



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1054

Case No. 1160: OBUYU

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo;
Ms. Brigitte Stern;

Whereas, on 10 October 2000, Jackton Nyende Obuyu, a former staff member of the
United Nations, filed an Application containing pleas which read as follows:

"II: PLEAS

...

2. That the Secretary-General's decision to agree with the Joint Appeals Board [(JAB)] at Nairobi ... be rescinded.
3. That the Tribunal orders a retrospective administrative review and payment of indemnity to the Applicant ..., or
4. That the Tribunal orders the Secretary General to pay the Applicant ... US\$12,000 ... for the injury sustained ...
5. That the Tribunal orders the Secretary General to pay relief and compensation to the Applicant, for injury suffered ... inclusive of costs for this appeal ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 April 2001 and periodically thereafter until 31 December 2001;

Whereas the Respondent filed his Answer on 21 November 2001;

Whereas the Applicant filed Written Observations on 30 January 2002;

Whereas the Applicant submitted an additional communication on 14 June 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Centre for Human Settlements (Habitat), Nairobi, (UNCHS) as a Telex Operator on a six-month fixed-term appointment at the G-6 level, on 10 March 1986. His appointment was extended several times until his separation from service upon the expiration of his last fixed-term appointment, on 31 March 1996.

On 15 December 1995, the Assistant Secretary-General, UNCHS, informed the Applicant that the ad hoc Joint Advisory Panel on the Re-deployment of Staff Made Redundant by the Establishment of the United Nations Office at Nairobi (UNON) (the ad hoc Panel) had completed its review and that the Applicant's services could not be retained in UNON. He assured the Applicant that UNCHS was making efforts to find him employment elsewhere; however, his fixed-term contract would not be renewed beyond 31 March 1996.

On 2 April 1996, the ad hoc Panel submitted its final report and re-deployment recommendations to the Assistant Secretary-General, UNCHS. Annex 2 of the report, entitled "List of Fixed-Term Staff Not Originally Accommodated in UNON", included the Applicant's name with his "Status of Redeployment" noted as "Serve out contract up to 6/96".

On 29 April 1996, the Applicant wrote to the Chairman of the Panel on Discrimination and Other Grievances (the Grievance Panel), expressing his dismay at the discrimination by the Organization manifested in the payment of indemnity payments to former staff members of UNCHS' sister agency, United Nations Environment Programme, who were not retained as a result of the establishment of UNON, while such payments were not offered to staff members of UNHCS. The Chairman of the Grievance Panel forwarded this submission to the Acting Chief of Administration, UNON, on 20 May 1996 and requested the Administration's observations on the Applicant's grievance.

On 19 May 1998, the Applicant wrote to the Secretary-General requesting administrative review of the decision not to pay him termination indemnity.

On 12 August 1998, the Applicant lodged an appeal with the JAB. On 15 September 1998, the Secretary of the JAB noted in the Applicant's JAB file that the Chairman of the Grievance Panel had decided not to entertain the Applicant's request on the grounds that, as a former staff member, this recourse was not available to him.

The JAB adopted its report on 13 June 2000. Its considerations, conclusions and recommendations read, in part, as follows:

"V. Considerations

The panel considered the issue of receivability *res temporis* and came to the conclusion that the present appeal is not receivable.

... [T]he [Applicant] whose fixed-term contract expired in March 1996 and who had submitted his appeal in August 1998 had not respected the time limits specified in Staff Rule 111.2 (a).

The question before the panel therefore was whether exceptional circumstances justified a waiver of the aforementioned time limits. In deciding this question the panel took note of Article 13, No. 3 of the Rules of Procedure and Guidelines of the Joint Appeals Board at Nairobi, adopted in March 2000. According to that Article the institution of proceedings, prior to the appeal, before the Panel on Discrimination and Other Grievances shall normally constitute valid grounds for the Board's waiver of time limits for the filing of a request of review or of an appeal.

... [T]he panel came to the conclusion that Article 13, No. 3 of the Rules of Procedure and Guidelines of the Joint Appeals Board at Nairobi is not applicable in the present case.

... The Administrative Tribunal has defined exceptional circumstances to be those 'beyond the control of the appellant' (Judgement No. 372, *Kayigamba* (1986).) ...

... The [Applicant] had submitted his request for review to the Discrimination Panel in April 1996 and although he was not informed by the Chairman of that panel that as a former [staff member] he was not eligible to call upon that panel, there is no evidence that at any one time he attempted to either enquire about the progress of his request or to inform himself as to the necessity to lodge an appeal. Since the [Applicant] was the instigator of the process, he had a responsibility to follow up not only on the progress of his request but, moreover, to enquire whether, after a reasonable lapse of time, he should lodge an appeal to reserve his rights under the Staff Rules. The fact that he had not done this for a period of approximately two years is tantamount to negligence on his behalf. Negligence ... excludes the assumption that the late filing of the appeal was ... 'beyond the appellant's control'. The panel, therefore, could not assume that

'exceptional circumstances' had prevented the [Applicant] from respecting the time-limits for filing an appeal and that therefore a waiver could be granted.

...

VI. *Conclusions*

... [T]he panel concluded that the present appeal was not receivable.

VII. *Recommendations*

The panel therefore recommends that the present appeal be rejected."

On 12 July 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's conclusions and had accordingly decided to take no further action on his appeal.

On 10 October 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was entitled to termination indemnity; alternatively, at the very least, the Applicant was entitled to be re-deployed to serve out his contract until June 1996.
2. The Applicant's rights were violated and he suffered discrimination.
3. The Applicant's claim is not time-barred since he instituted proceedings before the Grievance Panel prior to the appeal, warranting the waiver of time-limits by the JAB in accordance with article 13 (3) of the Rules of Procedure and Guidelines of the JAB at Nairobi.

Whereas the Respondent's principal contentions are:

1. The appeal was time-barred.
2. The decision not to waive the time-limits was not vitiated by discrimination, prejudice or other extraneous factor. Nor was the decision flawed by mistake of fact or error of law.

The Tribunal, having deliberated from 4 to 25 July 2002, now pronounces the following Judgement:

I. The issue in this case is whether the Applicant's claim for compensation is time-barred. Staff rule 111.2 (f) provides that an appeal to the JAB shall not be receivable unless the time limits as set out in staff rule 111.2 (a) have been met or have been waived in exceptional circumstances. The JAB found that the Applicant, whose fixed-term contract expired in March 1996 and who submitted his appeal on 12 August 1998, had not respected the time limits specified in staff rule 111.2 (a), and therefore his claim for compensation was time-barred.

The Applicant contends that he had filed a timely complaint with the Chairman of the Grievance Panel and that, in accordance with article 13 (3) of the Rules of Procedure and Guidelines of the JAB at Nairobi, this should be sufficient to warrant a waiver of the statutory time limit. Additionally, the Applicant contends that the inefficiency of the Grievance Panel and the Administration constitutes exceptional circumstances for the purpose of waiving time-limits.

Furthermore, the Applicant submits that his appeal process was tainted by procedural irregularities, such as the failure to inform him of the change in the composition of the JAB panel and by the failure to invite him to attend the JAB's hearing. He added that such irregularities confirm that the decision of the JAB not to waive the time limits was discriminatory.

II. The Tribunal notes that the Chairman of the Grievance Panel forwarded the Applicant's submission to the Acting Chief of Administration in May 1996 and requested the Administration's observations on the Applicant's grievances. The Administration did not respond to this request and, therefore, the Applicant's case was not taken up again. The Tribunal further notes that the official JAB file contains a note dated 15 September 1998, which states that the Chairman of the Grievance Panel decided not to entertain the Applicant's complaint on the grounds that, as a former staff member, this recourse was not available to him. The decision was never communicated to the Applicant.

III. The relevant legal framework by which the Applicant's case is to be examined includes the Rules of Procedure and Guidelines of the JAB at Nairobi as well as administrative instruction ST/AI/308/Rev.1 of 25 November 1983 entitled "Establishment of Panels on Discrimination and Other Grievances".

Article 13 (3) of the Rules of Procedure and Guidelines of the JAB at Nairobi stipulates "the institution of proceedings, prior to the appeal, before the Panels on Discrimination and Other Grievances ... shall normally constitute valid grounds for the Board's waiver of time-limits for the filing of a request for review or of an appeal". Whilst these rules were promulgated in March 2000, four years after the Applicant requested administrative review, the Tribunal is satisfied that the JAB applied the same principles, following the Rules of Procedure of the JAB at Headquarters.

ST/AI/308/Rev.1 provides that "[t]he panel shall investigate grievances submitted by staff members arising from their employment with the Organization". This may be contrasted with Chapter XI of the Staff Regulations and Rules, which provides machinery for the resolution of disputes filed by staff members and former staff members. Similarly, article 1 (25) of the Rules of Procedure and Guidelines of the JAB at Nairobi defines "staff member" as "current or former staff member holding or having held a contract under the Staff Regulations and Rules".

The Tribunal notes that the inclusion of "former staff member" within the definition of "staff member" is unique to proceedings of the JAB. This is, in fact, quite logical as part of the JAB's mandate is to advise the Secretary-General in cases of appeals stemming from decisions regarding separation from service. Regulation 1.1 (a) stipulates that "[s]taff members are international civil servants". Former staff members clearly are not international civil servants and thus, this regulation indicates that, unless otherwise stated, the term "staff members" refers to current staff members only. The JAB further reasoned that the Applicant was not eligible to call upon the Grievance Panel because it deals with issues of the working environment of staff members and cannot, therefore, rectify the kind of grievances the Applicant had. The Applicant pointed out that the mandate and terms of reference of the Grievance Panel were expanded to include all types of grievances.

The Tribunal, having considered all of the above, finds that since the Applicant was not a staff member at the time of filing his complaint with the Grievance Panel, his complaint was not eligible for consideration and therefore could not constitute valid ground for the waiver of the time-limits.

IV. The Applicant claims that at the time he submitted his appeal to the JAB, his complaint with the Grievance Panel was still pending. Furthermore, the Chairman of the Grievance Panel had not informed the Applicant that the case was closed. The fact that the Administration did not

respond to the Applicant's complaint, and that the Chairman of the Grievance Panel did not reply to the Applicant and did not inform him that as a former staff member his claim would not be handled by the Grievance Panel, constitutes, in the Applicant's view, exceptional circumstance beyond his control, which justifies a waiver of the time-limits. The Applicant further contends that this also constitutes a violation of his rights of due process.

In Judgement No. 372, *Kayigamba* (1986), the Tribunal defined exceptional circumstances for the waiving of time-limits to be those circumstances which are "beyond the control of the Applicant". In the instant case, there is no indication that the Applicant, at any time, attempted to enquire about the progress of his request or to get informed as to the necessity of lodging an appeal. The Tribunal concurs with the JAB that the fact that the Applicant had not done so for a period of approximately two years is tantamount to negligence on his behalf and negligence cannot be considered a matter "beyond the Applicant's control".

V. Having found the appeal to be time-barred, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President

Omer Yousif BIREEDO
Member

Brigitte STERN
Member

Geneva, 25 July 2002

Maritza STRUYVENBERG
Executive Secretary