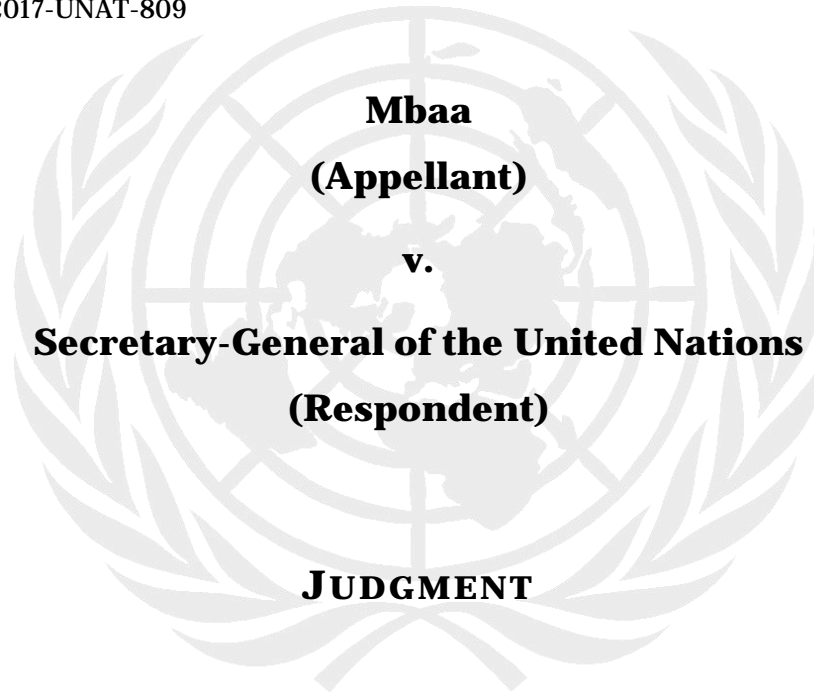




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-809



Before:	Judge John Murphy, Presiding Judge Richard Lussick Judge Sabine Knierim
Case No.:	2017-1095
Date:	27 October 2017
Registrar:	Weicheng Lin

Counsel for Mr. Mbaa:	Self-represented
Counsel for Secretary-General:	Wambui Mwangi

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Receivability No. UNDT/2017/047, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 27 June 2017, in the case of *Mbaa v. Secretary-General of the United Nations*. Mr. Moses Mbaa filed his appeal on 23 July 2017, and the Secretary-General filed an answer on 22 September 2017.

Facts and Procedure

2. Mr. Mbaa was employed as an Engineering Assistant at the GL-3 level with the United Nations Mission in South Sudan (UNMISS).

3. On 23 May 2014, the UNMISS Special Investigations Unit (SIU) received a report that Mr. Mbaa had tried to steal a generator engine block and two jerry cans of oil by concealing the items in a United Nations vehicle and attempting to drive out of the UNMISS compound with these items. UNMISS SIU conducted an investigation and based on the findings and conclusions contained in the SIU investigation report, UNMISS referred the matter to the Under-Secretary-General for the Department of Field Support (USG/DFS) on 7 November 2014 for review and appropriate action against Mr. Mbaa.

4. On 22 December 2014, DFS referred the allegation of misconduct against Mr. Mbaa to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) for institution of disciplinary action. By a memorandum dated 22 July 2015, the Officer-in-Charge (OiC)/OHRM, informed Mr. Mbaa of the allegations against him and provided him an opportunity to respond to the allegations. After a review of the documentary record, the Under-Secretary-General for the Department of Management (USG/DM) found that the alleged misconduct in relation to the generator engine block had been established and concluded that Mr. Mbaa's actions amounted to misconduct. The USG/DM decided to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice but without termination indemnity. Mr. Mbaa was informed of the decision by letter dated 28 October 2015, which he received on 2 November 2015.

5. More than 18 months later, Mr. Mbaa submitted an application to the UNDT on 16 May 2017 contesting the USG/DM's decision to impose a disciplinary sanction on him.

6. By Order No. 116 (NBI/2017) dated 20 June 2017, the UNDT provided Mr. Mbaa with an opportunity to address the issue of non-receivability of his application which had been filed outside the applicable time limits. On 23 June 2017, Mr. Mbaa provided a response which dealt only with the merits of his case and did not provide any response on the issue of receivability.

7. On 27 June 2017, the UNDT rendered the impugned Judgment holding that Mr. Mbaa's application was not receivable because it was time-barred as a result of his failure to file his application within the established time limits. Mr. Mbaa filed more than one year after the statutory deadline. The Dispute Tribunal also held that Mr. Mbaa failed to set out any exceptional circumstances justifying the delay.

8. As mentioned, Mr. Mbaa filed his appeal on 23 July 2017, and the Secretary-General filed an answer on 22 September 2017.

9. On 27 September 2017, Mr. Mbaa filed before the Appeals Tribunal a motion for additional pleadings, in which he sought the setting aside of the impugned Judgment and an order allowing him to file a case on the merits. On 2 October 2017, the Secretary-General submitted his response to the motion in which he argues that the motion should be dismissed as Mr. Mbaa had not adduced exceptional circumstances for filing an additional pleading and that the motion merely reiterated the arguments made by Mr. Mbaa in his appeal.

Submissions

Mr. Mbaa's Appeal

10. Mr. Mbaa requests the Appeals Tribunal to set aside the UNDT's Judgment dismissing his application and allow him to file a case out of time before the UNDT to be heard on the merits. He argues that he clearly stated in his application before the UNDT the reasons for having not filed a case within the 90 days' period which he submits constituted exceptional circumstances permitting the UNDT to waive the deadlines in terms of Article 8(3) of the UNDT Statute. He maintains that following his separation he could not begin the filing process with the Office of Staff Legal Assistance (OSLA) and before the UNDT given the security situation in Juba. As a former staff member he feared for his life since the security forces and the government of South Sudan viewed staff of the United Nations as spies and enemies of the state. As a result he fled and went into hiding outside of Juba where he was without internet access.

He argues that the UNDT erred in disregarding these exceptional circumstances when it dismissed his application as not receivable *ratione temporis*.

The Secretary-General's Answer

11. The Secretary-General submits that the UNDT correctly held that Mr. Mbaa's application was not receivable *ratione temporis*. Mr. Mbaa was afforded two opportunities before the UNDT to make his case for a waiver of the time limits; firstly, when he filed his application and, secondly, when the UNDT invited him by order to file a response on the question of receivability. On both occasions Mr. Mbaa failed to provide any information. Mr. Mbaa's sole reference to the delay in filing his application was a request to "be allowed to file an appeal or review out of time". The UNDT then gave him an additional opportunity to expand on this request. Yet he did not provide the UNDT with any information on the question of receivability, nor did he point to any exceptional circumstances that warranted a waiver of the time limit. Having failed to provide such information to the UNDT, Mr. Mbaa is now seeking to provide an explanation to the Appeals Tribunal, which is an attempt to have a *de novo* hearing of his application. Given that such information was not placed before the UNDT, it cannot be said that the UNDT erred on the facts or committed any error of law, procedure or jurisdiction. Mr. Mbaa has failed to satisfy the requirements of Article 2(1) of the Statute of the Appeals Tribunal (Statute). The appeal, accordingly, should be dismissed.

Considerations

12. As a preliminary matter, Mr. Mbaa filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is denied.

13. There is also no basis for receiving Mr. Mbaa's motion of 27 September 2017. Article 8 of the Rules provides for an appellant to submit an appeal form accompanied by a brief and copies of documents referred to in the appeal. There is no provision under the Rules for additional pleadings to be submitted by the parties after the answer. Article 28 of this Tribunal's Practice Direction No. 1 provides that a motion to file an additional pleading

may be granted if there are exceptional circumstances justifying the motion. However, an additional pleading consisting merely of arguments that reiterate or supplement a staff member's appeal, as in this case, provides no exceptional circumstance. In his motion Mr. Mbaa in fact merely reiterates assertions already made in his appeal. The motion merely re-argues the appeal and reflects Mr. Mbaa's disagreement with the Secretary-General's answer. There is no basis to find that his request to file an additional pleading is exceptional. Nor does the motion raise any new or compelling arguments. It must, accordingly, be dismissed.

14. For the reasons that follow, we are satisfied that the UNDT correctly concluded that the application was time-barred and not receivable as a result of Mr. Mbaa's failure to file his application within the established time limits.

15. Staff Rule 11.2(b) provides that a staff member wishing to contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2 following the completion of a disciplinary process, is not required to request management evaluation. It is common cause that in terms of these provisions, Mr. Mbaa was not required to request management evaluation.

16. Article 8(1)(d)(ii) of the UNDT Statute provides that in cases where management evaluation is not required, an application will be receivable if it is filed within 90 days of the applicant's receipt of the administrative decision.

17. Article 8(3) of the UNDT Statute provides that the UNDT may decide upon a request by the applicant to suspend or waive the deadlines for a limited period and only in exceptional circumstances.

18. Mr. Mbaa received the contested decision on 2 November 2015 but filed his application to the UNDT only on 16 May 2017, i.e., more than 15 months after the 90-day time limit for challenging the contested decision had expired. He requested waiver of the time limits in his application but set forth no basis for that request. He also set forth no exceptional circumstances justifying the delay when later directed by the UNDT to do so. He has done so for the first time on appeal and attempts to argue the matter *de novo* on the

basis of allegations not made before the UNDT. His contention that the UNDT erred on a question of fact resulting in a manifestly unreasonable decision by failing to accept that he was unable to start the appeal process as he feared for his safety and had no access to internet at his place of hiding is accordingly not sustainable.

19. This Tribunal has consistently emphasised that it is not its function to hear a *de novo* application.¹ To repeat: Mr. Mbaa had two opportunities before the UNDT to make his case for the waiver of the time limits and present the UNDT with the relevant information: (a) when he filed his application before the UNDT, and (b) on 20 June 2017, when the UNDT ordered him to file a response on the question of receivability. On both occasions, he failed to provide the information. His sole reference to the delay in his application was a request that he be allowed to file an appeal or review out of time. The UNDT gave him a further opportunity to expand on the request which he failed to take up. Having failed to provide the information to the UNDT, Mr. Mbaa seeks to provide this Tribunal with an explanation for the delay which amounts to an attempt to have a *de novo* hearing of his application. He has accordingly failed to satisfy the requirements of Article 2(1) of the Statute and has not identified any errors or failure of jurisdiction by the UNDT to warrant reversal of its Judgment.²

¹*Charles v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-284, para. 26; *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097, para 19. It is permissible in terms of Article 2(5) of the Statute under exceptional circumstances to receive additional evidence on appeal provided that such evidence was not known to either party and could not have been expected to be presented to the UNDT. There is no request before us to receive evidence under this provision. In any event, it is clear such evidence was known to Mr. Mbaa at the time he made the application to the UNDT and he could have presented it.

² *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547.

Judgment

20. The appeal is dismissed and Judgment No. UNDT/2017/047 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Knierim

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar