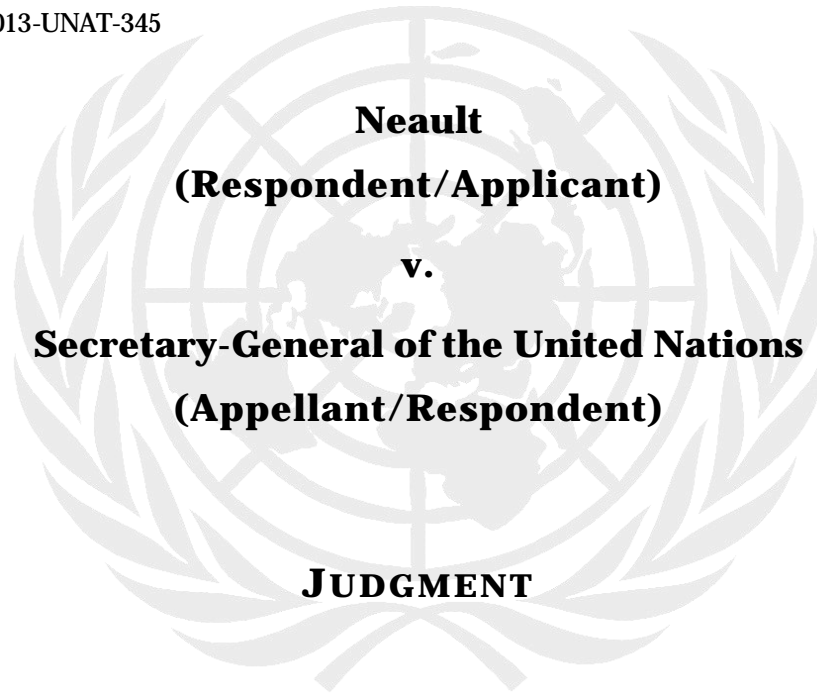




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-345



**Neault  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Rosalyn Chapman, Presiding  
Judge Mary Faherty  
Judge Richard Lussick

**Case No.:** 2012-387

**Date:** 28 June 2013

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Rick Cottam

**Counsel for Appellant/Respondent:** Simon Thomas

1. On 10 August 2012, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment No. UNDT/2012/123 in Geneva in the case of *Neault v. Secretary-General of the United Nations*. On 8 October 2012, the Secretary-General filed his appeal, and on 14 December 2012, Ms. Emilia Neault filed her answer.

### **Facts and Procedure**

2. Ms. Neault joined the International Criminal Tribunal for the Former Yugoslavia (ICTY) in August 2007 as a G-4 Computer Information Systems Clerk with the Office of the Prosecutor (OTP). On 1 March 2010, the ICTY issued vacancy announcement No. 2010/REG/CHA/012-GS (VA No. 012) for two G-5 posts as Judges' Assistant. Ms. Neault and six other candidates were interviewed.

3. On 8 June 2010, the Chair of the interview panel reported that the interview panel did not find any of the seven candidates suitable for the posts. Specifically, the interview panel found Ms. Neault unsuitable because there was a likelihood of an actual or apparent conflict of interest as she was involved in several cases still before the ICTY.

4. The findings of the interview panel were not endorsed by the Central Review Panel (CRP). On 12 August 2010, the CRP concluded that conflict of interest was not part of the pre-approved evaluation criteria, and that the reasons provided by the interview panel were insufficient to explain the rejection of all seven candidates. In revised reports released on 23 September 2010, the interview panel found five candidates, including Ms. Neault, qualified for the G-5 posts. The CRP endorsed the revised reports.

5. On 7 October 2010, the Acting Head of ICTY Chambers asked the Human Resources Section (HRS) to re-advertise the two G-5 posts because none of the five pre-selected candidates were suitable for the posts of Judges' Assistant.

6. On 11 October 2010, Ms. Neault was informed that she had not been selected, but that she was included on a roster for future job openings with similar functions at the G-5 level.

7. On 13 October 2010, Ms. Neault sought clarification regarding her non-selection for the posts. In response, the Chief of HRS, ICTY, advised her that it had been perceived that she may have had a conflict of interest in relation to the posts, due to her previous role in OTP.
8. On 29 November 2010, Ms. Neault sought management evaluation of the decision not to select her for the posts advertised in VA No. 012.
9. On 31 December 2010, Ms. Neault separated from service with the ICTY.
10. On 17 February 2011, she was advised by the Management Evaluation Unit (MEU) that the non-selection decision had been upheld.
11. On 6 May 2011, Ms. Neault filed an application with the UNDT challenging her non-selection for the posts advertised in VA No. 012.
12. Effective 22 June 2011, Ms. Neault was reemployed by the ICTY as a G-4 recruitment clerk on a temporary basis.
13. On 10 August 2012, UNDT Judgment No. UNDT/2012/123 was issued. The UNDT found, *inter alia*, that: Ms. Neault's application was receivable, *ratione temporis*, as it had been filed within 90 calendar days of the tardy MEU response; the selection process and resulting non-selection decision were flawed; Ms. Neault had not suffered compensable material damage; and Ms. Neault was entitled to moral damages in the amount of EUR 2,000. The Secretary-General appeals the rulings that the application was timely and receivable, but he does not appeal the merits or award of moral damages.

### **Submissions**

#### **The Secretary-General's Appeal**

14. The UNDT erred on a question of law and exceeded its competence by concluding that Ms. Neault's application was timely and receivable.
15. Ms. Neault's application was untimely under Staff Rule 11.4(a), which requires that it must be filed within 90 calendar days of the deadline for the completion of the management evaluation. In this case, the MEU's response was due by 13 January 2011, which meant that

under Staff Rule 11.4(a), Ms. Neault had until 13 April 2011 to file her application. The application was filed on 6 May 2011, which was three weeks late. Thus, it was not timely, and the UNDT's failure to apply Staff Rule 11.4(a) constituted an error of law.

16. Ms. Neault's application was also untimely under Article 8(1) of the UNDT Statute (Statute). When a MEU response is not timely made within 45 calendar days of a request for review, Article 8(1)(d)(i)b applies instead of Article 8(1)(d)(i)a. Or alternatively, the failure of the MEU response to be timely means that Article 8(1) must be deemed to be silent or ambiguous as to which subsection of that Article applies.

17. As a matter of policy, any approach other than requiring the filing date to run from the expiration of the period for management evaluation would lead to uncertainty for the parties. And a staff member awaiting a management response might wait too long and find herself or himself time-barred from an appeal.

18. Any ambiguity in the Statute "is ultimately resolved by the Staff Rules".

19. Since the language of Article 8(1) of the Statute is less specific than Staff Rule 11.4(a), the Staff Rule should apply.

20. The Appeals Tribunal's decisions in *Abu-Hawaila*<sup>1</sup> and *Vangelova*<sup>2</sup> are not "binding authority for the principle that a belated management evaluation response resets the time for filing an application with the UNDT".<sup>3</sup> Thus, it was an error of law for the UNDT to rely on these cases.

### **Ms. Neault's Answer**

21. The UNDT did not err on a question of law when it determined Ms. Neault's application was timely and receivable.

22. Article 8(1)(d)(i)b of the Statute is applicable only when "no response to the request [for management evaluation] was provided". Since the MEU did provide a response, albeit late, that provision does not apply. Rather, Article 8(1)(d)(i)a applies, and under that

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<sup>1</sup> *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118.

<sup>2</sup> *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172.

<sup>3</sup> Original italics omitted.

provision, Ms. Neault had 90 calendar days from the date of the MEU's response to file her application. She did file her application within that time; thus, it was timely and receivable.

23. There is no basis in law or fact to support the Secretary-General's argument that any ambiguity in the UNDT Statute is ultimately resolved by Staff Rules and that the UNDT's failure to apply Staff Rule 11.4(a) was an error of law.

24. The UNDT Judgments in *O'Hanlon*<sup>4</sup> and *Vangelova*<sup>5</sup> are highly persuasive and well-reasoned decisions, even if not binding precedent.

### **Considerations**

25. The sole issue before this Tribunal is whether the Dispute Tribunal correctly concluded that Ms. Neault's application was timely filed and receivable. This Tribunal determines that the UNDT's conclusions are correct.

26. Article 8 of the Statute sets forth the requirements for an application to be received by the Dispute Tribunal. Specifically, Article 8(1)(c) provides that an application "shall be receivable" if "[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required". And Article 8(1)(d)(i) requires that, "[i]n cases where a management evaluation of the contested decision is required", the application must be filed within the following deadlines:

- a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or
- b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was 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[.]

Similarly, Article 7 of the UNDT Rules of Procedure (Rules) provides that, where a management evaluation is required, the application shall be submitted to the UNDT within 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate, or 90 calendar days of the relevant deadline for the

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<sup>4</sup> *O'Hanlon v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/031.

<sup>5</sup> *Vangelova v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/179.

communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 days for disputes arising at other offices.

27. The facts underlying the pending appeal are simple and straightforward. Ms. Neault submitted her request for management evaluation on 29 November 2010. Management's response should have been made within 45 calendar days or no later than 13 January 2011. However, the MEU responded to her request on 17 February 2011, which was more than 45 calendar days from the date of her request. Ms. Neault filed her application with the UNDT on 6 May 2011, which is within 90 calendar days of the MEU's response but more than 90 calendar days from the date by which the MEU should have responded.

28. The Dispute Tribunal concluded that Ms. Neault had complied with Article 8(1) of the Statute and timely filed her application; thus, the application was receivable. In reaching this conclusion, the UNDT initially determined that subsection *b* of Article 8(1)(d)(i) was not applicable to Ms. Neault's situation because she *did* receive a response from the MEU, albeit an untimely response. Next, the UNDT determined that subsection *a* of Article 8(1)(d)(i) applied and, under that subsection, Ms. Neault had 90 calendar days from the date she received the response from the MEU to file her application for judicial review. Lastly, the UNDT determined that Ms. Neault had filed her application for judicial review within the time limit imposed by Article 8(1)(d)(i) *a*; thus, her application was timely and receivable.

29. The parties do not dispute that a management evaluation was required or that the MEU should have responded to Ms. Neault's request within 45 calendar days of the request. Rather, they disagree on when the limitations period began to run for Ms. Neault to file her application. On the one hand, the Secretary-General contends that, in light of the MEU response having been made beyond 45 calendar days of the request, the limitations period commenced to run on the date the MEU *should have* made its response, 13 January 2011. Since it was filed more than 90 calendar days from that date, the Secretary-General contends the application was untimely. On the other hand, Ms. Neault argues that the limitations period commenced to run on 17 February 2011, when she *did receive* the MEU response, and since the application was filed within 90 calendar days of that date, it is timely.

30. The Secretary-General makes several arguments to support his contention that the limitations period for filing the application commenced to run on the date the MEU should have responded to Ms. Neault's request for management evaluation. The main argument relies on Staff Rule 11.4(a), which provides:

A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation, or from the date of expiration of the deadline specified under staff rule 11.2(d), *whichever is earlier*. (Emphasis added.)<sup>6</sup>

31. There is a clear difference between the terms of Article 8(1)(d) of the Statute and Staff Rule 11.4(a). Staff Rule 11.4(a) contains the final clause "whichever is earlier". But that clause is missing from Article 8(1)(d) of the Statute. The Secretary-General relies on this final clause to support his argument that the limitations period for filing an application with the UNDT commences to run from the due date for the MEU response – because that date is earlier than the date the MEU issued its response. However, a basic tenet of administrative jurisprudence requires that "in the event of any ... contradiction between the UNDT Statute and the Staff Rules", the statutory provision must prevail.<sup>7</sup> The Secretary-General does not, and cannot, cite any authority to the contrary.

32. The Secretary-General also argues that when the MEU response is late (not within either 30 or 45 calendar days of the management evaluation request), first, subsection *a* of Article 8(1)(d)(i) of the Statute does not apply and subsection *b* applies instead; second, Article 8(1)(d)(i) becomes either silent or ambiguous regarding whether subsection *a* or *b* applies; and third, any statutory ambiguity must be resolved by the Staff Rules. None of these arguments has any merit. And all of them ignore the clear and unambiguous language of Article 8(1)(d)(i)*a*, which refers to "the response by management". It does not refer to the "timely" response by management or cross-refer to subsection *b*. The use of the word "or" between subsections *a* and *b* of Article 8(1)(d)(i) makes it quite clear that subsections *a* and *b* apply independently of each other.

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<sup>6</sup> Staff Rule 11.2(d) provides that the MEU should issue its response to the staff member within 45 calendar days of the request if the staff member is stationed outside of New York.

<sup>7</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293.

33. Lastly, the Secretary-General argues that, as a matter of policy, to alleviate any uncertainty on the part of staff members about the correct deadline for filing an application with the UNDT, this Tribunal should determine that the filing date should run from the expiration of the period for management evaluation; otherwise, a staff member awaiting a management response might find himself or herself time-barred from an appeal. This argument misunderstands the purpose of management evaluation, which “is to afford the Administration the opportunity to correct any errors in the administrative decision so that judicial review ... is not necessary”.<sup>8</sup>

34. With this goal in mind, it is both reasonable and practical for Article 8(1) of the Statute to provide for two different dates from which the limitations period commences to run. After all, the MEU response might partially or fully resolve the staff member’s concerns and give the staff member a reason to reconsider the filing of an application challenging the administrative decision. When the management evaluation is received after the deadline of 45 calendar days but *before* the expiration of 90 days for seeking judicial review, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT.<sup>9</sup> This affords the staff member an opportunity to fully consider the MEU response in deciding whether to proceed before the UNDT. Nevertheless, the staff member must be aware of the deadline for filing an application before the UNDT and make sure that he or she does not miss that deadline while waiting for the MEU response.

35. This Tribunal finds that the UNDT did not make any error of law in concluding that Ms. Neault timely brought her application and it was receivable. Thus, the Secretary-General’s appeal should be dismissed.

### **Judgment**

36. The Secretary-General’s appeal of Judgment No. UNDT/2012/123 is dismissed.

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<sup>8</sup> *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311.

<sup>9</sup> *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-331.



Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of June 2013 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Faherty

*(Signed)*

Judge Lussick

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

*(Signed)*

Weicheng Lin, Registrar