



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/022

Judgment No.: UNDT/2016/021

Date: 14 March 2016

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

NWUKE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Sandra Baffoe-Bonnie, EOS/ECA

## **Introduction**

1. The Applicant is currently serving at the P-5 level as Chief of the New Technologies and Innovation Section in the Special Initiatives Division (SID) at the United Nations Economic Commission for Africa (ECA) based in Addis-Ababa, Ethiopia.

2. He filed this Application with the Dispute Tribunal on 20 March 2014 contesting the selection/promotion decision for the post of Director, Governance and Public Administration Division (GPAD). The grounds for contesting the decision are:

- a. Unlawful tampering with a published job opening to make an ineligible candidate eligible to apply for the post;
- b. Unlawful membership of Mr. Abdalla Hamdok, a previous incumbent of the post, in the interview/assessment panel and;
- c. The Administration's disregard of the concerns raised by the Applicant concerning the breaches of procedural requirements in the impending selection process.

3. The Applicant additionally challenged the decision of the Management Evaluation Unit (MEU) not to award him remedies for the violation of his procedural rights.

4. By a Reply filed on 6 May 2014, the Respondent prayed: (i) that the Application be dismissed on the ground that it was filed outside of the time limits allowed by the Statute of the Dispute Tribunal; and (ii) the decision of the MEU on the award of remedies is not an administrative decision and is therefore not receivable.

5. On 20 May 2014, the Applicant submitted comments on the Respondent's Reply. It was his argument that the decision of the Under-Secretary-General for Management (USG/DM) on the outcome of management evaluation is receivable.

He also submitted that the circumstances warranting suspension of waiver or extension of the time limit for filing the Application were caused by the Respondent.

### **Considerations**

6. Upon perusal of the Parties' submissions, the Tribunal decided on 20 June 2014 that the Application was receivable and that the reasons for the decision would be stated in this Judgment.

### ***Receivability***

7. On 27 July 2012, the Applicant as required by the Statute of the Dispute Tribunal submitted a request for management evaluation. On 2 August 2012, he submitted a revised version of the request and made four further submissions on the said request, the last of these submissions being on 19 September 2012. His grounds for the request included that his candidacy for the post of Director/GPAD was not accorded full and fair consideration and that the process was flawed for the following reasons:

- a. The selected candidate was ineligible for consideration for the post because he did not have the required lateral moves or speak French or any other United Nations language.
- b. The removal of the Special Notice in the Job Opening was unlawful and designed to allow the selected candidate to become eligible for the post.
- c. The question on the professionalism competency in the interview was unbalanced in favour of the selected candidate.
- d. The participation of the hiring manager in the interview panel was unlawful because he was the immediate past incumbent of the post.
- e. The interview panel was not composed as management had earlier advised.
- f. There was no question on the competency of Communication.

8. The Applicant also filed a complaint on 24 August 2012 to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) alleging abuse of authority in the said selection decision for the position of Director/GPAD.

9. On 15 November 2012, the USG/DM, on behalf of the Secretary-General, responded to the Applicant's request for management evaluation.

10. In that response, the Applicant was informed that following a review of the selection decision complained of, the Secretary-General had determined that the failure to withdraw and reissue the job opening for the D-1 position of Director/GPAD upon its amendment was a procedural irregularity and constituted a violation of the Applicant's right to due process.

11. Also in the said response of the USG/DM, the Applicant was informed that since he had made a complaint alleging abuse of authority in the said selection process, the Secretary-General would await the outcome of the investigation into that complaint before deciding on an appropriate remedy to the admitted violation of his right to due process.

12. Sometime in April 2013, about five months after the USG/DM's response, a fact-finding panel was constituted to look into the Applicant's complaint of abuse of authority.

13. Subsequently, on 18 December 2013, the USG/DM again wrote to inform the Applicant that after reviewing the report of the fact-finding panel, he had determined that the Applicant did not deserve any remedies for the breach of his due process right which had been acknowledged more than a year earlier on 15 November 2012.

