



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

McILWRAITH et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON RESPONDENT'S MOTION FOR
EXTENSION OF TIME**

Counsel for Applicant:

April L. Carter

Robbie Leighton, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 24 March 2017, Counsel for the named Applicant filed an incomplete application before the Tribunal challenging “discrimination in relation to the denial of a permanent appointment”. The application was registered under Case No. UNDT/GVA/2017/016.
2. On 30 March 2017, said Counsel filed a motion for joinder seeking to:
 - a. join to the named Applicant’s case other cases to be instituted by many other current or former ICTY staff members affected by decisions of the same nature and issued in the context of the same reconsideration process; and
 - b. provide a common brief on the merits with supporting annexes.
3. The contested decisions regarding each of the Applicants-to-be were essentially identical. Each of their matters arose from the same context and raised similar factual and legal issues.
4. On 31 March 2017, through Order No. 79 (GVA/2017), the Tribunal granted Counsel’s motion to file a common brief within this case (Case No. UNDT/GVA/2017/016) on behalf of all current and former ICTY staff members who had instructed Counsel for the named Applicant to represent each of them regarding the challenge of substantially identical decisions and raising similar issues of law and fact. The current number of Applicants in this case is 179.
5. On 14 June 2017, the Registry served the application on the Respondent and, on 14 July 2017, the Respondent filed his reply.
6. On 23 August 2017, the Applicants’ Counsel filed a motion for request of evidence from the Respondent.

7. On 25 August 2017, the Registry acknowledged receipt of the Applicants' motion and, as instructed by the undersigned Judge, informed the Respondent that he had until Friday, 8 September 2017, to provide his observations/comments to it. No observations were received from the Respondent within the time provided.

8. Consequently, the Tribunal inferred that the Respondent did not object to the Applicants' motion and, on 13 September 2017, by Order No. 175 (GVA/2017), granted the Applicants' motion and ordered the Respondent to produce the documents by Friday, 13 October 2017.

9. On 14 September 2017, the Respondent's Counsel filed a "motion for extension of time to provide comments in response to the Applicants' request for evidence" while providing his comments to the Applicants' motion. In it the Respondent submitted as follows:

1 The Respondent requests that the deadline for providing the Respondent's observations to the Applicants' 23 August 2017 request for evidence be retroactively extended to the date of this motion.

2 On 25 August 2017, the Registry advised the Respondent to provide his observations on the Applicants' request by Friday, 8 September 2017.

3 Counsel for the Respondent duly prepared comments objecting to the request for evidence, and requested that those comments be filed by [the] deadline provided by the Registry (Attachment No. 1).

4 On 13 September 2017, Counsel for the Respondent discovered that the Respondent's comments had not been filed, and that the failure to file was material to the Dispute Tribunal's consideration of the Applicants' request. In paragraph 7 of Order No. 175 (GVA/2017) ... the Dispute Tribunal stated that the Respondent did not provide observations in response to the Applicants' requests, and that by implication the Respondent did not object to the Order.

5 The failure to file the Respondent's objections was due to an internal administrative oversight, stemming from a recent shortage in administrative support services.

6 Articles 19 and 35 of the Rules of Procedure permit the waiver and/or extension of a deadline in the interest of justice. It would be in the interests of justice for the Dispute Tribunal to consider the Respondent's objections to the Applicants' request (Attachment No. 2).

7 The Applicants would not be prejudiced from reconsideration of their request together with the Respondent's objections. The consideration of the Respondent's objections would not delay the proceedings in this matter.

10. "Attachment 1" referred above is an email sent on 8 September 2017, from the Respondent's counsel to the Administrative support officer in his office that reads as follows:

[Administrative support officer],

Please efile as soon as possible. It would be appreciated if you could rename the file according to convention.

Thanks,

11. On 15 September 2017, the Registry acknowledged receipt of the Respondent's motion and asked the Applicants' Counsel for observation or comments. The Applicants' Counsel provided a response on 18 September 2017 submitting that the Respondent had not provided legitimate reasons for the failure to provide timely comments to the Applicants' motion arguing that it was the responsibility of counsel to file the Respondent's comments and not that of the "administrative support officer."

12. Additionally, the Applicants' Counsel submitted that:

Given the gross inequality of arms in the administration of justice in the United Nations, a complaint of a shortage in administrative support services as an excuse for the failure to timely file the Respondent's comments cannot be in the interests of justice. Staff members such as the Applicants are left to rely on pro bono counsel who provide legal services on top of full time positions elsewhere and the notoriously under budgeted and understaffed Office of Staff Legal Assistance, yet deadlines are respected.

Consideration

13. Pursuant to art. 19 and 35 of the Tribunal's Rules of Procedure, the Tribunal is cognisant of the fact that it can make an order that it deems appropriate and fair and in the interests of justice.

14. The Tribunal notes that it is the duty of counsel appearing before it to ensure that all submissions are filed in a timely manner, without failure. It appears that Counsel for the Respondent failed to discharge this duty.

15. The Tribunal finds that the reason proffered by the Respondent's Counsel for failure to respond to the call for comments to the Applicants' motion, that is, "internal administrative oversight, stemming from a recent shortage in administrative support services" is not sufficient to warrant the Tribunal to vacate its Order No. 175 (GVA/2017). For there to be an extension of an already expired deadline, the circumstances explaining the default in compliance with the ordered time limit would have to be demonstrated to have been entirely beyond the control of counsel, which was not the case in this matter.

Conclusion

16. In view of the foregoing, the Respondent's motion for extension of time to provide comments in response to the Applicants' request for evidence is rejected.

17. The Registry is ordered to expunge the Respondent's submission in response to the Applicants' motion from the Applicants' case file (paper and electronic).

18. The Respondent shall comply with Order No. 175 (GVA/2017).

(Signed)

Judge Rowan Downing

Dated this 19th day of September 2017

Entered in the Register on this 19th day of September 2017

(Signed)

René M. Vargas M., Registrar, Geneva