Introduction

1. The Applicant, a former senior reviser, contests the implementation by the Department of General Assembly and Conference Management ("DGACM") of the decision to replace a paper based recording system that kept track of staff members' time and attendance with an electronic one named "Flex Time System".

2. The Respondent argues that the appeal before the Tribunal is not receivable as the Flex Time System did not affect any of the Applicant's right and entitlements.

Facts

3. Starting in September 2009, DGACM began holding town hall meetings and briefings with its different units to consult with staff members and explain the Flex Time System which they presented as an "improved technological infrastructure".

4. From October 2010 through December 2010, DGACM enabled over 700 staff members to test the system so that they could provide them with feedback regarding its functionalities.

5. On 26 November 2010, the Chief, Spanish Translation Section, DGACM sent out an email to staff under his supervision wherein he explained that as of 1 January 2011, the Flex Time System would be the only system in effect for recording attendance and for approving leave requests; thus, the attendance sheet to be signed upon arriving at the workplace would be discontinued.

6. On 4 January 2011, the Applicant reported to the workplace at which time he found that the usual attendance sheet had been discontinued. On the same day, by email to the Under-Secretary-General of DGACM, the Applicant requested proper directions or instructions on the use of the Flex Time System.

7. On 5 January 2011, the Executive Officer, DGACM (in the absence of the Under-Secretary-General, DGACM), responded by email to a prior communication from the Applicant by stating in part:

> You may not have been around for the numerous informational sessions (Town Halls, staff meetings, section-by-section meetings) we have had regarding the Flex Time System, nor does it seem you have spoken with any of the staff reps with whom we have also had numerous meetings. Please see the answer to your questions [contained in the 4 January 2011 email to the USG/DGACM] below in blue.

8. On 6 January 2011, the Executive Officer, DGACM sent an email to all staff in DGACM titled "Implementation of Flex Time System as of 1 January 2011", which contained the following information:

> As you know, we have begun to use fully (in all areas, that is, where readers have been installed), the Flex Time System throughout DGACM as of 1 January. This will be the official time and attendance recording system for the Department. In the near future, there will be scanners at all DGACM offices and in the NLB entrances. Until then, anyone not having access to a scanner will continue to use whatever [Time and Attendance] system is in place.
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> Flex Time System and attendance will simply replace any existing time and attendance system in use. No working rules or conditions service have changed. On a daily basis, you are required simply to 'scan in' and 'scan out' when you arrive and leave the workplace. You have the option of logging in and out for lunch, but all staff will be charged one hour no matter what timing is logged, if used. At the end of the month, you will be able to certify your own time sheet, which will then be reviewed by the timekeeper, as happens now, and submitted to the Executive Office and to Payroll for processing.
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> Eventually, your certified data will be

9. On 10 January 2011, the Applicant filed both a request for management evaluation with the Management Evaluation Unit ("MEU") and a suspension of action ("SOA") with the Dispute Tribunal.

10. On 17 January 2011, the Dispute Tribunal, in Order No. 12 (NY/2011), rejected the request for an SOA due to the Applicant's failure to meet the criteria of art. 2.2 of the Dispute Tribunal Statute. The Dispute Tribunal also held that due to its finding it did not need to answer the question of whether the contested decision was an administrative decision subject to appeal before the Dispute Tribunal.

11. On 9 February 2011, the MEU informed the Applicant, whose contract expired on 11 February 2011, that his "request did not identify a reviewable decision within the meaning of provisional Staff Rule 11.2(a)" and that his request for management evaluation was therefore not receivable.

12. On 5 May 2011, the Applicant filed an application with the Dispute Tribunal contesting DGACM's decision to force him to "improperly use the electronic 'Flex Time' system for time and attendance recording".

13. On 6 June 2011, the Respondent filed his reply in which he raised the issue of the receivability of the Applicant's appeal.

14. On 4 June 2012, the undersigned Judge was assigned to the present case.

15. On 18 September 2012, the Tribunal issued Order No. 193 (NY/2012), whereby it requested that the Applicant respond to the Respondent's submission on receivability, as well as whether the question of receivability could be dealt with on the papers.

16. On 1 October 2012 and 9 October 2012, the parties filed submissions on receivability and agreed that the question of receivability could be disposed of on the papers.

Applicant's submissions

17. The Applicant's principal contentions may be summarized as follows:

a. The application is not *res judicata* as a result of the prior filing for an SOA. The SOA was rejected due to the fact that it did not meet all of the applicable criteria under art. 2.2 of the Dispute Tribunal statute, and not based on its merits;

b. The requirement introduced by the Flex Time System, which registers the exact time of the Applicant's entry and exit into the workplace, is improper in both form and substance. More importantly, it is a an appealable administrative decision as it has a direct impact on the terms of appointment and contract of employment of the App

establishes a new monitoring system for a pre-existing obligation rather that modifying the application of a policy;

e. The decision is lawful as the Respondent has broad discretionary powers as to how best organize work within the Organization. Furthermore, staff members have "always been obliged to record their time and attendance".

Consideration

Applicable law

19. Article 2.1 of the Dispute Tribunal Statute states:

Article 2

Management Information System, so as to ensure effective internal control of attendance and leave entitlements.

1.2 The supervisor shall designate a time and attendance assistant who, under the supervisor's authority, shall:

(a) Verify attendance and compliance with working hours, especially for staff on staggered or flexible working hours, and inform the supervisor of unexplained absences;

(b) Record night-time and overtime work, indicating whether it is to be taken as compensatory time off or paid as overtime;

(c) Prepare reports on attendance, night-time work, compensatory time off and overtime, to be certified by the supervisor;

(d) Prepare an annual or sick leave form upon return to duty of a staff member after any period of such leave, and obtain endorsement of the completed form by the staff member and the supervisor;

(e) Keep all relevant records.

1.3 The supervisor shall promptly certify reports on attendance, night-time work, compensatory time off and overtime, and complete individual annual or sick leave reports. The supervisor shall ensure that all such reports and any supporting documentation are adequately maintained and transmitted to the executive or administrative office. The supervisor shall also promptly advise the executive or administrative office of any unexplained absence or extended sick leave on the part of staff members under his or her supervision.

1.4 The executive or administrative officer shall ensure that the requisite mechanisms are in place05.7lrougng t by thaenrive off asand ttendaned

21. ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations) states in part:

> **Regulation 1.3**
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> **Performance of staff**
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> (b) The whole time of staff members shall be at the disposal of the Secretary-General for the performance of official functions. The Secretary-General shall establish a normal working week and shall establish official holidays for each duty station. Exceptions may be made by the Secretary-General as the needs of the service may require, and staff members shall be required to work beyond the normal tour of duty when requested to do so.
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> **Regulation 8.1**
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> (a) The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies;
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> (b) Staff representative bodies shall be established and shall be entitled to initiate proposals to the Secretary-General for the purpose set forth in paragraph (a) above. They shall be organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially under electoral regulations drawn up by the respective staff representative body and agreed to by the Secretary-General.
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> **Rule 1.2**
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> **Basic rights and obligations of staff**
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> (a) Staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors.
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> …
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> **Rule 1.4**
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> **Hours of work and official holidays**
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> (a) The Secretary-General shall set the normal number of working hours per week for each duty station. Exceptions may be made by the Secretary-General as the needs of service may require. A staff member may be required to work beyond the normal number of working hours whenever requested to do so.
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> …

the administrative decision was of general rather than individual application for it to not be receivable.

28. The jurisprudence defining what constitutes an administrative decision has evolved since the approach that was taken in *Andronov*, former Administrative Tribunal Judgment No. 1157. As expressed by the United Nations Appeals Tribunal in *Andati-Amwayi* 2010-UNAT-058:

> What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.
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> In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.
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> What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

29. At the most basic level, and as expressed in *Charles* UNDT/2011/139, the question that the Tribunal has to determine if whether the contested administrative decision is "capable of affecting [the Applicant's] contractual rights". More specifically, is the contested decision in "non-compliance with the terms of appointment or the contract of employment" of the Applicant.

Applicant's rights

30. The Respondent distinguishes between the Regulations and Rules that "set the normal number of working hours per week for each duty station" and "the broad discretion [that] is vested in the Secretary-General to determine the organization and methods of work in the Organization".

31. On the other hand, the Applicant, as part of his request for management evaluation, stated that he saw "the merit of changing from a paper based system to an electronic one, as long as neither new and unnecessary information is recorded". Consequently, the question of whether any of the Applicant's rights were breached is not predicated on the usage of an electronic system but rather the usage that is made of the data obtained from that system.

32. Throughout his application, the Applicant submits that "DGACM staff was only required to sign once a day – when starting the work day – a paper time sheet, in which the working hours were pre-printed". Consequently, the new system which requires staff members to scan their ID card upon entering and exiting the office at the start and end of the day resulted in a change of the policy currently in place and a breach of his rights as it was now collecting irrelevant information, namely the exact working hours of each staff member.

33. It is however the responsibility of each staff member under staff rule 1.5(a), "for the purpose of determining their status under the Staff Regulations and Staff Rules as well as for the purpose of completing administrative arrangements in connection with their employment", to en

be reflected, either on the timesheet or by informing the timekeeper, as anything short of that would result in a staff member verifying an incorrect entry with regard to the hours that they had worked.

35. While it is correct for the Applicant to state that the prior paper system only required a single action, namely to sign the daily time sheet, it is incorrect for him to state that the new system which requires that staff members both sign-in and then sign-out, thereby collecting a staff members exact working hours, results in irrelevant information being obtained and also resulted in a fundamental change of his workplace conditions. To the contrary, it has always been the staff members' responsibility to accurately reflect their working hours and the new system, while slightly procedurally different, neither deviates from that nor does it modify the workplace conditions currently in place.

36. Both the old and the new system reflect in individual columns the time at which a staff member came "IN" and went "OUT". It can be assumed that under the previous system if a staff member arrived at 9:07 and then left at 17:39 he or she would verify that he had worked a full shift from 9:00 to 17:30 as reflected on the printed timesheet. However, under the new system the staff member verifies that his hours were actually 9:07 to 17:39 thereby ensuring the "accuracy and completeness of the information" provided to the Secretary-General.

37. It cannot be said that replacing the requirement that staff members sign a timesheet once a day versus sign in and out provides any new and irrelevant information to the Secretary-General. Rather it enables staff members to, as they always have, accurately comply with their obligations towards the Organization and does not result in the implementation of a system that is in "non-compliance with the[ir] terms of appointment or the[ir] contract of employment".

38. The Tribunal notes that the lat does it menca.(1T TrS.3le5 TD.000rn4la 0 fe59- - - -staff m)8.1(gati

matching the prior usage of the paper system. Consequently, it does not result in any change to the "working rules or conditions" of employment as defined by his terms of appointment or conditions of employment.

Staff consultation

39. As expressed by the Dispute Tribunal in its SOA judgment, a "question nevertheless remains: did an obligation of consultation exist upon DGACM *before* the Flex Time System was implemented in full and, if so, would this make the contested decision" unlawful thereby resulting in a breach of the Applicant's terms of appointment and contract of employment.

40. Sections 4 and 5 of ST/SGB/274 identify several situations where consultation with staff members is required, including whenever an "issue or policy should affect the entire department or office or at least a significant number of staff in a particular unit or service of the department or office".

41. In *Allen* UNDT/2010/009, the Dispute Tribunal stated that:

> Although, the former Staff Regulations and Rules contain no definition of the concept of consultation, the [former Administrative Tribunal] considered that "an essential element [of it] is that each party to the consultation must have the opportunity to make the other party aware of its views". (see judgement No. 518, Brewster (1991)).

42. As part of his application, the Applicant submitted that "[i]n 2009, DGACM started a campaign, with town hall meetings and briefings with different department units …."; [t]here were some informal discussions with staff representatives"; that certain "negotiations have not produced any results yet" and that at some point he considered that as a result of "further town hall meetings and briefings with individual units" DGACM was going beyond ST/SGB/2003/4.

43. Furthermore, as part of his 10 January 2011 request for management evaluation, the Applicant, in response to a 5 January 2011 email from an Executive Officer in DGACM which stated that there had been "numerous informational

sessions (Town Halls, staff meetings, section-by-section meetings) […] regarding the Flex Time System", submitted that:

> (a) Two DGACM Town Hall meetings were held since my first temporary appointment started on August 9th 2009, when my first temporary appointment started; in one of them the issue of FlexTime was not addressed (see http://iseek.un.org/webpgdept779_554.asp?dept=779). In the other one, specifically devoted to FlexTime, with the participation of a technical expert from Vienna and chaired by the manager making the allegation, I was one of the staff members who addressed a question to the Chair.
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> (b) No section-by-section meeting was held in the Spanish Translation Service after August 9th; I was informed by my colleagues, however, of the content of the briefing given by the Director of the Documentation Division a few weeks before my arrival.

44. Finally, prior to its implementation, a trial period was conducted to enable staff members to both test the system and provide the Organization with feedback regarding its usage.

45. The Tribunal notes that it is not settled law that when, as determined by the Tribunal above, there have not been any actual changes to a policy but rather only a "modernization" of it, that ST/SGB/274 is warranted.

46. Based on the facts before it, the Tribunal therefore considers that each of the parties, including the Applicant, had "the opportunity to make the other party aware of its views".

Discriminatory practice

47. In this case, unlike the case of *Leboeuf et al.*, the Applicant is the only staff member before the Tribunal. Under art. 3.1 of the Dispute Tribunal Statute, the only situation under which a person may file on behalf of another staff member is when the other concerned staff member is either incapacitated or deceased. Furthermore, as expressed in *Hunter* UNDT/2012/036,

> [t]he decision to contest an administrative decision alleged to be in non-compliance with the terms of appointment or the contract of employment is for each staff member to make. Under art. 2.1(a) of the Tribunal's Statute, the Applicant does not have standing to intercede in a contractual relationship that exists between other staff members and the Organization by filing applications on their behalf and contesting the alleged non-compliance with their terms of appointment and contracts of employment.

48. Consequently, the only potentially discriminatory practice that this Tribunal is concerned with is that as it applies to the Applicant.

49. Within the United Nations, different offices and departments benefit from a certain leeway as to how best implement certain policies, including the ones currently before the Tribunal, so long as that implementation complies with the regulations and rules of the United Nations. Indeed, sec. 1.1 of ST/AI/199/13 states that with regard to the recording of attendance and leave outside of the United Nations Headquarters, "[a]ll other offices shall establish similar procedures in the light of their *specific* requirements" (emphasis added). Similarly, sec. 4, ST/AI/408, provides that each Executive Office, without adding any emphasis on its location or a requirement of uniformity "shall establish a monitoring mechanism to ensure that individual work schedules are respected".

50. The Tribunal has to also be cognizant of the fact that not all staff members work under the same terms of appointment and contracts of employment or that the purpose and requirements of each department are always the same. For example, certain international Professional staff members benefit from a right to home leave which is not available to either Professional national hires or general service staff members. Similarly, in DGACM certain categories of professional staff members benefit from either overtime pay or compensatory time-off which may require the implementation of certain practices which are not applicable in departments that do not offer such benefits related to working hours.

51. The fact that a practice may not be required by other departments does not render the implementation of such a system within DGACM discriminatory.

Rather the test is whether the implementation of this system discriminates between the Applicant and other similarly situated staff members within DGACM.

52. Seeing that this system has been implemented uniformly to categories of staff similar to that of the Applicant and, as previously stated, does not breach any of the Applicants rights, the Tribunal can only conclude that the implementation of the Flex Time System does not result in the creation of discriminatory practice towards the Applicant any more than the previous usage of the paper system.

53. Both the paper and the electronic system were developed to address the specific needs of categories of staff in DGACM. The Tribunal does not consider that the implementation of this system, any more then the implementation of the prior system over the past 40 years, results in the creation of a discriminatory practice or in the Applicant being treated unfairly.

Conclusion

54. The Applicant has not provided the Tribunal with any persuasive arguments that would result in it to consider that the implementation of the Flex Time System infringed on either his contract of employment or his terms of appointment.

55. The Tribunal decides that the application is not receivable *ratione materiae*.

(*Signed*)

Judge Alessandra Greceanu

Dated this 28th day of January 2013

Entered in the Register on this 28th day of January 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York