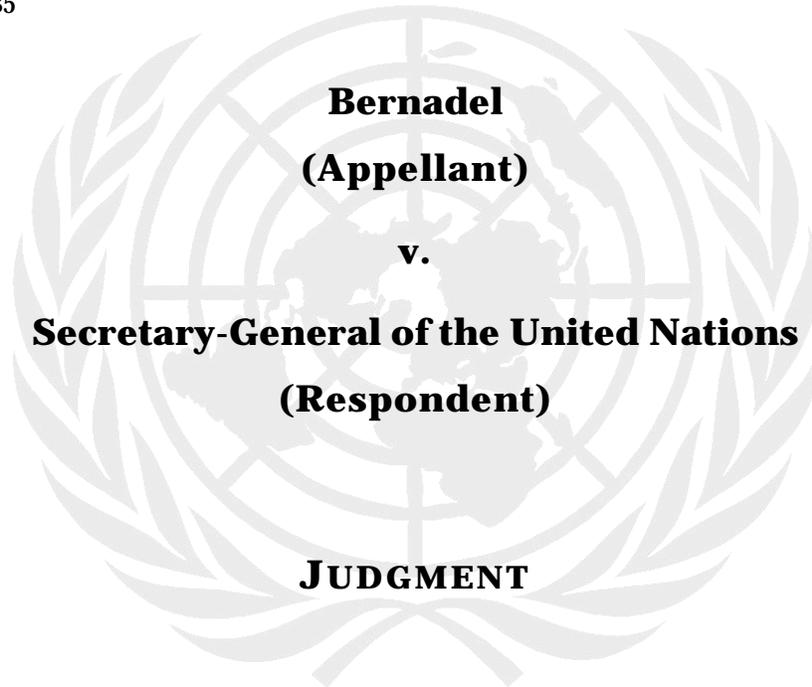




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-185



**Bernadel
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Kamaljit Singh Garewal, Presiding Judge Sophia Adinyira Judge Mark P. Painter
Judgment No.:	2011-UNAT-180
Date:	21 October 2011
Registrar:	Weicheng Lin

Counsel for Appellant:	Jeppe F. Christensen
Counsel for Respondent:	Amy Wood

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Ms. Anne-Marie Bernadel, while holding a G-7 post, requested a Special Post Allowance (SPA) at the P-2 level. However, her request was denied on 3 August 2001. She accepts that she was informed of this decision. She also received a copy of this decision sometime between 3 August 2001 and 15 April 2002. Therefore, her request for administrative review should have been filed within two months of being notified of this decision. The United Nations Appeals Tribunal (Appeals Tribunal) finds that her request for administrative review filed on 12 May 2005 was obviously not receivable. We affirm Judgment No. UNDT/2010/210 and dismiss this appeal.

Facts and Procedure

2. Ms. Bernadel joined the Organization in 1979 and received a permanent appointment in 1981. She moved to the New York Office of the High Commissioner for Human Rights (New York Office and OHCHR, respectively) in 1991. She was promoted to the G-6 level in July 1992 and the G-7 level in November 1996. Ms. Bernadel retired from service in August 2006.

3. After Ms. Bernadel advanced to the G-7 level she began to work at the professional level in the New York Office in 1997. Recognizing this fact, the Director of the New York Office wrote on behalf of Ms. Bernadel to OHCHR on 13 August 1997, requesting that a retroactive SPA at the P-2 level be granted to Ms. Bernadel. The basis for this request was Staff Rule 103.11(c), which stipulates that “when a staff member in the General Service category is required to serve in a higher level post in the Professional category, ...the allowance may be paid immediately [after] the staff member assumes the higher duties and responsibilities”.

4. In an email dated 4 May 1998 to the Office of Human Resources Management (OHRM), Ms. Bernadel provided further information regarding her work responsibilities and requested to retroactively receive an SPA. On 20 May 1998, OHRM responded to Ms. Bernadel by stating that, “at the moment”, OHRM was unable to support her SPA request, but “once the classified job description is available, should it be evident that

[she] had been fulfilling those functions then [she] would be eligible for consideration for an SPA upon recommendation of the Head of [her] Office”.

5. In 1999 and 2000, Ms. Bernadel sent communications to OHCHR requesting an update on the status of the SPA request, but was informed that the matter had been forwarded to the Administrative Section of OHCHR to prepare a reply to her SPA request. Ms. Bernadel followed up with further communications to the Administrative Officer in April and November of 2000 and January and February of 2001.

6. In a letter dated 3 August 2001 to the Director of the New York Office, the Chief of Administration, OHCHR, conveyed the administrative decision to decline Ms. Bernadel’s request. The Chief of Administration of OHCHR found it impossible to accede to the request to grant Ms. Bernadel a retroactive SPA for the period of 1997 and 1998. She stated that, while noting Ms. Bernadel’s very good performance and recognizing her commitment to OHCHR, “I regret that obligatory provisions of our rules have prevented OHCHR to accede to [the Director’s] request”. The Chief of Administration asked the Director of the New York Office to share her letter with Ms. Bernadel.

7. Sometime between 3 August 2001 and 15 April 2002, the Director of the New York Office called Ms. Bernadel to his office and shared a copy of the above-mentioned letter with her. In her communication dated 15 April 2002 addressed to the Chief of Administration, Ms. Bernadel acknowledged receipt of the 3 August 2001 letter, but disputed the summary of her case in the letter and requested that her case be reconsidered. Ms Bernadel wrote to the Chief of Administration again on 24 October 2002 requesting an update on the matter. On 23 December 2003, she wrote to OHRM requesting an update on her SPA request and furthermore the reconsideration of her case.

8. In communications dated 19 March 2004 and 5 May 2004 to Ms. Bernadel, OHCHR confirmed and reaffirmed that it was not in a position to accede to her SPA request. In emails sent on 29 November and 21 December 2004, Ms. Bernadel asked the High Commissioner for Human Rights (High Commissioner) to intervene.

9. On 24 January 2005, Ms. Bernadel informed the High Commissioner that she intended to submit her case to the Joint Appeals Board (JAB). The High Commissioner responded to Ms. Bernadel on 30 March 2005: “I regret to inform you that I do not see

any grounds on which I can intervene on your behalf. As a result, I am afraid I must consider this matter closed.”

10. By letter dated 2 May 2005 addressed to the Secretary-General, Ms. Bernadel requested administrative review of the decision not to compensate her for the functions performed at the professional level. She subsequently appealed to the JAB. On 7 December 2006, the JAB issued a report, in which it concluded that the appeal was not receivable. The JAB considered the 3 August 2001 letter from the Chief of Administration to the Director of the New York Office as OHCHR’s official reply. While she pursued various indirect channels to reverse that decision, Ms. Bernadel did not write to the Secretary-General in a timely manner. Ms. Bernadel only filed a request for administrative review on 2 May 2005, more than four years after the 3 August 2001 decision was taken. In the view of the JAB, the 30 March 2005 letter from the High Commissioner was not the contested decision, but a response to Ms. Bernadel’s personal appeal for her intervention. The JAB also noted that Ms. Bernadel had not submitted any evidence of exceptional circumstances warranting a waiver of the time limit. The JAB’s recommendation was endorsed by the Secretary-General.

11. On 31 January 2008, Ms. Bernadel filed an application with the former Administrative Tribunal. On 1 January 2010, the case was transferred to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal).

12. In Judgment No. UNDT/2010/210 dated 3 December 2010, Judge Ebrahim-Carstens rejected Ms. Bernadel’s application on the ground that she had failed to file a timeous request for administrative review. Judge Ebrahim-Carstens found that the final decision concerning Ms. Bernadel’s SPA request was expressed in the 3 August 2001 letter. While the precise date on which Ms. Bernadel was notified of, or received, that letter was not clear, it had to be on or before 15 April 2002, when Ms. Bernadel referred to that letter in her communication with the Chief of Administration. Even taking 15 April 2002, or for that matter, 19 March 2004 when OHCHR issued a letter reiterating the decision to deny Ms. Bernadel’s SPA request, as the date of the decision, Ms. Bernadel was still out of time. In the view of Judge Ebrahim-Carstens, the High Commissioner’s 30 March 2005 letter was a response to Ms. Bernadel’s appeal for intervention, but it contained no new administrative decision.

13. On 17 January 2011, Ms. Bernadel appealed the UNDT Judgment. On 3 March 2011, the Secretary-General filed an answer.

Submissions

Ms. Bernadel's Appeal

14. Ms. Bernadel stresses that the 3 August 2001 letter was addressed to the Director of the New York Office, and not to her directly. She believed at that time in good faith that it was time to enter into negotiations. She vigorously applied herself to a negotiated settlement between 2002 and 2005. It is difficult to understand why she was punished for going through the negotiating process before bringing the matter to the JAB.

15. Ms. Bernadel considered the response from the High Commissioner on 30 March 2005 as the final answer, after which she launched the appeal process.

16. The Director of the New York Office requested an SPA on behalf of Ms. Bernadel as early as August 1997. OHCHR did not respond to the request until four years later in 2001.

17. Seeking a resolution through negotiation constitutes the exceptional circumstance calling for the waiver of the time limit. Even the UNDT Judge brought up the question of mediation during the case management hearing, some 13 years later.

18. Ms. Bernadel requests that the Appeals Tribunal find in her favor so that she can receive compensation for the work performed at the professional level during 1997 and 1998 and for the emotional distress that she has suffered for almost 14 years.

Secretary-General's Answer

19. The Secretary-General submits that OHCHR's final decision on Ms. Bernadel's SPA request was reflected in the 3 August 2001 letter, and that Ms. Bernadel received notification of that letter at her meeting with the Director of the New York Office. In the view of the Secretary-General, the wording of the letter establishes that it conveyed the final decision. He noted that in her subsequent communications, Ms. Bernadel asked that her case be "reconsidered".

20. The Secretary-General maintains that the UNDT correctly concluded that Ms. Bernadel's application was time-barred because she did not file her request for administrative review within two months after she had received notification of the final decision.

21. The Secretary-General avers that Ms. Bernadel's arguments that she was not informed of her right to appeal, that all negotiations had to be exhausted before resorting to the legal route, or that seeking a negotiated solution constitutes exceptional circumstances, are legally unsustainable.

22. Ms. Bernadel failed to pursue the procedures available to staff members for the protection of her rights within the stipulated time limit. Her repeated submissions of the SPA request did not extend the deadline for requesting administrative review. Though she may have pursued various indirect channels in her attempt to reverse the decision, Ms. Bernadel did not write to the Secretary-General for administrative review in a timely manner.

Considerations

23. The main question is when Ms. Bernadel was notified of the administrative decision taken on 3 August 2001. Unless the decision is *notified in writing* to the staff member, the time limit of two months for requesting administrative review against that decision does not start.

24. The operative words in Staff Rule 111.2(a) then in force are "... within two months from the date the staff member *received notification of the decision in writing*". (Emphasis added) Ms. Bernadel may know about the decision but this is not the same thing as saying that she has been notified.¹ As we stated in *Schook*,

[w]ithout receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a 'notification of the decision in writing', required by Rule 111.2 (a).

¹ *Schook v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-013.

25. However, in this case the situation is different because the impugned administrative decision denying Ms. Bernadel's SPA request for 1997 and 1998 was contained in a written communication dated 3 August 2001. The Chief of Administration of OHCHR had asked the Director of the New York Office to share her letter with Ms. Bernadel. Sometime between 3 August 2001 and 15 April 2002, the Director of the New York Office called Ms. Bernadel to his office and shared a copy of the 3 August 2001 letter with her. As a matter of fact, Ms. Bernadel acknowledged receipt of that letter in her communication dated 15 April 2002.

26. Therefore, Ms. Bernadel received notification of the decision in writing at the latest by 15 April 2002. The two-month period for administrative review began on 15 April 2002 and certainly not when Ms. Bernadel received the High Commissioner's letter of 30 March 2005.

27. We do not find any reason to disagree with the UNDT Judgment. The request for administrative review was clearly time-barred. The UNDT Judgment does not contain any jurisdictional, factual or procedural defects.

Judgment

28. The UNDT Judgment is affirmed and this appeal is dismissed.

Original and authoritative version: English

Done this 21st day of October 2011 in New York, United States.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Painter

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar