



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/005

Order No.: 002 (NBI/2016)

Date: 13 January 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DE MASI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
ALS/OHRM

Introduction

1. The Applicant served as a radio producer at the P-4 level in Juba, South Sudan, with the United Nations Mission in the Republic of South Sudan (UNMISS).

Facts

2. The following facts are taken from the Applicant's Application and its supporting annexes:

a. The Applicant was recruited to serve as a radio producer at the P-4 level with UNMISS on 9 April 2013. Since there was no P-5 Chief of Radio Section, she assumed those duties.

b. In August 2013, a temporary vacancy was posted for the P-5 Chief of Radio Section, which the Applicant applied for. A mission broadcast was sent out on 4 September 2013 indicating that the Applicant had assumed the role of Chief of the Radio Section.

c. The Applicant's supervisor, the Chief of the Public Information Office (Chief/PIO), made a formal request on 19 May 2014 for a special post allowance (SPA) regarding the Applicant's assumption of the functions of the Chief of the Radio Section. This request was approved by the Chief Civilian Personnel Officer (CCPO).

d. The Applicant tendered her resignation from UNMISS on 9 June 2014 and was separated from service on 8 August 2014.

e. The Applicant was copied on a message dated 21 January 2015 from the UNMISS Human Resources Section indicating that she was not eligible for SPA.

f. The Applicant referred the matter to the Officer-in-Charge, Deputy Director Mission Support (OiC/DDMS) on 9 February 2015 and on 19 February 2015 the OiC/DDMS advised that the matter had been referred back to the SPA panel for “renewed” review.

g. On 7 June 2015, the Applicant was informed that the matter was submitted to the Field Personnel Division of the Department of Field Support (FPD/DS) who were seeking approval from the Office of Human Resources Management (OHRM).

h. The Applicant submitted a request for management evaluation to the Management Evaluation Unit (MEU) on 28 August 2015 challenging the Administration’s failure to grant her an SPA.

3. According to the Applicant, she did not receive a response from MEU within the 45-day deadline thus her 90-day deadline for filing an application to the Tribunal is 10 January 2015.

4. The Applicant submits that settlement negotiations have been ongoing between her and MEU and she is confident that these negotiations will result in informal settlement of her claim. MEU provided an email dated 8 January 2016 confirming that settlement negotiations are well advanced and anticipating resolution of the matter within the next three weeks.

5. The Applicant filed the current application for extension of time to file an application on 8 January 2016.

Applicant’s submissions

6. The Applicant submits the following as exceptional circumstances justifying her Application for extension of time to file an application:

- a) She has prioritized informal settlement throughout the process and only approached MEU when it became clear that the Mission was not addressing the issue.
- b) At no point have her actions contributed to the delay in the processing of the SPA request or the potential settlement of the case.
- c) Time limits set down for management evaluation have not been complied with in her case. This has now forced her to request the current application for extension of time solely to preserve her rights even though informal settlement is the most likely outcome.
- d) The Administration will not be in any way prejudiced by the extension if it is granted.
- e) She is conscious of the General Assembly's desire to encourage informal settlement where possible and of the Tribunal's endorsement of this position.

7. Should the Tribunal find that an extension of time for filing an application with the Tribunal is not possible; the Applicant respectfully requests that her current application for extension of time be deemed as her formal Application to the Tribunal.

Legal Framework

8. Pursuant to article 8.3 of the UNDT Statute, which relates to the receivability of an application, the Tribunal may decide "to suspend or waive the deadlines for a limited period of time and only in exceptional cases" upon the written request of an applicant.

9. Article 7.5 of the UNDT Rules of Procedure states: “In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request”.

10. In *Diagne et al.* 2010-UNAT-067, the United Nations Appeals Tribunal (UNAT) stated that there was no legal difference between “exceptional circumstances” mentioned in former staff rule 111.3(f) and “exceptional cases” mentioned in article 8.3 of the UNDT Statute. UNAT subsequently held that “we believe the correct standard to be consistent with the former Administrative Tribunal’s jurisprudence – a delay can generally be excused only because of circumstances beyond an applicant’s control”.

11. In *Abu-Hawaila* 2011-UNAT-118, UNAT considered the issue of time limits and held that:

28. At the time of receipt of the Settlement Offer, the time limit to file the application to the UNDT had already run for approximately three weeks. In these circumstances, nothing prevented Abu-Hawaila, for instance, from filing his application or at least applying for a waiver or extension of the time limit to file it under Article 8(3) of the UNDT Statute. But no action was taken, and the main attitude adopted was to postpone the decision about the Settlement Offer.

29. This Tribunal also holds that the exceptional suspension of time limits provided for under Article 8(1) of the UNDT Statute and provisional Staff Rule 11.1 applies only to informal dispute resolution conducted through the Office of the Ombudsman. The suspension of time limits cannot be extended by analogy to other informal dispute resolution procedures, precisely because of its exceptional character. Exceptions to time limits and deadlines must be interpreted strictly and are not subject to extension by analogy.

12. Similarly in *Eng* 2015-UNAT-520, UNAT held that the Dispute Tribunal had:

[E]rroneously 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 Ms. Eng, 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.

Considerations

13. In previous cases before the Dispute Tribunal where applicants have asserted exceptional circumstances, they have had to prove that the circumstances were beyond their control¹ and the onus has been placed on them to produce cogent evidence to support their contentions.²

14. In the present matter, the exceptional circumstances provided by the Applicant in support of her Application for extension of time revolve solely around the informal settlement process that she is engaged in with MEU. The Applicant does not provide any justification that indicates circumstances beyond her control. It is very clear however from the jurisprudence of UNAT that the negotiation of a settlement with MEU is not considered to be an exceptional circumstance that would toll the deadline with regards to article 8 of the UNDT Statute.

15. Thus the Tribunal is faced with an application under article 8.3 of the UNDT Statute and article 7.5 of the UNDT Rules of Procedure that fails to provide proper justification for the request and without proper justification, the Tribunal cannot grant this Application for extension of time.

¹ *Morsy* UNDT/2009/036; *Abu-Hawaila* UNDT/2010/102; *Samardzic et al.* UNDT/2010/019.

² *Thiam* UNDT/2010/131.

16. The Tribunal notes however that the Applicant has made an alternate motion praying that the Tribunal deem her application for extension of time as her substantive application should her application for extension be rejected.

17. The UNDT Statute and the Rules of Procedure have no provisions relating to the Applicant's motion for the Tribunal to consider her application for extension of time as a substantive application. However, article 19 of the UNDT Rules of Procedure allows the Tribunal to issue any order or to give any direction which appears to be appropriate for the fair and expeditious disposal of a case and to do justice to the parties and article 36 of the UNDT Rules of Procedure grants the Tribunal the authority to make decisions on matters that are not expressly provided for in the rules of procedures by virtue of the powers conferred on it by article 7 of the Statute.

18. Further in *Simmons* Order No. 325 (NY/2010), the Tribunal held that:

[...]The manner in which an appeal is initiated (complete or full) is not legally-determinative. Rather what is critical is that an appeal was filed in a timely manner...the filing of an incomplete statement of appeal establishes the date of the appeal, for the purposes of staff rule 111.2 and is sufficient for the purposes of that rule.

19. Pursuant to articles 19 and 36 of the UNDT Rules of Procedure, the Tribunal grants the Applicant's alternative motion to deem her application for extension of time as a substantive application. The Tribunal holds however that it is an incomplete application that establishes the date of filing but which will require some amendment by the Applicant prior to service on the Respondent.

It is hereby ordered that:

20. The Applicant's Application for extension of time to file an application is accordingly refused.

21. The Applicant's alternative motion for the Tribunal to consider her application for extension of time as a substantive application is granted. The substantive application before the Tribunal is in the circumstances incomplete.

22. The Applicant shall file a revised/amended application no later than 29 January 2016.

Observations

23. The core functions of MEU are set out in section 10 of ST/SGB/2010/9 (Organization of the Department of Management). They include:

- a) Conducting impartial and objective evaluations of administrative decisions contested by staff members of the Secretariat;
- b) Making recommendations to the Under-Secretary-General for Management (USD/DM) on the outcome of management evaluations and proposing appropriate remedies;
- c) Communicating the decisions of the USG/DM on the outcome of management evaluations to staff members;
- d) Proposing means of informally resolving disputes between staff members and the Administration; making recommendations to the USG/DM on extending deadlines for filing requests for management evaluation by staff members or for extending the deadlines for completing a management evaluation pending efforts for informal resolution by the Office of the Ombudsman;
- e) Conducting a timely review of an application to suspend implementation of a contested administrative decision, making a recommendation to the USG/DM on the outcome of such review and informing the staff member of the outcome;

- f) Monitoring the use of decision-making authority and making recommendations to the USG/DM to address any discerned trends; and
- g) Assisting the USG/DM to strengthen managerial accountability by ensuring managers' compliance with their responsibilities in the internal justice system.

24. This case has highlighted how MEU has arrogated to itself the duty to engage in informal settlement discussions with staff members on contested administrative decisions. The Tribunal however is unable to find any legal authority for this function in ST/STB/2010/9.

25. It appears that MEU is very loosely interpreting its functions under section 10.2(d) by participating in informal settlement discussions with staff. Section 10.2(d) merely authorizes MEU: to **propose means** of informal resolution of disputes and to make recommendations to the USG/DM on extending the deadlines for completing a management evaluation pending efforts for informal resolution **by the Office of the Ombudsman**. It is unclear how MEU's duty to propose methods or processes for informal dispute resolution and make recommendations on extension of deadlines in support of the work of the Ombudsman's office has metamorphosed into MEU legal officers becoming mediators.

26. The Tribunal is appreciative of the General Assembly's desire to encourage alternative dispute resolution, where possible, and commends MEU's efforts in informal settlement. Unfortunately, MEU's unchartered role in informal dispute resolution usurps the role of the Office of the Ombudsman and the Mediation Division and blurs the line between the informal and formal systems of internal justice set out in various General Assembly resolutions³ on administration of justice.

27. It may behoove MEU to limit itself to the specific roles set out for it in section 10 of ST/SGB/2010/9 to ensure it is not acting *ultra vires* or the Administration to

³ A/RES/61/261 and A/RES/62/228.

revise the SGB to formally mandate MEU to engage parties in informal settlement of disputes.

(Signed)

Judge Nkemdilim Izuako

Dated this 13th day of January 2016

Entered in the Register on this 13th day of January 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi