



Administrative Tribunal

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23 December 2009

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1485

Case No. 1556

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, President; Ms. Jacqueline R. Scott; Ms.
Brigitte Stern;

Whereas on 22 May 2007, a former staff member of the United Nations, filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas on 1 June 2007, the President of the Tribunal granted an extension of the time limit for filing an application until 31 August, and once thereafter until 30 November 2007;

Whereas on 26 November 2007, after making the necessary corrections, the Applicant filed an Application containing pleas which read, in part, as follows:

“II. PLEAS

...

(c) To find that the Applicant complied with the provisions of Staff Rule 111.2 and therefore her request for review is receivable;

(d) To find that the Applicant had a leave balance of 90 days as [of] 31 March 2005;

(e) To order the Respondent to pay the Applicant 60 days of her unutilized leave on her separation from service on 31 March 2005 with interest, and

(f) To find that the Applicant has been seriously injured by defamation, character assassination and by flagrant and undeniable administrative injustice and to therefore award the Applicant 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 12 May 2008, and once thereafter until 12 June;

Whereas the Respondent filed his Answer on 5 June 2008;

Whereas the Applicant filed Written Observations on 26 August 2008;

Whereas the facts in this case read as follows:

The Applicant joined the United Nations Development Programme ("UNDP") Office at Nairobi, Kenya, on 9 December 1986, as a secretary at the GS-6 level, on a three-month fixed-term appointment. Her appointment was extended several times, on a short-term basis. On 1 May 1991, the Applicant was granted a permanent appointment. Effective January 1992, the Applicant was promoted to the post of Junior Administrative Assistant, and effective July 1999, she was promoted to the post of Administrative Assistant in Personnel. As a result of a classification exercise, the Applicant was classified as a Human Resources Associate from 1 December 2001. The Applicant retired from service effective 31 March 2005.

The Applicant was placed on sick leave with full pay from 5 May 2003 until 11 February 2004. Upon exhaustion of the Applicant's sick leave entitlements to full pay, she was placed on sick leave with half pay, combined with annual leave from 12 February to 17 November 2004. Having exhausted all of her sick leave entitlements and accrued annual leave, the Applicant was granted special leave with full pay ("SLWFP") from 18 November 2004 until her retirement on 31 March 2005.

On 5 October 2005, the Applicant requested the Resident Representative, UNDP Kenya, to place her retroactively on special leave with full pay from 23 March 2004, stating that she had been "medically cleared" and had been "willing and able" to return to work in March 2004. The Applicant also requested that the attendance records and leave balance at the date of separation be adjusted accordingly.

On 11 November 2005, the Resident Representative, UNDP Kenya, replied to the Applicant's request, confirming her administrative status on extended sick leave in March 2004. On 22 December 2005, the Applicant replied to the Resident Representative's letter, and on 3 January 2006, the Applicant requested an administrative review of the decision of the Resident Representative, UNDP Kenya, not to place her on SLWFP from March 2004.

On 9 March 2006, the Assistant Administrator and Director of the Bureau of Management confirmed the Resident Representative's decision. In his letter to the Applicant, the Assistant Administrator stated that, despite the Applicant's claim that she is requesting the review of an administrative decision taken by the Resident Representative on 11 November 2005, it should be noted that the Resident Representative's 11

November 2005 letter is only an explanatory note of the Applicant's administrative status since March 2004. The Assistant Administrator also stated that the Applicant's claim that she was "medically cleared to return to work" on 23 March 2004 was not substantiated with medical evidence. However, the Assistant Administrator pointed out that, even if it was assumed that the Applicant had been medically cleared on 23 March 2004, the Applicant's request for review should have been made within two months from 23 March 2004. The Assistant Administrator, therefore, concluded that the Applicant's request for review was time-barred.

On 12 April 2006, the Applicant filed an appeal with the Joint Appeals Board ("JAB"). The JAB adopted its report on 26 December 2006. Its considerations and recommendation read, in part, as follows:

"1. The Appellant is contesting the administrative decision to not place her [SLWFP] from 23 March to 17 November 2004. The Appellant argues that, upon submission of her medical documentation dated 5 April 2004, she should have been removed from sick leave with half pay and placed on SLWFP.

2. The Panel, in its executive session of 7 December 2006, noted that the Appellant first made her request in a letter dated 5 October 2005 to UNDP, 18 months after the date of Appellant's alleged medical clearance, and six months after the Appellant's effective date of separation on retirement. The Resident Representative, UNDP, responded on 11 November 2005, reiterating the Organization's original decision. The Appellant requested on 3 January 2006 review of the response. The Director, Bureau of Management, UNDP, provided administrative review in a memorandum dated 9 March 2006, raising time-bar among other issues.

3. The Panel finds that the appeal is not receivable, as the Appellant failed to meet the requirement in staff rule 111.2(a) to submit a request for review within two months of receipt of notification of the contested decision, embodied here in the notification of March 2004 salary payment. The Panel observed that the medical documentation of 5 April 2004 was only received by the UN Joint Medical Services in March 2005, and contradicted earlier medical reports of the Appellant's treating physician. Noting that the Appellant was a Human Resources Assistant, the Panel, while taking into account her illness, found no exceptional circumstances as required by staff rule 111.2(f) for waiving the time-limit.

4. Therefore, the Panel recommends that the Secretary-General find this appeal time-barred and not receivable."

On 16 May 2007, the Under-Secretary-General for Management submitted a copy of the report to the Applicant and informed her that the Secretary-General accepted the JAB's findings and conclusions and accordingly decided to take no further action in her case.

On 26 November 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB misdirected itself when it found that the applicable administrative decision was that contained in the March 2004 salary payment. The applicable administrative decision was that contained in the Resident Representative's letter of 11 November 2005.

2. The Applicant complied with the provisions of staff rule 111.2 and therefore her request for review is receivable.

3. The Applicant has been seriously injured by defamation, character assassination, and by flagrant and undeniable administrative injustice which warrants compensation.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is time-barred. No exceptional circumstances existed that could warrant a waiver of the time limits.

2. The Applicant's claim relating to defamation and character assassination was not before the JAB and is therefore not receivable.

The Tribunal, having deliberated from 26 October to 25 November 2009, now pronounces the following Judgement:

I. The issue in this case is whether the Applicant's appeal against the Respondent's decision not to place the Applicant on SLWFP for the period from 23 March to 18 November 2004 is time-barred.

II. The Applicant joined the UNDP office in Nairobi, Kenya, on 9 December 1986 as a Secretary at the GS-6 Level on a three-month fixed-term contract. The contract was extended several times, leading to a permanent appointment on 1 May 1991. On 31 March 2005, the Applicant retired from service as a Human Resources Associate, a position she had held since 1 December 2001. The Applicant was on sick leave for an extended period before her retirement. Her sick leave commenced on 5 May 2003 and continued right up to her retirement on 31 March 2005. That was a period of nearly two years. Once her entitlement to sick leave with full pay was exhausted on 11 February 2004, she was placed on sick leave with half pay from 12 February to 17 November 2004 - a period of ten months. After that, for reasons which are not apparent from the record, but not really material to this appeal, she was granted SLWFP for a further period of four and a half months, i.e. from 18 November 2004 to 31 March 2005 until she separated from service.

III. Six months after her retirement, on 5 October 2005, the Applicant wrote a letter to the Resident Representative of UNDP in Kenya complaining that she had been medically cleared to return to work, some nineteen months previously, i.e. in March 2004, and that she should have been placed on SLWFP from then until her separation. In her letter of 5 October 2005 to the Resident Representative of UNDP complaining that she had been medically cleared for work and that this had been ignored, the Applicant refers to a memorandum of 23 March 2004 and two subsequent memoranda by which she claims she had "requested a meeting to discuss [her] return to work, following medical clearance to do so in March 2004". However, the Applicant produces none of these documents and the scanty correspondence which follows

the Applicant's letter of 5 October does not shed light on what, if anything, transpired between 23 March 2004 and 5 October 2005.

IV. The Administration replied to the Applicant's 5 October letter on 11 November 2005, indicating that the Administration had been taken by surprise because all the administrative actions connected with the Applicant's separation had been completed as far back as March 2005. The letter proceeds to state as follows:

“In reference to your request to be placed on special leave with full pay from March 2004 until your separation date, it is hard to understand on what grounds you are claiming the special leave because we have hitherto interpreted our records as showing that you were on extended sick leave, despite receiving the doctors certification very belatedly in almost all cases which could be read as failure to report to duty. We have nothing on file that says that you were fit to return to work, nor did you in effect show up to resume work.”

V. On 3 January 2006, the Applicant requested an administrative review of the decision of the Resident Representative, UNDP, Kenya, not to place her on SLWFP from March 2004. On 9 March 2006, the Assistant Administrator and Director of the Bureau of Management informed the Applicant that her request for review was time-barred. On 12 April 2006, the Applicant filed her appeal before the JAB. In its report issued on 26 December 2006, the JAB found that the appeal was not receivable since the Applicant had failed to submit her request for administrative review within two months from the impugned decision. Noting that the Applicant was a Human Resources Assistant, the JAB found that there were no exceptional circumstances for waiving the time-limits. The JAB recommended that the Secretary-General find the appeal time-barred and not receivable, a recommendation which the Secretary-General accepted on 16 May 2007.

VI. In order to determine whether the Applicant's request for administrative review was time-barred, the Tribunal must examine whether or not the March 2004 payslip as such constitutes the administrative decision at stake. The Applicant argues that the Resident Representative's letter dated 11 November 2005 is the administrative decision and that therefore her request for administrative review had been filed timely, i.e. within two months from the date of the impugned decision. The Respondent, on the contrary, submits that the Organization's decision to place the Applicant on sick leave with half pay, combined with annual leave, from 12 February to 17 November 2004, was reflected in the March 2004 salary payment issued to the Applicant. He contends that the March 2004 salary statement constituted the administrative decision that the Applicant challenges and that therefore the request for administrative review had been filed out of time.

VII. The Tribunal recalls that pursuant to staff rule 111.2(a) a staff member wishing to appeal an administrative decision must do so in writing to the Secretary-General within two months from the date the staff member received notification of the decision in writing. For the purpose of staff rule 111.2(a), the Tribunal has defined an “administrative decision” as the following:

“unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order ... [and] are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.” (Judgement No. 1157, *Andronov* (2004), para. V).

The Tribunal specified in Judgement No. 1211 that “once it is clear that a decision is made, the time for initiating the appeals process begins to run and, thus, further correspondence on the issue would normally not stop it from running”. The Tribunal further stated that:

“bringing up an issue on which a decision had previously been communicated to the staff member and which was not subject of a request for administrative review does not normally start the process anew, *i.e.*, the Administration’s response to the renewed request would not constitute a new administrative decision which would restart the counting of time. The Tribunal agrees with the Respondent’s assertion on this point, that allowing for such a renewed request to restart the running of time would effectively negate any case from being time-barred, as a new letter to the Respondent would elicit a response which would then be considered a new administrative decision.” (Judgement No. 1211 (2005), para. III).

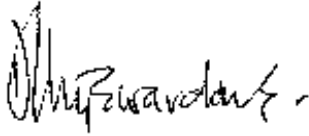
VIII. The Applicant asked for an administrative review of her complaint on the basis that the Administration’s letter of 11 November 2005 was an administrative decision on her claim. That is clearly not correct. The Resident Representative’s letter dated 11 November 2005 merely described and explained what in the view of the Administration had previously transpired between the parties. Given that the Applicant herself fixes 23 March 2004 as the date on which she should have been placed on sick leave with full pay – whatever the grounds she wished to advance for this – she should have challenged the Administration very soon thereafter and not waited until October 2005 to do so. The Tribunal takes the view that at the very latest, she should have sought administrative review two months after having separated from service. The Administration’s position was abundantly clear as throughout the period of March to November 2004, the Applicant was given half pay for her absence on sick leave. Consequently, when the Applicant sought an administrative review on 3 January 2006 of what she claims to have been an administrative decision affecting her rights taken on 11 November 2005, it was well beyond the time limit by which the Applicant should have challenged the Administration. The Tribunal also agrees with the JAB’s finding that no exceptional circumstances warranted a waiver of the time limit.

IX. The Tribunal is therefore satisfied that the JAB did not err in finding that the Applicant’s appeal was time-barred. Accordingly, the Tribunal finds the Applicant’s request on this point non-receivable *ratione temporis*.

X. The Tribunal finally notes that the Applicant’s allegations of defamation and her related claim for compensation are not properly before the Tribunal since the Applicant has not raised this matter either in her request for administrative review or before the JAB.

XI. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

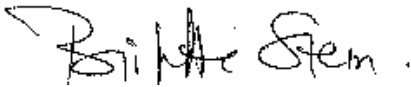
(Signatures)



Dayendra Sena **Wijewardane**
President



Jacqueline R. **Scott**
Member



Brigitte **Stern**
Member

New York, 25 November 2009



Tamara **Shockley**
Executive Secretary