



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1301

Case No. 1385

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Mr. Goh Joon Seng;

Whereas at the request of the surviving widow of a former staff member of the United Nations Environment Programme (hereinafter UNEP), the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 30 October 2004 and once thereafter until 31 December;

Whereas, on 23 December 2004, the Applicant filed an Application containing pleas which read as follows:

“II PLEAS

1. The United Nations Administrative Tribunal, is respectfully requested to order ...:

(a) The specific performance by the Secretary-General of the Joint Appeals Board (JAB) Nairobi Report 3/04 ...

(b) [The Respondent to undertake] the necessary action to ensure ... the continuation of the proper procedures envisaged under the [United Nations Joint Staff Pension Fund (UNJSPF)] Rules and Regulations for the determination of incapacity and inability to engage in gainful employment regarding [the Applicant's husband] ... and to facilitate the Applicant's case in this regard.

(c) Article 33 of the [UNJSPF] Rules and Regulations to be invoked. [The Applicant's husband's] formal and legal status before the Memorandum of Understanding (...) be re-instated and to order that [the Applicant] be paid all the benefits denied [to her husband] as [a] retiree on medical grounds.

(d) The Applicant to be paid her full benefits as a widow whose husband ... retired on medical grounds as stipulated in Article 34 of the UNJSPF Rules and Regulations, backdated to 13 August 1997.

(e) [The] three children, some [of whom] are still waiting to go to college, be paid their benefits as stipulated in Article 36 (a) of [the UNJSPF] Rules and Regulations, backdated to [13] August 1997.

(f) [The Respondent to pay] the Applicant 3 months' net base salary, on the basis of [her husband's] last salary, as compensation for the delay and agony the Organization caused [her] late [husband] and his family (...)."

Whereas, on 14 February 2005, the Applicant submitted additional documentation and an explanatory statement;

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 May 2005 and once thereafter until 30 June;

Whereas the Respondent filed his Answer on 9 June 2005;

Whereas the statement of facts contained in the report of the JAB reads, in part, as follows:

"The [Applicant] is the widow of a former staff member of UNEP. The [Applicant's] husband had been diabetic since 1988 and had been admitted to hospital on four separate occasions in the years 1994 to 1996. He died on 12 August 1997.

According to the documentation available, the [Applicant's] husband was informed towards the end of 1995 that his post in ... UNEP was to be abolished. In the course of discussions with his supervisors, he was offered [the opportunity to] opt for a separation package, which UNEP was at that time offering to staff members whose posts were being abolished. As a result of these discussions, [the Applicant's husband

signed a Memorandum of Understanding (MOU), dated 12 January 1996,] ... for an agreed termination, the main elements of which were that he would remain on special leave with full pay [(SLWFP)] from 1 January ... through to 31 October 1996 to accommodate his wish to remain a participant in the [UNJSPF]. He further agreed to forfeit his right to three months' compensation in lieu of notice as well as his right to termination indemnities under staff rule 109.3 as a consequence of [the Administration] having accommodated his wish to remain on [SLWFP]. In the [MOU], the [Applicant's] husband also acknowledged that the Organization had no further obligations towards him, financial or otherwise, upon [his] separation.

In accordance with the aforementioned [MOU], the [Applicant's] husband was then placed on [SLWFP] for the period 1 January ... to 31 October 1996. It [was] during this time that the Organization began to appreciate that [his] health was seriously deteriorating and, accordingly, on 29 October ..., the [United Nations] Medical Doctor in Nairobi wrote to the Senior Medical Officer, Medical Services Division, [New York, (MSD)] expressing his opinion that the [Applicant's] husband had enough reason to be considered for a disability benefit. In order to assist the [Applicant's] late husband and his efforts to be recognized for this benefit, the Organization extended [his] placement on special leave up to 31 December 1996 with half-pay, to allow him to exhaust his entitlement to sick leave, this being a precondition for the recognition of a disability under the [UNJSPF] rules. Despite initial positive indications from the Senior Medical Officer, [MSD], the Medical Director of the [MSD] informed [the Human Resources Management Service (HRMS), United Nations Office at Nairobi (UNON)] by letter dated 6 February 1997 ... that she had spoken with the Deputy Secretary, [UNJSPF,] who advised her that since the staff member signed an agreed termination in January 1996[, ... he] was in full working capacity at the time of separation from both the point of view of the staff member and the Organization. As a result, the Medical Director decided that there was no reason to change the grounds for the staff member's termination and that therefore the [Applicant's] late husband could not be considered for a disability benefit on medical grounds.

The [Applicant's] husband died on 12 August 1997 and on 2 September ... the [Applicant] informed the [UNJSPF] of his death. ...

It seems that the [Applicant] subsequently wrote to the [UNJSPF] requesting ... a change in the type of separation reported for her husband (agreed termination) to that of termination on medical grounds. This was refused on the basis of the agreed termination that [her] husband had entered into.

By letter dated 14 March 2002, the [Applicant] requested HRMS to reconsider the grounds for termination and a change to retirement on medical grounds. By letter dated 8 May ..., HRMS responded, refusing such a change on the basis of the ... Medical Director's negative reply of 6 February 1997.

On 30 October 2002, the [Applicant] again addressed her request to UNON, this time to the Chief, Division of Administrative Services.

As a result of this request, HRMS re-visited the issue, but came to the conclusion that a change to retirement on medical grounds was not warranted. [By letter dated 28 February 2003, the Applicant was advised accordingly.]

On 7 March 2003, the [Applicant] sought approval from the Secretary-General to have her case submitted directly to the United Nations Administrative Tribunal pursuant to Article 7.1 of its [Statute]. After consultations with the Office of Legal Affairs, this request was denied on the grounds that the ‘appeal does not appear to be limited to questions of law and would require that a [JAB] establish the facts of the case’.”

On 2 June 2003, the Applicant lodged an appeal with the JAB in Nairobi. The JAB adopted its report on 21 May 2004. Its considerations and recommendations read, in part, as follows:

“... **Considerations:**

Before entering into deliberations on the merits of this case, the Panel noted that there were several questions of receivability, which needed to be addressed first.

1. Regarding the question of receivability (*rationae temporis*), the Panel observed that the original decision, which the Appellant is contesting, namely the decision by the Medical Director ... of 6 February 1997 ..., is being appealed six years after it was issued. The Panel also noted that there is no evidence that the Appellant had gone through the necessary stage of submitting a request for administrative review to the Assistant Secretary-General, Office for Human Resources Management [(OHRM)], before submitting her appeal.

Regarding the first issue, the Panel noted that while it is true that the substance of the decision of 6 February 1997 is being contested, for purposes of determining the time limits, in particular the *terminus a quo*, the Panel had to take into account that [the Respondent] had re-entered into a substantial review of the Appellant’s case when she wrote to UNON requesting to reconsider her case by her letter dated 14 March 2002. ... [T]he Panel believes it is justified to assume that the *terminus a quo* is [28] February 2003. This being the case, the time-limits started counting from then and the Appellant has respected the relevant time-limits.

2. The Panel then turned to the issue of the missing request for administrative review to the Assistant Secretary-General. The Panel is of the opinion that either the Appellant’s letter of 14 March 2002 or at the latest that to the Chief, Division of Administrative Services of 30 October ..., should have been treated as such a request and should therefore have been forwarded to OHRM. ... Furthermore, the Panel believes that the Appellant’s request to have her appeal directly submitted to the Administrative Tribunal dated 7 March 2003 can also be seen as a request for administrative review as the intention to seek review of the original administrative decision clearly emerged from this request.

...

[Accordingly, the Panel considered the merits of the case.] While the Appellant’s contention that the [MOU] was signed under duress remained inconclusive, the Panel concluded that [it] became void because both parties to this agreement later acted in a way that shows that they no longer felt bound by it.

At some point during 1996, UNON clearly and unambiguously entered upon a course of action in agreement with the Appellant's deceased husband that was supposed to set the stage for recognition for disability benefits. ... It is important to understand that this marked a clear departure from the stipulations of the [MOU], not just because it extended the [SLWFP] beyond the agreed time limits, but more importantly, because it clearly showed that the Organization was now willing to accept that the Appellant's husband was already entitled to disability benefits before the [MOU] was signed and that, consequently, he should have been retired on health grounds. Therefore, the Organization and the Appellant's late husband, subsequent to ... signing the [MOU], entered into a new agreement that superceded the [MOU] in the eyes of the contracting parties.

It follows from the aforementioned considerations that the Medical Director ... erred in basing her decision to discontinue the proper procedure for recognition for disability benefits in her memorandum of 6 February 1997 on the [MOU] and that, consequently, that decision must be rescinded.

It goes without saying that the Appellant must then be put in a position to pursue the recognition of disability benefits in accordance with the proper procedures available to her under the [UNJSPF] Rules and Regulations and that the Organization, who has for now more than seven years denied the Appellant her due process rights, must do everything in its power to assist the Appellant in pursuing those rights.

Given the severe delay that the Organization has caused for the Appellant, the Panel also unanimously agreed that the Appellant deserves 3 months' net base salary compensation, on the basis of her late husband's last salary.

... ***Recommendations:***

In the light of the foregoing conclusions and recommendations, the Panel recommends to the Secretary-General:

1. To rescind the decision of the Medical Director, [MSD,] dated 6 February 1997.
2. The Organization undertakes the necessary action to ensure the continuation of the proper procedures envisaged under the [UNJSPF] Rules and Regulations for determination of incapacity and inability to engage in gainful employment regarding the Appellant's late husband and to make every effort to facilitate the Appellant's case in this regard.
3. To pay the Appellant 3 months' net base salary compensation on the basis of her late husband's last salary."

On 20 December 2004, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"[t]he Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case, and, while he sympathises with your difficult situation, he finds that he is unable to accept the JAB's findings or its recommendations.

Unfortunately, the JAB's finding that the MOU was superseded by subsequent actions is not legally sustainable. The fact that UNON attempted to assist your late husband during 1996 by extending his special leave and recommending him for a disability benefit shows that there was considerable goodwill on the part of UNON towards him, but these actions did not render null and void the MOU that he had signed. The final decision on his eligibility for disability benefits was correctly referred by UNON to the [MSD] at Headquarters, which found against your late husband due to his having signed the MOU. In addition, the Secretary-General does not accept that the Organization is responsible for delays in this case, since your request for reconsideration of the contested decision was not made for several years following the decision of the Medical Director in February 1997.

The Secretary-General has accordingly decided to take no further action on this appeal."

On 23 December 2004, the Applicant, having yet to receive the decision of the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The MOU was rendered null and void the moment the parties took action to effect the Applicant's husband's retirement on health grounds.
2. The Applicant's husband was extremely ill at the time of the Medical Director's decision in 1997.
3. The Applicant made ongoing efforts from 1998 to try and obtain information regarding her situation.
4. Time-limits in the case should be calculated from 28 February 2003 when UNON made a final decision.

Whereas the Respondent's principal contentions are:

1. The Application is time-barred.
2. The MOU constitutes a valid and enforceable agreement.
3. Any delays in this case are directly attributable to the Applicant.

The Tribunal, having deliberated from 7 to 28 July 2006, now pronounces the following Judgement:

- I. The Applicant is the widow of a former staff member of UNEP, based in Nairobi, Kenya. The Applicant's husband served with UNEP from 1978 until 1995, when he was

informed that his post was to be abolished. In order to accommodate his continued participation in the UNJSPF, the Organization approved an agreed termination package whereby he was placed on SLWFP for an extended period of time. On 29 October 1996, the Medical Doctor, Nairobi, advised MSD that the Applicant's husband had sufficient reason to be considered for a disability benefit, but, on 6 February 1997, OHRM indicated that the agreed termination could not be changed to termination on health grounds. On 12 August 1997, the Applicant's husband died.

On 14 March and 30 October 2002, the Applicant requested that her husband be deemed to have retired on medical grounds, but she did not receive satisfaction. On 7 March 2003, she sought the approval of the Secretary-General to submit her case directly to the Tribunal, but this request was also denied.

On 2 June 2003, the Applicant lodged an appeal with the JAB in Nairobi. In its report dated 21 May 2004, the JAB found that the appeal was not time-barred as, whilst the original decision dated back to February 1997, HRMS had conducted a full review of the case and issued a "final" decision on 28 February 2003. The JAB also found that the Applicant's failure to request administrative review should not be held against her as her letters of 14 March and 30 October 2002, and her request for direct access to the Tribunal, should have been treated as such. The JAB also found in favour of the Applicant on the merits of her case, concluding that the agreed separation became void when both parties acted in a way that showed they did not feel bound by it, in exploring a course of action to permit the Applicant's husband to seek disability benefits. The JAB found that the Administration's decision of 6 February 1997 should be rescinded and the Applicant should also be paid three months' net base salary as compensation for the severe delays in the case. On 20 December 2004, the Applicant was advised that the Secretary-General did not agree with the JAB's findings on the merits of the case and did not accept that the Organization was responsible for the delays in the case.

II. The Tribunal will first consider the receivability issues arising in this case. It finds that the appeal has, as its genesis, the Respondent's refusal to change the separation terms under the MOU to "termination on health grounds". This decision was arrived at and conveyed to the Applicant's husband on or about 6 February 1997.

The Tribunal cannot but find that the Applicant's case is not receivable. The Tribunal takes judicial notice of her various requests of 14 March 2002, 30 October 2002 and 7 March 2003, but finds that they do not raise any new issues as to the substance of this case, nor did the

Administration's answers thereto raise any new administrative decision which could have been contested. At all times, then, the material decision remained the decision of 6 February 1997. Thus, even if any of the Applicant's requests could be construed as a request for administrative review, they came long after the statutory time limits had expired because the contested decision was conveyed in 1997. Staff rule 111.2 provides that:

“(a) 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 a letter must be sent within two months from the date the staff member received notification of the decision in writing.

...

(f) An appeal [to the JAB] 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.”

Strict enforcement of time limits has been stressed time and again by this Tribunal. (See Judgements No. 527, *Han* (1991); No. 549, *Renninger* (1992); and, No. 596, *Douville* (1993).) In Judgement No. 1046, *Diaz de Wessely* (2002), the Tribunal emphasised that

“[i]n 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) ...).”

It follows, then, that the “exceptional circumstances” referred to in staff rule 111.2 (f) must be strictly construed. According to the Tribunal in Judgement No. 913, *Midaya* (1999), they “must consist of events beyond the Applicant's control that prevent the Applicant from timely pursuing his or her appeal”. Of course, such events as the serious illness of the Applicant's husband, or his untimely death and a period of mourning thereafter, could well amount to “exceptional circumstances” but, even in the most sympathetic circumstances, there must come a point at which the time limits can no longer be waived. The Tribunal is not going to quantify the exact point in this case but can say that, even taking into account that the

Applicant may not have been as familiar with the system as a staff member would have been, this point came far earlier than 2002.

III. It is to be noted that the JAB did not waive, or purport to waive, the time limits of staff rule 111.2 (a). In fact, it did not consider the timeliness of the Applicant's implicit requests for administrative review, deciding rather that "it is justified to assume that the *terminus a quo* is [28] February 2003". The Tribunal distinguishes simple reiteration - or even explanation - of an earlier decision from the making of an entirely new administrative decision. In the instant case, it finds that the letter of 28 February 2003 merely reiterated the position of the Organization as set out in its letter of 6 February 1997. Therefore, the time limit ran from 6 February 1997 and the request for administrative review was due within two months of that date. The Tribunal agrees with the JAB, however, that a request for administrative review need not be couched in those precise words and that the Applicant's letters would fulfill that essential function. However, in light of the findings in paragraph II above, even if the letters met the requirements of staff rule 111.2, *ratione materiae*, the time-bar is still in effect.

IV. Whilst the Tribunal has concluded that the case is non-receivable *ratione temporis*, it will nonetheless deal with the merits of the Application in order to resolve any outstanding doubts on the part of the Applicant.

The MOU was entered at the request of her husband without coercion, no evidence to the contrary having been adduced by the Applicant. By the terms of the MOU, he confirmed that in order to accommodate his request to remain as a participant in the UNJSPF, he was to be placed on "special leave with full pay from 1-1-96 through 31-10-[96]". The MOU continues:

"I understand that, had I not requested to be placed on special leave with full pay, I would have received three months' notice or three months' compensation in lieu of notice, as stipulated in staff rule 109.3, plus an increased termination package of _____ months salary. I also understand that, *under the special arrangement that I have requested*, the requirement of three months' notice and the lump sum payment of the termination indemnities will be satisfied by my being on special leave with full pay for the period from 1-1-96 through 31-10-96." (Emphasis added.)

The JAB, however, held that the MOU became "void because both parties ... acted in a way that shows that they no longer felt bound by it". This finding is not borne out by the letters of 6 February 1997 and 28 February 2003. The Applicant's husband - and, by extension, the Applicant - were bound by the terms of the MOU, and could only be released therefrom by the

actions of the Organization. What the Tribunal sees from the record are attempts by staff of the Organization, out of good will and sympathy, to assist the Applicant's husband in obtaining possibly more advantageous benefits, notwithstanding the MOU. The Organization did not by such actions on the part of its staff members evince an intention not to hold the Applicant's husband bound by the terms of the MOU. Nor was he induced by such actions to alter his position to his detriment. The MOU accordingly remains in full force and binding on the parties and the Organization is not estopped from relying on the same.

V. In view of the foregoing, the Application is rejected in its entirety.

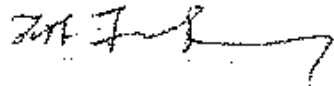
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Jacqueline R. Scott
First Vice-President, presiding

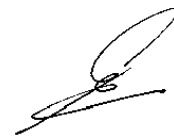


Dayendra Sena Wijewardane
Second Vice-President



Goh Joon Seng
Member

Geneva, 28 July 2006



Maritza Struyvenberg
Executive Secretary