



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/078  
Order No.: 032 (NBI/2012)  
Date: 21 March 2012  
Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

WU

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON RESPONDENT'S  
APPLICATION TO FILE LATE  
REPLY AND PARTICIPATE IN  
PROCEEDINGS**

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**Counsel for Applicant:**  
Self-Represented

**Counsel for Respondent:**  
Miouly Pongnon, Senior Legal Advisor, UNON

## **Introduction**

1. The Applicant, a former staff member of the United Nations Office at Nairobi (“UNON”), filed an Application on 8 December 2011 in which he contests a decision denying him payment of a non-removal allowance in lieu of removal costs in respect to his separation from service on retirement.

2. The Application was transmitted to the Respondent on 13 December 2011 with a deadline of 13 January 2012 by which to file a Reply. The Application was transmitted using the eFiling portal of the Tribunal’s Court Case Management System (“CCMS”).

3. Counsel for the Respondent had previously sought clarification from the Registrar, on 24 October 2010, on the proper means of service of submissions to the Dispute Tribunal. On 2 November 2011, Counsel was advised that the Tribunal now requires parties to utilize the eFiling portal.

4. On 16 December 2011, Counsel for the Respondent informed the Tribunal that she had not received the Application. On 20 December 2011, the Tribunal again advised Counsel for the Respondent that she was required to create an eFiling profile to access the case records as had been done by other Counsel for the Respondent in all of the Organization’s offices around the world.

5. On 20 December 2011, Counsel for the Respondent informed the Tribunal that she had,

elected not to create an e-filing account at this time owing to certain noted limitations with that system and the fact that e-filing is not a compulsory [sic] pursuant to the UNDT Rules of Procedure.

[...]

Consequently, until such time an official order issues from a judge of the Tribunal disposing of the formal application indicating that e-filing is compulsory pursuant to the UNDT Rules or Statute, please note that I will not be in a position to create an e-filing account. Accordingly, I would be grateful if the Registry would, consistent with the extant UNDT Rules of Procedure, transmit to me as soon as possible, either by e-mail or by hand, a copy [sic] of Mr. Wu's application filed with the Registry on or about 8 December 2011.

6. On 21 December 2011, the Tribunal informed Counsel for the Respondent that it considered that the Application had been properly transmitted to her on 13 December 2011 and that the deadline to file a Reply by or before 13 January 2012 still applied.

7. On 13 January 2012, Counsel for the Respondent filed an “Application for Declaratory Order in respect of Articles 8.3, 8.4 and 10.1 of the UNDT Rules of Procedure”. In the said Application, Counsel for the Respondent sought a declaratory Order of the Tribunal indicating the responsibilities and rights of the parties in respect of the provisions of arts. 8(3), 8(4) and 10(1) of the UNDT Rules of Procedure regarding the acceptable means of filing and receiving submissions with the Tribunal through its Registry offices. The Respondent’s Counsel submitted that the plain meaning of the provisions of arts. 8(3), 8(4) and 10(1) of the Tribunal’s Rules of Procedure do not require that parties file or receive case documents using electronic means or an eFiling portal in CCMS.

8. The Respondent’s Counsel also sought a direction from the Tribunal requiring the Nairobi Registry to transmit to her, outside of CCMS, a copy of Mr. Wu’s Application.

9. On 20 January 2012, the Tribunal issued Order No. 012 (NBI/2012) in which it declared as follows:

a. The Respondent in his capacity as the Chief Administrative Officer of the Organization has pioneered, supported and encouraged efforts to increase the efficiency of the internal administration of justice.

b. His agents and representatives are properly equipped to be part and parcel of the milestones reached in this regard and must represent his interests in carrying out their duties. It is therefore not the place of Counsel to go against the publicly stated position of the Respondent by refusing or rejecting the CCMS.

c. The Secretary-General has sanctioned the CCMS and all Counsel within the Organization have received adequate notice and been offered training in order that the system can be used to improve the filing and accessing of case-related documents by parties appearing before the Dispute and Appeals Tribunals.

d. As a result of Counsel for the Respondent’s decision not to create an eFiling account, she had failed to access the Application and to file a Reply within the

requisite time limit required by art. 10 of the Tribunal's Rules of Procedure. This meant that by operation of procedural law, the Respondent was not entitled to take part in the proceedings except with the leave of the Tribunal.

e. The Tribunal, however, in the interests of justice as stipulated in art. 35 of the Tribunal's Rules, exercised its discretion and granted the Respondent a further period of one month to file a Reply, namely by 20 February 2012.

10. In spite of the said declaratory Order of the Tribunal and its indulgence in granting the Respondent's Counsel a further period of 30 days, the Respondent's response was not filed as ordered. On 24 February 2012, the Applicant informed the Tribunal that he had not received the Respondent's Reply and therefore requested a copy so as to enable him to make observations. The Tribunal replied on the same day informing the Applicant that the Tribunal had not received the Respondent's Reply and that he would be advised on the next procedural steps.

11. On 26 February 2012, the Respondent sent an email to the Tribunal stating:

Please note that through sheer inadvertence, I missed the 20 February 2012 deadline the Tribunal had set for the filing of Respondent's reply. I had failed to carry the date in my electronic calendar.

I have prepared an application to open the record to permit the late filing of Respondents (sic) Reply as well as the Respondent's Reply, which submissions will be finalized and ready to be filed on CCMS on Monday, 27 February 2011 (sic). Alternatively, if the Tribunal is not disposed to entertain an application to open the record to allow for the late filing of Respondent's Reply, I would be grateful if you would communicate the Tribunal's wishes in this regard.

I wish to express my apologies to the Tribunal and Mr. Wu for delay caused by my oversight.

12. On 2 March 2012, the Respondent filed a Motion entitled "Respondent's Application to file late Reply and participate in proceedings".

### **Respondent's Submissions**

13. The reasons adduced by Respondent's counsel for not filing a reply are summarized as follows:

- a. Respondent's Counsel fully intended to comply with the Order No. 012 (NBI/2012) but regrettably failed to properly calendar the reply deadline.
- b. Respondent's Counsel had neither a legal assistant nor administrative assistant within the Office of the Director-General to assist her in the management of the calendar of cases and other legal matters, it is left to Counsel to calendar all dated upon receipt of orders and other communication from the Tribunal.
- c. The lapse in filing a timely reply "was due to inadvertence and excusable neglect by failing to transfer the filing deadline to the electronic calendar associated with Lotus Notes so as to trigger e-mail reminders of the deadline as it approached".

### **Considerations**

14. Article 10.1 of the UNDT Rules of Procedure requires the respondent's reply to be submitted within 30 calendar days of the date of receipt of the application by the respondent and further stipulates that 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.

15. In *Lutta* UNDT/2009/60, Boolell J held that there are two stages that should be followed in the application of art. 10(1). There is first the "permission" aspect and secondly the "reply" aspect. The respondent who finds himself outside the time limit for filing a reply should first seek the permission of the Tribunal to take part in the proceedings. This is so because by not filing his reply on time, he is no longer allowed to be part of the proceedings under art. 10(1).

16. A respondent, however, is entitled to apply to the Tribunal to allow him to take part in the proceedings stating reasons why he should be granted such permission. Where the Tribunal grants the Respondent's motion and admits him to be part of the proceedings, he will be given time within which to file his reply.

17. In the present case, the Respondent's Counsel has failed to file a reply within the requisite deadline on two occasions, that is, by 13 January 2012 and by 20 February 2012. Despite several reminders by the Tribunal, Counsel for the Respondent "elected" not to create an eFiling account to enable her access to the case records. It was only upon a declaratory

Order of the Tribunal, (Order No. 012 (NBI/2012), that Counsel for the Respondent created the said CCMS account needed to access case records. The Tribunal had also in that Order granted the Respondent a further 30 calendar days in the interests of justice to file a reply. That notwithstanding, Counsel failed to file the said reply.

18. Article 35 of the Tribunal's Rules of Procedure empowers the Judge hearing a case to shorten or extend a time limit fixed by the Rules or to waive any rule when the interests of justice so require. In the present case, between the two extensions provided to the Respondent to file a reply, Counsel has written on numerous occasions to the Tribunal to explain why she would not utilize the eFiling portal, brought a Motion for a declaratory Order to, as she put it, to clarify the rights and obligations of the parties and sought a ruling by the Tribunal. Despite all of this ancillary correspondence, Counsel was provided an additional 30 calendar days to file a reply. Counsel now states that she is overworked and her office understaffed and that she forgot to file her reply within time! She continued to forget until the Applicant called the attention of the Tribunal four days after the expiry of the deadline for filing a reply. Counsel was copied in on this communication.

19. It was 11 days after the expiry of the deadline for filing the Respondent's reply that Counsel filed her Motion for leave to file a late reply and participate in the proceedings. In the circumstances, the Tribunal is not convinced by the reasons proffered by Counsel and accordingly rejects her application for leave to re-enter the proceedings.

20. In view of the preceding, it would not be in the interests of justice and the integrity of the judicial process to continue to allow Counsel for the Respondent to act in clear disregard of the Tribunal's Orders at the expense of the Applicant and the administration of justice. The Respondent's Counsel's application for leave to take part in the proceedings is accordingly refused. The consequence of this ruling is that the present Application will be considered as an undefended cause.

**IT IS ORDERED THAT:**

21. The Respondent's request to file a late reply and participate in the proceedings is hereby refused.

22. The Tribunal shall issue a default judgment in this case in due course.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 21<sup>st</sup> day of March 2012

Entered in the Register on this 21<sup>st</sup> day of March 2012

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi