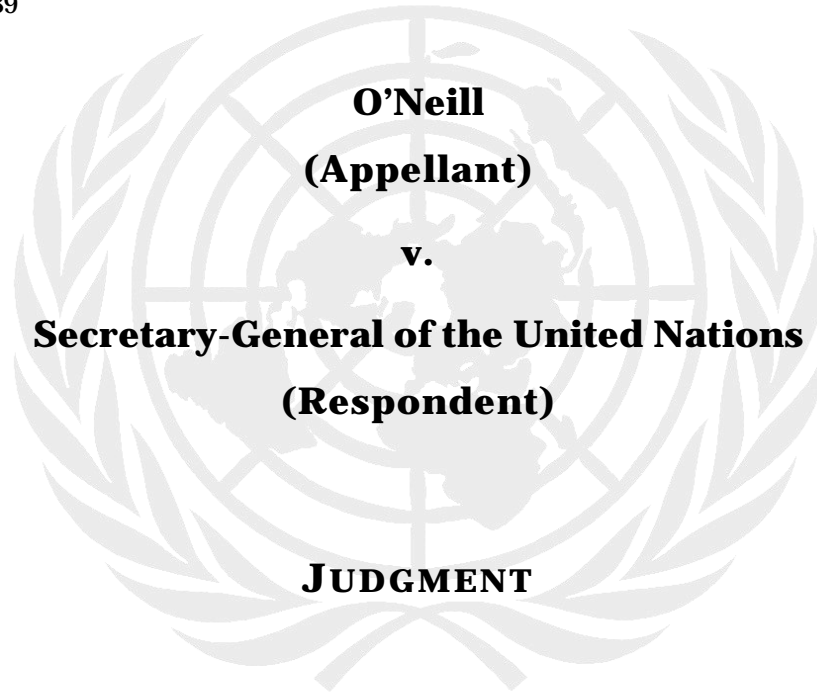




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2010-189



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Before:	Judge Luis María Simón, Presiding Judge Kamaljit Singh Garewal Judge Jean Courtial
Judgment No.:	2011-UNAT-182
Date:	21 October 2011
Registrar:	Weicheng Lin

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Counsel for Appellant:	Clifford A. Arrey
Counsel for Respondent:	Amy Wood

**JUDGE LUIS MARÍA SIMÓN**, Presiding.

### **Synopsis**

1. In the present case, Mr. James O'Neill maintains that he submitted for administrative review his non-promotion to the P-5 level, which had been presented to the Secretary-General and the Joint Appeals Board (JAB), contrary to the conclusion that the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) reached after considering his application, which declared his appeal in respect to his non-promotion not receivable. Mr. O'Neill also maintains that there was no need for him to seek an independent administrative review of the decision to release a confidential letter in the midst of the administrative proceedings related to his non-selection and the selection process, and that the UNDT erred when it decided that it had no jurisdiction over that matter.

2. The United Nations Appeals Tribunal (Appeals Tribunal) affirms the UNDT Judgment and dismisses the present appeal in its entirety.

### **Facts and Procedure**

3. Mr. O'Neill joined the Organization in 1976. He passed the G to P exam in 1992 and was promoted to the P-2 level as an Associate Auditor with the Internal Audit Division (IAD). At the material time, he was an Auditor at the P-4 level.

4. In September 2005, Mr. O'Neill applied for a vacant post at the P-5 level of Peacekeeping Audit Section Chief, IAD, Office of Internal Oversight Services (OIOS). But he was not selected. In April 2006, he applied for another P-5 post of Field Section Chief within IAD, OIOS. Again he was not selected.

5. On 26 June 2006, counsel for Mr. O'Neill sent a letter to the Under-Secretary-General for OIOS (USG/OIOS) regarding his client's non-selection for a number of P-5 posts for which he had applied. The letter was marked "PRIVILEGED AND CONFIDENTIAL" (Confidential Letter). In the Confidential Letter, the counsel expressed concern regarding Mr. O'Neill's non-selection due to extraneous considerations and other procedural irregularities on the part of the OIOS management, including a pattern of discrimination against his client and the promotion of the named candidates less qualified than Mr. O'Neill for the posts in question. The counsel asked

the USG/OIOS to appoint an independent panel to conduct an investigation, to immediately rescind the decision to promote a named candidate, and to retroactively promote Mr. O'Neill to the P-5 level.

6. By letter dated 21 July 2006, the USG/OIOS advised Mr. O'Neill's counsel that she had reviewed his contentions regarding the selection process, but found them to be without merit. She also expressed concern as to the "speculations and allegations" made in the Confidential Letter relating to the selections and appointments in OIOS.

7. By letter dated 24 July 2006, Mr. O'Neill submitted to the Secretary-General a request for administrative review of the decision not to select him for the post of Field Section Chief. In the request, he referred to the Confidential Letter of 26 June 2006 that his counsel had addressed to the USG/OIOS and the latter's response of 21 July 2006.

8. On 25 September 2006, Mr. O'Neill submitted a Statement of Appeal to the JAB in New York, challenging the OIOS' promotion process, especially for the P-5 post of Field Section Chief, and alleging denial of opportunity for him to fairly compete in the P-5 promotion exercises.

9. Under cover of a letter dated 11 October 2006 (cover letter), the USG/OIOS forwarded the Confidential Letter to five OIOS staff members, with copy to four other OIOS staff members. The cover letter was captioned "Allegations from Mr. James O'Neill on favouritism and improper promotions in IAD". In the cover letter, the USG/OIOS stated:

Some time ago I received a letter from Mr. James O'Neill's lawyer presenting Mr. O'Neill's case of allegations for [sic] favouritism and improper promotions in IAD. I responded to this letter refuting all the allegations brought forward. Mr. O'Neill has now submitted a formal complaint to the Joint Appeals Board.

As you are all mentioned by name in the complaint by Mr. O'Neill and in the interest of full transparency of this issue in the Office, I hereby submit to you for your perusal the exchange of documentation between Mr. O'Neill's lawyer and myself.

10. On 14 November 2006, the Secretary-General submitted a reply to Mr. O'Neill's appeal before the JAB. On 20 December 2006, Mr. O'Neill filed observations on the Secretary-General's reply. In his observations, Mr. O'Neill raised the issue of the decision

by the USG/OIOS to release the Confidential Letter to OIOS staff members, calling it an act of “aggravation, outrage, spite, malice, trickery and deceit” and seeking monetary damages for that “reprehensible conduct”.

11. Under cover of a memorandum dated 8 March 2007, the representative of the Secretary-General submitted his comments on Mr. O’Neill observations. He attached a copy of the comments dated 25 January 2007 from OIOS in response to Mr. O’Neill’s observations including his complaint about the cover letter and the decision to release the Confidential Letter. The representative of the Secretary-General quoted the OIOS’ comments on this issue that the cover letter and the Confidential Letter had been shared with the OIOS staff members

to ensure full transparency and to allow [them] to provide additional information if wished... In the USG’s view it is inappropriate that staff members be mentioned in a negative manner without having the opportunity to review the information and provide their viewpoint. The USG is also very much concerned with a culture that allows unsubstantiated accusations to be made without any accountability and without allowing a due process to take place. OIOS should also set an example of transparency by allowing the involved parties access to information which may be potentially harmful to them.

12. In a report dated 8 November 2007, the JAB dismissed Mr. O’Neill’s claim that the non-promotion decision was unlawful. But it concluded that “there was no legitimate rationale for the release of [the Confidential Letter]” and recommended that the USG/OIOS issue a written apology to Mr. O’Neill for non-observance of confidentiality in the present litigation.

13. On 25 January 2008, the Deputy Secretary-General informed Mr. O’Neill of the decision of the Secretary-General not to accept the JAB’s recommendation to issue an apology, noting nonetheless that confidentiality was an important part of the appeals process and should be respected.

14. According to the UNDT, in his application to the former Administrative Tribunal on 2 May 2008 and his subsequent submission to the Dispute Tribunal on 4 June 2010 after the case had been transferred to the UNDT, Mr. O’Neill only identified the decision to release the Confidential Letter, but not the decision not to select him for promotion to the P-5 level, as the issue for litigation. In his summation of the legal issues for the

UNDT dated 4 June 2010, Mr. O'Neill listed nine issues, of which one referred to the P-5 selection process, but not to any non-selection decision:

The Applicant believes that it is most desirable for the Judge, to judiciously address comprehensively the governing principles in implementing the relevant provisions of the Charter, relevant resolutions and decisions of the General Assembly, Staff Rules and Regulations of the Organization, relevant Administrative Instructions and Secretary-General's Bulletins, guidelines and their application to the Applicant's staff selection process to the P-5 level.

In his summation dated 2 June 2010 of the legal issues for the UNDT, the Respondent focused on the decision to release the Confidential Letter, while noting that Mr. O'Neill did not address the specific findings of the JAB with respect to his non-selection for the three posts at the P-5 level, or the decision of the Secretary-General to accept the JAB's recommendation on that issue.

15. In Judgment No. UNDT/2010/203 dated 22 November 2010, Judge Kaman dismissed Mr. O'Neill's application as not receivable. Noting that Mr. O'Neill did not identify the contested decision as being the one not to select him for promotion in either his application to the former Administrative Tribunal or his submission to the UNDT, Judge Kaman determined that

[t]hus, [Mr. O'Neill] ostensibly abandoned before the Administrative Tribunal the original grounds for his appeal before the JAB (the non-selection claim) and instead changed the basis of his appeal before the Administrative Tribunal to that of the Confidential Letter--an issue that had never been the subject of administrative review and that had not been formally preserved for appeal.

Consequently, Judge Kaman held that Mr. O'Neill was time-barred from appealing the non-selection decision. As for the issue of release of the Confidential Letter, Judge Kaman concluded that the decision "cannot be subsumed within the language of [Mr. O'Neill's] request for administrative review regarding non-selection" and the assessment of the issues from the decision to release the Confidential Letter "bears nothing in common with whether [Mr. O'Neill] should have been selected for the P-5 post or whether an apology was an appropriate remedy for the release of the Confidential Letter". Judge Kaman observed that "[e]ven if [Mr. O'Neill's] appeal were considered to be receivable, he has not substantiated the harm he has suffered from the distribution of the Confidential Letter – a mere reference to harm to career and reputation is not sufficient".

16. On 7 January 2011, Mr. O'Neill appealed the UNDT Judgment to the Appeals Tribunal. The Secretary-General filed an answer on 4 March 2011.

### **Submissions**

#### **Mr. O'Neill's Appeal**

17. Mr. O'Neill maintains that he did not abandon his appeal against his non-selection to a number of P-5 posts to which he had applied. For the purpose of judicial economy, he retained his original appeal to the JAB by attaching it as an annex to his application to the former Administrative Tribunal and the UNDT.

18. Mr. O'Neill submits that the UNDT Judge erred in law by considering the cover letter as an administrative decision requiring review by the Secretary-General, and not as documentary evidence, which was so found and accepted by the JAB. It was a fact that he had never received any written notification that his counsel's Confidential Letter had been released. Consequently, it cannot be considered as an "administrative decision".

19. Mr. O'Neill believes that the UNDT erred in fact and law by deeming the treatment of the cover letter as a matter raised *sua sponte* by the JAB, when it was raised by him as part of his JAB appeal. He stresses that the JAB handled the decision to release the Confidential Letter "properly".

20. Mr. O'Neill avers that the UNDT's conclusions that he identified the release of the Confidential Letter as the only administrative decision under appeal, but that the cover letter did not appear to have undergone the required administrative review were incorrect and flawed. The cover letter should have been treated by the UNDT Judge as correspondence and documentary evidence intertwined with the non-selection decision.

#### **Secretary-General's Answer**

21. The Secretary-General submits that the UNDT correctly concluded that Mr. O'Neill did not raise the issue of his non-selection in his application and had thus abandoned his claim. It was clear from his application that the only issue raised was the adequacy of the remedy recommended by the JAB in connection with the release of the Confidential Letter. He did not contest the non-selection decision in his application, nor

did he mention the non-selection decision in any context except for stating that he had requested administrative review of that decision. If he had disagreed with the JAB's conclusion in that regard, he should have clearly contested the non-selection decision in his application. Since the non-selection decision was not raised before the UNDT, it is impermissible for Mr. O'Neill to now attempt to raise it before this Court.

22. The Secretary-General maintains that the UNDT correctly concluded that Mr. O'Neill's application was not receivable with respect to the decision to release the Confidential Letter as he failed to request administrative review of that decision.

23. The Secretary-General notes that, contrary to his assertion, Mr. O'Neill admitted to having obtained an informal copy of the cover letter from his staff representatives and to having brought the matter to the attention of the JAB by way of a submission dated 20 December 2006. It is clear that he received written notice of the release of the Confidential Letter no later than 20 December 2006.

24. The Secretary-General submits that Mr. O'Neill has failed to establish that the UNDT committed any error warranting the reversal of its determination that his challenge to the decision to release the Confidential Letter was not receivable. Should this Court disagree to the UNDT finding, the appropriate remedy would be to remand the case to the UNDT for further fact-finding, in accordance with Article 2(4)(b) of the Statute of the Appeals Tribunal.

#### **Considerations**

25. After carefully reading Mr. O'Neill's application to the former Administrative Tribunal and his submissions to the UNDT, this Court concurs with Judge Kaman that in fact Mr. O'Neill did not appeal the administrative decision not to select him for a P-5 post. Neither did he challenge the selection process or the JAB's conclusion in that regard. Mr. O'Neill merely discussed the release of the Confidential Letter that occurred after the selection process.

26. Noting that Mr. O'Neill was assisted by counsel, we cannot accept that the simple inclusion of the original submission to the JAB as an annex to his UNDT application fulfills the requirement of an actual filing of a judicial appeal or of an exposition of grounds for appeal. This is because a party's strategy during the administrative and

judicial phases may evolve, and after the end of the first part of the proceedings, it is entirely possible for him or her to abandon a part of the claim. Therefore, to identify the grounds for judicial appeal, the party must clearly express them and particularly include in his or her pleas the corresponding part of the Judgment under appeal with specific reference to the contested administrative decision(s).

27. Despite the fact that he had contested before the Secretary-General and the JAB his non-selection and the selection process, Mr. O'Neill failed to repeat the claim before the UNDT. The conclusions that Mr. O'Neill expressed in paragraphs 31 to 36 of his application before the former Administrative Tribunal and his special references to the JAB's recommendation about the issuance of an apology leaves no doubt about what he was appealing: the release of the Confidential Letter and its consequences on Mr. O'Neill's person, career and family. Hence, the UNDT was correct in finding that Mr. O'Neill's appeal was not receivable with respect to his non-promotion.

28. This Court also finds that Mr. O'Neill has failed to establish that the UNDT committed errors warranting the reversal of its determination that his challenge to the decision to release the Confidential Letter was not receivable.

29. We consider that the UNDT Judgment under appeal correctly concluded that the issue related to the disclosure of the Confidential Letter arose from an administrative act that took place after the proceedings concerning the non-selection process were already underway. That issue constituted an independent matter that should have undergone administrative review by itself, irrespective of the ongoing proceedings.

30. The issues involved in the disclosure of the content of the Confidential Letter can and should be examined independently of those in respect to the non-promotion. Consequently, they should have been considered in the administrative phase as a necessary step prior to the judicial examination.

31. Moreover, the UNDT is competent to review its own jurisdiction, whether or not it has been raised by the parties. To proceed in that way in the present case was consistent with Article 8(1)(c) and Article 2 of the Statute of the Dispute Tribunal.



**Judgment**

32. This Court affirms the impugned Judgment and dismisses the appeal in its entirety.

Original and authoritative version: English

Done this 21<sup>st</sup> day of October 2011 in New York, United States.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Garewal

*(Signed)*

Judge Courtial

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

*(Signed)*

Weicheng Lin, Registrar