UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2013-UNAT-338

Dzuverovic

(Appellant/Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations

(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Luis María Simón Judge Mary Faherty
Case No.:	2012-375
Date:	28 June 2013
Registrar:	Weicheng Lin

Counsel for Ms. Dzuverovic:	Self-represented
Counsel for Secretary-General:	Rupa Mitra

1. On 12 July 2012, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi issued Judgment No. UNDT/2012/105 in the case of *Dzuverovic v. Secretary-General of the United Nations*. On 10 September 2012, Ms. Vesna Dzuverovic filed an appeal and, on 3 December 2012, the Secretary-General filed an answer. The Secretary-General also filed a cross-appeal on 30 November 2012, and Ms. Dzuverovic filed her revised answer to the cross-appeal on 3 March 2013.

Facts and Procedure

2. On 13 November 1994, Ms. Dzuverovic joined the Technical Cooperation Division of the United Nations Centre for Human Settlement (UNCHS), which is currently known as UN-HABITAT, based in Nairobi, on a two-year fixed-term appointment as a Programme Management Officer (PMO) at the P-3 level. Her appointment was extended several times.

3. On 7 November 1995, Ms. Dzuverovic wrote to the Office of Internal Oversight Services (OIOS) alleging irregularities in recruitment and procurement practices in her unit. Her supervisor responded to the allegations on 15 November 1995, and requested her immediate transfer.

4. On 30 November 1995, Ms. Dzuverovic received her performance evaluation in which her overall performance was rated as "D" ("Fair"). Following her rebuttal, her overall performance was upgraded to "B" ("Very Good"). On 26 February 1996, Ms. Dzuverovic was informed that she was being reassigned to the Information and Audio-Visual Department (IAVD).

5. On 1 August 1996, Ms. Dzuverovic requested that OIOS conduct an investigation into the circumstances of the preparation of her performance evaluation and her transfer to IAVD. OIOS was unable to take action "due to financial constraints and limited resources".

6. On 1 February 1997, Ms. Dzuverovic was reassigned from IAVD to the Office of the Executive Director of UNCHS and, on 27 July 1998, she was further reassigned to the Meeting, Planning and Services Section, Conference Services, United Nations Office at Nairobi (UNON).

7. On 7 September 1998, Ms. Dzuverovic was informed that her fixed-term appointment would not be extended beyond its expiration date of 31 December 1998. On 9 September 1998, she filed a complaint with OIOS.

8. Ms. Dzuverovic filed an appeal with the Joint Appeals Board (JAB), which recommended that the non-renewal be upheld. It also recommended that OIOS take measures to act upon Ms. Dzuverovic's complaint. On 2 June 1999, she was informed that the Secretary-General had decided to accept the JAB's recommendation to uphold the non-renewal decision.

9. Ms. Dzuverovic was separated from the Organization on 4 June 1999. On 3 October 2000, she filed an application before the former Administrative Tribunal contesting the non-renewal decision. The former Administrative Tribunal rendered its judgment on 23 July 2002, upholding the non-renewal decision but awarding compensation of three months' net base salary for decisions that were taken "throughout [Ms. Dzuverovic's] career in the Organization ... which proved to be to the detriment of her career opportunities".[1]

10. Following her separation from service, Ms. Dzuverovic applied for numerous positions within the United Nations system without success. On 3 August 2010, Ms. Dzuverovic wrote to OIOS asking that it "do something to amend the difficult situation [she was] in". On 26 August 2010, Ms. Dzuverovic was informed that "OIOS [would] be taking no further action" on the matter (contested decision).

11. On 13 September 2011, Ms. Dzuverovic filed a request for management evaluation of the contested decision. On 4 November 2011, the Management Evaluation Unit (MEU) rejected her request on the basis that it was not timely and not receivable and, moreover, raised the issue of *res judicata* with respect to matters already adjudicated by the former Administrative Tribunal.

12. On 3 February 2012, Ms. Dzuverovic filed an application with the UNDT challenging the contested decision. On 23 February 2012, the Secretary-General filed a motion to have receivability considered as a preliminary matter and a reply addressing receivability. Ms. Dzuverovic filed her response to the Secretary-General's motion

[1] Former Administrative Tribunal Judgment No. 1048, *Dzuverovic* VII (2002).

on 9 March 2012. Subsequently, on 12 March 2012, the Secretary-General filed a consolidated reply addressing both receivability and the merits and, on 4 April 2012, Ms. Dzuverovic filed her response to the consolidated reply. On 12 June 2012, the UNDT held an oral hearing.

13. On 12 July 2012, the UNDT issued its Judgment on Receivability, Judgment No. UNDT/2012/105, in which it determined the application was not receivable. Nevertheless, in paragraphs 60 to 76 of the Judgment, the UNDT proceeded to make a series of "recommendations" concerning Ms. Dzuverovic's role as a "whistler blower", including the recommendation that the Secretary-General make a "sympathetic review" of Ms. Dzuverovic's situation.

14. Ms. Dzuverovic appeals the UNDT Judgment and the Secretary-General cross-appeals the UNDT's "recommendations".

Submissions

Ms. Dzuverovic's Appeal

15. The UNDT erred on a question of fact by finding there was no evidence of "exceptional circumstances" within the meaning of Article 8(2) of the UNDT Statute to extend the deadline for management evaluation.

16. The UNDT failed to exercise its jurisdiction by allowing Staff Rules to prevail over the basic values and principles of the United Nations Charter.

Secretary-General's Answer

17. The UNDT did not err in determining that the application was not receivable because Ms. Dzuverovic was late in filing her request for management evaluation. Grounds did not exist to extend the deadline for seeking management evaluation because there is no evidence that the Office of the Ombudsman (Ombudsman) became involved in negotiations to settle Ms. Dzuverovic's complaints during the period in which the time for requesting management evaluation was running, or at any time.

18. Ms. Dzuverovic has not shown that the UNDT failed to consider evidence of "exceptional circumstances" or erred in determining "exceptional circumstances" did not exist to extend the deadline for management evaluation.

19. Ms. Dzuverovic's ignorance of the Staff Rules does not justify her failure to ask the Secretary-General for an extension of the deadline for management evaluation, pursuant to Staff Rule 11.2(c). A staff member is responsible for complying with the Staff Rules, and cannot avoid that responsibility by claiming ignorance.

20. Ms. Dzuverovic has not established that the UNDT failed to exercise its jurisdiction. The UNDT's jurisdiction is set forth in Article 2(1) of the UNDT Statute, and the UNDT's conduct was consistent with that provision.

21. Ms. Dzuverovic is not entitled to *de novo* review, as she requests on appeal, and such review is inconsistent with the Appeals Tribunal Statute and its jurisprudence.

Secretary-General's Cross-Appeal

22. The UNDT erred in law and exceeded its jurisdiction by making recommendations based on the merits of the case when it did not receive the application and, thus, had no jurisdiction to address the merits. The Secretary-General requests that the Appeals Tribunal redact paragraphs 60 through 76 of the Judgment.

Ms. Dzuverovic's Answer to the Cross-Appeal

23. The UNDT's Judgment should be reversed, and the UNDT's recommendations should be the basis of a judgment on the merits.

Considerations

24. As a preliminary matter, this Tribunal denies Ms. Dzuverovic's request for an oral hearing, finding there is no need for further clarification of the issues arising from her appeal, pursuant to Article 8(3) of the Statute.

Appeal

25. Staff Rule 11.2(a) provides that:

> A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules ..., shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

26. Staff Rule 11.2(c) provides that:

> A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

27. Article 8(3) of the UNDT Statute precludes the Dispute Tribunal from suspending or waiving the deadline for management evaluation. This Tribunal has made clear that the UNDT acts in excess of its competence or jurisdiction if it extends the deadline for management evaluation.[2] Without management evaluation of a contested decision, where it is required, the UNDT cannot receive and consider an application by a staff member.[3]

28. In the present case, the UNDT concluded that Ms. Dzuverovic's application was not receivable because she did not timely seek management evaluation, within 60 calendar days from the date of notification of the contested administrative decision, as required by Staff Rule 11.2(c). Specifically, the UNDT found that Ms. Dzuverovic "was in receipt of the contested decision on 26 August 2010" and did not file her request for management evaluation until 13 September 2011 – "exactly one year and 18 days after the contested decision was conveyed to her".

29. The UNDT further noted that it did not have the power to suspend or waive the deadline for management evaluation, but could determine, under Staff Rule 11.2(c), that the deadline had been extended by virtue of the Ombudsman's involvement in the contested

[2] *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-036, para. 1.
[3] *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

decision.[4] However, the UNDT inferentially did not find any "concrete evidence" showing that the Ombudsman was involved in attempting to resolve the contested decision. Thus, the UNDT determined that the deadline for Ms. Dzuverovic to make a request for management evaluation could not be extended.

30. On appeal, Ms. Dzuverovic asserts that the UNDT erred in not extending the deadline for her to seek management evaluation, based on the Ombudsman's involvement in the matter, and she points to a series of e-mail correspondence she had with the Ombudsman. There is no merit to this claim. The sporadic e-mail correspondence between Ms. Dzuverovic and the Ombudsman did not take place during the period in which the time for making a request for management evaluation was running and, in any event, the e-mail correspondence addressed matters other than the contested decision. Moreover, the Ombudsman never became involved in resolving the contested decision or the dispute between Ms. Dzuverovic and OIOS. Thus, this Tribunal determines that the UNDT did not make an error of law in concluding the application was not receivable *ratione materiae*.

31. As a staff member, Ms. Dzuverovic was responsible for knowing the applicable Regulations and Rules and ensuring she complied with them.[5] Ms. Dzuverovic never made a written request to the Secretary-General to extend the management evaluation deadline and her alleged ignorance of the availability of that option does not provide grounds to suspend or waive the deadline for seeking management evaluation.

Cross-Appeal

32. Although correctly determining that Ms. Dzuverovic's application was not receivable, the UNDT, in paragraphs 60 through 76 of the Judgment, made several "recommendations" addressing Ms. Dzuverovic's status as a "whistle blower", including the "recommendation" "for sympathetic review" by the Secretary-General of Ms. Dzuverovic's situation. On cross-appeal, the Secretary-General claims that the UNDT erred in law and exceeded its competence or jurisdiction by making such "recommendations" and requests that the Appeals Tribunal "order the redaction of paragraphs 60 to 76 of the Judgment".

[4] See: *Wu v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/074, para.24.
[5] *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-029, para. 16.

33. Notwithstanding the manner in which the "recommendations" are phrased, and without necessarily agreeing with them, this Tribunal, by majority with Judge Chapman dissenting, does not find the approach of the UNDT merits the remedy sought by the Secretary-General since the UNDT's "recommendations" have no binding consequences on the parties. Thus, by majority with Judge Chapman dissenting, the Secretary-General's cross-appeal is determined to be without merit and is dismissed.

Judgment

34. The appeal is dismissed unanimously. The cross-appeal is dismissed, by majority with Judge Chapman dissenting.

Original and Authoritative Version: English

Dated this 28th day of June 2013 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Chapman, Presiding	Judge Simón	Judge Faherty

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)
Weicheng Lin, Registrar

Dissent by Judge Chapman on Cross-Appeal:

I respectfully dissent from the majority's decision dismissing the Secretary-General's cross-appeal. Once the UNDT determined that the application was not receivable, *ratione materiae*, it lost competence and jurisdiction to address the merits of the claims raised in the application. Yet, the "recommendations" by the UNDT address those claims. Thus, I would grant the Secretary-General's request to redact paragraphs 60 through 76 of the Judgment and affirm cross-appeal, rather than dismiss it.

Original and Authoritative Version: English

Dated this 28th day of June 2013 in New York, United States.

(Signed)

Judge Chapman, Presiding

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar