference for the Office of the Joint Ombudsperson has no legislative effect but, as in this case, has the potential to mislead staff members about the operation of the time restrictions in former staff rule 111.2(a). They should be modified to avoid confusion.

2.1 Article 8, paragraph 3, of the Statute of the Tribunal prevents it from giving relief to staff members even in rare cases where exceptional circumstances exist that would otherwise justify the waiver of the time limit in the former Staff Rules for requesting administrative review. This applies also to the current Staff Rules relating to time limits for requests for management evaluation.

2.2 The power of the Secretary-General to extend the deadline for requesting management evaluation is conferred by current staff rule 11.2(c). This power is limited to those cases where efforts for informal resolution conducted by the Office of the Ombudsman are pending.

44. These restrictions on the powers of the Tribunal and the Secretary-General mean that there can be no relief to applicants, even where justice demands it. The Tribunal observes that access to justice will be denied to those who, because of exceptional circumstances, have not requested management evaluation within the statutory time limit. Appropriate legislative changes to the Staff Rules and the Statute of the Tribunal could rectify this source of injustice.

*(Signed)*

Judge Coral Shaw

Dated this 24<sup>th</sup> day of June 2011

Entered in the Register on this 24<sup>th</sup> day of June 2011

*(Signed)*

Víctor Rodríguez, Registrar, Geneva