UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/003
Judgment No.: UNDT/2016/097
Date: 7 July 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 3 February 2016, the Applicant, a former Security Officer who had worked with the United Nations Secretariat from 2005–2010, filed an application contesting the decision of the Department of Safety and Security ("DSS") not to "re-employ" him in response to a request he made in August 2015. The Applicant requests his re-employment as a Security Officer at the S-2 level, since, according to him, there are 22 vacancies available in DSS.

2. On 28 March 2016, the Applicant filed a submission requesting the Tribunal to waive the time limits to appeal two decisions made in 2010: (i) the decision of 5 April 2010 not to grant him special leave without pay ("SLWOP") and (ii) the decision to separate him from service effective 31 May 2010.

Procedural history

3. The Registry transmitted the present application to the Respondent on 4 February 2016, instructing the Respondent to file his reply on or before 7 March 2016.

4. On 11 February 2016, the Respondent filed a motion for leave to file a reply limited to the issue of receivability. The Respondent requested the Tribunal to address the receivability of the application as a preliminary issue.

5. On 11 February 2016, the case was assigned to the undersigned Judge.

6. On 12 February 2016, the Tribunal issued Order No. 38 (NY/2016), directing the Applicant to file a response to the Respondent's motion.

7. On 19 February 2016, the Applicant filed a submission reiterating his earlier submissions and requesting that the Respondent's motion be dismissed.

8. By Order No. 46 (NY/2016) dated 22 February 2016, the Tribunal dismissed the Respondent's motion of 12 February 2016 and directed the Respondent to file his reply by 7 March 2016, addressing issues of receivability and merits

9. On 7 March 2016, the Respondent filed his reply to the application. The reply, however, did not contain any supporting documents.

10. On 11 March 2016, the Tribunal issued Order No. 71 (NY/2016), directing the parties to further submissions and documents by 28 March 2016.

11. On 28 March 2016, the parties filed their submissions in response to Order No. 71 (NY/2016).

12. In his submission of 28 March 2016, the Applicant sought an extension of time to file the application, stating, *inter alia*:

> I admit that I could not file an application within the required time line at UNDT as I was in process of going to war, was in war on front lines in Afghanistan since [September] 2010, with no internet or any postal services. The [Management Evaluation Unit's ("MEU")] decisions were not served at me as I was in Afghanistan and not here at home during the 90 days' time limit SEP 2010 till NOV 2010, so the time line may please be waived.

13. On 29 March 2016, the Tribunal issued Order No. 78 (NY/2016), directing the Respondent to file a response to the motion for extension of time included in the Applicant's submission of 28 March 2016.

14. On 29 March 2016, the Applicant filed a copy of a "Letter of authorization" pertaining to his time in Afghanistan, dated 8 February 2012, and a copy of his national passport.

15. On 5 April 2016, the Respondent filed a submission pursuant to Order No. 78 (NY/2016), requesting the Tribunal to reject the Applicant's request for a waiver of the time limit to file his application.

16. By Order No. 86 (NY/2016), dated 7 April 2016, the Tribunal directed the parties to file their closing submissions on the issue of receivability of the present application, following which the Tribunal would consider the receivability of the application on the papers before it.

17. On 21 April 2016, the parties duly filed their closing submissions on the issue of receivability of the Applicant's claims.

Relevant factual background

18. The following factual background is based on the case record and the parties' submissions.

19. The Applicant commenced his employment with the Organization in August 2005, as a Security Officer with DSS on a fixed-term appointment.

20. His contract was renewed regularly until February 2010, when he was informed by the Executive Office of DSS that his fixed-term appointment would be extended on a one-month basis.

21. On 4 April 2010, the Applicant requested SLWOP for a one-year period to perform work outside the United Nations in support of the "United States war effort in Afghanistan". He requested that the one-year period start on 5 April 2010, the day immediately following his request for SLWOP.

22. On 5 April 2010, the Executive Officer of DSS advised the Applicant by email that DSS would not be able to grant his request for SLWOP. The Applicant sought management evaluation of this decision.

23. By letter dated 5 May 2010, the Applicant was informed of the outcome of management evaluation, namely that the Secretary-General decided to uphold the contested decision not to grant him SLWOP.

24. The Applicant received the management evaluation decision on 5 May 2010, as he confirmed in his email of the same date, stating:

> I thank you for the evaluation and I hereby acknowledge the receipt of the decision.
>
> I would take this opportunity to state that MEU [Management Evaluation Unit's] evaluation clears that SSS [Security and Safety Section, DSS] do not meet the basic requirement under [staff rule] 5.3(b) as all security officers are not recruited through competitive exam and no security officer can be granted SWLOP pursuant 5.3(b).
>
> I was of the opinion that at the initial recruitment process of security officers, the exam was a compet[i]tive exam.
>
> However, I once again thank MEU for the decision.

25. On 1 June 2010, the Executive Office, DSS, offered the Applicant a one-month extension of his contract. The Applicant did not reply to the offer dated 1 June 2010 until 18 June 2010, when he reiterated his request to be granted a fixed-term appointment for a period of time exceeding one month.

26. On 4 June 2010, the Executive Office, DSS, replied that, not having heard back from the Applicant, the Administration had already taken note of the Applicant's non-acceptance of the offer of appointment made on 1 June 2010 and that separation procedures had been initiated accordingly.

27. Accordingly, the Applicant was recorded as having separated from the Organization effective 31 May 2010.

28. On 22 July 2010, the Applicant sought management evaluation of the decision to separate him from service.

29. By letter dated 21 August 2010, the Applicant was informed of the outcome of management evaluation, namely that the Secretary-General decided to uphold the contested decision to separate the Applicant from service.

30. On 23 August 2010, the Applicant sent an email to the MEU in response to the letter of 21 August 2010, stating:

> **Re: Management Evaluation Letter – Case of [Applicant] (MEU/270-10/R)**
>
> Dear MEU,
>
> I thank MEU for the decision and I hereby acknowledge the reciept of the same. I will consult [the Dispute Tribunal] soon as the decision is in short of addressing some of the important issues of discrimination and abuse of powers by Executive office DSS. The motive behind the month to month renewal is also i[g]nored.
>
> However, i than[k] MEU for the decision.

31. It appears from the uncontested records provided by the Applicant that, in the period of 2010 to 2014, he was in Afghanistan.

32. On 26 August 2015, the Applicant wrote a letter to the Secretary-General, requesting that he be re-employed by DSS "under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301–4333".

33. On 27 August 2015, the Applicant sent an email to the Executive Office, DSS, stating: "I am writing you [sic] regarding my reemployment application I sent you yesterday, can u [sic] please confirm that you have received the same and it's in process?"

34. On 27 August 2015, the Executive Office of DSS replied to the Applicant by email, stating: "The application is received. If there is an availability someone from SSS will contact you".

35. By letter dated 25 October 2015, the Applicant filed a management evaluation request seeking evaluation of the decision dated 27 August 2015 as well as the DSS' failure to contact him concerning his re-employment. The Applicant concluded his request for management evaluation by requesting that the DSS Executive Office be directed to "let [him] come back to [his] job as Security Officer S-2/2".

36. On 19 November 2015, the MEU replied to the Applicant's request of 25 October 2015, rejecting his request for re-employment. The MEU stated that, upon the Applicant's separation from the Organization on 31 May 2010, he pursued employment with a private company (military contractor), and not with a military service. The Applicant was also not placed on SLWOP, but separated. Thus, the MEU found that the Applicant's request was not receivable under staff rule 11.2(a) and he had no right to re-employment with the Organization under the United Nations Regulations and Rules.

37. The Tribunal will further analyze the parties' submissions on the receivability of the application.

Parties' submissions

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

a. The Applicant is time-barred from appealing the 2010 decisions related to his former service with the Organization. More than three years have elapsed since the Applicant was notified of the 2010 decisions. Article 8.4 of the Tribunal's Statute is an absolute bar to hearing an appeal that is brought more than three years after the applicant's receipt of the contested administrative decision (*Hayek* 2015-UNAT-606). This three-year limitation cannot be waived at the request of the Applicant (*Reid* 2013-UNAT-389);

b. Prior to his separation from service, the Applicant requested management evaluation of the decision not to grant him SLWOP in order to work for a contractor with the United States military. By letter dated 5 May 2010, the decision not to grant him SLWOP was upheld. Also, the Applicant requested management evaluation of the decision to separate him from the Organization, which decision was upheld by letter dated 21 August 2010. The Applicant did not challenge the decisions to deny him SLWOP and to separate him from service within the 90-day limit under art. 8.1(d) of the Statute. The respective time limits expired over five years ago, in August and November 2010;

c. The Applicant has no standing as a former staff member with regard to the claims for re-employment in August 2015. The decision of 27 August 2015 not to re-employ the Applicant following his engagement as a United States military contractor is not connected to his former employment with the Organization. Second, the Applicant is time-barred from appealing the 2010 administrative decisions not to

grant him SLWOP to deploy as a military contractor, and to separate him from service;

d. The jurisdiction of the Dispute Tribunal with respect to former staff members is limited. A former staff member may only challenge an administrative decision that is connected to the terms of his or her former appointment (art. 3.1 of the Statute; *Ghahremani* 2011-UNAT-171). The Appeals Tribunal explained in *Shkurtaj* 2011-UNAT-148 that there must be a sufficient nexus between the former employment and the impugned action;

e. The Applicant's complaint about the Organization's failure to re-employ him does not have a sufficient nexus with his former appointment. The Applicant has not identified any breach of his rights under the terms of his former appointment as a Security Officer at the S-2 level;

f. The Applicant claims that the Organization is required to employ him under the federal law of the United States, in particular the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. 4301–4333). However, the Organization, through its privileges and immunities, is not bound by the provisions of USERRA. The terms of the Applicant's former appointment did not include the law of the United States.

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

a. The Applicant seeks waiver of time for the filing of his application. He could not file his application with the Dispute Tribunal within the required time line as he "was in process of going to war".

The MEU decisions from 2010 were not served on him as he was in Afghanistan and not at home in the United States during the 90-day time limit for the filing of the application with the Tribunal;

b. Under the provisions of USERRA, the Applicant had the right to "proceed to war with military even if the employer fails to approve [his] special leave request" and to be re-employed upon his return. USERRA was adopted by the United States especially for this purpose and it covers all the employers domestically and international employers working in the United States, including the United Nations;

c. Since returning from war, the Applicant requested DSS to allow him to come back to his job but DSS failed even to consider his re-employment. At the same time, DSS "has given to so many Security Officers their jobs back even when the officers resigned and came back to work after years of absence".

Consideration

Applicable law

40. 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.

4. 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.*

41. Article 7 of the Tribunal's Rules of Procedure states:

Article 7 Time limits for filing applications

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

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation,

namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(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.

42. Staff rule 11.4(a) states:

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.

43. Staff rule 5.3 states:

Rule 5.3

Special leave

(a) (i) Special leave may be granted at the request of a staff member holding a fixed-term or continuing appointment for advanced study or research in the interest of the United Nations, in cases of extended illness, for childcare or for other important reasons for such period of time as the Secretary-General may prescribe;

(ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted;

(iii) Subject to conditions established by the Secretary-General, family leave may be granted as follows:

a. As special leave with full pay in the case of adoption of a child;

b. As special leave without pay for a period of up to two years for a staff member who is the mother or father of a newly born or adopted child, with a possibility of extension for up to an additional two years in exceptional circumstances. The right of a staff member to be reabsorbed after the end of such special leave without pay shall be fully protected;

c. As special leave without pay for a reasonable period, including necessary travel time, upon the death of a member of the immediate family of the staff member or in case of serious family emergency.

…

(c) Subject to conditions established by the Secretary-General, a staff member who has successfully completed the competitive examination and completed one year of service under a fixed-term appointment or who holds a continuing appointment and who is called upon to serve in the armed forces of the State of which the staff member is a national, whether for training or active duty, may be granted special leave without pay for the duration of such military service, in accordance with terms and conditions set forth in appendix C to the present Rules.

…

(e) Staff members holding a temporary appointment may exceptionally be granted special leave, with full or partial pay or without pay, for compelling reasons for such period as the Secretary-General deems appropriate.

(f) In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he or she considers such leave to be in the interest of the Organization.

(g) Continuity of service shall not be considered broken by periods of special leave with or without pay. However, staff members shall not accrue service credits

towards sick, annual and home leave, salary increment, seniority, termination indemnity and repatriation grant during periods of special leave with partial pay or without pay exceeding one month. Periods of special leave with partial pay or without pay exceeding one month shall not be counted towards accrued years of service for eligibility requirements for a continuing appointment.

44. Appendix C to the Staff Rules provides:

Arrangements relating to military service

(a) In accordance with section 18(c) of the Convention on Privileges and Immunities of the United Nations, staff members who are nationals of those Member States which have acceded to that Convention shall be "immune from national service obligations" in the armed services of the country of their nationality.

…

(c) Staff members who have successfully passed a competitive examination and have completed one year of satisfactory service under a fixed-term appointment or who have a continuing appointment may, if called by a Member Government for military service, whether for training or active duty, be placed on special leave without pay for the duration of their required military service. Other staff members, if called for military service, shall be separated from the Secretariat according to the terms of their appointments.

(d) A staff member called for military service who is placed on special leave without pay shall have the terms of appointment maintained as they were on the last day of service before the staff member went on leave without pay. The staff member's re-employment in the Secretariat shall be guaranteed, subject only to the normal rules governing necessary reductions in force or abolition of posts.

…

(f) A staff member on special leave without pay for military service shall be required to advise the Secretary-General within 90 days after release from military service if the staff member wishes to be restored to active duty with the

> Secretariat. The staff member shall also be required to submit a certificate of completion of military service.

Scope of the Applicant's case

45. Having reviewed the Applicant's submissions on receivability the Tribunal is of the view that, in effect, he is:

> a. seeking a waiver of the time limit for filing his 28 March 2016 claims contesting the decision to deny his request for SLWOP, notified to him on 5 April 2010, and the decision to separate him from service on 31 May 2010, notified to him on 18 June 2010; and
>
> b. contesting the decision made in August 2015 not to re-employ him.

46. The Tribunal will therefore consider whether the Applicant's claims with respect to the above are receivable.

Receivability framework

47. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073; *O'Neill* 2011-UNAT-182; *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.

48. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and art. 7.1–7.3 of the Rules of Procedure.

49. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Consideration of the motion for waiver of time limits for filing an appeal against the two decisions notified to the Applicant in April and June 2010

50. With regard to the Applicant's motion for a waiver of time to appeal the decision to deny his request for SWLOP, the Tribunal notes that, as results from the evidence on the record, on 4 April 2010, the Applicant requested SWLOP for a one-year period under staff rule 5.3. He was informed that his

request for SWLOP was denied on 5 April 2010. He filed a management evaluation request against this decision and the MEU response was issued on 5 May 2010. The Applicant received the MEU decision on the same day, as he acknowledged by email, stating:

> I thank you for the evaluation and I hereby acknowledge the receipt of the decision.
>
> I would take this opportunity to state that MEU evaluation clears that SSS do not meet the basic requirement under [staff rule] 5.3(b) as all security officers are not recruited through competitive exam and no security officer can be granted SWLOP pursuant 5.3(b).

51. The Applicant did not file an application before the Tribunal contesting the decision to deny him SLWOP within 90 days from 5 May 2010. The present application was submitted to the Tribunal on 3 February 2016, more than five years and nine months from the date of notification of the contested decision.

52. With regard to the Applicant's motion for a waiver of time to contest his separation from service in May 2010, the Tribunal notes that, as results from the evidence, the Applicant was notified of his separation from service on 18 June 2010, the same day he announced his intention to seek review of this decision. On 22 July 2010, he submitted a request for management evaluation regarding the separation decision. The MEU response issued on 21 August 2010 was notified to the Applicant on 23 August 2010 at the latest, as on that day the Applicant acknowledged receipt of the response, stating that he would "consult [the Dispute Tribunal] as soon as the decision is in short [sic] of addressing some of the important issues of discrimination and abuse of powers".

53. However, the Applicant did not file an application before the Tribunal to contest his separation from service within 90 days of 23 August 2010. The

present application was submitted to the Tribunal on 3 February 2016, more than five years and five months from the date of notification of the contested decision.

54. 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.

55. As the Appeals Tribunal stated in a number of judgments, under art. 8.4 of the Dispute Tribunal's Statute, the Tribunal cannot waive the time limit to file an appeal more than three years after the applicant's receipt of the contested administrative decision (*Fagundes* 2010-UNAT-057; *Piskolti* 2011-UNAT-106; *Lesar* 2011-UNAT-126; *Borg-Olivier* 2011-UNAT-146; *Bangoura* 2012-UNAT-268; *Reid* 2013-UNAT-389).

56. In *Reid*, in particular, the Appeals Tribunal stated:

> 14. As recalled in Article 7(6) of the Rules of Procedure of the UNDT, "[i]n accordance with article 8.4 of the Statute of the Dispute Tribunal, no application shall be receivable if filed more than three years after the applicant's receipt of the contested administrative decision". Moreover, as the Appeals Tribunal has previously held, "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" [*Bangoura* 2012-UNAT-268]. Given this absolute restriction on its judicial discretion, 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. As it concluded that neither the interests of justice nor any such exceptional circumstances existed, however, the Appeals Tribunal need not vacate its findings.

57. The Tribunal finds that any applications in relation to the 2010 denial of SWLOP and separation from service are time-barred under art. 8.4 of the Tribunal's Statute, which provides that "an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision".

58. The Tribunal concludes that since the Applicant was aware of the management evaluation reviews of 5 May 2010 (regarding the decision not to grant him SLWOP) and 21 August 2010 (regarding his separation from service on 31 May 2010), he should have filed his applications within the deadlines stipulated in art. 8.1(d) of the Tribunal's Statute: by 5 August 2010 regarding the denial of SWLOP and by 23 November 2010 regarding his separation from service.

59. Moreover, the Tribunal underlines that staff members are presumed to know the rules governing their employment, particularly those pertaining to basic rights such as the right of appeal, including the deadlines for filing an appeal before the Dispute Tribunal (*Diagne et al.* 2010-UNAT-067*; Jennings* 2011-UNAT-184; *Muratore* 2012-UNAT-191; *Rahman* 2012-UNAT-260; *Christensen* 2013-UNAT-335).

60. Accordingly, in the light of the above considerations, the Tribunal finds that some of the exceptional circumstances invoked by the Applicant—namely, that he "could not file an application within the required time line at UNDT as [he] was in process of going to war, was in war on front lines in Afghanistan since [September] 2010, with no internet or any postal services" and that "[t]he MEU decisions were not served [to him] as [he] was in Afghanistan and not here at home during the 90 days' time limit SEP 2010 till NOV 2010"—are contradicted by the evidence. The Applicant confirmed by emails dated 5 May 2010 and 23 August 2010 that he had received the two MEU decisions

from May 2010 and August 2010, respectively. The deadline for contesting the decision to deny his SWLOP expired on 5 August 2010, during which period he had access to internet, since he was able to confirm on 23 August 2010 the receipt of the second MEU decision regarding his separation from service.

61. As clearly results from the mandatory provisions of art. 8.4 of the Dispute Tribunal's Statute and the binding Appeals Tribunal's jurisprudence regarding the interpretation of art. 8.4, an application (appeal) filed more than three years after the applicant's receipt of the contested administrative decision is not receivable.

62. Article 8.3 of the Statute refers explicitly to the Tribunal's power to waive the deadline for the filing of an application to the Tribunal for a limited period of time and only in exceptional cases. However, art. 8.4 of the Statute, which contains mandatory provisions ("shall"), explicitly states that "notwithstanding" provisions of art. 8.3, an extension cannot exceed three years after the applicant's receipt of the contested decision. Therefore, the Applicant's motion to waive the deadline to file an appeal against the denial of SWLOP and separation from service issued in 2010 is related to claims which are time-barred, having been raised more than three years after the notification of the contested decisions, as results from the above-mentioned considerations.

63. The Tribunal considers that, consequently, a motion to waive the deadline to file an appeal before the Dispute Tribunal filed three years after the receipt of the contested decision is also not receivable and cannot be granted by the Tribunal even if the Tribunal were to accept that there were exceptional circumstances as invoked by the Applicant in the present case.

64. Therefore, the Applicant's claims regarding SLWOP and separation therefore are not receivable *ratione temporis* and are to be rejected by the Tribunal.

65. Further, the Tribunal will analyze the Applicant's appeal against the decision not to re-employ him as a Security Officer.

August 2015 decision concerning the Applicant's re-employment request

Receivability *ratione materiae* and *ratione temporis*

66. In *Rosana* 2012-UNAT-273, the Appeals Tribunal made the following pronouncements:

> 23. This Tribunal holds that the [Dispute Tribunal] correctly established that the silence of the [United Nations Environment Programme/Department of Early Warning and Assessment] management constituted an implied administrative decision, and that this decision was taken on 31 August 2009.
>
> 24. An appellant may not unilaterally determine the date of the administrative decision by sending an e-mail to the Administration expressing an ultimatum to adopt a decision. If that were the case, no management review would ever be time-barred because the staff member could always prevent that possibility by simply sending an e-mail to the Administration stating that if his or her request is not analyzed by an arbitrarily chosen date it would be interpreted as an implied decision of refusal.
>
> 25. The date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine. On the date of her retirement on 31 August 2009, Ms. Rosana already knew what the administrative decision about her petition was: an implied refusal. As the request for management evaluation was filed on 3 December 2009, well outside the time-frame mentioned, the request had to be considered as time-barred. In order to comply with the previously-mentioned rules, Ms. Rosana only

> had until 30 October 2009 to file a request for management evaluation.

67. In *Terragnolo* 2015-UNAT-566, the Appeals Tribunal stated (footnotes omitted):

> 28. The Dispute Tribunal found that the application was not receivable *ratione materiae* on two grounds. First, the Appellant had "failed to comply with the mandatory requirement of article 8.1(c) of the [Dispute] Tribunal's Statute and staff rule 11.2(a)" to request management evaluation of the 25 April 2014 decision. Second, it was not reasonable for "a delay of ten working days" to be "considered as an implied unilateral decision"; thus, there was no implied decision for the Dispute Tribunal to review.
>
> 29. Article 8(1)(c) of the UNDT Statute provides that an application shall be receivable if "[a]n applicant has previously submitted the contested decision for management evaluation, where required". Further, Article 8(3) of the UNDT Statute prohibits the Dispute Tribunal from "suspend[ing] or waiv[ing] the deadlines for management evaluation".
>
> 30. Staff Rule 11.2(a), which was in effect in 2014, required that "[a] staff member wishing to formally contest an administrative decision […] shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision". This means that a request for management evaluation of a claim raised in an application must be submitted for management evaluation by the staff member prior to bringing an application before the Dispute Tribunal.
>
> …
>
> 32. The Appeals Tribunal has previously noted that a staff member must be familiar with the Staff Rules and understand his or her obligation to act in conformance with those rules [*Servas* 2013-UNAT-349; *Jennings* 2011-UNAT-184; *Diagne et al.* 2010-UNAT-067]. By his conduct in this case, it is clear that the Appellant knows of the requirement for management evaluation of a decision before seeking judicial review. Yet, the Appellant did not afford the Administration an opportunity to resolve his complaints before bringing legal action, as required by Staff Rule 11.2(a).

…

35. The UNDT found the Appellant's contention to have no merit, concluding that "at the time of [the Appellant's] request for management evaluation, there was no [implied] decision against which an appeal could have been filed". The UNDT found that the application also was not receivable on this ground, stating:

> … […] an applicant may not unilaterally determine the date of the decision when faced with the silence of the Administration.
>
> … The question to be considered by the Tribunal is whether the delay of ten working days on the part of OHRM in communicating a decision to the [Appellant] could reasonably and sensibly be construed as an implied decision on the part of the Administration to deny the [Appellant's] request. […]
>
> … Section 5.14 of ST/SGB/2008/5 […] states that "[u]pon receipt of a formal complaint or report, the responsible official will promptly review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation" […].
>
> … What constitutes a prompt reply is not defined but common sense dictates that it must refer to a reasonable period in the circumstances of a particular complaint. Having received two out of office notifications in relation to his email to OHRM dated 14 March 2014, the [Appellant] filed a request for management evaluation on 28 March 2014.
>
> … The absence of a response by OHRM, during a delay of ten working days between the [Appellant's] request of 14 March 2014 to carry out an investigation and his request for management evaluation on 28 March 2014, could not reasonably and sensibly be considered as an implied unilateral decision. It could also not be construed as a failure to act promptly in accordance with ST/SGB/2008/5. […]

> … The Tribunal finds that the absence of a response within ten working days does not constitute an appealable administrative decision and that the request for management evaluation was premature. There was in fact no decision at the time.
>
> 36. The Appeals Tribunal has held that "[t]he date of an [implied] administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine" [*Rabee* 2013-UNAT-296; *Rosana* 2012-UNAT-273]. As the UNDT found, it was unreasonable for the Appellant to assume that a decision regarding his request for an investigation could have been reached within fourteen days from his request – especially when he was not prejudiced or harmed in the interim. A staff member "may not unilaterally determine the date of the administrative decision for the purpose of challenging it" [*Rabee* 2013-UNAT-296; *Rosana* 2012-UNAT-273]. Yet, that is what the Appellant attempts to do. Thus, the Appeals Tribunal determines that the UNDT correctly concluded that there was no implied administrative decision to challenge at the time the Appellant filed his judicial review application and that his application was also not receivable on this ground.

68. In *Collas* 2014-UNAT-473, the Appeals Tribunal stated (footnotes omitted):

> 40. As stated in *Rosana* [2012-UNAT-273], "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".
>
> 41. Equally, the impact or consequences of a disputed decision is based on objective elements that both parties can accurately determine. With regard to the decision to deny Ms. Collas return rights to UNOPS, we are satisfied that, based on the 7 January 2011 communication to her, she could have had no doubt but that, once her tenure with the GF came to an end, she would not have return rights to UNOPS. In this circumstance, we find no legal error on the part of the UNDT in finding, while giving the benefit to Ms. Collas that her communication of 19 July 2011 was a request for management evaluation, that her request was untimely, being filed after

> the expiration of the sixty-day deadline provided for by Staff Rule 11.2(c). Furthermore, the UNDT correctly opined that, assuming the Administration's communication of 31 July 2011 was a response to a management evaluation request, Ms. Collas' UNDT challenge to that response did not comply with the requirement of Article 8(1)(d)(i)(a) of the Dispute Tribunal Statute.

69. In *Awan* 2015-UNAT-588, the Appeals Tribunal stated (footnotes omitted):

> 16. The Dispute Tribunal concluded that Mr. Awan's application was not receivable *ratione materiae* for two alternative reasons. First, the UNDT found that the application failed to identify in clear and precise terms a specific administrative decision that was being challenged. Second, the UNDT found the Appellant had failed to submit a timely request for management evaluation.
>
> 17. The Appeals Tribunal will address only the latter reason since, even assuming arguendo that Mr. Awan's application could be said to challenge a specific implied administrative decision on the part of UNICEF, Mr. Awan's request for management evaluation was clearly untimely.
>
> 18. Staff Rule 11.2(c) provides that "[a] request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested". This applies to both explicit and implied administrative decisions.
>
> 19. With an implied administrative decision, the Dispute Tribunal must determine the date on which the staff member knew or reasonably should have known of the decision he or she contests [*Rosana* 2012-UNAT-273; *Chahrour* 2014-UNAT-406]. Stated another way, the Dispute Tribunal must determine the date of the implied decision based "on objective elements that both parties (Administration and staff member) can accurately determine" [*Terragnolo* 2015-UNAT-566; *Rosana* 2012-UNAT-273; *Collas* 2014-UNAT-473]. The Dispute Tribunal determined that to the extent that Mr. Awan challenged a failure to act by UNICEF, the latest date of any administrative decision contested by Mr. Awan was the last date

> his criminal and civil cases were pending, or the date his ordeal ended, which according to Mr. Awan was 20 November 2013. In making this finding of fact or conclusion of law, the UNDT correctly applied our jurisprudence and did not err in fact or law. On appeal, Mr. Awan does not challenge this determination by the UNDT.
>
> 20. Having correctly determined that 20 November 2013 was the latest date from which time began to run for the purpose of contesting any implied decision, the UNDT then concluded that Mr. Awan had not requested management evaluation within 60 calendar days of that date; thus, the UNDT was precluded from receiving *ratione materiae* Mr. Awan's application and considering its merits:
>
> > … [I]t is clear that in submitting his request for management evaluation only on 24 March 2014 relating to issues which, at the very latest, came to an end in November 2013, [Mr. Awan] failed to respect the 60-day statutory time-limit to request management evaluation under staff rule 11[.]2(c)[.] The failure to file a timely request for management evaluation renders the application equally irreceivable, *ratione materiae*[.]

70. With regard to the Applicant's request for re-employment, the Dispute Tribunal notes that the Applicant filed this request on 26 August 2015 and the next day, 27 August 2015, he received an email from the Administration confirming the receipt of his application and informing him that "if there is an availability someone from SSS will contact you". The Applicant considered this message as being a denial of his request for re-employment.

71. On 19 October 2015, he filed a management evaluation request concerning his re-employment within 60 days from the date of receipt of the 27 August 2015 email from the Administration.

72. The Tribunal underlines that the Administration has the general obligation to respond to any request within a reasonable period of time from

the date of its receipt. A review of the deadlines established in the Staff Regulations and Rules and in other administrative issuances indicates that a period of 30–45 days appears to be considered a reasonable period of time within which the Administration should take a decision and respond. This period can be extended for reasons justified by complex circumstances related to the nature of the request, which should normally be notified to the staff member. In accordance with the Appeals Tribunal's jurisprudence, when the Administration does not issue an express response or decision verbally and/or in writing within a reasonable period, such a non-decision constitutes an implicit decision to refuse or deny the request or claim, which can be subject of a request for management evaluation review by the MEU and of an application before the Dispute Tribunal, if any.

73. The Tribunal considers that, in the light of the above-mentioned jurisprudence, there was no delay in considering the Applicant's request, and that it was not reasonable for the Applicant to consider the email received by him from the Administration one day after his request for re-employment as an implied administrative decision.

74. As clearly stated by Appeals Tribunal, an appellant may not unilaterally determine the date of the administrative decision which is to be established based on objective elements that both parties can accurately determine.

75. However, in the present case, the Tribunal considers that, even if the content of the 26 August 2015 email did not constitute an explicit decision to deny the Applicant's request for re-employment, by the time he filed his management evaluation request on 19 October 2015, a reasonable period of time (more than 50 days) passed for the Administration to be able to make a decision. Therefore, in the absence of an explicit decision, the Applicant reasonably considered that the Administration implicitly took the decision not

to re-employ him as a Security Officer. The Applicant timely filed a management evaluation request of this implied decision, which was confirmed and reasoned on 19 November 2015, when the Applicant was informed that the MEU had determined that he has no right to re-employment with the Organization and that his request is not receivable. The Tribunal concludes that since the contested decision is an administrative decision that can properly be reviewed by the Tribunal and the Applicant timely requested its management evaluation, the present application is receivable *ratione materiae*.

76. Further, the Tribunal notes that the application was filed before the Tribunal on 3 February 2016, within 90 days from the date on which the Applicant received the MEU decision and is also receivable *ratione temporis*.

Receivability *ratione personae*

77. The Respondent submits that the Applicant's request to be re-employed does not pertain to any former or existing terms of employment as any claims pertaining to the events in 2010 are time-barred under art. 8.4 of the Statute, and the Applicant has not been a staff member of the Organization since 2010. Accordingly, he does not have standing *ratione personae* and the Tribunal does not have jurisdiction over his appeal against the decision of August 2015 not to re-employ him in service.

78. The Tribunal notes that, in *Shkurtaj* 2011-UNAT-148, the Appeals Tribunal decided that "a former staff member has standing to contest an administrative decision concerning him or her if the facts giving rise to his or her complaint arose, partly arose, or flowed from his or her employment. There must be a sufficient nexus between the former employment and the impugned decision". In light of this binding jurisprudence, the Dispute

Tribunal will further determine if there is a sufficient nexus between the former employment of the Applicant and the impugned action and, consequently, if the present application filed by a former staff member is receivable *ratione personae*.

79. As results from the MEU letter of 5 May 2010, the Administration determined that, in terms of sec. (c) of Appendix C to the Staff Regulations and Rules, the Applicant was not recruited by the Organization through a competitive examination and did not meet the requirements set out in staff rule 5.3(b). Accordingly, the decision not to grant him SWLOP was upheld.

80. As clearly results from secs. (d) and (g) of Appendix C, a staff member called for military service has the right to maintain the terms of his appointment as they were on the last day of service, including the right to be re-employed after the period of required military service, only if she or he has been placed on SWLOP.

81. However, the Applicant was not placed on SWLOP. He was separated from the Organization effective 31 May 2010 and therefore he did not maintain the right to be re-employed.

82. The separation decision was not appealed within the deadline, i.e., within 90 days from the date of notification of the MEU decision of 5 May 2010, and the Tribunal has rejected the Applicant's motion to waive the deadline to file an appeal against that decision.

83. The Tribunal concludes that, since the Applicant 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. The Applicant has no standing to contest the decision not to

re-employ him with the Organization and the application is not receivable *ratione personae*.

Applicability of national laws

84. Further, the Tribunal notes that domestic legal provisions invoked by the Applicant—namely, USERRA (38 U.S.C. 4301–4333), which concerns employment and re-employment rights of members of the uniformed services—are not applicable to the United Nations, as clearly established in the jurisprudence of the Dispute and Appeals Tribunals.

85. As this Tribunal explained in *Jordan Mostajo* UNDT/2012/171 (not appealed),

> 26. While the Tribunal does not consider that the present application is receivable, it has decided that it should also address the Applicant's argument, both as part of her main submission and in response to the Respondent's receivability claims, that she should be receiving the remedy she requested due to the fact that the actions of UNDP [United Nations Development Programme] were in breach of the national laws of Bolivia. The Applicant further states that the national laws and the constitution of Bolivia should supersede any treaty or internal rule of the United Nations.
>
> 27. The jurisprudence of the Tribunal with regard to the applicability of national laws within the United Nations internal system of justice is clear and does not suffer from any ambiguity. Indeed, in *Ernst* UNDT/2011/047, the Tribunal stated that "[n]o national laws or regulations are directly applicable to staff members of the Organizations and only those United Nations organs authorised to do so have the power to decide to transpose a rule of national law into the internal law of the Organization".
>
> 28. Furthermore, in the case of *Saka* UNDT/2010/007, the Applicant, similarly to the one in the present matter, submitted that the contested decision was contrary to Turkish law. In response to that argument, the Tribunal stated that "it is

> clear that the internal regulations of the United Nations alone are applicable to disputes involving its staff members".
>
> 29. Finally, the Applicant's terms and condition of employment, like any staff member within the United Nations, clearly indicated that her employment contract was governed by the rules and regulations of the UNDP and its related judicial system.
>
> 30. The Tribunal can only conclude that even if this case were considered to be receivable, there is no place for this Tribunal to take into account the national laws of the State of Bolivia.

86. In *Ernst* UNDT/2011/047 (affirmed in *Ernst* 2012-UNAT-227), the Dispute Tribunal found:

> 30. The Applicant contends that, pursuant to the Flemming principle, the Administration was under a duty to adapt the circular in question to take account of changes in Austrian employment law. The Tribunal recalls that no national laws or regulations are directly applicable to staff members of the Organization and that only those United Nations organs authorised to do so have the power to decide to transpose a rule of national law into the internal law of the Organization, with the Tribunal having no powers whatever to rule upon whether such a transposition is appropriate.

87. Further, in *Wang* 2014-UNAT-454, the Appeals Tribunal stated (footnotes omitted):

> 32. We find Mr. Wang's further submission that the UNDT erred in disrespecting the Chinese law which prohibits counting of part-time employment as misconceived. The Organization's selection process is governed by its internal rules and regulations and not the national laws of its Member States, unless the Organization adopts such national laws as part of its internal law.

88. In *El Rush* 2016-UNAT-627, the Appeals Tribunal stated (footnotes omitted):

> 14. Mr. El Rush submits that the UNRWA DT [Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East] erred in law by not applying the applicable legislation, namely, the Palestinian Labour Law No. 7 (2000), to his case. This submission is misconceived as it is the internal laws of the Organization that govern staff matters and not national law, unless the Organization adopts such national law as part of its internal laws.

89. The Tribunal therefore concludes that, even if this case were considered to be receivable, the provisions of the United States law would not be directly applicable to the Applicant's employment-related claims with the United Nations.

Conclusion

90. In the light of the foregoing IT IS DECIDED:

a. The applicant's motion to waive the deadline to file an application contesting the decision not to grant him SWLOP and the decision to separate him from the Organization is rejected.

b. The application in Case No. UNDT/NY/2016/003 is dismissed as not receivable.

Observation

91. The Tribunal notes that the Administration informed the Applicant on 27 August 2015 that "[i]f there is an availability someone from SSS will contact you". The Tribunal observes that the Applicant has the right to apply for vacant posts within the Organization, including through Inspira (UN's job

and career website), and that, in the event any DSS vacancies are available outside of Inspira, the Applicant should be informed by DSS accordingly, in order to be able to apply.

(*Signed*)

Judge Alessandra Greceanu

Dated this 7th day of July 2016

Entered in the Register on this 7th day of July 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York