



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/034

Order No.: 049 (NBI/2019)

Date: 12 April 2019

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TEMU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON RESPONDENT'S
MOTION FOR SUMMARY
JUDGMENT**

Counsel for the Applicant:
Mohamed Abdou, OSLA

Counsel for the Respondent:
Thomas Jacob, UNDP

Introduction

1. The Applicant, a former staff member of the United Nations Development Programme (UNDP), filed an application on 25 March 2019 to challenge the decision to separate her from service with compensation in lieu of notice and without termination indemnities (Contested Decision).
2. The application was served on the Respondent on 26 March 2019 with a deadline of 25 April 2019 to file a reply.
3. On 3 April 2019, the Respondent filed a motion for summary judgment on the basis that the application has been filed out of time and is therefore not receivable *ratione temporis*. He is further requesting for additional time to file a reply should the Tribunal find the application to be receivable.
4. By Order No. 045 (NBI/2019), the Tribunal directed the Applicant to provide a response to the Respondent's motion no later than 8 April 2018. The Applicant complied with the Order on 8 April 2019.

Facts

5. On 20 March 2017, the Office of Audit and Investigation (OAI) informed the Applicant that she was the subject of an investigation into several allegations of misconduct. She was interviewed by OAI on 27 March 2017 and submitted comments on OAI's draft investigation report on 12 July 2017.
6. By memorandum dated 18 September 2017, the Applicant was informed by the Assistant Administrator and Director, Bureau for Management Services that there was sufficient evidence to charge her with misconduct. The Applicant submitted her response to the allegations on 15 November 2017.
7. By memorandum dated 16 July 2018, the Applicant was notified of a second charge letter containing additional allegations of misconduct. She submitted a response to this second set of allegations on 24 August 2018.

8. On 3 September 2018, the Applicant commenced maternity leave for 16 weeks, with an expiry date of 21 December 2018.

9. By memorandum dated 18 December 2018 (the Decision Letter), the UNDP Associate Administrator informed the Applicant that her actions, as alleged in the charge letters of 18 September 2017 and 16 July 2018 constituted acts of misconduct and that he had decided to impose on her the disciplinary measure of “separation from service with compensation in lieu of notice and without termination indemnities pursuant to staff rules 10.1(a) and 10.2(a)(viii), effective upon your receipt of this letter”.

10. UNDP sent the Decision Letter to the Applicant’s official UNDP email address by email dated 18 December 2018. On the same day, UNDP received an automated out of office notice from the Applicant’s email account. Consequently, UNDP sent the Decision Letter to Messrs. MB and MA, counsel with the Office of Staff Legal Assistance (OSLA), with the following message:

Seeing that [the Applicant] is currently on extended leave and may not be accessing her work emails, we would appreciate if you could ensure that [the Applicant] receive a copy of the attached letter. We would also ask that you inform us of when this decision has been communicated to [the Applicant]. Please note that we will also seek to have this letter delivered to [the Applicant] via the Country Office.

11. UNDP received an email receipt indicating that the Applicant had read the message at 10:16 a.m. on 19 December 2018. On the same day, a Human Resources Analyst with UNDP Tanzania contacted the Applicant via WhatsApp to inform her that an email had been sent to her attention from UNDP Headquarters and that she should “please assist acknowledgment of recipient [sic] while replying to them [...]”.

12. On 20 December 2018, the UNDP Administrator received a message from the Permanent Mission of Tanzania in New York regarding the Decision Letter and the disciplinary measure that had been imposed on the Applicant.

13. On 23 December 2018, Mr. MB of OSLA acknowledged receipt of UNDP’s email of 18 December 2018 in his personal capacity. He clarified that he

was not and had never been the Applicant's "attorney/agent" and that his personal acknowledgement of receipt did not constitute constructive receipt of the letter on behalf of the Applicant.

14. UNDP responded to Mr. MB's email on 24 December 2018 as follows:

On 19 October 2017, OSLA requested an extension of time and access to confidential documents related to [the Applicant] so that OSLA could provide [the Applicant] with "effective assistance of legal counsel." In support of this request, OSLA submitted [the Applicant's] 29 September 2017 "Consent Form for Legal Representation" which stated that OSLA would arrange to appoint a counsel to provide [the Applicant] with legal representation. Further to UNDP's receipt of this form, OSLA was provided with the requested extension of time and documents. On 15 November 2017, OSLA submitted [the Applicant's] response to the charge letter to UNDP, a correspondence which did not copy [the Applicant]. It is therefore unclear what distinction OSLA is seeking to make by saying that OSLA provided "legal advice [...]" as a logistical courtesy" but not legal representation.

As a general matter, UNDP needs to be able to rely on OSLA's submission that it is acting as a staff member's formal representative for UNDP to be able to take actions that support OSLA defending a staff member's interests, actions that would not be taken in an otherwise informal setting.

15. By email dated 24 December 2018, Mr. MA of OSLA acknowledged receipt of the Decision Letter and requested that due to serious health problems the Applicant had experienced after childbirth and the unfortunate death of her newborn baby, UNDP not proceed with separation formalities until the Applicant had exhausted her maternity/sick leave entitlements.

16. On 27 December 2018, the Chief of OSLA sent an email to UNDP that reads, in relevant part, as follows:

Apologies for the confusion regarding representation of [the Applicant]. OSLA counsel represent [the Applicant] in both disciplinary matters and we acknowledge receipt of your correspondence addressed to her. We will make good faith efforts to pass on this correspondence to our client and to inform you when this has been achieved.

Please note however that OSLA's acknowledgement of receipt does not waive the need for "good service" on the client for the

purposes of triggering any timeline that may commence from “receipt” of such documents.

17. On 4 January 2019, the Applicant followed up with the Deputy Country Director – Operations, UNDP, on the request to extend her maternity and sick leave until February 2019. On 8 January 2019, she was informed by the Deputy Country Director that her request had been rejected because she was no longer a staff member. The decision to separate her from service had become effective on 19 December 2018.

18. On 21 February 2019, the Applicant sought management evaluation of the decision communicated to her on 8 January 2019. UNDP upheld the contested decision on 1 April 2019.

Submissions

19. The Respondent’s case is that the application is not receivable *ratione temporis* because:

a. The Applicant received and opened the 18 December 2018 email notifying her of the Contested Decision on 19 December 2019.

b. The Applicant’s prior formal receipt of the decision letter on 19 December 2019 determines the date the decision was notified to the Applicant. The time limits started to run from the date of receipt of the decision, not its acknowledgment.

c. OSLA informed UNDP that acknowledgement by OSLA “does not waive the need for “good service” on the Applicant for “purposes of triggering any timeline”. Said service occurred on 19 December 2019.

d. The Applicant received the Contested Decision on 19 December 2019 and, pursuant to staff rule 11.4(b) and art. 8.1(ii) of the UNDT Statute, had until 19 March 2019 to file an application to the Tribunal. The Applicant, however, filed her application on 25 March 2019, which was outside of the statutory deadline of 90 days.

e. The Applicant may not rely on art. 8.3 of the UNDT Statute for a waiver of the applicable time limits because she has not submitted a written request. Additionally, the lack of communication between the Applicant and OSLA regarding the date of receipt of the Contested Decision is not an exceptional circumstance under art. 8.3.

20. The Applicant submits that the application is receivable because:

a. In respect of disciplinary measures, the relevant time limit starts to run from the date the staff member acknowledges receipt, not from the time the decision is issued.¹ UNDP in its communication to the Applicant and OSLA requested acknowledgement of receipt, which OSLA provided on behalf of the Applicant on 24 December 2018. Having decided to serve the Contested Decision through OSLA, UNDP is estopped from identifying an earlier date for the purpose of determining the applicable time line.

b. The Respondent failed to establish that the Applicant had actual knowledge of the Contested Decision on 19 December 2019. Time limits begin to run “from the date the staff member received notification of the decision in writing”.² The Applicant was suffering from and receiving treatment for a critical medical condition and had no knowledge of the Contested Decision.

c. The WhatsApp conversation between the Applicant and the HR Analyst did not allude to any disciplinary sanction or to a separation from service.

d. The Respondent’s reliance on the communication between the Permanent Representative of Tanzania to the UN and the UNDP Administrator is misplaced.

e. Should the Tribunal consider that the Application was filed out of time, the Applicant submits that there were exceptional circumstances to

¹ *Khisa* 2018-UNAT-883, paras. 5 and 16.

² *Schook* 2010-UNAT-013, para. 12 and *Chahrouf* 2014-UNAT-406, para. 32.

warrant a waiver of the time limits under art. 8.3 of the UNDT Statute. The exceptional circumstances being the loss of her child on 11 November 2018, her critical medical condition, and her travel to South Africa from 29 November 2018 to 12 January 2019 and from 11 to 24 March 2019 for medical treatment and ongoing treatment in Tanzania from November 2018 to April 2019. Her medical condition and travel made it difficult for her to communicate with counsel and hindered her ability to challenge the Contested Decision earlier. The waiver sought is limited in time and does not prejudice the Respondent.

Considerations

21. Article 12 of the UNDT Rules of Procedure, which relates to representation of applicants before the Tribunal, provides an Applicant with the options of representing him/herself, designating counsel from OSLA or external counsel as his/her legal representative or being represented by a staff member or former staff member of the Organization.

22. There is no doubt in this Tribunal's mind that once an applicant opts for representation by OSLA counsel, external counsel or a current/former staff member, that representative takes on the responsibility of standing in for or acting on behalf of the applicant. In other words, the representative assumes the role of "spokesperson" for the applicant. Consequently, communication flows between the applicant and his/her designated representative and then from the applicant's designated representative to third parties. Respecting this line of communication prevents confusion and mistakes.

23. It is clear from UNDP's email of 24 December 2018, that the Respondent was aware of the Applicant's representation by OSLA as early as 29 September 2017, when OSLA submitted the "Consent Form for Legal Representation" and then on 19 October 2017 proceeded to request an extension of time and access to confidential documents related to the Applicant's case. UNDP not only granted OSLA additional time and access to the documents as requested but also accepted the response to the charge letter that was submitted by OSLA on behalf of the Applicant.

24. Since the Applicant was clearly represented by OSLA, it stands to reason that UNDP's communication of the Contested Decision on 18 December 2018 should have been addressed to OSLA. UNDP choosing to send the email to the Applicant on 18 December 2018 and receiving an email receipt on 19 December 2019 from the Applicant's email account does not expunge the fact that UNDP technically should have been communicating solely with OSLA. Additionally, the Tribunal finds that the WhatsApp messages and the communication between the Permanent Representative and the UNDP Administrator are of no consequence to the issue at hand. The Tribunal finds therefore that the date for the Applicant to file an application to the Tribunal did not start running on 19 December 2018 as alleged by the Respondent.

25. The Tribunal holds that the time limits started running on 24 December 2018 when OSLA counsel, Mr. MA, complied with UNDP's entreaty to "inform us of when this decision has been communicated to [the Applicant]" by *inter alia* acknowledging receipt of the Contested Decision.

26. Pursuant to art. 8.1(d)(ii), an application shall be receivable by the Dispute Tribunal if the applicant files his/her application within 90 calendar days of receipt of the administrative decision where no management evaluation of the contested decision is required.

27. Since the Applicant received notification of the administrative decision on 24 December 2018 and management evaluation was not required, she had until 24 March 2019 to submit an application to the Dispute Tribunal.

28. Article 34 of the UNDT Rules of Procedure governs the calculation of time limits. This article states:

The time limits prescribed in the rules of procedure:

- (a) Refer to calendar days and shall not include the day of the event from which the period runs;
- (b) Shall include the next working day of the Registry when the last day of the period is not a working day;

(c) Shall be deemed to have been met if the documents in question were dispatched by reasonable means on the last day of the period.

29. Of relevance here is the fact that the last day of the statutory filing period, 24 March 2019, was a Sunday, which is not a working day for the Registry. Accordingly, the filing deadline extended to and included 25 March 2019, which was the next working day of the Registry. The Respondent does not dispute the fact that the Applicant filed her application on 25 March 2019.

30. The Tribunal finds that the application is receivable.

31. With respect to the Respondent's request for additional time to file a reply, the Tribunal notes that the Respondent has had ample time since the application was served on him on 26 March 2019 and still has ample time within which to prepare a reply. Thus, an extension of time to file said reply is not necessary.

It is hereby ORDERED that:

32. The Respondent's motion for summary judgment is refused.

33. The Respondent shall file a reply to the application **on or before 25 April 2019**.

(Signed)

Judge Nkemdilim Izuako

Dated this 12th day of April 2018

Entered in the Register on this 12th day of April 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi