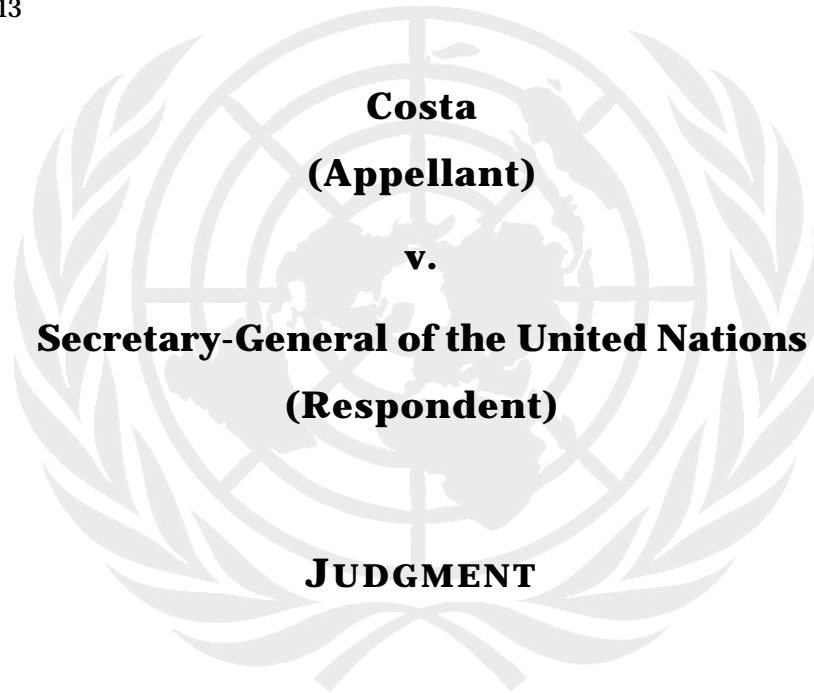




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2009-013



Before:	Judge Mark P. Painter, Presiding Judge Sophia Adinyira Judge Luis María Simón
Judgment No.:	2010-UNAT-036
Date:	1 July 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Bart Willemsen

Counsel for Respondent: John Stompor

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. The question is whether the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) can waive the time limits for management review. Article 8(3) of the statute of the Dispute Tribunal plainly states that “[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation”. The UNDT Judge held that she was thus without power to do so. We agree, and affirm the UNDT Judgment that this case is time-barred.

Facts and Procedure

2. Costa is a language teacher with the Office of Human Resources Management (OHRM). In 2007, she and her colleagues participated in a project called the “Continuous Evaluation System” (CES) to test the performance of students. After she had completed the CES in January 2008, Costa requested, on 5 February 2008, compensation for overtime that she had accrued throughout 2007. Her request was rejected on 26 February 2008.

3. On 5 March 2008, Costa contacted the New York Staff Union for guidance as to how to appeal the decision to reject her request for overtime compensation and she was advised to contact the Panel of Counsel.

4. On 24 April 2008, Costa contacted the Joint Appeals Board (JAB) for an extension of the time limit for her appeal. The deadline for filing an appeal with the JAB was extended to 9 May 2008. However, Costa did not submit any appeal to the JAB before the new deadline after she had allegedly been advised that she did not have a case.

5. Thereafter, Costa turned to the Executive Office of the Department of Management (DM) with her request for overtime compensation and subsequently to the President of the Staff Union for intervention.

6. On 6 November 2008, Costa met with the Executive Officer of DM to discuss overtime compensation among other things, but she received, on 4 February 2009, a response rejecting her claim for overtime.

7. On 1 April 2009, Costa wrote to the Secretary-General requesting administrative review of the decision to reject her claim for overtime compensation. On 5 May 2009, the Administration rejected Costa's request for administrative review. It also reserved the right to raise the issue of receivability of Costa's claim in further proceedings.

8. In June 2009, Costa requested and obtained from the JAB a new deadline of 8 July 2009 for filing her appeal.

9. On 8 July 2009, Costa filed an application with the UNDT in New York, which had replaced the JAB as the first-instance court in the new system of internal justice. The respondent objected, arguing that the application was not receivable.

10. On 21 October 2009, Judge Shaw of the UNDT rendered Judgment No. UNDT/2009/051 in regard to Costa's application. Judge Shaw found that the cause of action arose in February 2008, when the Administration rejected Costa's request for overtime compensation for her work in 2007. She also found that Costa's request of 1 April 2009 was nothing more than "a restatement of her original claim for overtime compensation." Judge Shaw concluded that Costa's application against the decision not to pay overtime to her was not receivable because Costa should have made a request for administrative review under Staff Rule 111.2 then in force within two months of the receipt of the impugned decision, i.e., by 26 April 2008, but she did not do so until 1 April 2009, almost a year later. Judge Shaw held that the UNDT had no jurisdiction to waive the time limits for requests for management evaluation or requests for administrative review.

Submissions

Costa's Appeal

11. Costa claims that Article 8(3) of the UNDT statute confers on the UNDT jurisdiction to waive time limits for management evaluation. This interpretation is supported by the Dispute Tribunal's decision in *Rosca*,¹ in which the Judge observed that, whereas the former JAB/Joint Disciplinary Committee (JDC) did have the

¹ *Rosca v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/052.

jurisdiction to waive time limits for requests for administrative review, it would be unfair if an applicant before the UNDT lost such entitlement through procedural legislative changes.

12. Costa requests that the Appeals Tribunal remand the case to the UNDT to consider whether the facts and circumstances warrant a waiver of the time limits for administrative review under the former Staff Rule 111.2.

Secretary-General's Answer

13. The Secretary-General asserts that UNDT correctly determined that it has no power to suspend or waive any deadlines for requesting or completing management evaluation, or administrative review, while it may decide to suspend or waive deadlines for filing an application with the UNDT.

14. Costa has not identified any error warranting a reversal of the UNDT's decision to declare her application non-receivable.

15. In this connection, the Secretary-General maintains that the UNDT in *Rosca* was incorrect in concluding that it had the power to suspend or waive any deadline in relation to management evaluation, as Article 8(3) of the UNDT statute plainly states that “[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.” He also maintained that the case in the judgment of the European Court of Human Rights (ECHR) *Zielinski et al v. France*² is distinguishable from Costa's case.

Considerations

16. Though the Judge in *Rosca* went to great lengths to justify disregarding the plain language of Article 8(3) of the UNDT statute, we cannot follow that reasoning, which holds that a legislative change should not prejudice an applicant. But the timing here is not a problem: Costa lost her case in May 2008 when she did not appeal by the extended deadline. That was well before the new legislation, which took effect in July 2009.

² *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII.

17. Judge Shaw explained her rationale in great detail in her Judgment, and we see no purpose in repeating it here. We approve the UNDT Judgment No. UNDT/2009/051 as the law on this issue. There is a conflict, we are obliged to resolve, with the Judgment of the UNDT in *Rosca*, which we disapprove.

Judgment

18. We affirm the UNDT's Judgment in all respects.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Painter, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 16th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal