



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

Judgment No. 2016-UNAT-708

**Finniss
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge Richard Lussick
Judge John Murphy

Case No.: 2016-943

Date: 28 October 2016

Registrar: Weicheng Lin

Counsel for Mr. Finniss: Anna Paula Silfverstolpe

Counsel for Secretary-General: Wambui Mwangi

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 116 (GVA/2016), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 8 June 2016, in the case of *Finniss v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 28 June 2016, and Mr. James Finniss filed his answer on 14 July 2016.

Facts and Procedure

2. The following facts are uncontested:¹

... [Mr. Finniss] started service with the United Nations at [the Investigations Division, Office of Internal Oversight Services (ID/OIOS)] in November 2004, and, after several assignments, he was promoted to his current post as Deputy Director (D-1), ID/OIOS, Vienna, on 1 August 2013.

...

... From 31 December 2015 to 28 February 2016, the post of Director, ID/OIOS was advertised under Job Opening No. 15-ING-OIOS-51498-D-NEW YORK (G). [Mr. Finniss] applied for it and was interviewed, together with other candidates.

...

... On 1 June 2016, the Executive Office of the Secretary-General informed OIOS of the Secretary-General's decision to select the Deputy Director, ID/OIOS, Nairobi, for the position at stake.

... The USG/OIOS called [Mr. Finniss] on 2 June 2016 to inform him about the Secretary-General's decision.

... [Mr. Finniss] sought management evaluation on 3 June 2016, and filed a request for suspension of action with the [Dispute] Tribunal on the same day. The application for suspension of action was served on the [Secretary-General] on the same day, who filed his reply on 7 June 2016.

3. On 8 June 2016, the UNDT issued the impugned Order, suspending the selection decision pending management evaluation pursuant to Article 2(2) of the Statute of the Dispute Tribunal (UNDT Statute). As a preliminary matter, the UNDT found that the contested selection decision had not been implemented and the application for suspension of action was

¹ Impugned Order, paras. 2-10.

thus receivable. In making this determination, the UNDT distinguished between internal and external candidates, noting that:²

... Despite different jurisprudential approaches with respect to the determination of the proper date of the implementation of a selection decision [...], there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of an offer of appointment [...]. However, the [UNDT] finds that such a procedure is reserved for selection decisions involving an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

... With respect to selection procedures that entail promotion of internal candidates, like in the present case, the [UNDT] recalls that [Section 10(2)] of [Administrative Instruction] ST/AI/2010/3 [dated 21 April 2010 titled "Staff selection system"] clearly states that:

When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision.

... It follows from this provision that the implementation of the contested selection decision, which was taken on 2 June 2016, cannot be implemented before 1 July 2016. Therefore, the contested decision has not yet been implemented, and the application for suspension of action is receivable.

4. On 28 June 2016, the Secretary-General appealed. On 14 July 2016, the same day Mr. Finniss filed his answer, the Management Evaluation Unit responded to Mr. Finniss' request for management evaluation of 3 June 2016; he was informed that the Administration's decision would be upheld.

5. On 25 July 2016, the Secretary-General filed a "Motion for Consideration" requesting that the Appeals Tribunal "determine that this matter falls within the exception to the mootness doctrine, and exercise [...] its discretion to review the issues raised in the [a]ppel in order to provide the Organization and the UNDT with guidance".

6. On 4 August, Mr. Finniss filed his comments on the "Motion for Consideration" requesting that the Secretary-General's appeal be dismissed.

² *Ibid.*, paras. 15-17.

Submissions

The Secretary-General's Appeal

7. The appeal is receivable because the UNDT exceeded its jurisdiction and competence when it suspended a selection decision (i) in a case of promotion notwithstanding the prohibition set forth in Article 10(2) of the UNDT Statute and (ii) because, contrary to the UNDT's erroneous finding, the selection decision had already been implemented.

8. The subject matter of the suspended decision was a promotion, falling within the purview of Article 10(2) of the UNDT Statute. It was thus non-receivable *ratione materiae* and legally impermissible for the UNDT to adjudicate the matter. The UNDT failed to consider the limitations to its competence. The prohibition as contained in Article 10(2) of the UNDT Statute recognizes that decisions on, *inter alia*, the promotion of staff members are not subject to suspension by the UNDT at any stage in the proceedings. Suspending promotion decisions negatively impacts the Organization's functioning and also puts it at risk of defending claims by selected candidates for failure to effect the promotion on the statutorily determined date.

9. The UNDT erroneously relied on Section 10(2) of ST/AI/2010/3 when determining whether the contested decision had been implemented. That provision identifies the earliest possible effective date of a promotion and does not change the implementation date, which corresponds to the date the Administration receives an unconditional acceptance of the offer (in this case, 2 June 2016, via telephone with the selected candidate who accepted the same day). The UNDT's reasoning is flawed and means that selection decisions would not be "implemented" until the future date upon which the selected candidate assumes the position, resulting in the suspension of any appointment/promotion decision and adversely impacting the Organization.

10. In reaching its decision in this regard, the UNDT also erred when it held that the determination of the implementation date of a selection decision differs between internal and external candidates. This holding is not supported by the legal framework or jurisprudence.

11. The Secretary-General requests that the Appeals Tribunal find the appeal receivable, review it on an expedited basis, find that the UNDT exceeded its competence and jurisdiction under both Articles 2(2) and 10(2) of its Statute and annul the impugned Order.

Mr. Finniss' Answer

12. The appeal is not receivable because the Secretary-General has failed to demonstrate that the UNDT exceeded its competence or jurisdiction.

13. The Secretary-General misrepresents the scope of Article 2(2) of the UNDT Statute to allege an excess of jurisdiction which does not exist. The argument that Article 10(2) of the UNDT Statute somehow modulates the meaning of Article 2(2) is without merit. The two provisions have different purposes, and the fact that the General Assembly did not include in Article 2(2) a limitation in cases of appointment, promotion or termination signals that no such limitation was intended pending management evaluation.

14. As the Secretary-General himself has argued in other cases, disagreement with the reasoning of the UNDT's determination of the implementation date of the contested decision goes to the merits and thus does not constitute a proper basis for appeal of a suspension of action order. In any event, the Secretary-General's argument that the contested decision was implemented on 2 June 2016 is without merit. No records have been submitted that a formal offer was made and accepted on that date and nothing in the pleadings suggests the telephone conversation relied upon by the Secretary-General would give rise to an enforceable contract.

15. To annul the suspension decision would make a mockery out of Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules of Procedure, which were designed to create a *status quo* between the parties pending management evaluation. It would also severely undermine the UNDT's statutory authority to issue interim actions pending management evaluation.

16. Mr. Finniss requests that the Appeals Tribunal dismiss the Secretary-General's appeal.

The Secretary-General's "Motion for Consideration"

17. Even though management evaluation has been concluded and the UNDT's suspension Order is consequently dissolved, the UNDT's "illegitimate Order" threatens the proper administration of similar selection exercises in the future. The Secretary-General requests that the Appeals Tribunal (i) determine that this case falls within the exception to the mootness

doctrine recognized by many jurisdictions,³ and (ii) exercise its discretion to review the issues raised on appeal in order to provide the Organization and the UNDT with guidance on the fundamental issues of law concerning the UNDT's jurisdiction *ratione materiae*.

18. An exception to the mootness doctrine exists where there is a significant public interest in settling issues of law, particularly in disputes capable of repetition while evading review. This appeal (i) concerns the finality of selection decisions that are of significant importance to the Organization; (ii) raises issues that require judicial review yet which are unlikely to come before the Appeals Tribunal again in the near future (because of the short window for appeal during which a selection process decision is subject to management evaluation); and (iii) raises issues likely to arise again for both the Organization and the UNDT as they involve staff selection.

19. Without intervention by the Appeals Tribunal, the UNDT's (i) error in not recognizing the prohibition under Article 10(2) of the UNDT Statute on suspending a selection decision involving appointment, promotion or termination even during the pendency of management evaluation and (ii) erroneous application of Section 10.2 of ST/AI/2010/3 will remain valid law. Pronouncement by the Appeals Tribunal on the issues raised in this appeal will eliminate unnecessary litigation.

Mr. Finniss' Comments on the "Motion for Consideration"

20. The Secretary-General's motion is moot and thus not receivable. It is established jurisprudence that the Appeals Tribunal does not give interpretations of the law absent a dispute before it. There is no such concept as an "exception to the mootness doctrine" within the United Nations administration of justice system, and the jurisprudence cited by the Secretary-General is not binding upon the Appeals Tribunal.

21. The Secretary-General's reasoning is also internally contradictory. On the one hand, he asserts that the probability of repetition of cases such as this one is high because the issues raised impact staff selection; and, on the other hand, he claims that judicial review is not likely to occur in the near future because of the short window for appeal before the issues become moot.

³ The Secretary-General cites cases from the United States (U.S.) and the United Kingdom, *inter alia* the U.S. Supreme Court case *Turner v. Rogers*, 564 U.S. 431 (2011) in support of his contention.

Considerations

22. In the present case, the UNDT, by the impugned Order, suspended the implementation of the selection decision for the post of Director, ID/OIOS, pending management evaluation. On 14 July 2016, the management evaluation of the underlying selection decision was adopted, concluding that the contested decision would be upheld.

23. This Tribunal has consistently held that in the United Nations system of administration of justice, the Appeals Tribunal was established to pass judgment on existing disputes, but not to give interpretations of the law where there are no cases before it.⁴

24. The impugned Order ceased to have any legal effect when the respective management evaluation was issued.⁵ The issuance of the management evaluation has thus rendered the Order under appeal moot. As a consequence, there is no live issue before this Tribunal, on which it is competent to pass judgment in terms of Articles 2 and 7 of its Statute.

25. It must be pointed out that the present case revolves around a different issue than the case of *Saffir and Ginivan*⁶ quoted by the Secretary-General in his “Motion for Consideration” on the merits. In the case at bar, the critical issue is whether the UNDT Order can still be appealed although it is deprived of any legal effect. By contrast, in *Saffir and Ginivan*, the main issue was whether an appeal could be receivable when filed by a prevailing party who simply disagrees with the reasoning of the judgment or with all or part of its motivation or the rejection of certain or all of the arguments submitted by him/her. Hence, the Appellant’s motion seeking consideration of the merits is rejected.

26. In view of the foregoing, the Appeals Tribunal holds that the present appeal has become moot and it therefore dismisses the appeal in its entirety.

Judgment

27. The appeal is dismissed.

⁴ *Rawat v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-223, para. 28; *Warintarawat v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-208, para. 10.

⁵ See also *Wilson v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-710, para. 28.

⁶ *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466.

Original and Authoritative Version: English

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

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

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

(Signed)

Weicheng Lin, Registrar