



ADMINISTRATIVE TRIBUNAL

Judgement No. 1386

Case No. 1482

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, First Vice-President; Mr. Dayendra Sena Wijewardane, Second Vice-President;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 January 2006, and twice thereafter until 31 March;

Whereas, on 4 April 2006, the Applicant filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 31 May 2006, the Applicant, after making the necessary corrections, filed an Application containing pleas which read, in part, as follows:

“II: *PLEAS*

12. With respect to competence and to procedure, the Applicant respectfully requests the Administrative Tribunal:

...

(c) to decide to hold oral proceedings ...;

13. On the merits, the Applicant respectfully requests the Tribunal:

(a) to find that the Secretary-General ... has a duty under staff regulation 1.1 (c) to ensure that the rights of all staff members are protected; and that failure to

intervene when evidence is submitted that a staff member is being victimized for carrying out his official duties amounts to tacit approval of these practices, and is therefore a dereliction of his duty under the referenced staff regulation;

- (b) to find and rule that the [Joint Appeals Board (JAB)] erred in its conclusion that the Applicant's appeal was not receivable due to the time limits, given the fact the Secretary-General neither acknowledged nor responded to the staff member's request for an investigation, and that it was only when the staff member discovered new information in the form of [a] memorandum ...on the subject, that he was finally in the position to initiate the appeal process, in addition to the fact time elapsed while his case was being handled by the office of the Ombudsman. To argue otherwise would mean the Secretary-General can hide behind a wall of silence to preempt a staff member's right to appeal;

...

14. [Whereafter] the Applicant most respectfully requests the Administrative Tribunal to order the Secretary-General [to]:

- (a) Pay compensation to the Applicant for the harm to his career that was a direct result of the Secretary-General's record of neglect dating back to 1990 that effectively, stymied the Applicant's career ... The amount of that compensation should be the differential in earnings as a result of the 1990 events;
- (b) Award compensation to the Applicant for the moral injury, which he suffered as well as the duress and extreme mental anguish, which he endured as a result of the above practices that started in 1990 and persisted throughout his career as [an] ... internal auditor;
- (c) Award punitive damages to the Applicant (i) [for] damage to his reputation that persists to this day and (ii) [to] send a clear message to the Secretary-General that hiding behind a wall of silence when an auditor, because of the nature of his/her duty, blows the whistle on any wrong doing at all, will not be tolerated and can only lead to a conspicuous void and absence of a 'tone from the top' on these issues, that in turn encourages even more abuses ...".

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 14 November 2006, and once thereafter until 14 December;

Whereas the Respondent filed his Answer on 22 November 2006;

Whereas the Applicant filed Written Observations on 31 January 2007;

Whereas, on 24 April 2008, the Tribunal decided not to hold oral proceedings in the case.

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 the Organization on 1 September 1982, on a fixed-term appointment [as] an Auditor at the P-3 level with the Internal Audit Division (IAD) of the Department of Administration and Management (DAM). [At the time of the events that gave rise

to his Application, the Applicant held a permanent appointment and had been promoted to the P-5 level.] ... On 18 May 2000, the [Applicant] was detailed to [the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)] and his functional title changed to Resident Auditor. [He retired from service on 31 October 2004.]

Summary of Facts

...

... On 16 and 26 June 2001, the Applicant issued two highly critical audit observations ... on [a] proposed ... contract ... which, according to the [Applicant], was valued at around US\$ 34 million. The [audit observations] purported to reveal certain management irregularities and were generally critical of the proposed contract's provisions.

... On 9 July 2001, [the] Director, IAD, Office for Internal Oversight Services (OIOS), sent an e-mail message to the [Applicant], which read, *inter alia*:

‘... We were astounded by the information provided to us in [a recent] meeting, which basically contradicted the main concerns expressed by your audit observations ... This, plus other equally serious matters, have led us to reach some unpleasant decisions, which I will talk over with you.’

... On 11 July 2001, the [Applicant replied to the Director, IAD/OIOS, as follows]:

‘... I am being invited to [Headquarters] for consultations over the ... contract ... it sounded odd that there would be a need for consultations before there was a response to the audit observation. I believe the normal procedure is for the auditee to respond to the audit observations in writing and I am not sure I understand why an exception is being made here. I do note that this action has been instigated by ... the auditee. This in itself seems to be a breach of the independence of OIOS, a fact that should be highlighted.’

... On 25 June 2002, [the Director, IAD/OIOS] sent the following memorandum to the [Applicant]:

‘1. You are herewith reassigned to the Internal Audit Division, OIOS in New York Headquarters, effective 1 September 2002. As your assignment in MONUC was to end on 30 June ..., I have ... requested an extension until 31 August ...

2. The rotation policy has recently been strongly emphasized by the [Advisory Committee on Administrative and Budgetary Questions] ... and endorsed by the Board of Auditors in their draft management letter of 6 June 2002.

3. Should you wish to continue service as Chief Resident Auditor in a peacekeeping mission your reassignment to [the United Nations Interim Administration Mission in Kosovo] as of the same date would be considered.’

... In a memorandum hand dated 28 June 2002, the Applicant [requested an investigation into the events subsequent to his audit observations as well as the decision of the Director, IAD/OIOS, to recall him] without first investigating ...’. ... The memorandum also itemized other allegations of mismanagement by ... other IAD officials, and listed numerous events supporting the [Applicant's] allegations that MONUC had systematically undermined the auditing process.

... Also on 28 June 2002, the [Applicant] filed a request for review of the decision by ... IAD to end his assignment with MONUC. The memorandum made reference to the aforementioned request for investigation ...

... In addition, on the same date, the [Applicant] filed a request for suspension of action [with the Joint Appeals Board (JAB) in New York] on the decision to reassign him to Headquarters. ... [On 28 August 2002, the JAB produced its report. The JAB unanimously agreed that the request failed to meet the two conditions of staff rule 111.2 (c), but noted that, in his submission, the Applicant ‘raised serious questions about the management of IAD/OIOS, which, while not properly a matter for an appeal to the JAB, warranted further investigation by the Secretary-General’. Accordingly, the JAB recommended that the request for suspension of action be denied. The same day, the Under-Secretary-General for Management, advised the Applicant that the Secretary-General had accepted the JAB’s conclusions and had decided not to grant his request for a suspension of action.]

...

... On 8 August 2003, the JAB received an emailed message from the [Applicant] with the subject line ‘Incomplete Statement of Appeal’, ... stating his intention to file an appeal regarding the matter ‘on the basis of the Secretary-General’s failure to act on my request [for an investigation] since the issues involved clearly violated my rights as a staff member’.

... By a memorandum dated 8 September 2003, the JAB informed [the Applicant of the time limits in his case and specified that he had to file his appeal within one month or it would be deemed to have been abandoned.]

... On 7 October 2003, Counsel for the [Applicant] informed the JAB of informal attempts at resolving the matter involving the Ombudsman and the Office of the [Under-Secretary-General for Management]. ...

...”

On 7 November 2003, the Applicant lodged an appeal on the merits of his case with the JAB. The JAB adopted its report on 19 August 2004. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

31. The Panel first examined the question of its competence to review the case under [staff] rule 111.2 (j). The Panel agreed with the Respondent that it had no competence insofar as the Appellant sought to contest the decision not to investigate the misconduct alleged in the audit. However, a substantial aspect of the appeal centres on [his] contention of the negative impact that the decision to reassign him and other conduct towards him had on his terms of employment. The Panel found that these contentions do fall within the scope of its competence.

32. The Panel next examined the issue of receivability. The Panel noted that Appellant had filed his appeal more than a year after the time-limit prescribed in rule 111.2 (a). ... The Panel did not consider that the failure on the part of the Respondent over a period of some 12 months to reply to the Appellant’s queries constituted *force majeure* preventing the latter from filing his appeal. Moreover, insofar as any efforts towards resolution on the part of the Ombudsman are confidential, it would be impossible for the Panel to evaluate the degree to which such efforts contributed to the delay; in this light, [the] Appellant, having been made aware of the requisite time-limits, certainly could have written to inform the JAB and request a waiver of the time-limits prior to the expiration of those limits. The Panel therefore found that the Appellant had failed to adduce evidence of exceptional circumstances.

Conclusions and Recommendations

33. In light of the foregoing, the Panel concluded that, while it had no competence to review the decision not to investigate the allegations arising from [the] Appellant's audit, it was empowered to hear those aspects of the appeal relating to the decision to reassign the Appellant and the alleged violation of [his] rights emerging therefrom.

34. The Panel also concluded, however, that insofar as [the] Appellant had adduced no evidence of exceptional circumstances to warrant the waiver of the time-limitations under [staff] rule 111.2 (a), the appeal is time-barred. The Panel thus recommended unanimously that the Secretary-General take no further action with regard to the present appeal."

On 31 January 2005, 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 findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on his appeal.

On 31 May 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent has a duty to ensure that the rights of all staff members are respected.
2. The JAB erred in refusing to consider the appeal against the decision not to investigate the Applicant's allegations.
3. The Applicant was subject to harassment, interference and abuse in the performance of his official duties.

Whereas the Respondent's principal contentions are:

1. The JAB was correct in determining that the appeal was not receivable.
2. The JAB was correct in deciding that it lacked competence to consider the case as regards the decision not to investigate the Applicant's allegations in connection with his audits at MONUC.
3. None of the Applicant's rights have been violated and, accordingly, he is not entitled to any compensation.
4. The Respondent requests an opportunity to address the merits should the Tribunal find that the case is receivable or that the JAB erred on the issue of competence.

The Tribunal, having deliberated from 24 April to 2 May 2008, now pronounces the following Judgement:

- I. The Applicant, a Certified Public Accountant who served in the IAD, issued two audit observations in June 2001 whilst he was Resident Auditor with MONUC. He claims that, as a result, he became subjected by the Administration to various actions which were prejudicial to him as a staff member trying to carry out his duties in a professional manner and perform his official functions as a senior auditor

of the United Nations. His claim is that instead of being supported in the audit function and having that critical area of work managed in the best interests of the Organization, his superiors turned on him, impeded his work, undermined his position and basically sought to “shoot the messenger”. He alleges that he was victimized in a number of ways, including being recalled from the mission assignment for doing his job. The Respondent, on the other hand, maintains that the decisions relating to the Applicant were all made objectively and in compliance with all applicable procedures and policy considerations. The Applicant had pressed for a full investigation of the way the audit was handled; the record does not reveal that such an investigation took place.

II. The Applicant’s situation was twice reviewed by the JAB. The first such review was occasioned by his 28 June 2002 request under staff rule 111.2 (c) for suspension of action of the decision made on 25 June to reassign him to IAD, NY, effective 1 September. The same day, the Applicant also requested administrative review of the decision to end his mission assignment and sent the Secretary-General a “Request for Investigation” of the MONUC contract he had originally protested, as well as of the associated actions of senior personnel. In its report dated 28 August, the JAB rejected the Applicant’s request for suspension of action on the basis that it failed to meet the two threshold requirements of staff rule 111.2 (c) (ii), which reads, in relevant part, “[i]f the panel, after considering the views of both parties, determines that the decision has not been implemented and that its implementation would result in irreparable injury to the appellant, it may recommend to the Secretary-General the suspension of action on that decision”.

The JAB did not, of course, enter into the merits of the Applicant’s case at that time but did observe that he had raised “serious questions about the management of IAD/OIOS which, while not properly a matter for an appeal to the JAB, warrant[ed] further investigation by the Secretary-General”. On 28 August, the date the JAB report was issued, the Secretary-General accepted its recommendation not to suspend action of the impugned decision and the Applicant was notified accordingly. No mention was made of the JAB’s remark regarding investigation.

The Applicant’s appeal on the non-extension of his mission assignment was considered by the JAB in its report on the merits of his case, dated 19 August 2004, in which the Board “recommended that while it had no competence to review the decision not to investigate the allegations arising from the ... audit, it was empowered to hear those aspects of the appeal relating to the decision to reassign the [Applicant] and the alleged violation of the staff member’s rights emerging therefrom”. However, the Board came to the view that the appeal was time-barred as the Applicant had lodged it “more than a year after the time-limit prescribed in rule 111.2 (a)”, and had not adduced any evidence of exceptional reasons justifying extension of the time limits. The Secretary-General’s acceptance of this recommendation was communicated to the Applicant on 31 January 2005, and it is that decision he now appeals to the Tribunal.

III. Before entering into the issue of receivability, the Tribunal wishes to endorse the distinction the JAB made between a general management review and an inquiry into aspects of the management process that affect an applicant's rights as a staff member because it has "direct legal consequences" as the Tribunal states in Judgement No. 1385, issued at this session. The Tribunal can only confirm the competence of the JAB in the latter process.

Nonetheless, in the instant case, it is clear that there might well have been a link between a general audit investigation and one into the Applicant's individual case, and the Tribunal takes the view that the internal processes involved may well have been better served if the Administration had, in fact, demonstrated that the broader claims of the Applicant had been taken account of and dealt with in some satisfactory way, as the JAB itself had indicated desirable.

IV. In any event, the question upon which the Tribunal must focus, at this point, is the preliminary matter of receivability of the Applicant's appeal. The administrative decision that was brought into issue was made on 25 June 2002. The Applicant requested administrative review promptly, on 28 June. It was not until 7 November 2003, however, that he lodged an appeal with the JAB. That, regrettably, was well over one year from the date when he should have acted, as is quite clear from the requirements of staff rule 111.2:

"(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 letter must be sent within two months from the date the staff member received notification of the decision in writing. The staff member shall submit a copy of the letter to the executive head of his or her department, office, fund or programme.

- (i) If the Secretary-General replies to the staff member's letter, he or she may appeal against the answer within one month of the receipt of such reply;
- (ii) If the Secretary-General does not reply to the letter within one month in respect of a staff member stationed in New York or within two months in respect of a staff member stationed elsewhere, 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." (Emphasis added.)

If the Applicant waited - in vain, it would now seem - to see the outcome, if any, of the investigation he had requested into the conduct of management, he waited at his peril. The Tribunal has repeatedly emphasised that it is incumbent on staff members to diligently prosecute their rights if they wish to use the procedures made available to them. In Judgement No. 549, *Renninger* (1992), it held "[o]ne acts at one's own peril after a claim arises by unreasonably delaying appropriate steps for vindication of the alleged right". (See also Judgement No. 1301 (2006).) Indeed, any legal system must insist on that. The Applicant's interest and concern in the larger picture, whilst understandable and even commendable, cannot justify the failure on his part to safeguard and pursue his individual rights if he wished to contend they had been affected or impinged upon by the Administration. Whilst the Tribunal has great sympathy and respect

for efforts of staff members, especially those such as the Applicant so well placed to safeguard the security and integrity of the Organization, it cannot overlook the responsibility of an applicant to act within the established procedures and time limits. As the Tribunal held in Judgement No. 1106, *Iqbal* (2003), “procedural rules ... are of utmost importance for ensuring the well functioning of the Organization”.

V. On 3 October 2003, the JAB was informed that the Applicant had sought the assistance of the Ombudsman in resolving his case. The Tribunal wishes to state, in the strongest possible terms, that while it is commendable for every effort to be made in resolving conflicts via the informal system, such efforts will not be considered to automatically “stop the clock ticking” in the formal system. In Judgement No. 1211, *Muigai* (2004), the Tribunal found 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.”

With respect to the Ombudsman’s Office, this was made clear to staff members, *ab initio*, as ST/SGB/2002/12 of 15 October 2002, entitled “Office of the Ombudsman – appointment and terms of reference of the Ombudsman”, specifically provides at section 3.10 that “[t]he Ombudsman *may* request the Joint Appeals Board to extend the normal time limit for filing an appeal within the framework of staff rule 111.2”. (Emphasis added.) If the time limit was to be automatically extended, there would have been no need for such a provision to be included. It is, of course, noteworthy in this case that no such request emanated from the Ombudsman’s Office.

The Tribunal wishes to take this opportunity to advise staff members of the most useful information contained in ST/IC/2004/4, of 23 January 2004, which is entitled “Conflict resolution in the United Nations Secretariat”. Whilst not dispositive of this case, which emanated well before the issuance of the circular, paragraph 8 thereof supports the Tribunal’s findings as set out in this Judgement:

“Recourse to an informal method does not preclude staff from also following the formal recourse methods if attempts to reach an informal solution fail. Staff members should inform themselves of the requirements of the appropriate recourse method, since *the initiation of proceedings through formal mechanisms generally involves a time limit, which must be observed*. If an informal process is pending, this may be grounds for an extension of the time limit. Conversely, recourse to a formal method does not preclude staff from pursuing a resolution or settlement through informal means while formal proceedings move forward.” (Emphasis added.)

VI. In Judgement No. 1054, *Obuyu* (2002), the Tribunal recalled:

“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’.”

Similarly, in this case, the Tribunal is not persuaded that the Applicant encountered exceptional circumstances justifying waiver of the time limits. Accordingly, it agrees with the JAB that the appeal was not receivable, *ratione temporis*.

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

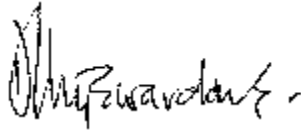
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Spyridon **Flogaitis**
President

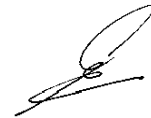


Jacqueline R. **Scott**
First Vice-President



Dayendra Sena **Wijewardane**
Second Vice-President

New York, 2 May 2008



Maritza **Struyvenberg**
Executive Secretary