United Nations AT/DEC/1046

# Administrative Tribunal

Distr.: Limited
23 July 2002
English
Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1046

Case No. 1150: DIAZ DE WESSELY Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President; Ms. Brigitte Stern;

Whereas at the request of Dora Diaz de Wessely, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 20 July 2000, the Applicant once again filed an application containing pleas which read as follows:

"II: PLEAS

The Tribunal is requested:

(a) to declare that, in view of the provisions of staff rule 104.6, the nature of the Applicant's post and the practice of the United Nations of international recruitment to identical posts in the Spanish Typing Pool prior to, and since, the date on which she became a staff member of the Organization, she should have been granted international recruitment from the date of her appointment;

(b) to order the Respondent to grant international recruitment status, together with the corresponding benefits, to the Applicant with retroactive effect from the date of her appointment."

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Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing an answer until 31 January 2001;

Whereas the Respondent filed his answer on 30 January 2001;

Whereas the Applicant filed written observations on 2 March 2001;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Industrial Development Organization (UNIDO), Vienna, as a locally recruited Typist, on a three-month fixed-term appointment at the G-3 level, with the Spanish typing pool, on 15 September 1969. Following several extensions of her fixed-term appointment, the Applicant was granted a permanent appointment, with effect from 1 September 1973. After completing more than 30 years of service with the Organization, and having attained the G-7 level and the title of Supervisor, Spanish Language Pool, the Applicant separated from service on 31 October 1999.

On 14 October 1998, the Applicant wrote to the Chief of the Human Resources Management Section (HRMS) in Vienna, requesting that her contractual status should be reviewed, with a view to "granting her the benefits of international recruitment status", retroactive to the date of her entry on duty. On 30 November 1998, the Chief of HRMS informed the Applicant that her request for retroactive revision of her contractual status had been denied. She further explained, that in keeping with the Organization's policies, posts in the General Service and related categories were not considered international. Therefore, "only in exceptional situations when required skills are not available in the local market … the Organization would resort to international recruitment". The Chief of HRMS added that as at the time of her appointment the Applicant's place of residence was Vienna her recruitment status had been determined correctly.

On 21 January 1999, the Applicant replied to the Chief of HRMS, pointing out that at the time of her recruitment her permanent address was in Argentina and that she was only temporarily staying in Vienna. According to her, she did not fulfil any of the conditions for local recruitment.

Also on 21 January 1999, the Applicant requested the Secretary-General to review the administrative decision denying her request.

On 3 February 1999, the Chief of HRMS informed the Applicant that her case would not be reopened since too much time had elapsed. The offer of appointment made in 1969 had been accepted by the Applicant, and if the terms of her employment were not acceptable they should have been reviewed at that time.

On 19 April 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 17 December 1999. Its considerations, conclusions and recommendations read in part as follows:

**"IV. Conclusions and recommendations**

> 34. … [T]he Panel concluded that it could not find any exceptional circumstances that prevented the Appellant from filing her appeal within the prescribed time limits. Therefore, the decision of the [A]dministration rejecting her request to review retroactively her situation was [...] founded.
>
> 35. The Panel therefore recommends that the Secretary-General should reject the claim.
>
> …"

On 11 January 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on her appeal.

On 20 July 2000, the Applicant filed the above-mentioned application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant suffered discrimination as she should have been granted international recruitment status from the date she joined the Organization.

2. In keeping with staff rule 104.6 and appendix B, the post that the Applicant held is one which justifies an exception to the norm of local recruitment for General Service staff. The need to recruit Spanish typists internationally had persisted before, during and after the Applicant's appointment.

3. The Respondent has a duty to be consistent in interpreting the rule and applying it to all similar posts.

4. At the time of recruitment, the Applicant was a temporary resident in Vienna; her permanent residence was in Argentina.

5. The applicant did not present a claim sooner because she believed that she would not be given a fair hearing.

6. Since the Applicant had been told, from the early stages of her career, that she had no claim against the Organization, the starting point for measurement of the delay is the point when she knew of a similar claim being upheld elsewhere.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is time-barred. The Applicant has cited no extraordinary circumstances that would warrant a waiver of the time limits.

2. Delay of 29 years in presenting a claim could cause irreparable injury to the Organization. Such negligence should not be rewarded. In any event, the basic concepts of estoppel would prevent a claim of this nature from proceeding.

3. The response to the Applicant's request for a review/reconsideration of her recruitment status of 1969 does not constitute a new administrative decision for the purpose of initiating an appeal against the original decision, nor could it revive the original 1969 decision for appeal purposes.

The Tribunal, having deliberated from 26 June to 23 July 2002, now pronounces the following Judgement:

I. The present application is motivated by the Respondent's refusal retroactively to grant international status to the Applicant, who joined the Organization on 15 September 1969 as a local recruit. The Applicant's first written request for the granting to her of international status was made on 14 October 1998, almost 30 years after the disputed decision, although the Applicant maintains that she raised the question orally at an early stage in her career.

II. The first thing the Tribunal must do is to look at the date on which the application was filed in order to determine its admissibility. Rule 111.2 (a) provides that staff members wishing to appeal an administrative decision shall "as a first step, address a letter to the Secretary-General requesting that the 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".

III. To apply this rule in practice, it is necessary to determine precisely when the time limit begins to run. More often than not, the starting point is the date on which a staff member was informed of the disputed legal decision, for example, the date on which the staff member receives a letter of dismissal; sometimes the starting point can be the time at which information enabling a staff member to appreciate that his or her situation was inconsistent with the regulations protecting him or her came to light, for example, when conditions granted to a new recruit revealed discrimination against someone recruited earlier.

IV. It is hardly necessary to say that the point at which the time limit begins to run can never be the refusal by the administration to remedy a long-standing situation that can no longer be disputed because protests are already time-barred; were that not so, the detailed provisions in the Staff Rules concerning the time limits for the submission of claims would be totally irrelevant, since it would always be possible to restart a limitation period by making a late protest and invoking the refusal to examine it as ground for the commencement of a new period, and so on ad infinitum. In the case in question, therefore, the starting point for the time limit most definitely cannot have been the administration's notification to the Applicant on 30 November 1998 of its refusal to alter her contractual status with effect from 1969, which, as indicated above, was first requested in writing on 14 October 1998.

V. Similarly, the Tribunal cannot accept the administration's contention that any claim submitted after the date of 15 November 1969, i.e., two months after the Applicant's initial recruitment on a three-month fixed-term contract, is inadmissible *ratione temporis*. Allowance must be made for the fact that a staff member may need to become familiar with the Organization's practice before he or she can fully appreciate the ins and outs of his or her contractual status, particularly as there was no Spanish version of the Staff Rules. Time was needed to compare the status of locally and internationally recruited staff members; it is probably an approach of this nature that led the Tribunal not to consider the claims made in its Judgement No. 612, *Burnett & al* (1993) to be time-barred. Time and a significant sample are needed before it can be realized that "persons, similar in every relevant way, have been treated so differently that some, namely those internationally recruited, can avail themselves of many benefits, while others, namely those locally recruited, are deprived of them".

VI. Consequently, another possible and, in the case in question, more realistic starting point would be the point at which the Applicant became aware that her situation was unsatisfactory by comparison with that of other staff members. The Tribunal recalls in this regard its jurisprudence in Judgements No. 549, *Renninger* (1992), para. VI, and No. 596, *Douville* (1993), para. IX, in which "the Tribunal notes that ordinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim" (see also Judgement No. 527, *Han* (1991)).

VII. As the Applicant's written submissions show, she was dissatisfied with her status almost from the outset and realized quite shortly after her recruitment in 1969 that she was being treated differently from her colleagues. The starting point for the period during which she should have acted is therefore very close to the date of her initial recruitment: as she puts it, "Very soon ... I became aware of the fact that the majority of the colleagues had been recruited internationally and enjoyed the corresponding benefits. As I got gradually acquainted with my colleagues, I began to realize the discriminatory situation that I was in". The Applicant herself admits that at the latest by 1974, after having passed an English proficiency examination and become a bilingual secretary, she had become fully aware of the discrimination of which she was the victim.

VIII. The only explanation that she gives for her inaction at the time is her feeling that an application to the Tribunal would have been doomed to failure: "I would most certainly have applied as of that period for a review of my contractual status, had I believed that I stood a chance of a fair hearing of my case". But that is simply a psychological factor that cannot be viewed as an objective element that prevented the Applicant from appealing.

IX. It behoves the Tribunal then to examine the reasons that led the Applicant to change her mind and ultimately to submit an application to the Tribunal on 20 July 2000. The Applicant herself explains her thinking very clearly when she says: "It was only recently, when I learned that a similar case had received a favourable hearing from the Administrative Tribunal of the United Nations". The reference is, of course, to the Judgement in *Burnett & al.*, in which the Tribunal decided that staff members who had been recruited under local contracts in 1978, 1989, 1980, 1988

and 1986, respectively, under conditions entitling them to international status, should be granted that status from the dates of their appointments.

X. However, the Tribunal has never held the adoption of a favourable judgement in a related case to be a ground for ignoring stated time limits. In the above-mentioned Judgements (*Renninger* and *Douville*), the Tribunal spelled that out as an extension of the comment quoted above, stressing that "logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim, not the time when a potentially favourable decision in another case is rendered".

XI. The fact that neither the date of refusal to examine a time-barred claim nor the date of a favourable judgement embodying rights in a similar situation can be considered as the starting point of the time limit for the submission of a claim was confirmed in Judgement No. 871, *Brimicombe* and *Ablett* (1998), in which two locally recruited staff members petitioned for the application to themselves of the benefits of Judgement No. 612 and for the retroactive granting to them of international status. This case is therefore very similar to that which is now before the Tribunal. In *Brimicombe* and *Ablett*, the Tribunal stated:

> "The requests that form the basis for this application were not made by the Applicants Brimicombe and Ablett for two and a half years and for more than one year, respectively, after Judgement No. 612 was rendered. The rendering of Judgement No. 612, however, is not the appropriate point for measuring the time bar, nor is the appropriate point the Respondent's answer to the Applicants' requests to extend Judgement No. 612 to them. The Applicant's claims are based on a request for a change in their recruitment status, which recruitment occurred in 1974. During the more than 15 years that the Applicants, who were hired as local recruits, worked alongside other staff members who had international recruitment status, they made no complaint about their status … The Tribunal finds that the claims are time-barred, as the Applicants knew or should have known of the differences in the benefits attaching to their recruitment status."

XII. Even supposing, for the sake of argument, that the Applicant became fully aware of what she believed to be her rights only at the moment when the judgement she cites was handed down, the Tribunal must find that the time limits were not observed. Judgement No. 612 dates from 1 July 1993 and the Applicant did not request that her situation should be adjusted in accordance with that Judgement until 14 October 1998, i.e. nearly five years after Judgement No. 612 of 13 July 1993.

XIII. And even assuming that it were possible to use the date of the second Judgement in *Burnett et al*. (No. 695 (1995)), which was rendered following the administration's reluctance to grant retroactive status to the staff members involved and which firmly established their rights by defining them unambiguously, the Applicant's claim would still be time-barred. The Tribunal has reasoned in similar fashion in the past, in the *Renninger* case mentioned above, in which the Applicant requested retroactive application of *Isaacs* (Judgement No. 423 (1988)), which had found in favour of another staff member in a situation similar to his own, and sought recognition for pension purposes of a period of service when he was not a participant in the United Nations Joint Staff Pension Fund (UNJSPF):

> "It is suggested that, until the Tribunal's Judgement in *Isaacs* on 26 October 1988, the Applicant could not have known that he was entitled to recognition of his past service ... Even assuming, for the sake of argument, that the question of delay is to be judged, not on the basis of when the Applicant was aware of his claim and of substantial disagreement as to his entitlement, but on the basis of when the Applicant was, or should have been, aware of a decision possibly favourable to his point of view, the Tribunal finds no justification at all for a delay of over 15 months from the date of issuance of the *Isaacs* decision, notwithstanding that the Applicant may not have learned of the decision immediately."

XIV. As the Tribunal has frequently pointed out in its judgements, "(n)o justification can be found for an Applicant, who thinks he is being victimized, to wait for years and years before resorting to the proper procedural steps" (Judgement No. 498, *Zinna* (1990), para. V; see also Judgements No. 475, *Martorano* (1990) and No. 364, *Marazzi* (1986)). There is no justification for waiting so long in the present case; in particular the Tribunal cannot accept the argument put forward by the Applicant, namely that she was not informed of this judgement at the time it was rendered and found out about it quite incidentally only in 1998. The Applicant's claims must therefore be deemed in principle time-barred.

XV. It is of course always possible for the Joint Appeals Board to waive the time limits for an appeal in exceptional circumstances. Staff rule 111.2 (f) stipulates that "(a)n appeal shall not be receivable unless the time limits specified ... have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal". Nothing in the present case points to such circumstances, and indeed the Applicant invokes none. The delay in submitting the request is the result of a choice freely made by the Applicant, on the basis of her own assessment of the situation and her chances of making a successful appeal, and can in no way be attributed to

exceptional circumstances beyond her control. The Applicant is solely responsible for the delay in submitting her appeal. The Tribunal is therefore of the opinion that the JAB was right to accept the position adopted by the Respondent in his answer of 22 June 1999, to the effect that "(a)n appeal against a decision taken nearly 30 years ago is manifestly time-barred". In other words, the Tribunal considers that the JAB was perfectly correct in declaring the application inadmissible on the grounds that it was not filed within the time limit, and in concluding "that it could not find any exceptional circumstances that prevented the Appellant from filing her appeal within the prescribed time limit".

XVI. In the Tribunal's view, it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations. Any other approach would endanger the mission of the international organizations, as the Tribunal has pointed out in the past: "Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning" (see Judgement No. 631, *Tarjouman* (1992), para. XVII)).

XVII. For the foregoing reasons, the Tribunal finds that the Applicant's claim is time-barred.

XVIII. The Tribunal notes, however, that, apart from the question of the admissibility of the application, the Applicant's situation appears to be the same as that of the Applicants affected by Judgement No. 612. The Tribunal is of the view that it would be fair for the Respondent to consider the possibility of granting her international status, with the corresponding entitlements, as of 14 October 1997, i.e. with retroactive effect from one year before her application. A similar approach, albeit with more serious consequences for the administration if it followed the Tribunal's suggestion, was adopted in the *Han* case, in which the Tribunal, while accepting that it was perfectly justifiable for the Respondent to be unable to obtain satisfaction on the merits because the application was time-barred, considered that "it would be altogether fair to facilitate the Applicant's reinstatement in the United Nations or a specialized agency". The equitable solution suggested by the Tribunal in this case would be in accordance with staff rule 103.15, which seeks to restrict retroactive payments to one year, and with simple justice towards a staff member

who has worked for 30 years in the service of the Organization without enjoying all the benefits she was entitled to.

XIX. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer **Gabay**
President

Kevin **Haugh**
Vice-President

Brigitte **Stern**
Member

Geneva, 23 July 2002

Maritza **Struyvenberg**
Executive Secretary