



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

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Judgment No. 2016-UNAT-709

**Wilson  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2016-944
Date:	28 October 2016
Registrar:	Weicheng Lin

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

**JUDGE DEBORAH THOMAS-FELIX, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 147 (NY/2016), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 20 June 2016, in the case of *Wilson v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 1 July 2016, and Mr. Anthony K. Wilson filed his answer on 18 July 2016.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... On 15 June 2016, [Mr. Wilson] filed an application seeking suspension, pending management evaluation, of the “selection decision for Chief, Information Management Systems Service, D-1 [level], United Nations Joint Staff Pension Fund [UNJSPF]”. [Mr. Wilson] is presently employed as Chief (D-1 level), Financial Information Operations Service, Office of Programme Planning, Budget and Accounts, (“OPPBA”), Department of Management.

...

... On 27 May 2016, the selected candidate—a P-5 level staff member with the Office of Internal Oversight Services (“OIOS”)—was notified by email of his selection. On the same day, the selected candidate replied to the selection notification, also by email, stating that he was “happy to confirm [his] interest and availability for this position”.

... On 31 May 2016, UNJSPF sent an email to OIOS requesting the release of the selected candidate for transfer to UNJSPF. On the same date, the OIOS Executive Office confirmed, by email, the release and approved the transfer of the selected candidate effective 30 June 2016.

... On 3 June 2016, [Mr. Wilson] received an email from Inspira announcing the selection of the rostered P-5 level staff member.

... Also on 3 June 2016, an email was circulated to UNJSPF staff on behalf of the [Chief Executive Officer (CEO)] of UNJSPF, announcing the selection of the new Chief of the Information Management Systems Service.

... On 7 June 2016, [Mr. Wilson] submitted a request for management evaluation of the decision ...

... As of the date of the [Secretary-General’s] reply, the management evaluation of [Mr. Wilson]’s request [remained] pending.

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<sup>1</sup> Impugned Order, paras. 1 and 12-17.

3. On 15 June 2016, the same day Mr. Wilson filed his application for suspension of the contested decision with the UNDT, he filed a motion for production of evidence, seeking an extensive disclosure of records in relation to his claims. The Secretary-General opposed the motion on the ground of relevance.

4. On 20 June 2016, the UNDT issued Order No. 147 (NY/2016), suspending the selection decision pending management evaluation after finding that the cumulative tests of Article 2(2) of the UNDT Statute had been met. As a preliminary matter, the UNDT determined that the contested selection decision had not yet been implemented and Mr. Wilson's application for suspension was thus receivable. In making this determination, the UNDT noted that "whilst the selected candidate's email of 27 May 2016 confirms his continued interest and availability, no records have been tendered or indeed any submission made that a formal offer ha[d] been made to the selected candidate or that he ha[d] accepted any such offer".<sup>2</sup> It further noted that the case involved a promotion of an internal candidate and, following earlier UNDT cases, held that although the contested decision had been communicated on 3 June 2016, it could not be implemented until 1 July 2016, as per Section 10.2 of Administrative Instruction ST/AI/2010/3 dated 21 April 2010 entitled "Staff selection system".<sup>3</sup> In its Order, the UNDT also rejected Mr. Wilson's motion for production of evidence, finding it not necessary and taking into account the urgent nature of proceedings for suspension of action.<sup>4</sup>

5. As noted above, on 1 July 2016, the Secretary-General appealed and, on 18 July 2016, Mr. Wilson answered.

6. On 30 August 2016, the Management Evaluation Unit (MEU) responded to Mr. Wilson's request of 7 June 2016 and informed him that the contested decision had been rescinded.

7. On 8 September 2016, the Secretary-General filed a "Motion for Consideration", requesting the Appeals Tribunal to consider and pronounce on the merits of the appeal even though "[t]he issuance of the management evaluation ... renders the Order under [a]ppeal moot".

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<sup>2</sup> *Ibid.*, para. 30.

<sup>3</sup> *Ibid.*, paras. 27-33.

<sup>4</sup> *Ibid.*, paras. 54-56.

8. On 17 September 2016, Mr. Wilson filed his comments on the “Motion for Consideration”, requesting that the Appeals Tribunal dismiss the Secretary-General’s appeal.

9. On 19 September, the Registry of the Appeals Tribunal informed the parties that the “Motion for Consideration” had been added to the appeal’s case file and that it would be considered by the Appeals Tribunal together with the appeal.

### **Submissions**

#### **The Secretary-General’s Appeal**

10. The appeal is receivable because the UNDT clearly 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 its erroneous finding, the selection decision had already been implemented.

11. Articles 2(2) and 10(2) of the UNDT Statute govern suspensions of action by the UNDT. The former provides the general power and jurisdiction to suspend an administrative decision pending management evaluation. The latter is broader in temporal scope but narrower in application, prohibiting the suspension of decisions pertaining to appointments, promotions or terminations “[a]t any time during the proceedings”. The UNDT failed to acknowledge the limitations of its jurisdiction when not considering the applicability of Article 10(2) of the UNDT Statute whatsoever. Because the case involved a promotion, the application to suspend the decision was non-receivable *ratione materiae*.

12. The UNDT erroneously determined that the selection decision had not yet been implemented. It reasoned that, pursuant to Section 10.2 of the ST/AI/2010/3, the decision could not be implemented before 1 July 2016. This was incorrect. The contested decision was implemented on 27 May 2016, when the successful candidate accepted the offer. The fact that the promotion was effective from the “first day of the month following the decision” does not change the implementation date.

