UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/103
Judgment No.: UNDT/2014/033
Date: 21 March 2014
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

LEBOEUF *et al.*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicants:
François Loriot

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

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Introduction

1. The Applicants, General Service level staff members in the Text Processing Units of the Department for General Assembly and Conference Management ("DGACM"), contest their Department's interpretation and application of the Organization's rules on compensation for overtime work. Specifically, the main issue raised by the Applicants in their request for administrative review and in their application before the Tribunal is whether time taken on annual leave, sick leave, or compensatory time off should be included when calculating the eight hours of work required for additional payment for overtime.

2. This case was first decided by the Dispute Tribunal in *Leboeuf et al.* UNDT/2010/206, rendered on 30 November 2010. The judgment was appealed and, in *Leboeuf et al.* 2011-UNAT-185, the United Nations Appeals Tribunal ("UNAT") vacated the Dispute Tribunal Judgment and remanded the case for "further proceedings". This Judgment is rendered pursuant to the remand of this case. Due to the extensive detail of facts and issues, and the procedural history in this case, this Judgment contains a table of contents as an *aide mémoire*.

3. The Applicants submit, *inter alia*, that, prior to January 2005, DGACM developed a practice recognizing compensatory time off, annual leave, and sick leave as part of the eight hours of work required for the payment of overtime. The Applicants submit that the "sudden December 2004 changes in salary practices" were done unilaterally by the Administration, without prior consultations with the Applicants or their representatives, and that they were introduced by the Executive Officer, DGACM, who acted without proper delegated authority. The Applicants submit that this changed policy was adverse to them. They state that, although they filed their request for administrative review on 16 January 2009, more than four years after the change in policy, the delay was mainly due to the Administration's actions, when it announced in 2005 that it would issue a new administrative instruction recognizing compensatory time off as part of the "actual work day", but

never did. The Applicants submit that this announcement created a good faith legitimate expectation on their part and that the changes introduced in December 2004 constituted discrimination against the Applicants.

4. The Respondent submits, *inter alia*, that the Applicants filed their request for administrative review more than four years after the correction of DGACM's erroneous application of Appendix B, and, accordingly, their application was not receivable. Further, the Applicants acquiesced to the correction of the practice within DGACM, as they did not challenge it for more than four years. The Respondent submits that the Administration's interpretation of Appendix B has been consistent over 40 years, and that the Applicants' proposed interpretation of Appendix B is incorrect. The Respondent submits that the provisions of Appendix B are intended to accomplish a number of policy goals, including the protection of the health of staff and the efficiency and financial controls of the Organization, and the Applicants' proposed interpretation is contrary to these policy goals. The Respondent submits that, while the Applicants benefitted from an erroneous application of Appendix B within DGACM prior to 2005, they have no legal right or expectancy to continue to benefit from it. The Applicants presented no evidence of an express promise given to them or that their interpretation of Appendix B was a fundamental and essential term of their employment without which they would not have accepted a job with the Organization. The Respondent submits that the Organization acted fairly and lawfully in correcting the erroneous interpretation of Appendix B. The views of staff were considered, although the Administration was not required to do so in this case. The Respondent states that the evidence in this case, including oral testimony, confirmed that the practice of other departments in the United Nations Headquarters has been consistent with the Respondent's interpretation of Appendix B. The Respondent submits that the Applicants provided no evidence in support of their claim of discrimination or loss.

List of Applicants

5. The initial application before the Dispute Tribunal in this case was filed in August 2009 by 60 Applicants who were identified in Annex 2 to the application. On 30 November 2010, the Dispute Tribunal rendered *Leboeuf et al.* UNDT/2010/206, dismissing the application. Only 35 of the 60 applicants exercised their right of appeal. Therefore, upon remand of the matter to the Dispute Tribunal for "further proceedings", the Tribunal found, by Order No. 182 (NY/2013), that only 35 Applicants who appealed the Dispute Tribunal's judgment were properly before the Dispute Tribunal.[1]

6. The issue of the number of Applicants presently before the Dispute Tribunal was the subject of a request for interpretation, filed by the Applicants on 14 November 2012, whereby they sought a ruling from the UNAT stating that "the remanded UNDT case resumes with its initial 60 applicants". This request was rejected by Judgment No. 2013-UNAT-354, dated 26 August 2013, in which the UNAT stated that "these issues have already been addressed by the [Dispute Tribunal] in [Order No. 182 (NY/2013)]", which Order was "within the jurisdiction of the [Dispute Tribunal], so that there can be no justification for any interference by [the Appeals Tribunal]". Notably, Judgment No. 2013-UNAT-354 (on interpretation) specifically stated in para. 1 that the request for interpretation was filed by "Ms. Christiane Leboeuf and 34 other staff members".

7. Accordingly, the Tribunal has properly before it only the 35 Applicants who appealed *Leboeuf et al.* UNDT/2010/206 before the Appeals Tribunal.

[1] Adawi, Bassam; Alfaro, Eduardo Orestes; Arias-Bal, Maria Cristina; Saez-Sommer, Georgina; Bernier, Marie-Luce; Brière, Carmen; Démesmin, Carmel-Marie; Diaz, Maria Teresa; EI-Kadi, Bassem; Eisharidy, Aly M.; Flament, Richard; Gagnon, Estelle; Gueye, Marieme; Gurgas, Eryan Fahim; Hervé, Brigitte; Hya, Christiane; Jobin, Claire; Jouejati, Ahmad; Kananykina, Natalia; Kozlova, Nadezda; Leboeuf, Christiane; LeBreux, Nicole; Leclerc-Gagnon, Diane; Lemieux, Line; Lizotte, Denise; Marquez, Nelly; Martin Bejarano, Jorge; Oueslati, Viviane; Pagé, Muriel; Paré, Louise; Pastor, Claudia Maria; Peslages, Micheline; Ramirez, Marcela; Soboleva, Marina; Suarez, Rosa.

8. As part of their closing submissions, the parties raised an issue of whether several of the Applicants, who joined the Organization between 2005 and 2008, have standing in this case, given that the contested change was introduced with effect from 1 January 2005, before their entry on duty. It does not appear from the Appeals Tribunal's judgment that this issue was raised by either party on appeal before the Appeals Tribunal, nor was it the subject of the remand. This issue was first brought up during these proceedings by the Respondent after the matter was remanded by the Appeals Tribunal. Therefore, it may well be argued that the Respondent is estopped from raising the point at this stage of the proceedings. In any event, in view of its findings below, the Tribunal need not examine the receivability or merits of this issue and reach a final conclusion.

Procedural history

Application filed with the Dispute Tribunal

9. On 20 August 2009, the Dispute Tribunal received an application dated 19 August 2009. The application identified the contested decision as follows (emphasis omitted):

> 1. Author of New Policy Decision: Ms. Neeta Tolani, Executive Officer at DGACM;
>
> 2. Date of issue: 15/12/2004 becoming effective 1 January 2005;
>
> 3. Date of notification: every month by Payroll's non-payment of proper [overtime/compensatory time off];
>
> 4. Content of decision: abrogation of pre-2005 UN policy which allowed computation of overtime (OT) regardless of a staff having previously been on compensatory time (CT), sick leave (SL), or annual leave (AL);
>
> 5. Request for Administrative Review (RAR) on 16 January 2009.

10. The Applicants sought, *inter alia*, rescission of the 2005 "new policy", reinstatement of the pre-2005 policy, and monetary compensation.

Judgment No. UNDT/2010/206

11. On 30 November 2010, the Dispute Tribunal rendered *Leboeuf et al.* UNDT/2010/206, finding in paras. 19–21 that the present case was receivable only with respect to the calculation and application of compensatory time and overtime payments following 19 November 2008, and not as an appeal against the changes introduced on 15 December 2004. The Dispute Tribunal found, *inter alia*, that the present application was time-barred with respect to the change of policy in December 2004 as no timeous request for administrative review was filed. (Under the former Staff Rules, requests for administrative review had to be filed within two months from the date of notification of the contested decision, and the Applicants' request for administrative review was filed in January 2009.) Specifically, with regard to the scope of receivable issues in this case, the Dispute Tribunal stated the following:

> 19. … [A]ppeals against matters of policy will not generally be receivable under art. 2.1 of the Statute of the Dispute Tribunal, and it will be the role of the Tribunal to determine whether there is a contestable decision affecting the staff member's terms of appointment or contract of employment.
>
> 20. The present application is receivable not as an appeal against a general policy, but as an appeal against the *application* of this policy to each of the Applicants individually affecting their legal rights under their contracts of employment. …
>
> 21. However, the present application is receivable only with respect to the calculation and application of compensatory time and overtime payments *following* 19 November 2008, as the Applicants were required to file their request for administrative review within two months of the date of notification of the contested decision in writing. Accordingly, this application is time-barred with respect to any compensation calculations that occurred prior to November 2008 as no timeous request for administrative review was filed.
>
> …
>
> 23. In this case, the Tribunal has to answer one specific, receivable legal issue—namely, whether the application of the policy of DGACM, in place as at November 2008, concerning the use of sick

> or annual leave or compensatory time off during part of the workday, was in compliance with the former Staff Rules. To answer this question, the Tribunal is required to interpret, in particular, secs. (iv) and (vi) of Appendix B to the former Staff Rules.

12. The Dispute Tribunal further found that, with respect to the calculation and application of compensatory time and overtime payments, the Respondent's interpretation and application of Appendix B in place at DGACM since December 2004 was correct. The Tribunal therefore dismissed the application.

13. The Judgment of the Dispute Tribunal was preceded by vigorous case management, including with regard to the presentation and relevance of the two witnesses put forward by the Applicants. These case management efforts are reflected in the Tribunal's Orders, although it is not clear whether these Orders were properly brought to the attention of the Appeals Tribunal in the subsequent appeals proceedings. In particular, see Order No. 60 (NY/2009) (7 August 2009); Order No. 92 (NY/2009) (24 August 2009); Order No. 114 (NY/2009) (14 September 2009); Order No. 26 (NY/2010) (17 February 2010); Order No. 120 (NY/2010) (19 May 2010); Order No. 139 (NY/2010) (3 June 2010); Order No. 287 (NY/2010) (28 October 2010); Order No. 293 (NY/2010) (4 November 2010); and Order No. 304 (NY/2010) (15 November 2010).

Judgment No. 2011-UNAT-185: remand of the case "for further proceedings"

14. By Judgment No. 2011-UNAT-185, the UNAT (composed of Judge Mark P. Painter (Presiding), Judge Kamaljit Singh Garewal, and Judge Jean Courtial) vacated the Dispute Tribunal's Judgment and remanded Case No. UNDT/NY/2009/103 to the Dispute Tribunal "for further proceedings". The UNAT found that this case raised a number of questions that the Dispute Tribunal might find relevant, including:

> A. When a rule is consistently applied—at least in one department—for decades, and its "interpretation" is then changed, having a serious effect on working conditions and compensation of

> the staff members involved, must the Administration consult with staff representatives, under Chapter IX of the Staff Regulations?
>
> B. What is the practice in granting overtime throughout the United Nations?
>
> C. Do Staff Rules apply differently in different duty stations, or should the same "interpretation" apply everywhere?

15. The UNAT stated that "[t]hese, and possibly other issues, require further testimony". Judge Courtial in a concurring opinion stated that, while he was "of the opinion that the interpretation rendered by the UNDT judge of these provisions in the judgment under appeal is the most in line with the terminology used, most notably when read in French", the Dispute Tribunal should examine whether "the provisions for the protection of legitimate expectation can be advanced by Ms. Leboeuf *et al.* against the Administration in this case, meaning, in [his Honour's] opinion, whether the provisions of Appendix B paragraphs (iv) and (vi) of the former Staff Rules were really applied in a continuous, uniform and general manner during an extended period of time".

Resumed proceedings following the remand

16. Following the remand of the case "for further proceedings", the Dispute Tribunal issued 11 orders and held a case management hearing on 6 September 2012 in an effort to set this case down for a hearing.[2] The Tribunal's extensive efforts to hear this case are explained below.

Initial efforts to schedule a substantive hearing

17. By Order No. 123 (NY/2012), dated 19 June 2012, the parties were informed that this matter was set for a hearing on Tuesday, 24 July 2012. In para. 3 of the

[2] See Orders No. 123 (NY/2012) (19 June 2012); No. 127 (NY/2012) (29 June 2012); No. 143 (NY/2012) (18 July 2012); No. 160 (NY/2012) (3 August 2012); No. 182 (NY/2012) (14 September 2012); No. 203 (NY/2012) (9 October 2012); No. 216 (NY/2012) (2 November 2012; No. 256 (NY/2012) (6 December 2012); No. 252 (NY/2013) (11 October 2013); No. 276 (NY/2013) (31 October 2013); and No. 323 (NY/2013) (25 November 2013).

Order, the parties were directed to file their lists of proposed witnesses and an agreed bundle of documents on which they intend to rely at the hearing.

18. On 27 June 2012, the Respondent filed a submission requesting an extension of time until 13 August 2012 to comply with para. 3 of Order No. 123 (NY/2012) and an adjournment of the hearing until October 2012.

19. On 29 June 2012, the Tribunal issued Order No. 127 (NY/2012), finding that the reasons provided by the Respondent were insufficient to reschedule the hearing set for 24 July 2012. The Tribunal ordered the parties to attend the hearing on 24 July 2012, with a possibility of continuation on 25–26 July 2012, if required.

20. On 16 July 2012, approximately one week before the hearing, the parties filed their list of witnesses. Whereas the Respondent proposed calling two witnesses, the Applicants requested the presence of a total of 33 witnesses: 23 witnesses testifying in English, six witnesses testifying in Chinese, three witnesses testifying in Arabic, and one witness testifying in Russian. The Applicants stated that "[i]t would be appreciated that interpreters be made available by the Respondent when these Applicants will be called to testify before the Tribunal".

Case management hearing set

21. On 18 July 2012, the Tribunal issued Order No. 143 (NY/2012), stating in view of the extraordinary number of witnesses called by the parties on short notice and the technical difficulties posed by the Applicants' request for simultaneous back-and-forth translations in four official languages of the United Nations, the hearing set for 24 July 2012 would be a case management hearing at which the parties would assist the Tribunal with determining how to proceed with this case.

Case management hearing postponed

22. Regrettably, the Tribunal was unable to hold a case management hearing on 24 July 2012 due to the unexpected sick leave of the undersigned Judge. The Tribunal thus set the case management hearing down for 6 September 2012.

Summary of case management hearing of 6 September 2012

23. Following the case management discussion of 6 September 2012, the Tribunal issued Order No. 182 (NY/2012), dated 14 September 2012. The Order addressed, *inter alia*, the list of Applicants in this case, the issues before the Tribunal (including jurisdiction and receivability), the list of proposed witnesses, and set the case down for a three-day substantive hearing on 14–16 November 2012. The Applicants and the Respondent were ordered to file additional submissions, due respectively on 10 October and 6 November 2012. Specifically, the parties were ordered as follows (emphasis omitted):

> 18. By 5 p.m., Wednesday, 10 October 2012, the Applicants shall file and serve:
>
> a. copy of the appeal and all supporting documents filed with the United Nations Appeals Tribunal with regard to Judgment No. UNDT/2010/206;
>
> b. list of the 35 Applicants presently before the Dispute Tribunal;
>
> c. list of approximately three witnesses (see para. 13 above) with their contact information and method of appearance;
>
> d. any additional submissions, including on matters addressed in this Order.
>
> 19. By 5 p.m., Wednesday, 6 November 2012, the Respondent shall file and serve:
>
> a. copy of the answer to the Applicants' appeal and all supporting documents filed with the United Nations Appeals Tribunal;
>
> b. copies of relevant documents on compensation for overtime work in duty stations other than New York;

> c. list of approximately three witnesses (see para. 13 above) with their contact information and method of appearance;
>
> d. Any additional submissions, including on matters addressed in this Order.
>
> 20. The hearing is set for Wednesday–Friday, 14–16 November 2012, commencing at 10:00 a.m.

Applicants' requests to reschedule the substantive hearing

24. On 5 October 2012, the Applicants filed a request that the scheduled dates be vacated, and that the hearing be rescheduled to any date after 16 November 2012 due to their Counsel's prior scheduled engagements in Europe. The Applicants also requested that the deadline for the filing of their submission pursuant to Order No. 182 (NY/2013) be extended to early November 2012.

25. By Order No. 203 (NY/2012), dated 9 October 2012, the Tribunal granted the Applicants an extension of time until 31 October 2012 to file their submission, and rescheduled the hearing dates to 27–29 November 2012. The deadline for the filing of the Respondent's submission was adjusted accordingly.

26. On 31 October 2012, the Applicants filed a submission stating that their Counsel had scheduled the period of 29–31 October 2012 to finalize and discuss the preparation of the documents to be filed pursuant to Order No. 203 (NY/2012). However, due to Hurricane Sandy, Counsel for the Applicants was unable to travel to New York City and was unable to communicate with the Applicants or to hold telephone conferences with them to discuss, prepare, and adduce the requested evidence, and to finalize their submission by the specified deadline. Accordingly, the Applicants requested that the deadline to prepare and to file their submissions and documents pursuant to Order No. 203 (NY/2012) be extended to early December 2012, and that "the date for trial be set in January 2013 or any other dates when the attendance of all the witnesses can be confirmed by both … parties". Following the case management, the Applicants reduced the previously expected number of 33 witnesses, and the parties agreed that each party would call approximately three

witnesses, with leave granted for further submissions should additional witnesses be required (see Orders No. 143 (NY/2012) and 182 (NY/2012).

27. On 1 November 2012, the Respondent communicated to the Registry that he had no objections to the Applicants' request for an extension of time.

28. On 2 November 2012, the Tribunal issued Order No. 216 (NY/2012), stating that although the Tribunal was mindful of the effects of Hurricane Sandy, it noted with concern that the parties continued to seek extensions of time despite being aware since September 2012 of the submissions to be filed in preparation for the hearing scheduled to take place in November 2012. The Tribunal granted the extension requested by the Applicants and issued appropriate orders, but, bearing in mind the several postponements and that this matter is long outstanding, also stated that it was unlikely that any further extensions would be granted.

29. Further, in view of the difficulties experienced by the parties in complying with the Tribunal's scheduling orders, the parties were ordered to file, by 5 December 2012, a joint submission with agreed hearing dates, to be scheduled for late January 2013 or early February 2013.

Applicants' submission of 5 December 2012

30. On 5 December 2012, the Tribunal received a submission from the Applicants, confirming that the parties had agreed that the case be set down for a hearing on 19–20 February 2013. However, the Applicants further informed the Tribunal, after the fact, that "[a]n application for interpretation dated 9 November 2012 ha[d] been filed at [the UNAT] seeking a definition of the actual parties bound by judgment 2011-UNAT-185". The Applicants attached a copy of the said application for interpretation. In the said application, they sought the UNAT to (emphasis in original)

> interpret their judgment 2011-UNAT-185 and rule that:

a. The remanded case UNDT/NY/2009/103 resumes with its initial **60 Applicants**;

b. Absent a timely appeal or cross-appeal at UNAT by the Respondent on **receivability and jurisdiction**, the respondent is time-barred and not allowed to reopen such issues, once and when the case is remanded at UNDT;

c. Statements made in judgment 2011-UNAT-085 are not merely *obiter dictum*, and are **binding the Parties** in the remanded case.

Stay of proceedings pending Appeals Tribunal's ruling on the Applicants' request for interpretation

31. The application for interpretation, referred to in the Applicants' submission of 5 December 2012, was apparently filed with the UNAT on 9 November 2012, although the sitting Tribunal was informed of it only on 5 December 2012. Furthermore, the Applicants had neither sought leave of the Dispute Tribunal, nor applied for a stay of the proceedings when filing the application with the UNAT on matters that were *sub judice* and in the midst of preparation for a hearing at the Dispute Tribunal.

32. By Order No. 256 (NY/2013), dated 6 December 2012, the Dispute Tribunal found that, in view of the Applicants' application for interpretation of the UNAT's judgment and the issues raised therein, the sitting Tribunal would stay the proceedings, and directed that no hearings would be held until the determination of the application for interpretation or until other directions by the UNAT.

Appeals Tribunal's Judgment No. 2013-UNAT-354 on the Applicants' request for interpretation

33. Some eight months later, on 26 August 2013, the Appeals Tribunal published Judgment No. 2013-UNAT-354 (dated 28 June 2013), rejecting the Applicants' application for interpretation. The Appeals Tribunal found that the Dispute Tribunal was "in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties and the [Appeals] Tribunal will not

lightly interfere with the broad discretion of the [Dispute Tribunal] in the management of cases". The Appeals Tribunal found that the Dispute Tribunal's case management orders in the present case were within its jurisdiction and there was no justification for any interference by the Appeals Tribunal.

Resumed preparations for substantive hearing

34. Approximately six weeks after the publication of Judgment No. 2013-UNAT-354, the Dispute Tribunal issued Order No. 252 (NY/2013), dated 11 October 2013, setting this case down for a hearing on 6–7 November 2013. The parties were ordered to file lists of witnesses, keeping in mind their previous agreement, reflected in para. 13 of Order No. 182 (NY/2012), that each party would call approximately three witnesses at the hearing, with leave being granted by the Tribunal to make further submissions at the hearing as to whether additional witnesses would be required.

35. The Applicants filed their submission on 18 October 2013, listing seven witnesses. The Respondent filed his submission on 24 October 2013, listing four witnesses.

Applicants' request for adjournment of the substantive hearing

36. On 30 October 2013, one week before the hearing, the Tribunal received a submission from Counsel for the Applicants stating that he was unable to represent the Applicants at the hearing scheduled for 6–7 November 2013 due to medical reasons, in support of which a medical certificate was available upon request. The certificate was produced at the substantive hearing. Counsel further requested the hearing to be scheduled for a date after 15 November 2013.

Adjournment of the substantive hearing to 21–22 November 2013

37. By Order No. 276 (NY/2013), having considered the request of the Counsel for the Applicants and noting "the unfortunate history of delays and postponements

made at the Applicants' requests", the Tribunal adjourned the hearing until 21–22 November 2013 (Thursday–Friday). The parties were directed to ensure availability on those dates as well as on 25 November 2013 (Monday), if deemed necessary by the Tribunal. The parties were given an extension of time until 18 November 2013 to file their lists of witnesses.

Applicants' submission of 18 November 2013

38. On 18 November 2013, the parties submitted their lists of witnesses, proposing an agreed order of appearance.

39. On 18 November 2013, the Applicants also filed a submission objecting to the reference in Order No. 276 (NY/2013) to "the unfortunate history of delays and postponements made at the Applicants' requests" and stating that such references was "factually incorrect, and not conducive to a fair and serene hearing". The Applicants stated that all of the delays in this case "were not the Applicants' responsibility and were totally outside their control". In their submission, the Applicants proceeded to set out their views with respect to some parts of the procedural history of this case.

40. At the outset of the hearing of 21–22 November 2013, I inquired as to the purpose of the Applicants' submission of 18 November 2013. I further noted that this case has a complicated procedural history, and that Order No. 276 (NY/2013) did not state that all of the delays in this case were attributable to or due to the Applicants. Following this, Counsel for the Applicants explained that the submission of 18 November 2013 was filed to avoid any misunderstanding and that he had no further requests in that regard.

Substantive hearing of 21–22 November 2013

41. The substantive hearing took place on 21 and 22 November 2013, as scheduled. The Applicants called the following witnesses:

a. Mr. Emad Hassanin, former United Nations Staff Union's Second Vice-President;

b. Ms. Michèle Hassan-Bodo, former Supervisor of the French Text Processing Unit;

c. Ms. Marcela Ramirez, Spanish Text Processing Unit staff member (and one of the Applicants);

d. Ms. Maria Teresa Diaz, Spanish Text Processing Unit staff member (and one of the Applicants).

42. The following witnesses testified on behalf of the Respondent:

a. Mr. Teddy Keya, Human Resources Officer, Office of Human Resources Management ("OHRM") (since 2001, including in the Policy and Conditions of Service Section since 2010);

b. Ms. Mary Ann Chiulli, Executive Officer, DGACM (since 2006);

c. Ms. Cecilia Nadres, Administrative Officer, Executive Office of DGACM (prior to 1992 and from 2009 to 2012); former Administrative Officer, Administrative Officer, Executive Office of the Department of Management (1992 to 2005); Executive Office of the Department of Safety and Security (2005 to 2009).

43. On 20 November 2013, one day before the hearing, the Respondent filed a bundle of documents, totaling over 250 pages, on which he intended to rely on at the hearing. It was clarified at the outset that several dozen pages of documents provided

by the Respondent were not available to the Applicants previously. The parties agreed to a short adjournment of approximately 40 minutes, during which the Applicants and their Counsel reviewed the new documents. Following the adjournment, the hearing proceeded as scheduled, with the agreement of both parties. The Tribunal must at this juncture express its disapproval of late filings particularly when a matter has been pending for such a considerable period of time and when the witnesses who could truly speak to the documents are unavailable, as was the case in this instance.

44. During the hearing, Counsel for the Applicants also provided the Respondent and the Tribunal with three previously undisclosed documents. The Tribunal entered them into the record as exhibits A1–A3.

Closing submissions

45. At the conclusion of the hearing, it was agreed that both Counsel would make oral closing submissions that would be supplemented by subsequent written submissions. In view of the Counsels' schedule, it was agreed that the closing submissions would be filed by Friday, 20 December 2013. The submissions were duly filed and considered by the Tribunal.

Issue of relief

46. It was agreed at the hearing that, if the Applicants prevailed on the merits, there would have to be a further consideration of appropriate relief in this case, requiring further submissions.

Background

Overtime prior to 2004

47. The Respondent produced a number of memoranda dating back to 1970 (specifically, 1970, 1994–1996, and 1998), addressed to, *inter alia*, staff of

DGACM, regarding various aspects of compensation and overtime pursuant to Appendix B which was applicable within the United Nations Secretariat at all relevant times. The general tenor of these documents was that, to be granted overtime payment, staff members had to have worked a full work day.

48. For instance, on 6 April 1994, a note was prepared (by OHRM, according to the Respondent) with the title "CTO [Compensatory time off] taken the same day that [overtime] is performed in the evening" (the copy of the note produced by the Respondent also had a facsimile header with the date of 15 October 1996). It is unclear who the note was addressed to and whether it was circulated, but it stated (emphasis added):

> **CTO [Compensatory time off] taken the same day that [overtime] is performed in the evening**
>
> …
>
> The practice to apply the provisions of Appendix B(i) and (ii) of the Staff Rules is: **Overtime means time worked in excess of the scheduled workday.** Consequently if a staff member commences his/her day 1 [hour] later, will complete it 1 [hour] later. **If a staff member takes more than one hour for lunch, the completion of the work day will be delayed for as much time as additionally taken for lunch.**
>
> **Compensatory time and overtime will only be accrued after the completion of 7 hours of work (7 ½ during the [General Assembly]).**

49. On 5 November 1998, Mr. Franz Baumann, then Executive Officer, DGACM, sent a memorandum to all staff of DGACM, explaining that annual leave or compensatory time off is considered to be authorized absence from work. The memorandum explained that such absences should be recorded first as compensatory time off as its use should be encouraged, and only charged against annual leave after the compensatory time off balance was exhausted. The memorandum also stated that staff taking this authorized absence from work may nevertheless be required to work

overtime as required due to exigencies. The text of the relevant parts of the memorandum of 5 November 1998 is as follows (emphasis added):

> 1. Overtimes, as defined in Staff Rule 103.12 as well as in Appendix B to the Staff Rules, is:
>
> > time worked in excess of the established work day or in excess of the established work week or time worked on official holidays, provided that such work has been authorized by the proper authority.
>
> The normal work week is five days of eight hours (or 8 ½ hours during the main part of the General Assembly's regular session), with a break of one hour for lunch which is not counted as work time (staff members are required to avail themselves of this break; it is not permissible to forgo this break and, instead, start work later, leave earlier or claim overtime). It should be noted in this connection that during the session of the General Assembly, the first 30 minutes (at other times, the first 60 minutes) of time worked beyond the regular work day must be recorded as compensatory time off (CTO) credit.
>
> 2. Conditions governing the payment of overtime are as follows:
>
> – **Staff members who have not worked a full work day or a full work week are not entitled to be granted overtime pay for that day or for that weekend. Staff whose absence was scheduled (i.e. authorized annual leave or CTO [compensatory time off])** are not excluded from working overtime.

January 2003 reminder regarding the memorandum of 5 November 1998

50. On 16 January 2003, Ms. Tolani, Executive Officer, DGACM, sent an email to the staff of DGACM, in which she, *inter alia*, reminded them of the memorandum dated 5 November 1998.

March 2004 reminder regarding the memorandum of 5 November 1998

51. On 16 March 2004, Ms. Tolani sent an email to the staff of DGACM, stating, *inter alia*, that "payment for overtime takes place only after eight hours of work any day of the scheduled work week". She attached the memorandum of 5 November 1998 to her email.

May 2004 request for a legal opinion

52. On 1 May 2004, Ms. Tolani sent an email to the Policy Support Unit of OHRM, attaching the memorandum of 5 November 1998 and seeking a legal opinion on several issues in connection with overtime and compensatory time off. The specific issues raised were (emphasis added):

> Would very much appreciate your guidance on a couple of issues in connection with overtime and [compensatory time off]. I am attaching two pieces of communication sent out to staff in this connection: a) memorandum from Mr. Baumann, former Executive Officer of DGACM, dated 5 November 1998; and b) my email of 16 March 2004. The latter has created some turmoil among staff and a number of issues have come to the forefront since then, which I attempt to summarize below.
>
> 1. Appendix B(ii): The scheduled work day at Headquarters means the duration of the working hours in effect at the time on any day of the scheduled work week, less one hour for a meal.
>
> …
>
> **2. Appendix B(vi): Compensation shall take the form of an additional payment for overtime in excess of a total of eight hours of work of any day of the scheduled work seek, or when it takes place on the sixth of seventh day of the scheduled work week.**
>
> **a) If a staff member takes one half-day of sick or annual leave or compensatory time off, is he/she entitled to overtime payment for that day? Or should the eight hour requirement still be applied, i.e., hours up to eight be compensated by time off, and hours in excess of eight be compensated by payment?**
>
> 3. Appendix B(iv): Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled work day up to a total of eight hours of work on the same day. Subject to the exigencies of services, such compensatory time off may be given at any time during the four months following the month in which the overtime takes place.
>
> a) If exigencies of service permit the staff member to take time off, can a staff member be asked to use the compensatory time accrued before using annual leave (position taken in [the November 1998 memorandum as well as in my email)?

> b) Does the word "may" imply that it is at the staff member's discretion whether the compensatory time accrued should be used to take time off or retained in order that hours in excess of 40 can be paid?
>
> 4. Appendix B(v): Compensation shall take the form of payment at the straight time rate in respect of each hour in excess of forty hours if, at the time of a review to be conducted three times a year, it is ascertained that a staff member has accumulated more than forty hours of compensatory time off which could be authorized because of the exigencies of the service. The remaining entitlement to forty hours of compensatory time off will be counted as part of the staff member's accumulated entitlement at the time of the next review.
>
> …
>
> Would be happy to provide you more details, if necessary. Just let me know.

53. It is issue no. 2 raised in the email of 1 May 2004 (under "Appendix B(vi)", emphasis in bold) that is the subject matter of the present case.

54. On the same day, Ms. Tolani forwarded her email to the Chiefs of Units in DGACM, explaining that the reason why she was seeking this legal opinion from OHRM was because she had been approached by the staff representatives, who told her that she was "too rigid" in her interpretation of Appendix B and that they felt that compensatory time off was "very much at the discretion of the staff". She said that, pending OHRM's response, the Chiefs of Units should exercise their discretion and treat situations that arise on "a case by case basis" and, if their staff "argue very strongly against what we are implementing, please do not push" until OHRM's response is provided. Ms. Tolani stated that, depending on OHRM's response, she will "send out another email to all Chiefs either stressing previous position or retracting".

November 2004 response to the request for a legal opinion

55. On 30 November 2004, the Policy Support Unit of the Office of Human Resources Management ("OHRM") responded to Ms. Tolani on the interpretation and application of Appendix B. With respect to issue no. 2 in the email of 1 May

2004 (under "Appendix B(vi)"), which is the subject matter of the present case, OHRM stated (emphasis added):

> With regard to your second question on paragraph (vi) of Appendix B, if a staff member takes a half-day off as [compensatory time off], sick leave or annual leave, the staff member would be entitled to payment of overtime for the period in excess of eight hours of work pursuant to paragraph (iv). In your example, the half-day off would count towards the regular 8-hour (or 8½ hour) work day. **Hence any work performed after the half-day of actual work would then be subject to [compensatory time off] for the first eight hours and then overtime pursuant to paragraph (vi) of Appendix B.** Similarly, if a staff member takes time off during the work week, he/she would be entitled to payment of overtime only after 40 hours (or 42.5 hours during the [General Assembly session]) have been worked. Any extra hours worked would be subject to [compensatory time off] up to the first 40 (or 42.5) hours and then overtime pursuant to paragraph (vi) of Appendix B.

December 2004 notification of the contested decision in this case

56. On 15 December 2004, Ms. Tolani sent an email to the DGACM staff representatives, senior management, and Chiefs of Units in DGACM, summarizing the advice received on 30 November 2004 with respect to the issues raised in her email of 1 May 2004. With respect to issue no. 2 raised in the email of 1 May 2004, which is the subject matter of the present case, Ms. Tolani's email stated (emphasis added):

> You will recall that on 16 March 2004, I sent an e-mail on conditions governing compensation for overtime work, in particular the use of compensatory time and payment thereof. … In response to a number of queries received and concerns raised by staff on the application and interpretation of the provisions of Appendix B of the Staff Rules, I referred the matter to the Administrative Law Unit of OHRM. Their response is summarized below.
>
> …
>
> 2. If a staff member takes a half-day off as CTO [i.e., compensatory time off], sick leave or annual leave is he/she entitled to payment of overtime for that day?

> The staff member would be entitled to payment of overtime for the period in excess of eight hours of work pursuant to paragraph (iv) [of Appendix B]. … [T]he half-day off would count towards the regular 8-hour (or 8½ hour) work day. **Hence any work performed after the half-day of actual work would then be subject to CTO for the first eight hours and then overtime pursuant to paragraph (vi) of Appendix B**.
>
> …
>
> I should be grateful if you would bring this to the attention of your staff, and in particular, your designated timekeepers.
>
> The above provisions will be applied effective 1 January 2005.

57. The Chiefs of Units subsequently transmitted this information to the staff of their respective Units.

December 2004 objections of the staff representatives

58. On 30 December 2004, Mr. Igor Shpiniov, then Coordinator, DGACM Staff Representatives' Group, sent an email to Ms. Tolani, copying the DGACM staff representatives, senior management, and Chiefs of Units in DGACM, expressing that the general reaction of staff representatives was that "of a protest and willingness to challenge some aspects of the policy" (referring to the range of issues raised in the emails of 16 March and 15 December 2004). He stated, *inter alia*, that the views of the staff representatives had not been taken into account. He concluded by requesting "not to implement the policy on 1 January 2005, in order to give staff representatives an opportunity to express their views at the next DGACM [Staff-Management Committee] in January [2005]".

59. On 30 December 2004, Ms. Tolani replied to Mr. Shpiniov, copying the Chiefs of Units in DGACM. She stated that her emails of "16 March and 15 December 2004 do not introduce any new policy but rather reiterate the application of what is already in Appendix B". She further stated: "Regrettably these provisions

may not have been consistently applied in the past. They will, however, be applied effective 1 January 2005".

January 2005 document of the Staff Council

60. On 20 January 2005, the 41st Staff Council circulated a document entitled "Administration of Leave Policy in the Secretariat". In it, the Staff Council quoted the email of 15 December 2004, stating that it was implemented effective 1 January 2005. The Staff Council further stated that "the DGACM staff representative group has requested the President of the Staff Committee to follow-up on this matter and address it to the Joint Advisory Committee" and that "the President is currently reviewing the documents on leave policy and checking with other departments to determine the manner in which they administer leave".

January 2005 email of the President of the Staff Union

61. On 26 January 2005, Ms. Rosemarie Waters, then President of the Staff Union, sent an email to Ms. Georgette Miller, one of the senior officers in OHRM, referring to "a small storm brewing in DGACM over the enforcement of the [compensatory time off] and annual leave policy" and stating that she had asked for this matter to be placed on the agenda of the Joint Advisory Committee".

January 2005 meeting of the Joint Advisory Committee

62. The records indicate that the meeting of the Joint Advisory Committee took place on 28 January 2005 and that various objections were raised at the meeting by the DGACM staff representatives. It is the Applicants' case that the staff representatives never acceded to management's interpretation at this or any other time.

2 February 2005 meeting of the Staff-Management Committee

63. On 2 February 2005, eight representatives of management (including the Under-Secretary-General, DGACM) and eleven staff representatives of DGACM

held a Staff-Management Committee, during which they discussed the policy on overtime. The conclusion reached was that the policy in place effective 1 January 2005 would continue to be implemented, but management would look into the issue further. The staff representatives stated that, any time there was a change in the conditions of service of staff, they should be consulted and "the staff had been able to ascertain that there were at least two areas" with respect to which Appendix B was not applied uniformly throughout the Organization. The minutes of the meeting do not make it clear what those two areas were, however, in all likelihood this was in reference to the following two issues: whether staff who worked less than 40 hours a week are entitled to overtime for weekends, and whether staff members may be asked to use compensatory time off before using annual leave (see minutes of 11 October 2006, listing three overtime-related issues).

March 2005 communication from OHRM

64. By note dated 21 March 2005, Ms. Miller informed the Executive Office, DGACM, that, following further review, two aspects of the practice would revert back to the pre-January 2005 situation, namely compensation for work on weekends and payment of compensatory time off in excess of 40 hours. However, all other matters, including the issue that is the subject matter of the present case, would remain as stated in the emails of 30 November and 15 December 2004. The full text of Ms. Miller's note is reproduced below:

> Please refer to the 30 November 2004 advice provided by the Policy Support Unit to your office regarding the application of the provisions of Appendix S to the Staff Rules in respect of overtime and compensatory time off (CTO) and to subsequent exchanges and discussions triggered by the objections presented by the DGACM staff representatives at the JAC [Joint Advisory Committee] meeting on 28 January 2005.
>
> The JAC has been informed that the resolution of the various issues raised by the staff representatives will require OHRM to consult with all Executive Offices at Headquarters to ascertain the

> various practices and clarify the provisions of Appendix B as necessary to facilitate uniformity of application.
>
> Pending the conclusion of that exercise, and without prejudice to its outcome, the JAC has been informed that DGACM would revert to its prior practice under which:
>
> 1. Work done on a Saturday is paid at time and a half, and work done on a Sunday is paid at double time, even if the staff member has actually worked for less than 40 hours (42.5 hours during the General Assembly) in the preceding week, due to annual leave, sick leave or days taken as CTO;
>
> 2. CTO in excess of 40 hours is paid at straight time at the time of the period review conducted every 4 months.
>
> It would be desirable if the prior practice could be restored retroactively to 1 January 2005.
>
> All other matters remain as stated in your message of 15 December 2004 regarding the policy governing overtime and compensatory time off, which was itself based on our advice of 30 November 2004,

65. On 29 March 2005, Ms. Tolani transmitted the note of Ms. Miller to the DGACM staff representatives, senior management, and Chiefs of Units in DGACM. She stated that, pursuant to OHRM's note of 21 March 2005, her email of 15 December 2004 was amended to reflect that the practice in relation to the calculation of compensation for work done on weekends was "restored retroactively to 1 January 2005", but "all other matters remain as stated in her email below".

March 2005 communication of the President of the Staff Union to OHRM

66. On 31 March 2005, Ms. Waters, the President of the Staff Union sent an email to Ms. Miller referring to DGACM's interpretation of the relevant provisions of Appendix B as "troubling" and asking whether OHRM was "supporting this interpretation". The email stated:

> It was definitely my impression that these issues would be suspended until there was a complete review by all Executive Officers. Please see below Ms. Tolani's interpretation of overtime worked during the week. Under this interpretation, if I take off 2

> hours and charge it to compensatory time, I will have to work an additional two hours in the evening before my overtime payment begins.
>
> There is something troubling about this interpretation. The compensatory time does not represent free time given to me by the Organization - which needs to be made up -- it also represents time that I worked for. The same is true if I have taken sick leave or annual leave—these are periods of time which are deducted from my own personal entitlement. Is OHRM supporting this interpretation?

April 2005 response from OHRM to the President of the Staff Union

67. On 7 April 2005, Ms. Miller replied to Ms. Waters, reiterating OHRM's position with respect to the interpretation of the relevant provisions of Appendix B and stating that OHRM had "no basis to request DGACM to change its position on the point". The email stated:

> Apologies for the delay in responding. We did not anticipate discussions to continue in the Fifth [Committee of the General Assembly] until yesterday afternoon.
>
> As mentioned at JAC, all the issues raised by the DGACM staff representatives in respect of the application of Appendix 8, as well as related issues on the same subject, will be reviewed with the Executive Officers shortly.
>
> Meanwhile, and also as indicated in JAC, DGACM will resume the practice of paying work done on a Saturday or a Sunday, regardless of whether a staff member has actually worked for less than the normal workweek, due to annual leave, sick leave or days taken at CTO.
>
> For compensation of overtime on week days, and unless the wording of Appendix 8 is changed, the controlling provision is contained in paragraph (iv) which reads, in relevant part:
>
> "Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled workday up to a total of eight hours of work on the same day … " emphasis added).
>
> Work done after the scheduled workday is compensated and credited as CTO for the hours worked after normal working hours until the total of 8 hours of work on the same day have been served. Since this is fully consistent with the wording of Appendix 8, OHRM

> would have no basis to request DGACM to change its position on the point.

April 2005 communication of the President of the Staff Union to OHRM

68. On 8 April 2005, Ms. Waters, the President of the Staff Union replied to Ms. Miller, acknowledging that "the words say 8 hours", but stating that she "believe[d] that the spirit is quite different". Her email stated:

> Thank you for reply, although, we completely disagree on OHRM's interpretation. It is true that the words say 8 hours, but we believe that the spirit is quite different. We will be meeting with the staff of DGACM and then will present a proposal which will include a change of wording in the Appendix.
>
> You will be meeting with the Executive Officers on the other matters, that is clearly understood. However, until such time as all of these matters are finalized, I do not understand the reluctance to request DGACM to suspend implementation of this new policy until such time as all issues are clear.
>
> Currently, the staff of DGACM are being treated in a discriminatory manner since there are other departments where individuals who use CTO or SL or AL for two to four hours are permitted to work overtime. Appendix B covers all staff, therefore, until such time as there is an interpretation that is being fairly and evenly applied to all staff, there should be no strict interpretation of one aspect only in one specific department against specific groups of staff.
>
> I appeal to you to reconsider OHRM's position on this matter and thank you for the amount of time you have invested in this issue.

April 2005 review of consistency of application of Appendix B among major departments

69. On 11 and 18 April 2005 meetings were held by OHRM with the Executive Offices of several Departments and Offices of the UN Secretariat to review how the provisions on overtime were applied by them. The minutes of the meetings of 11 and 18 April 2005 reflect that the meeting discussed the previously raised overtime-related matters, including, under item 2(a), the subject matter of the present case. The following departments were represented: DGACM; Department of Economic and

Social Affairs ("DESA"); Department of Management ("DM"); Office of the Coordination of Humanitarian Affairs ("OCHA"); Department of Peacekeeping Operations ("DPKO"); Department of Political Affairs ("DPA"); Office of Internal Oversight Services ("OIOS"); PSU; United Nations Joint Staff Pension Fund ("UNJSPF"); United Nations Monitoring, Verification and Inspection Commission ("UNMOVIC"); and International Civil Service Commission ("ICSC"). The minutes of the meeting state that, with respect to item 2(a) (i.e., the issue of whether time taken as compensatory time off, sick leave or annual leave should be included in the hours of work for purposes of overtime) the views of those present at the meeting "confirmed that it is the general practice to require 8 hours of actual work in a day before overtime is paid". Specifically, the meeting minutes state (emphasis added):

> Discussion
>
> 1. The Chair welcomed the participation of the numerous offices which indicated the strong interest in the subject matter. She opened the first meeting by stating the need to conduct a comprehensive review of the manner in which Appendix B to the 100 series of the Staff Rules was applied and to clarify the relevant provisions as necessary to ensure that they are applied as fairly and uniformly as possible. Reference was made to the discussion paper entitled "Appendix B – Overtime and Compensatory Time Off: Issues for discussion" which had been distributed in advance of the meeting.
>
> Item 2 (a)
>
> 2. Item 2(a) asks: "If a staff member takes a half-day off as CTO, sick leave or annual leave, and works on that day beyond the scheduled workday, will that work be compensated as CTO until the staff member has completed 8 hours of actual work on that day or as paid overtime?".
>
> 3. Sub-paragraph (iv) of Appendix B provides: "Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled workday up to a total of eight hours of work on the same day. Subject to the exigencies of service, such compensatory time off may be given at any time during the four months following the month in which the overtime takes place". Sub-paragraph (vi) provides: "Compensation shall take the form of an additional payment for overtime in excess of a total of eight hours of

work of any day of the scheduled workweek, or when it takes place on the sixth or seventh day of the scheduled workweek".

4. The participants explained the approach used in their respective offices as follows:

a. **DGACM** (Tolani) stated that *within her department, the application of Appendix B was inconsistent and this question was one of the issues that generated the most concern*. DGACM also indicated that there was a need to define "subject to the exigencies of service";

b. **DPKO** (Legaspi) said that *the spirit of payment is to compensate for hours actually wo*rked;

c. **DPA** stated that *if a person took annual leave during normal working hours, then work beyond the normal working hours would be recognized only as CTO*;

d. **DM** said there is a need to look at what is driving the need for overtime, and that these matters should be evaluated on a case-by-case basis. As a rule, *after a half-day absence followed by a half-day of work, any time after normal working hours is calculated first as CTO up to eight hours of actual work but no overtime is paid*;

e. **EOSG** [Executive Officer of the Secretary-General] said that *there would be CTO if a staff member has not worked an 8 hour day*. There is a need to place responsibility on supervisors to clearly indicate what they need.

5. In the view of many of the EOs, many of difficulties relating to overtime would be removed if supervisors were required to plan ahead when overtime will be needed.

6. The Chair stated that a case-by-case approach was problematic as it led to perceptions of inconsistency and favoritism. She conveyed the views of the staff representatives that CTO, sick leave and annual leave are earned and therefore staff should be able to exercise these forms of leave without adverse consequences. She also noted the concern that some supervisors appeared too free to demand continued presence and availability of staff, and to distribute overtime work in an uneven manner.

7. The views expressed confirmed that it is *the general practice to require 8 hours of actual work in a day before overtime is paid*.

Draft administrative instruction

70. The Applicants submit that in late 2005 and early 2006, the Administration worked on a draft administrative instruction on overtime and compensatory time, to take into account staff position, but no instruction was ever issued.

Further meetings in 2006

71. In 2006, various aspects of overtime compensation were among the issues raised and discussed at the Staff-Management Committee meetings (see, in particular, meeting minutes of 14 July 2006; 6 September 2006; and 11 October 2006). In particular, the meeting minutes of the meeting of 11 October 2006 reflect the following exchange (emphasis added):

> *Overtime compensation*
>
> 3. Mr. Bauzá [Coordinator, Spanish Translation Unit] asked whether OHRM had further considered the issue of overtime compensation since the last meeting.
>
> 4. Ms. Bhatia [Executive Office] outlined three issues involved under this subject: First, if a staff member takes half-day off as compensatory time, sick leave or annual leave, is he/she entitled to payment of overtime for that day? … With regard to the first question, *Ms. Bhatia clarified that any work performed after the half-day of actual work would be subject to CTO [compensatory time off] for the first eight hours and then overtime pursuant to the relevant paragraph of Appendix B. The Executive Office reviewed the application of this policy in the major services/sections of the Department and noted that it had been applied consistently*. If there were any areas in the Department where it has been applied differently, Ms. Bhatia suggested that the staff members or the staff representatives should bring such cases to the attention of the Executive Office. Ms. Bhatia had contacted several Executive Offices on the application of this policy and two major departments responded on its application on similar lines as DGACM. *Ms. Bhatia also stated that the new administrative instruction (ST/AI) was being prepared by OHRM which included that if a staff member takes CTO for half-day, CTO would be considered as credit for actual work on that particular day***.** Once the ST/AI is issued, the application of the revised policy on overtime payment for half-day CTO-off would be implemented in the Department.

> 5. Mr. Hassanin noted that with regard to overtime after eight hours of work in a given day, some staff members were upset by the new policy because they felt it was not being implemented Secretariat-wide, *they were not being compensated correctly, and were planning to take legal action. Until the new administrative instruction was issued, the administration should revert to the old policy on compensatory time and overtime*. He understood that there was a JAC decision to that effect.
>
> 6. Ms. Bhatia said that there had been an exchange on this subject between Ms. Rosemarie Waters (former Staff Union President) representing the staff and Ms. Georgette Miller of OHRM. *The policy being applied by the Executive Office was in line with the opinion of the Policy Support Unit of OHRM.* She requested that Mr. Hassanin share the JAC decision with her so that she could go back to OHRM for policy guidance on the matter.

72. In their closing submission, the Applicants state that "in 2007, with the new Secretary-General and with his new team of [senior officials] who were appointed throughout the year, the Applicants and [United Nations Staff Union] officials decided to respect such transition at the United Nations, and to remain patient on this issue".

Request for administrative review

73. On 16 January 2009, the Applicants' Counsel wrote to the Secretary-General and the Under-Secretary-General, DGACM, requesting a review of the "new practices on overtime and compensatory time (OT/CT) at TPUs [Text Processing Units]" on behalf of 60 staff members working in the TPU. The request for review stated that this "unilatera[l] change [to] the UN policies and interpretation" was introduced by the Administration effective January 2005. The request for review stated:

> **Ref: Request for Administrative Review and Management Evaluation of New Practices on Overtime and Compensatory Time (OT/CT) at TPUs and for Reimbursement**
>
> On behalf of Text-Processing Units (TPUs) staff members whom I represent as legal counsel (listed in attachment), I am requesting an Administrative Review and Management Evaluation of

> the Administration's new OT/CT practices applied to them and reimbursement of their unpaid OT/CT for the last 12 months.
>
> In January 2005, the Administration decided to unilaterally change the UN policies and interpretation governing computation and payment of weekdays and weekends' overtime, as well as of compensatory time for [General Service] staff members employed at TPUs. On 21 March 2005, following TPUs staff protests, the Administration reverted to earlier policies for weekends' computation, but maintained for weekdays a novel, and unfair interpretation for OT/CT, under which the Department disregards the TPUs staff members' statutory time taken on 1/2 sick leave, or 1/2 annual leave or on CT, before allowing them to become eligible for OT.
>
> The 2005 Department's decision on OT/CT computation practices has never been discussed, promulgated and published in accordance with internal UN legislation (ST/SGB/1997/11). The Department's decision violates the letter and spirit of Staff Rules (Appendix B), constitutes discrimination towards TPUs staff, and it deviates from the OT/CT policies elsewhere in the Organization. This decision to change OT/CT policies and practices creates anxiety, frustration and stress at work for TPUs staff, and is compounded by the additional workload imposed on them by a 20% reduction of TPUs personnel in recent months. Your confirmation is requested that the policy will be rectified and of my clients' reimbursement of their unpaid OT/CT.

Response to the request for administrative review

74. On 25 March 2009, the Chief of the Human Resources Policy Service, OHRM, replied to the Applicants, describing their communication as a "request for review of policy on granting overtime in TPU/DGACM" and stating that the rules, as clarified and applied since November 2004, were correct, namely that a staff member "must have actually worked eight hours before becoming eligible for payment of overtime". The letter stated:

> I refer to your letter of 16 January 2009 addressed to the Secretary-General and to the Under-Secretary-General for General Assembly and Conference Management in which you contend that, in January 2005, the administration "unilaterally" changed the UN policies and interpretation of the rules concerning payment of overtime for work in excess of eight hours in a scheduled workday. You further contend

that such interpretation has not been promulgated in any administrative issuance.

As we understand it, the interpretation you refer to is contained [in] a ruling issued by OHRM on 30 November 2004, which reads:

> "With regard to your second question on paragraph (vi) of Appendix B, if a staff member takes half-day off as CTO, sick leave or annual leave, the staff member would be entitled to payment of overtime for the period in excess of eight hours pursuant to paragraph (vi). In your example the half-day off would count towards the regular 8-hour (or 8 and 1/2 hour) workday. Hence, the work performed after the half-day of actual work would then be subject to CTO for the first eight hours and then overtime pursuant to paragraph (vi) of [A]ppendix B".

This interpretation stems from the wording of sections (iv) and (vi) of Appendix B to the Staff Rules on compensation for overtime:

> – section (iv) of Appendix B provides, in relevant part, that: "Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled workday up to a total of eight hours of work on the same day;"
>
> – section (vi) of Appendix B provides, in relevant part that: "Compensation shall take the form of an additional payment for overtime in excess of a total of eight hours of work of any day of the scheduled work week …"

Therefore, section (iv) refers to the scheduled workday for the purposes of granting compensatory time off, while section (vi) refers to the hours actually worked for the purposes of overtime payment. In other words, in order for a staff member to be eligible for payment of overtime, he or she must actually work eight hours on a given day.

For example, if a staff member's scheduled workday is from 9 to 5 pm, and she/he is required to work until 11 pm, she/he will be entitled to compensatory time off for the work performed from 5 to 6 (i.e., work in excess of the scheduled workday up to eight hours of work) on that day, and then payment of overtime for the work performed from 6 to 11 pm (additional work performed after having actually worked eight hours).

Similarly, if on a day when a staff member is required to work until 11 pm, she/he takes time off (either annual or sick leave, or CTO) from 9 am to l pm and starts working at 1 pm, she/he will be entitled to compensatory time off for the work performed from 5 pm to 9 pm

> (work in excess of the scheduled workday up to eight hours of work) and then to payment of overtime for the work performed from 9 to 11 pm (additional work performed after having actually worked eight hours).
>
> In summary, for the purposes of granting CTO, the point of reference is the scheduled workday, irrespective of whether a staff member has taken time off during the day. However, the staff member must have actually worked eight hours before becoming eligible for payment of overtime. This is the interpretation which is consistent with sections (iv) and (vi) of Appendix B to the Staff Rules, as clarified by OHRM in November 2004 and applied by DGACM ever since.
>
> With respect to the contention that no administrative issuance explains the content of Appendix B, it is our view that paragraph (vi) of Appendix B clearly states that compensation shall take the form of additional payment only after eight hours have been actually worked.

Request for an extension of time to file with the Joint Appeals Board

75. On 21 May 2009, the Applicants filed a request for an extension of time of two months to file an appeal with the former Joint Appeals Board in New York. However, the Joint Appeals Boards were abolished effective 30 June 2009, with the introduction of the new system of administration of justice.

Initiation of proceedings before the Tribunal

76. On 29 July 2009, the Applicants requested an extension of time to file their application with the Dispute Tribunal. The extension of time was granted by Order No. 60 (NY/2009), dated 7 August 2009.

77. On 20 August 2009, the Dispute Tribunal received the present application, which was dated 19 August 2009.

Administration's memorandum of 22 September 2009

78. On 22 September 2009, after the present proceedings before the Tribunal had commenced, Ms. Pollard, Assistant Secretary-General for Human Resources Management, issued a memorandum addressed to "All Departments and Offices in

Headquarters" stating that "it has come to [her] attention that there may be some misunderstandings regarding the application of the Organization's provisions regarding compensation for overtime at Headquarters". She proceeded to "clarify the proper application of paragraphs (iv) and (vi) of the former Appendix B" regarding compensation to be provided when a staff member takes half-day off as compensatory time off, annual leave or sick leave and works on that day beyond the scheduled workday. Ms. Pollard stated that the provisions of Appendix B continue to apply and will be incorporated into an administrative instruction that was being prepared. She explained that "with respect to overtime payment, the staff member must have actually worked eight hours before becoming eligible for such payments" and included several examples. Specifically, the memorandum stated:

> 3. We note that paragraph (iv) refers to the scheduled workday for the purpose of granting compensatory time off; while paragraph (vi) refers to the hours actually worked for the purposes of overtime payment. In other words, in order for a staff member to be eligible for payment of overtime, he or she must actually work eight hours (or eight and a half during the General Assembly) on a given day.
>
> …
>
> 6. In summary, for the purposes of granting [compensatory time off], the point of reference is the scheduled workday, irrespective of whether a staff member has taken time off during the day. However, with respect to overtime payment, the staff member must have actually worked eight hours before becoming eligible for such payments.

Consideration

Issues for consideration

79. This matter was remanded "for further proceedings" before the same Tribunal, unlike the case of, for example, *Wishah* 2013-UNAT-289, in which the UNAT annulled the judgment of the UNRWA DT ["Dispute Tribunal of the United Nations Relief and Works Agency"] and remanded the case "for a *de novo* trial, before a different UNRWA DT Judge".)

80. In light of the Judgment No. 2011-UNAT-185, and following the case management discussion, the following issues were raised for consideration by the Tribunal:

a. Scope of the case, jurisdiction of the Tribunal, and receivability of the claims raised;

b. Issues for consideration on remand:

i. Practice within DGACM with respect to the relevant overtime rules prior to December 2004;

ii. Whether the overtime rules and policy were changed in DGACM in December 2004;

iii. Consultation;

iv. Legitimate expectation and acquiescence;

v. The practice of granting overtime through the UN and consistency of interpretation;

c. Interpretation of the relevant provisions of Appendix B, in view of the evidence produced;

81. The Tribunal will consider each of the issues above in turn.

Scope of the case, issues of jurisdiction and receivability

The contested decision

82. In his closing submissions, the Applicants asserted that "the Tolani 2004 email was a general announcement, but did not yet constitute a valid decision amending the previous long-standing DGACM practice on what constituted 'actual' workday" and that, although the Applicants subsequently received their salary pay

slips, these "gave only computation results, but not the actual rationale for such computations nor the new OHRM amendment". The Applicants submit that they were awaiting the promulgation of a new administrative instruction and that further delay in filing their administrative review request was due to the "change-of-the-guard at the UN" in January 2007, when a new Secretary-General entered on duty and "[a]ll staff members understood that the new SG team was going through a transition and needed time to take action on the promulgation of the ST/AI".

83. As stated previously by the Appeals Tribunal, an applicant may not unilaterally determine the date of the administrative decision" for the purpose of challenging it (*Rosana* 2012-UNAT-273, para. 24). An applicant also may not put forward contradictory assertions regarding the contested decision he or she seeks to contest. The date of an administrative decision is based on objective elements that both parties can accurately determine (*Rosana* 2012-UNAT-273, para. 25).

84. The Appeals Tribunal has also clarified that for the statutory time limits to start to run, the relevant date is the date on which the staff member was informed of the decision, and not when he/she realized or was provided with a reasonable belief that there were grounds to request management evaluation (*Rahman* 2012-UNAT-260).

85. Through the entire proceedings, including in their own submissions, the Applicants have consistently asserted that the contested decision is that of 15 December 2004, which introduced the "unilatera[l] change [to] the UN policies and interpretation" effective "January 2005" (see their request for administrative review). This was confirmed at the hearing on the merits—for instance, Ms. Hassan-Bodo testified that she informed her staff immediately of the change in practice, and Ms. Diaz testified that she was also notified of the change in practice at the time it was introduced. Furthermore, not only was there a general circulation and announcement concerning the change, but since January 2005, each Applicant was receiving regular paychecks reflecting the implementation of this policy each month.

This decision was reiterated on numerous occasions in the following months. When the staff representatives raised the matter subsequently with the Administration in various meetings and communications, the Administration's response was that the policy would remain in place. Those communications reiterating that the policy would be maintained do not, in the words of the Appeals Tribunal, "re-create for the [Applicants] the right to challenge it through management evaluation or before the [Tribunal]" (*Rabee* 2013-UNAT-296).

86. The Applicants stated in their closing submissions that, as there were ongoing discussions in and around 2006 between DGACM representatives and the Administration regarding a draft administrative instruction on overtime, the time for filing their application did not start to run until sometime in 2008.

87. The Tribunal finds this submission unpersuasive. Firstly, no evidence has been produced by the Applicants that, after January 2005, the Administration made a binding promise to revert to the pre-2005 practices in DGACM (including by providing retroactive compensation) with respect to the issue of non-inclusion of compensatory time off, annual leave, and sick leave in the eight hours of work required for overtime payment. To the contrary, the decision to maintain the decision not to include compensatory time off, annual leave, and sick leave in the eight hours of work required for overtime payment was reiterated by OHRM on 21 March 2005, and communicated on 29 March 2005 to DGACM staff representatives, senior management, and Chiefs of Units in DGACM. It was reiterated again on 7 April 2005 to the President of the Staff Union, as well as in subsequent meetings, including meetings of the Staff-Management Committee (see, in particular, meeting of 11 October 2006).

88. Secondly, any such draft instruction certainly could not overwrite the provisions of Appendix B, which was part of the Staff Rules. Administrative instructions have inferior legal authority compared to the Staff Rules and may only explain and elaborate on them without contradicting their provisions (*Korotina*

UNDT/2012/178). The kind of change envisaged by the Applicants would have required a revision to Appendix B. (See, for instance, email of 8 April 2005 from the President of the Staff Union to Ms. Miller, acknowledging that "a change of wording in the Appendix" was needed.) There is, however, no record that any changes to Appendix B were even contemplated. Further, the issue of legal hierarchy aside, any administrative instruction on the issue of overtime could not have retroactive effect, but could only be applicable to future calculation of overtime.

Jurisdiction under art. 8.4 of the Statute (three-year cap)

89. In paragraphs 19–21 of Judgment No. UNDT/2010/206, the Dispute Tribunal held that the claims against the policy introduced in December 2004 were time-barred, and the Tribunal sees no reason to depart from that finding. It is established jurisprudence of the Dispute Tribunal and of the Appeals Tribunal that, for an application to be receivable, an applicant must adhere to the various time limits provided for in the Staff Rules and in the Dispute Tribunal's Statute, and that the Tribunal will strictly enforce those time limits (*Romman* 2013-UNAT-308, *Mezoui* 2010-UNAT-043).

90. In particular, the Dispute Tribunal cannot waive the time limits beyond a three-year period after the Applicants' receipt of the contested administrative decision. The relevant part of art. 8 of the Statute of the Dispute Tribunal reads as follows:

> 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.

91. As stated in *Belhachmi* UNDT/2012/051, art. 8.4 of the Statute "does not allow for any discretion, and must be applied strictly. When a claim is filed three years or more after the date [on which] the cause of action arose, the Tribunal has no discretion or power to address the issue of time extension. Article 8.4 of the Statute of the Tribunal clearly prohibits consideration of a claim that is filed three years or more from the date of the cause of action". Article 8.4 was applied by the Dispute Tribunal and the Appeals Tribunal in a number of cases (see *Borg-Olivier* 2011-UNAT-146; *Bangoura* 2012-UNAT-268; *Reid* 2013-UNAT-389; *Omwenga* UNDT/2012/087; *Munuve* UNDT/2013/137).

92. The underlying cause of action in this case—the notification of the change in policy—arose and was notified in December 2004, with implementation effective 1 January 2005, and the Applicants' request for administrative review was filed on 16 January 2009, more than four years later. Article 8.4 of the Statute of the Tribunal clearly prohibits consideration of a claim that is filed three years or more after the notification of the contested decision. Such claims "shall not be receivable". Therefore, the Tribunal finds that it lacks jurisdiction, pursuant to art. 8.4 of its Statute, to consider the lawfulness of the change that went into effect on 1 January 2005.

Filing of the request for administrative review

93. Even if not for art. 8.4 of the Statute, the Tribunal would still be precluded, under art. 8.3 of its Statute, from adjudicating whether the change in policy on 15 December 2004, with effect from 1 January 2005, was lawful.

94. The UNAT has consistently reiterated that the Dispute Tribunal does not have the authority to suspend or waive the deadlines for requests for management evaluation and administrative review (see *Costa* 2010-UNAT-036; *Ajdini et al.* 2011-UNAT-108; *Muratore* 2012-UNAT-191). The Applicants, at the material time, were required to file their request for administrative review within two months from the date of notification of the decision. Having filed their request for administrative

review more than four years after being informed of the change in policy, the claims are time-barred.

95. Further, even if the Dispute Tribunal had the power to suspend or waive the deadlines for the requests for administrative review, the only explanation offered by the Applicants for the delay was that they were waiting in good faith upon management to come back to them and implying that some former staff representatives failed to "come through". These considerations, however, do not constitute exceptional circumstances precluding the Applicants from challenging the changes introduced effective January 2005. The Tribunal finds that the Applicants have offered no exceptional circumstances to explain the delay in filing their request for administrative review.

96. Therefore, the Tribunal finds that, pursuant to art. 8.3 of its Statute, it has no jurisdiction regarding the lawfulness of the change in policy announced on 15 December 2004 and implemented effective 1 January 2005.

Effect of former staff rule 103.15

97. The Applicants referred to former staff rule 103.15, which provided that a staff member who has not received an allowance, grant, or other payment to which he or she is entitled, shall not receive it retroactively unless a written claim was filed within one year following the date on which the staff member would have been entitled to such payment. Former staff rule 103.15 stated:

> **Rule 103.15**
>
> **Retroactivity of payments**
>
> A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:
>
> (i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;

> (ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.

98. The Applicants submit, in effect, that they are entitled at least to overtime claims in the year preceding the filing of their administrative review request, i.e., starting 16 January 2008.

99. The Respondent submits that staff rule 103.15 is not applicable in the context of proceedings before the Tribunal, because this rule concerns payments to which staff members are entitled to, which requirement is not satisfied in this case. Further, the Respondent states that if the Applicants wanted to formally contest their monthly pay slip amounts relating to overtime, they should have requested administrative review within a two-month period of each pay slip.

100. The Applicants interpretation of staff rule 103.15, even if accepted, would not affect the findings regarding receivability and jurisdiction with respect to the contested change in policy on 15 December 2004, effective 1 January 2005. The three-year cap under art. 8.4 of the Statute, which is higher in authority than a staff rule, is an absolute statutory bar. Thus, even if the Tribunal were to accept that the Applicants may claim salary back to 16 January 2008 (i.e., one year prior to the date of their request for administrative review), it would not affect the three-year statutory cap with respect to the change that went into effect on 1 January 2005. At most, staff rule 103.15 could be raised at the stage of relief, should the Tribunal consider how far back the Applicants could go in claiming any underpaid salary amounts.

Conclusion on receivability, jurisdiction, and scope of the case

101. It follows that the Tribunal has no jurisdiction to consider the Applicants' challenge to the change announced in December 2004, effective 1 January 2005. As stated in Judgment No. UNDT/2010/206 in paras. 19–21, the present application is only receivable with respect to the *subsequent application* of the policy on overtime in the relevant period immediately prior to the request for administrative review in

January 2009, which the Tribunal examines in paras. 130–137 below. Notably, as the Applicants correctly point out, this finding in Judgment No. UNDT/2010/206 was not appealed by either party and no criticism of it was expressed by the Appeals Tribunal.

102. However, in light of the Appeals Tribunal's decision to remand the case "for further proceedings", the Tribunal examined the issues raised by the Appeals Tribunal as issues of potential relevance. The Dispute Tribunal's findings are provided below, under the relevant subheadings.

Issues considered on remand

Practice within DGACM with respect to the relevant overtime rules prior to 1 January 2005

103. The evidence indicates that, in the years prior to 2004, the Text Processing Units in DGACM developed a practice whereby they applied Appendix B inconsistently with the Respondent's interpretation of secs. (iv) and (vi) of the Appendix and with its application by the other departments in the Secretariat. This was confirmed by the oral testimony, including that of Ms. Hassan-Bodo and Ms. Diaz. It is unclear how this practice arose, but it is safe to assume that due to the nature of the work performed, particularly during the busy General Assembly sessions, on a continuous rotating and sometimes mandatory overtime basis this practice evolved and staff were paid accordingly. Despite a number of directions issued by the Administration in 1990s, it appears that this practice continued for more than a decade, although the parties were unable to demonstrate to the Tribunal the exact date on which it commenced or who authorized it. Mr. Hassanin testified that attempts were made in or about 1998 to change the policy, but after further consideration management decided not to change it at the time.

104. Contemporaneous records as well as witness testimony (Ms. Nadres, Ms. Chiulli) demonstrate that, with respect to the issue that is the subject matter of this case, various departments in the Organization have been applying Appendix B in

a manner consistent with the Respondent's interpretation of Appendix B and distinct from the practice in DGACM, which explains the changes in DGACM, introduced by the email of 15 December 2005.

105. In their closing submissions, the Applicants suggested that the testimony of witnesses, including Ms. Nadres, was that when staff members in departments other than DGACM took half-a-day off as sick leave or annual leave, and were required to work overtime, the time taken off was counted towards the eight hours of work.

106. However, Ms. Chiulli testified that other offices in the United Nations Secretariat have generally adhered to the same application of overtime policy. She further testified that this application of the system is currently applied consistently throughout DGACM.

107. Ms. Nadres testified that, when she worked in the Executive Office in what is now the Department of Safety and Security ("DSS") in January 2005 to November 2009, there was every effort to avoid overtime, but when it occurred, eight hours of work—excluding sick leave, annual leave, and compensatory time off—were required before overtime would be paid. She further testified that, when she worked in the Executive Office of DM (1992 to 2005), eight hours of work were also required before overtime would be paid. Ms. Nadres stated that "the payment of overtime would happen when they have worked the eight hours" and they could not use compensatory time off toward the eight hours of work. Ms. Nadres stated that although some departments have varying practices with respect to the payment of the balance of compensatory time off when staff members separate, her experience was that staff members have to work eight hours before additional overtime payment.

108. Although the Applicants alleged that departments other than DGACM had practices similar to that of DGACM with respect to the issue in question, no specific evidence was led on this. The evidence indicates that there were some differences within the United Nations in overtime-related practices, which are not the subject

matter of the present case, such as compensation for work on weekends and payment of compensatory time off in excess of 40 hours. However, with respect to the issue before the Tribunal in this case—whether time taken on annual leave, sick leave, or compensatory time off should be included when calculating the eight hours of work required for additional payment for overtime—no firm evidence of any specificity has been provided to the Tribunal that other departments (and which departments in particular) followed the pre-2005 practice of DGACM.

109. Based on the minutes of the meetings of 11 and 18 April 2005, it appears that DGACM was the only department with units applying secs. (iv) and (vi) of Appendix B inconsistently with other departments. According to the minutes, the general consensus expressed at the meeting (which was also attended by the Executive Officers of DESA, OCHA, OIOS, PSU, UNJSPF, UNMOVIC, and ICSC) was that it is the general practice "to require 8 hours of actual work in a day before overtime is paid". During the meetings of 11 and 18 April 2005, the Executive Officers of DPKO, DPA, DM, and EOSG stated that the spirit of payment is to compensate for hours actually worked and that if a half-day absence is followed by a half-day of work, any time after normal working hours is calculated first as compensatory time off up to eight hours of actual work but no overtime is paid.

110. The evidence indicates that the large number of overtime hours billed by DGACM prompted the Administration to look closer at overtime practices in DGACM. According to Ms. Chiulli, in year 2000 alone, DGACM paid for over 200,000 hours of overtime. Through various measures aimed at reducing the number of overtime hours, it was reduced by 90 per cent by 2010. Ensuring compliance with the provisions of Appendix B was one of these measures, and reorganizing the sessions of the General Assembly another.

111. Thus, the Tribunal finds that, prior to 2005, at least some of the units in DGACM, for reasons that cannot be conclusively established, developed a long-standing practice with respect to how time taken off should be counted for

the purposes of overtime payments that was not in line with the practices of other departments in the Organization. It was also not in line with the language of Appendix B, as explained above.

Whether the overtime rules and policy were changed in DGACM in December 2004 (effective 1 January 2005)

112. On the evidence before it, the Tribunal finds that there was a change in the application of Appendix B in DGACM. Specifically, the decision to discount annual leave, sick leave, and compensatory time off as part of actual work time ("hours of work") for overtime payment was implemented effective 1 January 2005 and applied consistently thereafter, including to this day. This change was notified to the staff members of DGACM by email of 15 December 2004 and applied effective 1 January 2005.

Issue of consultations

113. The general tenor of the Applicants' evidence was that there was no proper consultation process regarding the changes introduced effective 1 January 2005. The Applicants submit that the Administration failed to hold proper consultations in connection with the change applied starting January 2005. The Respondent submits that Appendix B was not a new policy, and no consultations were required for DGACM to correct its erroneous implementation of Appendix B. The Respondent further states that, despite no requirements to consult, such consultations were carried out.

114. As the Dispute Tribunal explained in *Gatti et al.* Order No. 126 (NY/2013), meaningful consultation process involves consultations that are carried out in good faith and generally before a final decision has been made, so that staff members concerned have a proper opportunity to be heard (*Chattopadhyay* UNDT/2011/198; *Bauzá Mercére* UNDT/2013/011). Among the goals of the consultation process is ensuring that staff members have a say in the process, that they receive proper notice, and that their interests and views are taken into consideration (*Allen*

UNDT/2010/009; *Adundo et al.* UNDT/2012/118; *Bauzá Mercére* UNDT/2013/011). Consultations are not the same as negotiations (*Rees* UNDT/2011/156). When carrying out consultations, it is not necessary for the Administration to secure consent or agreement of the consulted parties to satisfy the requirement of consultation (*Rees* UNDT/2011/156; *Gehr* UNDT/2011/142; *Adundo et al.* UNDT/2012/118).

115. Due to the drastic change of a long-established practice, on the basis of erroneous interpretation, the Administration should have exercised caution in how the matter was handled prior to the decision circulated on 15 December 2004. As stated in sec. 4 of ST/SGB/274 (Procedures and terms of reference of the staff management consultation machinery at the departmental or office level), issues subject to consultation at the departmental or office level include "matters affecting staff welfare", "direct application of the Staff Rules … including the implementation at the departmental or office level of policies and recommendations … bearing on the welfare of the staff". The changes introduced effective 1 January 2005, having drastic consequences for staff and pertaining to the long-standing practice, required a meaningful consultation process. Regrettably, the evidence regarding the consultation process is mostly in the form of documents before the Tribunal. Ms. Tolani has retired and was not available to give evidence. The evidence purported to be given by Mr. Keya was at best a summary of assumptions that he gleaned from the written documents. There is certainly a justifiable sense of dissatisfaction among the Applicants that no proper consultation process was carried out. This was corroborated by Mr. Hassanin, who was the United Nations Staff Union's Second Vice-President, who stated during his testimony that, in his view, the communications that transpired in the period of 2004 to 2006 did not amount to a proper consultation process. Furthermore, the Applicant's contend that Ms. Tolani did not have the delegated authority to effect such a drastic change.

116. However, the Tribunal finds that, following the protestations from the staff representatives, the Administration remedied the lack of prior consultation process,

at least in part, by the subsequent discussions held in January–March 2005. Specifically, the Administration had a written exchange of views and meetings with the staff representatives and the President of the Staff Union (see emails of November 2004–April 2005; SMC meeting of 2 February 2005; and JAC meeting on 28 January 2005). Notably, following these consultations, the Administration reverted back to the pre-January 2005 practice regarding the calculation of compensation for weekend work, but, with regard to the contested decision in this case—the treatment of compensatory time off, annual leave, and sick leave—decided to continue enforcing the January 2005 change. The change with respect to the weekend calculations indicates that the consultations were not a perfunctory exercise but were meaningful and that the views of staff representatives were taken into account.

117. In the final analysis, however, although in the circumstances of this case consultation process was warranted and could have been organized earlier, it is highly doubtful, in view of all the factors involved, that the outcome with respect to the issue in question would have been any different. Consultations are not negotiations, and it is not necessary for the Administration to secure consent or agreement of the consulted parties. On the evidence before it, the Tribunal finds that the Respondent had a valid policy and legal rationale for bringing the inconsistent application within DGACM in line with the terms of Appendix B and with the practices of other departments.

Issue of legitimate expectation and acquiescence

118. The Applicants submit that the old practice in DGACM was more favourable to them, and the change introduced effective 1 January 2005 negatively affected their entitlements and well-being. The issue therefore arises as to whether the Applicants had a legitimate expectation for continuation of the pre-2005 practice (see also the concurring opinion of Judge Courtial in Judgment No. 2011-UNAT-185).

119. As the Dispute Tribunal stated in *Candusso* UNDT/2013/090, a contract of employment is consensual and, generally, once the parties have agreed to the terms, neither party may unilaterally amend them unless the original contract provides for certain agreed variations. In terms of fairness and reasonableness, an employer may only vary the terms and conditions of employment if there is a valid reason for the change in the conditions of employment and the change must be brought about through a fair procedure. In other words, the variation must be based on a rationalization of an economic, technical or structural nature, and, procedurally, the employer must consult or negotiate depending on the nature of the change in the terms and conditions.

120. However, there may be situations where the employee consents to the variation, including through a waiver of a right (i.e., an express or implied abandonment of a right) (*Candusso* UNDT/2013/090). Waiver in simple terms means that one of the parties by his words, actions or inaction, has evinced an intention not to enforce one or more of the rights conferred by his contract. Consent to the variation need not be express, and silence coupled with tacit acquiescence in the change may stop the parties from later denying the legality of the variation. If not expressly waived, a right may be impliedly waived by acquiescence or conduct that is inconsistent with the enforcement of the right on the part of the party entitled (*Egglesfield* UNDT/2013/006). A party to a contract may also be deemed to have waived his rights if it does not act within a reasonable time.

121. The change in the application of Appendix B was notified to the staff of DGACM in December 2004 and went into effect on 1 January 2005 and has been thereafter applied consistently and uniformly. The Applicants formally challenged it only on 16 January 2009, more than four years later. The Tribunal finds that, to all intents and purposes, the Applicants acquiesced to the change by not seeking to formally challenge it for over four years after its introduction.

122. The Applicants submit that their delay in contesting it was due to their waiting for a new administrative instruction on the issue and their decision, when the new Secretary-General assumed office in 2007, "to respect such transition [in senior leadership], and to remain patient on this issue". Mr. Hassanin also explained in his evidence that as there was a new regime in the Secretary-General's office, the staff waited in good faith for feedback and on the promise that a new administrative instruction was under consideration.

123. As explained above in paras. 87–88, the Tribunal does not find that the circumstances in this case warranted a delay in challenging the change that went into effect on 1 January 2005. The Tribunal finds that, not having challenged the change in practice, the Applicants have acquiesced to it. The testimony of Ms. Diaz, staff member in the Spanish Text Processing Unit, was notable in this regard. She testified that prior to December 2004, time taken off was counted as part of the eight hours of work needed for paid overtime to commence. She testified that, in December 2004, she was informed by her supervisor that time taken off would no longer be counted as actual work, as stated in the email December 2004. Ms. Diaz testified that she personally was not consulted prior to it being introduced. Ms. Diaz testified that, when she learned of the change in December 2004, she and her colleagues disagreed with it, and discussed it within their units. She stated that, in the period of 2004 and 2009, she and her colleagues waited in the hope that the Administration would revert to the old practice, but did not hear from the Administration or the staff representatives. She explained that they filed a request for administrative review in 2009, more than four years after the decision was notified to them, because this was when Ms. Leboeuf approached the staff of DGACM and proposed to file a case in the name of all Text Processing Units. Ms. Diaz testified that the staff of DGACM between December 2004 and January 2009 had staff representatives, but she did not recall discussing the issue with them.

124. With regard to any claims of legitimate expectation, the Tribunal notes that such expectation can be created either through the application of a regular practice or

through an express promise (*Candusso* UNDT/2013/090). Legitimate expectations may result in the creation of an enforceable legal right, although the application of the doctrine is subject to a number of qualifications (see *Sina* UNDT/2010/060 (affirmed on liability in *Sina* 2010-UNAT-094), *Zuñiga Rojas* UNDT/2010/218).

125. The Applicants contend that the long-established practice created rights or at least an expectation on their part. However, not only must the expectation be "legitimate" or have some reasonable basis, the fulfillment of the expectation must lie within the powers of the person or body creating the expectation. Furthermore, a decision that has the effect of taking away such an expectation must be shown to have been unfair, not merely adverse to the interests of the individual, and considerations of public policy could override an individual's legitimate expectations in appropriate circumstances.

126. There is no evidence that the manner in which DGACM applied the relevant provisions on overtime prior to January 2005 was accepted by the Administration as the proper interpretation of Appendix B. Further, if any legitimate expectation was indeed taken away, the Respondent had a valid policy and legal rationale for bringing the application of Appendix B within DGACM in line with that of other departments and offices, provided, as it appears, that due regard was taken of the peculiarity and nature of the work conducted at DGACM, and to ensure that the rules on overtime are properly enforced without detriment to the valid health considerations that underpin overtime policies.

127. Further, the Tribunal finds that, in the present case, any claims for legitimate expectation have been compromised by the late challenge to the change introduced effective January 2005. Having acquiesced to the change for a protracted period of time without formally contesting it, the Applicants cannot reasonably sustain a claim of legitimate expectation. As stated in *Sina* UNDT/2010/060 (affirmed on liability in *Sina* 2010-UNAT-094), legitimate expectation giving rise to contractual or legal obligation occurs where a party acts in such a way, by representation, by deeds or

words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and the other party does so. The Applicants having waited for more than four years to raise a formal challenge, the Respondent was entitled to conclude that there was no longer any claim of right to the *status quo ante*.

128. The Tribunal finds that, having waited for more than four years to formally challenge the change in practice that was introduced effective 1 January 2005, the Applicants acquiesced to it and cannot rely on a claim of legitimate expectation. Further, if any legitimate expectation was indeed taken away, the Respondent had a valid policy and legal rationale for bringing the application of Appendix B within DGACM in line with that of other departments and offices.

The practice throughout the UN and consistency of interpretation

129. On the evidence available in this case, the Tribunal finds that the relevant rules on overtime have been interpreted consistently throughout the offices and departments of the Secretariat. It should be noted that it is conceivable that, in principle, duty stations may have different overtime rules, but this in itself would not necessarily be unlawful as the rules on overtime for General Service staff may differ among duty stations in line with the Flemming Principle, which provides that conditions of service for the locally recruited staff are to be determined by reference to the best prevailing local conditions of service among other employers in the locality. The application of the Flemming principle was affirmed by General Assembly in its resolution 47/216 (United Nations common system: report of the International Civil Service Commission) (see sec. III).

Interpretation of the relevant provisions of Appendix B

130. The parties agree that, at the material time, Appendix B was part of the former Staff Rules and governed the rules on overtime at the United Nations Headquarters. However, the parties disagree with respect to the correct application of

Appendix B, and whether the pre-January 2005 practice in DGACM should be reinstated. Appendix B to the former Staff Rules states (emphasis added):

> **Conditions governing compensation for overtime work**
>
> Pursuant to staff rule 103.12, staff members in the General Service category or in the Trades and Crafts category who are required to work overtime at Headquarters shall be given compensatory time off or may receive additional payment in accordance with the following provisions:
>
> (i) Overtime at Headquarters means time worked in excess of the scheduled workday or in excess of the scheduled workweek or time worked on official holidays, provided that such work has been authorized by the proper authority.
>
> **(ii) The scheduled workday at Headquarters means the duration of the working hours in effect at the time on any day of the scheduled workweek, less one hour for a meal.**
>
> …
>
> **(iv) Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled workday up to a total of eight hours of work on the same day. Subject to the exigencies of service, such compensatory time off may be given at any time during the four months following the month in which the overtime takes place.**
>
> …
>
> **(vi) Compensation shall take the form of an additional payment for overtime in excess of a total of eight hours of work of any day of the scheduled workweek, or when it takes place on the sixth or seventh day of the scheduled workweek.**

131. Having examined the evidence following the remand of the case, and having taken cognizance of the issues raised by the Appeals Tribunal, the Dispute Tribunal sees no reason to depart from its original interpretation of secs. (iv) and (vi) of Appendix B as stated in Judgment No. UNDT/2010/206. The Tribunal notes, with respect to the Appeals Tribunal's Judgment No. 2011-UNAT-185, that save to elude to lack of clarity or ambiguity in the language of the English text of Appendix B, the majority expressed no criticism of such interpretation, and indeed his Honour Judge

Courtial endorsed the Dispute Tribunal's interpretation in his concurring opinion, as "the most in line with the terminology used, most notably when read in French".

132. The "scheduled workday" is the duration of the working hours in effect at the time on any day of the scheduled workweek, less one hour for a meal. Work *in excess of the scheduled workday* and *up to eight hours of work* throughout the entire day is compensated in the form of an equal amount of compensatory time off (Appendix B, sec. (iv)). Work *in excess of a total of eight hours* of any day is compensated in the form of an additional payment (Appendix B, sec. (vi)).

133. Does "work" within the meaning of secs. (iv) and (vi) of Appendix B include time off? There is a plain distinction between *working*—which requires being on duty and performing work functions—and taking time *off* work. Sick leave, annual leave, or compensatory time *off* are authorized absences from work, permitting staff to be absent from work and to not perform one's duties (that is, to be *off* work), while still being a staff member. See, for example, ST/SGB/2002/1 (Staff Rules), staff rule 106.2(a), stating that sick leave applies when staff members "are unable to perform their duties [i.e., to work] by reason of illness or injury or whose attendance at work is prevented by public health requirements"; ST/AI/1999/13 (Recording of attendance and leave), discussing in sec. 3.1 the rules for the calculation of "absence from work"; ST/AI/2005/2 (Family leave, maternity leave and paternity leave), discussing in secs. 6.1–6.4 and 10.5, *inter alia*, "absence" from work, "return to duty" and "return to work"; and ST/AI/2005/3 (Sick leave), drawing a distinction in sec. 3.4 between working and being on leave.

134. Thus, time spent on annual leave, sick leave, or compensatory time off is not included in the actual work time ("hours of work"). For a staff member to be eligible for *a payment* for overtime, he or she must have actually worked more than eight hours that day, *not* including time taken off, because sec. (vi) of Appendix B refers to the hours of work, not to the scheduled workday. Thus, if a staff member takes half-day off (for example, 9 a.m. to 1 p.m.) as annual or sick leave or as

compensatory time off, and works on that day beyond the scheduled workday (i.e., beyond 5 p.m.), he or she would get compensatory time off after working beyond the scheduled workday (i.e., beyond 5 p.m.) and up to eight hours of *actual* work, but he or she would start receiving payment for any additional overtime work only after having exceeded eight hours of actual work that day.

135. Further, aside from the plain interpretation of Appendix B, it is important to consider the purpose of compensatory time off, which is to provide staff with time to recoup from a period of work done outside the scheduled workday. Compensatory time off is needed for health reasons, in order to alleviate the difficult working conditions of staff who are required to work beyond the normal hours. The testimony of Ms. Hassan-Bodo, Ms. Ramirez, and Ms. Teresa Diaz highlighted some of the health-related issues, especially given that apparently overtime was mandatory in certain cases. Indeed, Ms. Ramirez poignantly testified that the situation at some stage became unbearable as many of the staff members concerned were female caregivers who were placed under tremendous strain working compulsory long hours on shift. It is imperative that adequate period of rest be given to recover from the earlier period of labour beyond eight hours in a given workday. It is instructive that as a result, the General Assembly subsequently refrained from having weekend and long nightly sessions.

136. The Applicants state that, because compensatory time was earned by working, it should be counted as part of working hours (actual work) for the purposes of calculating eight hours of work after which paid overtime starts. This submission is misguided. Compensatory time off is *earned* by working beyond the normal hours of work, up to eight hours of actual work in a given workday, when overtime payments start. When compensatory time off is used, it is considered authorized absence from work, not actual work. When a staff member is absent from work on compensatory time off, he cannot be considered as being at work and performing actual work. The actual work through which this compensatory time off was accrued had been *performed previously*, when the staff member was working

beyond the normal working hours, for which he was compensated in the form of compensatory time off.

137. Therefore, the Tribunal finds it has no reason to depart from its original decision that the correct interpretation of secs. (iv) and (vi) of Appendix B is that, for a staff member to be eligible for payment for overtime he or she must have actually worked more than eight hours that day, not including time taken off as sick leave, annual leave, or compensatory time off.

Observations

Working conditions at the Text Processing Units

138. It is clear that there is a general sense of dissatisfaction among the staff members in the Text Processing Units in DGACM, particularly those staff involved in shift work, and more nuanced arrangements have to be put in place, if not already done so, to take into account various health and human effect factors.

139. It is instructive that the representative of the Department of Management highlighted in April 2005 at the OHRM meeting with Executive Officers that there was a need to evaluate on a case-by-case basis what was driving the need for overtime, although the Chair thought this would lead to perceptions of "inconsistency and favouritism", recognising nevertheless, the "concern that some supervisors appeared too free to demand continued presence and availability of staff, and to distribute overtime work in an uneven manner".

140. The testimony of the Applicants who testified, all women, illustrated that due to the nature and exigencies of the work in the Text Processing Units, particularly at "peak times", they often performed overtime, shift work and night work. One witness testified that she often worked extended hours, returning home in the early hours to release the babysitter, and would then be back at work the next morning, having had little rest. She also testified that she often worked night shifts

continuously as she alone worked on the daily Journal. With regard to night work, the nature of duties at the Text Processing Units of course differs from work in industrial undertakings (such as mining, manufacturing, construction and other heavy duty work), where there is a general prohibition for women to be engaged in night work (see International Labour Organization ("ILO") Convention No. CO89 concerning Night Work of Women Employed in Industry (Revised 1948). However, in terms of ILO Convention C171 concerning Night Work (1990), which defines a "night worker" as an "employed person whose work requires performance of a substantial number of hours of night work which exceeds a specified limit", specific minimum protective measures shall be taken "for night workers in order to protect their health, assist them to meet their family and social responsibilities, provide opportunities for occupational advancement, and compensate them appropriately". These include, *inter alia*, health assessments, suitable working conditions, and suitable first aid facilities. Convention No. 171 also states that "[c]ompensation for night workers in the form of working time, pay or similar benefits shall recognise the nature of night work". Furthermore, before introducing work schedules requiring the services of night workers,

> the employer shall consult the workers' representatives concerned on the details of such schedules and the forms of organisation of night work that are best adapted to the establishment and its personnel as well as on the occupational health measures and social services which are required. In establishments employing night workers this consultation shall take place regularly.

141. Similarly with shift work, precautionary well-being measures for staff are important. Shift work may be described as work that is scheduled either permanently or frequently, outside normal daytime working hours, or work hours with changing assignment patterns, and which normally attracts a shift premium or additional compensation for work performed outside the regular day schedule. As explained in Peter Knauth, "Hours of Work", in *Encyclopaedia of Occupational Health and Safety*, *vol. II*, pp. 43.1–43.15 (4th ed., International Labour Office, 1998)), each type of shift system has its advantages and disadvantages, and each is associated with

differing effects on well-being, health, social life, and work performance. In the traditional slowly rotating shift systems, shifts change weekly; that is a week of night shifts is followed by a week of evening shifts and then a week of morning shifts. In a quickly rotating shift system only one, two or a maximum of three consecutive days are spent on each shift. In this serious study and critique of extended hours of work and night work, the night shift was found to be the most disruptive of all shifts in terms of physiological adjustment, sleep and well-being, with fixed night shifts having negative effects on social interaction, sexual relations, on the workers' ability to fulfil familial roles and on families who must adapt their lifestyles.

142. Overtime worked due to the exigencies of service and the commensurate remuneration or entitlements flowing therefrom cannot be a one size fits all, depending on the nature of the work and the departments concerned. Work done on rotational or shift basis, including night work, particularly of a continuous nature, has to be treated with extra caution. In response to a question from the Tribunal, Mr. Keya testified that rotational and/or fixed shifts may have been worked only at DGACM at the General Service staff level. Other staff working shifts were at DPKO, but they were professional level staff members who are not entitled to overtime in any event. This may be another explanation for the peculiarity of the practice that developed in DGACM prior to 2005. Furthermore, the overtime work and week-end and late-night sittings of the General Assembly have decreased substantially or have been done away with.

143. In preparing and applying overtime rules, it is advisable to take into account international minimum standards regarding overtime work, shiftwork and night work, with the appropriate provisions for rest periods, non-excessive overtime to meet the basic standards and requirements for the particular type of work and occupation.

Reference to abuses of overtime system

144. Counsel for the Respondent during the cross-examination of some witnesses alluded to abuses of the overtime system at the material time by staff members, including the Applicants. This was understandably perceived by the Applicants as an allegation of impropriety and abuse of the system of overtime on their part and DGACM staff generally, implying that an intervention by management was required to stem this abuse. This was an entirely new issue on the Respondent's part, which was never the Respondent's case, and, in the Tribunal's mind, was totally uncalled for. The Applicants are hard-working and valuable staff members of the United Nations. There have been no questions raised with respect to their integrity, nor evidence adduced in the course of the proceedings with respect to any lack of integrity.

Duration of proceedings

145. The Tribunal notes the delays in concluding these proceedings, which were attributable to various circumstances, including proceedings at the appeals level. The Tribunal is satisfied that the delays were not due to any bad faith on the part of any of the parties involved. Given the complicated procedural history, both Counsel are commended for their best efforts for finally ensuring the attendance of the appropriate number of witnesses for completing this long-outstanding matter.

Conclusion

146. In all the circumstances, the Tribunal finds that:

a. The Applicants' claims against the lawfulness of the change introduced in December 2004, with effect from January 2005, are time-barred and not receivable under arts. 8.3 and 8.4 of the Tribunal's Statute. The Tribunal thus has no jurisdiction to consider them. Therefore, the present application is receivable only with respect to the subsequent application of

the policy on overtime in the relevant period immediately preceding the request for administrative review of 16 January 2009. Insofar as the receivable claims are concerned, the Tribunal finds that the Administration's interpretation and application of the relevant provisions of Appendix B was lawful.

b. Even if the lawfulness of the change introduced effective 1 January 2005 was properly before it, the Tribunal makes the following findings:

i. Prior to 2005, at least some of the units in DGACM developed, for reasons unknown and unsubstantiated by evidence, a practice whereby time taken off as annual leave, sick leave, and compensatory time off would be counted as actual work time ("hours of work") for the purposes of overtime payments. This was not in line with the practices of other departments in the Organization. It was also not in line with the language of Appendix B. This practice developed in the absence of any official issuances by the Administration introducing it and contrary to reminders from the Administration as to how Appendix B was to be implemented;

ii. Subsequently, in December 2004, after the issue was brought to its attention, the Administration announced a change in practice in the application of Appendix B in DGACM. Specifically, the decision was announced that time taken off as annual leave, sick leave, and compensatory time off would not be included in the actual work time ("hours of work") required for overtime payment. This decision was announced on 15 December 2004 and implemented on 1 January 2005, including through monthly pay slips. The Administration's interpretation and application of Appendix B in this respect was in line with Appendix B. At

present and since 2005, with respect to the issue at hand, Appendix B is interpreted consistently in terms of the interpretation in this Judgment throughout the offices and departments of the Secretariat;

iii. Although in the particular circumstances of this case consultations regarding the change were warranted and could have and should have been held prior to the decision going into effect on 1 January 2005, this was in part remedied in the period of January to March 2005, when the Administration held consultations with staff representatives. Even if the consultation process were organized earlier, it is highly doubtful, in the circumstances of this case, that the outcome with respect to the issue in question would have been any different. The Respondent had a valid policy and legal rationale for bringing the inconsistent application within DGACM in line with the terms of Appendix B and with the practices of other departments.

iv. In view of the circumstances of this case, the Applicants acquiesced to the corrected practice in DGACM, in line with the wording of the relevant provisions of Appendix B, by not formally appealing it for more than four years after its introduction. With respect to the legitimate expectation of a continuation of the pre-2005 practice, the Applicants, having waited for more than four years to formally challenge the changes introduced effective 1 January 2005 and applied consistently thereafter, can no longer rely on the claim of legitimate expectation. Furthermore, if indeed claim for a legitimate expectation was sustainable and was taken away, the Respondent had a valid overriding policy and legal reasons for doing so, namely to bring the application of

the relevant rules in DGACM in compliance with Appendix B and the practices of other departments.

147. No costs will be awarded as neither party abused the proceedings before the Tribunal.

148. The application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 21st day of March 2014

Entered in the Register on this 21st day of March 2014

(*Signed*)

Hafida Lahiouel, Registrar, New York