UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2011-228

Christensen

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Kamaljit Singh Garewal Judge Inés Weinberg de Roca
Judgment No.:	2012-UNAT-218
Date:	16 March 2012
Registrar:	Weicheng Lin

Counsel for Appellant:	Miles Hastie
Counsel for Respondent:	John Stompor

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by Ms. Hanne Moll Christensen against Order No. 041 (NBI/2011) rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 18 May 2011 in the case of *Christensen v. Secretary-General of the United Nations*.[1]

2. The Appeals Tribunal emphasizes the need to observe time limits. Furthermore, the Appeals Tribunal held in *Jennings*[2] that "it is the staff member's responsibility to ensure that she is aware of the applicable procedure in the context of the administration of justice at the United Nations. Ignorance cannot be invoked as an excuse."

3. Accordingly, we hold that Ms. Christensen's appeal is not receivable. Notwithstanding her illness, Ms. Christensen did not demonstrate any exceptional circumstances that would have required the waiving of the applicable time limits for the Secretary-General to reopen Ms. Christensen's case to reconsider the decision taken by the Advisory Board on Compensation Claims (ABCC).

4. Ms. Christensen's appeal is dismissed. Order No. 041 (NBI/2011) is affirmed.

Facts and Procedure

5. Ms. Christensen joined the Organization in 1984. On 14 October 1996, Ms. Christensen joined the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania as a Training and Staff Welfare Assistant on a fixed-term appointment. In December 1998, Ms. Christensen contracted a rickettsial infection, also known as tick typhus, which resulted in severe medical complications and financial expenses and, ultimately, her retirement from service on medical grounds on 23 June 2003.

6. On 16 April 1999, Ms. Christensen filed a claim for compensation in front of the ABCC under Article 2(a) of Appendix D to the Staff Rules for the unreimbursed expenses she had incurred as a result of her illness.

[1] Case No. UNDT/NBI/2009/069.
[2] *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-184.

7. On 26 July 2004, the ABCC issued its report in which it denied Ms. Christensen's claim on the basis that she had not contracted her illness while in service but rather while visiting Mount Meru near Arusha, Tanzania. On 25 September 2004, Ms. Christensen was informed that on 9 August 2004 the Secretary-General had endorsed the ABCC's findings.

8. On 10 October 2005, Ms. Christensen sent a letter to the Secretary-General in which she requested administrative review of the findings of the ABCC. As a result of the lack of answer from the Secretary-General to her 10 October 2005 letter, Ms. Christensen submitted an Appeal to the Joint Appeals Board (JAB) on 16 October 2006. On 22 June 2006, in parallel to her JAB submission, and following over a year's worth of extensions of the time limit to file, Ms. Christensen filed an application with the former Administrative Tribunal contesting the findings of the ABCC.

9. On 28 November 2006, the JAB rejected Ms. Christensen's appeal in Case No. 2006-004 noting that "the appeal is not receivable by the JAB for lack of competence in the matter", as the contested decision "[fell] under Appendix D, rather than Chapter XI of the Staff Rules".

10. On 30 January 2009, the former Administrative Tribunal issued Judgment No. 1427 in which it rejected the application in its entirety by stating in its considerations that:

> VI. At the outset, the Tribunal must first consider whether the Applicant's claim regarding the ABCC is receivable, *ratione materiae*. Unfortunately for the Applicant, the Tribunal finds that it is not. Article 17 of Appendix D sets forth with considerable specificity the procedure to be followed [...]. That process requires that the Applicant request that a medical board be convened to review the decision of the Secretary-General within thirty days of notice of the Secretary-General's decision. In exceptional circumstances, the Secretary-General "may accept for consideration a claim made at a later date".
>
> VII. In the instant case, the Applicant has failed to request reconsideration of the Secretary-General's decision in accordance with article 17, even though she was directed by the JAB to pursuing her claims under Appendix D. As the matter was never properly before the JAB and as the Applicant has never sought the appropriate review of the matter, the claim is not properly before the Tribunal. [...] Although she is well beyond the thirty-day time period in which she should have brought her request for reconsideration, the Secretary-General may still accept for consideration her request for review, if she can demonstrate exceptional circumstances. If she demonstrates exceptional circumstances, the matter is considered and the Secretary-General maintains his position, denying her service-incurred status, she would then be free to bring her claim to the Tribunal.

> However, for the reasons set forth above, under the present circumstances, the matter is not receivable by the Tribunal, *rationae materiae*, and must be rejected.
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> VIII. [...] Staff rule 111.2 provides that when a staff member wishes to appeal an administrative decision, he or she must first seek administrative review of the decision by the Secretary-General. Thereafter, the matter may be brought to an appeals body, such as the JAB. In the normal course, the JAB then makes its recommendations and the Secretary-General either accepts or rejects the recommendations [...]
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> IX. In the instant case, the issues raised by the Applicant are still pending before the JAB, and, therefore, in accordance with article 7, the matter is not receivable, *ratione materiae*, by the Tribunal. Once the JAB has issued its recommendations, and the Secretary-General has decided whether to accept or reject those recommendations, the Applicant will be free to bring her claims to the Tribunal. Presently, her Application to the Tribunal is premature, and, therefore, must be rejected.

11. On 27 February 2009, Ms. Christensen wrote to the Secretary-General "requesting him to either reopen (under Article 9 of Appendix D) or reconsider (under Article 17 of Appendix D) [Ms. Christensen's] ABCC case". After not receiving a response, Ms. Christensen sent a follow-up request to the Secretary-General on 5 June 2009. On 8 September 2009, Ms. Christensen wrote an additional letter to the Secretary-General in which she requested that the Management Evaluation Unit (MEU) review the Secretary-General's lack of response to any of her requests.

12. On 23 October 2009, the MEU informed Ms. Christensen that her 8 September 2009 request for management evaluation was not receivable. On 29 October 2009, following her 26 October 2009 request that the MEU revisit its decision, Ms. Christensen was informed that after careful consideration the MEU still could not consider her request for management evaluation receivable. As part of its response, the MEU noted that Ms. Christensen had:

> Two cases pending before the UNDT, and it reiterates that it is not competent to receive cases that are pending adjudication before the UNDT.
>
> Concerning your "Petitions" dated 27 February 2009 and 8 September 2009, respectively, they do not constitute a decision for purposes of the provisional Staff Rule 11.2 and therefore, there is no administrative decision to be evaluated. In any event, your request is based on the rejection of the ABCC claim. Please be reminded that, in accordance with the Secretary-General's Report *(A/62/294*, para. 82) " ... those administrative decisions taken pursuant to the advice given by the technical boards, such as Advisory Board on

> Compensation Claims or the Medical Boards, would also not be subject to a management evaluation.

13. On 14 December 2009, Ms. Christensen e-mailed the UNDT in New York requesting an extension of time to appeal the MEU decision due to her counsel's withdrawal as a result of a medical illness. That same day, the UNDT in New York forwarded Ms. Christensen's request to the UNDT in Nairobi.

14. On 28 May 2010, the UNDT in Nairobi issued Order No. 101 (UNDT/101) regarding Ms. Christensen's appeal against "the administrative decision not to pay her certain entitlements which remained outstanding upon her separation from service with the Organization on 23 June 2003". This order was issued in case No. UNDT/NBI/2009/069 which appears to be the Nairobi case number issued for two applications by Ms. Christensen that were previously in front of the UNDT in New York: former JAB case No. 2005-004 which was transferred to the New York Registry as UNDT/NY/2009/105 (Salary Case) and former JAB case No. 2006-053 which was transferred to the New York Registry as UNDT/NY/2009/106 (Entitlements Case).

15. On 30 July 2010, as part of the "Statement of Facts and Core Issues" in case No. UNDT/NBI/2009/069, Ms. Christensen stated that she "wishes to raise as a preliminary issue the possibility of joining the two cases [the Salary Case and the Entitlements Case] since they arise out of the same facts." Within that same statement, Ms. Christensen also stated that she was considering filing an application with regard to the former JAB case No. 2006-004 (ABCC Case) for which there was an "outstanding request for an extension of time".

16. On 22 December 2010, Ms. Christensen filed her "Application (Motion) for Consolidation, Waiver of Time Limits". As part of this motion, Ms. Christensen sought leave to file an application in the ABCC Case and its subsequent consolidation with the Entitlements and Salary Cases. In the ABCC Case's application, Ms. Christensen stated that she was contesting "the decision [...] of the Secretary-General not to reopen or reconsider the ABCC's decision of 24 July 2004". Ms. Christensen's motion stated that, among other remedies, she was seeking: "1. A declaration that the ABCC Decision was incorrect, unreasonable and reached without due process, and should be rescinded; 2. A declaration that the Secretary-General was under a duty to reconsider or reopen the ABCC Decision."

17. On 18 May 2011, the UNDT in Nairobi issued Order No. 041 (NBI/2011) in which it ordered the consolidation of the Salary Case and the Entitlements Case while finding that the ABCC Case was not receivable stating in part:

> 57. In [Judgment Number 1427 of 30 January 2009] the former UN Administrative Tribunal stated that [...] the Secretary-General could still have accepted for consideration [Ms. Christensen's] request for review if she could demonstrate exceptional circumstances. If she demonstrated exceptional circumstances and if the Secretary-General maintained his position, denying her service-incurred status, she would then be free to bring her claim to the Tribunal.
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> 58. Subsequent to that decision, on 27 February 2009 and 5 June 2009, as per the [Secretary-General]'s submissions, [Ms. Christensen] forwarded a letter requesting the Secretary-General to reopen her case pursuant to art. 9 of Appendix D of the Staff Rules. The Secretary-General did not respond to this request from the Applicant and, accordingly, her case was not re-opened. The Tribunal observes that the Administration's failure to respond, especially in view of the Applicant's predicament, is inexcusable.
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> 59. In essence, [Ms. Christensen] is requesting the Tribunal to order the Administration to waive the time limits for seeking review of the decision by the Secretary-General accepting the ABCC's recommendation. [...]
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> 60. [...] In *Sethia*, the Appeals Tribunal reaffirmed its decision in *Costa* adding that the Tribunal does not have the power under art. 8.3 of the Statute of the Tribunal to suspend or waive the deadlines for requesting administrative review under the old system of internal justice. Additionally, art. 8.4 of the Statute of the Tribunal states that an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

18. On 1 July 2011, Ms. Christensen appealed Order No. 041 (NBI/2011) and also requested that an oral hearing be held for the purpose of clarifying the complex history of the case. The Secretary-General filed an answer on 25 August 2011. On 31 August 2011, Ms. Christensen filed a motion for leave to file a reply to the Secretary-General's answer or alternatively to seek an order directing that an oral hearing be held. On 13 September 2011, the Appeals Tribunal issued Order No. 62 in which it rejected Ms. Christensen's motion seeking leave to file a reply to the Secretary-General's answer and ordered that the request for an oral hearing be determined by the panel hearing the case.

Submissions

Ms. Christensen's Appeal

19. Ms. Christensen submits that her appeal is limited to the decision within Order No. 041 which declared the ABCC Case non-receivable. Ms. Christensen submits that the UNDT erred in law in "ask[ing] itself whether it could extend the deadline for administrative review of the ABCC decision" whereas she was seeking an extension of time "to contest [...] the MEU [...] decision not to respond to her request to convene a medical board, in 2009".

20. Ms. Christensen submits that the UNDT Order failed to distinguish between the 2004 and 2009 decisions thereby misinterpreting Articles 9 and 17(a) of Appendix D to the Staff Rules. Ms. Christensen submits that these articles contemplate a process by which the Secretary-General would issue a second decision as to whether or not he would reopen a case or reconsider a determination. Ms. Christensen submits that, as expressed by the former Administrative Tribunal, a claimant is required to seek a second decision before he or she can attempt to seek a judicial review.

21. Ms. Christensen submits that the UNDT erred in considering the reviewability of the 2004 decision seeing that the only decision before it was the one, or lack thereof, taken in 2009. Ms. Christensen submits that the failure to take a decision is no different than an actual negative decision.[3] Furthermore, Ms. Christensen submits that neither the MEU nor the Administration has contended that her 2009 request or the ensuing UNDT application were time-barred.

22. Ms. Christensen submits that the UNDT erred in applying Article 8(3) of the UNDT Statute which states that the UNDT does not have the power to suspend or waive any deadline in relation to management evaluation seeing that Articles 9 and 17 of Appendix D to the Staff Rules does not provide for a management evaluation. Ms. Christensen submits that Article 9 of Appendix D do not identify any deadlines to submit a request whereas under Article 17 of Appendix D such requests can, if exceptional circumstances are present, be made at any time.

[3] See *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030.

23. Nevertheless, Ms. Christensen submits that in any event, the Secretary-General still has the discretionary power to reopen or reconsider cases in exceptional circumstances. Ms. Christensen further submits that the "UNDT and [former Administrative Tribunal] have repeatedly held that the exercise of a discretionary power affecting terms of appointment (as Appendix D determinations do), constitutes proper subject matter for review by the Tribunals, under what is now Article 2(1)(a) of the UNDT Statute".

24. Ms. Christensen submits that her actions with regard to the ABCC Case were solely dictated by the former Administrative Tribunal's decision and that the UNDT Order conflicts with that decision. Ms. Christensen submits that if the former Administrative Tribunal erred in its decision then she has actually been deprived of "a review procedure and remedy to which she was entitled" and as such is caught in a process that started under the old judicial system and is now unfolding itself in the new one.

25. Ms. Christensen requests that UNDT Order No. 041 be reversed and that the Appeals Tribunal allow her application in the ABCC Case thereby only leaving "the correctness of the ABCC Decision and ensuing benefits at issue".

Secretary-General's Answer

26. The Secretary-General submits that the UNDT did not err in denying Ms. Christensen compensation as a result of the ABCC decision seeing that her application was filed more than three years after she had been notified of the contested 25 September 2004 administrative decision.

27. The Secretary-General also submits that the UNDT did not err in not reconsidering Ms. Christensen's claim in the ABCC Case. The Secretary-General submits that Ms. Christensen's application, which was filed more than 11 months after seeking an extension of the filing deadline for medical reasons, did not demonstrate any exceptional circumstances that would warrant waiving any of the applicable time limits to appeal the MEU decision. The Secretary-General submits that Ms. Christensen's circumstances are similar to those in *Ibrahim*[4] where the Appeals Tribunal affirmed the JAB's decision that the

[4] *Ibrahim v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees*, Judgment No. 2010-UNAT-069.

appellant's counsel's ongoing medical treatment was not an exceptional circumstance that justified a filing delay of 18 months.

28. The Secretary-General submits that should the Appeals Tribunal consider that Ms. Christensen's application is receivable "it would be premature to grant [Ms. Christensen]'s request for reconsideration". The Secretary-General submits that under Appendix D, a request for reconsideration has to meet certain procedural and substantive requirements that have not yet been put before the Dispute Tribunal, including "the name of the medical practitioner who the staff member has chosen to represent him or her on the medical board" and whether exceptional circumstances were present that would justify waiving the 30-day time limit for the submission of such a request.

29. The Secretary-General requests that the Appeals Tribunal find that the Dispute Tribunal correctly concluded that Ms. Christensen's application was not receivable and dismiss her appeal in its entirety. Nevertheless, should the Appeals Tribunal consider her application receivable, the Secretary-General submits that the case should be remanded to the Dispute Tribunal.

Considerations

30. Ms. Christensen's request for an oral hearing in order to clarify the actual relief she sought in front of the UNDT is denied as the submissions by the parties before the Appeals Tribunal do not require clarification.

31. On 30 January 2009, the former Administrative Tribunal, in Judgment No. 1427, dismissed Ms. Christensen's claim against the ABCC decision as irreceivable due to the fact that she had failed to seek a review of the Secretary-General's decision to affirm the ABCC decision prior to seeking judicial review. The former Administrative Tribunal expressed the view that notwithstanding the fact that her filing was well beyond the thirty days limit for seeking a review of the ABCC decision by the Secretary-General, he may still accept her request for a review of the aforementioned decision provided Ms. Christensen could demonstrate exceptional circumstances under Articles 9 and 17 of Appendix D to the Staff Rules:

> **Article 9. Reopening of cases**
> The Secretary-General, on his own initiative or upon the request of a person entitled to or claiming to be entitled to compensation under these rules, may reopen any case under these rules, and may, where the circumstances so warrant, amend in accordance with these rules any previous award with respect to future payments,
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> **Article 17. Appeals in case of injury or illness**
> (a) Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date.

32. On 27 February 2009, Ms. Christensen wrote to the Secretary-General requesting that he either reopen or re-consider her ABCC claim pursuant to Articles 9 and 17 of Appendix D to the Staff Rules. On 5 June 2009, Ms. Christensen sent a follow-up letter to inquire on the status of her request in the off-chance that they had not received the prior communication. Finally, on 8 September 2009, Ms. Christensen sent a letter to the Secretary-General requesting a management evaluation of "the lack of any response to a request, made in writing on 27 February 2009 and reiterated on 5 June 2009 requesting...to reopen the applicant's claim...". On 23 October 2009, the MEU informed Ms. Christensen that her request did not contain any reviewable decision.

33. The Appeals Tribunal considers that, similarly to its decision in *Tabari*,[5] the Secretary-General's failure to respond to Ms. Christensen's request for reopening her case was akin to the Secretary-General denying her request for the reopening of her ABCC claim.

34. Ms. Christensen submits that the purpose of her application before the UNDT was not to request judicial review of the ABCC decision, but rather a review of the Secretary-General's negative, or lack thereof, decision in response to her request for reopening or reconsidering her case.

35. We recall that, under Articles 9 and 17 of Appendix D to the Staff Rules, the Secretary-General may reopen a case provided that the applicant presents exceptional circumstances. We therefore consider that this appeal is confined to the receivability of

[5] *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030.

Ms. Christensen's application for a reconsideration of the Secretary-General's denial to review her ABCC claim and not the MEU's decision that there was no reviewable decision.

36. We find that while the UNDT correctly decided that it could not waive a deadline for the review of a decision taken by the MEU, it erred when it considered that Ms. Christensen's application consisted of a request for the waiver of the time limit with respect to the decision taken in 2004 by the ABCC. Rather, this is a request as to whether her case presented exceptional circumstances that would have warranted the reopening of her case by the Secretary-General.

37. The question of what constitutes exceptional circumstance will vary from case to case, all the facts in this case were before the UNDT. Ms. Christensen was informed of the ABCC decision on 9 August 2004, yet she did not submit her request for administrative review of that decision until 14 months later, on 10 October 2005. Ms. Christensen submits that the 14 months delay was caused by her illness as well as the fact that she was not aware that she could appeal the ABCC decision.

38. While the proceedings in front of the JAB were ongoing, Ms. Christensen's counsel also submitted an application before the former Administrative Tribunal on 22 June 2006. Upon rejecting her claim on 28 November 2006, the JAB advised Ms. Christensen that any further action should be entertained under the framework of Appendix D to the Staff Rules. Nevertheless, no further action was taken for over two years until the former Administrative Tribunal advised Ms. Christensen on 30 January 2009 that while her claim was not receivable, she might still be able to seek redress under Appendix D provided she could present exceptional circumstances to waive the applicable time limit.

39. The Appeals Tribunal emphasizes the need to observe time limits. Furthermore, the Appeals Tribunal has held that "it is the staff member's responsibility to ensure that she is aware of the applicable procedure in the context of the administration of justice at the United Nations. Ignorance cannot be invoked as an excuse."[6] Accordingly, we hold that Ms. Christensen's appeal is not receivable as, notwithstanding her illness, she does not demonstrate any exceptional circumstances that would have required the waiving of the

[6] *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-184.

applicable time limits for the Secretary-General to reopen or reconsider the decision in the ABCC Case.

Judgment

40. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 16th day of March 2012 in New York, United States.

(*Signed*)	(*Signed*)	(*Signed*)
Judge Adinyira, Presiding	Judge Garewal	Judge Weinberg de Roca

Entered in the Register on this 7th day of May 2012 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar