



Judgment No. 2018-UNAT-835



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sounded attractive, the Personal Assistant position would provide her with better job security.

... On 23 March 2016, the Chief of Mission Support decided to temporarily loan the post that the Applicant encumbered to the Training Unit where she was to perform the functions of an Administrative Assistant at the FS-5 level, from 23 March 2016 until 30 June 2016 [(Second Contested Decision)]. On the same date, the Management Evaluation Unit (“MEU”) informed the Applicant that her 14 February 2016 request was moot since the 27 December 2015 decision was not implemented and then was superseded by the 23 March 2016 decision to temporarily loan her post to the Training Unit.

... On 24 March 2016, the Applicant submitted a request for management evaluation of the decision to reassign her to the Training Unit.

... On 29 March 2016, the Applicant filed an application for suspension of the implementation of the 23 March 2016 decision to reassign her to the Training Unit. The Mission subsequently suspended the implementation of the decision pending the outcome of the management evaluation.

... Following the outcome of her application for the suspension of action dated 29 March 2016, the Applicant embarked on amicable settlement negotiations with the MEU and UNISFA. However, the parties did not agree on a settlement.

... On 7 June 2016, the Under-Secretary-General for Management (“USG/DM”) informed the Applicant that the Secretary-General had upheld the 23 March 2016 decision to reassign her to the Training Unit.

... In its 7 June 2016 letter, the USG/DM stated that UNISFA explained that the

... Following the decision taken at the Plenary of Dispute Tribunal Judges held in May 2016, to balance the [Dispute] Tribunal's workload, the present case was selected to be transferred to the Dispute Tribunal in New York.

... By Order No. 461 (NBI/2016) of 26 October 2016, the parties were instructed to express their views, if any, on the transfer of the present case by 2 November 2016.

... On 2 November 2016, the Applicant responded that, while, in principle, not objecting to the transfer, she requested an expeditious settlement of her case and indicated that, in her view, this might only be possible if the case remained in Nairobi.

... By Order No. 474 (NBI/2016) of 7 November 2016, the [Dispute] Tribunal noted that neither party objected to the transfer and, pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure, transferred the case to the Dispute Tribunal in New York. The New York Registry registered the case under Case No. UNDT/NY/2016/064.

... On 22 November 2016, the case was assigned to the [UNDT in New York].

... By Order No. 10 (NY/2017) of 17 January 2017, the [Dispute] Tribunal ordered the Applicant to file, by 31 January 2017, a response to the receivability issues raised by the Respondent in his reply and



result of the unlawful implementation and extension of the 23 March 2016 (...) decision”<sup>2</sup> and found that its Judgment together with USD 2,250 in compensation to Ms. Kataye represented a reasonable and sufficient relief for her emotional distress.

### **Submissions**

#### **The Secretary-General’s Appeal**

5. The UNDT erred in law and fact in concluding that Ms. Kataye’s application in respect of the second contested decision was receivable *ratione temporis*. The UNDT erred in finding that the deadline for filing Ms. Kataye’s application fell, pursuant to Article 34 of the UNDT Rules of Procedure, on 6 September 2016, because 5 September 2016, the day the 90-day deadline for filing the application ended, was an official holiday at the New York Registry. The official holiday for the New York Registry was irrelevant for the determination of the timeliness of Ms. Kataye’s filing before the Nairobi Registry. In Nairobi, 5 September 2016 was a working day and was, consequently, the last day for Ms. Kataye to file her application. Moreover, the fact that Ms. Kataye’s case was transferred to the New York Registry subsequent to the filing of her



and were thus, inseparable”. Ms. Kataye also submits that, while the matter was still under review by the UNDT, following concerns raised by the Office of Internal Oversight Services on the unlawfulness of the decisions regarding Ms. Kataye’s transfer and the occurrence of similar practices in other duty stations, OHRM has put in place procedures and guidance on the recruitment of positions of Chief of Staff, Special Assistant and Personal Assistant by reviewing Administrative Instructions ST/AI/2016/1 (Staff selection and managed mobility system) and ST/AI/2010/3 (Staff selection system) to address irregularities in the recruitment for such positions.

12. As the appellant, the Secretary-General has the burden of satisfying the Appeals Tribunal that the UNDT Judgment is defective. The Secretary-General has not discharged this burden, and thus, the appeal fails. Ms. Kataye requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss the appeal in its entirety.

### **Considerations**

13. Following a decision taken at the Plenary of Dispute Tribunal Judges held in May 2016, to balance the Dispute Tribunal’s workload, the present case was selected to be transferred from the Dispute Tribunal in Nairobi to the Dispute Tribunal in New York. By Order No. 461 (NBI/2016) of 26 October 2016, the parties to the proceedings were instructed to express their views, if any, on the transfer of the case to New York by 2 November 2016. The parties did not object to the transfer and as a result, by Order No. 474 (NBI/2016) of 7 November 2016, the case was officially transferred to the Dispute Tribunal in New York.

14. The Secretary-General challenges on appeal the UNDT’s finding in law and fact that Ms. Kataye’s application, as it relates to the second contested decision, was filed on time and was receivable *ratione temporis*.



16. We note the observation of the Secretary-General that 5 September 2016 was a working day in Nairobi. This was not refuted; we therefore accept that this was in fact the case.

17. An examination of the facts reveals that in the month of September 2016, and more particularly on 6 September 2016, this case was still recorded as pending before the UNDT Nairobi and the filing of all documents in that month was expected to be done at the Nairobi Registry. Indeed, it is at that Registry that Ms. Kataye filed her application on 6 September 2016. Moreover, the case was only officially transferred to the New York Registry on 7 November 2016; which is some two months subsequent to the filing of the application with the Nairobi Registry.

18. It stands to reason, and we agree with the Secretary-General, that the official holiday at the New York Registry on 5 September 2016 is irrelevant for the determination of the timeliness of Ms. Kataye's filing before the Nairobi Registry. The only issue for consideration to determine whether the case was receivable by the UNDT is whether the filing of the application with the Nairobi Registry was timely.

19. From the evidence we find that the application in this case was filed after the stipulated time limit. There is no evidence that Ms. Kataye applied for and was granted an extension to file a late application nor is there evidence to establish that there were any exceptional circumstances which supported a waiver of the statutory time limit.

20. The Appeals Tribunal has repeatedly emphasized the need for statutory time limits to be observed, except where there is evidence of exceptional circumstances which may dictate otherwise.<sup>3</sup> We find that Ms. Kataye's application before the UNDT was not receivable *ratione temporis*. We therefore order that the UNDT Judgment be vacated in its entirety.

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<sup>3</sup> *Shehadeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-689, para. 19; *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.

