



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/088
Order No.: 15 (NBI/2012)
Date: 25 January 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

RUDOLF JOCONDO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICANT'S MOTION FOR
EXTENSION OF TIME TO FILE HIS
APPLICATION**

Counsel for the Applicant:
Victor Rodriguez

Counsel for the Respondent:
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM
Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. On 28 December 2011 the Applicant, a staff member of the Office for the Coordination of Humanitarian Affairs (OCHA) filed a motion with the United Nations Dispute Tribunal (UNDT) requesting an extension of time in which to file an application to contest the decision to offer him an appointment at P-5 level instead of his current D-1 level and to abolish the Applicant's D-1 post.

2. The Applicant avers that the relevant decisions were taken on 25 April 2011 and 21 July 2011 respectively.

3. On 24 June 2011, the Applicant filed a request for management evaluation but this was kept in abeyance until 15 August 2011, due to ongoing mediation by the Regional Ombudsman in Nairobi. The Applicant reactivated his request on 15 August but has not yet received a response from the Management Evaluation Unit (MEU).

4. In his Motion, the Applicant stated that the deadline for filing his application on the merits was 29 December 2012. Just prior to that deadline the Applicant was informed by the MEU that he would receive a final answer from the Under-Secretary-General for Management in New York "very shortly".

5. The Applicant contends that he needs the final determination from the MEU in order to be better able to file his application on the merits, or indeed, to know whether it is necessary to file an application at all.

6. In the circumstances, the Applicant requested an extension of time of 30 days—that is, until 27 January 2012—in which to file his Application, if any. However, since filing his Motion, the Applicant has been advised that the MEU will provide him with a response by 31 January 2012 at the latest.

7. The Respondent indicates he does not oppose the Application.

8. Article 35 of the Rules of Procedure of the Tribunal provides that “[s]ubject to article 8.3 of the statute of the Dispute Tribunal, the President, or the judge or panel hearing a case, may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require”.

9. Article 8.3 of the Dispute Tribunal’s Statute provides that:

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.

10. Article 19 of the Rules of Procedure of the Dispute Tribunal provides that the 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”.

11. In a number of cases, such as *Samardzic et al.* UNDT/2010/019 and *Barned* UNDT/2010/083, the Dispute Tribunal has relied on the jurisprudence of the former UN Administrative Tribunal (for example, judgment No. 372 *Kayigamba* (1986) to assert that only events beyond the applicant’s control preventing him from filing an application in a timely manner may amount to “exceptional circumstances” warranting a waiver of the time limits. It has been said that the decision of the Appeals Tribunal in *El-Khatib* 2010-UNAT-029 affirms this rather strict test.¹ This Tribunal, however, does not consider that *El-Khatib* has quite that effect. The reliance in *El-Khatib* on the former UN Administrative Tribunal’s “beyond the applicant’s control” test was applied in that case because, as stated in the judgment, “the provisions applicable *ratione temporis* are those of the former United Nations

¹ See for example *Abu-Haiwaila* UNDT/2010/102 at paragraph 48.

Administrative Tribunal which...had jurisdiction to consider the action brought by Ms. El-Khatib.”²

12. In *Morsy* UNDT/2009/036, *Rosca* UNDT/2009/052, *Avina* UNDT/2010/54, the Dispute Tribunal applied a more liberal test, requiring the applicant to show circumstances which were out of the ordinary, quite special, uncommon, but not necessarily unique, unprecedented or beyond the applicant’s control. In *Jaen*, Order No. 331 (NY/2010), the Tribunal considered that in a case such as this, where the request for an extension of time is filed before the deadline for filing has expired, it would be quite inappropriate to apply the “beyond the applicant’s control” test.³ The situation in the present case is quite different from one in which an applicant comes to the Tribunal after the passing of the deadline. This is not a case of a missed deadline but one of “a good faith, diligent, and timeous effort by the applicant to file a meaningful submission and, possibly, avoid unnecessary litigation.”⁴

13. In deciding, therefore, whether or not to grant the Applicant’s request for extension of time, the Tribunal is examining all the circumstances of the case and not merely whether or not it is beyond the applicant’s control to file on time. In this case, the uncommon feature is that the Respondent’s own review body—the MEU—has advised the Applicant that it will be providing its evaluation report shortly, but some time after the deadline for the filing of an application to the Tribunal.

14. The Tribunal takes account of article 19 of the Rules of Procedure of the Tribunal, cited above, and considers that it is appropriate for the fair and expeditious disposal of the case and that it will do justice to the parties to grant the Applicant’s request. The Tribunal also considers it of significance that the Respondent makes no objection to the Applicant’s request, and will therefore suffer no prejudice as a result.

² *El-Khatib*, 2010-UNAT-029 (English), paragraph 14.

³ *Jaen*, Order No. 331(NY/2010), paragraph 9.

⁴ *Id.*

15. In the hope that the Management Evaluation Unit will provide its report shortly, the Tribunal is mindful to grants the Applicant an extension of time.

IT IS ORDERED THAT:

16. The Applicant's request for an extension of time in which to file his Application is granted.

17. The Applicant is to file his Application on the Merits by **14 February 2012.**

(Signed)

Judge Vinod Boolell

Dated this 25th day of January 2012

Entered in the Register on this 25th day of January 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi