



**Introduction and procedural history**

1. The Applicant is a Field Language Assistant working with the United Nations

7. The Respondent filed a response to the Applicant's motion for production of documents on 19 March 2019.

8. The Applicant filed submissions on the Respondent's motion of 16 March 2019 on 21 March 2019.

### **Facts**

9. The Applicant joined UNIFIL as a Language Assistant on 10 July 2009.

10. In 2016, The Applicant applied for JOs 2016/38 and 2016/026.

11. In October 2017, the Applicant applied for JO 87684 (Information Technology Assistant, G-5).

12. On 5 December 2017, the Applicant via email wrote to the UNFIL Head of Mission and Force Commander, requesting that the Head of Mission use his authority to make an exception under staff rule 12.3 (b) and paragraph 7 of the guidelines for selection of locally recruited staff members. The Applicant offered to withdraw his current on-going cases before the Tribunal, if he was considered and placed out of the regular recruitment process for a General Service position at the GS-5 or higher level. The Director of Mission Support responded on 19 December 2017 by informing the Applicant of his unsuccessful candidacy for JOs 2016/38 and 2016/026.

13. On 27 April 2018, the Applicant was informed of his unsuccessful candidacy for JO 87684.

14. On 26 June 2018, the Applicant requested management evaluation of the decision not to select him for the three positions.

15. The Management Evaluation Unit (MEU) responded to the Applicant by memorandum dated 16 October 2018. The response was emailed to the Applicant on 17 October 2018.

16. On 5 November 2018, the Applicant wrote to an UNTSO Human Resources Partner (HR Partner) requesting scanned copies of the papers in his official status file (OSF), especially a copy of a letter from one Marcel Savard to the UNIFIL DMS. The HR Partner informed him that his OSF had not been transferred to UNTSO from UNIFIL thus she could not assist him. After communicating with various people between 6 and 12 November 2018 about the copies, he emailed an UNTSO HR Officer on 25 November 2018 requesting that his entire OSF be transferred from UNIFIL to UNTSO. The UNTSO HR Officer informed him that OSFs are not transferred between missions when a staff member moves. Each mission is responsible for setting up and maintaining its own OSF.

17. The Applicant then emailed one Ms. AA on 26 November 2018 requesting a copy of Mr. Savard's letter, which he intended to refer to in his "follow up on the recent MEU review of [his] cases".

18. On 10 December 2018, the Applicant wrote to one Dr. HM requesting that he write to the UNIFIL Head of Mission, on the Applicant's behalf, for a waiver of the deadline for management evaluation for JOs 2016/038 and 2016/026. Dr. HM informed the Applicant on 15 December 2018 that he had moved on and provided him with the contact information for the Office of the Ombudsman and Mediation Services (UNOMS).

19. The Applicant wrote to the UNIFIL Head of Mission on 24 December 2018 to request a waiver of the deadline for management evaluation for JOs 2016/038 and 2016/026. The UNIFIL Head of Mission informed him on 14 January 2019 that he did not have the authority to waive or extend management evaluation deadlines. The UNIFIL Head of Mission advised him to write to MEU.

20. On 15 January 2019 and 19 February 2019, the Applicant emailed UNOMS seeking assistance to mediate his claims.

## Considerations

### Applicant's request for an oral hearing

21. It is clear from the UNDT Rules of Procedure and the Appeals Tribunal's jurisprudence that a hearing is not mandatory for every case.<sup>3</sup> Whilst the Tribunal may take the parties' views into consideration on the necessity of a hearing, the decision to hold an oral hearing lies squarely within the authority of the Tribunal.

22. In the present matter, the Tribunal has concluded that there is adequate documentary evidence to allow it to render a decision on the Respondent's motion without resorting to an oral hearing. A determination will therefore be made based on the parties' pleadings and supporting documentation. The Applicant's motion for an oral hearing is refused.

### Is the Applicant's challenge against the non-selection decisions for Job Openings (JOs) 2016/038 and 2016/026 receivable

23. The Respondents submits that the Applicant's challenge against the non-selection decisions for JOs 2016/038 and 2016/026 are not receivable *ratione materiae* because he did not file timely requests for management evaluation.

24. In accordance with staff rules 11.2(a) and 11.2(c), for an application to be receivable, the applicant must first submit a request for management evaluation within the applicable time limit, which is "60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

25. The Applicant tendered a letter dated 19 December 2017 from the UNFIL Director of Mission Support (DMS), which was addressed to him (the Applicant). The DMS informed the Applicant in the said letter that he had not been invited for the competency-based interviews because he had failed the technical tests for both job openings. (JOs).

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<sup>3</sup> Lee2015-UNAT-583.

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August 2018 or no later than 9 November 2018. When MEU responded to the Applicant on 17 October 2018, the Applicant was still within the 90-day delay to file his application. Consequently, the receipt of the MEU response on 17 October 2018 reset the Applicant's deadline for seeking judicial review before the UNDT to 15 January 2019.

34. On 15 January 2019, the Applicant emailed UNDT Registry in Nairobi requesting an extension of time to file his application and on 23 January, he filed an incomplete application. The Tribunal granted his motion on 6 February 2019 by extending the deadline until 20 February 2019.

35. The Respondent submits that the application is time-barred because the incomplete application the Applicant filed on 23 January 2019 was filed eight days after the statutory deadline. The Respondent further submits that: (i) the Applicant did not present any exceptional circumstances for an extension of the deadline for filing his application; (ii) the Applicant's email of 15 January 2019 to UNOMS did not toll the filing deadline; and (iii) the Applicant and UNIFIL have never agreed to or participated in informal resolution through UNOMS.

36. The Applicant submits that his application is receivable because: (i) MEU failed to consider his 12-page email of 21 February 2018; (ii) conditions for tolling deadlines while pursuing informal resolution should be clearly specified by the Respondent; (iii) he was in contact with MEU regarding his efforts at informal resolution; (iv) his inability to recover his official email log regarding his communications with UNOMS; (iii) he made the minimum filing to the Tribunal in an effort to give the Ombudsman's effort a real chance of success; and (ii) the



written application for suspension, waiver, or extension of time limit by an appellant prior to the filing of an appeal.”

39. In *Nikwigize 2017-UNAT-731*, the Appeals Tribunal explained further that: “[...], Thiam does not allow an applicant or appellant to request a waiver of the time limits for filing a late application or appeal in the untimely (or belated) application or appeal. Thus, the UNDT erred when it appeared to suggest that a waiver could be requested “as part of the belated application”.

40. In other words, a request under art. 8.3 should be filed before the expiry of the 90-day statutory deadline in art. 8.1(d)(i)(a). Although the Applicant submitted his request for extension of time on the last day of the 90-day deadline, he was still within the statutory deadline.

41. However, the Tribunal notes that an extension or waiver of time can be justified under art. 8.3 of the UNDT Statute only if the applicant shows that exceptional circumstances beyond his or her control prevented him or her from acting within the statutory time limits.<sup>5</sup>

42. The reason the Applicant provided for his request for extension of time was that he “needed to concentrate on genuinely trying to find a mediated solution under the auspices of the ombudsman”. The Applicant provided copies of emails he sent to UNOMS on 15 January and 19 February 2019 requesting assistance.

43. Art. 8.1(d)(i)(b)(iv) states that an application is receivable:

Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

44. The Applicant has not provided documentation showing that he and UNIFIL were in mediation within the deadlines for the filing of his application. In fact, the Applicant’s 10 December 2018 email to Dr. HM states that he considered the amicable efforts to have broken down. It is also noteworthy that even after Dr.

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<sup>5</sup> *Bofill 2014-UNAT-478*; *El-Khatib 2010-UNAT-029*.

HM advised the Applicant on 15 December 2018 to contact UNOMS in New York, he did not do so until 15 January 2019, his deadline for filing his application to the Tribunal.

45. In the absence of tangible documentary evidence from UNOMS regarding informal dispute resolution under its auspices, the Applicant has not shown exceptional circumstances that were beyond his control. Thus, the Tribunal reverses its initial conclusion that the Applicant had satisfied the requirements under art. 8.3 of the UNDT Statute for an extension and/or waiver of the deadlines