(*c*) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(*d*) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

(ii) In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision;

(iii) The deadlines provided for in subparagraphs (d) (i) and (ii) of the present paragraph shall be extended to one year if the application is filed by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

2. An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation…

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute

Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

5. The filing of an application shall not have the effect of suspending the implementation of the contested administrative decision.

6. …

5. *Rules of Procedure of the Tribunal –*

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

2. Any person making claims on behalf of an incapacitated or deceased staff member of the United Nations, including the Secretariat and separately administered funds and programmes, shall have one calendar year to submit an application.

3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

4. Where an application is filed to enforce the implementation of an agreement reached through mediation, the application shall be receivable if filed within 90 calendar days of the last day for implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after 30 calendar days from the date of the signing of the agreement.

5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the

management evaluation shall not be receivable by the Secretary-General unless sent within 60 days of notification of the contested administrative decision and that the Secretary-General may expand this deadline pending efforts for informal resolution by the Office of the Ombudsman. Her Honour then observed that there was no "express power" in the Statute for the Tribunal to extend or waive any deadlines or other time constraints set by the Staff Rules and noted, "To the contrary, Article 8.3 contains an express prohibition in relation to management evaluation deadlines"[26]. Her Honour then concluded –

> "[27] In the context of the Statute, the Rules of Procedure and the Staff Rules, I interpret Article 8.3 of the Statute to mean that the Tribunal may suspend or waive the deadlines for the filing of applications imposed by the statute and rules of procedure, but may not suspend or waive *the deadlines in the Staff Rules concerning management evaluation* because this is the prerogative of the Secretary-General." (Italics added.)

Her Honour then asked whether this prohibition extended to requests for administrative review under the former Staff Rules, pointing out that administrative review under the earlier system served the same purpose as management evaluation under the new regime, namely, in substance to permit a wrong decision to be corrected. Referring to rule 111.2(f), her Honour said (at [32]) that a significant

Rule 11.2(b) concerns administrative decisions taken pursuant to advice from technical bodies or a decision taken following completion of the disciplinary process; in such cases the staff member is not required to request a management evaluation. Rule 11.2(c) requires requests for management evaluation to be made within 60 days from notification of the impugned decision and provides that this "deadline" may be extended by the Secretary-General "pending efforts for informal resolution conducted by the Office of the Ombudsman". This paragraph does not refer to or impose any time limits on the management evaluation itself. Rather, it deals with the deadline for making a request for the evaluation. At all events, the rule does not, by giving the Secretary-General a power to extend a deadline, limit the jurisdiction of the Tribunal in any way. This necessarily follows from the language of the paragraph itself but also from the fact that, of course, the Staff Rules are subordinate to the Statute and it is not possible that a Staff Rule could limit jurisdiction which is conferred by the Statute. Accordingly, the power to extend given to the Secretary-General should be regarded as an additional mode of extending the deadlines referred to in the paragraph in the limited circumstances mentioned and cannot be read as limiting the Tribunal's jurisdiction as conferred by the first sentence of art 8.3.

10. New rule 11.2(d) requires the Secretary-General's response "reflecting the outcome of the management evaluation" to be communicated to the staff member within 30 or 45 days of receipt of the request for management evaluation, depending on the location of the staff member. It follows, therefore, that management evaluation must occur before either 30 or 45 days, as the case may be. In this sense rule 11.2(d) imposes a deadline for the management evaluation. This deadline cannot be waived by the Tribunal by virtue of the excluding provision in art 8.3. (Under the old rules the only time limits that could be waived by the JAB were those with which the staff member was required to comply. The possible waiver of time limits with which the Secretary-General was required to comply did not arise, since there were no such time limits. Under the new system since a time limit was either envisaged or implicitly imposed by new rule 11.2(d), the question of waiver did arise. The General Assembly decided that the Tribunal should not have the jurisdiction to waive this

limit, hence the second sentence of art 8.3 b) of the Statute. Other than rule 11.2(d), there appears to be no provision applying a deadline to management evaluation. Although it seems likely that the draftsperson of the Statute envisaged that such a deadline would be imposed, it should be noted that the Resolution adopting the Statute was passed by the General-Assembly on 24 December 2008 whilst the new Staff Rules are dated 16 June 2009. At all events, if the excluding pr

must be complied with by an applicant in respect of certain actions. It is clear that these actions are prospective in the sense that they apply to applications made to the Tribunal after the commencement of its jurisdiction, as distinct from cases commenced earlier and transferred to it. As we have seen, art 8.3 empowers the Tribunal "to suspend or waive the deadlines", but it does not explicitly specify the particular deadlines which the Tribunal can suspend or waive. Plainly the "deadlines" include those imposed by art 8 itself and, as I have endeavoured to show, deadlines for management evaluation. Does the term apply to the other time limits that applied to the cases transferred from the JAB, in particular, those in which no application for or decision concerning waiver had been made?

14. The only specific power given to the Tribunal to suspend or waive time limits is that given by art 8.3, which uses the phrase "*the* deadlines" (italics added), possibly suggesting that it relates only to those deadlines specified in the article. Not only does this require the definite article to do a great deal of work, it would necessitate giving to the word "deadlines" as used in the first sentence of the clause a different meaning to that which it must have in the second sentence of the clause. Such a result would, at the least, be most unlikely. It is important to note, in my view, that art 8 is part of a scheme which involved the transfer of a substantial number of cases from the JAB and it must be considered in this context. Potentially, many of these cases would concern appeals that were out of time and awaiting consideration by the JAB which, typically, did not consider the issue of waiver until all submissions on the substantive appeal had been filed.

15. Did the applicants lose their right to seek waiver simply by the abolition of the JAB and the substitution of the Tribunal to determine their cases? I do not think so. First, art 8.3 is a distinct and independent provision within art 8: had it been intended to apply only to the deadlines in art 8.1(d), its logical placement would have been a subparagraph in art 8.1. Secondly, it is a procedural provision and, though it uses different language ("exceptional *cases*") to that of rule 111.2(f) ("exceptional circumstances"), is capable of being applied to those matters transferred to the

Tribunal where there has not been a determination by a JAB about waiver. Where there has been no such determination, the Secretary-General has no accrued entitlement to a dismissal of the appeal. By contrast, an applicant has a subsisting entitlement to seek a waiver. It would be unfair if an appellant lost that entitlement because his or her case is transferred to a Tribunal whose jurisdiction replaces that of the JAB. The arbitrariness of such unfairness is all the more obvious because (accepting the hypothesis) the Tribunal would be able to grant waiver in respect of cases commenced in it but not those transferred to it. (I have already explained that, differing with respect from Shaw J, I do not accept that the Tribunal does not have jurisdiction to vary, on an applicant's request, the time limit for requesting management evaluation. Of course, where an applicant succeeded in obtaining a waiver of the deadline for requesting management evaluation, the Tribunal would usually not proceed to hear the substantive application until the Administration had the opportunity to conduct the evaluation.) The removal of entitlements by subsequent procedural legislative changes can, of course, be done but, according to ordinary canons of interpretation, only by specific language unambiguously dealing with the particular subject matter. The use of the definite article in the first sentence of art 8.3 of the Statute is scarcely sufficient. It should be assumed that, in making changes to its laws, the General Assembly intended to do justice to all affected parties.

16. Accordingly, in the absence of specific language demonstrating that the General Assembly intended to destroy the entitlement of an appellant to seek a waiver of the time limits imposed by rule 11.2, it would be wrong to construe the UNDT Statute as effecting this unjust result unless, of course, it is simply not possible to construe it in any other way. The word "deadline" is not a technical term but a noun in common parlance and, as used in art 8.3, is capable of being construed in a way that gives the Tribunal jurisdiction to waive or suspend the deadlines relevant to the cases transferred from the JAB. According to this interpretation, the phrase "the deadlines" in the first sentence of art 8.3 is a reference to all deadlines affecting the applicant in all matters that come before the Tribunal, whether new or

transferred. To my mind, this interpretation does not do any violence to the language of the provision but simply recognises the context in which it falls to be construed.

17. An alternative approach which leads to the same result is to adopt the conventional mode of interpretation of retroactive legislation which, in general, applies procedural changes to past cases that are subject to pending proceedings unless the later legislation expressly provides otherwise (see, for example, Clapinska, *Retrospectivity in the Drafting and Interpretation of Legislation, Drafting Legislation, A Modern Approach*, (eds) Stefanou and Xanthaki (University of London, UK), 2008, Ashgate Publishing Company, where the author also points out, *a propos* the difficulty of distinguishing between substance and procedure, the contention in the well known and authoritative *Craies* (D Greenberg (ed), *Craies on Legislation*, London: Sweet and Maxwell, 2004, at 394) that the better approach is "consideration of the substance of the provision concerned and, taking all the circumstances into account, considering what results the legislature can reasonably be assumed to have wanted or not wanted to reach". (This article is especially useful because of its discussion of the European, Canadian and US approaches as well as that of England; other texts and authorities to the same effect are too numerous and unnecessary to mention here). It seems to me that the General Assembly decided to hand over the whole of the jurisdiction of the JAB and Joint Disciplinary Committee to the Tribunal and, in providing for a procedure for the Tribunal to waive or suspend deadlines, it intended to preserve in substance the same procedures for all matters coming before the Tribunal by virtue of the usual rule that changes in procedure apply to pending matters as well as those newly instituted unless this rule is explicitly departed from. It follows that, the power to grant waiver given to the Tribunal by art 8.3 can be applied to transferred cases and should exercised in accordance with the language of that provision to waive or suspend time limits imposed by the old rules where the case is exceptional.

18. It will be seen that I have confined myself to a discussion of the relevant provision of the UNDT Statute. In my view, as distinct from the Statute, the Rules of

Procedure do not and cannot deal with the time limits referable to the transferred cases. Article 7 of the Rules of Procedure concerns time limits for filing applications and, as art 7.1 shows, deals with what might be called "new" applications. No ensuing sub-article suggests that it refers or is capable of referring to transferred cases. Art 7.5 explicitly confines the request for waiver for which it provides to "the time limits referred to in Article 7.1" which, as I have mentioned, are the time limits for submitting new applications. Such an indication is, as I have pointed out, not contained in art 8.3 of the Statute. It follows that there is no provision in the Rules of Procedure for waiver of time limits referable to the transferred cases, in particular as prescribed by rule 111.2(a)(i) and (ii). No doubt this was an oversight but, since the matter is sufficiently dealt with in the Statute, it is of no account.

19. A third approach relies on the use of the word "case" in art 2.7 of the Statute. It would not be unreasonable to regard the matter transferred as not only comprising the substantive dispute but also all the incidental or ancillary requirements attached to it by the rules that provided for its determination including, of course, the necessity to consider the question of waiver where a time limit had not been complied with. This interpretation is rendered the more available because the word "case" is used rather than "appeal", since the former term is simply not meant in any technical sense and should therefore be construed as it is usually used in common parlance. Thus the transfer of a "case" is the transfer of the whole matter including a pending or potential application for waiver, as it were, the whole of the unfinished business of the JAB.

20. It seems to me each of these three approaches is a legitimate mode of construction well within the conventional judicial method of interpreting legislation of this kind.

21. Since writing this, I have become aware of *Doligne et al*. UNDT/2009/057, in which Laker J exercised the jurisdiction of the Tribunal to consider waiving the time limit in rule 111.2 with which the applicant had failed to comply. If I may respectfully say

so, I agree that his Honour was correct in this regard, though - as I point out below - I am regrettably unable to agree with other aspects of his Honour's decision.

22. In my view, the relevant test in transferred cases is that prescribed by art 8.3 of the UNDT Statute: first, judicial comity makes it desirable that I should follow the opinion of Ebrahim-Carstens J in *Morsy* that the General Assembly, in using the phrase "exceptional case" in art 8.3 intended deliberately to depart from both the earlier language and, more pointedly, the jurisprudence of the Administrative Tribunal with which it had been encrusted (a view with which I respectfully agree); secondly, the correct principle relating to repeal of procedural provisions is not that the old procedure survives repeal for old cases but that the new rule applies to current cases, although they had previously been governed by the old rule; thirdly, the test of

The fundamental issue posed by the rule is whether there should be a waiver. There is no logical reason why the only relevant matter to be considered should be the reason for delay. The rule does not suggest that the class of "exceptional circumstances" is limited or qualified beyond the requirement, of course, that the circumstances are rationally related to matters capable of justifying waiver, which should then be granted if any one of those circumstances or the circumstances as a whole were "exceptional". If there is a difference in nuance between "exceptional circumstances" and "exceptional case", it is that the latter may be regarded as more clearly indicating that the relevant matters are not confined to the reasons for delay: see, eg, *Mersey*, where Ebrahim-Carstens J mentions (at [48]) the possible legal or policy significance of the case as one of the potentially relevant matters.

29. Without attempting a complete list, the relevant matters for consideration include the reasons for and length of the delay, any personal difficulties, if any, faced by the applicant, the consequences of the impugned decision for the applicant, the nature of the relief sought, the nature of the decision and the reasons for it, whether it involure

where the appellant had not complied with the time limit for filing an appeal from the decision of the Secretary-General rejecting the recommendation of the JAB. Although this case concerned art 7.4 of the Statute of the Administrative Tribunal relating to appeals to that tribunal rather than rule 111.2(f), applying to the JAB, the Administrative Tribunal endorsed its earlier decisions on rule 111.2(f) and then applied them to its own appeals. This was done even though art 7.4 gave it the discretion "to suspend the provisions regarding time limits" but, as distinct from rule 111.2(f), did not impose any requirement that there should be "exceptional circumstances". The usual interpretation given to a provision such as this would be that which governed the general exercise of judicial discretion, in short, that the order would be made if it served the interests of justice. Rather than taking this approach, which would have required weighing up, amongst other things, the consequences of the decision for the applicant on the one hand and the respondent on the other, the Administrative Tribunal decided that it should apply the same test that had hitherto been used when considering the meaning of "exceptional circumstances" in rule 111.2(f), namely whether the applicant's delay had been caused by matters outside his or her control, despite the omission of any such test in the sub-article. The Administrative Tribunal, in justification of this approach, did not attempt to interpret art. 7.4 but simply made a policy decision, citing the apocalyptic language used in *Diaz de Wessely* (2002) Judgment 1046 concerning rule 111.2(f) –

> "…it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy unforeseen requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations, Any other approach would endanger the mission of the international organizations, As the Tribunal has pointed out in the past: 'Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning' (see Judgment No. 631, *Tarjouman* (1992), para. XVII))"

Whilst time limits are important, it is difficult to see how, in the vast bulk of cases, they could possibly be of the *utmost* importance, let alone capable of *endangering the*

Is an applicant's ignorance of the law relevant?

34. In *Diagne* et al. Laker J applied the decisions of the Administrative Tribunal to the interpretation and application of rule 111.2(f). Applying the decision in *Van Leeuwen* (2004) Judgment 1185, his Honour stated that, apart from the fact that the applicant "had acknowledged that he had become familiar with the Staff Rules and Regulations by signing his letter of appointment, ignorance of the law is in general no excuse and each staff member is bound to know the laws which are applicable to him". With respect for my learned colleague, I regret that I am unable to agree with this approach, since I regard the decisions of the Administrative Tribunal on rule 111.2(f) as fundamentally flawed, no less so *Van Leeuwen*. It is surely a fiction that any staff member knows and fanciful that he or she could be expected to know the rules that apply to his or her employment and we should be concerned with truth rather than fancy or fiction. I would readily accept that the staff member's knowledge of the time limits and understanding of the consequences of non-compliance are relevant factors for considering whether exceptional circumstances were present but these two matters, namely knowledge of the deadline and understanding the consequences of delay are very different since the latter can be gathered only from the decisions of the Administrative Tribunal, a knowledge which surely cannot be attributed to any ordinary staff member. Moreover, the rule that ignorance of the law is no defence applies to the commission of criminal offences because in these cases the crucial question is that of the intent of the accused. Even here, the rule is of limited application: such ignorance will often be relevant to the question of punishment. In civil cases, intent is rarely relevant and the rule has virtually no application. In disciplinary cases, ignorance of a rule might or might not be a defence, depending on the particular circumstances of the case and no general statement can usefully be made; however, it is plainly not material where intent is irrelevant.

35. It might well be reasonable that a staff member who does not know a relevant time limit and therefore does not comply with it cannot point to ignorance as an exceptional circumstance since it is reasonable to expect a staff member who is

contemplating appeal to familiarise himself or herself with the particular process which he or she is invoking. But this is not because of any presumption or the application of any rule of law or fiction. At all events, as I have attempted to show, in many cases it would not be fair simply to look at knowledge of the time limit unless the applicant was also aware of the devastating effects of non-compliance: understanding of the time limit requires knowledge of the consequences of non-compliance, a knowledge which mere reading of the rule would not provide.

36.

senior manager had abused his authority by unlawfully removing the applicant from his position without due process for improper reasons and by using the applicant as a "scapegoat" for problems that were not his fault. The "report" did not state the date upon which the applicant had received written notification of his removal and reassignment, which is the event marking the commencement of the two-month time limit under rule 111.2(a); nor did it seek rescission of the decisions or mention rule 111.2.

39. A letter was sent to the applicant by the Office of Human Resources Management (OHRM) on 6 November 2008 apparently to the effect that his "complaint" should be referred to the Head of Office because it alleged misconduct and the "communication" about reappointment and reassignment would be treated as a request for review of those decisions. This communication was somewhat ambiguous, as it is capable of being read as meaning, on the one hand, that the applicant should take the step of preferring his report to th

his request of 12 November and "replaced" it with a lengthier and more detailed document on 20 November 2008. (Nothing here turns on whether the formal request could be withdrawn and replaced as distinct from being amended or supplemented.) Having regard to the similarities between this document and the complaint of 20 October 2008, much of which it reproduces, it is clear that the earlier document was available to Mr Danquah at least by that date. The 20 November 2008 document requested that "as a remedy, you [the Secretary-General] order an extension of my contract for an additional nine months and have me reassigned to ICTS for justice to be done". In these circumstances, was the request submitted on 24 October or 12 November 2008?

41. The specific elements of a request within rule 111.2(a) are: first, it is a letter (that is to say, it is a communication in writing); secondly, it is addressed to the Secretary-General; and, thirdly, it requests that an administrative decision be reviewed. Certainly, the applicant's "report" was in writing. But it only sought a review of what the particular manager had done – only one of which was comprised administrative decisions - in the sense that it comprised evidence of misconduct and no correction of the decisions themselves was sought. Nor was the letter addressed to the Secretary-General. It is apparent, therefore, that the applicant did not have in mind the provisions of rule 111.2(a) and was not intending to invoke it. However, it must be said that, from the Administration's point of view, the requirements of rule 111.2(a) have never been strictly applied, since to do so would often be to a staff member's disadvantage. As I understand it, if a written communication were made to a responsible manager that complained about some conduct or decision affecting the staff member adversely, it would be regarded as a request within rule 111.2(a) and the staff member so informed by letter from OHRM, usually in the form of that sent to the applicant on 11 November 2008 (with which I deal in the following paragraphs). The only reasonable interpretation of Mr Danquah's explicit request is that he (on the applicant's behalf) was of the view that the 12 November request was the communication upon which the applicant relied for the purpose of invoking the

provisions of rule 111.2. The arrival of his request should have led OHRM to the same conclusion.

42. In the meantime, however, on 11 November 2008, the applicant was sent a letter, in what I understand was the standard form, from the then Acting Chief, Administrative Law Unit that his "e-mail dated 24 October 2008" had been received and that the two-month period for review of the decisions to reassign him and extend his contract only for three month began to run from that date. He was told that, if he received a reply to his request for administrative review with which he was not satisfied he could appeal against the answer within one month from his receipt of the reply. He was also told that, in the absence of any response, he could appeal against the administrative decision within the two months from 24 October 2008. The applicant was informed that, if he wished to file an appeal with the JAB, he could use counsel who were listed on the Panel of Counsel, contact details for which were provided. The text of the relevant staff rules was set out in an attachment to the letter.

43. The letter of 11 November 2008 was seriously misleading. The applicant was not informed, except to the extent that he might have gathered from the rules, that a failure to comply with the time limits might lead to his being unable to proceed with his appeal. No reference was made in the letter to the notions of receivability, waiver, or exceptional circumstances. These terms are not part of common parlance and their true legal meaning is not easy even for lawyers to understand with precision. It is difficult to understand why only some of the relevant factors concerning time were brought to his attention and not even a hint given of the potentially devastating consequences of non-compliance with the time limits. The ordinary reasonable person receiving such a letter would justifiably infer that, if not every relevant matter was mentioned, at least the key ones were. *Suppressio veri, suggestio falsi* (to suppress the truth is to suggest the false). I mention this Latin maxim to show that it has long been a part of ordinary human experience that people will often infer from a list of circumstances that seems to be complete that other circumstances that happen to be relevant but which are not mentioned either did not occur or are irrelevant.

Having brought the time limits to the applican

Fundamental matters

47. This case concerns a fundamental principle disguised as procedure: access to justice. The unique status of the United Nations protects it from the justice administered by the ordinary courts. A staff member cannot obtain legal redress except within the Organization itself: there is nowhere else to go. It is important also to bear in mind the context: the rights of an employee to enforce the contract of employment. Decisions about employment affect lives.

48. The time limits have the effect of completely preventing legal redress, even in respect of patently wrongful and unjust decisions. I have been unable to find another jurisdiction in which action must be commenced within one or two months of an alleged breach or a refusal by the employer to correct it. I am also unaware of any statute of limitations that gives less than several years to commence proceedings and most also give a court the discretion to extend these limits if the justice of the case requires. Viewed in the general context of employment and contract law, therefore, the UN time limits are not only unique but exceptionally restrictive, and only somewhat ameliorated by the discretion to waive or suspend the deadlines, because exceptional circumstances are or an exceptional case is present. It inexorably follows as a matter of logic from the fact that justice of the case is not enough for waiver

The issues

51. Ms Maddox, for the respondent, submitted that the time limit of one month specified in rule 111.2(a)(ii) for appealing was not complied with, contending that it should be inferred that the applicant received the reply to the request for administrative review on 24 December 2008. In the alternative, if the applicant and his counsel did not receive the reply, so that the relevant time limit is that specified in rule 111.2(a)(ii), the incomplete statement of appeal should have been submitted by 24 January 2009 on the basis that the request had been communicated on 24 October 2008.

52. Ms Maddox submitted that the relevant provision for considering whether waiver should be granted is rule 111.2(f), although she also contended that, if art 8.3 of the Statute or art 7.5 of the Rules of Procedure of the Dispute Tribunal applied, the test was in substance the same. She contended that it was necessary that the applicant establish that the delay in appeal was caused or substantially caused by matters outside his control and that he had not been able to do so. He knew that his "report" had been made on 24 October 2008 and knew or should have known that, if he did not receive a response from the Secretary-General within two months, he had to appeal by 24 January 2009 in accordance with rule 111.2(a)(ii). He did not do so. Handing over responsibility for the conduct of his appeal to his counsel did not obviate his own responsibility for ensuring that he complied with the time limits. She did not suggest that the respondent suffered any prejudice by the 19-day delay in submitting the incomplete statement of appeal or that it had ever been under the misapprehension that the applicant did not intend to press his appeal. She accepted that Mr Danquah did not receive the response until 11 February 2009 at the earliest. His knowledge that he received

applicant's request was not made on 24 October 2008 but on 12 November, it was out of time.

53. It was submitted by Mr Danquah that the date upon the decisions were notified was established by the fact that the offer of appointment was dated 12 September 2008 and thus could not have been made before that date. Although the e-mail relating to the reassignment was dated 27 August 2008, this was not any evidence that it was actually received on that date. Accordingly, the respondent had not established that the date by which the request should have been made was 27 October. (As it happened, the request of 12 November 2008 stated that the relevant decisions were notified on 12 September 2008, which might well have been correct but which it was not necessary for the applicant to prove.) Mr Danquah submitted, in effect, that the "report" e-mailed on 24 October 2008 was not a request in form or substance but that the applicant had submitted (through him) a formal request on 12 November 2008 upon which he was entitled to rely in terms of the time limit. He also submitted that the respondent had not established that either the applicant or his counsel had received the response of the Secretary-General at any relevant time, so that the crucial questio

map. Unfortunately, as my review of the facts has shown, the confusion did not end there. In my view, in the circumstances here, the request should be regarded as having been made on 12 November 2008.

When was the reply received?

56. The time limit for appealing or applying commenced in each transferred case with receipt of the reply to the request for administrative review, except of course where no reply has been given. Accordingly, it is necessary for the respondent to establish the date of receipt before an issue concerning the expirati

to delivery and a person at the receiving computer was aware of the communication. To require more would be, in my view, to place too heavy an evidentiary burden on the respondent in respect of matters unlikely to be within his knowledge and difficult to discover. It would be for the applicant to establish, if receipt were denied, that in the particular circumstances the message was not available for access or he or she was not in a position to access it.

57. In this case, the respondent quite reasonably sought to deliver the Secretary-General's reply to both the applicant and his lawyer. The Administration was aware, of course, that the applicant's appointment had been extended only to 17 December 2008. Whether or not the applicant would or could access his e-mail account afterwards and the frequency with which he might do so was necessarily speculative. In this context it is unfortunate that the date chosen to convey the Secretary-General's decision was two days after the applicant's term expired, a day upon which in all likelihood he would not be in his office or even in the country, as indeed happened. The alternative means of contacting the applicant, namely by co

the way that the applicant gave evidence which gave rise to any doubts about his truthfulness. Nor is his account inherently unlikely. In the result I accept, although the margin is a narrow one, more probably than not that the applicant did not in fact open the e-mail conveying the reply.

59. What then of service on Mr Danquah? Although it appears that the reply was sent to Mr Danquah's inactive e-mail address on 22 December 2008 it is not disputed that he did not access that account until 11 February 2009, when he forwarded the reply to the active e-mail address. As mentioned, he had not read the reply on 12 February, the date upon which he forwarded the incomplete statement of appeal and, certainly, he had read it by 27 February, when he e-mailed the JAB seeking an extension of the time limit for submitting a full statement of appeal until 12 March. There is no further evidence about this matter and Mr Danquah's memory does not fill the gap.

60. Whether Mr Danquah was in "receipt" of the reply on 11 February within the meaning of rule 111.2(a)(i) is not easy to determine. Conventionally, personal service does not require personal knowledge of the contents of the relevant document; in short, it does not have to be read to have been served. It seems to me that it would place too high an evidentiary burden on the respondent to require proof of more than physical reception of the reply. There may be a number of reasons why the document (electronic or hard copy) was not immediately read by an applicant but the explanation for not doing so should come from the applicant as a matter that can be taken into account in consideration whether, on the assumption his or her appeal is out of time, the delay should be waived. It seems to me, therefore, that strictly speaking Mr Danquah (and, hence, the applicant) received the reply on the 11 February 2009.

61. It is not clear whether receipt of the reply after the one or two month period specified in rule 111.2(a)(ii) but before expiry of the time for appeal provided in that paragraph will, as it were, restart the clock. Applied literally, rule 111.2(a)(i) suggests that it would. If the clock did restart on 11 February 2009, it is obvious that the

applicant's incomplete statement of appeal was well within time, having been submitted on 12 February 2009. If it did not start the clock, the relevant date is 12 February and no question of waiver arises.

Is this an exceptional case?

62. To adopt the test of "exceptional" as enunciated by Ebrahim-Carstens J in *Morsy* (set out in the passage extracted above), exceptional means, in substance, something out of the ordinary, quite unusual, special, or uncommon, rather than regular or routine or normally encountered, but it need not be unique, unprecedented or very rare. Perhaps it is worth adding that the descriptions are, in substance, synonymous rather than differentiating, although each might differ in nuance: they should not be parsed as logically distinct entities.

63. If I am wrong about my finding the respondent has not proved that the applicant was in receipt of the Secretary-General's reply on 24 December 2009, it is necessary for the applicant to establish that this is, in short, an uncommon case justifying suspension or waiver of the time limit to 12 February 2009. It is submitted on his behalf that, in this event the evidence taken as a whole justifies the Tribunal exercising this discretion in the applicant's favour. In my view, for obvious reasons it will almost always be necessary for an applicant who seeks waiver or suspension at least to establish facts that explain the relevant delay. This has not been done here. There is no direct evidence about the communications between the applicant and Mr Danquah concerning the conduct of his appeal although, having regard to the applicant's evidence about his depressed state of mind following his departure from his employment, it might have been quite reasonable for him to have entrusted the appeal to Mr Danquah and assumed that his counsel would do what was necessary to ensure that it proceeded in accordance with the rules. However, on the assumption (contrary to my finding) that the applicant was in receipt of the Secretary-General's reply on 24 December 2008, the only reason at all for the delay explaining why the appeal was not lodged until 12 February is that he did not bring it to Mr Danquah's attention.

It is possible, I suppose, that he assumed that the reply would also have been sent to Mr Danquah and maybe he did not appreciate the fact or importance of the time limit. But these possibilities are merely speculation and, since the applicant bears the onus of establishing the existence of an exceptional case, do not go far enough. As the evidence stands, on the assumption that the applicant was in receipt of the reply on 24 December 2008, there is no basis for concluding that this is an exceptional case within art 8.3 of the UNDT Statute. (I am aware of the line of decisions of the Administrative Tribunal declining to regard an applicant's delegation to counsel of the conduct of an appeal as significant in considering whether there might be "exceptional circumstances" within 111.2(f). It is enough to say for present purposes that these decisions may need to be reconsidered if the question arises before the UNDT.) If the discretion is governed by rule 111.2(f), I would come to the same conclusion for the same reason.

64. On the assumption that the applicant did not receive the reply on 24 December 2009 and the request should be considered as having been made on 24 October 2009 rather than 12 November 2008, it is also necessary to consider whether waiver of the delay resulting from submitting the incomplete statement of appeal is justified. It seems to me that the applicant (by his counsel) was reasonably entitled to act upon the basis that the request that matter drew was that which had been made on his behalf on 12 November 2008. There is no evidence that the applicant or Mr Danquah received the letters of 6 or 11 November 2008, the respondent did not attempt to prove that he did and there is no evidentiary presumption that he did so. Even if those letters were received, it was reasonable to act on the basis that the requests of 11 and 20 November 2008 should would be understood by OHRM as

Conclusion

66. The appeal was submitted within time and is receivable.

(*Signed*)

Judge Michael Adams

Dated this 5th day of November 2009

Entered in the Register on this 5th day of November 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York