



**Before:** Judge Coral Shaw

**Registry:** New York

**Registrar:** Hafida Lahiouel

COSTA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for applicant:**  
Self-represented

**Counsel for respondent:**  
Josianne Muc, ALU

## **Introduction**

1. The applicant is a language teacher in one of the departments of the Office of Human Resources Management (OHRM). In 2007, the applicant's department decided to test a new system, known as the Continuous Evaluation System (CES), to evaluate the performance of students. The new system required the participation of all teachers working in the applicant's department, including the applicant. After the pilot project was completed in January 2008, the applicant went back to the previous evaluation system, while the other teachers continued with the CES. The applicant subsequently requested compensation for the overtime she had performed while working with the CES. Her request was refused.

2. The applicant subsequently filed an application with the United Nations Dispute Tribunal to appeal that decision, contending that as a result of the implementation of the CES she was forced to work overtime throughout 2007 without any compensation. The applicant requests compensation for 766 additional hours of work, including in connection with the language proficiency exam.

3. The respondent has challenged whether the application is receivable. This preliminary issue of receivability has been dealt with on the papers, as agreed by both parties.

## **The facts relating to the preliminary issue**

4. On 5 February 2008, the applicant sent her first request for compensation for overtime work in 2007 to the chief of her section. Her request was rejected on 26 February 2008.

5. The applicant then requested assistance from the Staff Union, who referred her to the Panel of Counsel. In April 2008, she told the Panel of Counsel that she

wished to appeal the administrative decision but was advised that she was unlikely to succeed.

6. On 24 April 2008, aware that the time limit for taking action on the administrative decision was about to expire, she discussed an extension of time to file her appeal with the Secretary of the Joint Appeals Board (JAB). On the following day, the applicant formally requested an extension of time to file an appeal. In her email to the JAB, the applicant stated:

“I received the decision on 26 February and, as I explained to you, I was unable to find the right information . . . on how to proceed; only yesterday I found out that your office is the proper chan[n]el to follow”.

7. The deadline was extended to 9 May 2008 but the applicant took no further steps to file an appeal or otherwise challenge the administrative decision. Instead, she continued to correspond with the Staff Union and with the Department of Management.

8. On 18 July 2008, the applicant sent an email to the Department of Management repeating her request for compensation. The administration enquired into the matter again in some detail. After further correspondence and repeated requests by the applicant, it rejected the applicant’s claim for compensation on 4 February 2009.

9. On 1 April 2009, the applicant requested a review of the administrative decision by the Department of Management to reject her request for compensation for overtime.

10. The administration reviewed the applicant’s request and rejected her compensation claim on substantive grounds on 5 May 2009. It also reserved the right to raise the issue of receivability of the applicant’s claim in further proceedings.

11. In June 2009, the JAB granted the applicant's request for an extension to file her appeal against the decision until 8 July 2009. On 8 July 2009, the applicant filed her application with the Dispute Tribunal.

12. The respondent's reply to the application raised the question of whether the application was receivable. Accordingly, on 21 August 2009, the Dispute Tribunal ordered the applicant to provide a submission "fully explaining the reasons for the delay in submitting her request for administrative review and why the [Tribunal] should find that this is an exceptional case".

13. The applicant filed a submission which is reproduced in full below, save for some changes to protect the anonymity of the persons referred to.

#### **Applicant's submissions**

14. The applicant stated:

"I am writing in response to your August 21 2009 order that I explain the reasons related to the timing of the formal submission of my request for administrative review.

After receiving a negative answer to my request for compensation in February 2008 . . . , on 5 March 2008 I requested assistance from the Staff Union. . . . [T]he staff representative, suggested that I contact the Panel of Counsel to get guidance on how to proceed with the appeal. On 12 April 2008 I send a request to . . . the coordinator of the Panel of Counsel. . . .

I met with [the coordinator's assistant] on 21 April 2008. I explained the situation and sent him the documentation he requested. . . .

I contacted the Joint Appeal[s] Board on 24 April 2008 to request an extension for the appeal; the deadline was extended to 9 May 2008. . . .

I continued meeting [the coordinator's assistant] and finally we had a meeting with [the coordinator of the Panel of Counsel] to discuss the issue in light of the notes taken by [her] assistant. In that meeting, [the coordinator] said that I did not have a case to appeal. Her arguments were similar to the ones provided by the administration in their denial [of] my request. In view of the advise [sic] provided by [the coordinator], I did not proceed with the appeal.

On 19 June 2008 I had a meeting with the president of the Staff Union . . . and the First Secretary . . . to discuss the [Performance Appraisal System] situation. . . . During that meeting, I brought up the issue of my request for compensation, the administrative decision and the information provided by [the coordinator]. [The Staff Union representatives] said that the arguments I had presented were valid: the instructions from my supervisor constituted “pre-approval” and teachers are a General Service related category and as such, the provisions made in the rules to compensate General Service staff also apply to them.

On 1 July 2008 I requested an appointment with the Executive Officer [in the Department of Management] to try to solve the dispute through mediation and negotiation. He responded on 24 July 2008 that he and his deputy were going to try to resolve the issue. . . .

On 26 September 2008 I requested [the President of the Staff Union] to intervene in view of the fact that executive officer would not reply to my messages. . . . [The President of the Staff Union] had tried to negotiate to resolve the issue in two other instances. . . .

I finally met with the Executive Officer on 6 November 2008, discussed the issue of the [Performance Appraisal System] and compensation, re-submitted the request and got a negative respon[s]e. . . . I then proceeded to formally request the administrative review.

Thus, while I did take what I was told were the appropriate steps to request administrative review within two months of my receipt of the Administration’s 26 February 2008 decision, I did not formally submit a letter to the Secretary-General requesting review within that period because I relied on what I now believe was incorrect advice of the Panel of Counsel that I did not have a case to appeal. I then also continued to attempt t[o] resolve the matter through mediation, which ultimately was not success[s]ful. I thus respectfully request that the Tribunal waive any technical defect that might have occurred and proceed to consider the merits of my appeal, so that I am not prejudiced because of my reasonable reliance on the Panel of Counsel’s advice and my good faith efforts to arrive at an amicable resolution”.

### **Respondent’s submissions**

15. The respondent asserted that the application is not receivable because the request was not submitted within the two-month time limit. It submitted that this

time either started to run in January 2007, when the new evaluation system was first implemented and the applicant began working overtime without compensation, or following her initial request for compensation dated 5 February 2008 and the administration's reply on 26 February 2008. On the basis of the February 2008 communications, the applicant's request for administrative review was due 26 April 2008, yet the applicant filed it only on 1 April 2009, almost a year later. It is submitted by the respondent that the applicant failed to demonstrate that this delay was not due to any "objective element beyond the Applicant's control". According to the respondent, this test is consistent with the jurisprudence of the United Nations Administrative Tribunal.

16. The respondent further submits that the applicant's claim for compensation for overtime with regard to the language proficiency exam (which is in addition to the applicant's requests regarding her work with the CES) is not receivable as it is a new issue raised by the applicant that was not part of the request for administrative review.

### **The law**

17. The facts of this case span the transition from the old system of internal justice to the new on 1 July 2009. In order to decide whether this application is receivable by the Dispute Tribunal it is necessary to determine if it was properly brought under the relevant Staff Rules and the Statute of the Tribunal.

18. The deadlines for the filing of applications with the Tribunal are set in Article 8.1 of the Statute and echoed in the Tribunal's Rules of Procedure.

19. Pursuant to Article 8.3 of its Statute, the Tribunal may waive the deadlines set out in Article 8.1(d) for the filing of applications for a limited period of time and only in exceptional circumstances. Article 35 of the Rules of Procedure refers to the Tribunal's power to shorten or extend a time limit fixed by the Rules of Procedure

and states that the Tribunal may “waive any rule when the interests of justice so require”. This rule is subject to Article 8.3 of the Statute.

20. Materially for the present application, Article 8.3 of the Statute further provides that “[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation”. Article 8.3 does not differentiate between deadlines set for a staff member to submit a request for management evaluation and the time allotted to the administration to complete the evaluation.

21. The words of a statutory provision are to be interpreted according to their plain meaning and, where necessary, with reference to the context in which the words are found. The words of Article 8.3 of the Statute are clear on their face. The Tribunal has no jurisdiction to suspend or waive any deadlines imposed on any party with regard to management evaluations. The wider context of Article 8.3 supports this interpretation.

22. The “deadlines” referred to in the first part of Article 8.3 of the Statute and the time limits referred to in Articles 7 and 35 of the Rules of Procedure are those specified in earlier subsections of Article 8 of the Statute. These are limited to the deadlines for an applicant to file an application with the Tribunal pursuant to Article 2 of the Statute.

23. Article 2.1 of the Statute confers jurisdiction on the Tribunal to hear and pass judgments on applications appealing administrative decisions. However, clauses (c) and (d) of Article 8.1 limit the receivability of such applications. An application is receivable when a staff member has previously submitted the contested administrative decision for management evaluation and the application is filed within the specified deadlines.

24. In contrast, the deadlines for an applicant to submit a request for a management evaluation are specified neither in the Statute of the Tribunal nor its Rules of Procedure. Instead, they are found in the Staff Rules.

25. Clause (c) of Staff Rule 11.2, in effect since 1 July 2009, provides that a management evaluation shall not be receivable by the Secretary-General unless sent within 60 days of notification of the contested administrative decision. The rule allows the Secretary-General to expand this deadline pending efforts for informal resolution by the Office of the Ombudsman.

26. There is no express power in either the Statute or the Staff Rules for the Tribunal to extend or waive any deadlines or other time constraints set by the Staff Rules. To the contrary, Article 8.3 contains an express prohibition in relation to management evaluation deadlines. Given that Article 35 of the Rules of Procedure is subject to Article 8.3 of the Statute, the reference to the power to waive “any rule” cannot be interpreted to confer a greater power of waiver than that contemplated by the Statute such as the power to extend the time for requesting a management evaluation.

27. In the context of the Statute, the Rules of Procedure and the Staff Rules, I interpret Article 8.3 of the Statute to mean that the Tribunal may suspend or waive the deadlines for the filing of applications imposed by the Statute and Rules of Procedure, but may not suspend or waive the deadlines in the Staff Rules concerning management evaluation because this is the prerogative of the Secretary-General.

28. Does this prohibition extend to requests for administrative review under the former Staff Rules?

29. Under the former system of internal justice, administrative review served the same purpose as management evaluation, namely to allow timely consideration of the contested decision and, as this Tribunal held in *Caldarone* (2009), to “allow management the opportunity to rectify an erroneous, arbitrary or unfair decision”.<sup>1</sup> Like requests for management evaluation, requests for administrative review were mandatory. Before an appeal could be brought against an administrative decision

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<sup>1</sup> United Nations Dispute Tribunal, Judgment No. UNDT/2009/35, *Caldarone*, para. 8.7 (2009).



there had to have been a request for administrative review in every case, with the exception of disciplinary cases.

30. Under Staff Rule 111.2(a), in force prior to 1 July 2009, a staff member was required to request an administrative review of the contested decision within two months from the date of being notified of the decision. The rule stipulated that a staff member wishing to appeal an administrative decision “shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed”.

31. Staff Rule 111.2(f) provided that an appeal to the JAB “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”.

32. A significant change between the two systems is that the JAB—unlike the Dispute Tribunal—had the power to waive the time limits for submitting a request for a review in exceptional circumstances. That power was not given to the Tribunal. There is no basis in the Statute or the Staff Rules to imply such power. I conclude that the drafters of the Statute intended that all applications to the Tribunal would be subject to the rules under which this Tribunal operates.

33. I conclude, therefore, that pursuant to Article 8.3 of the Statute, the Tribunal has no jurisdiction to extend the deadlines for the filing of requests for either administrative review or management evaluation.

#### **The request for administrative review**

34. In *Muigai* (2005), the Administrative Tribunal found that the two-month period for making a request for administrative review did not begin again when a staff member made a new request for an administrative review on the same subject matter. The Administrative Tribunal stated:

“[A]llowing for such a renewed request to restart the running of time would effectively negate any case from being time-barred, as a new letter to the Respondent would elicit a response which would then be considered a new administrative decision”.<sup>2</sup>

35. The Administrative Tribunal also consistently held that time limits should be respected to protect the administration from late and stale claims.<sup>3</sup>

36. The applicant does not suggest that her request for administrative review on 1 April 2009 was anything other than a restatement of her original claim for overtime compensation. I conclude that her 1 April 2009 request related to the same administrative decision made in February 2008 to refuse her compensation for overtime. The applicant accepts that at no time did she request the Secretary-General to conduct an administrative review before April 2009.

37. I therefore accept the respondent’s submissions on the issue of receivability and conclude that the applicant failed to submit a request for administrative review within the two-month period required by the Staff Rules. The two-month period began running from the time of the administrative decision on 26 February 2008 and the deadline for such a request was 26 April 2008.

38. As the applicant’s request for review was not made until 1 April 2009, it was outside the required time limits set by the Staff Rules.

## **Decision**

39. The material administrative decision in this case was taken on 26 February 2008. If the applicant wished to contest that decision, Staff Rule 111.2(a) required her to request the Secretary-General to review that decision within two months from that date. Her request for administrative review was not submitted until April 2009 and that request was out of time. The Tribunal has no jurisdiction to waive the time

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<sup>2</sup> United Nations Administrative Tribunal, Judgment No. 1211, *Muigai*, para. III (2005).

<sup>3</sup> Judgment No. 579, *Tarjoman*, para. XVII (1992); Judgment No. 1021, *Lascu*, para. VI (2001); Judgment No. 1106, *Iqbal*, para. IV (2003).

limits for requests for management evaluation or requests for administrative review from the time period prior to 1 July 2009. The application is therefore not receivable under Article 8.3 of the Statute of the Tribunal.

*(Signed)*

Judge Coral Shaw

Dated this 21st day of October 2009

Entered in the Register on this 29th day of October 2009

*(Signed)*

Hafida Lahiouel, Registrar, New York