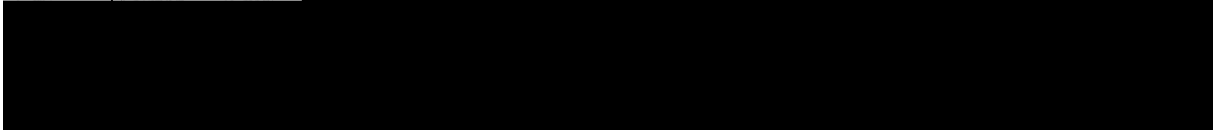




Case No. 2011-193



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.

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.

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