13. The UNDT’s reasoning is a significant departure from the applicable legal framework and jurisprudence. If the UNDT were permitted to suspend appointment/promotion decisions, this would negatively impact the operational effectiveness of the Organization and the rights of staff members. It would not be possible to complete a selection process pending management

evaluation, and the Organization would risk defending a claim for its failure to effect a selected candidate's promotion, which the candidate accepted, on the statutorily-determined date.

14. 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 Article 2(2) and Article 10(2) of the UNDT Statute and annul the impugned Order.

**Mr. Wilson's Answer**

15. Nothing in this case or in the Secretary-General's appeal supports the contention that the UNDT "clearly" exceeded its competence. Article 2(2) of the UNDT Statute and Article 13(4) of the UNDT Rules of Procedure provide that the UNDT is competent to hear and suspend any contested administrative decision subject to an ongoing management evaluation and that such matters "shall not be subject to appeal". Neither provision excludes cases of appointment, promotion or termination, which may thus be suspended during the pendency of management evaluation.

16. The argument that Article 10(2) modifies Article 2(2) of the UNDT Statute is without merit. These provisions have different scopes intentionally, with the goal of eliminating long suspensions while awaiting a judgment on the merits. The cases cited by the Secretary-General are cases where the UNDT clearly exceeded its competence. This is not the case here where a management evaluation request was timely filed, the UNDT found the cumulative requirements of Article 2(2) were met, and the suspension was ordered pending the management evaluation, not beyond it.

17. Nor is there any error by the UNDT with respect to its finding that 1 July 2016 was the date of implementation, pursuant to Section 10(2) of ST/AI/2010/3. The UNDT has taken the same position in other cases, which have not been appealed by the Secretary-General.

18. The Secretary-General seeks to uphold an unlawful decision by appealing a suspension of action order, opting to pay compensation when rescission is ordered. This does not speak well of the Administration's use of the Organization's justice system and resources. Without enforcement of accountability, combined with (if the appeal succeeds) the potential inability to review selection decisions before they are implemented, creates an environment where there is little or no incentive for managers to abide by the rules and regulations of the Organization.

19. Mr. Wilson requests that the Appeals Tribunal dismiss the appeal in its entirety.

**The Secretary-General’s “Motion for Consideration”**

20. Even though the appeal has been rendered moot by the issuance of the management evaluation, 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<sup>5</sup>, 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* which significantly impacts the Organization’s staff selection process.

21. 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 pending management evaluation); and (iii) raises issues that are likely to arise again for both the Organization and the UNDT.

22. There is inconsistency in the applicable jurisprudence. Without intervention by the Appeals Tribunal, the UNDT’s erroneous interpretation of Section 10.2 of ST/AI /2010/3 will remain valid law. Selection decisions would thus not be considered implemented until the future date upon which the selected candidate assumes his or her functions. This rationale is flawed and could result in the suspension of any selection decision involving appointment or promotion (even lateral appointments, if the UNDT were to employ its rationale in such cases) adversely impacting the Organization’s effectiveness and exposing it to claims from selected candidates.

**Mr. Wilson’s Comments on the “Motion for Consideration”**

23. The Secretary-General’s motion is moot and thus not receivable. There is no live issue before the Appeals Tribunal requiring it to pass judgment. 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

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<sup>5</sup> 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.

administration of justice system, and the jurisprudence cited by the Secretary-General is not binding upon the Appeals Tribunal.

24. Even assuming the Appeals Tribunal could exercise jurisdiction, the Secretary-General has not put forward any compelling reason or “public interest” for an exception. The argument that these issues have a significant impact on the staff selection process is unfounded. It is far more important to the justice system that decisions are carried out properly than rushed through without oversight. The purpose of a suspension of action under Article 2(2) of the UNDT Statute was fulfilled in this case where, because of it, the Secretary-General could review the contested decision. This resulted in its rescission and the assessment process being remanded to a new assessment panel, thereby removing the need to issue any payment of compensation.

### **Considerations**

25. On 30 August 2016, the MEU responded to Mr. Wilson’s request for management evaluation of 7 June 2016 and informed him that the contested decision had been rescinded. As a result, there is no live issue before the Appeals Tribunal requiring it to pass judgment. Therefore, there is no need to rule on the question of whether execution of a jurisdictional decision of the UNDT is imperative if it is appealed. This Tribunal has consistently held that in the United Nations system of administration of justice, the Appeals Tribunal was established to adjudicate on existing disputes, but not to give interpretations of the law where there are no cases before it.<sup>6</sup>

26. The impugned Order ceased to have any legal effect when the respective management evaluation was issued.<sup>7</sup> 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.

27. It is our finding that this case would not fall within the category of exceptions to the mootness doctrine even if such exceptions were to be accepted. Consequently, the Secretary-General’s motion seeking a review on the merits is rejected.

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<sup>6</sup> *Rawat v. United Nations 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.

<sup>7</sup> See also *Finniss v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-708, para. 25.

**Judgment**

28. The appeal is dismissed.



Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of October 2016 in New York, United States.

*(Signed)*

Judge Thomas-Felix,  
Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Knierim

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

*(Signed)*

Weicheng Lin, Registrar