



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/023
UNDT/NY/2015/030
Judgment No.: UNDT/2016/011
Date: 18 February 2016
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

REID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jonathan Croft, ALS/OHRM, UN Secretariat
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Security Officer with the Department of Safety and Security (“DSS”) of the United Nations Secretariat in New York, filed two cases:

a. Case No. UNDT/NY/2015/023, filed on 13 April 2015 as an application concerning the decision dated 30 October 2014 to issue him a written reprimand;

b. Case No. UNDT/NY/2015/030, filed as a separate case on 22 May 2015 by way of a motion entitled “Motion to re-file application with motion for waiver of deadline for such application”, to address the Respondent’s contention that the first case was not receivable.

2. The Applicant seeks rescission of the decision to place a reprimand on his file; removal of the reprimand; and unspecified damages for the breach of his due process rights in placing the reprimand on his file.

3. There is a dispute between the parties as to whether the Applicant’s claims are receivable. Accordingly, the Tribunal decided to first consider the issue of receivability.

Procedural history

4. By Order No. 83 (NY/2015), dated 13 May 2015, the Tribunal directed that the Applicant’s first case would join the queue of pending cases for assignment to a judge in due course. The Tribunal further directed the parties in the first case to refrain from filing any further documents until

assignment to a Judge. The Applicant subsequently filed, as a separate case, a motion to refile and for waiver of deadline.

5. These cases were assigned to the undersigned Judge on 13 January 2016.

6. By Order No. 11 (NY/2016), dated 15 January 2016, the parties were notified that the two cases had been assigned to the undersigned Judge. Order No. 11 stated that the two cases were subject to an order for combined proceedings and directed the parties to file further submissions on receivability. The Applicant's submission was due on 25 January 2016, whereas the Respondent's submission was to be filed by 1 February 2016. Order No. 11 further stated that the Tribunal would thereafter consider the issue of receivability of the two cases on the papers before it.

7. On 27 January 2016, the Applicant filed a reasoned motion seeking a waiver of the deadline to respond to Order No. 11. He also attached his submission on receivability. In essence, the Applicant sought leave to file the submission out of time due to Counsel's prior commitments and a five-day appearance before the Tribunal in both Geneva and Nairobi.

8. By Order No. 19 (NY/2016), the Tribunal granted leave for the Applicant's late filing. The Tribunal also directed the Respondent to file his submission on receivability on or before 4 February 2016.

9. On 2 February 2016, the Respondent filed his response to Order No. 11 (NY/2016).

Factual background

Events of 8 March 2013

10. On 8 March 2013, an incident took place between the Applicant, who was manning a UN security entry point, and a female staff member, who was entering the building.

Investigation report dated 25 March 2013

11. The report of the Special Investigations Unit of DSS, dated 25 March 2013, found that the Applicant “acted in an unwarranted hostile manner towards the staff member” and that the matter should be referred for subsequent action by the Office of Human Resources Management (“OHRM”).

Transmittal of the investigation report to OHRM on 31 May 2013

12. By memorandum dated 31 May 2013, the Executive Office of DSS transmitted the investigation report to OHRM.

ASG/OHRM memorandum dated 2 August 2013

13. By memorandum dated 2 August 2013, the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) informed the Applicant of the findings in the investigations report and requested the Applicant to respond, in accordance with para. 5 of ST/AI/371 (Revised disciplinary measures and procedures) to the allegations of misconduct, namely that he “grabbed [Ms. JL’s] wrist, on at least one occasion, while asking to see her UN ground pass”. The Applicant was invited to provide his response within two weeks of receiving the memorandum. He was

advised that he could avail himself of the assistance of the Office of Staff Legal Assistance (“OSLA”). The memorandum concluded with the following paragraph:

19. For further general information, you are referred to administrative instruction ST/AI/371 as amended (“Revised disciplinary measures and procedures”), which governs the process.

Retention of OSLA in August 2013

14. On 14 August 2013, the Applicant retained the services of OSLA and signed the “Consent Form for Legal Representation by OSLA”.

ASG/OHRM letter dated 23 December 2013

15. By letter dated 23 December 2013, the ASG/OHRM informed the Applicant that, after her review of the investigation report and his comments, she had decided not to impose a disciplinary sanction on him. The ASG/OHRM stated, however, that the case would be referred back to DSS for “consideration as to whether administrative measures or other action may be appropriate”. The Applicant was also informed that, if he had anything further to add for consideration by DSS, he could provide it directly to the acting head of DSS. The last three paragraphs of the letter are reproduced below (emphasis added):

After a thorough review and analysis of the Report, the supporting material (including the additional statements outlined above) and your comments, *I have decided not to impose a disciplinary sanction on you*, as the conduct you engaged in, in the circumstances, does not rise to the level of misconduct.

As a Security Officer, it is recognized that it may be appropriate, in certain circumstances, for you to grab

an individual's wrist, in the performance of your duties. Nevertheless, your conduct in handling the situation with Ms. [JL], may have fallen below the standards expected of Security Officers, as you may have been expected, as a professional Security Officer, to deescalate the situation and to handle the matter without resorting to any type of force. As the expectations placed on Security Officers, in their role as such, are best assessed by DSS, *the case is being referred back to DSS, for consideration as to whether administrative measures or other action may be appropriate.*

Please note that DSS has been provided with a copy of your comments on the allegations of misconduct. If you have anything further to add to those comments for consideration by DSS, *please provide it directly to Mr. [KK], Acting Head of the Department of Safety and Security, within two weeks of your receipt of this letter.*

Reprimand of 30 October 2014

16. By letter dated 30 October 2014, signed by the Chief of the Security and Safety Section ("SSS"), the Applicant was informed as follows:

Arising from a complaint from a staff member on 8 March 2013, I ordered a fact finding investigation by the Special Investigations Unit which ultimately determined that you engaged in "unwarranted conduct" of a hostile nature towards staff member [Ms. JL].

As a result of this finding, I referred the matter to the Executive Office, DSS for further forwarding to the Office of Human Resource Management (OHRM). As you have been informed by OHRM, it has been decided that no disciplinary measure be taken. However, the case was referred back to DSS for possible administrative action.

Following the above and discussion with [Acting Head/DSS], it was determined that in the performance of your duties as a security officer you acted in an inappropriate manner towards a staff member. As a professional security officer, you are expected to de-escalate a situation and to use force only as a last resort. You used unwarranted force in grabbing the staff member by the wrist, which is in clear

contravention of SSS SOP [Standard Operating Procedure] 11 and SOP 46.

The fact finding determined that you acted in a manner which employed an elevated use of force uncalled for by the situation. As OHRM noted, this is not the first incident in which you have been involved that has led to reprimands being issued. As a result, this letter serves as an official written reprimand.

Management evaluation request of 23 December 2014

17. On 23 December 2014, OSLA, on behalf of the Applicant, requested management evaluation of the decision “to impose reprimand” on the Applicant. The request for management evaluation stated that the Applicant was notified of the contested decision on 30 October 2014.

MEU acknowledgement letter of 29 December 2014

18. By letter dated 29 December 2014, the Management Evaluation Unit (“MEU”) confirmed receipt of the Applicant’s request for management evaluation dated 23 December 2014. The acknowledgement letter stated (emphasis in original):

Please also note that, pursuant to Staff Rule 11.2(d), the management evaluation in your case is to be completed within 30 days of receipt of your request, or no later than 22 January 2015. If there is any delay in completing the management evaluation, the MEU will contact you to so advise. In any event, please be advised that, pursuant to Staff Rule 11.4(a), the 90-day deadline for filing an application to the UNDT, should you wish to do so, will start to run from **22 January 2015**, or the date on which the management evaluation was completed, if earlier, unless the deadline has been extended by the Secretary-General to facilitate efforts for informal resolution under the auspices of the Office of the Ombudsman.

Filing of Case No. UNDT/NY/2015/023

19. On 13 April 2015, the Applicant filed his application, which was assigned Case No. UNDT/NY/2015/023.

MEU letter of 8 May 2015

20. By letter dated 8 May 2015, the Applicant was informed of the outcome of his management evaluation request of 23 December 2014, in that the Secretary-General decided to accept the recommendation of the MEU to uphold the decision to issue a written reprimand and place it on the Applicant's status file. The letter further stated: "The Secretary-General expressly reserves the right to raise the issue of receivability at any subsequent hearing of the matter".

Filing of Case No. UNDT/NY/2015/030

21. On 22 May 2015, the Applicant filed, as a separate case, his "Motion to re-file application with motion for waiver of deadline for such application", which was assigned Case No. UNDT/NY/2015/023.

Parties' submissions

22. The Respondent's submissions on receivability may be summarized as follows:

- a. The Appeals Tribunal has affirmed that time limits are to be strictly enforced and that staff members are presumed to know the rules, particularly those pertaining to their basic rights, such as the right of appeal (*Diagne et al.* 2010-UNAT-067; *Jennings* 2011-

UNAT-184; *Muratore* 2012-UNAT-191; *Christensen* 2012-UNAT-218).

b. Pursuant to art. 8.1(d)(ii) of the Dispute Tribunal's Statute, staff rule 11.2(b), and sec. 10 of ST/AI/371, the Applicant was not required to seek management evaluation regarding the decision to issue a written reprimand and had to file an application contesting the imposition of reprimand within 90 calendar days of 30 October 2014, the date of receipt of the reprimand. As the Applicant filed his application on 13 April 2015, he failed to comply with the statutory time limits;

c. The Tribunal's Statute and Rules of Procedure allow for suspension, waiver, or extension of the time limits for the filing of application only in exceptional cases and only when the exceptional circumstances have been succinctly set out in the request and jurisprudence has been consistent therewith (*Diagne et al.*). In the present case, the Applicant identified no such exceptional circumstances prior to the expiration of the 90-day period following his receipt of the letter of reprimand, nor did he identify such exceptional circumstances at the time of his filing of the application;

d. Communications from the MEU to the Applicant did not assert that his case was one "requiring management evaluation" and, moreover, those communications explicitly reserved the Secretary-General's right to raise issues of receivability and competency;

23. The Applicant's submissions on receivability may be summarized as follows:

a. The authority to issue a reprimand is provided to the ASG/OHRM alone. As the letter imposing reprimand was signed by DSS, it follows that the Assistant Secretary-General did not exercise her power. Instead, the ASG/OHRM referred the matter to DSS for an entirely new exercise of discretion. This demonstrates that the matter had been taken outside the purview of ST/AI/371. As a result, the decision to impose reprimand did not "follow the completion of a disciplinary process", as referred to in staff rules 10.3(c) and 11.2(b), and therefore management evaluation was required;

b. The Applicant was given no indication that any subsequent action by DSS would be appealable directly to the Tribunal. Thus, the Applicant had every reason to believe that a request for management evaluation was required;

c. If the Tribunal accepts the Respondent's position regarding the timeliness of the Applicant's original application (Case No. UNDT/NY/2015/023), the Applicant submits that exceptional circumstances exist to waive the time limit in relation to the refiled application (Case No. UNDT/NY/2015/030);

d. The Administration's failure to signal to the Applicant that he was still subject to a disciplinary process under ST/AI/371 was significantly exasperated by the actions of the MEU. The Secretary-General, though represented by numerous bodies, is indivisible. The MEU represented to the Applicant that his deadline was to be

calculated on the basis of a case requiring management evaluation. This representation was made by the Secretary-General prior to the deadline the Respondent now asserts should apply. Had the Secretary-General met that deadline and indicated that a management evaluation request was inappropriate, the Applicant would have been able to file a timely application;

e. A management evaluation was provided to the Applicant on 8 May 2015. It made no mention of the argument currently proposed by the Respondent. This indicates that the Secretary-General in the guise of the MEU considered that a management evaluation request was required even while the Secretary-General in the guise of the Respondent is arguing the opposite;

f. MEU's acknowledgment and management evaluation letters contained standard language reserving the right to raise a receivability defence at a later date. This language cannot insulate the Administration in a situation where the Secretary-General has initially represented that a management evaluation was necessary only to later argue that it was not. This would effectively allow the Secretary-General to mislead staff members regarding deadlines and later trap them with receivability arguments before the Tribunal;

g. More than one year and nine months passed since the Applicant received allegations of misconduct. Nothing in the Administration's conduct in this case indicates that it is of a time sensitive nature.

Consideration

Applicable law

24. Article 8 of the Statute of the Dispute Tribunal states (emphasis added):

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(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;

(ii) *In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision:*

...

3. 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.

25. Article 7 of the Tribunal's Rules of Procedure states (emphasis added):

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

...

(c) *90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.*

...

5. 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 request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

26. Staff rule 10.2 states:

Rule 10.2

Disciplinary measures

...

(b) Measures other than those listed under staff rule 10.2(a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand;

- (ii) Recovery of monies owed to the Organization;
- (iii) Administrative leave with or without pay pursuant to staff rule 10.4.

27. Staff rule 10.3 states:

Rule 10.3

Due process in the disciplinary process

...

(c) A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

28. Staff rules 11.2 and 11.4 state:

Rule 11.2

Management evaluation

...

(b) A staff member wishing to formally 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 a management evaluation.

...

Rule 11.4

United Nations Dispute Tribunal

(a) 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.

(b) Where a staff member *is not required to request a management evaluation*, pursuant to staff rule 11.2 (b), he or she may file an application directly with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received notification of the contested administrative decision.

...

29. ST/AI/371 (Revised disciplinary measures and procedures), as amended by ST/AI/371/Amend.1, states (emphasis added):

II. Investigation and fact-finding

...

9. Upon consideration of the entire dossier, the Assistant Secretary-General, Office of Human Resources Management, on behalf of the Secretary-General shall proceed as follows:

(a) Decide that the disciplinary case should be closed, and immediately inform the staff member that the charges have been dropped and that no disciplinary action will be taken. *The Assistant Secretary-General may, however, decide to impose one or more of the non-disciplinary measures indicated in staff rule 10.2 (b)(i) and (ii), where appropriate; or*

(b) Should the preponderance of the evidence indicate that misconduct has occurred, recommend the imposition of one or more disciplinary measures.

...

III. Application to the United Nations Dispute Tribunal

10. A staff member against whom a disciplinary or a non-disciplinary measure has been imposed following the conclusion of the disciplinary process *is not required to request a management evaluation, and may submit an application to the United Nations Dispute Tribunal in*

accordance with chapter XI of the Staff Rules. The submission of an application to the United Nations Dispute Tribunal contesting a disciplinary or non-disciplinary measure imposed following the conclusion of the disciplinary process *shall be made within 90 calendar days of receiving notification of the decision*. The filing of such an application shall not have the effect of suspending the measure.

Receivability of the application

30. The contested decision in this case is the decision of 30 October 2014 to issue a written reprimand to the Applicant.

31. Under staff rule 11.4(a), a staff member may file an application against a contested decision within 90 calendar days from the date of receipt of the outcome of the management evaluation or from the date of expiration of the 30 or 45 day MEU deadline. However, where the staff member is not required to request a management evaluation, he/she may file directly with the Tribunal, but within 90 calendar days from receipt of notification of the contested decision (staff rule 11.4(b)). In this context, the use of the word “may” appears to be permissive and empowering, that is, a staff member may or may not decide to pursue his case by filing an application with the Tribunal.

32. Further, staff rule 11.2(b) provides that a staff member against whom “disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed *following the completion of a disciplinary process*” is not required to request a management evaluation and may appeal the imposition of such measures directly to the Dispute Tribunal (emphasis added) (see also staff rule 10.3(c)).

33. Although the language used in staff rules 11.2(b) and 11.4(b) appears permissive—“may” and “is not required”—art. 8.1(d)(ii) of the Statute, which has higher legal authority than the Staff Rules, unequivocally states that, where a management evaluation of the contested decision is not required, an application *shall* (i.e., must) be filed within 90 calendar days of the receipt by the applicant of the administrative decision. The language of ST/AI/371 (Revised disciplinary measures and procedures), as amended by ST/AI/371/Amend.1, is consistent with art. 8.1(d)(ii) of the Statute.

34. Thus, pursuant to art. 8.1(d)(ii) of the Tribunal’s Statute, in such cases—i.e., when management evaluation is not required—an application shall be filed with the Tribunal within 90 calendar days of the applicant’s receipt of the administrative decision. This is in stark contrast to art. 8.1(d)(i) of the Statute, which applies to cases where management evaluation is required, and where time starts to run following the response of the MEU.

35. In the Tribunal’s view, submission by a staff member to management evaluation in cases where it is not required does not take these cases out of the ambit of art. 8.1(d)(ii) of the Statute so as to convert them into cases where evaluation is required. Thus, the applicable deadline for cases where management evaluation is not required is “within 90 calendar days of the applicant’s receipt of the administrative decision”, in accordance with the Statute, the Staff Rules, and ST/AI/371 (as amended by ST/AI/371/Amend.1).

36. The Dispute Tribunal and the United Nations Appeals Tribunal have consistently stressed the importance of complying with statutory deadlines (see, e.g., *Mezzoui* 2010-UNAT-043).

37. It is common cause that the Applicant was subject to a disciplinary process under ST/AI/371. In particular, the ASG/OHRM's letters of 2 August and 23 December 2013 clearly inform the Applicant of the disciplinary proceedings conducted under ST/AI/371 and of their outcome. Following the completion of the disciplinary process, the ASG/OHRM referred the matter "back to DSS, for consideration as to whether administrative measures or other action may be appropriate", advising the Applicant that he could make further representations directly to the Acting Head of DSS, which he apparently did, and following which the Applicant was issued an "official written reprimand".

38. The Tribunal is not persuaded by the Applicant's submission that the delegation of the matter by the ASG/OHRM to DSS resulted in the "official written reprimand" being something other than what is envisaged by staff rules 10.2(b) and 11.2(b). The Applicant received a written reprimand under staff rule 10.2(b) (which is the only form of written reprimand under the Staff Rules), and it undoubtedly stemmed from and was issued after completion of a disciplinary process, thus bringing it under the ambit of art. 8.1(d)(ii) of the Statute and staff rules 11.2(b) and 11.4(b). In any event, an alleged wrongful delegation of authority simply impugns the decision as one of the possible grounds of unlawfulness—but it does not change the nature of the decision.

39. Accordingly, any claims regarding unlawfulness of the decision to issue the written reprimand—including any claims regarding the lawfulness of the ASG/OHRM's delegation of authority to DSS for consideration of "administrative measures or other action" after the disciplinary process had been finalized—had to be filed within the statutory deadlines set out in art. 8.1(d)(ii) of the Tribunal's Statute.

40. The Applicant received the letter of reprimand on 30 October 2014. Accordingly, the 90-day period for the filing of his application with the Tribunal expired on 28 January 2015. The application in Case No. UNDT/NY/2015/023 was filed on 13 April 2015, more than two months after the expiration of the deadline. The motion to refile the application out of time, whilst the original application is pending, was filed on 22 May 2015, almost four months after the expiration of the deadline. Accordingly, both the application and the motion to refile the application were filed outside the applicable 90-day time limit as provided for by art. 8.1(d)(ii) of the Statute.

41. Therefore, the Tribunal finds that Case No. UNDT/NY/2015/023 is not receivable due to the Applicant's failure to comply with the statutory deadline stipulated in art. 8.1(d)(ii) for the filing of an application with the Tribunal.

Consideration of the motion for waiver of time limits

42. The Applicant submits that the motion for a waiver of the time limits (Case No. UNDT/NY/2015/030) was filed "in order to protect the Applicant's position in the event that the Tribunal were minded to accept the Respondent's submissions regarding the timeliness of the application" in the first case. However, if the Tribunal accepted the Respondent's submissions and rejected the application in the first instance, any subsequent refiling surely would be met with the defence of *res judicata*, although the merits would not have been traversed.

43. Nevertheless, art. 8.3 of the Statute states that the 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 Applicant contends that he was misled by the MEU’s consideration of the matter and the erroneous iteration of when time started to run, thus creating exceptional circumstances.

44. The provisions relating to the core functions of the MEU and the various time limits are contained in sec. 10 of ST/SGB/2010/9 (Organization of the Department of Management) and the relevant Staff Rules and are also clearly and concisely set out in the recent Order of Judge Izuako in *De Masi* Order No. 2 (NBI/2015), which referred to *Abu-Hawaila* 2011-UNAT-118 and *Eng* 2015-UNAT-520.

45. In *Abu-Hawaila*, published on 19 April 2011, the Appeals Tribunal considered the issue of time limits and stated:

28. At the time of receipt of the Settlement Offer, the time limit to file the application to the UNDT had already run for approximately three weeks. In these circumstances, nothing prevented *Abu-Hawaila*, for instance, from filing his application or at least applying for a waiver or extension of the time limit to file it under Article 8(3) of the UNDT Statute. But no action was taken, and the main attitude adopted was to postpone the decision about the Settlement Offer.

29. This Tribunal also holds that the exceptional suspension of time limits provided for under Article 8(1) of the UNDT Statute and provisional Staff Rule 11.1 applies only to informal dispute resolution conducted through the Office of the Ombudsman. The suspension of time limits cannot be extended by analogy to other informal dispute resolution procedures, precisely because of its exceptional character. Exceptions to time limits and deadlines must be interpreted strictly and are not subject to extension by analogy.

46. In *Eng*, published on 17 April 2015, the Appeals Tribunal found that the MEU did not have the power to extend the statutory deadline for

the filing of an application with the Tribunal and that correspondence with the MEU did not result in the re-setting of the applicable time limits.

The Appeals Tribunal stated in *Eng*, at para. 23:

[The Dispute Tribunal] erroneously concluded that the MEU could extend the deadline for filing an application by holding a case before it in abeyance. There is no legal authority for that proposition in Article 8(1) or any other provision of the Dispute Tribunal Statute. Nevertheless, Article 8(1)(d)(iv) of the Dispute Tribunal Statute does allow for the tolling of the limitations period when the Mediation Division of the Ombudsman's Office is involved in settlement or mediation discussions. That provision was not applicable to [the applicant's case], however; [the applicant] has never claimed involvement of the Ombudsman. If the General Assembly had intended settlement efforts by the MEU to toll the deadline for filing an application for judicial review, the UNDT Statute would clearly provide for that; it does not.

47. MEU's acknowledgement letter of 29 December 2014 referred to staff rules 11.2(d) and 11.4(a), advising the Applicant to file within the 90-day deadline from 22 January 2015. Those references were incorrect. The applicable staff rules were 11.2(b) and 11.4(b), and, as of the date of MEU's acknowledgment letter, the 90-day deadline had already started to run.

48. The Applicant also contends that the issue as to whether management evaluation was required for such cases is profoundly ambiguous and could be subject to legitimate legal argument, seeing as the MEU arrived at a different interpretation to that now submitted by the Respondent. The Tribunal notes that whilst the Appeals Tribunal has considered cases concerning non-disciplinary issues (including the issuance of a reprimand) which had been submitted for management evaluation, no definitive finding has previously arisen or been made on this particular

point (see, for example. *Applicant* 2013-UNAT-381; *Gebremariam* 2015-UNAT-584). Indeed, in *Applicant*, the Appeals Tribunal found that the Dispute Tribunal exceeded its jurisdiction in deciding on the merits of the Applicant's application when the matter of a reprimand, along with other non-disciplinary issues, had not been submitted for management evaluation.

49. The Tribunal finds that the issue is not whether management evaluation should or should not have been requested, but rather the applicable deadline for filing with the Tribunal. The plain and literal reading of art. 8.1(d)(ii) of the Statute and staff rules 11.2(b) and 11.4(b), is that the Applicant was required to file his application with the Dispute Tribunal within 90 days of the date of notification of the contested decision, even if he decided to also submit the case for management evaluation, although not so required. The filing of a management evaluation request when it was not required did not reset the statutory filing deadlines under art. 8.1(d)(ii).

50. The Applicant also takes the point that exceptional circumstances are also clearly made out by the fact that the Secretary-General, although represented by numerous bodies, is indivisible, and having endorsed the findings and recommendation of the management evaluation, cannot now be seen to resile and argue the opposite position. The Tribunal notes that this case is clearly distinguishable from the matter of *Simmons* UNDT/2013/015, in which the MEU extended the deadline for a request for management evaluation (subsequently affirmed by the Under Secretary General of Management). However, the Dispute Tribunal's Statute clearly does not provide the MEU with any express or implied statutory authority

to waive or extend the deadline for the filing of an application with the Tribunal.

51. The Tribunal finds that, in the particular circumstances of this case, and taking into account the jurisprudence of the Appeals Tribunal, a waiver or suspension of the statutory time limits is unmerited (*Eng; Gallo 2015-UNAT-552*). The language of art. 8.1(d)(ii) of the Statute is clear, and the Tribunal is not persuaded that this was an exceptional case that prevented the Applicant from filing a timeous application within the clear time limit stipulated in art. 8.1(d)(ii). If the Applicant indeed considered that there was ambiguity on the issue of whether his request for management evaluation affected the deadlines for filing with the Tribunal, the prudent way for him to proceed would have been to file, within the applicable time limits, an application or a motion for extension of time.

52. On a conspectus of all the relevant facts, the Tribunal does not find that the case is exceptional or that there are exceptional reasons in the ordinary sense to justify a waiver or suspension of time. Staff members are presumed to know the rules governing their employment, particularly those pertaining to the basic rights such as the right of appeal (*Diagne et al.; Jennings; Muratore; Christensen; Rahman 2012-UNAT-260*).

53. The Applicant has failed to comply with the basic statutory time limit for the filing of his application. In all the circumstances, the motion for waiver of deadline and to refile the application in Case No. UNDT/NY/2015/030 is denied.

Orders

54. The application in Case No. UNDT/NY/2015/023 is dismissed as not receivable.

55. The motion under Case No. UNDT/NY/2015/030 for waiver of time and to refile the application is denied.

(Signed)

Judge Ebrahim-Carstens

Dated this 18th day of February 2016

Entered in the Register on this 18th day of February 2016

(Signed)

Hafida Lahiouel, Registrar, New York