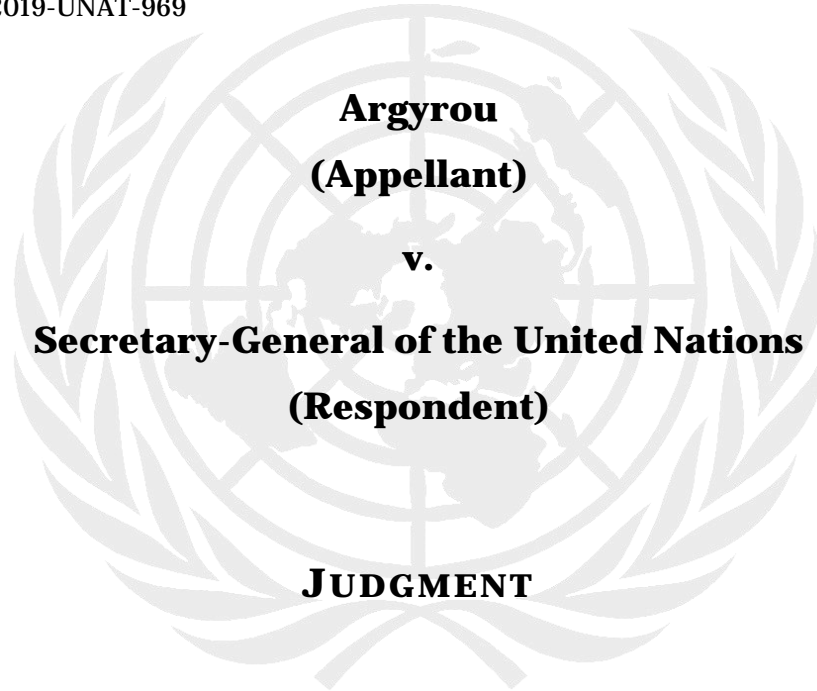




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-969



**Argyrou
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Martha Halfeld Judge Jean-François Neven
Case No.:	2019-1269
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Argyrou:	Flogaitis Spyridon
Counsel for Secretary-General:	Patricia C. Aragonés

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Mr. Costas Argyrou is a staff member of the Procurement Section of the United Nations Peacekeeping Force in Cyprus (UNFICYP). He complained that since he joined UNFICYP in 1992 he had been required to work additional hours without compensation or acknowledgement, and that he had raised this matter on several occasions with his supervisors. In his application to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Argyrou alleged that the UNFICYP Administration had violated Staff Rule 3.11 and the UNFICYP administrative circular governing compensation for overtime work. He also alleged harassment and abuse of authority by his supervisors and the failure to complete his performance evaluation. The Dispute Tribunal, by way of a summary judgment, dismissed Mr. Argyrou's application as not receivable *ratione materiae*. We affirm.

Facts and Procedure

2. Mr. Argyrou joined the Procurement Section of UNFICYP on 12 May 1992. He has been working in the same section since then.

3. According to Mr. Argyrou, there has been systemic understaffing in the Procurement Section since his appointment. This has required him to work additional hours without compensation since inception and on occasion has led to his forfeiting annual leave. He referred in particular to one example in 2006 regarding a post within the Procurement Section that was redeployed to the Finance Section on a temporary basis, though, to date, this post is still in the Finance Section. The temporary redeployment led to understaffing and the redistribution of the workload among the remaining staff in the Procurement Section. As a result, additional work hours were required to fulfil the Procurement Section's operational requirements. He maintains that he has been working additional hours, without compensation, beyond working hours and days, in order to meet the set deadlines, on an average of two and a half to three hours daily, including some weekends and holidays. Moreover, while no additional staff was hired for the Procurement Section, he and his colleagues had to provide additional administrative and logistical support to other organizations including the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), and the Operation for the Prohibition of Chemical Weapons–United Nations (OPCW-UN). The situation was made more difficult by another post of procurement assistant being temporarily reassigned from the Procurement Section to the Integrated Acquisition Unit (IAU) in May 2017.

4. Mr. Argyrou claims that he brought this issue to the attention of his reporting officer “on numerous occasions”, presumably verbally. His averments in that regard are not set out in his appeal or application in chronological order, are vague and do not indicate when and where he made the complaints to the first reporting officer. However, it is clear that the issue was not resolved to his satisfaction.

5. The application to the UNDT and the appeal brief refer only to one specific occasion where Mr. Argyrou had raised the matter of his working additional hours without compensation. This took place at a meeting on 25 November 2016 when Mr. Argyrou met with the Chief Mission Support (CMS). According to Mr. Argyrou, the CMS responded by saying that he did not want Mr. Argyrou to work additional hours. There is no other information about this meeting on record. While the CMS instructed Mr. Argyrou and others not to work additional hours at the meeting, that instruction was allegedly breached subsequently by the repetitive orders to Mr. Argyrou to finish the work before he could leave the office, and thus he states he was “forced” to continue to work overtime without compensation.

6. The appeal brief refers to other engagements with the CMS on 29 May 2015 and in March 2018 where it is alleged that the CMS acted arrogantly. Mr. Argyrou took umbrage particularly at an e-mail dated 6 March 2018 in which the CMS allegedly used abusive, offensive and harassing language against the Procurement Section. This relevant exchange of e-mails between the CMS and some UNFICYP staff members, including Mr. Argyrou, concerned the provision of right-hand self-drive vehicles. In a response, the CMS wrote: “I just spoke with [the Chief Procurement Officer (CPO)] who is currently on sick leave. I ripped into Procurement as they shouldn’t have sent that fax. I just flamed them!!”

7. Mr. Argyrou was clearly offended by the tone of the CMS but it is not clear from the stated facts whether any of these encounters related specifically to the failure to compensate Mr. Argyrou for his additional work.

8. Mr. Argyrou discussed the issue of overtime with a representative of the Office of Staff Legal Assistance on 24 and 25 May 2018 who allegedly told him that management could not be criticised for its decisions and that other posts might be cut from the Procurement Section.

9. On 7 June 2018, Mr. Argyrou submitted a request for management evaluation of the decision taken by the UNFICYP Administration to redeploy a post of procurement assistant from the Procurement Section to the IAU on 11 May 2017. Mr. Argyrou claimed that this redeployment created a negative impact on the workload of the Procurement Section, as the work had to be redistributed among the remaining staff of the Procurement Section and he had to work even more hours on top of the additional hours that he had already put in. Mr. Argyrou requested that the Procurement Section be staffed with an adequate number of staff “to enable me to finalise my work within the working hours” and added that he was seeking “compensation (additional payment) for the additional hours of work that I have performed for the Organization”.

10. By letter dated 24 July 2018, the Management Evaluation Unit (MEU) informed Mr. Argyrou of the outcome of the management evaluation. The MEU found that Mr. Argyrou’s management evaluation request was not receivable because, assuming that there had been such a decision, it had not been filed in a timely manner in terms of Staff Rule 11.2(c). Mr. Argyrou had failed to file the request within 60 calendar days from the date on which he became aware of the decision not to pay him overtime or when all the facts in relation to the decision should have been reasonably known, such being the date he received his payslip.¹

11. The MEU also found that Mr. Argyrou’s request was not receivable as it related to his allegations regarding systemic understaffing and the reclassification of his post and there was no individual contestable administrative decision having direct legal consequences on his terms of appointment.

12. On 8 October 2018, Mr. Argyrou filed an application with the UNDT alleging breach of his contract by the UNFICYP Administration in violation of Staff Rule 3.11 (Overtime and compensatory time off) and UNFICYP’s Administrative Circular No. 2010-006 (Conditions governing compensation for overtime work). He also alleged that he had been subjected to harassment and abuse of authority by his current and former supervisors in violation of the Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). He further challenged the failure by his second reporting officer to complete his 2017-2018 performance evaluation within the applicable deadline in violation of Administrative Instruction ST/AI/2010/5 (Performance Management

¹ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691.

and Development System). Mr. Argyrou sought official acknowledgement of the additional hours of work that he had performed since 12 May 1992 and monetary compensation in respect thereof. But he did not request any remedy in respect of his ST/SGB/2008/5 and ST/AI/2010/5 claims.

13. The UNDT determined in terms of Article 9 of the UNDT Rules of Procedure that summary judgment was appropriate in this matter. It dismissed Mr. Argyrou's application, concluding that none of his claims were receivable *ratione materiae*.

14. Regarding Mr. Argyrou's claim for compensation for additional work, the UNDT held that Mr. Argyrou had failed to identify any specific administrative decision taken by the UNFICYP Administration in respect of his alleged overtime work.

15. The UNDT also agreed with the Secretary-General regarding Mr. Argyrou's ST/SGB/2008/5 claim. ST/SGB/2008/5 sets out a separate process for investigating allegations of harassment and abuse of authority. Section 5.11ff of ST/SGB/2008/5 permit an aggrieved individual to file a written complaint of prohibited conduct and authorise the relevant officials to appoint a panel for a fact-finding investigation to determine whether harassment has taken place. Mr. Argyrou did not file a written complaint in terms of ST/SGB/2008/5 and raised the allegations of harassment formally for the first time in his application. The UNDT held that it did not have jurisdiction to conduct an investigation in terms of ST/SGB/2008/5.

16. The UNDT likewise dismissed as not receivable Mr. Argyrou's claim of delays in the completion of his performance evaluation, because there was no reviewable decision stemming from the said performance evaluation and Mr. Argyrou had not raised any issue related to his performance appraisal in his management evaluation request.

17. Mr. Argyrou appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal) on 10 June 2019, and the Secretary-General filed his answer on 13 August 2019.

Submissions

Mr. Argyrou's Appeal

18. Mr. Argyrou submits that the UNDT erred in law when it concluded that he had failed to identify any specific administrative decision in respect of his alleged overtime work. He maintains that he is contesting the "continuous, implicit, negative [a]dministrative acts of

the Management” towards him, the UNFICYP Administration’s repetitive oral refusal to acknowledge his overtime work, and the failure of his supervisor to officially request him to work overtime despite his insistent oral requests to receive overtime compensation. Moreover, the failure by the UNFICYP Administration to implement the approved staffing table of nine posts for the Procurement Section constituted an implied administrative decision. These are “challengeable implied administrative decisions”, because they produced a direct and legal effect on his contract as well as adverse consequences on his health.

19. Mr. Argyrou filed written attestations signed by his former colleagues confirming that he had often worked beyond the normal hours of work due to understaffing in the Procurement Section.

20. Mr. Argyrou submits further that his compulsory overtime work without compensation over the years was in violation of the UNFICYP’s responsibility to establish a normal working week for its employees. As the “wrongful occurrence” is “continuous”, the UNDT should have permitted an automatic waiver of the applicable time limits to allow him to present his claims and such an automatic waiver is “intuitively deemed justified”.

21. Mr. Argyrou maintains that the UNDT failed to exercise the jurisdiction vested in it by declaring his complaint of harassment and abuse of authority against the CMS as not receivable.

22. Mr. Argyrou requests that the Appeals Tribunal reverse or modify the impugned Judgment, acknowledge his overtime work and the unsustainability of his working environment and award him adequate compensation.

The Secretary-General’s Answer

23. As a procedural matter, the Secretary-General refers to three performance evaluation appraisals (2014-2015; 2017-2018; and 2018-2019), two e-mails from UNFICYP’s CMS dated 6 March 2018 and 11 May 2017, minutes of a procurement staff meeting on 11 April 2014, various e-mails sent by Mr. Argyrou after his normal working hours, and statements by former UNFICYP staff members dated 24 or 27 May 2019, all of which Mr. Argyrou annexed to his appeal. The Secretary-General requests that Appeals Tribunal not admit or consider such evidence, because those additional documents were all available at the time of Mr. Argyrou’s UNDT application, but he did not include any of them as part of his application. Mr. Argyrou has neither requested leave

to the Appeals Tribunal to file them nor complied with the criteria set forth in Article 2(5) of the Appeals Tribunal Statute for doing so.

24. The Secretary-General submits that the UNDT correctly concluded that Mr. Argyrou's claims regarding compensation for alleged overtime work were not receivable, as he did not identify or provide evidence of any instance in which he had requested to be compensated for overtime work or any instance in which the UNFICYP Administration had denied such a request. Nor was there any evidence showing the failure on the part of the UNFICYP Administration to fulfil its obligation towards Mr. Argyrou or implement any specific decision in his favour.

25. The decisions of the UNFICYP Administration to redeploy staff and not to reverse the redeployment are not appealable as they did not directly impact Mr. Argyrou's terms of appointment. They are of general application rather than individualized decisions producing direct legal consequences for Mr. Argyrou's terms of employment.

26. Contrary to Mr. Argyrou's argument about the need for an automatic waiver of the applicable time limits in case of continuous wrongful occurrence, the jurisprudence of the Appeals Tribunal has not endorsed a flexible approach to time limits.

27. The UNDT also correctly concluded that Mr. Argyrou's ST/SGB/2008/5 claim was not receivable, because his failure to file a written complaint under ST/SGB/2008/5 had deprived the UNDT of a basis to assert any jurisdiction to inquire into his allegations of harassment and abuse of authority. Moreover, Mr. Argyrou had not claimed harassment or abuse of authority in his request for management evaluation. In this regard, the Secretary-General notes that Mr. Argyrou has submitted, for the first time on appeal, a copy of the e-mail of 6 March 2018, though he had referred to it in his UNDT application. Nonetheless, this submission does not change the fact that he did not file a written complaint pursuant to ST/SGB/2008/5.

28. The UNDT further correctly concluded that Mr. Argyrou's claim regarding the delay in the completion of his performance evaluation appraisal was not receivable. The Secretary-General notes that Mr. Argyrou does not appeal the UNDT's holding in this regard.

29. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the impugned Judgment.

Considerations

30. Although in the final analysis not much turns on the question, the Secretary-General's objection to Mr. Argyrou's filing for the first time of the additional documents annexed to his appeal is well taken. Except Annexes 5 (impugned Judgment), and 14-16 (statements by former UNFICYP staff members), the additional documents were all available at the time of Mr. Argyrou's UNDT application and should have been presented at the UNDT. The statements dated 24 and 27 May 2019 by the former UNFICYP colleagues to the effect that Mr. Argyrou had worked additional hours beyond the normal office hours every day were not relevant to the central issues of the case. Accordingly, such documents are inadmissible in terms of Article 2(5) of the Appeals Tribunal Statute

31. The conclusion of the UNDT that Mr. Argyrou's claims regarding compensation for alleged overtime work was not receivable relates to the matter of jurisdiction. The relevant jurisdiction of the UNDT is defined by Article 2(1)(a) of the UNDT Statute as comprising the competence to hear and pass judgment on an application "to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

32. Our jurisprudence holds that a staff member is required to clearly identify the administrative decision which is contested.² Mr. Argyrou did not provide evidence with sufficient particularity of any specific instance in which he requested compensation for overtime work or any instance in which the UNFICYP Administration had denied such a request. The averments made in the application and the appeal brief are somewhat vague and lacking in precision. The allegations are of a general nature and complain about being "forced" to work additional hours and a non-compliance with the relevant rules and policies. Mr. Argyrou's averments that he repeatedly raised the matter over a 25-year period are insufficient. He has not precisely identified when he raised the matter, with whom, where and to what effect. The finding of the UNDT that absent any identifiable administrative decision the application was not receivable *ratione materiae* is therefore correct. There is no identified unilateral decision of individual application that carried direct legal consequences for Mr. Argyrou. The need to identify a specific administrative decision is obviously necessary for

² See *Haydar v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-821, para. 13.

the purpose of determining when the 60-day time limit for management evaluation in terms of Staff Rule 11.2(c) commenced.

33. Mr. Argyrou's submission that his overtime work without compensation over the years was in violation of UNFICYP's responsibility to establish a normal working week for its employees and was thus a continuous wrongful occurrence permitting an automatic waiver of the applicable time limits is unsustainable. Our jurisprudence has not endorsed a flexible approach to time limits, but more importantly, the alleged existence of a continuous wrong cannot of itself be perceived as an implied administrative decision conferring jurisdiction. Before it can be found that there was an implied administrative decision there must be evidence that the continuous wrong was challenged by a specific request to desist and a refusal or failure by the Administration to desist or an implied decision in the form of a failure to take any decision in that regard. As stated, there is no evidence that a specific request to an appropriate official was refused or ignored within the 60 days prior to the request for management evaluation on 7 June 2018. The request to the CMS on 25 November 2016 and the complaint about the redeployment of a post on 11 May 2017 were both outside that time frame. There is also no averment that the representative of the Office of Staff Legal Assistance had the authority to take any relevant administrative decision or in fact took one during the discussion in late May 2018.

34. The contention that the failure to properly staff the Procurement Section was in itself an implied administrative decision not in compliance with the contract is also not sustainable. Once again, for a breach of contract to fall within the jurisdiction of the UNDT it must take the form of an administrative decision that is not in compliance with the terms of appointment of a staff member and the decision must be an individual decision with direct legal consequences for the staff member. There are no clear averments on record identifying any instance where Mr. Argyrou, prior to his request for management evaluation, challenged the alleged failure to properly staff the Procurement Section and the Administration thereafter either refused to increase the staff of the Procurement Section or ignored the challenge. Moreover, the Administration's decision to redeploy staff did not directly impact Mr. Argyrou's terms of appointment. These were decisions of general application, perhaps with unsatisfactory practical consequences, but producing no direct legal consequences in relation to Mr. Argyrou's terms of employment. Again, if the redeployment led to Mr. Argyrou being required to work overtime, there is no precise indication of the overtime he worked, when he worked it or, most importantly, that he sought payment or time-off in lieu for it, or that any specific request for payment

or time-off was rejected or ignored at any time. In any event, the redeployments referred to in the application occurred in 2006 and 2017, long before Mr. Argyrou requested management evaluation, meaning that there was no compliance with the 60-day time limit in Staff Rule 11.2(c).

35. In the premises, the UNDT did not have jurisdiction *ratione materiae* in relation to the issue of overtime.

36. The UNDT also correctly concluded that Mr. Argyrou's claim of abuse and harassment in terms of ST/SGB/2008/5 was not receivable. Article 2 of the UNDT Statute does not authorise the UNDT to conduct investigations into complaints of abuse or harassment.

37. Section 5 of ST/SGB/2008/5 provides that where informal resolution of complaints of abuse or harassment is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the responsible official with authority. If there are sufficient grounds to warrant a formal fact-finding investigation, the responsible official is obliged to appoint a panel to conduct a fact-finding investigation. If the investigation finds that no prohibited conduct took place, the responsible official will close the case. If the investigation establishes that there was a factual basis for the allegations, depending on the gravity of the abuse or harassment, the responsible official should refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary proceedings or merely recommend managerial action. Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

38. The UNDT is competent under its jurisdiction to determine if there was a proper investigation in terms of ST/SGB/2008/5 and to review whether any administrative decision arising from the process was in compliance with the terms of the aggrieved individual's terms of contract. It is, however, not clothed with jurisdiction to itself conduct *ab initio* an investigation of a harassment complaint.³ The UNDT was accordingly correct in finding that it lacked jurisdiction in relation to this complaint. Moreover, Mr. Argyrou did not make any allegations of harassment or abuse of authority in his request for management evaluation. He did file, for the first time on appeal, a copy of the e-mail of 6 March 2018, which he mentioned in his UNDT application. However, this does not change the fact that he had not requested management

³ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

evaluation of the alleged harassment or abuse and did not file a written complaint pursuant to ST/SGB/2008/5. The UNDT accordingly did not err in concluding that the claim was not receivable.

39. Mr. Argyrou did not appeal against the finding of the UNDT that his claim regarding a delay in the completion of his performance was not receivable. One may assume that Mr. Argyrou accepts that the claim was not receivable *ratione materiae* because the issue was not raised in his referral to management evaluation and there was in any event no specific administrative decision stemming from his performance appraisal. There is accordingly no need to render a decision in that regard on appeal.

Judgment

40. The appeal is dismissed and Judgment No. UNDT/2019/054 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Neven

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar