



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/94

Judgment No.: UNDT/2011/111

Date: 24 June 2011

Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: Víctor Rodríguez

AL-BEHAISI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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 to separate her from service.
2. The Applicant alleges that her separation was the consequence of her non-selection for a post for which she had applied during a job fair and that her non-selection was motivated by extraneous factors or improper motives. She argues that these decisions amounted to acts of retaliation against her for having reported misconduct by a senior official. She also states that the Administration had not shared with her the investigation report concerning her complaint and that it is a violation of her due process rights.
3. The Respondent opposes the application both on substantive grounds and on irreceivability grounds. 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 worked in the Kuwait Country Office of the United Nations Development Programme (“UNDP”) from June 1992 to August 1994. She subsequently returned to the UNDP Kuwait Country Office in August 2002 as a Special Assistant to the Resident Coordinator/Media Specialist under a fixed-term contract. She was promoted to the post of Programme Analyst National Officer, level B, in August 2004. 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. The Applicant applied for the post of Assistant Resident Representative (Programme) at the C level. On 3 January 2008, she was notified that she had not been selected for the post to which she had applied and would be separated from service in three months time during which she could undertake a job search.

6. In January 2008, after being notified of the decision to separate her from service, the Applicant sought the assistance of the Office of the Joint Ombudsperson for UNDP, UNFPA, UNICEF, UNOPS and related funds and programmes.

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. The Applicant's job search period was extended until 7 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 7 October 2008.

9. By the end of 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 raised against her.

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

11. On 19 June 2009, the Applicant submitted a request for administrative review of the contested decision to the Secretary-General.

12. On 24 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.

13. On 23 November 2009, the Applicant filed an application before this Tribunal.

Parties' submissions

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

a. Her request for administrative review is not time-barred as it was filed as soon as she was notified by the Office of the Joint Ombudsperson that they were terminating the informal negotiations on her case. She is not requesting the Tribunal to suspend or waive the time limits, but is requesting the Tribunal 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);

b. 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.

c. She argues that having placed the matter in the hands of the Ombudsperson, she retained no authority or control over how the case would proceed or how long it might take to achieve an informal resolution, if at all. Indeed, the time for filing the request for administrative review was suspended by the timely referral to the Ombudsperson;

d. 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;

e. 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.

15. The Respondent's principal contentions on receivability are:

- a. The application is irreceivable *ratione temporis*. The Applicant was notified of the impugned decision on 3 January 2008. Therefore, in order to be admissible, the Applicant's request for administrative review should have been made by 2 March 2008. The Applicant's request dated 19 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*¹ 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*² 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

16. In order to decide if this application is receivable it is necessary to canvass the following issues:

- a. 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?
- b. Is the request for administrative review dated 19 June 2009 receivable?

Consideration

17. 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

¹ *Costa* 2010-UNAT-036, *Trajanovska* 2010-UNAT-074

² *Zia* UNDT/2010/198

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.

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

19. The Applicant's letter requesting review of the administrative decision to separate her from service was addressed to the Secretary-General and was in proper form, except that it was sent on 19 June 2009, over a year after the administrative decision had been made.

20. In *Costa* and other judgments³, 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.

21. 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.

22. 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.

23. 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 made no request for suspending the time limit within which she could request an

³*Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Adjini et al.* 2011-UNAT-108

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

24. 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.

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

- a. 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);
- b. The Applicant's request for administrative review, which was filed 17 months after the impugned decision, is out of time and is therefore not receivable.

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

Conclusion

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

The application is rejected.

Observations of the Tribunal

28. 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.

29. 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 24th day of June 2011

Entered in the Register on this 24th day of June 2011

(Signed)

Victor Rodríguez, Registrar, Geneva