



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

RÜGER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

Counsel for Applicant:

Antje Kunst

Counsel for Respondent:

ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 23 February 2016, the Applicant contests the imposition of a disciplinary measure of separation from service, with compensation in lieu of notice and with termination indemnity, communicated to her on 24 November 2015.

Relevant facts

2. Since 2013, the Applicant has served in various Legal Officer positions within the Organization.

3. On 24 November 2015, the Applicant received a letter dated 16 November 2015 from the Assistant Secretary-General for Human Resources Management informing her of the imposition of a disciplinary measure of separation from service, with compensation in lieu of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii).

4. Approximately two hours after midnight on 23 February 2016, Counsel for the Applicant (located in Europe) wrote to the Tribunal's eFiling portal technical support team (located in New York) seeking assistance, since she encountered problems to login to said portal. The support team replied a few hours later, early in the morning of 23 February 2016. Shortly thereafter, Counsel for the Applicant confirmed by email that she was then able to login.

5. On 23 February 2016 in the afternoon, Counsel for the Applicant emailed the Geneva Registry of the Tribunal, explaining that she had been trying to access the eFiling portal since the previous night and, also, that she had had great difficulties to obtain her client's approval of the final version of the application, as her client was in Vietnam travelling. She requested that the "application and cover letter of 22 February 2016" that were attached to her email be accepted. The annexes followed by separate emails. Less than one hour later the Geneva Registry acknowledged receipt of said emails and of the attached application, received on 23 February 2016.

6. Later in the same afternoon, Counsel for the Applicant filed the application via the eFiling portal.
7. On 25 February 2016, Counsel for the Applicant sent by email a “Motion for extension of time to file an application”.
8. At the Tribunal’s request, on 29 February 2016, Counsel for the Applicant provided her internet browser’s recent history log.

Applicant’s submissions

9. The Applicant’s principal contentions on receivability are:
 - a. The application was filed on 23 February 2016, a few hours after the expiration of the prescribed time limit of 90 days. This limited delay was caused by a combination of exceptional circumstances, making this an exceptional case;
 - b. First, to support her case, the Applicant had sought to collate character references from two senior officials of the Organization. Counsel for the Applicant received these statements directly from the relevant officials on 20-21 and 22 February 2016 respectively. Once all documents were gathered, the Applicant gave final instruction on the application only several hours later than expected, as she was in Vietnam—with an important time difference with respect to her counsel’s location, i.e., Berlin and London—supporting her husband, who had to be hospitalized for a serious medical condition and, hence, under considerable stress herself. As a result, there was insufficient time to file before midnight on 22 February 2016;
 - c. Further hours were lost because Google Chrome, the browser installed on the computer of Counsel for the Applicant, did not work, although the website of the Office of Administration of Justice reads that, while “[t]he eFiling portal is designed to be used with Internet Explorer ... Google Chrome also works”. This was exacerbated by the fact that the access to the eFiling portal of Counsel for the Applicant was dysfunctional until

23 February 2016 in the afternoon, and the technical support team did not provide any new login until starting working hours in New York;

d. If a filing is delayed for a brief period of time, the filing party was not lax in handling the case, and the delay caused no prejudice to the other party to the proceedings, such delay may be considered *de minimis* depending on the circumstances of the case. In this case, the filing was delayed for a couple of hours and the filing party, faced with difficulties to obtain final instructions, time differences and technical difficulties, did everything it could to file on time. The delay did not cause prejudice to the other party;

e. The factors explained above, taken together, are out of the ordinary, a series of unfortunate events not normally encountered. While they may not be persuasive when viewed alone, the consideration of the totality of these factors must satisfy the Tribunal that this is an exceptional case. Furthermore, the degree of lateness is minimal, the explanations for it are entirely reasonable, and the default of the Applicant and her counsel was not wilful or negligent. For fairness, the delay of one day deserves condonation;

f. If the extension of time to file the application is denied, the Applicant will be forever excluded from employment with the Organization, whereas there are serious issues of proportionality and due process in the imposition of termination for misconduct. There is no other remedy open to the Applicant for that matter. It is thus in the interest of justice that this extension be granted.

Consideration

10. The issue of the application's receivability is a matter of law which may be assessed even if not raised by the parties and even without serving the application to the Respondent for reply (see *Gehr* 2013-UNAT-313, *Christensen* 2013-UNAT-335). Bearing this in mind, and in light of the circumstances of the case, the Tribunal deems appropriate to rule on the application by summary judgment, in accordance with art. 9 of its Rules of Procedure, without serving the application to the Respondent and awaiting his reply.

11. Pursuant to art. 8.1(ii) of the Tribunal's Statute, for an application to be receivable, it must be filed within the applicable deadlines, which, in cases, such as the present one (see staff rule 11.4), where a management evaluation of the contested decision is not required, is "90 calendar days [as] of the applicant's receipt of the administrative decision".

12. The Applicant was notified of the impugned decision on 24 November 2015; therefore, the 90-day time limit to institute proceedings before the Tribunal expired on 22 February 2016. It follows that the application submitted on 23 February 2016 was filed after the statutory time limit had elapsed.

13. While it is regrettable that this application be time-barred by only one day, the Tribunal cannot but follow the constant and unambiguous case law of the Appeals Tribunal that time limits for formal contestation are to be strictly enforced (*Mezoui* 2010-UNAT-043, *Al-Mulla* 2013-UNAT-394, *Samuel-Thambiah* 2013-UNAT-385, *Romman* 2013-UNAT-308, *Kissila* 2014-UNAT-470, *Kazazi* 2015-UNAT-557).

14. The Tribunal observes that time limits, which are widely used both in domestic and international administrative jurisdictions (see *Samardzic* UNDT/2010/019), are generally applied strictly. In this respect, other sibling international administrative tribunals have adopted a similar position regarding the importance of time limits and their rigorous implementation (see Judgment of the United Nations Administrative Tribunal No. 953, *Ya'coub* (2002), Judgment of the Administrative Tribunal International Labour Organisation Administrative Tribunal No. 2722 (2008), Judgment of the World Bank Administrative Tribunal No. 151 (1996)). As a trained lawyer, assisted in addition by counsel, the Applicant could not ignore the potential consequences of missing the deadline to file her application.

15. In her motion of 25 February 2016, the Applicant effectively seeks a waiver of the 90-day time limit to file her application. She alleges that her case is exceptional since the applicable deadline could not be observed due to a combination of unusual circumstances that, taken together, should be regarded as

exceptional. In essence, the circumstances put forward include the delay in obtaining the Applicant's final approval, given the distance and the time difference between her, in Vietnam, and her counsel, in Europe, and the technical difficulties encountered in filing through the Tribunal's eFiling portal.

16. As to the difficulties in receiving feedback from the Applicant, it must be recalled that, according to art. 8.3 of the Tribunal's Statute, the Tribunal may "suspend or waive the deadlines for a limited period of time and *only in exceptional cases*" (emphasis added). The Appeals Tribunal has repeatedly found that only circumstances beyond the applicant's control that prevented him or her from exercising the right of appeal in a timely manner may be considered exceptional circumstances justifying a waiver of the statutory time limits (*El-Khatib* 2010-UNAT-029, *Bofill* 2014-UNAT-478).

17. This standard is not met in the case at hand. Distance, time difference and even the understandable stress caused by her husband's health might have rendered more difficult for the Applicant to timely review and approve the final version of the application, but they cannot be said to have made it impossible to file the application on time. In sum, none of these circumstances were, as required, beyond the Applicant's control.

18. Further, it is quite clear from her statements, that Counsel for the Applicant was fully aware that the deadline expired on 22 February 2016. Moreover, this is not a case where the Applicant had trusted her counsel to take the necessary steps and the latter missed the deadline due to gross negligence on her part. Rather, it is submitted that by the time the Applicant gave her final approval for the application to be filed, no sufficient time was left to file it within the time limit.

19. Finally, regarding the technical problems faced by Counsel for the Applicant, they played no role in preventing the mandatory deadline from being met, for the simple reason that they occurred once such deadline had already elapsed. Indeed, while Counsel for the Applicant experienced difficulties to login at some point, the history of her internet browser as well as the internal electronic records of the Tribunal show that the first attempts to file the application were only made in the early hours of 23 February 2016.

Conclusion

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

- a. The motion for extension of time to file an application is rejected; and
- b. The present application is irreceivable *ratione temporis*.

(Signed)

Judge Thomas Laker

Dated this 3rd day of March 2016

Entered in the Register on this 3rd day of March 2016

(Signed)

René M. Vargas M., Registrar, Geneva