United Nations AT/DEC/1424

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1424

Case No. 1486 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; Sir Bob Hepple;

Whereas, on 20 March and on 24 May 2006, a former staff member of the United Nations, filed applications that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 June 2006, the Applicant, after making the necessary corrections, filed an Application requesting the Tribunal, inter alia:

"(a) ...

[Production of documents]
…

[To hold an oral hearing]
...

(c)

... [T]o review the decision of the ... Secretary-General not to take into account the recommendations of [the Joint Appeals Board (JAB)] and to rescind the decision ... not to renew her contract as [an Associate Expert] with [the United Nations Drug Control Programme (UNDCP)], Laos, from 19 January 2001 to 18 January 2002 or, failing that, to order that she should be paid compensation equal to the loss of one year's net salary at grade L-2, step XI, and her pension contributions, and should be reimbursed for ... travel and other expenses …

(d) ... [C]ompensation] ...

... [T]he payment of one year's net salary at grade L-2, step XI, as well as the reimbursement of expenses incurred by the trip Vientiane-Vienna-Luxembourg, including the air fare, per diem and other costs. (...).

... [P]ayment by the United Nations and/or the donor of social security and pension contributions, which was the responsibility of the donor during the first contract.

(e) Other compensation ..."

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 26 December 2006, and once thereafter until 29 January 2007;

Whereas the Respondent filed his Answer on 26 January 2007;

Whereas the Respondent filed corrections to his Answer on 6 February 2007;

Whereas the Applicant filed Written Observations on 2 March 2007;

Whereas the Applicant filed an additional communication on 27 October 2008;

Whereas, on 4 November 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] was a staff member employed at UNDCP, Laos, from 19 January 2000 to 18 January 2001 as an Associate Expert at the L-2 level. Associate Experts are 'type I gratis personnel' whose services are provided by donor governments to technical co-operation projects. These services are fully financed by the donor governments. The [Applicant] is a national of Luxembourg and therefore, her contract was fully financed by the Government of that country. [The Associate Expert Programme for the Secretariat and Offices away from Headquarters, including UNDCP, is managed by the Division for Public Economics and Public Administration, Department of Economic and Social Affairs (DPEPA/DESA).]

Summary of the facts

… In accordance with the Memorandum of Understanding (MOU) between the United Nations and the Government of Luxembourg concerning the provision of Associate Experts, in 1999, the Government of Luxemburg decided to sponsor an initial appointment of the [Applicant] for one year, renewable for a second year. According to the Respondent and the authorities of Luxembourg, the initial appointment of the [Applicant] was supposed to be at [the L-2, step II level]. However, due to an error imputable to the Respondent, a budget estimate for two years at level L-2, step X and XI [levels] was submitted. The Government paid the first year in full at level L-2, step X and accordingly, a contract was issued to the [Applicant] for the period 19 January 2000 to 18 January 2001 at the L-2 level, step X. On 1 August 2000, the [Applicant]'s supervisor requested DESA to initiate the extension for the second year. Three months later, on 2 November 2000, [the] then Officer-in-Charge [(OiC)] of the Associate Experts Programme, DPEPA/DESA sent a letter to the Government of Luxembourg requesting the payment for the second year of service at the [L-2, step XI level]. On 4 January 2001, the Government of Luxembourg instructed the Respondent to extend the contract for a second year at the L-2 ..., step III [level].

… On 17 January 2001, a day before the expiration of her contract, the [Applicant] was offered an extension for a further period of one year, at the L-2 ..., step III [level].

… From 24 to 31 January 2001, without a valid contract, the [Applicant] was sent by the [UNDP] Resident Representative on a mission in northern Laos. In an e-mail dated 29 January 2001 to ... DESA, [the] UNDP [Resident] Representative in Laos *inter alia* stated: 'I am aware that [the Applicant] is without a contract since 18 January, but she still consented to go since we are short of staff'. All related mission and travel costs to northern Laos were reimbursed by UNDP.

[On 1 February 2001, the Applicant was informed by DPEPA/DESA that, unless she responded to the one-year extension offer by 5 February, repatriation procedures would be started. On 4 February, the Applicant, without the permission of DPEPA/DESA, left Laos to return to Luxembourg. On 14 February, the Applicant was given a final chance to accept the offer. On 6 March, the Applicant accepted the offer, however, she was advised on 13 March that, as she had missed the final deadline for acceptance (i.e. 15 February), her contract would not be extended beyond 18 January 2001. Finally, the Applicant accepted the renewal of her contract on 6 March 2001, but was told in a facsimile of 13 March that, due to the delay in accepting, DESA was not in position to renew her contract anymore.]

…

… By letter dated 25 April 2001, the [Applicant] filed a request for administrative review of the decision taken by [the OiC]. ...

… [The request for administrative review was forwarded to the JAB Secretariat on 7 August 2001 and] ... considered as an 'Incomplete Statement of Appeal' [for filing purposes] ...

…"

On 27 September 2001, the Applicant lodged her full Statement of Appeal with the JAB in New York. The JAB issued its report on 6 July 2004. Its considerations, conclusions and recommendation read, in part, as follows:

"***Considerations***

…

26. The Panel found disturbing that, despite the request made by the Appellant, no negotiation or conciliation efforts had been undertaken, though there were ample grounds for negotiation or conciliation. The Panel found also disturbing the lack of evidence that a true effort was made by the Respondent in requesting the extension of the contract at [the L-2, step XI level] to the sponsoring government. The Appellant had, at the time of her contract renewal, more than [seven] years of working experience, demonstrated good performance and the error incurred with the step was entirely attributable to the Respondent.

27. The Panel found regrettable that in a high risk duty station, dealing with sensitive matter such as drug control, the Appellant, at that time a junior staff member, was unnecessarily put in a dangerous situation for her personal safety when she was left without a valid contract and was sent on official mission to represent the organization. In an e-mail dated 29 January 2001 to [DESA], [the] UNDP Representative in Laos, stated *inter alia* that: '[the Appellant] is out of the office, but not on leave. She agreed to take part in a field visit to Houaphan, representing the

office on a joint Asian Development Bank/UNDCP mission to a project we are just starting.' Thus, contrary to the Respondent's assertion that the Appellant undertook unauthorized travel, the Administration was aware of the Appellant's official mission beyond her contract and did nothing to stop it. Furthermore, her mission and travel costs related to this trip were reimbursed.

…

30. The Panel found also disturbing that on 14 February 2001, a support staff informed the Appellant that the Organization was initiating repatriation procedures. It was only on 13 March 2001, a month later, that the Chief of Office informed the Appellant that repatriation instructions had been sent to the UNDCP Office in Laos. The repatriation instructions were sent twice, the last one dated 15 April 2001. The Panel noted that the Organization had the time to amend and correct the repatriation instructions but did not have the time to amend and correct the contract. Furthermore, the Appellant never received a proper separation letter laying out her entitlements due to her upon separation of service. The Panel found also disturbing the fact that the Appellant received her final pay statement only on 16 June 2003, two years and 5 months after the Appellant had separated from service.

31. The Panel found reasonable the contention made by the Appellant that she had no choice but leave the country a day before her visa expired. The Appellant was not in a position to remain at the duty station and negotiate the terms of her contract, without holding a proper visa. The Panel agreed that too much pressure was forced upon a junior staff member with limited knowledge of the organization and based in a remote duty station.

...

Conclusions and recommendations

33. In view of the considerations set out above, the Panel *unanimously concluded* that the decision not to renew the Appellant's contract was tainted by procedural and substantive errors imputable to the Organization. …

34. The Panel *unanimously recommended* that the Appellant be awarded a sum equivalent to one year's net base salary at the rate in effect on the date of her separation from service as compensation for not having her contract renewed for a second year.

35. The Panel also *unanimously recommended* that the Appellant be reimbursed ... the expenditures incurred ... related to her round trip Vientiane-Vienna-Luxembourg …

36. The Panel further *unanimously recommended* that an official apology to the Appellant be issued by the Respondent with copy to the Government of Luxemburg."

On 22 February 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"The Secretary-General ... finds that, unfortunately, he is unable to accept the JAB's findings or conclusions. While it is true that the original error in paying you at the [L-2, step X level] was made by the Organization, this was explained to you prior to the offer of extension of your contract. The Luxembourg authorities requested that your contract should be extended at the step III. You were also informed by your Government that it did not intend to seek recovery of the first year's overpayment. You were further informed by DESA on 1 February 2001 that repatriation procedures would be commenced if you did not accept the new contract by 5 February 2001. According to your own statement, you were also advised ... to 'accept the terms and fight for the step later'. You were given a further opportunity on 14 February to accept the contract, but

> you stated that 'the extension of my first contract is the only option that would be acceptable'. Notwithstanding the numerous communications from DESA concerning the urgency of the matter and the clear advice to you that the step for the proposed second year's contract was now at the correct level, you delayed communicating your acceptance of the extension until 6 March 2001, more than a month after DESA's deadline, and when your repatriation had already been organized.
>
> The visa problems experienced by you and your consequent departure from Laos without DESA's authorization appear to have arisen directly from your own decision to withhold your acceptance of the new contract. The Secretary-General therefore does not accept the recommendations of the JAB that you are entitled to compensation or that an official apology is due."

On 29 June 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Application is receivable in accordance with articles 7 and 10 of the Statute of the Administrative Tribunal, taking into account the circumstances that caused her to delay submitting her Application.

2. The decision not to renew her contract is invalid.

Whereas the Respondent's principal contention is:

1. The Application before the Tribunal is time-barred.

The Tribunal, having deliberated from 4 to 26 November 2008, now pronounces the following Judgement:

I. The Applicant was a staff member employed at UNDCP, Laos, from 19 January 2000 to 18 January 2001 as an Associate Expert at the L-2 level. The Applicant's initial appointment was for one year, renewable for a second year. Due to an error imputable to the Respondent, a budget estimate for two years at L-2, step X and XI levels had been submitted to the Government, and the Government paid the first year of the Applicant's contract in full, at the L-2, step X level. When the time came for the renewal, this error appears to have been discovered, and the Respondent, in coordination with the Government, offered the extension at the L-2, step III level instead of at the step XI level. Regrettably, the offer was made to the Applicant on the last day of the first year, and the Applicant was given a very short time to accept. The Applicant did not respond, and she was then given another chance to accept. The Applicant again missed the deadline, and, by the time she did accept, administrative action had already been taken to separate her. The Applicant appealed this action for the non-renewal of her contract, and the JAB found substantially in her favour. However, the Secretary-General rejected the recommendation.

II. The Tribunal refers to these background facts in order to put the present Application in context. The only issue before the Tribunal is the receivability of the Application. Article 7, paragraph 4, of the Statute of the Tribunal provides that for an application to be receivable, it must be filed within certain time

limits. The time limit relevant to the instant case is ninety days reckoned from the day the Applicant was advised of the unfavourable decision of the Secretary-General on the recommendations of the JAB. Apart from the mandatory terms of article 7, the Tribunal has repeatedly emphasized the need to strictly observe the time limits. In Judgement No. 1106, *Iqbal* (2003), the Tribunal "emphasized the importance of complying with the mandatory time limits as set out in the Staff Rules. (See Judgement No. 596, *Douville* (1993).) Similarly, it held in Judgment No. 498, *Zinna* (1990), 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".

III. At the same time, the Tribunal has always acknowledged the discretion vested in it by article 7, paragraph 5, of its Statute that "in any particular case, the Tribunal may decide to suspend the provisions regarding time limits". It is the Tribunal's duty to appropriately balance the significant considerations of policy and justice that are reflected in these provisions. Apart from the equal application of the rules to all applicants by the strict observance of the time limits, the Tribunal has in Judgement No. 1046, *Diaz de Wessely* (2002), formulated some of the policy considerations in the following terms:

> "In the Tribunal's view, it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations. Any other approach would endanger the mission of the international organizations, as the Tribunal has pointed out in the past: 'Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning' (see Judgement No. 579, *Tarjouman* (1992), para. XVII)".

When it comes to the waiver of time limits, the wording of staff rule 111.2 (f) in connection with appeals to the JAB gives somewhat more guidance by its reference to "exceptional" circumstances" than does the stark language of article 7, paragraph 5, of the Statute. Without in any way seeking to fetter the wide discretion vested in the Tribunal, it can be safely stated that the Tribunal's approach is very much the same as that expressed in the staff rules guiding the JAB. The Tribunal will not interfere with the time limits lightly. As it held in Judgement No. 1335 (2007):

> "Generally, though, the Tribunal, which recognizes the importance of complying with procedural rules, finding them to be 'of the utmost importance for the well functioning of the Organization' (see Judgement No. 1106, *Iqbal* (2003)), will not waive or suspend such time limits unless there are extraordinary circumstances, including 'serious reasons which prevented the Applicant from acting'. (See Judgement No. 359, *Gbikpi* (1985).)"

Similarly, in Judgement No. 1301 (2006), the Tribunal had to consider whether there were "exceptional circumstances". It was of the view that these circumstances must be strictly construed and, as it held in its Judgement No. 913, *Midaya* (1999), that they "must consist of events beyond the Applicant's control that prevent the Applicant from timely pursuing his or her appeal".

IV. The JAB issued its report on 6 July 2004 and the Secretary-General rejected its recommendations on 22 February 2005. Given the delay, the Applicant herself contacted the Executive Secretary of the Tribunal by email as early as 29 December 2004 requesting information on how to file an application before the Tribunal. On 4 January 2005, the Executive Secretary advised the Applicant to request an extension of the time limits for filing an application, in order not to miss the deadline. Soon thereafter, the Applicant was advised of the Secretary-General's decision to reject the recommendations of the JAB which were favourable to her. Further exchanges of information took place and on 9 March, the Executive Secretary again wrote to the Applicant, expressly drawing attention to the 90-day time limit and advising her how to obtain an extension of time limit, should she need one. The Tribunal is fully satisfied that this was not a case in which a new staff member was "left out in the cold". She received all reasonable guidance and direction. Nevertheless, the Applicant did little or nothing until the statutory deadline had passed. On 20 March 2006, the Applicant filed an Application that did not fulfill the required statutory conditions and it was returned to her for correction with a deadline for re-submission. Another request for correction was made and, the completed Application was finally filed on 29 June 2006. According to the practice of the Tribunal, the date of resubmission of a corrected application is used as the date of filing. Thus, in the best of circumstances and adopting the most generous interpretation of article 7, paragraph 4, even taking the date of 20 March 2006 as the date of the Application, the Applicant was some ten months beyond the statutory time limit (see also Judgement No. 1429, rendered at this session).

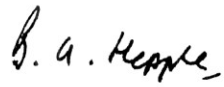
V. In the present case, the Applicant has confirmed that she was "well aware" of the time limits for filing her Application. She advances two or three reasons why she did not. She was preparing for her Masters in Business Administration which she considered essential for the advancement of her career at a time when she was doing State exams, all of which proved "time consuming"; her duties in the Government ministry where she was working were also demanding; and, on top of all that, she had to move house. In short, there were demands that she had to prioritize, and she did. The Tribunal accepts that it was her privilege to make these decisions and respects the very personal nature of the considerations that led her to act accordingly. However, these reasons fall far short of the exceptional or extraordinary circumstances which the Tribunal has considered as preventing an applicant from pursuing his or her claim within the prescribed time limits. The considerations advanced by the Applicant lack the weight required to constrain the Tribunal to exercise its discretion and to interfere with the time limits.

VI. For the foregoing reasons, the Tribunal finds that the Application is not receivable *ratione temporis* and thus rejects it in its entirety.

(Signatures)

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

Dayendra Sena **Wijewardane**
Second Vice-President



Bob **Hepple**
Member

New York, 26 November 2008

Maritza **Struyvenberg**
Executive Secretary