

Case No.:



Introduction

1. The Applicant, a former Senior Information Analyst in the United Nations Assistance Mission in Afghanistan (“UNAMA”), contests the decision not to renew his contract beyond 31 March 2008.
2. The Applicant seeks reinstatement effective 1 April 2008, with retroactive payment of salary and benefits, compensation for moral damages in the sum of two years’ net base salary, and removal of adverse material from his personnel file.
3. The Respondent objects to the receipt of the application, submitting that both the Applicant’s request for administrative review and the present application were filed out of time, and that the Applicant has failed to articulate any exceptional circumstances justifying the delay.

Facts

4. The Applicant joined UNAMA in November 2006 as a P-5 level Senior Information Analyst on an appointment of limited duration. He was stationed in Kabul, Afghanistan. His appointment was subsequently extended and set to expire on 31 March 2008.
5. On 27 December 2007 the Applicant was declared *persona non grata* by the Government of Afghanistan due to allegations of improper conduct made against him (hereinafter referred to as the “Alleged Improper Conduct Incident”). He left Afghanistan on the same day and was placed on special leave with full pay until his contract expired on 31 March 2008.
6. In the period between late December 2007 and early January 2008, allegations were raised within UNAMA that the Applicant had been in unauthorised possession of weapons at the guesthouse where the Applicant and several other UN staff members resided, and that he had facilitated an arrangement for the provision of two

weapons by the local ~~Off~~ of Police to the ~~Chowkidars~~ private security personnel guarding the guesthouse (hereinafter referred to as the "Alleged Weapons Incident").

7. On 1 February 2008, following several exchanges regarding the Alleged Weapons Incident between the Department of Field Support (DFS) and the Office of Internal Oversight Services ("OIOS"), the matter was referred by DFS to the Office of Human Resources Management ("OHRM") for further action.

8. By email dated 5 February 2008 the ~~Deputy~~ Special Representative of the Secretary-General ("Deputy SRSG"), UNAMA who was the Applicant's direct supervisor, advised the Applicant as follows:

This is to confirm further to our conversation that by mutual agreement we will not proceed with extension of your contract beyond March 2008. Our agreement, with which I seek your concurrence by return email, is that this step is being taken further to a lapse in judgment related to a single incident [the Tribunal understands this to refer to the Alleged Weapons Incident], which you have acknowledged.

The mission continues to insist with all Afghan interlocutors that your activities [in relation to the Alleged Improper Conduct Incident] were in entire accordance with the UNAMA mandate and indeed performed at the request of mission management. That the request for your withdrawal was based on a misunderstanding within the Afghan government has been acknowledged by all the relevant ministries and agencies. We continue to seek full exoneration of UNAMA from the allegations made. I wish to emphasize that this episode is entirely unrelated to the incident mentioned above [i.e., the Alleged Weapons Incident].

I would also like to confirm both as your direct supervisor and the Officer-in-Charge of UNAMA at this time that your contribution to the work of the mission has been outstanding. Your knowledge, experience and judgement have been invaluable service both to us and to Afghanistan: yours are among the skills that make this mission effective and highly respected. ...

I would be grateful for your positive reply to this email as soon

the allegations of misconduct against him. Attached to the email was a note, also dated 14 July 2008 and signed by the Applicant, in which he stated, *inter alia*

When I was, at the end of March, sent a non-extension memo from Personnel via the [Deputy SRSG] declined to sign it. Two versions were actually sent—the first I returned as it was inappropriately worded; the second after consideration, actively declined to sign, period.

...

The current situation is that my contract has not been extended—it lapsed on the 31st March. Whilst I would not suggest that anyone has acted with anything but the best of faith, I would contend that the decision not to extend it was not actually correct. ...

15. In a note dated 25 July 2008 and addressed to the Under-Secretary-General for Management, the Under-Secretary-General for Peacekeeping Operations stated:

1. [The Applicant] was separated from service with the United Nations on 31 March 2008. ...

2. On 9 January 2008, UNAMA alleged by cable that [the Applicant] was in the unauthorized possession of weapons. The cable attached an “Informal Inquiry” providing details of the allegation. I am not aware of any informal inquiry or judgment on the allegation.

3. In the absence of a formal judgement, and in the interests of fairness to a staff member who served the United Nations in Afghanistan in important capacities over the past several years, I would be most grateful if you could place in [the Applicant’s] file his own statement (attached) responding to the allegations of being in unauthorized possession of weapons.

16. In follow-up to the above note dated 25 July 2008, the Officer-in-Charge of the Administrative Law Unit of OHRM prepared a note dated 4 August 2008 for the Applicant’s personnel file, stating:

Note to the Official Status [F]ile of [the Applicant]

The Under-Secretary-General for Peacekeeping Operations requested by a note to the Under-Secretary-General for Management dated 25 July 2008 that a response to the allegations from [the Applicant] dated 23 July 2008 be placed on [the Applicant’s] [O]fficial [S]tatus [F]ile.

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Your letter dated 2 December 2008 addressed to the Secretary-General, requesting administrative review, has been received at this office on 31 December 2008. In accordance with staff rule 111.2(a)(ii), the two-month period for review of the administrative decision will begin to run from the date we received your request at this office.

If the Secretary-General replies to your request and you are not satisfied with the review of the administrative decision, you may appeal against the answer within one month of the receipt of that reply, pursuant to staff rule 111.2(a)(i). Likewise, if the Secretary-General does not reply to your request for review within two months of the receipt of your letter at this office, you may appeal against the original administrative decision within one month of the expiration of the two-month period for review, i.e., three months from

I refer to your letter of 2 December 2008 addressed to the Secretary-General, requesting administrative review of the decision not to extend your appointment with the United Nations, following your initial service on a[n] ... appointment of limited duration with [UNAMA].

Please find attached a copy of a memorandum dated 9 February 2009 from ... Officer-in-Charge, Field Personnel Division, [DFS], together with supporting documentation. This material indicates that the decision not to extend your appointment was taken in accordance with the Organization's regulations, rules and policies. The material further indicates that you were consulted about, and agreed with, the decision in March 2008. We would note that as a consequence of this, your contention that you were unaware of any decision concerning your contractual status as at the date of request for review (December 2008) would not appear to be supported by the record. As such, your request for review is not receivable, as it has not been submitted within the time limits specified by staff rule 111.2(a).

...

This letter constitutes the review of the administrative decision. Should you not be satisfied with this review, you may appeal against the answer within one month of the receipt of that reply, pursuant to staff rule 111.2(a)(i).

The foregoing notwithstanding, the Secretary-General always reserves the right to raise the issue of receivability and competence, as deemed appropriate.

The Applicant disputes receiving this letter prior to the commencement of the present proceedings.

23. By memorandum dated 15 May 2009, signed by the Director, DFS, the report of the investigation panel was referred to the Assistant Secretary-General, OHRM. The memorandum stated that in the view of DFS the Applicant's actions were not sufficient to warrant disciplinary action and recommended that, considering that the Applicant was separated from the Organization and it was therefore no longer feasible to impose a reprimand, the case be considered closed and the notes be expunged from his personnel file.

understand that a resolution is imminent. I would therefore kindly ask for your further patience and you can expect to hear from us shortly.

27. On 12 August 2009 a Legal Officer of the Administrative Law Unit of OHRM sent an email to the Applicant in response to his 16 July 2009 email to the Assistant Secretary-General, OHRM. This email refe

been placed on your Official Status [F]ile. Accordingly, I suggest you contact DFS directly about the matter.

28. On 13 January 2010 the Applicant filed his application with the Tribunal, along with a request for a waiver of time limits.

29. On 25 January 2010 the Assistant Secretary-General, DFS, informed the Applicant of the outcome of the fact-finding investigation convened by UNAMA in relation to the Alleged Weapons Incident. The Assistant Secretary-General's letter stated, *inter alia*

The evidence adduced by the Panel suggests that the allegation that you were in the unauthorized possession of weapons was not substantiated. However, your actions of facilitating the arrangements of the weapons to the Chowkidars, without recourse to UNAMA management or the Department of Safety and Security, suggests an error in judgment. DFS has determined that this error in judgment is not sufficiently grave to warrant disciplinary measures, however it would have warranted a letter of reprimand had you still been in service of the Organization.

DFS will insert a Note in your Official Status [F]ile which will indicate that, in the event you are offered a reappointment with the United Nations, you will be reprimanded for your involvement in an incident which occurred in Afghanistan in 2007, and a corresponding letter of reprimand will be placed in your Official Status [F]ile at that time.

[OHRM] will expunge from your Official Status [F]ile its Note dated 10-April 2008 which indicated that there was an unresolved matter at the time of your separation from the Organization, together with its subsequent note which attached your response, dated 23 July 2008, to the allegations against you.

30. Subsequently, a note dated 25 January 2010 and signed by the Assistant Secretary-General, DFS, was placed in the Applicant's personnel file. The note stated:

Pending administrative action in the case of [the Applicant]

[The Applicant] separated from service with [UNAMA] upon the expiration of his contract on 31 March 2008.

it became apparent to the Applicant that nothing was actually being done to resolve the outstanding issues;

c. Although under *Costa* 2010-UNAT-036 the Dispute Tribunal has no power to suspend or waive any ~~dead~~ deadlines in relation to management evaluation, which was introduced in July 2009, the Tribunal is empowered to waive the deadlines for administrative review, which existed prior to July 2009;

d. If the Administration chooses to receive a request for review, by undertaking a review and responding to it, albeit in the negative, it can no longer argue that the application is not receivable. As the Administrative Law Unit replied to the Applicant's request for administrative review on 2 January 2009, it must be understood that the Respondent "clearly and explicitly" waived the time limit for filing of the Applicant's request for review. Further, the Respondent's administrative review letter dated 16 February 2009—although not received by the Applicant—"unequivocally state[d] that it amount[ed] to the 'review of the administrative decision'" and thus "it [was] entirely reasonable for [the Applicant] to assume that he [was] entitled to appeal that decision to the (then) JAB";

e. The request for administrative review was not filed on time because "[a]lthough it transpired that the impugned decision was effected on 1 April 2008, the Applicant was led to believe that efforts were underway to resolve the matter". He was in negotiations with various senior United Nations officials, who led him to believe either that Tc [21. He was [u8J7-2(nis)/TJ 07 was

Respondent's submissions

33. The Respondent's principal contentions, pertaining to the matters within the scope of the present case, may be summarised as follows:

Receivability

a. The present application is not receivable. The Applicant received a written notification of the decision not to renew his contract on 5 February 2008. Pursuant to former staff rule 111.2(a), the Applicant had two months from the date of the notification of the decision to file a request for administrative review. However, the Applicant's request for review was filed

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not have been receivable due to his failure to file an appeal with the JAB (prior to 1 July 2009) or a timeous application with the Dispute Tribunal (after 1 July 2009), or to demonstrate exceptional circumstances such as to warrant a waiver of the applicable time limits.

48. Pursuant to former staff rule 111.2(a), the Secretary-General replied to a request for administrative review, the staff member concerned could file an appeal with the JAB within one month of the receipt of such reply. If the Secretary-General did not reply to the letter within one month in respect of a staff member stationed in New York or within two months in respect of a staff member stationed elsewhere, the staff member could appeal against the original administrative decision within one month of the expiration of the specified time limit.

49. Thus, whether or not the Applicant received the letter dated 16 February 2009 informing him of the outcome of the administrative review is, in the end, not material. Pursuant to former staff rule 111.2(a), if he did not receive a response he should have appealed the contested decision within one month of the expiration of the two-month time period allotted for administrative review. This was not only stated in clear terms in the former Staff Rules, but was also communicated to the Applicant by the Administrative Law Unit in its letter dated 2 January 2009. Since the Administration received the Applicant's request for administrative review on 31 December 2008, pursuant to staff rule 111.2(a)(ii), the Applicant had to file his appeal with the JAB within three months of that date, i.e., by 31 March 2009 at the latest. Instead, the Applicant filed the present application with the Dispute Tribunal, more than nine months after the expiration of the time limit.

50. This extensive delay took place despite further communication from the Administrative Law Unit, which informed the Applicant by email dated 12 August 2009 that the time limit for his appeal had run out and that he could obtain legal assistance from OSLA in relation to this case. Even after this email, the Applicant waited for approximately five months before filing his application with the

Dispute Tribunal. It is appropriate to note here that, as the Tribunal stated in *Trajanovska* UNDT/2010/032 (upheld in *Trajanovska* 2010-UNAT-074), the transition to the new internal justice system is generally not an exceptional circumstance that would warrant an extension of the time limits.

51. The Applicant further submitted that the delay in filing his application with the Tribunal was due to him not being aware of the existence of OSLA until December 2009. It is an applicant's responsibility to pursue her or his case and lack of counsel normally does not constitute an exceptional circumstance. *Kitu* UNDT/2010/025, *Hunt-Matthes* UNDT/2011/064). Furthermore, the Applicant was advised by the Administrative Law Unit on 2 January 2009 and 12 August 2009 to contact the former Panel of Counsel (prior to 1 July 2009) and OSLA (after 1 July 2009) to obtain legal assistance.

Observation

52. The Tribunal notes that the Director of DFS, who sent the memorandum of 15 May 2009, found it no longer feasible to impose a reprimand on the Applicant upon the cessation of the employment relationship, but the Assistant Secretary-General of DFS placed, on 25 January 2010, notes on the Applicant's file, imposing what amounts to a deferred reprimand. In light of the findings concerning the scope of the present application and in view of its conclusion that the present case is not receivable, the Tribunal is constrained not to make any findings with regard to whether the notes placed on the Applicant's file were lawful and in compliance with the established procedures, or regarding the wisdom and propriety of the reservation or suspension of a disciplinary administrative sanction in perpetuity.

Conclusion

53. This application is time-barred as a result

Even if not for that, it would have been time barred as the Applicant failed to file an appeal with the JAB (prior to 1 July 2009) a timeous application with the Dispute Tribunal (after 1 July 2009), or to demonstrate exceptional circumstances such as to warrant a waiver of the applicable time limits.

54. The application is not receivable and is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 27th day of May 2011

Entered in the Register on this 27th day of May 2011

(Signed)

Santiago Villalpando, Registrar, New York