



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

Judgment No. 2016-UNAT-693

**Rüger
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Richard Lussick Judge Dimitrios Raikos
Case No.:	2016-923
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Ms. Rüger:	Self-represented
Counsel for Secretary-General:	Ernesto Bondikov

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Summary Judgment No. UNDT/2016/015, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 3 March 2016, in the case of *Rüger v. Secretary-General of the United Nations*. Ms. Christina Rüger filed the appeal on 28 April 2016, and the Secretary-General filed an answer on 28 June 2016.

Facts and Procedure

2. The following facts are uncontested:¹

... Since 2013, the Applicant has served in various Legal Officer positions within the Organization.

... On 24 November 2015, the Applicant received a letter dated 16 November 2015 from the Assistant Secretary-General for Human Resources Management informing her of the imposition of a disciplinary measure of separation from service, with compensation in lieu of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii).

... Approximately two hours after midnight on 23 February 2016, Counsel for the Applicant (located in Europe) wrote to the [Dispute] Tribunal's eFiling portal technical support team (located in New York) seeking assistance, since she encountered problems to login to said portal. The support team replied a few hours later, early in the morning of 23 February 2016. Shortly thereafter, Counsel for the Applicant confirmed by email that she was then able to login.

... On 23 February 2016 in the afternoon, Counsel for the Applicant emailed the Geneva Registry of the [Dispute] Tribunal, explaining that she had been trying to access the eFiling portal since the previous night and, also, that she had had great difficulties to obtain her client's approval of the final version of the application, as her client was in Vietnam travelling. She requested that the "application and cover letter of 22 February 2016" that were attached to her email be accepted. The annexes followed by separate emails. Less than one hour later the Geneva Registry acknowledged receipt of said emails and of the attached application, received on 23 February 2016.

... Later in the same afternoon, Counsel for the Applicant filed the application via the eFiling portal.

... On 25 February 2016, Counsel for the Applicant sent by email a "Motion for extension of time to file an application".

¹ Impugned Judgment, paras. 2-8.

... At the Tribunal's request, on 29 February 2016, Counsel for the Applicant provided her internet browser's recent history log.

3. On 3 March 2016, the UNDT issued the impugned Judgment, in which it rejected the motion for extension of time to file Ms. Rürger's application and summarily dismissed her application as irreceivable *ratione temporis*. The UNDT stated that "[w]hile it is regrettable that this application be time-barred by only one day, the [UNDT] cannot but follow the constant and unambiguous case law of the Appeals Tribunal that time limits ... are to be strictly enforced".² In reaching its decision, it found no exceptional circumstances justifying a waiver of the statutory time limits. In this regard, the UNDT stated:³

... Distance, time difference and even the understandable stress caused by [Ms. Rürger's] husband's health might have rendered [it] more difficult for [her] to timely review and approve the final version of the application, but they cannot be said to have made it impossible to file the application on time. In sum, none of these circumstances were, as required, beyond [Ms. Rürger's] control.

Submissions

Ms. Rürger's Appeal

4. The UNDT erred in both law and fact, as is made clear by the e-mail correspondence between Ms. Rürger and her counsel between 15 and 25 February 2016. This period corresponds to the time leading up to the filing of Ms. Rürger's application before the UNDT and, subsequently, the motion for extension of time to file her application.

5. The UNDT erred on a question of law and fact in finding that there were no exceptional circumstances warranting a waiver of the deadline for the following three reasons: (i) Ms. Rürger did not have control over the final filing, which was "entirely in the hands of her Counsel"; (ii) the nature of the delay was *de minimis* and there was neither evidence of prejudice to the Respondent nor of "lax" behaviour on the part of Ms. Rürger, who "had diligently handled her case", "had done all [that] had been requested from her by her Counsel" and whose going to sleep "cannot be considered ... 'lax' ... as there had been no indication at all that her Counsel would contact her again for 'final green light'" before filing; and (iii) the interests of fairness and justice justified the waiver "as there is no other avenue for [Ms. Rürger] to seek any other recourse"

² *Ibid.*, para. 13.

³ *Ibid.*, para. 17.

against the imposition of the disciplinary sanction against her. This case is distinguishable from both *Powell*⁴ and *McCluskey*.⁵ Unlike in *Powell*, Ms. Rüger did not rely on counsel's calculation for filing the deadline; and, unlike in *McCluskey*, Ms. Rüger "does not seek to blame her Counsel for the delay, but rather has provided precise evidence of how the delay occurred and that it was beyond [her] control".

6. The UNDT also erred on a question of fact that resulted in a manifestly unreasonable decision when it found that Ms. Rüger had not trusted her counsel to take all the necessary steps to file her application on time. Ms. Rüger's counsel was aware of the filing deadline and Ms. Rüger fully relied on her counsel to observe the deadline. About two hours after counsel confirmed receipt of Ms. Rüger's signature page, Ms. Rüger went to bed (at about 10 pm, Vietnam time) understanding that "she had done all from her side that was required for the application to be submitted on that very day of 22 February 2016".

The Secretary-General's Answer

7. Ms. Rüger does not contest the UNDT's finding that her application was filed out of time. Instead, she challenges the UNDT's denial of her motion for extension of time and the resulting summary dismissal of her application as time-barred. Her arguments lack merit. The UNDT made no errors of law or fact in finding, based on the record before it, that Ms. Rüger failed to show exceptional circumstances.

8. The e-mails which Ms. Rüger relies on in advancing her arguments should be struck from the record. They are submitted for the first time on appeal and Ms. Rüger has not shown any exceptional circumstances warranting their admission by the Appeals Tribunal. Ms. Rüger may not now argue that the UNDT erred in law or fact when it denied her motion based on evidence which could have been, but never was, made available to the UNDT for consideration.

9. Ms. Rüger's arguments should be rejected because they have been impermissibly raised for the first time on appeal. In addition, they are without merit. Ms. Rüger's argument that she herself was not at fault fails as a matter of law because the Appeals Tribunal has unequivocally held in *Powell* that "[o]versight by counsel does not justify a waiver of statutory time limits".⁶

⁴ *Powell v. Secretary-General of the United Nations*, Order No. 96 (2012), paras. 4 and 9.

⁵ *McCluskey v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-384, paras. 11-12 and 20.

⁶ *Powell v. Secretary-General of the United Nations*, Order No. 96 (2012), para. 9.

Her argument that the delay was *de minimis* is without merit and her reliance on *Awad*⁷ is misplaced. In that case, the filing was late by less than one hour on the filing deadline; in contrast, Ms. Rürger's application was filed more than 14 hours *after* the deadline. Ms. Rürger has also failed to show that the UNDT erred in finding, based on the record before it, that she had given her approval for her application after the deadline had expired.

Considerations

Applicable law

10. Article 8(3) of the UNDT Statute provides that:

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. ...

11. Article 7(5) of the UNDT Rules of Procedure further provides that:

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 [concerning the filing of applications]. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. ...

12. As we have stated before, while Article 8(3) of the UNDT Statute empowers the UNDT “to suspend or waive any deadlines, except those for management evaluation, [that power] must be exercised with caution and under the discretion of the [UNDT] Judge. The exercise of discretion by the [UNDT] Judge may be overturned on appeal only if the decision taken appears to be clearly unreasonable.”⁸

Were there exceptional circumstances?

13. The UNDT did not err in law or fact in strictly applying the statutory time limits and stating that “exceptional cases” under Article 8(3) of the UNDT Statute justifying a waiver of those time limits are only circumstances beyond an applicant's control that prevented him or her from exercising the right of appeal in a timely manner. The UNDT's finding, as set forth in its Judgment, that the standard was not met in this case is in accordance with the constant and

⁷ *Awad v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/071, para. 23.

⁸ *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, para. 30.

unambiguous case law of this Tribunal.⁹ On appeal, Ms. Rüger argues that the “events of 22 and 23 February 2016 ... unravel[...]ed in a way that were beyond [her] control and could not be influenced by her in any way”. She also argues that the nature of the delay was *de minimis*, on the grounds that the deadline “was missed by just 14 hours and the circumstances of the filing were clearly exceptional and beyond [her] control”.

Additional evidence

14. Ms. Rüger submits e-mail correspondence not presented before the UNDT in support of her contention that the UNDT erred by not finding exceptional circumstances for her missing the deadline.

15. Article 2(5) of the Statute of the Appeals Tribunal provides in part that:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. ... The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

The Appeals Tribunal has consistently held that additional evidence may not be accepted on appeal if it could have been presented before the UNDT.¹⁰

16. We do not find any exceptional circumstances requiring this Tribunal to receive this documentary evidence; moreover, we find that its content would not affect the decision of the case. We further note that Ms. Rüger’s appeal is based almost exclusively on this additional e-mail correspondence; for this reason alone, the appeal will not succeed.

17. With regard to Ms. Rüger’s additional documentary evidence, we note that the correspondence reveals that the failure to observe the deadline was due to either negligence in calculating the time limit or a combination of negligence and confusion on the final day regarding

⁹ See for example, *Ocokuru v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-604 and *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.

¹⁰ See, for example, *Kalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-580, para. 51, citing *Seddik Ben Omar v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-264, para. 27; *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056, para. 12.

whether or not Mr. Rüger had given her final approval; there is nothing to support a finding of exceptional circumstances beyond Ms. Rüger's control. As this Tribunal has consistently held, negligence cannot justify a waiver of statutory time limits.¹¹

De minimis delay

18. Ms. Rüger's submission that the nature of the delay was *de minimis* is without merit. A day late ("just 14 hours", as she asserts) is by no means *de minimis*. More importantly, however, we take this opportunity to clarify that the degree of lateness has no relevance for the finding of exceptional circumstances. Whether a deadline is missed by several minutes, several hours or several days is irrelevant. A waiver of time can be justified under Article 8(3) of the UNDT Statute only if the applicant shows that exceptional circumstances beyond his or her control prevented him or her from acting within the statutory time limits¹² – which, as reasonably found by the UNDT based on the record before it, was not the case.

19. Having reviewed the UNDT Judgment and the parties' submissions, we can discern no reversible error in the UNDT's rejection of Ms. Rüger's motion for extension of time and its summary dismissal of her application as non-receivable *ratione temporis*.

Judgment

20. The appeal is dismissed and Judgment No. UNDT/2016/015 is hereby affirmed.

¹¹ *McCluskey v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-384, para. 20; *Scheepers v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-211, para. 44. See also *Powell v. Secretary-General of the United Nations*, Order No. 96 (2012), para. 9.

¹² *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.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Raikos

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar