



## ***Introduction***

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (UNECA) in Addis Ababa, Ethiopia. In his Application dated 26 March 2010, the Applicant is contesting an administrative decision dated 26 September 2001 transferring him out of the UNECA Security and Safety Section (“UNECA/SSS”).

2. On 29 April 2010, the Respondent filed a Reply in which he submitted, inter alia, that the Application was time-barred and that the decision to transfer the Applicant was an appropriate and lawful exercise of the Respondent’s discretionary authority. On 25 October 2010, the Tribunal therefore ordered the Applicant to file his written submissions on the question of waiver of time limits by 26 November 2010. The Applicant filed the said submissions on 24 November 2010.

## ***Respondent’s Submissions***

3. The Respondent submits the following arguments on the issue of receivability:

a. The Application in this matter was filed more than nine years after the receipt of the contested decision to transfer the Applicant out of UNECA/SSS.

b. Article 8(4) of the Statute of the J94n[ bSta)4.rits (4)etae Applic(4)t7( )TJ0 -1.725 TD0.0

Tribunal, the Applicant has forfeited his right to challenge the material before the Dispute Tribunal and the forfeit is not subject to waiver.

d. Review by the Management Evaluation Unit (MEU) of the contested decision does not serve to estop the Respondent from raising matters of receivability and does not serve to grant the Dispute Tribunal jurisdiction to review a matter which is otherwise barred by Article 8(4) of the Statute of the Dispute Tribunal.

### ***Applicant's Submissions***

4. The Applicant submissions are summarized below:

a. The decision made by the Secretary-General not to waive the deadline for management evaluation is of itself an administrative decision capable of review. Having found that this decision is reviewable, the Applicant requests the Tribunal to find that, given the circumstances of this case, this decision was wholly unreasonable and to rescind that decision. The administrative decision to transfer him and other staff members was a direct result of their joint complaint directed at the acts and omissions of the then Officer-in-Charge of UNECA/SSS, which carried all the relevant indicia of retaliation.

opted to 'keep his head down', fearful that any comp

Applicant requested management evaluation of this decision, and requested

recommendation from UNHQ, it seemed unlikely in the extreme that UNECA Management would have seriously and in

q. In view of the foregoing, therefore, the Applicant requests the Tribunal to find: that it is competent to review a decision made by the Secretary-General not to waive the time limit for management evaluation; that the exceptional circumstances in this case prevented him from pursuing his claim in a timely manner; and that under these circumstances, the Secretary-General's decision not to waive the time limit for management evaluation in his case was unreasonable.

### *Considerations*

5. In certain national jurisdictions, limitations of time are tolled under certain circumstances, which means that time will not run during the tolling period, for example, where the aggrieved party is a minor. Generally, for the statute of limitations to commence, time runs from the earliest time that legal action could have been brought. Every fact required to commence an action must be in existence before time begins to run. Applicants have a duty to pursue their causes of action promptly. Delay can cause considerable uncertainty and inconvenience not only for the Respondent but for third parties as well. Over time, evidence of all sorts can be corrupted or disappear, memories may fade, crime scenes are changed and companies may destroy records.

6. The Applicant asserts that the decision made by the Secretary-General not to waive the deadline for management evaluation is, of itself, an administrative decision capable of review and that the exceptional circumstances that prevented him from requesting administrative review of the contested decision were his fear of retaliation from UNECA management and the absence of an administrative issuance to offer protection against harassment and/or the abuse of authority. In this respect, the Tribunal observes that ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) was promulgated on 1 March 2008. The Applicant's request for management evaluation was filed on 24 November 2009, over one year and eight months after the coming into effect of the said administrative issuance. The Tribunal further observes that the request for

management evaluation was filed four months after the UNDT came into existence in July 2009.

7. Finally, it is the Applicant's submission that Mr. Chimya, who had been responsible for transferring him and his co-petitioners out of the Security Section in alleged retaliation for their complaint, passed away in 2007. Why then did the Applicant not request for administrative review of the contested decision at that time? The Applicant waited for almost two years after the passing of the cause of his fear before commencing his legal action. A reasonable and prudent staff member should have been more diligent in pursuing his cause of action.

8. In view of the foregoing, the well-known maxim of the law of equity, "equity aids the vigilant, not those who slumber on their rights" or to phrase it differently, "delay defeats equity," is applicable in this case since applicants have a duty to pursue their causes of action promptly. The Tribunal further observes that at all material times, the Administration had other bodies such as the Joint Appeals Board in existence which dealt with conflict resolution. The Tribunal finds that the Applicant's fears of retaliation due to the non-existence of administrative machinery to protect him are therefore not justified.

9. In *Costa*<sup>1</sup>, the Appeals Tribunal held that the Dispute Tribunal does not have the power to suspend or waive any deadline in relation to management evaluation as Article 8(3) of the UNDT statute plainly states that the Dispute Tribunal shall not suspend or waive the deadlines for management evaluation. In *Sethia*<sup>2</sup>, the Appeals Tribunal reaffirmed its decision in *Costa* adding that the Dispute Tribunal does not have the power under Article 8(3) of the Statute of the Dispute Tribunal to suspend or waive the deadlines for requesting administrative review under the old system of internal justice. Article 8(4) of the Statute of the Dispute Tribunal states that an application shall not be receivable if it is filed moappasgan[appasgreeb)5-is f applicant's receipt of the contested administrative decision.

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1 2010-UNAT-036.

2 2010-UNAT-079.



10. The facts in this case are distinguishable from those in *Schook*<sup>3</sup> where the applicant did not receive a notification of the contested decision in writing. By his own admission, the Applicant in this case was aware of the decision to transfer him out of UNECA/SSS as early as 29 August 2001 when the Chief/CGSD transferred him and his co-petitioners out of the Security Section. In other words, every fact required to commence an action was in existence at that time and time had begun to run.

***Conclusion***

11. The Applicant did not make a request for administrative review of the contested decision within the two-month time limit set out under former staff rule 111.2(a). This Application is not receivable as it was filed more than the three years stipulated under Article 8(4) of the Statute of the Dispute Tribunal after the Applicant's receipt of the contested administrative decision. In addition, the facts in this case would not have justified the tolling of the limitations of time and would only cause considerable uncertainty and inconvenience not only for the Respondent but for third parties such as other staff members in the UNECA Safety and Security Section. The Tribunal finds that this Application is time-barred and not receivable.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 2<sup>nd</sup> day of March 2011

Entered in the Register on this 2<sup>nd</sup> day of March 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi