



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2016/006  
Order No.: 032 (NBI/2016)  
Date: 25 February 2016  
Original: English

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**Before:** Judge Vinod Boolell  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko

KETO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER STRIKING OUT A  
PREMATURE APPLICATION**

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**Counsel for the Applicant:**  
Abbe Jolles

**Counsel for the Respondent:**  
ALS/OHRM

## **Introduction**

1. The Applicant is a staff member of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). He is contesting the “non-payment of months of salary without explanation or justification”.

## **Relevant facts**

2. The Applicant alleges in his Application dated 12 January 2016 that between August and November 2015, he was not paid his salary and even though he sought an explanation from the Administration, none was given to him.

3. According to the Application, the Applicant submitted a request for management evaluation on 11 January 2016.

4. On 13 January 2016, the Applicant’s Counsel submitted an Application on his behalf with the United Nations Dispute Tribunal (UNDT) in Nairobi via the Nairobi Registry’s email account. Counsel highlighted in her email that the UNDT website instructs/permits filing by email attachment.

5. The Nairobi Registry created an account in the Court Case Management System (“CCMS”) on behalf of the Applicant and uploaded the Application that was attached to Counsel’s email.

6. The Tribunal, in its Order No. 014 (NBI/2016) dated 2 February 2016, observed that:

The operative word in the website instruction is “unable”, which connotes that a party has at least made an attempt to file a submission via CCMS but failed to do so due to incapacity, a technical problem or the inexistence of technological facilities at his/her location. Clearly, this is not the case here as Applicant’s Counsel has filed pleadings electronically. Applicant’s Counsel has not bothered or attempted to offer any rational explanation to explain or justify her inability to file

through CCMS and takes it upon herself to dictate to the Tribunal that it should make its meagre resources available for her use as a matter of right. While parties have an undeniable right of access to a court of law at the same time they are required to comply with standard procedures and not try to impose their own views or practices on the court. It is the considered view of this Tribunal that parties appearing before the UNDT shall file their submissions through CCMS unless they can show they either have no access to the e-Filing portal or that it is impossible either technically or for some valid reason, which must be proved, to use it.

7. In the same Order, the Tribunal ordered Applicant's Counsel to submit a copy of the management evaluation request, copies of the emails referred to in the Application and any other supporting documentation, properly labeled as annexes, through CCMS no later than 4 February 2016.

8. Thus far, Applicant's Counsel has not complied with the Tribunal's directive in Order No. 014 and she has not offered any explanation for her non-compliance.

### **Preliminary matters**

9. Pursuant to art. 8.4 of the UNDT Rules of Procedure, the Registrar "shall transmit a copy of the application to the respondent and to any other party a judge considers appropriate" after ascertaining that the application is in compliance with articles 8.1 to 8.3 of the Rules of Procedure.

10. However, in *Kalpokas Tari* UNDT/2013/180, Judge Meeran stated that:

11. The Tribunal has regard not only to the plain words of the Statute and Rules of Procedure, but also to the expectations of the General Assembly in resolutions 66/237 and 67/241 that the Tribunal adopt effective measures in dealing with frivolous and manifestly inadmissible applications. In particular, para. 42 of General Assembly resolution 67/241 states:

42. [The General Assembly] *Recognizes* the importance of effective measures against the filing of frivolous applications [and] encourages the judges to make full use of those measures currently available to them ... .

12. Consistent with the General Assembly's resolutions, the Tribunal has on several occasions considered matters of admissibility or receivability on a priority basis (see *Hunter* UNDT/2012/036, *Milich* UNDT/2013/007, and *Masykkanova* UNDT/2013/033).

13. The present case may properly be dealt with on a priority basis without first transmitting a copy of the application to the Respondent, or awaiting the Respondent's reply before taking any action to consider the claim.

11. This Tribunal endorses the views set out in *Kalpokas Tari*. After a review of the Application, the Tribunal decided that the present matter could be determined on a priority basis without first transmitting a copy of the Application to the Respondent for a response.

## **Considerations**

### ***Receivability***

12. The issue presently before the Tribunal is whether the Application is receivable in light of the fact that it was filed prematurely with the UNDT.

13. Staff rule 11.2 provides for management evaluation and sets out the procedure and timelines relating to this process. Staff rule 11.2(a) states:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

14. Staff rule 11.2(d) states:

The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management

evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

15. Pursuant to art. 8.1(d)(i) of the UNDT Statute<sup>1</sup>, an application shall be receivable by the Tribunal if:

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

16. In *Khisa* UNDT/2013/001, the Tribunal dealt with the issue of the receivability of an application that was filed two days before the expiry of the 45 calendar day response provided for in staff rule 11.2(d). The Tribunal held that:

[I]t would also not be in the interest of justice to reject applications indiscriminately solely on the basis that they were filed prematurely without taking into consideration the particular and/or exceptional circumstances that may exist in each of these cases. Thus, the decision to either reject or accept an application which has been filed prematurely should be made on a case by case basis after a critical review of the relevant facts have been carried out. It would be a miscarriage of justice for the Tribunal to conclude generally that any and all applications that are filed during the pendency of management evaluation are automatically not receivable

17. The Tribunal did not dismiss the application in *Khisa* due to a number of exceptional circumstances, which included, *inter alia*:

a. The Application was filed two days in advance of the management evaluation response period; and

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<sup>1</sup> See also art. 7 of the Rules of Procedure of the Tribunal on Time limits for filing applications.

- b. The Respondent's submission that MEU did not undertake management evaluation of the contested decision because according to MEU it was not apparent from the Applicant's correspondence that she was seeking management evaluation.

18. In the present matter, the Tribunal has gleaned from the poorly drafted Application that the Applicant allegedly sought management evaluation of the contested administrative decision on 11 January 2016. The Tribunal has not been provided with a copy of the management evaluation request. Within two days of said management evaluation request, Counsel submitted the current Application to the Dispute Tribunal.

19. This case is easily distinguishable from the *Khisa* case in that the applicant in *Khisa* filed her application two days before the delay set out in staff rule 11.2(d) due to exceptional circumstances beyond her control. In the current case, the Application was filed only two days after the Applicant sought management evaluation, which means that MEU had probably not even had a chance to acknowledge receipt of the request much less review it before the Application was filed.

20. It has been held time and time again that the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary and that for this goal to be met it is essential to clearly identify the administrative decision the staff member disputes so that there would not be any need for judicial intervention.<sup>2</sup> It is also the duty of an Applicant to properly characterize the disputed decision.

21. The available record does not indicate that any exceptional circumstances exist that would make this Application receivable.

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<sup>2</sup> *Pirnea* 2013-UNAT-311; *Neault* 2013-UNAT-345; *Applicant* 2013-UNAT-381; *Amany* 2015-UNAT-521; *Akunamambo* UNDT/2014/002; *Nagayoshi v. Registrar of the International Tribunal for the Law of the Sea* 2015-UNAT 498.

22. The Tribunal concludes that the Application was filed prematurely and is therefore not receivable.

23. The Tribunal is gravely concerned that the Applicant's Counsel, a seasoned attorney who should be conversant with the United Nations Staff Regulations and Rules and the Statute and Rules of Procedure of the UNDT, appears to be oblivious to the legal framework.

24. In *Beaudry* 2011-UNAT-129, the United Nations Appeals Tribunal (UNAT) dealing with what appeared to be a frivolous application for revision of a judgment observed:

This Tribunal must point out that the submission of applications like the one under examination may constitute grounds for the adoption of disciplinary (administrative) measures against the counsel who files them, as that conduct constitutes an abuse of litigation and of the Organization's resources, waste of time and efforts for the other party, the Registry and the Tribunal itself. If the present warning goes unheeded and such abusive behavior continues, this Tribunal will not hesitate to take appropriate measures.

25. The same reasoning is applicable in the view of the Tribunal when counsel acts in the way in which counsel engaged in the present case has acted towards the Tribunal and even to the litigant.

#### **Non-compliance with Order No. 014**

26. As noted earlier, the Applicant's Counsel was instructed vide Order No. 014 to submit a copy of the management evaluation request, copies of the emails referred to in the Application and any other supporting documentation, properly labeled as annexes, through CCMS no later than 4 February 2016. Regrettably, not only did Counsel fail to comply with Order No. 014, she also failed to proffer any reason for her non-compliance.

27. In *Igunda* 2012-UNAT-255, UNAT stated *inter alia* that: “Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures”.

28. In *Igbinedion* 2014-UNAT-410, UNAT recognized the Tribunal’s “inherent judicial power” to regulate proceedings before it. UNAT held that:

A tribunal must be able to find natural persons appearing before it, whether as parties, counsel or witnesses, in contempt if their conduct is improper or they fail to comply with its strictures. Similarly, legal persons, including the Organization, must conduct themselves appropriately and must comply with orders and judgments of the court.

Contempt may be found to have harmed the other party in litigation, potentially leading to an award in favour of that party or the drawing of adverse inferences against the party in contempt, or it may be directed towards the court itself without necessarily harming the opposing party. Where a party behaves with disrespect during a hearing, for example, a tribunal may find contempt towards the court even in the absence of shown harm by a party before it.

There are, admittedly, certain limitations on the sanctions international administrative courts can impose. The issue of possible measures that can be imposed, howsoever limited, is quite distinct from the principle that the UNDT clearly enjoys the right to regulate conduct before it and the power to find disregard of its decisions as constituting contempt.

29. The Tribunal will here endorse what Judge Izuako stated in *Maiga* UNDT/2015/048:

Counsel must realize that in prosecuting a case, they are first and foremost officers of the Tribunal and their efforts at all times must be directed at laying all their cards face up on the table with a view to helping the Tribunal achieve the ends of justice. Counsel at all times must be beyond reproach and not place themselves in a position where they stand or fall with their clients.



30. In *Dalgaard et al* 2015-UNAT-532, UNAT held that it is the self-evident duty of all counsel appearing before the Tribunals to contribute to the fair administration of justice and the promotion of the rule of law.

31. By acting as she has done in the present matter, Counsel for the Applicant has failed to live up to her responsibilities as an officer of the court. She has acted with contempt of the court directions and has also denied the Applicant access to justice, which is a universal fundamental right of any litigant.

32. However much minded the Tribunal is it will make no order as to costs for abuse of process as this would further penalize the Applicant.

### **Decision**

33. The current Application is not receivable.

34. Pursuant to article 19 of the UNDT Rules of Procedure, the Tribunal strikes out the matter of *Keto v. The Secretary-General of the United Nations*, Case No. UNDT/NBI/2016/006.

(Signed)

Judge Vinod Boolell

Dated this 25<sup>th</sup> day of February 2016

Entered in the Register on this 25<sup>th</sup> day of February 2016

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi