



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

Judgment No. 2014-UNAT-561

**Pirraku
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Mary Faherty Judge Deborah Thomas-Felix
Case No.:	2014-647
Date:	2 July 2015
Registrar:	Weicheng Lin

Counsel for Mr. Pirraku:	Not represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2014/093, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 3 July 2014. The Secretary-General appealed on 29 August 2014. Mr. Kastriot Pirraku has not filed an answer.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant entered into the service of the United Nations on 30 August 2004 at the United Nations Mission in Burundi as a Logistics Assistant at the FS-4 level.

... On 24 June 2007, the Applicant received an email from [the United Nations Mission in Sudan (UNMIS)] informing him that he had been shortlisted for the post of Administrative Assistant at the FS-5 level. The Applicant was asked to confirm his interest and to provide contact details so that he could be contacted for the interview which was scheduled for later that week.

... The interview took place on 28 June 2007. The Applicant informed the panel during the interview that they were interviewing him for a post he had never applied for.

... On 20 August 2007, the Applicant received another email from Human Resources in UNMIS informing him that he had been “considered for an Administrative Assistant position” with UNMIS at the FS-5 level, and that

[I]n order for UNMIS-RECRUITMENT CELL to proceed with the recruitment, we kindly request that you submit your application in the Galaxy for a generic FS-5 Admin Assistant position. We recommend that you proceed as soon as possible and advise us of the vacancy number for further action.

... On the same day, the Applicant forwarded the Galaxy application confirmation receipt to Human Resources in UNMIS.

... On 27 December 2007, the Applicant received the offer of appointment for a contract of Limited Duration at his current level and step “pending Field Personnel Division [FPD] approval” of movement to a higher level.

¹ Impugned Judgment, paras. 12-63 (footnotes omitted).

... On 2 January 2008, the Applicant accepted the offer and joined UNMIS on 12 January 2008.

... On 21 February 2008, the UNMIS Chief Civilian Personnel Officer (CCPO) was instructed by the UNMIS Director of Mission Support (DMS) to deploy the Applicant to the Nasser Team Site as an Administrative Officer.

... After deploying to Nasser, the Applicant and his supervisors wrote several emails to the Human Resources section in UNMIS requesting information and updates as to movement to the FS-5 level. No response was received.

... On 1 June 2009, the Applicant received a Reassignment Directive by email instructing him to travel to Khartoum at his “earliest convenience to commence [Joint Logistics Operating Centre (JLOC)] induction training” following which he was to be deployed to El Obeid.

... On 23 June 2009, the Applicant received a memo entitled “Reassignment Letter” from the UNMIS CCPO’s Office.

... In the midst of these instructions and movements, the Applicant continued to request updates as to his movement to the FS-5 level. No update was forthcoming.

... On 7 July 2009, Human Resources in UNMIS wrote to the Applicant:

Reference is made to your selection and movement to higher level (MTHL) as Administrative Assistant, FS-5 with [the United Nations Mission in the Republic of South Sudan (UNMISS)], effective 12 February 2008.

We regret to inform you that the [FPD], New York has decided not to proceed with your movement to higher level.

In the meantime, please be advised that FPD approved the granting of the special post allowance (SPA) to the FS-5 level from 12 February 2008 to 11 February 2010, subject to the staff member’s remaining in the same function. You were redeployed as a Logistics Assistant to JLOC El Obeid, effective 1 June 2009. Therefore the SPA to the FS-5 level will be granted to you effective 12 February 2008 through 31 May 2009.

A copy of the relevant personnel action will be sent to you in due course.

... On 8 July 2009, emails were exchanged between the UNMIS JLOC Chief, Chief of the Logistics Base and Human Resources querying whether the Applicant was still on an FS-5 post and if the SPA should be continued. The JLOC Chief confirmed that the post in El Obeid should remain FS-5 and instructed his staff to commence the reclassification process for the post.

... On 30 July 2009, the Applicant wrote to the UNMIS CCPO asking for the rationale behind the [FPD’s] decision not to proceed with his promotion to FS-5. He did not receive a response.

... On 30 August 2009, the Applicant wrote to the CCPO reminding her of his email dated 30 July 2009.

... On 31 August 2009, the Applicant received an email from UNMIS Human Resources:

We are in response to your memorandum to Human Resources in regards to your Movement to Higher Level case. Kindly note, that we are reviewing the latest developments with your case and will prepare a reply. We will respond to your memorandum shortly.

... On 7 October 2009, the Applicant's second reporting officer (SRO) wrote to UNMIS Human Resources for an update. She received a reply on the same day informing her that the matter was being dealt with and instructing the Human Resources Officer in charge of this case to urgently respond to the staff member.

... On 29 October 2009, the Applicant's SRO again wrote to Human Resources for an update.

... On the same day, UNMIS Human Resources replied as follows:

In reference to my email below, I have consulted with Mr. Kamal, HRO on Mr. Pirraku's case. After further review and consultation of the case, Mr. Kamal has advised that an official memorandum will be sent to Mr. Nicholson with regard to the case.

Please contact Mr. Kamal, HRO regarding future inquiries of Mr. Pirraku's case. As stated below, Mr. Kamal is the HRO for MSD cases.

Shahid – Please advise.

... On 3 December 2009, a Memo "Staff in Confidence" was sent from the Chief of JLOC to the DMS, requesting the DMS to: "i) Request FPD to approve [Mr. Pirraku's] move to higher level (FS-5), and ii) If FPD do[es] not approve his move to higher level (FS-5), then FPD [should] provide him with a detailed written explanation [as to] why the move is rejected, and iii) Grant him SPA from 1 June 09, until his move to higher grade is approved."

... On the same day, the Officer-in-Charge in the Office of the DMS (OIC/DMS) confirmed receipt of the memo and instructed the UNMIS CCPO to: "i) prepare fax to NYHQ requesting reconsideration of case; ii) Provide formal explanation to S/M".

... On 7 February 2010, the Applicant wrote to the DMS seeking updates on the memo sent to his office on 3 December 2009.

... A similar request was sent by the Chief of JLOC on 11 April 2010, attaching the correspondence of 3 December 2009 and 7 February 2010.

... On 19 May 2010, the DMS instructed the CCPO to provide the Applicant with feedback.

... On the advice of the UNMIS Ombudsperson, the Applicant forwarded a dossier of relevant documents to the CCPO.

... On 10 August 2010, the Chief of JLOC sent another email, again attached the memos of 3 December 2009 and 7 February 2010, to the Chief of Administrative Services (CAS) seeking assistance in having this matter resolved.

... On 15 September 2010, the Chief of JLOC sent a follow up email to the CAS, attaching the same memos; this time also informing her that the Applicant had been FCRB (Field Central Review Body) cleared for a post at the FS-5 level.

... On 6 November 2010, the CCPO wrote to the Applicant:

Dear [Applicant],

I refer to your two letters of 3 December 2009 and 7 February 2010 respectively addressed to the DMS seeking information and clarification concerning FPD's decision to stop your movement to higher level during your recruitment with UNMIS effective 12 February 2008. I also refer to various meetings I have had with the Ombudsman, Ms. Gabrielle Kluck, on the subject matter.

You were reappointed from BINUB to UNMIS on 12 February 2008 as a result of [a] down-sizing exercise in BINUB. The reappointment as Administrative Assistant at UNMIS was at your current level (FS-4) but subject to movement to higher level (FS-5) upon FPD review and approval of the competitive selection process.

The selection and interview documents were [...] forwarded to FPD for review and/or approval on 3 June 2009. On 3 July 2009, FPD reverted confirming that the request for your movement to higher level (FS-5) was not approved for technical reason that you did not have initial nor technical clearance for the position of Administrative Assistant at FS-5 level notwithstanding that you were short-listed, interviewed and recommended. Your inclusion in the short-list came about when the programme manager provided the terms of reference for the post to include logistics experience in addition to administrative field experience and it was an oversight to have you short-listed for the interview based on your logistics experience without initial and technical clearance for the post. However, FPD approved SPA instead in recognition of the higher level duties you were performing at FS-5 level.

I have noted that you are now FCRB rostered and technically cleared for Logistics Assistant at FS-5 level in Nucleus. I will be in Juba for two days from 10 November 2010 and would like to meet with you during the visit to

discuss options that we have for considering you for movement to higher level (FS-5) given that you are now FCRB rostered and initially/technically cleared at FS-5 level though in a different occupational group from administration.

Please let me know your availability during my visit to Juba.

Best regards. Martin Ojjerro

... On 16 November 2010, the Applicant wrote to the Management Evaluation Unit (MEU).

... On 30 December 2010, the Applicant received an email from MEU informing him that there had been discussions with the Department of Field Support (DFS) on whether an informal resolution of this dispute would be appropriate, and seeking the Applicant's views on whether he would be amenable towards an extension of the management evaluation deadline.

... On 22 January 2011, the Applicant received another email from MEU outlining the different options for an informal settlement of the dispute.

... On 24 January 2011, the Applicant responded to MEU indicating his readiness for the matter to be resolved informally. The Applicant also "warned MEU" of UNMIS' incapacity to respond to staff members in a timely manner.

... On 2 February 2011, MEU wrote to the UNMIS CCPO:

Dear Mr. Ojjerro,

With regard to the subject case, as we understand UNMIS has undertaken to search for an FS-5 level post for [the Applicant]. DFS has also advised us [...] that it has requested an SPA panel be set up to look into the possibility of an SPA as from 1 June 2009 when apparently [the Applicant] took up other FS-5 functions as Logistics Assistant until whenever he actually stopped performing FS-5 functions[.] [The Applicant] has advised that he has been functioning at the FS-5 level continuously since June 09).

As you know, delays in follow-thru on undertakings for informal settlement will more often than not cause a s/m to doubt the Administration's good faith or simply become frustrated and abandon the settlement process. In this particular case we're concerned in addition that compensation for administrative delays may need to be awarded if the case goes to management evaluation. In order to avoid this, since we understand the mission agreed in November 2010 to look for the FS-5 we'd propose a timeframe of no more than two weeks to try to identify the post and, if found, to finalize the designation, or at least to commence the process to finalize. We would be grateful if you could confirm this or, in the alternate, advise as to what you believe would be a reasonable time frame.

In addition, we'd be grateful if you could advise as to when the SPA panel will meet to look into that matter. Also, we'd appreciate if you could advise as to a focal person with whom we can consult in the future on this case.

Please don't hesitate to contact me with any questions you may have.

Kind regards,

Marco

... On 14 April 2011, the Applicant wrote to MEU expressing his frustration with the delays in this case and seeking a management evaluation decision.

... On 9 May 2011, the Applicant wrote to MEU once again. MEU was at this time still waiting for a response from UNMIS.

... On 10 May 2011, the Applicant, feeling that he needed "neutral and impartial support/opinion" sought the assistance of the Office of Staff Legal Assistance (OSLA).

... On 11 May 2011, OSLA advised the Applicant to wait for MEU to complete its efforts at having the dispute informally resolved.

... Three months later, after numerous exchanges between the Applicant, OSLA, UNMISS and MEU, on 26 August 2011 OSLA informed the Applicant that an informal agreement was at hand.

... On 30 August 2011, the Applicant received an email from MEU attaching an Annex "Release Form" outlining details of the informal resolution settlement.

... On 13 September 2011, the Applicant wrote to OSLA seeking clarification on some of the issues in the Release Form.

...

Dear Esther

Thank you for your email and your assistance in my case. I tried to call but it seems you were away from your desk. Before I sign and send the doc. back to you, I want you to confirm the following.

1- If any of the items (a, b) under paragraph II, is not fulfilled, I can still appeal to UNDT.

2- The 60 days period is given for the establishment of an SPA panel.

What about the result of this panel, is there a deadline for that, or is this also going to drag on for another year. I apologize, but I need to be clear on what I am signing.

As soon as I get your input, I will sign and send it back to you.

... OSLA replied:

Dear [Applicant],

Thanks for your email. With regard to point 1, yes, if either item a or b is not performed, we will appeal to the Tribunal.

With regard to the second point, while we cannot put a specific time limit on the decision by the SPA panel, if it appears that they are stalling unreasonably, or that something else is wrong with the process, this too would be grounds to appeal to the tribunal, arguing that management was not complying with the agreement in good faith.

Please let me know if you require [...] further clarification. I should be available today in my office.

Best, Esther

... On 15 September 2011, the Applicant signed the document and it was forwarded to MEU by OSLA on the same day.

... On 15 December 2011, following numerous requests for updates from UNMISS, including through MEU and OSLA, the Applicant sought the assistance of the Field Staff Union to expedite the implementation of the settlement agreement.

... On the same day, the Applicant wrote to the UNMISS Ombudsperson apprising her of the latest developments with his case and seeking her assistance in having the settlement agreement implemented.

... On 5 December 2011, the Applicant received an email from an UNMISS HR Officer, Jesse, asking him to "call urgently". During the phone conversation, Jesse confirmed that they had received an instruction from UNHQ, and "wanted to know if we were on the same page". The Applicant requested that they communicate with him by email as he was about to go on leave. This was the only email the Applicant received from UNMIS[S] HR, regarding the informal resolution process.

... On 23 January 2012, the Applicant wrote to OSLA asking if they knew what the status of the implementation of the settlement agreement was. The Applicant also informed OSLA that there were plans to deploy him to a remote field site where logistics support was required.

... On 30 January 2012, after several attempts to get information from the Mission's Human Resources section, OSLA wrote to Jesse seeking an update. No response was received.

... On 7 February 2012, MEU requested a conference call between itself, OSLA and the Applicant regarding his SPA.

... On 16 February 2012, in response to a query by MEU as to whether the Applicant's supervisors thought he was functioning at the FS-5 level, the Applicant responded *via* OSLA:

Esther,

For them, I was interviewed, for an FS5, was told to apply for the FS5 post after the interview, was selected for FS5, and therefore performed and still continue to perform at FS-5 level. But, maybe the best would be if Marco gets this information through UNMISS HR. They can ask my supervisors.

I would like to talk to you, but don't know if you are in or out of the office. It has been four years now, and it is about time to close this case, and move on.

... On 22 February 2012, the Applicant instructed OSLA to formally inform MEU that he had withdrawn from the MEU informal resolution process "as no UN Office has formally informed/confirmed that the informal resolution settlement on [his] case has been implemented". The Applicant was therefore looking forward to receiving a management evaluation decision in two weeks.

3. By letter dated 23 February 2012, Mr. Pirraku was informed that "the eligibility requirements articulated in Section 6 of ST/AI/2010/3" had been waived "for purposes of allowing [him], a staff member serving at UNMISS at the FS-4 level, to be considered for positions at the FS-6 level". The letter further stated that "[t]he SPA Panel met on 13 October 2011 and recommended that the balance of [his] unpaid SPA [...] be paid to [him]" and that he would receive the balance with his March 2012 salary.

Procedure before the UNDT²

... On 12 March 2012,³ the Applicant ... filed an [a]pplication before the Dispute Tribunal.

...

... On 22 May 2013, the Tribunal issued Order No. 122 (NBI/2013) directing the Parties "to consult and deliberate, in good faith, on having this matter informally resolved". The Tribunal also directed the Parties to report on the progress of their "joint deliberations" and/or to indicate if a formal referral to mediation is necessary.

