Introduction

1. The applicant's supervisor had promised her, without lawful authority, that

The case for the applicant

9.

b. The applicant failed to show "exceptional circumstances" under former staff rule 111.2(f) which provides that an appeal against an administrative decision shall not be receivable unless the time limits have been met or, under "exceptional circumstances", waived. The respondent submitted that the applicant had not provided any facts or matters of substance which might be regarded as exceptional. The respondent further argued that following receipt by the applicant of the letter dated 28 October 2008, she had more than sufficient time to submit her appeal to the JAB.

c. The appeal was not in relation to an administrative decision since it involved the proper application of former staff rule 105.1(c).

d. In any event, the applicant was not prevented by the pressure of work from using up any excess leave before 31 March 2008.

Comment on the litigation

11. The JAB was unable to deal with this matter prior to 1 July 2009, on which date the appeal was transferred to the United Nations Dispute Tribunal.

12. At the beginning of the hearing held on 27 August 2009, I raised a question relating to the principle of proportionality in litigation over a matter of six and a half days of unpaid annual leave which counsel agreed was, in monetary value, no more than USD3,500–4,000. The litigation costs to the United Nations exceeded, by far, the sum of money involved. Counsel were asked if there were matters of principle or some other substantive reason for proceeding when the option of mediation was available. Counsel for the applicant was amenable to settlement discussions but counsel for the respondent had no instruction to do so for reasons which became clear as the hearing proceeded.

13. In the absence of any jurisdictional issue relating to the applicable time limits and given the fact that the applicant relied on a promise made by her supervisor,

e. Was there a physical impediment like ill health or some other special circumstance which constituted a barrier to the timeous presentation of the claim?

f. Was there any substantial failure on the part of the applicant or her adviser?

g. Was there any misrepresentation by the respondent about any matter relevant to the question of time limits?

h. Were the parties actively engaged in a conciliation or mediation process which, understandably and with justification on both sides, caused the case to go out of time?

i. Did the applicant act diligently, at all material times, in pursuing her claim?

j. Did the applicant or her advisers make a conscious decision, for whatever reason, including tactical, to delay or postpone the lodging of the appeal?

k. Was the totality of the circumstances and events which caused or contributed to the appeal being presented out of time beyond the control of the applicant and her advisers?

l. Even if it was within the control of the applicant to request the review within time was it nevertheless excusable in the particular circumstances of the case that she delayed in filing her application in time?

m. What is the actual prejudice or harm to the respondent if the time limit was waived?

n. Is a fair hearing possible notwithstanding the lapse of time?

o. What would constitute a "limited period" in the circumstances of the particular case?

24. In considering the above questions in light of the evidence in this case could it reasonably be said that this is an "exceptional case"? This is pre-eminently an issue of fact for the decision-making Tribunal. The Judge will bear in mind the importance that is placed on time limits being complied with in the interests of good administration. At the same time the Judge will remind himself that time limits are not intended to operate to the disadvantage of staff members or to constitute a trap or a means of catching them out when they did all that could reasonably be expected of them and furthermore when they acted in good faith.

25. The facts and circumstances that themselves caused or contributed to the appeal being out of time will have to be given considerable weight in reaching a final assessment.

26. The test involves the application of a discretionary power. In my view, this is a two-stage process:

a. The Tribunal must first decide if this is an exceptional case. If it is not, that would be the end of the matter.

b. If it is exceptional, the Tribunal should decide, in the exercise of its discretion, whether it would be just and equitable to suspend or to waive the time limit.

The Tribunal's findings

27. The applicant agreed that she was aware of the fact that there was a strict rule that prevented accrued annual leave in excess of 60 days from being transferred to the following leave year. It was her case that there were special circumstances which were indeed exceptional and related directly to her commitment to the United Nations.

28. The decision that she would forfeit the excess days was communicated to her by a document that she received in April 2008. She took no action in relation to that because she relied on the promise made to her by her supervisor that she would be allowed to use the excess leave prior to retirement.

29. The applicant and her supervisor came to an arrangement completely outside the staff rules that nom

because she knew that the rule was strictly applied. In any event, in collusion with her supervisor she believed that she would not lose these days which would be taken unofficially.

b. 28 October 2008 when she received the response from the Executive Officer for DESA to the effect that she had no authority to take six and a half days paid leave and that notwithstanding the request by her Director that these days should be "returned" they would not be.

33. I find as fact that the applicant knew in March and April 2008 that she was not permitted toTd(m4t bhlr008 thats.t1ap)Tj- 3obCnonexcess6 Twm4e,.0007eighte8permitted ttivea74t 0

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Staff Rule 105.1(c) has been consistently applied in a strict manner. No exceptions will be made to allow accumulation of more than 12 weeks of annual leave, unless the staff member is on mission, as stipulated in the rule. The necessity for strict observation of this rule is fairly obvious. In view of the generous leave entitlement and possible exigencies of service occurring during a leave year, it is not uncommon for staff to be unable to take their entire leave of six weeks, in any one year. For this reason, accumulation will be allowed, but only up to a total of 12 weeks. Within this maximum limit, staff members are expected to be able to

40. I consider that it is good practice to advise staff members of time limits but failure to do so could not in itself constitute a ground for the Tribunal to suspend or waive a time limit. Furthermore, I find that this claim did not go out of time because the applicant was ignorant of the time limit, but as a result of a deliberate decision taken for reasons which she regarded, at the time, as being in her best interest.

41. Given the factual findings based on the oral and documentary evidence before the Tribunal I find that the applicant has not shown that this was an "exceptional case".

42. The application is not receivable and is accordingly dismissed.

Applicant's submission of 4 November 2009

43. On 4 November 2009, the applicant filed an additional submission entitled "Applicant's submission on the denial of her request for remuneration", seeking compensation for 25 days of work performed in December 2008, after her retirement. In this submission, the applicant contended that she was asked to work in December 2008 to "salvage desperate situation facing the office" and that, although her contract was not extended, and she was denied compensation for her work, the Organization "cannot escape responsibility for recompensing the applicant merely on the ground that she lacks a formal contract on which to base her claim".

44. I make no comments on the merits of this issue. It is not before me.

45. This application to add a new cause of action is wholly misconceived. It did not at any stage form part of this case. In fact, during the hearing the applicant and her counsel intimated that they were contemplating or had actually commenced a challenge to the decision not to extend her contract beyond October 2008. Furthermore, they stated that they were taking action in relation to the 25 days of work which she had done after the termination of her employment and for which she received no remuneration. They made it clear that the instant case was in relation to the six and a half days leave and none other.

46. The applicant repeatedly emphasised her commitment and the fact that she

Conclusion

50. The appeal is out of time. This is not an "exceptional case" within the meaning of art. 8.3 of the Statute of the Dispute Tribunal. The purported amendment dated 4 November 2009 is misconceived.

51. The application is dismissed.

(*Signed*)

Judge Goolam Meeran

Dated this 28