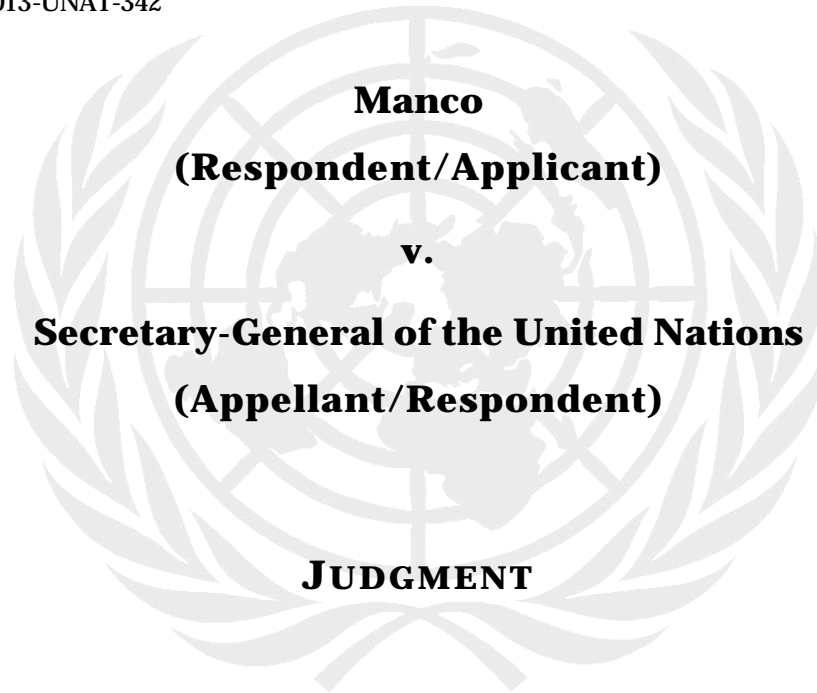




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-342



**Manco
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Sophia Adinyira
Judge Richard Lussick

Case Nos.: 2012-379 & 2012-409

Date: 21 June 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant:

Seth Levine

Counsel for Appellant/Respondent:

John Stompor/Simon Thomas

1. On 9 July 2012 and 11 September 2012, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi rendered Judgment No. UNDT/2012/104 (Judgment on Receivability), and Judgment No. UNDT/2012/135 (Judgment on merits), respectively, in the case of *Manco v. Secretary-General of the United Nations*. The Secretary-General appeals both Judgments.

Facts and Procedure

2. On 9 February 2009, Mr. Alan Manco, who had acquired a permanent resident status in New Zealand, received an offer of appointment for a P-3 Legal Investigator position with the Office of Internal Oversight Services (OIOS) in Nairobi, which he took up on 20 May 2009. The offer specified that “should [he] transfer to or be appointed to United Nations Headquarters, New York on a long-term appointment in the future”, he would need to either become a citizen of New Zealand or give up his permanent resident status there.

3. On 12 March 2010, Mr. Manco was offered a separate Investigator position in Nairobi. By e-mail dated 22 March 2010 from the Human Resources Management Services of the United Nations Office at Nairobi (HRMS/UNON), Mr. Manco was advised that before they could proceed with processing his two-year appointment, he would have to provide proof that he had applied for citizenship or that he had renounced his permanent resident status in New Zealand.

4. During a phone call on 26 March 2010, HRMS/UNON advised that a mistake had been made in the original offer of appointment which did not contain the same policy as the e-mail of 22 March 2010.

5. On 29 March 2010, Mr. Manco applied for New Zealand citizenship at a fee of NZD 460. In a letter to HRMS/UNON dated 21 October 2010, sent on 3 November 2010, Mr. Manco requested reimbursement of the fee as well as the discontinuance of this policy, with respect to himself and in general. He stated that a lack of response within fourteen days would be treated as an “adverse administrative decision”.

6. On 17 January 2011, Mr. Manco requested management evaluation, seeking reimbursement of the costs for his application for citizenship and discontinuance of the requirement that he apply for citizenship or renounce his permanent residency status.

7. The Management Evaluation Unit (MEU) responded on 3 March 2011. The MEU stated that the costs of his application for citizenship would be reimbursed. As to Mr. Manco's challenge of the disputed policy, however, the MEU held that the request for management evaluation was time-barred and irreceivable as the contested decision had been conveyed to him on 22 March 2010

8. On 9 May 2011, Mr. Manco filed an application with the UNDT in Nairobi. On 9 July 2012, the UNDT issued Judgment No. UNDT/2012/104 on receivability. The UNDT found that the application was receivable, *ratione temporis*, because the Administration had failed to notify Mr. Manco of any administrative decision in writing. The UNDT further found that in refunding Mr. Manco the NZD 460 application fee, the Secretary-General undermined his own argument that the application was time-barred. The UNDT also found that the application was receivable, *ratione materiae*. While Mr. Manco did not explicitly allege that the policy was in non-compliance with his terms of appointment, the non-compliance could clearly be inferred from his challenge of the policy.

9. On 11 September 2012, the UNDT issued Judgment No. UNDT/2012/135 on the merits. The UNDT concluded that it was unlawful to require Mr. Manco to apply for citizenship in New Zealand or renounce his permanent resident status in New Zealand as a condition of appointment and ordered the rescission of this policy in relation to Mr. Manco. The UNDT awarded moral damages in the amount of three months' net base salary "to allay the uncertainty that this policy has created with regard to both his professional and personal life".

10. On 12 November 2012 and on 21 September 2012, the Secretary-General appealed the respective Judgments. Mr. Manco answered on 25 November 2012.

Submissions

The Secretary-General's Appeals

11. The Secretary-General submits that the UNDT erred on a question of law and exceeded its competence by concluding that Mr. Manco's claim was receivable. The

Administration's e-mail to Mr. Manco from 22 March 2010 constitutes the administrative decision which Mr. Manco was obliged to challenge. This e-mail outlined a definite condition which represented the policy of the Administration, and clearly demonstrated the legal effect, as Mr. Manco applied for citizenship pursuant to this e-mail. Thus, the 60-day deadline for management evaluation commenced on 22 March 2010 and ended on 22 May 2010.

12. The UNDT erred in holding that Mr. Manco's letter dated 3 November 2010 extended the time limit in which he was entitled to request management evaluation. Similarly, the UNDT erred in mischaracterizing the MEU response from 3 March 2011, as the relevant administrative decision.

13. Since the UNDT erred in its conclusion that the application was receivable, it also erred in law and exceeded its jurisdiction in ordering the rescission of the requirement that Mr. Manco apply for citizenship in New Zealand or renounce his permanent resident status in New Zealand as a condition of appointment and the payment of moral damages to him.

14. The Secretary-General requests the Appeals Tribunal to find that Mr. Manco's application was not receivable and, consequently, to annul both Judgments in their entirety.

Mr. Manco's Answer

15. The UNDT neither erred in law nor exceeded its competence in concluding that Mr. Manco's claim was receivable.

16. Mr. Manco, therefore, submits that the Judgments on receivability and the merits of his case be affirmed.

Considerations

17. The Secretary-General appeals on the ground that the application was not receivable, *ratione temporis*.

18. Rule 11.2(c) of the Staff Rules reads, in part: "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."

19. This Tribunal reaffirms that unless the decision is notified in writing to the staff member, the limit of sixty calendar days for requesting management evaluation of that decision does not start.¹

20. Without receiving a notification of a decision in writing, it is not possible to determine when the period of sixty calendar days for appealing the decision under Staff Rule 11.2(c) starts. Therefore, a written decision is necessary if the time limits are to be correctly, and strictly, calculated.² Where the Administration chooses not to provide a written decision, it cannot lightly argue receivability, *ratione temporis*.

21. The UNDT Judgment on receivability is affirmed.

22. Mr. Manco challenges the disputed policy requiring him to renounce his permanent resident status in a country not of his nationality as a condition for becoming a staff member of the Organization at the professional level.

23. This Tribunal has noted previously that the Fifth Committee, in paragraph 73 of its 1953 report (A/2615), required that its decisions taken at the session were to “be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to the policies thus approved *through appropriate amendments to the Staff Rules*” (emphasis added). Since, to date, the contested policy is not reflected in any administrative issuance, we concluded that it has no legal basis, as the Secretary-General has not fully complied with the requirements set by the Fifth Committee for its implementation.³

24. No administrative issuance has been promulgated that reflects this contested policy of requiring an individual to renounce his or her permanent resident status in a country not of his or her nationality as a condition for becoming a staff member of the Organization at the professional level.

25. The Appeals Tribunal notes further that Article 101(3) of the United Nations Charter states:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of

¹ *Bernadel v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-180.

² *Schook v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-013.

³ *Valimaki-Erk v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-276.

efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

26. There is nothing in the United Nations Charter to suggest that geographical distribution is based on resident status. All along, recruitment into the Organization has been based on nationality and not on residence.⁴

27. While Mr. Manco only raised the claim for moral damages during the UNDT hearing, this case is a reiteration of the *Valimaki-Erk* judgment in which the Appeals Tribunal awarded moral damages. There is no reason to depart from this precedent and the award of moral damages is affirmed.

Judgment

28. The UNDT Judgments are affirmed in their entirety.

⁴ *Ibid.*

Original and Authoritative Version: English

Done in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding
21 June 2013

(Signed)

Judge Adinyira
21 June 2013

(Signed)

Judge Lussick
28 June 2013

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

(Signed)

Weicheng Lin, Registrar