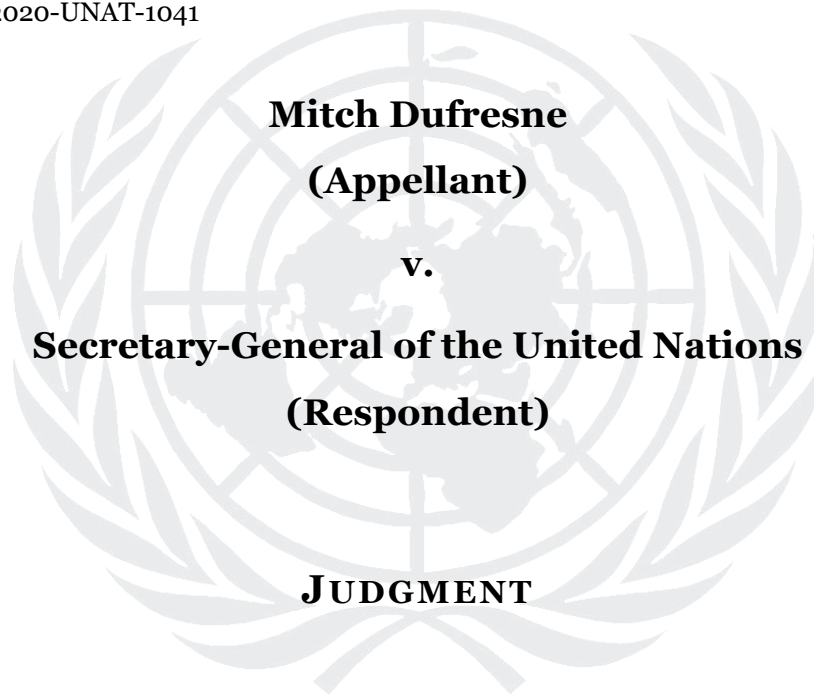




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1041



Mitch Dufresne

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2020-1380
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Ms. Dufresne: Self-represented

Counsel for Secretary-General: André Luiz Pereira de Oliveira

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Ms. Dufresne appeals against the decision of the United Nations Dispute Tribunal (UNDT) declining to exercise its jurisdiction on the grounds that she had failed to request management evaluation within 60 days from the notification of the contested administrative decision. We hold that the UNDT correctly concluded that the application was not receivable and accordingly dismiss the appeal.

Facts and Procedure

2. Ms. Dufresne is a staff member with the United Nations Support Office in Somalia (UNSOS). Between 17 May 2016 and 16 May 2017, she took a special leave without pay (SLWOP).

3. Before she went on SLWOP, Ms. Dufresne made inquiries about her ability to continue to pay into her pension while on SLWOP. On 6 June 2016, she received an e-mail from the Headquarters Payroll Client Service, including an estimated amount payable to maintain the continuity of her pension contribution during her SLWOP. She also received a document entitled “Instructions for UN staff members on SLWOP”. Paragraph 2 of the Instructions states:

Payments can be made in advance for a few months or on a monthly basis. However, a payment should never be delayed to the next month and late payments are not accepted by the UNJSPF.

4. Ms. Dufresne then elected to make her SLWOP period contributory, meaning she would pay her own pension contributions and the Organization’s pension contribution for the duration of her SLWOP. Ms. Dufresne paid the full contribution for the period from 17 May 2016 through 30 September 2016 (4 ½ months). She made no payment for the period from 1 October 2016 until 16 May 2017 (7 ½ months), when she resumed her duties.

5. After she returned from SLWOP, Ms. Dufresne enquired from UNSOS’ human resources section whether it was possible to pay her contribution plus the Organization’s contribution for 7 ½ months retroactively so as to make the entire period of her SLWOP pension contributory.

6. On 28 July 2017, a human resource officer (HRO) of UNSOS wrote to the Payroll and Disbursement Section at Headquarters on behalf of Ms. Dufresne, seeking the latter's approval of Ms. Dufresne's request to pay back her missed pension payments of 7 ½ months. The e-mail read:

Above-named staff member exercised Special Leave Without Pay (SLWOP) for one year during the period 17 May 2016 through 16 May 2017. The staff member had opted to make the SLWOP period contributory service for pension purposes, and had indeed commenced payments through 30 September 2016. My understanding is that staff member did not make any further payments from October 2016 through end of the SLWOP period, 16 May 2017.

Staff member is requesting if she can be exceptionally authorized to pay back post-facto her own + Organization's contribution for the period 1 October 2016 through 16 May 2017. If staff member's request is approved, she would then liaise with UNHQ Payroll on how to make the payments.

We await your review and response.¹

7. On the same day, 28 July 2017, the Acting Chief of Payroll e-mailed the Payroll and Disbursement Section directing it to respond to the HRO of UNSOS in the negative. He explained as follows:

We cannot arrange for retroactive contributions at this stage, since UNJSPF's rules do not allow it.

8. On 29 July 2017, the Payroll sent an e-mail to the HRO of UNSOS, copying Ms. Dufresne among others, attaching the Acting Chief's e-mail of 28 July 2017, explaining that retroactive contributions were not allowed, as "these payments are time sensitive and have to be made concurrently".

9. On the same day, 29 July 2017, the HRO of UNSOS addressed an e-mail to the Acting Chief of Payroll, which reads:

Thank you for the advice from Payroll's perspective, and we appreciate your feedback.

However, in order to be fair to the staff member, may we hear consideration from the Pension Fund itself? We understand the rules, but we also know that depending on the circumstances, there can be exceptions. In this case, the staff member had intention to make her SLWOP period contributory service and Payroll already received part of her

¹ Underline in original.

payments up to September 2016. The staff member has advised that she stopped contributing because Payroll was using her funds for other purposes – you might want to comment on this.

Given the importance of Pension to staff members, it is only fair that the Pension Fund is allowed to consider the staff member's request, and we will respect their decision. In this case, it appears Payroll has conveyed its own decision and not that of the Pension Fund.

We appreciate it may involve a lot of work on the part of Payroll in making retroactive adjustments, but since the staff member had every intention to pay, and made an effort to pay for some months, please allow the Pension Fund to review and respond to the staff member's request for exceptional approval to pay *post facto* payments for her SLWOP period as demonstrated by her commitment to make payments for part of this period.

We await to hear from the Pension Fund colleagues.

10. On 31 July 2017, the Acting Chief of Payroll responded to the HRO of UNSOS as follows:

Your understanding is not correct, this is not an issue that we in Payroll have discretion in order to make a decision favorable to the staff member's request or not. UNJSPF's rules are clear that contributions during the SLWOP period should be made concurrently with the leave in question and no post-facto contributions are accepted. Through experience with inquiring UNJSPF's for similar cases in the past, we understand that they are adamant in enforcing this particular rule. The contributions in question are in relation to a period in 2016, which has already been reported to UNJSPF.

Please feel free to directly communicate with UNJSPF if you think you can have them revisit their position on this.

Concerning your reference that "... Payroll was using her funds for other purposes ..." my colleague, who handled Ms. Dufresne case, confirmed that she had explained to the staff member that all payments would be transferred towards her pension contributions, after making the necessary adjustments to correct for the recoveries that Umoja was automatically processing. Nevertheless, the staff member decided on her own to cease her contributions.

11. On the same day, 31 July 2017, the HRO of UNSOS responded to the Acting Chief of Payroll. She copied Ms. Dufresne, and apparently also forwarded the Acting Chief's e-mail of 31 July 2017 to her. The HRO of UNSOS also copied the Pension Fund. The e-mail of the HRO reads:

Thank you very much for taking the time to explain this case. From HR and Payroll perspective, I understand your message.

Since the Pension Fund colleagues are in the loop on this conversation, we await to hear their comments concerning the staff member's request.

12. On 24 August 2017, Ms. Dufresne visited the New York office of the Pension Fund. UNJSPF advised her that it would accept retroactive pension contribution during the period of SLWOP if the United Nations would confirm formally in a memorandum that the cessation of contributions was the result of an administrative error on its part, and request an estimate of the potential actuarial costs involved. Some correspondence followed this interaction, but UNJSPF appears not to have taken any decision regarding the request to pay contributions retroactively.

13. On 6 September 2017, the Director of UNSOS sent a facsimile requesting the support of the Department of Field Services (DFS) in liaising with the Payroll to establish whether there might have been an administrative error on the Payroll's part in respect of Ms. Dufresne. The relevant part of the facsimile reads:

In pursuit of her request to make post-facto payments for the remaining part of her SLWOP period, the staff member consulted with the Pension Fund in August 2017. The advice received was that the UN should formally confirm to the Fund that it was an administrative error on its part, request for an estimate of the potential actuarial costs involved and subsequently pay the retroactive contributions for the period of SLWOP during 01 October 2016 to 16 May 2017.

As UNSOS does not have the authority to commit the Organisation in this instance and the issue may have to be referred to the Department of Management, we seek your support in liaising with UNHQ Payroll to establish whether there may have been an administrative error on the part of the Organisation and provide guidance to UNSOS in addressing the request made by the staff member.

14. No reply or follow-up communication to this facsimile appears in the record of the appeal. There is no evidence that any administrative error was made with regard to the payment of Ms. Dufresne's cessation of contributions. On the contrary, it is not disputed that Ms. Dufresne ceased making contributions of her own volition.

15. On 17 December 2017, Ms. Dufresne filed a request for management evaluation of the lack of a decision on her request for retroactive pension contribution. In her request, she identified the administrative decision to be evaluated as: "to pay retroactively UN Joint Staff

Pension Fund contributions from while on Special Leave Without Pay and lack of decision on the request". She stated the purpose of her request to be:

I simply want to pay the pension contributions to my pension fund for 7.5 months 01 Oct. 2016-16 May 2017 while on a one-year SLWOP which I was entitled to do and Payroll's mishandling of these payments 17 May – 30 Sept. 2016 (and still continued this year) preventing me from being able to do so even though I chose to make the contributions during SLWOP.

In response to the question in the request as to what remedy was sought through management evaluation, Ms. Dufresne replied:

An acceptable solution to pay the pension contributions while on SLWOP 01 Oct 2016-16 May 2017.

16. On 1 February 2018, the Management Evaluation Unit (MEU) rejected Ms. Dufresne's management evaluation request as not receivable for reasons of time, because she had failed to request a management evaluation within 60 days of 31 July 2017 when the Acting Chief of Payroll stated that he had no discretion to make a decision in support of her request for retroactive pension contribution. The MEU explained its position fully, in relevant part, as follows:

On 17 December 2017, you submitted the present request for a management evaluation due to the lack of response and resolution of your matter, despite your numerous follow-ups.

...

The MEU noted that you contested the lack of response from DFS and Payroll. The MEU noted that a request was made by your DMS to FPD/DFS to act as liaison with Payroll in order to discuss whether an administrative error occurred which would allow you to make retroactive pension contributions.

In the course of reviewing your case, FPD remarked to the MEU that it is not the decision-maker in this case, and that the matter lies with the UNJSPF and Payroll. The MEU noted that you are not contesting the UNJPSF rule of requiring concurrent contributions and in any event, if contested, such decision would not be subject to management evaluation by the MEU, as the decisions of the UNJSPF regarding pension matters do not constitute an administrative decision of the Secretary-General. Accordingly, the MEU discussed the matter with Payroll.

Payroll indicated to the MEU that it was your decision to stop contributing to your pension and that you were advised that all your pension contributions would be reported to UNJSPF properly and that the funds would be transferred to the correct account, after correcting for the automatic UMOJA recoveries for prior overpayments. Payroll did not agree that there was an administrative error on their part.

The MEU observed that the information provided by Payroll to the MEU was the same that Payroll had provided to your HR Officer on 31 July 2017, to which you were copied. While the response of Payroll on 31 July 2017 did not refer to whether there had been an administrative error warranting a request to UNJSPF to allow retroactive contribution, the MEU considered that Payroll's position on this matter was clear. They considered it was your decision to stop making pension contributions.

The MEU considered that to the extent that there was an administrative decision in this case, i.e., a decision not to acknowledge an administrative error and/or a decision not to take corrective action on the part of the Organization, you became aware of Payroll's position on 31 July 2017. As a result, you would have had to file a request for a management evaluation, within 60 calendar days of the communication of Payroll's position not to take any further action in your case. Even if the MEU took into account the information provided by UNJSPF on 25 August 2017 that an administrative error had to be acknowledged by the Organization for the possibility of making a retroactive contribution, the MEU noted that the 60 calendar day deadline from such date would still be prior to the submission of your request on 17 December 2017.

17. Ms. Dufresne filed an application with the UNDT on 19 February 2018. In the application, Ms. Dufresne contended that the request for management evaluation was not out of time and that her issue with the payments she had made remained unresolved. She submitted that the e-mail of 31 July 2017 did not constitute an administrative decision. Though she placed reliance on the facsimile of 6 September 2017, she contended that it too was not an administrative decision either. Rather, she maintained (in effect) that the lack of response to the facsimile of 6 September 2017 from the Director of UNSOS constituted an implied decision.

18. In Judgment No. UNDT/2020/019, the UNDT held that the Acting Chief of Payroll had made an administrative decision on 31 July 2017 when he declined to take action on Ms. Dufresne's request to make a retroactive pension contribution to the UNJSPF because he lacked competence to do so. Without deciding the merits of the administrative decision, the UNDT dismissed Ms. Dufresne's application as not receivable *ratione materiae*, because Ms. Dufresne had failed to file a timeous request for management evaluation of the decision made by the Acting Chief of Payroll on either 28 July 2017 or 31 July 2017. Discussions,

engagements and any inaction subsequent to the decision of late July 2017 did not lead to any new administrative decision and at best might have been a reiteration of the original administrative decision.

19. Ms. Dufresne appealed the UNDT Judgment on 1 April 2020, and the Secretary-General filed an answer to the appeal on 1 June 2020.

Submissions

Ms. Dufresne's Appeal

20. Ms. Dufresne submits that, by dismissing her application as not receivable *ratione materiae*, the UNDT committed an error of fact, resulting in a manifestly unreasonable decision. She maintains that she was not contesting the claim that the Acting Chief of Payroll made in his e-mail of 31 July 2017. Rather, she was contesting the lack of action or decision by the Payroll including the lack of action on the 6 September 2017 request from the UNSOS Director to the Payroll and the subsequent lack of action on the substantive issues raised. Consequently, she submits that it was an error of fact to conclude that 31 July 2017 was the date of the decision.

21. She requests that the Appeals Tribunal reverse the UNDT decision.

The Secretary-General's answer

22. The Secretary-General requests the Appeals Tribunal to uphold the UNDT decision that Ms. Dufresne's application was not receivable and affirm the UNDT Judgment. The Secretary-General submits that the Acting Chief of Payroll took the decision on 28 July 2017 in his e-mail to the Payroll staff member and clarified and confirmed it on 31 July 2017. Nothing in his e-mail of 28 July 2017 or his subsequent e-mail of 31 July 2017 supports Ms. Dufresne's contention that her request for retroactive pension contribution remained an open issue or that the Administration had not taken action on her request.

23. The Secretary-General maintains that Ms. Dufresne's contentions about the alleged errors and miscalculations regarding her pension contributions made during the earlier part of her SLWOP are outside the scope of the present case since they are not related to the issue

submitted to management evaluation, namely, the request to make retroactive pension contributions.

Considerations

24. Staff Rule 11.2(a) requires a staff member who wishes to formally contest an administrative decision to first submit a request for management evaluation of the administrative decision. Staff Rule 11.2(c) provides that a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. Time limits in the context of the administration of justice in the United Nations' internal justice system must be observed and strictly enforced.²

25. It is incumbent on the UNDT to individualize and define the administrative decision challenged by a party and to identify the subject of judicial review.³ As already discussed, the UNDT defined the contested decision as the decision taken by the Acting Chief of Payroll on 28 July 2017 in which he advised that the request to contribute with the UNJSPF retroactively was against the rules of the UNJSPF. The primary question for determination in this appeal is whether the decision of the Acting Chief of Payroll was the relevant impugned administrative decision.

26. The decision of the UNDT is correct.

27. In her request for management evaluation, Ms. Dufresne, although making some reference to her dissatisfaction regarding her earlier contributions, made it plain that she was at that point concerned solely about not being permitted to make retroactive contributions and sought "an acceptable solution" to her wish to pay contributions for the period from 01 October 2016 to 16 May 2017. The decision of the Acting Chief of Payroll was a refusal to

² *Diab v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-495; *Kissila v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-470; *Christensen v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-218; *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118.

³ *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 20. See also *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, paras. 25-26; *Monarawila v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-694, para. 32.

facilitate that payment on the grounds that the rules of the UNJSPF did not permit such a payment.⁴

28. While it is doubtful that the Acting Chief of Payroll had the authority or discretion to authorise such a payment without the concurrence of the UNJSPF, his refusal to pursue the matter was nonetheless a decision in the exercise of a function adversely affecting the rights or interests of Ms. Dufresne, which had a direct legal effect in her relationship with the Organisation.⁵ As such, it was an administrative decision which finally determined the position of the Organisation in relation to Ms. Dufresne's claim against it. The door remained open for Ms. Dufresne to approach the UNJSPF and to challenge any decision it might have taken in relation to any right to pay arrear contributions. She has, however, not challenged any decision of the UNJSPF.

29. Ms. Dufresne's assertion that it "is the lack of action or decision by Payroll that is being contested" is not sustainable. The UNJSPF Regulations provide that the contributions to the UNJSPF must be paid concurrently with the period of SLWOP.⁶ On 31 July 2017, the Acting Chief of Payroll reiterated that clearly, stressing that the UNJSPF had already rejected similar requests for retroactive payment of such contributions in the past. The e-mail also invited Ms. Dufresne "to directly communicate with UNJSPF if you think you can have them revisit their position on this". Hence, the e-mail of 31 July 2017, and the subsequent clarifications, indicated that from the perspective of the Organisation the matter was closed, but that Ms. Dufresne was free to pursue the matter with the UNJSPF, which she subsequently did. The decision of the Acting Chief of Payroll was final in nature.

30. The facsimile of the Director of UNSOS on 6 September 2017 did not change that or revise the decision in any way. It merely comprised a request from the Director of UNSOS to the DFS to determine if any administrative error had led to the cessation of contributions. The absence of a response to that request is not surprising considering that it is incontestable that Ms. Dufresne ceased making contributions of her own free will. No allegation was made

⁴ Article 25(b)(i) of the UNJSPF Regulations provides that contributions in respect of a period of leave without pay shall be payable "concurrently with such leave, by the participant in full or by the organization in full, or in part by the participant and in part by the organization".

⁵ It is debatable whether the Acting Chief's decision was an "administrative decision" as it arguably had no direct legal effect. The discretion to receive the payment of arrear contributions, if it exists at all, is with the UNJSPF. However, we accept that the refusal of the Acting Chief of Payroll to pursue the matter with the UNJSPF impacted on Ms. Dufresne's interests.

⁶ Article 25(b)(i) of the UNJSPF Regulations *supra*.

by the Director or Ms. Dufresne pinpointing any specific administrative error or asking the Administration to confirm that an error had been made regarding the non-payment of contributions, presumably for the obvious reason that the contributions were not stopped in error, but rather, at the voluntary instance of Ms. Dufresne.

31. While Ms. Dufresne may or may not have legitimate complaints regarding the handling of her earlier contributions, it is clear from the request for management evaluation, which limited her grievance to the refusal to allow her to make retroactive payments, that she did not impugn any administrative decision in that respect. Her complaint regarding the alleged mishandling of her contributions, which led her to stop payments, are beyond the scope of the case since they are not related to her request for leave to make payments of contributions to the UNJSPF retroactively for the period of her SLWOP.

32. In light of these facts, the UNDT correctly declined to exercise its jurisdiction. Ms. Dufresne should have requested management evaluation within 60 days from the notification in the e-mail of 28 July 2017. Instead, she requested management evaluation on 20 December 2017, far beyond the expiry of the 60-day statutory deadline. The UNDT was accordingly correct when it concluded that the application was not receivable.

Judgment

33. The appeal is dismissed and Judgment No. UNDT/2020/019 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Murphy, Presiding
Cape Town, South Africa

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 11th day of November 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar