



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/084/
JAB/2009/048
Order No.: 325 (NY/2010)
Date: 10 December 2010
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. On 15 June 2009, the Applicant filed her full statement of appeal before the Joint Appeals Board (“JAB”). In his reply of 25 August 2009, the Respondent submitted that the appeal is not receivable, since it was time-barred.
2. On 1 July 2009, the case was transferred to the UN Dispute Tribunal (“UNDT”) where it was assigned to Judge Adams.
3. In email of 28 January 2010, the prior Tribunal (Judge Adams) outlined the issues of the case, including the Respondent’s preliminary claim on the case being time-barred and thereby not receivable. In their subsequent emails, the parties agreed to handling this issue on the papers. By email of 3 February 2010, Judge Adams directed the parties to file and serve their submissions in this regard, which the Respondent did on 16 March 2010 and the Applicant on 30 March 2010.
4. On 30 June 2010, Judge Adams left the Dispute Tribunal, but he did not decide the preliminary issue on receivability before his departure. On 27 July 2010, the case was re-assigned to the sitting Tribunal.
5. Previous to this case, the Applicant had presented some claims to the UN Administrative Tribunal, which were concluded to Judgment. (UN Administrative Tribunal Judgment No. 1437 (30 September 2009) (JAB Report No. 1804) and Judgment No. 1462 (30 September 2009) (JAB Report No. 1859)).
6. At the time the Applicant submitted her incomplete statement of appeal in this case to the JAB, she was assumedly awaiting decision on JAB Case No. 066-2006, as will be discussed below.

Facts bearing on the issue of receivability

7. On 31 December 2007, the Applicant, as an unrepresented staff member, submitted a request for administrative review of the decisions:

- a. To fill the Programme Budget Officer posts with the vacancy announcements “OPPBA-VA-#07-ADM-DM-415191” and “OPPBA-VA-#07-ADM-DM-415428” without giving the Applicant full and fair consideration.
- b. The refusal of the Administration to conduct the Applicant’s electronic Performance Appraisal System (“e-PAS”) evaluation in a fair and timely manner and in accordance with Staff Rules, particularly considering the recommendations of two JAB panels in JAB Report No. 1804 and JAB Report No. 1859. In her request for administrative review, the Applicant referred to her e-PAS reports from 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007, as well as the work plan for 2007-2008. However, in her 15 June 2009 statement of appeal, the Applicant narrows the scope of the present case to her e-PAS reports for 2007-2008 and 2008-2009, as well as the alleged delay in completion of her e-PAS rebuttal for 2006-2007. The Tribunal notes that the latter question concerning the delay is also covered in another case of the Applicant currently pending before this Tribunal (Case No. UNDT/NY/2010/077).

8. In her request for administrative review, the Applicant, *inter alia*, also stated that:

10. This present appeal is based on two recent administrative decisions relating to two recently filled vacant posts and for which I

was [sic] once again did not benefit from full and fair consideration. This appeal is therefore based on totally separate administrative decisions notwithstanding the similarity of fact, evidence and legal basis for appeal

9. On 11 January 2008, the Respondent acknowledged receipt of the Applicant's request for review and appended the text of the relevant Staff Rules regulating the conduct of appeals, including former staff rule 111.2.

10. On 4 February 2008, the Respondent rejected the Applicant's request for administrative review.

11. On 29 February 2008, the Applicant filed an incomplete statement of appeal with the Secretary of the JAB, pursuant to Section III.E of the Rules of Procedure and Guidelines of the JAB ("JAB Rules of Procedure"). In her cover letter, the Applicant stated:

2. The Incomplete Statement of Appeal is submitted at this stage for establishing the date of filing of my appeal and to ensure that all necessary action is taken by me in a timely manner to avoid my appeal from being considered as irreceivable before the JAB.

3. Please note that I will make all necessary arrangements to provide the Board with a full statement of Appeal within one month of receipt of this request.

12. As stated in the incomplete statement of appeal of 29 February 2008, the Applicant appealed the following decisions:

* Untimely preparation work plan for the period 2007-2008 and non-completion of my e-PAS for 2006-2007;

* Continued violation of my due process rights to fair evaluation; and

* Denial my statutory right to full and fair consideration of my candidacy to fill advertized [sic] posts VA#07-ADM-DM-415191 New York and VA#07-ADM-DM-415428

13. On 20 March 2008, the Applicant sent a letter (dated 19 March 2008) to the JAB Secretariat, observing that she had not received a request from the JAB to submit a complete statement of appeal in accordance with sec. III.E of the JAB Rules of Procedure.

14. In her 20 March 2008 letter, the Applicant stated that she was “awaiting [a] response ... The delay in responding to my incomplete statement of appeal leaves me unsure of the time frame for submission of my complete statement”. She further stated:

3. I should also like to inform you that my decision [whether] to submit a complete statement or whether to abandon the appeal [depended] in part on the outcome of the third appeal case #066-2006, which the JAB Panel has been examining for a very long time.

4. It is my hope that the JAB Panel considering the third appeal [JAB Case] #066-2006 has met and finalized its report. In the event it has not, I plea for your intervention in encouraging the Panel [on JAB Case No. 066-2006] to complete its deliberation and submit its report to the Secretary General as soon as possible.

15. On 25 March 2008, the Secretary of the JAB Secretariat sent an email to the Applicant, which in relevant part stated as follows:

Dear Ms. Simmons,

I refer to your letter to me.

I would like to request that you kindly provide us with your full statement of appeal within one month from today’s date, i.e., by 24 April 2008. Please be advised that your new appeal, which has yet to be assigned a number upon receipt of the full statement of appeal, is different from, and independent of, your [JAB] case 066-2006, and that its progress should not be linked to the outcome of the review of [JAB] case 066-2006.

16. On 24 April 2008, the Applicant again emailed to the JAB Secretariat informing it that the submission of the full statement of appeal would be “delayed by a few days due to competing priorities”. The Applicant also stated, “It would be appreciated if the JAB Secretariat would allow a further 15 working days for filing a complete statement. I look forward to your favorable response in this regard”.

17. The JAB Secretariat did not respond to the Applicant’s 24 April 2008 request.

18. On 1 May 2008, the Applicant emailed the JAB Secretariat stating, “Further to my email of 24 April 2008 requesting an extension to submit my completed Statement of Appeal, I would be grateful if you could confirm whether this extension has been granted”.

19. The JAB Secretariat again did not respond to the Applicant’s 1 May 2008 email.

20. On 29 May 2009 [Note to reader: 2009 is the correct year], the Applicant for a third time wrote to the JAB Secretariat, again seeking “advice on the pending incomplete case” filed on 19 February 2008. The Applicant explained that she had been waiting for over a year for a response from the JAB with regard to her earlier emails:

... I have been awaiting advice in writing from the JAB with regard to my incomplete appeal but to date I have not had a response.

In addition, my delayed submission was due to the fact that the JAB took more than a year to consider my third appeal which had significant bearing on the incomplete appeal. As I only recently received the JAB report 1566 and the condition of my employment include the non completion of e-pas still continues without an acceptable remedy, I have no choice but to continue to seek justice. Having been failed by the old administration of justice system, I am hopeful that this appeal will be considered by the new administration of justice system.

21. On 15 June 2009, the Applicant filed her complete statement of appeal contesting three administrative decisions, namely, in terms of her statement:

* Administrative decision to:

(i) Continue the violation of my due process rights to fair evaluation of my performance as evidenced by the untimely preparation of my e-PAS for 2007-2008 and 2008-2009 and the delay in completion of my e-PAS rebuttal for 2006-2007;

(ii) Deny my contractual right to full and fair consideration of my candidacy to fill advertised posts VA#07-ADM-DFM-415191-R-New York and VA#07-ADM-DM-415428-R-New York;

(iii) Continue to expose me to workplace harassment and intimidation by supervisors.

22. On 25 June 2009, the JAB Secretariat sent the Applicant a letter, stating as follows (emphasis added):

This Office received your statement of appeal (case No. 2009-048) on 15 June 2009, in addition to a letter dated 29 February 2008, letter dated 19 March 2008, e-mails dated 25 March 2008, 24 April 2008, and 1 May 2008, letter dated 29 May 2009, informing the JAB Secretariat of your intention to file this appeal, a copy of which is being transmitted to the Representative of the Secretary-General for a reply.

Staff Rule 111.2(g) provides that “the designated representative of the Secretary-General shall submit a reply within two months following the receipt of the appeal.”

Please note that, as a result of the introduction of a new system of administration of justice, the Joint Appeals Board (JAB) in New York ... will be abolished effective 30 June 2009. The United Nations Dispute Tribunal (UNDT) will replace the JABs and become operational on 1 July 2009 in New York, Geneva and Nairobi.

As we have less than a month to go, it is not possible for the JAB in New York to take up your appeal before its abolition.

Nevertheless, we will continue to accept and forward all the communications that may be filed in respect of your case, and keep your case file in safe custody, through 30 June. On 30 June, we will transfer your case to the UNDT ...

Relevant legal provisions

23. Former staff rule 111.2

Appeals

(a) A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing. The staff member shall submit a copy of the letter to the executive head of his or her department, office, fund or programme.

(i) If the Secretary-General replies to the staff member's letter, he or she may appeal against the answer within one month of the receipt of such reply;

(ii) If the Secretary-General does not reply to the letter within one month in respect of a staff member stationed in New York or within two months in respect of a staff member stationed elsewhere, the staff member may appeal against the original administrative decision within one month of the expiration of the time limit specified in this subparagraph for the Secretary-General's reply.

...

(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.

14. JAB Rules of Procedure, 1 June 2007

III.E. Incomplete statement of appeal

An incomplete statement of appeal will be accepted by the Board for the purpose of establishing the date of filing of the appeal. The secretariat of the Board will, upon receipt of an incomplete statement, request in writing that the appellant provide to the Board, within one month, a full statement of appeal, containing all of the elements described in rule III.J.1, below. If the appellant, without explanation, fails to submit a full statement of appeal within the month, the appeal shall be deemed to have been abandoned (see rule III.O.3, below), and shall be removed from the calendar.

III.F. Receivability of appeals

An appeal is receivable only if it complies with the time-limits set forth in Staff Rule 111.2(a) and (b), or if the Panel considering the appeal decides to waive the time-limits (see G. Below).

III.G. Waiver of time-limits for late filing

1. When appeal is challenged solely on the ground that it is not receivable, a panel shall be constituted to consider the receivability challenge. If it determines that the appeal is receivable, the Panel shall remand the case to the party raising the receivability issue, with reasons, and direct that party to submit a reply on substance. When an appeal is challenged on procedure and substance, the Panel constituted to consider the appeal shall decide, at its own discretion, whether to consider receivability as a preliminary issue or in conjunction with the whole appeal. In either situation the Panel may request statements, supporting evidence and comments relating specifically to this issue and shall decide, on the basis thereof, if “exceptional circumstances” justify a waiver of the time-limits under Staff Rule 111.2(f), bearing in mind that the onus of proving exceptional circumstances lies with the appellant.

...

III.O. Abandonment of an appeal

...

3. Where an appellant has submitted an incomplete appeal but has failed to submit a full statement of appeal within the specified time-

limit without explanation, the appeal may be deemed to have been abandoned upon the expiry of the time limit.

4. An abandoned appeal may be restored upon adequate explanation. If the appeal was deemed abandoned for failure by the appellant to submit a full statement of appeal, any such motion to restore a case must be accompanied by the full statement of appeal.

Respondent's submissions (put first as the moving party)

The full statement of appeal is time-barred

24. The Respondent's submissions may be summarized as follows and pertain only to the Applicant's *full* statement of appeal:

- a. The Applicant was fully aware of the time limits that applied for filing her full statement of appeal, having been expressly advised by the Respondent of those time limits, having expressly acknowledged them in correspondence with the JAB, and having previously brought claims to the JAB;
- b. The Applicant's failure to proceed and file her full statement of appeal was not due to any mistake of fact or law, but was instead the result of her own free choice not to proceed with the appeal pending the outcome of another appeal;
- c. The JAB expressly advised the Applicant that the appeals were not linked in any manner; the Applicant nevertheless made the decision not to proceed with her appeal, despite express advice from the JAB that this was not the appropriate course and with full knowledge that she should not link the appeals in this manner;

- d. The Applicant acknowledged in her request for review that the appeal was separate and distinct from her earlier appeals;
- e. Although the Applicant requested an extension of time for 15 days, the Applicant failed to diligently follow up on her request;
- f. There is no justification for the Applicant's failure to lodge an appeal more than one year following her request for an extension of 15 days.

Exceptional circumstances do not exist for waiving time limits

25. The Respondent contends that more than one year elapsed between the Applicant's filing of the incomplete statement of appeal and her filing of the full statement of appeal, and that it is completely inappropriate and contrary to the rules of procedure to reactivate the case. The Respondent argues, in particular, that:

- a. In accordance with staff rule 111.2(f), the JAB had authority to waive the time limit specified in staff rule 111.2(a) upon a finding of exceptional circumstances;
- b. the justification provided by the Applicant in her letter of 29 May 2009, namely that the submission was delayed due to the time it took the JAB to consider another of the Applicant's appeals, does not amount to "exceptional circumstances" for the purposes of staff rule 111.2(f).
- c. "exceptional circumstances" for the purposes of staff rule 111.2(f) are only those circumstances that are beyond the control of an appellant, citing UN Administrative Tribunal Judgment Nos. 372 *Kayigamba* (1986), 713 *Piquilloud* (1995) and 1046 *Díaz de Wesley* (2002);

- d. strict adherence to time-limits for administrative review of and appeals against administrative decisions is required, citing UN Administrative Tribunal Judgment No. 1482 *Nhliziyo* (2008);
- e. the reasoning in *D'Hooge* UNDT/2009/035 that an Applicant only needs to provide a reasonable explanation, and not exceptional circumstances, should not be followed. This “less demanding test” should not be applied, but whatever test is used, the Applicant cannot succeed on the facts of this case;
- f. under sec. III.E of the JAB Rules of Procedure, the Applicant was required to provide an explanation *within* one month after submitting her incomplete statement of appeal and since she did not do this, her appeal is deemed to be abandoned; and
- g. once abandoned, sec. III.O.4 provides that the appeal may be restored, but restoration is contingent upon an adequate explanation being provided, and the standard to be applied here is that “exceptional circumstances” need to be demonstrated.

26. The judgment of *Morsy* UNDT/2009/036 stipulates that the correct standard the Applicant must establish is that of an exceptional case by setting out exceptional reasons why s/he should be granted an extension of time:

What is required is a conspectus of all relevant factors before the Tribunal to ascertain in each case whether it is exceptional or whether there are exceptional reasons in the ordinary sense, to justify a waiver or suspension of time; exceptional simply meaning something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered.

27. The Respondent additionally cites the cases of *Samardizic et al.* UNDT/2010/019 and *Fedoroff* UNDT/2010/016 for the factors that must be considered in determining whether an application is receivable.

28. Whether the Tribunal determines that the appropriate test is that of a “reasonable explanation” applied in *D’Hooge* or the provision of “exceptional reasons” establishing an “exceptional case” as recognized in the jurisprudence referred to above, the Applicant has failed to discharge either standard.

The alleged harassment is not the subject of the application

29. By her request for administrative review submitted on 31 December 2007, the Applicant sought review of the decisions not to select her for the two Programme Budget Officer posts, as well as review of the alleged “refusal of the administration to conduct [her] e-PAS in accordance with the Staff Rules.” In support of her request for administrative review, the Applicant refers to what she characterizes as a hostile and/or unhealthy work environment. In accordance with the decision of *de Porres* UNDT/2010/021, since the reference to these matters is merely in support of her complaint regarding the rejection of her candidacy, these matters are not properly before the Tribunal. Furthermore, these matters do not constitute “administrative decisions” and are too general and non-specific to be the subject of the Tribunal’s jurisdiction.

Applicant’s submissions

General points

30. The Applicant is a self-represented staff member. The Applicant’s submissions, at times, include more information than may be required. Thus, the

Tribunal has attempted herein to summarize succinctly the Applicant's main contentions on the issue of receivability.

The full statement of appeal was timely and the appeal was not abandoned

The timing of the incomplete statement of appeal

31. The incomplete statement of appeal was submitted to the JAB Secretariat in a timely manner in order to establish the date of the initial filing and to ensure management was aware of the Applicant's intention to contest the selection decision with regard to the advertised Programme Budget Officer posts "VA-#07-ADM-DM-415191-R-New York" and "VA-#07-ADM-DM-415428-R-New York".

Timeliness of the complete statement of appeal (the Applicant's reasons for not putting forward the complete statement of appeal at an earlier stage)

32. The Applicant did not want to overburden a justice system that was slow and unresponsive while she was awaiting the outcome of a long, protracted consideration of her other JAB appeal. Other circumstances, which the Applicant refers to in this connection, are the following:

- a. At the time of filing her incomplete statement of appeal, the Applicant had hoped she would have received the JAB report concerning her other JAB case, since the Administration had argued she had abused the legal process by bringing on matters that had already been decided upon. This report had been delayed due to circumstances internal to the JAB. The Applicant made every effort to comply with former staff rule 111.2(a) by giving the Administration the opportunity to investigate/review the circumstances of this other appeal and to reconsider or reevaluate its decision before she filed another case;

- b. due to the illness and eventual passing away of her father in the period from May to mid-July 2008, a matter she did not feel like sharing with the JAB, she did not follow up on the incomplete appeal during this period of time;
- c. the Applicant had been in constant communication with the JAB Secretariat on the matter of her appeal and the Presiding Officer of the JAB took no action to make the official decision—required under secs. III.E and III.O.3—to consider her appeal abandoned. The Secretariat was aware that the Applicant did not intend to nor did abandon or withdraw her appeal;
- d. it was the Applicant who advised the JAB Secretariat that it had neglected to respond in a timely manner to her incomplete statement of appeal; and
- e. finally, the JAB Secretariat did not respond to any of the Applicant's requests for time extension for filing the complete statement of appeal. The JAB Secretariat also did not contact her to inquire whether she wanted to proceed with her appeal as per its own rules and normal practice (the Applicant makes no reference to any such rules or provide any evidence of such practice).

The application was not abandoned

33. No active steps were taken by the Presiding Officer of the JAB to deem the Applicant's appeal abandoned. Furthermore, there is no evidence that the Applicant took any specific action to request a withdrawal of her appeal.

If deemed abandoned, the Applicant had a right to restore her statement of appeal upon providing “an adequate explanation”

34. The JAB Rules of Procedure did not intend to deny staff of justice, but were designed to ensure that staff members are diligent in filing a challenge to an administrative decision against their interest in a timely manner. In that regard, the Rules specifically stated that even where an appeal is deemed abandoned by the appropriate official, the appeal in question may be restored upon adequate explanation. If the appeal was deemed abandoned for failure by the Applicant to submit a full statement of appeal, any such motion to restore a case must be accompanied by the full statement of appeal. The JAB Rules of Procedure stipulated that an appeal “may be abandoned” (cf., sec. III.O.1, which indicates that active steps must be taken by the JAB to declare the appeal abandoned).

The question of exceptional circumstances

35. Under *D’Hooge*, the question of exceptional circumstances is not relevant in the Applicant’s case, since *D’Hooge* merely concerned potential abandonment and not receivability. As for the test of “exceptional case” in *Fedoroff*, that case did not deal specifically with the issue of receivability or abandonment of appeal, but it dealt with the broad issue of requests that are deemed out of time and concerned facts that are not close to the issues in this case.

Notions of fundamental fairness

36. The Respondent has acknowledged that it failed to take timely follow-up action on the Applicant’s incomplete statement of appeal in accordance with its own rules; thus, it is unfair for the Organization to now invoke the issue of delay, as the Organization is guilty of more blatant violations of the principle of timely consideration.

Considerations

Was the statement of appeal time-barred under former staff rule 111.2?

37. To clarify, the Respondent's contention—that the Applicant's appeal is time-barred—is a reference only that the Applicant's *full* statement of appeal was time-barred, not that the Applicant's *incomplete* statement of appeal was time-barred.

38. Former staff rule 111.2 sets out the time limits for an appeal, but the language of the rule does not specify whether it applies only to a full statement of appeal or whether the rule is also applicable in those instances where an incomplete statement of appeal is filed. As relevant here, the rule states (emphasis added):

(a) A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing. The staff member shall submit a copy of the letter to the executive head of his or her department, office, fund or programme.

(i) If the Secretary-General replies to the staff member's letter, he or she *may appeal* against the answer within one month of the receipt of such reply;

...

(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.

39. The necessity to observe time limits has been emphasised both by the UNDT and the UN Appeals Tribunal in several cases. For instance, in *Ibrahim* 2010-UNAT-069, the Appeals Tribunal stressed “the importance of time limits”, and in *Mezoui* 2010-UNAT-043 it emphasized “that this court has been strictly enforcing, and will

continue to strictly enforce, the various time limits”. In principle, this Tribunal therefore agrees with the Respondent that strict adherence to time-limits generally is required.

40. The Tribunal finds that, in relation to the time limits specified in former staff rule 111.2, the rule is applicable to both types of appeals (whether through filing of incomplete statement or complete statement of appeal) and that the manner in which an appeal is initiated (incomplete or full) is not legally-determinative. Rather, what is critical is that an appeal was filed in a timely manner—either following the Respondent’s answer or the original administrative decision, if the Respondent did not reply to the staff member’s request for review of the administrative decision. The filing of an incomplete statement of appeal establishes the date of the appeal, for purposes of former staff rule 111.2 and is sufficient for purposes of that rule.

41. Thus, the Tribunal finds that the Applicant’s appeal was in compliance with former staff rule 111.2, since her *incomplete* statement of appeal was timely under this Rule. As to sec. III.G of the JAB Rules of Procedure, which concerns the JAB’s waiver of time-limits for late filing in “exceptional circumstances”, the Tribunal notes that since the Applicant’s appeal is found *not* to be late, sec. III.G is not applicable here.

Did the Applicant abandon her appeal?

42. The next inquiry is whether the Applicant’s abandoned her appeal under the JAB Rules of Procedure. In a nutshell, the Applicant’s contentions, with which the Tribunal agrees, are: a) that the JAB knew all along that the Applicant intended to file a full statement of appeal and the Applicant did not intend to abandon her appeal; b) that the JAB did not respond to the Applicant’s communications; c) that the JAB did not take any steps towards deciding the receivability issue; d) that the Applicant had

several good explanations for her delayed filing of her full statement of appeal; and e) that the Applicant, in both law and fact, did not abandon her appeal.

43. Section III.E of the JAB Rules of Procedure set out the circumstances under which a full statement of appeal may be filed following the submission of an incomplete statement of appeal:

An incomplete statement of appeal will be accepted by the [JAB] for the purpose of establishing the date of filing the appeal. The secretariat of the Board will, upon receipt of an incomplete statement, request in writing that the appellant provide to the Board, within one month, a full statement of appeal, containing all of the elements described in rule III.J.1, below. If the appellant, without explanation, fails to submit a full statement of appeal within the month, the appeal shall be deemed to have been abandoned (see rule III.O.3, below), and shall be removed from the calendar.

44. By the express language of sec. III.E, upon receipt of an incomplete statement of appeal, the JAB Secretariat was under an obligation to notify the Applicant, in writing, of the fact that an incomplete statement of appeal had been filed and that she was required to file a full statement of appeal within one month following notification to the Applicant by the Secretariat.

45. Whether the JAB Secretariat complied with the requirement to notify the Applicant upon “receipt” of the Applicant’s incomplete statement of appeal is debatable. That is, the Applicant filed her incomplete statement on 29 February 2008, and it was only on 25 March 2008 that the JAB Secretariat contacted the Applicant with the request that she file a full statement of appeal. This point—that it was JAB Secretariat’s responsibility to make a request of the Applicant for a full statement of appeal and that the JAB Secretariat did not promptly make such a request—is the point that the Applicant makes (as outlined in paras. 12-14 above).

46. Additionally, with a 20 March 2008 interim letter to the JAB, the Applicant explained that she wanted to delay the submission of her full statement of appeal while she was awaiting the conclusion of another JAB case that she had pending. In the event that the other JAB case were to be decided favorably to the Applicant, the pending appeal might have been obviated. To the Tribunal, this appears to be a very reasonable and fair explanation which, for all intents and purposes, appears to have been ignored or implicitly rejected by the JAB without further explanation.

47. On 25 March 2008, the JAB Secretariat did notify the Applicant of the need to file a full statement of appeal by 24 April 2008, but on that day (i.e., within the one month deadline), the Applicant responded to the JAB Secretariat with the information that her full statement of appeal would be “delayed by a few days due to competing priorities” (it is unclear what these competing priorities were). The Applicant further asked for a time extension of 15 days from the one-month requirement. The JAB Secretariat did not reply to this communication of the Applicant.

48. By 1 May 2008 email, the Applicant further elaborated on her reasons for wishing to extend her deadline, *inter alia*, referring to the JAB’s delays in considering her “third appeal, which had significant bearing on the incomplete appeal”. The Tribunal also finds this explanation to be proper, but the JAB Secretariat did not reply to this email, either.

49. Under sec. III.O.3 of the JAB Rules of Procedure, where an Applicant failed to timely submit a full statement of appeal, a decision had to be made concerning the delay in filing the full statement of appeal. Thus, for an incomplete statement of appeal to be deemed abandoned under sec. III.O, the JAB had to take a decision on that point. However, in letters dated 29 February 2008 and 19 March 2008, e-mails dated 24 April 2008 and 1 May 2008, and a letter dated 29 May 2009, the Applicant repeatedly informed the JAB Secretariat of her intention to file the full statement of

appeal. The Tribunal agrees with the Applicant that she had been in constant communication with the JAB Secretariat on the matter of her appeal and the JAB took no official decision—required under secs. III.E and III.O.3—to consider the Applicant’s appeal officially abandoned.

50. According to the terms of secs. III.E. and III.O.3, if the full statement of appeal was not filed within a month following notification regarding an incomplete statement of appeal, the appeal would be deemed abandoned, unless the Applicant provided an “explanation” of reasons for non-compliance with the one-month time limit. The requirement under secs. III.E and III.O.3 of an explanation is different than sec. III.O.4, which states that an abandoned appeal may be restored upon “adequate explanation”. The rules do not further elaborate on what constitutes an “explanation” or “adequate explanation” for purposes of secs. III.E, III.O.3, or III.O.4.

51. Furthermore, the Applicant explains that her father’s illness from May to mid-July 2008 and eventual passing away delayed her filing of the full statement of appeal, but that she did not wish to share this with the JAB. The Tribunal is sympathetic to this explanation.

52. Due to the ambiguity of the wording of secs. III.E and III.O.3, and also having in mind the principle of *contra proferentem*—that an ambiguous term will be construed against the party that drafted it—the Tribunal finds that it would be unjust to hold that the Applicant’s explanations for her delayed full statement of appeal were insufficient in this case.

53. In *Morsy* (para. 47), the Dispute Tribunal stressed the importance of the efforts made by an applicant to obtain information relevant in deciding whether his later application was receivable and stated that:

47. In a decision of the Administrative Tribunal of the International Labour Organization (ILOAT) in Judgment No. 758, *In re Thresher* (1986), the Tribunal found the means open to the complainant and his attempts to obtain information relevant in deciding whether his late application was receivable:

“[H]aving regard to the lapse of time involved, the means open to him to obtain information and his lack of diligence in pursuing his remedies, this case does not fall within the very exceptional class of cases where the Tribunal will grant relief for failure to observe the requirements of Article VII of the Statute. The complaint is therefore irreceivable”.

54. As noted in the 25 June 2009 letter from the JAB Secretariat to the Applicant, the Applicant in six separate communications sought information regarding her appeal from the JAB, but she never got a proper response. Thus, the Tribunal concludes that the Applicant made diligent attempts to determine when her full statement of appeal would need to be filed.

55. Finally, when the JAB Secretariat on 25 June 2009 stated that “[n]evertheless, we will continue to accept and forward all the communications that may be filed in your case”, this communication had the effect of waiving any deficiencies in the Applicant’s adherence to time limits and clearly indicated that the JAB did *not* find that the appeal had been abandoned.

56. Based on the above, the Tribunal finds that the Applicant did not abandon her incomplete statement of appeal before she submitted her full statement of appeal on 29 May 2009.

The scope of the present appeal

57. That a request for administrative review (or management evaluation) is mandatory has consistently been reaffirmed by the UNDT (see this Tribunal’s outline of the jurisprudence in *O’Neill* UNDT/2010/203, paras. 45-47). This also means that

each claim subsequently submitted before the UNDT must first have undergone such review (*Crichlow* UNDT/2009/028 and *Syed* 2010-UNAT-061).

58. In the instant case, the Applicant explicitly requested an administrative review of: 1) two selection processes for the posts with the vacancy announcements “OPPBA-VA-#07-ADM-DM-415191” and “OPPBA-VA-#07-ADM-DM-415428”; and 2) her e-PAS reports (from 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007) and her work plan for 2007-2008. However, she did not make any specific claim for review of the “workplace harassment and intimidation by supervisors”, which she later mentions in her statement of appeal as a separate claim in addition to the already mentioned claims.

59. Accordingly, within the confines of this appeal, the Tribunal finds that the Applicant has not properly requested an administrative review of her claim concerning workplace harassment and intimidation. This claim is therefore not before it.

60. Concerning the alleged delays of the Applicant’s e-PAS rebuttal for 2006-2007, since this is dealt with in another case of the Applicant pending currently before this Tribunal (Case No. UNDT/NY/2010/077) it will not be considered as part of this case.

61. It is finally noted that in her 15 June 2009 statement of appeal, the Applicant narrows the scope of the present case to her e-PAS reports for 2007-2008 and 2008-2009, as well as the alleged delay in completion of her e-PAS rebuttal for 2006-2007.

IT IS ORDERED THAT—

1. The Applicant's appeal is receivable and the legal issues to be determined are:
 - a. Did the Respondent violate the Applicant's employment contract when preparing her e-PAS reports for 2007-2008 and 2008-2009?
 - b. Did the Respondent's handling of the selection process concerning the posts with vacancy announcements, "OPPBA-VA-#07-ADM-DM-415191" and "OPPBA-VA-#07-ADM-DM-415428", constitute a breach of the Applicant's employment contract?
2. The Tribunal will revert with further orders for managing the remainder of the case.

(Signed)

Judge Marilyn J. Kaman

Dated this 10th day of December 2010