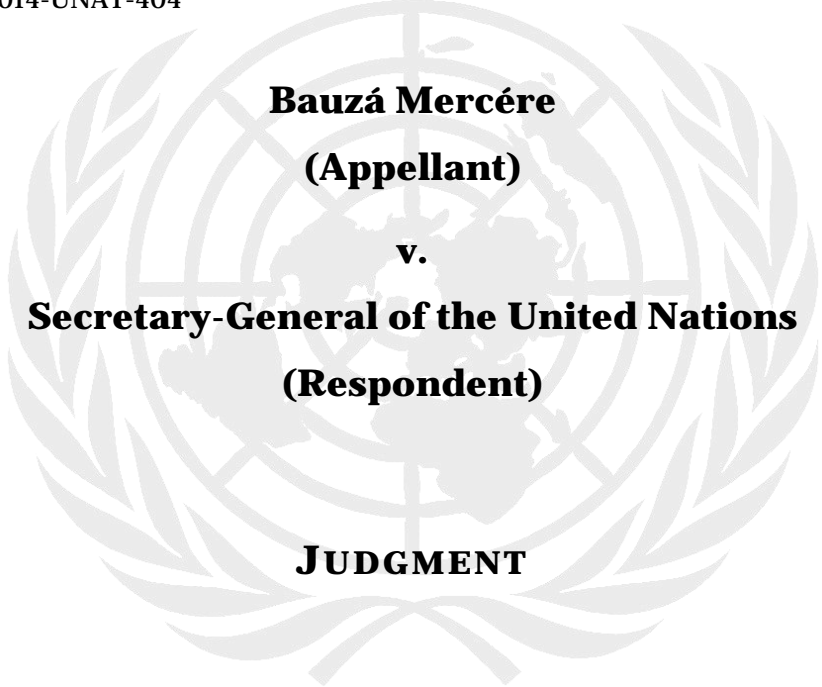




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-404



**Bauzá Mercére  
(Appellant)**  
**v.**  
**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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**Before:** Mary Faherty, Presiding  
Judge Inés Weinberg de Roca  
Judge Richard Lussick

**Case No.:** 2013-454

**Date:** 2 April 2014

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Self-represented

**Counsel for Respondent:** Stéphanie Cartier

**JUDGE MARY FAHERTY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Eduardo Bauzá Mercére against Judgment No. UNDT/2013/011, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 28 January 2013, in the case of *Bauzá Mercére v. Secretary-General of the United Nations*. Mr. Bauzá Mercére submitted his appeal on 26 March 2013, and the Secretary-General filed his answer on 28 May 2013.

**Facts and Procedure**

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties except as noted:<sup>1</sup>

... The Applicant, a former senior reviser, contests the implementation by the Department of General Assembly and Conference Management (DGACM) of the decision to replace a paper based recording system that kept track of staff members' time and attendance with an electronic one named 'Flex Time System'.

...

... Starting in September 2009, DGACM began holding town hall meetings and briefings with its different units to consult with staff members and explain the Flex Time System which they presented as an 'improved technological infrastructure'. [Mr. Bauzá Mercére disputes the nature of the town hall meetings and submits there was no section meeting in the Spanish Translation Service, as from his entry into service on 9 August 2009.]

... From October 2010 through December 2010, DGACM enabled over 700 staff members to test the system so that they could provide them with feedback regarding its functionalities.

... On 26 November 2010, the Chief, Spanish Translation Section, DGACM sent out an email to staff under his supervision wherein he explained that as of 1 January 2011, the Flex Time System would be the only system in effect for recording attendance and for approving leave requests; thus, the attendance sheet to be signed upon arriving at the workplace would be discontinued.

... On 4 January 2011, the Applicant reported to the workplace at which time he found that the usual attendance sheet had been discontinued. On the same day, by email to the Under-Secretary-General of DGACM, the Applicant requested proper directions or instructions on the use of the Flex Time System.

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<sup>1</sup> The following text is taken from Judgment No. UNDT/2013/011, paras. 1-16.

... On 5 January 2011, the Executive Officer, DGACM (in the absence of the Under-Secretary-General, DGACM), responded by email to a prior communication from the Applicant by stating in part:

You may not have been around for the numerous informational sessions (Town Halls, staff meetings, section-by-section meetings) we have had regarding the Flex Time System, nor does it seem you have spoken with any of the staff reps with whom we have also had numerous meetings. Please see the answer to your questions [contained in the 4 January 2011 email to the USG/DGACM] below in blue.

... On 6 January 2011, the Executive Officer, DGACM sent an email to all staff in DGACM titled 'Implementation of Flex Time System as of 1 January 2011', which contained the following information:

As you know, we have begun to use fully (in all areas, that is, where readers have been installed), the Flex Time System throughout DGACM as of 1 January. This will be the official time and attendance recording system for the Department. In the near future, there will be scanners at all DGACM offices and in the ... entrances. Until then, anyone not having access to a scanner will continue to use whatever system is in place.

Flex Time System and attendance will simply replace any existing time and attendance system in use. No working rules or conditions service have changed. On a daily basis, you are required simply to 'scan in' and 'scan out' when you arrive and leave the workplace. You have the option of logging in and out for lunch, but all staff will be charged one hour no matter what timing is logged, if used. At the end of the month, you will be able to certify your own time sheet, which will then be reviewed by the timekeeper, as happens now, and submitted to the Executive Office and to Payroll for processing.

Eventually, your certified data will be automatically uploaded into [the Integrated Management Information System] at the end of each month for the purpose of payroll processing, representing a huge savings for both timekeepers and for Executive Office staff, and will be an accurate, modern and timely way for the time and attendance function to be administered.

... On 10 January 2011, the Applicant filed both a request for management evaluation with the Management Evaluation Unit (MEU) and a suspension of action (SOA) with the Dispute Tribunal.

... On 17 January 2011, the Dispute Tribunal, in Order No. 12 (NY/2011), rejected the request for an SOA due to the Applicant's failure to meet the criteria of art. 2.2 of the Dispute Tribunal Statute. The Dispute Tribunal also held that due to its finding it did not need to answer the question of whether the contested decision was an administrative decision subject to appeal before the Dispute Tribunal.

... On 9 February 2011, the MEU informed the Applicant, whose contract expired on 11 February 2011, that his 'request did not identify a reviewable decision within the meaning of provisional Staff Rule 11.2(a)' and that his request for management evaluation was therefore not receivable.

... On 5 May 2011, the Applicant filed an application with the Dispute Tribunal contesting DGACM's decision to force him to 'improperly use the electronic "Flex Time" system for time and attendance recording'.

... On 6 June 2011, the Respondent filed his reply in which he raised the issue of the receivability of the Applicant's appeal.

...

... On 18 September 2012, the [UNDT] issued Order No. 193 (NY/2012), whereby it requested that the Applicant respond to the Respondent's submission on receivability, as well as whether the question of receivability could be dealt with on the papers.

... On 1 October 2012 and 9 October 2012, the parties filed submissions on receivability and agreed that the question of receivability could be disposed of on the papers.

3. In its "Judgment on Receivability", Judgment No. UNDT/2013/011, the Dispute Tribunal considered the Respondent's argument that the contested decision was of general application and, thus, not receivable, and reviewed the jurisprudence of the former United Nations Administrative Tribunal as well as the Appeals Tribunal in determining what constitutes an appealable decision. It concluded that the application was not receivable, *ratione materiae*, as the Appellant had "not provided the [UNDT] with any persuasive arguments that would result in it to consider that the implementation of the Flex Time System infringed on either his contract of employment or his terms of appointment".

4. The Dispute Tribunal determined that as Staff Rule 1.5(a) requires staff members to ensure "the adequacy and completeness of the information" they provide the Secretary-General for, *inter alia*, "the purpose of completing administrative arrangements in connection with their employment", this incorporates "the need to provide ... correct and complete information regarding the performance of their duties and ... the hours during

which such duties are performed”. The impugned system, by which data on staff members’ working hours was recorded electronically rather than via a paper-based system, did not introduce a requirement to provide new and irrelevant information to the Secretary-General and nor did it fundamentally change the Appellant’s working conditions.

5. Furthermore, the UNDT, citing its Judgment No. UNDT/2010/009, *Allen v. Secretary-General of the United Nations*, determined that any requirement regarding staff consultation was met as “each of the parties ... had the opportunity to make the other party aware of its views”. It also rejected the Appellant’s argument of discrimination, finding “[t]he fact that a practice may not be required by other departments does not render the implementation of such a system within DGACM discriminatory. Rather, the test is whether the implementation of this system discriminated between [him] and other similarly situated staff members within DGACM”. As the new system was being applied uniformly throughout DGACM, there was no discrimination or unfair treatment of the Appellant.

### **Mr. Bauzá Mercére’s Appeal**

6. Mr. Bauzá Mercére submits that the UNDT exceeded its jurisdiction and competence by entering into the merits of the case, rather than restricting its review to the issue of receivability.

7. He further submits that the Dispute Tribunal erred on a question of law in finding his application non-receivable, *ratione materiae*, as it considered not merely whether an administrative decision existed but also whether such decision was in compliance with the terms of his appointment or contract of employment.

8. Mr. Bauzá Mercére contends that the UNDT committed an error in procedure, which affected its decision, in venturing beyond the issue of receivability as he was denied the right to respond to the merits of the Respondent’s case or the right to a hearing.

9. Finally, he argues that the Dispute Tribunal erred on a question of fact, resulting in a manifestly unreasonable decision, with respect to its understanding of the existence and adequacy of staff consultations.

10. Mr. Bauzá Mercére asks that the UNDT Judgment be reversed, that his application be considered receivable and that the matter be remanded to the UNDT for consideration of the merits.

**The Secretary-General's Answer**

11. The Secretary-General submits that the UNDT was correct in concluding that no appealable administrative decision subject to review had been identified. Its conclusion, he explains, was in line with its Statute as well as the jurisprudence of the Appeals Tribunal and the former United Nations Administrative Tribunal. There was no administrative decision which adversely impacted the rights of the DGACM staff members.

12. Furthermore, he argues that the change in recording practice did not constitute a change in the benefits and entitlements of staff with substantial implications for their careers, welfare or working conditions, being “procedurally marginal” and, as such, ST/SGB/274, “Procedures and terms of reference of the staff management consultation machinery at the departmental or office level”, was not triggered by the impugned decision. In any event, however, the Secretary-General contends that there was adequate interaction with staff on the new system.

13. The Secretary-General avers that the UNDT was correct in concluding that the implementation of the new system was neither discriminatory nor unfair, as it was implemented uniformly within categories of staff members similar to the Appellant.

14. Finally, he submits that the Dispute Tribunal did not err in considering the merits of the case, given its wide margin of discretion in case management. Moreover, the Appellant did not seek leave to enter comments on the merits of the case after the Respondent filed his reply; nor was he statutorily entitled to a hearing.

15. The Secretary-General requests the Appeals Tribunal to affirm the UNDT Judgment and to dismiss the appeal in its entirety.

**Considerations**

16. Pursuant to Mr. Bauzá Mercére's grounds of appeal, the Appeals Tribunal must determine whether the Dispute Tribunal erred in law in finding his application non-receivable *ratione materiae* and whether it exceeded its competence by embarking upon a merits review of the case rather than confining such review to the issue of receivability.

17. Appropriately, the Dispute Tribunal embarked upon its consideration on the issue before it by outlining its statutory function which is, *inter alia*, to hear appeals against administrative decisions that are alleged to be in non-compliance with the terms of appointment or contract of employment of a staff member. Thus, at the heart of the Dispute Tribunal's jurisdiction is its statutory remit to judicially review *decisions* which affect the contractual entitlements of employees.

18. At paragraph 27 of its Judgment, the Dispute Tribunal correctly opined, "[w]hile it is not sufficient for an Applicant to merely establish that an administrative decision was taken, for him or her to have standing before the [UNDT], it is also not sufficient for the Respondent to state that the administrative decision was of general rather than individual application for it to not be receivable." The basis of this pronouncement can be found in the decision of the Appeals Tribunal in *Andati-Amwayi*, expressed as follows:

... What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

... In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.<sup>2</sup>

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<sup>2</sup> *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 17 *et seq.*

19. In the present case, the administrative measure under review is the 6 January 2011 e-mail sent by the Executive Officer of DGACM to all staff, entitled “Implementation of Flex Time System as of 1 January 2011”, quoted in full elsewhere in this Judgment.

20. In considering this document, the Dispute Tribunal conducted a comparative analysis of the old sign in system with the Flex Time System. At paragraph 38 of its Judgment, it stated as follows:

The Tribunal notes that the lack of the Applicant’s rights being affected by the Flex Time System is predicated on the fact that, as stated by the 6 January 2011 announcement, the current implementation of the system solely serves the goal of matching the prior usage of the paper system. Consequently, it does not result in any change to the ‘working rules or conditions’ of employment as defined by his terms of appointment or conditions of employment.

21. In his submissions in this appeal, Mr. Bauzá Mercére takes issue with the Dispute Tribunal’s approach and maintains that Article 2(1) of the UNDT Statute

establishes a double distinction:

- a) the appeal should refer to an administrative decision; and
- b) the administrative decision should refer to the non-compliance with the terms of appointment or the contract of appointment. The decision on receivability, thus, should refer exclusively to the first issue: that we are dealing with an administrative decision.

22. However, the Appeals Tribunal does not find Mr. Bauzá Mercére’s arguments in this regard to be well-founded and we are of the opinion that the distinction which he seeks to make is too finely drawn. The approach of the Dispute Tribunal in the instant case, when it conducted its comparative analysis of the previous sign in system with the Flex Time System, was no more than a mechanism to establish whether there were “consequences” for Mr. Bauzá Mercére of the nature contemplated by our jurisprudence in *Andati-Amwayi*. Having reviewed the comparative analysis undertaken by the Dispute Tribunal, we find no basis to upset its finding that Mr. Bauzá Mercére has not established the existence of a decision capable of giving the Dispute Tribunal jurisdiction to embark upon a consideration of his particular complaints. The UNDT correctly determined that the application was not receivable *ratione materiae*. Accordingly, Mr. Bauzá Mercére’s appeal on this ground is not upheld.



23. Mr. Bauzá Mercére also appeals on the ground that the UNDT embarked on a consideration of substantive issues such as staff consultations and discrimination arguments when it should have confined itself to the issue of receivability. We uphold his contention in this regard and declare that the Dispute Tribunal's pronouncements on those issues do not have the force of legal authority given that its function, pursuant to Order No. 193 (NY/2012), was to determine receivability.

### **Judgment**

24. The appeal with regard to receivability is dismissed. We declare that the UNDT's consideration of the staff consultations and discrimination arguments is without legal authority.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Lussick

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar