



Administrative Tribunal

Distr. Limited
30 January 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1433

Case No. 1506

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

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 30 April 2006, and once thereafter until 30 June;

Whereas, on 22 June 2006, the Applicant filed an Application requesting the Tribunal, inter alia:

“8. ... [T]o find:

(a) That the non-recognition of the validity of the PACS [Pacte Civil de Solidarité] between [the Applicant] and his spouse:

- violated the relevant United Nations rules;
- violated the instructions given to Arusha by the relevant New York offices;
- caused significant financial and social injury;
- prevented [the Applicant] from pursuing his career with the United Nations (...).

(b) That his recruitment at the P-2/1 level:

- derives from a clear material error in the evaluation of his professional experience;

- caused him significant financial injury;
- engendered a climate of mistrust and harassment which led to [the Applicant's] resignation from the United Nations.

9. Whereafter the Applicant most respectfully requests the Administrative Tribunal *to order:*

- (a) [Rescission] of the decision of 26 June 2002 [not to characterize a PACS as a marriage] ... and [payment of compensation];
 - (b) [Rescission] of the decision ... confirming his entry level at P-2, step 1 and [payment of] compensation for ... loss of earnings ...
 - (c) Award of damages and interest for the injury sustained ...
- ...”

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 27 March 2007, and once thereafter until 27 April;

Whereas the Respondent filed his Answer on 26 April 2007;

Whereas the Applicant filed Written Observations on 17 May 2007;

Whereas the facts of the case are as follows:

The Applicant joined the International Criminal Tribunal for Rwanda (ICTR) in The Hague on a one year fixed-term appointment on 28 October 2001 as an Associate Legal Officer at the P-2, step 1 level.

On 31 October 2001, the Applicant requested review of his recruitment level and provided ICTR with an updated P-11 form. On 12 November, ICTR responded that there were substantial differences between his original P-11 and the P-11 he submitted on 31 October, and requested clarification and verification of the information contained in the forms. The Applicant provided his explanations on 5 December but, on 29 May 2002, his entry level was confirmed at the P-2, step 1 level.

Also in late 2001, the Applicant sought to have his partner under a French PACS recognized as his wife by the Organization. On 26 June 2002, he was advised that, as French law did not characterize a PACS as a marriage, his partner could not be considered a “spouse” for United Nations purposes.

On 18 July 2002, the Applicant requested administrative review of the decision to maintain his entry level at the P-2, step 1 level and the refusal to recognize his marital status under his PACS. On 18 October, he faxed a Statement of Appeal to the JAB in New York.

On 27 October 2002, the Applicant separated from service at the expiration of his contract, having indicated that he was not interested in continuing in the service of ICTR.

On 16 December, the Secretary of the JAB acknowledged receipt of the Applicant's fax and informed him that he was required to provide the JAB with six copies of his submission as well as a Form

of Appeal. He attached the JAB Rules of Procedure and the Form of Appeal. The information was mailed to the address the Applicant had listed on his 18 October fax.

On 5 February 2003, the Coordinator of the Panel of Counsel advised the Applicant to contact the JAB Secretariat by phone, email or fax. The same day, the JAB emailed the Applicant its request for the Form of Appeal and six copies of all written materials. Once again, the JAB included the Rules of Procedure. The Applicant responded that he would send the documents “as fast as possible”. On 24 August 2004, the Applicant emailed the JAB expressing his regret for the delay in sending the requested forms. He stated that for nearly 18 months he had been in contact with the Panel of Counsel, but that his assigned counsel had failed to make any progress in the case. He indicated that, with the assistance of his new, third, counsel, he would re-launch the procedure. On 23 September 2004, the JAB received the Applicant’s modified appeal.

On 30 November 2005, the JAB found that the Applicant’s appeal was not receivable because he had “failed to exercise due diligence in complying with [the] JAB’s filing requirement and ... the resultant delay was unreasonable”. On 20 January 2006, the Applicant was informed that the Secretary-General accepted the JAB’s findings and conclusions.

On 22 June 2006, the Applicant filed his Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. He was never explicitly informed by the JAB that it considered his appeal to be incomplete or that he was required to reply or submit documentation within 30 days.
2. The 18 months’ delay in submitting his completed appeal to the JAB was due to fact that his first two counsel failed to make progress in the case. It took a third counsel to complete his appeal.

Whereas the Respondent’s principal contentions are:

1. The Applicant effectively abandoned his appeal by failing to comply with the filing requirements of the JAB in a timely manner.
2. The Applicant’s appeal against the Respondent’s decision to accept the JAB’s findings and recommendation, and to take no further action on the Applicant’s case, is not receivable by the Tribunal.

The Tribunal, having deliberated from 19 to 26 November 2008, now pronounces the following Judgement:

- I. The Applicant, a P-2 level Associate Legal Officer, served with ICTR in The Hague for one year on a fixed-term appointment. He separated from service at the expiration of his contract, on 27 October 2002.

Soon after commencing his brief tenure with the Organization, the Applicant protested his initial entry level. He provided additional information in support of his efforts, but his entry level was confirmed at the P-2, step 1 level. He was equally unsuccessful in his efforts to have his partner under a French PACS recognized as his wife by the Organization. As French law did not characterize a PACS as a marriage, he was advised that his partner could not be considered a “spouse” for the purposes of the United Nations.

On 18 July 2002, the Applicant requested administrative review of these decisions. He faxed a Statement of Appeal to the JAB in New York in October, but, on 16 December, was advised that he needed to provide six copies of his submission as well as a Form of Appeal. The JAB sent him the relevant material, but the Applicant apparently did not receive this package.

On 5 February 2003, the Applicant received a reminder from the JAB. Despite his promises to send the documents “as fast as possible”, the Applicant did not do so until 24 August 2004. The JAB received the modified appeal on 23 September.

On 30 November 2005, the JAB found that the Applicant’s appeal was not receivable. The Secretary-General agreed with this conclusion on 20 January 2006.

II. The Applicant filed his Application with the Tribunal on 22 June 2006. He asks the Tribunal to declare that his appeal before the JAB was receivable and the findings of the JAB - and the decision of the Respondent thereon - were invalid. On the substance, he requests the Tribunal to rescind the impugned decisions outlined above and to award him compensation for loss of earnings, moral prejudice and for the “loss of the opportunity to pursue a career with the United Nations”.

III. The Tribunal will first register its surprise at being presented with an Application submitted by a Legal Officer who protests that he was held to statutory time limits and judicial, or quasi-judicial, rules of procedure, especially when that Legal Officer was repeatedly provided with the rules in question.

Staff rule 111.2 (a) provides that the first step in an administrative appeal is the submission of a request for administrative review to the Secretary-General, which letter must be sent within two months of the impugned decision. In this case, the staff member was informed on 29 May 2002 that his entry level was confirmed at the P-2, step 1 level and, on 26 June, that his partner could not be considered a “spouse” for United Nations’ purposes. He requested administrative review of these decisions on 18 July 2002, within the two -month window provided for in the rule. However, staff rule 111.2 (a) continues as follows:

“(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.”

Staff rule 111.2 (f) provides that “[a]n appeal shall not be receivable unless the time limits specified in paragraph (a) ... have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal”. The Applicant’s initial contact with the JAB was his fax of 18 October 2002, which was the last date on which he could file his appeal.

IV. With respect to the JAB Rules of Procedure, section III.E provides:

“An incomplete statement of appeal will be accepted by the Board for the purpose of establishing the date of filing of the appeal. The secretariat of the Board will, upon receipt of an incomplete statement, request in writing that the appellant provide to the Board, *within one month*, a full statement of appeal, containing all of the elements described in rule III.J.1,... If the appellant, without explanation, fails to submit a full statement of appeal within the month, the appeal shall be deemed to have been abandoned ..., and shall be removed from the calendar.” (Emphasis added.)

Section III.J.1 of the JAB Rules of Procedure provides:

“Statement of Appeal: *In order to submit a statement of appeal the Appellant will complete the Form of Appeal*, as it appears in appendix A of the Rules and shall include: (a) the name of the appellant and his or her present or former status with the United Nations; (b) an identification, description and date of the administrative decision being contested and the terms of appointment and/or provisions of Staff Regulation or Rule which have not been observed...” (Emphasis added.)

Accordingly, the Tribunal finds that the JAB secretariat correctly accepted the Applicant’s fax as an incomplete Statement of Appeal, for the purposes of the time limits set out in staff rule 111.2 (a). Moreover, it acted in accordance with its own Rules of Procedure in contacting the Applicant and requesting that he submit the necessary documentation for a complete statement of appeal to be lodged.

V. Since the JAB wrote to the Applicant on 16 December 2002, it is evident that he ought to have submitted his Statement of Appeal by 16 January 2003. Under the most generous interpretation of the circumstances - giving the Applicant the benefit of the doubt with respect to the delivery failure of the information mailed in December - the one month period would commence on 5 February 2003, when the JAB e-mailed him, and end on 5 March. It was not, however, until some eighteen months later, on 23 September 2004, that the JAB received the Applicant’s modified appeal.

The Tribunal has repeatedly emphasized “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))”. (See also Judgement No. 1335 (2007).) As it held in Judgement No. 549, *Renninger* (1992), a staff member “acts at [his] own peril after a claim arises by unreasonably delaying appropriate steps for vindication of the alleged right”. While staff rule 111.2 (f) permits the JAB to waive the relevant time limits, “in exceptional circumstances”, the Tribunal has, necessarily, defined those circumstances narrowly. In Judgement No. 372, *Kayigamba* (1986), the Tribunal held that a staff member

seeking to have the time limits in his case waived must present “convincing reasons” to prove that the delay is due to exceptional circumstances, which must have been beyond his control. The Tribunal recalls its Judgement No. 1054, *Obuyu* (2002), in which it held:

“In ... *Kayigamba* [(*ibid.*)], 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’.”

The Tribunal is satisfied that this reasoning is equally applicable with respect to the Applicant in the instant case.

VI. It remains only for the Tribunal to address the Applicant’s contention that because the JAB did not expressly bring to his attention the time period for resubmission of his appeal, it did not begin to run. The Tribunal cannot accept this line of reasoning. It recalls its Judgement No. 1335 (*ibid.*), in which it held:

“The Tribunal notes that, while the Secretary-General’s standard language directing staff members to pursue their claims with the Administrative Tribunal, if they choose, provides adequate notice of their rights, such notice could be enhanced in a way that would better inform staff members of the specific details of pursuing their remedies with the Administrative Tribunal. Such enhancement easily could be accomplished by the Administration with the addition of language indicating the time frame in which such remedies need be pursued and the contact information of the Tribunal.”

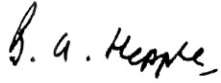
Similarly, in the instant case, the Tribunal finds that the Applicant was provided with “adequate notice” of his rights, particularly in view of his legal qualifications, but that it would be helpful, in the future, for the JAB secretariat to include the relevant legal provisions in the text of its letter. This suggestion on the part of the Tribunal, however, should not be construed as relieving litigants from exercising due diligence in the prosecution of their appeals (see Judgement No. 953, *Ya’coub* (2000)), as the onus remains upon them to know their rights. (See Judgements No. 1348 (2007) and No. 1409 (2008).)

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

(Signatures)



Spyridon **Flogaitis**
President



Bob **Hepple**
Member



Agustín **Gordillo**
Member

New York, 26 November 2008



Maritza **Struyvenberg**
Executive Secretary