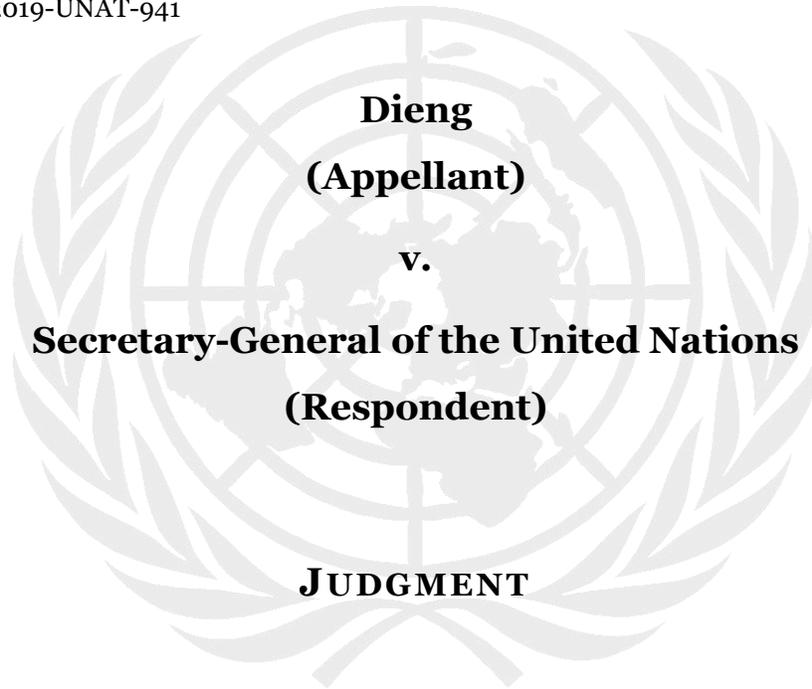




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-941



**Dieng
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge Deborah Thomas-Felix
Case No.:	2019-1237
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. Dieng:	Evelyn Kamau, OSLA
Counsel for Secretary-General:	Phyllis Hwang

Reissued for technical reasons on 16 July 2020

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Receivability No. UNDT/2019/014, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 30 January 2019, in the case of *Dieng v. Secretary-General of the United Nations*. Mr. Boubacar Dieng filed the appeal on 28 February 2019, and the Secretary-General filed an answer on 25 April 2019.

Facts and Procedure

2. Mr. Dieng joined the Organization as a Human Rights Officer at the P-2 level on 14 July 2000. He was later appointed to several positions in the United Nations Mission in Sierra Leone and the United Nations Operations in Côte d'Ivoire. On 23 February 2009, Mr. Dieng was appointed as Senior Child Protection Advisor at the P-5 level in the Child Protection Unit (CPU) in the United Nations-African Union Mission in Darfur (UNAMID).

3. By memorandum dated 4 April 2018, the Joint Special Representative, UNAMID informed Mr. Dieng that he would be reassigned from the CPU, UNAMID to the Office of the Joint Special Representative (OJSR) as a Senior Political Affairs Officer. Mr. Dieng was informed that his reassignment was effective 8 April 2018 and that he would maintain his current grade and level, as well as his contractual status.

4. On 1 June 2018, Mr. Dieng requested management evaluation of the reassignment decision and on 2, 3 and 7 June 2018, he submitted supplementary information to the Management Evaluation Unit (MEU).

5. On 8 June 2018, Mr. Dieng received a letter from the MEU confirming receipt of his correspondences dated 1, 2, 3 and 7 June 2018 and received by the MEU on 1, 4 and 8 June 2018, respectively. The MEU informed Mr. Dieng as follows:¹

Please (...) note that, pursuant to Staff Rule 11.2 (d), the management evaluation in your case is to be completed within 45 calendar days of receipt of your completed request, or no later than **23 July 2018**. If there is any delay in completing the management evaluation, the MEU will contact you to so advise. In any event, please be advised that, pursuant to Staff Rule 11.4 (a), the 90-day deadline for filing an application to the [UNDT], should you wish to do so, will start to run from **23 July 2018**, or the date on which the management

¹ Original emphases.

evaluation was completed, if earlier, unless the deadline has been extended by the Secretary-General to facilitate efforts for informal resolution under the auspices of the Office of the Ombudsman.

6. On 17 October 2018, Mr. Dieng received the MEU's response to his request for management evaluation which advised him that the contested decision had been upheld.

7. By e-mail dated 18 October 2018, the MEU confirmed that its decision of 17 October 2018 was issued prior to the expiration of the UNDT's 90-calendar day deadline (i.e. 23 October 2018) and that accordingly his receipt of the management evaluation resulted in setting a new deadline for submitting his application, in accordance with the Appeals Tribunal's holding in *Neault*.² The MEU advised that "the clock starts ticking from yesterday when you received the [management evaluation] letter. In practical terms, you have 90 calendar days from 17 October 2018, to file your application with the UNDT."

8. By letter dated 7 November 2018, Mr. Dieng was informed that his fixed-term appointment would not be renewed beyond 31 December 2018.

9. That same day, Mr. Dieng filed his application before the UNDT challenging the decision to reassign him from the CPU to the OJSR, UNAMID.

10. On 30 January 2019, the UNDT issued Judgment on Receivability No. UNDT/2019/014 dismissing Mr. Dieng's application as not receivable. The UNDT noted that Mr. Dieng had filed his request for management evaluation on 1 June 2018 and accordingly, the MEU's response to his request was due by 16 July 2018. Since on that date, Mr. Dieng had not yet received a response to his request, the 90-day time limit for filing an application before the UNDT started to run. His application to the UNDT was therefore due by 14 October 2018; yet, Mr. Dieng did not file his application until 7 November 2018. The UNDT found that the fact that Mr. Dieng received a response to his request on 17 October 2018 did not reset the clock for filing an application with the UNDT as it was received after the expiration of the 90-day time limit to appeal to the UNDT. The UNDT therefore concluded that Mr. Dieng's application was time-barred.

² *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345.

Submissions

Mr. Dieng's Appeal

11. The UNDT erred in fact and in law in failing to consider the MEU's timeline to complete its review by 23 July 2018. By confirming that the MEU would complete a review of Mr. Dieng's management evaluation request by 23 July 2018, it is clear that the MEU considered 8 June 2018 as the date of the request for management evaluation. The MEU also informed him that his 90-day deadline for filing an application to the UNDT would run from 23 July 2018. His deadline to file an application with the UNDT would therefore have been 21 October 2018. The MEU eventually issued its decision on 17 October 2018, several days before the expiry of Mr. Dieng's UNDT application deadline. The MEU confirmed that following *Neault*, Mr. Dieng's timeline to file his UNDT application was therefore reset to start afresh from 17 October 2018. Mr. Dieng's new deadline to file his UNDT application therefore fell on 16 January 2019. Mr. Dieng filed his application on 7 November 2018, well before this deadline.

12. Mr. Dieng is not pleading ignorance of the applicable rules regarding the relevant deadlines. On the contrary, he is relying on an express confirmation he received from the MEU. When the UNDT failed to consider the date as confirmed by the MEU and imposed a different deadline on Mr. Dieng, Mr. Dieng was effectively deprived of his right for this case to be heard on its merits.

13. The UNDT erred in allowing the receivability challenge by the Secretary-General. The MEU conducts a review on behalf of the Secretary-General. The MEU confirmed twice in writing that the relevant date for calculating ensuing deadlines was 23 July 2018. As the MEU made this determination on behalf of the Respondent, Mr. Dieng should be entitled to rely on it for purposes of exercising his rights to the internal justice system. It would be manifestly unjust that now, after the completion of the management evaluation process, a different date is applied for purposes of calculating Mr. Dieng's UNDT deadline. Moreover, the standard clause in the acknowledgement letter received from the MEU does not invalidate the date indicated therein. The standard clause is irrelevant where there is a specific and substantive issue involved.

14. The MEU is vested with powers to suspend or extend the relevant deadlines concerning the management evaluation process. Under Staff Rule 11.2(d), the Secretary-General may extend the deadlines for completion of management evaluation beyond 30 or 45 days, whichever is

applicable. The authority to modify the relevant deadlines is delegated by the Secretary-General to the MEU pursuant to Section 10.2(d) of Secretary-General's Bulletin ST/SGB/2010/9 (Organization of the Department of Management). These provisions state that deadlines may be extended to accommodate informal resolution efforts. The UNDT has previously held that in accordance with the Secretary-General's authority to make exceptions pursuant to Staff Rule 12.3(b), the deadlines may also be extended by the MEU in circumstances other than those where there has been an ongoing informal resolution process.³ In the present case, the Secretary-General has essentially exercised his discretion under Staff Rule 12.3(b) when he extended the deadline to 23 July 2018 by which Mr. Dieng could expect an outcome of a review of his management evaluation request.

15. Finally, by being asked to rely on a specific date and then having another date applied to him, Mr. Dieng has not been treated fairly, justly, and transparently. The obligation to respect deadlines does not fall only on Mr. Dieng, as an applicant to the case, but also on the Secretary-General, who has the obligation to comply with the deadlines he sets for himself. In Mr. Dieng's case, the UNDT deemed itself to have jurisdiction over the matter starting from 16 July 2018, whereas the MEU deemed itself to be seized of the matter up until 23 July 2018. For seven days, there was effectively an overlap of the jurisdictions of the MEU and the UNDT whereas it is clear from Staff Rules 11.2 and 11.4 that the jurisdictions of the respective review bodies are not meant to run concurrently. This situation deprives the internal justice system of the predictability and certainty for the staff member.

16. Mr. Dieng's application was filed in a timely manner based on the date of 23 July 2018. The UNDT's decision to apply the wrong date for purposes of calculating Mr. Dieng's time limit for filing his UNDT application and to ignore the date specified by the MEU has resulted in a manifestly unreasonable decision. As a result of this error, Mr. Dieng is barred from having his case heard. Mr. Dieng requests that the Appeals Tribunal reverse the UNDT Judgment and remand the Judgment to the UNDT for a hearing on the merits.

³ Staff Rule 12.3(b) reads: "Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members."

The Secretary-General's Answer

17. The UNDT correctly determined that the application was not receivable because it had been filed after the expiration of the relevant statutory deadline. Mr. Dieng requested management evaluation on 1 June 2018. Pursuant to Article 8(1) of the UNDT Statute and Staff Rule 11.2(d), the deadline for the provision of an outcome of Mr. Dieng's request for management evaluation was 45 days from 1 June 2018, that is, 16 July 2018. Accordingly, Mr. Dieng was required to file his application with the UNDT within 90 days after 16 July 2018, that is, by 14 October 2018. As Mr. Dieng filed the application after the expiration of the statutory time limit, on 7 November 2018, the UNDT correctly dismissed the application as time-barred.

18. Mr. Dieng has not established any error of fact or law by the UNDT warranting a reversal of its Judgment. To the extent that Mr. Dieng made decisions on the filing of his application based on the MEU, it is well established that staff members have to ensure that they are aware of Staff Regulations and Rules and the applicable procedures in the context of the United Nations' internal justice system and ignorance of the law is no excuse for missing a deadline. The MEU has no authority to waive deadlines for management evaluation. The MEU also has no authority to determine the deadline for filing an application before the UNDT. Rather, pursuant to Article 8(3) of the UNDT Statute, only the UNDT may suspend or waive the deadline for the filing of an application and only in exceptional circumstances. Accordingly, the MEU acknowledgement letter could not serve to alter the deadline for filing the application before the UNDT.

19. The Appeals Tribunal held in *Neault* that the deadline for filing an application with the UNDT will reset only when the management evaluation is received after the deadline of 45 calendar days but *before* the expiration of 90 days for seeking judicial review. The MEU received Mr. Dieng's request for management evaluation on 1 June 2018. Pursuant to Staff Rule 11.2(d) and Article 8(1)(i) of the UNDT Statute, the outcome of the management evaluation request had to be communicated to Mr. Dieng within 45 calendar days, that is, by 16 July 2018. Under Article 8(1)(i)(b) of the UNDT Statute, Mr. Dieng's 90-day filing deadline with the UNDT therefore expired on 14 October 2018. Consequently, in accordance with *Neault*, the deadline for filing an application with the UNDT was not reset when Mr. Dieng received the outcome of his management evaluation request on 17 October 2018.

20. Mr. Dieng's contention that 8 June 2018 should be accepted as the date of his request for management evaluation is legally unsustainable. Under Staff Rule 11.2(c), a request for management evaluation shall not be receivable unless it is sent within 60 calendar days from the date on which the staff member was notified of the contested administrative decision. Mr. Dieng was notified of the contested decision on 4 April 2018. Accordingly, a request for management evaluation sent on 8 June 2018 could not have been receivable nor could it constitute a basis for calculating deadlines. Rather, Mr. Dieng's communications to the MEU of 2, 4 and 8 June 2018 merely supplemented his management evaluation request of 1 June 2018. A staff member's submission of additional information to the MEU, after a request for management evaluation of a contested administrative decision has already been made, cannot have the effect of extending the deadlines provided in Article 8(1)(i) of the UNDT Statute. In view of the foregoing, the UNDT correctly held that the application was filed out of time.

21. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Considerations

22. The issue before this Tribunal is whether the Dispute Tribunal correctly concluded that Mr. Dieng's application was filed untimely and therefore not receivable. This Tribunal determines that the UNDT's conclusions are not correct.

23. Article 8(1) of the UNDT Statute reads, in part, as follows:

An application shall be receivable if:

(...)

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices[.]

24. Similarly, Article 7(1) of the UNDT Rules of Procedure provides that, where a management evaluation is required, the application shall be submitted to the UNDT within 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate, or 90 calendar days of the relevant deadline for the communication of a response to a management evaluation request, namely, 30 calendar days for disputes arising at Headquarters and 45 days for disputes arising at other offices.

25. Staff Rule 11.2 provides in relevant part:

Staff Rule 11.2

Management evaluation

(...)

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 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 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 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.

26. As per the Appeals Tribunal's jurisprudence, where a response to a management evaluation request is not received, a staff member has 90 days from when the response is due to file an application to the UNDT. When a response is received *after* the deadline for a response to a request for management evaluation has lapsed but *before* the expiration of the 90-day time limit for filing an application with the UNDT, then the receipt of the response resets the clock for filing an application with the UNDT. Whereas, if a response is received after the

expiration of that 90-day time limit, as in this case, the receipt of the response does not reset the clock for filing an application with the UNDT.⁴

27. In the present case, Mr. Dieng submitted his request for management evaluation on 1 June 2018. The MEU's response should have been made within 45 calendar days or no later than 16 July 2018. However, the MEU responded to his request on 17 October 2018, which was more than 45 calendar days from the date of his request. Mr. Dieng filed his application with the UNDT on 7 November 2018, which is within 90 calendar days of the MEU's response but more than 90 calendar days from the date by which the MEU should have responded, that is 16 July 2018, and therefore was well beyond the deadline by which he should have filed his application, i.e. 15 October 2018.⁵

28. Therefore, this Tribunal finds that the UNDT initially did not make any error of law in concluding that Mr. Dieng's application of 7 November 2018 was not receivable *ratione temporis* because it was filed outside the regulatory time limit. The MEU's response of 17 October 2018, which was received after the expiration of that 90-day period, did not reset the clock for Mr. Dieng to file an application with the UNDT.

29. Besides, having reviewed the documents on file, we find, contrary to Mr. Dieng's claims, that neither his communications to the MEU of 2, 3 and 7 June 2018, whereby he supplemented his management evaluation request of 1 June 2018, nor the MEU's acknowledgement letter of 8 June 2018 could have, or did have, the effect of extending the statutory deadlines for Mr. Dieng to file his application with the UNDT.

30. Indeed, as a matter of law, 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 a timely filing come within the narrow confines of Article 8(3), that same paragraph clearly and unambiguously provides that the Dispute Tribunal has no jurisdiction to waive or suspend the time limits for management evaluation.⁶

⁴ *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-679, para. 37 and *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345, paras. 31-34.

⁵ The application was due on 14 October 2018. 14 October 2018 was, however, a Sunday and accordingly, the time limit fell on Monday, 15 October 2018.

⁶ *Survo v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-644, para. 31; *Pavicic v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-619, para. 21; *Khan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-559, para. 25, citing, among others, *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-402,

31. The same prohibition applies to the MEU, which is thus precluded from waiving its own deadlines for responding to requests for management evaluation. Staff Rule 11.2(c) allows only the Secretary-General to extend a management evaluation deadline “under conditions specified by the Secretary-General”.⁷ There is no evidence that the Secretary-General extended the management evaluation deadline or specified any conditions for extending it. Hence, the MEU’s response of 17 October 2018 as such could not, and did not, reset the deadline for Mr. Dieng to file an application with the UNDT.

32. The Appeals Tribunal does not find merit in Mr. Dieng’s submissions that the MEU, conducting a review on behalf of the Secretary-General, is vested with powers to suspend or extend the relevant deadlines concerning the management evaluation process and has the delegated authority to modify the relevant deadlines pursuant to Section 10.2(d) of ST/SGB/2010/9.

33. Pursuant to Section 10.2(d) of ST/SGB/2010/9, it is among the MEU’s functions to make “*recommendations* to the Under-Secretary-General for Management on extending the deadlines for filing requests for management evaluation by staff members or for extending the deadlines for completing a management evaluation pending efforts for informal resolution by the Office of the Ombudsman”.⁸ As per the plain language of this provision, the MEU is competent only to make recommendations whereas the authority to extend a management evaluation deadline – closely connected to the deadline for filing an application for judicial review - is reserved for the Secretary-General alone, who has not, as correctly argued by the Administration, exercised it in the present case. Moreover, Mr. Dieng’s allegation that the MEU made this determination on behalf of the Secretary-General is not supported by the MEU’s acknowledgement letter of 8 June 2018 which states that “unless the deadline has been extended by *the Secretary-General* to facilitate efforts for informal resolution under the auspices of the Office of the Ombudsman”, the MEU’s deadline for responding to Mr. Dieng’s request for management evaluation is 23 July 2018.

para. 23, and *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-301, para. 26; *Roig v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-368, para. 17.

⁷ *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306/Corr.1, paras. 22-25.

⁸ Emphasis added.

34. With regard to Mr. Dieng's contention that 8 June 2018 should be accepted as the date of his request for management evaluation, from which all subsequent deadlines should be counted, we find it without merit for two reasons. First, as already noted, Mr. Dieng's communication to the MEU of 8 June 2018 did not constitute a request for management evaluation but a mere supplementation of his management evaluation request of 1 June 2018 in that it provided additional information to the MEU. Second, had Mr. Dieng wanted to submit a "new" request for management evaluation on 8 June 2018, he should have waived his first application to the MEU on 1 June 2018. Moreover, he had to do so in a timely manner, which is not the case here, since 8 June 2018 was well beyond the time limit for filing a request for management evaluation, that is, by 4 June 2018, given that Mr. Dieng was notified of the contested administrative decision on 4 April 2018. Anyway, resubmitting a request for management evaluation cannot, and does not, reset the date management evaluation is sought or the date from which the time limits for filing an application for judicial review ensues. Otherwise, the deadline for filing an application would have no certainty.⁹

35. Further, Mr. Dieng argues that the MEU confirmed twice in writing that the relevant date for calculating ensuing deadlines was 23 July 2018 and hence his application was filed in a timely manner based on that date, as he was entitled to rely on it for purposes of exercising his rights to the internal justice system.

36. The factual basis of this claim is borne out by the content of two letters that the MEU sent to Mr. Dieng on 8 June 2018 and 18 October 2018, respectively. Specifically, on 8 June 2018, Mr. Dieng received an acknowledgment letter from the MEU, which informed him, *inter alia*, that:¹⁰

Your correspondence dated 1, 2, 3 and 7 June 2018 and addressed to the Management Evaluation Unit (MEU), requesting management evaluation concerning the decision to reassign you from the Child Protection Unit to the Office of the Joint Representative, was received at this office on 1, 4 and 8 June 2018, respectively...

(...)

Please also note that, pursuant to Staff Rule 11.2(d), the management evaluation in your case is to be completed within 45 calendar days of receipt of your completed request, or no later than **23 July 2018**. If there is any delay in completing the management

⁹ *Al-Dawoud v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-664, para. 19.

¹⁰ Original emphases.

evaluation the MEU will contact you to so advise. In any event, please be advised that, pursuant to Staff Rule 11.4(a), the 90-day deadline for filing an application to the United Nations Dispute Tribunal, should you wish to do so, will start to run from **23 July 2018**, or the date on which the management evaluation was completed, if earlier, unless the deadline has been extended by the Secretary-General to facilitate efforts for informal resolution under the auspices of the Office of the Ombudsman.

37. While on 18 October 2018, the MEU advised Mr. Dieng as follows:

Please be advised that as indicated in our acknowledgement letter of 8 June 2018, your deadline for filing an application with the UNDT is 23 October 2018. However, as the Administration responded to your request after the 45-day deadline but prior to the expiration of the Tribunal's 90 calendar-day deadline (i.e. 23 October 2018), your receipt of the management evaluation results in setting a new deadline for submitting your application, under the UNAT precedent in *Neault*, 2013-UNAT-345, para. 34[.]

38. As already noted above, the MEU is not vested with the authority to suspend or extend the relevant deadlines concerning the management evaluation process; much more so, the MEU does not possess the competency to suspend or extend the relevant deadlines for filing an application for judicial review or, even further, to revive the expired ones.

39. However, the material facts show that the MEU, though not bound to do so, advised Mr. Dieng that the 90-calendar day deadline for his filing of an application with the UNDT started to run from 23 July 2018. Based on this misrepresentation, Mr. Dieng filed his application with the UNDT untimely on 7 November 2018.

40. Under these circumstances, by applying the principles of good faith and of the regularity of administrative proceedings to the specific facts of the case at hand, the Appeals Tribunal finds that the UNDT finally did not properly consider the facts and the applicable statutory law and jurisprudence in arriving at its decision that Mr. Dieng's application was not receivable as it was time-barred. Concomitantly, the Secretary-General is estopped from raising the defense that the application for judicial review was time-barred, since Mr. Dieng relied, to his prejudice, upon the MEU's advice that the 90-calendar day deadline for filing his application with the UNDT started to count from 23 July 2018.

41. For the foregoing reasons, Mr. Dieng's appeal must be granted. Since the Judgment under appeal only addresses issues of receivability, the case must be remanded to the UNDT for a consideration on the merits.

Judgment

42. The Appeals Tribunal grants the appeal and reverses Judgment No. UNDT/2019/014. The case is remanded to the UNDT for a trial on the merits.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Thomas-Felix

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar