UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2019-UNAT-970

Adnan-Tolon

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Martha Halfeld Judge John Raymond Murphy
Case No.:	2019-1271
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Adnan-Tolon:	Flogaitis Spyridon
Counsel for Secretary-General:	Patricia C. Aragonés

JUDGE KANWALDEEP SANDHU, PRESIDING.

Introduction

1. Mr. Ahmet Adnan-Tolon (the "Appellant") applied to the United Nations Dispute Tribunal (the "Dispute Tribunal") for official acknowledgment of the additional hours of work and monetary compensation. In its Judgment, the Dispute Tribunal dismissed his application on the basis that none of his claims were receivable, primarily, because there was no specific, reviewable administrative decision. The Appellant appeals the Dispute Tribunal's Judgment. For the reasons set out below, we dismiss the appeal.

Legislative Mandate

2. In cases of receivability, the relevant legal framework is set out in Article 8(1) of the Dispute Tribunal Statute and Staff Rule 11.2, which provides that the first step for a staff member formally contesting an administrative decision is to submit to the Secretary-General a written request for a management evaluation of the administrative decision. This requires an "administrative decision".

3. The Staff Rule also sets out specific deadlines for filing the request for a management evaluation from the date of notification of the administrative decision. Article 8 of the Dispute Tribunal Statute provides that an application to the Dispute Tribunal is receivable if the applicant has previously submitted the contested administrative decision for management evaluation, where required.

Issue

2. The issue in the appeal is whether the Dispute Tribunal erred on questions of jurisdiction, procedure, law or fact when it held the Appellant's application was not receivable for failure to identify a specific administrative decision.

3. As a preliminary matter, the Secretary General objects to the additional documentary evidence attached to the Appellant's appeal in annexes 1, 2, 3, 10, 11 and 12. They consist of i) a 13 May 2019 letter regarding the Appellant's request for transfer, ii) two performance appraisals, iii) two e-mails dated 6 March 2018 and 11 May 2017, iv) minutes of a Procurement staff meeting on 11 April 2014 and v) various e-mails sent by him after normal working hours (the "Additional

Evidence"). The Secretary General says the Additional Evidence was not part of the record before the Dispute Tribunal.

4. Article 2(5) of the Statute of the United Nations Appeals Tribunal (the "Statute") provides that "(i)n exceptional circumstances. ... the Appeals Tribunal ... may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings". The Appeals Tribunal has consistently held that additional evidence may not be accepted on appeal if it could have been presented before the Dispute Tribunal.[1] The Appellant has not submitted or shown exceptional circumstances for the introduction of the Additional Evidence and why the Additional Evidence was not or could not have been filed before the Dispute Tribunal. If the Additional Evidence "could have been presented before the UNDT", it should not be admitted on appeal.[2]

5. In addition to establishing that the new evidence was not known or available at the time of the Dispute Tribunal proceedings, the party tendering the new evidence must demonstrate the relevancy and materiality of the evidence. This is consistent with the role of the Appeals Tribunal as an appellate body and not ordinarily the first instance, fact-finding tribunal. In the present appeal, the Additional Evidence does not assist the Appellant as the Appeals Tribunal will only admit new evidence if it is likely to establish relevant facts. The Additional Evidence largely relates to facts that should have been supported before the Dispute Tribunal or, as in the evidence dated after the issuance of the impugned Judgment, is not material to the issues in the appeal, namely, whether there was an appealable administrative decision, or whether he requested, but was denied, overtime compensation or compensatory time off (CTO).

6. Therefore, we decline to admit the Additional Evidence in this appeal.

Facts and Procedure

7. The Appellant joined the United Nations Peacekeeping Force in Cyprus (UNFICYP) on 6 March 2003. Effective 17 March 2014, he was promoted to the G-5 level and moved to the Procurement Section. He has been working in the same section since then.

[1] *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693, para. 15; *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056, para. 1.
[2] *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693, para. 15.

8. In 2006, a post within the Procurement Section was redeployed to the Finance Section on a temporary basis. However, to date, this post is still in the Finance Section. The temporary redeployment led to understaffing and the redistribution of the workload among the remaining staff in the Procurement Section. As a result, additional work hours were required to fulfil the Procurement Section's operational requirements. Since he joined UNFICYP in 2003, the Appellant says he has been working additional hours, without compensation, beyond working hours and days, in order to meet the set deadlines, on an average of two to two and a half hours daily, including some weekends and holidays. His superiors and colleagues acknowledged that he worked beyond regular working hours. While no additional staff was hired for the Procurement Section, on occasions, he and his colleagues had to provide additional administrative and logistical support to some other organizations including the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), and the Operation for the Prohibition of Chemical Weapons–United Nations (OPCW-UN).

9. According to the Appellant, this issue was brought to the attention of his reporting officers "on numerous occasions", presumably verbally. But none of them relayed that issue to the Administration of the Mission. At a meeting on 25 November 2016, when Mr. Argyrou, his colleague, raised the issue of additional work hours without adequate compensation with the Chief Mission Support (CMS), the CMS responded by saying that he did not want Mr. Argyrou to work additional hours. The Appellant also says in May 2015 and March 2018, he received negative and offensive comments from the former CMS and the current CMS.

10. On 7 June 2018, the Appellant submitted a request for management evaluation of the decision taken by the UNFICYP Administration to redeploy a post of procurement assistant from the Procurement Section to the Integrated Acquisition Unit on 11 May 2017. The Appellant claimed that this redeployment created a negative impact on the workload of the Procurement Section, as the work had to be redistributed among the remaining staff of the Procurement Section and he had to work even more hours on top of the additional hours that he had already put in. The Appellant was seeking "compensation (additional payment) for the additional hours of work that [he had] performed and [was] still performing by serving the Organization".

11. By letter dated 24 July 2018, the Management Evaluation Unit (MEU) informed the Appellant of the outcome of the management evaluation. The MEU found that the Appellant failed to request compensation for overtime and that the instances in which he claimed to work overtime took place in November 2016 or before. Accordingly, the MEU

considered that the Appellant's management evaluation request had not been filed in a timely manner, as he had failed to file such a request within 60 days from the date on which he became aware of, or should have reasonably known, the decision not to compensate him for his overtime work. The MEU also found that the Appellant's request was not receivable as it related to his allegations of systemic understaffing.

12. On 8 October 2018, the Appellant filed an application with the Dispute Tribunal alleging breach of contract by the UNFICYP Administration in violation of Staff Rule 3.11 (Overtime and compensatory time off) and UNFICYP's Administrative Circular No. 2010-006 (Conditions governing compensation for overtime work). He also alleged that he had been subjected to harassment and abuse of authority by the current and former CMS in violation of Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) (Bulletin). He further challenged the failure to complete his 2017-2018 performance evaluation by his Second Reporting Officer within the applicable deadline in violation of Administrative Instruction ST/AI/2010/5 (Performance Management and Development System). The Appellant sought official acknowledgement of the additional hours of work that he had performed since 17 March 2014 and monetary compensation in respect thereof. But he did not request any remedy in respect of his harassment and performance evaluation claims.

13. In its Summary Judgment now under appeal, the Dispute Tribunal dismissed the Appellant's application, concluding that none of his claims were receivable *ratione materiae*. The Dispute Tribunal found that the Appellant had failed to identify any specific decision taken by the UNFICYP Administration in respect of his alleged overtime work. Regarding the Appellant's harassment and abuse of authority claim, the Dispute Tribunal held that the Bulletin set out a separate process for investigation into allegations of harassment and abuse of authority, and that the Dispute Tribunal did not have jurisdiction to conduct such an investigation. The Dispute Tribunal likewise dismissed as not receivable the Appellant's claim of delays in the completion of his performance evaluation, because there was no reviewable decision stemming from the said performance evaluation and the Appellant had not raised any issue related to his performance appraisal in his management evaluation request.

14. The Appellant appealed on 10 June 2019, and the Secretary-General filed his answer on 13 August 2019.

Submissions

The Appellant's Submissions

15. The Appellant submits that the Dispute Tribunal failed to exercise jurisdiction vested in it, erred on a question of law and erred on a question of fact resulting in a manifestly unreasonable decision.

16. First, the Appellant says the Organization breached its contract with him but does not explain what specific breaches of his contract occurred.

17. Second, he says the Dispute Tribunal erred in law when it concluded that the Appellant had failed to identify any specific decision in respect of his alleged overtime work. The Appellant says he was contesting the "continuous, implicit, negative [a]dministrative acts of the Management" towards him, the UNFICYP Administration's repetitive verbal refusal to acknowledge his overtime work, and the failure of the supervisor to officially request him to work overtime despite his insistent verbal requests to receive overtime compensation. Moreover, the failure by the UNFICYP Administration to implement the approved staffing table of nine posts for the Procurement Section constituted an implied administrative decision. These are "challengeable implied administrative decisions", because they produced a direct and legal effect on his contract as well as adverse consequences on his health. While the CMS instructed the Appellant and others not to work additional hours at a meeting on 25 November 2016, that instruction was breached subsequently by the repetitive orders to the Appellant to finish the work before he could leave the office, and he was "forced" to continue to work overtime without any compensation.

18. The Appellant alleges that the UNFICYP Administration has been taking advantage of his overtime work without providing him with any compensation over the years in violation of its responsibility to establish a normal working week for its employees. As the "professional malpractice" is "continuous", the Dispute Tribunal should have permitted an "effective toll[ing]" of the applicable time limits to allow the Appellant to present his claims and such a tolling is "intuitively deemed justified".

19. Third, the Appellant says the Dispute Tribunal failed to exercise the jurisdiction vested in it by declaring his complaint of harassment and abuse of authority against the CMS as not receivable. It should be noted that, in his e-mail dated 6 March 2018, the Appellant submits the

CMS exercised his authority in an abusive, offensive and harassing manner by using inappropriate language against the Procurement Section, resulting in a breach of his contract with the Organization, which in turn breached the contract between the Organization and the Appellant.[3]

20. The Appellant requests that the Appeals Tribunal reverse or modify the impugned Judgment, acknowledge his overtime work and the unsustainability of his working environment and award him adequate compensation.

The Secretary-General's Answer

21. The Secretary General submits that the Dispute Tribunal correctly concluded that the Appellant's claims regarding compensation for alleged overtime work was not receivable, as he did not identify or provide evidence of any instance in which he had requested to be compensated for overtime work or any instance in which the UNFICYP Administration had denied such a request. Nor was there any evidence showing the failure on the part of the UNFICYP Administration to fulfil its obligation towards the Appellant or implement any specific decision in his favour.

22. The decisions of the UNFICYP Administration to redeploy staff and not to reverse the redeployment are not appealable as they did not directly impact the Appellant's terms of appointment. They are of general application rather than individualized decisions producing direct legal consequences for the Appellant's terms of employment.

23. Contrary to the Appellant's argument about the need to toll the applicable time limits in case of continuous wrongful occurrence, the jurisprudence of the Appeals Tribunal has not endorsed a flexible approach to time limits.

24. The Dispute Tribunal also correctly concluded that the Appellant's harassment and abuse of authority claim was not receivable, because his failure to file a written complaint under the Bulletin had deprived the Dispute Tribunal of a basis to assert any jurisdiction to inquire into his allegations of harassment and abuse of authority. Moreover, the Appellant had not claimed harassment or abuse of authority in his request for management evaluation. In this regard, the

[3] On 6 March 2018, there was an exchange of e-mails between the CMS and some UNFICYP staff members regarding the provision of leave of right-hand self-drive vehicles. In a response, the CMS wrote: "I just spoke with [the Chief Procurement Officer (CPO)] who is currently on sick leave. I ripped into Procurement as they shouldn't have sent that fax. I just flamed them!!"

Secretary-General notes that the Appellant has submitted, for the first time on appeal, a copy of the e-mail of 6 March 2018, though he referred to it in his Dispute Tribunal application. Nonetheless, this submission does not change the fact that he did not file a written complaint pursuant to the Bulletin.

25. The Dispute Tribunal further correctly concluded that the Appellant's claim regarding the delay in the completion of his performance evaluation appraisal was not receivable. The Secretary-General notes, and we agree, that the Appellant does not challenge the Dispute Tribunal's holding in this regard.

26. The Secretary-General requests that the Appeals Tribunal dismiss the present appeal and affirm the impugned Judgment.

Considerations

Was there an appealable administrative decision in respect of the Appellant's alleged overtime work?

27. We find the Dispute Tribunal did not err in finding that the Appellant failed to identify an administrative decision in respect of his alleged overtime as required by Article 2(1)(a) of the Dispute Tribunal Statute.

28. Article 2(1)(a) gives the Dispute Tribunal jurisdiction to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance. An applicant has the statutory burden to establish that the administrative decision in issue was in non-compliance with the terms of his or her appointment or contract of employment. Such a burden cannot be met where the applicant fails to identify an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on his or her contractual rights.[4]

[4] *Haydar v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-821, para. 13.

29. When determining what is an "administrative decision", the key characteristic "is that the decision must 'produce ... direct legal consequences' affecting a staff member's terms and conditions of appointment".[5] In certain instances, an administrative decision can be "implied" and "not taking a decision is also an administrative decision challengeable before the United Nations Appeals Tribunal",[6] in which case, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".[7]

30. The Appellant says that an administrative decision can arise from the "continuous, implicit, negative" acts of the management. He says that he continued to work overtime over the years, but the UNFICYP Administration failed to acknowledge it by requesting monetary compensation or compensatory time off on his behalf. It does not seem to be disputed that the Appellant may have worked overtime over the years like others in his department due to staffing issues. However, this does not amount to an administrative decision by any objective measure. He has not provided evidence to show that UNFICYP requested overtime specifically for the Appellant nor that the Appellant requested UNFICYP for compensation for overtime and the request was denied. He says they "knew" he worked overtime, but knowledge or lack of action alone is not sufficient to constitute an administrative decision.

31. There must be a specific, recognizable decision, declaration or ruling made by the Administration (express or implied) that can then be challenged and on which the MEU deadlines can be imposed. The decisions of the UNFICYP Administration to redeploy staff and not to reverse the redeployment are decisions of general application that may have indirect impact on the Appellant's working conditions, but they did not produce direct legal consequences, individually, to the Appellant's terms of employment.

[5] *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49, citing former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V. See also *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.
[6] *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030, para. 1.
[7] *Rabee v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-296, para. 19, citing *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273, para. 24.

32. Further, to hold that an administrative decision can be "continuous" would make application of the deadlines in Staff Rule 11.2 unwieldy as it would be difficult to ever know when an administrative decision was made and when the deadline for a request for management evaluation would commence.

33. In these circumstances, the Appellant should have requested an administrative decision by way of a written CTO request. That did not occur here. Once there was a response to the written CTO request, the Appellant would have an administrative decision and the process to request for review by the Management Evaluation Unit could begin. Staff Rule 11.2(a) provides that the first step in formally contesting an administrative decision is to submit a written request for management evaluation, without which the staff member can not proceed to the tribunals.

34. As a result, the Dispute Tribunal did not err when it held the Appellant's claims regarding overtime work was not receivable *ratione materiae*.

Did the Dispute Tribunal have jurisdiction regarding the Appellant's allegations of harassment and abuse of authority?

35. Before a staff member may file a harassment or abuse of authority claim with the Dispute Tribunal, he or she must make efforts to pursue internal remedies set out in the Bulletin which provides for an informal and formal process for addressing these allegations.

36. In circumstances where informal resolution is not desired or appropriate, or has been unsuccessful, the aggrieved individual may submit a written complaint to the head of department, office or mission concerned, except in those cases where the official who would normally receive the complaint is the alleged offender, in which case the complaint should be submitted to the Assistant Secretary-General for Human Resources Management or, for mission staff, to the Under-Secretary-General for Field Support. Formal resolution may also be initiated by the submission of a report of prohibited conduct from a third party that has direct knowledge of the situation to one of the officials listed above. Upon receipt of a formal complaint, the responsible individual will promptly review the complaint or report and take appropriate measures, including an investigation.[8]

[8] See Sections 5.11 and 5.14 of ST/SGB/2008/5.

37. The Appellant did not follow either the informal or formal process as required by the Bulletin. As stated by the Appeals Tribunal previously, if a staff member has been subjected to acts of harassment and abuse of authority over several years, there is "a contractual entitlement to request that his allegations are addressed. That entitlement, and the procedural path he is obliged to take to bring his complaint to his employer, is set out in the Secretary-General's Bulletin ST/SGB/2008/5 on the 'Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority'."[9]

38. The Appellant did not follow that procedural path under the Bulletin. He did not file a complaint of harassment and abuse of authority against his supervisors. He failed to raise or allege such harassment and abuse of authority in his request for management evaluation. As such, he did not pursue the internal processes required by the Bulletin.

39. Therefore, we find the Dispute Tribunal did not err in finding that the Appellant's application regarding harassment and abuse of authority was not receivable.

[9] *Luvai v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-417, para. 62.

Judgment

40. The appeal is dismissed and Judgment UNDT/2019/056 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding	Judge Murphy	Judge Halfeld

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar