



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

**Campos
(Appellant)**

v.

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

JUDGMENT

[No. 2010-UNAT-001]

Before:	Judge Rose Boyko, Presiding Judge Mark P. Painter Judge Kamaljit Singh Garewal
Case No.:	2009-002
Date:	30 March 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Edward P. Flaherty

Counsel for Respondent: Phyllis Hwang

JUDGE ROSE BOYKO, Presiding Judge.

Synopsis

1. The appeals by Xavier Campos Ballester (Campos) against three Judgments issued by the United Nations Dispute Tribunal (UNDT) are dismissed. This Court affirms the findings of the UNDT that there was no flaw in the procedure used by the Staff Management Coordinating Committee (SMCC) to select a staff representative on the Internal Justice Council (IJC). It was known to staff associations, which freely participated in the selection process, that each participating staff association would be accorded one vote regardless of its respective membership. This Court also affirms the UNDT judgments rejecting Campos's allegations of conflict of interest on the part of UNDT judges. It furthermore rejects Campos's allegations of conflict of interest on the part of United Nations Appeals Tribunal (UNAT) judges.

Facts and Procedure

2. This appeal pertains to the appointment of Jenny Clift (Clift) instead of Campos, as a member of the IJC, which was established pursuant to the recommendations of the Redesign Panel to the United Nations (UN) General Assembly. The purpose of the IJC was, among others, to assist in the recruitment of suitable judicial candidates for appointment by the General Assembly as judges in two tribunals, namely the UNDT and the UNAT.

3. The composition of the five-member IJC was determined according to the proposal of the Redesign Panel, accepted by the UN General Assembly and the UN Secretary-General. The IJC is comprised of two members appointed to represent staff and two members appointed to represent the Administration with the fifth member being the Chair.

4. Campos is a Senior Interpreter at the P-5 level and has been employed by the United Nations Office at Geneva (UNOG) since 1979 with a few breaks. Between 11 April 2008 and 27 April 2009 he served as an elected Executive Secretary of the Staff Coordinating Council at UNOG.

5. In establishing the IJC, the UN Secretary-General sought to find suitable staff representation in accordance with the proposal of the Redesign Panel and in accordance

with the General Assembly Resolution A/RES/62/228 of 22 December 2007 by approaching the SMCC, which was established by the Secretary-General to advise him on matters related to human resources policies and staff welfare.

6. In filling the two positions for staff representatives on the IJC, the SMCC considered the nominees of many staff unions. Three staff unions, which together apparently represented a majority of UN staff, supported a slate of two names for joint appointment to fill the two staff representative vacancies on the IJC: namely Geoffrey Robertson Q.C. (Robertson) and Campos. The SMCC advanced the name of Robertson to the UN Secretary-General and Robertson was appointed as the external jurist representing staff. No complaint arises from that appointment. Ten other staff representative bodies participating in the SMCC selection process supported Clift. The SMCC provided the name of Clift to the UN Secretary-General who then appointed her as the second staff representative on the IJC.

7. It was this appointment process that Campos claims was flawed maintaining that not giving more weight to staff unions and staff associations who represented a larger number of staff was evidence of management interference in staff union election of staff representatives on the IJC.

8. Campos maintains that it was not up to the SMCC to give preference to the nominee of a larger number of staff unions when such preference should properly be given to the nominee of those staff unions who together represent the majority of UN staff.

9. The Secretary-General maintains that the selection procedure employed by the SMCC was transparent from the outset and known to all participating staff unions.

10. Campos filed two appeals to the then existing Joint Appeals Board (JAB). The first appeal to the JAB filed on July 17, 2008 was to challenge the decision of the UN Secretary-General not to nominate him as a representative of the staff on the IJC.¹ His second appeal to the JAB filed on November 11, 2008 was to contest all decisions taken by the IJC which he alleged was illegally constituted.²

¹ Geneva JAB case number 609 which became UNDT/GVA/2009/6.

² Geneva JAB case number 627, which became UNDT/GVA/2009/13.

11. When these cases were transferred to the newly established UNDT, Campos filed several motions to have judges of the UNDT recuse themselves, and, a motion which he renews before this Court, requesting judges of UNAT to recuse themselves. His grounds for the recusal of judges are that they all had a conflict of interest by having been recruited and recommended by the IJC for judicial appointment with the involvement of Clift whose appointment he challenges. He also requested in his motion a blanket removal of all judges appointed by the General Assembly.

12. Also prior to the UNDT hearing of these applications, Campos brought an interlocutory motion in a letter dated 21 July 2009, in which he objected to a hearing of his applications by the UNDT, asking that instead his applications be referred to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

13. Under the UNDT Rules of Procedure, the applicant's interlocutory motion for the recusal of UNDT judges was referred to the UNDT president, Judge Boolell. Campos and the Secretary-General were also informed on 21 July 2009 that UNDT Geneva, under article 11 of the UNDT Rules of Procedure, had advised members of the IJC of the filed proceedings involving one of its members, to afford them an opportunity to join the proceedings. Campos was strongly opposed to the notice given to the IJC members since the JAB pleadings had previously closed before the appeal was transferred to the UNDT. By letter dated 23 July 2009, he filed another interlocutory motion repeating his request for the recusal of UNDT and UNAT judges, this time also citing the notice to the IJC as further grounds in support of his motion.

14. In UNDT Judgment³ dated 12 August 2009 and in another UNDT Judgment⁴ also dated 12 August 2009, the UNDT President, Judge Boolell rejected Campos's requests for the recusal of UNDT judges submitted in an interlocutory motion and re-submitted in a supplementary interlocutory motion.

15. In a UNDT Judgment released on 17 September 2009,⁵ Judge Cousin rejected the two applications that had initially been filed as Geneva JAB Case No. 609 and Case No. 627, respectively. These involved a challenge of the appointment of Clift to the IJC by the

³ UNDT/2009/005.

⁴ UNDT/2009/010.

⁵ UNDT/2009/021.

Secretary-General through a flawed process and a request to declare the decisions of the IJC as being void on the grounds of that body having been illegally constituted.

16. Campos has appealed to this Court from all three of these UNDT judgments.

Submissions

Campos's Appeal

17. Campos requests an oral hearing and the hearing of the following witnesses: President of the UN Staff Union and Vice President of UNISERVE.

18. Campos requests that UNAT immediately set aside the three UNDT Judgments, on the grounds of "grave procedural errors and the flagrant violations of the judicial due process principles, including violation of the UNDT's own Rules of Procedure".

19. Campos requests that UNAT set aside the UNDT judgments rejecting his motions to have the UNDT and UNAT judges recuse themselves on the grounds of having a conflict of interest in presiding over cases involving Clift.

20. Campos requests UNAT to declare the immediate and retroactive recusal of the Geneva *ad litem* judge and all other UNDT judges.

21. Campos requests UNAT to set aside the UNDT rejection of his two appeals originally filed as JAB appeals in which he challenged the UN Secretary-General's decision to appoint Clift, and not him, as a representative of the staff on the IJC, and challenged the four-year appointment term of the IJC members.

22. Further, Campos requests that UNAT issue an order, pursuant to article 19 of the UNDT Rules of Procedure that the parties to the dispute submit to binding arbitration.

23. Lastly, Campos requests that UNAT take all required temporary measures to preserve Campos's substantive and procedural rights, and to determine adequate and equitable compensation for legal expenses incurred and for damages, including moral damage.

24. Campos states in a letter to UNAT that he was appealing UNDT judgments rejecting his request for the recusal of UNDT judges. His objective was to prevent them from hearing his grievance against the Secretary-General of the United Nations. Campos

alleges a violation of the right to freedom of association by the Secretary-General in connection with “the nomination of the staff representative in the Internal Justice Council” established by the General Assembly to guarantee the independence and the impartiality of the new United Nations Justice System.

25. Campos refers to a letter dated 19 February 2008 from the Executive Secretary of the UNOG Staff Coordinating Council to the President of the United Nations Staff Union, in which the Executive Secretary reconfirmed the decision to support the joint nomination of Justice Robertson, as the external jurist nominated by staff, and Campos as the staff representative who would serve in the IJC, adding, “I therefore hereby request you to transmit the names of these nominees to the Secretary-General as the representatives of the majority of the staff who currently fall under the jurisdiction of UNAT which the new justice system is to replace”. The Secretary-General does not dispute that Campos had the support of the majority of the staff who are represented by the unions who supported him.

26. According to Campos, the President of the United Nations Staff Union sent a copy of the above mentioned Staff Council Resolution to the Secretary-General in which the staff unions reiterated their consensus on a joint nomination of Robertson and Campos as the staff representatives and opposed the position taken by the remaining staff associations which, although in support of Robertson, supported Clift instead of Campos.

27. Also according to Campos, the staff unions in support of Robertson and Campos demanded that these candidates be jointly appointed to the IJC because they received the support of the majority of the staff. To do otherwise they insisted would be in effect to “[allow] the administration to interfere in the sovereign affairs of the staff associations and unions by referring this matter to the staff management consultative machinery which is not a requirement of the General Assembly”.

28. Campos argues that the goal of the General Assembly, to establish the IJC as an independent body where the staff and management would be equally and fairly represented was not achieved. A staff-management consultative group was allowed to interfere and give equal consideration to the participation of unions, which although represented fewer staff, were successful in having their nominee, Clift, appointed instead of appointing both of the nominees of the staff associations representing the majority of staff.

29. Campos regards the appointment of only one of the two nominees of the staff unions representing the majority of staff as an interference of the freedom of association which staff members have. His position is that effectively he was duly elected in a staff union election and this was not recognized by management. Further, his position is that although the SMCC purports to be a consultative body representing both management and staff, this body holds a bias towards the New York Staff Union and the UNOG Staff Coordinating Council.

30. Campos seeks the recusal of UNDT and UNAT judges from hearing this matter which pertains to his own appeal of not being appointed to the IJC on the grounds that the IJC was illegally constituted, and since the IJC played a role in the appointment of judges, every UNDT and UNAT judge has a conflict of interest in hearing his appeals.

Secretary-General's Answer

31. With regard to Campos's claims originally filed as the two JAB appeals and disposed of by the UNDT in Judgment No. UNDT/2009/021, the Secretary-General maintains that his appointment of the IJC members falls outside the competence of the UNDT. He contends that he has the authority to appoint the IJC members and that the exercise of his authority with respect to the appointment of Clift was legal and proper.

32. The nomination of Clift for appointment to the IJC was conducted according to a procedure established by the SMCC in July 2007. Clift was nominated in accordance with the procedures of section 1.2 of ST/SGB/2002/15 on the SMCC which provides that "all interventions made by SMCC members shall carry equal importance and, as such, shall be given due consideration". Clift received the support of ten staff representative bodies participating in the SMCC whereas Campos received the support of only three.

33. The Secretary-General argues that Campos has not established sufficient grounds to maintain a claim of conflict of interest on the part of the UNDT and UNAT Judges. Thus, the Secretary-General concurs with the UNDT's decision to reject the request for recusal and submits that Judgments (released as) UNDT 2009/005 and 010 be upheld.

34. The Secretary-General maintains that Campos's requests for orders of arbitration, temporary measures, and compensation should be rejected.

Considerations

Whether to grant Campos's request for an oral hearing and the hearing of witnesses

35. On the grounds that he had the opportunity to make a full written argument on all issues and provided this Court with no adequate reason for an oral hearing or the hearing of witnesses, this Court rejects Campos's motion.

36. First, Campos filed in his appeal material pertaining to the position of the staff associations and specific unions clearly supporting his nomination as a representative of the staff on the IJC. He makes no submissions why there is a need to call oral evidence.

37. Second, Campos made no submissions why an oral hearing should be granted. In support of his appeal he filed additional written material and argument in support of his appeal. His primary grounds for appeal are that the UNDT erred in law in not giving proper legal consideration to the undisputed facts of the selection procedures and erred in finding that they were not flawed.

38. Campos does not claim that there is any particular complexity or other reason why this case would demand an oral hearing or the hearing of witnesses. Accordingly, Campos's motions for an oral hearing and the hearing of witnesses are denied.

Whether the UNDT erred in rejecting Campos's claim that Clift was appointed by a flawed process

39. The General Assembly, after considering the proposals of the Redesign Panel concerning the Administration of Justice, passed a resolution aimed at implementing the establishment of the proposed Office of Administration of Justice, the creation of the IJC, and the selection and appointment of judges.

40. The UNDT reviewed the 2007 Report wherein the SMCC specified the role it was assuming in facilitating the participation of the staff in finalizing the details of the new system (that is the establishment of the Office of Administration of Justice and UNDT and UNAT). More specifically, part VI. A. 23 (f) of the Report refers to the identification of a representative of staff, and of management, to serve on the IJC. It is this joint staff and management body that the UN Secretary-General resorted to in seeking to find a staff representative to appoint to the IJC.

41. The UNDT found that it was within the SMCC's mandate in anticipation of having to implement a General Assembly directive on the proposed creation of the IJC, if this was endorsed by the General Assembly, to take the initiative of constituting itself as a contact group to facilitate the creation of the IJC. It followed that the SMCC would also elaborate the necessary selection procedures, something that became necessary when the UN General Assembly resolution did not specify how staff representatives would be chosen and appointed to the IJC. The SMCC procedure made it clear that, "all interventions made by SMCC members shall carry equal importance and, as such, shall be given due consideration".

42. Therefore under these terms Clift received the support of ten staff representative bodies participating in the SMCC, or ten votes, whereas Campos received the support of three staff representative bodies participating in the SMCC, or three votes.

43. Nor is it disputed that the SMCC respected its own procedures on the appointment of a staff representative to the IJC.

44. Campos argued before the UNDT that in failing to appoint him to the IJC, the Secretary-General in effect did not accept the recommendation made by "**the overwhelming majority** of ALL UN staff ... represented through UNSU ..., UNOG, UNDP, UNOPS, UNFSU and UNHCR staff associations" (emphasis in original). This he argued was effectively management interference in a union election, because a staff management consultative group was allowed to give equal consideration to unions representing fewer staff, which were successful in having the name of their nominee, Clift, appointed as one of the two staff representatives on the IJC.

45. Press releases filed by Campos reveal that when he was not the successful candidate in the SMCC selection process, the staff associations who supported him also complained that this process was flawed, alleging management interference in union affairs through the process adopted by the SMCC.

46. But none of the abovementioned staff associations joined in these proceedings and there is no evidence before this Court that the staff associations that supported the appointment of Campos did not participate freely in the SMCC process. On the contrary, they advanced a slate of two names and one of the other candidates they supported, Robertson, was indeed appointed.

47. Nor is there any evidence that during the selection process any of the staff associations participating in the SMCC was opposed to having one vote per association and not one vote per the number of staff members they represented.

48. The UNDT accepted that these facts established, on a balance of probability, that the staff associations in question who put forward names for appointment to the IJC, freely participated in the SMCC selection process, being aware that they would be accorded one vote per association.

49. Further the UNDT found that it was open to the Secretary-General, in establishing the IJC, to seek assistance from the SMCC to provide him with a name of an individual who could be appointed as a staff representative on the IJC.

50. Accordingly the UNDT held that Campos failed to establish the illegality he alleged in the appointment of Clift and rejected his application that Clift's appointment be declared null and void. Campos's two requests before the UNDT, namely (1) to rescind the action dated 8 April 2008 by which the Secretary-General published the appointment of Clift as a member of the IJC and, consequently, to rescind all decisions taken by that Council; and (2) to rescind the decision to appoint the five members of the IJC for a period of four years, were also rejected in their entirety.

51. The UNDT rejected the alleged illegality of Clift's appointment to the IJC, which was also based on an alleged management interference of union affairs and interference in Campos's freedom of association.

52. This Court agrees with and affirms this decision of the UNDT in UNDT Judgment UNDT/2009/021. We hold that the UNDT made no reversible error in rejecting Campos's claim that the UN Secretary-General illegally appointed Clift as the staff representative on the IJC.

53. This disposes of the entire appeal and it is unnecessary for this Court to decide the further claim, being Campos's position in the alternative, that no decision made by the UN General Assembly on the recommendation of the IJC is valid because of one allegedly impugned appointment to the IJC, that all of its subsequent decisions should be rescinded, and that Campos's case should be referred to arbitration.

Whether the UNDT erred in rejecting Campos's request for the recusal of UNDT judges and the dissolution of the entire UNDT panel on the grounds of conflict of interest

54. The UNDT considered Campos's claim that the decision not to appoint him to the IJC resulted from a flawed process which amounted to interference by UN management in the selection of the staff representative of the IJC; and that this interference "tainted the independence and the impartiality of the new UN system of justice".⁶ The tainting of all judges appointed by any involvement of the IJC is the primary ground underlying Campos's claim that all judges appointed to the UNDT and UNAT have a conflict of interest that would erode public confidence in the tribunals.

55. There were, however, other grounds of conflict of interest alleged by Campos in regard to judges of both tribunals. He implies that by virtue of the appointment process, with judges being interviewed in person by the IJC, that judges may be inclined to act deferentially in favour of IJC members. It seems to be from this limited one-time interview that gave rise to his allegation that a professional relationship between the judicial candidates and Clift resulted. This one-time interview he alleges would then give rise to an appearance of an impaired ability on the part of judges of both tribunals to independently and impartially adjudicate a case against him.

56. Under UNDT and UNAT rules, UNDT judges and UNAT judges may be asked to recuse themselves under their respective rules if a litigant establishes that a conflict of interest exists.

57. Each tribunal will itself determine whether or not a judge or judges of that court should recuse himself/herself or themselves.

58. Article 27 of the UNDT Rules of Procedure states:

1. The term "conflict of interest" means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her.

2. A conflict of interest arises where a case assigned to a judge involves any of the following:

a) A person with whom the judge has a personal, familiar or professional relationship;

⁶ Judgment No. UNDT/NBI/2009/29 (released as UNDT/2009/005).

b) A matter in which the judge has previously served in another capacity, including as an advisor, counsel, expert or witness;

(c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.

59. Article 28(1) of the UNDT Rules of Procedure specifies the applicable procedure for recusal by a judge on his or her own motion. Article 28(2) provides for a motion for the recusal of a judge on the ground of a conflict of interest to be heard by the President of the UNDT, who after seeking comments from the judge shall decide on the request in writing. A motion for the recusal of the President shall be referred to a three-judge panel for a decision.

60. As noted above, the UNDT rejected Campos's claim of a flawed appointment process, which judgment this Court has affirmed. This disposed of Campos's fundamental ground underlying his claim that an appearance of an impaired ability arises on the part of judges of both tribunals to independently and impartially adjudicate a case against him.

61. Second, the UNDT rejected Campos's portrayal of the actual role of the IJC in the appointment of judges to the UNDT and to UNAT, finding that the IJC did not appoint judges. Rather, the mandate of the IJC was limited to identifying, narrowing, and recommending names of potential judicial candidates to the General Assembly, which was the appointing body. Further, the removal of judges was also a decision of the General Assembly and not the IJC. The UNDT therefore rejected this ground of alleged conflict of interest and likely appearance of judges being deferential to the IJC.

62. As for an alleged professional relationship between judges and Clift, Campos stated:

The fact is that all UN Dispute Tribunal judges were selected as recommended by the illegally constituted IJC with the participation of Ms. J. Clift and therefore have had a "professional relationship" with her. Furthermore, they clearly have a ***prima facie vested interest in the dismissal of my appeal***. This circumstance 'would make it appear ... that their participation in the adjudication of the matter would be inappropriate' as stated in article 27.2 c) of the UNDT Rules of Procedure. (Bold in original)

63. The UNDT rejected the mere allegation not supported by any evidence that there was any professional relationship between Clift and any of the UNDT or UNAT judges.

64. After considering various legal precedents that apply to the principle of the impartiality of judges, the UNDT found that Campos had not established that the UNDT judges or UNAT judges would likely be partial towards the IJC or any member of the IJC. Finding no meritorious grounds for the allegation of appearance of bias or conflict of interest, the UNDT rejected the application for the recusal of UNDT judges.

65. Another error by the UNDT alleged by Campos is that the UNDT failed to convene a three-judge panel to hear Campos's motion specifically directed at Judge Boolell as the UNDT President. Campos was in effect seeking the dissolution of the entire UNDT bench which the UNDT president found exceeded his jurisdiction. This Court affirms the UNDT judgment ⁷ to reject Campos's claim on the grounds of not having the jurisdiction to dissolve the UNDT as he lacked the statutory authority to dissolve a body that was created by the UN General Assembly.

66. The second motion for the recusal of UNDT judges was effectively a supplementary motion to the one above with the additional grounds of alleged court staff's interference. This supplementary motion was heard by the UNDT and was rejected on the grounds that court staff acted properly as authorized by the UNDT statute and rules and that the other grounds alleged were a mere repetition of the 21 July 2009 application.⁸

67. This Court also agrees with, and affirms, this UNDT Judgment.

Whether to grant Campos's motion on Appeal requesting that UNAT judges recuse themselves and that UNAT be dissolved

68. Although this same motion was brought before the UNDT, the UNDT does not have the jurisdiction to order the recusal of UNAT judges. The following provisions are found in the UNAT Rules of Procedure. Article 22 of the UNAT Rules of Procedure states:

1. The term "conflict of interest" means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her.
2. A conflict of interest arises where a case assigned to a judge involves any of the following:

⁷ UNDT/NBI/2009/029.

⁸ UNDT/NBI/2009/029, which was released as UNDT/2009/010.

- a) A person with whom the judge has a personal, familiar or professional relationship;
- b) A matter in which the judge has previously served in another capacity, including as an advisor, counsel, expert or witness;
- (c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.

69. Article 23(1) of the UNAT Rules of Procedure specifies the applicable procedure for recusal by a judge on his or her own motion. Article 23(2) provides for a motion for the recusal of a judge on the ground of a conflict of interest to be heard by the President of the UNAT, who after seeking comments from the judge shall decide on the request in writing.

70. This Court affirms and adopts the findings of the UNDT concerning the limited role of the IJC in the appointment of all judges, including the UNAT judges, and the findings concerning the lack of any professional relationship between Clift and all judges including the UNAT judges. Accordingly this Court rejects Campos's motion that the UNAT judges recuse themselves from the hearing of the within appeal.

71. This Court also affirms and adopts the findings of the UNDT that UNAT being a creature of statute lacks the statutory authority to dissolve UNAT which is a body created by the UN General Assembly.

Judgment

72. This Court affirms the three UNDT judgments on appeal before this Court and dismisses all of Campos's appeals. It also rejects Campos's request that UNAT judges recuse themselves from the hearing of the appeal and dissolve UNAT.



Judge Boyko, Presiding



Judge Painter



Judge Garewal

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



Weicheng Lin, Registrar, UNAT