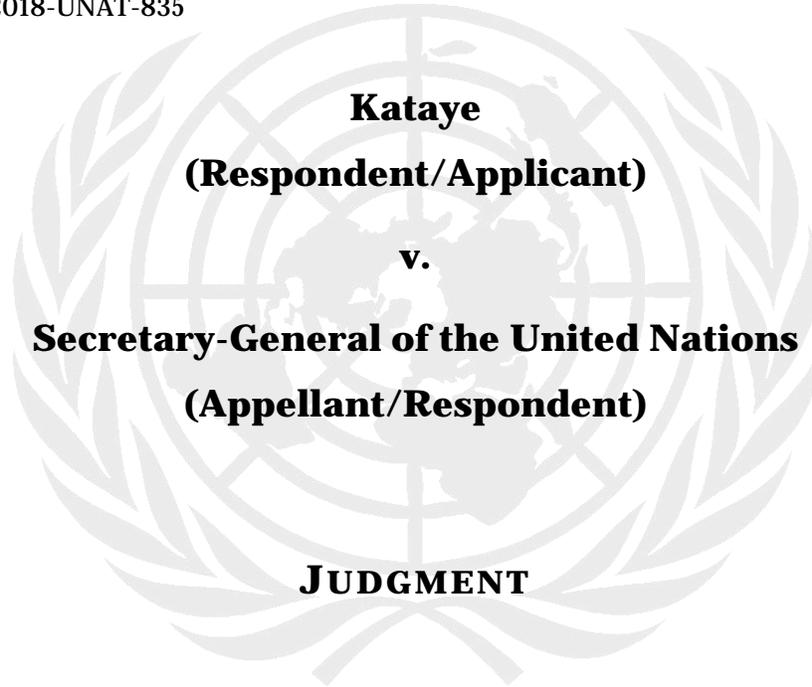




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-835



**Kataye
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Sabine Knierim Judge Richard Lussick
Case No.:	2017-1124
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Ms. Kataye:	Self-represented
Counsel for Secretary-General:	Francisca Lagos Pola

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/072, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 6 September 2017, in the case of *Kataye v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 6 November 2017, and Ms. Papienne Kataye filed her answer on 20 December 2017 and perfected it on 15 January 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant joined the Organization in August 2000. She joined [the United Nations Interim Security Force for Abyei (UNISFA or the Mission)] as a Personal Assistant at the FS-5 level on 21 July 2012, assigned to the Office of the Head of Mission (“OHoM”).

... In February 2015, a new [Head of Mission (HoM)] was appointed to UNISFA. On 17 June 2015, he internally transferred the Applicant to the Office of the Chief, Supply Chain and Service Delivery (“SCSD”) as an FS-5 level Administrative Assistant.

... On 27 December 2015, the Officer-in-Charge of the SCSD and the Mission Support Division informed the Applicant that he decided to rotate the Applicant from the SCSD office to the Supply, Centralized Warehousing and Property Management Section (“SCWPMS”) effective 1 January 2016 [(First Contested Decision)].

... On 29 December 2015, after the Applicant objected to the move, the then Chief of Mission Support directed the Officer-in-Charge of the SCSD not to implement the decision pending further discussions with the Applicant.

... On 14 February 2016, the Applicant requested a management evaluation of the 27 December 2015 decision to move her to the SCWPMS, as a continuation of the decision of 17 June 2015. As a remedy, she requested to be reassigned back to the OHoM as a Personal Assistant or, alternatively, to be reassigned within her rostered job descriptions and/or profiles of Administrative Assistant or Human Resources Assistant.

... On 22 March 2016, a newly appointed Chief of Mission Support met with the Applicant to discuss a possible reassignment to the Training Unit as an FS-5 level Administrative Assistant. The Applicant responded that while the reassignment

¹ Impugned Judgment, paras. 4-31.

sounded attractive, the Personal Assistant position would provide her with better job security.

... On 23 March 2016, the Chief of Mission Support decided to temporarily loan the post that the Applicant encumbered to the Training Unit where she was to perform the functions of an Administrative Assistant at the FS-5 level, from 23 March 2016 until 30 June 2016 [(Second Contested Decision)]. On the same date, the Management Evaluation Unit (“MEU”) informed the Applicant that her 14 February 2016 request was moot since the 27 December 2015 decision was not implemented and then was superseded by the 23 March 2016 decision to temporarily loan her post to the Training Unit.

... On 24 March 2016, the Applicant submitted a request for management evaluation of the decision to reassign her to the Training Unit.

... On 29 March 2016, the Applicant filed an application for suspension of the implementation of the 23 March 2016 decision to reassign her to the Training Unit. The Mission subsequently suspended the implementation of the decision pending the outcome of the management evaluation.

... Following the outcome of her application for the suspension of action dated 29 March 2016, the Applicant embarked on amicable settlement negotiations with the MEU and UNISFA. However, the parties did not agree on a settlement.

... On 7 June 2016, the Under-Secretary-General for Management (“USG/DM”) informed the Applicant that the Secretary-General had upheld the 23 March 2016 decision to reassign her to the Training Unit.

... In its 7 June 2016 letter, the USG/DM stated that UNISFA explained that the Applicant was being reassigned to the Training Unit because the post of HoM was currently vacant and that, as a result, there would be no work for her in that office. The MEU further observed that the decision to reassign the Applicant to the Training Unit would not in any way impact on her career development and/or employment, and that the reassignment was only temporary which would be revisited at the end of the budget cycle at the time (2016-2017).

... On 5 July 2016, UNISFA decided to implement the 23 March 2016 decision to temporarily reassign the Applicant from SCSD to the Training Unit along with her current encumbering post from 5 July 2016 until the end of the budget cycle in June 2017 when the decision was to be revisited.

... On 26 July 2016, the Applicant went on sick leave.

... On 6 September 2016, the Applicant filed [an] application with the [Dispute] Tribunal.

... On 17 October 2016, the Respondent filed his reply.

... Following the decision taken at the Plenary of Dispute Tribunal Judges held in May 2016, to balance the [Dispute] Tribunal's workload, the present case was selected to be transferred to the Dispute Tribunal in New York.

... By Order No. 461 (NBI/2016) of 26 October 2016, the parties were instructed to express their views, if any, on the transfer of the present case by 2 November 2016.

... On 2 November 2016, the Applicant responded that, while, in principle, not objecting to the transfer, she requested an expeditious settlement of her case and indicated that, in her view, this might only be possible if the case remained in Nairobi.

... By Order No. 474 (NBI/2016) of 7 November 2016, the [Dispute] Tribunal noted that neither party objected to the transfer and, pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure, transferred the case to the Dispute Tribunal in New York. The New York Registry registered the case under Case No. UNDT/NY/2016/064.

... On 22 November 2016, the case was assigned to the [UNDT in New York].

... By Order No. 10 (NY/2017) of 17 January 2017, the [Dispute] Tribunal ordered the Applicant to file, by 31 January 2017, a response to the receivability issues raised by the Respondent in his reply and provide certain additional information and documentation. The parties were further instructed to file separate statements by 31 January 2017, informing the [Dispute] Tribunal if (a) additional evidence would need to be produced and, if so, stating its relevance, (b) the case may be decided on the papers, and (c) the parties were amenable for an informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions. If the parties were not amenable to informal resolution, they agreed that no further evidence were to be requested, and that the [Dispute] Tribunal could decide the case on the papers before it[;] they were instructed to file their closing submissions by 21 February 2017.

... On 31 January 2017, the parties filed their submissions as per Order No. 10 (NY/2017).

... By Order No. 23 (NY/2017) of 6 February 2017, the [Dispute] Tribunal instructed the parties to attend a Case Management Discussion ("CMD") on 21 February 2017 in the court room in New York.

... During the 21 February 2017 CMD, the [Dispute] Tribunal noted that, in the Applicant's 31 January 2017 submission, the Applicant had informed the [Dispute] Tribunal that she had been assigned back to her original job. At the inquiry of the [Dispute] Tribunal, Counsel for the Applicant explained that the Applicant had resumed her old functions on 20 February 2017. Counsel for the Respondent stated that he did not believe that the case was amenable for informal negotiations, noting that the Applicant had been granted the relief she had sought; the only remaining claim, therefore, concerned damages and the Respondent did not find that the

Applicant had suffered any economic loss. Counsel for the Respondent further requested to be offered the opportunity to comment on the medical records the Applicant had submitted in evidence. In response, Counsel for the Applicant argued that the Applicant had suffered both direct economic losses and non-pecuniary damages. The [Dispute] Tribunal stated that it strongly believed that both parties would benefit from the case being resolved amicably and encouraged them to enter into informal negotiations, either through the United Nations Ombudsman and Mediation Services or *inter partes* discussions. The [Dispute] Tribunal ordered Counsel for the Respondent to consult with his client and file a submission on or before 24 February 2017 on the possibility of entering into settlement discussions. If this was rejected by the Respondent, the [Dispute] Tribunal would thereafter issue an order to set a deadline for closing submissions.

... On 24 February 2017, the Respondent informed the [Dispute] Tribunal that he maintains his view that this case is not amenable for an informal resolution.

... By Order No. 38 (NY/2017) of 27 February 2017, the [Dispute] Tribunal instructed the parties to file their closing submissions by 17 March 2017.

... On 17 March 2017, the parties filed their closing submissions.

3. On 6 September 2017, the UNDT issued its Judgment. The UNDT found that the application with respect to the first contested decision was filed out of time and was therefore not receivable *ratione temporis*. The UNDT, however, found that the application against the second contested decision was filed timely and was receivable. The UNDT noted that Ms. Kataye received the outcome of her management evaluation request on 7 June 2016, and that from that date, the 90-day deadline for filing an application before the UNDT ended on 5 September 2016. Since 5 September 2016 was observed as an official holiday at the New York Registry, the UNDT concluded that the deadline for filing an application before the UNDT fell on 6 September 2016, the day on which Ms. Kataye filed her application.

4. On the merits, the UNDT concluded that while the 23 March 2016 reassignment decision was valid until 30 June 2016, its extension beyond that date, until the end of June 2017, was unlawful. The UNDT found that the Administration failed to observe that the 23 March 2016 decision was no longer valid when Ms. Kataye's temporary loan expired on 30 June 2016, and the Administration did not issue, before or on the 30 June 2016 expiration date, a decision to extend the initial temporary loan beyond the expiration date or issue a new decision to loan Ms. Kataye's post to the same unit starting 1 July 2016, as required by the Standard Operating Procedures. The UNDT took into consideration the circumstances of Ms. Kataye's case together with the medical evidence she presented which indicated that she "suffered emotional distress as a direct

result of the unlawful implementation and extension of the 23 March 2016 (...) decision”² and found that its Judgment together with USD 2,250 in compensation to Ms. Kataye represented a reasonable and sufficient relief for her emotional distress.

Submissions

The Secretary-General’s Appeal

5. The UNDT erred in law and fact in concluding that Ms. Kataye’s application in respect of the second contested decision was receivable *ratione temporis*. The UNDT erred in finding that the deadline for filing Ms. Kataye’s application fell, pursuant to Article 34 of the UNDT Rules of Procedure, on 6 September 2016, because 5 September 2016, the day the 90-day deadline for filing the application ended, was an official holiday at the New York Registry. The official holiday for the New York Registry was irrelevant for the determination of the timeliness of Ms. Kataye’s filing before the Nairobi Registry. In Nairobi, 5 September 2016 was a working day and was, consequently, the last day for Ms. Kataye to file her application. Moreover, the fact that Ms. Kataye’s case was transferred to the New York Registry subsequent to the filing of her application with the Nairobi Registry does not cure the flaw of the late filing. Finally, Ms. Kataye has not established any exceptional circumstances warranting the waiver of the statutory time limit.

6. In the alternative, if the Appeals Tribunal decides that the application before the UNDT was filed on time, the Secretary-General submits that the UNDT erred in concluding that the second contested decision was unlawfully implemented since it had a limited duration and was not valid beyond 30 June 2016. The UNDT’s finding appears to stem from a misunderstanding by the UNDT of two distinct matters, first, the “temporary loan” of a post to the Training Unit, and second, the reassignment of Ms. Kataye to the Training Unit. While the “loaning” of the post had a time limitation of 30 June 2016, which was tied to the Mission’s budget cycle, the reassignment of Ms. Kataye to the Training Unit had no such time limitation. The limited validity of the reassignment decision finds no support either in Staff Regulation 1.2(c) which regulates reassignment of staff members or in the relevant Appeals Tribunal’s jurisprudence. The budgetary implications of the loan have no impact on the procedural fairness of the decision to reassign Ms. Kataye. The UNDT itself found no evidence of the decision having been tainted by improper motive or that it was unlawful for reasons other than the time limit.

² Impugned Judgment, para. 77.

7. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Ms. Kataye's Answer

8. The UNDT did not err by finding Ms. Kataye's application challenging the second contested decision receivable *ratione temporis*. A review of the trial record reveals that following Order No. 10 (NY/2017), Ms. Kataye provided medical reports supporting her contention that "the chain of events and the continuity of the three moves (transfer/rotation/loan) had adversely affected [her] health" requiring her to undergo medical procedures outside the duty station, making communication with her legal team difficult. Should the Appeals Tribunal find that her application was filed out of time, Ms. Kataye requests that the Appeals Tribunal take into account the fact that she filed only one day late due to special circumstances which were beyond her control. Finally, the Secretary-General suffered no prejudice in the preparation of his defense as a result of Ms. Kataye's submission a day after the alleged deadline.

9. The UNDT did not err in concluding that the second contested decision was not valid beyond 30 June 2016 and was therefore unlawful. In response to the Secretary-General's distinction between "temporary loan" of Ms. Kataye's post to the Training Unit and her "reassignment" to the Training Unit, Ms. Kataye contends that the Secretary-General is "simply playing with semantics" to justify the three moves. In fact, both loaning and reassignment were subject to the same considerations and limitations including the consideration of the budget cycle and availability of funds to support the function.

10. While the Secretary-General has the authority to reassign staff, he is subjected to the stringent consideration of fairness under Staff Regulation 4.2. In the present case, the motivations underpinning the decisions to laterally move Ms. Kataye were extraneous and far removed from the interests of the Organization, or standards of efficiency. The fact that, until now, the Administration has not expressed in any of its budget cycles the need of provision of the post of Administrative Assistant in the Training Unit or the SCSD Section, supports the argument that the moves were not necessary by operational requirements.

11. Furthermore, while Ms. Kataye acknowledges that the UNDT's decision that the 27 June 2015 transfer (the very first move) may not have been receivable *ratione temporis* and *ratione materiae*, it does not rule out that all three transfers were a "perpetuation of one agenda,

and were thus, inseparable". Ms. Kataye also submits that, while the matter was still under review by the UNDT, following concerns raised by the Office of Internal Oversight Services on the unlawfulness of the decisions regarding Ms. Kataye's transfer and the occurrence of similar practices in other duty stations, OHRM has put in place procedures and guidance on the recruitment of positions of Chief of Staff, Special Assistant and Personal Assistant by reviewing Administrative Instructions ST/AI/2016/1 (Staff selection and managed mobility system) and ST/AI/2010/3 (Staff selection system) to address irregularities in the recruitment for such positions.

12. As the appellant, the Secretary-General has the burden of satisfying the Appeals Tribunal that the UNDT Judgment is defective. The Secretary-General has not discharged this burden, and thus, the appeal fails. Ms. Kataye requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

13. Following a decision taken at the Plenary of Dispute Tribunal Judges held in May 2016, to balance the Dispute Tribunal's workload, the present case was selected to be transferred from the Dispute Tribunal in Nairobi to the Dispute Tribunal in New York. By Order No. 461 (NBI/2016) of 26 October 2016, the parties to the proceedings were instructed to express their views, if any, on the transfer of the case to New York by 2 November 2016. The parties did not object to the transfer and as a result, by Order No. 474 (NBI/2016) of 7 November 2016, the case was officially transferred to the Dispute Tribunal in New York.

14. The Secretary-General challenges on appeal the UNDT's finding in law and fact that Ms. Kataye's application, as it relates to the second contested decision, was filed on time and was receivable *ratione temporis*.

15. The UNDT noted in its Judgment that Ms. Kataye received the outcome of her management evaluation request on 7 June 2016 and therefore the 90-day deadline for filing an application ended on 5 September 2016. The UNDT reasoned that since 5 September 2016 was observed as an official holiday at the New York Registry, the deadline for filing an application at that Registry was the following day, 6 September 2016; this is the day on which Ms. Kataye filed her application at the Nairobi Registry.

16. We note the observation of the Secretary-General that 5 September 2016 was a working day in Nairobi. This was not refuted; we therefore accept that this was in fact the case.

17. An examination of the facts reveals that in the month of September 2016, and more particularly on 6 September 2016, this case was still recorded as pending before the UNDT Nairobi and the filing of all documents in that month was expected to be done at the Nairobi Registry. Indeed, it is at that Registry that Ms. Kataye filed her application on 6 September 2016. Moreover, the case was only officially transferred to the New York Registry on 7 November 2016; which is some two months subsequent to the filing of the application with the Nairobi Registry.

18. It stands to reason, and we agree with the Secretary-General, that the official holiday at the New York Registry on 5 September 2016 is irrelevant for the determination of the timeliness of Ms. Kataye's filing before the Nairobi Registry. The only issue for consideration to determine whether the case was receivable by the UNDT is whether the filing of the application with the Nairobi Registry was timely.

19. From the evidence we find that the application in this case was filed after the stipulated time limit. There is no evidence that Ms. Kataye applied for and was granted an extension to file a late application nor is there evidence to establish that there were any exceptional circumstances which supported a waiver of the statutory time limit.

20. The Appeals Tribunal has repeatedly emphasized the need for statutory time limits to be observed, except where there is evidence of exceptional circumstances which may dictate otherwise.³ We find that Ms. Kataye's application before the UNDT was not receivable *ratione temporis*. We therefore order that the UNDT Judgment be vacated in its entirety.

³ *Shehadeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-689, para. 19; *Bofill v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-478, para. 19, citing *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-029, para. 14.

Judgment

21. The appeal is granted and Judgment No. UNDT/2017/072 is vacated in its entirety.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Knierim

(Signed)

Judge Lussick

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar