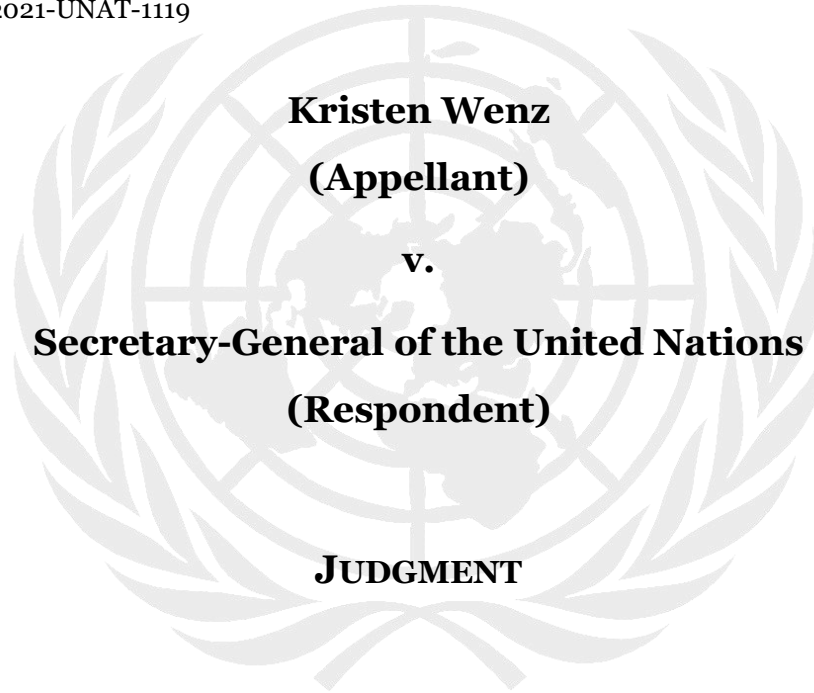




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1119



**Kristen Wenz
(Appellant)**

v.

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

JUDGMENT

Before: Judge Sabine Knierim, Presiding
Judge Martha Halfeld
Judge Dimitrios Raikos

Case Nos.: 2020-1464

Date: 25 June 2021

Registrar: Weicheng Lin

Counsel for Appellant: Alex Haines

Counsel for Respondent: Francisca Lagos Pola

JUDGE SABINE KNIERIM, PRESIDING.

1. Ms. Kristen Wenz, (Appellant), a former P-3 Child Protection Specialist with the United Nations Children’s Fund (UNICEF), contested several implied administrative decisions she alleged had taken place following a security incident while she was on mission with UNICEF. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment on Receivability No. UNDT/2020/138 dismissing her application as not receivable *ratione materiae*, finding that her request for management evaluation was not filed timely, and not receivable *ratione temporis* as her application was also filed out of time. For the reasons set out below, we dismiss the appeal and uphold the UNDT Judgment.

Facts and Procedure

2. On 5 September 2017, Ms. Wenz started her service with UNICEF on a temporary appointment, as a Child Protection Specialist at the P-3 level. This appointment was extended twice, until she separated from service on 4 September 2019. She was re-appointed on a temporary appointment on 16 October 2019, again as a Child Protection Specialist at the P-3 level. On 22 November 2019, Ms. Wenz was informed that her appointment would be renewed until 16 February 2020.

3. While on official mission with UNICEF in April 2018, Ms. Wenz had suffered a severe security incident.

4. On 20 January 2020, Ms. Wenz filed a request for management evaluation in which she contested: i) the implied administrative decision not to take appropriate measures after she experienced a critical incident, resulting in the Administration breaching its duty of care towards her; and ii) the decision not to renew her temporary appointment beyond 16 February 2020.

5. On 20 February 2020, the management evaluation unit rejected her request finding there was no administrative decision, implied or otherwise, to not take appropriate measures after Ms. Wenz experienced a critical incident, and that her challenge to the decision not to renew her temporary appointment beyond 16 February 2020 was moot because she had been offered, and had accepted, a temporary appointment for a period of three months until 17 May 2020, during which time she would be placed on Special Leave with Full Pay.

6. On 20 May 2020, the UNDT granted Ms. Wenz' motion for an extension of the deadline to file an application until 17 June 2020. On 16 June 2020, the UNDT granted a further extension of deadline until 4.00 p.m. on 24 June 2020 and informed Ms. Wenz that no further extensions of deadline would be granted.

7. On 24 June 2020 at 10:40 p.m. New York time, Ms. Wenz filed an application contesting several alleged implied administrative decisions, which she described as follows:

- (a) Failure to maintain a work environment free from sexual harassment and abuse;
- (b) Failure to take necessary safety and security arrangements to prevent or adequately respond to gender-related security incidents;
- (c) Failure to uphold the highest standard of integrity in regard to the determination of the Applicant's conditions of employment; and
- (d) Failure to ensure the effective participation of the Applicant in resolving issues related to staff welfare, including conditions of work, general conditions of life and other human resources policies.

8. In her application, Ms. Wenz did not challenge the decision to only renew her temporary appointment until (but not beyond) 16 February 2020.

9. On 13 July 2020, the UNDT granted the Secretary-General's motion to have the receivability of the application determined as a preliminary matter.

10. In its Judgment issued on 7 August 2020, the UNDT found that the application was not receivable both *ratione temporis* and *ratione materiae*. The UNDT determined that despite two extensions of time, Ms. Wenz filed her application 6 hours and 40 minutes beyond the deadline rendering it time-barred. The UNDT rejected her argument that her mental state was incapacitating noting that her counsel had a professional duty to request a time extension before the deadline expired. As Ms. Wenz had not demonstrated exceptional circumstances to warrant a waiver of the deadline her application was time-barred and not receivable.

11. The UNDT further held that while the articulation of the four categories of alleged implied administrative decisions may seem vague, Ms. Wenz further provided examples of actions by UNICEF officials which in her submission represented the contested implied decisions. The UNDT was satisfied that these examples provided enough information to

identify the challenged decisions if the application had been receivable. However, these alleged implied administrative decisions occurred in 2018 through to October 2019, and Ms. Wenz did not request a management evaluation review of these implied decisions within the statutory 60-day deadline, which rendered her application not receivable *ratione materiae*.

12. Ms. Wenz filed the instant appeal on 6 October 2020, and the Secretary-General filed his answer on 7 December 2020.

Submissions

Ms. Wenz' Appeal

13. The UNDT erred in law in its reliance on the *Khisa*¹ case as that case stated that an application for waiver is only “ordinarily” filed before the application is made and not afterwards. In her situation a previous extension indicated that no further extensions would be granted making a waiver request moot. Nonetheless, her mental health situation constituted exceptional circumstances to warrant an extension and prevented her from being able to timely file an application and request a waiver in advance of her filing. Furthermore, it was not known to the Appellant or her counsel that her mental health status would prevent the timely filing of an application and/or waiver by her counsel. By way of representing an incapacitated person, they are entitled to a one-year deadline per Article 7.2 of the UNDT Statute.

14. The UNDT erred in law and fact in concluding her mental health did not constitute exceptional circumstances. Her mental health situation, exacerbated by her engaging in the preparation of the application, was documented by expert medical evidence. The UNDT failed to consider such evidence when it found they were not “satisfied” there were exceptional circumstances and further made no reference and gave no reasoning in its Judgment and no indication it had considered the evidence and pleas set forth by the Appellant. The UNDT’s omission amounts to an error of fact resulting in a manifestly unreasonable decision.

¹ *Khisa v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-883, para. 17.

15. The UNDT erred in law as Article 34(c) of the UNDT's Rules of Procedure provides for submission on the same day as a deadline. The Appellant did in fact file on the same day as the deadline, and a 6-hour delay is *de minimis*. When there is an inconsistency between the UNDT's Rules of Procedure and the Tribunal's orders, the Rules of Procedure prevail as a higher norm. The UNDT could have found that reliance on conflicting information may not be held against a staff member and could have exercised its discretion to do justice to the parties. Its finding that Ms. Wenz is time-barred amounts to a failure to do justice.

16. The UNDT erred in fact in its use of the date of October 2019 for the latest implied administrative decision for purposes of calculating the 60-day deadline to file a management evaluation request. The Appellant was informed of her contract extension on condition of entering into mediation on 29 November 2019, rendering her request for management evaluation filed on 20 January 2020 within the 60-day deadline. Thus, the UNDT erred in fact in its conclusion that her application was not receivable *ratione materiae* on account of failing to file a timely request for management evaluation.

The Secretary-General's Answer

17. The Secretary-General requests the UNDT Judgment be upheld. In support he argues that the Appellant failed to identify any error. The UNDT correctly found there was no exceptional circumstance preventing her from timely filing her application. Appellant's arguments that her incapacity to give her counsel instructions are without merit and ignore professional responsibility of counsel. Her counsel also failed to act to mitigate the deadline as he could have notified the UNDT to request an extension before the deadline.

18. The Appellant has not proffered any evidence to support her inability to instruct counsel. Her numerous medical certifications confirm she should not work however they do not attest that at the relevant time she was unable to instruct her counsel.

19. Counsel failed to provide justification for a late filing in the application itself. Counsel only provided a justification when the Respondent requested the UNDT to determine receivability.

20. The UNDT correctly rejected Appellant's argument that counsel in representing an incapacitated person entitled her to a year's extension per Article 7(2) of the UNDT's Statute. Appellant argues counsel was awaiting her instructions which she couldn't give because she

was incapacitated yet argues the incapacitation grants her a year's extension. If incapacitated counsel need not wait for her instruction and thus these two arguments conflict. Furthermore, there is no evidence counsel's power of attorney allowed him to act on behalf of the Appellant as an incapacitated applicant as the power of attorney on file does not mention an incapacitated status.

21. The UNDT correctly found her application not receivable *ratione materiae*. It correctly determined the implied administrative decisions challenged were from the latest in October 2019 and thus her request for management evaluation filed in January 2020 was beyond the 60-day deadline.

22. The Appellant's argument that the date for calculating 60 days should be from 29 November 2019 (not October) because that was when she was informed of her temporary contract renewal, is misplaced. While she had challenged the non-renewal in her management evaluation request, she did not challenge that decision in the Application because her appointment had been renewed rendering it moot. Thus, the date relating to her renewal are irrelevant for establishing the deadline for filing a management evaluation request.

23. Lastly, the Appellant's argument that mediation extended her deadline to file a management evaluation request is without merit. Per Staff Rule 11.2(c) the Secretary-General has discretion to extend the deadline pending efforts of informal resolution. No such extension was granted in this matter.

Considerations

24. The question on appeal is whether the UNDT erred in holding that the application was not receivable. We find that the UNDT did not commit any errors when it found that Ms. Wenz' application was irreceivable *ratione materiae*. Therefore, the Appeals Tribunal does not have to address the question whether the application was also irreceivable *ratione temporis*.

Receivability ratione materiae

25. The UNDT held that Ms. Wenz' request for management evaluation was filed outside the statutory 60-day deadline. It found that it followed from Ms. Wenz' submissions and own admission that she was aware between 2018 to October 2019 of the alleged implied administrative decisions with which she disagreed. However, despite identifying these administrative decisions from 2018 to October 2019, and despite numerous exchanges with UNICEF officials during that period of time, she did not file her request for management evaluation until 20 January 2020. The UNDT further held that although the parties engaged in mediation in November 2019, no waiver of the deadline for requesting management evaluation was subsequently granted. Finally, the UNDT rejected Ms. Wenz' argument that the Secretary-General was barred from raising the issue of receivability because he did not address it at the management evaluation stage. The UNDT reasoned that it has no jurisdiction to waive deadlines for management evaluation.

26. On appeal, Ms. Wenz does not challenge the UNDT's finding based on her own submissions that she was aware, between 2018 and October 2019, of the alleged implied administrative decisions. The finding of the UNDT is also supported by Ms. Wenz' 24 June 2020 application to the UNDT in which she stated that the implied administrative decisions were made and communicated by Ms. D. M., Senior Advisor Child Protection, and Ms. M., Director Human Resources, UNICEF. In her 20 January 2020 management evaluation request, Ms. Wenz had submitted that she met with UNICEF's legal team in February 2019, and was effectively provided with two options: firstly she could submit a claim for compensation and/or she could seek legal advice regarding the duty of care and her employment status. Ms. Wenz, in this request, had also stated that Ms. D. M. had been her supervisor only until March 2019, because at that time Ms. Wenz was reassigned by UNICEF to be under the supervision of Mr. W. We find that the alleged implied administrative decisions were already taken and communicated to Ms. Wenz in the spring of 2019, and the UNDT, by extending the date to October 2019, took a favorable approach towards Ms. Wenz.

27. In her appeal, Ms. Wenz argues that the UNDT failed to take into consideration that she was informed only on 29 November 2019 that her appointment would be renewed for two months, and that this date, not October 2019, was relevant for the 60-day deadline to file a request for management evaluation.

28. This argument has no merit. While the 29 November 2019 information triggered the time limit for Ms. Wenz' request for management evaluation with respect to the decision to only renew her appointment for two months, it has no legal relevance for her claims regarding the alleged implied administrative decisions concerning UNICEF's duty of care. As noted above, the UNDT found without error that, based on Ms. Wenz' own submissions, she was aware of those implied administrative decisions at an earlier stage (until October 2019). Ms. Wenz did not challenge the renewal decision in her application to the UNDT.

29. Ms. Wenz further submits that she and the Administration engaged in mediation, and that this should have the effect of staying proceedings. Otherwise the Organisation would have "carte blanche" to purport to mediate, run down a staff member's time to bring a complaint and then argue that they are out of time. Contrary to the UNDT's finding, a waiver of the deadline to file a request for management evaluation should have been implied given that both parties agreed to engage in mediation.

30. We do not agree. The UNDT correctly found that UNICEF's participation in the mediation efforts did not automatically extend the time limit for filing a request for management evaluation. According to Staff Rule 11.2(c), the Secretary-General has discretion to extend the management evaluation deadlines "pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General." Ms. Wenz has not shown, and we cannot see that an extension was given by the Secretary-General in this case.

31. Ms. Wenz, on appeal, does not challenge the UNDT's finding that the Secretary-General was not estopped from raising the issue of receivability, and we find no fault in this finding. According to Article 8(3) of the UNDT Statute, the Dispute Tribunal shall not suspend or waive the deadlines for management evaluation. We note, further, that the Management Evaluation Unit (MEU), in their 20 February 2020 response, found there was no administrative decision, implied or otherwise, to not take appropriate measures after Ms. Wenz experienced a critical incident, and in this case, Ms. Wenz' claim would also be irreceivable *ratione materiae*.

Judgment

32. The appeal is dismissed and UNDT Judgment No. UNDT/2020/138 is affirmed.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 7th day of July 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar