



UNITED NATIONS DISPUTE TRIBUNAL

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UNDT/GVA/2010/033  
(UNAT 1635)

Case No.: UNDT/GVA/2010/034  
(UNAT 1636)

UNDT/GVA/2010/036  
(UNAT 1639)

Order No.: 50 (GVA/2010)

Date: 22 April 2010

Original: English

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**Before:** Judge Coral Shaw

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

AJDINI  
RUDI  
ZENELI H.  
ZENELI S.

APPLICANT 1  
APPLICANT 2  
APPLICANT 3  
APPLICANT 4

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

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**Counsel for Applicant:**

Duke Danquah, OSLA

**Counsel for Respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

Josianne Muc, ALS/OHRM, UN Secretariat

## **Introduction**

1. The four applicants are former employees of the United Nations Interim Administration Mission in Kosovo (UNMIK). They were separated from their employment with the UN on 30 June 2005 when their contracts were not renewed. One year later, in May 2006, applicants 1 and 2 sought administrative review of the decision not to renew their contracts, while applicants 3 and 4 did so in August 2006. The Administrative Law Unit (ALU) at the UN Secretariat found that the requests for review were not receivable because of the time delay. This decision was supported on appeal by a majority of the Joint Appeals Board (JAB) Panel which considered their appeals. One member of the JAB Panel dissented. The applicants then appealed to the United Nations Administrative Tribunal (UNAT) but the appeals were not decided before the dissolution of that body and the cases were transferred to the United Nations Dispute Tribunal (UNDT).

2. At a directions hearing held on 25 March 2010, the applicants agreed to have their cases heard together. The Tribunal ordered them to file particulars of their evidence in support of their claim of exceptional circumstances which would justify an extension of time for administrative review. The applicants complied with this order and the respondent filed further evidence in reply.

3. There is now sufficient evidence before the Tribunal for it to rule on the question of receivability without the need for an oral hearing.

## **The Issue**

4. The sole issue is whether there are exceptional circumstances to justify a waiver of the two-month time limit set by former staff rule 111.2 (a) for a staff member to submit a request for review to the Secretary-General against an administrative decision.

## **The Law**

5. As this began as a UNAT appeal, the applicable law is that as applied by UNAT. The test for exceptional circumstances was described in Judgement No. 372, *Kayigamba* (1986) as:

“[O]nly circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review and filing an appeal in time, may be deemed ‘exceptional circumstances’ and warrant a waiver of the prescribed time-limits...”

6. In an ILOAT Judgment No. 2722 (2008), it was held that:

“The only exceptions to [the] rule that [complaints should not be filed out of time] are where the complainant has been prevented by *vis major* from learning of the impugned decision in good time (see Judgment 21), or where the organisation by misleading the complainant or concealing some paper from him or her has deprived that person of the possibility of exercising his or her right of appeal in breach of the principle of good faith (see Judgment 752).”

## **The facts**

7. The following facts are limited to those that are material to the issue of receivability. They are taken from the submissions of both parties to UNAT and the supplementary statements from the applicants and their witnesses and the respondents’ witnesses filed in accordance with the order of the UNDT.

8. The applicants were language assistants recruited between September 2000 and August 2002 at the GL-3 level at UNMIK in the Police component of the Police and Justice Pillar in Pristina. They were employed on 300-series contracts of limited duration and their appointments were renewed continuously until June 2005. They worked in a separate building from the main UNMIK Headquarters.

9. They each say that they never received the Staff Regulations and Rules, even though they were referred to in their letters of appointment, and that they

were unfamiliar with them. Examples of this unfamiliarity included not taking advantage of certain entitlements which would have been to their advantage, such as parental leave and medical insurance, because they did not know about them.

10. The evidence presented by the respondent is that during the start up of the Kosovo Mission, copies of the Staff Regulations and Rules were not immediately available to be provided to newly recruited staff members with their letters of appointment. In 2002, steps were taken to provide a refresher induction briefing on the 300 series of the Staff Rules to which all national staff were invited. In 2003, all UNMIK staff members were sent an electronic message advising that they could access the DPKO Human Resources Handbook Discussion Database to send in questions, comments or suggestions on human resources issues. The Staff Regulations and Rules were also available on UNMIK Intranet. However, not all language assistants had a computer. From 2004, hard copies of the Staff Regulations and Rules were available to everybody entering the container where the Personnel Section was located at UNMIK Administrative Headquarters.

11. There is no evidence that the applicants personally received the Staff Regulations and Rules. To the contrary, each of the applicants and their supporting witnesses who were former colleagues all deny ever receiving them or being aware of the procedures for challenging an administrative decision. I conclude that it is probable that they had not been given reasonable, if any access, to the Staff Regulations and Rules and were reliant on advice from managers for information. The normal presumption that they should have been familiar with the rules because they received them at their induction and with their offers of appointment is displaced in the unusual circumstances of this case.

12. In 2004, the applicants developed concerns about the way they were being treated by the Language Assistants (LA) Coordinator and proposed that she be replaced. As a result a new LA Coordinator was designated and the previous one was temporarily reassigned as Assistant LA Coordinator. The applicants believe that she has influenced their employment negatively since then.

13. In April 2005, the applicants first learned of a plan to downsize the Office and reduce the number of Language Assistants on the basis of their last e-PAS evaluations. They were shown the downsizing list with their names on it and asked to see their e-PAS evaluations. When they did, they formed the view that their signatures had been forged on the 2004 evaluations. I draw no conclusions of fact about these allegations which remain to be determined after a substantive hearing on the merits. They allege that when they raised these serious matters, they received negative and very unhelpful replies from their managers.

14. In 2005, the downsizing of UNMIK was implemented by the Officer-in-Charge of the Division of Administration of UNMIK, Mr. Lucien Chaker. In his statement to the Tribunal, Mr. Chaker said that the process involved a comparative evaluation of staff “with the same series, titles and grades”, and then looking at the staff members’ performance reports among other retention criteria.

15. On 23 or 24 May 2005, the applicants were called into the office of the Director of Administration of the Police component of the Justice and Police Pillar, Mr. Robert Locke, and were told that their contracts would not be renewed. Mr. Locke gave them a letter dated 23 May 2005 from the Chief Civilian Personnel Officer, Ms. Danielle Pecorini, entitled “Completion of UNMIK Appointment”, which informed the applicants that their appointments would “expire on 30 June 2005 without further extension” due to post reductions.

16. Two of the applicants said about their meeting with Mr. Locke: “We wanted to tell him regarding all the injustices made to us by the structure command of the border.” They thus showed Mr. Locke the alleged falsifications on their performance evaluations to support their allegations about the performance reports and also showed him a downsizing document which they allege had inconsistencies. One applicant says that Mr. Locke was very surprised when he saw these documents. Mr. Locke told them that they had the right to make an appeal and advised them to get information from the Personnel Section at

UNMIK Administrative Headquarters in Pristina but they had to sign the above-mentioned completion of UNMIK appointment letter first. Only after signing it could they make an appeal against the decision. He asked them to come back the next day. In his statement, Mr. Locke says he does not recall the applicants but I find that his description of the procedure he normally followed during the downsizing was consistent with the evidence of the applicants.

17. The applicants returned to see Mr. Locke the next day as arranged but he had gone on leave. Instead they approached Mr. Sebastien Beaufils, Supervisor of Local Staff, Police and Justice Pillar, and explained their concerns to him. He took copies of their documents and said that he would send them to the UN security investigation team to see if they were forged. The applicants have not seen the documents since and there has been no response to their complaint nor a result from any investigation.

18. They also say that when they showed Mr. Beaufils a copy of the downsizing list they had been provided with, he told them there had been a mistake on the list and that there was a new list. He refused to give them a copy of the new list and had no answers concerning this list. The applicants say that they told him everything about the alleged injustices done to them but he defended the staff of the command structure of the border. They formed the view that everything had been preplanned. Two of the applicants also say that they asked Mr. Beaufils for advice about the procedure to make an appeal. He told them that the appeal was cancelled with no further explanation.

19. The applicants say they next requested an appointment with the Chief Civilian Personnel Officer, Ms. Danielle Pecorini. No appointment was given at that time despite several attempts. They left their numbers for her to contact them but they had no response.

20. One of the witnesses who submitted a statement to the Tribunal in support of the applicants was a language coordinator. In her statement she says: "We made an appeal on 11 June 2005 to Ms Danielle Pecorini Director of Personnel at

that time but no answer probably they throw to bin.” It is unclear what this appeal was about or who made it.

21. The next step taken by the applicants was to approach the UN Ombudsman in December 2005. On advice they then wrote to the Officer-in-Charge of the Division of Administration, UNMIK, in Pristina in January 2006. This letter set out fully the allegations that they had previously raised with Mr. Locke and Mr. Beauflis regarding the falsification of their signature on the 2004 evaluations. In that letter they alleged that their inclusion on the downsizing list was completely unfair and explained why. In response, on 20 February 2006, they were called to receive a letter. The letter was from Ms Pecorini. It read:

**“Review of PAS Performance Cycles 2003-4 and 2004-05**

1. With reference to your memorandum on the above subject please be advised that all staff members in the Mission who disagree with their overall ratings may submit within 30 days of signing the performance appraisal form a rebuttal statement to the Director of Administration. Please refer to the attached Administrative Instruction ST/AI/2002/3 section 15 paragraph 15.1 up to 15.4 for reference.

2. In view of the above please note that we are not in the position to take any further action regarding your request.”

22. On the same day the applicants received the above-mentioned letter, they finally managed to meet with Ms. Pecorini. They say they told her about the falsification of their signatures but claim that Ms. Pecorini dismissed the allegation. They also say that they asked her “why the right of appeal was cancelled by her” but got no answer to that. In her statement, Ms Pecorini says she does not recall the applicants. Language assistants were administered conjunctly by the Police and the Personnel Section in UNMIK Headquarters.

23. The applicants continued to try to bring their appeal. Some time in February 2006, they sent an appeal to New York. It was addressed to “UN 100 10017 attn 3 Civilian personnel Plaza”. After four weeks and no response, one of

them sent an e-mail to the Secretary of the JAB and immediately was advised that the appeal had not been received.

24. It appears from the JAB reports that applicants 1 and 2 requested the Secretary-General to review the decisions not to renew their contracts by letter dated 8 May 2006, that applicant 4 did so by letter dated 11 August 2006 and applicant 3 by letter dated 14 August 2006.

### **Applicants' case**

25. The applicants' case may be summarized as follows:

- They did not know of the correct procedure for appealing against an administrative decision;
- They took immediate steps to bring their concerns to the Administration;
- These steps were rebuffed and thwarted by the Administration;
- The Administration tried to prevent their substantive case being heard by relying on the expiry of time.

### **Respondent's case**

26. In response to the applicants' appeal to UNAT, the respondent cited the orthodox UNAT jurisprudence on time limits and exceptional circumstances. It submitted that the applicants have not presented any evidence of exceptional circumstances that would explain their failure to request a review within the two-month period prescribed in former staff rule 112.2 (a) but rather provided a list of explanations why they were unaware of the relevant procedures.

27. The respondent submits that the applicants were serving in positions where they had ample opportunity to become acquainted with the relevant UN Staff Regulations and Rules as well as the relevant procedures explaining how a staff



member appeals an administrative decision. It is the case for the respondent that the failure of the applicants to apprise themselves of those procedures does not constitute exceptional circumstances.

28. In fairness to the respondent, that submission was presented before the further particulars were presented for consideration. Those particulars have significantly supplemented the material that was before the JAB. It is to the credit of the respondent that the statements it produced in reply to the applicants' further particulars contains material that is adverse to the respondent's original position.

### **Discussion**

29. The applicable law in this case is not in dispute. The question is whether there is sufficient evidence of exceptional circumstances as defined in the cases cited above.

30. In usual circumstances, it would be improbable that the applicants were unaware of the appropriate procedure for seeking a review of an administrative decision. However on the basis of the consistency of the applicants' evidence on this point, including the evidence of their unfamiliarity with their rightful entitlements coupled with the evidence of the respondent that the Staff Regulations and Rules were not provided at the time the letters of appointment were signed, there are sufficient grounds to displace the presumption of knowledge.

31. Unfamiliarity alone though would not be sufficient to establish exceptional circumstances. It is not enough for a staff member who believes that there has been an injustice to sit by and rely on lack of specific knowledge to do nothing. The staff member should at least attempt to take steps to bring the complaint to the Administration.

32. The evidence on this point is compelling. The applicants took immediate steps to challenge their separations by raising it with Mr. Locke on the day he

gave them the decision. From then on the Administration failed them. Because of their unfamiliarity with the procedure to be followed, they were reliant on advice and this was not forthcoming. The respondent did not produce any evidence to rebut the serious allegation that the applicants were discouraged by Mr. Beaufils from appealing their separations or to explain what happened to the investigation into the allegations of forgery that he said would occur and upon which they relied.

33. Although Ms Pecorini made a statement for the Tribunal, it was silent on important matters and did not dispute the applicants' allegation that she did not respond to their frequent attempts to meet with her to discuss their complaints. If she had met them at the time, she could have given the precise information they needed to expedite their appeals within time.

34. The applicants persisted with their efforts to have their case heard by taking it to the Ombudsman. This time, their attempts to approach the Administration were met by a formal rejection based on the time limits. In spite of this, they continued and after some difficulties managed to send a request for review to the Secretary-General and to lodge an appeal in New York with the JAB. I find that there is strong evidence that these applicants were proactive in the face of immense difficulties caused principally by representatives of the Administration.

35. The Administration failed to give them advice about their rights, including the procedure for review, and when they sought such information actively, discouraged them from proceeding by telling them their appeal had been "cancelled". It also failed to expedite the investigation into the allegations of forgery. I have no doubt that the Administration acted in bad faith towards the applicants and as a result they were prevented from bringing their requests for review to the appropriate authorities within the two-month time frame required by staff rule 112.2.

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36. I conclude that the applicants have made out their claim that their appeals were delayed by exceptional circumstances and find that their appeals are receivable.

37. The applicant's cases will now be decided on the merits. Their cases will be heard by another judge of the UNDT as my tour of duty in Geneva is at an end.

*(Signed)*

Judge Coral Shaw

Dated this 22<sup>nd</sup> day of April 2010

Entered in the Register on this 22<sup>nd</sup> day of April 2010

*(Signed)*

Víctor Rodríguez, Registrar, UNDT, Geneva