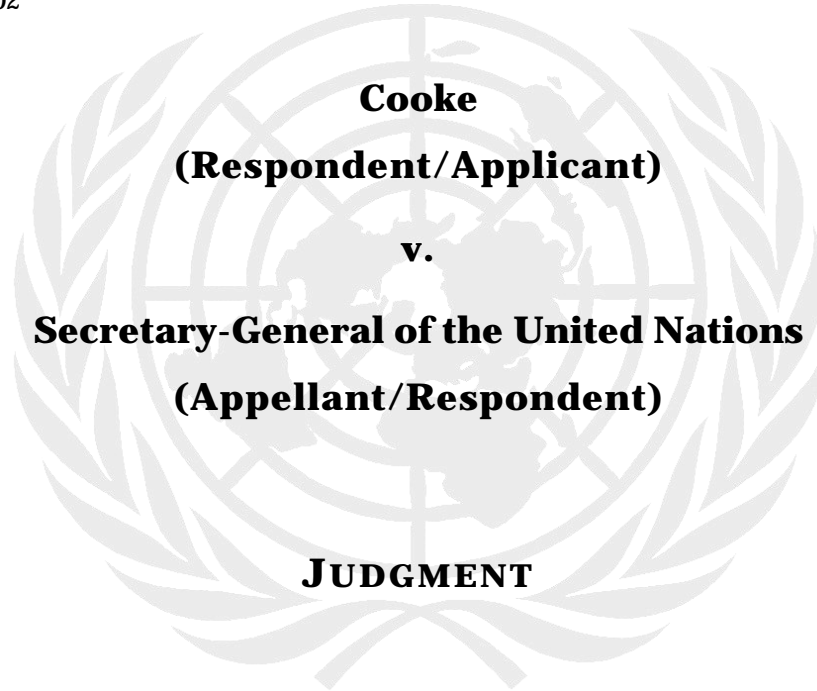




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2012-302



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**Before:** Judge Rosalyn Chapman, Presiding  
Judge Sophia Adinyira  
Judge Richard Lussick

**Judgment No.:** 2012-UNAT-275

**Date:** 1 November 2012

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Seth Levine

**Counsel for Appellant/Respondent:** Amy Wood

**JUDGE ROSALYN CHAPMAN**, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment on Receivability No. UNDT/2011/216, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 28 December 2011 in the case of *Cooke v. Secretary-General of the United Nations*. The Secretary-General appealed on 27 February 2012, and Mr. George Cooke answered on 30 April 2012.

### **Synopsis**

2. On 15 April 2010, Mr. Cooke was summarily dismissed for misconduct by the United Nations Children's Fund (UNICEF). On 29 October 2010, he filed an application before the Dispute Tribunal challenging the summary dismissal, without making a prior written request for waiver of the filing deadline, as required by Article 8(3) of the UNDT Statute. The UNDT, on its own motion, waived the time limit and found Mr. Cooke's application was receivable in Judgment No. UNDT/2011/216. The Secretary-General appeals the Judgment. This Tribunal determines the UNDT cannot waive the filing time limit on its own motion, without the applicant making a prior written request. This Tribunal further determines Mr. Cooke's application was not timely and not receivable, and reverses the UNDT's Judgment.

### **Facts and Procedure**

3. Mr. Cooke was employed by UNICEF for more than ten years. His most recent posting was as Deputy Representative at the P-4 level in the UNICEF Malawi Country Office, effective 2008.

4. On 17 November 2009, the UNICEF Office of Internal Audit issued an investigative report about Mr. Cooke. On 12 January 2010, UNICEF sent a Charge Letter to Mr. Cooke setting forth the nature of the misconduct charges against him and, on 27 January 2010, Mr. Cooke responded to the charges. On 15 April 2010, after consideration of the foregoing documents, UNICEF's Deputy Executive Director sent Mr. Cooke a letter of summary dismissal on the basis of the following: (i) physical assault on a civilian while using his status as a UNICEF staff member for intimidation purposes to support his private claims; (ii) sexual harassment of three female UNICEF staff members; and, (iii) abuse of authority and the misappropriation of UNICEF resources for private purposes by requesting subordinates to prepare a private academic paper.

5. The summary dismissal letter of 15 April 2010 to Mr. Cooke concluded by stating:

[Y]our actions constitute willful and serious misconduct and warrant dismissal in accordance with United Nations Staff Regulation 10.2. *Your dismissal will take place with immediate effect on the date of receipt of this letter* (emphasis added).

6. On 21 April 2010, Mr. Cooke sent an email to UNICEF's Deputy Executive Director acknowledging receipt of the summary dismissal letter and requesting that he review the summary dismissal decision, "based on [Mr. Cooke's] track record with this organization which [Mr. Cooke] ha[s] served for over ten years with dedication and commitment".<sup>1</sup> Mr. Cooke also inquired about how to pick up his personal effects, turn over his house to its owner and obtain certain benefits. Mr. Cooke did not receive a response to his email.

7. On 29 June 2010, Mr. Cooke sent an email to UNICEF's Executive Director requesting that he intervene in the summary dismissal decision and advising UNICEF's Executive Director he had sent a similar request to UNICEF's former Executive Director, as well.<sup>2</sup>

8. On 8 September 2010, the Chief of the Policy and Administrative Law Section of UNICEF's Division of Human Resources, after telephone conversations with Mr. Cooke, advised Mr. Cooke in writing that the summary dismissal was a final decision and, if he wished to contest it, he must comply with the time limit in the staff rules for bringing an application before the UNDT.

9. Mr. Cooke did not make a written request to the UNDT to suspend or waive the deadline for filing his application.

10. On 27 October 2010, Mr. Cooke filed an application before the UNDT for review of his summary dismissal, and the UNDT Registrar served the application and its annexes on the Secretary-General.

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<sup>1</sup> This email was merely Mr. Cooke's request for reconsideration of the administrative decision to summarily dismiss him. However, the Dispute Tribunal mischaracterized the email, stating Mr. Cooke was "seeking amicable solution to his predicament".

<sup>2</sup> The Dispute Tribunal also mischaracterized this email, calling it an attempt by Mr. Cooke to seek a settlement of his situation, noting Mr. Cooke stated, in part, "*I feel it is crucial that you intervene so as to amicably resolve this matter...*" (emphasis in original). Once again, this email was merely a request for reconsideration of the decision to summarily dismiss Mr. Cooke.

11. The Secretary-General did not file a reply within 30 days of receipt of Mr. Cooke's documents, as required by Article 10(1) of the UNDT Rules of Procedure (UNDT Rules), and, on 14 December 2010, the UNDT Registry advised the Secretary-General of his tardiness. On the same day, the Secretary-General filed a motion for leave to re-enter the proceedings and his reply. Mr. Cooke then filed an opposition to the Secretary-General's motion. On 13 January 2011, the UNDT granted the Secretary-General's motion to re-enter the proceedings and ordered the reply be filed.

12. In his reply, the Secretary-General challenged the timeliness and receivability of Mr. Cooke's application and filed a motion for summary judgment on the issue of timeliness.

13. On 28 December 2011, the UNDT issued its Judgment on Receivability No. UNAT/2011/216, denying the Secretary-General's motion for summary judgment and concluding Mr. Cooke's application was receivable. The UNDT determined it was empowered under Articles 19 and 35 of the UNDT Rules to waive on its own motion the statutory 90-day deadline for Mr. Cooke to file his application and found "exceptional circumstances" existed to waive the deadline. The "exceptional circumstances" were UNICEF's failure to respond to Mr. Cooke's repeated attempts to "amicably resolve" his situation and its failure to advise Mr. Cooke, at the time he received the summary dismissal letter, of his review rights and the mechanisms for challenging his summary dismissal.

### **Submissions**

#### **Secretary-General's Appeal**

14. The Appeals Tribunal has jurisdiction to hear the appeal under Article 2(1) of the Appeals Tribunal Statute.

15. Mr. Cooke's application was not timely because it was not filed within 90 days of his receipt of the summary dismissal letter, as required by Article 8(1) of the UNDT Statute and Article 7(1) of the UNDT Rules.

16. The UNDT exceeded its competence and erred on a question of law by not adjudging Mr. Cooke's application as untimely and not receivable, *ratione temporis*.

17. The UNDT exceeded its competence and erred on a question of law by waiving, on its own motion, Mr. Cooke's deadline to file his application when Mr. Cooke had not made a written request for the waiver. The applicant's written request for waiver is required before the UNDT may consider the waiver of a filing deadline under Article 8(3) of the UNDT Statute.

18. The UNDT exceeded its competence and erred on a question of law by finding exceptional circumstances under Article 8(3) of the UNDT Statute to waive the deadline for Mr. Cooke to file his application. Neither Mr. Cooke's attempts to "amicably resolve" his summary dismissal and UNICEF's delayed response to those attempts nor its failure to advise Mr. Cooke, at the time he received the summary dismissal letter, of his rights and the mechanisms for challenging his dismissal constitute exceptional circumstances. Mr. Cooke was not engaged in mediation and staff members are reasonably expected to be aware of the rules governing their employment.

**Mr. Cooke's Answer**

19. Article 19 of the UNDT Rules empowers the UNDT to waive, on its own motion, filing deadlines in order to assure staff members have equitable access to administrative justice even if the staff member does not make a written request for waiver. A written request is merely "a technicality" and the UNDT can infer an implicit request for waiver to avoid unfairness and to advance equitable access to justice.

20. Deadlines may be waived if exceptional circumstances exist. Exceptional circumstances are circumstances beyond the control of the applicant. In Mr. Cooke's case, the exceptional circumstances were UNICEF's failure to respond to his attempts to resolve his situation. UNICEF cannot remain silent while the time to file an application is running. The provision in Article 8(3) of the UNDT Statute that allows the UNDT to waive Mr. Cooke's filing deadline is not the same provision in Article 8(3) that prohibits the UNDT from suspending or waiving the deadlines for management evaluation. This Tribunal, thus, need not follow the jurisprudence addressing the latter provision.

21. Article 8(1)(d)(iv) of the UNDT Statute allows the filing of an application within 90 days after mediation has broken down and that provision applies to Mr. Cooke. After receiving the summary dismissal letter, Mr. Cooke sought to amicably resolve his situation,

which is akin to mediation, and he did not know until 8 September 2010 that it could not be resolved and UNICEF's decision was final. Mr. Cooke's application of 27 October 2010 was timely because it was within 90 days of 8 September 2010.

22. The 90-day statutory time limit of Article 8(1)(d)(ii) commenced to run on 9 September 2010, the day after Mr. Cooke was advised that UNICEF's decision was final and that, if he wanted to contest the decision, he must comply with the rules for bringing the matter before the UNDT. Mr. Cooke's application was timely because it was brought within 90 days of 8 September 2010.

23. Annex 2 to the Respondent's answer, a copy of a letter to Mr. Cooke denying representation by the Office of Staff Legal Assistance on the appeal, is not relevant to this proceeding. The Appeals Tribunal must exercise its own discretion, as the UNDT did.

### **Considerations**

24. Preliminarily, Mr. Cooke does not contest this Tribunal's jurisdiction over the appeal or contend it is not receivable.

25. Article 8 of the UNDT Statute sets forth the deadlines for filing applications before the Dispute Tribunal. In Mr. Cooke's case, "where a management evaluation of the contested decision is not required", Article 8(1)(d)(ii) provides that "[a]n application shall be receivable" by the UNDT if it is filed "within 90 calendar days of the applicant's receipt of the administrative decision". This statutory deadline is restated in Article 7(1)(c) of the UNDT Rules.

26. The Dispute Tribunal was well aware of the 90-day statutory time limit, stating in part:

The Applicant's letter of dismissal was dated 15 April 2010 and he acknowledged receipt soon thereafter. In the light of art. 8.1(d)(ii) of the Statute and art. 7(1)(c) of the Rules of Procedure of the Dispute Tribunal, the Tribunal notes that the Applicant was due to file his Application by late July 2010. In other words, *on the mere reading of the provisions, it would appear that the Application was not filed in time* (emphasis added).

Mr. Cooke was required to comply with the 90-day time limit in Article 8(1)(d)(ii). This Tribunal has repeatedly and consistently strictly enforced the time limits for filing applications and appeals.<sup>3</sup> Strict adherence to filing deadlines assures one of the goals of our new system of administration of justice: the timely hearing of cases and rendering of judgments.<sup>4</sup> Under the old system of administration of justice, the various entities involved, including the former Administrative Tribunal, were “perhaps too generous in extending or waiving time”.<sup>5</sup>

27. Article 8(3) of the UNDT Statute authorizes the Dispute Tribunal to waive the time limits for filing applications in certain situations, as follows:

The 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* (emphasis added).

28. Article 7(5) of the UNDT Rules describes how an applicant may submit a written request for waiver and requires the applicant to explain “the exceptional circumstances” that justify the request.

29. Mr. Cooke did not submit a prior written request for waiver, as required by Article 8(3) of the UNDT Statute. Under Article 8(3) of the UNDT Statute, the applicant’s submission of a written request for waiver is a prerequisite, or condition precedent, to the UNDT being competent to waive the filing deadline in Article 8(1). The UNDT cannot infer such request has been made where there is no prior written request from the applicant. The UNDT simply cannot ignore the statutory requirement of a written request and, nevertheless, waive the filing deadline; it is not competent to do so. Yet, that is what the UNDT did in the present case. In so doing, the UNDT exceeded its competence and committed an error of law.

30. Correspondingly, although Article 8(3) authorizes the UNDT to waive the filing deadline when the applicant submits a request for waiver, it specifies such waiver must be

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<sup>3</sup> *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-043. See also *Laeijendecker v. United Nations Joint Staff Pension Board*, Judgment No. 2011-UNAT-158; *Thiam v. Secretary-General of the United Nations*, Judgment No. 2011-144; and *Ibrahim v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-069.

<sup>4</sup> *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

<sup>5</sup> *Mezoui*, 2010-UNAT-043, para. 21.

“for a limited period of time and only in exceptional cases”. The UNDT cannot consider whether exceptional circumstances exist unless the applicant has submitted a prior written request for waiver.<sup>6</sup> In other words, unless the applicant has made a written request for waiver, the UNDT cannot waive the filing deadline based on “exceptional circumstances”; it is not competent to do so. Yet, that is what the UNDT did in the present case. In so doing again, the UNDT exceeded its competence and committed an error of law.

31. Apart from Article 8(3), the UNDT relied on Articles 19 and 35 of the UNDT Rules to “empower” it to waive on its own motion Mr. Cooke’s filing deadline. Article 19 pertains to case management, stating:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, 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.

32. Article 35 pertains to Article 8(3) of the UNDT Statute, stating:

*Subject to article 8.3 ...*, the President, or the judge or panel hearing a case, may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require (emphasis added).

33. Neither Article 19 nor Article 35 “empowers” the UNDT to waive on its own motion the 90-day statutory filing deadline. Article 19 addresses only matters of case management, such as the UNDT’s order permitting the Secretary-General to re-enter these proceedings and to file a tardy response. Article 35 cannot be considered separate from Article 8(3) of the UNDT Statute, to which it is “[s]ubject”. This means compliance with Article 8(3) is a prerequisite to the application of Article 35. Since Mr. Cooke did not submit a written request for waiver as required by Article 8(3) of the UNDT Statute, Article 35 a fortiori cannot be the basis to waive the filing deadline for Mr. Cooke’s application.

34. A basic tenet of statutory construction prohibits courts and administrative tribunals from interpreting rules in a manner that conflicts with the statutory scheme; rather, rules

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<sup>6</sup> Mr. Cooke’s failure to submit a prior written request for suspension or waiver of the filing deadline, as required by Article 8(3) of the UNDT Statute and Article 7(5) of the UNDT Rules, prevented the UNDT from knowing the reasons Mr. Cooke alleged his case was an “exceptional case” warranting suspension or waiver. Without Mr. Cooke’s reasons, the UNDT considered factors this Tribunal generally has held do not constitute exceptional circumstances.



must be interpreted to be consistent with their enabling statutes. Yet, in the present case, the UNDT “interpreted” Articles 19 and 35 of the UNDT Rules in a manner to conflict with Articles 8(1) and 8(3) of the UNDT Statute. Clearly, the UNDT exceeded its competence and erred in waiving, on its own motion, the deadline for Mr. Cooke to file his application.

35. Our situation is analogous to that in which this Tribunal has repeatedly found the UNDT acted in excess of its competence and erred as a matter of law by waiving management evaluation deadlines despite a statutory prohibition against such waiver.<sup>7</sup>

36. The record clearly shows Mr. Cooke’s application was not timely and was not receivable, and the UNDT exceeded its competence and erred as a matter of law in receiving Mr. Cooke’s application. Mr. Cooke acknowledged receipt of the summary dismissal letter on 21 April 2010; he had 90 days thereafter to bring an application. However, he did not bring his application until 29 October 2010, more than three months late. As a long-time UNICEF employee, Mr. Cooke “is deemed to be aware” of the filing deadlines in the UNDT Statute.<sup>8</sup> Nothing prevented Mr. Cooke from filing his application in a timely manner and contemporaneously seeking intervention from UNICEF officials.

37. Mr. Cooke contends his application is timely, asserting the 90 days for filing commenced to run on 9 September 2010 -- the day after UNICEF advised him the summary dismissal decision was final -- instead of 21 April 2010. Mr. Cooke makes two arguments to support this contention. Neither argument has any merit. First, Mr. Cooke claims Article 8(1)(d)(iv) of the UNDT Statute, which pertains to situations “[w]here the parties have sought mediation”, applies. Although Mr. Cooke acknowledges mediation did not take place, he asserts the principle behind Article 8(1)(d)(iv) applies to his situation. Mr. Cooke is mistaken. That provision applies only where both parties have engaged in mediation, which is not Mr. Cooke’s situation.<sup>9</sup>

38. Mr. Cooke’s second argument is that the administrative decision to summarily dismiss him was not final until he received the letter from UNICEF advising him it was so. This argument ignores the explicit language of the summary dismissal letter, which states

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<sup>7</sup> *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108; *Trajanovska v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-074.

<sup>8</sup> *Diagne v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067.

<sup>9</sup> *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118.

Mr. Cooke's dismissal would "take place with immediate effect" upon receipt of the letter. Mr. Cooke's last day of work was when he received the summary dismissal letter, as he candidly acknowledged. Rather than promptly filing his application before the UNDT, Mr. Cooke began a campaign to get UNICEF officials to intervene in, or to reconsider, the dismissal decision. A staff member cannot extend the statutory deadline for filing an application by writing letters for reconsideration. Such conduct cannot and does not delay the running of the time limit.

### **Judgment**

39. Mr. Cooke's application was untimely and not receivable. Accordingly, the Judgment on Receivability is reversed.

Original and Authoritative Version: English

Dated this 1<sup>st</sup> day of November 2012 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Lussick

Entered in the Register on this 18<sup>th</sup> day of January 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar