



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

Judgment No. 2023-UNAT-1314

**Nancy Mugo
(Appellant)**

v.

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

JUDGMENT

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| Before: | Judge Dimitrios Raikos, Presiding Judge Kanwaldeep Sandhu Judge Graeme Colgan |
| Case No.: | 2022-1654 |
| Date of Decision: | 24 March 2023 |
| Date of Publication: | 3 April 2023 |
| Registrar: | Juliet Johnson |

Counsel for Appellant: Víctor Rodríguez

Counsel for Respondent: Sylvia Schaefer

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Ms. Nancy Mugo, a former staff member with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), contested the decisions of the Administration to suspend the consideration of her disciplinary process until such time when she returned to the employment of the Organization following her retirement and to place a note in her Official Status File (OSF).
2. By Judgment No. UNDT/2021/139¹ (impugned Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) concluded that the decisions were not appealable administrative decisions pursuant to Article 2(1)(a) of the UNDT Statute and therefore rejected Ms. Mugo's application as not receivable *ratione materiae*.
3. Ms. Mugo lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

5. On 22 November 2018, Ms. Mugo retired from the Organization.
6. On 31 December 2018, the Office of Internal Oversight Services (OIOS) transmitted to the Assistant Secretary-General for Human Resources (ASG/OHR) an OIOS Investigation Report regarding allegations of misconduct against Ms. Mugo.
7. On 24 June 2019, the ASG/OHR transmitted to Ms. Mugo the OIOS Investigation Report and informed her that, given the fact that she had retired from the Organization before the resolution of the matter, a note would be placed in her OSF. Ms. Mugo was further informed that her name would also be placed in the Organization's Clear Check system, a screening database accessible to the United Nations entities when they are conducting recruitment exercises, and would reflect that she had separated on retirement with pending

¹ *Mugo v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/139.

allegations of misconduct. Ms. Mugo was given four weeks to provide comments on the note as well as on her name's inclusion in the database.

8. On 2 July 2019, Ms. Mugo provided her comments as requested.

9. On 16 July 2019, the Administrative Law Division (ALD), on behalf of the ASG/OHR, asked Ms. Mugo by e-mail to confirm if she was prepared to cooperate in a disciplinary process and to respect the confidentiality of the proceedings, which she confirmed on 30 July 2019.

10. On 1 April 2020, the ASG/OHR notified Ms. Mugo by memorandum that the Administration had decided to suspend consideration of whether or not to initiate a disciplinary process until such time when she would return to the employment of the Organization. Instead, Ms. Mugo was informed that, in accordance with Sections 9.7 to 9.9 of Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), the following note would be placed in her OSF: “[Mrs. Mugo] separated from service with the Organization effective 22 November 2018. At the time, a matter had not been resolved. Please contact the Office of Human Resources, at Headquarters, in the event that [Ms. Mugo] should become employed as a staff member within the United Nations Common System in the future.”² Ms. Mugo was also informed that her name would not be placed in the Organization's Clear Check system. She was given four weeks to provide comments on the note.

11. On 4 May 2020, Ms. Mugo provided her comments on the note.

12. On 5 June 2020, Ms. Mugo requested management evaluation of the ASG/OHR decisions to suspend the consideration of a disciplinary process against her and to place a note in her OSF.

13. On 27 July 2020, the Management Evaluation Unit (MEU), Office of the Under-Secretary-General for Management Strategy, Policy and Compliance, issued a written decision upholding the contested decisions and concluding that Ms. Mugo's request for management evaluation was not receivable due to the absence of an appealable administrative decision.

² *Ibid.*, para. 34.

14. On 26 October 2020, Ms. Mugo filed an application with the Dispute Tribunal contesting the decisions to suspend the consideration of a disciplinary process against her and to place a note in her OSF.

Impugned Judgment

15. On 24 November 2021, the UNDT issued the impugned Judgment, rejecting Ms. Mugo's application as not receivable *ratione materiae*.

16. The UNDT determined that the decisions were not appealable administrative decisions pursuant to Article 2(1)(a) of the UNDT Statute, since they did not produce any direct legal consequences affecting Ms. Mugo's terms or conditions of employment.³

17. Regarding the decision to suspend the consideration of a disciplinary process against her, the UNDT rejected Ms. Mugo's argument that the Administration had even initiated a disciplinary process against her. The UNDT determined that pursuant to Staff Rule 10.3(a) and Section 8.2(a) of ST/AI/2017/1, the initiation of a disciplinary process required the issuance and notification of written allegations of misconduct to Ms. Mugo and the opportunity for her to respond to those allegations. Such allegations were never issued as Ms. Mugo was only asked to confirm if she was prepared to cooperate in a disciplinary process.⁴

18. Referring to *Kennes*⁵, which the UNDT found applied *mutatis mutandis*, the Dispute Tribunal recalled that the Administration had no obligation and lacked the capacity to conduct a disciplinary process once a staff member had left the Organization.⁶

19. The UNDT rejected Ms. Mugo's argument that by suspending the consideration on initiating a disciplinary process, the Administration violated her due process rights. The UNDT concluded that if Ms. Mugo were to be employed by the Organization in the future and the Administration were to decide to initiate a disciplinary process against her, she would have the opportunity to defend herself.⁷

³ *Ibid.*, paras. 16-17, 30 and 35-36.

⁴ *Ibid.*, paras. 19-24.

⁵ *Kennes v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1073, para. 45.

⁶ Impugned Judgment, paras. 18 and 25.

⁷ *Ibid.*, paras. 27-29.

20. Turning to the decision to place a note in her OSF, the UNDT recalled that the potential of a future injury was not an appealable administrative decision.⁸

21. The UNDT concluded that the note placed in Ms. Mugo's OSF was merely informative in nature and did not have any impact on Ms. Mugo's terms or conditions of employment and, therefore, was not an administrative decision subject to judicial review.⁹

Procedure before the Appeals Tribunal

22. On 24 January 2022, Ms. Mugo filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Secretary-General responded on 25 March 2022.

Submissions

Ms. Mugo's Appeal

23. Ms. Mugo requests that the Appeals Tribunal reverse the impugned Judgment and rescind the contested decisions. Ms. Mugo also requests that the UNAT order the ASG/OHR to complete the disciplinary process and, in the meantime, order that the note placed in her OSF along with "all other possible negative materials" related to her be removed from her personnel file. Lastly, Ms. Mugo requests that the Appeals Tribunal order the Secretary-General to pay an "adequate monetary compensation for the violation of her due process rights, for the pain and suffering and the legal costs".

24. With respect to the impugned Judgment, Ms. Mugo submits that the UNDT failed to exercise jurisdiction vested in it.

25. Firstly, Ms. Mugo submits that the UNDT erred by considering that the decision to suspend the consideration of a disciplinary process against her was not an appealable administrative decision.

26. Ms. Mugo argues that the UNDT erred by concluding that the disciplinary process against her had not even been initiated. She submits that by asking her to confirm if she was prepared to cooperate in a disciplinary process, which she clearly confirmed, the Administration instituted

⁸ *Ibid.*, para. 32.

⁹ *Ibid.*, paras. 33-37.

a “bilateral relationship creating rights and obligations to both parties” and a “promise” to perform a disciplinary process against her. Therefore, Ms. Mugo argues that the Administration was not entitled to suspend the disciplinary process unilaterally and had an obligation to state the reasons for this decision that deprived her from the presumption of innocence and from the right to defend herself.

27. Ms. Mugo submits that the UNDT also erred by considering that the rights of staff members ceased to exist once they left the Organization. Rather, she observes that the staff members’ rights and duties persist after the end of their appointment pursuant to Staff Regulation 1.1(c).

28. Ms. Mugo states that the UNDT erred by referring to *Kennes*¹⁰ which raised different legal and factual issues.

29. Consequently, Ms. Mugo notes that the decision to suspend the disciplinary process initiated against her was affecting her due process rights and thus should have been considered as an administrative decision subject to judicial review pursuant to Article 2(1)(a) of the UNDT Statute.

30. Secondly, Ms. Mugo states that the UNDT erred by considering that the decision to place a note in her OSF was merely informative in nature and was not an appealable administrative decision.

31. Ms. Mugo argues that the placement of this note in her OSF implies that she engaged in misconduct since, pursuant to Section 9.7 of ST/AI/2017/1, this type of note is prepared “in order to document cases in which a staff member who is the subject of a report of unsatisfactory conduct separates from service before the investigation or the disciplinary process is concluded”.

32. Therefore, Ms. Mugo submits that the placement of the note in her OSF “ban[ned] [her] re-employment in the Organization” which constitutes an administrative decision producing direct legal consequences and affecting her due process rights.

¹⁰ *Kennes* Judgment, *op. cit.*

The Secretary-General's Answer

33. The Secretary-General requests that the Appeals Tribunal dismiss the appeal.

34. The Secretary-General observes that Ms. Mugo's arguments are largely a repetition of arguments that she made before the UNDT and that she did not demonstrate that the UNDT failed to exercise jurisdiction vested in it.

35. The Secretary-General submits that the UNDT correctly concluded that Ms. Mugo's application was not receivable *ratione materiae* since the contested decisions were not appealable administrative decisions within the meaning of Article 2(1)(a) of the UNDT Statute.

36. Firstly, the Secretary-General states that the UNDT correctly concluded that the disciplinary process against Ms. Mugo had never been initiated by the Administration.

37. The Secretary-General observes that the UNDT correctly referred to Staff Rule 10.3(a) and Section 8.2(a) of ST/AI/2017/1, that mention that the initiation of a disciplinary process requires the issuance of written allegations of misconduct to the staff member. Such allegations were never issued as Ms. Mugo was only asked to confirm if she was prepared to cooperate in a disciplinary process.

38. The Secretary-General submits that the UNDT correctly found that Ms. Mugo's due process rights could not have been violated, as they only arise once a disciplinary process has been initiated. The Secretary-General also notes that Ms. Mugo herself appeared to have understood this requirement as she repeatedly requested for "formal charges" and "formal allegations" to be presented to her.

39. The Secretary-General argues that the UNDT rightfully applied the legal principles set out in *Kennes*¹¹ to conclude that the Administration had no obligation to conduct a disciplinary process once a staff member had left the Organization. The Secretary-General maintains that staff members who are no longer employed by the Organization are not deprived of their due process rights, as they will have the opportunity to defend themselves should they be

¹¹ *Kennes* Judgment, *op. cit.*

reemployed by the Organization and if the Administration were to decide to initiate a disciplinary process against them.

40. Moreover, the Secretary-General argues that the Administration does not have the authority to discipline former staff members. The Secretary-General observes that this conclusion is supported by the wording of Staff Rule 1.2(d), which provides that disciplinary procedures may be instituted against a “staff member” and not a “former staff member”.

41. The Secretary-General observes that even if Ms. Mugo was reemployed, she would not have the right to compel the Administration to initiate a disciplinary process against her. To the contrary, the Secretary-General observes that pursuant to Staff Rule 10.1(c), he has the discretionary authority to institute a disciplinary process.

42. The Secretary-General also argues that the decision to suspend the consideration of a disciplinary process against Ms. Mugo was only a preliminary decision in nature and not an administrative decision in itself.¹²

43. Therefore, the Secretary-General submits that the UNDT correctly concluded that the decision to suspend the consideration of a disciplinary process against Ms. Mugo could not be considered as an administrative decision affecting her rights, since her due process rights were not yet implicated.

44. Secondly, the Secretary-General states that the UNDT correctly concluded that the decision to place a note in Ms. Mugo’s OSF was not an appealable administrative decision.

45. The Secretary-General argues that the note was merely informative as it was only referring to “a matter” in accordance with Sections 9.7 to 9.9 of ST/AI/2017/1 and did not confirm any misconduct by Ms. Mugo or preclude her from becoming reemployed by the Organization.

46. Therefore, the Secretary-General submits that the UNDT correctly concluded that the note placed in Ms. Mugo’s OSF did not have any direct impact on her terms or conditions of employment.

¹² *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para. 50.

Considerations

Receivability of the Administration's decision not to proceed with the disciplinary process

47. In the case at hand, the UNDT held that the 1 April 2020 decision of the Administration to suspend the consideration of whether to initiate a disciplinary process against Ms. Mugo until such time when she returned to the employment of the Organization was not an appealable administrative decision as it did not impact her terms or conditions of appointment.¹³

48. The UNDT based the reasoning of its holding on the Appeals Tribunal's judgment in *Kennes*¹⁴, that recalled the following principles: i) to be appealable, a decision must produce direct legal consequences affecting the staff member's terms or conditions of employment; ii) the Administration's decision not to complete a disciplinary process against a staff member and instead resume it should the staff member become reemployed by the Organization in the future does not constitute an appealable administrative decision under Article 2(1)(a) of the UNDT Statute; and iii) "the Administration has no duty to proceed with, and lacks the capacity to conduct, a disciplinary measure once a staff member has left the Organization, as its authority to complete a disciplinary process is predicated on the fact that a staff member has an ongoing employment relationship with the Organization".¹⁵

49. In further assessing the various arguments made by Ms. Mugo, the UNDT concluded that no written allegations were ever issued against her, per Section 8.2(a) of ST/AI/2017/1, which provides that a disciplinary process is initiated with the issuance of written allegations of misconduct. In this case, all the Administration did was inquire if Ms. Mugo was prepared to cooperate in a disciplinary process and, therefore, the UNDT concluded that Ms. Mugo had no right to force the Administration to initiate a disciplinary process against her.¹⁶ Under the specific circumstances of the present case and the nature of the decision, we agree with the UNDT and uphold its underpinning reasoning.

¹³ Impugned Judgment, para. 30.

¹⁴ *Kennes* Judgment, *op. cit.*, paras. 40 and 44-45.

¹⁵ *Ibid.*, para. 45.

¹⁶ Impugned Judgment, para. 26.

50. The Appeals Tribunal also agrees with the UNDT's conclusion that the Administration's decision to suspend the consideration of initiating a disciplinary process and instead resume it should Ms. Mugo become reemployed by the Organization in the future, did not constitute an appealable administrative decision for the purpose of Article 2(1)(a) of the UNDT Statute, as it did not produce a present and direct adverse impact on Ms. Mugo's terms or conditions of employment.

51. Further, the Appeals Tribunal finds that the principle of legitimate expectation raised by Ms. Mugo does not find solid ground in the present case. Ms. Mugo submits that by asking her to confirm if she was prepared to cooperate in a disciplinary process, the Administration raised her legitimate expectation to complete said disciplinary process instituted against her. The Appeals Tribunal finds that the Administration has no duty to proceed with, and lacks capacity to conduct, a disciplinary measure once a staff member, in the present case Ms. Mugo, has left the Organization, as its authority to complete a disciplinary process is predicated on the fact that a staff member has an ongoing employment relationship with the Organization.¹⁷

52. Lastly, in any event, as we held in *Kennes*¹⁸, Ms. Mugo is not deprived of her right to raise a proper defense, including regarding the alleged violation of her due process rights, should she become a staff member again and should the Administration resume the disciplinary process against her.

Receivability of the Administration's decision to put a note in Ms. Mugo's OSF

53. In terms of the decision to place a note in Ms. Mugo's OSF, the UNDT held, in the same vein, that such decision was not receivable *ratione materiae*, as it was not an appealable administrative decision. As in *Kennes*¹⁹, the Dispute Tribunal observed that this note was merely informative in nature and, therefore, did not have any impact on Ms. Mugo's terms of employment.²⁰

¹⁷ *Kennes* Judgment, *op. cit.*, para. 45.

¹⁸ *Ibid.*, para. 46, citing *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-786, para. 30, *Birya v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-562, para. 47 and *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 36.

¹⁹ *Kennes* Judgment, *op. cit.*, paras. 49 and 52.

²⁰ *Impugned* Judgment, paras. 35-36.

54. We do not find any reason to differ from the UNDT's conclusion. In arriving at it, the UNDT correctly put weight on the mere informative and instructive nature of the contested decision, which did not involve a certain and present adverse impact on Ms. Mugo's status as a former staff member.²¹ Hence, all arguments of Ms. Mugo regarding the Administration's decision to put a note in her OSF are devoid of any merit.

55. Having found so, the Appeals Tribunal considers, however, that the outcome of Ms. Mugo's case is potentially unfortunate for her.

56. Indeed, some might be inclined to conclude, based on the note placed in Ms. Mugo's OSF and from the relevant facts summarized by both the UNDT and the Appeals Tribunal, that she left her employment in light of, and perhaps even to avoid, an adverse finding of allegations of misconduct against her. It is not the case.

57. Ms. Mugo was the subject of an investigation regarding allegations of a failure to report misconduct allegedly committed by another staff member. As the investigation against Ms. Mugo was not concluded, there is no conclusion or finding of misconduct against her.

58. In 2018, Ms. Mugo reached the Organization's compulsory retirement age and retired. Her retirement was solely for age-related reasons. It was only over a year after she retired that she was informed of the investigation conducted by the OIOS regarding allegations of misconduct against her. Ms. Mugo contested strongly the allegations made against her and has continued to do so ever since.

59. Ms. Mugo having now well passed the United Nations' retirement age, it seems unlikely that she will be reemployed by the Organization so that the opportunity to resurrect the disciplinary process at some future time is, as the Secretary-General has held out, in reality, illusory. In these circumstances it is understandable that Ms. Mugo feels an acute sense of injustice, but the Appeals Tribunal does not find any reason to differ from the UNDT's conclusions.

60. Accordingly, we dismiss the appeal.

²¹ *Kennes Judgment, op. cit.*, para. 49.

Judgment

61. The appeal is dismissed, and Judgment No. UNDT/2021/139 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 3rd day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar