United Nations AT/DEC/1211

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1211

Case No. 1300: MUIGAI
No. 1314: MUIGAI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 27 March 2003, Teresa Wanjiru Muigai, a staff member of the United Nations, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 18 June 2003, the Applicant, after making the necessary corrections, again filed an Application (the "first case") requesting the Tribunal to order, inter alia:

> "a) The nullification of the decision of the United Nations Secretary-General not to grant the Applicant the accrued annual leave totalling 76.5 days as of 31 December 1997 …
>
> …"

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2003 the time limit for the filing of an application in the "second case";

Whereas, on 22 July 2003, the Applicant filed an Application in the "second case" that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 October 2003, the Applicant, after making the necessary corrections, again filed an application in the "second case", requesting the Tribunal, inter alia, to

> "2. …
>
> i) Find that the [A]pplication contains sufficient clarity and substance.
>
> ii) Find that the [A]pplication is receivable [and is] within the time limit [for] requesting … compensation …
>
> 3. … [O]rder the award of compensation in the amount of US$ 2.7 million to the Applicant in damages for the abuse of due process and arbitrary treatment by the Respondent …"

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 in the "first case" until 28 November 2003 and twice thereafter until 31 January 2004;

Whereas the Respondent filed his Answer in the "first case" on 13 January 2004;

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 in the "second case" until 27 February 2004 and twice thereafter until 15 June 2004;

Whereas the Respondent filed his Answer in the "second case" on 27 May 2004;

Whereas the Applicant filed Written Observations in the "second case" on 10 August 2004;

Whereas the Applicant filed Written Observations in the "first case" on 23 August 2004 and the Respondent commented thereon on 9 September;

Whereas the statement of facts relevant to both cases, contained in the reports of the Joint Appeals Board (JAB) reads, in part, as follows:

> **"**[The Applicant] entered the services of the United Nations Environment Programme [(UNEP)] as [a] Secretary at the G-6 level in October 1973 and served on several fixed-term appointments …
>
> …
>
> [At the time of the events which gave rise to these Applications, the Applicant held a permanent appointment and was serving as Chief, Recruitment Unit, at the P-4 level.]

…

In February 1997 she was temporarily assigned to the Office of the Humanitarian Co-ordination in Iraq (UNHCI).

[On] 6 January 1998, [the Applicant] was informed of the Executive Director's decision to summarily dismiss her.

[On] 20 July 1998, [the Applicant] was informed of the Executive Director's decision to reinstate her [retroactively] effective 7 January … and to place her on suspension with full pay, also effective 7 January … pending investigations into allegations of misconduct against her.

[Thereafter, the Applicant's case was referred to the Joint Disciplinary Committee (JDC) in Nairobi. On 23 December 1999, the JDC issued its report concluding, inter alia, that the Applicant had 'successfully exonerated herself' of the allegations of misconduct which had been brought against her. The JDC recommended that no disciplinary measures be taken against the Applicant.]

[The Applicant] … reported back to work on 3 April 2000. She is presently working in the secretariat of the Governing Council of UNEP."

Whereas the statement of facts pertaining to the "first case", as contained in the report of the JAB reads, in part, as follows:

"[On] 29 May 2000 … the [Applicant] requested confirmation … that she had accrued 60 days of leave for the period preceding 1 January 1998 [and had since accumulated an additional 60 days of leave].

[On] 8 June 2000, [Human Resources Management Service (HRMS), United Nations Office at Nairobi (UNON)] responded by rejecting this request citing staff rule 105.1 (c) whereby annual leave may be accumulated, provided that no more than 12 weeks of such leave shall be carried forward beyond 1 January of any year.

[On] 15 June 2000, the [Applicant] responded, arguing that staff rule 105.1 (c) would only be applicable in a normal working situation. Since she had been on 'unauthorized' summary dismissal/suspension from work during the period 1998/1999, her working situation could not be considered normal, since the Administration had placed her in a situation that prevented her from exercising her rights under staff rule 105.1. … On the basis of these arguments, she again requested acknowledgement of accrual of annual leave.

[On] 19 June 2000, HRMS, UNON, reiterated its position.

[On] 7 July 2000, the [Applicant] responded and continued to argue her case.

[On 13] July 2000, HRMS responded in turn giving detailed reasons for its position and informing the [Applicant] that [subsequent to an inquiry by HRMS] the Rules and Regulations Unit at Headquarters had agreed with [this] position. …

[On] 12 December 2000 … the [Applicant] repeated her wish to have the accrued leave acknowledged. UNON addressed another inquiry to the Rules and Regulations Unit by memorandum dated 28 December … The Rules and

> Regulations Unit responded by memorandum dated 25 January 2001 and reiterated its position that the [Applicant] was not entitled to carry forward any leave accumulated before 1 January 1998.
>
> This negative response was forwarded to the [Applicant] by memorandum dated 27 February 2001 ..."

On 23 March 2001, the Applicant requested the Secretary-General to review the administrative decision to deny her accrual of 76.5 days annual leave as an exception to staff rule 105.1.

On 19 June 2001, the Applicant lodged an appeal in the "first case" with the JAB in Nairobi. The JAB adopted its report on 10 September 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations:***
>
> …
>
> The Panel is of the opinion that the *terminus a quo* for calculating the time limit for filing the request for administrative review and the subsequent appeal started to run with the Administration's first negative response of 8 June 2000, [or at the very latest], with the final response from HRMS … dated 14 July 2000.
>
> The Panel … concluded that the … letter of 27 February 2001 was merely a confirmation of what had previously been communicated to [the Appellant] in July 2000. … [T]he staff member's request for administrative review of 23 March 2001 and her subsequent appeal came almost seven months too late. … Since the staff member has not presented any facts that would allow for the assumption that adherence to the time limits was 'beyond her control' … the Panel has to assume that the present appeal is irreceivable.
>
> …
>
> ***Recommendation***:
>
> In the light of the above considerations, the Panel recommends to the Secretary-General that the present Appeal be rejected".

On 20 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report in the "first case" to the Applicant and informed her that the Secretary-General had decided to accept the JAB's conclusion and, in accordance with its recommendation, to take no further action on her appeal.

On 18 June 2003, the Applicant filed the above-referenced Application in the "first case".

Whereas the statement of facts pertaining to the "second case" case, as contained in the report of the JAB reads, in part, as follows:

> "[On] 11 March 2001, [the Applicant wrote] to the Chief, Division of Administrative Services, UNON, … [requesting] compensation for decisions taken in respect of her contractual status during the years 1994 to 1998. ...
>
> …
>
> [On] 29 May 2001, the Chief, Division of Administrative Services, UNON, informed the [Applicant] that her request only contained a general narrative of events and lacked 'an exact identification of administrative decisions' which she believed [to] have resulted in [the] non-observance of her terms of appointment. In order for UNON to be able to conduct a procedurally correct review of her request for compensation, it was necessary for the [Applicant] to identify the specific administrative decisions which she alleged caused her grievance.
>
> The [Applicant] responded [on] 18 June 2001 [stating] that she had not requested … review of an administrative decision because she truly believed that the 'good offices of the Chief, Division of Administrative Services, could effectively be used to negotiate for compensation'. She again requested [compensation.]
>
> The Chief, Division of Administrative Services, UNON, replied [on] 2 July 2001, stating that since the [Applicant] had not addressed an issue for which provisions under the Staff Rules of the United Nations exist, he was of the opinion that her request was not receivable for consideration under the existing rules and administrative issuances of the Organization."

On 8 July 2001, the Applicant requested the Secretary-General to review the administrative decision to deny her compensation in the amount of US$ 2.7 million.

On 30 September 2001, the Applicant lodged an appeal in the "second case" with the JAB in Nairobi. The JAB adopted its report on 12 November 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations*:**
>
> …
>
> … It is the Panel's opinion that the appeal is not receivable because of insufficient clarity of grounds as presented in the appeals documentation by the Appellant.
>
> Moreover, and more importantly however, the Panel is of the opinion that the appeal is not receivable *rationae temporis*. …
>
> Regarding events that took place before 1998 … administrative decisions that might have violated the staff member's rights could and should have been challenged by her at the time. She chose not to appeal these decisions then, when she could have possibly achieved their reversal. Instead she waited for four years to seek redress regarding these decisions. There is no doubt in the

> Panel's mind that redress regarding decisions made before 1998 is excluded by the rules regarding time-limits for filing appeals.
>
> Regarding the administrative decisions surrounding her summary dismissal in January 1998 and her subsequent placement on suspension with full pay in July 1998, the Panel is of the opinion that the [Appellant] … could have sought compensation regarding the summary dismissal immediately after her reinstatement from July 1998 onwards. She also could have addressed an appeal to the JAB regarding her prolonged placement on suspension with full pay any time after the third month on which she was so placed. She did not do so.
>
> Even if the Panel assumes … that it could have possibly been difficult for her to seek redress successfully before the JAB at a time when disciplinary proceedings were pending against her and that it is at least arguable that she was only able to calculate the extent of her damage regarding the prolonged placement on suspension with full pay as from the date of her reinstatement, the latest point at which she could and should have submitted her appeal would have been the date of her reinstatement. This is also the *terminus a quo* from which the time limits have to be calculated. Since the Appellant was reinstated in March 2000, she should have submitted a request for administrative review latest in May 2000 and the subsequent appeal in July 2000. Instead she waited until one year after her reinstatement to initiate her compensation claim. And it was only in July 2001 that she submitted her request for administrative review. The Panel was therefore unanimously of the opinion that the present appeal is time-barred.
>
> ***Recommendation***:
>
> In light of the above considerations, the Panel recommends to the Secretary-General to reject the appeal."

On 21 April 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report in the "second case" to the Applicant and informed her that the Secretary-General had accepted the JAB's conclusions and, in accordance with its unanimous recommendation, had decided to take no further action on her appeal.

On 28 October 2003, the Applicant filed the above-referenced Application in the "second case".

Whereas the Applicant's principal contentions in the "first case" are:

1. The Application is not time-barred. Between 14 July and 12 December 2000, the Applicant was involved in consultations and negotiations in an attempt to redress the issue of her annual leave. The *terminus a quo* is 27 February 2001.

2. Having been dismissed, and subsequently suspended from duty, the Applicant could neither have applied for, nor taken, annual leave.

Whereas the Respondent's principal contentions in the “first case” are:

1. The Application is time-barred.

2. The Applicant is not entitled to accrued annual leave.

Whereas the Applicant's principal contentions in the “second case” are:

1. The Application is not time-barred. The various administrative decisions involved in this case were taken informally, making it difficult to justify an appeal to the JAB at that time; they “became facts” only through an investigation conducted by the Office of Internal Oversight Services and the JDC proceedings. The Applicant was not in a position to seek compensation until all the alleged charges against her had been dispensed by the JDC.

2. From the time of her reinstatement in April 2000, until July 2000, negotiations were on-going between the Applicant and the Administration in an attempt to agree on compensation.

3. The JAB erred in determining that the appeal lacked clarity. The Applicant’s appeal to the JAB referred to specific administrative decisions which led to specific damages.

4. The Applicant was treated with bias and hatred since 1994.

Whereas the Respondent's principal contentions in the “second case” are:

1. The Application is time-barred.

2. The Applicant’s rights of due process were not violated.

The Tribunal, having deliberated from 9 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant has brought before the Tribunal two different cases. In the “first case”, she requests the Tribunal to rescind the Respondent’s decision not to grant her accrued 76.5 days of annual leave; the “second case” concerns the Applicant’s request for compensation of US$ 2,700,000 for administrative decisions taken in violation of her rights during the period from 1994 to 1998. Since the Applications concern different alleged wrongs, arising from different administrative decisions sufficiently related to each other to be considered jointly and without prejudice to the Applicant, the Tribunal will address them in the same Judgement. (See Judgement No. 1010, *Kanj* (2001).)

II. Having considered the two cases, the Tribunal finds them both to be time-barred, as explained below.

Staff rule 111.2 (a) provides that:

> "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."

Staff rule 111.2 (f) states 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."

In her "first case", the Applicant appeals the decision denying her accrued leave of 76.5 days as of 31 December 1997. The Applicant claims that as a consequence of the Respondent's decision of 6 January 1998 to summarily dismiss her from UNEP, she could not take these days as vacation within the mandatory four-month period following her return from mission assignment in Iraq, as per staff rule 105.1 (c).

The Tribunal notes that on 29 May 2000, the Applicant, for the first time, raised the issue of annual leave accrued prior to her summary dismissal. She did so when she requested confirmation that, as of 1 January 1998, she had a balance of 60 days of leave and that in the years 1998 and 1999, while on suspension from duty, she had accumulated a further 60 days. In response, she was informed that, in accordance with staff rule 105.1 (c), no more than 60 days of leave could be carried forward beyond 1 January of any year. The Applicant addressed the issue again, challenging this determination and contending that had the Administration respected her due process rights, this question would never have arisen. She therefore requested that an exception be made in her case to allow her to utilize her accrued annual leave in excess of 60 days. On 13 July 2000, the Applicant was informed that her request had been rejected. It was explained that such a request should have been made "before the end of the year in which the days would be forfeited" and, furthermore, the exceptional circumstances in which the carrying over of leave days in excess of 60 had been authorized was restricted to cases when exigencies of service prevented the staff

member from taking annual leave, which was not the circumstances of the Applicant's case. Five months later, on 12 December 2000, the Applicant addressed her request anew to the Chief, Division of Administrative Services, UNON. Her request was once again denied and, on 23 March 2001, she wrote to the Secretary-General requesting administrative review.

The Respondent contends that the Applicant failed to prove that exceptional circumstances existed which justified the delay in her request and that, therefore, her Application was time-barred.

III. The Applicant requests the Tribunal to find that the *terminus a quo* is 27 February 2001 "on the grounds of Common Law stand on 'fresh step' which provides for waiver in light of available new facts". The Tribunal does not accept this contention. Upon review of the file, it appears that the Applicant, upon receipt of the negative response to her request of May 2000, rather than initiating an appeals process, chose to seek repeated confirmation of what had been previously communicated to her by the Respondent. Moreover, the Applicant failed to provide a substantiated and convincing argument as to why, subsequent to her request having been rejected yet again on 13 July 2000, she remained silent for five months, until her renewed request of December 2000. It would seem that the Applicant might have realized that her time to initiate the appeals process had elapsed and thus chose to seek to revive her claim in this renewed request. In this regard, the Tribunal wishes to reiterate two points: a) once it is clear that a decision is made, the time for initiating the appeals process begins to run and, thus, further correspondence on the issue would normally not stop it from running; and, b) bringing up an issue on which a decision had previously been communicated to the staff member and which was not the subject of a request for administrative review does not normally start the process anew, *i.e.*, the Administration's response to the renewed request would not constitute a *new* administrative decision which would restart the counting of time. The Tribunal agrees with the Respondent's assertion on this point, that allowing for such a renewed request to restart the running of time would effectively negate any case from being time-barred, as a new letter to the Respondent would elicit a response which would then be considered a new administrative decision. The Tribunal furthermore wishes to reiterate that negotiations between the parties do not stop the time from running. While negotiations are to be encouraged, they do not in and of themselves necessarily suspend the time limits for initiating the formal proceedings.

The Tribunal considers that even on the basis of the "fresh step" theory, a required element is that there would be a new fact. It would be logical to expect that the new fact would have to be discovered, and subsequently brought forward, by the party requesting to benefit from the waiver of the time limit. In the present case, the Applicant suggests that the "new fact" is related to the statement made by the officer who issued the ruling in her case that he was not aware of her having been on mission immediately prior to her separation. However, the Applicant herself was fully aware of this fact, as well as of the provisions of the relevant Staff Rules. She therefore cannot benefit from the "fresh step" theory. In any event, the knowledge of this fact ultimately did not lead to any subsequent change in the decision. The Tribunal refers on this issue to the Administrative Tribunal of the International Labour Organization (ILOAT), which has repeatedly decided that when a decision is not changed, but subsequent actions or decisions are merely confirmation of the earlier decision, such subsequent action will not have the effect of delaying the time limits (ILOAT Judgements No. 329, *In re Quansah*, (1977); No. 413, *In re Over* (1980); and, No. 430, *In re Chamayou* (1980).) Therefore, the Applicant's letter of 12 December 2000 and the subsequent response of the Respondent cannot be considered as a "fresh step" to reopening the issue and to calculating the time-limits.

The Applicant further contends that the four-month period, during which staff members must utilize their accrued annual leave in order to avoid its forfeiture, as stipulated in staff rule 105.1 (c), had expired when she ceased to be a staff member upon her dismissal and she was therefore not able to utilize her accrued leave days. The Tribunal does not subscribe to this view.

Staff rule 105.l (c) provides that:

> "Annual leave may be accumulated, provided that not more than twelve weeks of such leave shall be carried forward beyond 1 January of any year or such other date as the Secretary-General may set for a duty station. However, upon completion of service with a mission … any accumulation of annual leave which otherwise would have become subject to forfeiture during the mission service, or within two months thereafter, may be utilized to cover all or part of an authorized period of post-mission leave. Any such leave which is not so utilized within four months following departure from the mission area shall be forfeited."

The Tribunal notes that the Applicant was summarily dismissed on 6 January 1998 and was retroactively `reinstated and placed on suspension with full pay on 20

July 1998. During this six-month period, and particularly upon receipt of her final entitlements upon separation, such as her last salary, she should have requested that the value of her accumulated 60 days of annual leave be paid to her. Had the Administration declined then to pay her for these days, she should have initiated proceedings challenging that decision. There is no indication that the Applicant addressed this issue at that time. Moreover, the Tribunal is of the opinion that there was nothing to prevent the Applicant from utilizing these accrued annual leave days after she was retroactively reinstated and placed on suspension with full pay, as from 7 January 1998. The letter whereby the Applicant was reinstated and placed on suspension, clearly indicated that the suspension would be without prejudice to her rights and would not constitute a disciplinary measure. Bearing in mind that a staff member on suspension is expected to be available for service when called, the Applicant could have utilized these accrued leave days within four months of her reinstatement. Furthermore, while suspended, the Applicant could have requested an extension of the time in which to utilize these accrued days, and she could also have requested that an exception be made to the 60-day limit as stipulated in staff rule 105.1 (c). The Applicant waited more than two years before submitting any such request.

In light of all the foregoing, the Tribunal concludes that the Applicant's request for accrued annual leave days in excess of the allowed 60 days is time-barred.

IV. The Tribunal will now turn its attention to the Applicant's "second case", concerning her request for compensation in the amount of US$ 2,700,000 in respect of violations of her contractual rights between 1994 and 1998. The Tribunal notes that the Applicant first requested compensation in a letter addressed to the Chief, Division of Administrative Services, UNON, on 11 March 2001. In her letter, the Applicant presented a series of events which allegedly caused her injury. The JAB found that in her appeal before it, the Applicant did not identify specific administrative decisions, nor did she link any "decision" with specific damage. The JAB therefore concluded that the appeal was irreceivable, as it was lacking in clarity of the grounds on which it was based. The JAB also found that the appeal was time-barred.

As explained below, the Tribunal concurs with the JAB that this case, like the first one, is time-barred. It therefore does not find it necessary to address the issue of clarity of grounds invoked.

V. The Applicant initiated her claim for compensation in respect of events that took place during the period 1994-1998, in March 2001. Her request for administrative

review was filed in July 2001. In keeping with staff rule 111.2, the Applicant should have requested administrative review within two months of the allegedly damaging decisions. As correctly stated by the JAB, "regarding events that took place before 1998 … decisions that might have violated the staff member's rights could and should have been challenged by her at the time". The Tribunal has rigorously maintained the importance of complying with the mandatory time-limits set out in the Staff Rules. In Judgement No. 498, *Zinna* (1990), the Tribunal held that "the various time-limits provided in the Staff Rules are to ensure that remedies are sought from contested administrative decisions in a timely and proper manner". In Judgement No. 1046, *Diaz de Wessely* (2002), the Tribunal emphasized that

> "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."

Accordingly, the Tribunal finds that the Applicant's claims arising from events which took place prior to 1998 are not receivable.

VI. As for the Applicant's claims arising from her dismissal and suspension in 1998, the Tribunal is of the opinion that these too are time-barred. The JDC report was issued on 23 December 1999 and the Applicant was subsequently reinstated in March 2000. At the very latest, the Applicant should have initiated her proceedings with regard to compensation within two months of her reinstatement, *i.e.*, by the end of May 2000. However, the Applicant waited more than a year and submitted her request for administrative review only in July 2001.

The Applicant argues that she was fully involved in negotiations with the UNON administration up to 2 July 2001 and that immediately after finalizing negotiations, she requested administrative review, on 8 July. However, once again, the Applicant's argument must fail, since, as previously explained, negotiations do not necessarily "stop the clock from ticking". Moreover, the Applicant failed to provide the Tribunal with convincing evidence in support of her claim of receivability. Unfortunately for the Applicant, in waiting for over one year to request compensation, she had missed her opportunity.

VII. In view of the foregoing, the Tribunal, although sympathetic with the Applicant, finds that both Applications are time-barred and therefore rejects them in their entirety.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary