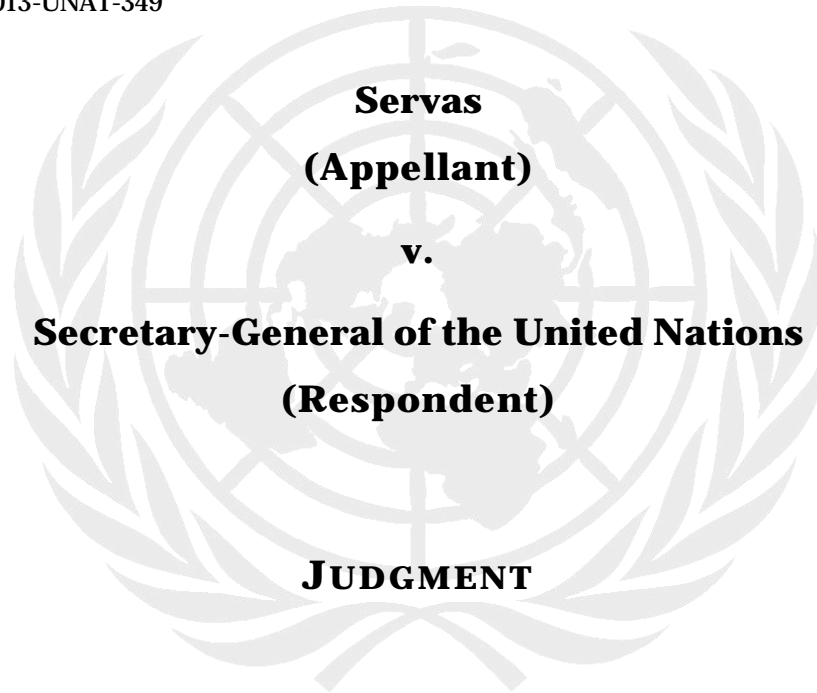




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-349



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Before:	Judge Rosalyn Chapman, Presiding Judge Luis María Simón Judge Richard Lussick
Case No.:	2013-425
Date:	28 June 2013
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-represented
Counsel for Respondent:	Rupa Mitra

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Ms. Susan Lee Servas of Judgment No. UNDT/2012/195 in the case of *Servas v. Secretary-General of the United Nations*, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 11 December 2012.

### **Facts and Procedure**

2. Ms. Servas joined the International Trade Centre (ITC), Geneva, on 20 January 2009 as a locally-recruited G-5 Programme Assistant on a short-term appointment, which was renewed through 19 July 2009. As of 20 July 2009, she was reappointed to the same post on a temporary contract. She served as a Programme Assistant at the G-5 level until 31 May 2010.

3. Ms. Servas was retroactively appointed, effective 1 June 2010, as an Associate Programme Adviser at the P-2 level, pursuant to a Settlement Agreement signed on 29 June 2011 under the auspices of the Office of the United Nations Ombudsman and Mediation Services (UNOMS).

4. On 27 October 2011, Ms. Servas filed an application before the UNDT (Case No. UNDT/GVA/2011/068) to enforce the Settlement Agreement. On 16 February 2012, the UNDT entered Judgment No. UNDT 2012/027, partially granting the application to enforce the Settlement Agreement. In its Judgment, which is now final, the UNDT made the following relevant findings of fact:

... On 26 October 2010, [Ms Servas] submitted to the Secretary-General a request for a management evaluation of the ITC decision finding her ineligible for a P-2 vacancy ... [claiming that] since 1 June [2010] she had been performing some of the duties attached to that post.

...

... The case was thus referred to the [UNOMS].

...

... On 29 June 2011, when the mediation was concluded, the parties signed a settlement agreement ...

5. After she separated from service with the ITC on 18 July 2011, Ms. Servas filed a request, on 12 March 2012, for protection against retaliation with the United Nations Ethics Office, claiming she was subjected to retaliation after she had concluded the Settlement

Agreement. On 26 March 2012, the Ethics Office refused to grant protection to Ms. Servas on the grounds that the Settlement Agreement did not constitute a protected activity within the scope of the Secretary-General's Bulletin ST/SGB/2005/21 ("Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations").

6. On 2 April 2012, Ms. Servas filed an application with the UNDT challenging the Ethics Office's decision of 26 March 2012. The Secretary-General filed his answer to the application on 3 May 2012, raising the defenses that the application was not receivable because: (i) decisions of the Ethics Office are not administrative decisions that are reviewable under Article 2(1)(a) of the UNDT Statute and the Ethics Office is independent of the Secretary-General; and (ii) Ms. Servas had failed to seek management evaluation, as required under Article 8(1) of the UNDT Statute.

7. On 7 May 2012, Ms. Servas filed with the UNDT a request to remand the case for correction of procedure and for leave to submit observations to reply. As part of her request, Ms. Servas stated:

[S]hould the [Dispute] Tribunal determine that a management evaluation is required, *I move the [Dispute] Tribunal for an order that deliberation of the present application be held in abeyance until the outcome of the review.* I point out that as the [Secretary-General] agrees I have no chance of success in such an administrative review, the [Dispute] Tribunal can expect a response of non-receivability well-before the 30-45 day mark, which would in no way delay or frustrate [the Dispute] Tribunal's ability to properly review my case. (Emphasis in original.)

8. On 7 May 2012, Ms. Servas submitted a request for management evaluation of the Ethics Office's decision of 26 March 2012. On 11 May 2012, she was advised by the Chief of the Management Evaluation Unit (MEU), Office of the Under-Secretary-General for Management, that her request was not receivable because the Ethics Office was independent of the Secretary-General and its actions could not be attributed to the Administration; thus, the MEU "has no authority to evaluate the subject matter of [her] request".

9. On 6 December 2012, the UNDT held an oral hearing, and on 11 December 2012 it issued Judgment No. 2012/195, determining the application was not receivable. On 20 December 2012, Ms. Servas filed an appeal, and the Secretary-General filed his answer on 8 March 2013.

### **Submissions**

#### **Ms. Servas' Appeal**

10. The UNDT failed to attach sufficient weight to the exceptional circumstances of Ms. Servas' case which preclude the necessity of a management evaluation.

11. The UNDT failed to exercise its jurisdiction to remand the case for procedural correction in view of the UNDT Statute, the Rules of Procedure of the UNDT and in the interests of justice.

12. The UNDT erred in rejecting Ms. Servas' application on its merits and ignoring all considerations giving rise to a legitimate expectation that the Settlement Agreement is a protected activity.

13. The UNDT erred in failing to consider the rationale of Order No. UNDT/NBI/025, *Kasmani* (2010), which established that the UNDT's jurisdiction to find protected activity is not strictly limited to conditions in the Secretary-General's Bulletin, but can be interpreted in the interests of justice.

14. The UNDT failed to exercise jurisdiction to find *prima facie* retaliation in light of the evidence before it.

15. The UNDT erred in refusing a request for confidentiality without giving due consideration to the confidentiality clause in the Settlement Agreement.

#### **Secretary-General's Answer**

16. The UNDT correctly denied Ms. Servas' claim that management evaluation of the contested administrative decision is not required and correctly concluded that the application was not receivable, *ratione materiae*, due to her failure to seek management evaluation prior to bringing the application.

17. Article 10(4) of the UNDT Statute is not the basis for the UNDT to stay and hold in abeyance an application while the staff member seeks management evaluation. That provision applies only to errors by the Administration, not a staff member and, in any event, requires the Secretary-General to concur to the remand.

18. Statements made by the UNDT in the Judgment addressing the merits of the Ms. Servas' claims are *obiter dicta* since the UNDT correctly found that the application was not receivable. These *obiter dicta* statements cannot be the basis of an appeal of the Judgment.

### Considerations

#### *Receivability*

19. On appeal, Ms. Servas contends that the UNDT erred in holding her application was not receivable because she had not requested management evaluation *before* filing it. She contends that, in light of the exceptional circumstances of her case, wherein she did submit a request for management evaluation within the requisite 60 calendar days of the administrative decision, the UNDT should have found her application to be receivable.

20. The UNDT determined that the application was not receivable *ratione materiae* under Article 8(1)(c) of the UNDT Statute. In reaching this determination, the UNDT noted that Staff Rule 11.2 requires management evaluation as a first step for judicial review. Specifically, Staff Rule 11.2 provides in pertinent part:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, *as a first step*, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision. (Emphasis added.)

21. The UNDT further concluded that Staff Rule 11.2 is “unambiguous” and requires that “the request for a management evaluation must be submitted *before* an application is filed before the [Dispute] Tribunal, which was not done ...”.

22. This Tribunal agrees with the UNDT and its conclusion that the application was not receivable, *ratione materiae*. A staff member must be familiar with the Staff Rules and understand her obligation to act in conformance with those rules.<sup>1</sup> This means that a request for management evaluation must be submitted *prior to* bringing an application before the

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<sup>1</sup> *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-184, para. 26; *Diagne et al v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067, para. 22.

Dispute Tribunal. As we have noted many times, the requirement of management evaluation assures that there is an opportunity to quickly resolve a staff member's complaint or dispute without the need for judicial intervention.<sup>2</sup> Moreover, based on the facts of the present case, even if the MEU failed to resolve Ms. Servas' complaints about the contested decision, she still had the opportunity to timely file an application in the UNDT for judicial review after she received the response from the MEU; however, she did not choose to do so.

### *Merits and Other Matters*

23. Despite concluding that the application was not receivable, *ratione materiae*, the UNDT addressed in great detail the merits of Ms. Servas' claims in paragraphs 39 through 44 of the Judgment. Since the application was not receivable, the claims raised in the application were not before the UNDT for a decision on the merits. Thus, in deciding the merits of those claims, the Dispute Tribunal exceeded its competence and jurisdiction. Accordingly, this Tribunal *sua sponte* strikes paragraphs 39 through 44 from the Judgment.

24. Because the UNDT had no competence and jurisdiction to make any factual findings and reach any legal conclusions on the merits of Ms. Servas' claims, the correctness of such improper findings and conclusions cannot be the basis of an appeal. Thus, Ms. Servas' challenges to the UNDT's rulings on the merits must be dismissed.

25. Ms. Servas has also appealed the UNDT's denial of her request for confidentiality. This Tribunal finds the UNDT did not err in denying Ms. Servas' request for confidentiality.<sup>3</sup> Ms. Servas' other claims on appeal also have no merit, and this Tribunal need not address them.<sup>4</sup>

### **Judgment**

26. The appeal of UNDT Judgment No. UNDT/2012/195 is dismissed.

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<sup>2</sup> *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311.

<sup>3</sup> See the Appeals Tribunal's Order No. 127 (2013), paras 4 and 5.

<sup>4</sup> *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 38.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of June 2013 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on this 26<sup>th</sup> day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar