



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

OMWENGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Bartolomeo Migone, WFP

Simone Parchment, WFP

Introduction

1. The Applicant was employed by the World Food Programme (WFP) in Nairobi from 22 February 1999. She was separated from service on 20 August 2008.

2. On 23 November 2011 the Applicant filed an Application with the United Nations Dispute Tribunal (UNDT) requesting compensation arising out of her wrongful appointment at the General Service Level [“the impugned decision”] when she had applied to and been selected for a National Officer position with WFP in Nairobi, Kenya.

3. The Applicant states that the contested decision was taken on 1 January 2001 and that she first came to know about it on 24 January 2001.

4. Concurrent with the filing of her Application the Applicant submitted a Motion requesting a waiver of time limits, since her Application was out of time. Both the Application and the Motion were served on the Respondent on 30 November 2011.

5. By Motion dated 12 December 2011, the Respondent requested the Tribunal to permit him to file a Reply on the issue of receivability alone, and that this be dealt with as a preliminary matter.

6. By Order No. 157 (NBI/2011) of 19 December 2011, the Tribunal granted the Respondent’s request, inviting the Respondent to file his submissions on the preliminary issue of receivability by 18 January 2012. Thereafter, the Applicant was given until 1 February 2012 to provide a Response to those submissions.

The Timeline

7. The Applicant applied for and was employed by WFP pursuant to a Special Service Agreement (SSA) dated 23 January 1999. The SSA expired on 31 May 1999 whereupon the Applicant was offered a further SSA, which was then converted into a new Service Contract of one year from 1 November 1999.

8. On 24 January 2001, she was offered a new, fixed-term, appointment as a General Service Level Programme Assistant.

9. On 6 February 2007, the Applicant lodged a letter entitled “Unfair Treatment at Work” with the Executive Director of WFP, in which she complained, *inter alia* about the declassification or re-designation of her post from National Officer to General Service level in 2001. The Executive Director did not respond to this letter.

10. On 22 July 2008, the Applicant resigned from WFP, separating in August 2008.

11. On 23 November 2011, the Applicant applied to the Tribunal for a waiver of time limits.

The Respondent’s submissions

12. It is not disputed that the Application is out of time. The Applicant’s acceptance of this fact is evident from her submission of a Motion for waiver of time limits.

13. The Respondent argues that the Applicant ought properly to have contested the impugned decision by 24 March 2001 at the latest. By her own admission she did so only six years later, by letter to the Executive Director of WFP. The Applicant has not identified any reason for the delay.

14. Even if the Applicant had timely appealed to the Executive Director, she waited a further four years before taking the matter further.

The Applicant’s submissions

15. In her Motion for waiver of time limits, the Applicant asserted that she began contesting the impugned decision before she accepted the fixed-term appointment—but she was assured by the then Country Director that he would follow up with headquarters and that he was sure she would soon be given the National Officer position she was recruited for. The Applicant contends that from then on, she made regular further enquiries but they came to nothing until some six years later she came to realise that the

Country Office was not going to help her. At that point, she decided to write to the Executive Director.

16. When she received no response from the Executive Director, the Applicant contacted the WFP Ombudsman's office but did not receive much assistance from them. In the end, the Applicant resigned.

17. The Applicant stated that "the UNDT had not become operational by the time of my separation with WFP in August 2008, and secondly, I just learned recently that even a former member of staff can appeal to the Tribunal."

18. When providing her Response to the Respondent's Reply on Receivability, the Applicant asserts that she "waited patiently on the resolution of [the] matter", "did not want to cause unease in an office environment" and "counted on the goodwill and trust of my seniors at the country office". The Applicant goes on to state that she filed her Application the moment she came to know of the existence of the Tribunal, and that it would be an injustice for WFP to succeed in "hiding behind the cloak of procedure".

Consideration

19. The Applicant, by her own admission, became aware of the impugned administrative decision on 24 January 2001.

20. At the time of the impugned decision, the Dispute Tribunal did not exist and the former 100-series of Staff Rules applied to the Applicant. Former staff rule 111.2(a) was as follows:

A staff member wishing to appeal an administrative decision...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.

21. The Applicant should, therefore, have raised a formal request for review by 24 March 2001. Whilst the Tribunal understands and accepts that the Applicant was not

aware of the rules applicable to appealing adverse administrative decisions, the Appeals Tribunal in *Jennings* 2011-UNAT-184 has held that:

it is the staff member's responsibility to ensure that she is aware of the applicable procedure in the context of the administration of justice at the United Nations. Ignorance cannot be invoked as an excuse.

22. Even if the Applicant could show exceptional circumstances justifying why she did not do so until 6 February 2007, this Tribunal has no power to extend or waive the deadlines for administrative review—this is settled law.¹

23. Thus the Applicant's case falls at the first hurdle. However, it is worth pointing out that even if the request for review had been made in a timely fashion, the Applicant would have been required to file an appeal to the then Joint Appeals Board within a maximum of three months from the date of her request. This is because under former staff rule 111.2(a)(ii), where the staff member did not receive a response to the request for review within two months, the staff member could appeal against the original administrative decision to the Joint Appeals Board within one month of the Secretary-General's unmet deadline for responding to the request for review.

24. Such a hypothetical time-limit would have been around 6 May 2007. In fact, the Applicant did not seek to challenge this until November 2011, some five years later, and after a change in the entire system of internal justice resulting in the creation of the Dispute Tribunal.

25. The Dispute Tribunal cannot waive the time limits beyond a three year period. The relevant part of article 8 of the Statute of the Dispute Tribunal reads as follows:

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

¹ *Costa* 2010-UNAT-036.

4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.
26. As stated in *Belhachmi* UNDT/2012/051, "[t]his rule does not allow for any discretion, and must be applied strictly. When a claim is filed three years or more after the date that the cause of action arose, the Tribunal has no discretion or power to address the issue of time extension. Article 8.4 of the Statute of the Tribunal clearly prohibits consideration of a claim that is filed three years of more from the date of the cause of action."
27. The Tribunal thus has no choice but to rule that this Application is not receivable.

Conclusion

28. The Application is dismissed as not receivable.

(Signed)

Judge Vinod Boolell

Dated this 11th day of June 2012

Entered in the Register on this 11th day of June 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi