Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2010/031 (UNAT 1628)
Judgment No.:	UNDT/2011/005
Date:	10 January 2011
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

COMERFORD-VERZUU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Andrew Granger

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. In November 2007, the Applicant, a staff member of the United Nations Volunteers Programme ("UNV"), filed an appeal with the former United Nations Administrative Tribunal against the decision of the Office of Internal Oversight Services ("OIOS") not to open an investigation following her complaint of 25 June 2005 against the Administrator of the United Nations Development Programme ("UNDP") and the Director, Office of Legal and Procurement Support, UNDP.

2. The Applicant requests the Tribunal:

   a. To order that her complaint be investigated;

   b. To order payment of compensation for the damage suffered, including moral damage, and for the legal costs incurred.

3. Pursuant to the transitional measures set out in General Assembly resolution 63/253, the application, which was pending before the Administrative Tribunal, was transferred to the United Nations Dispute Tribunal on 1 January 2010.

Facts

4. Having been employed by various United Nations agencies and organizations since 1991, the Applicant entered the service of UNV in November 2000 as a Programme Specialist.

5. On 18 August 2000, the Applicant's husband, who was at that time a UNDP staff member, died in his hotel room in Kisangani, Democratic Republic of Congo, where he was on mission.

6. On 15 December 2000, the Applicant's Counsel wrote to the Secretary-General seeking compensation pursuant to Appendix D of the Staff Rules

governing the payment of compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.

7. On 27 July 2001, the Applicant submitted a complaint to OIOS against UNDP and the Office of the United Nations Security Coordinator, which she accused of not having taken the necessary security measures prior to sending her husband on mission.

8. On 7 December 2001, the Advisory Board on Compensation Claims, having concluded that it was not possible to determine the cause of death of the Applicant's husband, nonetheless recommended to the Secretary-General that the death should be recognised as having been attributable to the performance of official duties and that the dependent survivors should be awarded compensation pursuant to the above-mentioned Appendix D.

9. By letter of 18 December 2001, the Director, Investigations Division, OIOS, replied to the Applicant that her allegations had been examined and that the matter would not be pursued.

10. By letter of 28 February 2002, the Applicant submitted a claim to UNDP under the Malicious Act Insurance Policy.

11. On 6 June 2003, the Applicant submitted an appeal to the Joint Appeals Board ("JAB") against the decision of UNDP to take no action on the insurer's refusal to pay her compensation under the Malicious Act Insurance Policy ("the first appeal").

12. In its report of 14 November 2004, the JAB recommended that the Secretary-General reject the Applicant's first appeal.

13. On 30 March 2005, the Secretary-General gave his decision on the Applicant's first appeal, which was to take no action on her behalf.

14. By letter dated 25 June 2005, the Applicant submitted a second complaint to OIOS, this time requesting an investigation into the UNDP Administrator and the Director, Office of Legal and Procurement Support, UNDP, whom she

accused of "violation of the UN's International Civil Servant Standards of Conduct and other misconduct" against her between March 2004 and March 2005.

15. By email of 2 August 2005, the Investigations Division, OIOS, informed the Applicant, in reply, that since the substance of her second complaint was the same as the one she had made in 2001 (see paragraphs 7 and 9 above), which had already been examined in various United Nations fora, the matter was closed.

16. The Applicant replied on 9 August 2005 to the Investigations Division, pointing out, among other things, that her 2005 complaint was distinct from that of 2001.

17. On 19 August 2005, the Applicant filed an application ("the first application") to the former United Nations Administrative Tribunal against the decision of the Secretary-General on her first appeal.

18. On 5 September 2005, the Applicant again sent her email of 9 August 2005 to the Investigations Division, OIOS, copying, among others, the Under-Secretary-General, OIOS.

19. By email of 6 September 2005, the Investigations Division replied to the Applicant, repeating the contents of its email of 2 August 2005, namely that since her second complaint was substantially the same as the one she had made in 2001, the matter was closed.

20. By email dated 16 September 2005 to the Under-Secretary-General, OIOS, the Applicant complained about the replies from the Investigations Division concerning her second complaint and her request for an investigation. She pointed out that if the Under-Secretary-General did not react differently to her complaint, she would pursue the case in other fora.

21. By letter of 23 September 2005, the Applicant again sent her email of 16 September 2005, together with her complaint of 25 June 2005, to the Under-Secretary-General, OIOS.

22. By letter dated 11 January 2006, the Applicant again requested the Under-Secretary-General, OIOS, to launch an investigation into her complaint of 25 June 2005 and gave her 14 days in which to reply, failing which the Applicant would take her silence as an administrative decision that she would request the Secretary-General to review.

23. By letter dated 16 February 2006, the Applicant requested a review by the Secretary-General of the decision of the Under-Secretary-General, OIOS, refusing to investigate her complaint of 25 June 2005 or to answer her correspondence, which decision she deemed to date from 25 January 2006.

24. By letter of 13 March 2006, the Administrative Law Unit, UN Secretariat ("ALU"), replied to the Applicant that the UNDP Administrator was competent to review decisions contested by UNDP staff members and that, since her request for a review made reference to actions of both UNDP and OIOS, it had been forwarded to the responsible persons within those bodies.

25. The Applicant replied on 31 March 2006, asking that her request for review be dealt with in accordance with staff rule 111.2(a).

26. By letter of 5 April 2006, ALU altered its decision and informed the Applicant that it would examine her request to the Secretary-General.

27. On 20 April 2006, the Director, Investigations Division, OIOS, submitted comments to ALU on the Applicant's request for review. After summarising the facts and the actions taken by the Applicant, she stated that, though the complaint of 25 June 2005 was directed against the UNDP Administrator and the Director, Office of Legal and Procurement Support, UNDP, the Applicant was in practice seeking additional compensation for the death of her husband. In that connection, she stressed that the issues surrounding the cause of death and the appropriate compensation had been resolved. OIOS lacked the resources to respond to such attacks, nor was it in the interests of the Organization to do so.

28. By letter of 1 May 2006, ALU informed the Applicant that no steps would be taken as a result of her request for review. It notified the Applicant of the reply

of OIOS and stated that, in accordance with the case law of the UN Administrative Tribunal, the Organization was under no obligation to investigate every allegation of misconduct, nor did staff members have a right to compel an investigation into allegations of misconduct against other UN officials.

29. On 8 June 2006, the Applicant filed a second appeal with the JAB in Geneva, this time against the decision of OIOS "dated 25 January 2006 not to investigate the Appellant's complaint against [the Administrator of UNDP and the Director, Office of Legal and Procurement Support, UNDP] dated 25 June 2005".

30. On 11 July 2007, the JAB issued its report to the Secretary-General. Having taken the view that the appeal was admissible *ratione temporis* and *ratione materiae*, the JAB concluded that the decision by the Under-Secretary-General "of 25 January 2006" to take no action on the Applicant's 2005 complaint had violated the Applicant's rights, and that OIOS had failed to treat that complaint with due diligence, given that it was substantially different from the complaint made in 2001. However, since it considered that the Applicant had not suffered any financial loss, the JAB made no recommendation in her favour.

31. By letter of 28 August 2007, the Under-Secretary-General, Department of Management, forwarded a copy of the JAB report to the Applicant and notified her of the Secretary-General's decision to reject the conclusions of the JAB and to take no further action in respect of her second appeal. By contrast with the JAB, the Secretary-General found that there was no substantive difference between her 2001 complaint and her 2005 complaint, as the allegations in the latter had formed part of her first application to the UN Administrative Tribunal (see paragraph 17 above) following her first appeal. He therefore took the view that it would be prejudicial to take a decision on issues that were pending before that Tribunal.

32. On 30 November 2007, having sought and obtained an extension of time from the UN Administrative Tribunal, the Applicant filed a second application, this time against the Secretary-General's decision of 28 August 2007. A corrected application was submitted on 16 May 2008.

33. On 25 July 2008, the UN Administrative Tribunal gave its Judgment No. 1388 on the first application. It awarded the Applicant compensation of USD250,000. It refused, however, to rule on her allegations of persecution against senior officials of the Organization, on the grounds that the said allegations were the subject of another application before the Tribunal (the second, and present, application).

34. On 12 September 2008, the second application was forwarded to the Respondent.

35. On 15 March 2009, having sought and obtained two extensions of time from the UN Administrative Tribunal, the Respondent submitted his answer to the application. The Applicant filed observations on 29 May 2009.

36. As the case could not be decided by the UN Administrative Tribunal before its abolition on 31 December 2009, it was transferred to the United Nations Dispute Tribunal on 1 January 2010.

37. By letter dated 13 October 2010, the Tribunal informed the parties of its decision to raise, on its own motion, the issue of admissibility *ratione materiae* and *ratione temporis* of the application and requested the parties to submit their comments on the following two questions: 1) Whether the decision of OIOS not to investigate the Applicant's complaint of 25 June 2005 was an appealable administrative decision; and 2) if so, whether or not the Applicant was appealing a confirmative decision and, by writing to the Secretary-General on 16 February 2006, complied with the time-limits set out in former staff rule 111.2(a).

38. On 27 October 2010, the parties filed their comments on the two questions referred to above. Counsel for the Applicant contested, *inter alia*, the Tribunal's jurisdiction to raise those issues.

39. By letter dated 16 November 2010, and following repeated requests by the Applicant, the Tribunal informed the parties that a hearing would be held, in French, on 2 December 2010. The parties were invited to inform the Tribunal if they required interpretation services.

40. By letter of 25 November 2010, Counsel for the Applicant filed a series of objections with the Tribunal. He complained, among other things, that the hearing date had been set at short notice without consulting the parties, and without explaining its purpose, format or duration. He regarded it as unfair and prejudicial to his client for the hearing to be conducted in French when, among other things, all the pleadings were in English and English was "the principal language of the UN itself", as well as the native language of the parties' lawyers. He further considered that if the Judge assigned to the case did not have a sufficient mastery of English to conduct the hearing in that language, he should recuse himself. He also disputed the admissibility of the Respondent's comments dated 27 October 2010, which he considered the Respondent to have filed despite having no right to raise new arguments. Lastly, he asked for the hearing to be adjourned until he had received a reply to his letter of 27 October, the Judge had given a decision on the issue of admissibility of the Respondent's comments of 27 October 2010, and he himself had been able to reply to those comments.

41. By letter of 26 November 2010, the Tribunal informed the parties that the hearing would deal only with the issues of admissibility raised on 13 October and, in view of the protests of Counsel for the Applicant, asked them to confirm by 30 November if they still considered the hearing to be necessary.

42. By letter of 29 November 2010, Counsel for the Applicant complained that he had not received a reply to his questions of 27 October and 25 November 2010. He reiterated that the Tribunal had no jurisdiction to raise, on its own motion, the question of admissibility, and that the Tribunal must reject the Respondent's comments of 27 October. In the event the Tribunal did not find in his favour on those two points, he requested time to reply to the Respondent's comments of 27 October 2010. He requested, lastly, that the hearing deal only with the issues of whether the Judge had the power to raise, on his own motion, the question of admissibility, and whether the Respondent's comments of 27 October were receivable.

43. By letter of 30 November 2010, the Tribunal informed the parties of its decision to maintain the hearing, and specifically informed Counsel for the Applicant that he would be able to put all his questions on that occasion.

44. Also by letter of 30 November 2010, Counsel for the Applicant once again made a series of objections to the Tribunal. He complained, *inter alia*, that the Registrar had still not replied to his questions of 27 October, 25 November and 29 November 2010, a matter he regarded as not only discourteous but also as a substantive and procedural irregularity. He added, among other things, that he was still awaiting a reply concerning the level of English of the Judge assigned to the case and whether it was possible to respond to the Respondent's comments of 27 October, filed, according to him, without leave of the Judge.

45. By email of 1 December 2010, the Applicant complained to the Registrar that the failure to reply to her Counsel's letters was a breach of her rights, and stated that she would be filing a formal complaint with the Head of Human Resources of her organization.

46. By emails of 2 December 2010, the Applicant and her Counsel finally provided the Tribunal with telephone numbers where they could be contacted for the purposes of the hearing.

47. On 2 December 2010, the hearing took place. The Applicant and her Counsel participated via a telephone conference link and Counsel for the Respondent by videoconference. At the end of the hearing, the Judge ordered Counsel for the Applicant to submit within 15 days—not later than 17 December 2010—his reply to the Respondent's comments dated 27 October 2010. Those instructions were confirmed the same day by Order No. 89 (GVA/2010).

48. By email of 17 December 2010, Counsel for the Applicant sent the Tribunal his reply to the Respondent's comments dated 27 October 2010, stating that he would forward a signed version later.

49. By email of 20 December 2010, Counsel for the Applicant sent the Tribunal what he presented as the "final signed version" of his reply to the Respondent's comments dated 27 October 2010. The attached document was not, however, signed, and differed both in length and content from the document Counsel for the Applicant had filed within the time limit.

Parties' contentions

50. On admissibility, the Applicant's contentions are:

a. The Tribunal exceeded its jurisdiction in raising the issue of admissibility of the application as the JAB has given a "decision" in the Applicant's favour on that issue and the Respondent has neither contested the JAB "decision" nor appealed it. The present application was made not to the Dispute Tribunal but the Administrative Tribunal, and was transferred to the former only when the latter was abolished; the only issues in the matter before the Tribunal are, therefore, those raised in the written pleadings filed with the former Administrative Tribunal;

b. The OIOS decision is an appealable administrative decision, as the JAB found. The Secretary-General has not disputed that point, either in his letter of 28 August 2007, or in his answer to the application. Consequently, the issue of admissibility *ratione materiae* has been resolved, and the Tribunal should not have raised it. Moreover, the Respondent—who maintains that an administrative decision is of necessity a decision taken by the Administration—offers no definition either of "Administration" or "administrative decision". In the present case, the fact that OIOS enjoys autonomy in the exercise of its functions does not support the conclusion that OIOS is not part of the Administration. The Respondent confuses operational independence—which the OIOS has—and constitutional independence. OIOS is an integral part of the United Nations and acts under the authority of the Secretary-General, as is clear from the applicable instruments. Its decisions are therefore appealable;

c. The time limits have been complied with, as the JAB explained in its report, and the Respondent has not contested the JAB decision on that point. Prior to that, ALU itself did not dispute the fact that the Applicant had submitted her request for review to the Secretary-General within the time limit allowed. Consequently, the question of admissibility *ratione temporis* has been resolved and the Tribunal should not have raised it.

> Furthermore, in her request for review to the Secretary-General dated 16 February 2006 the Applicant was not contesting the OIOS decision of 2 August 2005 but the refusal of OIOS to reply to her letter of 11 January 2006; clearly, in so doing, the Applicant was also contesting the decision of 2 August 2005. OIOS has not treated the Applicant in a courteous and professional manner.

51. The Respondent's contentions are:

> a. The OIOS decision not to open an investigation is not an appealable administrative decision. OIOS is in fact an independent office established by the General Assembly. Its role with regard to investigations is to establish the facts and make recommendations based on its conclusions. The contested decision is not, therefore, a decision taken by the Administration;
>
> b. Even assuming the OIOS decision were appealable, the contested decision merely confirms the original decision of 2 August 2005. The Applicant should, therefore, have submitted her request for review on 2 October 2005 at the latest; in fact she submitted it only on 16 February 2006, 134 days after the expiration of the time limit laid down in staff rule 111.2(a) in force at the time.

Judgment

52. Though the Applicant maintains that the Judge assigned to the case should have recused himself because he—according to Counsel for the Applicant—apparently did not speak or did not understand English, nowhere is there any obligation requiring the Judges of the Dispute Tribunal to speak or read the language in which an application, or any other pleading, is filed. It is however well understood that the Judge assigned to a case must take all necessary measures, including having translations made, to familiarise himself or herself with the contents of any pleadings filed in a language he or she does not understand, though that was not necessary in the present case. Lastly, while the

Applicant contests the choice by the Judge assigned to the case to conduct the hearing in French, it should be remembered that French is on an equal footing with English as one of the two working languages of the United Nations pursuant to General Assembly resolution 2(I) of 1 February 1946, and that the services of interpreters were available throughout the hearing.

53. On the admissibility of the application, the Applicant maintains that at the time the Tribunal raised that issue on its own motion, it no longer had the power to do so, because the question had been decided by the JAB in the Applicant's favour, and the Respondent had not raised it subsequently.

54. The Tribunal must therefore set out the legal reasoning underlying its decision to raise, on its own motion, the question of admissibility of the application. First, however, the Tribunal must make it clear that on the one hand, it is not in any way bound by the conclusions of the JAB, which is merely an advisory and not a judicial body, and on the other, the fact that the Respondent has not, of his own initiative, raised the question of admissibility of the application does not prevent the Tribunal from raising it on its own motion if its Statute so requires.

55. The Tribunal recalls that the present application was referred to it pursuant to General Assembly resolution 63/253, which decided that all cases pending on 1 January 2010 before the former UN Administrative Tribunal would be transferred with effect from that date to this Tribunal.

56. It is beyond dispute that the only powers of any tribunal are those conferred by its Statute, which in this case means the General Assembly resolutions establishing the former UN Administrative Tribunal and the present Dispute Tribunal. This means that, before it rules on the lawfulness of a decision, the Tribunal is bound in all cases, including those where the issue is not raised by the parties, to verify whether its Statute, or the Statute of the former UN Administrative Tribunal for transferred cases, grants it jurisdiction to do so.

57. The Statute of the former UN Administrative Tribunal, as laid down in General Assembly resolution 55/159, provided that it was "competent to hear and

pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of employment of such staff members" (article 2.1). That Tribunal made it clear through its case law that, in order to be receivable, an application must invoke an administrative decision whereby the applicant was harmed. It defined, notably in Judgment No. 1157, *Andronov* (2004), what was meant by an administrative decision and stated, in Judgment No. 1213 (2004): "The Tribunal must first make a determination on the issue of receivability. A finding that the case is not receivable would negate the need to enter into its merits. The essential element of an appeal is that there is a contested 'administrative decision'."

58. Article 8 of the Statute of the present Tribunal provides that "[a]n application shall be receivable if … [t]he Dispute Tribunal is competent to hear and pass judgment on the application, pursuant to article 2 of the present statute". Article 2 of the Statute states that the Tribunal shall be "competent to hear and pass judgment on an application filed … against the Secretary-General as the Chief Administrative Officer of the United Nations … [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms 'contract' and 'terms of employment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance".

59. It follows from what has been said above that the jurisdiction of the former UN Administrative Tribunal, like that of the new Dispute Tribunal, is limited to ruling on the lawfulness of administrative decisions. It follows that the question whether the contested decision is an appealable administrative decision is one of jurisdiction, which the Tribunal must raise on its own motion before proceeding any further, since failure to verify it could result in the Tribunal making rulings that are *ultra vires*.

60. The Tribunal must now decide whether the decision contested, namely the OIOS decision not to investigate the Applicant's complaint of 25 June 2005 against the UNDP Administrator and the Director, Office of Legal and Procurement Support, UNDP, is an appealable administrative decision.

61. According to General Assembly resolution 48/218 B dated 29 July 1994, OIOS shall "investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken" (para. 5(c)(iv)). Resolution 59/287 of 13 April 2005 furthermore recognises that OIOS "has established an efficient mechanism to enable all staff members … to convey directly their allegations to the Office of Internal Oversight Services".

62. The Secretary-General's bulletin ST/SGB/273 of 7 September 1994 establishing OIOS provides:

> 16. The Office shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken.
> …
> 18. The Office may receive and investigate reports from staff … reporting perceived cases of possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority.

63. The language of those resolutions and that bulletin make it clear that staff members of the Organization have the right to report cases of presumed violation of their rights directly to OIOS provided those cases fall within the categories listed in the above-cited paragraph 18 of bulletin ST/SGB/273 and request it to carry out an investigation, and, therefore, that the refusal to carry out such an investigation breaches their rights under a rule in force at the time the matter is reported to OIOS.

64. That analysis is supported by the Judgments of the Appeals Tribunal in *Nwuke* 2010-UNAT-099 and *Abboud* 2010-UNAT-100 of 29 December 2010. Those two cases relate to refusals by the Administration to investigate complaints by the staff members concerned. The Appeals Tribunal considered that it was competent to exercise judicial control over such decisions of a discretionary

nature, to the extent that the rights of the claimant were directly affected. The Appeals Tribunal thus held, in *Nwuke*:

> 28. So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?
> 29. In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.
> 30. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.
> …
> 40. … The Administration must decide within its discretion whether or not to conduct investigations. The Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation, a staff member had a right to an investigation and it may be subject to judicial review under Articles 2(1)(a) and 10(5) of the UNDT Statute and Articles 2 and 9 of the Statute of the Appeals Tribunal.
> 41. The General Assembly established the new internal justice system and approved the Statutes of both the UNDT and the Appeals Tribunal. The member states of the United Nations made a great effort to achieve an "independent, transparent, professionalized, adequately resourced and decentralized system … consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike" (A/RES/63/253, preamble, paragraph 2).
> 42. According to the Statutes, the jurisdiction of both Tribunals and the content of the possible judgments they can render match those high goals and the UNDT should not decline to exercise its competence in matters like the present, when the respective right is provided for to the claimant by the rules.

65. At first sight, therefore, it appears that this Tribunal has jurisdiction to rule on the decision of OIOS not to investigate the Applicant's complaint. The

Tribunal must, however, examine the legal arguments that might defeat such jurisdiction.

66. It must, first of all, reject one of the Respondent's arguments, to the effect that the OIOS decision is not an administrative decision appealable to the Tribunal. The Respondent maintains that, given the independence of OIOS, the Secretary-General cannot be held responsible for the unlawfulness of decisions over which he has no power.

67. Resolution 48/218 B provides that the purpose of OIOS "is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization" (para. 5(c)), and bulletin ST/SGB/273 states that "[t]he purpose of this Office … is to assist the Secretary-General in fulfilling his internal oversight responsibilities" (para. 1). What is more, the bulletin reaffirms, as does the resolution (para. 5(a)), that the Office "shall exercise operational independence under the authority of the Secretary-General" (para. 2).

68. The Tribunal considers that, while it is clear from the foregoing that the General Assembly intended to confer "operational independence" on OIOS—which prevents any staff member, even the Secretary-General, from giving it instructions in its investigative work—the General Assembly must, in stating that the Office acts under the authority of the Secretary-General, have intended to acknowledge that the Secretary-General was administratively responsible for any breaches or illegalities OIOS might commit. In fact, contrary to what the Respondent contends, in an organization like the United Nations it would be inconceivable for one of its offices to be able to act without potentially engaging the liability of the Organization and thus of the Secretary-General, in his capacity as Chief Administrative Officer.

69. Secondly, under both the former and the present internal justice systems, before filing an application with the Tribunal, the staff member must request the Secretary-General to review the contested decision or carry out a management evaluation. The purpose of that formal requirement, imposed by resolutions

55/159 and 63/253 respectively as a prior obligation on the staff member, is to allow the Secretary-General to overturn the contested decision if he considers it necessary. However, where the contested decision is a decision taken by OIOS in the exercise of its investigative functions, the Secretary-General may not, by virtue of resolution 48/218 B, annul or modify that decision.

70. It follows that the Secretary-General, faced with the Applicant's request for review of OIOS decision refusing to conduct an investigation, had no choice but to confirm that decision. The Tribunal therefore finds itself confronted with two principles, explained above, which are difficult to reconcile: on the one hand, the operational independence of OIOS and on the other, the binding nature of the request to the Secretary-General for review or management evaluation of the decision taken by OIOS in the exercise of its investigative function. When faced with apparently contradictory instruments of equal value, the Tribunal must necessarily give precedence to the staff member's right of access to justice. It must find, therefore, that the fact that the Secretary-General may not modify the OIOS decision cannot operate to prevent the staff member from contesting it before the Tribunal.

71. The Tribunal considers that, while the General Assembly intended when establishing OIOS that it should be operationally independent of the Administration and the Secretary-General, nowhere in the General Assembly resolution, nor in any of the legislative history of the resolution establishing OIOS, is it stated that the decisions of that Office cannot be subject to judicial review. Furthermore, it is unacceptable in a legal system such as that of the United Nations that a staff member should not have access to justice to assert his or her rights.

72. It therefore follows from all of the foregoing that the decision of OIOS refusing to carry out the investigation requested by the Applicant is an administrative decision appealable to the Tribunal.

73. The Tribunal must now rule on the admissibility *ratione temporis* of the application, a question the Tribunal also regards as one it has a duty to raise on its own motion.

74. Staff rule 111.2 in force at the time of the events provided:

> (a) 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; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

75. But the Administration, like the Tribunal, is bound to respect the applicable instruments, notably with regard to time limits. Therefore, where the Administration fails to raise the lateness of a staff member's request for review of the decision, the Tribunal must do so on its own motion, because neither it nor the Administration has any right to waive an instrument setting time limits for appeals, unless in exceptional circumstances or in cases where the staff member has, before the expiration of the time limit, expressly requested an extension.

76. Thus, contrary to what the Applicant contends, the Tribunal also had a duty to raise, on its own motion, the question of admissibility *ratione temporis*.

77. As to this, the facts as described above show that the first decision to refuse an investigation was notified to the Applicant by OIOS on 2 August 2005. After the Applicant had made two further requests on 9 August and 5 September 2005, that decision was confirmed on 6 September 2005. The Applicant sent three more requests to OIOS on 16 September 2005, 23 September 2005 and 11 January 2006 respectively, none of which received a reply. Only on 16 February 2006 did the Applicant request the Secretary-General to review the OIOS decision refusing to investigate her complaint of 25 June 2005.

78. The Tribunal must, therefore, rule on the question whether the Applicant's new requests, subsequent to the decision of 2 August 2005, could have given rise to express or implied refusals that were not mere confirmations of the previous ones, but capable of being the subject of a fresh request for review.

79. In this connection, the Tribunal recalls the principles laid down in *Ryan* UNDT/2010/174:

> 53. When a staff member has submitted requests to the Administration on several occasions, only the first decision of refusal is appealable, and this appeal must be lodged within the time limits which run from the moment of the first decision of refusal. Subsequent decisions of refusal by the Administration are merely confirmative decisions that cannot be appealed. It is only when the staff member's new request is accompanied by new circumstances that the Administration must review it and the ensuing decision cannot be considered as a confirmative decision (see for example judgment No. 1301 (2006) of the former UN Administrative Tribunal, as well as judgment UNDT/2010/155, *Borg-Oliver*, by this Tribunal). In the case at hand, the Applicant does not mention any new circumstances subsequent to the decision of 16 October 2003 that could have obliged the Administration to take a new decision.

80. Similarly, in *Bernadel* UNDT/2010/210, the Tribunal stated:

> 31. Reiterations of the same decision in response to a staff member's repeated requests to reconsider the matter do not reset the clock. Therefore, the Applicant's subsequent communications with the Administration seeking reconsideration of the decision do not render this application receivable. As the former UN Administrative Tribunal stated in Judgment No. 1211, *Muigai* (2005), para. III, "the Administration's response to [a] renewed request would not constitute a *new* administrative decision which would restart the counting of time" as "allowing 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". In Judgment No. 1301, *Waiyaki* (2006), para. III, the UN Administrative Tribunal also drew a distinction between "simple reiteration—or even explanation—of an earlier decision from the making of an entirely new administrative decision". I agree, in principle, with these pronouncements of the UN Administrative Tribunal…

81. In *Sethia* 2010-UNAT-079, dated 29 October 2010 and published on 29 December 2010, the Appeals Tribunal, also relying on the case law of the former UN Administrative Tribunal, upheld the position of the present Tribunal, stating:

> 19. In his appeal, Sethia argues that the Dispute Tribunal erred in fact as the administrative decision was made on 7 February 2008

> and his request for review of this decision was made within the time limit under former Staff Rule 111.2(a). We do not accept this argument. As found by the Dispute Tribunal, the decision confirming Sethia's entry level was communicated to him in writing in February 2001. Sethia did not pursue the procedure available under the former Staff Rules to seek redress, but rather made repeated demands over a period of seven years to the management of ICTR for a correction of his entry level.
>
> 20. We consider the repeated submission by Sethia for a correction of his entry level to be a mere restatement of his original claim, which did not stop the deadline for contesting the decision from running or give rise to a new administrative decision thereby restarting the time period in which to contest his entry level. (See UNAT Judgment No. 1211, *Muigai* (2004) and UNAT Judgment No. 1311, *Burbridge et al* (2006) of the former Administrative Tribunal.)

82 In the present case, as in *Ryan*, the Applicant has not raised any new circumstances of fact or law dating from after the decision of 2 August 2005 that might have obliged OIOS to take a new decision.

83. Therefore, by submitting her request for review to the Secretary-General more than six months after receiving notification of the contested decision, the Applicant was out of time and, inasmuch as her application is directed against the refusal of OIOS to investigate her complaint, it must be rejected as having been filed too late.

Decision

84. In view of the foregoing, the Tribunal DECIDES:

The Application is rejected.

(*signed*)

Judge Jean-François Cousin

Dated this 10th day of January 2011

Entered in the Register on this 10th day of January 2011

(*signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva