



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

YOUNIS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Nicole Wynn, ALS/OHRM, UN Secretariat

Nusrat Chagtai, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 25 January 2018, the Applicant, a Chief at the P-5 level in the Transport Section with the African Union–United Nations Hybrid Operation in Darfur (“UNAMID”) in El Fasher, Sudan, filed an application contesting a decision finding him ineligible for attendance and participation at the United Nations Leaders Programme (“UN Leaders Programme”) training in Cape Town, South Africa. The Applicant alleges that he was discriminated against as two other staff members in like situation were nevertheless allowed to attend. As relief, he seeks an apology from the Office of Human Resources Management (“OHRM”) and the Management Evaluation Unit (“MEU”), an official investigation to determine accountability, a reinstatement of his nomination to the UN Leaders Programme, and financial remedy for stress, including that caused by the Administration’s delay in processing the case.

2. On 28 February 2018, the Respondent filed the reply submitting that the application is not receivable because the decision finding the Applicant ineligible to participate in the training did not adversely affect the terms or conditions of his employment and thus he does not contest a reviewable administrative decision. The Respondent also submitted that the decision was lawful, and the Applicant’s claim is without merit. Furthermore, the Respondent submitted that OHRM did not knowingly allow any staff member who was ineligible to attend the program, conceding also that one ineligible staff member did attend in error.

3. On 16 May 2018, the Applicant submitted his comments and observations in response to the reply, submitting that the Respondent in admitting an error confirms that he was discriminated against and that OHRM and MEU did not conduct due diligence to verify information. As a result, he is entitled to compensation for damage caused to his personal life, morale and career advancement.

4. The application was initially filed in Nairobi and assigned to Judge Izuako, but on 16 November 2018, it was transferred from Nairobi to New York and assigned to the undersigned Judge.

**Factual background**

5. The Applicant joined the Organization in 2009. The Applicant states that he was on temporary appointment as the Officer-in-Charge (“OiC”) Deputy Director of Mission Support for UNAMID at the D-1 level from 13 November 2016 to 2 May 2017, whilst the Respondent contends it was from 13 November 2016 until 30 April 2017. The personnel action form provided by the Respondent, however, states the relevant dates as 14 November 2016 until 30 April 2017. During this temporary assignment as OiC Deputy Director, the Applicant received a Special Post Allowance (“SPA”) to the D-1 level.

6. On 24 March 2017, OHRM announced that it was receiving nominations for the UN Leaders Programme designed for staff members at the Director level. This announcement included the selection criteria, which are set forth in the UN Leaders Programme Standard Operating Procedure (“SOP”):

The basic prerequisite set by [United Nations System Staff College (“UNSSC”)] for the “UN Leaders” Programme is UN leaders at Director levels (D1 and D2). However, [s]taff members who are on fixed term, continuing or permanent appointments at P5 level and currently on a ‘SPA to D1’ are eligible to attend. This includes staff members serving on D1 post on temporary assignment for at least 3 months or more. The end of the temporary assignment should be beyond the selected course date.

7. Based on OHRM’s call for nominations, UNAMID also issued a broadcast regarding participation in the UN Leaders Programme, which reiterated the above selection criteria stating also that although the program was originally designed for participants at the Director level (D-1/D-2 levels), those at the P-5 level on an SPA to the D-1 level were eligible to apply.

8. On 28 July 2017, the OiC of the Integrated Mission Training Center (“IMTC”), UNAMID, nominated the Applicant and two other UNAMID staff members for the UN Leaders Programme to be held in Cape Town, South Africa, in September 2017.

9. On 31 July 2017, OHRM confirmed via email that UNSSC accepted the nomination of three UNAMID staff members, including the Applicant, for this training.

10. On 2 August 2017, the Applicant and the two other UNAMID staff members received an email from OHRM confirming their nomination for the relevant UN Leaders Programme. The email provided logistics and general information about the training and requested them to complete an online application via UNSSC website and a registration form in Inspira to finalise the nomination process. The Applicant says he completed various forms and booked his hotel in Cape Town.

11. On 10 August 2017, the OiC of IMTC, UNAMID inquired with OHRM whether the Applicant was still eligible to attend the UN Leaders Programme given that he was no longer on SPA to the D-1 level. On 14 August 2017, the OiC of IMTC, UNAMID sent a reminder of his enquiry to OHRM.

12. Having received no response from OHRM, on 20 August 2017, the Director of Mission Support, UNAMID, approved the Applicant's attendance at the UN Leaders Programme with the following comments:

The training is mandatory for D1, D2, P5 on SPA D1[.] The staff member is a P5[.] However he registered and was accepted in this course when he was on SPA to D1, course will help st/m's [staff member's] work and section[.]

13. On 21 August 2017, UNAMID received a response from OHRM that the staff member was no longer eligible to attend the course as, according to the standard operating procedures, the end of the temporary D-1 level assignment "should be beyond the selected course date". This email was forwarded to the Applicant.

14. On 27 August 2017, the Applicant requested management evaluation.

15. On 3 November 2017, the Applicant received a management evaluation response upholding the decision deeming him ineligible to participate in the Programme.

### **Applicant's submissions**

16. The Applicant's principal contentions may be summarized as follows:
- a. The Applicant expressed his interest to join the UN Leaders Programme when he was on temporary assignment at the D-1 level, following which he was nominated. By the time the training was to take place, he was no longer on SPA to the D-1 level and hence he was informed that he was no longer eligible to participate in the training;
  - b. However, there were two other staff members on the UN Leaders Programme participant list who were at the P-5 level without SPA to the D-1 level. While the Applicant pointed out this discrepancy to OHRM and protested that they were not treated equally, OHRM and later MEU did not perform the proper verification and told him that these two staff members met the selection criteria.

### **Respondent's submissions**

17. The Respondent's principal contentions may be summarized as follows:
- a. The application is not receivable since the Applicant admits that he was ineligible to attend the UN Leaders Programme and hence the contested decision produced no direct legal consequences to the legal order;
  - b. Further, the contested decision was lawful as the Applicant did not meet the selection criteria. The Applicant is correct that one staff member participated in the UN Leaders Programme in Turin in May 2017 even though he did not meet the selection criteria, and his attendance in the Program was in error. However, OHRM relied on the information it received from the nominating office and there was no deliberate decision to treat the Applicant and another staff differently. Even though this ineligible staff member was allowed to erroneously participate, this did not give the Applicant the right to also attend the Programme against the rules.

## Consideration

18. Whilst, in fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing, the Dispute Tribunal may expedite the disposal of a case for various reasons.

19. In this instance, upon initial perusal and review of the case, it became evident to the Presiding Judge that the facts and the law were sufficiently pleaded, that there seemed to be no dispute as to the material facts of the case, and that the case turned on a matter of construction of the applicable law. The Tribunal therefore decided to deal with this matter on an expedited basis without the need for further submissions.

### *Receivability*

20. Article 2.1(a) of the Dispute Tribunal's Statute states that the Tribunal is competent to "hear and pass judgment on an application ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

21. In this case, the Respondent submits that the application is not receivable because the decision to disallow the Applicant's participation in training, for which he was ineligible, did not adversely affect the terms or conditions of his employment and thus he did not contest a reviewable administrative decision. The Tribunal notes that the case law on what constitutes an administrative decision has been long settled by both Tribunals (see, for instance, *Lee* 2014-UNAT-481 as referred to in many subsequent judgments of the Appeals Tribunal, including *Harb* 2016-UNAT-643, *Faye* 2016-UNAT-654, *Faye* 2016-UNAT-657, *Hassanin* 2017-UNAT-759, *Zachariah* 2017-UNAT-764, *Fasanella* 2017-UNAT-765, *Smith* 2017-UNAT-768 and *Loeber* 2018-UNAT-884). Counsel should therefore exercise circumspection in pleading matters of receivability as they may be unnecessarily time consuming and wasteful of resources.

22. The Appeals Tribunal has held that “[t]he terms and conditions of the employment contract of a staff member are set forth in the letter of appointment and its express incorporation by reference of the Organization’s Regulations and Rules and all pertinent administrative issuances”. Further, the Staff Regulations and Rules “embody the conditions of service and the basic rights and duties and obligations of United Nations staff members” (*Slade* 2014-UNAT-463, paras. 26-27, referencing *Egglesfield* 2014-UNAT-399, para. 21, quoting *Valimaki-Erk* 2012-UNAT-276, para. 42. See also *Obdeijn* UNDT/2011/032, para. 31).

23. The Tribunal notes that staff rule 1.3(b) provides that “the Secretary-General shall seek to ensure that appropriate learning and development programmes are available for the benefit of staff”. Furthermore, the Tribunal also notes that sec. 2.3 of ST/SGB/2009/9 (Learning and development policy) reiterates that “[l]earning and development opportunities should normally be made available to staff at all levels” and sec. 2.2 sets a “minimum target of five days for professional development per year” for all staff members.

24. Considering that learning and development opportunities are for the benefit of the staff members under the Staff Regulations and Rules, which form the terms and conditions of the Applicant’s employment, the decision relating to learning and development opportunities is therefore an administrative decision subject to judicial review. Whether the Applicant is eligible or not for a learning opportunity is a question for the merits and has no bearing on receivability. Thus, the Tribunal finds the application receivable.

#### *The merits*

25. The Respondent submits that the decision deeming the Applicant ineligible to participate in the training program was lawful since the standard operating procedure for the UN Leaders Programme (“the SOP”) clearly states that staff members at the P-5 level are eligible to attend the course while serving on temporary assignment at the D-1 level for at least three months or longer if the end of the temporary

assignment is beyond the selected course date. The Applicant served on temporary assignment at the D-1 level until 30 April 2017 and the UN Leaders Programme for which he was nominated was to take place in September 2017, after the end of the temporary assignment. Therefore, it is contended by the Respondent that the Applicant did not meet the last eligibility criterion stipulated in the SOP by the time the training was to take place, as his temporary contract had ended already.

26. The Applicant, however, argues that he was eligible for participation at the time when the training was initiated, was duly nominated, endorsed, approved and confirmed for participation. He further argues that other staff members at the P-5 level, who were not on temporary assignment at the D-1 level and thus did not meet the selection criteria, were nevertheless allowed to attend the course and thus he was discriminated against. Although MEU found that the other two staff members met the selection criteria, the Respondent concedes and admits that one staff member did not qualify and attended the course in error, but counters that OHRM relied on the nomination information it received from the peacekeeping mission in Abyei, Sudan, which had nominated that staff member, and that there was no deliberate decision to treat the Applicant and another staff member differently.

27. The Tribunal has already cited staff rule 1.3(b) above regarding the Administration's obligation to ensure that appropriate learning and development programs are available for the benefit of staff including the Applicant. Furthermore, in terms of ST/SGB/2009/9, learning and development opportunities "should normally be made available to staff at all levels" and "[a] minimum target of five days for professional development per year is established for all staff members". The Respondent, however, submits that the contested decision was lawful and in line with the SOP on the determination of eligibility since the Applicant did not fulfil a condition requiring that his assignment at the D-1 level extend beyond the selected course date. The question therefore arises as to what legal status and legal authority the standing operating procedures have and how they relate to the Administration's obligations under the Staff Rules and the aforecited Secretary-General's Bulletin.



### Legal status of the SOP

28. It is not known from the information in the text of the SOP as to who drafted, authored or approved them. However, from a 27 March 2017 email circulating them, it is stated that OHRM developed the SOP for the selection and nomination of candidates, “in order to implement a transparent selection process that fairly distributes available seats amongst offices and departments in line with organizational priorities”.

29. Regarding the hierarchy of the Organization’s internal legislation, the Tribunal stated in *Korotina* UNDT/2012/178:

31. As the Tribunal stated in *Villamorán* UNDT/2011/126, at the top of the hierarchy of the Organization’s internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General’s bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

32. Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Tolstopiatov* UNDT/2010/147, *Ibrahim* UNDT/2011/115, *Morsy* UNDT/2012/043).

33. Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance which it elaborates (Administrative Tribunal of the International Labour Organization, Judgment No. 486, *In re Léger* (486)). It is also important to highlight that a distinction must be made between matters that may be dealt with by way of guidelines, manuals, and other similar documents, and legal provisions that *must* be introduced by properly promulgated administrative issuances (*Villamorán*, *Valimaki-Erk* UNDT/2012/004).

30. In *Husseini* 2016-UNAT-701, at para. 15, for example, in reviewing the status of staff circulars as administrative issuances, the Appeals Tribunal found that in all practical terms they are akin to employment policy guidelines, bestowing “discretionary powers which must be exercised reasonably, fairly and flexibly in accordance with their internal substantive legal requirements”. Thus, even if a staff member has no contractual right to receive an entitlement, he does have an expectation that the discretion will be exercised properly.

31. In terms of the Staff Rules and the relevant Secretary-General’s bulletin ST/SGB/2009/9, the Administration is obligated to ensure appropriate learning and development programs for the benefit of the Applicant, and opportunities normally availed to him like any other staff member. Although there is no case law that the Tribunal is aware of on the legal standing of standard operating procedures in this context, it must be clear that they fall at the very bottom of the hierarchy of “instruments”. There is certainly no doubt that the Staff Rules and applicable Secretary-General’s bulletin trump the SOP in this case. Standard operating procedures in common parlance and meaning within any organization normally provide step-by-step instructional guidance on carrying out routine procedures and operations, whereas criteria for eligibility for selection and nomination would more ordinarily be better served in a higher instrument or document, particularly if they are to be applied strictly as binding. In any event, the Tribunal observes that in the aforementioned email of 27 March 2017 by which the SOP was circulated, it is further stated that this is a pilot of the nomination process to be evaluated later, serving as a basis for the coming years, and “requesting offices and departments to provide feedback to the SOP’s that could enhance the process in the future”. To all intents and purposes, therefore, the SOP does not in any event appear to be final and binding. Their status as being legally binding and enforceable is therefore already questionable.

Was the contested decision lawful?

32. The Tribunal observes that aside from their questionable binding nature, and whatever the legal status of the SOP, there is a clear proviso by way of footnote on page 4 of the SOP, which reads as follows (emphasis added):

*Nominations by peacekeeping missions are not approved by OHRM as the departmental internal nomination and approval procedures may vary. However, approvals on mission level are strongly encouraged to follow the approval process as outlined in III.1 and III.2 for organizational consistency and quality assurance.*

33. The facts of this case are that the Applicant was nominated, confirmed, and endorsed by UNSCC, as follows from an email from OHRM of 31 July 2017 regarding the training. It follows also from the above proviso that the OiC of IMTC who nominated the Applicant and the Director of Mission Support who approved the Applicant's attendance, having considered the organizational needs of the Mission, were "strongly encouraged" to follow the approval process, but not obligated to do so. Furthermore, it being common cause that UNAMID is a peacekeeping mission, OHRM's approval was not required in this instance. This is evident from OHRM's casual acceptance of the nomination of the staff member from Abyei, without much ado.

34. If OHRM retained any right to refuse the Applicant's participation, the Tribunal finds that at the very least OHRM had a discretion to reconsider the Applicant's situation in light of the particular circumstances, and had to exercise such discretion reasonably, fairly and flexibly. The particular circumstances in this case being, *inter alia*, that the Applicant had satisfied every other nomination criteria, that the SOP was only provisional and not set in stone, that another ineligible staff member had been accorded the benefit to participate, that the Applicant had already been nominated, approved and endorsed even beyond the date of expiry of his temporary D-1 assignment, and in light of the last minute and late notification of refusal, the Tribunal finds that a strong expectation of the training benefit was created for the Applicant. Therefore, the Tribunal finds that the discretion, if indeed OHRM

had any power thereof, was not exercised properly. Even if a staff member has no contractual right to receive an entitlement, or for that matter a benefit, he does have an expectation that the discretion will be exercised properly in all the circumstances.

35. In addition, the Tribunal also finds that as the SOP was not mandatory nor obligatory, and possibly only directory, that an exception could have been made in the Applicant's favour in all the particular circumstances of this case (see *Hastings* UNDT/2009/030, paras. 22-26).

36. The Tribunal notes that the Respondent also contends that he relied on UNAMID's nomination of the Applicant which was later found to be in error, but does not argue that he committed an error by accepting the Applicant to the training program in Cape Town, which it was entitled to rectify. Considering the non-binding nature of the SOP and the specific proviso of the SOP which clearly states that OHRM's approval was not required in this case, the Tribunal finds that this is not the case where the Respondent committed an error and later rectified it. However, for the sake of completeness, the Tribunal will deal with this issue as well.

37. The Appeals Tribunal held in *Kule Kongba* 2018-UNAT-849, at para. 30, that the Administration has a duty, and is entitled, to rectify its own error, citing its decision in *Cranfield* 2013-UNAT-367:

36. In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

38. Furthermore, in the case of *Zillner* UNDT/2015/079 regarding the obligation of the Administration to correct its own mistakes, the Tribunal stated "where the administration commits an irregularity in the recruitment procedure it falls to it to

take such measures as appropriate to correct the staff member's situation". The correction of an error is therefore not without consequence and the Administration must take full responsibility in a measured way. The Tribunal finds that if indeed the decision was erroneous, in all the particular circumstances of the Applicant's case, the Administration's discretion should have been exercised in a responsible manner and it should have taken such measures as appropriate to promote the Applicant's interests.

### **Conclusion**

39. In view of all of the foregoing, the application succeeds.

40. The question of remedies is reserved, and the Tribunal encourages the parties to seek a joint resolution on this issue, either *inter partes* or through the Office of the United Nations Ombudsman and Mediation Services ("UNOMS").

41. The parties shall attempt to resolve the issue of appropriate relief and inform the Tribunal, on or before 25 February 2019, if they have reached an agreement. If the parties are unable to reach a resolution, they may be directed to file further submissions.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 14<sup>th</sup> day of January 2019

Entered in the Register on this 14<sup>th</sup> day of January 2019

*(Signed)*

Nerea Suero Fontecha, Registrar, New York