



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

JORDAN MOSTAJO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Carlos Laguna Navarro

**Counsel for Respondent:**  
Teresa López Posse, UNDP

## **Introduction**

1. The Applicant is contesting both the non-renewal of her fixed-term appointment as well as the decision by the Office of Audit and Investigations (“OAI”) in the United Nations Development Programme (“UNDP”) not to pursue her complaint regarding workplace harassment.

## **Issues**

2. The issues in this case are:
  - a. Is the application receivable?
  - b. Does the Dispute Tribunal have to consider the laws of a national state?

## **Facts**

3. On 5 February 2009, the Applicant filed a workplace harassment complaint with OAI against the Deputy Resident Representative, UNDP, Bolivia. The Applicant submitted that her complaint was filed as a result of her belief that as part of the harassment she was allegedly suffering, a decision to terminate her appointment had been taken.

4. On 1 October 2009, the Resident Representative, UNDP, Bolivia addressed a letter to the Applicant informing her that her fixed-term contract would not be renewed following its expiry on 31 December 2009.

5. On 30 November 2009, the Applicant submitted a letter to the Resident Representative, UNDP, Bolivia, questioning the non-renewal of her fixed-term contract.

6. On 3 December 2009, OAI informed the Applicant that upon further investigation they had determined that her allegations of workplace harassment were unsubstantiated, resulting in OAI considering the case closed.

7. On 11 January 2010, the Applicant, in response to her inquiries, was provided with additional information regarding the grounds for her non-renewal. The Applicant was also informed of the applicable rules and procedures should she wish to contest her non-renewal.

8. On 31 March 2010, the Applicant submitted a request for management evaluation whereby she requested that UNDP, following the non-renewal of her fixed-term contract “pay [...] [her] social benefits (indemnisation) for [her] 14 and half years of service”.

9. On 24 May 2010, UNDP responded to the Applicant’s request for management evaluation and informed her that they “could not find any legal basis for granting [her] claim”.

10. On 22 August 2010, the Applicant submitted an application with the Tribunal. On 31 August 2010, the Dispute Tribunal issued Order No. 229 (NY/2010) granting the Respondent an extension of time to file its reply which was dully filed on 6 October 2010.

11. On 10 August 2012, the Dispute Tribunal issued Case Management Order No. 166 (NY/2012) ordering the parties to files submissions on whether the present application is receivable. Both the Applicant, on 6 September 2012, and the Respondent, on 7 September 2012, dully complied with the Tribunal’s order and stated that they agreed with the question of receivability being handled on the papers.

### **Applicant’s submissions**

12. The Applicant’s principal contentions, both on the merits and regarding whether the application is receivable, may be summarized as follows:

#### *Non-renewal of fixed-term appointment*

a. The non-renewal of the fixed-term contract did not respect the laws of Bolivia which supersede any of the applicable United Nations convention and treaties;

b. The management evaluation request was receivable as the UNDP only relied on the Rules and Regulations of the United Nations which “are a dead letter without assessing the human dimension and, essentially, the human rights that the United Nations itself proclaims”;

*Finding of the OAI investigation*

c. There was a nine-month delay by OAI prior to them looking into the harassment allegations. Furthermore, OAI’s decision to consider the allegations unsubstantiated was reached “in a summary and unusual fashion since no serious investigation was conducted and no explanation was given”;

d. OAI’s findings appear to merely repeat the “other party’s response in detail” and did not provide the Applicant with the opportunity to respond to any of the findings.

**Respondent’s submissions**

13. The Respondent’s principal contentions may be summarized as follows:

*Non-renewal of fixed-term appointment*

a. The Applicant’s request for management evaluation regarding the non-renewal is time-barred as it was submitted more than sixty calendar days after the 11 January 2010 letter which advised her of her rights to contest the non-renewal of her contract. Furthermore, under *Costa* 2010-UNAT-036, the Tribunal may not waive or suspend the applicable deadlines for requesting management evaluation of an administrative decision;

b. UNDP is a subsidiary organ of the United Nations and is not subject to the application of national law. Therefore, the non-renewal of the Applicant's fixed-term contract does not give rise to any benefits other than those provided for in the applicable Staff Regulations and Rules.

*Findings of the OAI investigation*

c. The Applicant's submission regarding OAI's findings is a new issue which is not receivable as the Applicant did not, as required by art. 8.1(c) of the Dispute Tribunal's Statute, first contest the findings by filing a claim for management evaluation;

d. Furthermore, the findings of OAI are not a contestable administrative decision as they did not create any direct legal consequences on the Applicant's term of employment;

e. In reviewing the Applicant's claim of workplace harassment, OAI fully complied with all of the applicable procedures prior to concluding that the Applicant's allegations were unsubstantiated.

**Consideration**

*Applicable law*

14. Article 8 of the Tribunal's Statute states, in relevant part, that:

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

...

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.

15. Provisional Staff Rule 11.2, applicable at the time, states that:

Rule 11.2 – Management Evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

*Receivability of the non-renewal of fixed-term appointment*

16. The Staff Rules and the jurisprudence of both the Dispute Tribunal and the United Nations Appeals Tribunal have consistently stressed the importance of observing the applicable time limits (see *Mezoui* 2010-UNAT-043).

17. In the present case, the Applicant was notified of the UNDP's decision not to renew her fixed-term contract on 1 October 2009. Furthermore, in response to the Applicant's 30 November 2009 inquiries regarding the non-renewal of her contract, the UNDP advised her on 11 January 2010 that should she wish to contest her non-renewal she could submit a request for management evaluation in accordance with staff rule 11.2(c).

18. It follows from the foregoing that by submitting her request for management evaluation on 31 March 2010, the Applicant submitted her request nearly four months following the expiry of the sixty calendar days time limit identified in staff rule 11.2(c). Even assuming, as suggested by the Respondent, that the applicable date upon which the time limit started to run is that of their 11 January 2010 letter,

the Applicant still submitted her request after the expiry of the applicable time limit which would have been on 11 March 2010.

19. The Appeals Tribunal stated in *Costa* that the Tribunal cannot waive the applicable time limits for requesting the management evaluation of an administrative decision. Consequently, the Applicant's application regarding her appeal of the management evaluation's decision is not receivable.

20. The Tribunal also notes that the Applicant's request for management evaluation was limited to requesting the payment of certain benefits as a result of the non-renewal of her contract following fourteen years of service and did not appear to contest the actual non-renewal of her contract whereas the present application before the Tribunal was expanded to the larger issue of the non-renewal of the said contract.

*Receivability of a review of the decision of AOI*

21. Under art. 8.1(c) of the Dispute Tribunal Statute, the Tribunal will only have jurisdiction to review a contested administrative decision if the "applicant has previously submitted the contested administrative decision for management evaluation, where required". Where the contested administrative decision relates to a disciplinary sanction, a staff member may appeal directly to the Tribunal without first requesting a management evaluation of the said decision.

22. In the present case, the Applicant also seeks to challenge the findings of OAI. These findings do not relate in any way to any type of disciplinary sanction imposed on the Applicant. In *Gehr* UNDT/2012/070 the Tribunal reasserted the established jurisprudence by stating that:

It is settled case law of both the Dispute Tribunal (see, *inter alia*, *O'Neill* UNDT/2010/203, *Leboeuf* et al. UNDT/2010/206, *Znamenski* UNDT/2010/208) and the Appeals Tribunal (see, *inter alia*, *Crichlow* 2010-UNAT-035 and *Planas* 2010-UNAT-049) that requesting a management evaluation is a mandatory first step in the appeal process.

23. Consequently, should the Applicant have wished to challenge the OAI's findings, she should have, as expressed under staff rule 11.2(c), first submitted a request for management evaluation within sixty days from her 3 December 2009 receipt of OAI's findings prior to presenting this issue to the Tribunal.

24. As discussed *supra*, while the Applicant did file a request for management evaluation on 31 March 2010, that request was limited to requesting the payment of benefits and entitlements as a result of the non-renewal of her contract and did not concern itself with the findings of the OAI report.

25. The Tribunal can only find that the claim the Applicant submitted as part of her application regarding the OAI report is not properly before it and is therefore not receivable.

*Applicability of national laws to the Office of Administration of Justice*

26. While the Tribunal does not consider that the present application is receivable, it has decided that it should also address the Applicant's argument, both as part of her main submission and in response to the Respondent's receivability claims, that she should be receiving the remedy she requested due to the fact that the actions of UNDP were in breach of the national laws of Bolivia. The Applicant further states that the national laws and the constitution of Bolivia should supersede any treaty or internal rule of the United Nations.

27. The jurisprudence of the Tribunal with regard to the applicability of national laws within the United Nations internal system of justice is clear and does not suffer from any ambiguity. Indeed, in *Ernst* UNDT/2011/047, the Tribunal stated that "[n]o national laws or regulations are directly applicable to staff members of the Organizations and only those United Nations organs authorised to do so have the power to decide to transpose a rule of national law into the internal law of the Organization".



28. Furthermore, in the case of *Saka* UNDT/2010/007, the Applicant, similarly to the one in the present matter, submitted that the contested decision was contrary to Turkish law. In response to that argument, the Tribunal stated that “it is clear that the internal regulations of the United Nations alone are applicable to disputes involving its staff members”.

29. Finally, the Applicant’s terms and condition of employment, like any staff member within the United Nations, clearly indicated that her employment contract was governed by the rules and regulations of the UNDP and its related judicial system.

30. The Tribunal can only conclude that even if this case were considered to be receivable, there is no place for this Tribunal to take into account the national laws of the State of Bolivia.

### **Conclusion**

31. The application is not receivable and the case is dismissed.

*(Signed)*

Judge Alessandra Greceanu

Dated this 7<sup>th</sup> day of November 2012

Entered in the Register on this 7<sup>th</sup> day of November 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York