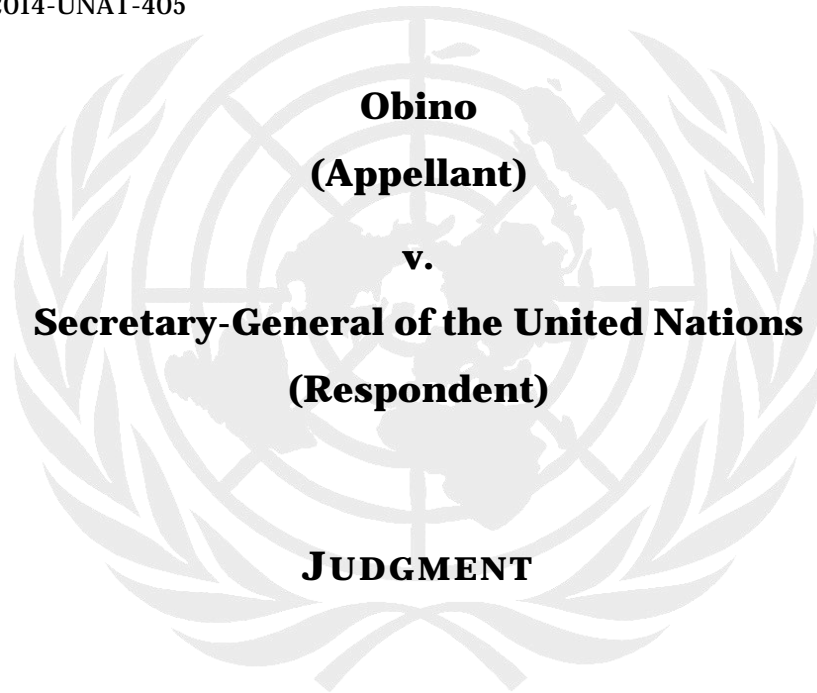




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-405



**Obino  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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Before:	Judge Inés Weinberg de Roca, Presiding Judge Mary Faherty Judge Richard Lussick
Case No.:	2013-455
Date:	2 April 2014
Registrar:	Weicheng Lin

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Counsel for Appellant:	Miles Hastie
Counsel for Respondent:	John Stompor

**JUDGE INÉS WEINBERG DE ROCA, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Namwell Obino against Judgment No. UNDT/2013/008, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 23 January 2013, in the case of *Obino v. Secretary-General of the United Nations*. Mr. Obino appealed on 26 March 2013, and the Secretary-General answered on 24 May 2013.

**Facts and Procedure**

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties:<sup>1</sup>

... The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA) in Addis Ababa. On 15 Jun 2010, the Applicant in the present case and [another Applicant, Kodre,] filed Applications with the Dispute Tribunal ... in Nairobi contesting the decision of the Secretary-General to implement a decision by the Chairman of the International Civil Service Commission (ICSC) to reclassify the Addis Ababa and the Nairobi duty stations, respectively ...

...

... During the relevant period, the Applicant was employed on a fixed-term appointment as a Communications Officer with ECA. His duty station was Addis Ababa.

... On 22 December 2009, the then Executive Secretary of ECA (the ES/ECA) advised all ECA staff per interoffice memorandum of the intention of the ICSC to change the classification for Addis Ababa from hardship class C to class B, effective 1 January 2010. He advised the staff that he had established a working group to prepare a submission that would form the basis of an appeal to [the] ICSC to reconsider the planned reclassification. He also advised the staff that he had written to the Chairman of the ICSC requesting a suspension of the reclassification until the ECA submission on the matter had been reviewed.

... ECA's request for suspension was rejected by the ICSC Chairman and on 1 January 2010, the hardship classification for the Addis Ababa duty station was changed from C to B.

... On 25 February 2010, the Applicant filed a request for management evaluation. By a memorandum dated 15 March 2010, the Applicant's then counsel was informed by the Management Evaluation Unit ... that the request was not receivable

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<sup>1</sup> The following text is taken from Judgment No. UNDT/2013/008, para. 1 and paras. 9-13.

because the [c]ontested [d]ecision was not an administrative decision within the meaning of [Article] 2 of the Statute of the [Dispute] Tribunal.

... The Applicant filed the current application on 15 June 2010.

3. On 18 June 2010, the Secretary-General filed a motion for recusal and change of venue, arguing the existence of a conflict of interest for the Judges of the UNDT in Nairobi as the *Obino* application challenged the reclassification of the Nairobi and Addis Ababa duty stations. The motion was ultimately denied by UNDT Order No. 075 (GVA/2010), dated 28 September 2010, on the basis that as the contested decision was challenged by Mr. Obino only insofar as it related to Addis Ababa, no conflict of interest existed for the Nairobi UNDT. This Order was considered as precedent in establishing the scope of the *Obino* case for all further UNDT proceedings.

4. The related case of *Kodre*, which challenges the reclassification of the Nairobi duty station, was transferred to the UNDT in New York, where it is pending.

5. On 17 February 2011, the Secretary-General filed a motion for change of venue for purposes of joinder, seeking to have *Obino* transferred to the UNDT in New York to be considered together with *Kodre*. The motion was rejected by the UNDT in Order No. 016 (NBI/2011), dated 18 February 2011, citing Order No. 075 (GVA/2010), which recognized that the cases were not identical but had crucial differences.

6. The Dispute Tribunal considered the case on the papers before it, declining to hold oral proceedings. It found that the application was not receivable, as it did not challenge an appealable administrative decision.

7. The UNDT considered that whilst the application purported to challenge the Secretary-General's decision to implement the ICSC's decision on reclassification, "the fundamental decision being contested ... [was] actually the ICSC decision to reclassify the Addis Ababa duty station". It recalled that whilst the ICSC makes *recommendations* in certain areas, such as salary scale, post adjustment and allowances, it is empowered by article 11 of its Statute to *establish*, or decide upon, the classification of duty stations. Such decisions are binding on the Secretary-General.

8. Accordingly, the Dispute Tribunal concluded that the ICSC is “answerable and accountable” only to the General Assembly, not to the Secretary-General, and, as such, its decisions cannot be imputed to him. In the absence of any discretionary authority on the part of the Secretary-General, the UNDT found that “his implementation of the ICSC reclassification is not an administrative decision under [Article] 2 of the [Dispute] Tribunal’s Statute”. Finally, the UNDT opined that the decision in question was of “general application” and not taken in a “precise individual case” (per the former United Nations Administrative Tribunal (UNAdT) in Judgment No. 1157, *Andronov* (2003)).

### **Mr. Obino’s Appeal**

9. Mr. Obino submits that the UNDT erred when it concluded that staff have effectively no right of recourse when a decision is attributable to the ICSC or the General Assembly. He argues that this is contrary to the principles and jurisprudence of the International Court of Justice (ICJ), the former UNAdT, the Administrative Tribunal of the International Labour Organization, the UNDT and the Appeals Tribunal.

10. Mr. Obino relies upon the ICJ’s 1954 advisory opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, in which it held that the General Assembly was bound by orders of the former UNAdT, to sustain his submission that the General Assembly is not above the jurisdiction of the internal justice system and that the Secretary-General is accountable, even when impugned decisions are taken in excess of his individual authority. Similarly, he cites jurisprudence of the UNDT and the Appeals Tribunal in which the Organization was held accountable for decisions taken by independent entities over which the Secretary-General has no direct authority, such as the Office of Staff Legal Assistance, the Office of Internal Oversight Services and the Ombudsman’s Office. Moreover, Mr. Obino cites a series of judgements of the former UNAdT which reviewed cases involving ICSC recommendations to support his argument that his case ought to have been receivable in the current system of administration of justice.

11. Mr. Obino contends that the UNDT erred in its interpretation of *Andronov*: a decision of general application may be reviewable provided that it results in direct legal consequences for the staff member; it must affect them as an individual, but the decision need not be limited to them, exclusively. He explains, “[t]he Administration can hardly take

the position that if it wrongs one staff member, it is liable, if it multiplies that wrong, it is immune”.

12. He requests that the UNDT Judgment be set aside and his case be remanded for consideration of its merits.

### **The Secretary-General’s Answer**

13. The Secretary-General contends that the Appellant has not established any errors on the part of the UNDT such as would warrant reversal of its decision.

14. The Secretary-General submits that the UNDT correctly concluded the application was not receivable as the Appellant had failed to contest an administrative decision, and that its decision was consistent with the Statute of the UNDT, resolutions of the General Assembly and the jurisprudence of both the Appeals Tribunal and the former UNAdT.

15. He further submits that the UNDT properly found the decision of the ICSC to be binding on the Organization and, as such, not subject to the discretion of the Secretary-General who could neither modify nor suspend the decision.

16. Moreover, the Secretary-General argues that decisions of the ICSC, an independent expert body accountable only to the General Assembly, do not constitute administrative decisions within the competence of the UNDT and, in any event, could not be construed as individual administrative decisions as they are effectively policy decisions and are of general application.

### **Considerations**

17. The UNDT Statute in Article 2 provides, *inter alia*:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. ...

18. The Appeals Tribunal has had the opportunity to define what constitutes an administrative decision susceptible to challenge. In *Andati-Amwayi*,<sup>2</sup> the seminal case on this issue, the Appeals Tribunal considered:

... 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.

... 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.

... 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.

19. In the instant matter, the UNDT correctly found that Mr. Obino did not identify an administrative decision capable of being reviewed, as he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment.

20. The ICSC takes decisions in some matters (e.g. establishment of daily subsistence allowance; schedules of post adjustment, i.e. cost-of-living element; hardship entitlements); in other areas, it makes recommendations to the General Assembly which then acts as the legislator for the rest of the common system. Such matters include professional salary scales, the level of dependency allowances and education grant. On still other matters, the ICSC makes recommendations to the executive heads of the organizations; these include, in particular, human resources policy issues.

21. In the instant case the ICSC made a decision binding upon the Secretary-General as to the reclassification of two duty stations and Mr. Obino has not shown that the implementation of this decision affects his contract of employment.

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<sup>2</sup> *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, paras. 17-19.

22. In view of the foregoing, the Appeals Tribunal need not enter into further consideration of the arguments pertaining to judicial review of ICSC decisions.

**Judgment**

23. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Weinberg de Roca,  
Presiding

*(Signed)*

Judge Faherty

*(Signed)*

Judge Lussick

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar