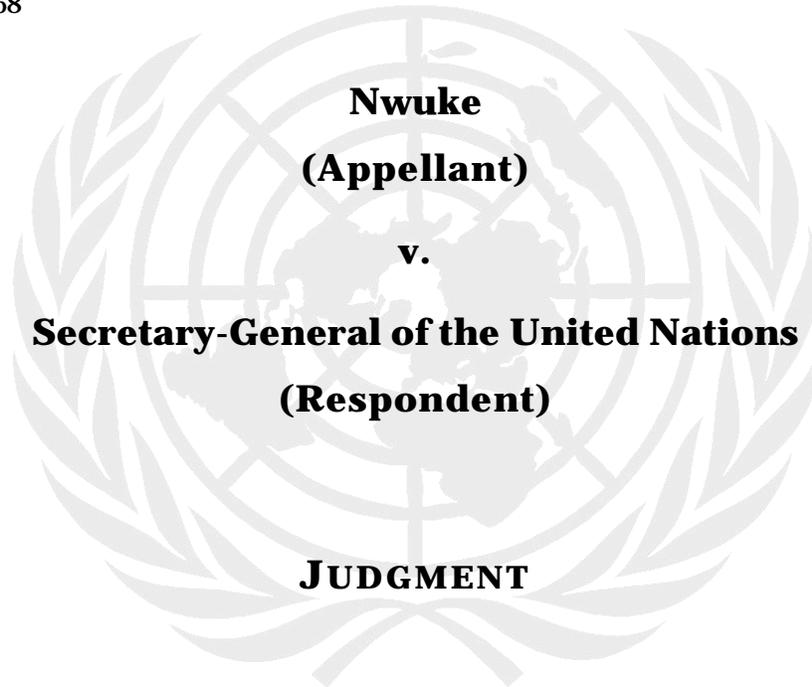




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-068



**Nwuke
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Sophia Adinyira Judge Kamaljit Singh Garewal
Judgment No.:	2010-UNAT-099
Date:	29 December 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Cristián Gimenez Corte

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. In an application before the United Nations Dispute Tribunal (Dispute Tribunal or UNDT), Kasirim Nwuke (Nwuke) requested the UNDT to (a) compel the Administration to investigate in full the series of complaints about discrimination he had filed against Senior Management of the United Nations Economic Commission for Africa (ECA); (b) order the Administration to perform different actions concerning the selection process for the position that he had applied for and appoint him to the position; and (c) order the Administration to treat him in a proper, non discriminatory way, restrain from retaliation, make him whole in every way, and grant him any other relief as may be deemed proper.

2. The UNDT held that it could not compel the Organization to investigate the staff member's complaints against ECA's Senior Management. It considered that Nwuke did not contest an administrative decision "that is alleged to be in non-compliance with the terms of [Nwuke's] appointment or contract of employment" as defined by the UNDT Statute and rejected his application as irreceivable.

3. Nwuke appeals the UNDT judgment. The Appeals Tribunal holds that the investigation into management and administrative practices in general or of disciplinary cases is usually a matter within the discretion of the Administration. But that does not mean that the administrative decision whether or not to undertake an investigation cannot be subject to judicial review. Whether or not the UNDT may review such a decision depends on whether it falls into the UNDT's jurisdiction pursuant to Article 2(1) of the UNDT Statute.

4. Article 2(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, Bulletins, and Administrative Instructions issued by the Secretary-General. Among those is ST/SGB/2008/5 concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority.

5. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.

6. In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, the Appeals Tribunal concludes that, when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation.

7. The judicial review of the administrative decision may result in the affirmation of the contested decision or its rescission. In the latter case, Article 10 of the UNDT Statute allows to order both the rescission and the performance needed to bring the administrative situation in compliance with the law.

8. In view of the foregoing, the Appeals Tribunal finds that the UNDT erred in finding the staff member's application not receivable. Nwuke in fact did challenge an administrative decision which he claimed was in non-compliance with his terms of employment. The UNDT therefore had jurisdiction to decide whether or not to order the conduct of an investigation or other courses of action concerning his accusations and complaints.

9. For the foregoing reasons, the Appeals Tribunal reverses the UNDT Judgment and remands the case to the UNDT for a trial on the merits.

Facts and Procedure

10. Nwuke is a staff member of ECA. On 12 June 2009, Nwuke was invited for an interview for the post of Director, Trade, Finance and Economic Development Division (TFED) of ECA. On 13 June 2009, Nwuke wrote to the Human Resources Service Section of ECA. He asserted that, in the past, ECA had appointed candidates from the roster for the post of Director, and since he had been placed on the roster for the post of Director, he should be treated in the same manner as the other rostered candidates.

11. On 24 June 2009, Nwuke wrote to the Secretary-General to complain about discriminatory practices and abuse of due process in promotions at ECA. On 3 August 2009, the Under-Secretary-General for Management advised Nwuke that the Management Evaluation Unit (MEU) determined that the decision to require him to undergo an interview

for the post was properly taken in the circumstances and that the Secretary-General endorsed the MEU's conclusions. The Secretary-General also endorsed the MEU's conclusion that, in order to avoid even the appearance of a conflict of interest, ECA should reconfigure the composition of the Advisory Selection Panel (ASP) constituted to interview him.

12. On 8 September 2009, Nwuke submitted an application to the UNDT seeking an order to compel the ECA Administration to undertake investigations into his various complaints against ECA management and its administrative practices.

13. On 5 October 2009, the Executive Secretary, ECA, announced his decision to fill the post of Director, TFED.

14. On 14 October 2009, Nwuke filed an application with the UNDT seeking an order to suspend the implementation of the administrative decision dated 5 October 2009. On 26 October 2009, the UNDT issued Judgment No. 2009/054 rejecting Nwuke's application for suspension of action.

15. On 28 January 2010, the UNDT issued Judgment No. UNDT/2010/017. The UNDT noted that, under Article 2(1)(a) of its Statute, it had jurisdiction in relation to an administrative decision that was alleged to be in non-compliance with the terms of appointment or the contract of employment. It held that it could not compel the Organization to investigate Nwuke's complaints against ECA's Senior Management. An investigation is part of a disciplinary procedure which is the privilege of the Organization itself. The UNDT observed that Nwuke had recourse under the Staff Regulations and Rules to pursue his grievances in relation to his allegations of abuse of authority by ECA Management. It considered that Nwuke did not contest an administrative decision "that is alleged to be in non-compliance with the terms of [Nwuke's] appointment or contract of employment" as defined by the UNDT Statute and rejected his application as irreceivable.

16. Nwuke filed an appeal against Judgment No. UNDT/2010/017 on 14 March 2010. The Registry of the Appeals Tribunal forwarded the appeal to the Secretary-General on 24 March 2010 and the Secretary-General filed his answer on 10 May 2010.

Submissions

Nwuke's Appeal

17. Nwuke requests the Appeals Tribunal to find his appeal receivable under Article 2 of its Statute; to rescind the UNDT's decision rejecting his application; and to remand the case to the UNDT.

18. Nwuke submits that the UNDT erred in fact in finding that he submitted his application under ST/SGB/2008/5 entitled "Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority" and that his application was therefore irreceivable. He further submits that the UNDT erred in law in finding that it could not compel the Organization to investigate his complaints against ECA's Senior Management. The UNDT in fact recently held in *Abboud* that an "applicant ha[s] a right under his contract of employment to have his request for an investigation fairly and competently investigated".¹

Secretary-General's Answer

19. The Secretary-General submits that the UNDT correctly determined that there was no administrative decision alleged to be in non-compliance with the terms of Nwuke's contract of employment and, accordingly, rejected his application. The UNDT, in accordance with the long-standing jurisprudence of the former Administrative Tribunal, correctly found that staff members have no right to require the Organization to undertake investigations into management and administrative practices in general.

20. The Secretary-General submits that Nwuke has not identified any error that would warrant a reversal of the UNDT Judgment. He contends that Nwuke's reliance on the *Abboud* Judgment is not dispositive because this Judgment has been appealed. Contrary to Nwuke's assertions, the UNDT correctly found, in accordance with the jurisprudence of the former Administrative Tribunal, that the investigation of disciplinary matters is a matter within the discretion of the Administration.

¹ *Abboud v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/001/R.

Considerations

21. The Appeals Tribunal considers that Nwuke's application to the UNDT was receivable and should have been examined on its merits. The Appeals Tribunal therefore vacates the UNDT Judgment on receivability for the following reasons.

22. In his application before the UNDT, Nwuke requested the UNDT to (a) compel the Administration to investigate in full the series of complaints Nwuke had filed against ECA Senior Management about discrimination; (b) order the Administration to perform different actions concerning the selection process for the position that Nwuke had applied for and appoint him to the position; and (c) order the Administration to treat Nwuke in a proper, non-discriminatory way, refrain from retaliation, and make him whole in every way and grant him any other relief as may be deemed proper.

23. Nwuke requested the UNDT to review the Administration's acts and omissions following his letter dated 24 June 2009 to the Secretary-General complaining of discriminatory treatment and seeking several performances related to the selection process which was pending at the time. Nwuke contends that the Administration failed to act in accordance with the applicable law. He therefore requested that the UNDT order certain performances to correct the administrative wrongdoing.

24. The application was therefore directed against administrative decisions, relating to actions taken by the Administration as well as the Administration's failure to act.

25. In *Tabari*, the Appeals Tribunal held that "... not taking a decision is also a decision" constitutes an administrative decision subject to judicial review under Article 2(1)(a) of the UNDT Statute.²

26. When a staff member files a complaint and makes accusations about administrative violations of law, the Administration can exercise its discretion and decide whether or not to undertake an (at least preliminary or summary) investigation. The investigation into management and administrative practices in general or into disciplinary cases is a matter within the discretion of the Administration. But that does not mean that the administrative

² *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-030.

decision to undertake, or not to undertake, an investigation cannot be subject to judicial review. Whether or not the UNDT may review such a decision depends on whether it falls into the UNDT's jurisdiction pursuant to Article 2(1) of the UNDT Statute.

27. Article 2(1) of the UNDT Statute stipulates that the UNDT "shall be competent to hear and pass judgment on an application filed by an individual against ... (a) ... an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment ...". It also establishes that "[t]he 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".

28. So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

29. In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.

30. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.

31. Article 2(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, Bulletins, and Administrative Instructions issued by the Secretary-General. Among those is ST/SGB/2008/5 concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority. Paragraph 2.1 of ST/SGB/2008/5 provides that "every staff member has the right to be treated with dignity and respect and to work in an environment free from discrimination, harassment and abuse".

32. Paragraph 2.2 adds that "[t]he Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from

exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed”. Paragraph 5.3 establishes that “[m]anagers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings”.

33. ST/SGB/2008/5 then sets out the informal and formal proceedings that must take place and in paragraph 5.17, the final report of those proceedings is referred to as follows:

The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

34. Paragraph 5.18 provides for the possible courses of action one of which the responsible official shall take: (a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and will inform the alleged offender and the aggrieved individual; (b) If the report indicates that there was

a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) the third option is stated as follows:

If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken (footnote omitted).

(d) A final option is established in paragraph 5.19:

Should the report indicate that the allegations of prohibited conduct were unfounded and based on malicious intent, the Assistant Secretary-General for Human Resources

Management shall decide whether disciplinary or other appropriate action should be initiated against the person who made the complaint or report.

Paragraph 5.20, which is particularly relevant in the present case, finally establishes that “[w]here an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules”.

35. Chapter XI of the Staff Rules provides for the possibility to submit an application before the UNDT, and under Article 10 of the UNDT Statute, the UNDT may order the rescission of a contested administrative decision or a specific performance, and compensation (indispensable as an alternative to the rescission or performance ordered when the contested administrative decision concerns appointment, promotion, or termination).

36. In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, the Appeals Tribunal concludes that when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation.

37. The judicial review of the administrative decision may result in the affirmation of the contested decision or its rescission, and in the latter case, Article 10 of the UNDT Statute allows to order both the rescission and the performance needed to bring the administrative situation in compliance with the law.

38. In view of the foregoing, the Appeals Tribunal finds that the UNDT erred in finding Nwuke’s application not receivable. Nwuke in fact did challenge an administrative decision which he claimed was in non-compliance with his terms of employment. The UNDT therefore had jurisdiction to decide whether or not to order the conduct of an investigation or other courses of action concerning Nwuke’s accusations and complaints.

39. Of course, and as stated above, under paragraph 5.2o of ST/SGB/2008/5, a staff member who requests an investigation or makes accusations able to lead to disciplinary proceedings can also be held responsible for his or her application, for instance when acting in a frivolous, negligent, abusive, or mischievous way, causing unnecessary administrative action or even prejudice.

40. But serious and reasonable accusations and requests for investigations constitute important instruments to improve administrative procedures and to ensure that day-to-day actions by the Administration are in compliance with the Organization's law. The Administration must decide within its discretion whether or not to conduct investigations. The Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation, a staff member had a right to an investigation and it may be subject to judicial review under Articles 2(1)(a) and 10(5) of the UNDT Statute and Articles 2 and 9 of the Statute of the Appeals Tribunal.

41. The General Assembly established the new internal justice system and approved the Statutes of both the UNDT and the Appeals Tribunal. The Member States of the United Nations made a great effort to achieve an "independent, transparent, professionalized, adequately resourced and decentralized system ... consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike" (A/RES/63/253, preamble, paragraph 2).

42. According to the Statutes, the jurisdiction of both Tribunals and the content of the possible judgments they can render match those high goals and the UNDT should not decline to exercise its competence in matters like the present, when the respective right is provided for to the claimant by the rules.

43. For the foregoing reasons, Nwuke's appeal must be granted. Because the Judgment under appeal only addressed issues of receivability, the case must be remanded to the UNDT for a consideration on the merits.

44. Nwuke did not strictly follow the correct proceedings to present his grievances under ST/SGB/2008/5. But neither did the Administration, which could have forwarded Nwuke's request to the competent authorities under ST/SGB/2008/5 to follow the proper

procedures. Instead, the Administration addressed merely in the framework of its management evaluation what were considered the relevant facts of the case and found no discrimination. Despite that, the Administration decided that appropriate actions should be taken to ensure the integrity of the selection process, including the composition of the panel. Finally, in its letter of 3 August 2009, the Administration notified Nwuke that if he were dissatisfied with the outcome of the evaluation, he could file an application against the administrative decision.

45. This course of action clearly reveals that in the view of the Administration, the issues arising from Nwuke's application had been investigated to the extent that time, circumstances, and lack of ECA staff permitted. It results that Nwuke was not compelled to follow further administrative procedures, because the Administration, in exercising its discretion, had already acted upon his application.

46. Given this, it seems senseless and quite a paradox to refer him back to the procedures under ST/SGB/2008/5. Essentially, Nwuke has already accomplished its requirements, and his situation and pleas have already been examined and evaluated by the Administration. Hence, the UNDT had competence and must conduct the judicial review of the Administration's decision, actions taken or failure to act.

Judgment

47. For the foregoing reasons, the Appeals Tribunal reverses the UNDT Judgment and remands the case to the UNDT for a trial on the merits.

Dated this 29th day of December 2010.

Original and authoritative version: English

(Signed)

Judge Simón, Presiding
Montevideo, Uruguay

(Signed)

Judge Adinyira
Accra, Ghana

(Signed)

Judge Garewal
Chandigarh, India

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar