	UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2009/068/ JAB/2009/018
		Judgment No.:	UNDT/2009/052
		Date:	5 November 2009
		Original:	English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

ROSCA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON TIME LIMITS

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Susan Maddox, ALU, UN Secretariat

Notice: This Judgement has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. This case concerns the application of time limits where proceedings were commenced in the Joint Appeals Board (JAB) prior to 30 June 2009 and transferred to the United Nations Dispute Tribunal. The applicant was stationed in Cambodia. He complained about two administrative decisions. The Secretary-General responded adversely to the applicant's request for administrative review within two months but there is an issue as to whether the reply was received within that time or at all. The applicant had one month to appeal from the date of receipt or, if he did not get the reply, three months from the date of his request. The respondent submitted that, in either case, the time limit had not been complied with. Whether other communications from the Administration were received (as distinct from sent) is another issue.

2. The appeal was transferred to the Tribunal from the JAB on 30 June 2009, raising the following legal issues –

(i) whether the Tribunal has jurisdiction to grant waiver of a time limit imposed by rule 111.2;

(ii) if so, whether the question of waiver of a time limit is governed by rule 111.2(f), art 8.3 of the UNDT Statute or art 7.5 of the UNDT Rules of Procedure;

(iii) depending on which provision applies, the correct meaning of the terms "exceptional circumstances" and "exceptional case"; and

(iv) the meaning of "receipt" in rule 111.2(a)(i) and the applicable onus of proof.

The instruments

3. *General Assembly A/RES/63/253 –*

> [44]…all cases pending before the joint appeals boards, the joint disciplinary committees and the disciplinary committees shall be transferred, as from the abolishment of those bodies, to the United Nations Dispute Tribunal…

4. UNDT Statute –

> **Article 2**
>
> 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 noncompliance 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;
> >
> > (*b*) To appeal an administrative decision imposing a disciplinary measure;
> >
> > (*c*) …
>
> 7. As a transitional measure, the Dispute Tribunal shall be competent to hear and pass judgment on:
>
> > (a) A case transferred to it from a joint appeals board or a joint disciplinary committee established by the United Nations, or from another similar body established by a separately administered fund or programme;
> >
> > (b) A case transferred to it from the United Nations Administrative Tribunal;
>
> as decided by the General Assembly.
>
> **Article 8**
>
> 1. An application shall be receivable if:
>
> > (*a*) The Dispute Tribunal is competent to hear and pass judgment on the application, pursuant to article 2 of the present statute;
> >
> > (*b*) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(*c*) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(*d*) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

(ii) In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision;

(iii) The deadlines provided for in subparagraphs (d) (i) and (ii) of the present paragraph shall be extended to one year if the application is filed by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

2. An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation…

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute

Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

5. The filing of an application shall not have the effect of suspending the implementation of the contested administrative decision.

6. …

5. *Rules of Procedure of the Tribunal* –

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

2. Any person making claims on behalf of an incapacitated or deceased staff member of the United Nations, including the Secretariat and separately administered funds and programmes, shall have one calendar year to submit an application.

3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

4. Where an application is filed to enforce the implementation of an agreement reached through mediation, the application shall be receivable if filed within 90 calendar days of the last day for implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after 30 calendar days from the date of the signing of the agreement.

5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the

> applicant, justify the request. The request shall not exceed two pages in length.
>
> 6. …

Is the UNDT empowered to waive the old time-limits?

6. In *Morsy* UNDT/2009/036, the applicant was notified of an administrative decision from which he could appeal to the Administrative Tribunal. He was out of time and was granted an extension from the Administrative Tribunal to 30 June 2009. Well before this time limit expired, he wrote to the Administrative Tribunal asking that his appeal be transferred to the UNDT or for information about how he might do this himself. About seven weeks later, towards the end of July, he was advised by the Administrative Tribunal to submit his application to the UNDT. A week or so later he requested advice from the UNDT about how he should do this and three days later he submitted an application together with a request for an extension of time. Ebrahim-Carstens J held (at [25]) that the Tribunal "is enjoined to hear and render judgment on an application under the conditions prescribed in its own Statute and Rules of Procedure" and went on to consider whether the circumstances disclosed that the case was an exceptional one, justifying waiver of the non-compliance with the time limit for appeal to the Administrative Tribunal or the application to the UNDT.

7. In *Costa* UNDT/2009/51, the applicant's request for overtime payments was rejected on 26 February 2008. On 24 April 2008, not yet having appealed and being aware that she needed to do so by the following day, she sought an extension of time from the JAB. The deadline was extended to 9 May 2008. However, the applicant did not request administrative review, which was a prerequisite for filing an appeal, until 1 April 2009. (I have omitted a number of intermediate steps that are not presently material.) Eventually, she made an application to the Tribunal. The respondent submitted that her application could not be considered since the request was out of time. Shaw J held that the Tribunal did not have jurisdiction to waive any time limits imposed by the old Staff Rules, in particular rule 111.2(a). Her Honour pointed out that the new Staff Rule 11.2(c), 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 and that the Secretary-General may expand this deadline pending efforts for informal resolution by the Office of the Ombudsman. Her Honour then observed that there was no "express power" in the Statute for the Tribunal to extend or waive any deadlines or other time constraints set by the Staff Rules and noted, "To the contrary, Article 8.3 contains an express prohibition in relation to management evaluation deadlines"[26]. Her Honour then concluded –

> "[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." (Italics added.)

Her Honour then asked whether this prohibition extended to requests for administrative review under the former Staff Rules, pointing out that administrative review under the earlier system served the same purpose as management evaluation under the new regime, namely, in substance to permit a wrong decision to be corrected. Referring to rule 111.2(f), her Honour said (at [32]) that a significant change between the old and new systems "is the JAB - unlike the Dispute Tribunal – had the power to waive the time limits for submitting a request for a review in exceptional circumstances" and went on –

> "…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."

Although a judgment of another judge of the Tribunal is not binding on me, the principles of judicial comity would lead me to follow it in the ordinary course.

I regret, however, that I am unable to do so since, with all respect, I am unable to agree with Her Honour's decision on the jurisdiction of the Tribunal.

8. A useful starting point is art 8.3 of the Statute. The first sentence gives the Tribunal jurisdiction "to suspend or waive the deadlines ... in exceptional cases". The second sentence provides that the "Tribunal shall not suspend or waive the deadlines for management evaluation". The phrase used is not "deadlines *concerning* management evaluation" but is quite specifically limited to the time limits for the evaluation itself. Accordingly, the first sentence refers to deadlines pertaining to the applicant. The second sentence refers to deadlines pertaining to the Secretary-General. Article 8.1 permits applications to be filed by staff members where the contested decision has been submitted for management evaluation where required, in which event certain time limits, called "deadlines", are specified in art 8.1(d)(i); where a management evaluation is not required the deadlines are specified in art 8.1(d)(ii) and in the particular circumstances outlined in art 8.1(d)(iii) and (iv), the details of which do not presently matter. It is clear from this that art 8.1 is not concerned with and does not mention a "deadline for management evaluation" but refers only to what must be done *following* a management evaluation if the response of management to the evaluation is disputed. In short, the word "deadlines" referred to in the second sentence of art 8.3 does not comprehend the "deadlines" referred to in art 8.1 and art 8.2. On the other hand, it is reasonable, indeed compelling, that the word "deadlines" is used in the first sentence of the sub-article in the same sense as it is used in the second sentence of that sub-article. It follows that the jurisdiction conferred on the Tribunal by the first sentence must extend to deadlines in addition to those referred to in art 8.1 and art 8.2, particularly of course "the deadlines for management evaluation". I return to this point in due course.

9. As set out above, Shaw J referred to new Staff Rule 11.2(c), concerning management evaluations. It is useful to look at the overall scheme. Rule 11.2(a) requires a staff member contesting an administrative decision first to submit to the Secretary-General a written request for a management evaluation of the decision.

Rule 11.2(b) concerns administrative decisions taken pursuant to advice from technical bodies or a decision taken following completion of the disciplinary process; in such cases the staff member is not required to request a management evaluation. Rule 11.2(c) requires requests for management evaluation to be made within 60 days from notification of the impugned decision and provides that this "deadline" may be extended by the Secretary-General "pending efforts for informal resolution conducted by the Office of the Ombudsman". This paragraph does not refer to or impose any time limits on the management evaluation itself. Rather, it deals with the deadline for making a request for the evaluation. At all events, the rule does not, by giving the Secretary-General a power to extend a deadline, limit the jurisdiction of the Tribunal in any way. This necessarily follows from the language of the paragraph itself but also from the fact that, of course, the Staff Rules are subordinate to the Statute and it is not possible that a Staff Rule could limit jurisdiction which is conferred by the Statute. Accordingly, the power to extend given to the Secretary-General should be regarded as an additional mode of extending the deadline referred to in the paragraph in the limited circumstances mentioned and cannot be read as limiting the Tribunal's jurisdiction as conferred by the first sentence of art 8.3.

10. New rule 11.2(d) requires the Secretary-General's response "reflecting the outcome of the management evaluation" to be communicated to the staff member within 30 or 45 days of receipt of the request for management evaluation, depending on the location of the staff member. It follows, therefore, that management evaluation must occur before either 30 or 45 days, as the case may be. In this sense rule 11.2(d) imposes a deadline for the management evaluation. This deadline cannot be waived by the Tribunal by virtue of the excluding provision in art 8.3. (Under the old rules the only time limits that could be waived by the JAB were those with which the staff member was required to comply. The possible waiver of time limits with which the Secretary-General was required to comply did not arise, since there were no such time limits. Under the new system since a time limit was either envisaged or implicitly imposed by new rule 11.2(d), the question of waiver did arise. The General Assembly decided that the Tribunal should not have the jurisdiction to waive this

limit, hence the second sentence of art 8.3.) Other than rule 11.2(d) there appears to be no provision applying a deadline to management evaluation. Although it seems likely that the draftsperson of the Statute envisaged that such a deadline would be imposed, it should be noted that the Resolution adopting the Statute was passed by the General-Assembly on 24 December 2008 whilst the new Staff Rules are dated 16 June 2009. At all events, if the excluding provision in art 8.3 cannot legitimately be applied to rule 11.2(d), the conclusion to which I have referred as to its meaning remains unaffected since it is capable of referring to a deadline that may be imposed in the future for management evaluations.

11. It is necessary to return to consider the meaning of the first sentence of art 8.3, which confers jurisdiction on the Tribunal to waive or suspend deadlines and ask whether these deadlines include those imposed by the old rules, in particular rule 111.2(a). In my respectful opinion it does. The starting point is the nature of the jurisdiction conferred on the Tribunal in respect of transferred cases.

12. Article 2.1 of the Statute gives jurisdiction to the Tribunal "to hear and pass judgment on an *application* filed by an individual, as provided for" in art 3.1 (italics added). Article 3.1 specifies the persons able to make such applications. Article 2.7 of the Statute gives the Tribunal jurisdiction "to hear and pass judgment on … a *case* transferred to it from a joint appeals board" (italics added), The Statute thus distinguishes between an *application* on the one hand, which initiates proceedings in the Tribunal and a *case* on the other hand which are the matters transferred from the JAB to the Tribunal for determination. An appeal which had been submitted out of time, but in respect of which no waiver had been granted by the JAB as at 30 June 2009 could no longer be given a waiver by the JAB but, of course, the question of receivability, hence also of waiver, would still be outstanding. (Where the Administration does not take the objection, as the limitation is merely procedural, waiver is not necessary and the problem does not arise.)

13. Article 8 of the UNDT Statute commences by dealing with the receiving of what are named *applications* and specifies certain time limits, called deadlines, which

must be complied with by an applicant in respect of certain actions. It is clear that these actions are prospective in the sense they apply to applications made to the Tribunal after the commencement of its jurisdiction, as distinct from cases commenced earlier and transferred to it. As we have seen, art 8.3 empowers the Tribunal "to suspend or waive the deadlines" but it does not explicitly specify the particular deadlines which the Tribunal can suspend or waive. Plainly the "deadlines" include those imposed by art 8 itself and, as I have endeavoured to show, deadlines for management evaluation. Does the term apply to the other time limits that applied to the cases transferred from the JAB, in particular, those in which no application for or decision concerning waiver had been made?

14. The only specific power given to the Tribunal to suspend or waive time limits is that given by art 8.3, which uses the phrase "*the* deadlines" (italics added), possibly suggesting that it relates only to those deadlines specified in the article. Not only does this require the definite article to do a great deal of work, it would necessitate giving to the word "deadlines" as used in the first sentence of the clause a different meaning to that which it must have in the second sentence of the clause. Such a result would, at the least, be most unlikely. It is important to note, in my view, that art 8 is part of a scheme which involved the transfer of a substantial number of cases from the JAB and it must be considered in this context. Potentially, many of these cases would concern appeals that were out of time and awaiting consideration by the JAB which, typically, did not consider the issue of waiver until all submissions on the substantive appeal had been filed.

15. Did the applicants lose their right to seek waiver simply by the abolition of the JAB and the substitution of the Tribunal to determine their cases? I do not think so. First, art 8.3 is a distinct and independent provision within art 8: had it been intended to apply only to the deadlines in art 8.1(d), its logical placement would have been a subparagraph in art 8.1. Secondly, it is a procedural provision and, though it uses different language ("exceptional *cases*") to that of rule 111.2(f) ("exceptional circumstances"), is capable of being applied to those matters transferred to the

Tribunal where there has not been a determination by a JAB about waiver. Where there has been no such determination, the Secretary-General has no accrued entitlement to a dismissal of the appeal. But by contrast, an appellant has a subsisting entitlement to seek a waiver. It would be unfair if an appellant lost that entitlement because his or her case is transferred to the Tribunal whose jurisdiction replaces that of the JAB. The arbitrariness of such unfairness is all the more obvious because (accepting the hypothesis) the Tribunal would be able to grant waiver in respect of cases commenced in it but not those transferred to it. (I have already explained that, differing with respect from Shaw J, I do not accept that the Tribunal does not have jurisdiction to vary, on an applicant's request, the time limit for requesting management evaluation. Of course, where an applicant succeeded in obtaining a waiver of the deadline for requesting management evaluation, the Tribunal would usually not proceed to hear the substantive application until the Administration had the opportunity to conduct the evaluation.) The removal of entitlements by subsequent procedural legislative changes can, of course, be done but, according to ordinary canons of interpretation, only by specific language unambiguously dealing with the particular subject matter. The use of the definite article in the first sentence of art 8.3 of the Statute is scarcely sufficient. It should be assumed that, in making changes to its laws, the General Assembly intended to do justice to all affected parties.

16. Accordingly, in the absence of specific language demonstrating that the General Assembly intended to destroy the entitlement of an appellant to seek a waiver of the time limits imposed by rule 111.2, it would be wrong to construe the UNDT Statute as effecting this unjust result unless, of course, it is simply not possible to construe it in any other way. The word "deadline" is not a technical term but a noun in common parlance and, as used in art 8.3, is capable of being construed in a way that gives the Tribunal jurisdiction to waive or suspend the deadlines relevant to the cases transferred from the JAB. According to this interpretation, the phrase "the deadlines" in the first sentence of art 8.3 is a reference to all deadlines affecting the applicant in all matters that come before the Tribunal, whether new or

transferred. To my mind, this interpretation does not do any violence to the language of the provision but simply recognises the context in which it falls to be construed.

17. An alternative approach which leads to the same result is to adopt the conventional mode of interpretation of retroactive legislation which, in general, applies procedural changes to past cases that are subject to pending proceedings unless the later legislation expressly provides otherwise: see, for example, Clapinska, *Retrospectivity in the Drafting and Interpretation of Legislation, Drafting Legislation, A Modern Approach*, (eds) Stefanou and Xanthiki (University of London, UK), 2008, Ashgate Publishing Company, where the author also points out, *a propos* the difficulty of distinguishing between substance and procedure, the contention in the well known and authoritative *Craies* (D Greenberg (ed) *Craies on Legislation*, London: Sweet and Maxwell, 2004, at 394) that the better approach is "consideration of the substance of the provision concerned and, taking all the circumstances into account, considering what results the legislature can reasonably be assumed to have wanted or not wanted to achieve". (This article is especially useful because of its discussion of the European, Canadian and US approaches as well as that of England; other texts and authorities to the same effect are too numerous and unnecessary to mention here). It seems to me that the General Assembly decided to hand over the whole of the jurisdiction of the JAB and Joint Disciplinary Committee to the Tribunal and, in providing for a procedure for the Tribunal to waive or suspend deadlines, it intended to preserve in substance the same procedures for all matters coming before the Tribunal by virtue of the usual rule that changes in procedure apply to pending matters as well as those newly instituted unless this rule is explicitly departed from. It follows that, the power to grant waiver given to the Tribunal by art 8.3 can be applied to transferred cases and should exercised in accordance with the language of that provision to waive or suspend time limits imposed by the old rules where the case is exceptional.

18. It will be seen that I have confined myself to a discussion of the relevant provision of the UNDT Statute. In my view, as distinct from the Statute, the Rules of

Procedure do not and cannot deal with the time limits referable to the transferred cases. Article 7 of the Rules of Procedure concerns time limits for filing applications and, as art 7.1 shows, deals with what might be called “new” applications. No ensuing sub-article suggests that it refers or is capable of referring to transferred cases. Art 7.5 explicitly confines the request for waiver for which it provides to “the time limits referred to in Article 7.1” which, as I have mentioned, are the time limits for submitting new applications. Such an indication is, as I have pointed out, not contained in art 8.3 of the Statute. It follows that there is no provision in the Rules of Procedure for waiver of time limits referable to the transferred cases, in particular as prescribed by rule 111.2(a)(i) and (ii). No doubt this was an oversight but, since the matter is sufficiently dealt with in the Statute, it is of no account.

19. A third approach relies on the use of the word “case” in art 2.7 of the Statute. It would not be unreasonable to regard the matter transferred as not only comprising the substantive dispute but also all the incidental or ancillary requirements attached to it by the rules that provided for its determination including, of course, the necessity to consider the question of waiver where a time limit had not been complied with. This interpretation is rendered the more available because the word “case” is used rather than “appeal”, since the former term is plainly not meant in any technical sense and should therefore be construed as it is usually used in common parlance. Thus the transfer of a “case” is the transfer of the whole matter including a pending or potential application for waiver, as it were, the whole of the unfinished business of the JAB.

20. It seems to me each of these three approaches is a legitimate mode of construction well within the conventional judicial method of interpreting legislation of this kind.

21. Since writing this, I have become aware of *Diagne et al*. UNDT/2009/057, in which Laker J exercised the jurisdiction of the Tribunal to consider waiving the time limit in rule 111.2 with which the applicant failed to comply. If I may respectfully say

so, I agree that his Honour was correct in this regard, though - as I point out below - I am regrettably unable to agree with other aspects of his Honour's decision**.**

22. In my view, the relevant test in transferred cases is that prescribed by art 8.3 of the UNDT Statute: first, judicial comity makes it desirable that I should follow the opinion of Ebrahim-Carstens J in *Morsy* that the General Assembly, in using the phrase "exceptional case" in art 8.3 intended deliberately to depart from both the earlier language and, more pointedly, the jurisprudence of the Administrative Tribunal with which it had been encrusted (a view with which I respectfully agree); secondly, the correct principle relating to repeal of procedural provisions is not that the old procedure survives repeal for old cases but that the new rule applies to current cases, although they had previously been governed by the old rule; thirdly, the test of exceptional circumstances was not only stipulated by a rule that has been repealed but was required to be applied by the JAB, a body no longer in existence and of a very different character to the Tribunal; and, fourthly, it seems to me to be undesirable that the Tribunal should apply different tests to what is essentially the same problem, namely, what to do when a litigant fails to comply with a time limit.

23. In *Diagne et al.*, Laker J acted upon the basis that the relevant test, in a transferred case where the applicant had not complied with the old time limits, is that posed by rule 111.2(f). I have carefully considered whether I should follow his Honour's approach but, with utmost respect, I am unable to do so; for the reasons stated, I remain of the opinion that art 8.3 must apply to transferred cases.

Does "exceptional case" mean the same as "exceptional circumstances"?

24. I need to deal with this issue in case it is held on appeal that the conclusion that the question of waiver of time limits applicable to transferred cases is governed by art 8.3 of the UNDT Statute rather than rule 111.2(f) is wrong. This question is also important because the respondent seeks to argue that the jurisprudence developed by the Administrative Tribunal applies or should apply to the new rule,

contending that the concepts conveyed by the phrases “exceptional circumstances” and “exceptional case” on the other are very similar, if not identical.

25. The Administrative Tribunal gave the phrase “exceptional circumstances” as it was used in rule 111.2(f) an extremely restrictive meaning. In the instant case, Ms Maddox, counsel for the respondent, submitted that, although the Tribunal is not bound by decisions of the Administrative Tribunal, it should apply them both for reasons of comity and because they are, at all events, correct. However, with unfeigned respect for the Administrative Tribunal, Ms. Maddox’ submission must be rejected.

26. In *Morsy*, Ebrahim-Carstens J held that she was not bound to follow the Administrative Tribunal’s decisions on the meaning of rule 111.2(f), in part for the reason that the expression “exceptional case” had a far wider meaning than that which had been given by the Administrative Tribunal to “exceptional circumstances” and that this difference was intended by the General Assembly. Her Honour relied not only on the ordinary English meaning of the expression “exceptional” itself but the meaning given to it in other jurisdictions. (It is worth noting that, if the same reasoning were applied to “exceptional circumstances”, the interpretation of the Administrative Tribunal would be wrong. Her Honour did not, however, find it necessary to make this point.) Her Honour observed, quite rightly, if I may respectfully say so, that –

> “[57]… In the nature of things it is hardly possible and certainly undesirable for the Tribunal to attempt to define exceptional reasons or exceptional cases since no general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature…”

Her Honour pointed out –

> “[50]…[The Tribunal must] ascertain in each case whether it is exceptional or whether there are exceptional reasons in the ordinary sense, to justify a waiver or suspension of time; exceptional simply meaning something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be

> unique or unprecedented or very, rare, but it cannot be one which is regular or routinely or normally encountered."

With respect (if I may be permitted to make a perhaps pedantic point) although the version of the Rules of Procedure to which Ebrahim-Carstens J refers uses the phrase "exceptional reasons" these are not required as such. They are simply the reasons that the applicant must proffer in his or her request to show that the *case* is exceptional. With this minor correction, the test as formulated by her Honour is not only correct but, for the reasons Ebrahim-Carstens J stated, is as far as one can usefully go. The intractable uncertainty of the meaning of the word "exceptional" cannot be fairly criticised, given the very wide range of cases in which waiving non-compliance with a time limit might be justified. In my view, the word was deliberately chosen to enable the Tribunal (and, for that matter, the JAB) to bring into account all the relevant matters that might affect the exercise of the discretion without excluding any matter that should rationally be taken into account.

27. Ebrahim-Carstens J pointed to the significant restrictions placed on the discretion to grant a waiver under rule 111.2(f) by the decisions of the Administrative Tribunal. The substance of those decisions was that waiver should not be given unless the applicant had demonstrated that his or her delay was caused by circumstances substantially out of his or her control: see, amongst many others, *Kayigamba*, (1986) Judgment 372; *Gbikpi* (1985) Judgment 359; *Shehabi* (1996) Judgment 759; *Shehabi* (2002) Judgment 1076; *Pudasaini* (2008) Judgment 1398; *Waiyaki* (2006) Judgment 1301; *Midaya* (1999) Judgment 913. The effect of these decisions was that, of all the possible exceptional circumstances that justified a waiver only those which caused or contributed to delay could be considered and, of these, only those outside or substantially outside the control of the appellant could justify waiver. With respect, I' consider that this interpretation was an unjustified departure from the plain language of the rule.

28. At the outset, it is very important to observe that rule 111.2(f) did not either explicitly or implicitly confine the exceptional circumstances to the reasons for delay.

The fundamental issue posed by the rule is whether there should be a waiver. There is no logical reason why the only relevant matter to be considered should be the reason for delay. The rule does not suggest that the class of "exceptional circumstances" is limited or qualified beyond the requirement, of course, that the circumstances are rationally related to matters capable of justifying waiver, which should then be granted if any one of those circumstances or the circumstances as a whole were "exceptional". If there is a difference in nuance between "exceptional circumstances" and "exceptional case", it is that the latter may be regarded as more clearly indicating that the relevant matters are not confined to the reasons for delay: see, eg, *Morsy* where Ebrahim-Carstens J mentions (at [48]) the possible legal or policy significance of the case as one of the potentially relevant matters.

29. Without attempting a complete list, the relevant matters for consideration include the reasons for and length of the delay, personal difficulties, if any, faced by the applicant, the consequences of the impugned decision for the applicant, the nature of the relief sought, the nature of the decision and the reasons for it, whether it involved mere oversight or allegedly serious misconduct, the potentially adverse consequences to the Organization of permitting the appeal, the importance of resolving the legal or factual question at stake, and whether there is any other remedy open to the applicant. Additional factors are whether the applicant has at least an arguable case (if not, there is no point in waiving the non-compliance), or delay has caused the Organization to act to its detriment or it has been significantly prejudiced in its ability to conduct its case on the substantive appeal, in either event, the extent of the exceptional character of the case would need to be significantly greater to justify waiver or suspension. These or cognate factors are typically those which courts faced with the exercise of a similar discretion habitually weigh up and are not inherently difficult or complicated.

30. The reason given by the Administrative Tribunal for departing from the ordinary and conventional meaning of rule 111.2(f) is usefully exemplified in its recent extensive discussion of the problem in *Schimmer* (2009) Judgment 1424,

where the appellant had not complied with the time limit for filing an appeal from the decision of the Secretary-General rejecting the recommendation of the JAB. Although this case concerns art 7.4 of the Statute of the Administrative Tribunal relating to appeals to that tribunal rather than rule 111.2(f), applying to the JAB, the Administrative Tribunal endorsed its earlier decisions on rule 111.2(f) and then applied them to its own appeals. This was done even though art 7.4 gave it the discretion "to suspend the provisions regarding time limits" but, as distinct from rule 111.2(f), did not impose any requirement that there should be "exceptional circumstances". The usual interpretation given to a provision such as this would be that which governed the general exercise of a judicial discretion, in short, that the order would be made if it served the interests of justice. Rather than taking this approach, which would have required weighing up, amongst other things, the consequences of the decision for the applicant on the one hand and the respondent on the other, the Administrative Tribunal decided that it should apply the same test that had hitherto been used when considering the meaning of "exceptional circumstances" in rule 111.2(f), namely whether the applicant's delay had been caused by matters outside his or her control, despite the omission of any such test in the sub-article. The Administrative Tribunal, in justification of this approach, did not attempt to interpret art. 7.4 but simply made a policy decision, citing the apocalyptic language used in *Diaz de Wessely* (2002) Judgment 1046 concerning rule 111.2(f) –

> "…it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations, Any other approach would endanger the mission of the international organisations, As the Tribunal has pointed out in the past: 'Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning' (see Judgment No. 631, *Tarjouman* (1992), para. XVII))"

Whilst time limits are important, it is difficult to see how, in the vast bulk of cases, they could possibly be of the *utmost* importance, let alone capable of *endangering the* *mission* of the Organization or "*vital*...to its proper functioning". It will be recalled that the sword of Damocles hung over the head of the mythical ruler and could at any moment decapitate him without warning. Where exceptional circumstances were present other than matters outside the control of the applicant and it was just to waive a time limit, the contention that doing so might lead to the destruction of the Organization's efficiency merely has to be stated to be refuted. Nor is it right to describe protection from delayed appeals as "imperative" for the "proper functioning" of the Organization, though it may be desirable. It needs to be understood that we are not discussing a situation in which there are no time limits at all, but those in which waiver is justified by exceptional circumstances as that term would be conventionally understood. As Ebrahim-Carstens J has shown in *Morsy* by a brief sample of cases from other jurisdictions, the ordinary meaning of the phrase can readily be applied by the conventional application of the rules of administrative and judicial discretion.

31. Certainly, late requests either to review administrative decisions or appeal can be productive of inconvenience, inefficiency and, possibly, cost. On the other hand, the survival of administrative decisions that are unfair, unreasonable, capricious or improper also involves a cost, quite possibly substantial, not only to the staff member but *also* to the Organization. The jurisprudence of the Administrative Tribunal on this question is silent upon the potential injustice of requiring staff members to suffer unfair, unreasonable or improper decisions because they have not appealed in time. And the Administrative Tribunal, just as significantly, also overlooked the obvious and substantial interest of the Organization in correcting the mistakes or misconduct of its management, an interest arguably greater than that of preventing the inefficiencies that might arise from too liberal an approach to waiving time limits. On occasions, perhaps many, there will be no good reason for extending the time limit for appeal and good reason for not doing so but it is difficult to see how the proper interpretation of art 7.5 required it to be understood in the same sense as rule 111.2(f) when the language of the former provision, one should assume deliberately, made no reference at all, even by a hint, to "exceptional circumstances". This judgment is cited as a recent example of the reasons of the Administrative Tribunal for restrictively

interpreting rule 111.2(f) (and art 7.5 of the Statute of the Administrative Tribunal), showing them to be driven by policy objectives rather than the statutory language.

32. The importance of the policy identified by the Administrative Tribunal as justifying departure from the actual language was not only overstated but, as I have mentioned, that policy was merely one of a number of relevant, arguably more important countervailing policy considerations, none of which are mentioned. I repeat that it is very important as a matter of policy that administrative decisions are fair, reasonable and unaffected by impropriety, according to the staff every right to which they are entitled by virtue of their employment, not only because that is the staff's legal right but because of the need to maintain the integrity of the Organization itself. Moreover, a wrong decision, even if apparently insignificant when considered in isolation, may well have the tendency to breed and thus give rise to, or reflect, a practice that, if widespread, could prove to be significantly adverse to the efficient and proper functioning of some aspect of the Organization's affairs. Obviously, no one could deny that the survival of the Organization's mission trumps everything. But the suggestion that this was at risk if the ordinary meaning of "exceptional circumstances" were applied to the exercise of the discretion to grant waiver, is a gross, indeed absurd, exaggeration.

33. In summary, to refuse waiver, even if exceptional circumstances were present, because the reasons for delay were not outside the control of the applicant, was not required by rule 111.2(f), and it is not required by the reasonable administrative and managerial functioning of the Organization. By excluding appeals which ought to have been heard, other important policy requirements of the Organization were frustrated. The judgments of the Administrative Tribunal demonstrate that, instead of rule 111.2(f) being applied, it was reconstructed to serve an arbitrarily selected policy objective. Speaking for myself, I will not accept interpretations that are arrived at in this way. I do not think that these decisions were correct when they were pronounced and they are not correct now.

Is an applicant's ignorance of the law relevant?

34. In *Diagne* et al. Laker J applied the decisions of the Administrative Tribunal to the interpretation and application of rule 111.2(f). Applying the decision in *Van Leeuwen* (2004) Judgment 1185, his Honour stated that, apart from the fact that the applicant "had acknowledged that he had become familiar with the Staff Rules and Regulations by signing his letter of appointment, ignorance of the law is in general no excuse and each staff member is bound to know the laws which are applicable to him". With respect for my learned colleague, I regret that I am unable to agree with this approach, since I regard the decisions of the Administrative Tribunal on rule 111.2(f) as fundamentally flawed, no less *Van Leeuwen*. It is surely a fiction that any staff member knows and fanciful that he or she could be expected to know the rules that apply to his or her employment and we should be concerned with truth rather than fancy or fiction. I would readily accept that the staff member's knowledge of the time limits and understanding of the consequences of non-compliance are relevant factors for considering whether exceptional circumstances were present but these two matters, namely knowledge of the deadline and understanding the consequences of delay are very different since the latter can be gathered only from the decisions of the Administrative Tribunal, a knowledge which surely cannot be attributed to any ordinary staff member. Moreover, the rule that ignorance of the law is no defence applies to the commission of criminal offences because in these cases the crucial question is that of the intent of the accused. Even here, the rule is of limited application: such ignorance will often be relevant to the question of punishment. In civil cases, intent is rarely relevant and the rule has virtually no application. In disciplinary cases, ignorance of a rule might or might not be a defence, depending on the particular circumstances of the case and no general statement can usefully be made; however, it is plainly not material where intent is irrelevant.

35. It might well be reasonable that a staff member who does not know a relevant time limit and therefore does not comply with it cannot point to ignorance as an exceptional circumstance since it is reasonable to expect a staff member who is

contemplating appeal to familiarise himself or herself with the particular process which he or she is invoking. But this is not because of any presumption or the application of any rule of law or fiction. At all events, as I have attempted to show, in many cases it would not be fair simply to look at knowledge of the time limit unless the applicant was also aware of the devastating effects of non-compliance: understanding of the time limit requires knowledge of the consequences of non-compliance, a knowledge which mere reading of the rule would not provide.

36. As a matter of principle it is conceivable that a legislative instrument might require the application of a fiction to destroy a right (here the right of appeal) in particular circumstances but this is so offensive to ordinary notions of justice that it would require the clearest possible language to overcome the presumption that a legislative body would not intentionally make a law of this kind. Certainly, the common law is replete with statements of such a rule of interpretation.

Facts

37. The applicant took up a one-year fixed-term appointment on 1 September 2007. This appointment was extended to 30 November 2008, then to 12 December and lastly 17 December 2008. In early 2008, following a major review, the applicant's position had been varied in respect of a number of tasks and responsibilities. This required his post to be re-advertised, which occurred on 6 August 2008, with a closing date of 21 August. The applicant, however, did not apply for the position. On 4 July 2008, he was informed that his contract would be extended, but only for three months. According to the applicant, he was notified on 12 September 2008 of the relevant decisions, by two documents, one dated 27 August (concerning the reassignment) and the other 12 September (extending his contract by three months).

38. By a document entitled "Report on Abuse of Authority..." addressed to the Assistant-Secretary-General for Human Resources Management, dated 20 October 2008 and sent by e-mail on 24 October, the applicant claimed that a

senior manager had abused his authority by unlawfully removing the applicant from his position without due process for improper reasons and by using the applicant as a "scapegoat" for problems that were not his fault. The "report" did not state the date upon which the applicant had received written notification of his removal and reassignment, which is the event marking the commencement of the two-month time limit under rule 111.2(a); nor did it seek reversal of the decisions or mention rule 111.2.

39. A letter was sent to the applicant by the Office of Human Resources Management (OHRM) on 6 November 2008 apparently to the effect that his "complaint" should be referred to the Head of Office because it alleged misconduct and the "communication" about reappointment and reassignment would be treated as a request for review of those decisions. This communication was somewhat ambiguous, as it is capable of being read as meaning, on the one hand, that the applicant should take the step of referring his report to the Head of Office whereupon it would be regarded as a request for review or, on the other hand, that his report was now being regarded as such a request but that he also needed to send it to the Head of Office to enable consideration of his allegations of improper conduct. It is apparent that OHRM proceeded on the latter basis. The evidence does not show whether the letter of OHRM was actually received by the applicant. However, I propose to disregard this letter because it was not tendered in evidence and the above description of its content is derived from a submission to the JAB. It is not appropriate that I should have regard to this letter as its content is hearsay. The applicant gave evidence in the proceedings but not about this and was not cross-examined on the point.

40. What the applicant made of the letter of 6 November (if he received it) is unknown but, on 12 November 2008 Mr Danquah, applicant's counsel, addressed to the Secretary-General on his behalf an explicit request for administrative review under rule 111.2(a), which identified the notification of the impugned decisions as having been given by the Chief of Personnel on 12 September 2008. In this request, reinstatement to the applicant's previous post was sought. Mr Danquah, "withdrew"

his request of 12 November and "replaced" it with a lengthier and more detailed document on 20 November 2008. (Nothing here turns on whether the formal request could be withdrawn and replaced as distinct from being amended or supplemented.) Having regard to the similarities between this document and the complaint of 20 October 2008, much of which it reproduces, it is clear that the earlier document was available to Mr Danquah at least by that date. The 20 November 2008 document requested that "as a remedy, you [the Secretary-General] order an extension of my contract for an additional nine months and have me reassigned to ICTS for justice to be done". In these circumstances, was the request submitted on 24 October or 12 November 2008?

41. The specific elements of a request within rule 111.2(a) are: first, it is a letter (that is to say, it is a communication in writing); secondly, it is addressed to the Secretary-General; and, thirdly, requests that an administrative decision be reviewed. Certainly, the applicant's "report" was in writing. But it only sought a review of what the particular manager had done – only some of which was comprised administrative decisions - in the sense that it comprised evidence of misconduct and no correction of the decisions themselves was sought. Nor was the letter addressed to the Secretary-General. It is apparent, therefore, that the applicant did not have in mind the provisions of rule 111.2(a) and was not intending to invoke it. However, it must be said that, from the Administration's point of view, the requirements of rule 111.2(a) have never been strictly applied, since to do so would often be to a staff member's disadvantage. As I understand it, if a written communication were made to a responsible manager that complained about some conduct or decision affecting the staff member adversely, it would be regarded as a request within rule 111.2(a) and the staff member so informed by a letter from OHRM, usually in the form of that sent to the applicant on 11 November 2008 (with which I deal in the following paragraphs). The only reasonable interpretation of Mr Danquah's explicit request is that he (on the applicant's behalf) was of the view that the 12 November request was the communication upon which the applicant relied for the purpose of invoking the

provisions of rule 111.2. The arrival of this request should have led OHRM to the same conclusion.

42. In the meantime, however, on 11 November 2008, the applicant was sent a letter, in what I understand was the standard form, from the then Acting Chief, Administrative Law Unit that his "e-mail...dated 24 October 2008" had been received and that the two-month period for review of the decisions to reassign him and extend his contract only for three month began to run from that date. He was told that, if he received a reply to his request for administrative review with which he was not satisfied he could appeal against the answer within one month from his receipt of the reply. He was also told that, in the absence of any response, he could appeal against the administrative decision within three months from 24 October 2008. The applicant was informed that, if he wished to file an appeal with the JAB, he could use counsel who were listed on the Panel of Counsel, contact details for which were provided. The text of the relevant staff rules was set out in an attachment to the letter.

43. The letter of 11 November 2008 was seriously misleading. The applicant was not informed, except to the extent that he might have gathered from the rules, that a failure to comply with the time limits might lead to his being unable to proceed with his appeal. No reference was made in the letter to the notions of receivability, waiver, or exceptional circumstances. These terms are not part of common parlance and their true legal meaning is not easy even for lawyers to understand with precision. It is difficult to understand why only some of the relevant factors concerning time were brought to his attention and not even a hint given of the potentially devastating consequences of non-compliance with the time limits. The ordinary reasonable person receiving such a letter would justifiably infer that, if not every relevant matter was mentioned, at least the key ones were. *Suppressio veri, suggestio falsi* (to suppress the truth is to suggest the false). I mention this Latin maxim to show that it has long been a part of ordinary human experience that people will often infer from a list of circumstances that seems to be complete that other circumstances that happen to be relevant but which are not mentioned either did not occur or are irrelevant.

Having brought the time limits to the applicant's attention, the failure to mention the possible consequence of non-compliance implied that it was not important. Merely to attach the Staff Rules, which are not at all easy to understand, was not sufficient to overcome this implication, especially since they were not applied in their ordinary sense.

44. It seems to me that the Administration had a responsibility to explain in ordinary language the procedure which an applicant needed to follow if he or she wished to appeal, including pointing out the likely consequence of non-compliance with the time limits, namely the complete loss of the right of appeal. If this latter information were not to be provided, then better no information about the process of appeal at all. This is all the more important having regard to the extremely restrictive interpretation given by the Administrative Tribunal to the phrase "exceptional circumstances", a draconian jurisprudence which, it can safely be assumed, would be unknown to almost all staff members and shocking to most. In short, the rules, especially as interpreted by the Administrative Tribunal, concealed a trap which should have brought to the applicant's attention.

45. The reply to the request for review had been e-mailed to Mr Danquah's personal UN account on 22 December 2008. Regrettably this e-mail account was almost completely inactive and Mr Danquah had been using another general Panel of Counsel account as his official work account for about three years although, he explained, he had been in the habit of forwarding its contents from time to time to his personal UN account. There is a message of 11 February 2009 forwarding the reply from his personal to the official account, which shows that Mr Danquah had accessed it on that day. Although Mr Danquah had no actual recollection of reading (as distinct from forwarding) the reply on 11 February, he clearly did not realize that the reply had been sent since, on 12 February, he submitted the incomplete statement of appeal under cover of an e-mail in which he said that the reply had not been received which, I would accept, was indeed the truth of the matter so far as his knowledge went. On 27 February 2009, Mr Danquah e-mailed the JAB to acknowledge that the reply had

been received by him (meaning in his personal UN e-mail account) on 22 December 2008 and, pointing out that the delay in submitting the incomplete statement of appeal was not the applicant's fault, requested a suspension of the time limit to 12 March 2009 to permit submission of the full statement of appeal. This request assumed that he had received the reply within the meaning of the rule on 22 December 2008, although as a matter of fact he was unaware of it. In my view, a communication to an address not indicated by the addressee as his or hers does not justify any inference that it was received by the addressee. (The information about the e-mail accounts and when Mr Danquah became aware that a reply had been made was given by him in a written submission to the Tribunal and from the bar table. I was informed by Ms Maddox for the respondent that Mr Danquah's statements were not disputed.)

46. It is now necessary to move to the applicant's involvement in the relevant events. The applicant gave evidence that, having lost his job, he left his office on 18 December 2008 and flew home to France the following day. On 19 December 2008 a reply to the request for review was e-mailed by the OHRM to the applicant's UN e-mail account. The reply was sent in three parts, each being attached to a separate e-mail message. On 24 December 2008 three automatically generated receipts from the applicant's UN e-mail account were received by OHRM. The applicant said that he was on a skiing holiday at the time. He said that from time to time he accessed his e-mail account to communicate with his former colleagues because, although he had made arrangements to transfer all his e-mails to his private account, for some reason this had not worked. He does not believe he accessed his account on this day (which was, after all, Christmas Eve). He said that he did not see the reply to his request for administrative review. He said that it was possible that someone else accessed his e-mail account because his "password was [very simple and obvious]". He said that he had asked Mr Danquah to deal with the request because he was very depressed over the decision that had been made.

Fundamental matters

47. This case concerns a fundamental principle disguised as procedure: access to justice. The unique status of the United Nations protects it from the justice administered by the ordinary courts. A staff member cannot obtain legal redress except within the Organization itself: there is nowhere else to go. It is important also to bear in mind the context: the rights of an employee to enforce the contract of employment. Decisions about employment affect lives.

48. The time limits have the effect of completely preventing legal redress, even in respect of patently wrongful and unjust decisions. I have been unable to find another jurisdiction in which action must be commenced within one or two months of an alleged breach or a refusal by the employer to correct it. I am also unaware of any statute of limitations that gives less than several years to commence proceedings and most also give a court the discretion to extend these limits if the justice of the case requires. Viewed in the general context of employment and contract law, therefore, the UN time limits are not only unique but exceptionally restrictive, and only somewhat ameliorated by the discretion to waive or suspend the deadlines, because exceptional circumstances are or an exceptional case is present. It inexorably follows as a matter of logic from the fact that the justice of the case is not enough for waiver that injustice, perhaps grave, is an inevitable consequence of both the Statute and the old Rules.

49. It might be argued that the Administration would not take the objection where injustice would result. This is no answer. Rights cannot depend on *noblesse oblige*.

50. It must be accepted, of course, that the Tribunal is governed by the Statute and the Rules. But I will not go one inch beyond what is strictly required and, where the provision is ambiguous I will give it an interpretation that preserves rights and does justice so far as the language permits. This expresses the longstanding principles of common law and, so far as my understanding goes, the civil law as well. The UN might be a legal island but it is not entirely in a world of its own.

The issues

51. Ms Maddox, for the respondent, submitted that the time limit of one month specified in rule 111.2(a)(i) for appealing was not complied with, contending that it should be inferred that the applicant received the reply to the request for administrative review on 24 December 2008. In the alternative, if the applicant and his counsel did not receive the reply, so that the relevant time limit is that specified in rule 111.2(a)(ii), the incomplete statement of appeal should have been submitted by 24 January 2009 on the basis that the request had been communicated on 24 October 2008.

52. Ms Maddox submitted that the relevant provision for considering whether waiver should be granted is rule 111.2(f), although she also contended that, if art 8.3 of the Statute or art 7.5 of the Rules of Procedure of the Dispute Tribunal applied, the test was in substance the same. She contended that it was necessary that the applicant establish that the delay in appeal was caused or substantially caused by matters outside his control and that he had not been able to do so. He knew that his “report” had been made on 24 October 2008 and knew or should have known that, if he did not receive a response from the Secretary-General within two months, he had to appeal by 24 January 2009 in accordance with rule 111.2(a)(ii). He did not do so. Handing over responsibility for the conduct of his appeal to his counsel did not obviate his own responsibility for ensuring that he complied with the time limits. She did not suggest that the respondent suffered any prejudice by the 19-day delay in submitting the incomplete statement of appeal or that it had ever been under the misapprehension that the applicant did not intend to press his appeal. She accepted that Mr Danquah did not receive the response until 11 February 2009 at the earliest. His knowledge that he received it or not was, in the circumstances, irrelevant. As a fall-back argument Ms Maddox submitted that, at all events, the relevant date by which the request had to be made was 27 October 2008, since the date of the e-mail notifying the applicant of the impugned decisions was 27 August 2008, so that, if the

applicant's request was not made on 24 October 2008 but on 12 November, it was out of time.

53. It was submitted by Mr Danquah that the date upon the decisions were notified was established by the fact that the offer of appointment was dated 12 September 2008 and thus could not have been made before that date. Although the e-mail relating to the reassignment was dated 27 August 2008, this was not any evidence that it was actually received on that date. Accordingly, the respondent had not established that the date by which the request should have been made was 27 October. (As it happened, the request of 12 November 2008, stated that the relevant decisions were notified on 12 September 2008, which might well have been correct but which it was not necessary for the applicant to prove.) Mr Danquah submitted, in effect, that the "report" e-mailed on 24 October 2008 was not a request in form or substance but that the applicant had submitted (through him) a formal request on 12 November 2008 upon which he was entitled to rely in terms of the time limit. He also submitted that the respondent had not established that either the applicant or his counsel had received the response of the Secretary-General at any relevant time, so that the crucial question is whether the incomplete statement of appeal was filed within three months from 12 November 2008. That being so, it was not necessary to consider the question of waiver. However, if the question of waiver arose, he submitted that the circumstances as a whole showed that they were exceptional or otherwise that this was an exceptional case so that the discretion should be exercised in the applicant's favour to permit the appeal.

When were the impugned decisions notified in writing?

54. Where the respondent seeks to prove that an applicant is out of time it is necessary for him to establish on the balance of probabilities the commencement point of the relevant time period – in this case, the date upon which the impugned decisions were notified in writing to the applicant. In this respect there are only two items of evidence: an e-mail dated 27 August 2008 addressed to the applicant which

notified him that he had been reassigned; and an offer of appointment dated 12 September 2008 on behalf of the Administration. There is no evidence as to the date upon which these documents were given to the applicant. It is self-evident that, on the assumption that a document is correctly dated, that it cannot have been conveyed before that date but the date is not any evidence either of receipt or the date of receipt. The applicant's request said that he had been notified of the decisions on 12 September 2008 and annexed the two documents to which I have referred. This is certainly an admission of that fact but it is not an admission which supports the administration's case. Accordingly, the respondent has failed to establish that the applicant was notified before 12 September 2008 of the administrative decisions of which he sought review.

When was the request made?

55. It is clear from the letter of 11 November 2008 that OHRM was acting on the basis that the crucial request (for the purpose of the time limits) was made on 24 October 2008. In my view, when the explicit request was received on 12 November, OHRM should have realized that its assumption was mistaken and that the applicant had not accepted that the "report" e-mailed on 24 October was the relevant "request". Although, in general, the approach of the Administration to informal requests is entirely reasonable, indeed usually in the staff member's interest, where, as here, an applicant makes it clear that he or she does not regard a communication that does not fit the description of a request specified in rule 111.2(a) as a communication within that provision and submits a communication within time that does satisfy the description of a request, the Administration is not entitled, expressly or by implication, unilaterally to require the staff member to adopt its characterization of the earlier communication. Not that there was any conscious decision by anyone on the Administration's behalf to take this line. Rather, OHRM on the one side and the applicant and his counsel on the other were like Longfellow's ships that passed in the night speaking to each other in passing with "only a signal shown and a distant voice in the darkness..." neither understanding that the other was navigating by a different

map. Unfortunately, as my review of the facts has shown, the confusion did not end there. In my view, in the circumstances here, the request should be regarded as having been made on 12 November 2008.

When was the reply received?

56. The time limit for appealing or applying commenced in each transferred case with receipt of the reply to the request for administrative review, except of course where no reply has been given. Accordingly, it is necessary for the respondent to establish the date of receipt before an issue concerning the expiration of time arises. It is then for the applicant to establish that waiver or suspension of the time limit is justified on the basis that the case is exceptional. The word “receipt” is somewhat uncertain. Does it require the respondent to bring the reply to the personal attention of the appellant/applicant or will delivery, for example, to the applicant’s e-mail address suffice? Given the consequences of a failure to take timely action if a staff member wishes to appeal an adverse decision, the word “receipt” in rule 111.2(a)(i) should be strictly interpreted to mean actual receipt in the sense of personal delivery to the appellant/applicant such as to actually bring to his or her attention the existence of the relevant communication. Where, however, he or she has provided an address (electronic or actual) for a response to the request, delivery to that address will usually be sufficient because of the implication that arises from provision of the address. Where, however, an applicant has instructed a legal representative to act on his or her behalf, there is no reason to depart from the ordinary rule that service on the agent is service on the principal so that personal service on the legal representative should be regarded as receipt by the applicant. Delivery by an e-mail clearly stating that the subject matter is the reply to the request for administrative review to the address identified by or normally used by an applicant together with evidence that, in the usual course, access by the applicant’s computer is likely to have been available would normally be sufficient to prove, on the balance of probabilities, the fact and date of receipt. Where, as here, an automatically generated receipt is produced, this is convincing evidence at least that there was no technical impediment

to delivery and a person at the receiving computer was aware of the communication. To require more would be, in my view, to place too heavy an evidentiary burden on the respondent in respect of matters unlikely to be within his knowledge and difficult to discover. It would be for the applicant to establish, if receipt were denied, that in the particular circumstances the message was not available for access or he or she was not in a position to access it.

57. In this case, the respondent quite reasonably sought to deliver the Secretary-General's reply to both the applicant and his lawyer. The Administration was aware, of course, that the applicant's appointment had been extended only to 17 December 2008. Whether or not the applicant would or could access his e-mail account afterwards and the frequency with which he might do so was necessarily speculative. In this context it is unfortunate that the date chosen to convey the Secretary-General's decision was two days after the applicant's term expired, a day upon which in all likelihood he would not be in his office or even in the country, as indeed happened. The alternative means of contacting the applicant, namely by communicating with Mr Danquah, was attempted by an e-mail regrettably addressed to his inactive account, which I accept was unlikely to be known to the officer who sent the reply. It is fair to say that Mr Danquah should have taken the responsibility of ensuring that his active contact e-mail address was contained in the request for review which he forwarded on the applicant's behalf but this was apparently overlooked and no e-mail address was indicated.

58. It is reasonable to be skeptical of the applicant's evidence about not receiving the reply in light of the automatic receipt, which could only have been generated had the e-mail been opened. Of course, merely to open the e-mail is not necessarily to open the attachment but if the e-mail is opened by the recipient it will readily be inferred that he or she also opened the attachment. The applicant gave evidence via telephone link and I was, accordingly, unable to assess his demeanour. Of course, I acknowledge that a witness' demeanour is usually of limited utility but it is not altogether without significance. It is fair to say, however, that there was nothing in

the way that the applicant gave evidence which gave rise to any doubts about his truthfulness. Nor is his account inherently unlikely. In the result I accept, although the margin is a narrow one, more probably than not that the applicant did not in fact open the e-mail conveying the reply.

59. What then of service on Mr Danquah? Although it appears that the reply was sent to Mr Danquah's inactive e-mail address on 22 December 2008 it is not disputed that he did not access that account until 11 February 2009, when he forwarded the reply to the active e-mail address. As I mentioned, he had not read the reply on 12 February, the date upon which he forwarded the incomplete statement of appeal and, certainly, he had read it by 27 February, when he e-mailed the JAB seeking an extension of the time limit for submitting a full statement of appeal until 12 March. There is no further evidence about this matter and Mr Danquah's memory does not fill the gap.

60. Whether Mr Danquah was in "receipt" of the reply on 11 February within the meaning of rule 111.2(a)(i) is not easy to determine. Conventionally, personal service does not require personal knowledge of the details of the relevant document; in short, it does not have to be read to have been served. It seems to me that it would place too high an evidentiary burden on the respondent to require proof of more than physical reception of the reply. There may be a number of reasons why the document (electronic or hard copy) was not immediately read by an applicant but the explanation for not doing so should come from the applicant as a matter that can be taken into account in consideration whether, on the assumption his or her appeal is out of time, the delay should be waived. It seems to me, therefore, that strictly speaking Mr Danquah (and, hence, the applicant) received the reply on the 11 February 2009.

61. It is not clear whether receipt of the reply after the one or two month period specified in rule 111.2(a)(ii) but before expiry of the time for appeal provided in that paragraph will, as it were, restart the clock. Applied literally, rule 111.2(a)(i) suggests that it would. If the clock did restart on 11 February 2009, it is obvious that the

applicant's incomplete statement of appeal was well within time, having been submitted on 12 February 2009. If it did not restart the clock, the relevant date is 12 February and no question of waiver arises.

Is this an exceptional case?

62. To adopt the test of "exceptional" as enunciated by Ebrahim-Carstens J in *Morsy* (set out in the passage extracted above), exceptional means, in substance, something out of the ordinary, quite unusual, special, or uncommon, rather than regular or routine or normally encountered but it need not be unique, unprecedented or very rare. Perhaps it is worth adding that the descriptions are, in substance, synonymous rather than differentiating, though each might differ in nuance: they should not be parsed as logically distinct entities.

63. If I am wrong about my finding the respondent has not proved that the applicant was in receipt of the Secretary-General's reply on 24 December 2009, it is necessary for the applicant to establish that this is, in short, an uncommon case justifying suspension or waiver of the time limit to 12 February 2009. It is submitted on his behalf that, in this event the evidence taken as a whole justifies the Tribunal exercising this discretion in the applicant's favour. In my view, for obvious reasons it will almost always be necessary for an applicant who seeks waiver or suspension at least to establish facts that explain the relevant delay. This has not been done here. There is no direct evidence about the communications between the applicant and Mr Danquah concerning the conduct of his appeal although, having regard to the applicant's evidence about his depressed state of mind following his departure from his employment, it might have been quite reasonable for him to have entrusted the appeal to Mr Danquah and assumed that his counsel would do what was necessary to ensure that it proceeded in accordance with the rules. However, on the assumption (contrary to my finding) that the applicant was in receipt of the Secretary-General's reply on 24 December 2008, the only reasonable inference explaining why the appeal was not lodged until 12 February is that he did not bring it to Mr Danquah's attention.

It is possible, I suppose, that he assumed that the reply would also have been sent to Mr Danquah and maybe he did not appreciate the fact or importance of the time limit. But these possibilities are merely speculative and, since the applicant bears the onus of establishing the existence of an exceptional case, do not go far enough. As the evidence stands, on the assumption that the applicant was in receipt of the reply on 24 December 2008, there is no basis for concluding that this is an exceptional case within art 8.3 of the UNDT Statute. (I am aware of the line of decisions of the Administrative Tribunal declining to regard an applicant's delegation to counsel of the conduct of an appeal as significant in considering whether there might be "exceptional circumstances" within 111.2(f). It is enough to say for present purposes that these decisions may need to be reconsidered if the question arises before the UNDT.) If the discretion is governed by rule 111.2(f), I would come to the same conclusion for the same reason.

64. On the assumption that the applicant did not receive the reply on 24 December 2009 and the request should be considered as having been made on 24 October 2009 rather than 12 November 2008 it is also necessary to consider whether waiver of the delay resulting from submitting the incomplete statement of appeal is justified. It seems to me that the applicant (by his counsel) was reasonably entitled to act upon the basis that the request that mattered was that which had been made on his behalf on 12 November 2008. There is no evidence that the applicant or Mr Danquah received the letters of 6 or 11 November 2008, the respondent did not attempt to prove that he did and there is no evidentiary presumption that he did so. Even if those letters were received, it was reasonable to act on the basis that the requests of 11 and 20 November 2008 should and would be understood by OHRM as an indication that he did not accept the position set out in his letters and that the crucial date for submitting an appeal, in the event of the Secretary-General did not reply to his request, was 12 March 2009. It is indeed unfortunate that neither Mr Danquah nor OHRM thought it necessary to communicate with each other specifically about the relevant time limit but I am prepared to accept that this was not so much the result of indifference as of pressure of work. In my view, also, it was

reasonable for the applicant to entrust his appeal to a lawyer whose duty it was to act competently on his behalf. I do not accept Ms Maddox' contention that the applicant was not entitled to delegate his responsibility for the due conduct of his appeal to his legal representative, although he had a responsibility to bring to Mr Danquah's attention in a timely way all communications he received from OHRM. There was no reason for the applicant to apprehend that Mr Danquah would not ensure that all relevant time limits were complied with. In trusting Mr Danquah in this respect the applicant did what most litigants would do. It is relevant to note that OHRM not only did not bring to the applicant's attention, the likely consequence of non-compliance with the time limits but sent him a letter which was misleading in this respect. Having acted in this way, I do not think the respondent is able to argue that the applicant should have realised how important compliance with the time limits was and should have acted independently of his counsel. In short, the delay was minimal, the applicant has an arguable case, the respondent was not prejudiced and the circumstances were unusual. In my opinion, this is an exceptional case justifying waiver of the time limit to the extent necessary to permit the applicant's case to be received.

65. I should add that my conclusion on both these hypotheses would have been the same, and for the same reasons, even if (contrary to my view) the applicable provision is rule 111.2(f).

Conclusion

66. The appeal was submitted within time and is receivable.

(*Signed*)

Judge Michael Adams

Dated this 5th day of November 2009

Entered in the Register on this 5th day of November 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York