



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1346

Case No. 1450

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Sir Bob Hepple;

Whereas, on 24 August 2005, a former staff member of the United Nations Development Programme/World Food Programme (UNDP/WFP), filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 15 November 2005, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal

“[1. to reinstate her as recommended by the Joint Appeals Board (JAB) with retroactive entitlements or, alternatively,

2. to award her appropriate compensation for premature retirement because it ‘will be difficult for [her] to find another job without first being reinstated in [her] previous job because [she] would always have an inadmissible judicial record.]”

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 12 May 2006 and once thereafter until 12 June;

Whereas the Respondent filed his Answer on 12 June 2006;

Whereas, on 30 August 2006, the Applicant filed Written Observations amending her pleas as follows:

“My application cannot possibly be time-barred and inadmissible, especially as I was not advised of or informed about the procedure to be followed. The letter of 18 November 2004 from ... [the] Officer-in-Charge of the Department of Management, which announced to me the decision of the Secretary-General,

stated that I had recourse to the Administrative Tribunal but failed to specify the procedures I must follow. As [the Coordinator, Panel of Counsel] confirmed to you, I spoke with her after receiving the letter. I asked her why the Secretary-General had not authorized my reinstatement, and she said that the problem was at the level of the office here in Bujumbura. I therefore went to see the WFP Representative ... who told me to wait until he had consulted Rome. On 23 August 2005, he informed me that Rome could not change the decision of the Secretary-General and that receiving payment had nothing to do with the disposition of my appeal. I therefore took the money and submitted my application promptly the next day with the Administrative Tribunal. ...”

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

“Employment History

... [The Applicant] joined ... WFP [in Burundi] on 27 March 1997 as an Administrative Assistant in the Administration and Finance Unit on a fixed-term appointment at the GS-5 level. Pending an investigation, she was suspended with pay from 10 March 1998 to 28 October 1999, when the UNDP Administrator lifted her suspension and directed her reinstatement without delay. She was not reinstated and was separated from ... service when her post was abolished ...

Summary of the facts

... In a memorandum of 31 December 1997 addressed to [the Applicant], the Officer-in-Charge of the Logistics Unit at the WFP Office in Burundi stated that following the conclusions of a Local Enquiry Committee (LEC) established earlier, [she] ‘may have deliberately contrived to steal and sell (the contents of) a WFP container’ and that WFP was recommending that UNDP terminate [her] services ...

... On 10 March 1998, [the Applicant] was suspended from her job by a letter from the UNDP Resident Representative for allegations of theft and sale of WFP property in accordance with the terms of [UNDP] administrative circular [UNDP/ADM/97/17] of 13 March 1997 and after consultation with WFP Headquarters in Rome. Pending the conclusions of the on-going investigation, [the Applicant’s] pay was maintained. The suspension was announced ‘without prejudice to the [Applicant’s] rights and did not constitute a disciplinary measure’.

... On 12 June 1998, [the Applicant] received a letter from UNDP extending her suspension for another two months.

... On 13 September 1999, a joint [UNDP/United Nations Population Fund/United Nations Office for Project Services (UNDP/UNFPA/UNOPS)] Disciplinary Committee [(DC)] noted in its report the procedural irregularities involved in the work of the LEC and the unconvincing evidence submitted by the Respondent. The [DC] gave [the Applicant] the ‘benefit of the doubt’ and unanimously recommended that the UNDP Administrator reinstate [the Applicant] with all entitlements retroactively.

... In a letter dated 28 October 1999, the UNDP Administrator advised [the Applicant] that he had endorsed the report of the [DC]. Consequently, he ended her suspension and directed that she be reinstated in her previous functions without delay.

... On 4 February 2000, the Principal Deputy Resident Representative of UNDP in Burundi wrote to [the Applicant] informing her that the post she had previously encumbered had been abolished and that the only alternative left to her was ‘to negotiate her separation or leave amicably’.

[According to a Personnel Action form dated 31 May 2000, the Applicant’s post was abolished on that date.]

... On 5 June 2000, [the Applicant] wrote to the UNDP Administrator drawing attention to (a) procedural irregularities involved in her 18-month suspension from ... service; and (b) the failure of UNDP to implement its own decision of 28 October 1999 to reinstate her in her functions.

... On 5 June 2000, [the Applicant] requested an administrative review of the decision not to reinstate her ... and to subsequently separate her from ... service on grounds of abolition of post.

... On 14 November 2000, the ... [Applicant was advised] that UNDP was no longer able to reinstate her as her post had been abolished in the interest of service. ...

... On 28 November 2000, [the Applicant] submitted [an appeal] ... to the JAB [in New York] which was not received by the secretariat of the Board.

...

... On 26 November 2001, [another copy of the Applicant's appeal was] ... transmitted to the ... JAB by [the Applicant]'s Counsel, when advised by the JAB ... that the [appeal] posted earlier by the [Applicant] had not been received."

The JAB adopted its report on 1 March 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

21. The Panel ... decided to waive the time-limits under staff rule 111.2 (e) ...

22. The Panel considered first the circumstances under which the Appellant's post had been abolished. ... The Panel noted that the *ex post facto* abolition of the Appellant's post coming so soon after the Appellant's reinstatement had been directed by the UNDP Administrator had the effect of circumventing the UNDP Administrator's decision. As such the Panel found the abolition of post unacceptable as a means to circumvent the reinstatement of the Appellant.

...

24. The Panel noted, furthermore, that the Appellant's suspension for 18 months from the time she was suspended with pay until the time her suspension was ended by the UNDP Administrator was far too long under any circumstance and highly irregular. (...)

Conclusions and Recommendations

25. On account of the abrupt nature of the abolition of the Appellant's post on the heels of a decision of the UNDP Administrator to end the protracted and procedurally irregular suspension of the Appellant from the service and reinstate her in her previous post - a decision which was never implemented by the WFP/UNDP Administration in Burundi - the Panel concluded that, had the Appellant been reinstated as directed by the UNDP Administrator on 28 October 1999, she would have received all her entitlements. The Panel therefore *unanimously* recommends that the Appellant be re-integrated in WFP on a post similar to the one she previously encumbered within four months from the date of this recommendation. In addition, the Panel recommends *unanimously* that the Appellant be given compensation in the amount of two years of net base salary pursuant to article 10 of the Statute of Administrative Tribunal."

On 18 November 2004, the Officer-in-Charge, Department of Management, transmitted a copy of the JAB report to the Applicant and informed her as follows:

“The Secretary-General has ... decided to accept the JAB’s recommendation for compensation in the amount of two years’ net base salary at the rate in effect at the time of your separation from service. Unfortunately, reinstatement within WFP is not possible given the lack of available posts and budgetary cuts over the last few years.”

On 15 November 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. Her suspension from 10 March 1998 until 28 October 1999 - a period of over 18 months - was arbitrary and exceeded the discretionary authority of the Secretary-General.
2. The Respondent violated her due process rights when he failed to reinstate her with all retroactive entitlements as decided by the UNDP Administrator.

Whereas the Respondent’s principal contentions are:

1. The Application is time-barred.
2. The Applicant was justly compensated for the suppression of her post.

The Tribunal, having deliberated from 31 October to 21 November 2007, now pronounces the following Judgement:

I. The preliminary issue is whether the Application is receivable by the Tribunal. So far as relevant, article 7, paragraph 4 of the Tribunal’s Statute provides that an application is not receivable by the Tribunal unless it is filed within ninety days reckoned from the date the Secretary-General has rejected the recommendation of the JAB. In this case, the JAB recommended that the Applicant be re-integrated within WFP on a post similar to the one she previously encumbered within four months from the date of the recommendation and that she be given compensation in the amount of two years’ net base salary. This recommendation was communicated to her under cover of a letter from the Department of Management dated 18 November 2004. The letter informed her that the Secretary-General had decided to accept the JAB’s recommendation for compensation, but that reinstatement within WFP was not possible given the lack of an available post and budgetary cuts over the last few years. She was advised that: “[a]ny recourse in respect of [the decision] should be addressed to the Administrative Tribunal”. On or about 15 August 2005, the Applicant received the recommended compensation. She then submitted her Application to the Tribunal on 24 August, some nine months after the Secretary-General’s decision was communicated to her, that is, almost six months after expiry of the 90-day period prescribed for filing an application.

II. Article 7, paragraph 5 of the Tribunal’s Statute provides that the Tribunal may decide to suspend the provisions regarding time limits. It is well-established in the jurisprudence of the Tribunal that the Tribunal will do so only in exceptional circumstances, that is, circumstances beyond the control of the applicant which prevent him or her from appealing in a timely manner. The Tribunal has made it clear that

“time limits exist in every legal system and respond to important legal values which have to be respected, such as order, legal security, and dispatch. The law has considered it necessary to establish such limitations and it is not for the Tribunal to change a clear legal policy.” (See Judgement No. 1021, *Lasca* (2001), para. VI.)

The Applicant was informed in the letter of 18 November 2004 of her right of recourse to the Tribunal. In her Application she states: “I regret the delay in submitting my appeal. This delay was caused by a lack of information because I did not know the regulations.” It was not until she filed her Observations on the Respondent’s Answer, that she offered the following explanation:

“My application cannot possibly be time-barred and inadmissible, especially as I was not advised of or informed about the procedure to be followed. The letter of 18 November 2004 from ... [the] Officer-in-Charge of the Department of Management, which announced to me the decision of the Secretary-General, stated that I had recourse to the Administrative Tribunal but failed to specify the procedures I must follow. As [the Coordinator, Panel of Counsel] confirmed to you, I spoke with her after receiving the letter. I asked her why the Secretary-General had not authorized my reinstatement, and she said that the problem was at the level of the office here in Bujumbura. I therefore went to see the WFP Representative ... who told me to wait until he had consulted Rome. On 23 August 2005, he informed me that Rome could not change the decision of the Secretary-General and that receiving payment had nothing to do with the disposition of my appeal. I therefore took the money and submitted my application promptly the next day with the Administrative Tribunal. Given the circumstances, therefore, the compensation granted by the Secretary-General is not adequate, the joint UNDP/UNFPA/UNOPS Disciplinary Committee in its letter of 13 September 1999 having told me that I would be reinstated without delay and would have my entitlements restored retroactively.”

The Tribunal notes, in this regard, its Judgement No. 1185, *van Leeuwen* (2004), where it stated that “ignorance of the law is no excuse, and that each staff member is bound to know the laws which are applicable to him”.

III. The Applicant acknowledges that she was aware of her right of recourse to the Tribunal. It is to be noted that the Respondent had earlier alleged that she was time-barred in respect of her appeal to the JAB. The JAB found that there were exceptional circumstances (the original appeal was never received by the JAB), and waived the time limits. As a result of this experience, she must have realized that there were also very likely to be time limits for filing an application to this Tribunal. Not only has she failed to provide corroboration, in the form of affidavits from the persons involved or otherwise, in respect of her alleged conversations with officials, but she has also failed to explain why she did not make any other inquiries about the procedure between November 2004 and 23 August 2005. Even if she was “waiting” for a reply from Rome, this did not prevent her from making further inquiries about the procedure for an appeal to the Tribunal. On her own account, she did not do this. It was unreasonable for her to believe that, by raising the matter with the local WFP Representative after she had been told in writing that her right of recourse was to the Tribunal, it was sufficient to “wait” for a reply from Rome. There is no suggestion that the WFP Representative in any way misled her about her right of recourse to the Tribunal. Accordingly, the Tribunal is bound to infer that she was negligent in pursuing her own rights, and that there are no “exceptional circumstances” which would entitle it to waive the prescribed time limits.

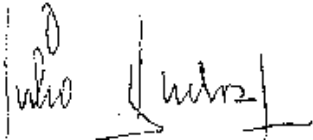
IV. The Tribunal sympathises with the Applicant's wish to be reinstated in accordance with the directions given by the UNDP Administrator on 28 October 1999, and can understand her dismay at the decision of the Respondent not to implement the JAB recommendation to reinstate her because the post to which she should have been reinstated had been abolished with effect from 31 May 2001. It also appreciates that the failure to reinstate her, at least for the period from 28 October 2000 to 31 May 2001, may have made it more difficult for her to find other employment. However, the Tribunal notes that she has received compensation of two years' net base salary, as recommended by the JAB, on account of the abrupt nature of the abolition of her post. The Tribunal finds that her Application to the Tribunal seeking an order for specific performance or further compensation is not receivable for the reasons given above.

V. Accordingly, the Application is rejected in its entirety.

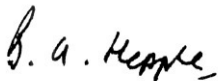
(Signatures)



Spyridon Flogaitis
President



Julio Barboza
Member



Bob Hepple
Member

New York, 21 November 2007



Maritza Struyvenberg
Executive Secretary