



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

Judgment No. 2015-UNAT-509

**Nguyen-Kropp & Postica
(Respondents/Applicants)**

v.

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

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Rosalyn Chapman
Judge Luis María Simón

Cases Nos.: 2014-581 & 2014-585

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Respondents/Applicants: Thad M. Buyer

Counsel for Appellant/Respondent: Rupa Mitra

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals filed by the Secretary-General of the United Nations against three Judgments rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York, one appeal against two Judgments on Receivability dated 22 February 2013 in the case of *Nguyen-Kropp v. Secretary-General of the United Nations* (No. UNDT/2013/028) and *Postica v. Secretary-General of the United Nations* (No. UNDT/2013/029), and the other appeal against Judgment on the Merits (No. UNDT/2013/176) dated 20 December 2013 in the case of *Nguyen-Kropp and Postica v. Secretary-General of the United Nations*. The Secretary-General filed the appeals on 18 February 2014. Pursuant to Order No. 181 (2014) granting the motion from Ms. Ai Loan Nguyen-Kropp and Mr. Florin Postica for a seven-day extension of the time limit for submitting an answer, Ms. Nguyen-Kropp and Mr. Postica filed a consolidated answer on 28 April 2014.

Facts and Procedure

2. At the material time, Ms. Nguyen-Kropp and Mr. Postica were staff members of the Office of Internal Oversight Services (OIOS). Ms. Nguyen-Kropp was a P-3 Investigator and Mr. Postica was a P-5 Senior Investigator and Ms. Nguyen-Kropp's supervisor.

3. In January 2009, a staff member "Ms. X." made a complaint to the Investigation Division (ID), OIOS, alleging that certain physicians within the Medical Services Division (MSD) of the United Nations Secretariat had engaged in the improper prescription of controlled substances or medication.

4. Mr. Postica and Ms. Nguyen-Kropp were assigned with investigating the complaint. During their investigation, Mr. Postica found evidence of irregularities in respect of how the initial evidence provided by Ms. X. had been saved, and suspected that the Officer-in-Charge (OIC) of ID/OIOS, whom Ms. X. had initially contacted, may have tampered with the evidence.

5. On 29 October 2009, Mr. Postica and Ms. Nguyen-Kropp filed a complaint against the OIC of ID/OIOS with the Under-Secretary-General for OIOS (USG/OIOS), accusing the OIC of having mishandled the evidence.

6. Pursuant to the instruction of the USG/OIOS, Mr. Postica and Ms. Nguyen-Kropp's complaint was forwarded to the Professional Practice Section (PPS), OIOS, for investigation.

7. In the notes dated 25 March 2010, the PPS reported the outcome of its review of Mr. Postica and Ms. Nguyen-Kropp's complaint. The PPS concluded that the alleged claims of misconduct against the OIC of ID/OIOS were not substantiated. It also concluded that Mr. Postica and Ms. Nguyen-Kropp might have committed possible misconduct during their investigation of Ms. X's complaint and recommended the appointment of an external consultant for an independent fact-finding inquiry.

8. Mr. Postica moved to the European Anti-Fraud Office (OLAF) in mid-January 2010. He subsequently complained that the OIC of ID/OIOS had subjected Ms. Nguyen-Kropp and him to retaliation, including moving Ms. Nguyen-Kropp from an office to a cubicle and lowering the ratings in her performance report, as well as significantly lowering his performance ratings.

9. On 9 April 2010, the USG/OIOS requested the assistance of the Department of Management (DM) in identifying an external consultant to look into the possible misconduct of Mr. Postica and Ms. Nguyen-Kropp. The DM contacted a number of international organizations including OLAF before it settled on the International Criminal Tribunal for the former Yugoslavia (ICTY) and appointed an ICTY investigator to undertake the investigation in December 2010.

10. On 4 October 2010, Mr. Postica and Ms. Nguyen-Kropp filed a request for management evaluation of inter alia the decision to investigate them for possible misconduct. On 28 December 2010, Ms. Nguyen-Kropp applied to the Dispute Tribunal contesting, among other things, the decision to investigate her. On 12 January 2011, Mr. Postica applied to the UNDT challenging the same decision.

11. In January 2011, Mr. Postica and Ms. Nguyen-Kropp were notified that an ICTY investigator would conduct an investigation against them. In March 2011, the ICTY investigator transmitted the findings of the investigation to Mr. Postica and Ms. Nguyen-Kropp for comments, which they did.

12. By letter dated 10 November 2011, the USG/OIOS informed Mr. Postica and Ms. Nguyen-Kropp of the outcome of the investigation carried out by the ICTY investigator and cleared them of misconduct.

13. The Dispute Tribunal issued a total of three judgments on Mr. Postica and Ms. Nguyen-Kropp's applications, two dealing with the receivability issue and one dealing with the merits. In the Judgments on Receivability, the Dispute Tribunal determined that the respective applications of Ms. Nguyen-Kropp and Mr. Postica in respect of the decision of 9 April 2010 by the USG/OIOS to conduct an investigation into their conduct were receivable. The UNDT found that the contested decision to initiate an investigation against Ms. Nguyen-Kropp and Mr. Postica was an appealable administrative decision as the launching of a disciplinary investigation concerned rights of the accused staff members. It also found that their requests for management evaluation of 4 October 2010 were not time-barred because Ms. Nguyen-Kropp and Mr. Postica had not received clear notification of the 9 April 2010 decision either prior to, or even after, 4 October 2010.

14. In its Judgment on the Merits, the Dispute Tribunal found that the decision that there was "reason to believe" that misconduct may have occurred on the part of Ms. Nguyen-Kropp and Mr. Postica was manifestly unreasonable and unlawful. The Dispute Tribunal also found that the manner in which, and the process whereby, the subsequent preliminary investigation was embarked upon and effected were procedurally flawed and marred by due process breaches and retaliatory intent. The decision-makers paid scant regard to the risk of reputational damage to Ms. Nguyen-Kropp and Mr. Postica and failed to have full regard to the principles and imperatives of the Organization's oversight policy.

15. In the view of the Dispute Tribunal, the preliminary investigation was also flawed, in that harmful and prejudicial materials concerning the Applicants had been widely disseminated among the professional communities of several international offices whose involvement was solicited. The UNDT found a causal link between the Applicants' making a complaint of evidence tampering against the OIC of ID/OIOS and the subsequent investigation initiated against them for possible misconduct.

16. By way of remedy, the Dispute Tribunal awarded Ms. Nguyen-Kropp and Mr. Postica each USD 10,000 "as a contribution towards the economic loss suffered by each Applicant in the form of legal costs", and moreover, USD 40,000 "for the non-pecuniary loss (moral damages) suffered".

Submissions

In respect of the Judgments on Receivability

The Secretary-General's Appeal

17. The UNDT erred in accepting Ms. Nguyen-Kropp's and Mr. Postica's applications as receivable when they challenged a decision to undertake a preliminary investigation while the investigation process was still ongoing. That decision was but one in a series of steps in the investigative and disciplinary processes. If it were to consider each individual stage of an administrative process as giving rise to an administrative decision subject to appeal, the UNDT would essentially assume the role of the Administration undertaking the day-to-day management of administrative processes. The conclusion of the Dispute Tribunal is at odds with the consistent jurisprudence of the Appeals Tribunal and the Dispute Tribunal that preparatory decisions in an ongoing process cannot be challenged, particularly when it results in a decision that no disciplinary measure should be imposed.

18. The UNDT also erred in accepting Ms. Nguyen-Kropp's and Mr. Postica's applications as receivable when they challenged the decision to undertake a preliminary investigation, given that the decision did not have direct legal consequences for them. Ms. Nguyen-Kropp and Mr. Postica filed their UNDT applications before the report of the investigation of their actions was completed in March 2011 and the decision of the USG/OIOS that no misconduct had been established was communicated to them in November 2011. Therefore, when they applied to the Dispute Tribunal in January 2011, Ms. Nguyen-Kropp and Mr. Postica could not establish any legal consequences that resulted from the contested decision to investigate them since no final decision had been taken.

19. The Secretary-General requests that the Appeals Tribunal vacate the Judgments on Receivability, as well as the Judgment on the Merits on the basis that the applications were not receivable.

Ms. Nguyen-Kropp and Mr. Postica's Answer

20. No clearly stated statutory or judicial authority renders an application against the launching of an investigation non-receivable. Requiring staff to wait until they appeal the disciplinary sanction to challenge the decision to investigate would grant the Administration a

carte blanche to use the threat of investigation to intimidate staff from disclosing administrative wrongdoings, knowing that even a retaliatory investigation of staff is beyond judicial review as long as the Administration takes no further action after the investigation is closed. The current jurisprudence of the Appeals Tribunal does not support such an unseemly rule of law.

21. The duty of the Administration not to undertake a misconduct investigation absent an objective and “well-founded” “reason to believe” that a disciplinary offence had been committed creates a concomitant due-process right to be free of unfounded, unreasonable or retaliatory investigations. Such a right forms part of the “terms of appointment or contract of employment” subject to review by the Dispute Tribunal under Article 2(1) of its Statute.

22. If an investigation is closed without further action, and the staff member alleges that the investigation caused him reputational injury, then the Dispute Tribunal should have jurisdiction to review the lawfulness of the investigation as a free standing administrative decision.

23. Ms. Nguyen-Kropp and Mr. Postica request that this Tribunal affirm the Judgments on Receivability in all respects.

In respect of the Judgment on the Merits

24. In view of our decision below with respect to the Dispute Tribunal’s receivability findings, we do not find it necessary to summarize the parties’ contentions in respect of the Judgment on the Merits.

Considerations

Appeal in respect of the Judgments on Receivability

25. The UNDT held in the two Judgments on Receivability that the contested decision, which was the decision to initiate an investigation into the alleged misconduct on the part of Ms. Nguyen-Kropp and Mr. Postica, was an appealable administrative decision.

26. Article 2(1)(a) of the UNDT Statute reads:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual [...]

...

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance[.]

27. The UNDT held the view that nothing in the definition under Article 2(1)(a) of its Statute appeared to limit its authority to receive the application. We quote:¹

Nothing in this definition appears to limit the Tribunal’s authority in terms of considering an application from a staff member who wishes to appeal an administrative decision to launch a disciplinary investigation into her affairs, which, in addition to being procedurally flawed, may also be tainted by bad faith and/or ulterior motives. That the Tribunal may review such an application was also confirmed by the Appeals Tribunal in *Nwuke* 2010-UNAT-099 in which it stated that “a possible disciplinary procedure” would concern the rights of “the accused staff member” [...].

28. The Secretary-General submits that:²

[T]he UNDT’s reliance on *Nwuke* is misplaced. In *Nwuke*, the UNAT examined the question of whether a staff member could challenge the Administration’s decision *not* to investigate a claim of discrimination. The excerpt of the UNAT’s judgment in *Nwuke* cited by the UNDT actually states in full as follows:

“In the majority of cases, *not* undertaking a requested investigation into alleged misconduct will *not* affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member”.

However, the UNAT went on to find that a claimant (a staff member who alleges that he or she has been subject to harassment) could challenge a decision *not* to investigate a claim of discrimination because of the Secretary-General’s bulletin on the “Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority” (ST/SGB/2008/5). The [UNAT] noted that “when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken.” Contrary to the UNDT’s discussion in the Judgments on Receivability, therefore, the [Secretary-General] submits that the UNAT did not hold in *Nwuke* that a decision to investigate a staff member for misconduct has legal consequences for a staff member’s terms of appointment and can be challenged at any stage. Rather, the UNAT held that when a staff member files a complaint about discrimination, harassment or abuse of

¹ Impugned Judgment, para. 20.

² Appeal, paras. 28 and 29 (original emphases; internal citations omitted).

authority, a challenge of the Administration's decision *not* to investigate such a complaint is receivable, in light of the specific guarantees provided for in ST/SGB/2008/5.

29. The Appeals Tribunal notes that our jurisprudence requires that to be reviewable, the administrative decision must have direct legal consequences on an individual's terms of appointment. "Thus, the key characteristic of an administrative decision subject to judicial review is that the decision must 'produce direct legal consequences' affecting a staff member's terms or conditions of appointment. 'What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.'"³

30. Ms. Nguyen-Kropp and Mr. Postica submit that there is no clearly stated statutory or judicial authority that renders an application against the launching of an investigation non-receivable. Requiring staff to wait until they appeal the disciplinary sanction to challenge the decision to investigate would create a *carte blanche* for the Administration to use the threat of investigation to intimidate staff from disclosing administrative wrongdoings, knowing that even a retaliatory investigation of staff is beyond judicial review as long as the Administration takes no further action after the investigation is closed. They argue that the current jurisprudence of the Appeals Tribunal does not support such an unseemly rule of law.

31. The position of Ms. Nguyen-Kropp and Mr. Postica is not entirely correct. Generally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.

32. This accords with another general principle that tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality.

³ *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460, para. 27, citing *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18, as well as *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457.

33. The Appeals Tribunal has previously held that certain administrative processes, such as a selection process in *Ishak*,⁴ and the Administration's proposal of an alternative rebuttal panel in an ongoing performance appraisal rebuttal process in *Gehr*,⁵ are preparatory decisions or one of a series of steps which lead to an administrative decision. Such steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences.⁶

34. Initiating an investigation is merely a step in the investigative process and it is not an administrative decision which the UNDT is competent to review under Article 2(1) of its Statute.

35. From the foregoing, we hold that the UNDT erred on a question of law and exceeded its competence in accepting Ms. Nguyen-Kropp and Mr. Postica's applications as receivable.

36. The appeal succeeds.

Appeal in respect of the Judgment on the Merits

37. As we have vacated the UNDT's decisions on receivability, we consequently vacate its decision on the merits.

Judgment

38. The appeal is allowed. UNDT Judgments on Receivability Nos. UNDT/2013/028 and UNDT/2013/029 and UNDT Judgment on the Merits No. UNDT/2013/176 are hereby vacated.

⁴ *Ishak v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-152.

⁵ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313.

⁶ See also *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460 and *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457. The Dispute Tribunal, by its well settled case law, has also ruled that preparatory decisions are not subject to appeal. For instance, *Hashimi v. Secretary-General of the United Nations*, Order No. 93 (NY/2011); *Balakrishnan v. Secretary-General of the United Nations*, Judgment No. 2012/UNDT/041.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar