



Judgment No. 2017-UNAT-727



Counsel for Mr. Khan: Self-represented

Counsel for Secretary-General: Carla Hoe

JUDGE

did not file an application with UNDT contesting the decision to separate him from service within 90 days of the decision.

7. Mr. Khan joined the private military contractor on or about September 2010, and shortly thereafter left the United States. He returned to the United States in September 2014.

8.

Submissions

Mr. Khan's Appeal

16. Mr. Khan seeks an order requiring DSS to hire him for the position of Security Officer. He maintains that there are many vacancies currently available for security officers, but he has not had any offers from DSS despite contacting its Executive Office.

17. Mr. Khan contends that he was advised by the private contractor who hired him that, because he is an American citizen, he would be rehired by the Organization when he returned "from war", pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. Sections 4301-4333.

The Secretary-General's Answer

18. The Appellant has not identified any ground for appeal within the meaning of Article 2(1) of the Appeals Tribunal Statute. Although he disagrees with the Judgment, he does not cite any errors of law or fact by the UNDT. Essentially, the Appellant seeks a trial de novo by the Appeals Tribunal. This failing by the Appellant is a basis for dismissing the appeal.

19. The UNDT correctly dismissed Mr. Khan's request to waive the time limits for filing an application contesting the 2010 decisions denying his request for SLWOP and separating him from service. There is no dispute that Mr. Khan was aware of these decisions in April and June of 2010, respectively, and Article 8(4) creates a three-year statute of limitations for filing applications, which cannot be waived by the Dispute Tribunal. Thus, Mr. Khan is now barred from challenging the 2010 decisions.

20. The UNDT correctly concluded that the application was not receivable *ratione personae*. First, since his terms of appointment did not envisage a right to reemployment following separation from service, he has no standing to contest any decision not to re-employ him. Second, there is no sufficient nexus between his former employment as a Security Officer and the purported impugned decision. Third, the Organization is not bound to comply with USERRA, which is a national law of the United States, and any expectations Mr. Khan had about the applicability of USERRA were made by a private individual, who is not affiliated with the Organization.

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25. Despite acknowledging our jurisprudence in Reid, the UNDT proceeded to consider whether Mr. Khan had shown exceptional circumstances justifying a waiver of the filing deadline. In this regard, the UNDT acted *ultra vires* or in excess of its competence and jurisdiction; thus, paragraphs 50 through 60 of the Judgment are *obiter dicta* and should be stricken.⁵

26. In addition, the UNDT determined that Mr. Khan's request or motion to waive the deadline was not receivable *ratione temporis*, as it was also time-barred under Article 8(4) of the UNDT's Statute. We disagree.

27. The General Assembly enacted Article 8(4) of the Dispute Tribunal's Statute to preclude the Dispute Tribunal from accepting or receiving stale applications, not motions seeking permission to file such applications. Although the UNDT has no discretion under our jurisprudence to grant a motion to waive the deadline for filing an application challenging a decision that is more than three years old,⁶ there is nothing in the Dispute Tribunal's Statute which prevents the UNDT from receiving such motions. And the Dispute Tribunal Statute controls. Thus, the UNDT cannot refuse to receive an untimely or late motion for waiver. As such, the UNDT erred in holding that Mr. Khan's request for waiver was not receivable *ratione temporis*. It was not timely; but that did not make it irreceivable.

Application re 2015 decision

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29. Accordingly, the Dispute Tribunal correctly concluded:⁹

[S]ince [Mr. Khan] had not maintained any of the terms of his former appointment, including his right to be re-employed, there is no sufficient nexus between his former employment that ended in 2010 and the impugned decision in 2015 not to re-employ him as a Security Officer. [Mr. Khan] has no standing to contest the decision not to re-employ him with the Organization and the application is not receivable *ratione personae*.

30. Despite concluding that the application was not receivable, the Dispute Tribunal addressed the merits of the application, stating: “[I]f this case were considered to be receivable, the provisions of the United States law would not be directly applicable to [Mr. Khan’s] employment-related claims with the United Nations.”¹⁰ Addressing the merits of an application which is not receivable is an error of law and such comments are *obiter dicta*, which should be stricken.¹¹

Judgment

31. The appeal is denied and Judgment on Receivability No. UNDT/2016/097 is affirmed.

⁹ Impugned Judgment, para. 83.

¹⁰ Impugned Judgment, para. 89.

¹¹ *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 23. See also *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306, para. 27.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Halfeld

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar