



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-145



Before: Judge Luis María Simón, Presiding
Judge Kamaljit Singh Garewal
Judge Mark P. Painter

Judgment No.: 2011-UNAT-147

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Amy Wood

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. An application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting a decision of non-renewal of a staff member's appointment is time-barred if it is not filed within 90 calendar days of an applicant's receipt of the response by management to his or her request for management evaluation; or within 90 calendar days of the expiry of the relevant response period for management evaluation if no response to the request was provided.
2. The applicant filed his application outside the aforementioned time limit. This Tribunal considered whether any exceptional circumstances existed that would allow the waiver of the applicable time limit. The Tribunal found that neither the Appellant's health problems nor the need to replace counsel constituted justification *in the present case*.

Facts and Procedure

3. Tariq Osman (Osman) joined the Organization in October 1991 first with the United Nations Iraq-Kuwait Observations Mission (UNIKOM) and later in other missions. Effective 19 February 2007, he joined the United Nations Assistance Mission for Iraq (UNAMI) as a Fuel Supply Assistant at the FS-3 level on a six-month fixed-term appointment. His appointment was subsequently renewed on several occasions.
4. In October 2008, Chief, Mission Support, UNAMI, informed Osman that his post was being abolished in the budget for 2009 and that he would be reassigned, together with his post, to the Movement Control Unit, and that subsequent renewal of his contract would be subject to the satisfactory performance of his new duties.
5. In accordance with the April 2009 rotation plan of the Baghdad International Airport, Osman was due to leave Iraq for rest and recreation on 20 April 2009 and return on 30 April 2009. But on 14 April, Osman made a request for rest and recreation from 23 to 30 April 2009 and, moreover, a request for annual leave of five days from 1 to 4 May 2009. Osman's direct supervisor approved his leave request, but on 15 April 2009, his second reporting officer, Chief, Mission Support, refused to approve it.

The following day, Chief, Mission Support, reiterated to Osman that he would not approve the leave request as submitted, but Osman could receive full cooperation from him if Osman used some of his available uncertified sick leave balance. He advised Osman to consult with the human resources section on this matter. But Osman took his leave as planned and returned to work on 5 May 2009.

6. In a memorandum dated 9 June 2009, Chief, Mission Support, informed Osman that his contract due to expire on 18 July 2009 would not be extended due to unsatisfactory performance. Yet Osman's appointment was subsequently extended for a month through 18 August 2009.

7. On 2 August 2009, Osman requested management evaluation of the non-renewal decision, and the next day he applied to the Dispute Tribunal for a suspension of action of the non-renewal decision during the pendency of the management evaluation. As a result of those actions, Osman's contract was extended on several occasions, the last of which carried him through 30 June 2011.

8. By letter dated 5 October 2009, Osman was notified of the result of the management evaluation. On 22 April 2010, Osman appealed to the Dispute Tribunal the decision taken as a result of the management evaluation. The Secretary-General submitted his reply on 28 May 2010.

9. On 1 September 2010, the Dispute Tribunal rendered Judgment No. UNDT/2010/158. Judge Laker dismissed as time-barred Osman's application concerning the rejection of his request for five-day annual leave and the non-renewal of his contract. Regarding the annual leave, Judge Laker found that Osman had failed to submit the impugned decision for management evaluation. While in his request for management evaluation Osman did make reference to the refusal to authorize his five-day annual leave, "it is patent that this episode was mentioned as factual background in order to substantiate the alleged unlawful character of the non-renewal decision, and was not singled out for review". Even assuming that Osman did contest the refusal to grant him 5-day annual leave in his management evaluation request, such request would have been time-barred, as it was filed on 2 August 2009, more than 60 days after the Chief, Mission Support, took the contested decision on 15 April 2009. As for the non-renewal decision, Judge Laker held that Osman's application was not receivable, because the

decision had been superseded by subsequent extensions of his contract, and also because the application would have been time-barred. He noted that Osman received the response from the Management Evaluation Unit on 5 October 2009, had 90 days, until 4 January 2010, to appeal to the Dispute Tribunal, but only did so on 22 April 2010. Judge Laker did not find that Osman's sick leave and his need to replace counsel constituted exceptional circumstances to justify his failure to observe the time limits set forth in the UNDT Statute.

10. On 13 October 2010, Osman appealed the UNDT Judgment. The Secretary-General filed an answer on 24 November 2010.

Submissions

Osman's Appeal

11. There were significant errors of law or omissions of fact that contributed to the findings on the merits that were not supported by the evidence. The UNDT mischaracterized Osman's appeal as an appeal against *inter alia* the "non-renewal of [the appellant's] appointment beyond 18 August 2009", when Osman was contesting "a pattern of discriminatory treatment" culminating in the contested decision. That mischaracterization led the UNDT to conclude that the subsequent contract extensions addressed all of Osman's complaints. In Osman's view, the UNDT Judgment appeared to be inconsistent with the UNDT Order on suspension of action, which summarized his claims as unfair treatment consisting of discrimination, harassment and abuse of authority leading to the non-renewal of his contract.

12. The UNDT failed to exercise the jurisdiction vested in it to review Osman's application based on jurisdictional grounds and failed to take into account exceptional circumstances warranting some flexibility in the application of time limits. After the result of the management evaluation was issued on 5 October 2009, Osman went on home leave from 1 to 19 November, during which period he fell ill. He was hospitalized and remained on medical leave until 3 January 2010. From 17 January through 17 June 2010, he was on intermittent sick leave. Osman should have requested a time extension to complete his UNDT application, but he only had the assistance of volunteer counsel, who either failed to vigorously pursue his case or gave him wrong advice. The

derelection of duty by his volunteer counsel left Osman to fend for himself. Only after he retained outside professional legal assistance was he able to submit an application to the UNDT, but “slightly beyond the time limit”. It should be noted that Osman is an FS-3 level staff member serving in a difficult and isolated mission and had to rely on the assistance of counsel in pursuing his claims.

Secretary-General’s Answer

13. The Secretary-General notes that Osman was only appealing the UNDT Judgment with respect to the decision not to renew his contract; he did not challenge the UNDT’s determination with respect to the decision not to grant him five days of annual leave.

14. The UNDT correctly concluded that Osman’s application against the non-renewal decision was time-barred because he had failed to file his application within 90 days of the expiry of the response period for the management evaluation. Moreover, Osman’s application against the non-renewal of his contract was rendered moot by subsequent decisions to extend his contract through 30 June 2011.

15. The UNDT did consider whether or not any exceptional circumstances existed that would warrant a waiver of the time limits, but correctly found that neither the health problems nor the need to replace counsel constituted exceptional circumstances justifying Osman’s failure to observe the statutory time limits.

Considerations

16. As it was pointed out by the learned Judge Laker, Osman’s application against the decision of non-renewal of his appointment was time-barred because it was not filed within 90 days of the expiry of the response period for management evaluation.

17. The UNDT also considered whether any exceptional circumstances existed that would allow a waiver of the time limits, but found that neither the health problems nor the need to replace counsel constituted justification *in the present case*.

18. This Tribunal holds that Osman’s argumentation has not demonstrated any error warranting the reversal of the first instance judgment, whose conclusions we endorse, as they rely on a correct application of the law.

Judgment

19. This Tribunal affirms the UNDT's Judgment and dismisses the present appeal.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Painter

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar