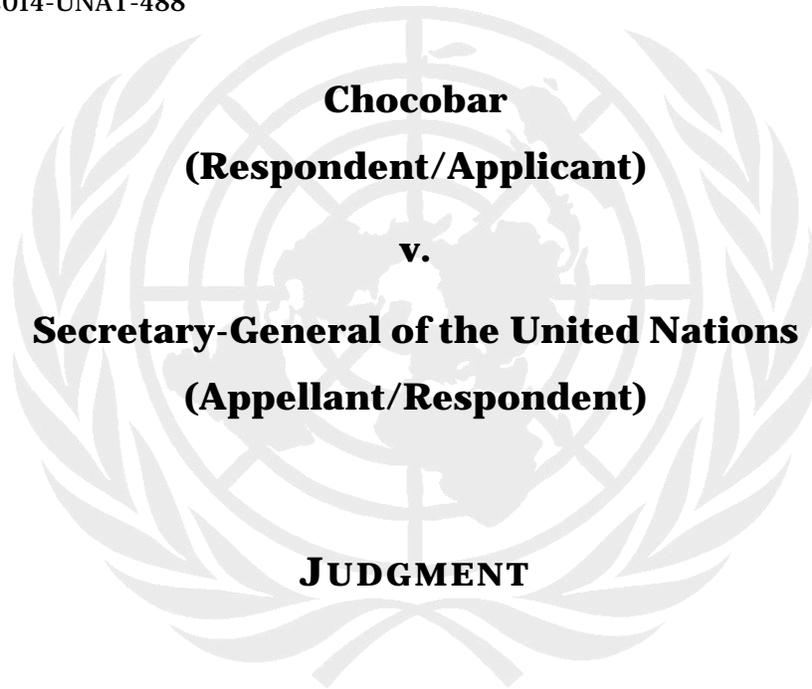




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-488



**Chocobar
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Rosalyn Chapman
Judge Inés Weinberg de Roca
Judge Sophia Adinyira
Judge Luis María Simón
Judge Mary Faherty

Case No.: 2014-641

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Ms. Chocobar: Not represented

Counsel for Secretary-General: Phyllis Hwang

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Order No. 233 (NY/2014), issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 8 August 2014 (Order). The Secretary-General appealed on 22 August 2014 and Ms. Maria Chocobar answered on 27 August 2014.

Facts and Procedure

2. On 4 February 2013, a P-4 position of Telecommunications Engineer with the Department of Field Support (DFS) in New York was advertised with the deadline for receipt of applications being 5 April 2013. Ms. Chocobar applied for the position on 26 March 2013. That same day, she was informed that the post had been filled by a candidate from a pre-approved roster. No interviews or written tests were conducted.

3. On 20 September 2013, Ms. Chocobar filed an application with the UNDT alleging that the selection of another candidate from the roster, without a proper selection exercise, was unlawful and breached her right to full and fair consideration for the post.

4. On 24 June 2014, Ms. Chocobar filed a motion seeking leave to withdraw the application following a confidential settlement agreement.

5. On 8 August 2014, the UNDT issued Order No. 233 (NY/2014). The UNDT noted that in light of Ms. Chocobar's "written notice of withdrawal of her application ... there [was] no matter for adjudication by the Dispute Tribunal" and therefore declared the case closed.¹ The UNDT, however, proceeded to make findings regarding a substantive issue raised in Ms. Chocobar's application and made an order to the Secretary-General on the basis of these findings. Specifically, the UNDT found that the Organization's continued use of pre-approved rosters for both generic job openings and position-specific openings was incorrect and ordered, pursuant to Article 7 of the UNDT Statute and Article 36 of its Rules of Procedure, that the matter be referred "to the Secretary-General for urgent consideration, including a referral to the President of the General Assembly, if he deems it necessary to do so".²

¹ Impugned Judgment, para. 39.

² *Ibid.*, para. 38.

Submissions

The Secretary-General's Appeal

6. The Secretary-General contends that the UNDT exceeded its competence in issuing an order in the present case. The case fell outside the UNDT's jurisdiction because Ms. Chocobar withdrew her appeal. The UNDT even conceded that there was "no matter for adjudication".

7. The Secretary-General further contends that the UNDT had no authority to issue this Order on the basis of Article 36 of its Rules of Procedure. The General Assembly has repeatedly affirmed that the UNDT and the Appeals Tribunal "shall not have any powers beyond those conferred under their respective statutes". The Appeals Tribunal has been mindful of this limitation on the Tribunals' authority and held that Article 36 of the UNDT Rules of Procedure does not allow the UNDT to violate its Statute.

8. The Secretary-General next submits that the UNDT had no authority to re-open the issue of the use of pre-approved rosters in selection processes, as the issue had already been decided by the Appeals Tribunal. In light of the fundamental principle of *stare decisis* and the Appeals Tribunal's clear ruling in *Charles*,³ there is no legal basis for the UNDT to require the Secretary-General to re-examine the issue in the context of confirming Ms. Chocobar's withdrawal of her application.

9. The Secretary-General requests that the Appeals Tribunal vacate the Order in its entirety. He further requests that the Appeals Tribunal review the appeal on an expedited basis.

Ms. Chocobar's Answer

10. Ms. Chocobar did not file an answer. By e-mail dated 27 August 2014, she advised that "following [her] confidential settlement agreement, [she withdrew] the case" and the "UNDT confirmed that the case was closed". She stated that she "trust[s] this will suffice as [her] formal response".

³ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416.

Considerations

11. The UNDT did not have a case before it when it made its Order on Withdrawal and Referral to the Secretary-General. It acknowledged that: “In light of the Applicant’s written notice of withdrawal of her application and there being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2013/109 is hereby closed and this ends the matter as far as the Applicant’s claim is concerned”;⁴ and “[s]ince the claim has been withdrawn this matter is not before the Tribunal for a judicial determination.”⁵

12. The UNDT then proceeded to deliver its views on the proper administration of the policy on staff recruitment and the Organization’s policy and values concerning staff selection, as well as making findings on issues raised in the withdrawn application. The UNDT concluded by ordering the matter to be “referred to the Secretary-General for urgent consideration of its implications for the staff selection system ... including a referral to the President of the General Assembly, if he deems it necessary to do so”.⁶

13. Pursuant to Article 2 of the UNDT Statute, the statutory function of the UNDT is, *inter alia*, “to hear appeals against administrative decisions that are alleged to be in non-compliance with the terms of appointment or contract of employment of a staff member. Thus, at the heart of the Dispute Tribunal’s jurisdiction is its statutory remit to judicially review *decisions* which affect the contractual entitlements of employees.”⁷ The limitation on the jurisdiction of the Dispute Tribunal is confirmed by the General Assembly which, in its resolution 63/253 at paragraph 28, states “that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes”.⁸

14. There is nothing in the statutory provisions prescribing the jurisdiction of the Dispute Tribunal which could empower it to issue a decision such as the Order under appeal.

⁴ Impugned Order, para. 10.

⁵ *Ibid.*, para. 12.

⁶ *Ibid.*, paras. 38 and 40.

⁷ *Bauzá Mercère v. Secretary-General of the United Nations*, Judgment No., 2014-UNAT-404, para 17 (emphasis in original).

⁸ *Kasmani v. Secretary-General of the United Nations*, 2010-UNAT-011, para 7.

15. Notwithstanding the statutory limits on its jurisdiction, the UNDT sought to legitimize its Order by invoking Article 36 of the UNDT Rules of Procedure. Article 36 provides:

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal *on the particular case*, by virtue of the powers conferred on it by article 7 of its statute.
2. The Dispute Tribunal may issue practice directions related to the implementation of the rules of procedure”.⁹

16. Article 36 cannot provide a legal basis for the UNDT Order. Firstly, there was no case before the UNDT to which Article 36 could apply. Secondly, Article 36 does not allow the UNDT to augment its jurisdiction in violation of Article 2 of the UNDT Statute.¹⁰

17. We find that the UNDT, in making its Order (replete with comments and findings) in the absence of a case to adjudicate, lacked jurisdiction and exceeded its competence to a significant degree.

18. The Secretary-General is concerned that the Order “has once again undermined the legal framework governing the staff selection system”. This is not possible. The UNDT went beyond its jurisdiction in making the Order, so that the Order does not have the force of legal authority and nothing in it has any binding consequences on the Secretary-General.

Judgment

19. The appeal is allowed and the UNDT’s Order is vacated in its entirety, with the exception of its closure of the case in which the application was withdrawn.

⁹ Emphasis added.

¹⁰ See *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011, para 9.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Adinyira

(Signed)

Judge Simón

(Signed)

Judge Faherty

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar