
Page No of 9 UNDT/NY/2009/097

Judgment No.: UNDT/2009/080

Date: 23 November 2009



Introduction

1. The applicant is a former staff member in the Procurement Division of the Department of Management. The applicant entered the service of the Organization on 13 March 2008 on a fixed-term contract for eleven months. After the applicant was informed that her contract would not be extended beyond its expiration date, she sought an administrative review of this decision and filed a request with the Joint Appeals Board (JAB) for a suspension of action. The applicant subsequently filed an application with the United Nations Dispute Tribunal under article 2.2 of its Statute, requesting a suspension of action on the administrative decision not to extend her contract pending the outcome of an ongoing management evaluation. After the Dispute Tribunal rejected the application filed under article 2.2 of the Statute of the Tribunal, the applicant filed an application under article 2.1 of the Statute.

2. On 6 November 2009, the respondent requested an extension of time until 22 January 2010 to file his reply to the application. The applicant objects to the respondent's request.

3. The issue presently before me is whether the respondent's request for an extension of time to file his reply should be granted.

Facts

4. On 28 May 2009, the applicant was informed that her contract would not be extended beyond 30 June 2009. The applicant requested review of this administrative decision on 23 June 2009, and, on the same day, filed a request with the JAB for a suspension of action on the decision to proceed with her separation. The JAB issued its report on 26 June 2009, recommending, *inter alia*, that the implementation of the decision not to renew her contract be suspended "until such time as her appeal has been considered on the merits or until 31 August 2009, whatever is earlier".

5. On 30 June 2009, the Secretary-General informed the applicant of his decision to grant her request for suspension of action on the decision not to renew her fixed-term appointment until 17 July 2009 “in order that a final [performance evaluation] for 2008–2009 may be finalized and issued to [her]”.

6. On 13 July 2009, the applicant filed an application with the Dispute Tribunal seeking suspension of the implementation of the administrative decision of 28 May 2009 not to renew her fixed-term appointment. The applicant submitted that the decision not to renew her appointment was improperly motivated and retaliatory and that she would suffer irreparable harm as a result of the non-extension of her contract. The applicant submitted that her electronic Performance Appraisal System (“e-PAS”) report for the period of May 2008 to June 2009 had not been completed and her right of rebuttal had not been exercised. The applicant stated, “As of today I have not received my completed e-PAS and the present suspension [i.e., until 17 July 2009] would not allow me sufficient time to exercise my right to rebut the report if necessary”.

7. On 16 July 2009, the matter was heard by the Tribunal. One day before the hearing, on 15 July 2009, the applicant finally signed her e-PAS report, having previously refused to do so.

8. On 16 July 2009, the Tribunal issued a written judgment, rejecting the application for a suspension of the contested administrative decision of 28 May 2009. The Tribunal held that the applicant failed to satisfy the criteria established in article 2.2 of the Statute of the Dispute Tribunal.

9. On 23 July 2009, the applicant initiated an e-PAS rebuttal process.

10.

[T]he Secretary-General has decided that the decision not to renew your appointment beyond its expiration date of 30 June 2009 was taken in accordance with the relevant rules and procedures.

11. On 26 October 2009, the Tribunal received a new application contesting the decision to separate the applicant from service following the non-renewal of her fixed-term appointment. In this application, the applicant alleges that the decision not to renew her appointment was made in retaliation for her complaints against her supervisors. The applicant asserts that she was subjected to harassment and discriminatory treatment and submits that her performance evaluation process was not in accordance with the established procedures. The applicant requests reinstatement with retroactive effect and compensation for the damage to her career and reputation.

12. On 30 October 2009, the Registry of the Dispute Tribunal transmitted the 26 October 2009 application to the respondent, stating that the respondent's reply was due 30 November 2009.

13. On 6 November 2009, the respondent filed a request for an extension of time to file and serve his reply. The respondent stated:

1. On 30 October 2009 the Respondent received the Application in this proceeding, together with notice from the Registry that the Reply is due on Monday 30 November 2009. The Chief of the Procurement Operations Service, Procurement Division, . . . who is responsible for providing instructions to the Administrative Law Unit (ALU), has been posted from headquarters to Entebbe Uganda until the end of December 2009 in order to establish a regional procurement office. In order that the resources of the [Procurement Division] and [the Chief of the Procurement Operations Service] . . . are not diverted from this important undertaking at this critical time, the Respondent respectfully requests an extension of time of 8 weeks to file the Reply, until Friday 22 January 2010.

. . .

2. Although the Application in this matter relates to the relatively confined issue of the non-renewal of the Applicant's fixed term contract, in circumstances where the Applicant had no expectancy of renewal, the Applicant has made wide-ranging allegations and

accusations against a number of staff members in the [Procurement Division], that the Respondent considers should not remain on the record unanswered.

...

5. In light of these time critical and extensive duties, . . . [the Chief of the Procurement Operations Service and the Procurement Division] are not in a position to immediately divert sufficient resources to prepare a response to the allegations.

14. On 7 November 2009, the Tribunal received a submission from the applicant, objecting to the respondent's request for an extension of time, and stating, *inter alia*, that "time is of critical importance concerning a direct disposition of this case; any delay in this suit will be extremely detrimental to [the applicant's] well being".

Considerations

15. Article 10.1 of the Rules of Procedure imposes an obligation on the respondent to file his reply within 30 calendar days of the date of receipt of the application by the respondent. Article 10.1 provides that:

The respondent's reply shall be submitted within 30 calendar days of the date of receipt of the application by the respondent. . . . A respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, except with the permission of the Dispute Tribunal.

16. Article 19 of the Rules of Procedure provides the Tribunal, either upon application by a party or on its own initiative, with discretion to "issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties". Article 35 of the Rules of Procedure allows the Tribunal to shorten or extend time limits "fixed by the rules of procedure or waive any rule when the interests of justice so require".

17. Article 19 of the Rules of Procedure deals generally with case management and is more appropriate for orders relating to time limits that are not set forth in the

Rules of Procedure, including any deadlines established by the Tribunal in the course of the proceedings.

18. Being of general application, article 19 has been relied upon together with article 36.1 of the Rules of Procedure in a matter where the Tribunal allowed an applicant to file an answer to the reply, in the absence of a prescribed procedure for the filing of further pleadings (see *Abubakar*, Judgment No. UNDT/2009/079). It was also used to issue directions for an applicant to file and serve a revised application where the original application was wanting (see *Gabriel*, Judgment No. UNDT/2009/067).

19. Article 35 of the Rules of Procedure, however, deals specifically with the time limits fixed by the Rules of Procedure, and should be applied by the Tribunal when dealing with the time limit for the filing of a reply, set forth in article 10.1.

20. In *Lutta*, Judgment No. UNDT/2009/060, Boolell JP discussed the effects of a failure on the part of the respondent to file a reply within the prescribed time period. His Honour stated:

2.4.2 The Respondent who finds himself outside the time limit for filing a reply should first seek the permission of the Tribunal to take part in the proceedings.

...

2.4.5 If the Tribunal grants the Respondent's motion and authorizes him to be part of the proceedings, the next stage is to determine whether the Respondent should be allowed to file a reply.

21. The present case is, of course, distinct from *Lutta*. In the present matter, the respondent's request for additional time was filed *prior* to the expiration of the prescribed time period for the respondent's reply. Therefore, it would be entirely appropriate for the Tribunal in the present case to extend the deadline for the filing of a reply, provided that the respondent gives good reasons and the Tribunal finds that the requirements set forth in article 35 of the Rules of Procedure are satisfied.

word “instructions” was rather intended to mean that the Administrative Law Unit expects to obtain certain relevant information from the Procurement Division, although the expression used by the respondent can be easily misread. In any case, it is not contended in this case that the Administrative Law Unit is unable to communicate with the Chief of the Procurement Operations Service. I understand that, although the Chief of the Procurement Operations Service is away from his duty station in New York, he remains in active service and is available to provide his assistance to the respondent.

26. Whilst the respondent concedes that the application in this matter relates to the relatively confined issue of the non-renewal of the applicant’s fixed term contract, it contends that “the Applicant has made wide-ranging allegations and accusations against a number of staff members . . . that the Respondent considers should not remain on the record unanswered”. The respondent may take exception to some of these allegations on the grounds they are specious, vexatious and irrelevant and stand to be struck out. Alternatively, if the allegations are relevant to the applicant’s case, the respondent needs to respond to them, lest he be seen to admit them. For the purposes of sufficiency and adequacy of pleadings, I am minded to allow an extension of time to the respondent.

27. Having considered the factors discussed above, including the explanation provided by the respondent and the objection raised by the applicant, I find that the reasons advanced by the respondent for an extension of time to file his reply are unconvincing for me to grant an extension until 22 January 2010. In the exercise of my discretion under article 35 of the Rules of Procedure, I find that it would be in the

Order

28. The respondent is to file and serve its reply to the application on or before Monday, 21 December 2009.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 23rd day of November 2009

Entered in the Register on this 23rd day of November 2009

(Signed)

Hafida Lahiouel, Registrar, New York