14. The Applicant thereafter filed the present Application.

15. In arguing that the Application is not receivable, the Respondent has cited art. 8.1 of the UNDT Statute, art. 7.1 of the Tribunal's Rules of Procedure and staff rule 11.2 with regard to time limits for filing an application. He pointed out that the Applicant had requested management evaluation and had been notified of

its outcome on 19 November 2012. He argued that pursuant to the relevant legislation, the Applicant had a 90-day time limit after receiving the response from management evaluation and that this time limit expired on 19 February 2013 and that this meant that the Application was filed 13 months late.

16. The Respondent argued further that the Applicant had not shown any circumstances warranting suspension, waiver or extension of time for filing of the Application.

17. The Respondent continued that it was stated at para. 32 of the Application that the purpose of the said Application is to request a review of the management evaluation decision not to award damages to the Applicant after having found that his procedural rights were breached. He argued also that the outcome of management evaluation is not an administrative decision for which the Applicant may request a review.

18. The Respondent cited the UNDT decisions in *Staedtler*<sup>1</sup>, *Hassanin*<sup>2</sup> and *Ameer*<sup>3</sup>. He submitted that on the authorities of the said cases, the decision reached in management evaluation is not an administrative decision capable of being reviewed by the Tribunal.

19. The Applicant in his closing statements submitted that the Secretary-General had concluded in management evaluation that he was not given full and fair consideration for the position of Director/ GPAD to which he had applied and for which he had undergone a selection process.

*Time limits for filing an application*

20. The Tribunal is not in any doubt that applicable legislation clearly shows that the Applicant is allowed up to 90 calendar days following the response from MEU to bring his Application to the Tribunal.

21. This means that insofar as this Application relates to the claims of the Applicant which were denied by the Respondent, the time allowed by law for

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<sup>1</sup> Judgment No. UNDT/2014/046.

<sup>2</sup> Judgment No. UNDT/2014/006.

<sup>3</sup> Order No. 145 (NBI/2010).

challenging them had elapsed since 19 February 2013, that is, 90 days after the Applicant received the response of the Secretary-General through the USG/DM of his decision on those claims, rendered on his behalf by MEU.

22. In other words, the Applicant's failure to challenge any claims which the Respondent had admitted and for which he had asked for time in order to determine what remedies would be appropriate for the purpose of compensating the Applicant survived the legislation governing time limits since by implication, the said time limits had been effectively waived or suspended by the Respondent himself.

23. It is therefore the Tribunal's decision that the Applicant is entitled to approach it regarding the Respondent's turn-about on the issue of compensating him for the breach of his due process rights.

*UNDT's previous decisions on the non-appealability of a management evaluation decision.*

24. As already stated above, there are existing decisions by the Tribunal which speak to the issue of the non-appealability of management evaluation decisions. The Tribunal will distinguish them from the instant case.

25. In the case of *Ameer* which was decided in July 2010, a self-represented applicant whose fixed-term contract was not renewed requested management evaluation of that decision. When the non-renewal decision was affirmed by a management evaluation decision, he brought an application to the Tribunal to challenge the failure of MEU to evaluate documents and information he provided and his complaints against his first reporting officer and continuous mistreatment he was receiving.

26. The true essence of the Tribunal's reasoning in that case is that the unfavourable decision of MEU with respect to the Applicant's claims of non-renewal of his contract could not become a new cause of action before the Tribunal.

27. In other words, the fact that management evaluation affirmed the actions of management in that case did not entitle the said applicant to turn around and appeal the affirmation of MEU whilst abandoning his original cause of action. When a management evaluation decision affirms the impugned decision of management, it only means that the original position that informed the Applicant's resort to litigation remains intact and unaltered. As correctly stated in the case, the staff member can still go to the Tribunal with a merits application to seek appropriate remedies. The precise words of the Tribunal in *Ameer* are as follows:

The Tribunal considers that the review by MEU is not an appealable administrative decision ... This process however, is not the end of the matter for a staff member as s/he can still contest the original decision to the Dispute Tribunal on its substantive merits and seek appropriate remedies<sup>4</sup>.

28. Also in the case of *Staedtler*<sup>5</sup>, the Tribunal stated that the remedy for an applicant who is dissatisfied with the outcome of a management evaluation review of an administrative decision is to file an application with the Tribunal. The Tribunal will then hear the appeal against the administrative decision *de novo* and without regard to the outcome of the management evaluation review.

29. Similarly, the Tribunal observed in the *Hassanin*<sup>6</sup> judgment that its competency is strictly limited to a legal review of the content of the administrative decision that was previously before MEU and cannot be extended to the findings included in MEU's review.

30. The foregoing three cases are clearly right in their decisions that a litigant cannot abandon his original cause of action and change course by attempting to challenge or litigate the unfavourable findings of MEU. When MEU makes adverse findings or affirms the actions taken by management against which a staff member seeks management evaluation, the only option open to the aggrieved staff member is to proceed to the Tribunal in good time to seek vindication and redress.

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<sup>4</sup> Ibid, at para. 8.

<sup>5</sup> *Op. cit.*, at para. 30.

<sup>6</sup> *Op. cit.*, at para. 37.

*The purpose and meaning of management evaluation*

31. The purpose and meaning of the management evaluation process have been pronounced upon in various judgments of the Dispute Tribunal.

32. MEU came into being pursuant to General Assembly resolution 62/228.<sup>7</sup> Its purpose is stated in paragraphs 50 and 51 of that resolution.

33. While paragraph 51 reaffirms the importance of exhausting administrative remedies before formal proceedings are instituted within the internal justice system of the Organization, paragraph 50 emphasizes the need to have in place a process that is efficient, effective and impartial.

34. Paragraph 52 of the resolution establishes MEU in the Office of the USG/DM.

35. Further, section 10 of ST/SGB/2010/9 (Organization of the Department of Management), clearly sets out the core functions of MEU. These core functions include:

- a. Conducting an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with rules and regulations.
- b. Making recommendations to the USG/DM on the outcome of the management evaluations and proposing appropriate remedies in case of improper decisions made by the Administration.

36. Additionally, staff rule 11.2(a) provides:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision.

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<sup>7</sup> Administration of justice at the United Nations, para 52.



37. It can therefore be seen that management evaluation is a mechanism that gives the Respondent Secretary-General an opportunity to review an administrative decision complained of and to correct any errors committed with a view to reducing the number of cases that would likely end up in the formal system of justice.

38. Sending a timely request for review by way of management evaluation is a compulsory pre-requisite therefore for any staff member wishing to challenge an administrative decision before the Tribunal, except in disciplinary cases.

*Weight to be attached to management evaluation decisions*

39. When a management evaluation request is sent by an aggrieved staff member, it is expected that an efficient, effective, objective and impartial review of the subject matter would be made. After such a review is conducted by MEU, its outcome could be an affirmation of all the actions taken by management with regard to the issues raised by the staff member.

40. On the other hand, the outcome could be an admission that management had committed errors in actions it had taken regarding some or all of the issues that were raised.

41. Where errors on the part of management are discovered after the review, MEU makes recommendations to the USG/DM proposing appropriate remedies to be made to the aggrieved staff member.

42. Such a recommendation when made and communicated to the staff member whose case is reviewed effectively replaces the decision of the manager on the particular issue. This is because in making an administrative decision, the manager acts for the Respondent Secretary-General who has actual ownership of the said administrative decision.

43. When that administrative decision is objectively and impartially reviewed by MEU on behalf of the Secretary-General, its recommendation that the administrative decision was a breach of the staff member's right is an admission of liability on the part of the Secretary-General and overtakes and replaces the

administrative decision that was made in error. What is then left is to grant appropriate remedies to the aggrieved staff member.

44. Even if the staff member later decides to go to the Tribunal over the same issue for which the Secretary-General has admitted liability as a result of the outcome of management evaluation, he or she can only dispute that the remedy granted him or her is not appropriate to the harm done.

45. In the case of *Kasmani*<sup>8</sup>, the applicant had, as required, sought a management evaluation review of the issues raised in his application before resorting to the Tribunal. One of his claims was that he had relied on the promise of his supervisor that his temporary contract would be renewed. This claim was upheld by the Secretary-General in management evaluation.

46. Although the applicant in that case was awarded three months' salary as compensation by the Secretary-General for reliance on his supervisor's promise, he still canvased that ground at the Tribunal and was awarded additional compensation. The three-judge panel observed:

The Tribunal will not speculate on whether or not the Applicant would have been renewed. The Tribunal however notes, with approval, the Secretary-General's decision by way of management evaluation that an expectancy of renewal was in fact created by the promise made to the Applicant...<sup>9</sup>

47. Because management evaluation is not window-dressing but a compulsory first step to be taken before a dispute can go to the formal system, a great deal of weight is attached to it. That is the philosophy that ensured the establishment of such a mechanism by the General Assembly.

*Can the Secretary-General appraise and reprobate in management evaluation?*

48. In the instant case, the Applicant had sent a management evaluation request raising several issues regarding the making of wrong administrative decisions during the recruitment process for the position of Director/GPAD at the ECA. The outcome of the review of his management evaluation request is

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<sup>8</sup> Judgment No. UNDT/2012/049.

<sup>9</sup> *Ibid*, at para. 123.

conveyed in the 15 November 2012 letter to the Applicant by the USG/DM. The said letter stated in its second paragraph:

Upon review of the substantive elements of your claim, the Secretary-General decided that:

- There was a procedural irregularity in the selection process for the post; and that:
- a decision on appropriate remedies will be made following the outcome of the investigation into your complaint to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) made pursuant to ST/SGB/2008/5, Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority...

49. In the same letter, the USG/DM also concluded:

In the light of the foregoing considerations of your case, the Secretary-General has decided to accept the MEU's conclusions and recommendations and to await the outcome of the investigations into your complaint pursuant to ST/SGB/2008/5 before deciding on an appropriate remedy.

50. As already stated above, a fact-finding panel was set up about five months later to look into the Applicant's allegations of abuse of authority. It took the USG/DM more than one year after admitting liability to write to the Applicant on 18 December 2013 and inform him that since no improper conduct, improper motivation or abuse of authority was found by the panel, no remedies were due to him.

51. The management evaluation mechanism is an objective and impartial, well-intentioned process established to correct administrative decisions that are found to be erroneous and thereby stem the tide of litigation within the Organization's internal justice system. Where the Secretary-General through this mechanism admits liability, the only option open to him is to grant appropriate remedies as he is enjoined to do under section 10.2(b) ST/SGB/2010/9.

52. Can the Respondent Secretary-General withdraw his admission of liability more than 13 months later and turn around to invoke time limits for filing an application against the Applicant in this case? Can he approbate and reprobate?

Can he withdraw his admission of liability at any stage? Clearly, the answers are a resounding NO!

53. After informing the Applicant that he had admitted liability for the breach of the said Applicant's right to due process and would determine what appropriate remedies could be made at a later date, the Secretary-General cannot be heard to later say that the appropriate remedies due to the Applicant was that he was not deserving of any remedies at all!

54. It is a well-established principle of Law and Equity that "*ubi jus ibi remedium*" (where there is a right, there is a remedy). The Respondent Secretary-General having admitted that the legal right of the Applicant to due process was violated by his agents, this Tribunal has a legal duty to enforce that right.

*Is the Applicant out of time?*

55. With regard to the computation of time limits, the Secretary-General by himself had reset the hands of the clock concerning only the breach of the Applicant's right to due process when he admitted liability but thought it prudent to wait for a fact-finding panel he had set up over a complaint on abuse of authority before deciding on what would be appropriate remedies for the said breach.

56. The Applicant's patience in waiting for the Secretary-General to decide on when to grant him appropriate remedies cannot be used against him. It is not in contention that as soon as he was informed that the Secretary-General had decided that the appropriate remedies he was promised meant no remedies at all, the Applicant approached the Tribunal.

57. In the case of *Faraj*,<sup>10</sup> the UNRWA Dispute Tribunal had dismissed the applicant's case as not receivable for being filed out of time. On appeal, UNAT overruled the first instance Tribunal's finding on time limits. This was because after sending his request for administrative review, the applicant and the

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<sup>10</sup> Judgment No. 2013-UNAT-331.

administration continued to engage on the subject of his termination and he again requested review on two subsequent occasions.

58. UNAT held that “whilst under normal circumstances, Mr. Faraj should indeed have filed his appeal within 60 days of his unanswered request for review, the circumstances of his case and, in particular, the actions of UNRWA do not support such a conclusion.”<sup>11</sup>

59. In the instant case, it was not even a matter of the Applicant continuing to engage with the administration to resolve the matter; rather it was a case of the Administration admitting liability to one of the impugned decisions complained of.

60. When the Applicant filed this Application, he raised three different issues for which he had earlier requested management evaluation. These issues are already set out above. Aside of the issue of breach of due process rights, the other administrative decisions of tampering with a published vacancy advertisement and the membership of the former incumbent of the position on the interview panel were affirmed as not being erroneous administrative decisions.

61. In other words, the Secretary-General did not admit liability with regard to the two claims. These were part of management evaluation decisions conveyed to the Applicant in the Under-Secretary-General’s letter of 15 November 2012. The Applicant ought to have proceeded to the Tribunal on those grounds within 90 days of receiving the said letter. His failure to do so renders the Application on those grounds out of time. Those claims in the Application are accordingly struck out.

62. In holding that the Secretary-General is bound by his admission of liability to provide appropriate remedies to the Applicant, the Tribunal is not reviewing a management evaluation decision. This is because the Respondent’s admission of liability following his management evaluation to a claim by an applicant effectively supersedes the administrative decision complained of in the same way

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<sup>11</sup> Ibid at para. 17.

that the favourable outcome of rebuttal proceedings would replace or substitute the poor rating which is the subject matter of the rebuttal process.

*Is there a nexus between the breach of a right to due process and the existence of prejudice, bias or abuse of authority?*

63. It has been established that following the management evaluation of the Applicant's claims in this case, the Respondent admitted that a breach of the Applicant's due process rights had occurred in the selection process for the position of Director/GPAD.

64. In arriving at the conclusion that the breach indeed occurred, the Respondent quoted the UNDT's holding in the case of *Allen*<sup>12</sup> as follows:

Formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence of which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process.

65. In the USG/DM's letter of 15 November 2012 to the Applicant, he stated that since the Applicant had also sent a complaint alleging abuse of authority against the ECA administration, an official investigation into the said complaint would be set up and the appropriate remedies due to him for the breach of due process would be determined after the investigation report.

66. The Respondent later decided that because the fact-finding panel found that there was no bias, ill motive or abuse of authority on the part of the ECA administration, the Applicant was not entitled to any remedies for the violation of his due process rights.

67. The Tribunal holds that such a decision is perverse as there is no nexus between the two wrongs of violation of due process rights and abuse of authority. The Applicant is right to challenge it before the Tribunal. The Applicant is entitled to remedies for the violation of his due process rights.

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<sup>12</sup> UNDT/2010/009 at para. 35.

*Summary of findings*

68. The Tribunal's findings are that:

a. The Applicant is entitled to approach the Tribunal regarding the Respondent's turn-about on the issue of compensating him for the breach of his due process rights.

b. After informing the Applicant that he had admitted liability for the breach of his right to due process and would determine what appropriate remedies could be made at a later date, the Secretary-General cannot later be heard to say that the appropriate remedies due to the Applicant was that he was not deserving of any remedies at all!

c. The Applicant's patience in waiting for the Secretary-General to decide on when to grant him appropriate remedies cannot be used against him. It is not in contention that as soon as he was informed that the Secretary-General had decided that the appropriate remedies he was promised meant no remedies at all, the Applicant approached the Tribunal.

d. The Applicant's claims in regard to the other administrative decisions of tampering with a published vacancy advertisement and the membership of the former incumbent of the position on the interview panel which were affirmed in management evaluation as not being erroneous administrative decisions are not receivable because the Applicant did not challenge those affirmations within the applicable time limits.

e. The Secretary-General's decision not to grant a remedy to the Applicant for violation of his due process rights because there was no abuse of authority against the said Applicant is perverse.

f. The Secretary-General's admission of liability effectively superseded the administrative decision complained of in the same way that the favourable outcome of rebuttal proceedings would replace or substitute the poor rating which is the subject matter of the rebuttal process.

**Judgment**

69. Having found that the Applicant's due process rights were breached, the Tribunal awards three months' net base salary as compensation.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 14<sup>th</sup> day of March 2016

Entered in the Register on this 14<sup>th</sup> day of March 2016

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi