
Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

Introduction

1. On 15 June 2009, the Applicant filed her full statement of appeal before the Joint Appeals Board (“JAB”). In his reply of 25 August 2009, the Respondent submitted that the appeal is not receivable, since it was time-barred.
2. On 1 July 2009, the case was transferred to the UN Dispute Tribunal (“UNDT”) where it was assigned to Judge Adams.
3. In email of 28 January 2010, the prior Tribunal (Judge Adams) outlined the issues of the case, including the Respondent’s preliminary claim on the case being time-barred and thereby not receivable. In their subsequent emails, the parties agreed to handling this issue on the papers. By email of 3 February 2010, Judge Adams directed the parties to file and serve their submissions in this regard, which the Respondent did on 16 March 2010 and the Applicant on 30 March 2010.
4. On 30 June 2010, Judge Adams left the Dispute Tribunal, but he did not decide the preliminary issue on receivability before his departure. On 27 July 2010, the case was re-assigned to the sitting Tribunal.
5. Previous to this case, the Applicant had presented some claims to the UN Administrative Tribunal, which were concluded to Judgment. (UN Administrative Tribunal Judgment No. 1437 (30 September 2009) (JAB Report No. 1804) and Judgment No. 1462 (30 September 2009) (JAB Report No. 1859)).
6. At the time the Applicant submitted her incomplete statement of appeal in this case to the JAB, she was assumedly awaiting decision on JAB Case No. 066-2006, as will be discussed below.

Facts bearing on the issue of receivability

7. On 31 December 2007, the Applicant, as an unrepresented staff member, submitted a request for administrative review of the decisions:

- a. To fill the Programme Budget Officer posts with the vacancy announcements “OPPBA-VA-#07-ADM-DM-415191” and “OPPBA-VA-#07-ADM-DM-415428” without giving the Applicant full and fair consideration.
- b. The refusal of the Administration to conduct the Applicant’s electronic Performance Appraisal System (“e-PAS”) evaluation in a fair and timely manner and in accordance with Staff Rules, particularly considering the recommendations of two JAB panels in JAB Report No. 1804 and JAB Report No. 1859. In her request for administrative review, the Applicant referred to her e-PAS reports from 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007, as well as the work plan for 2007-2008. However, in her 15 June 2009 statement of appeal, the Applicant narrows the scope of the present case to her e-PAS reports for 2007-2008 and 2008-2009, as well as the alleged delay in completion of her e-PAS rebuttal for 2006-2007. The Tribunal notes that the latter question concerning the delay is also covered in another case of the Applicant currently pending before this Tribunal (Case No. UNDT/NY/2010/077).

8. In her request for administrative review, the Applicant, *inter alia*, also stated that:

16. On 24 April 2008, the Applicant again emailed to the JAB Secretariat informing it that the submission of the full statement of appeal would be “delayed by a few days due to competing priorities”. The Applicant also stated, “It would be appreciated if the JAB Secretariat would allow a further 15 working days for filing a complete statement. I look forward to your favorable response in this regard”.

17. The JAB Secretariat did not respond to the Applicant’s 24 April 2008 request.

18. On 1 May 2008, the Applicant emailed the JAB Secretariat stating, “Further to my email of 24 April 2008 requesting an extension to submit my completed Statement of Appeal, I would be grateful if you could confirm whether this extension has been granted”.

19. The JAB Secretariat again did not respond to the Applicant’s 1 May 2008 email.

20. On 29 May 2009 [Note to reader: 2009 is the correct year], the Applicant for a third time wrote to the JAB Secretariat, again seeking “advice on the pending incomplete case” filed on 19 February 2008. The Applicant explained that she had been waiting for over a year for a response from the JAB with regard to her earlier emails:

... I have been awaiting advice in writing from the JAB with regard to my incomplete appeal but to date I have not had a response.

In addition, my delayed submission was due to the fact that the JAB took more than a year to consider my third appeal which had significant bearing on the incomplete appeal. As I only recently received the JAB report 1566 and the condition of my employment include the non completion of e-pas still continues without an acceptable remedy, I have no choice but to continue to seek justice. Having been failed by the old administration of justice system, I am

21. On 15 June 2009, the Applicant filed her complete statement of appeal contesting three administrative decisions, namely, in terms of her statement:

* Administrative decision to:

(i) Continue the violation of my due process rights to fair evaluation of my performance as evidenced by the untimely preparation of my e-PAS for 2007-2008 and 2008-2009 and the delay in completion of my e-PAS rebuttal for 2006-2007;

(ii) Deny my contractual right to full and fair consideration of my candidacy to fill advertised posts VA#07-ADM-DFM-415191-R-New York and VA#07-ADM-DM-415428-R-New York;

(iii) Continue to expose me to workplace harassment and intimidation by supervisors.

22. On 25 June 2009, the JAB Secretariat sent the Applicant a letter, stating as follows (emphasis added):

This Office received your stat

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, below. 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 (see rule III.O.3, below), and shall be removed from the calendar.

III.F. Receivability of appeals

An appeal is receivable only if it complies with the time-limits set forth in Staff Rule 111.2(a) and (b), or if the Panel considering the appeal decides to waive the time-limits (see G. Below).

III.G. Waiver of time-limits for late filing

1. When appeal is challenged solely on the ground that it is not receivable, a panel shall be constituted to consider the receivability challenge. If it determines that the appeal is receivable, the Panel shall remand the case to the party raising the receivability issue, with reasons, and direct that party to submit a reply on substance. When an appeal is challenged on procedure and substance, the Panel constituted to consider the appeal shall decide, at its own discretion, whether to consider receivability as a preliminary issue or in conjunction with the whole appeal. In either situation the Panel may request statements, supporting evidence and comments relating specifically to this issue and shall decide, on the basis thereof, if “exceptional circumstances” justify a waiver of the time-limits under Staff Rule 111.2(f), bearing in mind that the onus of proving exceptional circumstances lies with the appellant.

...

III.O. Abandonment of an appeal

...

3. Where an appellant has submitted an incomplete appeal but has failed to submit a full statement of appeal within the specified time-

limit without explanation, the appeal may be deemed to have been abandoned upon the expiry of the time limit.

4. An abandoned appeal may be restored upon adequate explanation. If the appeal was deemed abandoned for failure by the appellant to submit a full statement of appeal, any such motion to restore a case must be accompanied by the full statement of appeal.

Respondent's submissions (put first as the moving party)

The full statement of appeal is time-barred

24. The Respondent's submissions may be summarized as follows and pertain only to the Applicant's *full* statement of appeal:

- a. The Applicant was fully aware of the time limits that applied for filing her full statement of appeal, having been expressly advised by the Respondent of those time limits, having expressly acknowledged them in correspondence with the JAB, and having previously brought claims to the JAB;
- b. The Applicant's failure to proceed and file her full statement of appeal was not due to any mistake of fact or law, but was instead the result of her own free choice not to proceed with the appeal pending the outcome of another appeal;
- c. The JAB expressly advised the Applicant that the appeals were not linked in any manner; the Applicant nevertheless made the decision not to proceed with her appeal, despite express advice from the JAB that this was not the appropriate course and with full knowledge that she should not link the appeals in this manner;

- d. The Applicant acknowledged in her request for review that the appeal was separate and distinct from her earlier appeals;
- e. Although the Applicant requested an extension of time for 15 days, the Applicant failed to diligently follow up on her request;
- f. There is no justification for the Applicant's failure to lodge an appeal more than one year following her request for an extension of 15 days.

Exceptional circumstances do not exist for waiving time limits

- d. strict adherence to time-limits for administrative review of and appeals against administrative decisions is required, citing UN Administrative Tribunal Judgment No. 1482 *Nhliziyo* (2008);
- e. the reasoning in *D'Hooge* UNDT/2009/035 that an Applicant only needs to provide a reasonable explanation, and not exceptional circumstances, should not be followed. This “less demanding test” should not be applied, but whatever test is used, the Applicant cannot succeed on the facts of this case;
- f. under sec. III.E of the JAB Rules of Procedure, the Applicant was required to provide an explanation *within* one month after submitting her incomplete statement of appeal and since she did not do this, her appeal is deemed to be abandoned; and
- g. once abandoned, sec. III.O.4 provides that the appeal may be restored, but restoration is contingent upon an adequate explanation being provided, and the standard to be applied here is that “exceptional circumstances” need to be demonstrated.

26. The judgment of *Morsy* UNDT/2009/036 stipulates that the correct standard the Applicant must establish is that of an exceptional case by setting out exceptional reasons why s/he should be granted an extension of time:

What is required is a conspectus of all relevant factors before the Tribunal to ascertain in each case whether it is exceptional or whether there are exceptional reasons in the ordinary sense, to justify a waiver or suspension of time; exceptional simply meaning something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered.

27. The Respondent additionally cites the cases of *Samardizic et al.* UNDT/2010/019 and *Fedoroff* UNDT/2010/016 for the factors that must be considered in determining whether an application is receivable.

28. Whether the Tribunal determines that the appropriate test is that of a “reasonable explanation” applied in *D’Hooge* or the provision of “exceptional reasons” establishing an “exceptional case” as recognized in the jurisprudence referred to above, the Applicant has failed to discharge either standard.

The alleged harassment is not the subject of the application

29. By her request for administrative review submitted on 31 December 2007, the Applicant sought review of the decisions not to select her for the two Programmemeit3-02oget Off

Tribunal has attempted herein to summarize succinctly the Applicant's main contentions on the issue of receivability.

The full statement of appeal was timely and the appeal was not abandoned

The timing of the incomplete statement of appeal

31. The incomplete statement of appeal was submitted to the JAB Secretariat in a timely manner in order to establish the date of the initial filing and to ensure management was aware of the Applicant's intention to contest the selection decision with regard to the advertised Programme Budget Officer posts "VA-#07-ADM-DM-415191-R-New York" and "VA-#07-ADM-DM-415428-R-New York".

Timeliness of the complete statement of appeal (the Applicant's reasons for not putting forward the complete statement of appeal at an earlier stage)

32. The Applicant did not want to overburden a justice system that was slow and unresponsive while she was awaiting the outcome of a long, protracted consideration of her other JAB appeal. Other circumstances, which the Applicant refers to in this connection, are the following:

- a. At the time of filing her incomplete statement of appeal, the Applicant had hoped she would have received the JAB report concerning her other JAB case, since the Administration had argued she had abused the legal process by bringing on matters that had already been decided upon. This report had been delayed due to circumstances internal to the JAB. The Applicant made every effort to comply with former staff rule 111.2(a) by giving the Administration the opportunity to investigate/review the circumstances of this other appeal and to reconsider or reevaluate its decision before she filed another case;

- b. due to the illness and eventual passing away of her father in the period from May to mid-July 2008, a matter she did not feel like sharing with the JAB, she did not follow up on the incomplete appeal during this period of time;
- c. the Applicant had been in constant communication with the JAB Secretariat on the matter of her appeal and the Presiding Officer of the JAB took no action to make the official decision—required under secs. III.E and III.O.3—to consider her appeal abandoned. The Secretariat was aware that the Applicant did not intend to nor did abandon or withdraw her appeal;
- d. it was the Applicant who advised the JAB Secretariat that it had neglected to respond in a timely manner to her incomplete statement of appeal; and
- e. finally, the JAB Secretariat did not respond to any of the Applicant's requests for time extension for filing the complete statement of appeal. The JAB Secretariat also did not contact her to inquire whether she wanted to proceed with her appeal as per its own rules and normal practice (the Applicant makes no reference to any such rules or provide any evidence of such practice).

The application was not abandoned

33. No active steps were taken by the Presiding Officer of the JAB to deem the 33.

UNDT/NY/2009/084/JAB/2009/048

Order No. 325 (NY/2010)

Considerations

Was the statement of appeal time-barred under former staff rule 111.2?

37. To clarify, the Respondent's contention—that the Applicant's appeal is time-

several good explanations for her delayed filing of her full statement of appeal; and e)
that the Applicant, in both law

47. In a decision of the Administrative Tribunal of the International Labour Organization (ILOAT) in Judgment No. 758, *In re Thresher* (1986), the Tribunal found the means open to the complainant and his attempts to obtain information relevant in deciding whether his late application was receivable:

“[H]aving regard to the lapse of time involved, the means open to him to obtain information and his lack of diligence in pursuing his remedies, this case does not fall within the very exceptional class of cases where the Tribunal will grant relief for failure to observe the requirements of Article VII of the Statute. The complaint is therefore irreceivable”.

54. As noted in the 25 June 2009 letter from the JAB Secretariat to the Applicant, the Applicant in six separate communications sought information regarding her appeal from the JAB, but she never got a proper response. Thus, the Tribunal

each claim subsequently submitted before th

IT IS ORDERED THAT—

1. The Applicant's appeal is receivable and the legal issues to be determined are:
 - a. Did the Respondent violate the Applicant's employment contract when preparing her e-PAS reports for 2007-2008 and 2008-2009?
 - b. Did the Respondent's handling of the selection process concerning the posts with vacancy announcements, "OPPBA-VA-#07-ADM-DM-415191" and "OPPBA-VA-#07-ADM-DM-415428", constitute a breach of the Applicant's employment contract?
2. The Tribunal will revert with further orders for managing the remainder of the case.

(Signed)

Judge Marilyn J. Kaman

Dated this 10th day of December 2010