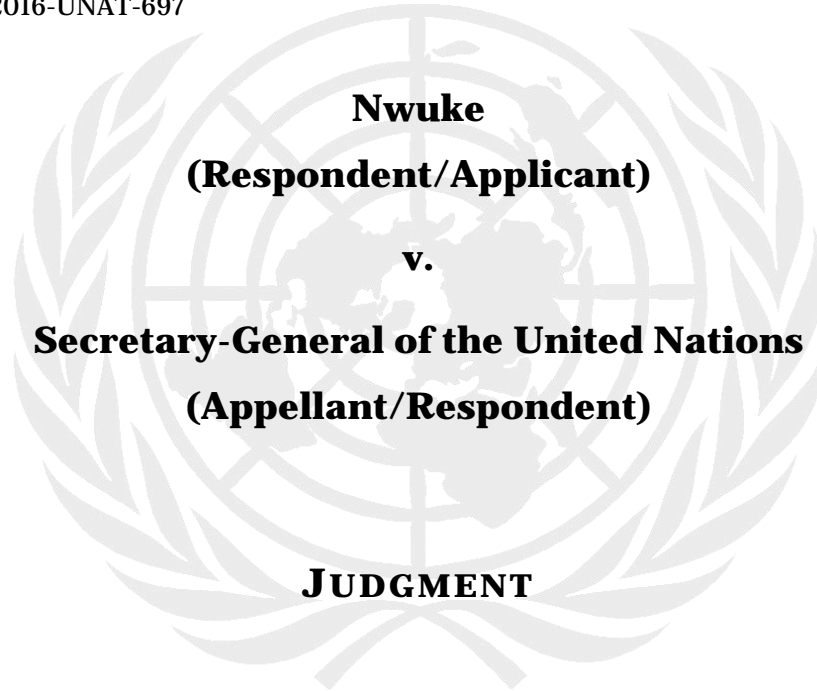




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-697



**Nwuke
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge John Murphy Judge Martha Halfeld
Case No.:	2016-927
Date:	28 October 2016
Registrar:	Weicheng Lin

Counsel for Mr. Nwuke:	Self-represented
Counsel for Secretary-General:	Ernesto Bondikov

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Liability and Relief No. UNDT/2016/021, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 March 2016 in the case of *Nwuke v. Secretary-General of the United Nations*. The Secretary-General filed an appeal on 11 May 2016, and Mr. Kasirim Nwuke filed his answer on 10 July 2016. Asserting that Mr. Nwuke's answer includes a "putative" cross-appeal, the Secretary-General filed an answer to that "putative" cross-appeal on 12 August 2016. On 28 September 2016, Mr. Nwuke filed a motion seeking dismissal of the Secretary-General's 12 August 2016 submission.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:¹

... The Applicant is currently serving at the P-5 level as Chief of the New Technologies and Innovation Section in the Special Initiatives Division (SID) at the United Nations Economic Commission for Africa (ECA) based in Addis-Ababa, Ethiopia.

...

... On 27 July 2012, the Applicant as required by the Statute of the Dispute Tribunal submitted a request for management evaluation [of the decision not to select him for the post of Director, Governance and Public Administration Division (Director/GPAD)]. On 2 August 2012, he submitted a revised version of the request and made four further submissions on the said request, the last of these submissions being on 19 September 2012. His grounds for the request included that his candidacy for the post of [Director/GPAD] was not accorded full and fair consideration and that the process was flawed for the following reasons:

- a. The selected candidate was ineligible for consideration for the post because he did not have the required lateral moves or speak French or any other United Nations language.
- b. The removal of the Special Notice in the Job Opening [(JO)] was unlawful and designed to allow the selected candidate to become eligible for the post.
- c. The question on the professionalism competency in the interview was unbalanced in favour of the selected candidate.

¹ Impugned Judgment, paras. 1, 7-13 & 2-4.

d. The participation of the hiring manager in the interview panel was unlawful because he was the immediate past incumbent of the post.

e. The interview panel was not composed as management had earlier advised.

f. There was no question on the competency of Communication.

... The Applicant also filed a complaint on 24 August 2012 to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) alleging abuse of authority in the said selection decision for the position of Director/GPAD.

... On 15 November 2012, the [Under-Secretary-General for Department of Management (USG/DM)], on behalf of the Secretary-General, responded to the Applicant's request for management evaluation.

... In that response, the Applicant was informed that following a review of the selection decision complained of, the Secretary-General had determined that the failure to withdraw and reissue the job opening for the D-1 position of Director/GPAD upon its amendment was a procedural irregularity and constituted a violation of the Applicant's right to due process.

... Also in the said response of the USG/DM, the Applicant was informed that since he had made a complaint alleging abuse of authority in the said selection process, the Secretary-General would await the outcome of the investigation into that complaint before deciding on an appropriate remedy to the admitted violation of his right to due process.

... Sometime in April 2013, about five months after the USG/DM's response, a fact-finding panel was constituted to look into the Applicant's complaint of abuse of authority.

... Subsequently, on 18 December 2013, the USG/DM again wrote to inform the Applicant that after reviewing the report of the fact-finding panel, he had determined that the Applicant did not deserve any remedies for the breach of his due process right which had been acknowledged more than a year earlier on 15 November 2012.

...

... [The Applicant] filed [an] Application with the Dispute Tribunal on 20 March 2014 contesting the selection/promotion decision for the post of Director[/GPAD]. The grounds for contesting the decision [were]:

a. Unlawful tampering with a published job opening to make an ineligible candidate eligible to apply for the post;

b. Unlawful membership of Mr. Abdalla Hamdok, a previous incumbent of the post, in the interview/assessment panel[;] and ...

c. The Administration's disregard of the concerns raised by the Applicant concerning the breaches of procedural requirements in the impending selection process.

... The Applicant additionally challenged the decision of the Management Evaluation Unit (MEU) not to award him remedies for the violation of his procedural rights.

... By a Reply filed on 6 May 2014, the Respondent prayed: (i) that the Application be dismissed on the ground that it was filed outside of the time limits allowed by the Statute of the Dispute Tribunal; and (ii) the decision of the MEU on the award of remedies is not an administrative decision and is therefore not receivable.

3. In Judgment No. UNDT/2016/021 now under appeal, the Dispute Tribunal first reviewed the issue of receivability of Mr. Nwuke's application. It rejected two of Mr. Nwuke's claims that the USG/DM denied in his letter of 15 November 2012 as not receivable *ratione temporis*. However, the UNDT held that Mr. Nwuke's claim regarding the removal of the special notice from the JO for the Director/GPAD post that the Secretary-General admitted and for which he had asked for time in order to determine an appropriate amount of compensation "survived the legislation governing time limits since by implication, the said time limits had been effectively waived or suspended by the Respondent himself", and that Mr. Nwuke's challenge of "the Respondent's turn-about on the issue of compensating him for the breach of his due process rights" was therefore receivable.²

4. In the view of the UNDT, the present case was distinguishable from the UNDT precedents standing for the proposition that the management evaluation decisions were not appealable. In the present case, "[w]here errors on the part of management are discovered after the review, MEU makes recommendations to the USG/DM proposing appropriate remedies to be made to the aggrieved staff member", such a recommendation "effectively replaces the decision of the manager on the particular issue" and "overtakes and replaces the administrative decision that was made in error".³ "[T]he Respondent's admission of liability following his management evaluation to a claim by an applicant effectively supersedes the administrative decision complained of in the same way that the favourable outcome of rebuttal proceedings would replace or substitute the poor rating which is the subject matter of the rebuttal process."⁴

² *Ibid.*, paras. 22 and 23.

³ *Ibid.*, paras. 41-43.

⁴ *Ibid.*, para. 62.

5. The Dispute Tribunal further held that after the Secretary-General admitted his liability on 15 November 2012, he “cannot be heard to later say that the appropriate remed[y] due to the Applicant was that he was not deserving of any remedies at all”, and “the only option open to him is to grant appropriate remedies”.⁵ Consequently, the Secretary-General’s decision of 18 December 2013 not to grant a remedy to Mr. Nwuke was “perverse”. The UNDT ordered three months’ net base salary as compensation for the breach of Mr. Nwuke’s due process rights.

Submissions

The Secretary-General’s Appeal

6. The Dispute Tribunal erred in law and fact and exceeded its competence by treating the MEU determinations in the first MEU letter of 15 November 2012 and the second MEU letter of 18 December 2013 as administrative decisions subject to judicial review, in disregard of the Staff Regulations and Rules, the UNDT Statute and the UNDT’s clear jurisprudence that the MEU reviews are not administrative decisions and that the UNDT lacks jurisdiction to review the merits of the MEU determinations.

7. The UNDT’s reasoning is flawed. In the first MEU letter, the MEU did not rescind the non-selection decision. In the second MEU letter, the MEU left the underlying decision undisturbed. By treating the first and second MEU letters as administrative decisions, the UNDT failed to recognize the difference between an underlying decision and the management evaluation of that decision.

8. The Dispute Tribunal erred in holding that the first MEU letter amounted to an admission of liability and the second MEU letter was an attempt to withdraw the admission of liability, and that the determination that Mr. Nwuke’s right to due process had been violated automatically entitled him to a remedy. Contrary to the UNDT’s holdings, the first MEU letter did not admit liability, nor did it indicate that Mr. Nwuke would automatically receive compensation. The MEU correctly deferred the determination of appropriate remedies until the issuance of the report of the fact-finding panel. It based its conclusion that Mr. Nwuke was not entitled to any remedy on the conclusion of the fact-finding panel that there was no unlawful behaviour or abuse of authority.

⁵ *Ibid.*, paras. 51 and 53.

9. The UNDT's award of three months' net base salary as damages was unsupported by any reason or evidence; it amounts to an award of exemplary or punitive damages; and it is excessive. The UNDT ordered the award in disregard of the Appeals Tribunal jurisprudence and Article 10(5) (b) of the UNDT Statute that requires such an award to be supported by evidence of harm. Since it did not specify whether it awarded compensation for pecuniary or moral damages, the UNDT also violated Article 10(7) of the UNDT Statute against punitive or exemplary damages, as it is solely based on the UNDT's finding of violation of Mr. Nwuke's due process rights without any finding of harm suffered by him.

Mr. Nwuke's Answer

10. The Secretary-General has failed to adduce any evidence to support his assertion that the UNDT treated the MEU determinations in the first and second MEU letters as administrative decisions. The Dispute Tribunal did not undertake judicial review of, or make any pronouncement on, the MEU findings. All it did was to seek to enforce the recommendation made by the MEU and accepted by the Secretary-General in the first MEU letter.

11. This case is in some ways unique, in that, to the best of Mr. Nwuke's knowledge, it is the first time that the MEU has issued two evaluations of the same administrative decision, using the second, after the passage of a very long period, to reverse the first. To allow this practice to stand will erode the confidence in the MEU and cause irreparable damage to the internal justice system.

12. The argument made by the Secretary-General about the admission of liability is without merit. It is deliberately false and unethical to insert a conditionality—"appropriate remedies, if any"—into the first MEU letter, when the Administration admitted liability without any condition.

13. There is no nexus between the unlawful behaviour with respect to Mr. Nwuke's harassment allegations and the unlawful behaviour with respect to the selection process. The former is not needed to prove the latter; the Secretary-General did not have to wait for the outcome of the investigation in order to decide on an appropriate remedy.

14. The UNDT's award of damages is proper; it is supported by reason and evidence, such as the long delay in considering Mr. Nwuke's harassment complaint. The Secretary-General has failed to provide evidence to support his assertion that the UNDT's award amounts to punitive or exemplary damages.

15. Mr. Nwuke requests that the Appeals Tribunal affirm the UNDT Judgment in its entirety. He also requests that the Appeals Tribunal increase the award of compensation from three to six months' net base salary "due to the moral and emotional distress arising from the vexatious and frivolous way the Administration has handled this matter". In the alternative, should the Appeals Tribunal decide to vacate the UNDT Judgment, Mr. Nwuke requests that the Appeals Tribunal "remand the Judgment back to the UNDT for review of the non-selection decision on the merits".

The Secretary-General's Answer to Mr. Nwuke's Putative Cross-Appeal

16. Mr. Nwuke has not designated a portion of his answer as containing a cross-appeal. However, in his answer, Mr. Nwuke requests relief different from that ordered by the UNDT. He also requests remand of his case to the UNDT should the impugned Judgment be vacated. His arguments in this regard effectively constitute a cross-appeal. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Nwuke's filing.

Mr. Nwuke's Motion to Dismiss Answer to Putative Cross-Appeal

17. Mr. Nwuke's answer to the Secretary-General's appeal does not constitute an appeal against the UNDT Judgment, but a response to the claims made by the Secretary-General in his appeal. The Secretary-General's 12 August 2016 filing should be dismissed, because there is no prescribed rule for responding to a putative cross-appeal. In the alternative, Mr. Nwuke requests that the Appeals Tribunal allow him to submit an answer to the Secretary-General's 12 August 2016 filing.

Considerations

Preliminary Matter

18. The Secretary-General has filed an answer to the “Putative Cross-Appeal” filed by Mr. Nwuke. There is no such document. Mr. Nwuke has not filed a cross-appeal. The answer is struck-out.

The Appeal

19. We find that the UNDT erred in coming to the conclusion that where a management evaluation discloses a procedural error by the Administration and makes a recommendation proposing appropriate remedies, such a recommendation, when communicated to the staff member, effectively replaces the decision of the manager on the particular issue. A recommendation by the MEU cannot have the status of an appealable administrative decision.

20. The UNDT sought to distinguish the present case from its own jurisprudence, which has been affirmed by the Appeals Tribunal, that the Administration’s response to a request for management evaluation is not a reviewable decision.⁶ According to the UNDT, the distinguishing feature of the present case is that the MEU letter of 15 November 2012 constituted an admission of liability which “overtakes and replaces the administrative decision that was made in error”,⁷ so that all that remained to be decided was how much compensation was to be awarded to Mr. Nwuke.

21. We find that the UNDT was wrong both in law and in fact.

22. In *Kalashnik*, the Appeals Tribunal explained why the contested decision which may be reviewed by the Dispute Tribunal is not the decision of the MEU, but the administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member. Our reasoning in that case is as follows:⁸

The Appeals Tribunal has “consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must ‘produce[]

⁶ Impugned Judgment, paras. 24-30; *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661.

⁷ Impugned Judgment, para. 43.

⁸ *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661, paras. 25-30 (internal footnotes omitted).

direct legal consequences' affecting a staff member's terms and conditions of appointment; the administrative decision must 'have a direct impact on the terms of appointment or contract of employment of the individual staff member'". ... Further, a reviewing tribunal should consider "the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision" in determining whether an application challenges an administrative decision which is subject to judicial review. ...

Management evaluation is a vital component of our system for the administration of justice. As we have commented, "the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary ...". ...

To assure that the Administration has the opportunity to correct any errors before litigation is brought, Article 8(1)(c) of the UNDT Statute provides that "[a]n application shall be receivable if ... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

However, Article 8 does not require that the Administration respond to the request for management evaluation in order for an application to be received by the UNDT. To the contrary, pursuant to Article 8(1)(d)(i)(b) of the UNDT Statute, an application shall be received by the UNDT despite the failure of the Administration to respond: "An application shall be receivable if ... [t]he application is filed ... [w]ithin 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided".

Accordingly, it is fair to say that the General Assembly when enacting the provisions of the UNDT Statute did not consider the Administration's response to a request for management evaluation to be a decision that "produced direct legal consequences[]" affecting a staff member's terms and conditions of appointment. To the contrary, as discussed above, "the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision" all support the conclusion that the Administration's response to a request for management evaluation is not a reviewable decision. The response is an opportunity for the Administration to resolve a staff member's grievance without litigation –not a fresh decision.

If the decision itself cannot be subject to judicial review, then the procedures utilized by the Administration in reaching the decision also cannot be subject to judicial review. Mr. Kalashnik cannot create a right to challenge the Administration's procedures for responding to requests for management evaluation when that right does not exist in the Staff Rules or elsewhere. Management has discretion in how to consider and respond to staff members' requests for evaluation; the discretion is not subject to micro-managing by the staff members. In fact, as discussed, management may choose not to respond at all.

23. Thus, in conformity with our jurisprudence, we find that the MEU's reviews dealt with in its letters of 15 November 2012 and 18 December 2013 were not administrative decisions and the UNDT was not competent to pass judgment on them.

24. Moreover, the MEU did not make admissions binding on the Secretary-General. In fact, there is no record of any admission of the Secretary-General accepting liability to pay compensation to Mr. Nwuke. The UNDT was mistaken in its interpretation of the MEU's letter of 15 November 2012 which recommended an investigation. The MEU did not state that the investigation would ascertain "what remedies would be appropriate for the purpose of compensating [Mr. Nwuke]" as opined by the UNDT.⁹ The MEU's recommendation was that "the issue of an appropriate remedy be addressed following the outcome of the investigations". It is not logical to construe this as meaning that the Secretary-General would pay compensation to Mr. Nwuke and that it was just a question of how much. An "appropriate remedy" might not amount to compensation being paid, as happened in this case.

25. We further find that the UNDT erred in holding that the MEU's decision mentioned in its letter dated 18 December 2013 that no remedies were appropriate was "perverse, as there is no nexus between the two wrongs of violation of due process rights and abuse of authority".¹⁰ The concept of an "appropriate remedy" obviously involved both issues, and was the reason the Administration decided to defer a decision on this pending the outcome of the investigation.

26. The violation of Mr. Nwuke's due process rights did not, of itself, entitle him to an award of damages. There was no evidence before the UNDT of any pecuniary loss or harm suffered by Mr. Nwuke as a result of the said violation. The Appeals Tribunal has consistently held that not every violation of a staff member's right will necessarily lead to an award of compensation. There are no legal grounds that can justify such an award when no actual prejudice was found.¹¹

27. It follows from the foregoing that the appeal succeeds.

⁹ Impugned Judgment, para. 22.

¹⁰ *Ibid.*, para. 67.

¹¹ *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518; *Andreyev v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-501, para. 33; see also UNDT Statute, Article 10(5) (b).

Judgment

28. The appeal is allowed and Judgment No. UNDT/2016/021 is vacated, with the exception of its findings of non-receivability in paragraphs 61 and 68(d) of the Judgment.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar