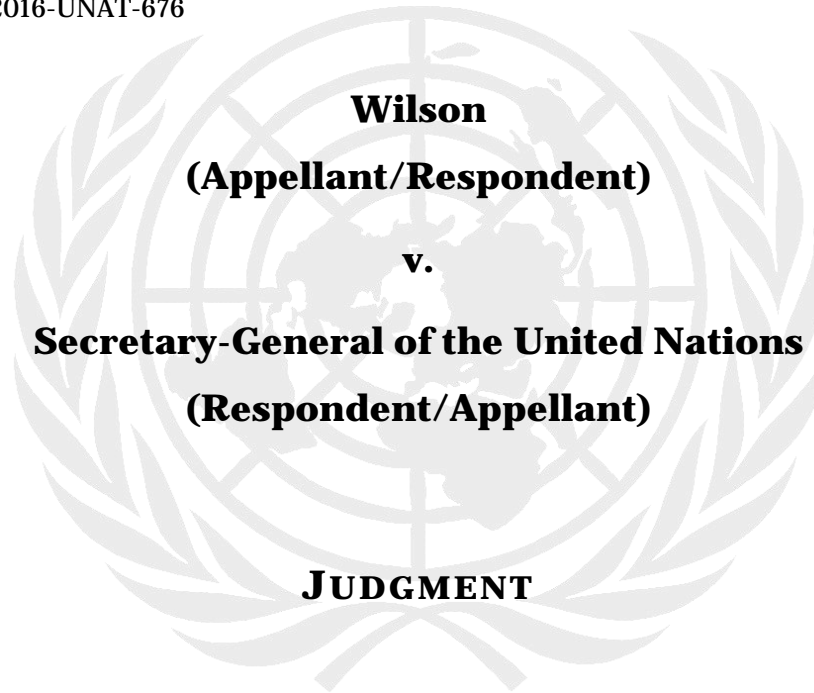




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-676



**Wilson
(Appellant/Respondent)**

v.

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

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Rosalyn Chapman
Judge Luis María Simón

Case Nos.: 2016-902 and 2016-906

Date: 30 June 2016

Registrar: Weicheng Lin

Counsel for Mr. Wilson: Self-Represented (2016-902)
Duke Danquah, OSLA (2016-906)

Counsel for the Secretary-General: Ernesto Bondikov

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals of Judgment No. UNDT/2015/125, rendered by the United Nations Dispute Tribunal (UNDT) in New York on 31 December 2015, in the case of *Wilson v. Secretary-General of the United Nations*.
2. One appeal was filed by Mr. Dan Campbell Wilson on 24 February 2016, and on 25 April 2016, the Secretary-General filed his answer (Case No. UNAT-2016-902).
3. The other appeal was filed by the Secretary-General on 29 February 2016, and on 29 April 2016, Mr. Wilson filed his answer (Case No. UNAT-2016-906).
4. By Order No. 257 (2016), dated 8 April 2016, the Appeals Tribunal consolidated these two appeals.

Facts and Procedure

5. Mr. Wilson is a Senior Investigator with the Office of Internal Oversight Services (OIOS) of the United Nations Secretariat, at the P-5 level. At the time this case arose, Mr. Wilson was performing the duties and functions of Deputy Director of Operations, Investigations Division, OIOS, in New York, at the D-1 level.
6. On 17 October 2014, Mr. Wilson applied for the D-2 level position of Director, Ethics Office. The job opening was issued on 26 September 2014 and had a closing date of 25 November 2014. It required, *inter alia*, 15 years of progressively responsible professional experience in the field of public administration.
7. On 29 October 2014, the Office of Human Resources Management (OHRM) notified Mr. Wilson that he was not eligible to apply for the post on the ground that the level of the advertised post was more than one level above his fixed-term post at the P-5 level, in accordance with Section 6.1 of ST/AI/2010/3 (Staff selection system).
8. On 30 October 2014, Mr. Wilson requested that the Organization make an exception to Section 6.1 of ST/AI/2010/3, pursuant to Staff Rule 12.3(b).

9. By e-mail dated 17 November 2014, the Assistant Secretary-General (ASG) of OHRM denied Mr. Wilson's request. The ASG/OHRM reasoned, *inter alia*, that "[t]he exception would be considered as prejudicial to the interests of any other similarly situated staff member or group of staff members for other positions in the same and other categories advertised across the Secretariat that have not applied to the same [or] similar positions following ... paragraph 6.1 of ... ST/AI/2010/3".

10. Mr. Wilson unsuccessfully sought management evaluation of that decision.

11. On 27 January 2015, Mr. Wilson filed an application to the UNDT.

12. In Judgment No. UNDT/2015/125, now under appeal, the UNDT held that Mr. Wilson's request for an exception was not given proper consideration by the ASG/OHRM. The UNDT found that:¹

... irrelevant factors were taken into consideration whereas relevant factors were not. In particular, no proper consideration was given to the individual circumstances and attributes that may have warranted a legitimate exception in this case. Further, the reasoning supporting the decision was flawed. In effect, no reasonable explanation has been provided as to why the granting of this exception would have been prejudicial to other staff.

13. Mr. Wilson was awarded USD 3,000 as compensation "for the breach of his right to proper consideration of his request for an exception and for the resultant loss of chance of promotion".²

Submissions

The Secretary-General's Appeal (Case No. 2016-906)³

14. The ASG/OHRM was correctly informed of the law and exercised her discretion by giving proper consideration to Mr. Wilson's request for an exception. The UNDT should have affirmed the ASG/OHRM's decision as a proper exercise of the Secretary-General's discretion.

¹ Impugned Judgment, para. 55.

² *Ibid.*, para. 64.

³ For the purposes of clarity and coherence within this Judgment, a summary of the Secretary-General's appeal on the merits and award of compensation appears before Mr. Wilson's appeal on the award of compensation, notwithstanding that Mr. Wilson's appeal was filed first.

15. The UNDT erred in fact and law in finding that the ASG/OHRM had considered Section 6.5 of ST/AI/2010/3 to be the only possible exception. The evidence supports the conclusion that the ASG/OHRM had a correct understanding of the law and there is no evidence to support the UNDT finding to the contrary. Moreover, the UNDT's inference that the failure to cite the Appeals Tribunal precedent in the decision meant that the Administration did not act in accordance with its legal framework constitutes an error of law.

16. The UNDT erred in fact and in law in finding that (i) the ASG/OHRM had not properly exercised her discretion because the decision had "failed to consider and discuss any of the personal circumstances and attributes raised by [Mr. Wilson]" and (ii) the ASG/OHRM's reasoning supporting the decision was flawed because no reasonable explanation was provided for why "the granting of this exception would have been prejudicial to other staff".⁴ The ASG/OHRM was not required to specifically recite all of Mr. Wilson's contentions in order to show that she had exercised her discretion properly. Nor was she required to list any "identifiable and sufficiently comparable interests of other staff".⁵ Moreover, the UNDT's requirement that the ASG/OHRM's reasons be accompanied by additional supporting evidence constitutes an error of law.

17. The UNDT overstepped its competence by placing itself in the position of the ASG/OHRM. It substituted its judgment for that of the ASG/OHRM by deciding which factors had to be considered in evaluating Mr. Wilson's request for an exception.

18. As the UNDT erred in fact and in law in its Judgment, the award of damages to Mr. Wilson cannot stand. However, even if the UNDT's Judgment is affirmed, the award of damages must be vacated as speculative. The UNDT erred in finding that Mr. Wilson sustained "some loss" and in basing its awards on a "range of sums" from other cases as these findings are not supported by any evidence.⁶

19. The Secretary-General requests that the Appeals Tribunal grant his appeal and vacate the UNDT's Judgment.

⁴ Impugned Judgment, para. 55.

⁵ *Ibid.*, para. 35.

⁶ *Ibid.*, paras. 62-64.

Mr. Wilson's Answer

20. The UNDT was correct in its findings. The ASG/OHRM's consideration of Mr. Wilson's request for an exception was based on improper or inadequate considerations.

21. It is clear from a plain reading of the ASG/OHRM's e-mail of 17 November 2014 that it indeed was her understanding that exceptions could only be granted under Section 6.5 of ST/AI/2010/3. The ASG/OHRM was wrong in her conclusion.

22. The Secretary-General's argument that the UNDT exceeded its competence and substituted its own decision for that of the Secretary-General is baseless. Nowhere in the Judgment did the UNDT attempt to intrude upon the authority of the Secretary-General. Rather, the UNDT merely exercised its inherent power of judicial review to examine whether the ASG/OHRM had abided by the precepts of the relevant Staff Rules, statutory instruments and judicial precedents.

23. The UNDT did not award damages based on a "range of sums" awarded in prior cases. It is clear from the Judgment that the award of damages was actually based on a breach of Mr. Wilson's right to proper consideration of his request for an exception. The UNDT acted reasonably in making the assessment of the level of compensation due to Mr. Wilson.

24. Mr. Wilson requests that the Appeals Tribunal dismiss the Secretary-General's appeal and affirm the UNDT's Judgment.

Mr. Wilson's Appeal (Case No. 2016-902)

25. The UNDT erred in its approach in setting the amount of compensation. He submits that the relief, which equates to approximately one week of his annual salary, is both arbitrary and prejudicial.

26. The UNDT's efforts to establish relief were principled, but were nonetheless based on errors in procedure thereby making the award inherently unfair and prejudicial. Relying primarily upon the case of *Solanki*,⁷ the UNDT based its determination on *Hastings*,⁸ (in part),

⁷ *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044.

⁸ *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

Marsh,⁹ *Mezoui*¹⁰ and *Asariotis*,¹¹ while it cast aside the only two cases most relevant to his case, *Hastings* and *Lutta*,¹² specifically in relation to the percentage analysis.

27. The award of six months' salary requested by Mr. Wilson was both justified and substantiated in the context of his lost salary, pension emoluments, and the jurisprudence established by the Appeals Tribunal.

28. Mr. Wilson's experience or qualifications is not an issue of speculation as the UNDT asserted in paragraph 62 of its Judgment. Mr. Wilson maintains that he had sufficient experience and qualifications for the post and it was not a function of the UNDT to question that fact, nor speculate on the ASG/OHRM's implied endorsement of his experience and qualifications.

29. The UNDT failed to exercise its jurisdiction by not requesting information from the Secretary-General which was necessary to establish the probability of Mr. Wilson being recommended for the promotion. Such information may have been intentionally withheld by the Secretary-General.

30. Mr. Wilson requests that the Appeals Tribunal exercise its power to order the Secretary-General to provide information regarding the number of applicants, the number of the eligible applicants, and the number of the applicants that advanced to the next stage of the selection process for the Director of Ethics Office position. He also requests that the Appeals Tribunal order the United Nations Joint Staff Pension Fund to provide information needed for a determination of his lost pension emoluments and appropriate financial relief in accordance with *Solanki*.

31. Additionally, Mr. Wilson requests that the Appeals Tribunal award him three months' salary as this sum would be "the most fair and appropriate relief".

⁹ *Marsh v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/035.

¹⁰ *Mezoui v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/098.

¹¹ *Asariotis v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/144.

¹² *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117.

The Secretary-General's Answer

32. Mr. Wilson has failed to show that the UNDT committed an “error of procedure” and rendered an “inherently unfair and prejudicial” award. His reliance on *Hastings* and *Lutta* is misplaced as those cases are distinguishable from the present one. Moreover, contrary to Mr. Wilson’s argument, the UNDT did consider the compensation awarded in the cases cited in its Judgment.

33. Mr. Wilson has failed to show that the award of damages is unjustified and unsubstantiated. His argument that the UNDT should have included calculations on lost salary and pension contributions through his age of retirement lacks merit. He did not provide the UNDT with any evidence to support his contention that he would have been selected for the post.

34. Mr. Wilson has failed to demonstrate that the UNDT erred or failed to exercise due diligence by not requesting additional information from the Secretary-General. His claim that the Secretary-General “intentionally” withheld information has no merit. Information on the number of candidates who applied for the post of Director of the Ethics Office and advanced to later stages in the selection process for the post was irrelevant to the dispositive issue in the case. Additionally, it was Mr. Wilson’s burden to substantiate his claim for compensation. At no time during the proceedings did he produce, or request the UNDT to order the production of, the information he considered withheld.

35. Mr. Wilson has not shown any exceptional circumstances under Article 2(5) of the Statute of the Appeals Tribunal warranting the production of any new evidence. He has also failed to show any error by the UNDT that would warrant the modification of the award of compensation.

36. Lastly, the Secretary-General challenges the admission of documents annexed to Mr. Wilson’s appeal.

37. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

38. The Secretary-General contends that rather than finding as it did, the Dispute Tribunal should have affirmed the contested decision as a proper exercise of the Secretary-General's discretion. Specifically, the Secretary-General contends that the Dispute Tribunal:

- Erred in law and in fact in finding that the ASG/OHRM had considered Section 6.5 of ST/AI/2010/3 as the only possible exception to Section 6.1 of the said statutory instrument;
- Erred in fact and in law in finding that the ASG/OHRM had not properly exercised her discretion;
- Erred in fact and in law by substituting its own decision for that of the Secretary-General; and
- Erred in law and in fact when it awarded damages to Mr. Wilson.

39. The backdrop to the present appeal is Mr. Wilson's request pursuant to Staff Rule 12.3(b) that the Organization should make an exception to Section 6.1 of ST/AI/2010/3, which provides:

Eligibility requirements

6.1 Staff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade. Staff members in the General Service and related categories holding a permanent, continuing or fixed-term appointment may apply for positions in the Field Service category at any level, irrespective of the grade held in the General Service and related categories, provided they meet the requirements of the post.

40. Mr. Wilson's request was made after he was notified by OHRM that as a holder of a P-5 post he was not currently eligible for D-2 posts and that he could only apply for posts up to one level higher than his current personal level. This was in effect the application of Section 6.1 of ST/AI/2010/3 to Mr. Wilson's candidacy.

41. Staff Rule 12.3(b) states:

(b) Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly

affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

As provided for in Staff Rule 12.3(b), Mr. Wilson requested that an exception be made to Section 6.1 on the grounds, *inter alia*, that he met the required competencies as well as the required educational and work experience requirements; that he had been placed on the D-1 roster since July 2013; that he was performing duties at the D-1 level since May 2014; and that this was perhaps one of his last opportunities to be promoted in light of his due retirement in approximately five years' time.

42. The response of the ASG/OHRM to the request was as follows:

This refers to your interoffice memorandum of 30 October 2014 on your request for exemption as a candidate for the position of Director Ethics, D-2: JO 14-ETH-Ethics Office-37595-D-New York (G).

...

I have carefully reviewed your request to be exceptionally considered as a candidate for the position of Director Ethics, D-2 notwithstanding your personal grade and fixed-term appointment at the P5 level.

To give full consideration to your case I made reference to ... Article 101.3 of the Charter that provides: "The paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

I have also taken note of the Staff Rule 112.2(b) [sic] in regard with exceptions. "Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion [of] the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members."

Additionally I considered the ST/AI/2010/3 as it applies to the selection and appointment of all staff members to whom the Organization has granted or proposes to grant an appointment of one year or longer under the Staff Rules up to and including the D-2 level. The appointment at the level of ASG and USG [Under-Secretary-General] are political appointments and would not be comparable with the provisions set out in the scope of the [administrative instruction (AI)] on the Staff selection system.

Under the applicable pre-screening and assessment criteria (Section 7) and eligibility requirements (Section 6 of the ST/AI/2010/3) applicants applying to job openings are pre-screened on the basis of the information provided in their application to

determine whether they meet the minimum requirements as stated in the job opening including their current personal grade.

Exceptions to the above mentioned eligibility requirements on current personal grade (paragraph 6.1) are allowed for and communicated in paragraph 6.5 of the same ST/AI, which sets out that a staff member holding a permanent, continuing, probationary or fixed-term appointment (with no appointment limitation) assigned from a headquarters location, including regional commissions, to a position one level higher than his/her current grade in a peacekeeping operation or special political mission, where a lien is maintained against a position at the parent duty station, may temporarily be promoted to the level of the position in the peacekeeping operation or special political mission for the duration of the assignment. A staff member temporarily promoted may apply during his/her assignment in a peacekeeping operation or special political mission to job openings one level higher than his/her temporary grade level, provided that he/she has spent more than 12 months continuously in the peacekeeping operation or special political mission. This is the exception to the rule and the determination made in the best interest of the Organisation to ensure transparency, and opportunity for those serving in locations of [peacekeeping operations (PKOs)] or [special political missions (SPMs)].

I would also like to highlight that every effort is made to ensure equity and fairness in recruitment and ensure equitable treatment of staff[.]

Having analysed your request and the ruling in this matter, I regret to inform you that I am unable to grant an exception to the eligibility requirements as set out in ST/AI/2010/3 in order for you to apply for the post of Director Ethics, D-2; JO 14-ETH-Ethics Office-37595-D-New York (G)[.] The exception would be considered as prejudicial to the interests of any other similarly situated staff member or group of staff members for other positions in the same and other categories advertised across the Secretariat that have not applied to the same [or] similar positions following [...] paragraph 6.1 of the ST/AI/2010/3.

I hope this helps to clarify your eligibility for higher level positions.

43. The Dispute Tribunal impugned the contested decision on the basis, *inter alia*, that the ASG/OHRM's e-mail "strongly suggests that the ASG considered that the only exceptions that could be granted to [S]ec[tion] 6.1 were under the provisions of [S]ec[tion] 6.5, which would in turn suggest that no other exceptions outside of [S]ec[tion] 6.5 of ST/AI/2010/3 were possible".¹³

¹³ Impugned Judgment, para. 40.

44. The Secretary-General takes issue with the Dispute Tribunal's interpretation of the ASG/OHRM's response to Mr. Wilson and contends that the evidence clearly supports the conclusion that the ASG/OHRM had a correct understanding of the law and that there is no evidence that the ASG/OHRM considered that Section 6.5 was the only exception to Section 6.1.

45. There is no doubt that the ASG/OHRM embarked upon a totally unnecessary discourse on the provisions of Section 6.5 of ST/AI/2010/3 when it was perfectly clear that Mr. Wilson's particular circumstances would not invoke the provisions of that section, given that he was not employed in a peacekeeping operation or special political mission. The question is whether this is sufficient to vitiate the decision. We do not believe that it is.

46. We agree with the Secretary-General's arguments that the ASG/OHRM's considerations are not confined to Section 6.5 of ST/AI/2010/3. Clearly, the e-mail as written lacks elegance, but there is sufficient information in it for us to conclude that the ASG/OHRM was aware that the discretion which the Secretary-General has in terms of granting exceptions to Section 6.1 derives from Staff Rule 12.3(b). The latter provision is referenced at the beginning of the ASG/OHRM's e-mail, albeit cited under its previous incarnation as Staff Rule 112.2(b). The Dispute Tribunal found that nothing turned on the erroneous reference to former Staff Rule 112.2(b) given that the language of that rule is identical to Staff Rule 12.3(b). We agree with the Dispute Tribunal in this regard but we would have expected that the Administration as the promulgator of the Staff Rules should have been more familiar with the up-to-date rules.

47. The three elements of Staff Rule 12.3(b) are:

- (a) Such an exception must be consistent with the Staff Regulations and other decisions of the General Assembly;
- (b) Such an exception must be agreed to by the staff member directly affected; and
- (c) Such an exception, in the opinion of the Secretary-General, must not be prejudicial to the interests of any other staff member or group of staff members.

48. The ASG/OHRM invoked the third element as the basis upon which to refuse her discretion to grant the exception sought by Mr. Wilson, namely that it would be “prejudicial to the interests of any other similarly situated staff member or group of staff members ... that have not applied to the same [or] similar positions following ... paragraph 6.1 of ... ST/AI/2010/3”. The Dispute Tribunal interpreted this as a reference by the ASG/OHRM to staff members “who have *not* applied for [the] ‘*same [or] similar positions*’, in the *past*”.¹⁴

49. We agree with the Secretary-General that it was open to the ASG/OHRM to take into consideration that the granting of an exception would be prejudicial to staff members who, in deference to Section 6.1 of ST/AI/2010/3, had not applied for the post applied for by Mr. Wilson. Furthermore, we find no basis for the UNDT having concluded that the ASG/OHRM’s rationale in this regard related to the past. The clear impression from the ASG/OHRM’s e-mail is that she was referring to staff members who may have refrained from applying for the post in question because of Section 6.1. However, the Secretary-General’s submission that the ASG/OHRM’s rationale can be read as encompassing prejudice to applicants for the advertised position is not sustained by the language used in the e-mail.

50. Insofar as the ASG/OHRM relied on the interests of other staff in declining to exercise her discretion, we do not find any reversible error in the failure to specify any “identifiable” or “sufficiently comparable” staff interests as we find that the reason actually provided by the ASG/OHRM was both reasonable and sufficient in all the circumstances.

51. We find that there was no basis for the UNDT to conclude that “no proper consideration was given to [Mr. Wilson’s] individual circumstances and attributes that may have warranted a legitimate exception in this case”.¹⁵ There is a sufficient basis set out in the ASG/OHRM’s response for Mr. Wilson, for the Appeals Tribunal, on judicial review, to be satisfied that the ASG/OHRM had regard to the case put for the exemption to be granted. The ASG/OHRM’s e-mail begins by referring to Mr. Wilson’s “interoffice memorandum of 30 October 2014”, regarding his request for exemption as a candidate for the position of Director of the Ethics Office. Reference is made to his application having been “carefully reviewed” and his request having been “analysed”.

¹⁴ *Ibid.*, para. 44 (italics in original).

¹⁵ *Ibid.*, para. 55.

52. Staff Rule 12.3(b) accords the Secretary-General discretion to grant an exception to the Staff Rules.

53. As to how this discretion must be exercised, in *Benchebbak*, the Appeals Tribunal stated:¹⁶

When judging the validity of the Secretary-General's exercise of discretion it is not the role of the UNDT 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 UNDT to substitute its own decision for that of the Secretary-General.

Similarly, in *Bali* we held:¹⁷

[T]he Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they have been applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

54. In all the circumstances of this case, while we are of the view that in her response to Mr. Wilson, the ASG/OHRM could have been more discursive, the fact that this did not occur does not, in our view, displace the (rebuttable) presumption of regularity which attached to the decision.

55. As we said in *Sanwidi*, the Dispute Tribunal (and the Appeals Tribunal) will only interfere with an administrative decision if it is established that the decision is:¹⁸

... unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

¹⁶ *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-438, para. 19, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹⁷ *Bali v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-450, para. 29, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265.

¹⁸ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

56. The present case was not one where the ASG/OHRM improperly precluded the exercise of discretion. Discretion was exercised in regard to Mr. Wilson's request. It was not however exercised in his favour. While the Dispute Tribunal has held that the discretion was improperly exercised, for the reasons we have set out herein we do not agree and find that the Dispute Tribunal erred in law.

57. Accordingly, the Secretary-General's appeal succeeds. The UNDT Judgment is reversed.

58. As the Dispute Tribunal Judgment is reversed, it follows that Mr. Wilson's appeal on the quantum of damages is rendered moot and dismissed accordingly.

Judgment

59. The Dispute Tribunal Judgment is reversed.

Original and Authoritative Version: English

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

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar