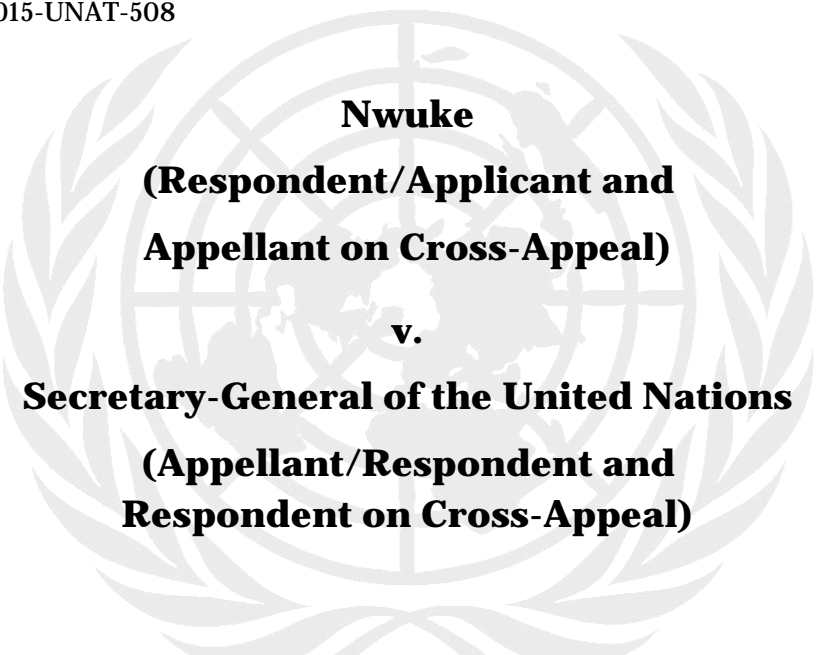




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-508



Nwuke
**(Respondent/Applicant and
Appellant on Cross-Appeal)**
v.
Secretary-General of the United Nations
**(Appellant/Respondent and
Respondent on Cross-Appeal)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Inés Weinberg de Roca
Judge Deborah Thomas-Felix

Case No: 2014-578

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Mr. Nwuke: Self-represented

Counsel for Secretary-General: Noam Wiener

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/161, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 4 December 2013 in the case of *Nwuke v. Secretary-General of the United Nations*. The Secretary-General appealed on 3 February 2014, and Mr. Kasirim Nwuke answered on 6 April 2014. On 8 April 2014, Mr. Nwuke filed a cross-appeal, and on 29 May 2014, the Secretary-General filed an answer to the cross-appeal.

Facts and Procedure

2. The facts as established by the Dispute Tribunal read as follows:¹

... The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). He has filed seven substantive applications before the [Dispute] Tribunal challenging a number of administrative decisions taken between August 2008 and July 2011. He alleges that each of these administrative decisions is unlawful because they are not only in breach of specific regulations or rules but also are examples of a continuing pattern of abuse of authority against him by the Executive Secretary (ES) of ECA.

... In this case he has challenged the 13 July 2011 decision not to select him for the ECA Post of Director, Regional Integration and Infrastructure and Trade Division (D/RIITD). He alleges that this case is another in the series of persistent retaliatory actions taken against him by the ES/ECA that began in 2009.

...

... On 9 June 2011, the post of Director/RIITD was advertised with an application deadline of 8 August 2011. The Applicant applied for the post on 16 June 2011. Mr. Rao [then Chief of Human Resources Services Section (HRSS/ECA)] said that approximately 65 candidates applied and about 17 of them were screened in, including the one who was selected.

... On 4 July 2011, the ES requested the list of all candidates rostered against D-1 posts in substantive divisions. HRSS sent him a list of rostered candidates in the Economic Affairs Job family at the D-1 level on the same day. The Applicant was not on this list.

¹ Impugned Judgment, paras. 1-2, 33-37 (internal citations omitted).

... On 13 July 2011, the ES wrote to the Director of Administration advising her that he considered that it was appropriate and important given the urgent demands on ECA in the area of trade, to fill the position of Director/RIITD expeditiously. He said he had reviewed the roster and decided to make a selection from it as per paragraph 9.4 of ST/AI/2010/3. On the same day he selected Mr. K who had been rostered against the Director/RIITD post after it had been advertised in February 2010 and had applied for the post again. The ES set out the qualities to justify Mr. K's appointment and asked the Director of Administration to take the necessary steps to appoint Mr. K effective immediately. On the same day Mr. K was notified of his selection from the roster of pre-approved candidates. He accepted the appointment immediately.

... The appointment was effective 1 August 2011. On 27 July 2011 when it was announced by the ES to all staff, the Applicant requested management evaluation of the decision of the ES to fill the post of Director/RIITD from the roster and applied to the [Dispute] Tribunal for a suspension of action. This was rejected. The MEU decision dated 28 September 2011 upheld the decision to fill the post from the roster.

... The Applicant told the [Dispute] Tribunal that he waited and thought carefully about his next step. He was considering not proceeding with his challenge but because matters at the ECA were not improving, he filed his application with the Tribunal on 12 December 2011.

3. The issue before the Dispute Tribunal was whether Administrative Instruction ST/AI/2010/3 entitled "Staff selection system" dated 21 April 2010 enabled the Administration to lawfully fill a vacancy by appointing a roster candidate without evaluating other candidates who had applied for the vacancy. The UNDT concluded that the decision to appoint Mr. K. to the post of Director/RIITD from the roster without consideration of the other candidates including Mr. Nwuke who had applied to the post was unlawful, as it failed to give Mr. Nwuke full and fair consideration for the post and denied him due process. In the view of the Dispute Tribunal, such action was inconsistent with the paramount requirements of the United Nations Charter and the pertinent Staff Regulations, the proper interpretation of ST/AI/2010/3 and the principle of transparency.

4. The Dispute Tribunal was also of the view that ST/AI/2010/3 "require[d] the hiring manager to prepare a shortlist from *all* applicants released from pre-screening, not just from rostered candidates".² "Under section 9 [of ST/AI/2010/3], selection decisions shall be made by the head of department on the basis of the proposal made by the hiring manager. These are

² Emphasis in original.

mandatory procedures.” “The manager’s discretion is exercised once all suitable candidates have been considered.” The UNDT considered that changes between section 7.8 of ST/AI/2006/3 and section 9.4 of ST/AI/2010/3 “did not remove the requirement for all candidates to be considered”. Accordingly, “[t]he actions of the ES in calling for the list of candidates from the roster and making a selection directly from that list without considering the proposal of the hiring manager were in violation of section 9.2 [of ST/AI/2010/3]”.³ However, the Dispute Tribunal did not find sufficient evidence of retaliation on the part of the ES/ECA against Mr. Nwuke as a result of his having lodged a complaint against the ES/ECA in 2009. Furthermore, the UNDT did not see any evidence of monetary or professional harm to Mr. Nwuke. However, the Dispute Tribunal felt that Mr. Nwuke was entitled to moral damages, which it affixed at one month net base salary.

Submissions

The Secretary-General’s Appeal

5. The UNDT erred by finding that the decision to select a rostered candidate for the position in the present case was unlawful. Specifically, the UNDT erred by finding that ST/AI/2010/3 required a review of all candidates for a post before a rostered candidate may be selected. The Secretary-General notes that this finding of the Dispute Tribunal was inconsistent with its own finding in another case also involving Mr. Nwuke,⁴ in which it found that the same procedure was taken in accordance with section 9.4 of ST/AI/2010/3 and not *per se* unlawful. The Secretary-General also notes that the administrative instruction on staff selection was revised in 2010 and the requirement that the programme manager review the applications of new candidates before the head of department may select a rostered candidate was “expressly removed” from the text of the 2010 administrative instruction.

6. The Dispute Tribunal erred in substituting its own judgment for that of the Secretary-General in deciding how candidates for a post should be considered. The UNDT does not have authority to introduce different procedures for the evaluation of candidates as that authority lies solely with the Secretary-General.

³ Impugned Judgment, paras. 67, 68, 72 and 73.

⁴ *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/002.

7. The Dispute Tribunal erred by finding that the selection of rostered candidates without consideration of non-rostered candidates is inconsistent with General Assembly resolutions on the need for transparency and advertising the vacancy announcement, and the reference to “surge needs” in General Assembly resolution 61/244 (2006). The Dispute Tribunal erred in finding that the decision to select Mr. K. was unlawful and as such constituted a violation of Mr. Nwuke’s due process rights. Contrary to that finding, the vacancy announcement for the D-1 position had been advertised as required by the General Assembly and the ES/ECA had reviewed other rostered candidates before he selected Mr. K. The decision to select Mr. K. was properly taken pursuant to the applicable legal and regulatory framework for the selection of staff.

8. The UNDT erred in awarding compensation in the present case. The Organization complied with its contractual obligations vis-à-vis Mr. Nwuke, and his rights were not violated because the contested decision was properly and lawfully taken. The UNDT thus erred in law and exceeded its competence in awarding compensation to Mr. Nwuke, when no, or virtually no, damages were established. It is not clear on what basis the UNDT ordered compensation for moral damages given that Mr. Nwuke was one of 65 candidates. Furthermore, the Dispute Tribunal held that Mr. Nwuke did not have any legitimate or concrete expectation to be appointed and the contested decision did not cause him any monetary or professional harm.

9. The Secretary-General requests that this Tribunal vacate the impugned Judgment.

Mr. Nwuke’s Answer

10. Mr. Nwuke submits seven UNDT judgments on his seven cases, as they are all related and the Secretary-General has made reference to some of them. It is necessary for this Tribunal to have access to all of these seven decisions for the sake of coherence and context and in the interest of justice.

11. The Appeals Tribunal is requested not to admit the new documents that the Secretary-General has submitted to this Tribunal, but not to the Dispute Tribunal. Likewise, the Appeals Tribunal should not admit the new arguments in A.(ii) and (iii) of the Secretary-General’s appeal, which the Secretary-General did not file with the UNDT. In addition, the Appeals Tribunal should not receive a number of the Secretary-General’s arguments which are of a “general, academic nature” and do not stem precisely

from this particular case, but rather were submitted for the purpose of “strategic positioning” with respect to future non-selection cases.

12. The General Assembly has never given the Administration the mandate to use a roster as the primary instrument for filling position-specific job openings. The practice of appointing from a roster without proper consideration of all candidates is inconsistent with the proper interpretation of ST/AI/2010/3 since it grants managers an unreasonably wide discretion to disregard the applications of non-rostered candidates.

13. The Secretary-General asserts but provides no proof that the UNDT substituted its judgment for his.

14. The Dispute Tribunal made no reversible error in concluding that the failure of the Secretary-General to give fullest regard to Mr. Nwuke’s candidature for the post and the appointment of Mr. K. constituted a violation of his rights.

15. Mr. Nwuke suffered additional prejudice as the ES/ECA used the unlawful device of a roster to extinguish every possibility that he may have had in respect of the post.

16. The UNDT Judgment under appeal does not contain any factual or legal errors that vitiate its findings or warrant its reversal. The present appeal has no merits and should be dismissed in its entirety, and the UNDT Judgment, including the award of compensation, should be affirmed.

Mr. Nwuke’s Cross-Appeal

17. The trial bundle, along with the UNDT judgments in all seven of his cases, should be part of the record of this Tribunal.

18. The UNDT erred on a question of fact when it relied on his own statement to find that the “Applicant did not expect to be promoted”. That was incorrect. His statement must be viewed in context. In making that statement, he did not intend that he did not want a promotion but that, given the continuing discrimination, victimization and abuse of authority by the ES/ECA, he had no expectation of promotion as he would not be selected even if he were the only candidate for selection.

19. Mr. Nwuke requests that this Tribunal “[r]eview upward” the UNDT compensation of one month net base salary so as to make it consistent with the compensation awarded in *Skourikhine*.⁵ Specifically, he requests that, in addition to the one-month net base salary that the Dispute Tribunal already awarded him, he be awarded USD 12,000 for material injury, USD 4,000 for moral injury and USD 4,000 if the Administration elects not to rescind the contested decision.

The Secretary-General’s Answer to the Cross-Appeal

20. Mr. Nwuke’s request to broaden the base of his cross-appeal to include documents that had not been part of the original record of the present case, if granted, would be inconsistent with the Statute of this Tribunal (Statute). Article 2(7) of the Statute explicitly limits the written record of a case to materials that have been “entered in the formal record of the Dispute Tribunal”, and any additional evidence accepted by the Appeals Tribunal under Article 2(5) of the Statute. Moreover, it will unnecessarily complicate the case. The consideration of Mr. Nwuke’s appeal and his cross-appeal does not require an examination of the history of his relationship with the ES/ECA.

21. Since the Appeals Tribunal has overturned the UNDT’s interpretation of ST/AI/2010/3 in *Charles*,⁶ the damages ordered by the Dispute Tribunal in the present case are no longer sustainable. Thus, Mr. Nwuke’s request for additional damages, beyond those already awarded, is also unsustainable.

22. The *Skourikhine* Judgment rendered by the Dispute Tribunal, which Mr. Nwuke cites in support of his request for increased compensation, does not provide an applicable precedent warranting an increase in damages awarded to him. It is factually distinguishable from the present case. Moreover, it is under appeal before the Appeals Tribunal.⁷

23. The Secretary-General requests the dismissal of the cross-appeal in its entirety.

⁵ *Skourikhine v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/113.

⁶ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416.

⁷ *Skourikhine v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/113. This Tribunal in its Judgment No. 2014-UNAT-468 vacated the UNDT Judgment, including its award of damages.

Considerations

24. The jurisprudence of the Appeals Tribunal in *Charles*⁸ is decisive for the outcome of the present case since it affirmed the validity of the type of selection and appointment process impugned by Mr. Nwuke, thereby, overturning the position adopted by the Dispute Tribunal prior to the issuance of the quoted case.

25. Therefore, the jurisprudence in *Charles* endorses the Secretary General's appeal, since this Tribunal stated therein that:

... ST/AI/2010/3 establishes the staff selection system. Section 9.4 of that instruction, the interpretation of which is the central issue in the instant cases, provides in part:

Section 9

Selection decision

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time the present administrative instruction is amended. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body. ...

... The UNDT rejected the Secretary-General's contention that this provision allows selection of rostered candidates without consideration of those candidates who actually applied for the job opening. The UNDT held that:

The [Secretary-General's] interpretation of ST/AI/2010/3, in effect, allows rostered candidates to be treated as a privileged class above other candidates for position-specific job openings. No such priority consideration exists for roster candidates under ST/AI/2010/3. Simply put, they are not a separate privileged class of candidates for position-specific job openings and cannot be treated as such. This was not the purpose of the roster, which was mainly to speed up the recruitment process by avoiding the stage of a referral to the

⁸ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416.

central review bodies if a roster candidate is considered the best candidate when compared to all other candidates.

... This is not a case where the written law is silent or has to be interpreted because it is not explicit. The plain wording of Section 9.4 makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position. There is no requirement in Section 9.4 for the head of department to first review all non-rostered candidates. If the head of department's discretion is subject to such a requirement, then it would be essential for the instruction to provide as much. On the contrary, as pointed out by the Secretary-General, Section 9.4 has been amended specifically to remove such a requirement.

... It was thus not open to the UNDT to come to the conclusion that Section 9.4 requires the head of department/office to first review all non-rostered candidates before selecting a rostered candidate.⁹

26. Hence, the UNDT erred in law in deciding that the appointment of the rostered candidate was unlawful and in breach of Mr. Nwuke's rights. No illegality occurred and the appointment was entirely within the Administration's discretion, which was not abusive.

27. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal held in *Antaki*¹⁰ and *Oummih*,¹¹ no compensation can be granted in the absence of a breach of the staff member's rights or administrative wrongdoing in need of repair.

28. Therefore, the compensation granted by the Judgment under appeal must be set aside and the cross-appeal submitted by Mr. Nwuke asking for an increase in compensation must be dismissed.

Judgment

29. The appeal by the Secretary-General is allowed, the Dispute Tribunal Judgment is vacated and the cross-appeal submitted by Mr. Nwuke is dismissed in its entirety.

⁹ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416, paras. 26-29.

¹⁰ *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.

¹¹ *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Thomas-Felix

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar