



6.

appointment. On 18 December 1998, a summary hearing was held on the Applicant's request for suspension of action and, on the same day, the JAB produced its report in which it noted that the non-extension of the Applicant's contract would be an obstacle to due process and would result in irreparable injury to her. Accordingly the JAB recommended that the request for suspension of action be approved.

13. On 22 December 1998, the Chairperson of UNCHS Staff Association addressed a Memorandum to Mr Biau stating that

In view of the facts presented by [the Applicant]: the report of the Panel on Discrimination and other Grievances, the report of her last supervisor in Habitat and the criteria mentioned by you in our meeting on 27 November 1998 for non-extension of contract of staff, [the Applicant] qualifies for the extension of her contract, as other staff of Habitat, beyond December 1998.

I, therefore, request you to reconsider her case in light of facts presented by her for extension of her contract beyond December 1998.

14. On 23 December 1998, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had decided to approve her request and to extend her appointment for three months in order for the merits of the case to be determined.

15. On 13 January 1999, the Applicant lodged an appeal on the merits with the JAB. The JAB issued its report on 9 April 1999 in which it was held that

The [Acting Executive Director, UNCHS] duly exercised his authority and prerogative as vested in him through his mandate.

The transfer of the Appellant from the TCD Unit to several units....without proper job description cannot be described as being a sound personnel management practice in the United Nations. The failure or reluctance to conclusively see through the investigations regarding the allegations made (sic) by the Applicant cannot but give the impression that the report she submitted to the OIOS must have caused some bad feeling.

been seen to be done. The Panel recommends that the necessary measures be taken by the OIOS to act on the report submitted to it by

Procedural History

20. Having been made to leave the services with the Organisation following her complaints to the OIOS alleging irregularities particularly with regard to recruitment and procurement, which were never addressed in her department, the Applicant was then informed by OIOS on 26 August 2010 of its decision not to take action on her report made 15 years earlier.

21. The Applicant then filed a request for management evaluation on 13 September 2011 with regard to the said OIOS decision. On 4 November 2011, the Management Evaluation Unit (MEU) refused the Applicant's request on the grounds that it was not receivable. The MEU pointed out that her request exceeded the statutory deadline for management evaluation and that in the absence of exceptional circumstances, the request was refused for being out of time for 20.20.

status as a staff member when she was separated from service on 4 June 1999. There are no grounds upon which the Applicant cannot claim that her contractual rights as a staff member up until 4 June 1999 were breached by a decision taken over 11 years later, on 26 August 2010.

The Application is res judicata

31. The Applicant sets out a number of claims related to her previous employment with UNCHS. Those claims have been resubmitted in her Application to the UNDT. Those matters were already addressed in

34. The length of time that elapsed ~~since~~ the Applicant's separation which the Respondent uses to show that the Applicant has ~~no~~ *no standi* to appeal to the UNDT seems to be of no relevance according to the UNDT Statute articles 2.1, 3.1(b) and 8.1(b), where former staff members can show that their contractual rights at the time of their employment were breached.

Decision not to investigate her allegations was a breach of her rights as a former staff member

35. The OIOS decision taken in August 2010 not to take any further action regarding the Applicant's request to investigate her ~~allegations~~ was a breach of her terms of appointment as a former staff member, given that those terms included the staff member's right of participation in the Joint UN Pension System. The Applicant was rightfully expecting to enjoy a UN pension upon separation one day after 10 years of UN service, bearing in mind her absence (due to that UN service) from the local pension system in her home country over that period.

36. The reluctance of OIOS to investigate the Applicant's claims was met with disapproval not only from the Applicant herself, but also from the JAB that dealt with this case and the former UN Administrative Tribunal. The appeal to OIOS to investigate the Applicant's case ~~remains~~ an unfulfilled obligation from 1995 to 1998 and from 2002 to 2010. Therefore, the decision taken by OIOS in 2010 not to take any further action regarding the Applicant's case, should be seen in context of the fact that the JAB strongly recommended that ~~such~~ action be taken by OIOS and was supported by the former UN Administrative Tribunal in its Judgment No. 1048 (2002).

37. Therefore, OIOS has not only harmed the Applicant by deciding not to undertake an investigation into her ~~claims~~ of prolonged discrimination but has further aggravated the situation by sending her file to the ICTY (an entity that is not mandated to look into staff administrative complaints) instead of carefully determining another UN entity that N

The failure of OIOS to investigate her claims was responsible for her loss of entitlements

38. Because of the reluctance of OIOS to investigate the claims that she had lawfully made in 1995, responding to the appeal by the UN administration and as advised by the local UN Ombudsman in Nairobi, she had lost all her entitlements including the right to enjoy the UN pension for which she was only five months short on the day of separation.

39. Had the OIOS undertaken such an investigation, it would have established that there existed improper and ~~trans~~aneous motives behind these interrelated developments that covered a long period of time and ~~the~~ situation would have been redressed as a consequence. The Applicant's future would have been secured, at least in basic financial terms, by means of a new UN temporary assignment that would have enabled her to complete the five months missing for her UN pension.

Applicant's cause of action is not res judicata

40. The Applicant's complaint from 1995 might ~~be~~ *res judicata*, but it represents just a small part of the Applicant's overall complaint. ~~From~~ *From* the interval between 1995 and 1999 covered by the former UN Administrative Tribunal Judgment No. 1048 (2002), the complaint also refers to a long period of 10 years that followed, characterized by *"institutional prejudice"* against the Applicant. Upon the publication of the former UN Administrative Tribunal Judgment No. 1048 (2002) and in the period that ensued, this prejudice remained unchanged and in fact became more accentuated, although in a silent way, expressing ~~itself~~ *itself* mostly through the Administration ignoring all of the Applicant's attempts to address and redress the situation.

41. The rationale of the Applicant's request filed to the OIOS in 2010 originates from the fact that the recommendation made by the JAB and endorsed in the former UN Administrative Tribunal Judgment No. 1048 (2002) never materialized, and on the premise that a recommendation, similar to an order given in a judgment, cannot become time barred. The Applicant believes that the obligation to implement the JAB recommendation, which has never been ~~filed~~ *filed*, and that pending on OIOS, was not

quashed by the former UN Administrative Tribunal Judgment No. 1048 (2002) and did not cease by 2010.

The Application is not time-barred

42. The Applicant argues that she had established regular communication with the Ombudsman's office to find an informal way to resolve the issue of her re-employment with the UN. She further states that the UN Ombudsman had undertaken various attempts, specifically in relation to her employment with the ICTY, proposing a solution in 2004 and repeating the same attempt in 2010.

43. These attempts, although proven unviable had confirmed her conviction that the UN Ombudsman's office was mediating with the UN Administration in order to remedy the consequences of mismanagement during her UN employment in view of

and only in exceptional cases. The Dispute Tribunal ~~shall~~ *suspend or waive* the deadlines for management evaluation. [Emphasis added]

50. Staff rule 11.2(a) and (c) state respectively that

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of

55. In the case of *Wu*⁷, the Applicant argued that his request for management evaluation was not time-barred because he had engaged the Ombudsman's office in an attempt to resolve the matter informally. On the basis of staff rule 11.2(c) where the Secretary-General may extend the deadline and by virtue of the fact that the matter being seized of the Ombudsman, such a deadline had been extended, J Izuako held that

This is because during the period that the Ombudsman was seized of the matter, time would cease to run. ...The Ombudsman is appointed by the Secretary-General to represent ~~him~~ for the purposes of facilitating conflict resolution...During the two day period that the Ombudsman was seized of the matter, that is, 15 to 17 June 2011, the deadline was effectively extended for the ~~pur~~poses of staff rule 11.2 (c).

The 60-day timeline in this case should have begun to run from 17 June

formal system of the internal justice system. The Tribunal, being a creature of statutory law, cannot go beyond its mandate. In view of the above, the Applicant having failed to meet the statutory time limits, the Tribunal finds the Application time-barred and not receivable.

Conclusion

59. The Application in this case is not receivable and the Tribunal consequently lacks the jurisdiction to entertain it.

Recommendation

60. It goes without saying that justice in certain cases cannot always be fully and effectively served through the formal system of administration of justice. It is partly for this reason that the General Assembly of the United Nations saw to it that an informal system of internal justice was in place side by side with the formal system. Due to the fact that even the informal system might sometimes be constrained by the applicable rules of engagement, it could find itself unable to bring a proper settlement or closure to a case.

61. In the instant case, certain troubling issues stand out in bold relief. So much so that although it appears that substantive justice for the Applicant may have fallen through the cracks in the formal and informal justice systems and consequently eluded her for more than a decade, it has become necessary for the Secretary-General in his good offices to take a compassionate view to these issues.

62. The procedural history of this case already set out in the opening pages of this judgment does not bear repeating. What is clear is that the Applicant had in 1995, before the end of her first year as a staff member of the UNCHS (having served as a UN Volunteer previously for five years), reported certain irregularities she had observed within UNCHS offices to OIOS with regards to recruitment and procurement.

63. While OIOS refused to carry out any investigations on her report, the Applicant's supervisor and head of her unit,

The Applicant had commenced work at UNHCS with a two-year fixed-term contract in late 1994 and in spite of her protests, she was immediately transferred to another unit without funds for her new post and without a proper job description.

64. The same supervisor gave her a very low "D" rating in her performance evaluation soon after but, upon rebuttal, the Applicant's performance was replaced with a "B" rating. It appears that Mr. Biau opposed a two-year extension of the Applicant's contract and as a result the UNCHS Personnel office began giving her only short-term extensions.

65. Convinced that her former supervisor was on a retaliation path, the Applicant applied for a vacancy at the United Nations Economic Commission for Africa (UNECA) but was not appointed probably because the UNCHS Personnel office forwarded the PER with the low performance rating initially awarded to the Applicant which she had successfully rebutted.

66. The Applicant was thereafter shunted to several different posts within and outside UNCHS and was informed that her contract would not be renewed after its expiry on 31 December 1998. She wrote to OIOS seeking its intervention and also to the Secretary-General for administrative review of the said decision. On 1 September 1998 she complained to the Panel on Discrimination and Other Grievances. The said Panel in its 10 November 1998 report recommended the extension of the Applicant's contract.

67. On 22 December 1998, the Staff Association of Habitat wrote to Mr. Biau, who was then Officer in Charge (OIC) of UNCHS, stating a number of reasons why her contract should be extended but without success. The Applicant appealed to the former JAB for a suspension of the decision not to extend her contract. Following a favourable recommendation by the JAB, the Secretary-General extended her appointment by three months for the merits of the case to be determined.

68. The records filed by the Applicant show that Mr. Biau, who in 1998 had become the Deputy Acting Director of UNCHS and effectively its head, had actually refused to implement the decision of the Secretary-General for the three-month

justice system came into being, it is compelled, bearing in mind the special circumstances in this matter, ~~to~~ RECOMMEND it to the Secretary-General for sympathetic review with a view to bringing substantive justice and closure to it.

75. This recommendation is made bearing in mind the special measures that have been put in place with regards to the protection of whistle-blowers who risk their jobs, professional lives and livelihoods by courageously seeking to expose wrong-doings within the Organization.

76. The United Nations, being the foremost international Organization for setting standards for governments and other organizations, needs to review the case of this Applicant as this will serve not only the ends of justice but also to reassure whistle-blowers that they are indeed protected.

(Signed)

Judge Nkemdilim Izuako

Dated this 12th day of July 2012

Entered in the Register on this 12th day of July 2012

(Signed)