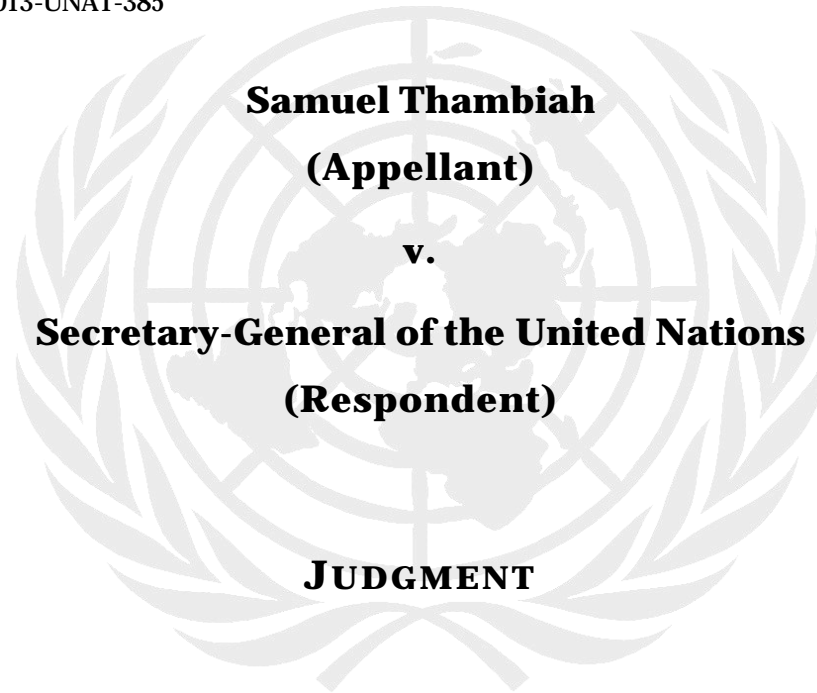




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-385



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

Case No.: 2013-439

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Appellant: Michael Ford Shanahan

Counsel for Respondent: Simon Thomas

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Oshadhie Samuel Thambiah against Judgment No. UNDT/2012/185, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 29 November 2012 in the case of *Samuel Thambiah, O. v. Secretary-General of the United Nations*. Ms. Samuel Thambiah appealed on 28 January 2013, and the Secretary-General answered on 4 April 2013.

Facts and Procedure

2. Ms. Samuel Thambiah joined the United Nations Children's Fund (UNICEF) in May 2001 as a Publicity and Promotion Officer in the Private Fundraising and Partnerships Division (PFP), based in Geneva.

3. In October 2010, the Director of PFP announced to the staff the restructuring of the PFP's Cards and Gifts Section. On 1 December 2010, she informed Ms. Samuel Thambiah that, "due to the necessities of service" her post was slated for abolition with effect on 31 May 2011. She invited Ms. Samuel Thambiah to apply for available posts, but warned that if her applications were not successful, she would be separated from service on 31 May 2011.

4. On 8 April 2011, Ms. Samuel Thambiah received a letter of separation with effect on 31 May 2011.

5. On 20 May 2011, Ms. Samuel Thambiah wrote to the Director of PFP complaining about not being considered for posts for which she had applied and asking that the abolition of her post not be implemented on 31 May 2011. The Director of PFP responded on 21 May 2011 that the date when Ms. Samuel Thambiah's post would be abolished could not be deferred.

6. By e-mail sent on 29 May 2011, Ms. Samuel Thambiah requested management evaluation of the decision to separate her from service on 31 May 2011. On 30 May 2011, she filed with the Dispute Tribunal an application for suspension of action, which was rejected by the UNDT on 31 May 2011.

7. Meanwhile, by e-mail of 30 May 2011, Ms. Samuel Thambiah was advised, in connection with a medical certificate dated 25 May 2011 that she had submitted and that placed her on sick leave for two weeks, that the Medical Services Section of the

United Nations Office at Geneva (Section) required her to undergo a medical examination by an independent practitioner with a view to determining whether or not her sick leave could be certified, and she was thus requested to promptly report to the Section. Ms. Samuel Thambiah eventually reported to the Section on 14 July 2011, following which her sick leave was certified up until 31 May 2011.

8. On 14 July 2011, a Human Resources Assistant with the Policy and Administrative Law Section (PALS), Division of Human Resources, UNICEF, e-mailed Ms. Samuel Thambiah a letter dated 12 July 2011 from UNICEF's Deputy Executive Director, in which he announced the outcome of the management evaluation.

9. Under cover of an e-mail dated 18 July 2011, the Human Resources Assistant sent to Ms. Samuel Thambiah two annexes that were referred to in the 12 July 2011 letter, but were "inadvertently omitted" from the e-mail of 14 July 2011.

10. The parties differ as to when Ms. Samuel Thambiah received the 12 July 2011 letter from UNICEF's Deputy Executive Director. According to the Secretary-General, the Administration sent her the letter via e-mail, which Ms. Samuel Thambiah received "[o]n 14 July 2011, at latest". On the other hand, Ms. Samuel Thambiah's recollection of the sequence of events is different and has changed over time. In her application to the Dispute Tribunal dated 17 October 2011, Ms. Samuel Thambiah stated: "A response to [her] request for management evaluation was delivered on 14 July 2011". However, in her appeal to the Appeals Tribunal of 28 January 2013, Ms. Samuel Thambiah now states "she has no recollection of receiving the rejection on the 14th July 2011", and her statement to the Dispute Tribunal was "clearly inaccurate" as "[i]t was her attorney who selected the term 'delivered' in drafting the [UNDT application]". Ms. Samuel Thambiah maintains on appeal that although the letter of 12 July 2011 "may have been dispatched on 14 July 2011, she did not receive and read the e-mail until 18 July 2011 ... when [the second e-mail from the Human Resources Assistant] arrived".

11. Also on 18 July 2011, Ms. Samuel Thambiah, through a newly appointed counsel, filed another request for management evaluation of the decision to separate her from service as a supplement to her first request of 29 May 2011. That request was rejected by UNICEF.

12. In August 2011, Ms. Samuel Thambiah submitted a claim to the Advisory Board on Compensation Claims [ABCC] in accordance with Appendix D to the Staff Rules and Regulations.

13. In Judgment No. UNDT/2012/185, the Dispute Tribunal rejected Ms. Samuel Thambiah's application. Regarding the issue of the termination of Ms. Samuel Thambiah's service as a result of the abolition of her post, the UNDT determined that the decision was conveyed to her on 1 December 2010, and that she failed to contest that decision within the 90-day time limit. As to when Ms. Samuel Thambiah received the letter of 12 July 2011, the Dispute Tribunal found that her statement of 17 October 2011 submitted to the UNDT, which was made a little over three months after the event, to the effect that the letter of 12 July 2011 was delivered on 14 July 2011, accurately reflected the chronology of events and no further evidence was needed in this regard. The Dispute Tribunal rejected Ms. Samuel Thambiah's claim that 18 July 2011, when she received the two annexes, should be considered as the date from which the 90-day time limit started to run. In the view of the UNDT, the two annexes were purely illustrative and added no substantive information to the seven-page letter of 12 July 2011,¹ and the Administration's failure to append the annexes to its e-mail of 14 July 2011 did not have any impact on the validity or completeness of its response to Ms. Samuel Thambiah's initial request for management evaluation, insofar as her non-selection for posts for which she had applied was concerned. The Dispute Tribunal concluded that the transmittal of the missing annexes on 18 July 2011 did not reset the clock, and Ms. Samuel Thambiah had 90 days from 14 July 2011, i.e., until 12 October 2011, to apply to the UNDT, but did not do so until 17 October 2011, and her application was therefore time-barred and irreceivable. Lastly, the UNDT reviewed Ms. Samuel Thambiah's claim in respect of her separation while on sick leave, but decided to reject it because she had failed to follow the prescribed procedure for review of the decision relating to her sick leave and also because it was premature as her related claim was still pending before the ABCC.

¹ The two annexes are not available on record. According to the UNDT, they consisted of a document reflecting the status of Ms. Samuel Thambiah's candidatures and a copy of the recommendations made by the selection panel concerning her candidature for two P-3 posts of Project Manager (Fundraising Services Unit) within PFP.

Submissions

Ms. Samuel Thambiah's Appeal

14. Ms. Samuel Thambiah submits that the UNDT erred in fact in finding that she had received the letter containing the outcome of management evaluation on 14 July 2011. There is no evidence to indicate that she received the said letter on 14 July 2011.

15. Ms. Samuel Thambiah also submits that the UNDT erred in law when it found that the delivery of the outcome of management evaluation was effective on 14 July 2011, when the transmittal was incomplete and its partial presentation prevented her from having the requisite mind frame that the appellate process had commenced.

16. Ms. Samuel Thambiah further submits that the UNDT erred in law by finding that her second request for management evaluation filed on 18 July 2011 was a mere repetition of her 29 May 2011 request. She asserts that her second request contained new claims in addition to those presented in her first request.

17. Ms. Samuel Thambiah maintains that UNDT's rejection of her claims in light of only a three-day delay is inconsistent with the jurisprudence and constitutes a breach of her right to due process.

18. Ms. Samuel Thambiah also maintains that the UNDT erred in law when it determined that she was properly separated from service even while she was on service-incurred sick leave. The relevant administrative issuances and the broader principles of international jurisprudence protect employees from improper termination while on service-incurred sick leave.

The Secretary-General's Answer

19. The Secretary-General maintains that the UNDT correctly concluded that Ms. Samuel Thambiah's challenge of the decision to abolish her post was not receivable as it was time-barred. As she received the outcome of management evaluation no later than 14 July 2011, the 90-day time limit for filing an application with the UNDT started to run on 14 July 2011 and she should have filed her application by 12 October 2011. However, Ms. Samuel Thambiah did not do so until 17 October 2011, beyond the statutory time limit.

Ms. Samuel Thambiah's argument that the time limit only starts to run once the Administration can prove that the document has actually been received by the staff member would place an unreasonable burden on the Respondent, given that the knowledge and evidence of this is solely in the hands of Ms. Samuel Thambiah. It would moreover allow staff members to arbitrarily re-set deadlines in accordance with their own convenience, based on inherently unverifiable claims that they had only opened an e-mail communication after the unambiguous date on which it had been sent.

20. The Secretary-General also submits that Ms. Samuel Thambiah is repeating the same arguments that were made to, and rejected by, the UNDT, without showing any error on the part of the Dispute Tribunal.

21. Lastly, the Secretary-General submits that Ms. Samuel Thambiah's argument that it was illegal to separate her from service while she was on service-incurred sick leave should be rejected. Whether she was on service-incurred sick leave at the relevant time was an issue pending before the ABCC. In addition, her own failings to follow the correct sick leave certification procedure made it impossible for any leave to be certified in a timely manner

Considerations

22. Ms. Samuel Thambiah appeals the Judgment of the UNDT on grounds that:

- i. The Dispute Tribunal made an error of fact in concluding that her challenge of the decision to abolish her post was not receivable as it was time-barred.
- ii. The Dispute Tribunal made an error of law in determining that she was time-barred from contesting the decisions not to select her for the posts she had applied for.
- iii. The Dispute Tribunal made an error of law in finding that she was not improperly separated while she was on service-incurred sick leave.

23. Article 8 of the Statute of the UNDT prescribes that:

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.

24. Staff Rule 11.4 prescribes that:

A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

25. Ms. Samuel Thambiah submits that the finding by the UNDT that she had received the rejection of her 29 May 2011 request for management evaluation on 14 July 2011 was an error of fact which led to a manifestly unreasonable decision that the majority of her claims in her 17 October 2011 UNDT application were irreceivable. She submits further that there is no evidence to indicate that she received the said letter on 14 July 2011.

26. We do not accept this argument. The Dispute Tribunal expressly rejected the arguments of Ms. Samuel Thambiah that she did not remember when she received the letter of 12 July 2011 and that it was for the Secretary-General to prove that she had indeed received it on 14 July 2011.

27. The UNDT relied on her statement in her application of 17 October 2011 that the letter in question dated 12 July 2011 was delivered on 14 July 2011.

28. It is within the competence of the UNDT to consider all the evidence presented by both parties and to determine the weight to attach to such evidence. The Appeals Tribunal defers to the determination of facts by the UNDT and would only interfere if it was satisfied

that the UNDT considered irrelevant matters or ignored relevant matters placed before it by the parties.²

29. Ms. Samuel Thambiah also failed to show any error on the UNDT's part.³

30. Ms. Samuel Thambiah maintains that UNDT's rejection of her claims in light of only a three-day delay is inconsistent with the jurisprudence and constitutes a breach of her right to due process.

31. This submission is clearly misplaced. The Appeals Tribunal has consistently been strictly enforcing, and will continue to strictly enforce, the various time limits.⁴ Under Article 7(5) of the UNDT Rules of Procedures, parties have the right to ask for extension or waiver of the time limits, which may be granted depending on the circumstances. Ms. Samuel Thambiah failed to submit such a request.

32. Since the 90-day deadline for filing an application with the UNDT started counting from 14 July 2011, Ms. Samuel Thambiah should have filed her application with the UNDT by 12 October 2011.

33. The Secretary-General rightly submits that, at the onset, the deadline for Ms. Samuel Thambiah to file an application with the UNDT was 12 October 2011 in the light of Staff Rule 11.4(a), notwithstanding any ambiguity as to when she actually received the management evaluation response.

34. The appeal fails on this ground.

35. Ms. Samuel Thambiah also submits that the UNDT erred in law in finding that the delivery of the outcome of management evaluation was effective on 14 July 2011, when the transmittal was incomplete and its partial presentation prevented her from having the requisite mind frame that the appellate process had commenced.

² *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

³ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

⁴ *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-043.

36. We reject this submission as the UNDT found as a fact that the letter of 12 July 2011 addressed all the issues pertaining to Ms. Samuel Thambiah's non-selection in a clear and conclusive way. The UNDT further found that the annexes which were transmitted four days later were merely illustrative and added no information to the letter of 12 July 2011 and did not have any effect on the 90-day time limit.

37. We note that Ms. Samuel Thambiah repeats the same arguments she made before the UNDT. The Appeals Tribunal has repeatedly held that it is for an appellant to show how the UNDT erred in its conclusion by demonstrating that its findings are not supported by the evidence or that they are unreasonable.⁵

38. Ms. Samuel Thambiah further submits that the UNDT erred in law by finding that her second request of 18 July 2011 for management evaluation was a mere repetition of her 29 May 2011 request. She contends in paragraphs 42 to 47 of her appeal that she actually challenged separate decisions in the 18 July 2011 request.

39. These arguments were raised and considered by the UNDT which determined that: "As is clear from the wording of the letter of 12 July 2011 responding to the Applicant's 29 May 2011 request for management evaluation, the Administration reviewed the selection processes in relation to all 30 posts for which she had applied, both within and outside PFP."

40. We agree with the UNDT:

[W]ith respect to her non-selection for posts for which she had applied, this request [of 18 July 2011] did not identify novel administrative decisions but simply reiterated and developed the claims raised in her 29 May 2011 request for management evaluation that were dealt with in a conclusive way in the letter of 12 July 2011. It was thus redundant in that respect and does not reset the clock.

41. From the foregoing, we hold that all the alleged separate decisions are either covered under the original request, time barred themselves or not administrative decisions subject to challenge. The UNDT properly rejected them.

⁵ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110.

Separation while on service-incurred sick leave

42. The UNDT found Ms. Samuel Thambiah's claim regarding separation while on service-incurred sick leave to be receivable. It, however, dismissed her claim by holding that Ms. Samuel Thambiah had failed to follow procedures relating to service-incurred illness and her service was therefore properly terminated.

43. She contests that the UNDT's finding was a mistake of law and "in clear contradiction with international jurisprudence on work-related injuries".

44. Ms. Samuel Thambiah submits further that the Dispute Tribunal failed to consider the Secretariat's administrative instruction ST/AI/2005/3. This Tribunal notes that the relevant administrative instruction is UNICEF's CF/AI/2009-009 of 19 August 2009 that provides, in section 7.1:

When a staff member on a fixed-term or temporary appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he or she shall be granted an extension of the appointment, after consultation with the United Nations Medical Director or designated medical officer, for the continuous period of certified illness up to the maximum entitlement to sick leave at full pay and (in the case of fixed-term appointments) half pay under staff rules 6.2 (b) (ii) and (iii).

45. The Secretary-General submits that whether Ms. Samuel Thambiah was on service-incurred sick leave at the relevant time is an issue pending before the ABCC. In addition, her failure to follow the correct sick leave certification procedure made it impossible for any leave to be certified in a timely manner.

46. In light of the finding by the UNDT that the issue of whether Ms. Samuel Thambiah's sickness was service-incurred is pending before the ABCC pursuant to Appendix D of the Staff Rules, any challenge on this issue before the UNDT, or for that matter this Tribunal, is premature.

Judgment

47. The appeal is dismissed in its entirety. The UNDT Judgment is affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

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

(Signed)

Weicheng Lin, Registrar