



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

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Judgment No. 2021-UNAT-1155

**Florin C. Postica  
(Appellant)**

**v.**

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

**Judgment**

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**Before:** Judge Sabine Knierim, Presiding  
Judge Graeme Colgan  
Judge John Raymond Murphy

**Case No.:** 2021-1514

**Date:** 29 October 2021

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Government Accountability Project, Inc., Thad Guyer, Esq., Samantha Feinstein, Esq. and Alain G. Norman, Esq.

**Counsel for Respondent:** André Luiz Pereira de Oliveira

**JUDGE SABINE KNIERIM, PRESIDING.**

1. Mr. Florin C. Postica appeals Judgment on Receivability No. UNDT/2020/197 in which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed his two applications challenging (a) the decision taken by the Office of Internal Oversight Services (OIOS) to propose to the General Assembly the redeployment of his post of Senior Investigator (P-5) from New York to Nairobi; and (b) the decisions to move his post to Nairobi, to require his involuntary transfer from New York to Nairobi or suffer loss of his position in OIOS, and the failure by OIOS to implement in a timely way the Medical Service's written decision notifying OIOS that Mr. Postica had not been medically certified for transfer to Nairobi.
2. For the reasons set out below, we dismiss the appeal.

**Facts and Procedure**

3. On 19 November 2019, Mr. Postica filed an application before the UNDT contesting "the decision taken by OIOS to propose the 'redeployment of one post of Senior Investigator (P-5) from the New York Investigations Office to the Nairobi Investigations Office to serve as Chief of Office, in view of the increasing workload and the need to strengthen the management of that office', which was included in the OIOS [p]roposed program budget for 2020".
4. On 27 December 2019, the General Assembly approved the OIOS budget including the redeployment of Mr. Postica's post from New York to Nairobi.<sup>1</sup>
5. On 11 February 2020, OIOS notified Mr. Postica that the request to transfer the post he was encumbering to Nairobi had been approved by the General Assembly. Accordingly, he was informed that he was expected to report for duty in Nairobi as soon as he obtained his medical clearance but no later than 1 July 2020.
6. On 18 May 2020, the Officer-in-Charge of the Joint Medical Service in Nairobi informed OIOS that Mr. Postica had not been medically cleared for transfer to Nairobi.

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<sup>1</sup> A/Res/74/262, *Questions relating to the proposed programme budget for 2020*, paras. 8 and 74.

7. On 28 June 2020, Mr. Postica filed another application contesting the “administrative decisions initiated and/or taken by OIOS (a) to move his post to Nairobi, (b) to require his involuntary transfer from New York to Nairobi or suffer loss of his position in OIOS, and (c) the failure by OIOS to implement in a timely way the [United Nations Office at Nairobi (UNON)] Medical Service’s written decision notifying OIOS that [Mr. Postica] is not medically certified for transfer or move to Nairobi”.

8. By Case Management Order No. 183 (NY/2020) dated 12 November 2020, the UNDT ordered that both cases be heard jointly. The UNDT considered that the cases could be adjudicated on the papers but asked that the Secretary-General provide an update on Mr. Postica’s employment status, including a statement regarding his current functions within OIOS.

9. By submission dated 19 November 2020, the Secretary-General confirmed that Mr. Postica had not been assigned to Nairobi, there had been no changes in his functions, and he continued to serve on his permanent appointment and to perform his previously assigned functions as an OIOS P-5 Senior Investigator in New York. On 20 November 2020, the Appellant filed a submission stating that the Secretary-General’s representation of his functions was incomplete and misleading and requested oral evidence. At the same time, he acknowledged that he held a permanent appointment and that he had not yet been assigned to Nairobi.

10. On 23 November 2020, the UNDT issued Judgment on Receivability No. UNDT/2020/197, dismissing the applications.

11. As a preliminary matter, the UNDT found that Mr. Postica’s second application, challenging the actual decision to move his post to Nairobi, subsumed his first application challenging the proposal to transfer his post to Nairobi and decided to review that decision in the context of the second application.

12. The UNDT found that the Administration’s decision to redeploy Mr. Postica to Nairobi was subject to the condition that he be medically cleared and that since this condition had not been met, the decision had not been implemented. The UNDT concluded that the challenged administrative decisions had yielded no direct legal consequences for

Mr. Postica's terms of appointment, which remained unchanged and that as a result, the applications were not receivable *ratione materiae*.

13. The UNDT further noted that under Article 8(1)(c) of the UNDT Statute, the UNDT has competence to review challenges of administrative decisions if the applicant has previously sought management evaluation of said decision. Since the Management Evaluation Unit (MEU) has 30 days to respond to requests for management evaluation at Headquarters, the deadline to challenge an administrative decision starts to run once the 30-day deadline has elapsed. Since Mr. Postica requested management evaluation on 25 June 2020 and received a response from the MEU on 15 July 2020, his application before the UNDT dated 28 June 2020 was premature.

14. With respect to Mr. Postica's contentions regarding the nature of the work assigned to him in OIOS, the UNDT found that this was outside the scope of the applications under review which concerned Mr. Postica's transfer to the OIOS Nairobi office.

15. Mr. Postica appealed both the UNDT Judgment and Case Management Order No. 183 (NY/2020) on 22 January 2021 and the Secretary-General filed his answer on 29 March 2021.

### **Submissions**

#### **Mr. Postica's Appeal**

16. The UNDT failed to address the central issue of Mr. Postica's applications, which is the fact that the challenged administrative decisions involve whistleblower retaliation by OIOS in successfully initiating and recommending to the General Assembly the relocation of Mr. Postica's position to Nairobi, leaving him with only a temporary assignment that ended in August 2019, involving, as the Secretary-General in his reply to Mr. Postica's application himself concedes, none of his OIOS assigned P-5 functions, and thereafter leaving him without any job functions. The UNDT erred by taking a limited approach by finding Mr. Postica's application not receivable *ratione materiae* on grounds that none of the challenged administrative decisions had been implemented.

17. The UNDT erred in finding that the relocation of Mr. Postica's position could have no direct legal consequences on the terms of his employment. There often is no clear delineation of what administrative actions constitute reviewable administrative decisions. According to UNAT jurisprudence, the standard is not whether an adverse effect on the employee's contract occurs, but whether the decision has the *capacity* of such an adverse effect. Mr. Postica's declaration made it clear that his career was being destroyed by the "disturbing gap on his job history and being assigned to no investigation at all". The issue for the UNDT to determine was whether Mr. Postica could face career damage and whether OIOS had removed him from performing the functions his permanent appointment required him to perform.

18. The UNDT erred in procedure and violated Mr. Postica's due process rights when in Case Management Order No. 183 (NY/2020), it invited only the Secretary-General and not Mr. Postica to file a submission providing an update on Mr. Postica's employment status, including a statement on his current functions, and did not require the Secretary-General to submit admissible evidence on Mr. Postica's employment status and current functions. Furthermore, the UNDT failed to dispose of Mr. Postica's motions seeking leave to comment on the Secretary-General's statement regarding Mr. Postica's current job functions and to hear oral testimony.

19. It is black letter law in UNAT and the UNDT that each party has a right to comment on any material evidence or assertions of fact submitted by his adversary upon which a tribunal will rely. Due process in the Organization's system includes the holding of a hearing at which each party may present, and question, evidence presented by the other. The UNDT erred in deciding the applications on the papers before it; it should have held the requested case management hearing, delineated the matters to be adjudicated and allowed Mr. Postica to address those matters in formal submissions and/or received evidence in relation to such findings.

20. The UNDT erred in accepting the Secretary-General's counsels' unattributed and hearsay statements over Mr. Postica's immediate written objection and sworn declaration to the contrary that there had been no changes to his functions and that he continued to serve on his permanent appointment and to perform his previously assigned functions as OIOS P-5 Senior Investigator in New York. The UNDT's finding that there had been no changes in Mr. Postica's functions is based on inadmissible evidence and directly contradicts Mr. Postica's application and annexes showing that his temporary assignment ended in August 2019 and that he applied for available

jobs in New York at other United Nations agencies, but that as of 19 November 2019, he did not have an alternative placement anywhere.

21. Mr. Postica asks that the Appeals Tribunal vacate the UNDT Judgment and remand the case for a hearing so that Mr. Postica may examine the undisclosed OIOS officials under oath who told the Secretary-General's counsel that Mr. Postica is performing the same P-5 Investigator functions that he has always performed and cross-examine the OIOS officials who initiated the relocation of Mr. Postica's job to Nairobi after trying to "force him out of his job".

### **The Secretary-General's Answer**

22. Mr. Postica is attempting to alter his application and requests that the Tribunals consider the lawfulness of the General Assembly's decisions by suggesting that the Tribunals reconsider the OIOS budget proposal for 2020 which the General Assembly approved. The appeal is not addressing errors by the UNDT. Rather, it is requesting a review of the decision by the General Assembly to move Mr. Postica's post to Nairobi by suggesting that the reviewable decision is OIOS's proposal to the General Assembly. Contrary to Mr. Postica's claims that OIOS's proposal on post redeployment was a retaliatory act against him, the evidence before the UNDT revealed the operational reasons for the proposal. The General Assembly agreed with such an operational need when it approved the proposed OIOS budget for 2020. Therefore, contrary to Mr. Postica's claims that the OIOS budget proposal should be considered a reviewable administrative decision because it was motivated by bias, the UNDT found no evidence of any such bias.

23. Mr. Postica has failed to demonstrate that the contested decision was appealable. The UNDT found, in accordance with UNAT's established jurisprudence and the applicable legal framework, that Mr. Postica's claims were not receivable *ratione materiae*, since he was contesting a decision that had not yielded any direct legal consequences in his terms of appointment. As Mr. Postica himself concedes, the General Assembly's decision to redeploy his post to Nairobi has not yet been implemented as Mr. Postica has not been cleared by the Medical Service for reassignment and he continues performing his functions in the OIOS office in New York. Mr. Postica's reliance on *Handy* is misplaced since contrary to *Handy*, the discussion in Mr. Postica's case is not related to performance evaluation.

24. Mr. Postica has failed to demonstrate that his due process rights were violated. By Order No. 183 (NY/2020), the UNDT instructed the Secretary-General to file a submission providing an update on Mr. Postica's employment status. In his submission of 19 November 2020, the Secretary-General provided the UNDT with accurate information that Mr. Postica had not been assigned to Nairobi, and that there had been no change in his functions. One day later, Mr. Postica also filed a submission, providing the UNDT with his arguments concerning his current employment status confirming that he had not yet been assigned to Nairobi due to medical unfitness. Therefore, Mr. Postica did provide the UNDT with his comments regarding the Secretary-General's response to Order No. 183 (NY/2020) and the UNDT did consider his arguments when it correctly highlighted that Mr. Postica had expressly confirmed that he held a permanent appointment and had not been assigned to Nairobi due to his medical unfitness.

25. The UNDT further correctly found that the other matters raised by Mr. Postica concerning the alleged retaliation were outside the scope of the instant case, which was restricted to his contentions against his reassignment from New York to Nairobi based on the redeployment of the post, as approved by the General Assembly. Finally, Mr. Postica's reliance on UNAT jurisprudence is misplaced. Mr. Postica has not disputed the fact that the General Assembly ultimately decided to redeploy the post to the OIOS Office in Nairobi. As such, the UNDT and UNAT lack competence to review the General Assembly's decision. Moreover, it is indisputable that Mr. Postica's reassignment to the OIOS Nairobi office was never implemented due to his medical conditions.

26. Mr. Postica has failed to demonstrate that the UNDT erred in accepting the Secretary-General's statement attesting that he continues to perform assigned functions as a Senior Investigator in New York. Contrary to the Secretary-General's assertion, the Secretary-General's statement presented in response to Order No. 183 (NY/2020) is not hearsay evidence since it adequately reflects Mr. Postica's own admissions concerning the current status of his appointment and assignment. Moreover, the factual circumstances that UNAT considered in the cases quoted by Mr. Postica are distinguishable from those that the UNDT took into account in the instant case. Therefore, Mr. Postica has failed to show that the UNDT erred in finding that he continued to perform his role as a Senior Investigator with OIOS in New York and that the General Assembly decision to redeploy the post to the OIOS office in Nairobi has

never been implemented. As such, the decision was not appealable as it did not affect the terms of Mr. Postica's appointment.

27. The Secretary-General requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss the appeal in its entirety.

### **Considerations**

*Did the UNDT commit errors of law or fact in finding Mr. Postica's application not receivable?*

28. The crucial question on appeal is whether the UNDT committed any errors in dismissing Mr. Postica's application as not receivable. We do not find that in his appeal Mr. Postica shows that the UNDT committed such errors.

*Proposal to move Mr. Postica's post from New York to Nairobi*

29. The UNDT correctly found that Mr. Postica's second (28 June 2020) application in which he challenged the decision to move his post to Nairobi subsumed his earlier (19 November 2019) application where he had challenged OIOS's proposal to move his post to Nairobi. A proposal is not yet final, and therefore has no direct legal effect on a staff member's terms of appointment or contract of employment. Consequently, regardless of the motives of OIOS, its proposal to move Mr. Postica's post to Nairobi does not constitute an administrative decision and is not subject to judicial review. It follows that Mr. Postica's first application is not receivable *ratione materiae*.

*Decision to move Mr. Postica's post from New York to Nairobi*

30. As to the decision to move the post from New York to Nairobi, this decision was not taken by the Administration (OIOS) but the General Assembly and thus does not constitute an administrative decision either. Under the consistent jurisprudence of the Appeals Tribunal, decisions of the General Assembly cannot be challenged by staff members; what staff members may contest is the administrative decision based on, or following from, the General Assembly's decision.<sup>2</sup> In the present case that could be an administrative decision to transfer Mr. Postica (along with his post) to Nairobi.

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<sup>2</sup> *Abd Al-Shakour et al. and Aksioutine et al. v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1107, para. 51.



*Mr. Postica's redeployment/transfer from New York to Nairobi*

31. We agree with the UNDT that in this respect, Mr. Postica's application is also not receivable *ratione materiae* as there is no administrative decision to transfer or redeploy Mr. Postica to Nairobi.

32. The 11 February 2020 letter with the subject line "Reassignment to Nairobi/Kenia" informs Mr. Postica, that his reassignment to Nairobi would be subject to a medical clearance. Should he be medically cleared, OIOS would expect him to relocate to Nairobi as soon as possible but before 1 July 2020. It is evident that the decision to transfer Mr. Postica to Nairobi is not yet final as it depends on the outcome of his medical examination. Only if he is medically cleared will OIOS pursue with his reassignment to Nairobi. As the reassignment was under a condition, it did not constitute an administrative decision. On 18 May 2020, the Joint Medical Service informed OIOS that Mr. Postica was not fit for deployment to Nairobi, and he was not reassigned to that duty station. There is no evidence that the situation has changed and Mr. Postica is now medically fit for the transfer. Consequently, there is no administrative decision to reassign him to Nairobi.

*Implementation of the 18 May 2020 Medical Service's decision on Mr. Postica's medical state*

33. The UNDT dismissed Mr. Postica's application as premature because he had requested management evaluation of the alleged failure by OIOS to timely implement the Medical Service's 18 May 2020 decision on 25 June 2020 and received the response from the Management Evaluation Unit on 15 July 2020; however, he had filed his application to the UNDT already on 28 June 2020.

34. On appeal, Mr. Postica does not challenge these findings of the UNDT.

*Did the UNDT commit an error of procedure, such as to affect the decision of the case?*

35. In his appeal, Mr. Postica claims that the UNDT violated his due process rights in not inviting him to address the factual issue of clarification of his employment status including a statement regarding his current functions within OIOS, and in not granting his motions i) to comment on the Secretary-General's 19 November 2020 statement regarding his current job functions and ii) to take oral testimony.

36. In the present case, we do not find that the UNDT committed any error of procedure, such as to affect the decision of the case.

37. To respect Mr. Postica's due process rights, it was not necessary for the UNDT to "invite" him to address the matter of his current functions with OIOS, to grant his motion in this respect or take oral testimony.

38. Firstly, we note that Mr. Postica was able to, and did, comment on the Secretary-General's 19 November 2020 statement on 20 November 2020. The UNDT received and took notice of Mr. Postica's comment and dealt with it in paragraphs 10 and 19 of the Judgment.

39. Secondly, we agree with the UNDT's finding that Mr. Postica's contentions regarding the extent and nature of the work currently assigned to him in OIOS are outside the scope of his application and thus legally irrelevant. Therefore, it was not necessary for the UNDT to clarify this matter (by holding an oral hearing and/or gathering further evidence).

40. In his two applications dated 19 November 2019 and 28 June 2020, Mr. Postica challenged i) the proposal of OIOS to redeploy his post from New York to Nairobi and the following decision of the General Assembly to redeploy the post; ii) his involuntary transfer from New York to Nairobi or suffer loss of his position in OIOS; and iii) the failure by OIOS to timely implement the UNON Medical Service's decision that Mr. Postica is not medically certified for transfer or move to Nairobi (see above). However, Mr. Postica did not complain about or request any changes to his current working situation, specifically that he be given (more) duties in line with his position as a P-5 Senior Investigator at OIOS.

41. Consequently, the only question that legally mattered for the UNDT was whether Mr. Postica had been redeployed to Nairobi or not. The Secretary-General's 19 November 2020 statement, presented in paragraph 9 of the UNDT Judgment, that Mr. Postica "has not been reassigned to Nairobi and that there have been no changes to his functions, as he continues to serve as Senior Investigator in OIOS' office in New York at the P-5 level" answers this question and is in complete accordance with Mr. Postica's employment information given in his 28 June 2020 application according to which he holds a permanent appointment P-5 step 10 as Senior Investigator at OIOS in New York.

**Judgment**

42. The appeal is dismissed and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of October 2021.

*(Signed)*

Judge Knierim, Presiding  
Hamburg, Germany

*(Signed)*

Judge Colgan  
Auckland, New Zealand

*(Signed)*

Judge Murphy  
Cape Town, South Africa

Entered in the Register on this 8<sup>th</sup> day of December 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

**Concurring Opinion by Judge Colgan**

1. I agree with the outcome of this appeal and its reasoning. I wish, however, to make additional comments on two elements of the case that are not able to be addressed satisfactorily by this Tribunal's unanimous Judgment. As in many cases, the legal or judicial result of the case cannot, and does not, resolve at least satisfactorily its underlying employment relational issues.

2. The first is Mr. Postica's claim that the initiative for the proposal put to, and adopted by, the General Assembly to relocate his post (and therefore him) from New York to Nairobi, was a retaliatory response by some person or persons within the Administration to "whistle-blowing" by Mr. Postica. That is a serious allegation which, if true, has serious consequences. I do not, of course, express any view on the validity of Mr. Postica's claim in this regard. But the dismissal of this appeal and the upholding of the UNDT's Judgment should not preclude Mr. Postica from pursuing this allegation with the Administration if he wishes to do so.

3. The second matter on which I wish to comment concerns Mr. Postica's claim that he is disadvantaged in his employment by being left, as I understand his case, without any real work to perform as a Senior Investigator with OIOS based in New York. While his post, that is the work that he used to perform, has moved to Nairobi, he says he has been left with little to do or to show for it, in New York. Mr. Postica says that this may have a number of consequences for him including having to seek another position, either within the United Nations or elsewhere, and that his curriculum vitae will show, to his professional disadvantage, a significant and questionable lacuna. I imagine also that the United Nations would not wish to have that situation continue for more than a short period, that is to have Mr. Postica being paid to do little or nothing, and not using his skills and abilities to its best advantage.

4. Modern notions of employment relationships include the provision of fulfilling and satisfying professional work in return for the provision of valuable services to the employer. If not done already, I would encourage the Administration and Mr. Postica (with the assistance of a mediator) to attempt to achieve that mutually beneficial outcome in the unsatisfactory situation left by the events at issue in this case and which is not able to be addressed by the necessarily narrow confines of this Judgment.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of October 2021.

*(Signed)*

Judge Colgan  
Auckland, New Zealand

Entered in the Register on this 8<sup>th</sup> day of December 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar