





Respondent's response to Order No. 055 (NBI/2019) and to indicate whether an oral hearing is necessary in this case.

8. He filed the submissions on 16 July 2019. In response to the Respondent's arguments regarding receivability, the Applicant states:

It is in the interest of justice to examine the requested evidence. The over resourced respondent's reference to Czarán does not assist him, Czarán saw an e-mail on his mobile phone from the Management Evaluation Unit on 19 December 2011. [T]he Dispute Tribunal relied on Mr. Czarán's own submissions to the Dispute Tribunal which show that the subject of the e-mail received by Mr. Czarán on 19 December 2011 contained the term "Evaluation Letter". It is not the case here, let alone the mediation process which I am going to elaborate on in a rejoinder to the respondent's reply after evidence discovery, (after seeking leave of the UNDT).

9. The application was assigned to the current Judge on 22 October 2019.

### **Considerations on Receivability**

10. The Respondent has challenged the receivability of this application. He has argued that the application is time-barred because the Applicant did not file the application within the stipulated time limit under art.8 of the Dispute Tribunal's statute.

11. The Applicant requested management evaluation of the contested decision on 18 October 2016. In response to paragraph VI (4) of the UNDT application form on management evaluation which asks: "If yes, date of the response and date on which you received it: He stated: *'Date of response 16 November 2016. I received it on 21 November 2016'*

12. Through Order No. 055 (NBI/2019), the Respondent was asked to provide proof that the Applicant received or opened the 16 November 2016 email on that date. The Respondent submitted that MEU did not request a delivery or read receipt when it sent the management evaluation outcome.

13. The legal position on the question of notification of administrative decision was enunciated in *Czarán*, where the Appeals Tribunal held that:

the staff member was put on notice on the date that he received the emailed response from the MEU and the time limit for him to challenge that response before the Dispute Tribunal commenced from that date, even if he did not read it on the date in question [...].<sup>1</sup>

14. The Respondent has exhibited proof<sup>2</sup> that the email containing the MEU response was sent on 16 November 2016. The Applicant on the other hand has not exhibited any proof to show that he received the notification on 21 November 2016.

15. The burden of proving the date of receipt for purposes of complying with the requirement under art.8.1(i)(a) of the UNDT Statute is on the Applicant. This is because according to the provision, it is the Applicant who must show that he has complied with the requirement and not the Respondent. The provision reads:

An application shall be receivable if; (i) in cases where a management evaluation of the contested decision is required (a) within 90 calendar days of the **applicant's receipt** of the response by management to his or her submission (added emphasis).

16. The Dispute Tribunal's finding in its order No. 087 (NBI/2017) of 25 April 2017 that the Applicant was within the time limit was made *per incuriam* as the Tribunal did not properly consider the documentary evidence before it regarding the date when the response was sent by email and when it ought to have been received also by email. If indeed the email was received on 21 November 2016, the Applicant was still under a duty to explain why this was the case, for example, he could have produced the trail of emails between 16 and 21 November. In *Czaran*, the Applicant acknowledged that he received notification email on 19 December 2011 but 'for personal reasons he did not read the email until 23 December 2011'.<sup>3</sup>

17. A mere assertion that the Applicant did not receive the notification on 16 November 2016 would, in this Tribunal's view, not satisfy the requirement to show compliance with statutory deadlines. Accepting that position would dilute the objective of setting time limits in the place. Strict adherence to filing deadlines

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<sup>1</sup> 2013-UNAT-373, para. 19.

<sup>2</sup> Respondent's annex 6.

<sup>3</sup>



interpreted to be consistent with their enabling statutes. Yet, in the present case, the UNDT “interpreted” Articles 19 and 35 of the UNDT Rules in a manner to conflict with Articles 8(1) and 8(3) of the UNDT statute. Clearly, the UNDT exceeded its competence and erred in waiving, on its own motion, the deadline for Mr. Cooke to file his application.<sup>6</sup>

21. The issue in the case before this Tribunal is not about waiving deadline on the Tribunal’s own motion. The deadline was extended after the Applicant had made a written request alleging (i) impliedly that as at the date of the request he was still within the time to file his application because he alleged that he had received the management evaluation response on 21 November 2016 and (ii) that at the time of the request his case was before UNOMS for mediation. Therefore, *Cooke* is distinguishable from this case.

Applicant to extend the filing of his application contained a misrepresentation.

25. It is clear in the present case that the Applicant made a calculated move to mislead the Tribunal. He suppressed material facts concerning proof of when he received the MEU notification and that he in fact was not engaged in any formal dispute settlement process with UNFIL involving the UNOMS as he alleged.

26. The Applicant in the present case was out of time and he wanted the Tribunal to consider extending the time within which to file his application. Under art. 8.3 of our statute;

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

27. The Applicant was under an obligation to make a full and frank disclosure of the circumstances leading to the delay. It is a cardinal principle of the law that he who comes to equity must come with clean hands. The assertion that his case was under mediation was misleading because UNFIL was not engaged in mediation with the Applicant at this time (Respondent's submissions). The emails that the Applicant produced as evidence that he had engaged UNMOS did not have the effect of extending the deadline as was held in *Cooke* that;

A staff member cannot extend the statutory deadline for filing an application by writing letters for consideration. Such conduct cannot and does not delay the running of the time limit.

Although the facts in *Cooke* related to the correspondence between Mr. Cooke and the administration, the same principle applies in this case because G[(T3I6be)4(c)4(a)4(us)-10(c

**Judgment**

29. The application is not receivable and it is dismissed in its entirety.

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 24<sup>th</sup> day of February 2020

Entered in the Register on this 24<sup>th</sup> day of February 2020

*(Signed)*

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi