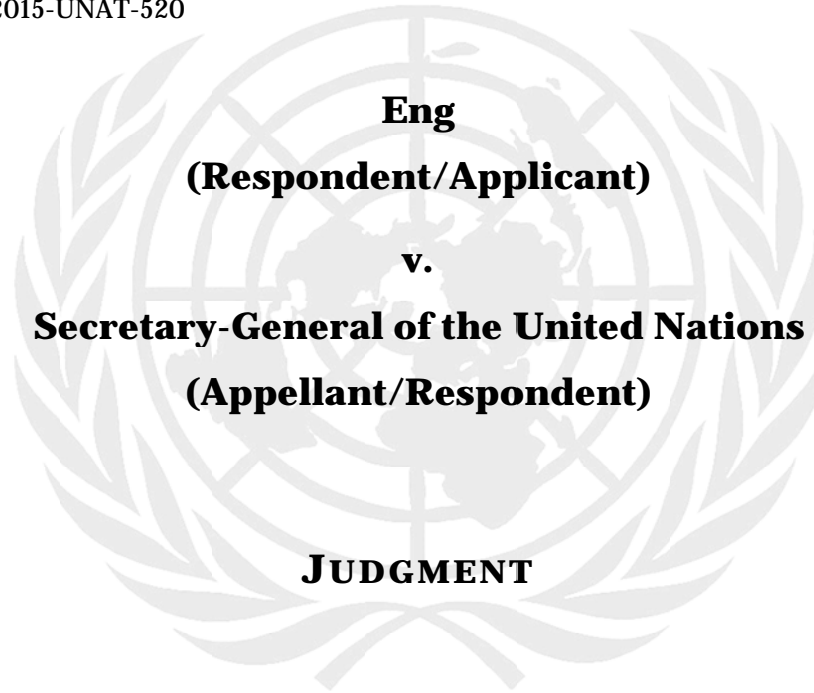




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-520



**Eng
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Richard Lussick Judge Sophia Adinyira
Case No:	2014-597
Date:	26 February 2015
Registrar:	Weicheng Lin

Counsel for Ms. Eng:	Alexandre Tavadian/OSLA
Counsel for Secretary-General:	Rupa Mitra

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal has before it an appeal of Judgment No. UNDT/2014/014, rendered by the United Nations Dispute Tribunal (UNDT and Dispute Tribunal) in Nairobi on 31 January 2014, in the case of *Eng v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 4 April 2014, and Ms. Bibi Eng filed her answer on 28 May 2014.

Facts and Procedure

2. The following factual findings made by the Dispute Tribunal are not contested by the parties:¹

... [Ms. Eng] is currently a Senior Legal Officer at the United Nations Environment Programme (UNEP), in Nairobi, Kenya, at the P-5 level. [...]

...

... On 13 May 2009, [she] applied on the *Galaxy* tool against a vacancy announcement for the post of “Senior Legal Officer (P-5), multiple duty stations” [generic SLO (P-5) position].

... On 18 May 2010, [Ms. Eng] was informed that she had been short-listed for the [location-specific] position of Legal Officer at the P-5 level in the [United Nations Mission in the Central African Republic and Chad (MINURCAT)]. She was interviewed for the position on 7 June 2010. She was not successful.

... On or about 20 June 2010, the Field Personnel Division, Department of Field Support (FPD/DFS) conducted Expert Panel interviews for the [generic SLO (P-5) position]. [Ms. Eng] was not interviewed.

... On 3 September 2010, the Special Representative of the Secretary-General for the United Nations Integrated Mission in Timor-Leste (“SRSG/UNMIT”) sent an email to [Ms. Eng] in which she stated that she had received an updated list of rostered candidates and that [Ms. Eng’s] name was not on it. [Ms. Eng] responded to the email on 7 September 2010 and informed the SRSG/UNMIT that she had contacted FPD to inquire about her status.

...

¹ Impugned Judgment, paras. 1 and 4-7.

3. On 27 September 2010, Ms. Eng filed a request for management evaluation asserting that her “right to full and fair consideration for lateral movement and/or promotion as a Legal Officer in peacekeeping” had been violated, and referred to an “attached statement for more detail”. The attached four-page statement set forth a chronological account of events commencing on 13 May 2009, and continuing through the date of the request.

4. On 11 November 2010, the Management Evaluation Unit (MEU) began discussions and an exchange of e-mails with Ms. Eng in an attempt to resolve her complaint that the Expert Panel had unlawfully failed to interview her in June 2010 for the generic SLO (P-5) position.²

5. On 2 December 2010, the MEU confirmed with Ms. Eng her “agreement to be subject to an evaluation by an ad hoc interview panel to be established by DFS, for the purpose of determining whether [she] should be rostered as a P-5 candidate”. The MEU also advised Ms. Eng that it “will continue to hold [her] case in abeyance pending the conduct of the interview”.

6. On 27 January 2011, Ms. Eng requested that the “MEU proceed to provide a written response on the outcome of the management evaluation” since she had not yet heard “from FPD on an interview” and it was now the end of January 2011. She asked the MEU to consider her requests for compensation, and other entitlements, “from the time [she] could have begun working as Senior Legal Officer at UNMIT”.

7. On 21 February 2011, Ms. Eng wrote the MEU, stating: “I do believe that MEU’s deadline of 45 days has passed, liberally taking into account the ‘informal’ resolution period of December-January. [¶] Unless I hear from MEU by Friday COB, I will proceed with my appeal to the [Dispute] Tribunal.” On 27 February 2011, Ms. Eng repeated her request to the MEU for a written response, citing Staff Rule 11.2(d) and again noting that “[t]he forty-five calendar days have expired” for the MEU to respond.

8. On 30 March 2011, an ad hoc Expert Panel interviewed Ms. Eng for the generic SLO (P-5) position. As a result, Ms. Eng was placed on the roster for SLO positions at the P-5 level. On 20 May 2011, she was notified that she had been selected for the post of Senior Legal Officer (P-5) with UNEP.

² As of that date, Ms. Eng’s request for management evaluation had been pending for 45 days.

9. On 6 June 2011, Ms. Eng filed an application before the UNDT contesting “a series of actions resulting in the absence of full and fair consideration of [her] candidacy for the peacekeeping roster”. The Secretary-General filed his reply on 5 July 2011, contending that the application was not receivable *ratione materiae*, *ratione temporis* and was moot. Ms. Eng filed a “streamlined” application on 15 December 2011, and on 29 December 2011, the Secretary-General filed a reply to that application, in which he continued to contend that the application was not receivable.

10. On 31 January 2014, the UNDT issued Judgment No. UNDT/2014/014. As a preliminary matter, the UNDT found Ms. Eng’s application was timely and receivable. The UNDT found that Ms. Eng was not given full and fair consideration for placement on the Field Central Review Body (FCRB) roster in June 2010 since the Expert Panel failed to conduct interviews of those candidates who were also being considered for the MINURCAT vacancy, as it should have. The UNDT also found that Ms. Eng’s interview on 7 June 2010 for the location-specific Senior Legal Officer (P-5) post in MINURCAT was marred by several deficiencies. Finally, the UNDT concluded that the ad hoc Expert Panel’s interview of Ms. Eng on 30 March 2011 was “characterized by several shortcomings” or procedural errors, which entitled her to an award of compensation. The UNDT awarded Ms. Eng two months’ net base salary for “procedural errors” and USD 1,000 as moral damages for the “stress caused to [her] by the circumstances of this case”.

Submissions

The Secretary-General’s Appeal

11. The UNDT erred in law, and exceeded its competence or jurisdiction, in receiving the application. Ms. Eng’s request for management evaluation challenged only the failure of FPD to interview her for the generic SLO (P-5) position. As a result of her request for management evaluation, she was interviewed for that position and placed on the FCRB roster. Once the Administration revises a contested decision, the only remaining issue for review is what adverse consequences, if any, continued to be suffered by the staff member. In this case, the UNDT correctly determined that Ms. Eng suffered no adverse consequences; thus, her application was moot.

12. The UNDT erred in law, and exceeded its competence or jurisdiction, when it awarded compensation for alleged irregularities in connection with the ad hoc Expert Panel interview of 30 March 2011. As Ms. Eng had never contested before the MEU the manner in which the ad hoc interview was conducted, the issue was not properly before the Dispute Tribunal.

13. The UNDT also erred in law, and exceeded its competence or jurisdiction, when it awarded moral damages for stress without any evidence to support the award. Moreover, since the UNDT found there was no harm to Ms. Eng as a result of the Expert Panel's failure to interview her in June 2010 for the generic SLO (P-5) position, and the subsequent 30 March 2011 interview had not been the subject of a management evaluation request, the UNDT could not award moral damages to Ms. Eng.

14. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Ms. Eng's Answer

15. There is no merit to the Secretary-General's claim that Ms. Eng's application should not have been received. Her request for management evaluation challenged two distinct administrative decisions: (1) the failure to interview her in June 2010 for the generic SLO (P-5) position; and (2) the failure to give her application full and fair consideration for the location-specific vacancy of Senior Legal Officer (P-5) in MINURCAT. Ms. Eng's claim that she was not given full and fair consideration for the location-specific vacancy in MINURCAT was not affected by the ad hoc Expert Panel's interview of her for the generic SLO (P-5) position. Thus, the application was not moot.

16. Ms. Eng's application raised a claim for compensation stemming from the ten-month period (June 2010 until 30 March 2011) during which she was not on the roster and "may have lost numerous opportunities of being selected for P-5 Senior Legal Officer from the roster". Moreover, due to shortcomings in the 30 March 2011 ad hoc Expert Panel interview, she was not placed in the position she would have been in had she been interviewed by the Expert Panel in June 2010. Ms. Eng's circumstances are different than the staff members' circumstances in the cases cited by the Secretary-General.

17. The UNDT properly considered the nature of the ad hoc Expert Panel interview on 30 March 2011, to determine whether it was an adequate remedy for the failure to interview Ms. Eng in June 2010.

18. The UNDT properly awarded compensatory damages to Ms. Eng based on the failure to give her full and fair consideration for the location-specific MINURCAT vacancy. If the Appeals Tribunal determines that the UNDT did not give sufficiently detailed reasons to award compensatory damages, it should remand the matter to the UNDT. An award of moral damages may be based on a fundamental breach of a staff member's rights. The Appeals Tribunal may infer that the UNDT found a fundamental breach of Ms. Eng's rights as the basis for its award of moral damages, based on the findings in paragraph 74 of the Judgment.

19. Ms. Eng requests that the appeal be dismissed.

Considerations

20. Article 8(1) of the UNDT Statute provides, in relevant part:

An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

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[.]

...

(iii) The deadlines provided for in subparagraphs (d)(i) and (ii) of the present paragraph shall be extended to one year if the application is filed by any person making claims in the name of an incapacitated or deceased staff member ...;

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the

mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

Article 7 of the UNDT Rules of Procedure (Rules) reiterates the deadlines for filing an application.

21. Relying on Article 8(1) of the UNDT Statute, the Secretary-General argued before the Dispute Tribunal that Ms. Eng's application was not timely, having been filed more than eight months after the date she requested management evaluation, and was not receivable *ratione temporis*. The Secretary-General argued that under Article 8(1) of the UNDT Statute, Ms. Eng was required to file her application within 90 days from the date the MEU was supposed to respond to her, i.e., 45 days from the date of her request, which was 27 September 2010; thus, the last date for her to file a timely application with the UNDT was 19 February 2011.³ Moreover, the Secretary-General contended that the informal discussions between Ms. Eng and the MEU did not suspend the time for her to file an application because only a formal referral of negotiations to the Ombudsman/Mediation Division could accomplish that. Finally, the Secretary-General called the UNDT's attention to a similar case considered by both Tribunals: *Abu-Hawaila v. Secretary General*, Judgment No. 2011-UNAT-118, affirming Judgment No. UNDT/2010/102, wherein the staff member's application was found to be untimely and not receivable in circumstances similar to those of Ms. Eng's.

22. The UNDT found the application was timely, however, stating:

... [T]he Tribunal concludes that [...] a Legal Officer in MEU had the requisite delegated authority to make an exception to the Staff Rules [Staff Rules 11.2(c) and 12.3(b)] in suspending the time limits for the Applicant to request for management evaluation as he did in the present case. The Applicant's case was therefore held in abeyance until 30 March 2011. [...] The Applicant, as a result, had until 30 June 2011 to file her Application which she did on 6 June 2011. Having suspended the time limit for the Applicant's management evaluation request, the [Secretary-General] is estopped from arguing that the claim is now not receivable.

... The Tribunal finds and holds that this Application is receivable.⁴

³ This is a typographical error since the correct date is 9 February 2011.

⁴ Impugned Judgment, paras. 64 and 65.

This is an erroneous legal conclusion for many reasons, as discussed below. Our jurisprudence mandates that both Tribunals must strictly adhere to statutory filing deadlines as one of the ways to assure the timely hearing of staff members' cases and the prompt rendering of judgments.⁵ Under the old system of administrative review, it was generally recognized that the tribunals were "perhaps too generous in extending or waiving time".⁶

23. Article 8(1) of the Dispute Tribunal Statute governs the deadlines by which applications must be filed. Yet, the Dispute Tribunal did not discuss Article 8(1). Instead, it erroneously concluded that the MEU could extend the deadline for filing an application by holding a case before it in abeyance. There is no legal authority for that proposition in Article 8(1) or any other provision of the Dispute Tribunal Statute. Nevertheless, Article 8(1)(d)(iv) of the Dispute Tribunal Statute does allow for the tolling of the limitations period when the Mediation Division of the Ombudsman's Office is involved in settlement or mediation discussions. That provision was not applicable to Ms. Eng, however; she has never claimed involvement of the Ombudsman. If the General Assembly had intended settlement efforts by the MEU to toll the deadline for filing an application for judicial review, the UNDT Statute would clearly provide for that; it does not.⁷

24. Nor is there any authority for the proposition that the UNDT has the inherent power to suspend or waive the statutory time limits for filing an application.⁸ The only authority the Dispute Tribunal has to suspend or waive the filing time limits is set forth in Article 8(3) of the UNDT Statute, which requires a prior "written request by the applicant". Ms. Eng did not make a written request to the UNDT to suspend or waive the filing deadline for her application; thus, Article 8(3) did not apply.⁹ Under Article 8(1) of the UNDT Statute, Ms. Eng was required to file her application before the UNDT within 90 days of the 45 day-period in which the MEU is required to respond to her request for management evaluation. As Ms. Eng's request for management evaluation was made on 27 September 2010, and the MEU did not respond in writing to her request, Ms. Eng needed

⁵ *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, para. 26, quoting *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

⁶ *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, para. 26, quoting *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-043, para. 21.

⁷ *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, para. 29.

⁸ *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, para. 29.

⁹ *Ibid.*, para. 30 and *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, para. 28.

to file her application no later than 9 February 2011. She did not. The application was not filed until 6 June 2011; thus, it was untimely.

25. Moreover, the e-mail correspondence between Ms. Eng and the MEU shows that Ms. Eng was well-aware that the MEU had not responded in writing to her request for management evaluation within 45 days and that the deadline for her to file an application before the Dispute Tribunal was rapidly passing. Nothing prevented Ms. Eng from filing an application within the statutory time.¹⁰ When Ms. Eng chose to proceed with the MEU's resolution of her grievance,¹¹ she did so with the full understanding that any application she later filed for judicial review would be untimely.

26. For the foregoing reasons, Ms. Eng's application was not timely and not receivable *ratione temporis*. Thus, the UNDT exceeded its competence or jurisdiction in receiving the application and addressing its merits. The Judgment should be vacated.

Judgment

27. The appeal of the Secretary-General is granted, and Judgment No. UNDT/2014/014 is vacated.

¹⁰ *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, para. 28.

¹¹ The MEU's resolution of her grievance resulted in Ms. Eng having a successful interview for the generic SLO (P-5) position and being placed on the FCRB roster.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar