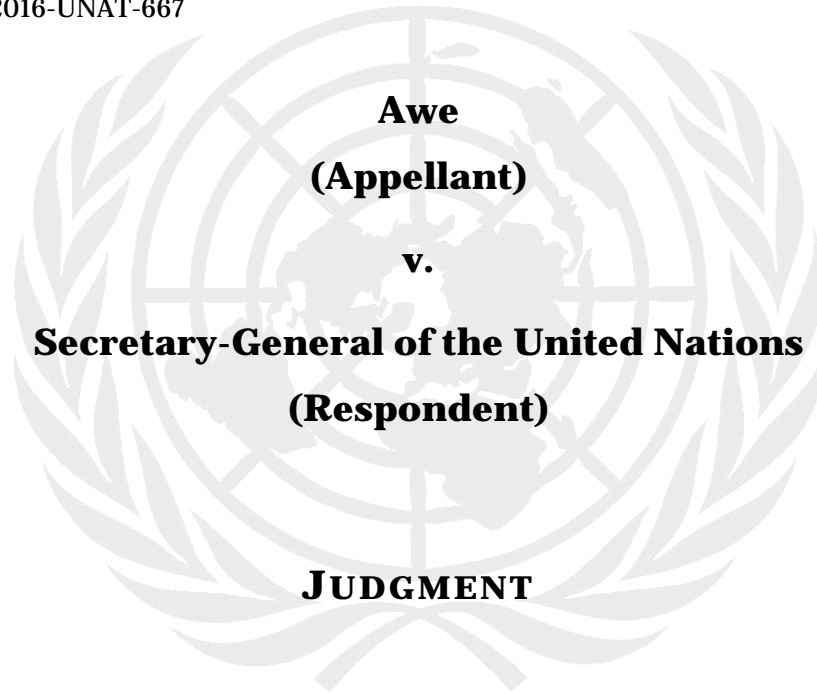




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-667



Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Mary Faherty
Case No.:	2015-878
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Mr. Awe:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Ekundayo Olukayode Awe of Judgment No. UNDT/2015/099, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 22 October 2015, in the case of *Awe v. Secretary-General of the United Nations*. On 18 December 2015, Mr. Awe filed the appeal, and on 16 February 2016, the Secretary-General filed his answer to the appeal.

Facts and Procedure

2. The UNDT made the following factual findings:¹

... The Applicant is a Resident Auditor with the Audit Unit of the United Nations Assistance Mission for Iraq (UNAMI) at the P-4 level. ...

...

... The Applicant was reassigned from the United Nations Mission in Liberia (UNMIL) to UNAMI in accordance with an Offer of Appointment on Reassignment dated 7 October 2012. He was working with the Internal Audit Division of the Office of Internal Oversight Services (IAD/OIOS) as a Resident Auditor for UNMIL.

... The UNAMI Audit Unit reports to the Special Representative of the Secretary-General (SRSG) of UNAMI but the Applicant's Service Chief and first reporting officer is the Chief of Peacekeeping Audit Services, Internal Audit Division of the Office of Internal Oversight Services (Chief/PAS/OIOS).

... The Applicant arrived in Baghdad on 10 November 2012. On 13 November 2012, the Office of the UNAMI Chief of Staff announced his arrival in Baghdad to UNAMI staff via a broadcast and on the same day, he received an email from the UNAMI Finance Section informing him of the payment of his relocation grant at the Baghdad rate.

... According to the Applicant, the Chief of Staff informed him verbally on 14 November 2012 of the decision to relocate him and the Audit Unit immediately to Kuwait because the Mission was facing space constraints as a result of the crisis in Syria. On the same day, the Chief of Staff informed the Chief/PAS/OIOS by email of the decision to reassign and/or relocate the Audit Unit to Kuwait due to the impact the crisis in Syria was having on UNAMI's Baghdad operations. The Applicant was copied on this communication.

¹ Impugned Judgment, paras. 1, 10-13, 16-19, 21-27.

...

... The Applicant left Baghdad on 19 November 2012 for Kuwait. At the end of November 2012, he was paid his salary and entitlements as a Baghdad-based staff member but at the end of December 2012, he was paid as a Kuwait-based staff member.

... In January and February 2013, he was paid as a Baghdad-based staff member. On 13 February 2013, he wrote to the Chief of the UNAMI Human Resources Section (Chief/HRS) seeking clarification as to his duty station in the absence of any formal notification indicating a change from Baghdad to Kuwait.

... On 14 February, HRS informed him via email that his post had been erroneously changed in IMIS and that this would impact on his February 2013 salary and could lead to an overpayment and subsequent recovery in March 2013.

... On 17 February, the Chief/HRS informed him that HRS had received a request to change his duty station from Baghdad to Kuwait effective 1 March 2013. A memorandum dated 14 February 2013 confirming the Applicant's change in duty station with effect from 1 March 2013 had been issued by the Officer-in-Charge (OIC) of the Office of the Chief of Staff.

...

... On 3 April 2013, the HR Operations Manager clarified to the Applicant that HRS had "initiated all actions" to have his duty station changed to Baghdad from November 2012 to 28 February 2013 and that his duty station was also changed effective 1 March 2013 to Kuwait.

... In April 2013, the Applicant submitted an F-10 claim form for payment of Daily Subsistence Allowance (DSA) for the days he had been in Kuwait up until 28 February 2013. He did not receive a response.

... On 5 May 2013, the Applicant received an email from the Payroll Section[] at the Kuwait Joint Support Office that confirmed the payment of his assignment grant and provided a breakdown of the payment.

... The Applicant followed up on his DSA claim in June 2013 and was informed by the Chief of Finance, Kuwait Joint Support Office, that the timing and location of the place of his assignment had become an issue that needed to be resolved since this would determine the applicable DSA rate. The Finance Unit was therefore waiting for resolution of this issue to make payment.

... On 19 June 2013, the Applicant received an inter-office memorandum dated 16 June 2013 from the Chief of Staff indicating that the Applicant had departed Baghdad for Kuwait on 19 November 2012 and requesting that the Chief of Mission Support take the necessary "Personnel" action to formalize the transfer of the Applicant to Kuwait. The effective date of the transfer, 19 November 2012, was handwritten on the memorandum by the Chief Administrative Services.

... On 9 July 2013, the Applicant requested management evaluation of the decision to retroactively change his duty station in violation of his contract of employment.

... The Management Evaluation Unit (MEU) informed the Applicant by a letter dated 27 August 2013, that his request for management evaluation was not receivable because the issues he had raised in his request were time-barred.

3. On 20 November 2013, Mr. Awe filed an application with the UNDT.

4. In Judgment No. UNDT/2015/099, the UNDT stated that there were two issues for determination: whether the application was receivable, and if so, whether the reversal of the original decision to change Mr. Awe's duty station from Baghdad to Kuwait, effective 1 March 2013, violated his rights.

5. The UNDT found that the application was receivable as Mr. Awe was challenging the decision contained within the 16 June 2013 memorandum and, therefore, he submitted his request for management evaluation within the 60-day time limit. Also, the memorandum constituted an administrative decision pursuant to Article 2(1) of the Dispute Tribunal Statute.

6. On the merits of the application, the UNDT found that the decision to relocate Mr. Awe from Baghdad to Kuwait was lawful. Mr. Awe had the opportunity of expressing his views as to the relocation but did not do so. Moreover, "he acquiesced in the reassignment by signing all the relevant documents".²

7. The UNDT held that Mr. Awe "was only entitled to the DSA and/or hardship allowances for the days he actually spent in Baghdad".³ The facts showed that Mr. Awe was physically located in Baghdad from 10 to 19 November 2012. Therefore, "the reversal of the 14 February 2013 decision to change [his] duty station from Baghdad to Kuwait, effective 1 March 2013 did not violate [his] rights."⁴

8. Mr. Awe appealed the UNDT Judgment to the Appeals Tribunal on 18 December 2015. The Secretary-General filed an answer on 16 February 2016. Mr. Awe filed a motion on 16 April 2016 requesting leave to file additional pleadings in order to respond to the "incorrect assertions" in the Secretary-General's answer. In his observations on the motion filed on 20 April 2016, the Secretary-General requests that the motion be denied as

² *Ibid.*, para. 74.

³ *Ibid.*, para. 84.

⁴ *Ibid.*, para 85.

Mr. Awe has failed to demonstrate any exceptional circumstances justifying the filing of additional pleadings.

Submissions

Mr. Awe's Appeal

9. The Dispute Tribunal erred in procedure such as to affect the decision of the case. On 22 January 2014, Mr. Awe filed a motion with the UNDT seeking to submit a response to the Secretary-General's reply to his application on the merits of the case. He also sought leave to admit witness testimony from the former Chief Civilian Personnel Officer. In Order No. 011 (NBI/2014), the UNDT determined that receivability would be addressed as a preliminary issue. The UNDT erred therefore in judging the merits of the case. It denied Mr. Awe the opportunity to buttress his claim with further pleadings. The UNDT also erred in its refusal, without explanation, to hear the testimony of the former Chief Civilian Personnel Officer.

10. On 3 July 2015, Mr. Awe filed a motion before the UNDT for the production of evidence from the Secretary-General. The UNDT erred as a matter of procedure in reaching a decision on the merits of the case without considering this motion. As a result, Mr. Awe's right to due process was violated.

11. The UNDT erred on a question of law when it failed to find that retroactively changing Mr. Awe's duty station in June 2013 was in violation of the principle of non-retroactivity.

12. The UNDT erred on a question of law and fact when it determined that the SRSG's decision to reassign Mr. Awe from Baghdad to Kuwait was a valid exercise of his discretion. This is because the UNDT wrongly inferred that the required consultation had taken place at the relevant time. Mr. Awe was not duly consulted about the reassignment.

13. The UNDT erred on a question of law and fact when it failed to find that, based on the ambiguity of the Administration's communications with Mr. Awe in November 2012, the doctrine of *contra proferentem* should apply, such that no administrative decision should have been enforced to his detriment.

14. Mr. Awe requests that the Appeals Tribunal vacate the UNDT Judgment and remand his case to the UNDT for a determination of the facts and merits of the case.

The Secretary-General's Answer

15. Mr. Awe failed to demonstrate that the UNDT's refusal to admit further pleadings and to allow an oral hearing led to the unfair disposal of his case. Contrary to his submissions, the UNDT ruled on the two issues raised in his 22 January 2014 motion when it determined in the UNDT Judgment that the issues for decision were "clearly defined in the Parties' submissions".⁵ Moreover, the UNDT determined that the documentary evidence adequately addressed the issues raised and that an oral hearing was not required. In that regard, the written statement of the former Chief Civilian Personnel Officer was entered into evidence by Mr. Awe's application. The UNDT correctly exercised its discretion to issue any order or give any direction it saw fit for the fair and expeditious disposal of the case. The UNDT did not issue a separate decision in response to Mr. Awe's motion of 3 July 2015. However, that motion sought the same documents that Mr. Awe had requested in two motions filed in May 2015. On 22 June 2015, the UNDT directed that the Secretary-General produce these documents, which he did on 1 July 2015. Those events rendered Mr. Awe's motion of 3 July 2015 moot.

16. The Administration did not make any decision having a retroactive effect. Thus, the principle of non-retroactivity does not apply. The Administration prospectively implemented the payment of Mr. Awe's DSA and hardship allowance at the Kuwait-based rate following his relocation to Kuwait.

17. Mr. Awe failed to demonstrate that there was a requirement that he be consulted about the reassignment. Nor has Mr. Awe demonstrated that the UNDT erred on a question of fact, particularly given its findings that he had the opportunity to raise his concerns about the matter.

18. Mr. Awe does not provide any arguments showing that the UNDT erred in determining that the decision to relocate him to Kuwait was lawful. He merely disagrees with the UNDT Judgment by offering his own analysis of the documentary evidence provided to the UNDT.

19. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment as it relates to the merits of the case and dismiss the appeal in its entirety.

⁵ *Ibid.*, para. 8.

Considerations

20. The Appeals Tribunal will first deal with Mr. Awe's motion to file additional pleadings. Article 31(1) of our Rules of Procedure, Section II.A.3 of Practice Direction No. 1, and our jurisprudence provide that the Appeals Tribunal may allow an appellant to file a pleading after the answer to the appeal when there are exceptional circumstances justifying the motion.⁶ In the present case, however, Mr. Awe has not demonstrated the existence of exceptional circumstances to justify the need to file additional pleadings. His motion for additional pleadings presents factual and legal contentions that reiterate the arguments made in his appeal brief. In the circumstances, the motion is denied.

21. Mr. Awe submits that the Dispute Tribunal erred in procedure such as to affect the decision of the case on the merits because it should have ruled on receivability alone.

22. We find no fault with the UNDT's decision.

23. The UNDT correctly held that the issues in the instant case were clearly defined in the parties' pleadings, submissions, and documentary evidence. The Appeals Tribunal has previously held that the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties, and this Tribunal will not lightly interfere with the broad discretion of the UNDT in the management of cases.⁷

24. Staff Regulation 1.2(c) provides that: "Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or office of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them".

⁶ *Neocleous v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-635, para. 26, and cites therein.

⁷ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-294, para. 20, citing, *inter alia*, *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062.

25. Traditionally, the reassignment of staff members' functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate.⁸

26. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered. The Tribunal can also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

27. It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by an improper motive, or taken in violation of mandatory procedures. An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.⁹ In the present case, the decision to change Mr. Awe's duty station was based on circumstances external to Mr. Awe and which fell entirely within the Administration's remit. The decision was not based on any improper motive and was not in breach of any mandatory procedures.

28. Thus, we affirm the UNDT Judgment declaring that the decision to change the duty station from Baghdad to Kuwait did not violate Mr. Awe's rights, and that he was only entitled to the DSA and hardship allowances applicable to Baghdad for the days that he actually spent there.

⁸ *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503, para. 45, citing *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236; *Kamunyi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-194; *Allen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-187; *Kaddoura v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-151.

⁹ *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 58, citing *Allen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-187.

Judgment

29. The UNDT Judgment is affirmed in its entirety.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar