

Judgment No. 2016-UNAT-679



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respects identical to case UNDT/NY/2015/011, but was “re-filed, out of abundance of caution”, to address further receivability arguments raised by the [Secretary-General].

12. In Judgment No. UNDT/2015/124 now under appeal, the UNDT dismissed all five cases as not receivable “due to [Mr. Lemonnier]'s failure to comply with the relevant statutory requirements, including the filing of his management evaluation requests and the deadlines for the filing of an application with the Tribunal”.² The UNDT summarized its findings as follows:³

... In the cases concerning separation (Cases No. 011 and 028), [Mr. Lemonnier] failed to file an application with the Tribunal within the statutory period of 90 days from the date of expiration of time for a response to his management evaluation request. Pursuant to *Neault*,^[4] ..., MEU's belated communications after the expiration of the 90-day period did not re-set the applicable time limits.

... In the cases concerning non-selection (Cases No. 012, 027, and 029), [Mr. Lemonnier] identified the date of 5 February 2015 as the date of notification of the non-selection decision. He failed to file a management evaluation request of this decision. Thus Cases No. 012, 027, and 029 are not receivable. Further, in relation to [Mr. Lemonnier]'s earlier alternative assertions regarding the relevant dates in Cases No. UNDT/NY/2015/011 and 027 (on non-selection), the Tribunal finds that [Mr. Lemonnier] failed to file timely management evaluation requests even with regard to those dates. Even if the Tribunal were to accept [Mr. Lemonnier]'s submission that he made a purported request for management evaluation by e-mail or “orally” on 10 June 2014, his claims would not be receivable under *Neault*, as [Mr. Lemonnier] failed to file his application within 90 days of the date of expiration of time for the management evaluation response (which expired 45 days after 10 June 2014). Further, even if [Mr. Lemonnier] asserted that his Counsel's e-mail exchange of 2 December 2014 (which was referred to in the MEU letter of 5 February 2015)^[5] constituted a management evaluation request in relation to his claims that the CISS position should have been given to him as part of the retrenchment process, these claims would still not be receivable. The contested position was advertised on 17 April 2014, and any purported request of 2 December 2014 would have been well outside the statutory 60-day period for the filing of a management evaluation request.

² *Ibid.*, para. 66.a.

³ *Ibid.*, paras. 66.a-c.

^[4] *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345.

^[5] See impugned Judgment, paras. 28-30 (finding that no copy of a management evaluation request of 2 December 2014 had been made available to the UNDT; “2 December 2014” appeared to be a reference to a series of e-mail exchanges between Mr. Lemonnier's counsel at OSLA and the MEU; and, Mr. Lemonnier had identified 5 February 2015 as the first time he had been formally notified of the non-selection decision).

“clear and unambiguous language” that points out that it refers to “the response of management”

23. The UNDT correctly concluded that Mr. Lemonnier's application regarding the non-selection decision was not receivable *ratione materiae* because he did not submit a request for a management evaluation.

24. The Secretary-General requests the UNDT Judgment be affirmed, and the appeal be dismissed in its entirety.

Considerations

Did the UNDT err in law in determining that Mr. Lemonnier's challenge to the separation decision was time barred?

25. It is undisputed that Mr. Lemonnier was notified on 29 May 2014 of the decision to separate him from service. On 2 June 2014 Mr. Lemonnier, represented by OSLA, filed a request for management evaluation of the separation decision. Pursuant to Staff Rule 11.2(d) and Article 8(1)(d)(i) of the UNDT Statute, the deadline for the response by the MEU was 17 July 2014.

26. The UNDT determined (citing Staff Rule 11.4.(a) and Article 8(1)(d)(i) of the UNDT Statute) that since the Administration's response was not received by 17 July 2014, Mr. Lemonnier had 90 days to file his application with the Dispute Tribunal which gave him a deadline of 15 October 2014. His application was filed on 6 March 2015.

27. Before the Dispute Tribunal, the Secretary-General argued that, in accordance with the Appeals Tribunal's decision in *Neault*, the belated response from management did not re-set the time limit for the filing of an application. Mr. Lemonnier argued before the UNDT that the Administration's interpretation of *Neault* was wrong, and that the correct interpretation of *Neault* was that even if a management response is received after the 90 day period, the 90 day period begins to run afresh.

28. The Dispute Tribunal rejected Mr. Lemonnier's submission, stating that his interpretation of *Neault* "was misconceived and inconsistent with current jurisprudence".¹³ It held that "[p]ursuant to *Neault* if at any point during [the] 90-day time period for the filing of his application with the Tribunal [Mr. Lemonnier] received a belated management evaluation response, it would have re-set the 90-day deadline

receipt of a management evaluation *after* the expiration of the 90-day period for the filing of an application does not have the same effect”.¹⁴

29. It further found that “the subsequent refiling of the application under a separate case number ... [which] explain[ed] [Mr. Lemonnier’s] view on the interpretation of *Neault* [was] misconceived” as “the filing could not conceivably have cured this fundamental procedural flaw”.¹⁵

30. In his submissions before the Appeals Tribunal, Mr. Lemonnier argues that the Dispute Tribunal in effect misinterpreted *Neault*. He contends that in *Neault* the Appeals Tribunal rejected the Administration’s argument that the case of a late management evaluation was to be treated as no management evaluation and, thus, the deadline ran from when the response was due. Pointing out that in his case a management evaluation response was provided, Mr. Lemonnier contends, relying on the *ratio decidendi* of *Neault*, that his UNDT application UNDT/NY/2015/012 was timely filed as it was filed within 90 days of that response.

31. The Secretary-General submits that the Appeals Tribunal’s jurisprudence in *Neault* does not support Mr. Lemonnier’s position.

32. Article 8(1)(d)(i) of the UNDT Statute provides that “[i]n cases where a management evaluation of the contested decision is required”, the application to the UNDT must be made:

- a. Within 90 calendar days of the applicant’s receipt of the response by management to his or her submission; or
- b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices[.]

33. In *Neault*, the Appeals Tribunal had occasion to consider the above provision. We stated:¹⁶

... There is a clear difference between the terms of Article 8(1)(d) of the [UNDT] Statute and Staff Rule 11.4(a). Staff Rule 11.4(a) contains the final clause “whichever is

¹⁴ *Ibid.*, para. 35 (emphasis original).

¹⁵ *Ibid.*, para. 38.

¹⁶ *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345, paras. 31-34 ,4

earlier”. But that clause is missing from Article 8(1)(d) of the [UNDT] Statute. The Secretary-General relies on this final clause to support his argument that the limitations period for filing an application with the UNDT commences to run from the *due date* for the MEU response – because that date is earlier than the date the MEU issued its response. However, a basic tenet of administrative jurisprudence requires that “in the event of any ... contradiction between the UNDT Statute and the Staff Rules”, the statutory provision must prevail [citing *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293]. The Secretary-General does not, and cannot, cite any authority to the contrary.

... The Secretary-General also argues that wh

for filing an application before the UNDT and make sure that he or she does not miss that deadline while waiting for the MEU response.

34. Mr. Lemonnier contends that it is the Administration that decides whether or not to issue a management evaluation. He submits that the Administration cannot issue a management evaluation and then argue that the time limit to challenge it has already expired. We are not persuaded by Mr. Lemonnier's argument that the *ratio decidendi* in *Neault* effectively provides that a staff member's rights to pursue an application to the UNDT are protected when a tardy response is received from the Administration. We hold that Mr. Lemonnier's argument in this regard is misconceived.

35. In *Neault*, the request for management evaluation was made on 29 November 2010, and the response was due on 13 January 2011. It was received on 17 February 2011, outside of the 45 days but within the 90 days in which Ms. Neault had to file her application under the UNDT Statute. The Appeals Tribunal held (for the reasons set forth in its judgment) that applicable time started running against Ms. Neault from the date of the MEU response, and that she had timely filed her application on 6 May 2011 as it was filed within 90 calendar days of the MEU response. In Mr. Lemonnier's case, the management request was made on 2 June 2014, and the MEU response was due 45 days later, on 17 July 2014. During the following 90 calendar days Mr. Lemonnier did not file an application with the UNDT, nor did the MEU respond within that 90-day period (which would have re-set the clock for Mr. Lemonnier). The MEU responded on 11 December 2014, and Mr. Lemonnier filed his application with the UNDT on 6 March 2015 which, while within 90 days of the MEU's late response, was well outside the 90 calendar days period established in Article 8(1)(d)(i)(b).

Is there a contradiction between Neault and Gallo as contended by Mr. Lemonnier?

36. In *Gallo* the Appeals Tribunal stated:¹⁷

... Having reviewed the UNDT Judgment, we can discern no error in the UNDT's computation of the applicable time limits. We agree that, once the MEU failed to provide its response within the prescribed 30-day period, pursuant to Article 8(1)(d)(i)(b) of the [UNDT]'s Statute, Mr. Gallo was required to file his application for judicial review with the UNDT within 90 days thereafter, being by 28 January 2014 at the latest. However, Mr. Gallo did not file his application until 2 May 2014, well beyond the deadline prescribed by the [UNDT]'s Statute.

¹⁷ *Gallo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-552, para. 15.

37. Mr. Lemonnier argues that the *ratio decidendi* of *Neault* is irreconcilable with the *ratio* in *Gallo*, and that the reasoning in *Neault* should be preferred. We hold that there is no discrepancy between *Neault* and *Gallo*. The *ratio* of both judgments is that where a response to a management request is not received, a staff member has 90 days from when the response was due to file an application to the UNDT. When a response *is* received but *after* the expiration of that 90-day period, as in this case, the receipt of the response does not reset the clock for filing an application with the UNDT, as noted above in paragraph 35.

Did the UNDT err in law or otherwise fetter its discretion in refusing Mr. Lemonnier's request to extend the time for the filing of the application to challenge the separation decision?

38. In the wake of the Administration's arguments on receivability as set out in its reply, Mr. Lemonnier's legal representative filed a request for "judicial leave" to refile the application challenging the separation decision. In the motion filed with the UNDT seeking an extension of time, Mr. Lemonnier argued for the following factors to be taken as exceptional circumstances: (i) his interpretation of the Appeals Tribunal's jurisprudence in *Neault*; (ii) the protracted dialogue with the Administration; and (iii) the fact that the Administration was caused

asserts that in believing that it could not grant an extension, the Dispute Tribunal fettered its discretion and failed to exercise the jurisdiction which Mr. Lemonnier's motion had invoked.

41. In response to the Dispute Tribunal's ruling that there were no exceptional circumstances, Mr. Lemonnier also argues that there were numerous reasons for extending the time limits.^{0.72-.0172 1}

51. As to the manner in which a management evaluation request should be formulated, we make the following general observation. While the use of a specific “form” is not a mandatory requirement for there to be a valid management evaluation request, the use of the MEU’s standard form is preferable as it is readily available to staff members, online and from the MEU. The fundamental point is that a staff member’s request for management evaluation, however it is transmitted (including, for example, via a mobile device), must be an unambiguous written request which clearly identifies the staff member and the contested decision. As already stated, in the present case, the Appeals Tribunal was sufficiently satisfied that the content of the e-mails sent on Mr. Lemonnier’s behalf between October and 2 December 2014 satisfied the requirement for an unambiguous request, particularly in light of the management response of 5 February 2015.

The award of costs against Mr. Lemonnier

52. Pursuant to Article 10(6) of the UNDT Statute, the Dispute Tribunal may award costs against a party where a determination is made that that party has manifestly abused the proceedings before it. The question to be determined is whether the circumstances of the present case merited an award of costs against Mr. Lemonnier. We find that they did not.

53. While undoubtedly the Dispute Tribunal was ultimately confronted with a plethora of applications in an attempt by Mr. Lemonnier’s legal representative to cure receivability issues raised by the Administration, we do not find that the number of filings reached the threshold where Mr. Lemonnier “manifestly abused” the proceedings. In arriving at our conclusion, we

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Dated this 30th day of June 2016 in New York, United States.