UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-679

Lemonnier

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Rosalyn Chapman Judge Luis María Simón
Case No.:	2016-905
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Mr. Lemonnier:	Daniel Trup, OSLA
Counsel for the Secretary-General:	Stéphanie Cartier

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Emmanuel Lemmonier of Judgment No. UNDT/2015/124, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 31 December 2015, in the case of *Lemonnier v. Secretary-General of the United Nations.* On 27 February 2016, Mr. Lemonnier filed the appeal, and on 6 May 2016, the Secretary-General filed his answer to the appeal.

Facts and Procedure

2. Mr. Lemonnier is a former staff member of the United Nations Stabilization Mission in Haiti (MINUSTAH). In 2001, he entered the service of the Organization as a staff member at the P-2 level. In December 2010, he was appointed to the position of Chief Telecommunications and Information Technology Officer, MINUSTAH, at the P-4 level. On 1 January 2011, he was promoted to the P-5 level.

3. In July 2012, following the abolition of Mr. Lemonnier's post, he was retained for short-term durations, assigned to non-core functions against temporary sources of finance on posts from different sections.

4. In January 2014, MINUSTAH announced a retrenchment exercise. In view of its factual findings regarding receivability, the UNDT did not address the merits of the parties' contentions with regard to this entrenchment exercise.

5. On 17 April 2014, a job opening within MINUSTAH for the position of Chief, Integrated Support Services (CISS) was advertised as a "recruit from roster" selection exercise. Mr. Lemonnier was on the pre-approved roster and was one of ten candidates considered for the position. However, he did not meet the mandatory requirement of Headquarters experience indicated in the job opening.

6. On 29 May 2014, Mr. Lemonnier received written notification that his post would not be renewed beyond 30 June 2014 due to the non-availability of funding. The notification explained he was not performing any core functions and was temporarily placed on the P-5 level post of Chief Finance and Budget Officer, pending it being filled via the roster system.

7. In early June 2014, Mr. Lemonnier retained the services of OSLA, which submitted on 2 June 2014 Mr. Lemonnier's request for management evaluation of the 29 May 2014 decision to separate him from service. Between June 2014 and March 2015, the record shows e-mail correspondence between OSLA and the Management Evaluation Unit (MEU) and other sections of the Administration in relation to Mr. Lemonnier's case.

8. Mr. Lemonnier's appointment was renewed beyond 30 June 2014, and then again on 1 October 2014, pending the outcome of the ongoing management evaluation.

9. By letter dated 11 December 2014, Mr. Lemonnier was informed of the outcome of the management evaluation request of 2 June 2014, upholding the decision not to renew his contract.

10. By letter dated 5 February 2015, Mr. Lemonnier was notified of the outcome of management evaluation of his request "dated 2 December 2014", upholding the decision of 1 December 2014 not to select him for the post of CISS.

11. The UNDT had before it the following five separate cases filed by Mr. Lemonnier arising from the foregoing events:[1]

> ... UNDT/NY/2015/011, filed on 6 March 2015, concerning the decision not to select him for the post of [CISS], MINUSTAH. [Mr. Lemonnier] identified the date of notification of the contested decision as 5 February 2015;
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> ... UNDT/NY/2015/012, filed on 6 March 2015, concerning the decision dated 29 May 2014 not to renew his contract and to separate him from service;
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> ... UNDT/NY/2015/027, filed on 4 May 2015 as a separate claim, although it was in fact a motion for an extension of time in relation to Case No. UNDT/NY/2015/011 (on non-selection), to address the [Secretary-General]'s contention that the claim was not receivable;
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> ... UNDT/NY/2015/028, filed on 4 May 2015 as a separate claim, although it was in fact a motion for an extension of time in relation to Case No. UNDT/NY/2015/012 (on separation), to address the [Secretary-General]'s contention that the claim was not receivable; [and,]
>
> ... UNDT/NY/2015/029, filed on 4 May 2015 as a separate claim in relation to his non-selection for the CISS post, identifying the date of notification of non-selection as 5 February 2015. [Mr. Lemonnier] explained in his application that it was almost in all

[1] Impugned Judgment, para. 1.

> respects identical to case UNDT/NY/2015/011, but was "re-filed, out of abundance of caution", to address further receivability arguments raised by the [Secretary-General].

12. In Judgment No. UNDT/2015/124 now under appeal, the UNDT dismissed all five cases as not receivable "due to [Mr. Lemonnier]'s failure to comply with the relevant statutory requirements, including the filing of his management evaluation requests and the deadlines for the filing of an application with the Tribunal".[2] The UNDT summarized its findings as follows:[3]

> ... In the cases concerning separation (Cases No. 011 and 028), [Mr. Lemonnier] failed to file an application with the Tribunal within the statutory period of 90 days from the date of expiration of time for a response to his management evaluation request. Pursuant to *Neault*,[4] ..., MEU's belated communications after the expiration of the 90-day period did not re-set the applicable time limits.
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> ... In the cases concerning non-selection (Cases No. 012, 027, and 029), [Mr. Lemonnier] identified the date of 5 February 2015 as the date of notification of the non-selection decision. He failed to file a management evaluation request of this decision. Thus Cases No. 012, 027, and 029 are not receivable. Further, in relation to [Mr. Lemonnier]'s earlier alternative assertions regarding the relevant dates in Cases No. UNDT/NY/2015/011 and 027 (on non-selection), the Tribunal finds that [Mr. Lemonnier] failed to file timely management evaluation requests even with regard to those dates. Even if the Tribunal were to accept [Mr. Lemonnier]'s submission that he made a purported request for management evaluation by e-mail or "orally" on 10 June 2014, his claims would not be receivable under *Neault*, as [Mr. Lemonnier] failed to file his application within 90 days of the date of expiration of time for the management evaluation response (which expired 45 days after 10 June 2014). Further, even if [Mr. Lemonnier] asserted that his Counsel's e-mail exchange of 2 December 2014 (which was referred to in the MEU letter of 5 February 2015)[5] constituted a management evaluation request in relation to his claims that the CISS position should have been given to him as part of the retrenchment process, these claims would still not be receivable. The contested position was advertised on 17 April 2014, and any purported request of 2 December 2014 would have been well outside the statutory 60-day period for the filing of a management evaluation request.

[2] *Ibid*., para. 66.a.
[3] *Ibid*., paras. 66.a-c.
[4] *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345.
[5] See impugned Judgment, paras. 28-30 (finding that no copy of a management evaluation request of 2 December 2014 had been made available to the UNDT; "2 December 2014" appeared to be a reference to a series of e-mail exchanges between Mr. Lemonnier's counsel at OSLA and the MEU; and, Mr. Lemonnier had identified 5 February 2015 as the first time he had been formally notified of the non-selection decision).

13. In addition, the UNDT awarded costs against Mr. Lemonnier in the amount of USD 1,000, finding that "[i]n a misguided attempt to cure receivability flaws, multiple applications [were filed] with contradictory submissions on receivability and relevant dates ... [which] was a manifest abuse of proceedings".[6] In reaching its decision, it found that "[Mr. Lemonnier], represented by Counsel from OSLA, failed to comply with elementary statutory preconditions for filing a claim" which "resulted in a waste of valuable resources".[7] Noting OSLA's "invaluable contribution" and role "in providing much needed advice and representation to staff members at no cost", it found that: [8]

> Regrettably, [OSLA's] failure to provide proper advice and guidance on this occasion and [its] persistence in advancing legally untenable propositions and frivolous arguments have crossed the line between a vigorous and proper litigation strategy and a manifest abuse of process. There is no power to order costs against a representative, and the Tribunal considers that costs are properly to be ordered against [Mr. Lemonnier].

14. The UNDT also proffered observations about the MEU, noting with regret "the failure on the part of the MEU to have due regard" to both the policy objectives of having clearly defined time limits and the jurisprudence of the Appeals Tribunal as well as "blurring the lines between formal procedures and some form of informal resolution that it apparently attempts to carry out".[9] It expressed the view that it was incumbent upon the Administration "to carefully review how the MEU handles its management evaluation requests in order to ensure compliance with the applicable time limits and consistency with [the jurisprudence]".[10]

Submissions

Mr. Lemonnier's Appeal

15. The UNDT made errors of law and fact in dismissing the five cases as not receivable.

16. With respect to the separation cases (UNDT/NY/012 and 028), the UNDT made an error of law in its application of Article 8(d)(i) of the Statute of the Dispute Tribunal (UNDT Statute) and interpretation of *Neault* when it dismissed the cases as time barred. The UNDT's Judgment does not accord with the Appeals Tribunal's interpretation in *Neault* of Article 8(1)(d)(i)(a)'s

[6] *Ibid.*, para. 66.d.
[7] *Ibid.*, para. 56.
[8] *Ibid.*, para. 59.
[9] *Ibid.*, paras. 62-63.
[10] *Ibid.*, para. 65.

"clear and unambiguous language" that points out that it refers to "the response of management" but not a "timely" response. Although the UNDT's interpretation is in line with the more recent decision in *Gallo*,[11] that case represents a change to *Neault* and cannot be applied retroactively.

17. With respect to the non-selection cases (UNDT/NY/0 11, 27 and 29), the UNDT erred in determining that Mr. Lemonnier had not satisfied the requirement of requesting a management evaluation in a timely fashion or at all. It is manifestly unreasonable for the UNDT to characterize the communications between Counsel and the MEU as simple e-mail exchanges not constituting a request for management evaluation. There is no legal rule requiring the use of a specific form. The e-mail correspondence in this case suffices.

18. The UNDT failed to properly exercise its discretionary authority and also made a number of other reversible errors. It erred when it concluded, based on an incorrect interpretation of *Eng*,[12] that extensions of time limits under Article 8(3) of the UNDT Statute cannot be sought *after* the time limits expire.

19. The UNDT erred in law, exceeded its jurisdiction and made manifestly unreasonable determinations in awarding costs. Costs were not sought by the Secretary-General and an award against an OSLA-represented applicant has the anomalous effect of having a staff member pay for OSLA's errors. The award cannot be justified on the grounds of "procedural flaws" as Mr. Lemonnier's arguments were not "frivolous".

20. Mr. Lemonnier requests that the UNDT Judgment be vacated and his case be remanded to a different UNDT judge for consideration on the merits.

The Secretary-General's Answer

21. The UNDT correctly concluded that Mr. Lemonnier's application regarding the separation decision was not receivable because his application had not been timely filed.

22. The UNDT correctly concluded that even if Mr. Lemonnier had filed a prior written request for a waiver or suspension of the time limit in respect of his application regarding the separation decision, no exceptional circumstances warranted such waiver or suspension of time limits.

[11] *Gallo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-552.
[12] *Eng v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-520.

23. The UNDT correctly concluded that Mr. Lemonnier's application regarding the non-selection decision was not receivable *ratione materiae* because he did not submit a request for a management evaluation.

24. The Secretary-General requests the UNDT Judgment be affirmed, and the appeal be dismissed in its entirety.

Considerations

Did the UNDT err in law in determining that Mr. Lemonnier's challenge to the separation decision was time barred?

25. It is undisputed that Mr. Lemonnier was notified on 29 May 2014 of the decision to separate him from service. On 2 June 2014 Mr. Lemonnier, represented by OSLA, filed a request for management evaluation of the separation decision. Pursuant to Staff Rule 11.2(d) and Article 8(1)(d)(i) of the UNDT Statute, the deadline for the response by the MEU was 17 July 2014.

26. The UNDT determined (citing Staff Rule 11.4.(a) and Article 8(1)(d))(i) of the UNDT Statute) that since the Administration's response was not received by 17 July 2014, Mr. Lemonnier had 90 days to file his application with the Dispute Tribunal which gave him a deadline of 15 October 2014. His application was filed on 6 March 2015.

27. Before the Dispute Tribunal, the Secretary-General argued that, in accordance with the Appeals Tribunal's decision in *Neault*, the belated response from management did not re-set the time limit for the filing of an application. Mr. Lemonnier argued before the UNDT that the Administration's interpretation of *Neault* was wrong, and that the correct interpretation of *Neault* was that even if a management response is received after the 90 day period, the 90 day period begins to run afresh.

28. The Dispute Tribunal rejected Mr. Lemonnier's submission, stating that his interpretation of *Neault* "was misconceived and inconsistent with current jurisprudence".[13] It held that "[p]ursuant to *Neault* if at any point during [the] 90-day time period for the filing of his application with the Tribunal [Mr. Lemonnier] received a belated management evaluation response, it would have re-set the 90-day deadline for the filing of an application. However,

[13] Impugned Judgment, para. 34.

receipt of a management evaluation *after* the expiration of the 90-day period for the filing of an application does not have the same effect".[14]

29. It further found that "the subsequent refiling of the application under a separate case number ... [which] explain[ed] [Mr. Lemonnier's] view on the interpretation of *Neault* [was] misconceived" as "the filing could not conceivably have cured this fundamental procedural flaw".[15]

30. In his submissions before the Appeals Tribunal, Mr. Lemonnier argues that the Dispute Tribunal in effect misinterpreted *Neault*. He contends that in *Neault* the Appeals Tribunal rejected the Administration's argument that the case of a late management evaluation was to be treated as no management evaluation and, thus, the deadline ran from when the response was due. Pointing out that in his case a management evaluation response was provided, Mr. Lemonnier contends, relying on the *ratio dicidendi* of *Neault*, that his UNDT application UNDT/NY/2015/012 was timely filed as it was filed within 90 days of that response.

31. The Secretary-General submits that the Appeals Tribunal's jurisprudence in *Neault* does not support Mr. Lemonnier's position.

32. Article8(1)(d)(i) of the UNDT Statute provides that "[i]n cases where a management evaluation of the contested decision is required", the application to the UNDT must be made:

> a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or
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> 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[.]

33. In *Neault*, the Appeals Tribunal had occasion to consider the above provision. We stated:[16]

> ... There is a clear difference between the terms of Article 8(1)(d) of the [UNDT] Statute and Staff Rule 11.4(a). Staff Rule 11.4(a) contains the final clause "whichever is

[14] *Ibid*., para. 35 (emphasis original).
[15] *Ibid*., para. 38.
[16] *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345, paras. 31-34 (emphasis added).

earlier". But that clause is missing from Article 8(1)(d) of the [UNDT] Statute. The Secretary-General relies on this final clause to support his argument that the limitations period for filing an application with the UNDT commences to run from the *due date* for the MEU response – because that date is earlier than the date the MEU issued its response. However, a basic tenet of administrative jurisprudence requires that "in the event of any ... contradiction between the UNDT Statute and the Staff Rules", the statutory provision must prevail [citing *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293]. The Secretary-General does not, and cannot, cite any authority to the contrary.

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

... Lastly, the Secretary-General argues that, as a matter of policy, to alleviate any uncertainty on the part of staff members about the correct deadline for filing an application with the UNDT, this Tribunal should determine that the filing date should run from the expiration of the period for management evaluation; otherwise, a staff member awaiting a management response might find himself or herself time-barred from an appeal. This argument misunderstands the purpose of management evaluation, which "is to afford the Administration the opportunity to correct any errors in the administrative decision so that judicial review ... is not necessary" [citing *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311].

... With this goal in mind, it is both reasonable and practical for Article 8(1) of the [UNDT] Statute to provide for two different dates from which the limitations period commences to run. After all, the MEU response might partially or fully resolve the staff member's concerns and give the staff member a reason to reconsider the filing of an application challenging the administrative decision. When the management evaluation is received after the deadline of 45 calendar days but *before* the expiration of 90 days for seeking judicial review, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT [citing *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-331]. This affords the staff member an opportunity to fully consider the MEU response in deciding whether to proceed before the UNDT. Nevertheless, the staff member must be aware of the deadline

> for filing an application before the UNDT and make sure that he or she does not miss that deadline while waiting for the MEU response.

34. Mr. Lemonnier contends that it is the Administration that decides whether or not to issue a management evaluation. He submits that the Administration cannot issue a management evaluation and then argue that the time limit to challenge it has already expired. We are not persuaded by Mr. Lemonnier's argument that the *ratio decidendi* in *Neault* effectively provides that a staff member's rights to pursue an application to the UNDT are protected when a tardy response is received from the Administration. We hold that Mr. Lemonnier's argument in this regard is misconceived.

35. In *Neault*, the request for management evaluation was made on 29 November 2010, and the response was due on 13 January 2011. It was received on 17 February 2011, outside of the 45 days but within the 9o days in which Ms. Neault had to file her application under the UNDT Statute. The Appeals Tribunal held (for the reasons set forth in its judgment) that applicable time started running against Ms. Neault from the date of the MEU response, and that she had timely filed her application on 6 May 2011 as it was filed within 90 calendar days of the MEU response. In Mr. Lemonnier's case, the management request was made on 2 June 2014, and the MEU response was due 45 days later, on 17 July 2014. During the following 90 calendar days Mr. Lemonnier did not file an application with the UNDT, nor did the MEU respond within that 90-day period (which would have re-set the clock for Mr. Lemonnier). The MEU responded on 11 December 2014, and Mr. Lemonnier filed his application with the UNDT on 6 March 2015 which, while within 90 days of the MEU's late response, was well outside the 90 calendar days period established in Article 8(1)(d)(i)(*b*).

Is there a contradiction between Neault and Gallo as contended by Mr. Lemonnier?

36. In *Gallo* the Appeals Tribunal stated:[17]

> ... Having reviewed the UNDT Judgment, we can discern no error in the UNDT's computation of the applicable time limits. We agree that, once the MEU failed to provide its response within the prescribed 30-day period, pursuant to Article 8(1)(d)(i)(*b*) of the [UNDT]'s Statute, Mr. Gallo was required to file his application for judicial review with the UNDT within 90 days thereafter, being by 28 January 2014 at the latest. However, Mr. Gallo did not file his application until 2 May 2014, well beyond the deadline prescribed by the [UNDT]'s Statute.

[17] *Gallo v. Secretary-General of the United Nations,* Judgment No. 2015-UNAT-552, para. 15.

37. Mr. Lemonnier argues that the *ratio decidendi* of *Neault* is irreconcilable with the *ratio* in *Gallo*, and that the reasoning in *Neault* should be preferred. We hold that there is no discrepancy between *Neault* and *Gallo.* The *ratio* of both judgments is that where a response to a management request is not received, a staff member has 90 days from when the response was due to file an application to the UNDT. When a response *is* received but *after* the expiration of that 90-day period, as in this case, the receipt of the response does not reset the clock for filing an application with the UNDT, as noted above in paragraph 35.

Did the UNDT err in law or otherwise fetter its discretion in refusing Mr. Lemonnier's request to extend the time for the filing of the application to challenge the separation decision?

38. In the wake of the Administration's arguments on receivability as set out in its reply, Mr. Lemonnier's legal representative filed a request for "judicial leave" to refile the application challenging the separation decision. In the motion filed with the UNDT seeking an extension of time, Mr. Lemonnier argued for the following factors to be taken as exceptional circumstances: (i) his interpretation of the Appeals Tribunal's jurisprudence in *Neault;* (ii) the protracted dialogue with the Administration; and (iii) the fact that the Administration was caused no prejudice by being given additional time to evaluate and attempt to address his case.

39. The Dispute Tribunal rejected the application for an extension of time finding that Mr. Lemonnier had not made the application for an extension before the expiration of the relevant time limit. It went on to find that even if the application for an extension had been filed in a timely manner "[t]here was nothing exceptional about these cases and the Tribunal sees no good reason why a proper application against the separation decision could not have been filed within the applicable time limits".[18]

40. On appeal, Mr. Lemonnier submits that the UNDT's determination that it could not grant an extension of time limits because they had already expired was a misinterpretation on its part of the Appeals Tribunal's jurisprudence in *Eng.*[19] He argues that the thrust of the Appeals Tribunal's approach in *Eng* is that an applicant must file a request for an extension of time prior to the filing in respect of which an extension is sought and not that such a request has to be filed prior to the expiry of the time limits. Mr. Lemonnier submits that this is consistent with the plain reading of Article 8(3) of the UNDT Statute and with its Rules of Procedure. He

[18] Impugned Judgment, para. 39.
[19] *Eng v. Secretary-General of the United Nations,* Judgment No. 2015-UNAT-520.

asserts that in believing that it could not grant an extension, the Dispute Tribunal fettered its discretion and failed to exercise the jurisdiction which Mr. Lemonnier's motion had invoked.

41. In response to the Dispute Tribunal's ruling that there were no exceptional circumstances, Mr. Lemonnier also argues that there were numerous reasons for extending the time limits. He submits that the MEU had led him to believe that he could expect a reasoned response. Further, the MEU elected to complete management evaluation. Mr. Lemonnier submits that his cases on the merits were so strong that the MEU had already suspended action. Additionally, Mr. Lemonnier argues that there was no suggestion of prejudice to the Administration. He asserts that the foregoing and other considerations were not considered by the UNDT which amounts to a reversible error.

42. We find no merit in the submission that the Dispute Tribunal erred in its interpretation of *Eng* or in finding that no exceptional circumstances existed. Insofar as Mr. Lemonnier relies on claimed confusion as to the scope of *Neault* in his exceptional circumstances argument, the UNDT correctly noted that that case was applied in a number of judgments of which Mr. Lemonnier's OSLA representative would have been aware. Furthermore, it is well settled that ongoing exchanges with the MEU do not re-set the applicable time limits.[20]

Did the UNDT err in law in concluding that Mr. Lemonnier's challenge to his non-selection for the CISS post was not receivable?

43. Essentially, the UNDT found that Mr. Lemonnier's applications in respect of the non-selection decision were not receivable because he "failed to request management evaluation of the contested decision of 5 February 2015".[21] The Dispute Tribunal stated that "it is settled law" that the Tribunal has no jurisdiction to consider an application in the absence of a management evaluation request. It is trite law at this juncture that in the context of a case such as the present the request for management evaluation is a perquisite for the Dispute Tribunal to entertain the challenge to Mr. Lemonnier's non-selection.

[20] *Ibid*., para. 23, citing *Abu-Hawaila v. Secretary-General of the United Nations,* Judgment No. 2011-UNAT-118, para. 29.
[21] Impugned Judgment, para. 49.

Was there a request for management evaluation in respect of the non-selection decision?

44. In the course of its judgment, the Dispute Tribunal stated: "[Mr. Lemonnier] produced neither a copy of any management evaluation request nor any other credible evidence of an actual evaluation request". Mr. Lemonnier submits that there is no legal rule prescribing the use of any management evaluation *form* and that all that is required is that an appropriately addressed request makes clear that it is seeking administrative review in respect of an identified decision. Moreover, he submits that there were requests for management evaluation of his non-selection and points to the e-mails dated 14 November 2014, 2 December 2014 and 5 December 2014. Mr. Lemonnier argues that in its myriad receivability arguments before the UNDT, the Administration never contended that management evaluation of the non-selection decision had not been sought. The Secretary-General in his reply to the non-selection application stated, in fact, that management evaluation of the non-selection decision had not been requested. However, the Administration appears to ground its assertion on the basis that Mr. Lemonnier's application cites 5 February 2015 as the date of the impugned decision and that there was no request for management evaluation subsequent to that date. It appears that the Administration's assertion was predicated on Mr. Lemonnier's contentions, both in his first application to the UNDT challenging the non-selection and in the re-filed non-selection application, that the non-selection decision was communicated to him on 5 February 2015 and that he had sought management evaluation of that decision on dates in November and December 2014. Mr. Lemonnier's contentions, on their face suggest, that management evaluation was sought *before* the impugned decision was issued.

45. It is an undisputed fact that Mr. Lemonnier received a response from the MEU on 5 February 2015. This begs the question as to what the MEU were responding to in their letter of 5 February 2015.

46. Clearly on its face this letter was a response to a request for management evaluation as management specifically refers to a request dated 2 December 2014 for management evaluation of the decision not to select Mr. Lemonnier for the CISS post. The letter states that Mr. Lemnonier's request was reviewed and it informed him that the Secretary-General had endorsed the findings and recommendation of the MEU to uphold the decision not to select him for the CISS post.

47. The available record clearly indicates that the MEU, by the nature and content of its response of 5 February 2015, was answering a management evaluation request of 2 December 2014 in relation to the non-selection of Mr. Lemonnier for the CISS post. In light of that, the date of 5 February 2015, referred to as the date of the impugned decision in both of the applications challenging the non-selection, should not be the deciding factor as to whether Mr. Lemonnier had sought management evaluation of the non-selection decision.

48. The Appeals Tribunal holds that the UNDT failed to take sufficient account of the content of the communications sent on Mr. Lemonnier's behalf between October and 2 December 2014 or of the letter sent to Mr. Lemonnier on 5 February 2015 which was clearly a management response to his request for an evaluation of why he was not selected for the CISS post. Furthermore, we are of the view that there was no legal or factual basis for the UNDT to determine that "any purported request of 2 December 2014" for management evaluation was "well outside the statutory 60 day period for the filing of a management evaluation request" as the "contested position was advertised on 17 April 2014".[22]

49. We find no basis upon which the UNDT could logically take 17 April 2014 as a starting date for time to run for a management evaluation request for two reasons – first, because that date pertains only to when the post was advertised; and, second, because the communications sent on Mr. Lemonnier's behalf seeking management evaluation of his non-selection refers to his having become aware on 17 September 2014 that the CISS post had been filled by a third party (not necessarily the third party who was ultimately selected for the CISS post). On its face, therefore, Mr. Lemonnier timely sought management evaluation of his non-selection by virtue of the communication sent on his behalf on 14 November 2014, requests which were repeated in his e-mail of 2 December 2014.

50. Consequently, we hold that as Mr. Lemonnier had sought management evaluation of the non-selection decision, the Dispute Tribunal had jurisdiction to entertain the application filed on 6 March 2015. We find that when confronted by these confusing and contradictory filings, the UNDT effectively lost sight of the fact that there had been a request for management evaluation of the non-selection decision which was responded to by the Administration on 5 February 2015. We find, therefore, that the Dispute Tribunal erred in finding application UNDT/NY/2015/11 not receivable and hereby remand this application to the UNDT for a consideration on the merits.

[22] *Ibid*., para. 52.

51. As to the manner in which a management evaluation request should be formulated, we make the following general observation. While the use of a specific "form" is not a mandatory requirement for there to be a valid management evaluation request, the use of the MEU's standard form is preferable as it is readily available to staff members, online and from the MEU. The fundamental point is that a staff member's request for management evaluation, however it is transmitted (including, for example, via a mobile device), must be an unambiguous written request which clearly identifies the staff member and the contested decision. As already stated, in the present case, the Appeals Tribunal was sufficiently satisfied that the content of the e-mails sent on Mr. Lemonnier's behalf between October and 2 December 2014 satisfied the requirement for an unambiguous request, particularly in light of the management response of 5 February 2015.

The award of costs against Mr. Lemonnier

52. Pursuant to Article 10(6) of the UNDT Statute, the Dispute Tribunal may award costs against a party where a determination is made that that party has manifestly abused the proceedings before it. The question to be determined is whether the circumstances of the present case merited an award of costs against Mr. Lemonnier. We find that they did not.

53. While undoubtedly the Dispute Tribunal was ultimately confronted with a plethora of applications in an attempt by Mr. Lemonnier's legal representative to cure receivability issues raised by the Administration, we do not find that the number of filings reached the threshold where Mr. Lemonnier "manifestly abused" the proceedings. In arriving at our conclusion, we take into account that in its reply to UNDT application UNDT/NY/2015/11, the Administration did not acknowledge, as it should have, that in the letter of 5 February 2015 Mr. Lemonnier was actually advised that his management evaluation request regarding the non-selection for the CISS post had been considered and upheld. Had that been more directly acknowledged, it seems to us that Mr. Lemonnier's lawyer might have felt less inclined to embark on the subsequent filings with regard to the non-selection decision.

Judgment

54. Mr. Lemonnier's appeal succeeds in part. The UNDT's finding on the non-receivability of the challenge to the non-selection decision is vacated and this matter is hereby remanded to the UNDT for a consideration on the merits. The costs order against Mr. Lemonnier is also vacated. The balance of the Dispute Tribunal's Judgment No. UNDT/2015/124 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Faherty, Presiding	Judge Chapman	Judge Simón

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar