UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2011-193

Leboeuf et al.

(Appellants)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Mark P. Painter, Presiding Judge Kamaljit Singh Garewal Judge Jean Courtial
Judgment No.:	2011-UNAT-185
Date:	21 October 2011
Registrar:	Weicheng Lin

Counsel for Appellants:	François Loriot
Counsel for Respondent:	Stéphanie Cartier

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. Many questions are presented in this case:

A. When a rule is consistently applied—at least in one department—for decades, and its "interpretation" is then changed, having a serious effect on working conditions and compensation of the staff members involved, must the Administration consult with staff representatives, under Chapter IX of the Staff Regulations?[1]

B. What is the practice in granting overtime throughout the United Nations?

C. Do Staff Rules apply differently in different duty stations, or should the same "interpretation" apply everywhere?

2. These, and possibly other issues, require further testimony. We vacate the United Nations Dispute Tribunal's (UNDT) decision and remand the case for further proceedings.[2]

Facts and Procedure

3. On 30 November 2004, a Legal Officer in the Policy Support Unit of the Office of Human Resources Management (OHRM) sent an e-mail to an Executive Officer of the Department for General Assembly and Conference Management (DGACM) providing guidance on the interpretation and application of Appendix B to the former Staff Rules regarding the conditions governing the compensation and application of overtime work. The information provided by the Legal Officer was then summarized by the Executive Officer, DGACM, in a 15 December 2004 e-mail distributed to the staff of DGACM.

4. On 28 January 2005, DGACM staff representatives objected to the interpretation of this policy in response to which, on 21 March 2005, OHRM informed the Executive Officer, DGACM, that it would consult with all the Executive Offices at Headquarters to review how

[1] Staff Regulations - ST/SGB/2009/7, Rule 8.1.
[2] Article 2(4)(b) of Statute of the United Nations Appeals Tribunal.

overtime policies were being applied across the various departments. The consultation meetings took place on 11 and 15 April 2005.

5. On 16 January 2009, 60 staff members, including Ms. Christiane Leboeuf, requested a review of what they referred to as the "new practices on overtime and compensatory time (OT/CT) at [Text-Processing Units]". On 25 March 2009, in response to their request, the Chief of the Human Resources Policy Service, OHRM, stated that the rules, as clarified and applied since November 2004, were correct, namely that a staff member "must have actually worked eight hours before becoming eligible for payment of overtime".

6. On 30 November 2010, the Dispute Tribunal in New York issued Judgment No. UNDT/2010/206 in which it found in favour of the Secretary-General and stated that OHRM's interpretation of the rules was consistent with Appendix B to the former Staff Rules. On 12 January 2011, 35 of the original 60 Applicants appealed the UNDT's decision to the United Nations Appeals Tribunal (Appeals Tribunal). The Secretary-General filed his answer on 7 March 2011. On 14 October 2011, upon the Appellants' request, the Appeals Tribunal held an oral hearing.

Submissions

Ms. Leboeuf et al's Appeal

7. Ms. Leboeuf et al. (Ms. Leboeuf) submits that the UNDT erred in law by not explaining how it reached its decision that the "15 December 2004 email to the applicant ... [is] consistent with Appendix B" or the fact that the Administration's decision resulted in changes to salary practices that had been in place for almost 60 years through an unapproved process, namely a decision "by a low-level official at DGACM".

8. Ms. Leboeuf further submits that the UNDT "totally disregarded chapter IX of Staff Regulations, as well as its related Staff Rules which require consultations with Staff Unions whenever the [Secretary-General] introduces a change of policy or contractual conditions".

9. Ms. Leboeuf contends that the Dispute Tribunal failed when it "avoid[ed] addressing how and when and under what conditions the notion of '*compensatory time off*' [CTO] is to be applied to staff members, if such contractual CTO notion is to have any legal significance"

and that the "letter and spirit of what compensatory time is at the [United Nations] (or any employer) is therefore totally absent in and rendered meaningless by the judgment".

10. Ms. Leboeuf submits that while *Azzouni*[3] states that an appellant bears the burden of proof to establish allegations of discrimination, it also states that the trial judge must "give the opportunity required for the Appellants to establish their allegations, which included the opportunity to call evidence and to effectively challenge the Administration's evidence". Consequently, the UNDT denied Ms. Leboeuf her due process rights by not allowing witnesses to testify as to the varying application of the CTO practices within the United Nations; by denying that the practice at DGACM had been in place prior to the 15 December 2004 e-mail; and by deciding "that the only 'receivable legal issue' in this case was related to the interpretation of sections (iv) and (vi) of Appendix B".

11. Ms. Leboeuf requests that the Appeals Tribunal overturn Judgment UNDT/2010/206 and remand the case back to the UNDT. Ms. Leboeuf also requests that damages and costs be awarded to the Appellants.

Secretary-General's Answer

12. The Secretary-General submits that the Dispute Tribunal, in paragraphs 22 to 27 of its Judgment specifically sets out the reasons, both in fact and in law, on which it based its decision that the Administration had properly interpreted the text of Appendix B to the former Staff Rules. In providing details such as the definition of the term "scheduled work day", the Dispute Tribunal clearly stated the reasons on which it based its decision and did not err in law or in fact in "finding that compensatory time off, sick leave and annual leave are not part of the actual hours of work for the purpose of calculating monetary compensation for overtime".

13. The Secretary-General contends that the 30 November 2004 e-mail message from OHRM "merely clarified the interpretation of Appendix B for staff members working with DGACM, and did not establish 'rules, policies or procedures'". Furthermore, the authority to interpret and clarify the meaning of these rules and policies falls within OHRM's purview. Consequently, OHRM's actions did not result in a change of policy or contractual conditions

[3] *Azzouni v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-081.

that would have required it, under chapter IX of the Staff Regulations, and the related Staff Rules, to consult with Staff Unions.

14. The Secretary-General submits that Ms. Leboeuf's assertions that the UNDT ignored the different and discriminatory practices in place are contradicted by the UNDT Judgment in which it not only stated that it considered the said allegations but also stated that Ms. Leboeuf had "failed to articulate to the [Dispute] Tribunal any reasonable alternative interpretation of secs. (iv) and (vi) of Appendix B". Furthermore, as affirmed in *Azzouni*[4] and *Asaad*,[5] "the burden of proving discrimination, improper motivation or wrongful purpose" lies with the staff member making the allegation or contesting the decision.

15. The Secretary-General recalls that under Article 17(1) of the UNDT Rules of Procedure, the UNDT "may examine witnesses [...] called by either party". However, decisions relating to the management of a case, and the related production of evidence is, as affirmed in *Calvani*[6], part of the discretionary case management authority of the Dispute Tribunal. Consequently, seeing that "the Dispute Tribunal considered that the main issues were legal and not factual, and therefore, not dependent on witness testimony" and due to the "extensive submissions and contemporaneous documentary material" already filed in the case, further witness testimony was not necessary and the UNDT did not err in its decision.

16. The Secretary-General submits that, under Article 2(5) of the Statute of the Appeals Tribunal, this Tribunal may indeed require the production of additional evidence in exceptional circumstances. Nevertheless, the Secretary-General submits that the UNDT properly motivated the basis upon which it determined that Ms. Leboeuf's request to submit additional evidence was irrelevant and inadmissible, and that as part of her appeal Ms. Leboeuf does not formulate a basis on which such evidence would meet the exceptionality test.

17. Furthermore Article 2(4) of the Statute of Appeals Tribunal provides that, in the normal course, if the Appeals Tribunal "determines that further findings of fact are necessary", it shall be competent to remand the case to the Dispute Tribunal for additional

[4] *Azzouni v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-081.
[5] *Asaad v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-021.
[6] *Calvani v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-044.

findings of fact. Moreover, the Appeals Tribunal has held that it is not the appropriate forum for fact-finding, stating that the Dispute Tribunal "is not a dress-rehearsal".

Considerations

18. For perhaps 50 years, this language was applied in a certain way:

> section (iv) Compensation shall take the form of an equal amount of compensatory time off for overtime in excess of the scheduled workday up to a total of eight hours of work on the same day;
> section (vi) Compensation shall take the form of an additional payment for overtime in excess of a total of eight hours of work of any day of the scheduled work week.

19. The "interpretation" of the language was changed by the Administration. Whether the former or latter interpretation was legally correct depended first on whether the provision was ambiguous. It seems that the words are more ambiguous in English than in French. At least the English is unclear to this writer. Then, the parties' historical treatment might be relevant. This writer, at least, is baffled by the UNDT's statement that the Appellants had not articulated "any reasonable alternative interpretation". The reasonable alternative surely is the way the sections were applied for 50+ years: compensatory time was counted in the time necessary to reach eight hours.

20. But we are still unclear on some other issues: is it proper for the Staff Rules to apply differently in different duty stations? The Secretary-General submitted before the UNDT and this Court that overtime practices are different for Geneva, Vienna, and Nairobi, based on locally prevailing conditions. Perhaps this may be entirely appropriate, but are Staff Rules to be interpreted differently in different duty stations? The UNDT should hear evidence on this issue.

21. The Secretary-General also admitted that there exist some "slight discrepancies" even among different departments in New York. The UNDT should also consider evidence on this issue.

22. All of this was under the former Staff Rules. The above-quoted language no longer exists, as far as we can tell. In the present Staff Rules, Rule 3.1 states that those who are "required to work in excess of the working week established for this purpose

shall be given compensatory time off or may receive additional payment, under conditions established by the Secretary-General." We can find no "conditions," but they may exist. Or is the present policy the interpretation of language that no longer exists? The UNDT might consider this issue relevant.

Judgment

23. The UNDT's Judgment is vacated and the case is remanded for further proceedings.

Original and authoritative version: English

Dated this 21st day of October 2011 in New York, United States.

(*Signed*)	(*Signed*)	(*Signed*)
Judge Painter, Presiding	Judge Garewal	Judge Courtial

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar

Opinion concordante du Juge Jean Courtial

1. Je partage l'opinion de l'ensemble des juges du panel sur le caractère ambigu de la rédaction de l'Appendice B, paragraphes iv) et vi) à l'ancien Règlement du personnel. Je suis toutefois d'avis que l'interprétation que la juge du TCNU a donnée de ces dispositions dans le jugement attaqué est la plus conforme aux termes utilisés, notamment dans leur version française.

2. Cela étant, je crois que l'on ne peut tenir légalement pour indifférente l'argumentation, à la supposer vérifiée, que les mêmes dispositions auraient été interprétées d'une autre manière, de façon constante, pendant cinquante ans comme il est soutenu. Si tel est bien le cas, cette affaire présente un caractère tout à fait inhabituel.

3. Je ne pense pas que la pratique doive prévaloir sur la lettre des règles de droit. Je ne crois pas, en particulier, que l'Administration pourrait valablement se prévaloir d'une pratique constante de sa part pour l'opposer aux droits qu'un fonctionnaire tiendrait d'une règle écrite.

4. En revanche, il me semble qu'un fonctionnaire pourrait se prévaloir du principe de protection de la confiance légitime pour soutenir qu'il tire d'une pratique constante une espérance fondée et demander à ce qu'en soient tirées les conséquences.

5. C'est sans doute un cas de figure de ce genre auquel le Tribunal d'Appel est confronté dans cette affaire. Dans un tel cas, si le Secrétaire général détient bien évidemment le droit de modifier la règle pour l'avenir – les fonctionnaires n'ont aucun droit acquis au maintien d'une règle – il ne peut le faire que selon la procédure prévue pour la modification d'une règle.

6. La thèse de l'Administration selon laquelle elle peut à tout moment et sans formalité revenir à la bonne interprétation d'une règle qui a fait l'objet d'une mauvaise interprétation me semble correcte d'une façon générale, sauf lorsque les conditions de la protection de la confiance légitime peuvent lui être opposées par les fonctionnaires.

7. Il reste à déterminer si les conditions de la protection de la confiance légitime peuvent être opposées à l'Administration par Mme Leboeuf et autres dans cette affaire, c'est à dire, selon moi, si les dispositions de l'Appendice B, paragraphes iv) et vi) de l'ancien

Règlement du personnel ont été réellement appliquées de manière constante, uniforme et générale pendant une longue période de temps. C'est ce qu'il appartiendra au TCNU de déterminer. C'est pour cette raison que le Tribunal d'Appel doit lui renvoyer l'affaire.

Version originale faisant foi : français

Fait ce 21 octobre 2011 à New York, États-Unis.

(*Signé*)

Juge Courtial

Enregistré au Greffe ce 2 décembre 2011 à New York, États-Unis.

(*Signé*)

Weicheng Lin, Greffier

{Translation from French}

Concurring Opinion by Judge Jean Courtial

1. I share the opinion of the other panel Judges on the ambiguous nature of the language used in paragraphs iv) and vi) of Appendix B of the former Staff Rules. I am however of the opinion that the interpretation rendered by the UNDT judge of these provisions in the judgment under appeal is the most in line with the terminology used, most notably when read in French.

2. Nevertheless, I do not think that we can legally be indifferent to the argumentation, supposing that it is verified, that the same provisions were interpreted differently, and continuously, for, as expressed, 50 years. If that is the case, this matter provides for a very unique situation.

3. I do not think that the application of a rule should prevail over the letter of the law. More specifically, I do not think that the Administration could validly rely on a continuous practice to oppose the rights granted to a staff member by a written rule.

4. On the other hand, I believe that a staff member could rely on the principle of legitimate expectancy to uphold the fact that the continuous application of a practice results in a legitimate expectation from which one can reach certain conclusions.

5. It is probably such a situation that the Appeals Tribunal is confronted with in this case. In such a case, if the Secretary-General clearly has the right to modify the rule moving forward – the staff members have no given rights to maintain a rule – he can only do it following the established procedure regarding the modification of a rule.

6. The Administration's theory that it can at any moment, and without any formal proceedings, revert to the correct interpretation of a rule that was misinterpreted appears to me to be generally appropriate, except when the provisions for the protection of legitimate expectation can be advanced against it by the staff members.

7. It remains to be determined whether the provisions for the protection of legitimate expectation can be advanced by Ms. Leboeuf et al. against the Administration in this case, meaning, in my opinion, whether the provisions of Appendix B paragraphs

iv) and vi) of the former Staff Rules were really applied in a continuous, uniform and general manner during an extended period of time. This is for the UNDT to determine. It is why the Appeals Tribunal has to remand this case.

Original and authoritative version: French

Dated this 21st day of October 2011 in New York, United States.

(*Signed*)

Judge Courtial

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar