



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/73  
Order No.: 004 (NBI/2011)  
Date: 13 January 2011  
Original: English

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**Before:** Judge Vinod Boolell  
**Registry:** Nairobi  
**Registrar:** Jean-Pelé Fomété

COOKE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON RESPONDENT'S REQUEST  
TO RE-ENTER THE PROCEEDINGS**

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**Counsel for applicant:**

Self-represented

**Counsel for respondent:**

Jorge A. Balletero, Policy and Administrative Law Section, Division of Human Resources, UNICEF

## **Introduction**

1. On 27 October 2010, the Applicant filed an application with the UN Dispute Tribunal (UNDT) in Nairobi, contesting his summary dismissal from the United Nations Children's Funds (UNICEF), Malawi Country Office.

2. On 29 October 2009, the application and its annexes were served on the Respondent. In accordance with Article 10 of the Tribunal's Rules of Procedure, the Respondent was advised that a response to the application was due within 30 days of receipt of the application, i.e. 28 November 2010. The Respondent acknowledged receipt on the same day.

3. On 14 December 2010, the Registry advised the Respondent that the 30 days had elapsed and yet it had not received a reply. In response, the Respondent transmitted his response to the application on the same day.

4. In a letter to the Registry dated 14 December 2010, the Applicant noted that the Respondent had been late in filing his reply by 15 days. On the same day, the Respondent filed a motion requesting leave from the Tribunal to re-enter the proceedings. He stated that "as per usual practice the Respondent's response was drafted and dated 28 November 2010, with a view to be filed on the said date" and added "Unfortunately, further to communications with the Nairobi Registry, it appears that the said reply did not reach [the Tribunal] within the required timeframe." He apologized for the oversight.

5. On 11 January 2011, the Applicant was granted an opportunity to submit comments to the Respondent's motion, by or before 18 January 2011. In his reply dated 12 January 2011, the Applicant submitted that, by not replying within 30 days, the Respondent was "playing delay tactics".

## Considerations

6. Article 10 (1) of the Rules provides as follows:

“The respondent’s reply shall be submitted within 30 calendar days of the date of receipt of the application by the respondent. The signed original reply and the annexes thereto shall be submitted together. The document may be transmitted electronically. A respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, except with the permission of the Dispute Tribunal.”

7. A Respondent who defaults in filing a timely reply must in compliance with Article 10.1 of the Rules “seek the permission of the Dispute Tribunal” to take part in the proceedings. The only available remedy for a Respondent who has not filed a Reply in time is to request for an extension of the time limit to submit a Reply.

8. In the case of *Lutta* UNDT/2010/071 the following observations were made:

“The underlying idea for the introduction of the new system of administration of justice is to ensure timely dispensation of cases without delay as expressed in General Assembly Resolution A/RES/61/261 - *Administration of justice at the United Nations*, where it was recognized,

“...that the current system of administration of justice at the United Nations is slow, cumbersome, ineffective and lacking in professionalism, and that the current system of administrative review is flawed.”<sup>1</sup>

9. The Report of the Redesign Panel on the United Nations system of administration of justice emphasized the fact that requests for extension of time limits from management were invariably granted.

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<sup>1</sup> General Assembly Resolution A/RES/61/261 –paragraph 5 of the preamble.

*“After an appeal has been filed, management has two months in which to file a reply. However, JABs [Joint Appeals Boards] frequently granted an extension for the filing of management’s reply.”<sup>2</sup>*

10. The absence of any rule to allow the Respondent to file an application for extension of time has no doubt been motivated by the fact that management is invariably considered to be in a better position to answer a claim filed by a staff member. Another reason that may have prompted the framers of the Rules is that management was obtaining extensions too frequently as evidenced by the Report of the Redesign Panel.

11. An application to reenter the proceedings would invariably embody a motion to file a belated reply. It would be for the Tribunal to determine whether the reasons put forward by the Respondent to file a late reply are convincing enough. In its approach the Tribunal should be guided by one important consideration, namely, what would be the best course of action in the circumstances, to ensure that justice is done.

12. Article 35 of the Rules empowers the Tribunal to shorten or extend a time limit fixed by the Rules but this is subject to Article 8.3 of the Statute that reads: *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 all important words are *exceptional cases*. A shortening or extension of time application must satisfy the test of exceptional circumstances and cannot be granted for the mere asking.

13. The reasons put forward by the Respondent are contained in a letter dated 13 December 2010 forwarded to the Registry and they are: *Respondent had timely received and acknowledged receipt of the Tribunal’s communication serving the Applicant’s application on 29 October 2010. As per usual practice, the Respondent’s response was drafted and dated 28 November 2010, with a view to be filed on said date. Unfortunately, further to communications with the Nairobi Registry, it appears*

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<sup>2</sup> General Assembly A/61/205, paragraph 67 of the Report.

*that said reply did not reach your Tribunal within the required timeframe. Counsel for the Respondent apologizes for the oversight.*

14. Do these reasons bring the matter within the realm of exceptional cases? In *Morsy* UNDT/2009/036, Judge Ebrahim-Carstens observed:

*What is required is a conspectus of all relevant factors before the Tribunal to ascertain in each case whether it is exceptional or whether there are exceptional reasons in the ordinary sense, to justify a waiver or suspension of time; exceptional simply meaning something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered.*

15. The duty of the Tribunal when faced with an application on waiver of time limits is twofold. On the one hand the Tribunal should strictly adhere to the time limits provided for by the law. On the other hand it is also equally vital to consider whether a too strict adherence to the time limits would be conducive to the interest of justice to all parties concerned. In the latter case the Tribunal should make a judicious exercise of the power and discretion given to it to waive time limits.

16. The Tribunal does not consider that the Respondent has satisfied the requirement of exceptional cases as provided in Article 35 of the Rules read subject to Article 8.3. All that the Respondent is alleging is that it would appear that the reply did not reach the Registry in a timely manner and at the same time apologising for the oversight. Either the reply was sent and never reached the Registry or it was not sent through oversight. The Respondent cannot have it both ways. The Tribunal does not find that the Respondent has put forward any convincing reason that brings his situation within the exceptional cases requirement. The application cannot therefore be granted on this ground.

17. However, the Tribunal notes that Article 19 of the Rules provides: *The Dispute Tribunal may at any time, either on an application of a party or on its own*

*initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.* The case involves serious allegations of misconduct against the applicant and it would be only fair and expeditious that the Respondent be allowed to be part of the proceedings and file a reply. This would ensure that justice is properly done to both parties.

18. The Tribunal however wishes to point out that the Respondent should have exercised more diligence and care in respecting the time limits, especially in view of the observations of the Redesign Panel mentioned above and in the interests of its own image and reputation as a responsible manager.

19. The Tribunal therefore authorizes the Respondent to participate in the proceedings and to file a belated reply.

20. As for the adjudication of this case, the parties will be communicated further directions in due course.



Judge Vinod Boolell

Dated this 13<sup>th</sup> day of January 2011

Entered in the Register on this 13<sup>th</sup> day of January 2011



Jean-Pelé Fomété, Registrar, UNDT, Nairobi