... On 1 July 2013, the Respondent filed submissions in response to Order No. 122 (NBI/2013). The Respondent informed the Tribunal that the matter could not be resolved informally between the Parties.

² Impugned Judgment, paras. 1, 7-10.

³ It is not clear from the Judgment whether the application to the UNDT was filed on 12 or 13 March 2012. See paras. 1 and 64.

... On 26 August 2013, the Tribunal issued Order No. 190 (NBI/2013) formally referring the matter to the Mediation Division, and directed the Division to advise the Tribunal if the matter is amenable to being mediated.

... On 13 September 2013, the Tribunal received a letter from Mr. Marc Vaucher of the Mediation Division informing the Tribunal that the:

Division contacted the parties to this case to assess if the matter was amenable to mediation. Unfortunately, *it appears that there is no matter to discuss at this stage*. Accordingly the matter is not suitable for mediation.⁴

4. On 3 July 2014, the UNDT rendered its Judgment. On receivability, the UNDT noted that the release agreement was subject to two conditions, namely that Mr. Pirraku be granted an exception to apply for an FS-6 position while encumbering an FS-4 position; and that a panel be established within 60 days from 15 September 2011 to review his eligibility for an SPA as from June 2008. The UNDT found that the agreement was not implemented within the deadline stipulated therein or in the absence of a deadline within a reasonable time thereafter and as a result there was no agreement Mr. Pirraku could be properly held to. The UNDT concluded that the application was receivable.

5. On the merits, the UNDT held that the fact that the Administration mistakenly interviewed and cleared Mr. Pirraku for the post could not be held against him and that the withdrawal of the offer for the FS-5 position was “unreasonable and wrong”. The UNDT further found that there had been an inordinately long delay in the implementation and ultimately a breach of the release and settlement agreement. Based on these findings, the UNDT awarded compensation in the amount of six months’ net base salary at the FS-5 level.

Submissions

The Secretary-General’s Appeal

6. The dispute relating to the non-promotion decision was resolved by an informal process between the MEU and Mr. Pirraku which resulted in a settlement and release agreement signed by Mr. Pirraku in September 2011. Article 8(2) of the UNDT Statute precludes applications challenging decisions that have been resolved by agreement through mediation by the MEU. The UNDT therefore erred in ruling that the application was receivable notwithstanding the agreement between Mr. Pirraku and the MEU settling the matter.

⁴ Original emphasis.

7. The UNDT erred in fact in finding that all terms of the settlement and release agreement should have been implemented within a 60-day deadline and that these terms were not implemented. At the time Mr. Pirraku filed his application with the UNDT, on 13 March 2012, both conditions of the settlement and release agreement had been fully implemented. The first condition of the agreement, the granting of an exception to the Staff Rules allowing Mr. Pirraku to apply for posts at the FS-6 level, was not subject to a deadline and was implemented at least as of February 2012. The second condition of the agreement, the establishment of an SPA panel mandated to review Mr. Pirraku's eligibility for an SPA as from 1 June 2009, was subject to a 60-day deadline. An SPA panel had been constituted and met on 13 October 2011, well within the 60-day deadline, and Mr. Pirraku was officially informed of its implementation in February 2012.

8. The UNDT erred in law by finding that the alleged failure to implement the settlement agreement rendered the said agreement void. Article 2(1)(c) of the UNDT Statute provides that the UNDT is competent to enforce the implementation of an agreement reached through mediation and Article 8(2) of the UNDT Statute sets out the applicable procedure. If the failure to implement an agreement rendered the agreement void, there would be no need for such a provision.

9. If the application were to be treated as an application to enforce the settlement and release agreement, it would be time-barred. Even if the deadline were to be construed in the most favourable manner to Mr. Pirraku, he would have been required to file his application for enforcement of the agreement by 12 February 2012. Mr. Pirraku filed his application on 13 March 2012 and was therefore out of time.

10. The UNDT erred in law and exceeded its jurisdiction by awarding compensation. Mr. Pirraku's claims regarding the non-promotion decision were not receivable *ratione materiae* according to Article 8(2) of the UNDT Statute as the matter had been resolved via a settlement and release agreement. Moreover, the UNDT lacked jurisdiction *ratione temporis* to award compensation on the basis of alleged undue delays in the implementation of the agreement since Mr. Pirraku had failed to file a timely application for enforcement of the agreement. Moreover, the terms of the agreement were fully implemented by the time Mr. Pirraku filed his application and he had therefore been placed in the same position that he would have been in had the Organization complied with its contractual obligations.

11. The Secretary-General asks that the Appeals Tribunal reverse the UNDT's finding that the application was receivable and vacate the order of payment of compensation.

Considerations

12. The Appeals Tribunal affirms, albeit on different grounds, the UNDT's award of compensation to Mr. Pirraku.

13. At the outset, the Appeals Tribunal observes that the issues related to Mr. Pirraku's non-promotion should not have been presented to, and addressed by, the Dispute Tribunal. Pursuant to Article 8(2) of the Dispute Tribunal Statute:

An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of the signing of the agreement.

14. Therefore, the legal consequences of a valid agreement are similar to those of a final judgment (*res judicata*). The issues regarding Mr. Pirraku's non-promotion were the subject of a settlement and release agreement reached through mediation, and pursuant to Article 8(2) of the UNDT Statute, were not subject to judicial review. The UNDT could not base its award of compensation on its determination that the administrative decision giving rise to the dispute was illegal. This matter had been subject of the settlement agreement, which did not provide for an award of compensation.

15. The issue for the Dispute Tribunal to decide was not the underlying dispute resulting in the settlement and release agreement. Rather, the issue to be addressed was the execution of said agreement.

16. Article 2(c) of the UNDT Statute reads as follows:

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:

...

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

17. The part of the application concerning the request for execution of judgment was therefore receivable under Articles 2(c) and 8(2) of the UNDT Statute. These provisions clearly admit applications to enforce the implementation of an agreement reached through mediation and theoretically allow the UNDT to award compensation for delays in executing or complying with an agreement.

18. Mr. Pirraku's application before the Dispute Tribunal contained numerous complaints of delays in addressing this matter and the Administration's failure to end the prolonged unlawful treatment of the staff member, as agreed upon through the mediation process.

19. As Mr. Pirraku himself explained, "[he] managed to involve all the relevant authorities, and tried to solve the case in-house, through UNMIS, [the] C[hief of] JLOC, [the Chief of the Integrated Support Services], CCPO, CAS, DMS, Ombudsperson, the [Field Staff Union], and later on agreed to an informal resolution through MEU, before appealing to UNDT. Unfortunately, due to the unreasonable administrative delays, in-house solution and MEU informal resolution did not succeed."

20. The Administration's tardiness in implementing the agreement naturally led the staff member to initiate the judicial procedure, since he endured what could be considered a *via crucis* and he nonetheless always acted in good faith, initially following the appropriate channels in search of a solution of the conflict, and subsequently seeking the execution of the agreed-upon solution.

21. Furthermore, and contrary to the Secretary-General's contention, the application filed on 13 March 2012 was not time-barred, since on 23 February 2012, Mr. Pirraku again received correspondence advising him that the agreement was in the process of being implemented, as pointed out by the Dispute Tribunal.

22. Therefore, the Appeals Tribunal holds that the issues of compensation relating to the partial non-execution of the agreement and the delays in its implementation were properly before the Dispute Tribunal, which did not err in exercising its jurisdiction concerning these issues.

23. Moreover, this Court finds that the compensation in the amount of six months' net base salary awarded by the Dispute Tribunal was adequate in the circumstances of the case and fairly reflected the prejudice suffered by the staff member.

24. Hence, the UNDT's award of compensation is affirmed.

Judgment

25. The appeal is dismissed and the award of compensation included in the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar