UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-568

Leboeuf et al.

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Richard Lussick Judge Luis María Simón
Case No.:	2014-608
Date:	4 September 2015
Registrar:	Weicheng Lin

Counsel for Leboeuf et al.:	François Loriot
Counsel for Secretary-General:	Stéphanie Cartier

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/033, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 21 March 2014, in the matter of *Leboeuf et al. v. Secretary-General of the United Nations*.[1] The staff members, Leboeuf et al., filed their appeal on 20 May 2014, and the Secretary-General filed his answer on 28 July 2014.

Facts and Procedure

2. The Appellants are staff members at the General Service level in the Text Processing Units (TPUs) of the Department for General Assembly and Conference Management (DGACM or Department). They contest the Department's alleged change to the interpretation and application of the Organization's rules on compensation for overtime work which they claim the Department announced in December 2004, thereby unilaterally changing a decades-long practice. As a result of the change, where a staff member is authorized to be absent from work on the basis of annual leave, sick leave, or compensatory time off (CTO), the period of such authorized absence would no longer be included in calculating the requisite "eight hours of work" required per day before a staff member is entitled to payment of overtime.

3. The salient facts related to the current matter are set out hereunder.

4. On 15 December 2004, Ms. Tolani, then Executive Officer, DGACM, sent an e-mail to DGACM staff representatives, senior management, and Chiefs of Units in DGACM, setting out advice received from the Policy Support Unit of the Office of Human Resources Management (OHRM) on 30 November 2004 on the issue of payment of overtime during the work-week. With respect to what constituted an eight-hour day for the purposes of commencing calculation of overtime, staff were notified:

> [A] staff member would be entitled to payment of overtime *for the period in excess of eight hours of work* pursuant to paragraph (iv) [of Appendix B to the Staff Rules (Appendix B)]. ... [If a staff member takes a half-day off as annual leave, sick leave or CTO,] [t]he half-day off would count towards the regular 8-hour (or 8½ [-]hour) work day.

[1] The present group of Appellants comprises only 35 of the 60 members who filed the initial application before the Dispute Tribunal in August 2009 in Case No. UNDT/NY/2009/103. See Order No. 182 (NY/2012) and *Leboeuf et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-354 (on interpretation).

> [...] [A]ny work performed after the half-day of actual work would then be subject to CTO for the first eight hours and then overtime pursuant to paragraph (vi) of Appendix B.[2]

5. On 30 December 2004, the then Coordinator, DGACM Staff Representatives' Group replied to Ms. Tolani, copying the DGACM staff representatives, senior management, and Chiefs of Units in DGACM, conveying the general dissatisfaction of staff representatives with what was generally perceived as a change to the Department's prior practice. The Coordinator requested that DGACM refrain from implementing the policy as of 1 January 2005 in order to allow staff representatives time to consider the policy change and express their views at the upcoming session of the Staff-Management Committee in January 2005.

6. On 30 December 2004, Ms. Tolani replied to the then Coordinator, copying the Chiefs of Units in DGACM, and indicated that her e-mail of 15 December 2004 did not introduce any new policy, but rather reiterated the application of the content of Appendix B. While acknowledging that the provisions of Appendix B may not have been consistently applied in the past, she assured that it would, however, be applied effective 1 January 2005.

7. In January 2005, the Staff Council followed up the issue with a document entitled "Administration of Leave Policy in the Secretariat", and the issue was discussed at the meeting of the Joint Advisory Committee (JAC) on 28 January 2005, which was attended by DGACM staff representatives, and on 2 February 2005 at a meeting of the Staff-Management Committee, which was attended by eight representatives of management (including the Under-Secretary-General, DGACM) and eleven staff representatives of DGACM. The February 2005 meeting concluded, inter alia, that the policy in place effective 1 January 2005 would continue to be implemented, but that management would look into the issue further.

8. On 21 March 2005, one of the senior officers in OHRM informed the DGACM Executive Office that, following further review, the practice concerning compensation for work on weekends and payment of CTO in excess of 40 hours would revert to the pre-January 2005 situation, but that the issue of payment of overtime during the work-week would continue as stated, inter alia, in the e-mail of 15 December 2004. On 29 March 2005, Ms. Tolani notified the DGACM staff representatives, senior management, and Chiefs of Units in DGACM of the same.

[2] Emphasis added.

9. On 7 April 2005, in response to a letter from the Staff Union President concerning DGACM's "troubling" interpretation of the relevant provisions of Appendix B on the issue of payment of overtime on weekdays, OHRM advised that it had "no basis to request DGACM to change its position" as the position was "fully consistent with the wording of Appendix B".

10. On 11 and 18 April 2005, OHRM held meetings with the Executive Offices of several Departments and Offices of the Secretariat to review how they applied the provisions on payment of overtime. According to the meeting minutes: "The views expressed confirmed that it is *the general practice to require 8 hours of actual work in a day before overtime is paid*."[3]

11. Over the course of 2006, various aspects of overtime compensation were among the issues raised and discussed at the Staff-Management Committee meetings.

12. According to the Appellants, in late 2005 and early 2006, the Administration worked on a "Draft Administrative Instruction on Overtime and Compensatory Time in New York" to take into account the staff position, although no instruction was ever issued.

13. On 16 January 2009, 60 staff members working in the TPUs, represented by Counsel, wrote to the Secretary-General and the Under-Secretary-General, DGACM, requesting a review of the Department's "new practices on overtime and compensatory time", as introduced by the Administration in January 2005. They submitted that the 2005 decision was never discussed, promulgated and published in accordance with internal United Nations legislation and requested reimbursement of unpaid overtime and compensatory time for the preceding 12 months.

14. On 25 March 2009, the Chief of the Human Resources Policy Service, OHRM, replied to the group of staff members stating, inter alia, that the rules, as clarified and applied since November 2004, were correct, namely that a staff member "must have actually worked eight hours before becoming eligible for payment of overtime".

15. On 21 May 2009, the group filed a request for an extension of time to file an appeal with the former Joint Appeals Board in New York. With the abolition of the Joint Appeals Board effective 30 June 2009, on 7 August 2009, the Dispute Tribunal granted the group an extension of time to file their application.[4]

[3] Impugned Judgment, para. 69 (original emphasis).
[4] UNDT Order No. 60 (NY/2009).

16. On 20 August 2009, the group filed an application with the Dispute Tribunal contesting the December 2005 decision to "abrogat[e the] pre-2005 UN policy which allowed computation of overtime [...] regardless of a staff having previously been on compensatory time [...], sick leave [...], or annual leave [...]". [5]

17. On 22 September 2009, the Assistant Secretary-General (ASG) for OHRM issued an interoffice memorandum on the issue of overtime payment addressed to "All Departments and Offices in Headquarters". The memorandum stated: "[W]ith respect to overtime payment, the staff member must have *actually worked* eight hours before becoming eligible for such payments".[6]

18. On 30 November 2010, the Dispute Tribunal rendered Judgment No. UNDT/2010/206. The UNDT found that the application was time-barred with respect to its challenge to the alleged change of policy in December 2004, as the request for administrative review had not been timely filed. However, it found the case was receivable with respect to the calculation and application of compensatory time and overtime payments made to individual staff members, but only concerning those payments made after 19 November 2008, being the two months that preceded the date of the request for administrative review. In this respect, it held that the Administration's interpretation and application of Appendix B in place at DGACM since December 2004 was correct, and that compensatory time and overtime payments had been properly applied. The UNDT dismissed the application.

19. On appeal, in its judgment issued on 21 October 2011, the Appeals Tribunal found that the case raised a number of additional questions that the Dispute Tribunal might find relevant, and remanded the matter "for further proceedings" before the same Dispute Tribunal.[7] In particular, the Appeals Tribunal directed the Dispute Tribunal to consider whether it was appropriate for the Staff Rules to be interpreted differently within departments in New York, as well as in different duty stations; and whether the policy applied post-December 2014 was "the interpretation of language that no longer exist[ed]". Judge Courtial appended a concurring opinion stating that the Dispute Tribunal should examine whether there was a change in the application of Appendix B in DGACM as of 1 January 2005; and in the affirmative, whether consultation with staff was required before the change and whether the staff members could

[5] Impugned Judgment, para. 9.
[6] *Ibid.*, para. 78, quoting the memorandum of 22 September 2009 (emphasis added).
[7] *Leboeuf et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-185.

advance "the provisions for the protection of legitimate expectation [....] against the Administration", i.e. whether "the former Staff Rules were really applied in a continuous, uniform and general manner during an extended period of time".[8]

20. Following the remand, on 21 and 22 November 2013, the Dispute Tribunal held oral hearings at which it heard seven witnesses.

21. On 21 March 2014, the UNDT issued the Judgment under appeal and concluded:

a) that there was a change in the application of Appendix B in DGACM as of 1 January 2005 insofar as DGACM thereafter discounted annual leave, sick leave, and CTO in calculating *actual* work time completed, i.e., hours of work, before staff were entitled to payment of overtime;

b) nonetheless, that the Appellants' challenge to the change introduced in December 2004, with effect from January 2005, was time-barred and not receivable;

c) in any event, that in the period from 1 January 2005 to January 2009, the Appellants acquiesced to the change in practice, such that by the time they formally contested the change in January 2009 they could no longer be said to have a legitimate expectation to the practice's continuance;

d) that such change was based on a valid policy and legal rationale, namely to bring the inconsistent application within DGACM in line with the terms of Appendix B and with the practices of other departments;

e) that although it would have been preferable for staff to have been consulted *prior* to 1 January 2005 when the change was implemented, the discussions between management and staff from January to March 2005 partly remedied this failure;

f) that even if consultations would have taken place prior to 1 January 2005, it was doubtful that the outcome would have been any different given the Administration had a valid policy and legal rationale for harmonising the inconsistent application within DGACM with the terms of Appendix B and the practices of other departments;

[8] *Ibid.*, Concurring Opinion of Judge Jean Courtial, para. 7.

g) that the challenge concerning the application of the policy on overtime in the period immediately preceding the request for administrative review of 16 January 2009, was receivable; and

h) with respect to the latter, that the Administration's interpretation and application of the relevant provisions of Appendix B was lawful.

22. The UNDT dismissed the application and declined to order costs.

23. The staff members, Leboeuf et al., filed their appeal on 20 May 2014, and the Secretary-General filed his answer on 28 July 2014.

24. By Order No. 219 (2015) dated 20 May 2015, the Appeals Tribunal granted Leboeuf et al.'s request for an oral hearing. The oral hearing was held in Geneva on 25 June 2015, with the counsel for the Appellants attending in person and the Representative of the Secretary-General participating via video-conference.

25. On 16 June 2015, Leboeuf et al. filed a "Motion for Contempt and to Strike para[s]. 26-27 of the Respondent's Answer". The Secretary-General filed his observations on the motion on 22 June 2015.

Submissions

Leboeuf et al.'s Appeal

26. The Appellants submit that the UNDT did not properly address the directions and legal issues that the Appeals Tribunal raised in Judgment No. 2011-UNAT-185 when it remanded the matter.

27. The UNDT erred in law insofar as it recognized the existence of a decades-long practice in DGACM concerning the manner in which overtime was paid, yet: (a) failed to address the issue of the Administration's legal obligation to conduct prior consultation, and follow proper promulgation procedures before unilaterally amending the DGACM practice in September 2005; and (b) failed to draw the appropriate conclusions concerning the consequences on the Appellants' salary for payment of their entitlements for the 12 months preceding their request for administrative review, based on former Staff Rule 103.15.

28. The UNDT erred in finding the pay practice unlawful as international jurisprudence has held that the Administration's acquiescence into an administrative practice may create legal rights for staff members. Moreover, the practice was long-standing and repeatedly confirmed by the Administration's own Payroll Unit and DGACM timekeepers. As such, there was no basis to consider the practice was unlawful.

29. The UNDT also erred in fact when it found that "rules on overtime have been interpreted consistently" throughout departments of the Secretariat given evidence from the October 2006 meeting of the Staff-Management Committee showed at least two other United Nations departments practiced the same overtime rules as DGACM.

30. The UNDT erred and "pushed the limits of legality and of the [...] rule of law" when it concluded that the Administration's failure to hold proper consultations prior to implementation of the change would in any event likely not have yielded a different outcome on the issue. Discounting the value of such Staff-Management consultations insults the importance and value of the ongoing statutory Staff-Management consultation processes. The UNDT's views in this regard should be regarded as *obiter dictum*. Furthermore, post facto discussions are not a substitute to validate a decision that has already been taken. Lastly, the conclusion was presumptuous and speculative.

31. The UNDT Judgment is silent as to the deliberations of the JAC on 13 September 2005 that resulted in partial agreement on the contested issue recognising the long-standing rule practiced in DGACM. In particular, the meeting minutes show that OHRM agreed, inter alia, that: "[I]f a staff member takes CTO, which represents work already done, the CTO would be considered as credit for actual work on that particular day. A draft administrative instruction will be prepared to clarify a number of points. [...]." The Administration subsequently prepared a draft administrative instruction incorporating the foregoing and presented the proposal to staff on 30 November 2005. The proposed administrative instruction was subsequently discussed at JAC and Staff-Management consultation meetings in 2006 and 2007, and constituted a commitment by the Administration. The UNDT Judgment fails to refer to this evidence.

32. As concerns the receivability finding, the UNDT erred by considering that time ran as of 15 December 2004 when a policy e-mail was sent by a "junior OHRM staff" notifying staff how the policy would be applied, rather than from the date when OHRM notified staff that it was withdrawing the draft administrative instruction it had proposed on 30 November 2005. The

Administration only formally repealed or "clarified" the DGACM practice on 22 September 2009 when the ASG of OHRM issued an interoffice memorandum on the issue. Alternatively, the time limit for the Appellants to submit their request for administrative review began to run upon receipt of any of their salary payslips that reflected the computation of contentious overtime payments and compensatory time. Moreover, the UNDT's finding that time ran as of 15 December 2004 contradicts its prior finding that the same e-mail was only a "general policy announcement", and not an individual administrative decision. Lastly, the UNDT should have informed the parties from the outset that it did not consider the case receivable, rather than proceeding with a three-day hearing entailing significant trial preparation, especially as the issue of receivability was never raised by the judge and parties before or during the 2013 hearing.

33. The UNDT failed to address the issue of discrimination against the Appellants. While staff members outside DGACM could take morning sick-leave and are not compelled to work at night, the Appellants are compelled to work four hours in the evening before they can get paid their eight-hour day and start getting overtime. Moreover, most of the Appellants are female staff with family obligations and their job security depends on their willingness to obey their supervisors' orders to work overtime and nightshifts. They are therefore "more vulnerable to such abuses".

34. The UNDT also failed to consider and apply United Nations international covenants, and resolutions of the General Assembly and the Economic and Social Council concerning the conditions of work and overtime to make up an eight-hour day. The Appellants ask that the Appeals Tribunal affirm the UNDT's findings that the Administration imposed on the Appellants adverse work conditions contrary to international labour covenants.

35. The Appellants otherwise submit that several mistakes of fact or inaccuracies mar the UNDT Judgment and should be rectified.

36. The Appellants request that the Appeals Tribunal award them:

a) retroactive payment of their salary and overtime entitlements for the 12 months preceding their 16 January 2009 request for administrative review;

b) compensation of USD 10,000 each for the Administration's violation of their contractual and due process rights; and

c) legal costs in the amount of USD 20,000 for the Administration's abuse of procedures, for concealing that at least two other United Nations departments have salary practices similar to those of DGACM, and for denying that it had constantly violated international labour standards on overtime, on nightshifts and on employment of female staff members at night.

The Secretary-General's Answer

37. The UNDT correctly concluded that the Appellants' claims regarding the December 2004 communication were time-barred given they did not request administrative review until January 2009. The UNDT also correctly concluded that the Appellants' application was time-barred on the basis of Article 8(4) of the UNDT Statute, which precludes jurisdiction over an application filed more than three years after an applicant is notified of a contested administrative decision.

38. The UNDT was also correct to reject the argument that time for requesting management evaluation ran from when the Administration notified that it was withdrawing its alleged support to the staff members' proposition, since the Appeals Tribunal has consistently held that the UNDT has "no jurisdiction to waive deadlines for management evaluation or administrative review". It was also open to the UNDT to review its own competence or jurisdiction and find that the challenge to the December 2004 change in policy was not receivable.

39. On the substance, the UNDT correctly concluded that the Administration's interpretation and application of paragraphs (iv) and (vi) of Appendix B, requiring that a staff member must have actually worked more than eight hours a day, *not* including time off, were correct and lawful. The UNDT's conclusion is consistent with the plain meaning of the phrase "total of eight hours of work" in paragraph (vi) of Appendix B, and there is no legal error in finding that authorized absences from work cannot reasonably be construed as "work".

40. The UNDT correctly examined whether a number of additional factors might have undermined the legitimacy and application of Appendix B, namely: (i) whether the Administration failed to consult with staff on the change in the interpretation of Appendix B; (ii) whether the Appellants had a legitimate expectation of the continuation of the previous interpretation; and (iii) whether there was inconsistency throughout the Secretariat as to the interpretation and application of Appendix B. The UNDT considered the evidence with regard to

each of these factors, but concluded that none of these factors undermined the lawfulness of the Administration's interpretation and application of Appendix B.

41. In particular, as concerns consultations and the Appellants' submission that OHRM conceded and recognised in a statement at a Staff Council meeting in September 2005 the long-standing practice of DGACM, Appendix B was not amended as a result of that statement, and that statement alone clearly could not take precedence over properly promulgated Staff Rules, including Appendix B. Further, insofar as the Appellants claim that the Administration "proposed" a draft administrative instruction that reflected DGACM's overtime practice, the cover page of the draft administrative instruction shows it was actually circulated by the Staff Council as a "Working Paper" and that it had been "prepared in light of discussions held earlier [that] year with representatives from executive offices at Headquarters, and with staff representatives at the Joint Advisory Committee".

42. In relation to the Appellants' alleged legitimate expectation of the continuation of the previous interpretation of Appendix B, the UNDT correctly determined that what was relevant was the Appellants' expectation as of January 2009, and not at 1 January 2005. In any event, notwithstanding the long-standing nature of DGACM's practice, the Appeals Tribunal jurisprudence does not support the Appellant's contention that the Organization is precluded from correcting a mistake regarding the interpretation or application of a legal provision applied over a prolonged period of time. The fact that the Administration did not seek recovery of overpayments for overtime made prior to January 2005 does not mean that it accepted the lawfulness of that practice.

43. As to the Appellants' argument that two other departments implemented overtime payments in the same manner as DGACM, the UNDT did not find that DGACM was the *only* department that adopted a different interpretation of Appendix B. The UNDT Judgment clearly acknowledged evidence that two other departments also adopted different interpretations. However, the evidence on record supported the UNDT's finding that there was a generally consistent interpretation followed by most departments and offices, notwithstanding a few outlier departments. As such, the UNDT correctly concluded that there was no significant inconsistency as to the interpretation of Appendix B throughout the Secretariat and in other duty stations that would impact on the validity of the Administration's interpretation of Appendix B.

44. In relation to the Appellants' claims of discrimination, the burden is on the Appellants to prove that discrimination occurred. The Appellants however failed to establish that the Administration's interpretation and application of Appendix B in DGACM since January 2005 was designed to treat individuals or categories of them unequally. To the contrary, OHRM sought to ensure that all staff members of the TPU in DGACM were treated on an equal basis with all of the other similarly situated staff members subject to Appendix B in the Secretariat, consistent with the relevant provisions in Appendix B. The Appellants have not established any improper motive on the part of the Administration in interpreting and applying Appendix B in such a manner.

45. The Appellants also failed to support their claim that the Administration violated international labour standards on overtime and nightshifts. The UNDT's comments in paragraphs 138 to 143 of the Judgment constitute *obiter dicta* and, as such, have no binding consequences on the parties.

46. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

Preliminary matter

The Appellants' motion for contempt and to strike paras. 26-27 of the Respondent's Answer

47. Leboeuf et al. submit that the Respondent improperly denied, in paragraphs 26 and 27 of his answer, that the document contained in Annex 4 attached to their appeal, entitled "Draft Administrative Instruction on Overtime Compensation in New York", and dated 30 November 2005, "originated from the Administration itself" and instead "maliciously alluded in para[.] 26 that the proposed ST/AI would originate from the Staff Union". The Appellants also request the Appeals Tribunal to strike paragraphs 26 to 27 of the Respondent's answer from the record of the present case and to find "accountable and sanction the UN Legal Counsel for contempt concerning his false, belated and misleading statements of paragraphs 26-27, if they are not retracted before the 25 June 2015 hearing in Geneva". Finally, the Appellants seek to introduce new evidence in the form of an affidavit from Ms. Rosemary Waters who was the President of the Staff Union from 2005 to 2008.

48. The Secretary-General requests the Appeals Tribunal to deny the motion. Leboeuf et al.'s allegations of impropriety on the part of the Secretary-General are "manifestly without merit". Moreover, the request to introduce additional evidence is not in accordance with Article 10(1) of the Appeals Tribunal Rules of Procedure.

49. Having reviewed the arguments made by the parties, the Appeals Tribunal finds no basis to grant the relief sought by the Appellants. However, the issue raised by the Appellants will be dealt with in the Judgment.

The number of Appellant witnesses before the UNDT

50. Amongst the complaints made by the Appellants at the oral hearing was that the UNDT limited to three the number of witnesses they could call, notwithstanding that the Appellants had many more witnesses available to prove the existence of the decades-long practice on overtime within the TPUs of DGACM. This was in the context of the UNDT having already limited the number of Applicants from 25 to 20. Additionally, the UNDT refused to hear from any more DGACM supervisors on the issue of the accrual of compensatory time from overtime other than the testimony of Ms. Hassa-Boko. Furthermore, had more of the Appellants been allowed to give evidence, they would have testified that they never acquiesced to the post 1 January 2005 change.

51. The Appeals Tribunal holds that insofar as the Appellants seek to impugn the UNDT Judgment on the basis of the number of witnesses permitted to testify, there is no merit in this argument and we find no error of procedure such as to affect the decision in the case. In accordance with its Rules of Procedure, the UNDT enjoys a considerable discretion in case management with which the Appeals Tribunal is slow to interfere, absent any procedural error affecting the ultimate outcome of the case before the UNDT.[9] In any event, the UNDT Judgment records that "[f]ollowing the case management, the Applicants reduced the previously expected number of 33 witnesses, and the parties agreed that each party would call approximately three witnesses".[10]

52. Furthermore, we note that the UNDT accepted the existence of a practice within DGACM for at least a decade where annual leave, sick leave and CTO were counted for the purpose of computing overtime payments.[11] We do not find merit in the argument that the absence of more

[9] *Staedtler v. Secretary-General of the United Nations*, Judgment, No. 2015-UNAT-547, para. 15.
[10] Impugned Judgment, para. 34.
[11] Impugned Judgment, para. 146 b) i).

Appellant witnesses before the UNDT had a bearing on the ultimate finding on the issue of acquiescence. The procedural point made before us at the oral hearing was merely that each of the Appellants would have testified that they had not acquiesced. It is apparent from the UNDT Judgment that the issue of acquiescence (discussed later in this Judgment) was considered in the context of what occurred between the relevant parties in the period 1 January 2005 to 16 January 2009

Did the Dispute Tribunal err in finding that the Appellants were barred from contesting the 15 December 2004 decision?

53. We turn now to the question of whether the Dispute Tribunal was correct to find that the Appellants' challenge to the December 2004 change, as implemented by the Administration on 1 January 2005, was time-barred.

54. It is common cause that on 15 December 2004, the Appellants were in receipt of a communication from the then Executive Officer with DGACM, conveying news of the change in the application of the policy. This communication came in the wake of a prior e-mail of 16 March 2004 from the Executive Officer to the staff of DGACM which stated, inter alia, "payment for overtime takes place only after eight hours of work any day of the scheduled work week".[12] Attached to that e-mail was a memorandum of 5 November 1998 which, inter alia, had advised that "[s]taff members who have not worked a full work day or a full work week are not entitled to be granted overtime pay for that day or for that weekend".[13]

55. Paragraphs 58 to 71 inclusive of the UNDT Judgment set out the chronology of various communications and meetings between the Administration and staff representatives subsequent to the 15 December 2004 e-mail. Those interactions on the issue of overtime pay and how it was to be computed were ongoing until about October 2006.

56. It is also common cause that changes to overtime pay forewarned in the e-mail of 15 December 2004 came into effect on 1 January 2005. Save that part of the content of the 15 December 2004 e-mail that was later amended to reflect that the practice in relation to the calculation of compensation for work done on weekends was "restored retroactively to

[12] *Ibid.*, para. 51.
[13] *Ibid.*, para. 49.

1 January 2005", the changes referred to in the 15 December 2004 e-mail were implemented by the Administration.

57. As found by the UNDT, after 1 January 2005, it appears that each of the Appellants received regular pay cheques which reflected the implementation of the policy change regarding weekday overtime pay which came into effect on 1 January 2005. Thus, as the UNDT properly concluded, there was a change in the application of Appendix B in DGACM. Specifically, this change consisted of the discounting of annual leave, sick leave, and CTO as part of actual work time for the purposes of calculating overtime pay.

58. At para. 89 of its Judgment, the Dispute Tribunal stated:

> ... In paragraphs 19-21 of Judgment No. UNDT/2010/206, the Dispute Tribunal held that the claims against the policy introduced in December 2004 were time-barred, and the Tribunal sees no reason to depart from that finding. It is established jurisprudence of the Dispute Tribunal and of the Appeals Tribunal that, for an application to be receivable, an applicant must adhere to the various time limits provided for in the Staff Rules and in the Dispute Tribunal's Statute, and that the Tribunal will strictly enforce those time limits[.]

59. It went on to state:[14]

> ... The underlying cause of action in this case – the notification of the change of policy – arose and was notified in December 2004, with implementation effective 1 January 2005, and the Applicants' request for administrative review was filed on 16 January 2009, more than four years later. Article 8.4 of the Statute of the Tribunal clearly prohibits consideration of a claim that is filed three years or more after the notification of the contested decision. Such claims "shall not be receivable". Therefore, the Tribunal finds that it lacks jurisdiction, pursuant to art. 8.4 of its Statute, to consider the lawfulness of the change that went into effect on 1 January 2005.

60. The Tribunal opined:[15]

> ... Even if not for art. 8.4 of the Statute, the Tribunal would still be precluded, under art. 8.3 of its Statute, from adjudicating whether the change in policy on 15 December 2004, with effect from 1 January 2005, was lawful.
>
> ... The UNAT has consistently reiterated that the Dispute Tribunal does not have the authority to suspend or waive the deadlines for requests for management

[14] *Ibid.*, para. 92.
[15] *Ibid.*, paras. 93 and 94.

> evaluation and administrative review [...]. The Applicants, at the material time, were required to file their request for administrative review within two months from the date of notification of the decision. Having filed their request for administrative review more than four years after being informed of the change in policy, the claims are time-barred.

61. The UNDT thus found:[16]

> ... It follows that the Tribunal has no jurisdiction to consider the Applicants' challenge to the change announced in December 2004, effective 1 January 2005. As stated in Judgment No. UNDT/2010/206 in paras. 19-21, the present application is only receivable with respect to the *subsequent application* of the policy on overtime in the relevant period immediately prior to the request for administrative review in January 2009[.]

62. In their written submissions to this Tribunal, the Appellants argue that the time limit to submit their claims for salary and entitlement arrears was governed by Staff Rule 103.15 which provides for 12-month retroactivity such that requests for administrative review began to run, either on receipt of any of their prior 12-month salary pay cheques issued by the Administration (with computation of contentious overtime payments and compensatory time), or on foot of a notification by the Administration that it was withdrawing its support for the agreement reached with staff members on 13 September 2005 or withdrawing its proposed administrative instruction on overtime compensation (as circulated to staff via a staff circular on 30 November 2005) which acknowledged the DGACM decades-long rule on CTO as part of the eight-hour work day.

63. The Appellants also contend that the decades-long salary rule practiced at DGACM was never formally repealed or "clarified" by any authorised senior official before the 22 September 2009 interoffice memorandum signed by the ASG of OHRM.

64. This clarification came some eight months after the Appellants had submitted their request for administrative review. Thus, the Appellants argue that as the September 2009 issuance was not yet in force as of the time of their 16 January 2009 request for administrative review, they were entitled, in all good faith expectation, to believe that the Administration still supported its commitment given to the JAC on 13 September 2005, namely that compensatory time constituted "actual work" in the definition of an "eight-hour work

[16] *Ibid.*, para. 101 (emphasis in original).

day". They submit that the Respondent never notified the Staff Union that it was withdrawing its "support" to the agreement regarding CTO reached with staff representatives at the JAC meeting of 13 September 2005 or that it was withdrawing its draft administrative instruction of 30 November 2005.

65. Furthermore, the Appellants argue that the Administration had reassured staff representatives of its "follow up" actions on the draft administrative instruction at subsequent staff management meetings. In those circumstances, the Appellants argue that the UNDT erred when it decided that the 15 December 2004 e-mail should be the starting point to compute the Appellant's time-limit for administrative review.

66. Moreover, the Appellants contend that the issue of receivability was never raised by the UNDT before or during the 2013 hearing and the UNDT's finding on this issue came to them as a surprise.

67. On the issue of it being a surprise to the Appellants, the Appeals Tribunal does not find merit in this contention, since the approach adopted to the issue of receivability in the impugned UNDT Judgment was previously the subject of consideration by the UNDT in Judgment No. UNDT/2010/206 where the Dispute Tribunal found as follows:[17]

> ... [...] I [...] find the application to be receivable, in principle, because the Applicants appeal against allegedly incorrect calculation of their compensation for overtime work. Each time overtime payment is made or compensatory time is recorded at the end of the month, an administrative decision in respect of the calculations relating to that period is made[.] [...]
>
> ... However, the present application is receivable only with respect to the calculation and application of compensatory time and overtime payments *following* 19 November 2008, as the Applicants were required to file their request for administrative review within two months of the date of notification of the contested decision in writing. Accordingly, this application is time-barred with respect to any compensation calculations that occurred prior to November 2008 as no timeous request for administrative review was filed.

68. The Appeals Tribunal is satisfied that the Dispute Tribunal's rejection (in the Judgment under appeal) of the Appellant's claims regarding the 15 December 2004 communication was fully consistent with the jurisprudence of the Appeals Tribunal, namely that applications to the

[17] Judgment No. UNDT/2010/206, paras. 20 and 21 (emphasis in original).

UNDT are only receivable when a staff member has previously submitted a contested decision for administrative review or management evaluation within the specified deadlines.[18] The UNDT correctly found that pursuant to Article 8(3) of its Statute, it had no jurisdiction to suspend or waive deadlines for administrative review of the 15 December 2014 decision, or more appropriately, its implementation which became effective 1 January 2005. Moreover, the overarching issue for the Dispute Tribunal was Article 8(4) of its Statute which provides that claims filed more than three years after the contested decision "shall not be receivable".

69. The Appeals Tribunal notes that prior to coming to its conclusion on the receivability of the claims regarding the change made in December 2004, effective 1 January 2005, the Dispute Tribunal considered the argument advanced by the Appellants, namely that as there were ongoing discussions concerning the change, the time for filing their application for administrative review did not start to run until sometime in 2008. The Dispute Tribunal found this submission "unpersuasive". The Appeals Tribunal finds no reason to impugn the Dispute Tribunal's rejection of the Appellants' argument, finding no error of law or error of fact on the part of the UNDT. Specifically, the Dispute Tribunal noted that notwithstanding the consultations and negotiations which were ongoing in 2005 and 2006,[19]

> ... [...] the decision to maintain the decision not to include compensatory time off, annual leave, and sick leave in the eight hours of work required for overtime payment was reiterated by OHRM on 21 March 2005, and communicated on 29 March 2005 to DGACM staff representatives, senior management, and Chiefs of Units in DGACM. It was reiterated again on 7 April 2005 to the President of the Staff Union, as well as in subsequent meetings, including meetings of the Staff-Management Committee (see, in particular, meeting of 11 October 2006).

70. In all the circumstances, the UNDT did not err in law or in fact in deeming the Appellant's application only receivable "with respect to the *subsequent application* of the policy on overtime in the relevant period immediately prior to the request for administrative review in January 2009".[20]

[18] *Williams v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2013-UNAT-376, para. 31, citing *Ajdini v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108; *Trajanovska v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-074; and *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-036.
[19] Impugned Judgment, para. 87.
[20] *Ibid.*, para. 101 (emphasis in original).

The Dispute Tribunal's consideration of the merits of the Appellants' claims

71. Further to the remand by the Appeals Tribunal in Judgment No. 2011-UNAT-185 to the Dispute Tribunal "for further proceedings", at the subsequent hearing, the UNDT categorised the relevant questions for determination as follows:[21]

> A. When a rule is consistently applied – at least in one department – for decades, and its "interpretation" is then changed, having a serious effect on working conditions and compensation of the staff members involved, must the Administration consult with staff representatives, under Chapter IX of the Staff Regulations?
>
> B. What is the practice in granting overtime throughout the United Nations?
>
> C. Do Staff Rules apply differently in different duty stations, or should the same "interpretation" apply everywhere?

72. Moreover, the Dispute Tribunal stated that it should examine "whether 'the provisions for the protection of legitimate expectation can be advanced by Ms. Leboeuf *et al.* against the Administration in this case, meaning [...] whether the provisions of Appendix B paragraphs (iv) and (vi) of the former Staff Rules were really applied in a continuous, uniform and general manner during an extended period of time'".[22]

73. Before considering the Appellants' arguments as to the manner in which the Dispute Tribunal addressed the merits of their case, it is apposite to set out the provisions of Appendix B of the former Staff Rules. It provides, inter alia, as follows:

> Conditions governing compensation for overtime work
>
> Pursuant to staff rule 103.12, staff members in the General Service category or in the Trades and Crafts category who are required to work overtime at Headquarters shall be given compensatory time off or may receive additional payment in accordance with the following provisions:
>
> (i) Overtime at Headquarters means time worked in excess of the scheduled work day or in excess of the scheduled work week or time worked on official holidays, provided that such work has been authorized by the proper authority.

[21] *Ibid.*, para. 14.
[22] *Ibid.*, para. 15, citing Judgment No. 2011-UNAT-185, Concurring Opinion of Judge Courtial.

> (ii) The scheduled work day at Headquarters means the duration of the working hours in effect at the time on any day of the scheduled work week, less one hour for a meal.
>
> [...]
>
> (iii) Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled work day up to a total of eight hours of work on the same day. Subject to the exigencies of the service, such compensatory time off may be given at any time during the four months following the month in which the overtime takes place [...]
>
> [...]
>
> (vi) Compensation shall take the form of an additional payment for overtime in excess of a total of eight hours of work of any day of the scheduled work week, or when it takes place on the sixth or seventh day of the scheduled work week.

Alleged errors on "lawfulness" in the UNDT Judgment

74. The Appellants argue that while the UNDT finally recognised the existence of a decades-long practice on overtime and compensatory time within DGACM, the Dispute Tribunal did not draw any conclusions on the salary arrears claimed by the Appellants resulting from their overtime entitlements in the twelve months prior to 16 January 2009. Rather, the Appellants argue, the UNDT "sidelined" the relief issue and deviated to a new issue of "lawfulness" of DGACM's longstanding practice on overtime.

75. The Appellants claim that the issue of "lawfulness" was never argued by the parties. They contend that the UNDT erred in law and in fact in contesting the "lawfulness" of DGACM's longstanding practice which, they argue, had been supported and endorsed by the Respondent for many decades, such that acquired contractual rights for the Appellants had been created. They further argue that had the practice of computing annual leave, sick leave and CTO been unlawful, the question arose as to why no action was taken by the Administration to recover money from the staff members. Nor was the issue ever the subject of a report by the Organisation's auditors or the subject of an OIOS Report.

76. The Appellants submit that for the Administration now to hide behind the curtain and say it was not the originator of the practice was unbecoming to the Appellants. The Appellants argue that the practice was created not by them, but by the Administration by way of a solution appropriate for the circumstances in which the Appellants were working. The Appellants submit

that the UNDT was silent on the issue of the Administration's own acquiescence to this practice over 40 years, and to the Administration's acknowledgement of the practice by virtue of the draft administrative instruction it circulated in November 2005 with regard to CTO.

77. The Respondent argues that the Dispute Tribunal correctly concluded that the Administration's interpretation and application of Appendix B was correct and lawful. The Respondent submits that what the Appellants request is that the use of annual leave, sick leave and CTO should be counted as hours of work towards the minimum of eight hours work necessary for overtime pay. The Respondent states that such a demand is against the letter and spirit of Appendix B, as found by the UNDT. Time off work is not work for the purposes of Appendix B and the Respondent contends that what the Appellants effectively want is the Appeals Tribunal's blessing for "double dipping".

78. The Respondent maintains that since the 1970s, overtime pay has been consistently interpreted to mean eight hours of actual work while present at work within a 24-hour period. In November 1998, January 2003 and March 2004, the Executive Officer of DGACM sent memoranda to all DGACM staff explaining that staff members who had not worked a full day were not entitled to overtime pay for that day. Despite those instructions, as found by the UNDT, some units within DGACM developed a divergent practice whereby time off as leave, sick leave and CTO was calculated as eight hours of work when computing overtime pay. The Respondent submits that the UNDT correctly concluded that the Administration was entitled to correct the erroneous approach which had been taken to the application of Appendix B.

79. With regard to the content of Appendix B, and its application, the UNDT, inter alia, found:[23]

> ... The "scheduled work day" is the duration of the working hours in effect at the time on any day of the scheduled workweek, less one hour for a meal. Work *in excess of the scheduled workday* and *up to eight hours of work* throughout the entire day is compensated in the form of an equal amount of compensatory time off (Appendix B, sec. (iv)). Work *in excess of a total of eight hours* of any day is compensated in the form of an additional payment (Appendix B, sec.(vi)).
>
> ... Does "work" within the meaning of secs. (iv) and (vi) of Appendix B include time off? There is a plain distinction between *working* – which requires being on duty and performing work functions – and taking time *off* work. Sick leave, annual leave,

[23] *Ibid.*, paras. 132-134, 136 and 137 (emphasis in original).

> or compensatory time *off* are authorized absences from work, permitting staff to be absent from work and to not perform one's duties (that is, to *be* off work), while still being a staff member. [...]
>
> ... Thus, time spent on annual leave, sick leave, or compensatory time off is not included in the actual work time ("hours of work"). For a staff member to be eligible for a *payment* for overtime, he or she must have actually worked more than eight hours that day, *not* including time taken off, because sec. (vi) of Appendix B refers to the hours of work, not to the scheduled workday. [...]
>
> ...
>
> ... [...] Compensatory time off is *earned* by working beyond the normal hours of work, up to eight hours of actual work in a given workday, when overtime payments start. When compensatory time off is used, it is considered authorized absence from work, not actual work. When a staff member is absent from work on compensatory time off, he cannot be considered as being at work and performing actual work. The actual work through which this compensatory time off was accrued had been *performed previously*, when the staff member was working beyond the normal working hours, for which he was compensated in the form of compensatory time off.
>
> ... Therefore, the Tribunal finds it has no reason to depart from its original decision that the correct interpretation of secs. (iv) and (vi) of Appendix B is that, for a staff member to be eligible for payment for overtime he or she must have actually worked more than eight hours that day, not including time taken off as sick leave, annual leave, or compensatory time off.

80. The Appeals Tribunal does not agree with the Appellants' contention that their arguments were "sidelined" by the Dispute Tribunal's approach to Appendix B or its application. Since Appendix B and its application was a central issue in the case, the UNDT was perfectly within its remit in interpreting sections (iv) and (vi) of Appendix B, in order to put into context the issues between the staff members and the Administration. In the course of this appeal, no argument was advanced by the Appellants that the Dispute Tribunal's interpretation of the meaning and intent of Appendix B was erroneous. The Appeals Tribunal concurs with the interpretation of Appendix B, as outlined in the UNDT Judgment.

81. While the Dispute Tribunal found that there was no evidence that the manner in which DGACM applied the provisions of Appendix B prior to 2005 was accepted by the Administration as the proper interpretation of Appendix B, earlier in its Judgment it found that the evidence indicated that "in the years prior to 2004, the Text Processing Units in DGACM developed a practice whereby they applied Appendix B inconsistently with the Respondent's interpretation of secs. (iv) and (vi) of the Appendix and with its application by the other departments in the

Secretariat". The Dispute Tribunal went on to state: "It is unclear how this practice arose, but it is safe to assume that due to the nature of the work performed, particularly during the busy General Assembly sessions, on a continuous rotating and sometimes mandatory basis this practice evolved and staff were paid accordingly."[24]

82. We note that at paragraph 115 of its Judgment, the Dispute Tribunal referred to an "erroneous interpretation" of Appendix B in DGACM prior to the decision circulated on 15 December 2004. It seems to the Appeals Tribunal that the designation "erroneous" by the UNDT was misguided in light of its own finding that at least for more than a decade, annual leave, sick leave, and CTO were routinely counted as hours of work for the purpose of overtime pay within DGACM. The thrust of the evidence which was before the UNDT suggests that the practice which the Administration sought to correct in December 2004 was not an "erroneous" interpretation of Appendix B or an illegality, as contended by the Respondents at the oral hearing before this Tribunal; rather what was sought to be changed was a more liberal interpretation of, and application of, Appendix B adopted by the Administration in respect of staff within DGACM who worked long and irregular hours.

83. For all intents and purposes therefore, the Administration acquiesced to this practice within DGACM until they applied the provisions of Appendix B to the Appellants post December 2004, albeit that there were circulars issued on a periodic basis on the correct meaning and application of Appendix B. Thus, the Appeals Tribunal rejects the argument advanced by the Respondent that the Administration sought to correct an "illegality" or to put a stop to "double-dipping" by DGACM staff. Indeed, we view as inappropriate and disingenuous on the part of the Respondent to categorise the claims made by the Appellants as "double-dipping".

84. However, that being said, the Appeals Tribunal finds no legal or factual error on the part of the Dispute Tribunal when it found the Administration's interpretation and application of Appendix B to be lawful. As noted by the UNDT, the Administration had a "valid policy and legal rationale for bringing the application of Appendix B within DGACM in line with that of other departments and offices", particularly so when, as the record demonstrates, the manner of the application of Appendix B within DGACM pre-December 2004 was something that was of concern to the Administration periodically, notwithstanding the knowledge and

[24] *Ibid.*, para. 103.

toleration (until December 2004) of the practice that had evolved within DGACM over a considerable period of time.

85. Thus, we are not persuaded overall that there is merit in the Appellants' argument that the UNDT erred in law in the manner in which it dealt with the Administration's application of Appendix B in the relevant period prior to the Appellants' request for administrative review.

The issue of consistency of interpretation of Appendix B

86. The Appellants argue that the finding by the Dispute Tribunal that "rules on overtime have been interpreted consistently throughout the offices and departments of the Secretariat"[25] was not supported by any evidence and that it was contradicted by the Respondent's own documentary evidence. In particular, the Appellants point to the evidence contained in the record of the 11 October 2006 meeting of the Staff-Management Committee where reference was made to two departments which had responded that they applied Appendix B on similar lines as DGACM.

87. The Respondent contends that the Appellants' arguments in this regard do not point to any error on the part of the Dispute Tribunal. In particular, the UNDT had noted meetings convened in April 2005 with the Executive Offices of ten departments and offices of the Secretariat, the outcome of which, as documented by the record, was that it was "the general practice to require 8 hours of actual work in a day before overtime is paid", an issue which was referred to by the Dispute Tribunal in its Judgment.[26] Moreover, the Respondent contends that contrary to the Appellants' arguments, the UNDT did not find that DGACM was the "only" department that adopted a different interpretation of Appendix B since the Dispute Tribunal clearly acknowledged evidence that two other departments also adopted different interpretations.

88. In the view of the Appeals Tribunal, the Appellants have not made out a persuasive argument that the UNDT erred in law or in fact on the conclusions it reached. From the evidence available to the UNDT, the conclusion reached at paragraph 129 was open to it, notwithstanding the contents of the meeting of 11 October 2006. We so find because the Appellants have pointed to no evidence which was overlooked or ignored by the UNDT in this regard and, in any event, we note that the UNDT specifically took account of the Appellants' contention that departments

[25] *Ibid.*, para. 128.
[26] *Ibid.*, para. 69.

other than DGACM had practices similar to that of DGAGM but found that no specific evidence was led by the Appellants on this issue. Accordingly, we find no error in the approach of the Dispute Tribunal such as would warrant interference by this Tribunal.

Alleged errors of fact on the issue of mandatory consultation

89. The Appellants contend that while the UNDT Judgment rightfully recognised the existence of a decades-long overtime salary practice within DGACM, the Dispute Tribunal did not fully or properly address the modalities and procedures required from the Administration when it decided to amend the application of Appendix B within DGACM prior to December 2004. The Appellants argue that any change required prior consultation followed by an official promulgation of an administrative instruction or by an amendment issuance, in accordance with Staff Regulation 8 and with Circular ST/SGB/2009/4 (Procedure for the Promulgation of Administrative Issuances). The Appellants contend that the Dispute Tribunal erred when it concluded that the Respondent was entitled to amend, effectively, "unilaterally" the long-standing practice within DGACM. The UNDT "pushed the limits of legality and of the UN rule of law to the extreme" in questioning, having recognized that the Administration failed to hold prior consultations with staff representatives, whether "the outcome with respect of the issue in question would have been any different"[27] had such consultations been held prior to the December 2004 memorandum.

90. In the course of the oral submissions to this Tribunal, the Respondent contended that no prior consultation with staff representatives was required as no change in the application of Appendix B was being contemplated by the Administration. He further argued that in any event, the Administration did consult with staff as reflected in the record available to the Dispute Tribunal and as found by the Dispute Tribunal.

91. The Appeals Tribunal notes that the Dispute Tribunal was alert to the "justifiable sense of dissatisfaction among the Applicants that no proper consultation process was carried out", and that "the Administration should have exercised caution in how the matter was handled prior to the decision circulated on 15 December 2004".[28] However, it correctly noted that following protestations from staff representatives, a consultation process commenced in January 2005

[27] *Ibid.*, para. 117.
[28] *Ibid.*, para. 115.

which was ongoing until March 2005. Indeed, the documentary record indicates further meetings in 2006. Ultimately, the UNDT concluded:[29]

> In the final analysis, [...] although in the circumstances of this case [a] consultation process was warranted and could have been organized earlier, it is highly doubtful, in view of all the factors involved, that the outcome with respect to the issue in question would have been any different. Consultations are not negotiations, and it is not necessary for the Administration to secure consent or agreement of the consulted parties. On the evidence before it, the Tribunal finds that the Respondent had a valid policy and legal rationale for bringing the inconsistent application within DGACM in line with the terms of Appendix B and with the practices of other departments.

92. We find that the conclusion reached by the Dispute Tribunal was open to it on the evidence and, accordingly, we find no error of law or fact such as would serve to undermine the Dispute Tribunal's overall conclusion on the issue of consultation. As a matter of fact, the Dispute Tribunal found that some concrete results emerged from the consultations that did take place, albeit after the 15 December 2004 announcement, namely the change by the Administration of its position adopted concerning the calculation of compensation for weekend work. With regard to the argument advanced by the Appellants that the approach adopted post-15 December 2004 required an official promulgation, we find no merit in that particular argument given that no change was being proposed in December 2004 to the meaning or spirit of Appendix B. What occurred in December was no more than a move by the Administration to bring all staff members within the confines of the meaning and spirit of Appendix B.

The issue of legitimate expectation and acquiescence

93. In accordance with the directions given by Judge Courtial in his Concurring Opinion in Judgment No. 2011-UNAT-185, the Dispute Tribunal considered whether the Appellants had a legitimate expectation to the continuation of the pre-2005 practice within DGACM on how the payment of overtime was computed.

94. A reading of the UNDT Judgment (paragraphs 118 to 128) satisfies the Appeals Tribunal that the Dispute Tribunal, while it did not specifically pronounce on whether the Appellants had established a legitimate expectation to the continuance of the pre-January 2005 practice, did not

[29] *Ibid.*, para. 117.

discount the possibility of such expectation on the part of the Appellants. However, the Dispute Tribunal concluded that the Appellants,[30]

> having waited for more than four years to formally challenge the change in practice that was introduced effective 1 January 2005, [...] acquiesced to it and cannot rely on a claim of legitimate expectation. Further, if any legitimate expectation was indeed taken away, the Respondent had a valid policy and legal rationale for bringing the application of Appendix B within DGACM in line with that of other departments and offices.

95. In their written and oral submissions to this Tribunal, the Appellants contend that the Dispute Tribunal erred in finding that "the Applicants acquiesced to the change by not seeking to formally challenge it for over four years after its introduction". The Appellants submit that they never acquiesced to the change, which was immediately challenged by them in early 2005 through the consultations entered into with the Administration. They argue that insofar as they could be said to have acquiesced, they did so in response to the joint understanding reached on 13 September 2005 at the JAC, which was followed by the Administration's renewed commitment via the proposed administrative instruction (as documented in a working paper of the Staff Council dated 30 November 2005) on the issue of CTO being credited for the purposes of overtime pay, and by other positive commitments given by the Administration in 2006 and 2007.

96. The Appellants argue that it was not in their interest to acquiesce to the change in overtime pay effective as of 1 January 2005 as they suffered financial hardship as a result and were humiliated by the policy change made at that time. They contend that contrary to the assertion in the Respondent's answer, the proposed administrative instruction emanated from the Administration and the Appellants were awaiting the promulgation of this proposal up to the time they submitted their application for administrative review and to recover payment due for overtime in January 2009. There was thus no basis for saying that the Appellants had acquiesced to the change.

97. As to who circulated the proposed administrative instruction dated 30 November 2005, the Appeals Tribunal accepts, noting the contents of the affidavit submitted with the Appellants' motion of 16 June 2015, as a matter of probability that it emanated from the Administration, most probably as a result of the negotiations and consultations that were ongoing between the

[30] *Ibid.*, para. 128.

parties in September 2005. We note that another document referred to by the Appellants, namely the "Notes on the SMC meeting" of 14 July 2006 states that "OHRM had drafted an AI to address various CTO-related issues". The note of the 11 October 2006 meeting states that "the new administrative instruction [...] was being prepared by OHRM". Thus, to some extent, we are surprised at the thrust of paragraph 26 of the Respondent's answer to the present appeal given that management were present at the meetings held in July and October 2006 where a proposed administrative instruction on CTO was discussed and indeed where the record suggests that the proposed administrative instruction was being drafted by the Administration. At the end of the day of course, the proposed change referred to in the November 2005 and July and October 2006 documents never came to fruition.

98. One of the arguments made in the present appeal is that the UNDT in its Judgment ignored the import of the agreement reached on 13 September 2005, which the Appellants argue was an important milestone in that the 13 September 2005 agreement had resolved the issue of CTO and overtime payment in the Appellants' favour. While there is no specific reference to the 13 September 2005 meeting in the UNDT Judgment, there is reference to the fact that there were ongoing discussions between the parties in 2006 "regarding a draft administrative instruction on overtime".[31] Thus, while the meeting of 13 September 2005 might not have been alluded to, we cannot accept that the UNDT ignored evidence in the manner suggested by the Appellants. At paragraph 88 of the Judgment, the UNDT states that there was "no record that any changes to Appendix B were even contemplated". We are not persuaded that the UNDT was correct in that finding, given that there was the proposal in 2005/2006 (never promulgated) that CTO would be credited in the computation of overtime payments. However, even if the UNDT erred in that finding, we do not consider that it resulted in a manifestly unreasonable decision such as to warrant the intervention of the Appeals Tribunal, for reasons which are set out later in this Judgment.

99. To some extent, the Appeals Tribunal accepts the Appellants' argument that the UNDT erred in fact in holding that the Appellants had acquiesced to the change from December 2004. The evidence before the Dispute Tribunal (which included the discussions which took place between management and staff representatives under the auspices of the JAC, resulting in the draft administrative instruction in November 2005, and the record of what was discussed on 11 October 2006) shows that the changes effected in January 2005 remained an issue of concern

[31] *Ibid.*, para. 86.

for them. However, there was no evidence adduced before the UNDT that after October 2006, any further consultations or negotiations were entered into between the parties on the issue of how overtime pay for weekdays should be computed. We note the Appellants' closing submissions to the UNDT state that "no meetings took place in 2007 where this issue was raised". The position was likewise throughout 2008. The case made to the Appeals Tribunal on the Appellants' behalf is that they were awaiting the promulgation of the proposed administrative instruction of 30 November 2005.

100. The first thing to be observed with regard to the proposed administrative instruction is that it provided only for "accrued compensatory time off" to qualify as actual work towards the required eight hours of work for the purpose of overtime pay. The draft explicitly stated that annual leave or sick leave would not count towards hours of work for the purpose of overtime pay, contrary to the manner in which overtime pay had been calculated for DGACM staff pre- January 2005. The Appeals Tribunal finds that insofar as the Appellants had an expectation post-November 2005 or indeed October 2006, this would appear to have been limited to the computation of CTO as actual work being credited towards the required eight hours for overtime pay.

101. That being said, notwithstanding the arguments advanced by the Appellants in the course of this appeal, the Appeals Tribunal holds that it cannot reasonably be concluded that the Dispute Tribunal should have found that there was an extant legitimate expectation on the part of the Appellants as of January 2009. More than two years had elapsed between the last communication on the issue of CTO being counted as credit for overtime pay and the submission of the request for administrative review. From the content of the minutes of the 11 October 2006 meeting, the Appellants could have been under no illusion but that the post-1 January 2005 change would continue to be put into effect, not just regarding annual leave and sick leave but also with regard to CTO.

102. As already stated, both the proposed administrative instruction of 30 November 2005 and the record of the 11 October 2006 meeting documented that insofar as there had been discussion on the reversion to the pre-1 January 2005 practice, it was being contemplated only in terms that CTO would be considered as credit for actual work for the purposes of overtime pay. The Appellants could have had no expectation from 30 November 2005 that there would be a reversion to the pre-January 2005 position vis-à-vis annual leave or sick leave.

103. Insofar as they may have had an expectation as of 30 November 2005 or October 2006 that CTO would again be credited as actual work for computing overtime pay, the Appeals Tribunal holds that this expectation could not be said to have continued to subsist given the inaction of the Appellants from October 2006 until they ultimately submitted a request for administrative review on 16 January 2009. At all relevant times throughout this period the Administration continued to compute overtime in accordance with the provisions of Appendix B, a factor which was known to the Appellants by virtue of the computations which would have been evident in their payslips. While the Appeals Tribunal is of the view that the Dispute Tribunal should not have concluded that the Appellants acquiesced to the changes from January 2005, it remains the case that they acquiesced to the Administration's continued inclusion post-October 2006 of CTO in the change effected on 1 January 2005, without demur, until the request for administrative review on 16 January 2009. In all of the circumstances, the Appeals Tribunal is thus not persuaded that the Dispute Tribunal's Judgment should be impugned for having failed to acknowledge that the Appellants had a legitimate expectation to the continuance of the pre-January 2005 practice within DGACM.

Conclusion

104. We have not been persuaded that the UNDT erred in law, or in fact resulting in a manifestly unreasonable decision, or in procedure in its decision arrived on the Appellants' claims. Accordingly, the appeal is dismissed.

Judgment

105. The appeal is dismissed and the Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

Dated this 4th day of September 2015.

(Signed)	*(Signed)*	*(Signed)*
Judge Faherty, Presiding	Judge Lussick	Judge Simón
Dublin, Ireland	London, United Kingdom	Montevideo, Uruguay

Entered in the Register on this 4th day of September 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar