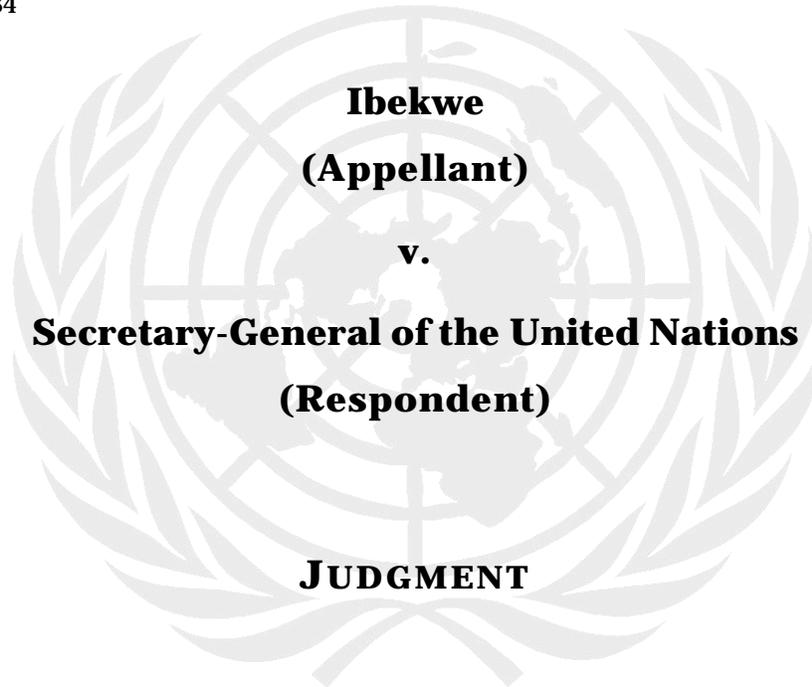




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-184



**Ibekwe
(Appellant)**

v.

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

JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Sophia Adinyira
Judge Luis María Simón

Judgment No.: 2011-UNAT-179

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Appellant: Not represented

Counsel for Respondent: Stéphanie Cartier

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Ms. Ngozi Ibekwe's case is that the Administration's responses to her complaints of discrimination were placed in her Official Status File (OSF) without her knowledge. A decade later she competed for promotion to the G-6 level, but was unsuccessful. In *Planas*¹ we stated that complaints of general discrimination are not relevant when the staff member challenges his or her non-selection to a specific post. We also stated in *Rolland*² that in non-selection cases all official acts are presumed to have been regularly performed. This is a rebuttable presumption. The presumption stands satisfied if the Administration is able to minimally show that full and fair consideration was given to the candidate. The burden of proof then shifts to the staff member to show, through clear and convincing evidence, that she was denied a fair chance of promotion. Lastly, a complaint which emanates from a staff member and the response thereto, which has been shown to the staff member concerned, can be placed in the staff member's OSF. In the absence of evidence of specific discrimination, we hold that the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) did not exceed, or fail to exercise, its jurisdiction, and moreover it did not err on questions of law, fact or procedure.

2. The appeal is dismissed. Judgment No. UNDT/2010/159 is affirmed.

Facts and Procedure

3. Ms. Ibekwe joined the United Nations Volunteer Program as a clerk/stenographer at the G-3 level in May 1980. Beginning January 1984, she held several fixed-term and short-term appointments as a clerk, typist and secretary with the United Nations Conference on Trade and Development and the Centre for Human Rights (predecessor to the Office of High Commissioner for Human Rights (OHCHR)). She was promoted to the G-5 level in October 1989 and was granted a permanent appointment in September 2006. Ms. Ibekwe retired from the Organization on 31 December 2007.

¹ *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049.

² *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122.

4. On 13 December 1995, the Chief of Personnel Service of the United Nations Office at Geneva (UNOG) requested that Ms. Ibekwe provide comments on a collective complaint of harassment and discrimination that she had lodged. On 27 February 1996, she informed Ms. Ibekwe that the procedure, opened following receipt of the collective complaint, had been closed owing to the general nature of the complaint and the lack of details as to facts.

5. In a letter dated 6 November 1997, the Chief of Personnel Service, UNOG, responded to Ms. Ibekwe's complaint of 15 October 1997 about irregularities in the selection of staff in OHCHR. She informed Ms. Ibekwe that she had closed the case as she deemed Ms. Ibekwe's allegations unfounded.

6. The two letters from Chief of Personnel Service to Ms. Ibekwe of 13 December 1995 and 6 November 1997 were subsequently placed in Ms. Ibekwe's OSF.

7. A decade later, in July 2007 and September 2007, two vacant Secretary posts at the G-6 level in OHCHR (VA No. 07-HRI-OHCHR-414977-R-Geneva (post No. 414977) and VA No. 07-HRI-OHCHR-415305-R-Geneva (post No. 415305)) were advertised. Ms. Ibekwe applied for both posts. She was interviewed for post No. 414977 as a 30-day mark candidate, but was not selected. As for post No. 415305, Ms. Ibekwe's candidacy was not evaluated as a 30-day mark candidate because a 15-day mark candidate was chosen to fill the post.

8. On 28 November 2007, Ms. Ibekwe wrote to the Secretary-General requesting administrative review of "the decisions: pursuant to 'ST/AI/292 of 15 July 1982, filing of adverse material in personnel records'; character assassination that inflicted [her] with health hazards of prolonged stress and isolation; and to clear [her] family name from the black file registry of any wrongdoing". She mentioned her non-promotion to either of the two G-6 posts, and stated that "[n]one of the GS staff, including myself, who applied for that post [No. 415305], was invited for interview", obviously because a 15-day mark candidate had been selected to fill that post. As for the other G-6 post, Ms. Ibekwe alleged that "OHCHR Management is stalling on filling [post No. 414977] pending my retirement [at the] end of the year". She continued:

OHCHR Management withheld filling [post No. 414977] simply because I was probably the only candidate meeting all requirements for the post. Here, I am not only being discriminated due to character, but also due to age. With barely 19 ½ years contribution at the pension fund, I had thought being favourably considered for either post, [sic] would enable me round up the minimum 21 years. Whatever illusion I had entertained that either of these two posts would eventually render me justice at OHCHR to forget these 10 years of inhuman treatment, [sic] had finally crumbled.

Ms. Ibekwe devoted the rest of her request to the elaboration of the unfair treatment that she had received at OHCHR during the previous 10 years.

9. After she had received a negative response to her request for administrative review, Ms. Ibekwe appealed to the Geneva Joint Appeals Board (JAB/Geneva). In its report dated 4 December 2008, the JAB/Geneva determined that the main issue on appeal was whether the decisions not to select Ms. Ibekwe for either of the two G-6 posts were taken properly. It concluded that the contested decisions “were not tainted by procedural flaw”, and recommended that the Secretary-General reject Ms. Ibekwe’s appeal. The Secretary-General endorsed the JAB recommendation.

10. Ms. Ibekwe then appealed to the former Administrative Tribunal. Her application was not considered by the former Administrative Tribunal before its abolition on 31 December 2009. The case was subsequently transferred to the UNDT on 1 January 2010.

11. In Judgment No. UNDT/2010/159 dated 3 September 2010, Judge Cousin rejected Ms. Ibekwe’s application. Judge Cousin reviewed the history of the case, and found that in her request for administrative review of 28 November 2007, Ms. Ibekwe only appealed i) the decision to place adverse material in her OSF, and ii) the discrimination to which she had been subjected over a 10-year period. But contrary to the conclusion of the administrative review, and for that matter, the findings of the JAB, Judge Cousin determined that Ms. Ibekwe did not ask the Secretary-General to review the decisions not to select her for either of the two G-6 posts. She “merely referred [to her non-selection] in her request for review as an argument with a view to substantiating her allegations of harassment and discriminatory treatment”. Judge Cousin thus concluded that Ms. Ibekwe’s appeal was not admissible insofar as it contested the decisions not to select her, and that it was also inadmissible as far as the allegations of harassment and discrimination were concerned as there was no express or implicit

decision that the Administration had taken in respect of her allegations. Turning to the two letters placed in Ms. Ibekwe's OSF, Judge Cousin considered that Ms. Ibekwe's appeal also failed because, after she had received those letters, Ms. Ibekwe did not request administrative review of the decision to place those letters in her OSF in a timely manner, even assuming the adverse nature of those documents.

12. On 17 December 2010, Ms. Ibekwe appealed to the United Nations Appeals Tribunal (Appeals Tribunal). On 31 January 2011, the Secretary-General filed an answer.

Submissions

Ms. Ibekwe's Appeal

13. Ms. Ibekwe maintains that the UNDT Judge erred in law and fact, and that he ignored the more favorable standards developed by the UNDT judges in New York and Nairobi, especially his refusal to apply the "preponderance of the evidence" test in her case.

14. Ms. Ibekwe avers that she exercised due diligence in pursuing her appeal through the system. She attaches a list of persons whom she contacted for assistance in obtaining redress.

15. Ms. Ibekwe requests that this Court obtain and review the letters of recommendation in favour of the selected candidates and the records of the interview panels in the possession of OHCHR, which would show a failure to give fair consideration to the candidates. She states that she submitted all the information at her disposal. The rest was in the hands of OHCHR.

16. Ms. Ibekwe submits that the UNDT Judge committed procedural errors, when he raised the admissibility issue concerning the decision to place adverse material in her OSF, when he proceeded with a hearing knowing that she was without counsel, and when he systematically ignored all her arguments.

Secretary-General's Answer

17. The Secretary-General submits that Ms. Ibekwe "reaffirms" her arguments before the UNDT, but does not establish how the UNDT Judge erred in concluding that her claim was not receivable.

18. The Secretary-General maintains that the UNDT correctly determined that the decisions not to select Ms. Ibekwe for either of the two G-6 posts were not properly before it, and, moreover, that her claim relating to the placement of two letters in her OSF and in a “confidential” file was time-barred.

19. The UNDT properly rejected Ms. Ibekwe’s claim of harassment and discrimination on the grounds that she had failed to identify and contest an “administrative decision”, such as to trigger the subject matter jurisdiction of the UNDT.

20. Regarding the two letters placed in Ms. Ibekwe’s OSF, the Secretary-General submits that they were not adverse material, as they did not make any adverse comment about Ms. Ibekwe or her work performance. They were follow-ups on her requests for investigation. The Secretary-General clarifies that ST/AI/292 does not prevent the placement of adverse material in personnel files. Instead, it protects the staff members’ right to be informed about them and to make comments thereon. The Secretary-General is of the opinion that the UNDT properly concluded that Ms. Ibekwe was in a position to submit comments on the two letters as she had received them several years ago and they could be found in her OSF. In this regard, the Secretary-General notes that letters between the Administration and staff members are filed in their respective OSFs within one week of being dispatched in conformity with standard administrative practices. In the present case, Ms. Ibekwe has failed to provide any evidence of a deviation from this practice in the handling of her OSF.

21. The Secretary-General rejects Ms. Ibekwe’s claim of procedural errors. He submits that the UNDT Judge enjoys broad discretionary authority in case management such as the timing of oral hearings. While she complained about lack of counsel, Ms. Ibekwe did not request a postponement of the hearing. In fact, she was present at the hearing with a new counsel.

22. The Secretary-General also rejects Ms. Ibekwe’s request that this Court obtain certain documents from OHCHR, as it fails to satisfy the requirements of Article 2 of the Statute of the Appeals Tribunal.

Considerations

23. In every United Nations agency or programme there will be a few staff members who will complain about systematic discrimination, harassment or injustice. This tendency becomes more pronounced when the staff member is continuously ignored for promotion.

24. Ms. Ibekwe's employment history has been recounted above. Her case is that sometime in 1995 she lodged a complaint before the Chief of Personnel Service of UNOG. On 13 December 1995, the Chief of Personnel Service of UNOG requested that Ms. Ibekwe provide comments on a collective complaint that she had lodged. On 27 February 1996, the Chief of Personnel Service of UNOG informed Ms. Ibekwe that the procedure, opened following receipt of her complaint, had been closed owing to the general nature of the complaint and the lack of details as to facts.

25. Later on 15 October 1997, Ms. Ibekwe filed another complaint about irregularities in the selection of staff in OHCHR. The Chief of Personnel Service of UNOG responded to this complaint on 6 November 1997 by saying that the case was closed as the allegations were unfounded. The two letters from the Chief of Personnel Service of UNOG were subsequently filed in Ms. Ibekwe's OSF. They are the basis for Ms. Ibekwe's contention that she was subjected to harassment and discrimination, which affected her career. According to Ms. Ibekwe, those two letters were also placed in a separate personnel file. She only discovered the impact that those two letters had on her career much later.

26. Ms. Ibekwe claims that she applied unsuccessfully for more than 20 posts, including the two G-6 posts advertised in July and September 2007. Ms. Ibekwe was a 30-day candidate but was unsuccessful for the first G-6 post. She was not even evaluated for the second G-6 post, as a 15-day candidate was selected. She did not challenge her non-selection or the result of the selection process through a request for administrative review.

27. Ms. Ibekwe sought administrative review through a letter dated 28 November 2007, which contained a request to address her two earlier grievances. She complained of the decision to place adverse material (the two letters) in her file and requested an inquiry into the discrimination she had allegedly been subjected to for over ten years. Ms. Ibekwe was informed about the outcome of the administrative review on

4 February 2008. By this time she had retired. Nevertheless, she took the matter to the JAB/Geneva on 27 March 2008. The JAB/Geneva in its report dated 4 December 2008 unanimously recommended that the non-selection decisions had been made in accordance with the established procedures, and Ms. Ibekwe had failed to prove that her right to full and fair consideration was violated.

28. The learned UNDT Judge declined to examine Ms. Ibekwe's contentions regarding her denial of promotion with respect to the two G-6 vacancies because they were not submitted for administrative review. At this stage, reference must be made to the JAB/Geneva's finding that Ms. Ibekwe's appeal with respect to the non-selection was admissible. Therefore, one cannot understand how the UNDT could hold that Ms. Ibekwe's challenge to her non-selection was not receivable.

29. Be that as it may, Ms. Ibekwe has not been able to establish on appeal before us that her non-selection to the two G-6 posts was flawed, or that she was not given full and fair consideration during the selection process. Her claim is that she faced *general* discrimination for many years. But she pleads this without demonstrating *specific* discrimination when she was denied appointment to a specific post for which she had competed. In this respect Ms. Ibekwe's case is similar to our Judgment No. 2010-UNAT-049 (*Planas*). In that case the claim of the staff member was that she was passed over and discriminated against. According to the Appeals Tribunal such a claim

could only be made if the staff member, feeling that she had suffered injury after she had submitted a specific candidacy and after another person had been selected, had contested the results of the selection process, that is, the specific appointment made..... as Planas did not contest in precise terms her non-selection for any post, she did not identify any administrative decision in her application.³

30. We may add that there is always a presumption that official acts have been regularly performed. A staff member who challenges a non-selection decision has to establish, through clear and convincing evidence that a fair chance of promotion was denied to him or her. Ms. Ibekwe bears the burden of proof. We may refer to *Rolland*⁴ in paragraph 26. Proof of unsubstantiated allegations of general discrimination,

³ Paragraphs 20 to 21.

⁴ Judgment No. 2011-UNAT-122.

in the shape of the two letters written in 1995 and 1997, cannot constitute evidence of real discrimination sufficient to upset the two non-selection decisions taken in 2007. We would not like to delve in the jurisprudential differences on the doctrines of burden of proof which Ms. Ibekwe has tried to raise because in the present appeal she has failed to show how the UNDT Judgment was flawed.

31. Ms. Ibekwe has attempted to make a lot out of the fact that her complaints of discrimination and the Administration's responses were placed in her OSF. This had been done behind her back, and she only learned about the placing of those letters on her record much later. This, according to her, was a violation of the procedure set forth in paragraph 2 of ST/AI/292 of 15 July 1982 "Filing of Adverse Material in Personnel Records". This provision provides that as a matter of principle any material which reflects adversely on a staff member "may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon." We fail to understand how Ms. Ibekwe can complain. The responses to her complaints, from the Chief of Personnel Service of UNOG dated 13 December 1995 and 6 November 1997 respectively, were sent to her by the Administration and she must be aware of their contents. Nothing was placed in her file behind her back. A staff member who chooses to file a complaint against the Administration must expect that the Organization will examine the complaint. Ms. Ibekwe must also expect that both her complaint and the Administration's response shall remain in the official record for all times. Such material is not adverse material at all. It would be adverse material if an adverse report, of indiscipline or misconduct, were placed on the staff member's file without it first being shown to the staff member to make comments thereon. Such action shall definitely be frowned upon, but not if the material placed on record emanated from the staff member himself or herself.

32. In the absence of evidence of specific discrimination, we must hold that the UNDT Judgment did not exceed, or fail to exercise, its jurisdiction, and moreover it did not err on questions of law, facts or procedure.

Judgment

33. The appeal is dismissed. Judgment No. UNDT/2010/159 is affirmed.

Original and authoritative version: English

Done this 21st day of October 2011 in New York, United States.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar