



1. Ms. Dianne Juliet Fairweather challenged before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the Administration's failure to provide a rebuttal report with respect to two performance appraisals which rated her as partially meeting expectations, as a result of which she alleges she did not obtain the long-service step and could not apply for the young professionals programme (YPP). The UNDT dismissed her application on grounds that it was not receivable since Ms. Fairweather had not challenged any administrative decision pertaining to a long-service step and that, if she intended to challenge such decision in her application, she should have done so earlier. (a) 0.7 (a)-10.7 (h)-4.7 (e i)-.8 (l)0.8 (i)-3.1 (cati)-

of the rebuttal process in 2013 and her retirement on 31 October 2016, Ms. Fairweather followed up with the human resources office several times regarding the status of her rebuttal request. After retirement, Ms. Fairweather continued to follow up with the human resources office regarding the status of her rebuttal request.

5. On 19 July 2017, Ms. Fairweather requested management evaluation of the decision “not to respond to and/or take appropriate and timely action to consider, complete and report on request for rebuttal on her performance appraisal filed on 13 May 2013”. Ms. Fairweather wrote that it had caused her tremendous stress and anxiety, had a significant negative impact on her long-service step and retirement benefits and also had made her

for in-grade increases to the long-service step, one of which was that the staff member's service should be satisfactory. The UNDT noted that ST/IC/2008/45 specifically addressed the relationship between the rebuttal process and long-service step providing that the decision whether to grant or deny the long-service step was not part of the rebuttal process and that denial of long-service step was an appealable administrative decision. The UNDT found that this guideline was consistent with Administrative Instruction ST/AI/2010/5 (Performance management and development system) which separates the rebuttal process from the challenge of any other administrative decision that might stem from a final performance appraisal.

10. The UNDT further found that there was no evidence that Ms. Fairweather had proceeded to challenge such a decision and that if she had intended to challenge any administrative decision pertaining to a long-service step in her application, her case would be time-barred. As to Ms. Fairweather's claim that her retirement benefits had been negatively affected because she had not received a long-service step, the UNDT found that it could not review her claim as there was no reviewable administrative decision concerning the long-service step.

11. Turning to Ms. Fairweather's eligibility for the YPP exam, the UNDT noted that Administrative Instruction ST/AI/2012/2/Rev.1 (Young professionals programme) provides that staff members who applied for the YPP exam and were found to be ineligible to take the exam should be informed of the reasons for that determination and may file a request for review with the Central Examinations Board (CEB). The UNDT read this provision together with ST/AI/2010/5 and concluded that any decision to find a staff member ineligible for the YPP exam also constituted an administrative decision that could be contested separately.

12. While it was unclear whether Ms. Fairweather had applied for the YPP exam and had been found ineligible, sometime between 2013 and her retirement in October 2016, the UNDT found that in any event, she should have followed the procedures set forth in ST/AI/2012/2/Rev.1 and timely requested management evaluation. Since she requested management evaluation only in July 2017, long after the prescribed time limit, the UNDT found that Ms. Fairweather's challenge to any administrative decision pertaining to her eligibility for the YPP exam was also time-barred.

13. The UNDT dismissed the application as not receivable.

14. Ms. Fairweather filed an appeal on 4 October 2019, and the Secretary-General filed his answer on 4 December 2019.

15. As a preliminary matter, Ms. Fairweather requests that the Appeals Tribunal hold an oral hearing.

16. The UNDT erred in finding that the delay in the completion of the rebuttal process was not an administrative decision within the meaning of Article 2 of the UNDT Statute. The Tribunals have decided in a number of cases that a non-decision or failure to take a timely decision is an administrative decision. In the instant case, the excessive delay, and failure or omission of the Administration to complete the rebuttal process within a reasonable timeframe is an appealable administrative decision which continues to have detrimental legal consequences affecting the terms and conditions of Ms. Fairweather's appointment. This is a clear omission or failure to take timely and appropriate action as required by the Administrative Instruction on Performance Management and Development System.

17. In considering the Appeals Tribunal jurisprudence, the UNDT failed to distinguish between the total failure or abdication of duty by the Administration to respond to a staff member's request as required by the Staff Rules, which is an implied administrative decision, and the case in which the requested process began and yet suffered inordinate delay. Where there is a process involving a series of steps, a staff member can only challenge the final administrative decision once the process has been completed. Under Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including s

18. The delay in the completion of the rebuttal process had direct legal consequences. As the UNDT observed, the qualifying criteria for in-grade increases to the long-service step include the requirement for the staff member's performance to be "satisfactory". Since the rebuttal process was not timely concluded and Ms. Fairweather's performance rating remained unsatisfactory, she was automatically denied the long-service step. The

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delay in the rebuttal process should have been challenged once the rebuttal reports were issued in November 2017 and communicated to Ms. Fairweather.

22. With regard to a decision on a long-service step, the UNDT correctly found that the delay in the completion of the rebuttal process did not have direct legal consequences. In accordance with the guidelines on long-service step and the Appeals Tribunal jurisprudence,³ (p)--2.6e-1.

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not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Artic

33. The present case raises the question whether the absence of a timely decision in the rebuttal process of a performance appraisal may be challenged before the UNDT.

34. Article 2(1)(a) of the UNDT's Statute provides:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-

1. This appeal raises real and serious access to justice issues. Although the Judgment of the majority purports to adhere to established jurisprudence, I consider that this is not as clear or consistent as the majority considers.

5. Case law recognises that a failure or refusal to make a decision can constitute an implied administrative decision.⁷ In other words, the fact that the Organization has, by its conduct, decided not to investigate and decide a matter properly put to it can meet the definition of an administrative decision under Article 2(1)(a) of the UNDT Statute. Established administrative law systems of judicial review around the world recognise that such failures or refusals are justiciable. In common law-based systems of judicial review, for example, the ancient prerogative writ of *Mandamus* (literally, an instruction to an administrator or other governmental officer to “do your official duty”) is a pertinent example.

6. This is just such a case, indeed perhaps unfortunately a classic of its sort. That, for me, satisfies the first limb of the statutory test. There was an administrative decision, *albeit* an implied one, not to address Ms. Fairweather’s request for rebuttal of her performance appraisals.

7. There is a second limb to the gatekeeping test under Article 2(1)(a) of the UNDT Statute.

that this superadded requirement may have a long provenance, including before 2009 when the former United Nations Administrative Tribunal adopted this test. Repetition over a long period does not necessarily make right what is wrong. But more importantly, the General Assembly enacted a new Statute to replace the previous body and under which the Appeals Tribunal operates. It used the language it did as part of that significant change. There is nothing to suggest that the General Assembly intended to make access difficult to the newly created institutions.

9. I understand the majority to say that there was no appealable administrative decision, as there was no decision that had legal consequences for Ms. Fairweather. However, in my conclusion she was entitled to a timely rebuttal report which the Administration did not produce. There is therefore an appealable implied administrative decision. Her rights under her ter(d)-6.388egeea

Dispute Tribunal are precluding potentially meritorious cases from even being considered or decided.

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