



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

MALININ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR EXTENSION OF
TIME TO FILE AN APPLICATION**

Counsel for Applicant:
Mariam Munang, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 21 September 2018, the Applicant filed a motion for extension of time to file an application before the Dispute Tribunal in respect of a decision to find him ineligible for the After Service Health Insurance (“ASHI”). He is seeking an extension of time pending settlement discussions and states that the parties have been engaged in settlement discussions to resolve the dispute with the assistance of the Management Evaluation Unit (“MEU”).

2. The Applicant requests an extension of time based on the assurance he received from the MEU that there is a very high likelihood of his case being resolved amicably and more time is needed to fully explore such informal resolution. He provides the following background information (references to annexes and footnotes omitted):

On 29 May 2018, [the Applicant] filed a Management Evaluation Request (MER) regarding the decision concerning his eligibility for [ASHI].

[MEU] acknowledged receipt of the Applicant’s MER and parties have been engaged in settlement discussions to resolve the dispute with the assistance of the MEU.

The deadline for the MEU decision was due on 28 June 2018. However, the MEU has not yet issued a decision because the MEU has been looking into the possibility of resolving the Applicant’s claim and making a settlement proposal agreeable to both parties.

On 20 September 2018, the MEU informed the Applicant that “there is a very high degree of probability that the matter will be resolved within the next month (or two, taking into account technical aspects)” and that they need more time to “finalize the settlement proposal”.

The MEU also undertook to inform the Applicant’s counsel if the mediation breaks down and the settlement proposal is not accepted.

The deadline for filing of the Applicant’s claim to the UNDT falls on 26 September 2018. The Applicant respectfully requests additional time and to allow the Applicant to file his Application to the UNDT, if necessary, within 90 calendar days after receiving notification that mediation has broken down and the settlement proposal is not accepted, pursuant to Article [7.3] of the UNDT Rules of Procedure.

3. On the same day (21 September 2018), the New York Registry of the Dispute Tribunal transmitted the Applicant's motion to the Respondent and, upon instructions of the undersigned Judge, directed the Respondent to file a response by Monday, 24 September 2018, at 3:00 p.m.

4. On 24 September 2018, the Respondent filed his reply to the Applicant's request stating that the Respondent has no objection to the Dispute Tribunal granting the Applicant additional time to file an application, more particularly that the Applicant is engaged in discussions with the MEU to informally resolve the dispute and that the "MEU anticipates that a settlement proposal for the review and consideration of the Under-Secretary-General for Management will be finalized the week of 24 September 2018."

Consideration

5. Article 8.1 of the Dispute Tribunal's Statute provides, in relevant part:

An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(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[.]

...

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application

is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

6. Article 8.3 of the Dispute Tribunal’s Statute provides that “[t]he Dispute Tribunal may decide ... 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”. Article 7.5 of the Dispute Tribunal’s Rules of Procedure reiterates that an applicant may request suspension, waiver, or extension of time limits for filing an application in exceptional cases.

7. In the present case, the deadline for the Administration’s response to the Applicant’s request for management evaluation expired approximately three months ago, and no decision has been rendered. Furthermore, the letter of acknowledgement of receipt of the Applicant’s request for management evaluation states as follows:

Please also note that, pursuant to Staff Rule 11.2 (d), the management evaluation in your case is to be completed within 30 days of receipt of your request, or no later than 28 June 2018. If there is any delay in completing the management evaluation, the MEU will contact you to so advise. In any event, please be advised that, pursuant to Staff Rule 11.4 (a), the 90-day deadline for filing an application to the UNDT, should you wish to do so, will start to run from 28 June 2018, or the date on which the management evaluation was completed, if earlier, unless the deadline has been extended by the Secretary-General to facilitate efforts for informal resolution under the auspices of the Office of the Ombudsman.

...

Notwithstanding the foregoing acknowledgement of receipt of your request for management evaluation, the Secretary-General expressly reserves the right to raise the issues of receivability and competence, as deemed appropriate (emphasis added).

8. Management evaluation is an administrative process, which is primarily intended to afford the Administration the earliest opportunity to reconsider and remedy a situation in which an administrative decision has been challenged (*Omondi UNDT/2011/020*). Whilst ordinarily, with a few exceptions, submission to management evaluation is a necessary requirement for having a case determined by

the Dispute Tribunal, awaiting the receipt of MEU's response beyond the requisite time period is not. If the MEU fails to deliver a management evaluation within the prescribed period, by default, as the time for management evaluation may generally not be extended, the original administrative decision stands as adopted by the Respondent.

9. If the Tribunal were to allow a request for extension of time solely because the MEU failed to render a timely response, an unintended consequence would be that the determination of cases may be prolonged unreasonably and go against the time limits prescribed by the Tribunal's Statute and Rules of Procedure. In this regard, it is noted that the initial administrative decision was made on 5 April 2018, over five months ago, and that no MEU decision has been made. The only reason proffered for the delay is that there is a possibility of resolving the Applicant's claim so an extension of time to file the application is required until settlement or within 90 days after mediation has broken down.

10. If the parties envisage at this stage that the MEU is still preparing a response to the Applicant's request for management evaluation, it should be pointed out that staff rule 11.2(d) provides that the deadline for the Secretary-General's response, reflecting the outcome of the management evaluation, 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" (See also para. 32 of General Assembly resolution 66/237). It appears that, for this provision to have meaningful effect, it has to be interpreted such that informal resolution efforts through the Office of the Ombudsman (in particular, its Mediation Services) are a required condition for the extension of the deadline for the response by the Secretary-General.

11. The Appeals Tribunal confirmed the above analysis in *Applicant* 2015-UNAT-590 as follows (reference to footnotes omitted):

In our considered opinion, what is envisaged or required by the UNDT Statute and the Staff Rules is that: mediation has to be pursued by

either party within the deadline for filing an application with the UNDT; such informal dispute resolution is carried out through the Office of the Ombudsman; the time limits may be tolled when the Mediation Division of the Ombudsman's Office is involved in settlement or mediation discussions; and the staff member may file an application within 90 calendar days of the breakdown of the mediation.

12. Further, in *Eng* 2015-UNAT-520, the Appeals Tribunal specifically held that Article 8.1(d)(iv) of the Dispute Tribunal's Statute, which allows the tolling of the limitations period when the Mediation Division of the Ombudsman's Office is involved in settlement or mediation discussions, is not applicable when the settlement efforts are made by the MEU, as follows:

Article 8(1) of the Dispute Tribunal Statute governs the deadlines by which applications must be filed. Yet, the Dispute Tribunal did not discuss Article 8(1). Instead, it erroneously concluded that the MEU could extend the deadline for filing an application by holding a case before it in abeyance. There is no legal authority for that proposition in Article 8(1) or any other provision of the Dispute Tribunal Statute. Nevertheless, Article 8(1)(d)(iv) of the Dispute Tribunal Statute does allow for the tolling of the limitations period when the Mediation Division of the Ombudsman's Office is involved in settlement or mediation discussions. That provision was not applicable to [the applicant], however; she has never claimed involvement of the Ombudsman. If the General Assembly had intended settlement efforts by the MEU to toll the deadline for filing an application for judicial review, the UNDT Statute would clearly provide for that; it does not.

13. In this case, the deadline for the Secretary-General's response to the management evaluation request expired on 28 June 2018. Unless the parties can demonstrate that this deadline has been "extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General", it is unclear on what basis the discussions are being held and how MEU continues to work on the Applicant's case. Based on the email exchange between the Applicant and the MEU submitted by the Applicant and the Respondent's submission dated 24 September 2018, it appears that the parties' efforts for informal resolution are not conducted "in accordance with the procedures laid down in the terms of reference of the Mediation Division", a condition set forth

in art. 8.1(d)(iv) of the Dispute Tribunal's Statute for extending the deadline to file an application, which condition is not satisfied in this case.

14. Although in this instance the Applicant has requested an extension of time to file before expiry of the deadline, unlike in *Eng*, and whilst the Tribunal appreciates the parties' efforts at informal resolution, the limitations imposed by art. 8.3 of the Dispute Tribunal's Statute and staff rule 11.2 are not to be ignored. In *Abu-Hawaila* 2011-UNAT-118, the Appeals Tribunal held that the exceptional suspension of time limits provided for under art. 8.1 of the Dispute Tribunal's Statute applies only to informal dispute resolution conducted through the Office of the Ombudsman and "[t]he suspension of time limits cannot be extended by analogy to other informal dispute resolution procedures, precisely because of its exceptional character." The Appeals Tribunal concluded that "[e]xceptions to time limits and deadlines must be interpreted strictly and are not subject to extension by analogy."

15. In view of these limitations, the Tribunal finds that, in the circumstances of this case, the reason provided by the Applicant (i.e., the ongoing discussions with the MEU) does not make this case "exceptional" within the meaning of art. 8.3 of the Dispute Tribunal's Statute.

16. The Tribunal also notes that the present case is distinguishable from *Neault* 2013-UNAT-345, in which the Appeals Tribunal held that "[w]hen the management evaluation is received after the deadline ... but *before* the expiration of 90 days for seeking judicial review, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT" (emphasis in original). In the present case, based on the records on file, the management evaluation was not issued within the deadline nor before the expiration of 90 days for seeking judicial review.

17. It is unfortunate that this motion was filed at the eleventh hour as such matters, which require urgent attention, tend to disrupt the normal flow of the Tribunal's business. Nevertheless, the Tribunal commends the parties for their efforts

at informal resolution and notes that the parties in this case, as in any other case, are not precluded from attempting to resolve the matter informally after the filing of the application under art. 2.1 of the Dispute Tribunal's Statute, including under the auspices of the Mediation Services of the Office of the Ombudsman, and can request the Tribunal to suspend the proceedings pursuant to art. 10 of the Dispute Tribunal's Statute or art. 15 of the Rule of Procedures (Referral to mediation).

18. In light of the above,

IT IS ORDERED THAT:

19. The Applicant's motion for extension of time to file an application is denied, and the Applicant shall file his application, if any, on or before **5:00 p.m. on 26 September 2018**, as required by art. 8.1(d)(i) of the Statute and art. 7.1(b) of the Rules of Procedure.

(Signed)

Judge Ebrahim-Carstens

Dated this 25th day of September 2018