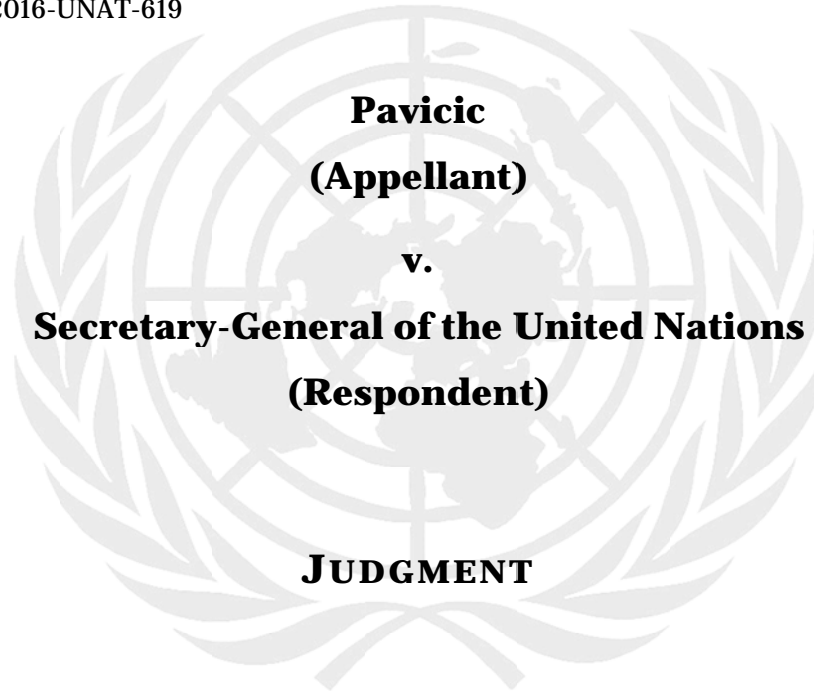




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-619



**Pavicic
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sophia Adinyira Judge Mary Faherty
Case No.:	2015-722
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Pavicic:	April Carter
Counsel for Secretary-General:	Rupa Mitra

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/032, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 2 April 2015, in the matter of *Pavicic v. Secretary-General of the United Nations*. Mr. Alexander Pavicic filed his appeal on 29 May 2015, and the Secretary-General filed his answer on 3 August 2015.

Facts and Procedure

2. The following facts are uncontested:¹

... In 2009, the Organization undertook a one-time comprehensive exercise by which eligible staff members under the Staff Rules in force until 30 June 2009 were considered for conversion of their contracts to permanent appointments. By memorandum dated 20 September 2011, the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) informed the Registrar, [the International Criminal Tribunal for the former Yugoslavia (ICTY)], that [she had decided to accept the Central Review Board (CRB) endorsement of OHRM’s recommendation that the concerned ICTY staff were not suitable for conversion].

... The Applicant was informed of the [ASG/OHRM’s] decision by letter dated 6 October 2011 from the ICTY Registrar. The Applicant filed a request of management evaluation, with the assistance of the ICTY Staff Union, who was helping other ICTY staff members in the same situation.

... On 16 April 2012, the Applicant filed a first application with the [Dispute] Tribunal, together with 261 other ICTY staff members. Their applications, after being consolidated at the Applicants’ request, were adjudicated by Judgment No. UNDT/2012/131 of 29 August 2012 [in the matter of *Ademagic et al. v. Secretary-General of the United Nations*].

... The Applicant appealed this ruling and, by Judgment *Ademagic et al.* No. 2013-UNAT-359, the Appeals Tribunal “rescind[ed] the decision of the ASG/OHRM; and remand[ed] the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of the [Applicant]”; and awarded non-pecuniary damages”.

¹ Impugned Judgment, paras. 2-10.

... The new conversion exercise was completed in June 2014, at which time the Applicant was informed [by letter dated 17 June 2014, which he claimed he received on 19 June 2014] of the decision to [again] deny him the conversion of his appointment to a permanent one.

... On 1 August 2014, the Applicant sent the documents required to formally contest the [second] decision to the ICTY Staff Union, which, anew, was assisting a large number of staff in the same situation in collecting, administering and archiving materials. However, these documents were not transmitted to Counsel for the Applicant.

... Between 8 and 13 August 2014, Counsel for the Applicant requested management evaluation of the June 2014 decisions on behalf of 247 other ICTY staff members. According to the Applicant, he only realised that his management evaluation had not be[en] requested at that time when his colleagues received management evaluation replies a few weeks later [varying between 29 September and 1 October 2014], while he did not. He then contacted the Staff Union to query about the lack of a management evaluation in his case.

... After a number of exchanges among the Applicant, his Counsel and the Staff Union, the President of the ICTY Staff Union clarified, on 17 February 2015, that the documents pertaining to the Applicant had “slipped through the cracks”.

... On 18 February 2015, the Applicant requested management evaluation of the contested decision [in which he explained, amongst other things, the circumstances giving rise to his late submission]. The Management Evaluation Unit (“MEU”), on behalf of the Secretary-General, upheld the decision, as per reply letter of 19 February 2015.

3. On 24 March 2015, Mr. Pavicic filed an application with the Dispute Tribunal contesting the ASG/OHRM’s decision of 19 June 2014 not to retroactively convert his fixed-term appointment into a permanent one, and referencing the arguments set out in the *Ademagic et al.* brief dated 5 December 2014.

4. On 2 April 2015, the Dispute Tribunal rendered a Summary Judgment, and found Mr. Pavicic’s application not receivable *ratione materiae* in the absence of a timely management evaluation request having been filed. The UNDT accepted Mr. Pavicic’s explanation that he had timely forwarded the required documentation to the Staff Union and the latter failed to transmit it to his Counsel, but found that this did not constitute a valid reason to set aside the mandatory time limit for management evaluation, noting the Appeals Tribunal’s jurisprudence holding that an applicant, even when represented by counsel, cannot be absolved of any error or oversight by counsel regarding the applicable

time limits.² While acknowledging that in extremely rare cases certain procedural failures have been set aside in the interest of justice on the grounds that they resulted from clerical mistakes, the UNDT nonetheless considered Mr. Pavicic's was not such a case, all the more so because even after Mr. Pavicic learned in mid-October 2014 that the mandatory step of requesting management evaluation had not been taken in his case, it took him until mid-February 2015 to submit his request to the MEU. Applying the equitable doctrine of laches, the UNDT considered that Mr. Pavicic's inaction showed a lack of diligence in taking the necessary steps to pursue his case in due time. Accordingly, the UNDT dismissed the application.

Submissions

Mr. Pavicic's Appeal

5. The UNDT erred when it found that there were no exceptional circumstances requiring consideration of Mr. Pavicic's MEU request and claim before the UNDT. The ICTY "permanent contract" litigation, by its very nature and history, is exceptional. The UNDT thus erred when it failed to give any consideration to the uniqueness of the *Ademagic et al.* litigation where the Staff Union served as an extension of a registry, facilitating their work. At each step, the Staff Union supported the MEU, UNDT, and the Appeals Tribunal by administrating the largest filings in the history of the Office of Administration of Justice. In this case, the UNDT improperly failed to duly consider the scale of the task assumed by the Staff Union and Counsel and equate the Staff Union's clerical error as a clerical error of a registry itself. Further, staff members should be encouraged to rely on staff unions in bringing mass litigation claims, and the UNDT's decision implies that Mr. Pavicic acted unreasonably in relying on the Staff Union, which will only encourage future litigants to file individually out of a surfeit of caution.

6. The UNDT erred when it found that Mr. Pavicic failed to pursue his case, given that he has been actively pursuing it for over five years. As was clear to the UNDT, Mr. Pavicic neither ignored a mandated time limit nor followed poor legal advice. He pursued his case in a timely fashion and with diligence, including after learning that the other *Ademagic et al.* litigants had received their MEU decisions.

² Citing *Scheepers v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-211, and *Powell v. Secretary-General of the United Nations*, Order No. 96 (UNAT/2012).

7. The UNDT erred in finding a lack of due diligence on the part of Mr. Pavicic by relying on the time elapsed between October 2014 and February 2015. Upon learning that his MEU request had not been filed, Mr. Pavicic could not simply file the pre-prepared MEU request. Rather, he needed to establish exceptional circumstances in order to overcome the fact that his MEU request was filed after the designated deadline. To do so required engaging with the Staff Union to establish what had occurred with the handling of his file, and he in fact filed his request for management evaluation on 18 February 2015, the day after the Staff Union provided him with the evidence and answers he needed to substantiate his claim of exceptional circumstances warranting a waiver of the 60-day time limit for filing requests with the MEU.

8. The UNDT erred and misapplied the “interest of justice” analysis as the appropriate query is whether a clerical error results in a disproportionate and irrational consequence for a party.³ Preventing Mr. Pavicic from seeking redress from the discriminatory decision relating to a permanent contract is contrary to the interest of justice, considering Mr. Pavicic has diligently and faithfully pursued his claim for the last five years. In the present case, the prejudice to Mr. Pavicic is significant whereas the prejudice to the Secretary-General is minimal. Moreover, as the UNDT noted, as Mr. Pavicic’s application on the merits does not relate to his particular individual circumstances, it would suffice to include his name in the annexes to the Secretary-General’s reply. Further, while the need for finality is one of the core reasons for requiring that proceedings be instituted in a timely manner, the fact that the ICTY litigation is ongoing diminishes the weight of this consideration.

9. In view of the foregoing, the Appeals Tribunal should determine that the UNDT erred and find that Mr. Pavicic’s application is receivable. The MEU’s letter of 1 October 2014 to the *Ademagic et al.* litigants should equally serve as a response to Mr. Pavicic, and his application should be joined to, and heard with, Case No. UNDT/GVA/2014/082.

The Secretary-General’s Answer

10. The UNDT gave due consideration to the reasons Mr. Pavicic had provided for filing his MEU request six months after the deadline to do so had passed but held that the circumstances did not constitute a valid reason for exempting him from the mandatory

³ Citing *Said v. Secretary-General of the United Nations*, Order No. 064 (NBI/2012), paras. 15-16, and *Xu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-053, paras. 16-17.

time limit for requesting management evaluation. Mr. Pavicic has not explained why the “nature and history” of the *Ademagic et al.* case should qualify as a factor justifying a violation of the time limit to request management evaluation.

11. Mr. Pavicic’s arguments alleging that this situation constitutes “exceptional circumstances” are also unfounded. Not only did the UNDT Registry not shift the burden to the Staff Union in any way, but the UNDT Registry has no role in the filing of a request for management evaluation and has no duty to ensure that such a request is timely filed. Further, Mr. Pavicic’s arguments concerning the “good administration of the judicial system” are also unwarranted in that the Appeals Tribunal has consistently emphasized the need for a strict observation of time limits within the formal justice system and that exceptions to time limits and deadlines must be interpreted strictly. The UNDT’s ruling will hardly discourage future litigants from seeking assistance from staff unions, as the Appellant claims, but rather will encourage litigants to be properly diligent, regardless of whether they are represented by counsel or assisted by staff unions, which can only serve to promote the timely and efficient functioning of the internal justice system.

12. The UNDT correctly found that the Appellant had failed to diligently pursue his case. Mr. Pavicic had ample opportunity after having submitted his documents to the Staff Union to seek confirmation from the Staff Union that his application had been included in those sent to Counsel, and subsequently submitted by Counsel to the MEU. Further, after realizing that all of the other ICTY litigants had received responses to their requests to the MEU on 1 October 2014, Mr. Pavicic waited another two weeks to enquire with the Staff Union as to why he had not received such a response, and then made no effort to contact the ICTY Counsel, who only became aware of his issue “weeks later”. Thereafter, Mr. Pavicic waited for the Staff Union to follow up with him, which they did not do until 18 December 2014 due to their heavy workload. He does not explain why he waited months for the Staff Union to contact him before he took any action to notify the MEU of the omission of his request, when he had the documentation to show that he had timely sent the required documents to the Staff Union. The foregoing lapses can hardly be considered as being circumstances beyond his control, which the Appeals Tribunal has recognised may justify a delay.⁴ Lastly, the fact that Mr. Pavicic relied on the Staff Union and Counsel

⁴ Citing *Diagne et al. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067, para. 23.

who were well aware of the applicable time limits “is only relevant to the relationship between the client and his counsel, and does not affect the case before the UNDT”.⁵

13. Insofar as Mr. Pavicic requests the Appeals Tribunal to find that the UNDT misapplied the interests of justice analysis and should have found exceptional circumstances in the present case, such relief would be tantamount to waiving the deadline to submit a request for management evaluation, and runs counter to Appeals Tribunal jurisprudence which has consistently held that the UNDT does not have the authority or jurisdiction to make such a waiver. The UNDT thus correctly held that Mr. Pavicic’s application was not receivable and that the interests of justice required no exception in this case.

14. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the Judgment.

Considerations

15. The arguments presented by Mr. Pavicic in support of his appeal presuppose that the Dispute Tribunal had a discretion to grant his application. This is not the case. In accordance with its own statutory framework, the Dispute Tribunal had no option but to reject Mr. Pavicic’s application as not receivable.

16. Under Article 8(1) of the Dispute Tribunal’s Statute, the Dispute Tribunal has jurisdiction to receive applications appealing administrative decisions only “when a staff member has previously submitted the impugned administrative decision for management evaluation and the application is filed within the specified deadlines”.⁶

17. The relevant parts of Staff Rule 11.2 provide:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision.

...

⁵ Citing *McCluskey v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-384, para. 20.

⁶ *Eggesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-402, para. 16, citing *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108, para. 23.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. [...]

18. As noted by the Dispute Tribunal, Mr. Pavicic was notified of the contested administrative decision by letter dated 17 June 2014,⁷ and in his management evaluation request Mr. Pavicic claims he was notified of the same on 19 June 2014. The 60-day time limit for him to request management evaluation thus began to run from the latter date and expired on 18 August 2014. However, Mr. Pavicic did not submit his request for management evaluation until 18 February 2015, which was six months after the time limit had expired.

19. The Dispute Tribunal found that the reason put forward by Mr. Pavicic for the delay in submitting a request for management evaluation did “not constitute a valid reason to effectively set aside the mandatory time limit for management evaluation”.⁸ The Dispute Tribunal further found that Mr. Pavicic “show[ed] a lack of diligence on his side in taking the necessary steps to pursue his case in due time”.⁹

20. The Dispute Tribunal decided correctly in finding Mr. Pavicic’s application to be not receivable. As a matter of law, the Dispute Tribunal was precluded from dealing with Mr. Pavicic’s application. Article 8(3) of the Dispute Tribunal’s Statute contains a statutory prohibition against the Dispute Tribunal suspending or waiving the deadline for seeking management evaluation. The relevant part of Article 8(3) provides: “The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.”

21. The Appeals Tribunal has repeatedly and consistently held that the Dispute Tribunal has no jurisdiction to waive deadlines for management evaluation or administrative review.¹⁰

22. Mr. Pavicic’s application was therefore not receivable *ratione materiae* and the Dispute Tribunal did not err in rejecting it.

⁷ Impugned Judgment, para. 13.

⁸ Impugned Judgment, para. 14.

⁹ Impugned Judgment, para. 18.

¹⁰ *Khan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-559, para. 25, citing, among others, *Eggesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-402, para. 23, and *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-301, para. 26; *Roig v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-368, para. 17.

Judgment

23. The appeal is dismissed and the Judgment of the Dispute Tribunal is affirmed.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar