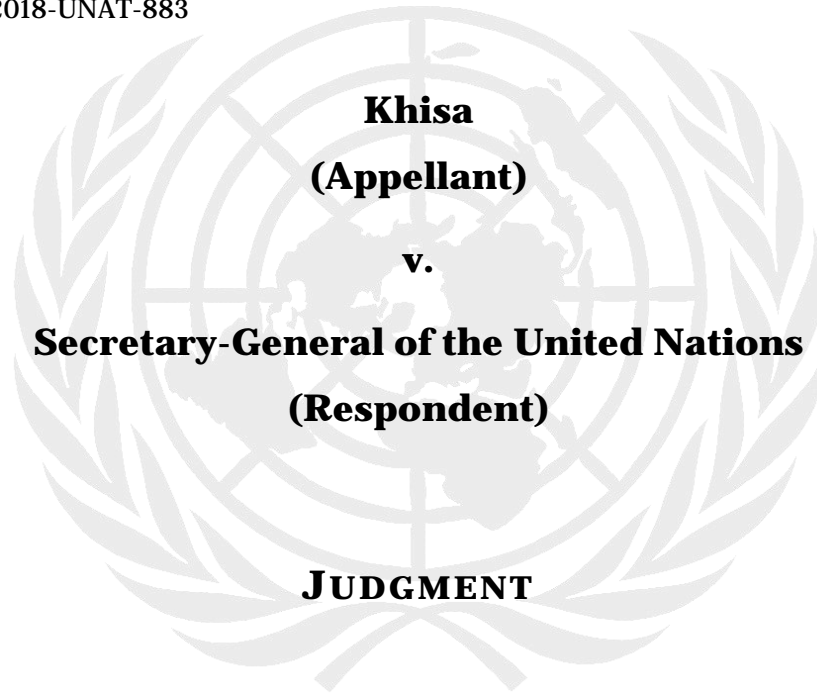




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-883



Before: Judge John Murphy, Presiding
Judge Dimitrios Raikos
Judge Martha Halfeld

Case No.: 2018-1176

Date: 26 October 2018

Registrar: Weicheng Lin

Counsel for Ms. Khisa: Mudibo and Company Advocates

Counsel for Secretary-General: John Stompor

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Receivability No. UNDT/2018/047, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 4 April 2018, in the case of *Khisa v. Secretary-General of the United Nations*. Ms. Janet Khisa filed the appeal on 1 May 2018, and the Secretary-General filed his answer on 6 July 2018.

Facts and Procedure

2. Ms. Khisa entered service with the Organization on 4 November 2006. At the time of her separation from service in December 2016, she was serving as an Associate Child Protection Officer at the United Nations Mission in South Sudan (UNMISS).

3. On 20 March 2015, the Office of Internal Oversight Services (OIOS) received a report of possible misconduct involving Ms. Khisa and another UNMISS staff member regarding her application for dependency benefits. After an investigation, OIOS concluded in a report dated 16 June 2016 that the established facts constituted reasonable grounds to conclude that Ms. Khisa failed to observe the standards of conduct expected of a United Nations staff member.

4. The matter was subsequently referred to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) for disciplinary action. By a memorandum dated 7 October 2016, OHRM notified Ms. Khisa that formal charges of misconduct were being brought against her for having submitted a birth certificate containing false information in support of an application for dependency benefits. Ms. Khisa submitted her written response to the allegations on 25 October 2016.

5. On 15 December 2016, OHRM addressed a letter to Ms. Khisa informing her that the Under-Secretary-General for Management (USG/DM) after reviewing the dossier, including her response to the allegations, had concluded that there was clear and convincing evidence establishing the charges of misconduct against her. The letter further informed her that the USG/DM, on behalf of the Secretary-General, had decided to separate her from service with compensation in lieu of notice and without termination indemnity and to recover 2,822.37 South Sudanese Pounds (which had been paid to her on the basis of the false information submitted) from her final entitlements. Ms. Khisa acknowledged receipt of the letter on 20 December 2016 and was subsequently separated from service in late December 2016.

6. Almost ten months later, on 17 October 2017, Ms. Khisa filed an application with the Dispute Tribunal in terms of Article 2(1)(b) of the UNDT Statute appealing the administrative decision imposing the disciplinary measure of separation from service. The Secretary-General filed a motion for summary judgment and a reply on 27 October 2017 in which he contended that the application was not receivable. By Order No. 022 (NBI/2018), dated 6 March 2018, the Dispute Tribunal instructed Ms. Khisa to file a response to the Secretary-General's motion for summary judgment by 27 March 2018. On 25 March 2018, Ms. Khisa filed a motion for a waiver of the deadlines in terms of Article 8(3) of the UNDT Statute.

7. In the Judgment now under appeal, the UNDT dismissed Ms. Khisa's application as not receivable. The UNDT found that, as Ms. Khisa received the contested decision on 20 December 2016, she was required, in terms of Article 8(1)(d)(ii) of the UNDT Statute, to have filed her application with the UNDT within 90 calendar days of her receipt of the administrative decision, and that the period had expired on 20 March 2017 and Ms. Khisa had not submitted her application until 17 October 2017.

8. In respect of the motion for suspension, waiver or extension of time limit that Ms. Khisa filed on 25 March 2018, the UNDT concluded that her motion could not be entertained because it was not filed before the filing of her substantive application. Article 8(3) of the UNDT Statute provides that the UNDT, upon request from an applicant, may decide to suspend or waive the deadlines in exceptional cases. However, an application for a waiver or extension of time limits must be made prior to the filing of a late application of appeal, which Ms. Khisa had failed to do.

9. The UNDT nonetheless considered whether there were exceptional circumstances for Ms. Khisa's failure to appeal in a timeous manner. Ms. Khisa was admitted to hospital for pregnancy-related complications on 2 January 2017, was discharged on 29 May 2017, but applied to the UNDT only on 17 October 2017, nearly five months after her hospital discharge. There was no convincing explanation for why she delayed for about five months and thus the UNDT held that Ms. Khisa in any event could not have availed herself of the plea of exceptional circumstances for her failure to bring her UNDT application within time.

10. As mentioned, Ms. Khisa appealed the UNDT Judgment to the Appeals Tribunal on 1 May 2018, and the Secretary-General answered on 6 July 2018. On 12 July 2018, Ms. Khisa submitted a motion for leave to file additional pleadings, to which the Secretary-General objected. By Order No. 329 (2018), the Appeals Tribunal denied Ms. Khisa's motion.

Submissions

Ms. Khisa's appeal

11. Ms. Khisa submits that there were exceptional circumstances beyond her control after her discharge from the hospital. The doctor recommended bed rest for three months to stabilize her condition. So, after six months at the hospital, she was still ill for the next three months. She was only able to engage an attorney after her full recovery. She could not delegate the task of looking for an attorney to others because the search needed her direct input.

12. Ms. Khisa requests that the Appeals Tribunal set a precedent by allowing her case to go forward. She also requests “unconditional release of [her] Benefits from [her] savings and salary payment of now approximately two years”.

The Secretary-General's Answer

13. The Secretary-General submits that the UNDT correctly concluded that Ms. Khisa's application was not receivable and dismissed it on that basis, as she had failed to file the application until after more than seven months past the deadline.

14. The UNDT also correctly concluded that Ms. Khisa had failed to file a timely request for waiver of the deadline to file her application. She submitted such a motion approximately five months after filing her application, in contravention of the jurisprudence of the Appeals Tribunal that a motion of this kind must be filed before the statutory time limit for filing the application has elapsed.

15. In respect of the UNDT's conclusion that Ms. Khisa could not avail herself of the plea of exceptional circumstances for a waiver of the time limit, the Secretary-General submits that any error on the part of the UNDT in considering her plea of exceptional circumstances did not adversely affect its ultimate conclusion that Ms. Khisa's application was irreceivable.

Considerations

16. Staff Rule 11.2(b) provides that a staff member wishing to formally contest a decision to impose a disciplinary measure is not required to request a management evaluation. In cases where management evaluation is not required, in terms of Article 8(1)(d)(ii) of the UNDT Statute, the application to the UNDT must be filed within 90 calendar days of the applicant's receipt

of the administrative decision. It is common cause that Ms. Khisa received the administrative decision on 20 December 2016 and only filed her application on 17 October 2017. She was accordingly seven months late.

17. In terms of Article 8(3) of the UNDT Statute, the UNDT may waive the deadlines in exceptional cases. However, as the UNDT properly pointed out, in terms of the jurisprudence of this Tribunal, an application for waiver ordinarily must be filed before the application is made and not afterwards.¹ Ms. Khisa did not request a waiver of the deadlines before filing her late application or in the belated application itself. She only requested a waiver in her motion filed five months after filing her application. The UNDT was therefore right in finding that Ms. Khisa had not filed a timely request for waiver of the deadline. Moreover, the UNDT was correct in its conclusion that absent a full explanation for the five-month delay after her discharge from hospital, Ms. Khisa could not avail herself of the plea of exceptional circumstances.

18. The UNDT accordingly did not err in finding that the application was not receivable and the appeal must be dismissed.

¹ *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275 para. 30.

Judgment

19. The appeal is dismissed and Judgment on Receivability No. UNDT/2018/047 is hereby affirmed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Halfeld

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar