



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/077/  
JAB/2009/035  
Judgment No. UNDT/2009/018  
Date: 10 September 2009  
Original: English

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**Before:** Judge Michael Adams  
**Registry:** New York  
**Registrar:** Hafida Lahiouel

D'HOOGHE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for Applicant:**  
Bart Willemsen, OSLA

**Counsel for Respondent:**  
Stephen Margetts, ALU

## **Introduction**

1. In this matter, the Applicant commenced proceedings by filing with the Joint Appeals Board (JAB) on 31 July 2008 a document entitled “Request to File an Appeal”. The decision appealed from was communicated to the Applicant on 28 April 2008 and the adverse outcome of the administrative review was dated 21 June 2008. Commencing an appeal by a document of this kind is, it appears, authorized by the Rules of Procedure (ROP) of the JAB at Headquarters (2007). Before moving on to discussing the precise character of this document and its legal effect, it is necessary to briefly refer to the Staff Rules.

### **What is an “appeal”?**

2. Staff Rule 111.2 deals with appeals. Staff Rule 111.2(a) requires a dissatisfied staff member first to request administrative review of the impugned decision. Staff Rule 111.2(a)(i) provides that, where the Secretary-General replies, the staff member “may appeal against the answer within one month of the receipt of such reply”. Where there has been no reply by the Secretary-General within specified periods, appeal is also permitted by Staff Rule 111.2(a)(ii) but this is not directly relevant in this case.

3. The Staff Rules do not define the term “appeal”. Obviously, some action is necessary but regrettably there is no mention of precisely what that action is. It would have been useful to specify in the Staff Rules what should be done by a staff member in order to appeal – as by sending a particular form with particular details – so that the staff member would know exactly what to do. It is inadequate management in respect of such an important matter to fail to make the precise requirements completely clear. The staff member should not need to guess or surmise or suppose; nor should it be necessary that the staff member consult the Rules of Procedure of the Joint Appeals Board, which as will be seen, are far less than sufficiently clear, let alone the decisions of the United Nations Administrative

Tribunal. This unfortunate obscurity also wastes judicial resources required to interpret what should have been clear to the least educated and least experienced staff member of the Organization.

4. The need for clarity is reinforced by the potentially devastating consequences of a failure to comply with the time limits by virtue of the terms of Staff Rule 111.2(f), which provides —

“An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.”

Given the requirement of “exceptional circumstances” – which has been narrowly interpreted by the Administrative Tribunal – many staff members have found that they have lost their right to appeal, even though their appeals might well have had substantial merit. Where such a consequence might occur, the overwhelming necessity for clarity is obvious.

#### **The relevance of the rules of the JAB**

5. In the present case, appealing within the one month time limit applicable under Staff Rule 111.2(a)(i) was crucial for the Applicant.

6. Staff Rule 111.1, concerning the establishment of Joint Appeals Boards, provides in para (e) that each Board “shall establish its own rules of procedure, which shall specify how its presiding officer and where necessary, any alternate presiding officers shall be selected from among the chairpersons”. This paragraph is not well drafted, since it appears to confine the rules of procedure to the somewhat trivial subject matter of the selection of presiding officers. However, it has fortunately not been so interpreted and has been regarded as authorizing the promulgation of general rules of procedure, governing, amongst other things, the way in which an appeal is initiated and determined.

7. The word “appeal” is defined in ROP I.A as “a complaint...beginning with the request for administrative review and concluding with the decision taken by the

Secretary-General on the report of the Joint Appeals Board”. So defined, “appeal” in the ROP has a broader denotation than that of “appeal” in Staff Rule 111.2(a)(i), since in the latter case, the appeal follows the decision made on the request for administrative review. ROP Parts III.D, III.E and III.F of the ROP deal with initiating appeals. Part III.D.1 states —

“A full statement of appeal, in accordance with rule 111.J.1, below, shall be submitted to the Board, through its secretariat, within the applicable time-limits (see Staff Rule 111.2(a)(i)).”

On the face of it, this seems to mean that, in order to comply with Staff Rule 111.2(a)(i), the staff member must submit a “full statement of appeal” within one month of the Secretary-General’s response to the application for administrative review. (I deal with this interpretation – which I consider to be mistaken – below.)

8. ROP III.F, headed *Receivability of appeals* provides —

“An appeal is receivable only if it complies with the time-limits set forth in Staff Rule 111.2(a) and (b), or if the Panel considering the appeal decides to waive the time-limits...”

Leaving aside the surprising reference to Staff Rule 111.2(b), which does not specify a time limit, this ROP merely repeats the Staff Rule and adds nothing by way of explanation or elaboration.

9. ROP III.J.1 stipulates the requirements for a statement of appeal. In addition to certain formal matters, such as the name of the Appellant and his or her status or former status with the United Nations, it must contain “a clear statement of the relevant facts in chronological order” and an “index of all documents annexed in full and numbered”. The Appellant is warned that failure by the Appellant to comply with the rule “may lead to the statement of appeal being treated as incomplete”. The notion of an “incomplete statement of appeal” is of crucial importance and is also discussed below.

10. ROP III.E states —

“An incomplete statement of appeal will be accepted by the Board for the purpose of establishing the date of filing of the appeal. The secretariat of the Board will, upon receipt of an incomplete statement, request in writing that the Appellant provide to the Board, within one month, a full statement of appeal, containing all the elements described in rule III.J.1... If the Appellant, without explanation, fails to submit a full statement of appeal within the month, the appeal shall be deemed to have been abandoned (see rule III.O.3 below) and shall be removed from the calendar.”

I leave for discussion on another occasion, if necessary, the question whether the “explanation” must be reasonable but suppose for present purposes that this is so.

11. ROP III.O, headed *Abandonment of an appeal*, is important in the present context. It provides, in effect, that where attempts to communicate with an Appellant are unsuccessful, or an incomplete appeal has been filed but not a full statement of appeal within the specified time limit without explanation, the appeal may be deemed to have been abandoned, respectively, upon expiry of a reasonable period of time or upon expiry of the time limit. Para 4 provides, most significantly, that the abandoned appeal “may be restored upon adequate explanation”, in the case of abandonment for failure to submit a full statement of appeal, the motion to restore “must be accompanied by the full statement of appeal”.

12. Leaving aside the effect of ROP III.D.1 (which I discuss below), the scheme of the ROP seems both clear and simple. An appeal is regarded as a process, commenced by the request for administrative review, initiated for the purposes of Staff Rule 111.2(a)(i) by the filing of an incomplete statement of appeal, particularized by the complete statement of appeal, controverted on behalf of the Secretary-General, reported on by the Board and ultimately determined by the decision of the Secretary-General. The imposition of a time limit on a staff member who wishes to appeal obviously can effectively relate only to the commencement of that process, all other matters being substantially out of the staff member’s control except for compliance with procedures designed to enable the process to continue and be completed. It is, no doubt, for this reason that ROP III.E permits the process to be

commenced by submission of an incomplete statement of appeal and provides, in effect, that commencement of the appeal process in this way within the time limits specified in the Staff Rules complies with those limits. It can have no other meaning. The rules of the JAB then go on to deal in their own way with the procedural prerequisites for bringing the appeal to its conclusion.

### **The applicable time limit**

13. It is important to note that it necessarily follows from ROP III.E that the time limit in Staff Rule 111.2(a)(i) will not be complied with in the case of incomplete appeals because, even if the incomplete statement of appeal is filed on the day of receipt of the Secretary-General's response to the application for administrative review, ROP III.E permits the Appellant to submit a full statement of appeal within one month from the date of receipt of the request to do so. Thus, leaving aside electronic communications (which is not required), the time frame envisaged by the ROP for appealing is longer than one month from receipt of the response to the request for administrative review.

14. If confirmation of this reading is necessary, it is provided by the stipulation in ROP III.J and O that failure to file a complete statement of appeal may (not must) lead to implied abandonment in the absence of explanation and permits restoration of the appeal if an adequate explanation is provided for the failure to submit the complete statement of appeal within the time limit imposed by the ROP – not by the Staff Rule – or any extensions. This is in marked contrast to the effect of Staff Rule 111.2 which firstly denies receivability to a late appeal but secondly, permits waiver only “in exceptional circumstances”. Whatever is meant by “explanation” in ROP III.E and III.O.3, it certainly does not require exceptional circumstances. If the ROP intended the time limitation in Staff Rule 111.2(a)(i) to apply retrospectively to the initiation of the appeal by the unfulfilled incomplete statement of appeal, it would not have used the language of abandonment and restoration. It would have used language that conveyed the notion that the appeal was not receivable. The notion of

abandonment implies that the appeal has commenced and is under weigh, not that it has been provisionally commenced.

15. It is necessary to now return to the effect of ROP III.D.1 (set out above) which, on the face of it, it is completely inconsistent with ROP III.E. If the words in parenthesis in the former provision were omitted, no problem would arise: it would simply be a general rule requiring submission of a full statement of appeal within the time specified by the ROP. It is the parenthetical reference to Staff Rule 111.2(a)(i) which creates the contradiction with ROP III.E. In my view, the parenthesis is simply a mistaken attempt to define what is meant by the phrase “applicable time limits”. The most obvious reason for this conclusion is that the parenthesized Staff Rule refers only to subparagraph 111.2(a)(i) whilst the time limit in subparagraph 111.2(a)(ii) must be just as relevant but is omitted. There can be no good reason for differentiating between appeals where the Secretary-General replies to the request for administrative review within one month and those where he does not. Specific time limits for appeal are specified in both cases, the non-receivability rule applies to both, and the requirement of ROP III.J applies to both. The parenthesis in ROP III.D.1 should be regarded in the same way as a marginal note in conventional legislative instruments: they are not part of the text of the instrument but merely editorial additions possibly relevant to interpretation in cases of doubt but not given any prescriptive worth. The parenthesis must be ignored as inconsistent with the plain terms of ROP III.E which deals unambiguously and specifically with the consequence of submitting an incomplete statement of appeal and the effect of failing to file a full statement of appeal as prescribed by ROP III.O.3: *generalia specialibus non derogant* (the general does not qualify the specific).

### **The applicant complied with the Staff Rules**

16. Accordingly, the filing of the incomplete statement of appeal by 31 July 2008 complied with the time limit specified by the Staff Rules and therefore Staff Rule 111.2(f) is irrelevant. The failure to file the full statement of appeal within the further one month specified in ROP III.E was explained (it appears) by the perceived need to

obtain the Investigative Report and its annexures that lie at the centre of the case and, at all events, only “may” lead to implicit abandonment. Again, Staff Rule 111.2(f) is not triggered.

17. The document prescribed by the JAB for the purpose of commencing an appeal is called a *Request to File an Appeal with the Joint Appeals Board Against an Administrative Decision* and requires an attachment of documents that would comprise a full statement of appeal. It appears that if such a Request were filed without the attachments, it would be accepted by the Board as an incomplete statement of appeal within ROP III.E. That is what happened in this case.

18. It is an open question whether under the present regime, which replaces that constituted both by the existence of the JAB and its rules there must now be an explanation for the failure to comply with the time limits imposed by those rules. It is contended by Mr. Margetts for the Secretary-General that there must be an explanation, and I think that Mr. Willemsen is at all events in a position to provide one, and therefore does not take issue with the argument. Of course, what constitutes a reasonable explanation will vary from case to case and will not be an entirely objective question. Accordingly, if counsel were of the opinion that certain documents were required in order to prepare a full statement of appeal, and made reasonable efforts to secure such documents, it may well have been reasonable for submission of the full statement of appeal to await receipt of those documents. If counsel has acted reasonably in this respect, it will only be in exceptional circumstances that such an explanation would not be accepted. Even if such an explanation were not accepted and the appeal treated as abandoned, it could be restored, provided that a full statement of appeal was forthcoming. As I understand it, in this case there was a submission that can be regarded in substance as a full statement of appeal. In the circumstances, it seems that an explanation should be given but I propose to proceed on the basis that such an explanation will be forthcoming in due course.



**Conclusion**

19. It follows that the appeal was receivable, remained receivable and has not been abandoned.

*(Signed)*

Judge Adams

Dated this 10<sup>th</sup> day of September 2009

Entered in the Register on this 18<sup>th</sup> day of September 2009

*(Signed)*

Hafida Lahiouel, Registrar, New York