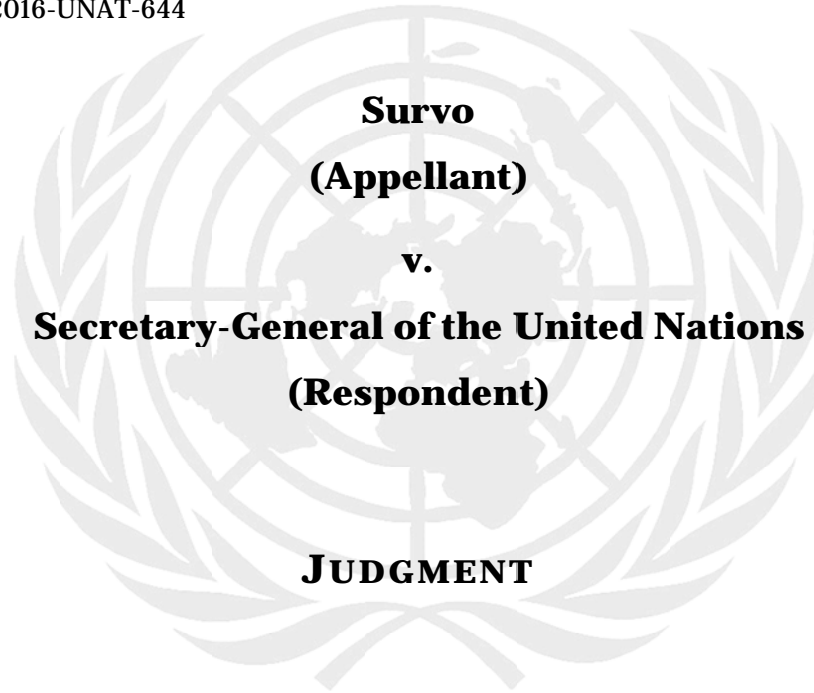




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-644



**Survo
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Sophia Adinyira Judge Inés Weinberg de Roca
Case No.:	2015-856
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Survo:	Self-represented
Counsel for Secretary-General:	Zarqaa Chohan

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/069, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 30 July 2015, in the matter of *Survo v. Secretary-General of the United Nations*. Mr. Ilpo Kalevi Survo filed his appeal on 28 September 2015, and the Secretary-General filed his answer on 27 November 2015.

Facts and Procedure

2. The UNDT found the following facts established:¹

... The Applicant served as Chief, Statistical Information Services Section (“SISS”), Statistics Division (“SD”), [Economic and Social Commission for Asia and the Pacific (ESCAP)], since 1 June 2003. In July 2009, this position was re-classified from P-4 to P-5,² following which the post was advertised on 2 February 2010.

... On 4 July 2010, the Applicant emailed the Chief, SD, ESCAP, his then supervisor, a draft workplan for his performance appraisal (e-PAS) for the period 2010-2011. There is no record of any feedback received by the Applicant thereon.

... On 3 September 2010, the Applicant, having applied for the re-classified post, was informed that he had not been selected [for the P-5 level post of Chief, SISS].

... From 29 October 2010 to 3 July 2011, the Applicant worked for the ICT and Disaster Risk Reduction Division (“IDD”), ESCAP. No e-PAS exists for this period.

... The Applicant states that during early 2011, the Human Resources Management Section (“HRMS”), ESCAP, followed-up on the Applicant’s 2010-2011 workplan.

... In April 2011, the Applicant requested the [Dispute] Tribunal order suspension of action in respect of the decision to reassign him to the position of Statistician (P-4) in the SD. This matter[] was settled through mediation.

... On 4 July 2011, as a result of the agreement reached, the Applicant was transferred to the position of Knowledge Management Coordinator with Office of the Executive Secretary (“OES”), ESCAP.

¹ Impugned Judgment, paras. 3-16. See also *Survo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-595, paras. 2-3 and 7.

² To the contrary, the P-5 level post was created as the result of reclassification of a separate post. See *Survo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-595, para. 3.

... In the context of ESCAP attempts to achieve 100% compliance with e-PAS procedures, by email of 6 July 2011, the Executive Secretary, ESCAP, urged ESCAP managers to finalise all pending e-PASes for 2010-2011 before 31 July 2011 and to ensure that all 2011-2012 workplans were approved electronically by the same date.

... On 19 August 2011, the Applicant emailed to his new supervisor, the Chief of Staff, OES, ESCAP, and his two additional supervisors, a draft workplan for the 2011-2012 period. She acknowledged receipt on the same day; however, there is no record on file about any feedback on it from the first reporting officer[.]

... On 11 and 12 April 2012, HRMS, ESCAP, contacted the Applicant regarding his workplans for 2010-2011 and 2011-2012 respectively [and sought to guide him in resolving the outstanding workplans, to no avail].

... From April 2012, the Applicant was reassigned to the Programme Planning and Partnerships Division. Since then, his e-PASes have been completed as required and in due course.

... [On 26 September 2014, t]he Applicant requested management evaluation of the [“[d]ecisions not to approve and provide [him with] feedback on (i) the 2010/2011 PAS work plan [...]submitted on 4 July 2010 and (ii) the 2011/2012 PAS work plan [...] submitted on 19 August 2011]. By letter dated 24 November 2014, the Management Evaluation Unit [(MEU)] responded that the Applicant’s request was irreceivable as it had not been submitted within the prescribed timeframes.

3. On 22 February 2015, Mr. Survo filed an application with the Dispute Tribunal contesting the “[n]on-approval of submitted PAS work plans for 2010/2011 and 2011/2012”, in respect of which he never received any formal notification.

4. On 27 March 2015, the Secretary-General submitted his reply, raising issues of receivability *ratione materiae* and *ratione temporis*.

5. On 1 April 2015, by Order No. 76 (GVA/2015), the parties were convened to a case management discussion on 15 April 2015, to address receivability issues.

6. On 30 July 2015, the Dispute Tribunal rendered a Judgment, finding Mr. Survo’s application not receivable *ratione materiae* in the absence of a timely management evaluation request having been filed. Accepting that Mr. Survo was never formally notified of a decision from which time would clearly begin to run for the purpose of filing a management evaluation request, the UNDT found that Mr. Survo should nonetheless have reasonably apprehended, if not actually been aware, as of 6 July 2011, when the Executive Secretary of ESCAP reminded managers to finalize 2010-2011 e-PAS and approve 2011-2012 workplans by 31 July 2011,

that the Organization had failed to approve his 2010-2011 and 2011-2012 workplans at the latest, by 31 July 2011. Accordingly, the UNDT dismissed the application.

Submissions

Mr. Survo's Appeal

7. The UNDT erred when it found that Mr. Survo's application was not receivable. In particular, the UNDT erred on a question of fact in interpreting the evidence, since, as outlined at paragraph 12 of the Judgment, HRMS followed up on Mr. Survo's missing workplans for 2010-2011 and 2011-2012 on 11 and 12 April 2012, at which time they confirmed that a decision to continue pursuing both workplans had been made and explicitly promised that the respective performance appraisals would follow. Mr. Survo never doubted that HRMS' communication of 12 April 2012 could not be relied on as it was clear that the two performance appraisals were being pursued in accordance with Administrative Instruction ST/AI/2010/5, titled "Performance Management and Development System". As the Secretary-General also failed to submit any evidence with regard to the decisions concerning Mr. Survo's workplans, in the absence of anything to the contrary, the Dispute Tribunal should have relied on the available evidence and found his application receivable.

8. The UNDT erred on a question of law by misinterpreting the time limits relevant to its jurisdiction. Pursuant to Article 8(1)(d)(iv) of its Statute, the UNDT has jurisdiction where an application is filed within 90 calendar days after mediation has broken down. Mr. Survo and ESCAP representatives entered into formal mediation for extended periods in 2011 and 2014 on interrelated issues, both of which included discussion of the missing workplans and performance appraisals. As mediation finally broke down in mid-August 2014, and Mr. Survo requested management evaluation on 26 September 2014, he was well within the 90-day time limit.

9. The UNDT also erred on a question of law by failing to consider whether it could extend the filing deadlines, pursuant to Article 8(3) of its Statute, in view of the "exceptional circumstances" of his case. His two workplans were not approved in retaliation for his having filed prior UNDT applications.

10. Further, in view of the three-year maximum outlined in Article 8(4) of its Statute, it would be illogical and unreasonable to apply anything less than a three-year time limit to any application where the contested administrative decision is yet to be made. The authorities cited by the UNDT and the Secretary-General in relation to the strict enforcement of time limits should be distinguished from his case, as the facts in those cases could all pinpoint an explicit date of decision from which time started running to contest a decision, which does not apply in his case. In view of the foregoing, the Appeals Tribunal should determine that the UNDT erred and instead find that Mr. Survo's application is receivable.

The Secretary-General's Answer

11. The UNDT correctly determined that Mr. Survo's 26 September 2014 request to the MEU was untimely and not receivable, given that it was submitted several years after the 2010-2011 and 2011-2012 performance appraisal cycles were required to be finalised. In making this finding, the UNDT considered Mr. Survo's actual knowledge and relied upon the Appeals Tribunal's jurisprudence for determining the date of an implied administrative decision when faced with the silence of the Administration. In view of the periodic checkpoints provided for in the performance evaluation procedure outlined in ST/AI/2010/5, Mr. Survo knew, or should have reasonably known, well before he filed his 26 September 2014 management evaluation request that neither his workplans for 2010-2011 or 2011-2012, nor his 2010-2011 performance evaluation, had been finalised.

12. Mr. Survo's claims regarding his communications with HRMS on 11 and 12 April 2012 are without merit. The record, including the e-mail correspondence, shows that no promise had been made that his performance appraisals would follow. While Mr. Survo refers to these e-mails in his request for management evaluation and his UNDT application, he does not refer to any promise in either document. The UNDT fully considered these documents together with the e-mails attached to Mr. Survo's UNDT application, and reasonably found that there was no merit to his argument.

13. Mr. Survo's contention that the UNDT should have applied Article 8(1)(d)(iv) of the UNDT Statute is without merit. Article 8(1)(d)(iv) of the UNDT Statute applies where the parties "have sought *mediation of their dispute* within the deadlines for the filing of an application" (emphasis added). Mr. Survo and ESCAP were involved in two different mediations, which concerned issues related to Mr. Survo's other UNDT cases, neither of which

touched upon the issues in the present case. Further, regardless of the time limits set out in Article 8(1)(d)(iv) of the UNDT Statute, Mr. Survo was out of time to file a request for management evaluation within the statutory time-limits set out in Staff Rule 11.2(c).

14. Mr. Survo's claims of retaliation are also without merit, as there is no evidence to support this contention. Mr. Survo has failed to show that the UNDT incorrectly applied the Appeals Tribunal's jurisprudence and his contention in this regard only disagrees with the UNDT's findings.

15. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

16. Pursuant to ST/AI/2010/5, the performance evaluation cycle for United Nations staff members begins on 1 April of each year and ends on 31 March of the following year. Pursuant to the aforesaid statutory instrument, the initial step in the performance appraisal process requires a staff member, in consultation with his or her supervisor, to prepare a draft workplan. The second step in the cycle is for the supervisor to conduct a midpoint review usually within six months after the creation of the work plan, and the last step is the end-of-cycle evaluation, which is to take place within three months of the end of the performance cycle, i.e. on 30 June of each year. Against this backdrop, on 4 July 2010, Mr. Survo submitted a draft workplan to the Chief, SD, ESCAP, his then supervisor, this being the initial step taken in his performance appraisal for the 2010-2011 cycle. Thus, pursuant to the aforesaid administrative issuance, Mr. Survo should have received feedback from his supervisors on his proposed workplan by October 2010 and the end-of-cycle evaluation required to complete his performance appraisal should have been completed by 30 June 2011. However, Mr. Survo's performance appraisal for 2010-2011 was not completed within the relevant timeframe as it was not progressed as envisaged by ST/AI/2010/5 beyond the action Mr. Survo himself took in submitting his workplan on 4 July 2010.

17. On 6 July 2011, the Executive Secretary, ESCAP e-mailed all ESCAP managers and urged them to finalise all pending performance appraisals for the 2010-2011 period before the end of July 2011. They were also urged to ensure that all 2011-2012 workplans were

approved electronically within the same timeframe. Despite this request, Mr. Survo's 2010-2011 performance appraisal remained stalled in that it never progressed beyond the submission of the workplan on 4 July 2010. This notwithstanding, on 19 August 2011, Mr. Survo duly e-mailed his draft workplan for the 2011-2012 cycle to his new supervisor, the Chief of Staff, OES, ESCAP.

18. There was some limited activity in relation to both of Mr. Survo's performance appraisals on 11 and 12 April 2012 when he forwarded the previously submitted draft workplans to the Chief of the Organizational Development and Staffing Unit, within HRMS, ESCAP. The latter acknowledged Mr. Survo's communications on 12 April 2012 and informed him that as she would be away the following week she would "look into" the matter upon her return.

19. However, as with Mr. Survo's 2010-2011 performance appraisal, neither step two, the midpoint review, nor step three, the end-of-cycle evaluation, was embarked upon in relation to the 2011-2012 e-PAS cycle.

20. The communication of 12 April 2012 from HRMS, ESCAP was noted by the Dispute Tribunal at paragraph 12 of the Judgment. In his appeal submissions, Mr. Survo argues that the 12 April 2012 communication confirmed that a decision to pursue the two workplans had been made and that it constituted an explicit promise on the part of the Administration that the respective performance appraisals would follow. He also submits that it was unclear if the Dispute Tribunal regarded 12 April 2012 as the "applicant-should-have-known" date for the purpose of seeking management evaluation in relation to the 2010-2011 workplan or whether the UNDT applied it to both workplans.

21. It seems to the Appeals Tribunal that Mr. Survo's belief that the UNDT relied on the date of 12 April 2012 as the "applicant-should-have-known" date is misconceived. The UNDT merely noted the date of 12 April 2012 as part of its factual recital. Paragraphs 26 and 27 of the UNDT Judgment, when read together, satisfies us that the Dispute Tribunal's rationale for deeming Mr. Survo's application not receivable relied upon the dates of 31 July 2011 and 30 June 2012 respectively, the first being the date which was advised on 6 July 2011 with regard to the 2010-2011 performance appraisal period and the second being the due date for the 2011-2012 performance cycle in accordance with ST/AI/2010/5.

22. As correctly noted by the Dispute Tribunal, the contested decisions at stake were implicit decisions in view of the Administration's failure to follow the requisite steps with regard to either of the workplans. Accordingly, it was open to Mr. Survo to contest the said decisions. There is no doubt but that the first procedural step in such a challenge was for Mr. Survo to seek management evaluation of the contested decisions.

23. Staff Rule 11.2 concerning "Management evaluation" provides:

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

...

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

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within thirty calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within forty-five calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

24. The issue for the Appeals Tribunal is whether for the purpose of Staff Rule 11.2(c) the Dispute Tribunal correctly determined that the respective end of cycle dates of 31 July 2011 and 30 June 2012 were the requisite time periods from whence time started to run for the purpose of Mr. Survo contesting the respective decisions concerning his 2010-2011 and 2011-2012 workplans.

25. Firstly, we find that the Dispute Tribunal correctly determined that in the case of silence from the Administration a staff member cannot unilaterally determine the date of an implied administrative decision. Furthermore, the UNDT correctly applied the test laid down by the Appeals Tribunal in *Rosana*, which held that "[t]he date of an administrative decision is based on objective elements that both parties (Administration

and staff member) can accurately determine”.³ In that case, the Appeals Tribunal was satisfied that Ms. Rosana was necessarily aware that her request to the Administration to extend her contract beyond retirement age would not be granted at the time she retired, because the fact of her retirement made it impossible to extend her contract.

26. As noted by the Dispute Tribunal, and in accordance with our jurisprudence, the exercise of determining the date of an implied administrative decision must be conducted by determining when the staff member actually knew or should reasonably have known about the implied decision he or she contests.⁴ We most recently reaffirmed these principles in *Awan*.⁵

27. We are satisfied that it was reasonable and logical for the UNDT to determine effectively that the most obvious objective element known to both parties was the respective end-of-cycle dates for the relevant performance appraisals and we find no fault with the Dispute Tribunal for its reliance on those objective elements.

28. Insofar as Mr. Survo relies on the approach adopted by the Appeals Tribunal in *Manco* and *Schook*, which required the Administration to communicate a decision to a staff member in writing and acknowledged the difficulties inherent in calculating the appropriate time limits in the absence thereof,⁶ the particular circumstances of this case, where the requisite end-of-cycles dates were within the knowledge of both Mr. Survo and the Administration, satisfy us that Mr. Survo’s situation was properly assessed by the UNDT having regard to the approach of the Appeals Tribunal in *Rosana* and *Chahrour*.

29. In aid of his appeal, Mr. Survo also relies on Article 8(1)(d)(iv) of the UNDT Statute, which provides:

... Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

³ *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273, paras. 21-22 and 25.

⁴ *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 22.

⁵ *Awan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-588, paras. 18-19.

⁶ *Manco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-342, paras. 18-20; *Schook v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-013, paras. 6 and 12.

He asserts that in the mediation processes in which he was involved in 2011 and 2014 “the missing work plans and performance appraisals were among the issues on the table”. He submits that as the 2014 mediation only broke down on 15 August 2014 he had ninety days from that date in which to file his request for management evaluation. He contends that as he filed his request on 26 September 2014 he was well within the limit provided for in Article 8(1)(d)(iv) of the UNDT Statute.

30. Mr. Survo’s reliance on this provision is misconceived. In the first instance, the mediation processes upon which he relies related to other cases which Mr. Survo had pursued before the Dispute Tribunal and therefore those mediation processes cannot constitute the “dispute” which is the subject of the present case. Secondly, the 90 days envisaged by Article 8(1)(d)(iv) allows a staff member to file an application to the UNDT once the requirements of the provision are met. In the present case, the UNDT did not declare Mr. Survo’s application non-receivable because he failed to respect the time limits for filing an application, rather it declined jurisdiction on the basis that he had not sought timely management evaluation, i.e., within the requisite sixty days of the contested decisions, as required by Staff Rule 11.2(c).

31. Mr. Survo also points to Article 8(3) of the UNDT Statute, which provides:

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.

He contends that notwithstanding that he did not argue before the Dispute Tribunal for a waiver or suspension of the requisite deadlines in his case, it was the Dispute Tribunal’s prerogative to examine if the circumstances in his case were “exceptional”. Insofar as Mr. Survo suggests that the Dispute Tribunal should have admitted his case pursuant to Article 8(3) of the UNDT Statute, his reliance on the aforesaid provision is misplaced. While Article 8(3) allows the Dispute Tribunal to admit an application that does not meet the required time limits if the particular circumstances precluding filing come within the narrow confines of Article 8(3), that same section clearly and unambiguously provides that the Dispute Tribunal has no jurisdiction to waive or suspend the time limits for management evaluation.

32. This limitation on the UNDT's authority has been consistently articulated by the Appeals Tribunal in its jurisprudence. In *Terragnolo*, we stated:⁷

... Article 8(1)(c) of the UNDT Statute provides that an application shall be receivable if “[a]n applicant has previously submitted the contested decision for management evaluation, where required”. Further, Article 8(3) of the UNDT Statute prohibits the Dispute Tribunal from “suspend[ing] or waiv[ing] the deadlines for management evaluation”.

... Staff Rule 11.2(a), which was in effect in 2014, required that “[a] staff member wishing to formally contest an administrative decision [...] shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision”. This means that a request for management evaluation of a claim raised in an application must be submitted for management evaluation by the staff member prior to bringing an application before the Dispute Tribunal.

33. Finally, Mr. Survo urges upon the Appeals Tribunal that if the absolute three-year time limit provided for in Article 8(4) of the UNDT Statute were to be applied to his case, that time limit would not have run out for him until 11 April 2015 this being the earliest date in Mr. Survo's estimation the contested decisions could have been made. He contends that as he filed his management evaluation request on 26 September 2015 he was well within the time limit provided for in Article 8(4) of the UNDT Statute.

34. Again, Mr. Survo's reliance on Article 8(4) of the UNDT Statute is misplaced. The Dispute Tribunal did not reject his application *ratione temporis*. Rather, his application was rejected *ratione materiae* pursuant to Article 8(3) of the UNDT Statute given his failure to seek management evaluation in a timely fashion. The Appeals Tribunal has also repeatedly recognised management evaluation as a mandatory first step in the appeals process and a prerequisite to invoke the UNDT's jurisdiction,⁸ for which reason we find no error in the UNDT's finding.

35. For the reasons outlined above, we are not persuaded by Mr. Survo's submissions. Accordingly, his appeal fails.

⁷ *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-566, paras. 29-30. See also *Khan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-559, para. 25, and cites therein.

⁸ *Survo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-595, para. 60, and cites therein; *Awan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-588, para. 21, citing *Leboeuf et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-568, para. 68, and *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 38.

Judgment

36. The appeal is dismissed and the Judgment of the Dispute Tribunal is affirmed.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar