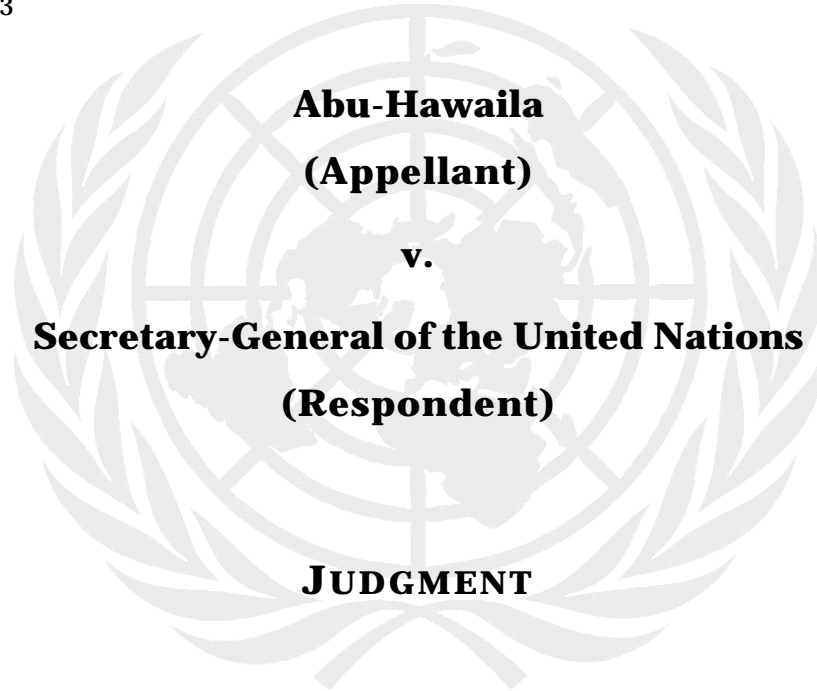




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-113



Before: Judge Luis María Simón, Presiding
Judge Jean Courtial
Judge Inés Weinberg de Roca

Judgment No.: 2011-UNAT-118

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Appellant: Amal Oummih

Counsel for Respondent: Melanie Shannon

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. In this case, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that the application by Jamil Abu-Hawaila (Abu-Hawaila) was time-barred. This Tribunal affirms the Judgment of the Dispute Tribunal. The Administration's letter containing a settlement offer did not constitute the Administration's response to Abu-Hawaila's request for management evaluation, and Abu-Hawaila filed his application after the expiry of the applicable time limit. The settlement negotiations between the parties did not toll the applicable time limits as the negotiations were not conducted by the Office of the Ombudsman.

2. There are no grounds for overturning the finding by the Dispute Tribunal that there are no exceptional circumstances justifying a waiver of the time limits in this case. The appeal by Abu-Hawaila is dismissed.

Facts and Procedure

3. Abu-Hawaila, a driver, was a locally recruited field staff member employed by the World Food Programme (WFP) in its Office in Amman, Jordan. His fixed-term appointment commenced on 12 September 1999. Locally recruited field staff members of WFP are appointed by the Executive Director of WFP and are subject to the United Nations Staff Regulations and Rules.

4. As a result of a back injury sustained while on duty in December 2006, Abu-Hawaila took extended periods of sick leave until his separation from service on 31 July 2009. In May 2009, WFP informed Abu-Hawaila that he was not eligible for a disability benefit and that his appointment, which was due to expire on 30 June 2009, would not be renewed. Abu-Hawaila's appointment was extended until 31 July 2009 to cover the duration of his certified sick leave.

5. By memorandum dated 21 July 2009, the Officer-in-Charge of the WFP Office in Amman informed Abu-Hawaila that his last day of service would be 31 October 2009, she had "approved [his] Agreed-Upon separation from the Programme under UN Staff Regulation 9.3(a)(vi)", and set out the calculation of his termination indemnity.

6. By letter dated 17 September 2009, received on 19 September 2009, Abu-Hawaila requested a management evaluation of the decision to separate him from service. By letter dated 29 September 2009, the WFP General Counsel informed Abu-Hawaila that he would receive a management evaluation “from the Executive Director not later than 3 November 2009”, the deadline for the response to the request for management evaluation. No response was sent to Abu-Hawaila.

7. By letter dated 24 November 2009, marked “PRIVILEGED & CONFIDENTIAL FOR SETTLEMENT PURPOSES ONLY” (Settlement Offer), the WFP General Counsel reiterated the earlier separation offer. Counsel for Abu-Hawaila and WFP exchanged correspondence until February 2010 regarding the separation of Abu-Hawaila and the deadline to respond to the Settlement Offer.

8. On 22 February 2010, Abu-Hawaila filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision to separate him from service. On 26 March 2010, the Secretary-General filed a motion to dismiss the application on the grounds of non-receivability as there was no response to the request for management evaluation. On 15 April 2010, the Dispute Tribunal held a directions hearing and the Judge drew the parties’ attention to the issue of receivability, noting that the application should have been filed on or before 1 February 2010, 90 calendar days after the deadline for the response to the request of management evaluation. The proceedings were suspended until 13 May 2010 to enable settlement discussions to continue. No settlement was reached.

9. On 3 June 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/102, which dismissed the application on the ground that it was time-barred. Abu-Hawaila contended that the Settlement Offer, dated 24 November 2009, was the Administration’s response to his request for management evaluation and he filed his application on 22 February 2010, within the 90-day time limit. The Dispute Tribunal found that the Settlement Offer was not the “response by management” to the request for management evaluation within the meaning of Article 8(1) of the Statute of the Dispute Tribunal (UNDT Statute), or the “outcome of the management evaluation” under provisional Staff Rule 11.4. The purpose of the Settlement Offer was not to respond Abu-Hawaila’s request for management evaluation and did not contain any decision with respect to the request.

10. The Dispute Tribunal also found that the time limit for filing the application was not tolled by the settlement negotiations which ended on 17 February 2010. Under the UNDT Statute and provisional Staff Rules, only informal resolution conducted by the Office of the Ombudsman could suspend the time limit to file an application with the Dispute Tribunal. Further, the Dispute Tribunal found that there were no exceptional circumstances to warrant a waiver of the time limit under Article 8(3) of the UNDT Statute and Article 7(5) of the Rules of Procedure of the Dispute Tribunal (UNDT Rules). The likelihood of success of the application was not a factor to be taken into account and the Dispute Tribunal would not excuse Abu-Hawaila for the failure of his counsel to file the application within the statutory time limit.

11. On 19 July 2010, Abu-Hawaila filed an appeal against the Judgment with the Appeals Tribunal. On 3 September 2010, the Secretary-General filed an answer to the appeal.

Submissions

Abu-Hawaila's Appeal

12. Abu-Hawaila submits that the UNDT erred on a question of fact in finding that the Settlement Offer was not the response to his request for management evaluation or the outcome of the management evaluation. The Settlement Offer contained several decisions with respect to the claims made in the request for management evaluation.

13. Abu-Hawaila requests that the Appeals Tribunal receive additional evidence under Article 2(5) of the Statute of the Appeals Tribunal (Statute). The additional evidence is a letter from WFP, dated 29 October 2009, informing Abu-Hawaila that his request for management evaluation was under consideration and he could expect to receive a reply by 24 November 2009 (the date of the Settlement Offer). Language and geographic barriers between counsel and Abu-Hawaila prevented the letter from being discovered earlier in the proceedings.

14. Abu-Hawaila argues that the Dispute Tribunal made an error of law in holding that the time limits to file an application were not tolled during the settlement negotiations. In its resolution 63/253, the General Assembly expressed its preference for informal resolution of disputes. Further, by choosing to engage in settlement negotiations rather than respond to

the request for management evaluation, the Secretary-General is estopped from asserting that the claim is time-barred.

15. In the alternative, Abu-Hawaila contends that the Dispute Tribunal erred on a question of fact in holding that there were no exceptional circumstances to justify a waiver of the time limits to file his application. Both parties were operating under a mistake of law in believing that the time limits for responding to the request for management evaluation and filing the application were tolled by the settlement negotiations.

16. Abu-Hawaila requests that the Appeals Tribunal reverse the Judgment and remand the case to the Dispute Tribunal for a trial on the merits.

Secretary-General's Answer

17. The Secretary-General argues that Abu-Hawaila has not established that the Dispute Tribunal made any errors warranting a reversal of its decision that the application is not receivable. The Dispute Tribunal correctly found that the Settlement Offer was not a response to the request for management evaluation. The additional evidence relied upon by Abu-Hawaila is not admissible under Article 2(5) of the Statute as it was known to him at the time of the hearing before the Dispute Tribunal and should have been disclosed before the Dispute Tribunal.

18. The Secretary-General submits that the Dispute Tribunal correctly concluded that the time limits for filing the application were not tolled by the informal settlement negotiations, and that there were no exceptional circumstances warranting a waiver of the time limits.

19. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and reject the appeal in its entirety.

Considerations

20. Two preliminary issues must first be addressed by this Tribunal. We reject Abu-Hawaila's request for an oral hearing as the pleadings filed by the parties address the relevant issues in sufficient detail. Second, Abu-Hawaila requests that this Tribunal admit additional evidence under Article 2(5) of the Statute. There are no exceptional

circumstances which justify the receipt of the evidence in this case as the additional evidence was known to Abu-Hawaila and should have been presented to the UNDT.

21. Article 8(1) of the UNDT Statute reads, in part, as follows:

1. An application shall be receivable if:

...

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

...

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

...

22. Article 8(3) of the UNDT Statute provides that “[t]he Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.”

23. Provisional Staff Rule 11.1 entitled “Informal resolution” states in paragraph (c) that “[t]he conduct of informal resolution by the Office of the Ombudsman, including mediation, may result in the extension of the deadlines applicable to management evaluation and to the filing of an application with the United Nations Dispute Tribunal, as specified in staff rules 11.2(c) and (d) and 11.4(c) below.”

24. In the present case, the issue of whether Abu-Hawaila filed his application with the UNDT within the applicable time limit turns on whether the Settlement Offer from the WFP Administration, dated 24 November 2009, was the Administration's response to Abu-Hawaila's request for management evaluation.

25. This Tribunal is not persuaded by the arguments made by Abu-Hawaila that the UNDT erred in its Judgment, and the 90-day time limit to file his application ran from the receipt of the Settlement Offer.

26. The Settlement Offer was made approximately three weeks after 3 November 2009, the date of expiry of the 45-day deadline for the Administration to respond to the request for management evaluation under Article 8(1) of the UNDT Statute. The Settlement Offer was clearly marked as confidential and for settlement purposes only.

27. Despite the fact that the letter refers to the request for management evaluation and addresses the claims made by the staff member, we share the views of Judge Laker set out in paragraphs 36 and 37 of the UNDT Judgment, in which he notes that there was no reference to a final decision on evaluation nor guidance on future courses of action by the staff member. The settlement purpose was clearly stressed throughout the letter in such a way that would not allow any party assisted by counsel, like Abu-Hawaila, to reasonably conclude that the letter, sent after the deadline for a response to the request for management evaluation, was the management evaluation.

28. At the time of receipt of the Settlement Offer, the time limit to file the application to the UNDT had already run for approximately three weeks. In these circumstances, nothing prevented Abu-Hawaila, for instance, from filing his application or at least applying for a waiver or extension of the time limit to file it under Article 8(3) of the UNDT Statute. But no action was taken, and the main attitude adopted was to postpone the decision about the Settlement Offer.

29. This Tribunal also holds that the exceptional suspension of time limits provided for under Article 8(1) of the UNDT Statute and provisional Staff Rule 11.1 applies only to informal dispute resolution conducted through the Office of the Ombudsman. The suspension of time limits cannot be extended by analogy to other informal dispute resolution procedures, precisely because of its exceptional character. Exceptions to time limits and deadlines must be interpreted strictly and are not subject to extension by analogy.

30. Finally, the power given to the UNDT by Article 8(3) of its Statute to suspend or waive any deadlines, except those for management evaluation, must be exercised with caution and under the discretion of the Trial Judge. The exercise of discretion by the

Trial Judge may be overturned on appeal only if the decision taken appears to be clearly unreasonable. In the present case, this Tribunal considers that the decision was reasonable and there are no grounds for overturning it.

Judgment

31. For the foregoing reasons, this Tribunal affirms the Judgment under appeal.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Courtial

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar