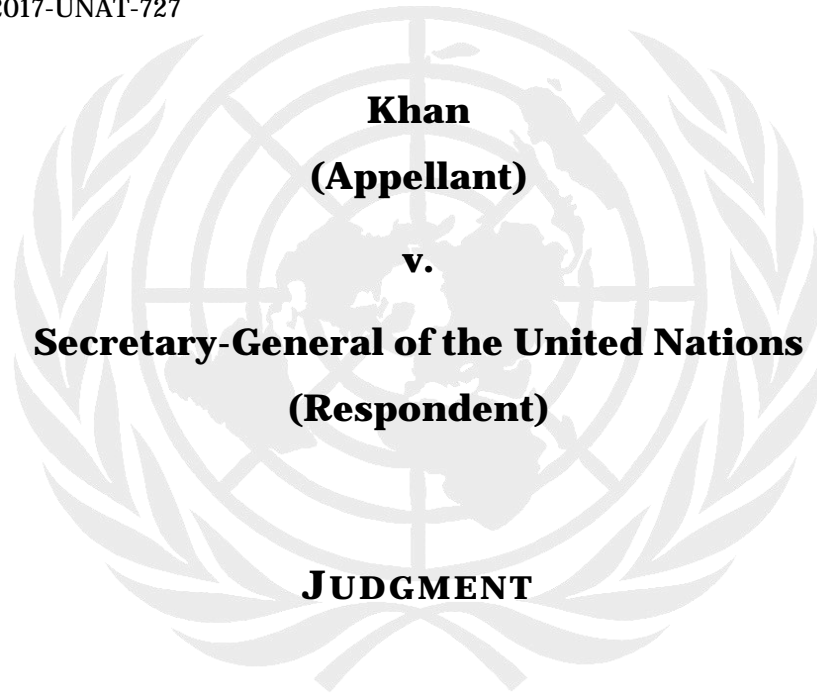




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-727



Before:	Judge Rosalyn Chapman, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2016-965
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Khan:	Self-represented
Counsel for Secretary-General:	Carla Hoe

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment on Receivability No. UNDT/2016/097, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 7 July 2016, in the case of *Khan v. Secretary-General of the United Nations*. Mr. Farid Ullah Khan filed his appeal on 1 September 2016, and on 31 October 2016, the Secretary-General filed his answer.

Facts and Procedure

2. From August 2005, until he was separated from service upon the expiration of his fixed-term appointment in 2010, Mr. Khan was employed by the Organization with the Department of Safety and Security (DSS) as a Security Officer, located at the Secretariat in New York.

3. On 4 April 2010, Mr. Khan requested that the Executive Office of DSS grant him permission to go on Special Leave Without Pay (SLWOP) for one year in order to accept an offer of employment as a linguist with a private military contractor working with the United States Department of Defense to provide civilian services in Afghanistan and elsewhere. However, his request was denied.

4. Mr. Khan promptly sought management evaluation of the denial of his request for SLWOP. On 5 May 2010, the Secretary-General adopted the findings and recommendation of the Management Evaluation Unit (MEU) and affirmed its decision that the denial of SLWOP was proper. Mr. Khan did not file an application with the UNDT contesting the decision to deny his request for SLWOP within 90 days of the decision.

5. On 1 June 2010, DSS offered Mr. Khan a limited one-month fixed-term appointment, following the end of his one-year appointment on 31 May 2010. He responded that he would not accept a month-to-month contract and he did not report for service. Accordingly, DSS separated Mr. Khan from service retroactively as of 31 May 2010.

6. Mr. Khan promptly sought management evaluation of his separation from service. On 21 August 2010, the Secretary-General adopted the MEU's findings and recommendation, which affirmed the decision that his separation from service was properly taken. Mr. Khan

did not file an application with UNDT contesting the decision to separate him from service within 90 days of the decision.

7. Mr. Khan joined the private military contractor on or about September 2010, and shortly thereafter left the United States. He returned to the United States in September 2014.

8. On 26 August 2015, Mr. Khan sent an e-mail to the Executive Office of DSS requesting reemployment as a Security Officer with DSS. In response, he was advised that “[i]f there is an availability someone from [the Security and Safety Section, DSS will] contact you”.

9. Mr. Khan did not get any offers of employment from DSS over the next few months.

10. On 19 October 2015, Mr. Khan requested management evaluation of the purported “decision” not to re-employ him as a Security Officer, and on 3 February 2016, he filed an application with the Dispute Tribunal. In subsequent filings with the Dispute Tribunal, Mr. Khan expanded his application to include challenges to the Administration’s 2010 decisions to deny his request for SLWOP and to separate him from service.

11. On 7 March 2016, the Secretary-General filed his reply to the application.

12. And on 28 March 2016, in response to an order by the UNDT, the parties submitted additional documents. In his response of 28 March 2016, Mr. Khan requested for the first time that “the time line [for filing an application before the UNDT] please be waived”.

13. On 21 April 2016, the parties filed their closing submissions on the issue of receivability.

14. On 7 July 2016, the UNDT issued Judgment on Receivability No. UNDT/2016/097. The Judgment found that Mr. Khan’s challenges to the 2010 decisions were not receivable *ratione temporis* under Article 8(4) of the Dispute Tribunal’s Statute, which sets a statute of limitations of three years from receipt of the decision, and the UNDT could not waive that statute of limitations. Additionally, the UNDT found that Mr. Khan could not challenge the 2015 decision not to re-employ him as he failed to show that, as a former staff member, he had a right to reemployment by DSS; thus, he lacked standing to seek judicial review regarding reemployment.

15. On 1 September 2016, Mr. Khan filed his appeal, and on 31 October 2016, the Secretary-General filed his answer.

Submissions

Mr. Khan's Appeal

16. Mr. Khan seeks an order requiring DSS to hire him for the position of Security Officer. He maintains that there are many vacancies currently available for security officers, but he has not had any offers from DSS despite contacting its Executive Office.

17. Mr. Khan contends that he was advised by the private contractor who hired him that, because he is an American citizen, he would be rehired by the Organization when he returned "from war", pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. Sections 4301-4333.

The Secretary-General's Answer

18. The Appellant has not identified any ground for appeal within the meaning of Article 2(1) of the Appeals Tribunal Statute. Although he disagrees with the Judgment, he does not cite any errors of law or fact by the UNDT. Essentially, the Appellant seeks a trial *de novo* by the Appeals Tribunal. This failing by the Appellant is a basis for dismissing the appeal.

19. The UNDT correctly dismissed Mr. Khan's request to waive the time limits for filing an application contesting the 2010 decisions denying his request for SLWOP and separating him from service. There is no dispute that Mr. Khan was aware of these decisions in April and June of 2010, respectively, and Article 8(4) creates a three-year statute of limitations for filing applications, which cannot be waived by the Dispute Tribunal. Thus, Mr. Khan is now barred from challenging the 2010 decisions.

20. The UNDT correctly concluded that the application was not receivable *ratione personae*. First, since his terms of appointment did not envisage a right to reemployment following separation from service, he has no standing to contest any decision not to re-employ him. Second, there is no sufficient nexus between his former employment as a Security Officer and the purported impugned decision. Third, the Organization is not bound to comply with USERRA, which is a national law of the United States, and any expectations Mr. Khan had about the applicability of USERRA were made by a private individual, who is not affiliated with the Organization.

Considerations

Waiver of time to file application

21. Article 8(4) of the Dispute Tribunal's Statute provides: "Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision."

22. In turn, Article 8(3) of the UNDT Statute provides: "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."

23. The Appeals Tribunal has consistently held that Article 8(4) is an "absolute restriction on [the UNDT's] judicial discretion".¹ Put differently, "under Article 8(4) of the UNDT Statute, the UNDT cannot waive the time limit to file an appeal, more than three years after the applicant's receipt of the contested administrative decision".² Thus, the Dispute Tribunal correctly determined that "any applications in relation to the 2010 denial of SLWOP and separation from service are time-barred under art. 8.4 of the [Dispute] Tribunal's Statute" and "are not receivable *ratione temporis*".³

24. When Article 8(4) of the Dispute Tribunal's Statute applies – and bars the filing of an application – we have found that the Dispute Tribunal acts *ultra vires* or beyond its competence and jurisdiction when it considers whether the applicant has established exceptional circumstances for waiving the deadline under Article 8(3). As we clearly stated: "Given th[e] absolute restriction on its judicial discretion [under Article 8(4)], the Dispute Tribunal ought not to have entered into a review of the possible existence of exceptional circumstances justifying an extension of the time limit."⁴

¹ *Reid v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-389, para. 14.

² *Bangoura v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-268, para. 30.

³ Impugned Judgment, paras. 57 and 64.

⁴ *Reid v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-389, para. 14.

25. Despite acknowledging our jurisprudence in *Reid*, the UNDT proceeded to consider whether Mr. Khan had shown exceptional circumstances justifying a waiver of the filing deadline. In this regard, the UNDT acted *ultra vires* or in excess of its competence and jurisdiction; thus, paragraphs 50 through 60 of the Judgment are *obiter dicta* and should be stricken.⁵

26. In addition, the UNDT determined that Mr. Khan's request or motion to waive the deadline was not receivable *ratione temporis*, as it was also time-barred under Article 8(4) of the UNDT's Statute. We disagree.

27. The General Assembly enacted Article 8(4) of the Dispute Tribunal's Statute to preclude the Dispute Tribunal from accepting or receiving stale applications, not motions seeking permission to file such applications. Although the UNDT has no discretion under our jurisprudence to grant a motion to waive the deadline for filing an application challenging a decision that is more than three years old,⁶ there is nothing in the Dispute Tribunal's Statute which prevents the UNDT from receiving such motions. And the Dispute Tribunal Statute controls. Thus, the UNDT cannot refuse to receive an untimely or late motion for waiver. As such, the UNDT erred in holding that Mr. Khan's request for waiver was not receivable *ratione temporis*. It was not timely; but that did not make it irreceivable.

Application re 2015 decision

28. Usually, it is preferable for a tribunal to determine whether an application is receivable before considering the merits of the application. Following our approach in *Ghahremani*,⁷ the UNDT properly determined that Mr. Khan's application was not receivable *ratione personae*. In *Ghahremani*, we held that a former staff member of the Organization who brings an application which does not complain that the contested decision was not in compliance with his terms of appointment or contract of employment does not have standing as the application has no bearing on the individual's former status as a staff member;⁸ thus, the application was not receivable *ratione personae*. In other words, the contested decision could not have adversely affected the individual's terms of appointment as a former staff member.

⁵ Cf. *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 23.

⁶ *Reid v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-389, para. 14.

⁷ *Ghahremani v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-171.

⁸ *Ibid.*, paras. 4 and 5.

29. Accordingly, the Dispute Tribunal correctly concluded:⁹

[S]ince [Mr. Khan] had not maintained any of the terms of his former appointment, including his right to be re-employed, there is no sufficient nexus between his former employment that ended in 2010 and the impugned decision in 2015 not to re-employ him as a Security Officer. [Mr. Khan] has no standing to contest the decision not to re-employ him with the Organization and the application is not receivable *ratione personae*.

30. Despite concluding that the application was not receivable, the Dispute Tribunal addressed the merits of the application, stating: “[I]f this case were considered to be receivable, the provisions of the United States law would not be directly applicable to [Mr. Khan’s] employment-related claims with the United Nations.”¹⁰ Addressing the merits of an application which is not receivable is an error of law and such comments are *obiter dicta*, which should be stricken.¹¹

Judgment

31. The appeal is denied and Judgment on Receivability No. UNDT/2016/097 is affirmed.

⁹ Impugned Judgment, para. 83.

¹⁰ Impugned Judgment, para. 89.

¹¹ *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 23. See also *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306, para. 27.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Halfeld

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar