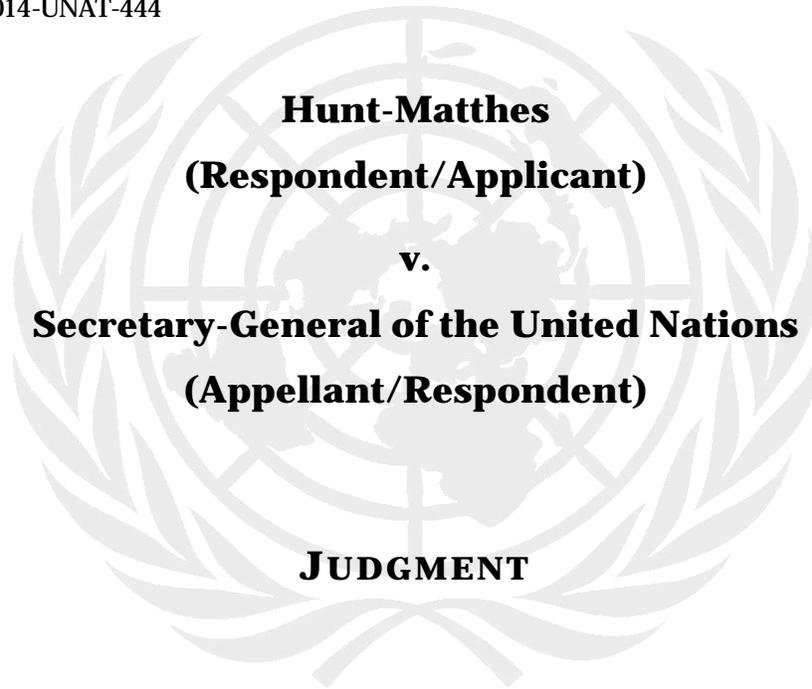




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-444



**Hunt-Matthes
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Luis María Simón
Judge Richard Lussick

Case Nos.: 2013-511 & 2013-512

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Ms. Hunt-Matthes: Miles Hastie/OSLA

Counsel for Secretary-General: Stéphanie Cartier/John Stompor

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. On 6 April 2011, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi issued Judgment on Receivability No. UNDT/2011/063 and on 28 May 2013, the UNDT issued Judgment on the Merits No. UNDT/2013/085, in the case of *Hunt-Matthes v. Secretary-General of the United Nations*. On 29 July 2013, the Secretary-General filed separate appeals of the Judgment on Receivability and the Judgment on the Merits to the United Nations Appeals Tribunal (Appeals Tribunal). On 27 and 30 September 2013, Ms. Caroline Hunt-Matthes filed her answers to the separate appeals. These appeals are consolidated for decision by the Appeals Tribunal.

Facts and Procedure

2. The parties do not dispute the following factual findings made by the Dispute Tribunal in its Judgment on Receivability:¹

... On 2 September 2003, [Ms. Hunt-Matthes] re-entered the service of [the United Nations High Commissioner for Refugees (UNHCR)] in Geneva on an inter-agency transfer from [the United Nations World Food Programme (WFP)] on a one year fixed-term appointment at the P-4 level as a Senior Investigation Officer in the Investigation Unit of the Inspector General's Office ("IGO"). She was ... supervised by the Head of the Investigation Unit[,] who reported to the Deputy Inspector General ("DIG") and the Inspector General ("IG").

... In October 2003, [Ms. Hunt-Matthes] was assigned to conduct an investigation into an alleged case of rape of a refugee by a UNHCR staff member in Sri Lanka. [She] claims that her investigation was subjected to obstruction by senior UNHCR representatives both in Sri Lanka and in the IGO in Geneva. [She] reported the obstruction she was experiencing to her supervisor and other senior members of the IGO at various times between October and December 2003. During the same period, she claims she also reported the obstruction to the UNHCR Mediator.

... On 12 April 2004, the head of the Investigation Unit approved and electronically signed [Ms. Hunt-Matthes]' mid-term assessment. [She] contends that while the mid-term assessment was very critical of her performance, it was not discussed with her.

... On 18 July 2004, [Ms. Hunt-Matthes] departed on mission to Indonesia and whilst there, she was involved in a car accident. She was evacuated back to Geneva for medical reasons. She was then placed on sick leave until 30 September 2004.

¹ Impugned Judgment, paras. 4-10, 12-13, 15-19 (internal footnotes omitted).

... On 25 August 2004, the Head of the Investigation Unit informed the Personnel Administration Section that the IGO had not recommended the extension of [Ms. Hunt-Matthes]' contract as a result of her unsatisfactory performance appraisal.

... On 26 August 2004, [Ms. Hunt-Matthes] received a copy of her Performance Appraisal Report ("PAR") for the period 1 September 2003 to 30 August 2004, which included the mid-term assessment dated 12 April 2004. Her performance was rated as "unsatisfactory".

... By a memorandum dated 27 August 2004, the Personnel Administration Section informed [Ms. Hunt-Matthes] that while her fixed-term appointment was due to expire effective 1 September 2004, her appointment was being extended as an administrative measure for the duration of her certified sick leave [until 30 September 2004].

...

... From 1 October 2004 until 30 August 2005 [Ms. Hunt-Matthes] was on 50 per cent sick leave. On 4 October 2004, [Ms. Hunt-Matthes] reported to work but was assigned to the Evaluation & Policy Analysis Unit ("EPAU"), UNHCR, as a Senior Evaluation Officer at the P-4 level where she served on several consecutive short-term appointments until she was separated from service on 31 May 2006.

... On 1 January 2005, [Ms. Hunt-Matthes] submitted a rebuttal statement contesting her PAR for the period 1 September 2003 to 30 August 2004. On 27 May 2005, the Rebuttal Panel issued a report in which it concluded that the case was outside its purview due to the allegations of misconduct involving senior staff of the IGO of the Executive Office. Instead, it recommended that the matter be referred to the Office of Internal Oversight Services ("OIOS") for action. This recommendation was not acted on.

...

... On 3 December 2005, [Ms. Hunt-Matthes] filed a formal complaint with OIOS alleging harassment and abuse of authority against her former supervisors at the IGO. OIOS did not investigate the matter.

... On 22 March 2006, [Ms. Hunt-Matthes] wrote to OIOS seeking protection against retaliation under ST/SGB/2005/21 [entitled "Protection against retaliation for reporting misconduct and cooperating with duly authorized audits or investigations"] pending the outcome of her 3 December 2005 complaint. On 7 April 2006, [she] wrote to the Ethics Office requesting protection from retaliation. She alleged that the negative PAR and the decision not to renew her contract pending the outcome of due process constituted retaliation.

... On 19 October 2006, the Interim Director of the Ethics Office informed [Ms. Hunt-Matthes] that the supporting evidence she had provided was insufficient for the Ethics Office to make a determination as to whether there was a credible case of retaliation. She was assured, however, that if she provided the requested material, the review would be undertaken expeditiously.

... Following several email exchanges and a meeting with the Ethics Office, [Ms. Hunt-Matthes] sent supporting documentation on 4 December 2006. By a memorandum dated 18 December 2006, the ... Ethics Office informed [Ms. Hunt-Matthes] of its conclusion that “[...] there is no connection between [her] reporting of misconduct and the decision not to renew her contract. The Ethics Office does not therefore find a *prima facie* case of retaliation.”

... [Ms. Hunt-Matthes] sought administrative review of the findings of the Ethics Office contained in the communication of 18 December 2006, which was upheld by the Secretary-General. She subsequently appealed to the Joint Appeals Board (“JAB”) which found that: (i) her appeal was receivable *ratione materiae* as the conclusion of the Ethics Office to qualify her case as a “non-credible case of retaliation” was an administrative decision ...; and (ii) the Ethics Office did not abuse its discretionary power in deciding that [Ms. Hunt-Matthes]’ case did not constitute a *prima facie* case of retaliation. Consequently, the JAB recommended that the Secretary-General reject the appeal. The Secretary-General accepted the recommendation of the JAB and therefore took no further action.

3. Ms. Hunt-Matthes filed an application with the former United Nations Administrative Tribunal challenging the Ethics Office’s determination, and on 1 January 2010, the application was transferred to the Dispute Tribunal.²

4. On 6 April 2011, the Dispute Tribunal issued Judgment on Receivability No. UNDT/2011/063, in which it held that Ms. Hunt-Matthes’ application challenged an administrative decision that could be reviewed by the UNDT and, thus, was receivable *ratione materiae*.

² The Appeals Tribunal takes judicial notice of Judgment No. UNDT/2013/084, and all records therein, which is concurrently on appeal. In that Judgment, the UNDT granted Ms. Hunt-Matthes’ application challenging the decision not to renew her fixed-term appointment on the grounds that the decision, which was purportedly based on her poor performance, was unlawful since the Agency had not followed the proper performance appraisal procedures and both the poor performance evaluation and the non-renewal decision were in retaliation for her reporting misconduct.

5. On 28 May 2013, the Dispute Tribunal issued Judgment on the Merits No. UNDT/2013/085, in which it found, *inter alia*, that Ms. Hunt-Matthes had a right to be protected from retaliation, the Ethics Office applied the wrong criteria in considering whether she had engaged in protected activities, the Ethics Office failed to identify that the retaliatory acts alleged were the unsatisfactory performance report and subsequent non-renewal of her appointment, and the Ethics Office failed to make a proper inquiry into the link between the protected activity and the alleged retaliation. The UNDT awarded Ms. Hunt-Matthes moral damages in the amount of USD 8,000, based on her stress and anxiety caused by the Ethics Office's breach of its duty to her.

Submissions

The Secretary-General's Appeal

The Appeal of the Judgment on Receivability

6. The Secretary-General's separate appeal of the Judgment on Receivability should be received by the Appeals Tribunal.

7. The UNDT erred in finding that Ms. Hunt-Matthes' application was receivable *ratione materiae*. The Ethics Office's determination that there was no *prima facie* case of retaliation is not an administrative decision taken by the Administration. Rather, the Ethics Office merely makes recommendations that may result in administrative decisions; it does not make administrative decisions. The Secretary-General has no authority over the determinations of the Ethics Office and its acts or omissions cannot be attributed to the Organization. Moreover, the Administration has never agreed that the Ethics Office's determination is an administrative decision taken by the Administration.

The Appeal of the Judgment on the Merits

8. The Ethics Office has authority to apply ST/SGB/2005/21 and not any other administrative issuances, as the UNDT erroneously held. The pre-existing mechanisms for protection from retaliation were not eliminated as a result of the establishment of the Ethics Office, and are not within the purview of the Ethics Office. The UNDT erred in finding that the complaints made by Ms. Hunt-Matthes constituted protected activity and that Ms. Hunt-Matthes had engaged in protected activities under ST/SGB/2005/21.

9. The UNDT erred in concluding that the Ethics Office failed to properly review Ms. Hunt-Matthes' complaint to determine if there was a *prima facie* case of retaliation. Since she did not engage in protected activity within the meaning of ST/SGB/2005/21, subsequent actions cannot be deemed retaliatory. The Ethics Office's determination is supported by the JAB.

10. The UNDT erred in determining that the Ethics Office must apply the clear and convincing standard of proof when conducting its preliminary review.

11. The UNDT erred in awarding Ms. Hunt-Matthes compensation for stress and anxiety resulting from delays by the Ethics Office. Some of the delays were caused by Ms. Hunt-Matthes.

Ms. Hunt-Matthes' Answer

The Appeal of the Judgment on Receivability

12. Although the Secretary-General may appeal whether an application has been properly received, that issue can only be raised in an appeal of the final judgment. There can only be one appeal addressing the case as a whole. The Secretary-General has improperly filed a separate appeal addressing the receivability of the application and, thus, has managed to avoid the Appeals Tribunal's rules on page limitations and forced Ms. Hunt-Matthes to file two answers.

13. Alternatively, the appeal is time-barred under Article 7(1)(c) and 7(4) of the Statute of the Appeals Tribunal.

14. The UNDT correctly held that the application was receivable under the jurisprudence of the Appeals Tribunal. The Ethics Office's determination that there was no *prima facie* case of retaliation is the ultimate determination of the Ethics Office -- not a preliminary determination. Although institutionally independent of the Secretary-General, the Ethics Office reports to the Secretary-General and its head is accountable to the Secretary-General; thus, the Administration is responsible for the operations of the Ethics Office. In Ms. Hunt-Matthes' case, the Administration is estopped from challenging the receivability of her application since it acknowledged at the management review stage that the Ethics Office had made an administrative decision.

The Appeal of the Judgment on the Merits

15. The Appeals Tribunal cannot retry the case *de novo*; it reviews for error under statutory grounds. The Appeals Tribunal must defer to the UNDT on factual matters, especially when oral testimony is taken, and should also defer to the UNDT on matters of remedy. When a factual error is appealed, that error must result in a manifestly unreasonable decision to be reversible. There are no legal errors in the UNDT Judgment on the Merits, and the Secretary-General's appeal should be dismissed.

16. The UNDT correctly determined that Ms. Hunt-Matthes engaged in protected activities. When a report is made to the Ethics Office, the Ethics Office is required to conduct a review in accordance with ST/SGB/2005/21, which it attempted to do, albeit deficiently. ST/SGB/2005/21 does not narrowly define retaliation and protected activity, as the Secretary-General asserts. All claims of retaliation are in the purview of the Ethics Office.

17. The Secretary-General has failed to allege that the UNDT's conclusion that the Ethics Office failed to complete its administrative mandate resulted in a manifestly unreasonable determination, as he must when appealing an error of fact.

18. The UNDT correctly determined that the Administration has the burden to disprove retaliation during the preliminary review by clear and convincing evidence under ST/SGB/2005/21, Section 2.2.

19. The UNDT did not commit reversible error when it awarded moral damages to Ms. Hunt-Matthes based on stress and anxiety resulting from the delays and non-processing of her complaint by the Ethics Office. Even if she was partially responsible for some of the delay, the Ethics Office is not absolved of its responsibility to act expeditiously. The award of USD 8,000 is quite modest.

Considerations

20. At the time she filed her answers, Ms. Hunt-Matthes did not request an oral hearing. However, on 3 June 2014, she filed a late motion for an oral hearing. Under Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure, a request for an oral hearing should be granted when it would "assist in the expeditious and fair disposal of the case". The Appeals Tribunal, having reviewed the record herein, does not

find that an oral hearing would assist it “in the expeditious and fair disposal of the case”; thus, the request is denied.

Is A Separate Appeal of the Judgment on Receivability Proper?

21. Our jurisprudence is clear: “[O]nly one appeal is to be filed after the final judgment has been delivered.”³ This jurisprudence developed in the context of dual appeals in the same case from separate judgments rendered by the UNDT on the merits and on the relief.⁴

22. In the pending matter, the UNDT rendered separate judgments on the issue of receivability and on the merits. This is a different situation than we addressed in *Kasyanov* and its progeny and, arguably, the Secretary-General could have been uncertain about the application of that jurisprudence to the case. Thus, we will receive the Secretary-General’s appeal of the Judgment on Receivability and will consider it in conjunction with the Secretary-General’s appeal of the Judgment on the Merits or final judgment.

23. The Appeals Tribunal concludes that our rationale in *Kasyanov* and its progeny applies equally to the situation presented in this case, in which the UNDT rendered separate judgments on receivability (concluding that the application was receivable) and on the merits. Only one appeal should be filed, and that is after the entry of the final judgment. This conclusion is consistent with our jurisprudence:

As established in *Bertucci*, an interlocutory appeal is receivable where the UNDT clearly exceeded its jurisdiction or competence. This will not be the case in every decision by the UNDT concerning its jurisdiction or competence. The general rule that only appeals against final judgments are receivable does not apply where the UNDT dismisses a case on the grounds that it is not receivable under Article 8 of the UNDT statute, as the case cannot proceed any further and there is in effect a final judgment,

The receivability of an interlocutory appeal from a decision of the UNDT allowing a case to proceed on the basis that it falls within its competence under the UNDT Statute is a different matter. If the UNDT errs in law in making this decision and the

³ *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 53.

⁴ See e.g. *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076; *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-280; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121 (full bench).

issue is properly raised later in an appeal against the final judgment on the merits, there is no need to allow an appeal against the interlocutory decision.⁵

24. In light of our conclusion that the Secretary General may properly appeal the Judgment on Receivability as part of his appeal of the Judgment on the Merits, the appeal of the Judgment on Receivability is timely.

Should the Dispute Tribunal Have Received the Application?

26. Section 1 of ST/SGB/1997/1, “Procedures for the Promulgation of Administrative Issuances”, applicable at the relevant time, lists two categories of administrative issuances: Secretary-General’s bulletins and administrative instructions. Section 2.1 provides, in part, that “[a]dministrative issuances shall enter into force upon the date specified therein”.

25. Recently we restated the well-known principle of law against retrospective application of laws, noting: “The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and holds that since the incidents in question occurred before [the administrative issuance] was promulgated it is not applicable in this case.”⁶

26. Effective 1 January 2006, the Secretary-General promulgated ST/SGB/2005/22, establishing the Ethics Office and its terms of reference. Among other things, the Ethics Office is to undertake responsibilities assigned to it under ST/SGB/2005/21, the Organization’s policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations, which also became effective 1 January 2006.⁷ ST/SGB/2005/21 provides new mechanisms to protect staff members from retaliation for protected activities, such as making complaints about misconduct.⁸

⁵ *Wasserstrom v. Secretary General of the United Nations*, Judgment No. 2010-UNAT-060, paras. 18 and 19. See also *Bertucci v. Secretary General of the United Nations*, Judgment No. 2010-UNAT-062 (full bench, Judge Boyko dissenting); *Wamalala v. Secretary General of the United Nations*, Judgment No. 2013-UNAT-300.

⁶ *Nogueira v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-409, para. 14.

⁷ ST/SGB/2005/22, Section 3.1.

⁸ Section 1 of ST/SGB/2005/21 provides:

1.1 It is the duty of staff members to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation.

...

27. The Dispute Tribunal applied ST/SGB/2005/21 to Ms. Hunt-Matthes' claims that UNHCR retaliated against her in 2004 when she was given a poor performance evaluation and her fixed-term appointment was not renewed. The UNDT, thus, concluded that her application contesting the Ethics Office's determination that there was no *prima facie* case of retaliation was receivable *ratione materiae*,⁹ stating:

... The Tribunal finds that *when a claim relates to issues covered by ST/SGB/2005/21, a staff member is entitled to certain administrative procedures and that if he or she is dissatisfied with the outcome, he or she may request judicial review of the administrative decisions taken.*

... In light of the foregoing, the Tribunal finds that the decision of the Ethics Office that was communicated to [Ms. Hunt-Matthes] in the memorandum of 18 December 2006 was an administrative decision. (emphasis added)

28. The Appeals Tribunal concludes that the UNDT erred in law when it determined that Ms. Hunt-Matthes' claims of retaliation are "covered by ST/SGB/2005/21" since her claims were based on events occurring in 2004 -- before ST/SGB/2005/21 went into effect. The UNDT violated the well-known principle prohibiting retrospective effect or application of law in reaching this erroneous legal conclusion. Moreover, as a result of this legal error, the UNDT further erred in law by receiving *ratione materiae* Ms. Hunt-Matthes' application; it should not have been received.

29. Since ST/SGB/2005/21 cannot be applied to Ms. Hunt-Matthes' claims of retaliation, which predated the promulgation of the Bulletin, the Ethics Office's determination that there was no *prima facie* case of retaliation under ST/SGB/2005/21 did not have any "direct legal consequences" on the terms or conditions of Ms. Hunt-Matthes' appointment; thus, it is not an administrative decision subject to judicial review. As we have consistently held, an administrative decision that is subject to judicial review is:¹⁰

1.4 Retaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct.

⁹ Section 5.5 of the Bulletin provides:

5.5 If the Ethics Office finds that there is a credible case of retaliation ..., it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. ...

¹⁰ *Tabari v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-030, para. 18, quoting Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

[A] unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

Accordingly, the application should not have been received *ratione materiae* and Judgment on Receivability No. UNDT/2011/063 should be reversed.

30. That is not to say, however, that Ms. Hunt-Matthes had no remedies for her complaint of retaliation or reprisal. In 2004, the administrative issuance covering UNHCR staff members, such as Ms. Hunt-Matthes, was IMO/FMO/65/2003. Section 5.2.8 of IMO/FMO/65/2003 provides:

No action may be taken against staff or others as a reprisal for reporting allegations of misconduct or disclosing information to, or otherwise co-operating with, the IGO. An investigation will be initiated against any staff member who is credibly alleged to have retaliated against another staff member or other person who submitted a complaint to the IGO or otherwise co-operated with the IGO.

And, of course, Ms. Hunt-Matthes could (and did) challenge the non-renewal of her appointment on the ground of improper retaliatory motive stemming from her reports of misconduct.¹¹

Should the Dispute Tribunal Have Addressed the Merits?

31. Since the application should not have been received *ratione materiae*, the UNDT was not competent to address the merits of Ms. Hunt-Matthes' application. Accordingly, the appeal is granted and Judgment on the Merits No. UNDT 2013/085 should be vacated.

Judgment

32. The appeal is granted. Judgment on Receivability No. UNDT 2011/063 is reversed and Judgment on the Merits No. UNDT 2013/084 is vacated.

¹¹ See, e.g., *Kasmani*, v. Secretary-General of the United Nations, Judgment No. 2013-305; *Koumoin* v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-119.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar