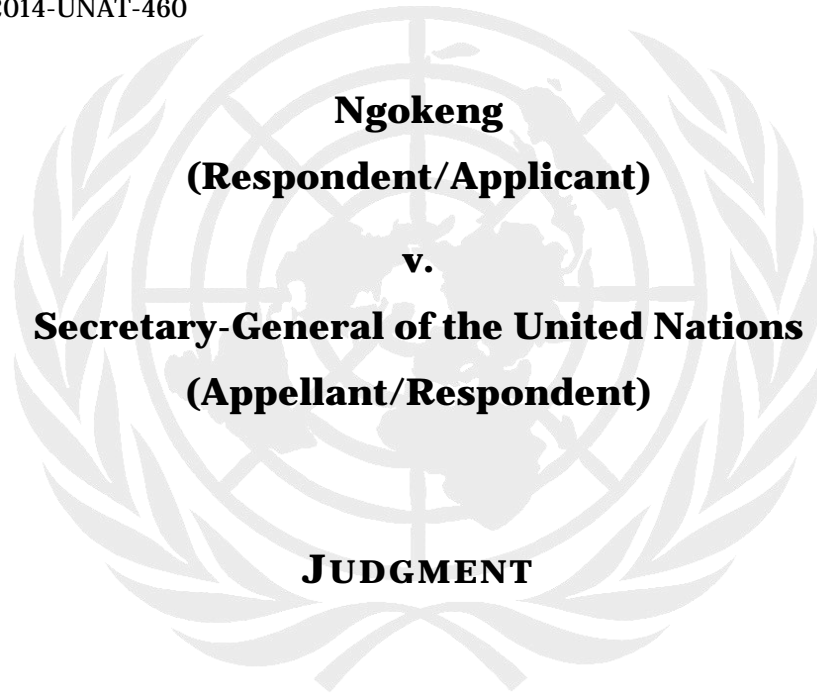




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-460



**Ngokeng  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Richard Lussick, Presiding  
Judge Inés Weinberg de Roca  
Judge Sophia Adinyira

**Cases Nos.:** 2013-529 & 2013-530

**Date:** 17 October 2014

**Registrar:** Weicheng Lin

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**Counsel for Mr. Ngokeng:** Self-represented

**Counsel for Secretary-General:** Stéphanie Cartier/John Stompor

**JUDGE RICHARD LUSSICK, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/061 on Receivability and Judgment No. UNDT/2013/101 on the Merits, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in the case of *Ngokeng v. Secretary-General of the United Nations* on 28 March 2013 and 6 August 2013, respectively. The Secretary-General appealed on 7 October 2013 and Mr. Noel Ngokeng answered on 5 December 2013.<sup>1</sup>

**Facts and Procedure**

2. On 16 February 2012, a job opening was issued for the position of Chief of the Language Services Section (LSS) with the International Criminal Tribunal for Rwanda (ICTR). Mr. Ngokeng applied for it on 16 March 2012. The job opening required the candidates to, *inter alia*, “have a demonstrated ability to interpret”.

3. On 24 April 2012, the Administration notified Mr. Ngokeng that recruitment had been suspended and could “possibly reopen at a later date”. Although no reasons were given in the notification, the Secretary-General explains that none of the applicants had the requisite “demonstrated ability to interpret”.

4. On 27 April 2012, Mr. Ngokeng’s First Reporting Officer (FRO) rated Mr. Ngokeng for the 2011/2012 performance cycle as having successfully met performance expectations, but commented that he had a “serious problem of output”.

5. On 20 June 2012, Mr. Ngokeng requested management evaluation of: (i) the decisions to suspend the recruitment process, to reject his application, and to extend the incumbent’s contract, as well as the vacancy announcement used for the selection decision; and (ii) the decision of the FRO to improperly evaluate his performance.

6. On 24 August 2012, a job opening for Chief, LSS was posted listing the demonstrated ability to interpret as a “desirable asset”, rather than a requirement. Mr. Ngokeng applied for the position.

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<sup>1</sup> For the purpose of the present Judgment, we do not find it necessary to summarize the parties’ submissions on the Judgment on the Merits.

7. On 6 September 2012, the Management Evaluation Unit (MEU) advised Mr. Ngokeng that because the selection process was to be resumed and the selection criterion of ability to interpret was to be revised so that the ability to interpret was merely desirable as opposed to a requirement, the request for evaluation was not receivable and/or moot. The MEU also noted that there appeared to be inconsistencies between Mr. Ngokeng's overall ratings and the overall comments made by the FRO regarding a work output problem. Subsequently, Mr. Ngokeng's performance appraisal was amended on two occasions, but his overall rating of "successfully meets performance expectations" remained unchanged.

8. On 5 December 2012, Mr. Ngokeng filed an application with the UNDT, contesting: (a) the decision to suspend the selection process and to reject his application for the position so as to retain the incumbent beyond retirement age; and (b) the improper evaluation of his performance for the 2011/2012 performance cycle.

9. On 28 March 2013, the UNDT issued its Judgment on Receivability, deciding that Mr. Ngokeng's application was receivable in that the contested decisions were administrative decisions.

10. On 6 August 2013, the UNDT issued its Judgment on the Merits. It decided that:

(i) it was unlawful to require "demonstrated ability to interpret" for the post, and the Secretary-General erred in rejecting Mr. Ngokeng's candidacy because he failed to meet this requirement;

(ii) the Secretary-General erred in suspending the selection process because none of the candidates satisfied the requirements for the post;

(iii) there was no evidence that Mr. Ngokeng had not met the goals set out in his work plan, and thus his performance evaluation was unlawful; and

(iv) the retention in service of the incumbent, Mr. Ngokeng's FRO, beyond retirement age was unlawful, and the decision to suspend the selection process for the post and the performance evaluation of Mr. Ngokeng were part of a scheme to retain her.

11. The UNDT ordered the payment of six months' net base salary as compensation for the unlawful selection process, six months' net base salary for the unlawful retention past retirement age of the incumbent (the Chief/LSS), and four months' net base salary for the flawed performance evaluation. Also, the UNDT ordered the nullification of the performance evaluation, the conduct of a fresh performance evaluation, and the exclusion of those who had taken part in the performance evaluation from future evaluations of Mr. Ngokeng. The UNDT also referred the Chief/LSS and the Officer-in-Charge, Judicial and Legal Services Division (OIC/JLSD) to the Secretary-General for accountability.

### **Submissions**

#### *Judgment on Receivability*

#### **The Secretary-General's Appeal**

12. The Secretary-General's appeal of the Judgment on Receivability is receivable. The Appeals Tribunal has held that if the UNDT errs on an issue of receivability, the issue can be properly raised in an appeal against the final judgment on the merits.

13. The UNDT erred in concluding that Mr. Ngokeng's performance appraisal constituted an appealable "administrative decision". The Appeals Tribunal has consistently interpreted Article 2(1)(a) of the UNDT Statute to mean that only those decisions made by the Administration that have a direct and negative impact on the staff member's rights can be reviewed by the UNDT.

14. Sections 15.1 and 15.7 of ST/AI/2010/05 (Performance Management and Development System) provide that staff members who have received the rating of "consistently exceeds performance expectations" or "successfully meets performance expectations" cannot initiate a rebuttal and that a rating resulting from an evaluation that has not been rebutted is final and cannot be appealed.

15. The Appeals Tribunal has held that challenges of actions taken in a process, which do not constitute the final decision taken by the Administration, are not receivable as "premature". A negative observation, in an otherwise satisfactory performance appraisal, merely constitutes an action taken in a performance management and development process,

not a final administrative decision. Mr. Ngokeng has not established any adverse administrative decision resulting from his performance appraisal.

16. The UNDT erred by concluding that there were two separate selection processes, since the second job opening superseded the first one. Accordingly, Mr. Ngokeng's claims regarding the rejection of his candidature for the first job opening are not receivable.

17. The Secretary-General requests that the Appeals Tribunal vacate the Judgment on Receivability in its entirety.

**Mr. Ngokeng's Answer**

18. Mr. Ngokeng challenged the improper evaluation of his performance as a whole, not just the comments and overall rating. Mr. Ngokeng's performance appraisal was not satisfactory and had a direct and negative impact on his rights.

19. The appeal is an abuse of process and should be summarily dismissed, with an award of costs against the Secretary-General.

20. The UNDT duly took Section 15 of ST/AI/2010/5 into account in finding that Mr. Ngokeng's application was receivable. Nothing in Section 15 of ST/AI/2010/5 precludes appeals against performance evaluations tainted by gross violations of other sections of ST/AI/2010/5 and other pertinent Regulations and Rules and relevant administrative issuances. Mr. Ngokeng's application was receivable in the light of the Regulations and Rules breached by the FRO, the Second Reporting Officer, and unauthorized "reporting officers".

21. Notwithstanding the prohibition in Section 15 of ST/AI/2010/5, an appeal against a performance evaluation should be receivable in exceptional circumstances where the evaluation is tainted by "illegality, irrationality, severe procedural irregularities, bad faith, arbitrariness, unfairness, inconsistencies, discrimination, bias, abuse of authority, extraneous factors, other improper motives, unequal treatment and lack of integrity or at least where the supervisor abused his/her authority and demonstrated a gross lack of integrity". Section 15 of ST/AI/2010/5 should be construed in the light of subsequent relevant instruments, including General Assembly resolution 65/247 and Secretary-General's Bulletin ST/SGB/2011/9.

22. The UNDT neither erred nor exceeded its competence by concluding that there were two separate selection processes and that Mr. Ngokeng's claims regarding the rejection of his application were receivable. The cancellation of the first job opening was a final decision not to select any candidate and to end the particular selection process and therefore fell within the scope of the jurisdiction and competence of the UNDT. The fact that "the advertisement of the first job opening did not result in the selection of any candidate" is immaterial and constitutes a challengeable decision.

### **Considerations**

#### *Judgment on Receivability*

23. With regard to the preliminary matter raised by the Secretary-General, we find that his appeal of the Judgment on Receivability is timely.<sup>2</sup>

24. The issue on appeal is whether the UNDT was correct in finding Mr. Ngokeng's application receivable. The Secretary-General challenges the UNDT's decision on two grounds: Firstly, that the UNDT erred in concluding that Mr. Ngokeng's performance appraisal constituted an appealable administrative decision; and secondly, that the UNDT erred "by concluding that there had been two separate selection processes, since the second job opening superseded the first one. Accordingly, [Mr. Ngokeng's] claims regarding the rejection of his candidature for the first job opening are not receivable."

25. Article 2(1) of the UNDT Statute provides, in part:

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. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

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<sup>2</sup> Cf. *Hunt-Matthes v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-444, paras. 22 and 24,

26. The former Administrative Tribunal's definition of an administrative decision that is subject to judicial review has been adopted by the Appeals Tribunal:

a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.<sup>3</sup>

27. Thus, the key characteristics of an administrative decision subject to judicial review is that the decision must "produce direct legal consequences" affecting a staff-member's terms or conditions of appointment. "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."<sup>4</sup>

*Did the UNDT err in concluding that Mr. Ngokeng's performance appraisal constituted an appealable administrative decision?*

28. Mr. Ngokeng's FRO gave Mr. Ngokeng a rating of "successfully meets performance expectations". The comment in that appraisal, i.e. that Mr. Ngokeng "had a serious problem of output" was subsequently amended, but Mr. Ngokeng's rating remained unchanged as "successfully meets performance expectations".

29. Pursuant to Section 15.1 of ST/AI/2010/5, staff members having received the rating of "successfully meets performance expectations" cannot challenge the performance appraisal by way of rebuttal. Section 15.1 provides:

Staff members who disagree with a "partially meets performance expectations" or "does not meet performance expectations" rating given at the end of the performance

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<sup>3</sup> Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para V. See *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-365; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313; *Al Surkhi et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-304.

<sup>4</sup> *Bauzá Mercère v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18, citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058. See also *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457.

year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given. Staff members having received the rating of “consistently exceed performance expectations” or “successfully meets [sic] performance expectations” cannot initiate a rebuttal.

30. Pursuant to Section 15.7 of ST/AI/2010/5, “[t]he rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.”

31. In the instant case, there was no evidence of any adverse administrative decision stemming from Mr. Ngokeng’s performance appraisal. The FRO’s comment on Mr. Ngokeng’s output – a comment made in a satisfactory appraisal - was not a final administrative decision. It did not detract from the overall satisfactory performance appraisal and had no direct legal consequences for Mr. Ngokeng’s terms of appointment.

32. We find that the UNDT erred in law in finding that Mr. Ngokeng’s satisfactory appraisal constituted an appealable administrative decision.

*Did the UNDT err by concluding that there had been two separate selection processes?*

33. Mr. Ngokeng claimed that the Secretary-General’s decision to suspend the selection process was improper and violated his rights to a full and fair consideration of his application. The Secretary-General’s case is that “the advertisement of the first job opening did not result in the selection of any candidate since it was superseded by the second job opening. In other words, the cancellation of the first job opening merely constituted a step in the selection process, not a final selection decision taken by the Administration.”

34. The UNDT found that “an administrative decision capable of challenge under Article 2.1 of the Statute of the Dispute Tribunal was made when the Administration rejected the Applicant’s application in respect of the first job opening and purported to suspend it.



The Tribunal concludes that there exist two separate selection processes in this matter, the latest of which is still ongoing.”<sup>5</sup>

35. This finding conflicts with the facts of the case. Recruitment for the job opening was suspended – that is, halted temporarily - not cancelled. The Administration’s advice to Mr. Ngokeng that recruitment could “possibly reopen at a later date” was realised when a revised job opening for the same position was later posted. Recruitment was ongoing when the case came before the UNDT.

36. The UNDT’s conclusion that there was nothing on the face of the second job opening to support the Secretary-General’s contention “that the second job opening was a continuation of a singular selection process which had been truncated”<sup>6</sup> ignores the obvious inference that it could not have been anything else. It was not necessary for the second job opening to specifically refer to the first job opening before the UNDT could decide that it was part of the same selection process. It related to the same post in respect of which recruitment had been suspended and to which no candidate had yet been appointed. The letter from the MEU to Mr. Ngokeng dated 6 September 2012 advised him that “the selection process for the Post [was] to be *resumed* and that the VA had been *revised*”.<sup>7</sup> The only logical inference that could be drawn from the facts was that the second job opening had replaced the first one and that there was only one recruitment process, which was still ongoing.

37. We find that the UNDT erred in deciding that there had been two separate selection processes. It follows that the Administration’s decision to suspend the recruitment process was not a final administrative decision and therefore had no direct legal consequences for Mr. Ngokeng’s contract of employment.

38. We note that Mr. Ngokeng has challenged the final outcome of the selection exercise.<sup>8</sup> However, that is an issue which is not before this Tribunal.

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<sup>5</sup> Impugned Judgment, para. 40.

<sup>6</sup> Impugned Judgment, para. 37.

<sup>7</sup> Emphasis added.

<sup>8</sup> The Secretary-General advised that in August 2013, Mr. Ngokeng filed a request for management evaluation against the selection exercise (Secretary-General’s appeal of Judgment on Receivability, para. 30).

*Conclusions*

39. Since Mr. Ngokeng's performance appraisal and the decision to suspend the recruitment process for the job opening did not have any "direct legal consequences" on the terms or conditions of his appointment, such decisions are not administrative decisions subject to judicial review. Accordingly, the application should not have been received *ratione materiae* and the Judgment on Receivability should be reversed.

*Judgment on the Merits*

40. Since the application should not have been received *ratione materiae*, the UNDT was not competent to address the merits of Mr. Ngokeng's application. Accordingly, the appeal is allowed and the Judgment on the Merits should be vacated.

**Judgment**

41. The appeals are allowed. Judgment on Receivability No. UNDT/2013/061 and Judgment on the Merits No. UNDT/2013/101 are vacated in their entirety.

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2014 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Adinyira

Entered in the Register on this 22<sup>nd</sup> day of December 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar