



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/047

Judgment No.: UNDT/2011/091

Date: 27 May 2011

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

PATTERSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Katya Melliush, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Melissa Bullen, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Senior Information Analyst in the United Nations Assistance Mission in Afghanistan (“UNAMA”), contests the decision not to renew his contract beyond 31 March 2008.
2. The Applicant seeks reinstatement effective 1 April 2008, with retroactive payment of salary and benefits, compensation for moral damages in the sum of two years’ net base salary, and removal of any adverse material from his personnel file.
3. The Respondent objects to the receivability of the application, submitting that both the Applicant’s request for administrative review and the present application were filed out of time, and that the Applicant has failed to articulate any exceptional circumstances justifying the delay.

Facts

4. The Applicant joined UNAMA in November 2006 as a P-5 level Senior Information Analyst on an appointment of limited duration. He was stationed in Kabul, Afghanistan. His appointment was subsequently extended and set to expire on 31 March 2008.
5. On 27 December 2007 the Applicant was declared *persona non grata* by the Government of Afghanistan due to allegations of improper conduct made against him (hereinafter referred to as the “Alleged Improper Conduct Incident”). He left Afghanistan on the same day and was placed on special leave with full pay until his contract expired on 31 March 2008.
6. In the period between late December 2007 and early January 2008, allegations were raised within UNAMA that the Applicant had been in unauthorised possession of weapons at the guesthouse where the Applicant and several other UN staff members resided, and that he had facilitated an arrangement for the provision of two

weapons by the local Chief of Police to the *Chowkidars*—private security personnel guarding the guesthouse (hereinafter referred to as the “Alleged Weapons Incident”).

7. On 1 February 2008, following several exchanges regarding the Alleged Weapons Incident between the Department of Field Support (“DFS”) and the Office of Internal Oversight Services (“OIOS”), the matter was referred by DFS to the Office of Human Resources Management (“OHRM”) for further action.

8. By email dated 5 February 2008 the Deputy Special Representative of the Secretary-General (“Deputy SRSG”), UNAMA, who was the Applicant’s direct supervisor, advised the Applicant as follows:

This is to confirm further to our conversation that by mutual agreement we will not proceed with extension of your contract beyond March 2008. Our agreement, with which I seek your concurrence by return email, is that this step is being taken further to a lapse in judgment related to a single incident [the Tribunal understands this to refer to the Alleged Weapons Incident], which you have acknowledged.

The mission continues to insist with all Afghan interlocutors that your activities [in relation to the Alleged Improper Conduct Incident] were in entire accordance with the UNAMA mandate and indeed performed at the request of mission management. That the request for your withdrawal was based on a misunderstanding within the Afghan government has been acknowledged by all the relevant ministries and agencies. We continue to seek full exoneration of UNAMA from the allegations made. I wish to emphasize that this episode is entirely unrelated to the incident mentioned above [i.e., the Alleged Weapons Incident].

I would also like to confirm both as your direct supervisor and the Officer-in-Charge of UNAMA at this time that your contribution to the work of the mission has been outstanding. Your knowledge, experience and judgement have been of invaluable service both to us and to Afghanistan: yours are among the skills that make this mission effective and highly respected. ...

I would be grateful for your positive reply to this email as soon as possible.

9. On 8 February 2008 the Applicant replied to the Deputy SRSG, stating, *inter alia*:

Thank you for your email to my UN address—from which I am unable to send a reply—regarding the issue of my contract. I would like hereby to record that I acknowledge the issue discussed and that I concur with your proposed course of action.

I would like to express my gratitude for your assistance with this matter and, naturally, my apologies for the obvious and considerable inconvenience that this has caused you.

10. According to the Respondent, on 14 February 2008 OHRM indicated to DFS that a further investigation into the allegations should be undertaken by UNAMA or by a panel constituted by DFS.

11. On 29 March 2008 the Deputy SRSG signed a form entitled “Request for Extension of Appointment/Assignment/Secondment of International Staff Member”, which contained a section on performance evaluation, rating the Applicant’s performance as “[f]requently exceed[ing] performance expectations” and marking the box that stated “I recommend no further extension”. The Deputy SRSG included a hand-written comment, stating: “Justification of the recommendation for non extension: For personal reasons and by mutual agreement”.

12. The Applicant was separated on 31 March 2008. According to the documents provided by the parties, in late March and early April 2008 the Applicant received several additional communications from OHRM—including memoranda and emails—confirming his separation effective 31 March 2008.

13. On 10 April 2008 a note to the file was placed in the Applicant’s personnel file, stating that at the time of his separation on 31 March 2008 there was a pending matter that had not been resolved and, should the Applicant seek further employment with the United Nations, the Administrative Law Unit of OHRM should be contacted.

14. On 14 July 2008 the Applicant sent an email to the Chief of the Conduct and Discipline Unit of DFS requesting, *inter alia*, to initiate a formal investigation into

the allegations of misconduct against him. Attached to the email was a note, also dated 14 July 2008 and signed by the Applicant, in which he stated, *inter alia*:

When I was, at the end of March, sent a non-extension memo from Personnel via the [Deputy SRSB], I declined to sign it. Two versions were actually sent—the first I returned as it was inappropriately worded; the second I, after consideration, actively declined to sign, period.

...

The current situation is that my contract has not been extended—it lapsed on the 31st March. Whilst I would not suggest that anyone has acted with anything but the best of faith, I would contend that the decision not to extend it was not actually correct. ...

15. In a note dated 25 July 2008 and addressed to the Under-Secretary-General for Management, the Under-Secretary-General for Peacekeeping Operations stated:

1. [The Applicant] was separated from service with the United Nations on 31 March 2008. ...

2. On 9 January 2008, UNAMA alleged by cable that [the Applicant] was in the unauthorized possession of weapons. The cable attached an “Informal Inquiry” providing details of the allegation. I am not aware of any informal inquiry or judgment on the allegation.

3. In the absence of a formal judgement, and in the interests of fairness to a staff member who served the United Nations in Afghanistan in important capacities over the past several years, I would be most grateful if you could place in [the Applicant’s] file his own statement (attached) responding to the allegations of being in unauthorized possession of weapons.

16. In follow-up to the above note dated 25 July 2008, the Officer-in-Charge of the Administrative Law Unit of OHRM prepared a note dated 4 August 2008 for the Applicant’s personnel file, stating:

Note to the Official Status [F]ile of [the Applicant]

The Under-Secretary-General for Peacekeeping Operations requested by a note to the Under-Secretary-General for Management dated 25 July 2008 that the attached response to the allegations from [the Applicant] dated 23 July 2008 be placed on [the Applicant’s] [O]fficial [S]tatus [F]ile.

17. On 15 September 2008 DFS requested UNAMA to conduct a formal investigation into the allegations of unlawful possession of weapons.

18. By memorandum dated 9 November 2008 the Applicant was informed by the SRSB as follows:

1. Your request for an investigation into the [Alleged Improper Conduct Incident] and [the Alleged Weapons Incident] refers.

2. A panel has been convened to conduct a formal investigation into the allegations, particularly that relating to unauthorized possession of weapons.

...

6. To authenticate your response, you will be asked to provide a signed statement and/or sign the minutes of your interview which will be sent to you via email.

...

9. Should you have any questions or require any assistance to facilitate the smooth and immediate resolution of this case, please do not hesitate to contact me, through the Conduct and Discipline Officer.

...

19. By letter dated 2 December 2008, the Applicant requested administrative review of the decision not to renew his contract with UNAMA beyond 31 March 2008. In his request, the Applicant stated, *inter alia*:

I would like to lodge an appeal of an administrative review of an apparent decision not to renew my contract with the UN. This decision was taken without, in my opinion, valid justification; in the midst of a complex political situation; and in spite of my performance which was evaluated as having been excellent.

I note that I have already requested an internal investigation into the various allegations against me and this has recently formally commenced under the auspices of the UNAMA Conduct and Discipline Unit. I am grateful that this is in progress and I am optimistic that this will clear me of any wrongdoing. I am certain that its findings would be of interest to any administrative review.

My contract expired at the end of March. I was actually neither then nor subsequently formally informed that a final administrative decision had been taken not to renew it. During March I expressed my

objection to a proposal then being recommended to me that I voluntarily accept its non-extension. At that time I was, however, given numerous indications that steps were being or would be taken to extend it.

Should my right to request a review depend on a specific decision then I would naturally be grateful if I could be provided with a copy of this decision in writing. Should, however, a decision be deemed to have been made then I would like to apply for leave to request an administrative review “out-of-time”—or for an extension of the time limit—based on special circumstances. I note that, as I had been given the impression that my contract would be extended, that I did not exercise my rights for review or appeal at an earlier stage. This has naturally been highly detrimental to me.

...

Bearing in mind the ongoing UNAMA [Conduct and Discipline Unit] investigation mentioned above I would hereby like to request an administrative review of the case.

...

20. The investigation panel convened by UNAMA carried out its investigation between 3 and 8 December 2008, focusing on the Alleged Weapons Incident. The investigation panel issued its report on 3 February 2009, finding, *inter alia*, that the Applicant facilitated the arrangement for the provision of two weapons to the *Chowkidars*, but that it was unable to conclude that the Applicant’s actions amounted to unauthorised possession of weapons. The Applicant was interviewed as part of the investigation on 8 December 2008. The record of the interview, hand-signed by the Applicant on 24 December 2008, states on page 2 (emphasis omitted):

My contract expired and on 1 April 2008 ... an email arrived from the Office of Human Resources Unit stating that I, the staff member, had separated from service and that there was a “pending matter that had not been resolved and that, in the event that he should seek future employment with the United Nations, the unspecified and unresolved matter be further reviewed by the Office of Human Resources Management”. ...

21. By letter dated 2 January 2009, the Acting Chief of the Administrative Law Unit, OHRM, acknowledged receipt of the Applicant’s request for review on 31 December 2008, stating:

Your letter dated 2 December 2008 addressed to the Secretary-General, requesting administrative review, has been received at this office on 31 December 2008. In accordance with staff rule 111.2(a)(ii), the two-month period for the review of the administrative decision will begin to run from the date we received your request at this office.

If the Secretary-General replies to your request and you are not satisfied with the review of the administrative decision, you may appeal against the answer within one month of the receipt of that reply, pursuant to staff rule 111.2(a)(i). Likewise, if the Secretary-General does not reply to your request for review within two months of the receipt of your letter at this office, you may appeal against the original administrative decision within one month of the expiration of the two-month period for review, i.e., three months from 31 December 2008 receipt of your letter at this office, in accordance with staff rule 111.2(a)(ii).

Should you decide to file an appeal with the Joint Appeals Board [(“JAB”)] in New York, you may avail yourself of the assistance of counsel. To this end, you may contact ... Co-ordinator, Panel of Counsel, Room S-B1-01, fax number (212) 963-0252, or look up the list of members of the Panel of Counsel via the Internet at <http://www.un.org/staff/panelofcounsel/bio.htm>. You may also seek the advice of any other serving or former staff member. In case you wish to have your appeal presented to the panel by a private attorney, this would be at your own expense. If you obtain counsel, kindly provide us with his or her name, address and telephone number. ...

The text of the relevant Staff Rules is set out in full in the attachment to this letter.

The foregoing notwithstanding, the Secretary-General always reserves the right to raise the issue of receivability and competence, as deemed appropriate.

It is apparent from the records—and the Applicant does not seek to adduce otherwise—that the Applicant was in receipt of the letter of 2 January 2009 from the Administrative Law Unit of OHRM.

22. The Acting Chief of the Administrative Law Unit, OHRM, replied to the Applicant’s request for administrative review by letter dated 16 February 2009, stating, *inter alia*:

I refer to your letter of 2 December 2008 addressed to the Secretary-General, requesting administrative review of the decision not to extend your appointment with the United Nations, following your initial service on a[n] ... appointment of limited duration with [UNAMA].

Please find attached a copy of a memorandum dated 9 February 2009 from ... Officer-in-Charge, Field Personnel Division, [DFS], together with supporting documentation. This material indicates that the decision not to extend your appointment was taken in accordance with the Organization's regulations, rules and policies. The material further indicates that you were consulted about, and agreed with, the decision in March 2008. We would note that as a consequence of this, your contention that you were unaware of any decision concerning your contractual status as at the date of request for review (December 2008) would not appear to be supported by the record. As such, your request for review is not receivable, as it has not been submitted within the time limits specified by staff rule 111.2(a).

...

This letter constitutes the review of the administrative decision. Should you not be satisfied with its review, you may appeal against the answer within one month of the receipt of that reply, pursuant to staff rule 111.2(a)(i).

The foregoing notwithstanding, the Secretary-General always reserves the right to raise the issues of receivability and competence, as deemed appropriate.

The Applicant disputes receiving this letter prior to the commencement of the present proceedings.

23. By memorandum dated 15 May 2009, signed by a Director, DFS, the report of the investigation panel was referred to the Assistant Secretary-General, OHRM. The memorandum stated that in the view of DFS the Applicant's actions were not sufficient to warrant disciplinary action and recommended that, considering that the Applicant was separated from the Organisation and it was therefore no longer feasible to impose a reprimand, the case be considered closed and the notes be expunged from his personnel file.

24. On 16 July 2009 the Applicant sent an email to the Assistant Secretary-General, OHRM, asking her for an update on his administrative review request dated 2 December 2008. The Applicant stated in his email:

Subject: Re: Administrative review – request for a progress update

I would be most grateful if you could please update me on the progress of an administrative review which I requested on 2 December 2008. This request related to a decision not to renew my contract with UNAMA which followed my being declared persona non grata by the Government of Afghanistan.

25. On 22 and 28 July 2009 the Applicant sent two emails to the Officer-in-Charge, OHRM, requesting information concerning the status of his case. In his email dated 22 July 2009, the Applicant stated:

Please find below my email to [the Assistant Secretary-General, OHRM] requesting an update on the administrative review of my case (I originally requested this on 2nd December 2008 ...).

This followed an earlier request, in July 2008, which I made to the Conduct and Discipline Unit, for an investigation into the case.

I understand that a review of the case at the level of the mission (UNAMA Afghanistan) has now been concluded and that its findings have been communicated to [New York]. I presume these have been submitted to the [Assistant Secretary-General, OHRM]. I would consequently be very grateful indeed if you would be able to establish the status of the review, or its conclusions, and if you could please let me know in due course.

26. On 30 July 2009 the Officer-in-Charge of the Human Resources Policy Service, OHRM, replied to the Applicant, stating:

Subject: Re: Fw: administrative review of the case of [the Applicant], UNAMA – request for an update on progress

...

[The Officer-in-Charge, OHRM,] asked me to check on the status of your case and to give you at least an interim progress report.

I have looked into this and wish to advise you that the matter is being dealt with in the [Human Resources] Policy Service, and I

understand that a resolution is imminent. I would therefore kindly ask for your further patience and you can expect to hear from us shortly.

27. On 12 August 2009 a Legal Officer of the Administrative Law Unit of OHRM sent an email to the Applicant in response to his 16 July 2009 email to the Assistant Secretary-General, OHRM. This email referred the Applicant to the Administrative Law Unit's letter dated 2 January 2009. The Applicant was advised of the Administrative Law Unit's view that his appeal of UNAMA's decision not to renew his appointment was time-barred and that, if he wished to receive further advice in relation to this matter, he could contact the Office of Staff Legal Assistance ("OSLA"). Specifically, the email of 12 August 2009 stated:

I refer to your email of 16 July 2009 to [the] ... Assistant Secretary-General, [OHRM], regarding the abovementioned subject.

We note that your letter dated 2 December 2008 addressed to the Secretary-General requesting an administrative review of UNAMA's decision not to renew your appointment, which expired on 31 March 2008, was received by this office on 31 December 2008. In our acknowledgment letter dated 2 January 2009, it was outlined that in accordance with staff rule 111.2(a)(ii), the two-month period for the review of the administrative decision began to run from the date we received your request (i.e., 31 December 2008). It was also mentioned that if the Secretary-General replies to your request and you are not satisfied with the review of the administrative decision, you may appeal against the answer within one month of the receipt of that reply, pursuant to staff rule 111.2(a)(i). Likewise, if the Secretary-General does not reply to your request for review within two months of the receipt of your letter at this office, you may appeal against the original administrative decision within one month of the expiration of the two-month period for review (i.e., three months from 31 December 2008) in accordance with staff rule 111.2(a)(ii). We further note that according to our record, you have never submitted an appeal of the subject decision.

Accordingly, the time allotted for you to appeal UNAMA's decision not to renew your appointment has passed. If you would like more advice on this matter please, contact the Office of Staff Legal Assistance at osla@un.org.

In relation to the [email of the Officer-in-Charge of the Human Resources Policy Service, OHRM] of 30 July 2009, please note that OHRM recently communicated with DFS about the notes which have

been placed on your Official Status [F]ile. Accordingly, I suggest you contact DFS directly about the matter.

28. On 13 January 2010 the Applicant filed his application with the Tribunal, along with a request for a waiver of time limits.

29. On 25 January 2010 the Assistant Secretary-General, DFS, informed the Applicant of the outcome of the fact-finding investigation convened by UNAMA in relation to the Alleged Weapons Incident. The Assistant Secretary-General's letter stated, *inter alia*:

The evidence adduced by the Panel suggests that the allegation that you were in the unauthorized possession of weapons was not substantiated. However, your actions of facilitating the arrangements of the weapons to the *Chowkidars*, without recourse to UNAMA management or the Department of Safety and Security, suggests an error in judgment. DFS has determined that this error in judgment is not sufficiently grave to warrant disciplinary measures, however it would have warranted a letter of reprimand had you still been in service of the Organization.

DFS will insert a Note in your Official Status [F]ile which will indicate that, in the event you are offered a new appointment with the United Nations, you will be reprimanded for your involvement in an incident which occurred in Afghanistan in 2007, and a corresponding letter of reprimand will be placed in your Official Status [F]ile at that time.

[OHRM] will expunge from your Official Status [F]ile its Note dated 10 April 2008 which indicated that there was an unresolved matter at the time of your separation from the Organization, together with its subsequent note which attached your response, dated 23 July 2008, to the allegations against you.

30. Subsequently, a note dated 25 January 2010 and signed by the Assistant Secretary-General, DFS, was placed on the Applicant's personnel file. The note stated:

Pending administrative action in the case of [the Applicant]

[The Applicant] separated from service with [UNAMA] upon the expiration of his contract on 31 March 2008.

In the event that [the Applicant] should be offered a new appointment with the United Nations, he will be reprimanded for his involvement in an incident which occurred in Afghanistan in 2007 and a corresponding Letter of Reprimand shall be placed in his Official Status File.

Scope of the case

31. The only decision contested in the Applicant's request for administrative review dated 2 December 2008 was the decision not to renew his contract beyond its expiration date of 31 March 2008. The Tribunal finds that the scope of the present application is confined to the non-renewal issue alone, and the events following the non-renewal—that is, the placing of the notes on the Applicant's personnel file and the investigation carried out between 3 and 8 December 2008—are not within the scope of the present case and are therefore not receivable before the Tribunal.

Applicant's submissions

32. The Applicant's principal contentions pertaining to the matters within the scope of the present case may be summarised as follows:

Receivability

a. Mere knowledge of an adverse administrative decision is not enough, it has to be notified to the staff member in writing, as required by former staff rule 111.2(a) (see *Schook* 2010-UNAT-013). The Applicant never received such written notification. The email exchange of 5 and 8 February 2008 between the Deputy SRSG and the Applicant "was completely overtaken by events". Therefore, the time limit never started to run and, accordingly, his request for administrative review, filed on 2 December 2008, was timeous;

b. Although the contract had not been extended beyond 31 March 2008, the Applicant was under the impression that in due course any pending issues would be sorted out and that he would be given a new contract. By June 2008,

it became apparent to the Applicant that nothing was actually being done to resolve the outstanding issues;

c. Although under *Costa* 2010-UNAT-036 the Dispute Tribunal has no power to suspend or waive any deadlines in relation to management evaluation, which was introduced in July 2009, the Tribunal is empowered to waive the deadlines for administrative review, which existed prior to July 2009;

d. If the Administration chooses to receive a request for review, by undertaking a review and responding to it, albeit in the negative, it can no longer argue that the application is not receivable. As the Administrative Law Unit replied to the Applicant's request for administrative review on 2 January 2009, it must be understood that the Respondent "clearly and explicitly" waived the time limit for filing of the Applicant's request for review. Further, the Respondent's administrative review letter dated 16 February 2009—although not received by the Applicant—"unequivocally state[d] that it amount[ed] to the 'review of the administrative decision'" and thus "it [was] entirely reasonable for [the Applicant] to assume that he [was] entitled to appeal that decision to the (then) JAB";

e. The request for administrative review was not filed on time because "[a]lthough it transpired that the impugned decision was effected on 1 April 2008, the Applicant was led to believe that efforts were underway to resolve the matter". He was in negotiations with various senior United Nations officials, who led him to believe either that he would in due course obtain an extension of the existing contract or a new contract with UNAMA. The Applicant was "actively misled by various parties into believing that the matter was shortly to be resolved". He also believed that if the investigation into the Alleged Weapons Incident resulted in his exoneration he would be renewed retroactively effective 1 April 2008;

f. The Applicant did not receive the Administration's letter dated 16 February 2009, containing its response to his request for administrative review, until the start of the proceedings before the Tribunal;

g. With respect to the delay in filing the present application with the Tribunal, the Applicant assumed, based on the email from the Administrative Law Unit dated 12 August 2009, that there was no avenue of appeal, but [he] was still under the impression that the pending outcome of the investigation was likely to lead to a resolution of his case". Further, the Applicant became aware of the existence of OSLA only in December 2009 and, as soon as he could, he sought its advice;

Merits

h. The decision not to renew the Applicant's contract beyond 31 March 2008 was unlawful because the motive behind the decision was improper and guided by extraneous motives;

i. The Applicant was given a number of verbal assurances by different senior staff, including the Deputy SRSG, that his contract would be renewed;

j. The Applicant was denied his due process rights when the Administration failed to initiate proper disciplinary proceedings against him in relation to the allegations of misconduct. The Respondent should have followed the procedure set out in ST/AI/371 (Revised disciplinary measures and procedures);

k. There was no agreement between the parties regarding the non-renewal of the Applicant's contract. The Applicant "does not allege that the placing of the notes on his file was in breach of any agreement".

Respondent's submissions

33. The Respondent's principal contentions, pertaining to the matters within the scope of the present case, may be summarised as follows:

Receivability

a. The present application is not receivable. The Applicant received a written notification of the decision not to renew his contract on 5 February 2008. Pursuant to former staff rule 111.2(a), the Applicant had two months from the date of the notification of the decision to file a request for administrative review. However, the Applicant's request for review was filed on 2 December 2008, approximately ten months after he was notified of the contested decision in writing. Under *Costa* 2010-UNAT-036 the Dispute Tribunal is not empowered to waive the time limits for requests for administrative review;

b. The Applicant also failed to file an appeal with the JAB or a timeous application with the Dispute Tribunal. Even if he did not receive the Administrative Law Unit's reply to his request for administrative review, his appeal to the JAB should have been filed within one month of the expiration of the time limit for the Administration's reply to his request for review, i.e., on or before 31 March 2009. However, the appeal, in the form of an application to the Tribunal, was filed on 13 January 2010, well after the expiration of the relevant time period. The Applicant has failed to establish the existence of exceptional circumstances justifying an extension or waiver of the time limits;

Merits

c. The Applicant was informed in writing of the decision not to renew his contract and he agreed to it, also in writing. The Applicant's contract was not renewed by mutual agreement, "further to a lapse in judgment related to a

single incident”, which the Applicant had accepted and for which he had apologised. The reasons for the non-renewal of the Applicant’s contract were known to him and are supported by the case record;

d. The Applicant did not have a right to renewal and there were no express promises made to the Applicant that would give rise to a legal expectancy of renewal;

e. The Administration took appropriate action with respect to the allegations of misconduct against the Applicant. No disciplinary proceedings were instituted against the Applicant as there were no findings of misconduct warranting disciplinary action.

Consideration

Failure to request administrative review within the established time limits

34. Pursuant to former staff rule 111.2(a), a staff member was required to request administrative review of a contested decision within two months from the date of being notified of the decision in writing.

35. Contemporaneous records submitted by both parties demonstrate that the Applicant was first informed, in writing, of the decision not to renew his contract on 5 February 2008. In an email sent on that date, the Deputy SRSG advised the Applicant that, *inter alia*, “by mutual agreement [UNAMA] will not proceed with extension of [his] contract beyond March 2008”. The Applicant replied three days later, stating, *inter alia*: “I acknowledge the issue discussed and ... I concur with your proposed course of action”.

36. The Tribunal finds that the email of 5 February 2008 constituted proper notification of the contested decision in this case, in compliance with the notification requirement as stipulated in former staff rule 111.2(a) (see also former United Nations Administrative Tribunal Judgment No. 1385 (2008), paras. III-IV, for a

useful discussion on the use of emails in the United Nations business environment). The Applicant has not proffered any persuasive explanation or argument why this email—which was undeniably received by him and responded to on 8 February 2008 with an agreement as to the proposed course of action—should not be considered to be a written notification of the contested decision in this case.

37. Furthermore, the records submitted by both parties demonstrate that the notification of 5 February 2008 was shortly followed by other instances of reiteration of the same decision. For instance, in his own application form submitted on 13 January 2010 the Applicant stated that the “[d]ate on which the [contested] decision was notified to [him] or on which [he] came to know about the decision” was “1 April 2008”. This date—1 April 2008—was also referred to by the Applicant on page 2 of his interview record, signed on 24 December 2008, as the date when he received an email from OHRM confirming his separation effective 31 March 2008. In his submission filed on 14 September 2010, the Applicant also referred to another email from the Administrative Law Unit, sent on 10 April 2008, confirming to him that he was “an ex staff member” (see para. 37 of the Applicant’s statement, attached to his submission of 14 September 2010). Further, the Applicant’s note of 14 July 2008, sent by email on the same date to the Chief of the Conduct and Discipline Unit, stated that he received two separate memoranda “at the end of March [2008]” concerning the non-extension of his contract (the Applicant did not include these memoranda in his submissions to the Tribunal).

38. Accordingly, the Applicant’s submission that he never received a written notification of the decision not to renew his contract is unsustainable as it is contradicted by the records submitted by both parties.

39. The time limit for the filing of a request for administrative review started to run from the date of the first notification—5 February 2008—as later reiterations of the same decision did not reset the clock (see *Bernadel* UNDT/2010/210, *Comerford-Verzuu* UNDT/2011/005). Accordingly, under the rules that existed at the time, the

Applicant's request for administrative review should have been filed within two months from the date of notification of the decision in writing (i.e., by 5 April 2008). However, the Applicant filed his request for administrative review on 2 December 2008—approximately nine months after the expiration of the applicable time limit.

40. As the Appeals Tribunal held in *Costa* 2010-UNAT-036 (upholding *Costa* UNDT/2009/051), the Dispute Tribunal does not have the power to waive or suspend the time limits for requests for administrative review or management evaluation. The Applicant's interpretation of *Costa* 2010-UNAT-036 as applying only to management evaluation (which was introduced on 1 July 2009), and not to administrative review (which existed prior to 1 July 2009), is misguided. The language of the *Costa* judgments of the Appeals and Dispute Tribunals is clear: the limitation expressed in art. 8.3 of the Statute of the Dispute Tribunal applies both to requests for management evaluation and to requests for administrative review. This was further confirmed by the Appeals Tribunal in *Ajdini et al.* 2011-UNAT-108, in which the Appeals Tribunal found that the Dispute Tribunal "erred on a question of law in determining that it had authority to waive the deadlines for administrative review".

41. I find it appropriate at this stage to observe, as I did in *Glasgow* UNDT/2010/201 and *Bernadel* UNDT/2010/210, that the Statute of the Dispute Tribunal (see art. 8.1), as well as the Staff Rules (see staff rule 11.2), appear to draw a distinction between a *request* for management evaluation and the *actual* management evaluation process, the outcome of which is the Secretary-General's response to the request. The request and the actual management evaluation process have different deadlines and it appears unclear whether the limitation in art. 8.3 of the Statute was intended to apply to both. However, the Appeals Tribunal's judgment in *Costa* is the law on the issue and, under *Costa*, this application is not receivable.

42. I will add, nevertheless, that even if I were permitted to consider whether the deadline for the request for administrative review in this case should be waived under

art. 8.3 of the Tribunal's Statute, the Applicant has failed to provide any exceptional circumstances justifying the delay in his filing of the request for administrative review, as explained below.

43. Firstly, the Applicant submits that this case is exceptional because he continued to communicate with the Administration with regard to this matter. However, with respect to informal resolution of disputes, it is envisaged by the provisional Staff Rules that went into effect on 1 July 2009 that deadlines for the filing of an application with the Tribunal may be extended only in cases in which such informal resolution is carried out through the Office of the Ombudsman (see provisional staff rules 11.1(a)–(c) and 11.4(c)). Attempts to informally resolve the matter directly with management, without involvement of the Office of the Ombudsman, generally will not amount to an exceptional circumstance for the purpose of a waiver of the time limits under art. 8.3 of the Statute (see *Kita* UNDT/2010/025, *Bidny* UNDT/2010/031, *Abu-Hawaila* UNDT/2010/102). Otherwise, it would be difficult—if not impossible—for the Tribunal to ascertain whether or not an applicant has complied with the time limits (*Abu-Hawaila* UNDT/2010/102). This line of reasoning was affirmed by the United Nations Appeals Tribunal, which stated in *Abu-Hawaila* 2011-UNAT-118 as follows:

29. This Tribunal also holds that the exceptional suspension of time limits provided for under Article 8(1) of the UNDT Statute and provisional Staff Rule 11.1 applies only to informal dispute resolution conducted through the Office of the Ombudsman. The suspension of time limits cannot be extended by analogy to other informal dispute resolution procedures, precisely because of its exceptional character. Exceptions to time limits and deadlines must be interpreted strictly and are not subject to extension by analogy.

44. Secondly, the Applicant argues that by replying to his communications, including on 2 January 2009 and 12 August 2009, the Administration “clearly and explicitly” waived the time limit requirements for his request for administrative review. In effect, the Applicant argues that any response from the Administration automatically rendered his belated request for review receivable. It is correct that the

letter of 2 January 2009 confirmed the receipt of the Applicant's request for administrative review and informed him that the two-month period for review would begin to run from the date his request was received. This letter was, however, prepared on the Applicant's contention in his request for review that he was unaware that a final administrative decision had been taken not to renew his contract. This transpired to be incorrect. The letter of 16 February 2009, which stated that it "constitute[d] the review of the administrative decision", also informed the Applicant that the material received by the Administrative Law Unit clearly indicated that he was consulted about and agreed with the decision not to renew his contract long before his application for review of 2 December 2008. This letter—which the Applicant claims was not received by him, but on which he relies to show that the Administration conceded that his request for review was receivable—specifically stated that his request for administrative review was time-barred.

45. Thirdly, the Tribunal is not persuaded that the time limits could have been waived because of the events that transpired after the contested decision. The non-renewal of the Applicant's contract beyond 31 March 2008 preceded the investigation carried out in December 2008 and the resultant notes on file and proposed reprimand. The investigation did not preclude the Applicant from launching the administrative review and appeal procedures within the established time limits.

46. Accordingly, the Tribunal finds that the Applicant failed to request administrative review of the decision not to renew his contract within the applicable time limit and the Tribunal is proscribed, under *Costa*, from waiving it. However, even if it were able to, the Applicant has failed to demonstrate that this is an exceptional case warranting a waiver.

Failure to file a timeous application with the Tribunal

47. The Tribunal's findings above are sufficient to reject the present application as not receivable. However, I find it appropriate to state that, even if the Applicant's request for administrative review had been filed timeously, the application would still

not have been receivable due to his failure to file an appeal with the JAB (prior to 1 July 2009) or a timeous application with the Dispute Tribunal (after 1 July 2009), or to demonstrate exceptional circumstances such as to warrant a waiver of the applicable time limits.

48. Pursuant to former staff rule 111.2(a), if the Secretary-General replied to a request for administrative review, the staff member concerned could file an appeal with the JAB within one month of the receipt of such reply. If the Secretary-General did 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 could appeal against the original administrative decision within one month of the expiration of the specified time limit.

49. Thus, whether or not the Applicant received the letter dated 16 February 2009 informing him of the outcome of the administrative review is, in the end, not material. Pursuant to former staff rule 111.2(a), if he did not receive a response he should have appealed the contested decision within one month of the expiration of the two-month time period allotted for administrative review. This was not only stated in clear terms in the former Staff Rules, but was also communicated to the Applicant by the Administrative Law Unit in its letter dated 2 January 2009. Since the Administration received the Applicant's request for administrative review on 31 December 2008, pursuant to staff rule 111.2(a)(ii), the Applicant had to file his appeal with the JAB within three months of that date, i.e., by 31 March 2009 at the latest. Instead, the Applicant filed the present application with the Dispute Tribunal, more than nine months after the expiration of the time limit.

50. This extensive delay took place despite a further communication from the Administrative Law Unit, which informed the Applicant by email dated 12 August 2009 that the time limit for his appeal had run out and that he could obtain legal assistance from OSLA in relation to this case. Even after this email, the Applicant waited for approximately five months before filing his application with the

Dispute Tribunal. It is appropriate to note here that, as the Tribunal stated in *Trajanovska* UNDT/2010/032 (upheld in *Trajanovska* 2010-UNAT-074), the transition to the new internal justice system is generally not an exceptional circumstance that would warrant an extension of the time limits.

51. The Applicant further submitted that the delay in filing his application with the Tribunal was due to him not being aware of the existence of OSLA until December 2009. It is an applicant's responsibility to pursue her or his case and lack of counsel normally does not constitute an exceptional circumstance (*Kita* UNDT/2010/025, *Hunt-Matthes* UNDT/2011/064). Furthermore, the Applicant was advised by the Administrative Law Unit on 2 January 2009 and 12 August 2009 to contact the former Panel of Counsel (prior to 1 July 2009) and OSLA (after 1 July 2009) to obtain legal assistance.

Observation

52. The Tribunal notes that the Director of DFS, who sent the memorandum of 15 May 2009, found it no longer feasible to impose a reprimand on the Applicant upon the cessation of the employment relationship, but the Assistant Secretary-General of DFS placed, on 25 January 2010, a note on the Applicant's file, imposing what amounts to a deferred reprimand. In light of the findings concerning the scope of the present application and in view of its conclusion that the present case is not receivable, the Tribunal is constrained not to make any findings with regard to whether the notes placed on the Applicant's file were lawful and in compliance with the established procedures, or regarding the wisdom and propriety of the reservation or suspension of a disciplinary or administrative sanction in perpetuity.

Conclusion

53. This application is time-barred as a result of the Applicant's failure to request administrative review of the contested decision within the established time limits.

Even if not for that, it would have been time-barred as the Applicant failed to file an appeal with the JAB (prior to 1 July 2009) or a timeous application with the Dispute Tribunal (after 1 July 2009), or to demonstrate exceptional circumstances such as to warrant a waiver of the applicable time limits.

54. The application is not receivable and is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 27th day of May 2011

Entered in the Register on this 27th day of May 2011

(Signed)

Santiago Villalpando, Registrar, New York