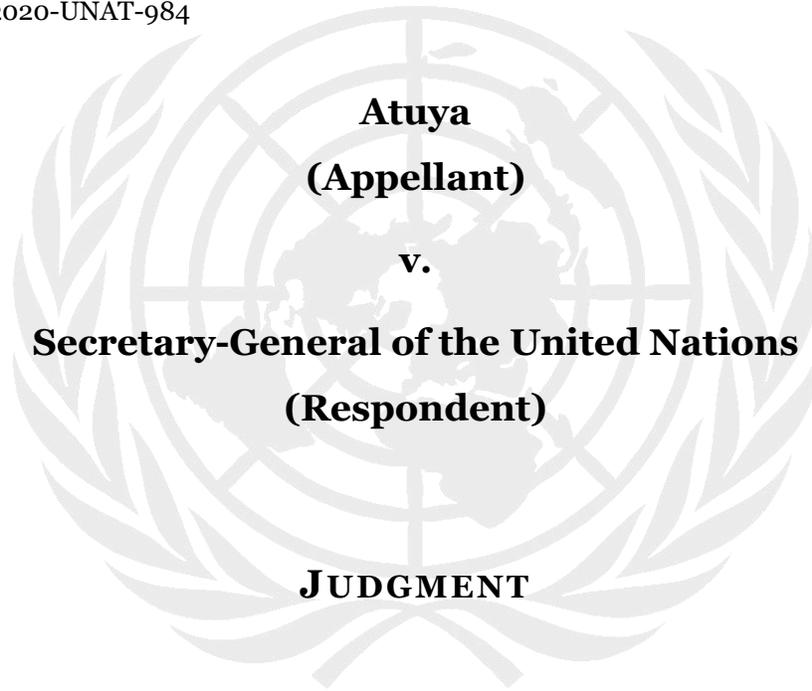




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-984



**Atuya  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2019-1284
Date:	27 March 2020
Registrar:	Weicheng Lin

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Counsel for Ms. Atuya:	Edwin Nhliziyo
Counsel for Secretary-General:	Noam Wiener

*Reissued for technical reasons on 16 September 2020*

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Appellant, a Human Resources Assistant with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) in Bangui, was detained and medically evacuated to her home country in March 2018. She unsuccessfully contested these decisions and appealed to the United Nations Dispute Tribunal (the UNDT or Dispute Tribunal).

2. In Judgment on Receivability No. UNDT/2019/087 issued on 20 May 2019, the Dispute Tribunal dismissed her application as irreceivable. The UNDT noted that, by 31 March 2018, the Appellant had all the information about the decisions to detain her and medically evacuate her to Nairobi. The time limit for seeking a management evaluation therefore started running from that date for 60 days through 30 May 2018. But, the Appellant sought management evaluation of the contested decisions only on 29 June 2018, 29 days out of time.<sup>1</sup> The Dispute Tribunal found unpersuasive her claim that she was unable to deal with the issue until after she had been released from the treatment center on 28 May 2018.

3. The Appellant appeals the Judgment. She says the Dispute Tribunal erred by basing its decision on mistaken facts including the assertion that, while confined to the treatment facility, the Appellant was free to communicate with the outside to allow her to file the request for a management evaluation. Also, she says the Dispute Tribunal erred procedurally in relying on the Appellant's reply that was misfiled for another application. Rather than request the Appellant's reply on the receivability issue, the Dispute Tribunal erroneously proceeded to issue its Judgment.

4. For reasons set out below, we affirm the Judgment.

**Facts and Procedure**

5. The Appellant has served with the Organization at various duty stations beginning in 1995.<sup>2</sup> She joined MINUSCA in Bangui on 1 May 2014 as a Human Resources Assistant at

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<sup>1</sup> This appears to be an error on the part of the Dispute Tribunal. The Appellant filed a request for management evaluation on 28 June 2018. The Respondent used yet another date, 27 June 2018. For consistency and avoidance of confusion, we use 28 June 2018 throughout the text as the date of the Appellant's request for management evaluation.

<sup>2</sup> According to the Respondent, Ms. Atuya has retired from service.

the FS-5 level in the international staff/field service category under a fixed-term appointment.

6. On 28 March 2018, a MINUSCA medical doctor addressed a letter to one “Dr. Sophia” informing that on that date, she went to the Appellant’s house and recommended that she receive “a further medical assessment as soon as possible, with possible treatment in an adaptable place”.

7. On the same day, the Appellant was brought to MINUSCA’s Level II Hospital, in Bangui, which recommended that the Appellant be assessed and treated “in [a] higher level medical facility”.

8. In a memorandum dated 29 March 2018 to the Director of Mission Support, MINUSCA, a medical officer, Medical Services Division (MSD), Office of Human Resources Management (OHRM) at Headquarters in New York, concurred with MINUSCA’s Medical Services Section’s recommendation that the Appellant be medically evacuated to her home country of Kenya, for three days.

9. On 1 April 2018, the Appellant left Bangui for Nairobi, Kenya. On 14 April 2018, she saw a doctor in Nairobi, who recommended a six-week residential treatment program. She was admitted into a treatment center on 17 April 2018 and was discharged on 25 May 2018.

10. On 28 June 2018, the Appellant filed a request for management evaluation of a) the inclusion of her post on the list of proposed posts for abolition and the decision to separate her from service, while she was on forced sick leave; and b) her unlawful “detention” twice against her will for unexplained reasons on the basis of a misdiagnosis of her illness. In the request for management evaluation, the Appellant stated that she was aware of the decision of 29 May 2018 but “did not see it until 18<sup>th</sup> of June [2018] when she returned from forced sick leave”.

11. On 5 October 2018, the Management Evaluation Unit (MEU) issued its response indicating that, as her appointment had subsequently been extended to 31 December 2018, the extension issue was moot and that her challenge of the “detention” and hospitalization

was the same challenge that Appellant had made in July 2016 against her “detention” and medical evacuation at that time and thus could not be revisited.

12. Before the MEU issued the outcome of the management evaluation, the Appellant appealed to the Dispute Tribunal, which held that the decisions to detain her in a medical facility and medically evacuate her were administrative decisions. However, the Dispute Tribunal dismissed her application as not receivable because she did not file a timely management evaluation request.

### **Submissions**

#### **The Appellant’s Appeal**

13. The Appellant does not allege jurisdictional errors and does not identify errors on questions of law. She, however, articulates the Dispute Tribunal committed errors of procedure (in accepting a misfiled rebuttal and not specifically requesting a rebuttal on the receivability issue) and errors on findings of fact.

14. In terms of procedure, the Appellant argues that the Dispute Tribunal accepted a misfiled rebuttal and should have given her an opportunity to reply on the issue of receivability. She says the Dispute Tribunal also erred in fact when it concluded that the Appellant had not addressed the issue of receivability of her application raised by the Respondent. She says she had submitted a document related to a separate case of her termination from service, but it was misfiled under the present case. In that submission, the Appellant did not address any receivability because it was not an issue in that case.

15. In terms of the receivability, the Appellant submits that Dispute Tribunal erred in fact when it accepted a claim by the Respondent that during her 42 days of confinement at the treatment center in Nairobi, the Appellant was allowed to receive communication from the outside and could be contacted in terms of preparing her appeal within the time limits. She submits this was untrue. While confined, the Appellant says she was able to send out an e-mail or two, but she was not allowed to receive phone calls or e-mails.

16. Because the Appellant was forcibly detained and confined to the treatment center on the recommendation of the United Nations medical staff on the basis of a wrong diagnosis, leading to the loss of her livelihood, she submits the present case qualifies for special

consideration under Article 30 of the Rules of Procedure of the Appeals Tribunal (Rules), which gives the Appeals Tribunal the power to “shorten or extend a time limit ... when the interests of justice so require”. Absent the misdiagnosis, the Appellant submits that she would still be employed by the Organization, because her post and functions were not affected by the retrenchment.

17. She alleges there was underhanded interference by the Administration in the Appellant’s exercise of her right to appeal. Twice, she says the Administration attempted to make the Appellant withdraw her appeal by offering inducements solely designed to render her case out of time limits, and the Administration did so without the involvement of her Counsel.

18. She argues that the Dispute Tribunal was in haste to dismiss the Appellant’s application without any attempt to assess whether its decision was fair and just under the circumstances.

### **The Secretary-General’s Answer**

19. In response, the Secretary-General submits that the Dispute Tribunal made no procedural errors. In addition, the Dispute Tribunal correctly held that the Appellant’s application was time barred because her request for management evaluation was not filed within the requisite 60-day time period. She was required to file her request for management evaluation by 30 May 2018, but she did not do so until 28 June 2018.

20. The Secretary General submits that the Appellant claims that she was not able to deal with the appeal when she was held *incommunicado* in the treatment center from 17 April 2018 to 28 May 2018. But she only entered the rehabilitation program two weeks after she had arrived in Nairobi. Additionally, she was able to acquire the services of the same legal counsel, who had assisted her in preparing her 2018 request for management evaluation and who could have helped her with her case.

21. Neither the Appellant nor her legal counsel made any attempt to request that the Secretary-General extend the deadline for management evaluation. The Dispute Tribunal had no authority to waive the deadline for management evaluation.

**Considerations**

22. Article 2(1) of the Statute of the Appeals Tribunal (the Statute) provides that the Appeals Tribunal is competent to hear and pass judgment on an appeal of the Dispute Tribunal’s judgment in which it is asserted that the Dispute Tribunal:

- a) Exceeded its jurisdiction or competence;
- b) Failed to exercise jurisdiction vested in it;
- c) Erred on a question of law;
- d) committed an error of procedure, such as to affect the decision of the case; or
- e) erred on a question of fact, resulting in a manifestly unreasonable decision.

23. The issues before us are:

- i) whether the Dispute Tribunal committed an error of procedure that affected the decision in accepting a misfiled rebuttal and not specifically requesting a rebuttal on the receivability issue; and
- ii) whether the Dispute Tribunal committed errors on questions of fact resulting in a “manifestly unreasonable decision”, in particular in the finding that the request for management evaluation was not receivable.

24. The Appellant has the burden of asserting and proving the Dispute Tribunal committed these defects in its judgment. The function of the Appeal Tribunal on an appeal is not to re-try the case or make its own findings of fact.<sup>3</sup>

*Error of Procedure that Affected the UNDT’s Decision*

25. We find there may have been an error in the misfiling of the Appellant’s rebuttal. However, this did not result in procedural unfairness that affected the decision in the case.

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<sup>3</sup> *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

26. The duty to provide a party with procedural fairness extends to all administrative decision makers acting under statutory authority, such as the Dispute Tribunal and the Appeals Tribunal. The content of the duty will vary depending on the context and function performed by the administrative decision-maker. The right to a fair hearing is the basis for procedural fairness, and this includes the right of a party to know the case against him or her and the right to reply.

27. While the content of procedural fairness is variable and is to be decided in the context of a specific case, procedural fairness is at issue where an administrative body has prescribed rules of procedure that have been breached.

28. The Dispute Tribunal's Rules of Procedure do not provide for an automatic right for the applicant to reply to the Respondent's answer to the application. The Dispute Tribunal's process allows for an applicant to file an application for leave to file additional materials. The Appellant did not file an application for leave to file the rebuttal in this application, although she did so for the other application against termination of her service. There was no procedural unfairness as the Appellant had the opportunity to file for leave to respond in this application, which she did not pursue.

29. In any event, we find this did not affect the ultimate decision of the case on receivability. The Dispute Tribunal had before it the Appellant's submission that she was unable "to deal with the issue until she was released from the medical facility" but found it unsupported. It also found that, in any event, the Dispute Tribunal could not suspend or waive the deadlines for management evaluation, as that authority lies with the Secretary-General. As a result, the lack of an opportunity to file a rebuttal would not have affected the UNDT's decision and as such cannot be categorized a reviewable error of procedure under Article 2(1) of the Statute.

*Errors of Jurisdiction, Law or Errors of Fact Resulting in a "Manifestly Unreasonable Decision"*

30. The Appellant contests the decisions to detain her and medically evacuate her, which occurred no later than 30 March 2018. The deadline was 60 days after that date, namely 29 May 2018. She filed her request for management evaluation on 28 June 2018.

31. In addition to being out of time, the Appellant's request for management evaluation did not identify the administrative decision she requested for review. She identified the retrenchment decision and her treatment for the past two years in the form of forcible and unlawful detention against her will. As a result, the MEU did not specifically deal with the March 2018 decisions; it held the issue of her March 2018 hospitalization was not receivable as she had withdrawn her request for management evaluation of the 2016 incidents, which were the same as those in 2018.

32. Therefore, there seems to be no specific management evaluation of the March 2018 incidents. However, as stated by the Dispute Tribunal, in any event, even if the March 2018 hospitalization was part of the management evaluation, it was out of time pursuant to Staff Rule 11.2(c).

33. Staff Rule 11.2(c) sets out the time limit for a staff member to file a request for management evaluation, which is 60 days after s/he was notified of the contested administrative decision.

34. The Appellant submits that she was not able to request a timely management evaluation due to her confinement and/or her inability to communicate with others.

35. However, article 8(3) of the UNDT Statute provides that “[t]he 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.*”<sup>4</sup>

36. It is now well settled jurisprudence that, pursuant to Article 8(3) of its Statute, the UNDT has no discretion to waive the deadline for management evaluation or administrative review.<sup>5</sup> This statutory provision has been interpreted as a strict prohibition. Only the Secretary-General, of which MEU forms part, has the authority to extend or waive the time limits for management evaluation.

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<sup>4</sup> Emphasis added.

<sup>5</sup> *Roig v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-368.

37. Therefore, the discretion to waive the deadline for management evaluation or administrative review is given to the Secretary-General. In this instance, the Appellant did not seek the exercise of that discretion by requesting a deadline extension from the Secretary-General during the management evaluation process. As a result, Article 8(3) of the UNDT Statute operated and the Dispute Tribunal correctly found that the Appellant's request for management evaluation was not receivable. The UNDT correctly interpreted its jurisdiction in the matter and the application of Article 8(3) of the UNDT Statute. In doing so, the UNDT did not commit errors of jurisdiction, law, or fact that led to a manifestly unreasonable decision.

### **Judgment**

38. The appeal is dismissed and Judgment No. UNDT/2019/087 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of March 2020.

*(Signed)*

Judge Sandhu, Presiding  
Vancouver, Canada

*(Signed)*

Judge Knierim  
Hamburg, Germany

*(Signed)*

Judge Halfeld  
Bournemouth, United Kingdom

Entered in the Register on this 19<sup>th</sup> day of June 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar