



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/100

Judgment No.: UNDT/2020/172

Date: 30 September 2020

Original: English

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**Before:** Judge Francis Belle  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

TEMU

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Julia Kyung Min Lee, OSLA

**Counsel for the Respondent:**

Elizabeth Gall, UNDP

### **The Application and Procedural History**

1. The Applicant was a Communications Specialist with the Country Office of the United Nations Development Programme (“UNDP”) in Tanzania.
2. In a pending application before the United Nations Dispute Tribunal (UNDT/NBI/2019/034), the Applicant challenges the Respondent’s decision to separate her from service of the Organization on grounds of misconduct.
3. In this application, she is challenging the Respondent’s decision to separate her from service while she was on maternity leave. The Respondent filed a motion for summary judgment on grounds that the application was filed out of time.
4. This Judgment deliberates on the issues of receivability raised by the Respondent, which submissions the Applicant has responded to.

### **Facts and Submissions**

5. The Applicant is an experienced communications specialist who is aware of the need for clear communication and the importance of the use of technology to make such communication timely and effective.
6. The Applicant received a decision from Mr Mourad Wahba on 18 December 2018 on allegations of misconduct for which she was charged.
7. The decision letter informed her that the disciplinary measure would be effective upon receipt of the letter. She was informed that she was terminated and separated

from service with the Organization with compensation *in lieu* of notice and without termination indemnities effective that same day.

8. The United Nations Dispute Tribunal has on several occasions considered matters of admissibility or receivability on a priority basis without considering the merits of an application or requiring that the Respondent submit a reply to the application.<sup>1</sup>

9. Article 8.1(d)(i)(a) of the Dispute Tribunal's Statute stipulates that in cases where a request for management evaluation ("RME") of a contested decision is required the application shall only be receivable if it is filed within 90 calendar days of the Applicant's receipt of the response to the RME.

10. The UNDT has no discretion to waive the applicable deadlines.<sup>2</sup>

11. In *Auda*, the United Nations Appeals Tribunal ("UNAT") stated that the date indicated on the communication provides the only date upon which it is possible to state with precision that [the applicant] received notification of the contested decision for purposes of staff rule 11.2 (c). The 2 April 2019 email is based on objective elements that both parties (administration and staff member) can accurately determine.<sup>3</sup>

12. Time limits for formal contestations are to be strictly enforced, a day late is by no means *de minimis*. Whether a deadline is missed by several minutes, several hours, or several days is irrelevant.<sup>4</sup>

13. The Respondent therefore submitted that the 90 calendar-day time limit by which the Applicant was required to appeal the 2 April 2019 response to the request for management evaluation was 1 July 2019.

14. The present application was filed one day late on 2 July 2019. Therefore, the Applicant is time barred and should be rejected as not receivable *ratione temporis*.

15. The Respondent submitted also that the Applicant had not submitted a written request for a waiver of the applicable time limits on the basis that the delay in filing her appeal represents an exceptional case as required by article 8.3 of the UNDT Statute. In this regard, the jurisprudence in *Cooke* states that<sup>5</sup>

the UNDT cannot consider whether exceptional circumstances exist unless the applicant has submitted a prior written request for a waiver. In other words, unless the applicant has made a written request for waiver of the filing deadline based on exceptional circumstances it is not competent to do so.

16. The Applicant submits that the Assistant Administrator and Director of Bureau for Management Services of UNDP sent the response to her RME on 2 April 2019 at 2.03 p.m. New York time which was 9.03 p.m. in the Applicant's time zone and 8.03 p.m. in her Counsel's time zone, which was well after the close of business in their respective time zones.

17. The Applicant and her Counsel did not become aware of the UNDP's response to her RME until 3 April 2019. As such the deadline began running from 3 April 2019 and expired on 2 July 2019 which is when the application was filed. Therefore, the

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<sup>1</sup> *Karambiza* UNDT /2018/001, *Riasasi* UNDT/2018/008.

<sup>2</sup> *Kissila* 2014-UNAT 746, *Babiker* 2016-UNAT-672, *Roig* 2014-UNAT-491.

<sup>3</sup> 2017-UNAT-746.

<sup>4</sup> *Ruger* 2016-UNAT-693.

<sup>5</sup> 2012-UNAT-275.

Applicant filed her application within the prescribed deadline in accordance with article 8.1(d)(i)(a) of the UNDT Statute and article 34 of the UNDT Rules of Procedure.

18. The Applicant submits that it was unreasonable for the Respondent to expect Counsel for the Applicant “to remain on standby for 24 hours” in a day to check their email to receive his response to the Applicant’s RME.

19. The Applicant went on to submit that, alternatively, should the Tribunal determine that the Application was filed out of time, there are exceptional circumstances justifying a waiver of the time limit to file a UNDT application.

20. The Applicant submits that the UNAT jurisprudence requires effective knowledge of service, pursuant to staff rule 11. 2(d), the response “reflecting the outcome of the management evaluation shall be communicated in writing to the staff member.” The Applicant cites *Chahrour*, where UNAT held that where a written decision is required the time limit begins to run “from the date the staff member received notification of the decision in writing.”<sup>6</sup>

21. The Applicant refers to *Cooke* which was also referred to by the Respondent.

22. Finally, the Applicant states that following the loss of her child in November 2018, she had been receiving regular medical care until April 2019 in Tanzania. She did not have regular access to email and was represented by counsel based in Geneva.

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<sup>6</sup> 2014-UNAT-406.

23. The Applicant submits that the waiver sought is limited to one day and this does not prejudice the Respondent who had been in possession of relevant information contained in these submissions but who failed to file his reply on the merits of the case.

### **Deliberations**

24. The UNDT considers that it cannot condone delay or adjust the time permitted for filing an application within the prescribed 90 calendar day limit. There must be a limit to such actions.

25. The Applicant's given reasons for failing to meet the deadline are not exceptional. There was not long-term outage of her electrical supply or internet service to prevent her from seeing the email before the end of business in the New York time zone. Similarly, when the deadline approached there was nothing preventing her from submitting the application after 4 p.m. on 1 July 2019 in the Tanzania time zone which would still have been within working hours on 1 July 2019 in New York.

26. The request for the waiver after the fact also shows that the matter of the deadline was an afterthought which could have been avoided by filing within working hours or even after working hours on 1 July 2019 in her time zone.

27. Instead the Applicant filed on 2 July 2019.

28. With regard to the application for the waiver, it has to be filed prior to the deadline and not after. In other words, the Applicant should have sought a waiver of the time limit or leave to file after the statutory timelines *before* the deadline for filing.<sup>7</sup>

29. The Applicant refers to the amendment to the UNDT statute but this was intended to address breaches of the deadline in cases of technical problems where the

time of arrival of an email on either side may be unclear. These circumstances along with a very debilitating illness which prevents ordinary physical and mental activity would be exceptional. In those circumstances, the deadline would be considered no more than one day after the intended deadline. But although there is a claim of illness, the description of the illness does not address the need for more time to file the application and no technical difficulties are mentioned.

30. The UNDT cannot adjust or waive the 90-day time limit in the aforesaid circumstances and the application is therefore deemed not receivable.

#### **JUDGMENT**

31. The application is DISMISSED.

*(Signed)*

Judge Francis Belle

Dated this 30<sup>th</sup> day of September 2020

Entered in the Register on this 30<sup>th</sup> day of September 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>7</sup> See *Khisa* UNDT-2018-047 and 2018-UNAT-883.