



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

Judgment No. 2013-UNAT-384

**McCluskey
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Sophia Adinyira Judge Rosalyn Chapman
Case No.:	2013-438
Date:	17 October 2013
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Iain McCluskey against Judgment No. UNDT/2012/184, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 21 November 2012 in the case of *McCluskey v. Secretary-General of the United Nations*. Mr. McCluskey appealed on 29 January 2013 and the Secretary-General answered on 5 April 2013.

Facts and Procedure

2. Mr. McCluskey joined the Office of the United Nations High Commissioner for Refugees (UNHCR), Division of Information Systems and Telecommunications (DIST), in Geneva on 1 November 2006. His initial appointment was not awarded through a competitive selection process or endorsed by UNHCR's Appointments, Postings and Promotions Committee (APPC).

3. In April 2010, all DIST staff members were informed of the Division's restructuring and reorganization. However, due to the delay in the implementation of the DIST reform, the service of the affected staff members, including Mr. McCluskey, was renewed through 30 June 2011. In the meantime, UNHCR offered additional mitigating measures including an enhanced agreed separation package to staff members who had held fixed-term appointments for more than five years.

4. On 29 May 2011, after meeting with Mr. McCluskey, the Director of UNHCR's Division of Human Resources Management (DHRM) confirmed to him that his contract would also be extended from 1 July 2011 through 30 September 2011, even though he had not been appointed through the APPC. The Director then enumerated four options for Mr. McCluskey to consider, of which Option 1 (non-renewal) and Option 2 (charging his renewal against a DIST position) were, in the Director's opinion, something to be avoided or problematic. Option 3 was to extend Mr. McCluskey's contract through 30 September 2011, but on a special leave with full pay (SLWFP) basis. Option 4 was an agreed separation effective 30 June 2011 with associated indemnities. Mr. McCluskey responded that "[a]s both options 2 & 3 imply a contract extension in line with the other [fixed-term appointment] contract holders in DIST then I would like to request that this is initiated immediately". While confirming Mr. McCluskey's contract extension through 30 September 2011 on a SLWFP basis, the Director advised Mr. McCluskey that "[t]he extension to end September is made with no expectation of subsequent renewal or conversion. ... Your contract will only be extended beyond 30 September if there is a position against which to charge your salary."

5. In June 2011, Mr. McCluskey asked DHRM for calculation of Option 4, and he received the calculation. However, when Mr. McCluskey inquired about the necessary steps to secure Option 4, DHRM responded that as he had opted for his contract extension, he was no longer entitled to Option 4.

6. After his separation from service, on 23 November 2011, Mr. McCluskey requested management evaluation of the decision not to make Option 4 available to him. He filed an application against the same decision with the Dispute Tribunal on 9 April 2012.

7. On 27 August 2012, the Dispute Tribunal issued Order No. 136 (GVA/2012) in respect of Mr. McCluskey's case, in which it invited the parties to file objections, if any, to its judgment being rendered without an oral hearing.

8. In Judgment No. UNDT/2012/184, the UNDT rejected Mr. McCluskey's application. The UNDT concluded that the application was not receivable as time-barred. As Mr. McCluskey requested management evaluation on 23 November 2011, he had to file an application with the Dispute Tribunal by 26 March 2012. However, Mr. McCluskey did not file until 9 April 2012.

9. In the same Judgment, the UNDT also concluded that Mr. McCluskey's application lacked merit. In the view of the UNDT, Mr. McCluskey's contractual situation was different from that of his four colleagues, and it was within the discretion of the Administration to differentiate between staff members who had accrued five years of service and those who had not, such as Mr. McCluskey.

Submissions

Mr. McCluskey's Appeal

10. Mr. McCluskey requests that the Appeals Tribunal overturn the UNDT Judgment and order that Option 4 as originally offered to him be paid in full. Additionally, he requests compensation for the stress endured by him due to the overall mismanagement of his case.

11. Mr. McCluskey submits that the Office of Staff Legal Assistance (OSLA), which represented him before the UNDT, made a series of errors and failed to abide by its own Code of Conduct. The OSLA-assigned Legal Officer filed the underlying application for him with the UNDT on 9 April 2012, 13 days beyond the time limit.

12. Mr. McCluskey states that no OSLA representative ever alerted him to the possibility of his appeal being time-barred. He also states that he was not informed by OSLA of UNDT Order No. 136 (GVA/2012) and, consequently, could not make any comment concerning whether he wished an oral hearing or not.

13. Mr. McCluskey also makes submissions on the merits of his case. However, they are not summarized for the purpose of this Judgment.

The Secretary-General's Answer

14. The Secretary-General requests the Appeals Tribunal to affirm the UNDT Judgment and reject Mr. McCluskey's appeal as non-receivable and without merit.

15. The Secretary-General submits that the UNDT correctly concluded that the application was not receivable as it was time-barred. Mr. McCluskey requested management evaluation on 23 November 2011. Therefore, the deadline for responding to this request was 26 December 2011, and the deadline for Mr. McCluskey's application with the UNDT was 26 March 2012. The application filed by Mr. McCluskey on 9 April 2012 was, thus, time-barred. This decision of the UNDT is in line with the jurisprudence of the Appeals Tribunal.

16. The Secretary-General interprets Mr. McCluskey's blame on OSLA for missing the time limit for his UNDT application as an attempt to characterize his case as satisfying the exceptional cases criterium under Article 8(3) of the Statute of the UNDT. The Secretary-General submits that Mr. McCluskey's circumstances are not exceptional. It is a staff member's duty to adhere to deadlines and to diligently pursue his or her case. Mr. McCluskey did not, even after OSLA discontinued his representation, make a request for suspension or waiver of the filing deadline.

17. The Secretary-General's submissions on the merits of the case are not summarized for the purpose of this Judgment.

Considerations

18. The UNDT did not commit any error when it determined that the application before it was not receivable as it was time-barred.

19. Whether that circumstance was due to the way in which Mr. McCluskey's counsel handled the case or the fact that the staff member was not aware of the applicable deadline or the UNDT Order No. 136 (GVA/2012), those elements would not have any different consequence in the outcome of the case before the UNDT or this Tribunal.

20. The reason for the above consideration is, first, the circumstance that the actions and omissions of counsel legally reflect the persons they represent. The application was time-barred and must be considered so with respect to Mr. McCluskey. The determination of the eventual responsibility of the counsel for that circumstance is only relevant to the relationship between the client and his counsel, and does not affect the case before the UNDT. The possible liability of the counsel constitutes a matter for a hypothetical separate case. Consequently, the application was not receivable.

21. Secondly, even after declaring Mr. McCluskey's application time-barred, the UNDT nonetheless analyzed the merits of the case, although it was technically improper for it to conduct such an examination.

22. Perhaps for the purpose of explaining to Mr. McCluskey that he was not prejudiced by his counsel and that his case had no merit, the UNDT went beyond its duties and expressly found that the claim had no merit since it was clear that Mr. McCluskey was not in the same situation as the colleagues with whom he compared himself. Thus, he was not entitled to what he was requesting.

23. Hence, even if the appeal would have been receivable, *ratione temporis*, the outcome of the case would have been the same: the claim could not succeed.

24. The Appellant merely makes statements and refers to facts that were not timely contested, without providing any evidence or contesting the reasoning of the first instance Judgment. Therefore, the grounds for appeal become unsubstantiated and the Judgment must be affirmed.

Judgment

25. The appeal is dismissed and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 17th Day of October 2013 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Chapman

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar