Current Staff Rules

8. The current Staff Rules under Chapter XI, Rule 11.4(a), simply state, without

Observations

12. It is clear that the Dispute Tribunal is enjoined to hear and determine any application only "under conditions prescribed in its statute and rules".

The Statutes

Statute of the Administrative Tribunal

13. Article 7.4 of the Statute of the Administrative Tribunal prescribes that

> "an application *shall not be receivable unless it is filed within ninety days* reckoned from the respective dates and periods referred to…above, or within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant" (emphasis added).

14. Article 7.5 of the Administrative Tribunal Statute provides that

> "[i]n *any* particular *case*, the Tribunal may decide to suspend the provisions regarding the time limits" (emphasis added).

Statute of the Dispute Tribunal

15. Article 8.1 of the Statute of the Dispute Tribunal, on the other hand, provides that an application "*shall be receivable"* within 90 calendar days of the applicant's receipt of the response by management to his or her submission where management evaluation is required, or within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request is 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 (Article 8.1(d)).

16. Article 8.3 of the Statute of the Dispute Tribunal provides that:

> "The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and *only in exceptional cases*. The Dispute Tribunal shall not

The Rules of Procedure

Rules of the Administrative Tribunal

19. Article 24 of the Administrative Tribunal's Rules of Procedure provides that:

> "The Tribunal or, in the interval between its sessions, the President or the presiding member may shorten or extend any time limit fixed by

any rule when the interests of justice so require. It is a separate question whether Article 35 of the Rules of Procedure enables the Dispute Tribunal to shorten or extend any deadlines set out in the Statute and the Staff Rules; however, I need not address this issue in the present case.

26. Furthermore, the current Staff Rules, as well as the Statute and the Rules of Procedure of the Dispute Tribunal do not contain the prohibitive language of the former provisions in regard to time barring, receivability, and applications that are out of time. To my mind, the current and prevailing emphasis and nuance regarding time limits is entirely different under the new dispensation. This is not to say of course, that time is not of the essence.

27. The present judgment therefore considers whether the new wording of "exceptional case" and "exceptional reasons", as distinct from "exceptional circumstances", creates an irreconcilable conflict or ambiguity, and whether the new terminology changes the test from a more objective to a subjective one. I have considered the relevance of the old test to the new dispensation and the aids to construction which the Dispute Tribunal should use, if any. Finally, I have considered the interpretation the Dispute Tribunal should give to the current provisions.

Issues considered

28. Whilst there is a definition of "exceptional circumstances" from the Administrative Tribunal jurisprudence, there is no definition of "exceptional case" or "exceptional reasons" under the current dispensation.

29. In Judgment No. 372, *Kayigamba* (1986), the Administrative Tribunal upheld the findings of the JAB which relied on a very narrow construction of the definition of exceptional circumstances:

> "[O]nly circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review and

> filing an appeal in time, may be deemed 'exceptional circumstances' and warrant a waiver of the prescribed time-limits…"

30. In *Kayigamba*, the staff member was seeking to have a time limit waived to enable him to appeal the denial of an allowance, more than five years after the last year of his service. The Administrative Tribunal held that,

> "On the face of it, this is a delay of an extraordinary length, and it would not be easy to present convincing reasons that such a delay had been due to 'exceptional circumstances' beyond the control of the staff member concerned".

Submissions

31. The Administrative Tribunal jurisprudence, referred to extensively by counsel for the respondent, consistently upholds "exceptional circumstances" as circumstances beyond an applicant's control. Mr. Ruckriegel submitted that the reasons preventing an Applicant from submitting a timeous application should be serious, akin to a *force majeure.* He said that as a possible aid in deciding what could be considered as exceptional circumstances, he had considered clauses in some commercial and other UN contracts which define *force majeure,* and concluded that such clauses generally refer to unforeseeable or irresistible acts. He maintained that exceptional circumstances must be strictly construed to events that are beyond the applicant's control, of significant severity, and that said events must directly prevent the timely application. Counsel for the respondent contended that the jurisprudence of the Administrative Tribunal was "very persuasive, if not binding".

32. Mr. Willemsen, counsel for the applicant, submitted that the case law submitted by the respondent was neither helpful nor on point in this case, highlighting that all of the cases mentioned by counsel for the respondent concerned time limits for a "Request for Review" or a "Statement of Appeal" under the old system of justice in place prior to 1 July 2009. The applicant sought to distinguish the instant case from those older cases and noted that while the 90-day time limit did exist in the old system, it was common practice for the Administrative Tribunal to grant

doubt that the consideration of such circumstances is premised on the particular wording and reading of Staff Rule 111.2(f), and that the definition stems from the Administrative Tribunal jurisprudence. This definition has been in practice and usage for many years, but this particular wording is absent from the current provisions. It is unclear why the new Statute and Staff Rules do not contain the previous wording and this raises the question of how the Tribunal should interpret the new wording.

Interpretation

37.

based on the Administrative Tribunal definition of exceptional circumstances is not applicable.

42.

the new dispensation, in the transitional period, and is delayed by a genuine confusion over the applicable procedures.

49. I have already found that the meaning of "exceptional circumstances", a meaning that the legislating body is presumed to have been aware of when it enacted the new provisions, is premised on the particular prescriptive wording and reading of Staff Rule 111.2(f). This wording is clearly absent from the current provisions. To my mind, the clear and manifest intention being that the old test is not applicable.

50. In view of this and the other reasons above, I find the former construction of "exceptional circumstances" of little assistance in interpreting "exceptional reasons" and "exceptional cases" under the current dispensation. I find that this Tribunal should not be bound by the previous wording and the strict definition of "exceptional circumstances" in interpreting "exceptional reasons" and "exceptional cases". What is required is a conspectus of all relevant factors before the Tribunal to ascertain in each case whether it is exceptional or whether there are exceptional reasons in the ordinary sense, to justify a waiver or suspension of time; exceptional simply meaning something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered.

51. It is noted that Administrative Tribunal jurisprudence places an understandable importance on the adherence to time limits—see Judgment No. 1046, *Diaz de Wessely* (2002):

> "[I]t is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like a sword of Damocles over the efficient operation of international organizations". [I presume the inequality of arms notwithstanding.]

The Administrative Tribunal also pointed out in Judgment No. 579, *Tarjouman* (1992), that:

> "Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning".

52. In Judgment No. 607, *In re Verron* (1984), the ILOAT pointed out that,

> "Proper administration requires the setting of time limits. But they are not supposed to be a trap or means of catching out a staff member who acts in good faith".

53. There is no doubt that review or appeal proceedings must be timeously instituted in the pursuit and desirability that finality is reached regarding the validity of an administrative action. Time limits exist for reasons of certainty and expeditious disposal of disputes in the workplace. An individual may by his own action or inaction forfeit his right to be heard by failing to comply with time limits, for the maxim *vigilantibus et non dormientibus legis subveniunt* (the law aids those who are vigilant and not those who are asleep) will surely apply.

54. A court may condone delay or late filing, although condonation of non-observance of time limits is by no means a mere formality. It is for the applicant to satisfy the court that there are "exceptional reasons" justifying his request. The Dispute Tribunal may suspend or waive the deadlines "only in exceptional cases". However, the Dispute Tribunal might also consider that there are overriding considerations in "the interests of justice". This creates a judicial discretion which is often used to grant extensions of time in the interests of justice, even where deadlines for filing have expired (see Decision of ICTY, *Popoviç et al.*, Case No. IT-05-88-T (20 May 2008), where extensions of time to file an English translation of an expert report were granted on two occasions).

55. In some jurisdictions, time limits may be waived where good, reasonable or sufficient cause is shown. To show good cause deserving of condonation, an

applicant must explain his default. The explanation must be reasonable and show that his default was not wilful or due to gross negligence on his part. In deciding whether sufficient cause has been shown, the basic principle is that a court has discretion, to be exercised judiciously upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant, but not exhaustive, are the degree of lateness, the explanation therefor, the prospects of success on the merits, prejudice to either party and the importance of the case:

> "Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked…" (*Melane v. Santam Insurance Co. Ltd*. 1962 (4) S.A. 531 (A), at p. 532C per Holmes J.A.)

56. The Administrative Tribunal has not been oblivious to the judicious consideration of the relevant factors in any particular case and indeed echoed some of these factors in its judgments. In the *Kayigamba* case *supra,* Administrative Tribunal noted that a five-year delay was "a delay of extraordinary length" requiring "convincing reasons" which were not provided. In Judgment No. 359 *Gbikpi* (1985), the Tribunal decided that:

> "[VI]…in this particular case, there are no grounds for suspending the provisions regarding time-limits, as article 7, paragraph 5, empowers it to do. On the one hand, the suspension of a time-limit must be justified by serious reasons which prevented the Applicant from acting, and must be for a reasonably short time; that is not the case here. Furthermore, as the Tribunal indicated above, consideration of the merits would also lead to rejection of the application".

57. Similarly, what constitutes exceptional reasons in one case may not do so in another; each case must be decided on its own merits. In the nature of things it is hardly possible and certainly undesirable for the Tribunal to attempt to define exceptional reasons or exceptional cases since no general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise

only received a response to his email dated 10 June 2009 as to the transfer of his case to the Dispute Tribunal towards the end of July 2009. His default was not willful or due to gross negligence on his part and there is no evidence of bad faith.

63. Time limits are not supposed to trap an applicant who acts in good faith. It appears clear that through no fault of his own, the applicant was caught in the unusual circumstance of a transition into the new internal justice system, when procedures were unclear or still in progress and timeous guidance unavailable to him. This does not mean that any case from the transition period will be considered as sufficiently exceptional. However, in consideration of the totality of the applicant's particular situation, the Tribunal is satisfied that this is an exceptional case with exceptional reasons justifying an extension of time.

64. The applicant is hereby granted an extension of time to file his application with the Registry of the Dispute Tribunal on or before 16 November 2009.