UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/118
Judgment No.: UNDT/2015/032
Date: 2 April 2015
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

PAVICIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

Counsel for Applicant:
April L. Carter
Robbie Leighton, OSLA

Counsel for Respondent:
ALS/OHRM

Introduction

1. By application filed on 24 March 2015, the Applicant, a former Translator with the International Criminal Tribunal for the former Yugoslavia ("ICTY"), contests the decision of 19 June 2014 not to retroactively convert his fixed-term appointment into a permanent one.

Facts

2. In 2009, the Organization undertook a one-time comprehensive exercise by which eligible staff members under the Staff Rules in force until 30 June 2009 were considered for conversion of their contracts to permanent appointments. By memorandum dated 20 September 2011, the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") informed the Registrar, ICTY, that:

> Pursuant to my authority under section 3.6 of ST/SGB/2009/10, I have decided in due consideration of all circumstances, giving full and fair consideration to the cases in question and taking into account all the interests of the Organization, that it is in the best interest of the Organization to … accept the [Central Review Board ("CRB")] endorsement of the recommendation by OHRM on the non-suitability [for conversion of ICTY staff].

3. The Applicant was informed of the decision by letter dated 6 October 2011 from the ICTY Registrar. The Applicant filed a request of management evaluation, with the assistance of the ICTY Staff Union, who was helping other ICTY staff members in the same situation.

4. On 16 April 2012, the Applicant filed a first application with the Tribunal, together with 261 other ICTY staff members. Their applications, after being consolidated at the Applicants' request, were adjudicated by Judgment No. UNDT/2012/131 of 29 August 2012.

5. The Applicant appealed this ruling and, by Judgment *Ademagic et al.* No. 2013-UNAT-359, the Appeals Tribunal "rescind[ed] the decision of the ASG/OHRM; and remand[ed] the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of the [Applicant]"; and awarded non-pecuniary damages".

6. The new conversion exercise was completed in June 2014, at which time the Applicant was informed of the decision to deny him the conversion of his appointment to a permanent one.

7. On 1 August 2014, the Applicant sent the documents required to formally contest the decision to the ICTY Staff Union, which, anew, was assisting a large number of staff in the same situation in collecting, administering and archiving materials. However, these documents were not transmitted to Counsel for the Applicant.

8. Between 8 and 13 August 2014, Counsel for the Applicant requested management evaluation of the June 2014 decisions on behalf of 247 other ICTY staff members. According to the Applicant, he only realised that his management evaluation had not be requested at that time when his colleagues received management evaluation replies a few weeks later, while he did not. He then contacted the Staff Union to query about the lack of a management evaluation in his case.

9. After a number of exchanges among the Applicant, his Counsel and the Staff Union, the President of the ICTY Staff Union clarified, on 17 February 2015, that the documents pertaining to the Applicant had "slipped through the cracks".

10. On 18 February 2015, the Applicant requested management evaluation of the contested decision. The Management Evaluation Unit ("MEU"), on behalf of the Secretary-General, upheld the decision, as per reply letter of 19 February 2015.

Applicant's submissions

11. The Applicant's principal contentions on the issue of receivability are:

a. He followed the instruction set out by the ICTY Staff Union for staff wishing to appeal the ASG/OHRM decision. He sent the email and attachments to the correct email address and believed that the documents were received as he did not get a mail delivery failure notice;

b. MEU did not receive the Applicant's request within the required time for reasons outside of his control. He acted with due diligence and good faith but his efforts were frustrated by a technical or clerical error;

c. In *Said* Order No. 64 (NBI/2012), the Tribunal found it "disproportionate and irrational" that such a small error should have such significant consequences for the party, stressing the overriding objective of MEU "to serve the interests of justice". Similarly, in *Xu* 2010-UNAT-053, the Appeals Tribunal ordered a matter to be retried where a party was prejudiced as a result of two emails that never reached their destination due to a clerical error;

d. In the present case, if his case were found to be irreceivable, the prejudice to the Applicant would be significant, whereas if the application was found receivable, that to the Respondent would be minimal. The fact that the ICTY litigation is ongoing for hundreds of litigants diminishes the weight of the need for finality of proceedings, which is one of the core reasons for requiring them to be instituted in a timely manner.

Consideration

12. Art. 8.1(c) of the Tribunal's Statute provides that for an application to be receivable, the applicant must have "previously submitted the contested administrative decision for management evaluation, where required". The applicable deadline to request management evaluation is 60 calendar days from

the date on which the staff member received notification of the administrative decision to be contested, as stipulated in staff rule 11.2(c). In this respect, it is well established that time limits for formal contestation are to be strictly enforced (*Al-Mulla* 2013-UNAT-394, *Samuel-Thambiah* 2013-UNAT-385, *Romman* 2013-UNAT-308).

13. In the instant case, the Applicant was notified of the non-conversion of his fixed-term appointment into a permanent one on 17 June 2014; he submitted his request for management evaluation only on 18 February 2015, that is, eight months later.

14. The Tribunal has considered the explanations given by the Applicant, and it accepts that, while the Applicant timely forwarded the required documentation to the Staff Union, the latter failed to transmit it to his Counsel. However, this does not constitute a valid reason to effectively set aside the mandatory time limit for management evaluation.

15. It is a well-established principle that the responsibility to pursue a case rests with the applicant and when he or she is represented by counsel, said applicant cannot be absolved of any error or oversight by counsel regarding the applicable time limits. This principle has been upheld by the Appeals Tribunal, notably in *Scheepers* 2012-UNAT-211 and *Powell* Order No. 96 (UNAT/2012).

16. Based on this jurisprudence, the Dispute Tribunal held in *A-Ali and 45 others* UNDT/2013/155:

> It cannot be accepted that, whilst claiming that they abandoned all responsibility regarding the conduct of their cases to their legal representatives, the applicants would at the same time be absolved of the consequences of the acts of the said legal representatives. Legal representatives act at the behest of their clients and not the other way around.

17. Only in extremely rare cases certain procedural failures have been set aside in the interest of justice on the grounds that they resulted from clerical mistakes (*Xu* 2010-UNAT-053; *Said* Order No. 64 (NBI/2012); *Hunt-Matthes* 2014-UNAT-443). Having said that, these rare and above-mentioned cases do not

appear to be analogous to the case at hand. For instance, *Xu* is clearly distinguishable in that it concerns an error by the Registry that prejudiced one of the parties, whilst *Said* relates to a further submission by the Respondent, necessary to inform the Tribunal on the matter, as opposed to the institution of proceedings.

18. Even assuming, for the sake of argument, that the inadvertence of the Staff Union cannot be held against the Applicant, it must be stressed that, after the latter came to know, in mid-October 2014, that the mandatory step of requesting management evaluation had not been made in his case, it took him until mid-February 2015 to submit his request to MEU. Considering that the statutory time limit for this purpose is 60 calendar days, the Applicant's inaction during approximately twice this length shows a lack of diligence on his side in taking the necessary steps to pursue his case in due time. As stated in *Morsy* UNDT/2009/036:

> Time limit exist for reasons of certainty and expeditious disposal of disputes in the workplace. An individual may by his own action or inaction forfeit his right to be heard by failing to comply with time limits, for the maxim *vigilantibus et non dormientibus legis subveniunt* (the law aids those who are vigilant and not those who are asleep) will surely apply.

19. Since the application is not receivable, the Tribunal may not assess its merits (see *Servas* 2013-UNAT-349). Furthermore, since the only issue that it has to address is the receivability *ratione materiae* of the application (cf. *Egglesfield* 2014-UNAT-402)—which is a matter of law and hence may be adjudicated even without serving the application to the Respondent for reply and even if not raised by the parties (see *Gehr* 2013-UNAT-313, and *Christensen* 2013-UNAT-335)—the disposal of this case by way of summary judgment is appropriate, in accordance with art. 9 of the Tribunal's Rules of Procedure (*Chahrour* 2014-UNAT-406, *Gehr* 2013-UNAT-313).

Conclusion

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

The application is rejected.

(*Signed*)
Judge Thomas Laker
Dated this 2nd day of April 2015

Entered in the Register on this 2nd day of April 2015
(*Signed*)
René M. Vargas M., Registrar, Geneva