



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

KITA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
None

**Counsel for Respondent:**  
Peri Johnson, Legal Support Office, UNDP

## **Introduction**

1. On 22 October 2009, at 11.07 p.m., the Applicant, a former staff member of the United Nations Development Programme (UNDP), sent an email to the Geneva Registry of the United Nations Dispute Tribunal (UNDT), which read as follows:

“I kindly request for an extension of the time limit to submit application against the decision sent to me on July 24<sup>th</sup> from the Administration. All this time I have been in contact with the office of UN Ombudsman and first Panel of council and now OSLA [Office of Staff Legal Assistance]. This transitional period of the UN internal justice system has caused a number of delays in submission of my case.”

## **Facts**

2. On 1 January 2003, the Applicant entered the service of the United Nations in Skopje, Macedonia, as a Radio Operator (G-4), under a one-year appointment of limited duration (300 series of the Staff Rules), in the UN Security Operations Centre (the Centre). She served the Centre thereafter under various contracts issued by either UNDP or the Office of the United Nations High Commissioner for Refugees (UNHCR), including a six months fixed-term appointment (100 series of the Staff Rules) issued by UNDP for the period from 1 July 2008 to 31 December 2008.

3. In a meeting held on 5 November 2008, the Applicant and the other two Radio Operators of the Centre were informed by the UNDP Resident Representative that one of the three Radio Operator posts would be abolished due to budgetary constraints and that a comparative review of the qualifications, competencies and performance of the three incumbents would be carried out to select the staff members who would fill the two remaining posts. The Applicant and her two colleagues were assured that the staff member who would be separated would receive at least a one-month notice.

4. By memorandum dated 26 December 2008, the Respondent informed the Applicant that, in light of the result of the comparative review, her fixed-term appointment would not be renewed and that she would be separated from service

effective 31 January 2009. Since her appointment was due to expire on 31 December 2008 and in order to grant the one-month notice promised in the meeting of 5 November 2008, the Applicant's contract was extended for a month until 31 January 2009.

5. By email dated 25 or 26 February 2009<sup>1</sup>, the Applicant apparently wrote to the UNDP Administrator to request the administrative review of "the separation notice that [she] received on December 26<sup>th</sup> 2008 from the UNDP Skopje".

6. On 22 May 2009, the Applicant wrote to the Panel of Counsel (POC) requesting their assistance to file an appeal with the Joint Appeals Board (JAB). She noted that: "The deadline to [file an appeal] is 26<sup>th</sup> May and I apologize for contacting you so late, but I have just returned from my honeymoon."

7. On the same day, the Coordinator of the POC asked the Applicant to fill out the JAB "form and template", as well as the POC form, and to return them together with all relevant annexes before Tuesday 26 May a.m., since Monday 25 May was a holiday at Headquarters and they would only have Tuesday to finalize the submission to the JAB. The Coordinator further requested the Applicant's authorization to finalize and submit the appeal on her behalf.

8. By email dated 3 June 2009, the Respondent contacted the Applicant to acknowledge receipt of her request for administrative review as forwarded by the POC on 26 May 2009, noting that "no trace of receipt of [her earlier] request" could be found. The Applicant was informed that she should expect a reply to her request for review by 27 July 2009.

9. On 5 June 2009, the Applicant forwarded the above-mentioned email to the POC and requested advice as to what she should do next, stressing that she "did not want to miss any date to submit [her] case further".

10. In an email dated 9 June 2009, the Coordinator of the POC replied to the Applicant clarifying the issue of time limits. She further informed her that the POC would cease to exist after 31 June 2009 and that on 1 July 2009, the Office of Staff Legal Assistance (OSLA) would become operational and would continue

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<sup>1</sup> There are two dates indicated on the copy of the email submitted by the Applicant to the Tribunal: (i) "Wed, 25 Feb 2009 23:51:45", and (ii) "February 26<sup>th</sup>, 2009".

to assist her. The Coordinator of the POC also provided the Applicant with the email address at which OSLA could be contacted as of 1 July 2009.

11. On 24 July 2009, the Applicant wrote to the POC to enquire about the status of her case since she had not yet received the response to her request for review, which was due by 27 July 2009. She noted that: “I know there are a few more days to go but I do not want to leave it at the very last minute.” On the same day, she forwarded her email to OSLA.

12. Also on 24 July 2009, the Assistant Administrator of UNDP replied to the Applicant’s request for administrative review of the decision not to renew her fixed-term appointment. The Assistant Administrator “could not find any factual or legal basis for overturning either the decision not to renew [her] appointment, or [her] non-selection for one of the two remaining posts of radio operators”.

13. By email dated 22 August 2009, the Applicant requested the assistance of OSLA to file an appeal against the Assistant Administrator’s decision which she said she had received on 24 July 2009.

14. On 25 August 2009, the Applicant wrote to a former member of the POC noting that she had not received any response from OSLA to her email sent three days earlier and asking where to go for assistance.

15. By email dated 15 September 2009, the Chief of OSLA, after summarizing the circumstances leading to the Applicant’s separation from service, informed her that his Office was “unable to take [her] case” since it could “only support cases and claims that have legal merit” and “[a]fter a careful review, [OSLA was] not of the opinion that [her] case ha[d] such merit”.

16. Sometime after 15 September 2009, the Chief of OSLA and a lawyer volunteering with OSLA met with two members of the Joint Ombudspersons Office who enquired as to why OSLA could not represent the Applicant before the UNDT. OSLA explained that they did not believe that the Applicant’s claim had legal merit. However, the Chief of OSLA said he would review his decision.

17. By email dated 13 October 2009, the Applicant requested the advice of OSLA as to what her next step should be, stating that she had been advised to do

so by the “Office of the UN Ombudsman”. It appears that OSLA never responded to that email.

18. On 22 October 2009, two members of the Joint Ombudspersons Office approached a General Service staff member of OSLA to make sure that OSLA was aware that the time limit for submitting the Applicant’s appeal to the UNDT was 24 October 2009, as it was their understanding that the Chief of OSLA had agreed to assist the Applicant, thereby reversing his previous decision. OSLA noted not only that the Chief had not agreed to assist the Applicant but also that, in fact, the deadline for the application was 22 October and not 24 October as thought by the staff of the Joint Ombudspersons Office. On the same day, OSLA phoned the Applicant to confirm that OSLA would not represent her and to suggest that she request an extension of time from the Tribunal if she wished to proceed with her claim. OSLA also emailed her a “template for a request for an extension”.

19. On 22 October 2009, at 11.07 p.m., the Applicant sent an email to the Geneva Registry of the UNDT requesting an extension of time to file an application (see paragraph 1 above). There were no attachments to the above-mentioned email and the Applicant did not provide any information, including as to the nature of the impugned decision or of her contacts with OSLA.

20. By email dated 23 October 2009, the Geneva Registry advised the Applicant to complete an application form and to return it with relevant attachments without delay.

21. By email dated 24 October 2009, the Applicant sent the Geneva Registry the form entitled *Application for extension of time to file an application*. In Section VI, “What are you reasons for requesting this extension of time”, the Applicant only stated: “Awaiting OSLA legal representation and results of Ombudsman intervention.” The Applicant provided as supporting documents with her application:

- (1) The decision to separate her dated 26 December 2008;
- (2) Her request for administrative review;

- (3) The acknowledgment of receipt of and the response to her request for review;
- (4) Her email dated 22 May 2009 to the POC;
- (5) Her email dated 22 August 2009 to OSLA;
- (6) Her email dated 25 August 2009 to a former member of the POC;
- (7) Her email dated 13 October 2009 to OSLA.

She did not attach or otherwise disclose the existence of the other correspondence and contacts she had had with OSLA, as detailed in the present summary of facts.

22. On 26 October 2009, the Registry of the UNDT transmitted a copy of the application to the Respondent, requesting, as per instructions from the Judge examining the case, that a reply focusing on the issue of receivability be provided within 30 calendar days.

23. On 27 October 2009, the Registry of the UNDT informed the Applicant that before deciding on her request for extension of time, the Judge examining her case required, in accordance with article 7.5 of the Tribunal's rules of procedure (UNDT RoP), that the Applicant submit a written statement setting out precisely the exceptional circumstances that, in her view, justified the request.

24. By email dated 1 November 2009, the Applicant submitted a statement in which she claimed that:

“As ... previously explained in my email (22/10/2009) the transitional period of the UN internal justice system has caused a number of delays in submission of my case.”

After briefly recalling the chronology of events between her request for administrative review on 26 February 2009 and the response received on 24 July 2009 from the Assistant Administrator, she further stated that:

“[A]s I do not agree with [the decision of 24 July 2009] I forwarded the email to POC ... and only then I discovered the changes and transitions in the UN legal system. On the same date I contacted OSLA, and again on 22 August 2009, and again on 25 August 2009 and again on 13 October 2009 only to be contacted by their office on 22 October 2009 and advised to request a deadline extension from your office.”

She concluded that the above “explain[ed] in details the exceptional circumstances” justifying her request for an extension of time to file an application. There were no further explanations or supporting documents provided.

25. By Order No. 28 (GVA/2009), the Judge hearing the case, considering that the Applicant’s statement of 1 November 2009 did not set out *prima facie* exceptional circumstances that would warrant a suspension, waiver or extension of the time limits for the filing of an application to the Tribunal, but taking note of the Applicant’s claim that she had contacted OSLA on three occasions “only to be contacted by their office on 22 October 2009 and advised to request a deadline extension”, requested that OSLA submit a statement detailing the chronology, nature and content of their contacts with the Applicant and produce any supporting documents in this respect.

26. On 11 November 2009, OSLA filed a submission in compliance with the above-mentioned Order. OSLA provided correspondence and information which the Applicant had not previously disclosed to the Tribunal, in particular but not only:

- (1) The email dated 9 June 2009 from the Coordinator of the POC to the Applicant;
- (2) The emails dated 24 July 2009 from the Applicant to the POC and OSLA;
- (3) The email dated 15 September 2009 from the Chief of OSLA to the Applicant;
- (4) The fact that on 22 October 2009, OSLA sent her a “template for a request for an extension”.

27. On 24 November 2009, the Respondent submitted his reply.

**Parties' contentions**

28. The Applicant's principal contentions are:

- a. The "transitional period of the UN internal justice system" and "the lack of communication from OSLA" have "caused a number of delays in [the] submission of [her] case";
- b. There were also personal reasons that prevented her from following up on her case in a timely manner, like moving to another country, not having access to the Internet on a daily basis, applying for jobs, etc.;
- c. She was aware of the time limits and "was not asleep" but she "expect[s] the Office of Staff Legal Assistance to provide legal help and assistance because [she has] signed all the relevant forms and authorizations for legal assistance with POC and [she] was informed and assured by the POC that the new OSLA and the legal officers will continue to assist [her]";
- d. She is entitled to legal assistance and needs such assistance to prepare and submit her case.

29. The Respondent's principal contentions are:

- a. In the decision of 24 July 2009, the Applicant was clearly informed, in plain, lay-man language, that if she wished to appeal that decision, she should do so within 90 days of having received the decision, that is, by 22 October 2009. She was also provided with the contact details of the UNDT Registry. Although OSLA advised the Applicant on 22 October 2009 to file a request for extension of time, the Applicant had already and in no uncertain terms been informed of the deadline for such submission as early as 24 July 2009;
- b. The Applicant first contacted OSLA about filing an appeal against the 24 July 2009 decision on 22 August 2009 and does not provide any explanation as to why it took her close to one month to do so.



On 15 September 2009, the Applicant was informed that OSLA was unable to represent her. On 13 October 2009, she wrote again to OSLA. While OSLA did not respond to that email, it remains nonetheless that the Applicant was aware that the deadline for filing an appeal, or at least requesting an extension to do so, was, at this time, starting to run short;

- c. The records of the case show that the Applicant, although no longer in the UN system, had adequate access to assistance and representation at all material times for the purpose of these proceedings;
- d. The Applicant did not set out exceptional circumstances justifying her request for an extension of the time limit to file an application. On the contrary, the Applicant's statement is misleading in that she contends that she did not hear anything from OSLA until 13 October 2009, which is not correct since she received a detailed response from OSLA on 15 September 2009. By not disclosing such communication, the Applicant did not fully answer the Tribunal's request for a "statement setting out precisely the exceptional circumstances that, in the Applicant's view, justify the request [for extension of the time limit]";
- e. The Applicant's statement that it is "the transitional period of the UN internal justice system [that] has caused a number of delays in submission of [her] case" is not supported by any evidence, on the contrary. The Applicant's case squarely falls under the new system because the decision which is the subject of the application was sent to her on 24 July 2009, that is, some three weeks after the inception of the new system;
- f. Adequate information was provided to the Applicant by the Respondent about time limits. Information on the merits of the case was also provided to her by OSLA. The Applicant is unduly late and the explanations provided for such tardiness are not reasonable nor do they appear to be true.

## Considerations

30. According to article 8, paragraph 1 (d) (i) a., of the UNDT statute an application shall be receivable if it is filed within 90 calendar days of the Applicant's receipt of the response by management to his or her submission. According to article 34 of the UNDT RoP, time limits refer to calendar days and shall not include the day of the event from which the period runs. It follows from these provisions that the Applicant, who received the response by management on 24 July 2009, had until 22 October 2009 to file an application with the Tribunal.

31. In the email she sent to the Geneva Registry on 22 October 2009, at 11.07 p.m., the Applicant merely requested "an extension of the time limit to submit application against the decision sent to [her] on July 24<sup>th</sup>", without providing any information as to the nature or author of the contested decision. Therefore, this message, which reached the Tribunal within the time limit for the filing of an application, cannot be considered as an application within the meaning of article 2, paragraph 1, of the UNDT statute. It was only a request to suspend the deadlines for the filing of an application within the meaning of article 8, paragraph 3, of the UNDT statute, which provides that:

"The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines [for the filing of an application] for a limited period of time and *only in exceptional cases*." (Emphasis added)

32. In this respect, article 7, paragraph 5, of the UNDT RoP, as submitted to the General Assembly for approval on 4 August 2009 (A/64/229), 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 ... [for filing an application]. Such request shall succinctly set out the *exceptional circumstances* that, in the view of the applicant, justify the request..." (Emphasis added)

33. The issue before the Tribunal is whether the instant case is exceptional in the sense that the Tribunal would be justified in granting the requested extension of time.

34. In judgment UNDT/2010/019, *Samardzic et al.*, the Tribunal emphasized the importance of time limits in general. With regard to exceptions, it stated:

“29. It is necessary to recall that time limits are connected to individual action, i.e. submitting an application for legal remedy within a fixed time frame. Therefore, exceptions to the prescribed time limits must also be related to the individual conditions and circumstances of the person seeking legal remedy, not to the characteristics of the application. Of course, all relevant factors have to be considered (see UNDT/2009/036, *Morsy*). However, relevant factors for an Applicant’s failure to act within the prescribed time limits are confined to his individual capacities. Factors like the prospects of success on the merits and the importance of the case are extraneous to the requirement to submit an application within the prescribed time limits and should not be taken into account at this level. Thus, the “exceptional cases” mentioned in article 8, paragraph 3, of the UNDT statute also refer to the Applicant’s personal situation and not to the characteristics of the application.

“30. In other words, exceptional cases arise from exceptional personal circumstances. The former UNAT defined exceptional circumstances as those circumstances which are “beyond the control of the Appellant” (see judgement No. 372, *Kayigamba* (1986) and, generally, judgement No. 913, *Midaya* (1999) and judgement No. 1054, *Obuyu* (2002)). This definition rightly refers to the Appellant’s capacity to comply with the time limits. Whether circumstances are within or beyond the control of the Applicant should be assessed against individual standards, e.g. the Applicant’s educational level. All relevant facts have to be taken into account, e.g. technical problems, state of health, etc. No strict or general line can be drawn. Since it is in the Applicant’s interest to obtain a suspension, waiver or extension of time limits, the burden of proof is on the Applicant.”

35. In the Applicant’s case, no exceptional personal circumstances can be found. The records of the case show that she was very well aware of the time limits. She also had sufficient information about how to seek legal advice and contacted OSLA within a month of receipt of the contested decision. When she received OSLA answer that they were not able to take her case on 15 September 2009, more than one month was left to submit an application before the court.

36. Moving to another country, applying for jobs or not having access to the Internet on a daily basis are not exceptional circumstances within the meaning of article 8, paragraph 3, of the UNDT statute.

37. Normally, lack of counsel is not an exceptional circumstance either and, therefore, no sufficient justification for the failure to observe the time limits set forth in the Tribunal's statute. The Tribunal's statute neither imposes financial costs on filing applications, nor requires that applications be filed by an attorney, nor requires that an attorney be obtained as a prerequisite for initiating a legal proceeding. While provisional staff rule 11.4(d) provides that "a staff member shall have the assistance of counsel through the Office of Staff Legal Assistance if he or she so wishes", this provision must be read in conjunction with the General Assembly resolution on which it is based. In this respect, the Tribunal held in judgment UNDT/2009/093, *Syed*, that General Assembly resolution 62/228 "must be interpreted as creating a right for staff members to request legal counsel from OSLA, which has an obligation to provide proper advice, including on the merits of the case. OSLA is therefore entitled to advise applicants not to file an application before the Tribunal and may therefore legally refuse to appoint counsel for an Applicant on the grounds that his application has little chance of success." Interpreting the resolution as imposing an obligation on OSLA to provide legal assistance to all staff members requesting it, including those with obviously frivolous cases, would overload the Office and prejudice those applicants with a serious case.

38. In the absence of exceptional circumstances, the Tribunal considers that the Applicant's request for an extension of time to file an application must be rejected.

39. The Applicant's contacts with the Joint Ombudspersons Office and her attempts to get assistance from OSLA despite OSLA negative response of 15 September 2009 did not release the Applicant from her duty to comply with the time limits. She never received any indication from OSLA that they had changed their opinion with regard to her case. Therefore, it was up to the Applicant to submit, on her own, an application to the Tribunal. The records show that this was not beyond her abilities.

40. Instead, the Applicant chose to wait until the last minute - i.e. 11.07 p.m. on 22 October 2009 - to request an extension of time to file an application, thus running the risk that if her request was rejected, any subsequent application on the merits would be time-barred.

41. On 24 October 2009, the Applicant sent to the Registry a more detailed submission than her initial email of 22 October 2009. Although such submission was made on a form entitled *Application for extension of time to file an application*, it contains some information as to the nature and author of the contested decision and therefore could be considered by the Tribunal as an application on the merits. However, even if considered as an application on the merits, it remains that it is time-barred and that the Applicant failed to set out exceptional circumstances that would warrant waiving the time limit for application.

### **Conclusion**

42. In the light of the foregoing, the Tribunal DECIDES:

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 8<sup>th</sup> day of February 2010

Entered in the Register on this 8<sup>th</sup> day of February 2010

*(Signed)*

Víctor Rodríguez, Registrar, UNDT, Geneva