UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/113
Judgment No.: UNDT/2009/036
Date: 16 October 2009
Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MORSY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON REQUEST FOR EXTENSION OF TIME

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. On 16 August 2009, the applicant, then unrepresented, made application for an extension of time until 8 October 2009 to lodge his application with the United Nations Dispute Tribunal in New York, having already received an extension of time from the United Nations Administrative Tribunal until 30 June 2009. The contested administrative decision was dated 27 March 2009, which the applicant alleged he only received on 9 April 2009.

2. On 19 August 2009, the respondent raised an objection on the grounds that, *inter alia*, the applicant failed to show that the extension was justified, submitting that the applicant:

> "has not raised any circumstance or impediment that could be considered 'exceptional', nor has he raised any circumstance demonstrating overriding 'interests of justice'. As to 'exceptional' circumstances the applicant has not shown that circumstances similar to force majeure or any other unforeseeable or irresistible circumstances affected him; thereby rendering him unable to comply with the time limits. As to 'interests of justice', the Applicant has not demonstrated in any way why he should otherwise be permitted, based on conclusive consideration of 'interests of justice', to exceed the statutory time limits".

3. On 28 August 2009, at the hearing on the preliminary point raised by the respondent, counsel for the applicant, having apparently received instructions at the eleventh hour, sought leave to tender further documents showing the chronology of events leading up to the application. As I was of the view that a complete record was essential for a just finding, I ordered production of said documents, with an opportunity for the respondent to comment on same.

4. I also raised several issues, including whether the Dispute Tribunal was bound to follow the decisions of the Administrative Tribunal on this issue, and whether the test for granting an extension of time under the Dispute Tribunal was the same as that under the Administrative Tribunal.

Issues

5. The questions raised with counsel can be summarised as follows:

(a) Is the Dispute Tribunal bound to follow the jurisprudence of the Administrative Tribunal, in particular, with regard to the definition of exceptional circumstances?

(b) Is the Administrative Tribunal definition of exceptional circumstances premised on any international law?

(c) Is it conceded that the consideration of exceptional circumstances is premised on the particular wording and reading of Staff Rule 111.2(f) and/or the Joint Appeals Board (JAB) Rules of Procedure?

(d) To what extent, if any, does the content and reading of Staff Rule 111.2(f) impose an objective test and/or the Statute and Rules of Procedure of the Dispute Tribunal impose a subjective test?

Applicable law

6. The relevant provisions of the previous and current Staff Regulations and Rules, the Statutes, and the Rules of Procedure, are set out hereunder for consideration and comparison.

The Staff Rules

Former Staff Rules

7. The previous Staff Rule 111.2(f) provides that:

> "An appeal *shall not* be receivable *unless* the time limits specified in paragraph (a) above have *been met or have been waived, in exceptional circumstances*, by the panel constituted for the appeal" (emphasis added).

Current Staff Rules

8. The current Staff Rules under Chapter XI, Rule 11.4(a), simply state, without any prohibition or bar, 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 ninety calendar days* from the date on which the staff member received the outcome of the management evaluation".

Observations

9. While setting out the time limits for an application to be filed, the current Staff Rule 11.4 does not contain a prohibition "shall not be receivable" similar to that of the former Staff Rule 111.2(f). More importantly, the new Rules make no reference to a waiver in exceptional circumstances.

The Staff Regulations

Former Staff Regulations

10. Regulation 11.2 of the previous Staff Regulations provides that:

> "The United Nations Administrative Tribunal shall, *under conditions prescribed in its statute*, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules" (emphasis added).

Current Staff Regulations

11. The current Staff Regulation 11.1(a) provides that:

> "The United Nations Dispute Tribunal shall, *under conditions prescribed in its statutes and rules*, hear and render judgment on an application from a staff member alleging non-compliance with his or her terms of appointment or the contract of employment, including pertinent regulations and rules" (emphasis added).

Observations

12. It is clear that the Dispute Tribunal is enjoined to hear and determine any application only "under conditions prescribed in its statute and rules".

The Statutes

Statute of the Administrative Tribunal

13. Article 7.4 of the Statute of the Administrative Tribunal prescribes that

> "an application *shall not be receivable unless it is filed within ninety days* reckoned from the respective dates and periods referred to…above, or within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant" (emphasis added).

14. Article 7.5 of the Administrative Tribunal Statute provides that

> "[i]n *any* particular *case*, the Tribunal may decide to suspend the provisions regarding the time limits" (emphasis added).

Statute of the Dispute Tribunal

15. Article 8.1 of the Statute of the Dispute Tribunal, on the other hand, provides that an application "*shall be receivable"* within 90 calendar days of the applicant's receipt of the response by management to his or her submission where management evaluation is required, or within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request is 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 (Article 8.1(d)).

16. Article 8.3 of the Statute of the Dispute Tribunal provides that:

> "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*. The Dispute Tribunal shall not

> suspend or waive the deadlines for management evaluation" (emphasis added).

17. Article 8.4 of the Statute of the Dispute Tribunal states:

> "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" (emphasis added).

Observations

18. Upon due consideration of the provisions quoted above, I make the following observations:

(a) Article 7.4 of the Statute of the Administrative Tribunal clearly articulates that an application "shall not be receivable unless" it is filed within the time limits. The Statute of the Dispute Tribunal (save for the provision relating to applications filed more than three years after receipt of the contested administrative decision), does not contain the mandatory prohibitive words "shall not be receivable" i.e. there is no express prescriptive bar or prohibition relating to the 90, 30 or 45 day period; it is confined only to the three-year limitation period.

(b) Whilst the Administrative Tribunal applied the test of "exceptional *circumstances*" in the old request for extension of time cases, the Dispute Tribunal may suspend or waive the deadlines "only in exceptional *cases*".

(c) To my mind, the current provisions are not inflexible. Although Article 8.4 of the Statute of the Dispute Tribunal is prohibitive or prescriptive in nature since it is a jurisdictional bar setting a limitation period of three years within which claims should be filed, Articles 8.1 and 8.3 do not prohibit access to the Tribunal but simply regulate it i.e. they grant the Tribunal discretion to waive or suspend deadlines in exceptional cases.

The Rules of Procedure

Rules of the Administrative Tribunal

19. Article 24 of the Administrative Tribunal's Rules of Procedure provides that:

> "The Tribunal or, in the interval between its sessions, the President or the presiding member may shorten or extend any time limit fixed by these rules".

Rules of the JAB

20. Rule III.F of the former JAB Rules of Procedure provides that an appeal is receivable:

> "*only if* it complies with the time-limits set forth in Staff Rule 111.2(a) and (b), *or if the Panel* considering the appeal *decides to waive* the time-limits" (emphasis added).

21. Rule III.G of the JAB Rules specifies that in considering whether an appeal is receivable, the JAB Panel

> "may request statements, supporting evidence and comments relating specifically to this issue and *shall decide*, on the basis thereof, if 'exceptional *circumstances'* justify a waiver of the time-limits under Staff Rule 111.2(f), bearing in mind that the onus of proving exceptional circumstances lies with the appellant" (emphasis added).

Rules of the Dispute Tribunal

22. Article 35 of the new Rules of Procedure of the Dispute Tribunal states that:

> "Subject to article 8.3 of the Statute of the Dispute Tribunal, the President, or the Judge or Panel hearing a case, may shorten or extend a time limit fixed by these Rules or waive any rule when the *interests of justice so require*" (emphasis added).

23. Article 7.5 of the Tribunal's Rules of Procedure provides that:

> "In *exceptional cases*, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in Article 7.1 above. Such written request shall succinctly set out the *exceptional reasons* that, in the view of the

applicant, justify the request. The request shall not exceed two pages in length" (emphasis added).

Observations

24. Upon consideration of these provisions, I make the following observations:

(a) Under the JAB Rules an appeal was receivable "*only if*" it complied with the time limits or a waiver of the time limits was granted.

(b) Whilst Staff Rule 111.2(f) permitted the JAB to waive the relevant time limits in exceptional circumstances, there is no reference under the new dispensation to "exceptional *circumstances*". The new Rules refer to "exceptional *cases*" and "exceptional *reasons*" that in the view of the applicant, justify the request for an extension, suspension or waiver.

(c) Under the new Rules of Procedure the Dispute Tribunal is granted a general power to shorten or extend the time for compliance with time limits fixed by the Rules of Procedure, or to "waive any rule when the interests of justice so require". This general power to shorten or extend the time for compliance covers the deadlines set out in Article 7.1 of the Rules of Procedure. I note in this regard that the time limits in Article 7.1 of the Rules of Procedure are identical to those in Article 8.1 of the Statute.

General observations on applicable law

25. In view of the above provisions, the Dispute Tribunal is enjoined to hear and render judgment on an application under the conditions prescribed in its own Statute and Rules of Procedure. These conditions speak of an "exceptional *case*" and "exceptional *reasons*", rather than exceptional circumstances, coupled with an apparently subjective test. In addition, in its Rules of Procedure, the Dispute Tribunal has the general power to shorten or extend the time limit fixed by its Rules or waive

any rule when the interests of justice so require. It is a separate question whether Article 35 of the Rules of Procedure enables the Dispute Tribunal to shorten or extend any deadlines set out in the Statute and the Staff Rules; however, I need not address this issue in the present case.

26. Furthermore, the current Staff Rules, as well as the Statute and the Rules of Procedure of the Dispute Tribunal do not contain the prohibitive language of the former provisions in regard to time barring, receivability, and applications that are out of time. To my mind, the current and prevailing emphasis and nuance regarding time limits is entirely different under the new dispensation. This is not to say of course, that time is not of the essence.

27. The present judgment therefore considers whether the new wording of "exceptional case" and "exceptional reasons", as distinct from "exceptional circumstances", creates an irreconcilable conflict or ambiguity, and whether the new terminology changes the test from a more objective to a subjective one. I have considered the relevance of the old test to the new dispensation and the aids to construction which the Dispute Tribunal should use, if any. Finally, I have considered the interpretation the Dispute Tribunal should give to the current provisions.

Issues considered

28. Whilst there is a definition of "exceptional circumstances" from the Administrative Tribunal jurisprudence, there is no definition of "exceptional case" or "exceptional reasons" under the current dispensation.

29. In Judgment No. 372, *Kayigamba* (1986), the Administrative Tribunal upheld the findings of the JAB which relied on a very narrow construction of the definition of exceptional circumstances:

> "[O]nly circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review and

> filing an appeal in time, may be deemed 'exceptional circumstances' and warrant a waiver of the prescribed time-limits…"

30. In *Kayigamba*, the staff member was seeking to have a time limit waived to enable him to appeal the denial of an allowance, more than five years after the last year of his service. The Administrative Tribunal held that,

> "On the face of it, this is a delay of an extraordinary length, and it would not be easy to present convincing reasons that such a delay had been due to 'exceptional circumstances' beyond the control of the staff member concerned".

Submissions

31. The Administrative Tribunal jurisprudence, referred to extensively by counsel for the respondent, consistently upholds "exceptional circumstances" as circumstances beyond an applicant's control. Mr. Ruckriegel submitted that the reasons preventing an Applicant from submitting a timeous application should be serious, akin to a *force majeure.* He said that as a possible aid in deciding what could be considered as exceptional circumstances, he had considered clauses in some commercial and other UN contracts which define *force majeure,* and concluded that such clauses generally refer to unforeseeable or irresistible acts. He maintained that exceptional circumstances must be strictly construed to events that are beyond the applicant's control, of significant severity, and that said events must directly prevent the timely application. Counsel for the respondent contended that the jurisprudence of the Administrative Tribunal was "very persuasive, if not binding".

32. Mr. Willemsen, counsel for the applicant, submitted that the case law submitted by the respondent was neither helpful nor on point in this case, highlighting that all of the cases mentioned by counsel for the respondent concerned time limits for a "Request for Review" or a "Statement of Appeal" under the old system of justice in place prior to 1 July 2009. The applicant sought to distinguish the instant case from those older cases and noted that while the 90-day time limit did exist in the old system, it was common practice for the Administrative Tribunal to grant

extensions to both parties simply by letter or in many instances, by silent acquiescence.

33. Counsel for the applicant, while agreeing that the Administrative Tribunal jurisprudence was at least consistent, did not agree with the test for exceptional circumstances. He cited his experience in the old system of justice where the administration had been known not to respond and to wait for time limits to expire, even when a staff member had notified it of an impending appeal, and then to rely on this as a bar to an appeal. He contended that the application of such a narrow test often resulted in injustice and incongruity, as in the cases where the administration failed to respond whilst time ran out.

34. Counsel for the respondent stated that one of the goals of the Redesign Panel on the United Nations Internal Justice System was to make the system of justice faster and more efficient, and one of the main reasons why there was a shift from a peer panel to a court is that time limits should gain more significance. He submitted that a literal interpretation was not appropriate in the instant case to understand the intent of the General Assembly. Counsel for the applicant disagreed, stating that the ordinary meaning of a word should be the first step of interpretation. He submitted that if the literal reading was unfair or nonsensical, it was only then that one should refer to other documents, such as the *travaux préparatoires* or legislative history. He said there also appeared to be a shift from an objective to a subjective test.

35. Counsel for the respondent submitted that he was not aware if the concept of exceptional circumstances was based on any international law, but that it was designed to ensure speedy and efficient procedures. He informed the Tribunal that he had asked the UN Office of Legal Affairs if there were any *travaux préparatoires*; however they identified no such documents available to assist in interpreting the new provisions.

36. In their submissions, neither counsel could establish on what basis the definition of "exceptional circumstances" was premised. In my mind there is no

doubt that the consideration of such circumstances is premised on the particular wording and reading of Staff Rule 111.2(f), and that the definition stems from the Administrative Tribunal jurisprudence. This definition has been in practice and usage for many years, but this particular wording is absent from the current provisions. It is unclear why the new Statute and Staff Rules do not contain the previous wording and this raises the question of how the Tribunal should interpret the new wording.

Interpretation

37. *Black's Law Dictionary* (West Publishing Co., 1990, 6th ed.) defines "exceptional circumstances" as "conditions which are out of the ordinary course of events; unusual or extraordinary circumstances". The meaning of exceptional circumstances, as construed by the JAB and the Administrative Tribunal, i.e. circumstances beyond an applicant's control, akin to a *force majeure* which prevented an applicant from submitting timeously, appears to place a heavier requirement on the applicant than a literal interpretation suggests.

38. The literal theory of interpretation holds that, where the language is plain, courts should not invoke external aids to construction, particularly if it has been in practice and usage for many years. Where a statute uses words of a doubtful meaning, the manner of acting under it for a long course of years sometimes gives an interpretation to the obscure meaning. In such cases, a construction that has been long and publicly acted upon is not lightly disturbed, see the old English case of *Migneault* v *Malo* (1872), LR 4 PC 136, as cited in *A Treatise on the Construction and Effect of Statute Law* (Stevens and Haynes, 1892, 1st ed.), where the question arose as to what was the effect of a Canadian statute passed in 1801, and the Privy Council declared:

> "Their lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts with respect to it for the last seventy years….[I]t appears to their lordships that, by the uninterrupted practice and usage of the Canadian Courts since 1801, the law has received an

> interpretation which does not affix to the grant of probate that binding and conclusive character which it has in England….their lordships therefore think that they ought not to advise Her Majesty that a different construction ought *now* to be put upon the law".

39. A legislating body is presumed to be aware of the state of the law at the time of the enactment of a statute. Thus, when a particular provision has received a judicial interpretation and the legislature has re-enacted it or included it in a statute *in pari materia*, the courts can validly infer that the legislature intends the provision to bear the judicial interpretation previously placed on it (see the South African case of *S v Van Rensburg* (1967) (2) SA 291 at 294H). However, the two Acts must be *in pari materia (pari* meaning *identical* rather than *similar* or *like),* they must be identical and deal with the same subject matter, and not merely give effect to the same policy:

> "[W]hen a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which had been so put upon them" (as per Blackburn, J in *Mersey Docks & Harbour Board v Cameron* (1865) 11 HLC 443 at 480).

40. Acts which deal with the same subject matter on the same lines are an example of statutes *in pari materia.* If two statutes are *in pari materia,* it is therefore assumed that "uniformity of language and meaning was intended" (see *Statutory Interpretation* by Francis Bennion (London, Butterworths, 1984), at page 516).

41. In the instant case, however, the analysis above illustrates that whilst the Statutes deal with the same subject matter, they do not do so on the same lines; the former provisions have not been re-enacted or adopted, and the two Statutes are not *in pari materia.* The General Assembly, presumed to have been aware of the state of the law at the time of the enactment of the Statute, in not re-enacting or adopting the old provisions, to my mind evinces a clear and manifest intention that the old test

based on the Administrative Tribunal definition of exceptional circumstances is not applicable.

42. Where the meaning of an Act is plain and unambiguous, it is not legitimate to resort to any such aid as is afforded by usage or contemporary exposition. This means that where the language is plain, courts should not invoke external aids to construction. In terms of the new provisions, in "exceptional cases" the applicant may submit a request which sets out "exceptional reasons" why he should be granted an extension of time. The case must be exceptional. The reasons must be exceptional. Whilst the language is clear and explicit, however, there is no definition of "exceptional".

43. There is a presumption that in enacting a law, the legislating body intended to be in agreement with international law, unless there is a clear and express intention to the contrary. I have also found the following case law useful in reaching a conclusion as to what construction the new Dispute Tribunal should apply.

44. In the English case of *Byrne v PJ Quigley Ltd* (1995) ELR 205, the Employment Appeal Tribunal (EAT) considered section 7(2) of the Unfair Dismissals (Amendment) Act 1993, which allows the Rights Commissioner or the EAT to extend the period for claiming unfair dismissal in circumstances where they are "satisfied that exceptional circumstances prevented" the making of the claim during the requisite six-month period (as discussed in Moffat's *Employment Law*: Oxford University Press, 2007, 2nd ed.). In that case the EAT stated as follows:

> "the words 'exceptional circumstances' are strong words and should be contrasted with the milder words 'reasonably practicable' in the claimant's written submission, or 'reasonable cause' which permits the extension of time for lodging a redundancy claim under section 12(2)(b) of the Redundancy Payments Act, 1971. 'Exceptional' means something *out of the ordinary*. At the least the circumstances must be *unusual, probably quite unusual but not necessarily highly unusual*....In order to extend the time the EAT must be satisfied that the exceptional circumstances 'prevented' lodging the claim within the

> general time limit. It is not sufficient if the exceptional circumstances caused or triggered the lodging of the claim" (emphasis added).

45. It is to be noted that the EAT had to be satisfied in the above case that the circumstances "prevented" the timely lodging of the claim because the statutory provision itself requires that.

46. Whilst not binding on the parties, the Labour Court (Ireland) decision of *Gaelscoil Thulach Na Nog v Joyce Fitzsimons-Markey* (Decision No. EET034) usefully sets out the meaning of exceptional, with reference to English case law:

> "The term exceptional is an ordinary familiar English adjective and not a term of art. It describes a circumstance which is such as to form an exception, which is out of the *ordinary course or unusual or special or uncommon*. To be exceptional a circumstance need not be unique or unprecedented or very rare; but it cannot be one which is regular or routinely or normally encountered (see *R v Kelly* [1999] 2 All ER 13 at 20 per Lord Bingham CJ.)" (emphasis added).

47. In a decision of the Administrative Tribunal of the International Labour Organization (ILOAT) in Judgment No. 758, *In re Thresher* (1986), the Tribunal found the means open to the complainant and his attempts to obtain information relevant in deciding whether his late application was receivable:

> "[H]aving regard to the lapse of time involved, the means open to him to obtain information and his lack of diligence in pursuing his remedies, this case does not fall within the very exceptional class of cases where the Tribunal will grant relief for failure to observe the requirements of Article VII of the Statute. The complaint is therefore irreceivable".

48. In my view, an "exceptional case" has a much wider definition and cannot be equated with the old definition of "exceptional circumstances". An exceptional case may include a case which raises a matter of important legal precedent which requires to be decided on the general applicability of a particular provision or policy, irrespective of personal or extraneous circumstances preventing the applicant from filing timeously. A case may also be exceptional because it falls between the old and

the new dispensation, in the transitional period, and is delayed by a genuine confusion over the applicable procedures.

49. I have already found that the meaning of "exceptional circumstances", a meaning that the legislating body is presumed to have been aware of when it enacted the new provisions, is premised on the particular prescriptive wording and reading of Staff Rule 111.2(f). This wording is clearly absent from the current provisions. To my mind, the clear and manifest intention being that the old test is not applicable.

50. In view of this and the other reasons above, I find the former construction of "exceptional circumstances" of little assistance in interpreting "exceptional reasons" and "exceptional cases" under the current dispensation. I find that this Tribunal should not be bound by the previous wording and the strict definition of "exceptional circumstances" in interpreting "exceptional reasons" and "exceptional cases". What is required is a conspectus of all relevant factors before the Tribunal to ascertain in each case whether it is exceptional or whether there are exceptional reasons in the ordinary sense, to justify a waiver or suspension of time; exceptional simply meaning something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered.

51. It is noted that Administrative Tribunal jurisprudence places an understandable importance on the adherence to time limits—see Judgment No. 1046, *Diaz de Wessely* (2002):

> "[I]t is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like a sword of Damocles over the efficient operation of international organizations". [I presume the inequality of arms notwithstanding.]

The Administrative Tribunal also pointed out in Judgment No. 579, *Tarjouman* (1992), that:

> "Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning".

52. In Judgment No. 607, *In re Verron* (1984), the ILOAT pointed out that,

> "Proper administration requires the setting of time limits. But they are not supposed to be a trap or means of catching out a staff member who acts in good faith".

53. There is no doubt that review or appeal proceedings must be timeously instituted in the pursuit and desirability that finality is reached regarding the validity of an administrative action. Time limits exist for reasons of certainty and expeditious disposal of disputes in the workplace. An individual may by his own action or inaction forfeit his right to be heard by failing to comply with time limits, for the maxim *vigilantibus et non dormientibus legis subveniunt* (the law aids those who are vigilant and not those who are asleep) will surely apply.

54. A court may condone delay or late filing, although condonation of non-observance of time limits is by no means a mere formality. It is for the applicant to satisfy the court that there are "exceptional reasons" justifying his request. The Dispute Tribunal may suspend or waive the deadlines "only in exceptional cases". However, the Dispute Tribunal might also consider that there are overriding considerations in "the interests of justice". This creates a judicial discretion which is often used to grant extensions of time in the interests of justice, even where deadlines for filing have expired (see Decision of ICTY, *Popoviç et al.*, Case No. IT-05-88-T (20 May 2008), where extensions of time to file an English translation of an expert report were granted on two occasions).

55. In some jurisdictions, time limits may be waived where good, reasonable or sufficient cause is shown. To show good cause deserving of condonation, an

applicant must explain his default. The explanation must be reasonable and show that his default was not wilful or due to gross negligence on his part. In deciding whether sufficient cause has been shown, the basic principle is that a court has discretion, to be exercised judiciously upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant, but not exhaustive, are the degree of lateness, the explanation therefor, the prospects of success on the merits, prejudice to either party and the importance of the case:

> "Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked…" (*Melane v. Santam Insurance Co. Ltd*. 1962 (4) S.A. 531 (A), at p. 532C per Holmes J.A.)

56. The Administrative Tribunal has not been oblivious to the judicious consideration of the relevant factors in any particular case and indeed echoed some of these factors in its judgments. In the *Kayigamba* case *supra,* Administrative Tribunal noted that a five-year delay was "a delay of extraordinary length" requiring "convincing reasons" which were not provided. In Judgment No. 359 *Gbikpi* (1985), the Tribunal decided that:

> "[VI]…in this particular case, there are no grounds for suspending the provisions regarding time-limits, as article 7, paragraph 5, empowers it to do. On the one hand, the suspension of a time-limit must be justified by serious reasons which prevented the Applicant from acting, and must be for a reasonably short time; that is not the case here. Furthermore, as the Tribunal indicated above, consideration of the merits would also lead to rejection of the application".

57. Similarly, what constitutes exceptional reasons in one case may not do so in another; each case must be decided on its own merits. In the nature of things it is hardly possible and certainly undesirable for the Tribunal to attempt to define exceptional reasons or exceptional cases since no general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise

in applications of this nature. We can only deal with each application on its own merits, and decide in each case whether exceptional reasons have been shown and whether an exceptional case exists; or indeed whether it is in the interests of justice to waive the rule as to time limits.

Facts

58. I turn now to the particular facts of this case. After counsel for the applicant, with leave of the Tribunal, filed a bundle of further documents setting out the chronology of events, the respondent took exception to some of the documents and the manner in which they were tendered, contending that they raised issues for argument. For the purposes of this judgment, I have ignored any material which I believe gives rise to argument, as the disputed facts are not material for the purposes of this judgment. This highlights the need for counsel and parties to prepare their documentation well in advance so the other side is not ambushed at a hearing. However, counsel for the applicant, in this case, was at a disadvantage as he was instructed rather late in the day.

59. The following facts are material and do not appear to be in dispute:

(a) The applicant received an administrative decision dated 27 March 2009 from the Secretary-General between 30 March and 9 April 2009 (the exact date is disputed, although it is not crucial to the instant matter).

(b) On 3 June 2009, the applicant sent a letter to the Administrative Tribunal requesting a 90-day extension to submit his appeal of said decision and an application form which contained preliminary information about his appeal.

(c) By letter dated 3 June 2009, the applicant received a reply from the Administrative Tribunal, which acknowledged receipt of the applicant's letter and stated,

> "I wish to inform the parties that the President of the Tribunal has extended the time limit in which to file an application until 30 June 2009…[a]fter 30 June, cases may be filed with the UN Dispute Tribunal. Information on the location of the Registry of the UNDT will be made available in due course".

(d) On 10 June 2009, the applicant emailed the Administrative Tribunal requesting "that the case be transferred to the new Tribunal, or please provide me with the details to effect such transfer".

(e) On or around 24 July 2009 (exact date disputed), the applicant received a letter from the Administrative Tribunal dated 14 July 2009 advising him to submit his application to the Dispute Tribunal and providing the Dispute Tribunal's contact information.

(f) By email dated 4 August 2009, the applicant requested advice on the new procedure to appeal the decision with the Dispute Tribunal.

(g) By email dated 7 August 2009, the applicant submitted the same request and application form he submitted to the Administrative Tribunal on 3 June 2009, requesting an extra 90 days to file his case for reasons of "changing [his] counsel and relocating overseas".

(h) By email dated 16 August 2009 to the Dispute Tribunal, following a request from the Tribunal to resubmit his application using the standard application forms, the applicant submitted an "Applicant's information sheet", "Extension of time application" and a copy of his request for time extension which he had sent to the Administrative Tribunal on 3 June 2009.

Findings

60. I find that this Tribunal should not be bound by the previous strict construction of the word "exceptional" as in the old "exceptional circumstances" test, which set the bar very high. Exceptional simply means something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or

reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered. What constitutes exceptional reasons in one case may not do so in another; each case must be decided on its own merits. A construction that the test is subjective depending on the applicant's own perception of "exceptional reasons" would, of course, lead to an absurdity, as each applicant would deem his reasons to be exceptional. It follows that the test must be that the Tribunal has the discretion, to be exercised judiciously, upon a consideration of all the relevant facts in each particular case, to establish whether the applicant's case is out of the ordinary, special, uncommon, or unusual. Whether an applicant sets out exceptional "reasons" or "circumstances" is a matter of mere semantics, so long as the Tribunal finds his case to be exceptional as something out of the ordinary.

61. The Tribunal may also, upon written request by the applicant in accordance with Article 8.3 of the Statute, decide to suspend or waive the deadlines fixed by the Rules or waive any rule if it finds that it is "in the interests of justice" to do so. However, as this "catch all" provision is not relevant in the instant case, I shall say no more about it.

62. In this case, the applicant already had an extension of time granted by the Administrative Tribunal until 30 June 2009. He filed his application and request for a further extension with the Dispute Tribunal on 16 August 2009, after receiving information about how to file his appeal with the Tribunal at the end of July 2009 (exact date disputed). The delay in filing this matter with the UNDT is therefore not inordinate. The reasons therefor, that the applicant changed counsel and was relocating are not entirely persuasive as exceptional when viewed alone. However, I have considered all the relevant facts before me and determined that cumulatively, they constitute exceptional reasons. The applicant was diligent and did not simply sit back nor abandon his rights at any time. He persistently, although unsuccessfully, sought guidance from the Administrative Tribunal from 3 June 2009 (well within 90 days of receipt of the decision contested) as to the applicable procedures. He received an extension of time from Administrative Tribunal until 30 June 2009. He

only received a response to his email dated 10 June 2009 as to the transfer of his case to the Dispute Tribunal towards the end of July 2009. His default was not willful or due to gross negligence on his part and there is no evidence of bad faith.

63. Time limits are not supposed to trap an applicant who acts in good faith. It appears clear that through no fault of his own, the applicant was caught in the unusual circumstance of a transition into the new internal justice system, when procedures were unclear or still in progress and timeous guidance unavailable to him. This does not mean that any case from the transition period will be considered as sufficiently exceptional. However, in consideration of the totality of the applicant's particular situation, the Tribunal is satisfied that this is an exceptional case with exceptional reasons justifying an extension of time.

64. The applicant is hereby granted an extension of time to file his application with the Registry of the Dispute Tribunal on or before 16 November 2009.

(*Signed*)

Judge Memooda Ebrahim-Carstens

Dated this 16th day of October 2009

Entered in the Register on this 16th day of October 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York