



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

Judgment No. 2022-UNAT-1269

**Ashok Kumar Nigam
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2021-1607
Date of Decision:	1 July 2022
Date of Publication:	24 August 2022
Registrar:	Weicheng Lin

Counsel for the Appellant: Self-represented

Counsel for the Respondent: Patricia C. Aragonés

JUDGE GRAEME COLGAN, PRESIDING.

Introduction

1. Ashok Kumar Nigam is a former staff member of the United Nations Development Programme (UNDP).¹ Previously he held a fixed-term appointment at the D-1 level as the Resident Coordinator and Resident Representative (RC/RR) in Riyadh, Saudi Arabia.

2. In Judgment No. UNDT/2021/092 of 29 July 2021 (the impugned Judgment), the United Nations Dispute Tribunal (UNDT or the Dispute Tribunal) dismissed Mr. Nigam's claims arising out of an investigation into alleged misconduct against him, as not having been received by it within the time allowed for doing so after his request for management evaluation was decided. Alternatively, the UNDT also determined that Mr. Nigam's appeal was not receivable because his allegations of "negligence" were raised for the first time before the UNDT and had not been the subject of his request for management review. Mr. Nigam has appealed against both conclusions in the impugned Judgment.

3. For reasons set out below, we allow this appeal in part and, with defined parameters as to its scope and content, remand his case to the UNDT for decision on the merits of Mr. Nigam's justiciable claims.

Facts and Procedure

4. This case has a convoluted history that it is necessary to trace and describe in order to determine what Mr. Nigam did and when. After he had left the UNDP's service in 2018 and was no longer a staff member, Mr. Nigam was advised that a complaint had been made by two staff members alleging misconduct by him. The complaint apparently concerned Mr. Nigam's actions in relation to the arranging of two events in New York about a communications platform called "Digital Good". The UNDP engaged investigators from the International Monetary Fund (IMF) to undertake a preliminary investigation into this complaint. Despite the very limited information that has been released about it, this complaint seems to have been, at worst, an allegation of very minor misconduct which, in the event, did not get past an initial investigation of it before it was rejected and taken no further by UNDP. It appears that the

¹ The UNDT recorded erroneously in the impugned Judgment (at para. 1) that he was then still a staff member whereas he had left UNDP more than 2 years previously. For reasons that are unclear, the complaint against him was lodged long after he left UNDP.

complaint against Mr. Nigam was not made until some 3 years after the event it concerned and more than 9 months after he had retired from UNDP.

5. It is necessary, however and as the Respondent reminds us, to record that Mr. Nigam made two applications to the UNDT. The first, filed on 30 September 2019, challenged the decision of the Administration of 5 August 2019 to close the complaint file against him on the basis that the allegations against him had not been substantiated. In his application to the UNDT, Mr. Nigam described this decision as “discriminatory” and “an abuse of authority”. By Judgment No. UNDT/2019/152 of 18 October 2019, the UNDT dismissed Mr. Nigam’s case because he had not sought management evaluation of the impugned decision. There was no appeal against that Judgment and so, except as the fact of it may affect the current appeal before us, no more needs to be said about it. Mr. Nigam was, however, still clearly dissatisfied with the way in which UNDP had dealt with him and was not to be deterred.

6. By one letter of 19 November 2019, Mr. Nigam sought a copy of the IMF investigators’ investigation report and written confirmation that there were no charges against him. On the same date, 19 November 2019, Mr. Nigam wrote to the UNDP Office of Audit and Investigation (UNDP OAI) complaining of the falsity and maliciousness of the complaints that the two staff members had made against him which had brought about the previous concluded investigation. Included in Mr. Nigam’s complaints to UNDP OAI was that the UNDP had acted without adequate evidence and due diligence in deciding to undertake the investigation against him.

7. By letter of 12 December 2019, the UNDP responded by advising Mr. Nigam that he had been informed on 5 August 2019 that the allegations against him had been found to be unsubstantiated, that the case against him had been closed and that he had been exonerated of the allegations brought against him.

8. By letter of 30 December 2019, Mr. Nigam requested management evaluation of the decisions not to provide him with the investigation report; not to provide him with the reasons why the unfounded allegations were raised; and not to provide him with the inculpatory evidence against him on the basis of which the investigation had been instigated. We will call this the “first management evaluation request”.

9. On 10 February 2020, the UNDP advised Mr. Nigam that there was no basis to set aside any of the decisions contested by him in his first management evaluation request. Mr. Nigam then had the period of 90 days within which to file an application with the UNDT challenging the decision to refuse the information he had sought on 30 December 2019 and as we have summarised in the immediately foregoing paragraph of this Judgment.

10. On 17 February 2020, UNDP OAI advised Mr. Nigam, in response to his complaint to it of 19 November 2019, that no investigation of his complaint had been warranted and his complaint file had been closed.

11. On 18 March 2020 Mr. Nigam requested management evaluation of the OAI's decision not to investigate his complaint which he described as being of harassment and abuse of authority. We will refer to this as the "second management evaluation request".

12. On 29 April 2020, the UNDP informed Mr. Nigam that there was no basis to set aside the UNDP OAI's decision. This included advice that his complaint had not contained sufficient evidence of alleged misconduct (we infer by the two staff members who had complained against him) to warrant further investigation. This was UNDP's response to Mr. Nigam's second management evaluation request.

13. On 23 July 2020, Mr. Nigam filed with the UNDT an application which contested the 17 February 2020 decision, management evaluation of which had been refused on 29 April 2020. Mr. Nigam's claim made to the UNDT was against the decision not to undertake a fact-finding investigation against the two staff members who had made complaint against him. He complained that his counter-complaints against the other staff members had not been adequately investigated by UNDP.

14. On 6 May 2021, the UNDT issued Order No. 093 (NBI/2021) granting Mr. Nigam leave to respond to the Secretary-General's reply and, on 13 May 2020, Mr. Nigam filed his rejoinder. Following a case management discussion on 14 May 2020, the UNDT issued a further Order No. 104 (NBI/2021) granting the Respondent leave to respond to Mr. Nigam's rejoinder. On 19 and 21 May 2021, both parties filed further submissions before the UNDT issued the impugned Judgment on 29 July 2021.

15. In its materially very short judgment, the UNDT determined first that Mr. Nigam did not file his application with the Dispute Tribunal within the 90-day period after receipt by him (which it said had been on 10 February 2020) of the management evaluation of the decision not to provide him with investigative materials. Second, the UNDT decided that Mr. Nigam's allegation of "negligence" against the Respondent had not previously been raised as a part of his management evaluation request and so this cause of action or ground of application was, separately and for that reason also, not receivable by the Dispute Tribunal.

Submissions

The Appellant's Case

16. Mr. Nigam claims that the management review decision, the subject of his proceedings filed with the UNDT on 23 July 2020, was notified to him on 29 April 2020 so that the application was filed with the UNDT 84 days later, which was within the statutory 90-day time limit.

17. Further, Mr. Nigam submits that there was no applicable request made by him for the investigation report, whether in his request for management evaluation made on 18 March 2020 or his application to the UNDT filed on 23 July 2020. He says that the investigation report only became an issue in the proceeding when it was raised by the Respondent's representative in his rejoinder of 12 May 2021 to Mr. Nigam's own pre-trial submissions on the preliminary issue of the timeliness of his proceedings. He says that he told the UNDT that having the investigative report would assist him with his case inviting, at least impliedly, the Dispute Tribunal to either direct its production (discovery) or to direct its provision by the Secretary-General to the UNDT. Put succinctly, Mr. Nigam says that the Dispute Tribunal erred in mistaking his suggestion made during the course of a pre-trial conference with the Judge, for an erroneous conclusion that this document had been sought earlier from UNDP and the refusal to provide it was the subject of the management evaluation decision and of the claims made to the Dispute Tribunal.

18. As to the second ground for dismissing the proceeding, Mr. Nigam says that the UNDT erred similarly by failing to take into account the grounds upon which management evaluation had been requested which included references to the Respondent's negligence.

The Secretary-General's Answer

19. The Respondent submits that the proceedings based on the first management evaluation request were clearly time-barred. The Respondent submits that Mr. Nigam's challenge was to the decisions not to provide him with evidence justifying the initiation of the assessment or investigation into the allegations made against him and to provide him with the materials gathered in the course of that process. These decisions were the subject of his first management evaluation request which was decided on 10 February 2020, but his proceeding challenging them was filed on 23 July 2020, more than 90 days after his receipt of the management evaluation decision. No request was made to waive the filing deadline. It follows that the application was not receivable in part.

20. As to the UNDT's decision to reject Mr. Nigam's application alleging negligence on the part of UNDP, the Secretary-General submits that the Appellant was required to seek management evaluation of UNDP's decision to initiate an assessment or investigation of the allegations against him "on the grounds of negligence". The Respondent points out that in his second request for management evaluation, Mr. Nigam contested the decision of 17 February 2020 of the OAI not to conduct an investigation into his (our emphasis) complaint of harassment. The Respondent points out that this challenge to the UNDP's decision was not brought on the grounds of the UNDP's negligence. It follows that the UNDT was correct to reject this proceeding as not receivable in that it had not been evaluated by management for negligence.

21. In relation to the "negligence" ground of challenge also, the Respondent submits that insofar as this cause of action may have applied to his first management evaluation request and the proceedings based on this, it is unavailable because the whole cause of action is out of time and, insofar as his first proceedings before the UNDT was concerned, there was no appeal against this, so the UNDT's determination stands.

22. In reply to the Appellant's argument that any suggestion of his getting access to the investigation report arose neither from his management evaluation request nor from his claim filed with the UNDT, the Secretary-General relies on the UNDT's general and inherent powers to define and individualise the administrative decision challenged, what should be the subject of judicial review of that decision so defined, and indeed says that it is incumbent on the Tribunal to do so. The Respondent says that the UNDT acted within this jurisdiction to

“interpret” the Appellant’s submissions to “partially challeng[e] the UNDP’s decisions to not provide him with the evidentiary material he had requested and, in this respect, was time-barred ...” [footnotes omitted].

Considerations

23. At the heart of the first head of appeal, the UNDT wrote, at para. 29 of the impugned Judgment, that the actions of UNDP (the decision to decline providing Mr. Nigam with the investigative materials) were: “... the subject of a management review [application] submitted since 30 December 2019. The Applicant was informed that the material would not be provided since 20 February 2020. The Applicant filed his application on 23 July 2020, which was not within the 90 days of being informed of the decision.” While, as we will show, this was correct in one sense and as far as it went, it also illustrates the UNDT’s error in failing to consider all the relevant pleadings and evidence.

24. Because of the complexities of the overlapping complaints, management evaluation requests and decisions, references to background and contextual materials not now in issue, and the dual UNDT proceedings, we will first summarise what is within the scope of this appeal. We have done so by working backwards from the pleadings filed in the UNDT on 23 July 2020 by Mr. Nigam which define what he was seeking from it. We have set out the nature of Mr. Nigam’s claims at paragraph 13 of this Judgment. This is because, with some exceptions that are inapplicable to this case, the UNDT’s Statute and Rules of Procedure only permit appeals to it of staff members’ claims that have first been referred to management evaluation and either declined or not responded to.

25. Mr. Nigam’s appeal to the UNDT related to the refusal of the UNDP’s OAI to investigate his complaint to the OAI of 19 November 2019 that the two staff members who had complained against him, had done so willfully, falsely, and maliciously and had fabricated untrue complaints against him. His complaint of that date also included an allegation that the UNDP’s Administrator had acted on those impugned complaints without adequate evidence supporting them and without undertaking ‘due diligence’, in commencing his investigation of his conduct.

26. Mr. Nigam's pleadings before the UNDT confirmed that, on 17 February 2020, the UNDP OAI declined to investigate his complaint of 19 November 2019 and closed its file. His pleadings confirmed that Mr. Nigam sought management evaluation of this decision on 18 March 2020 and that this was declined on 29 April 2020.

27. The 29 April 2020 UNDP decision declining management evaluation addressed the nature of that request by quoting from Mr. Nigam's letter of 18 March 2020 in which he described his claim as being against the decision of the OAI "...not to conduct an investigation into [his] complaint of harassment with regard to the ...investigation conducted by UNDP through the IMF [OII]". We address this somewhat inchoate description by Mr. Nigam of his complaints in our analysis of the correspondence in which it appeared and which we set out below. What is clearer, however, is that the UNDP's Assistant Administrator and Director of its Bureau for Management Services (AAD/BMS) who responded to the management evaluation request, concluded that Mr. Nigam had not established, by the provision of sufficient evidence, alleged misconduct to warrant further investigation. The AAD/BMS concluded that, despite his exoneration, it had not been established that the complaint against him had been made maliciously or frivolously. The AAD/BMS emphasised that the test for malice or frivolity was the genuineness and good faith of the complaint and the complainant, and that different perspectives by parties of what was said, how and in what context, had to be allowed for. The AAD/BMS concluded that there was no evidence that UNDP had engaged in harassment of Mr. Nigam by authorising the preliminary investigation of the complaints against him.

28. Mr. Nigam's 18 March 2020 request for management evaluation had sought a reconsideration of his request to the OAI to investigate his complaint that he had made to the OAI on 19 November 2019, to which it had responded on 17 February 2020 declining the request. We infer from Mr. Nigam's description of his complaint that it concerned two matters: first, the manner in which the complaint of the other two staff members against him was investigated and otherwise dealt with by the UNDP through its delegated investigator, the IMF OII; and, second, the UNDP's failure or refusal to investigate his own complaints against both the two staff members who had earlier complained against him, and against UNDP for the manner in which it dealt with his complaint against them.

29. The foregoing analysis of what was claimed by Mr. Nigam and decided by the Respondent set the parameters of the UNDT's consideration of his application to it: it was obliged to consider the issues so posed for it but, equally, was constrained from going beyond those issues.

30. Unfortunately, the impugned Judgment is internally inconsistent in several ways. It ruled as irreceivable this aspect of Mr. Nigam's appeal to it because what it said was Mr. Nigam's request for access to the investigative documentation was filed out of time after management evaluation of this request had been declined. The UNDT noted, however, that this was one aspect of Mr. Nigam's application to it. However, it did not address or refer at all to what was to happen to the balance of the proceedings that were receivable.

31. Next, the UNDT ruled that what Mr. Nigam described as the UNDP's "negligence" was not receivable because this had not ever been subject to management evaluation. But again, it did not refer to what was to happen to the balance of his claim that was receivable.

32. Finally, in respect of both of the foregoing partial findings of non-receivability, the UNDT nevertheless dismissed the whole of Mr. Nigam's application filed on 23 July 2020.

33. Even at worst for Mr. Nigam, therefore, there were some parts of his application to the UNDT that survived its non-receivability decisions despite the apparent dismissal of it as a whole.

34. It seems possible that the explanation for the UNDT's confusion may have been its reliance on one letter Mr. Nigam wrote to the Respondent on 19 November 2019 which indeed sought access to the investigative documentation. But as the factual narrative reveals, he wrote another letter on the same day, this one to the UNDP OAI. In it he complained about how he had been treated in the investigation of his alleged misconduct and in respect of his allegations against those staff members who had earlier complained about him. It was this latter letter that was the subject of the management evaluation exercise that was decided on 29 April 2020 thus making receivable his 23 July 2020 appeal filed with the UNDT. It will follow, however, that only those matters raised in that management evaluation exercise (and which survive other parts of this appeal) can form the issues for Mr. Nigam's application to the UNDT and it is these matters which we will direct be remanded to the Dispute Tribunal for hearing on their merits.

35. Perhaps as a result of the complexity of the issues and the several ways in which they were sought to be addressed, the impugned Judgment misinterpreted and erroneously described the issues for its consideration as including a claim by Mr. Nigam that he should have the IMF OII's investigation report disclosed to him. Although that issue arose in discussions in a pre-trial conference in the UNDT, it was not a claim that was pleaded by him. It arose rather as a matter of potential document discovery in preparation for trial. We should make clear that we are not determining whether the UNDT should have directed the Respondent to make this document available to Mr. Nigam as part of the exercise of its document discovery powers: that issue may yet arise again following the remanding of the case to the UNDT for decision on its merits and we have not had argument on the point. That confusion by the UNDT may account also for the erroneous recording of the dates of the request for, and response to, management evaluation which led the UNDT to conclude wrongly that Mr. Nigam did not apply to the UNDT within time.

36. Although as the summary of the relevant background reveals, there was a complex series of claims, requests and appeals brought by Mr. Nigam, we are satisfied that the UNDT erred by applying the time limits for bringing his proceedings to different correspondence and therefore to different dates. By applying the calendar to the appropriate correspondence, we conclude, as Mr. Nigam asserts, that he filed his application with the UNDT within the 90 days allowed for doing so. It follows that the UNDT erred in fact in concluding otherwise and the consequence of this error depriving Mr. Nigam of having his case determined on its merits, means that this error led to a manifestly unreasonable decision. The appeal succeeds on this principal ground.

37. The second ground on which the UNDT rejected, at least in part, Mr. Nigam's appeal, can be dealt with more concisely. It was that while in his appeal to the UNDT he alleged that UNDP had acted negligently, he had not asserted "negligence" in his application for management review and so was not permitted to do so on appeal.

38. Perhaps because Mr. Nigam is a layperson in such matters and so is unaware of them, we should point out that the UNDT is constrained in its jurisdiction and powers by its statute which does not allow causes of action founded on the tort of negligence. That is not to say that negligence (failure to comply with a duty of care to someone) cannot never be the basis of a claim brought by a staff member. However, negligence is not a stand-alone statutory cause of action. Contrary to the way in which the Dispute Tribunal dealt with it, this is not a matter of

whether a claim in negligence was brought to management evaluation and that if it was not, it could not be advanced before the UNDT as it was. Rather, to be justiciable, Mr. Nigam's appeal must be against an administrative decision made unlawfully by UNDP (or which it failed unlawfully to make) and which claim had previously been referred to management evaluation and either rejected or not actioned.

39. The statutory provisions to which we have referred are found in Article 2 of the UNDT Statute as follows with the emphasis in bold being ours:

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary- General as the Chief Administrative Officer of the United Nations:

(a) To appeal **an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.** The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

...

40. We consider that the UNDT was wrong to disallow consideration of these matters as ones of negligence because they had not been so raised for managerial evaluation. As we have already noted, there is a more fundamental jurisdictional bar to such a claim brought, apparently, as one in the tort of negligence: it does not fall within Article 2(a) of the UNDT Statute as set out above. So, the UNDT was right to disallow this claim as it was framed, but for a reason other than that which it applied, and it was wrong to have made Mr. Nigam's application irreceivable altogether.

41. To the extent that the UNDT held that some of Mr. Nigam's claims which were not filed within time after management evaluation were not receivable, it did not err in fact or law and such conclusions are upheld. There remain, however, errors made by the UNDT which we have identified and in respect of which the appeal must be allowed. The first is its decision not to receive the application in respect of claims that were made within after management evaluation and within the time limit. The second is that although the UNDT decided to not receive Mr. Nigam's application because of his use of the word "negligence" in relation to the

Secretary-General's actions or omissions, it should not have done so for that reason. The preferable analysis of this issue is that there is no independent cause of action in the tort of negligence available to staff members in Mr. Nigam's circumstances and such a claim was thereby irreceivable. However, the proper remedy was to sever that impugned cause of action but to receive the balance of Mr. Nigam's application which was within jurisdiction.

42. For the foregoing reasons, Mr. Nigam's appeal is allowed. The case must be, and is, remanded to the UNDT for decision on its merits based on and limited to those matters referred to in Mr. Nigam's second management evaluation request, that is by the contents of his letter of 18 March 2020 and which was responded to by letter dated 29 April 2020.

43. Finally, and as we note the UNDT did also, we recommend the Appellant to take legal advice and/or have legal representation: the complexities, pitfalls and nuances of this matter for an unrepresented litigant are well illustrated by this Judgment.

Judgment

44. The appeal is allowed in part. The UNDT's finding of irreceivability as contained in Judgment No. UNDT/2021/092 is set aside and the case is remanded to the UNDT for decision on its merits and as set out in paragraph 42 of this Judgment.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022.

(Signed)

Judge Colgan, Presiding
New York, United States

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
New York, United States

Judgment published and entered into the Register on this 24th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar