



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/050  
Judgment No.: UNDT/2023/127  
Date: 16 November 2023  
Original: English

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**Before:** Judge Solomon Areda Waktolla

**Registry:** Nairobi

**Registrar:** Rene Vargas, Officer-in-Charge

MALFITANO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Esther Shamash, UNDP

## **Introduction**

1. At the time material to this application, the Applicant held a fixed term appointment with the United Nations Development Programme (“UNDP”), with service limited to the United Nations Assistance Mission for Iraq (“UNAMI”). She served as a Communications Advisor at the P-5 Level.

## **Procedural History**

2. On 17 June 2023, the Applicant filed an application with the United Nations Dispute Tribunal (“UNDT”) sitting in Nairobi to challenge the Respondent’s decision which she describes as follows:

Denial of conducting the evaluations of my staff (one international and one national) based on a complaint letter that was submitted after the development of the Performance Management and Development [document] (PMD) of one international staff and that was never disclosed to me, preventing me to exercise my legal rights, to acknowledge and respond to such accusations, with real facts; the subsequent damage of my professional reputation and the discrediting and slander being conducted.

3. The Respondent filed his reply on 18 July 2023, in which he moved the Tribunal to dismiss the application as both time-barred and materially not receivable.

4. Upon assignment of this matter to the undersigned Judge, the Tribunal issued Order No. 135 (NBI/2023). The Applicant was afforded the opportunity to respond to the Respondent’s reply, particularly on the point of receivability. The Tribunal also advised the Applicant as follows:

The Tribunal also notes that the Applicant is self-represented. The Tribunal strongly advises the Applicant to seek the assistance of counsel in this matter. To hasten the process, the Tribunal will refer the matter to the Office of Staff Legal Assistance for their consideration.

5. The Applicant filed her submissions in response to the reply on 22 September 2023.

## **Facts and Submissions**

6. The Applicant began serving with UNAMI on 25 March 2021.
7. On 11 September 2022, three of the Applicant's supervisees complained to the UNAMI Chief of Mission Support ("CMS") that the Applicant was mismanaging and mistreating her team ("the complaint"). They requested that UNAMI assign an additional supervisor to conduct their performance appraisals.
8. On 7 December 2022, the Deputy Resident Representative ("DRR") of the UNDP Country Office in Iraq informed the Applicant that UNAMI had consulted with the Bureau for Management Services, Office of Human Resources, UNDP, and had been advised that under such circumstances, UNAMI could assign the task of conducting the performance appraisals to the Director, United Nations Integrated Electoral Assistance & United Nations Principal Electoral Advisor, i.e., the Applicant's supervisor.
9. On the same day, and in respect of the Applicant's own complaints, the DRR advised the Applicant to consider approaching the Office of Audit and Investigations ("OAI") of UNDP, the Office of the Ombudsman, or addressing her complaints directly with her supervisor.
10. The Applicant disagreed with the course of action proposed by the DRR in respect of the reassignment of the appraisal function and sought management evaluation of that decision on 6 February 2023.
11. On 16 March 2023, the Assistant Secretary-General, Assistant Administrator and Director, Bureau for Management Services, UNDP, responded to the Applicant's request for management evaluation upholding the decision to reassign the appraisal functions, reiterating the advice of the DRR to the Applicant and further advising her to report her claims of retaliation to the UNDP Ethics Office.

## Consideration

12. The Respondent challenges the receivability of the application on two grounds.

He claims that the application is not receivable:

a. *Ratione materiae* because the administrative decision contested by the Applicant is not a judicially reviewable administrative decision; and

b. *Ratione temporis*, because the Applicant failed to observe the deadline in art. 8(d)(i)(a) of the Dispute Tribunal's Statute concerning the filing of an application.

13. Art. 8.1(d)(i)a of the UNDT Statute provides that an application requiring management evaluation of the contested decision shall be receivable if filed “[w]ithin 90 calendar days of the applicant’s receipt of the response by management to his or her submission”.

14. Having examined the application and its annexes, the Tribunal considers that the Applicant is essentially contesting the denial of conducting the evaluations of her staff based on a complaint letter that was submitted after the development of the Performance Management and Development document (“PMD”) of one international staff and that was never disclosed to her.

15. The Applicant received the response of UNDP to her request for management evaluation on 16 March 2023. She filed her application only on 18 June 2023.

16. Art. 8.1(d)(i) of the Dispute Tribunal's Statute provides that the Applicant has 90 days from the management evaluation response to follow with an application before the Tribunal, or 90 days from the expiry of the relevant response period for the management evaluation if no response to the request was provided.

17. Considering that the management evaluation response was issued on 16 March 2023, the Applicant had 90 days from that date to file an application before this Tribunal. The deadline for the Applicant's application, per staff rule 11.4(a) and art. 8.1(d)(i)a of the Tribunal's Statute was Thursday, 15 June 2023. The Applicant filed her application only on 17 June 2023.

18. The Tribunal empathises with the Applicant's submission that she missed the deadline because she was *post partum* at the time.

19. In situations such as this, as soon as she had an inkling that meeting the deadline was going to pose a challenge, and certainly before the deadline itself, it would have been prudent for the Applicant to have invoked art. 8.3 of the Statute of the Dispute Tribunal, which read together with arts. 7.5 and 35 of the Tribunal's Rules of Procedure, afford the Court the power to shorten or extend time limits where the interests of justice so require.

20. It is established jurisprudence that the Tribunal may only suspend or waive the deadlines for filing an application in exceptional circumstances.<sup>1</sup> The Appeals Tribunal held in *El-Khatib* 2010-UNAT-029 that only events beyond an applicant's control and actually preventing him or her from pursuing legal action may be regarded as "exceptional circumstances" warranting such a waiver.

21. In *Gelsei* 2020-UNAT-1035, the Appeals Tribunal held that if an applicant requests a suspension, waiver or extension of the time limits, then an applicant bears the burden to prove "any circumstances beyond [her/his] control that would have the effect of preventing him from acting within the statutory time limits". The Appeals Tribunal stated that the circumstances should meet "the test of untypicality or unusualness".

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<sup>1</sup> *Christensen* 2012-UNAT-218; *Rüger* 2016-UNAT-693.

22. An applicant or appellant cannot submit a request for a waiver of the time limits for filing a late application or appeal along with his/her untimely (or belated) application or appeal.<sup>2</sup>

23. On the facts before the Tribunal, the Applicant did not seek a waiver of suspension of the deadline facing her, nor did she meet the deadline.

24. The Dispute Tribunal and the United Nations Appeals Tribunal have consistently stressed the importance of complying with statutory deadlines which is paramount to ensuring certainty and the expeditious disposal of disputes in the workplace.

25. Specifically, the Appeals Tribunal has repeatedly held that “it is the staff member’s responsibility to ensure that [he/she] is aware of the applicable procedures [...] [and] ignorance cannot be invoked as an excuse”.<sup>3</sup>

26. For the reasons set out above, the Application is not receivable *ratione temporis* as it is time-barred.

27. In the circumstances, the Tribunal does not consider it necessary to deal with the alternative argument that the Applicant’s claim is not a contestable administrative decision.

## **Conclusion**

28. The application is DISMISSED.

(Signed)

Judge Solomon Areda Waktolla

Dated this 16<sup>th</sup> day of November 2023

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<sup>2</sup> See *Nikwigize* 2017-UNAT-731.

<sup>3</sup> *Jennings* 2011-UNAT-184, para. 26. This principle was also reaffirmed in *Christensen* 2012-UNAT-218, para. 39; *Kissila* 2014-UNAT-470, para. 24; *Amany* 2015-UNAT-521, para. 18; *Khan* 2015-UNAT-559, para. 31; *Selim* 2015-UNAT-581, para. 33; *Gehr* 2016-UNAT-613, para. 15; *Babiker* 2016-UNAT-672, para. 49; *Vukasovic* 2016-UNAT-699, para. 14; *Abdellaoui* 2019-UNAT-929, para. 28.

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Entered in the Register on this 16<sup>th</sup> day of November 2023

*(Signed)*

René M. Vargas M., Officer-in-Charge, Nairobi