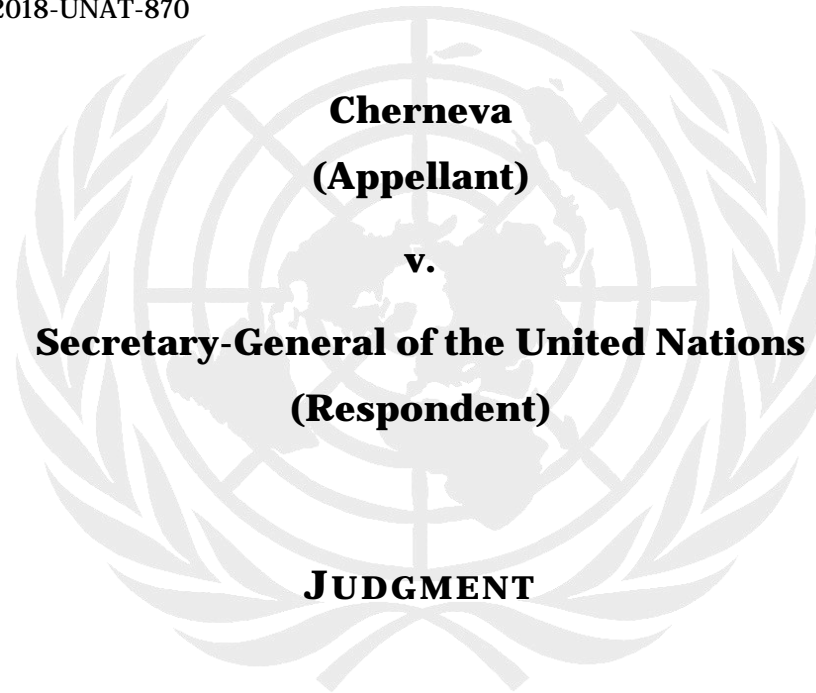




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2018-UNAT-870



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Before:	Judge Dimitrios Raikos, Presiding Judge John Murphy Judge Deborah Thomas-Felix
Case No.:	2018-1162
Date:	26 October 2018
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-represented
Counsel for Respondent:	John Stompor

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/040, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 20 March 2018, in the case of *Applicant v. Secretary-General of the United Nations*. Ms. Iveta Cherneva filed the appeal on 25 March 2018, and the Secretary-General filed his answer on 25 May 2018.

**Facts and Procedure**

2. In October 2016, Ms. Cherneva commenced service as a Corporate Research Officer (P-2) with the Private Fundraising and Partnerships Division (PFP), United Nations Children's Fund (UNICEF), under a two-year fixed-term contract.

3. On 8 April 2017, Ms. Cherneva wrote an e-mail to, *inter alia*, the Human Resources Manager and the Human Resources Learning and Development Specialist within PFP regarding a "situation" with her first reporting officer. On 10 April 2017, the Learning and Development Specialist responded to Ms. Cherneva's e-mail, suggesting a meeting between Ms. Cherneva and her first reporting officer. The meeting took place shortly thereafter.

4. On 17 May 2017, Ms. Cherneva went on certified sick leave (CSL) with full pay. Effective 9 August 2017, and following exhaustion of her entitlement to CSL with full pay, Ms. Cherneva was placed on CSL with half pay, combined with half annual leave so that she could continue to be on full pay status.

5. Upon exhaustion of her annual leave balance, Ms. Cherneva was placed on CSL with half pay effective 24 August 2017. However, she was erroneously paid full salary from 25 August 2017 until 30 September 2017.

6. On 9 September 2017, Ms. Cherneva submitted to UNICEF's Ethics Office a request for whistle-blower protection, alleging that her e-mail of 8 April 2017 constituted a protected activity requiring protection from retaliation and noting that her health situation was at least partly due to some actions of her supervisors after she had sent the said e-mail. Subsequently, there were several communications between Ms. Cherneva and the Ethics Advisor, UNICEF, in which the latter requested additional information to substantiate Ms. Cherneva's request for such protection. The Ethics Advisor informed

Ms. Cherneva that in the absence of any further information from Ms. Cherneva, she would complete the preliminary review by early December.

7. By e-mail dated 17 October 2017, the Chief, Human Resources, PFP (Chief HR), informed Ms. Cherneva that her entitlement to CSL with half pay would be exhausted on 8 November 2017, and that based on her leave use she would be placed on special leave without pay (SLWOP) effective 9 November 2017.

8. On 15 November 2017, the Chief HR discussed with Ms. Cherneva the option of submitting her case to the United Nations Medical Director and to the United Nations Staff Pension Committee for consideration for medical termination and disability benefits from the United Nations Joint Staff Pension Fund. Ms. Cherneva declined that option. The Chief HR also informed Ms. Cherneva that her health insurance coverage would expire in light of her being on SLWOP.

9. On 5 December 2017, Ms. Cherneva requested management evaluation of a) the decision to place her on SLWOP, effective 9 November 2017; and (b) the situation in which “one month and a half after the deadline” for the Ethics Office to make a determination on her request for whistle-blower protection, she had not received the determination.

10. On 6 December 2017, the Principal Adviser, Ethics, informed Ms. Cherneva of the UNICEF Ethics Office’s determination that a *prima facie* case of retaliation against her had not been established and expressed her regret for the delay which she noted was partly due to the lack of response from Ms. Cherneva to the UNICEF Ethics Office’s requests for follow-up information and clarifications.

11. On 12 December 2017, the UNDT issued Order No. 250 (GVA/2017). The UNDT found that the Administration should have submitted Ms. Cherneva’s case to the UN Medical Director for a medical determination as to whether she could be considered for a disability benefit, independently of her consent. The UNDT further found that the Administration’s mistaken belief that Ms. Cherneva’s consent was required to refer her case to the UN Medical Director led to the decision to place her on SLWOP upon the exhaustion of her sick leave entitlements, and therefore held that, under these circumstances, the Administration was obliged to place Ms. Cherneva on special leave with half pay pending the medical determination. On 21 December 2017, the Human Resources Manager, PFP,

informed Ms. Cherneva that, in view of the above-referenced UNDT Order, she was being placed on special leave with half pay and was being retroactively granted special leave with half pay from the time of the exhaustion of her sick leave entitlements.

12. On 13 December 2017, Ms. Cherneva requested the Chairperson of the Ethics Panel of the United Nations to review the UNICEF Ethics Office's determination that there was no *prima facie* case of retaliation against Ms. Cherneva. On 16 February 2018, the Chairperson of the Ethics Panel informed Ms. Cherneva that she agreed with the UNICEF Ethics Office's determination.

13. On 12 January 2018, UNICEF's Deputy Executive Director for Management informed Ms. Cherneva of the outcome of the management evaluation, noting a) the placement on special leave with half pay effective 21 December 2017 and the retroactive grant of special leave with half pay from the time of the exhaustion of her sick leave entitlements were in compliance with Order No. 250 (GVA/2017); and that b) her complaint of non-receipt of a response from the Ethics Office was not only moot but also that management evaluation was not the right mechanism to challenge it.

14. On 19 January 2018, Ms. Cherneva filed an application with the UNDT, contesting UNICEF's claim that a) placing her on special leave without pay in October 2017 was an administrative error; b) the UNICEF Ethics Office's decision on her case was delayed due to her fault and that such delay did not prejudice the outcome of the review by the Ethics Office; and c) her complaint of 8 April 2017 raised workplace issues (including performance, attendance, communication and administration issues) rather than violations of her rights and breaches of UNICEF rules.

15. The UNDT rendered its Judgment on 20 March 2018, rejecting Ms. Cherneva's application in its entirety. It considered that since the decision to place Ms. Cherneva on SLWOP had been rescinded, following Order No. 250 (GVA/2017), the matter was moot. The UNDT found that the assessment and findings made by the UNICEF Ethics Office on Ms. Cherneva's request for whistle-blower protection could not be subject to judicial review since it was not an administrative decision, and, as a consequence, it could not examine the delays that occurred in the framework of that assessment. With respect to Ms. Cherneva's challenge of the management evaluation's finding that her complaint of 8 April 2017 raised workplace issues rather than violations of her rights, the UNDT concluded that this part

of the application was not receivable *ratione materiae* since it could not identify any administrative decision subject to judicial review.

### **Submissions**

#### **Ms. Cherneva's Appeal**

16. Ms. Cherneva submits that the UNDT improperly determined that the Administration's decision to place her on SLWOP was due to an administrative error. Ms. Cherneva claims that the unlawful decision to place her on SLWOP was a matter of a purposeful retaliatory act and she had contested, before the UNDT, the Administration's claim that placing her on SLWOP was an administrative error. As such, the UNDT should have examined the "administrative error" aspect in the consideration of the merits. The UNDT committed an error of legal reasoning by omitting to examine the Administration's motives behind placing her on SLWOP and by presenting the disputed claim as an established fact in paragraph 8 of its Judgment.

17. Ms. Cherneva further submits that the Administration, by placing her on SLWOP illegally, had intended to "push [her] towards resigning...with the motive to cover up the informal investigations [] it [had] carried out against [her] for almost one year", which involved illegally wiretapping her apartment. Almost two months had passed between when Ms. Cherneva was notified of the decision to place her on SLWOP and the UNDT's Order No. 250 finding that she should have been granted special leave with half pay. Had the decision to place her on SLWOP been simply an administrative error, the Administration would have corrected the course of action and her case would have been correctly forwarded to the UN Medical Doctor for determination. The fact that the situation had remained unchanged until after the UNDT issued its Order signals that placing her on SLWOP could not have been an administrative error.

18. Ms. Cherneva requests financial compensation, within a range deemed reasonable by the Appeals Tribunal, for moral and reputational damages, as well as damages related to missed professional opportunities, health, and violations of rights and privacy.

**The Secretary-General's Answer**

19. The Secretary-General contends that Ms. Cherneva has failed to establish that the UNDT made any error warranting a reversal of its dismissal of her application.

20. The Secretary-General submits that the UNDT correctly found that Ms. Cherneva's claims regarding her placement on SLWOP were moot since the Administration's decision to place Ms. Cherneva on SLWOP was subsequently rescinded. Specifically, following the issuance of Order No. 250, the Administration promptly placed Ms. Cherneva on special leave with half pay and retroactively granted her special leave with half pay from the time of the exhaustion of her sick leave entitlements.

21. In response to Ms. Cherneva's assertion that the UNDT "improperly decided" that her placement on SLWOP "was due to an administrative error by UNICEF" and that the UNDT should have found that her placement on SLWOP was "a purposeful act", the Secretary-General submits that there is no evidence on the record of any unlawful motives in the administrative decision to place Ms. Cherneva on SLWOP. As Ms. Cherneva's sick leave entitlements were expiring, Human Resources officials of UNICEF presented to her the option of submitting a claim for disability benefits. It was understood at the time that consenting to this option would have triggered Ms. Cherneva's placement on special leave with half pay. However, Ms. Cherneva did not provide her consent.

22. The Secretary-General contends that the UNDT correctly found that Ms. Cherneva's claims regarding the UNICEF Ethics Office's review of her request for whistle-blower protection were not receivable. The Appeals Tribunal has held that recommendations by an ethics office are not administrative decisions subject to judicial review. Therefore, a determination of no *prima facie* case of retaliation that comes at an earlier stage in an ethics office's process of consideration of a request for whistle-blower protection should similarly not be subject to judicial review. Relatedly, a delay in the issuance of an ethics office's determination should also not be subject to judicial review.

23. Moreover, the proper forum for the review of the UNICEF Ethics Office's determination of no *prima facie* case of retaliation was the Chairperson of the Ethics Panel of the United Nations, and, upon Ms. Cherneva's request for review of that determination, the Chairperson informed Ms. Cherneva that she agreed with the UNICEF Ethic Office's

determination and confirmed that the delay in Ms. Cherneva's case did not nullify the UNICEF Ethics Office's determination.

24. The Secretary-General maintains that the UNDT correctly found that Ms. Cherneva's contestation of the management evaluation's finding that her complaint of 8 April 2017 raised workplace issues rather than violations of her rights was not receivable *ratione materiae* since such statement was not a separate administrative decision subject to judicial review. The Appeals Tribunal has held that a response to a request for a management evaluation was not an administrative decision that was subject to judicial review.

25. In view of the foregoing, the Secretary-General requests the Appeals Tribunal to affirm the Judgment and to dismiss Ms. Cherneva's appeal in its entirety.

### **Considerations**

#### *Preliminary issue*

26. As a preliminary matter, Ms. Cherneva made an application for an oral hearing before the Appeals Tribunal. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. In these circumstances, the request for an oral hearing is denied.

#### *Merits*

27. The issue under appeal is whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it found that the decision of 17 October 2017 to place Ms. Cherneva on SLWOP, effective 9 November 2017, was rescinded and therefore this matter was moot.

28. There is no contention about the UNDT's finding that the assessment and finding made by the UNICEF Ethics Office with respect to Ms. Cherneva's request for protection from retaliation was not subject to judicial review, and that the same applied to the examination of delays, if any, that occurred in the framework of that assessment. Nor does

Ms. Cherneva contest the UNDT's holding that Ms. Cherneva's application, so far as it concerned the finding by the management evaluation that her complaint of 8 April 2017 raised workplace issues rather than violations of her rights and breaches of UNICEF rules, was not receivable *ratione materiae* since such statement was not a separate administrative decision subject to judicial review.

29. Article 2(1) of our Statute provides that the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in which it is asserted that the Dispute Tribunal has: (a) exceeded its jurisdiction or competence; (b) failed to exercise the jurisdiction vested in it; (c) erred on a question of law; (d) committed an error of procedure, such as to affect the decision of the case; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision.

30. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.<sup>1</sup>

31. On appeal, Ms. Cherneva appears to be restating the claims which she made before the UNDT. She has not identified any of the above grounds in her appeal and has failed to demonstrate that the UNDT committed any error of fact or law in arriving at its decision.

32. Moreover, we have reviewed the UNDT Judgment and find that Ms. Cherneva's case was fully and fairly considered; we can find no error of law or fact in its decision.

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<sup>1</sup> *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15 and citations therein; *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.



33. We agree with the UNDT and uphold its findings that since the decision to place Ms. Cherneva on SLWOP was rescinded, following Order No. 250 (GVA/2017), the matter was moot.

34. It is true that, in the course of her appeal submissions, Ms. Cherneva does not literally take issue with the Dispute Tribunal's finding on the mootness. Inasmuch as it can be gleaned from her submissions on appeal to this Tribunal, and as stated above, Ms. Cherneva takes issue with the Dispute Tribunal's legal reasoning and its alleged failure to examine the Administration's motives behind placing her on SLWOP.

35. Specifically, she maintains that the UNDT erred in determining that the Administration's decision to place her on SLWOP was due to an administrative error, while it was a purposeful retaliatory act intended to "push [her] towards resigning...with the motive to cover up the informal investigations [] it [had] carried out against [her] for almost one year", which involved illegally wiretapping her apartment. She argues that the UNDT did not "respect [her] request to look into the motives behind the unlawful administrative decision, overlooked [her] argument that the motives are not irrelevant, and that overlooking motives might lead to more unlawful decisions against [her] in the future". Therefore, she asks the Appeals Tribunal to review the mootness holding of the UNDT (under paragraph 26 of the impugned Judgement), against the background of her claim for review of motives.

36. We note that the Administration, after realizing that it did not require Ms. Cherneva's consent to submit her situation to the UN Medical Director for determination, following the issuance of UNDT Order No. 250 (GVA/2017), rescinded the administrative decision to place Ms. Cherneva on SLWOP, and granted her instead special leave with half pay, thereby rendering moot the relevant part of Ms. Cherneva's application, as correctly found by the UNDT. Hence, because the litigation lacked subject matter in this respect and the UNDT had no competence and jurisdiction to make any factual findings and reach any legal conclusions on the merits of Ms. Cherneva's claims, her assertions directed at the correctness of the UNDT legal reasoning as well as its findings and conclusions regarding the motives of the impugned administrative decision cannot be the basis of an appeal. Thus, Ms. Cherneva's challenges to the legal reasoning of the UNDT's rulings must be dismissed.

37. At any rate, the Administration's misinterpretation of the existing legal framework (mistaken belief) that it needed Ms. Cherneva's consent to refer the case to the UN Medical Director for determination, which led to the decision to place her on SLWOP upon the exhaustion of her paid leave entitlements, without such a determination being made, and its failure to act timely under section 29 of DHR/Procedure/2017/006 (UNICEF procedure on sick leave),<sup>2</sup> regrettable though they are, do not *eo ipso* substantiate her allegations of the abovementioned improper motives on the part of the Administration. Nor is there any such evidence on record to support Ms. Cherneva's said allegations.

38. On the contrary, the facts of the instant case demonstrate that, as Ms. Cherneva's sick leave entitlements were expiring, Human Resources officials of UNICEF presented to her the option of submitting a claim for disability benefits. In this respect, we take note of the Secretary-General's argument that, "it was understood that consenting to this option would have triggered Ms. Cherneva's placement on special leave with half pay". In addition, following the issuance of the UNDT Order No. 250 (which stated that the Administration should have automatically submitted Ms. Cherneva's case for consideration to the UN Medical Director once she exhausted her sick leave with full pay, notwithstanding her rejection of such submission), the Administration promptly moved to place Ms. Cherneva on special leave with half pay and retroactively granted her special leave with half pay from the time of the exhaustion of her sick leave entitlements, thereby leaving no room for further contestation of this issue.

39. Our conclusion that the UNDT did not make any errors of law or fact in dismissing Ms. Cherneva's challenge of the decision of 17 October 2017 to place her on SLWOP, effective 9 November 2017, precludes Ms. Cherneva from seeking compensation. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".<sup>3</sup>

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<sup>2</sup> UNDT Order No. 250 (GVA/2017), paras. 20 and 24.

<sup>3</sup> *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.

40. Accordingly, the appeal fails.

**Judgment**

41. The appeal is dismissed and Judgment No. UNDT/2018/040 is hereby affirmed.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of October 2018 in New York, United States.

*(Signed)*

Judge Raikos, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Thomas-Felix

Entered in the Register on this 20<sup>th</sup> day of December 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar