

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1124

Case No. 1216: D'CRUZ

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Ms.
Brigitte Stern;

Whereas, on 14 February 1995, Cleophus D'Cruz, a staff member of the
United Nations Development Programme (hereinafter referred to as UNDP), filed
an Application against a decision to abolish his post and reassign him to another;

Whereas, on 2 August 1996, the Tribunal rendered Judgement No. 771,
D'Cruz. The Tribunal rejected the Application and concluded that:

“VII. In this case, it appears to the Tribunal that, despite the difficulties
of the past several years, the Respondent is willing to reintegrate the
Applicant into service and has made some effort to do so. In the
Tribunal's view, the Applicant should make a good faith effort to work
with the Respondent in this endeavour. The Applicant has no right to
assignment to a particular post, and the abolition of his post was carried
out in accordance with the relevant procedures.”

Whereas, on 28 September 2001, the Applicant filed a new Application
with the Tribunal, containing pleas which read, in part, as follows:

“ *PLEAS*

A) I hereby request to review my ... Personnel files.

...

... I would like to call [witnesses] ...

B) I hereby request the Tribunal to rescind the action by UNDP to separate me from service ...

C) ... the Organization ... [should] honour my ... contract ...

D) ... Before an assessment of 'compensation for the injury sustained' can be made, my first request would be for all salary to date with interest, legal fees and interest on loans. Further compensation to be determined ...

E) I also request additional compensation for denied career opportunities.”

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 31 January 2002 and once thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 31 January 2002;

Whereas the Applicant requested production of documents on 3 February 2002 and the Respondent responded thereto on 6 March 2002;

Whereas the Applicant filed Written Observations on 28 August 2002;

Whereas, the Applicant submitted an additional communication on 12 November 2002; the Respondent commented thereon on 19 December 2002; and, the Applicant responded to the Respondent's comments on 27 January 2003;

Whereas on 7 April 2003, the Respondent submitted a “Special Submission” and on 12 May 2003 the Applicant commented thereon;

Whereas on 27 May 2003, the Applicant submitted an additional communication and documentation;

Whereas, on 15 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case subsequent to the statement of facts contained in Judgement No. 771 are as follows:

On 27 May 1997, the Director, Office of Human Resources (OHR), wrote to the Applicant, reminding him that since the abolition of his post, efforts to place him in another suitable assignment, had been unsuccessful and advising him that, should no placement be identified, UNDP would have no other option but to terminate his services with the Organization as of end June 1997. The Director reassured the Applicant that OHR would make every effort to identify a suitable post for him within the coming month. On 12 August 1997, the Applicant was notified that his services with the Organization would be terminated as of 31 August 1997; he would receive a termination indemnity of 21 months net salary, which included three months pay in lieu of notice.

On 15 September 1997, the Applicant wrote to the Associate Administrator, UNDP, explaining that the decision to terminate his service had its roots in the past. The Associate Administrator, UNDP, replied on 17 October, informing the Applicant that having reviewed his case again, the decision stood.

On 10 December 1997, the Applicant wrote to the Secretary-General referring to the “increasingly intense efforts by UNDP’s administration to separate me” and requesting a meeting with the Secretary-General to “serve toward achieving an amicable resolution ...”

On 14 July 1998, Mr. Michael C. Caulfield, acting on behalf of the Applicant, wrote to the Administrator, UNDP, formally requesting administrative review of the decision to separate the Applicant from service and suggesting mediation, either as a parallel track to the formal procedure or as an alternative thereto. On 31 August, Mr. Caulfield wrote to the Senior Policy Officer, UNDP/OHR, stating that the 17 October letter from the Associate Administrator, UNDP, to the Applicant, followed by the Applicant’s letter to the Secretary-General, demonstrated that the Applicant had followed the procedural rules in a timely manner. Furthermore, he expressed the view that, the administrative review would be concluded only when the Secretary-General made a decision on the administrative action taken by UNDP, which decision the Applicant would then be entitled to appeal to the JAB. On 22 September, the Senior Policy Officer, UNDP/OHR, informed Mr. Caulfield that the Applicant had not complied with the strict time limits contained in staff rule 111.2 (a), and that there was no ground for waiving the prescribed time limits.

On 25 March 1999, Mr. Caulfield submitted, on behalf of the Applicant, an appeal to the JAB. On 19 April the Secretary of the JAB notified Mr. Caulfield that, since he was neither a serving nor a retired staff member, he was precluded from representing the Applicant before the JAB and that, accordingly, the appeal was not receivable. He further advised that the Applicant should submit a written explanation for the delay in filing his appeal.

On 27 April 1999, the Applicant requested the JAB Secretary to accept the appeal previously filed by Mr. Caulfield as if submitted by him. On the issue of timeliness, the Applicant indicated that he relied on the arguments contained in his appeal and that the process of the administrative review had not yet been concluded.

The JAB adopted its report on 24 April 2001. Its considerations, conclusion and recommendation read, in part, as follows:

“Considerations

40. the Panel noted that the Appellant did not file an appeal with the JAB until 25 March 1999, more than a year after he arguably requested administrative review. The Panel observed that the Appellant had not presented, nor could it find any exceptional circumstances warranting a waiver of the time limits.

...

42. The Panel observed that the claim raised by the Appellant in his [previous] application to the UNAT, as well as the contentions put forward in its support, [are] identical in all pertinent respects to the claim presented by the Appellant in the present appeal. ...

Conclusion and Recommendation

43. ... the Panel concluded that the Appellant’s contentions had already been adjudicated by the Tribunal, which has entered a final judgement. ... [and] *unanimously* decided to make no recommendation in support of the present appeal..”

On 29 June 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the JAB’s unanimous conclusion and had decided to take no further action on his appeal.

On 28 September 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was harassed and his rights were violated.
2. The Applicant was not offered any posts and was never considered for those he applied to. The Respondent did not make any efforts to place the Applicant in another post once his was abolished.
3. The Application which was the subject of Judgement No. 771 and the present Application complement each other.
4. The use of the word *may* in staff rule 111.2 (a) (ii) indicates that the staff member is not bound under some time constraints to appeal if the Secretary-General does not reply to the request for administrative review. If that were the case, the language used would not have been *may* but rather it would have been *shall*.
5. The decision to separate the Applicant from service was wrongfully taken and is procedurally defective.

Whereas the Respondent's principal contentions are:

1. The only substantive matter potentially before the Administrative Tribunal is the decision to terminate the Applicant's appointment following good faith but unsuccessful efforts to place the Applicant after his post had been abolished; matters that were before the Tribunal in Judgement No. 771: *D'Cruz* and that were adjudicated or encompassed in that judgement are not cognizable in the present case.
2. The Applicant's appeal is not receivable.
3. The termination of the Applicant's appointment was consistent with the Staff Regulations and Rules.

The Tribunal, having deliberated from 30 June to 25 July 2003, now pronounces the following Judgement:

- I. The Applicant requests the Tribunal to rescind the Secretary-General's decision to separate him from service, and further requests to be paid appropriate compensation for denied career opportunities.

II. On 12 August 1997, the Applicant was notified of the Respondent's decision to terminate his appointment, effective 31 August 1997. In accordance with staff rule 111.2 (a), in order to initiate an appeal process, the Applicant should have addressed a letter to the Secretary-General requesting him to review the contested decision. Such letter had to be sent within two months of the said decision, i.e. no later than 12 October 1997.

The Applicant sent several letters in connection with the contested decision. However, the Tribunal finds that none of these letters complied with the requirements of staff rule 111.2 (a) which stipulates, *inter alia*:

“A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 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.”

The Applicant's letter of 15 September was neither addressed to the Secretary-General nor did it contain a request for review of the decision; and his letter of 10 December, addressed to the Secretary-General, exceeded the two months' time limit. The Applicant's "official request" for administrative review, which was submitted on 14 July 1998 by an attorney acting on the Applicant's behalf, was not receivable, as only staff members or retired staff members may represent appellants in the early stages of the appeal process. Furthermore, this request was clearly outside the two months' time limit.

III. The Applicant's appeal to the JAB also did not comply with the requirements of staff rule 111.2 (a). First, as noted above, the Applicant did not meet the time limits prescribed for requesting administrative review, rendering his appeal with the JAB not receivable. Additionally, the Applicant did not attempt to file an appeal with the JAB until 25 March 1999, more than a year after he arguably requested administrative review and well over the prescribed time limit. The Applicant contends that he did not exceed the time limit for lodging an appeal with the JAB, as the process of administrative review is not completed until the Secretary-General issues a definitive reply, negative or positive. He further claims that the use of the word "may" in staff rule 111.2(a) (ii)

“indicates that the staff member is not bound under some time constraint to appeal if the Secretary-General does not reply to the letter. If that were to be indicated, the language would not be *may*, rather, the language would be *shall*”.

The Tribunal rejects this claim. Staff rule 111.2 (a)(ii) specifically addresses the situation in which the Secretary-General does not respond to a staff member’s request for administrative review, and stipulates a time limit for filing an appeal in such a case:

“(ii) If the Secretary-General does not reply to the [staff member’s letter requesting administrative review] within one month in respect of a staff member stationed in New York, ... the staff member may appeal against the original administrative decision within one month of the expiration of the time limit specified in this subparagraph for the Secretary-General’s reply”.

The use of the word “may” in this sub-paragraph indicates the option given to staff members regarding lodging an appeal with the JAB: a staff member may choose to lodge an appeal or he may choose not to lodge same. The Tribunal can find no basis for the Applicant’s interpretation of the above paragraph.

IV. Staff rule 111.2(f) provides that, “an appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal”. It is significant to note that staff rule 111.2 (a) establishes strict time limits for the submission of an appeal. The Tribunal finds that the Applicant did not comply with the provisions of staff rule 111.2 (a) nor did he present any exceptional circumstances warranting the waiver of the time limits by the JAB.

The Tribunal notes that in its report, the JAB considered the issue of receivability of the Applicant’s appeal, stating, inter alia:

“The Panel noted that pursuant to Staff Rule 111.2, the appeal was not receivable unless there were exceptional circumstances warranting the waiver of the relevant time limits. ... The Panel observed that the Appellant had not presented, nor could it find any exceptional circumstances warranting a waiver of the time limits”.

In the Tribunal’s opinion, once the JAB determined that there was no justification for waiving the time limits and that consequently the appeal was not

receivable, it should have rejected the appeal and should have refrained from considering its merits.

V. The Tribunal wishes once again to reaffirm the importance it attaches to observing the prescribed time limits for the administrative review process, as these time limits are of utmost importance for ensuring the well functioning of the Organization. Recently, in Judgement No. 1046, *Diaz de Wessely* (2002), the Tribunal stated:

“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. 579, *Tarjouman* (1992), para. XVII))”.

VI. In view of the foregoing the Tribunal finds the Application to be time barred and consequently rejects the Application in its entirety.

(Signatures)

Julio Barboza
President

Omer Yousif Bireedo
Member

Brigitte Stern
Member

Geneva, 25 July 2003

Maritza Struyvenberg
Executive Secretary

.../D'CRUZ