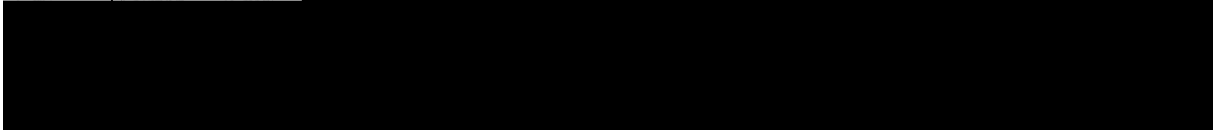




Case No. 2011-193



Counsel for Appellants: François Lorient

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?<sup>1</sup>
  - 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.<sup>2</sup>

**Facts and Procedure**

3. On 30 November 2004, a Legal Officer in th

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) submit



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*<sup>4</sup> and *Asaad*,<sup>5</sup> "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 orally or in writing".

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.g

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 21<sup>st</sup> day of October 2011 in New York, United States.

*(Signed)*

Judge Painter, Presiding

*(Signed)*

Judge Garewal

*(Signed)*

Judge Courtial

Entered in the Register on this 2<sup>nd</sup> 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



**THE UNITED NATIONS**

*{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 21<sup>st</sup> day of October 2011 in New York, United States.

*(Signed)*

Judge Courtial

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

*(Signed)*

Weicheng Lin, Registrar