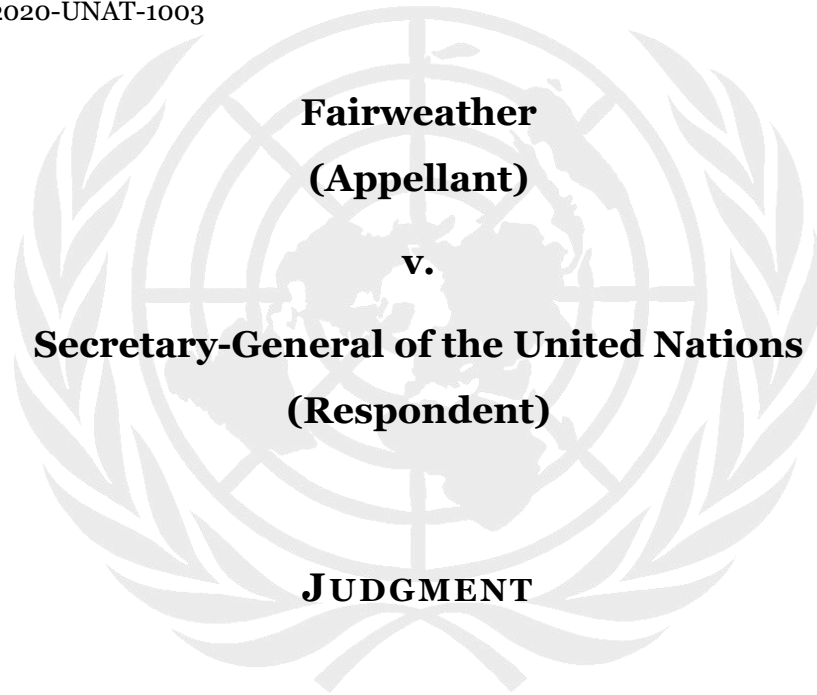




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-1003



**Fairweather  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Jean-François Neven, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2019-1317
Date:	27 March 2020
Registrar:	Weicheng Lin

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Counsel for Ms. Fairweather:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

**JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.**

1. Ms. Dianne Juliet Fairweather challenged before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the Administration's failure to provide a rebuttal report with respect to two performance appraisals which rated her as partially meeting expectations, as a result of which she alleges she did not obtain the long-service step and could not apply for the young professionals programme (YPP). The UNDT dismissed her application on grounds that it was not receivable since Ms. Fairweather had not challenged any administrative decision pertaining to a long-service step and that, if she intended to challenge such decision in her application before the UNDT, her case would be time-barred. The UNDT further held that it was unclear whether Ms. Fairweather had applied for the YPP exam and had been found ineligible sometime between 2013 and 2016 and that her 2017 management evaluation request was filed long after the prescribed time limit from the date on which she could have been notified of the decision on her eligibility for the YPP exam, if any. Since Ms. Fairweather did not clearly identify any other direct consequences stemming from her performance appraisals, the UNDT found there were no other issues for it to review. Ms. Fairweather appealed to the United Nations Appeals Tribunal (Appeals Tribunal). The Appeals Tribunal, by majority with Judge Colgan dissenting, dismisses the appeal and affirms the UNDT Judgment.

**Facts and Procedure**

2. Ms. Fairweather is a retired staff member of the Office of the High Commissioner for Human Rights.

3. In May 2013, Ms. Fairweather's performance appraisals for the periods 2010-11 and 2011-12 were completed, in which she received the ratings of "partially meets performance expectations". She timely requested a rebuttal of her performance appraisals.

4. In July 2013, Ms. Fairweather followed up by e-mail with the human resources office regarding the status of her rebuttal request, noting that the deadline for the YPP exam was 1 August 2013. In response, she was told that there was no news from the rebuttal panel and that the rebuttal process might take several months to complete. Ms. Fairweather also sent an e-mail to the rebuttal panel members noting that the two negative performance appraisals suspended her long-service step and her eligibility for the YPP exam. Between the initiation

of the rebuttal process in 2013 and her retirement on 31 October 2016, Ms. Fairweather followed up with the human resources office several times regarding the status of her rebuttal request. After retirement, Ms. Fairweather continued to follow up with the human resources office regarding the status of her rebuttal request.

5. On 19 July 2017, Ms. Fairweather requested management evaluation of the decision “not to respond to and/or take appropriate and timely action to consider, complete and report on request for rebuttal on her performance appraisal filed on 13 May 2013”. Ms. Fairweather wrote that it had caused her tremendous stress and anxiety, had a significant negative impact on her long-service step and retirement benefits and also had made her ineligible to sit for the YPP exam or to apply for any temporary positions.

6. Having received no response to her management evaluation request, on 17 October 2017, Ms. Fairweather filed an application with the Dispute Tribunal against the decision “not to respond to and/or take appropriate and timely action to consider, complete and report on request for rebuttal on her performance appraisal filed on 13 May 2013”.<sup>1</sup>

7. On 29 November 2017, the Rebuttal Panel issued its reports, recommending for the 2010-2011 performance period the upgrade of Ms. Fairweather’s rating to “successfully meets performance expectations”, but recommending no change to the 2011-2012 rating of “partially meets performance expectations”.

8. On 5 August 2019, the UNDT in New York issued Judgment on Receivability No. UNDT/2019/134 dismissing Ms. Fairweather’s application as not receivable. The UNDT found that an inordinate delay in the rebuttal process of an appraisal was not an administrative decision, unless it was shown that it had, by itself, a direct and negative impact on a staff member’s conditions of service. Ms. Fairweather therefore needed to demonstrate that the delay in conducting the rebuttal process on her rating “partially meets performance expectations”, by itself, had a direct and negative impact on her conditions of service.

9. With respect to the long-service step, the UNDT noted that this entitlement was governed by Information Circular ST/IC/2008/45 (Revised salary scales for staff in the General Service and related categories at Headquarters) which set out the qualifying criteria

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<sup>1</sup> Impugned Judgment, para. 13.

for in-grade increases to the long-service step, one of which was that the staff member's service should be satisfactory. The UNDT noted that ST/IC/2008/45 specifically addressed the relationship between the rebuttal process and long-service step providing that the decision whether to grant or deny the long-service step was not part of the rebuttal process and that denial of long-service step was an appealable administrative decision. The UNDT found that this guideline was consistent with Administrative Instruction ST/AI/2010/5 (Performance management and development system) which separates the rebuttal process from the challenge of any other administrative decision that might stem from a final performance appraisal.

10. The UNDT further found that there was no evidence that Ms. Fairweather had proceeded to challenge such a decision and that if she had intended to challenge any administrative decision pertaining to a long-service step in her application, her case would be time-barred. As to Ms. Fairweather's claim that her retirement benefits had been negatively affected because she had not received a long-service step, the UNDT found that it could not review her claim as there was no reviewable administrative decision concerning the long-service step.

11. Turning to Ms. Fairweather's eligibility for the YPP exam, the UNDT noted that Administrative Instruction ST/AI/2012/2/Rev.1 (Young professionals programme) provides that staff members who applied for the YPP exam and were found to be ineligible to take the exam should be informed of the reasons for that determination and may file a request for review with the Central Examinations Board (CEB). The UNDT read this provision together with ST/AI/2010/5 and concluded that any decision to find a staff member ineligible for the YPP exam also constituted an administrative decision that could be contested separately.

12. While it was unclear whether Ms. Fairweather had applied for the YPP exam and had been found ineligible, sometime between 2013 and her retirement in October 2016, the UNDT found that in any event, she should have followed the procedures set forth in ST/AI/2012/2/Rev.1 and timely requested management evaluation. Since she requested management evaluation only in July 2017, long after the prescribed time limit, the UNDT found that Ms. Fairweather's challenge to any administrative decision pertaining to her eligibility for the YPP exam was also time-barred.

13. The UNDT dismissed the application as not receivable.

14. Ms. Fairweather filed an appeal on 4 October 2019, and the Secretary-General filed his answer on 4 December 2019.

### **Submissions**

#### **Ms. Fairweather's Appeal**

15. As a preliminary matter, Ms. Fairweather requests that the Appeals Tribunal hold an oral hearing.

16. The UNDT erred in finding that the delay in the completion of the rebuttal process was not an administrative decision within the meaning of Article 2 of the UNDT Statute. The Tribunals have decided in a number of cases that a non-decision or failure to take a timely decision is an administrative decision. In the instant case, the excessive delay, and failure or omission of the Administration to complete the rebuttal process within a reasonable timeframe is an appealable administrative decision which continues to have detrimental legal consequences affecting the terms and conditions of Ms. Fairweather's appointment. This is a clear omission or failure to take timely and appropriate action as required by the Administrative Instruction on Performance Management and Development System.

17. In considering the Appeals Tribunal jurisprudence, the UNDT failed to distinguish between the total failure or abdication of duty by the Administration to respond to a staff member's request as required by the Staff Rules, which is an implied administrative decision, and the case in which the requested process began and yet suffered inordinate delay. Where there is a process involving a series of steps, a staff member can only challenge the final administrative decision once the process has been completed. Under Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) for example, staff members may only challenge procedural irregularities in the fact-finding investigation after the fact-finding panel has issued its report. This is distinguishable from the legal obligation imposed on the Administration to ensure that all requests for rebuttal are completed in a timely manner. The language of ST/AI/2002/3 and ST/AI/2010/5 expressly and implicitly intends that the rebuttal process of a staff member's e-pas is to be completed expeditiously as a complete administrative action.

18. The delay in the completion of the rebuttal process had direct legal consequences. As the UNDT observed, the qualifying criteria for in-grade increases to the long-service step include the requirement for the staff member's performance to be "satisfactory". Since the rebuttal process was not timely concluded and Ms. Fairweather's performance rating remained unsatisfactory, she was automatically denied the long-service step. The administrative guidelines clearly provide that the decision of whether or not to grant or deny the long-service step is not part of the e-pas rebuttal process, but constitutes an appealable administrative decision.

19. The UNDT erred in its determination that Ms. Fairweather had failed to contest the administrative decision pertaining to her long-service step award. The Administration has to routinely provide a list of qualifying staff at retirement to the head of office for approval. There is no application process for a long-service step award and there is no need for an explicit challenge of this potential administrative decision. Ms. Fairweather's ineligibility to qualify for such an award after 35 years of service at the time was itself a direct negative legal consequence of the inordinate delay in completing her e-pas rebuttal. The Administration's failure to timely complete the rebuttal process also resulted in Ms. Fairweather's ineligibility to apply to take the YPP exam since she failed to meet the minimum eligibility performance requirement. She did not have to apply for the YPP exam to be found ineligible as, by virtue of her performance status which was under review, she was ineligible.

20. Ms. Fairweather requests that she be paid full compensation for the deprivation of her full long-service step benefit, the fair assessment of her pension benefit based on the salary of the long-service step, the deprivation of opportunities to participate in the YPP exams and to apply for other positions in advancing her career as a staff member. She also requests payment of compensation as deemed appropriate by the Appeals Tribunal "for the stress, pain and suffering experienced from the excessive delay and violation of [her] employment rights".

### **The Secretary-General's Answer**

21. The UNDT correctly concluded that the application was not receivable. The inordinate delay in the rebuttal process was not an administrative decision subject to judicial review. At the time of the application, the requests for rebuttal were still pending before the Rebuttal Panel, so there was no administrative decision to be challenged. Any inordinate

delay in the rebuttal process should have been challenged once the rebuttal reports were issued in November 2017 and communicated to Ms. Fairweather.

22. With regard to a decision on a long-service step, the UNDT correctly found that the delay in the completion of the rebuttal process did not have direct legal consequences. In accordance with the guidelines on long-service step and the Appeals Tribunal jurisprudence, the denial of the long-service step would directly affect the terms and conditions of appointment and therefore constitute a reviewable administrative decision. Ms. Fairweather has, however, not presented any evidence of a decision by the Administration to grant or deny her a long-service step. Any claim she made on the matter, nearly a year after retirement, is clearly time-barred.

23. As to a decision on Ms. Fairweather's eligibility to sit for the YPP exam, ST/AI/2012/2/Rev.1 provides that the CEB shall determine the eligibility of staff members to take the YPP exam and staff members will be notified of such decision and provided reasons. If found ineligible, staff members may request a review of the CEB's determination. The CEB's determination is a reviewable administrative decision. In the present case, Ms. Fairweather has not provided any evidence that she had applied to take the YPP exam or that she had been denied the possibility of taking such exam because of her performance appraisals. Any claim she makes on the matter is time-barred.

24. Ms. Fairweather has failed to establish any error warranting the reversal of the UNDT Judgment. She has failed to establish that the inordinate delay in processing a performance rebuttal statement was an administrative decision. Contrary to Ms. Fairweather's assertions, while there may have been some delay in the rebuttal process, the Administration did not fail to act on her rebuttal statements regarding her performance appraisals for the 2010-2011 and 2011-2012 cycles. A Rebuttal Panel was established and when panel members resigned, they were replaced. Several attempts were made to contact Ms. Fairweather's first and second reporting officers and once the Rebuttal Panel was able to hear from them, it quickly issued its reports which were immediately transmitted to Ms. Fairweather, albeit to the wrong e-mail address. Since the Administration ensured that her rebuttal statements were being processed, there was no final administrative decision to be challenged at that time. Any inordinate delay in the rebuttal process should have been challenged once the rebuttal reports were issued and communicated to Ms. Fairweather.

25. Ms. Fairweather has also failed to establish that the delay in the completion of the rebuttal process of her performance appraisals had direct legal consequences. The performance appraisals in the present case were under review by the Rebuttal Panel. As such, they were not final and could not be the basis of an administrative decision. Moreover, no administrative decisions were taken on that basis. Ms. Fairweather is presuming the grounds for a potential decision to deny her a long-service step. If she thought that she had been wrongfully denied such a step on the basis of her performance appraisals pending before the Rebuttal Panel, she should have sought the basis for the alleged denial of the long-service step at that time and certainly before she retired. She then should have challenged such a decision if the basis for such a decision included the consideration of her performance appraisals under review. Since she failed to do so, she may not now challenge, what she claims is the reason why she was denied the long-service step, i.e. the delay in the rebuttal process.

26. Annexes 2 and 3 to the appeal contain confidential documents and information in relation to attempts to informally resolve the matter, in violation of Article 15 of the Appeals Tribunal Rules of Procedure (Rules). These annexes should be returned to Ms. Fairweather. In an effort to prevent any delay in the consideration of the present case, all references to any mediation effort should simply be struck from the appeal.

27. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

### **Considerations**

#### *Oral hearing*

28. Ms. Fairweather filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute, which states: "[t]he judges assigned to a case will determine whether to hold oral proceedings"; and by Article 18(1) of the Rules, which states: "[t]he judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case". The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. Moreover, we do



not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. Accordingly, the request for an oral hearing is denied.

*Confidential documents*

29. In her appeal, the Appellant shared information about a confidential settlement proposal made to her in November 2017 by the Administration and annexed the said proposal to her appeal (Appeal, paragraph 17, Annex 2 to the Appeal). She also shared information on an attempt she made to settle the case with the Administration in July 2019 (Appeal, paragraph 24, Annex 3 to the Appeal)

30. Article 15 of the Rules states under the title “Exclusion of all documents and statements made during mediation”:

1. Except in cases concerning enforcement of a settlement agreement, all documents prepared for and oral statements made during any informal conflict resolution process or mediation are absolutely privileged and confidential and shall never be disclosed to the Appeals Tribunal. No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Appeals Tribunal or in any oral arguments made before the Appeals Tribunal.

2. Subject to the provisions of paragraph 1 above, if a document relating to the mediation process is submitted to the Appeals Tribunal, the Registrar shall return that document to the submitting party. If such information is part of the brief or any other written pleadings submitted to the Appeals Tribunal by a party, all pleadings shall be returned to that party for resubmission to the Appeals Tribunal in compliance with paragraph 1 above.

31. The Appeals Tribunal will not consider annexes 2 and 3 to the appeal in its deliberations in this case.

*Merits*

32. Ms. Fairweather’s performance appraisals for 2010-2011 and 2011-2012 concluded that she “partially” met “performance expectations”. Ms. Fairweather filed a request for rebuttal on these appraisals, on time, in May 2013. She did not receive an answer within a reasonable period of time and when she asked for management evaluation and filed an application with the UNDT in 2017, she had been waiting for a decision for more than four years. This absence of a response presents a sorrowful picture of the functioning on the part of the Administration.

33. The present case raises the question whether the absence of a timely decision in the rebuttal process of a performance appraisal may be challenged before the UNDT.

34. Article 2(1)(a) of the UNDT's Statute provides:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance[.]

35. The UNDT found that Ms. Fairweather did not appeal an administrative decision and that her application was not receivable. It decided: "[A]n inordinate delay in the rebuttal process of an appraisal may be a receivable ground for contesting an administrative decision, but is not an administrative decision, unless the Applicant demonstrates that it had, by itself, a direct and negative impact on a staff member's conditions of service."<sup>2</sup>

36. On the question of whether the absence of a timely decision can be an administrative decision, our Tribunal has consistently held:<sup>3</sup>

[T]he key characteristic of an administrative decision subject to judicial review is that the decision must 'produce direct legal consequences' affecting a staff member's terms or conditions of appointment. 'What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.'

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<sup>2</sup> Impugned Judgment, para. 23.

<sup>3</sup> *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-786, para 25, citing *Birya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-562, para. 44; *Nguyen-Kropp and Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509, para. 29; *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460, para. 27; *Bauzá Mercère v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18.

37. An implied unilateral decision with direct legal consequences is considered an administrative decision under Article 2(1) of the Statute of the Dispute Tribunal.<sup>4</sup> The Appeals Tribunal has decided that the absence of a response to a staff member's request may constitute an implied administrative decision.<sup>5</sup> However, the absence of a decision without direct legal consequences is not an implied decision subject to judicial review.

38. In the present case, the Appellant alleges that the delay in the rebuttal process had direct negative legal consequences and was a decision, in itself. She alleges that the delay affected her eligibility for "the long-service step" and made her ineligible for the YPP exam.

39. Before the UNDT, it was unclear whether the Appellant had applied for the long-service step or for taking the YPP exam. The UNDT therefore assumed that the applications had been submitted and rejected prior to the retirement date, and consequently, since the Appellant did not request management evaluation until July 2017, the challenges to any administrative decision pertaining to a long-service step or to her eligibility for the YPP would have been time-barred.<sup>6</sup>

40. On appeal, Ms. Fairweather did not provide any evidence that she had applied for the long-service step or for taking the YPP exam. She only alleges that the possibility of applying for the long-service step or taking the YPP exam would have been denied due to the delay in the rebuttal process of her performance appraisals. She considers that "since the rebuttal of her e-PASes was delayed", she was "automatically ineligible for the long-service step" and she "was automatically made ineligible to apply as a candidate under the YPP".

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<sup>4</sup> *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-177 (finding that the absence of a response by that Agency to the staff member's request for hazard pay constituted an appealable administrative decision as it was an implied unilateral decision with direct legal consequences).

<sup>5</sup> *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-786, para. 28, citing *Nielsen v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-621, para. 33; *Birya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-562, para. 47; *Al Surkhi et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-304, para. 26, citing former Administrative Tribunal Judgment No.1157 *Andronov* (2003). See also *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-566, paras. 34-36 (where a delay of 14 days in responding to Mr. Terragnolo's request was not found to constitute an implied administrative decision able to be challenged); *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-177.

<sup>6</sup> While not contested by the parties, we note that UNDT should have found the application not receivable *ratione materiae* which is the case if there is no timely request for management evaluation.

41. We do not agree with the Appellant's reasoning. It is now clear that the Appellant did not apply for the long-service step or for taking the YPP exam. Her claim that an application was not necessary and that she "did not need to apply for the YPP test to be considered ineligible" cannot be followed. The decisions to grant or deny the long-service step or eligibility for the YPP exam are not part of the performance appraisals rebuttal process and constitute in themselves separate administrative decisions. If the Appellant believed that, regardless of the ongoing rebuttal process, she was eligible for the long-service step or the YPP exam, she would have applied and challenged any denial, especially if it was based on her performance appraisals under review in the ongoing rebuttal process.

42. In the absence of applications for the long-service step or the YPP exam, the Appellant cannot seek to backtrack and presume the direct negative legal consequences of a decision that might have existed but never did.

43. Consequently, the absence of a decision in response to a request for a rebuttal of performance appraisals had no direct legal effect and was neither an administrative decision nor an implied decision.

44. The UNDT therefore correctly decided that the application was not receivable.

**Judgment**

35. The appeal is dismissed, by majority with Judge Colgan dissenting, and Judgment on Receivability No. UNDT/2019/134 is affirmed.
36. Judge Colgan appends a dissenting opinion.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of March 2020.

*(Signed)*

Judge Neven, Presiding  
New York, United States

*(Signed)*

Judge Sandhu  
Vancouver, Canada

Entered in the Register on this 19<sup>th</sup> day of June 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

**Judge Colgan’s Dissenting Opinion**

1. This appeal raises real and serious access to justice issues. Although the Judgment of the majority purports to adhere to established jurisprudence, I consider that this is not as clear or consistent as the majority considers. I respectfully dissent from some of their conclusions and the ultimate result for the following reasons.

2. It is beyond doubt that the Organization failed or refused (it is not clear which) to undertake and complete, as it was obliged to, Ms. Fairweather’s application to rebut her performance assessments with which she disagreed. That was despite repeated attempts by her asking the Organization to fulfil its duty, an obligation that it had imposed upon itself. She received no responses, even apparently any acknowledgement of her justified enquiries and requests. Ms. Fairweather then sought management evaluation of the situation in which the Organization declined even to acknowledge the existence of her complaints and application. Her management evaluation request was also apparently ignored by the Organization, or at least the Administration did not issue a management evaluation within the time limit provided for under the Staff Rules. Eventually, after four years of waiting, Ms. Fairweather retired after 38 years of service to the Organisation.

3. The majority’s description of that record of delay and inaction as “sorrowful” understates the position.

4. I begin my analysis of this situation by asking rhetorically: if the Organization behaves in this manner and fails or refuses to meet its obligations affecting the employment of its staff, what can an affected staff member do to either compel compliance by the Organization or to obtain redress for this wrong, if not what Ms. Fairweather did? And, I would add, also rhetorically, what is the Tribunal to make of the Organization’s trenchant and very technical opposition to the merits of Ms. Fairweather’s complaints being decided by the UNDT? It may be difficult for Ms. Fairweather to conclude other than that this was apparently in order to conceal or relieve itself of any responsibility or accountability for this situation. That she eventually and very belatedly received some information, *albeit* she says essentially flawed, must be cold comfort to Ms. Fairweather.

5. Case law recognises that a failure or refusal to make a decision can constitute an implied administrative decision.<sup>7</sup> In other words, the fact that the Organization has, by its conduct, decided not to investigate and decide a matter properly put to it can meet the definition of an administrative decision under Article 2(1)(a) of the UNDT Statute. Established administrative law systems of judicial review around the world recognise that such failures or refusals are justiciable. In common law-based systems of judicial review, for example, the ancient prerogative writ of *Mandamus* (literally, an instruction to an administrator or other governmental officer to “do your official duty”) is a pertinent example.

6. This is just such a case, indeed perhaps unfortunately a classic of its sort. That, for me, satisfies the first limb of the statutory test. There was an administrative decision, *albeit* an implied one, not to address Ms. Fairweather’s request for rebuttal of her performance appraisals.

7. There is a second limb to the gatekeeping test under Article 2(1)(a) of the UNDT Statute. It provides materially: “that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. This is where I would conclude that the UNDT (no doubt following as it must, Appeals Tribunal precedent) has misinterpreted and misapplied the Statute. It requires that the administrative decision be “alleged” to be in non-compliance with the staff member’s terms of employment or the contract of employment. This is a gatekeeping provision, so that what is required is that Ms. Fairweather has so alleged, as she did. Those are the Statute’s plain and simple words and to require an applicant to go further and establish non-compliance adds a non-existent gloss to the Statute. Had the General Assembly in enacting the Statute intended the phrase to mean what it has been interpreted to mean, it would have used equally plain words such as “that is in non-compliance” which would require an applicant to establish that additional test.

8. There is a further additional gloss that decided cases have added to that test which is similarly absent from the statutory words of Article 2. The Tribunals have required that such non-compliance be established to have both “direct” and “negative impacts” on the employment of someone such as Ms. Fairweather. There are, however, no such qualifications required by the Statute. All that is required is “alleged non-compliance”. It does not matter

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<sup>7</sup> See, for example, *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030.

that this superadded requirement may have a long provenance, including before 2009 when the former United Nations Administrative Tribunal adopted this test. Repetition over a long period does not necessarily make right what is wrong. But more importantly, the General Assembly enacted a new Statute to replace the previous body and under which the Appeals Tribunal operates. It used the language it did as part of that significant change. There is nothing to suggest that the General Assembly intended to make access difficult to the newly created institutions.

9. I understand the majority to say that there was no appealable administrative decision, as there was no decision that had legal consequences for Ms. Fairweather. However, in my conclusion she was entitled to a timely rebuttal report which the Administration did not produce. There is therefore an appealable implied administrative decision. Her rights under her terms of appointment were not only alleged to have been violated but were violated. As set out in Article 2(1), the Regulations, Rules and applicable administrative issuances are incorporated by reference into the staff member's letter of appointment. So, in my view, her right to a timely rebuttal report, and thereby to due process, was violated. It may be that her application before the UNDT was not well presented in that regard. However, the UNDT could have recognised that she was not professionally represented and interceded in order to reach a fair and just conclusion on the merits. Such is not to negate the Tribunal's necessary neutrality but rather to seek to ensure a balance of power and to enable a focus on merits and a just outcome. There is jurisprudence to support such an approach by the UNDT.<sup>8</sup>

10. However, if I am wrong and Ms. Fairweather was required to establish this second limb test (direct and negative impacts), then I would find that she has done so. In my assessment, it was reasonable for her to not apply for her long-service step and for the YPP programme knowing that her performance assessments had ruled her ineligible and that she would remain so unless and until her rebuttal application had been successful. It was and is unreasonable to conclude that she should have set out on inevitably doomed applications and then tried to challenge the inevitable failures of her applications.

11. I reiterate that these are gatekeeping or access to justice issues. They do not determine the merits of Ms. Fairweather's case. But I am concerned that overly restrictive and, in my assessment, wrong barriers to staff members passing through the doors of the

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<sup>8</sup> See, for example *El Shaer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-942, para. 28.



Dispute Tribunal are precluding potentially meritorious cases from even being considered or decided.

12. For the foregoing reasons, I would allow the appeal, set aside the UNDT Judgment and remand the case to it for re-determination.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of March 2020.

*(Signed)*

Judge Colgan  
Auckland, New Zealand

Entered in the Register on this 19<sup>th</sup> day of June 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar