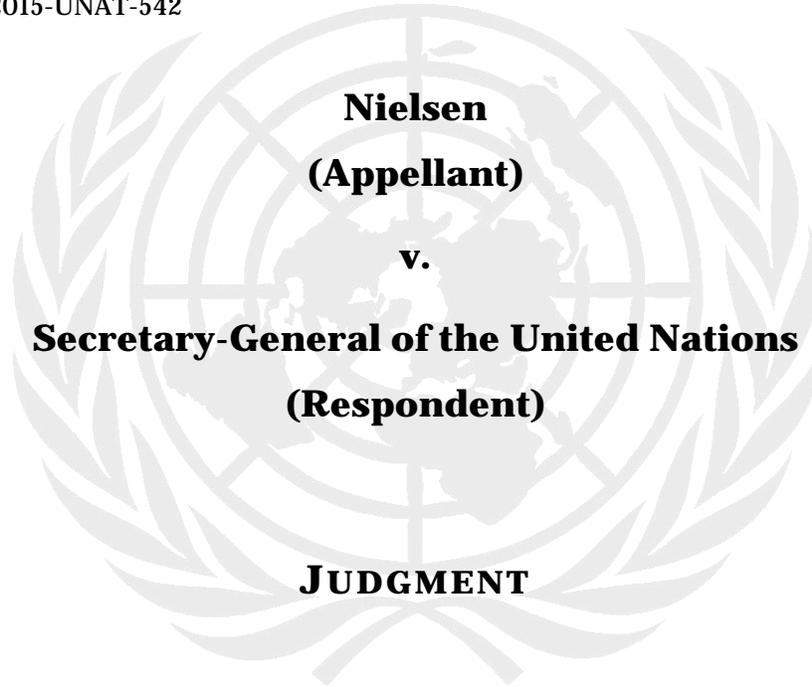




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-542



**Nielsen
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Luis María Simón Judge Deborah Thomas-Felix
Case No.:	2014-623
Date:	2 July 2015
Registrar:	Weicheng Lin

Counsel for Ms. Nielsen:	Self-represented
Counsel for Secretary-General:	Zarqaa Chohan

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 63 (GVA/2014) and Summary Judgment No. UNDT/2014/061, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 7 May 2014 and 13 June 2014 respectively, in the case of *Nielsen v. Secretary-General of the United Nations*. Ms. Olga Nielsen filed her appeal on 25 June 2014 and the Secretary-General filed his answer on 27 October 2014.

Facts and Procedure

2. On 28 January 2013, Ms. Nielsen joined the Procurement Services Branch (PSB) of the United Nations Population Fund (UNFPA) based in Copenhagen, Denmark, on the basis of a one-year temporary appointment.

3. By April 2013, the relations between Ms. Nielsen and some of her colleagues and supervisors had become difficult. Since measures taken between April and September 2013 to improve the situation were not successful, on 23 September 2013 Ms. Nielsen was placed on Special Leave with Full Pay (SLWFP).

4. On 5 November 2013, pursuant to a decision by Ms. Nielsen's supervisors and Staff Association representatives who were involved in mediating Ms. Nielsen's issues on her behalf with her supervisors, and apparently unbeknownst to her, Ms. Nielsen's private e-mail account was blocked in order to prevent her from sending continuous non-work related e-mails to her colleagues. E-mails sent from her private account to UNFPA servers were instead directed to the Chief of PSB.

5. On 13 November 2013, Ms. Nielsen requested management evaluation of the decision to place her on SLWFP and, on 11 December 2013, the Executive Director, UNFPA, informed Ms. Nielsen that he upheld the contested decision.

6. Ms. Nielsen subsequently challenged her placement on SLWFP before the UNDT in Case No. UNDT/GVA/2014/009, a separate matter. On 7 May 2014, during the course of that matter, the UNDT issued Order No. 63 (GVA/2014) being an "Order on Case Management",

which is also the subject of the present appeal.¹ By that order, the UNDT invited the Secretary-General to respond to a motion filed by Ms. Nielsen requesting leave to provide additional evidence and comment on the Secretary-General's reply to the UNDT application.

7. On 10 January 2014, Ms. Nielsen received a letter notifying her that her temporary appointment would not be renewed upon its expiration.

8. On 14 January 2014, Ms. Nielsen's Performance Appraisal and Development Report (PAD) was completed. Her supervisors gave her the following ratings: for core competencies-"not proficient", for functional competencies-"developing proficiency", and for developmental outputs-"partially achieved outputs", which Ms. Nielsen also contests.

9. On 26 January 2014, Ms. Nielsen's contract expired and she was separated from UNFPA.

10. On 13 February 2014, Ms. Nielsen sought to access the United Nations City building (UN City), a multi-story building complex housing multiple United Nations offices, in order to attend a written assessment organised by the World Health Organization (WHO) for the purpose of a position to which she had applied. However, United Nations Security denied her access to the complex. Having requested UNFPA for clarification, by e-mail of 14 February 2014, the Director of the Department of Human Resources, UNFPA, informed Ms. Nielsen that he had requested PSB to ensure that Ms. Nielsen would be given access to UN City if invited by another Agency.

11. On 14 February 2014, Ms. Nielsen initiated a rebuttal of her performance evaluation, the receipt of which was acknowledged on 3 March 2014. She provided additional documents concerning her rebuttal case on 30 April 2014. With the exception of the e-mail acknowledgment of 3 March 2014, she has had no further reply on the matter.

12. On 27 February 2014, Ms. Nielsen received an e-mail from WHO informing her that while UNFPA had made clear to WHO that Ms. Nielsen could attend the WHO for the purpose of undertaking the assessment, WHO, not wishing "to harbour unfriendly relations with any other UN agency [...] housed in UN City", had taken the decision to deny her access to UN City. In an

¹ On 9 December 2014, the UNDT handed down its judgment in that matter which found in favour of Ms. Nielsen, and ordered the rescission of the September 2013 decision to place Ms. Nielsen on SLWFP, and payment of USD 1,000 for moral damage. The Judgment was not appealed.

additional e-mail sent the same day, WHO informed Ms. Nielsen that she could not attend the next testing session.

13. On 27 March 2014, Ms. Nielsen was informed that she was not selected for two posts to which she had previously applied with PSB, UNFPA, one at the G-5 level and the other at the G-6 level. She noticed on the same day that e-mails she sent to UNFPA staff members from her private e-mail accounts were blocked.

14. On 1 April 2014, Ms. Nielsen filed a second request for management evaluation, challenging: i) the alleged denial of her “read-only” access to e-mails from her UNFPA account; ii) the denial of access to UN City to participate in an assessment for a position with WHO; iii) the non-extension of her contract; and iv) the decisions not to select her for the two positions in PSB, UNFPA. She also requested information as to why e-mails sent from her two private e-mail addresses to PSB, UNFPA, were blocked.

15. On 14 May 2014, the Executive Director, UNFPA, informed Ms. Nielsen that her request for management evaluation was rejected on the basis that her challenges to the issues of her e-mails being blocked and her non-extension were not receivable as they were time-barred. Further, her remaining challenges were without merit.

16. On 26 May 2014, Ms. Nielsen filed an application with the UNDT challenging, *inter alia*, the first, second and fourth issue raised in her second request for management evaluation. She also challenged UNFPA’s failure to conduct or follow-up on her rebuttal in accordance with the UNFPA Policy on PAD Rebuttal. Her case was assigned Case No. UNDT/GVA/2014/028.

17. On 13 June 2014, the UNDT issued its Summary Judgment in the matter, limiting itself to consideration of the receivability of Ms. Nielsen’s application. The UNDT found in favour of Ms. Nielsen, in part, and dismissed the remainder of her application. The UNDT found that her challenges to her non-selection for the two posts in PSB were receivable and could continue.² The UNDT nevertheless held that Ms. Nielsen had no standing to contest the first and second issue, namely the blocking of her e-mail and denial of access to UN City, insofar as she was no longer a staff member at the time the facts underpinning her challenges arose. Her challenge to the PAD rebuttal process was found to be premature as the process was still pending, while her

² The Secretary-General subsequently filed his reply regarding the merits of these claims on 9 July 2014.

challenge to the UNFPA Policy on PAD Rebuttal was not receivable as it challenged a regulatory framework, rather than an administrative decision.

18. On 25 June 2014, Ms. Nielsen appealed the UNDT Judgment to this Tribunal.

19. On 14 July 2014, Ms. Nielsen filed a “motion for confidentiality”, in which she sought leave to keep five documents annexed to her appeal confidential. On 22 August 2014, this Tribunal rejected the motion by Order No. 196 (2014). On the same day, Ms. Nielsen filed a motion purporting to reply to this Tribunal’s Order.

20. On 27 October 2014, the Secretary-General filed his answer to Ms. Nielsen’s appeal of 25 June 2014.

21. On 28 October 2014,³ Ms. Nielsen filed a motion seeking leave to file additional pleadings and adduce new evidence. On 13 November 2014, the Secretary-General filed his observations opposing the motion.

22. On 23 November 2014, Ms. Nielsen filed a motion seeking leave to include her initial filings in connection with the Judgment, i.e., 101 annexes, with her present appeal. On 15 January 2015, the Secretary-General filed his observations opposing the motion.

23. On 13 January 2015, Ms. Nielsen filed a motion advising the Appeals Tribunal of her unavailability for an oral hearing over several periods throughout 2015. The Registry transmitted this motion to the Secretary-General for information only.

24. On 19 January 2015, Ms. Nielsen filed a motion seeking leave to protest against the Secretary-General’s observations of 15 January 2015. Ms. Nielsen also informed the Appeals Tribunal that she had seven additional cases before the UNDT involving the same facts underlying her current appeal and requested that the Appeals Tribunal “rephrase the Judgment” to reflect her version of the facts or to wait until all seven of her cases “will be finished” before reviewing her appeal.

25. On 20 January 2015, Ms. Nielsen filed a motion requesting this Tribunal to remand the Judgment to the UNDT for “further work” by the UNDT. In the motion, Ms. Nielsen also complained of the conduct of UNFPA with respect to her harassment complaints.

³ This motion was resubmitted on 31 October 2014.

26. On 27 February 2015, the Secretary-General filed his observations opposing Ms. Nielsen's motions of 19 and 20 January 2015.

27. On 3 March 2015, Ms. Nielsen filed a motion seeking leave to comment on the Secretary-General's observations of 27 February 2015, and repeating her request to remand the Judgment to the UNDT for proper consideration in light of the additional evidence now before the UNDT in respect of all her other cases. The Registry transmitted this motion to the Secretary-General for information only.

28. On 8 March 2015, Ms. Nielsen filed a motion seeking leave to include a recent Rebuttal Report which upgraded her PAD Report for 2013, and to amend a sentence in the Judgment discussing her PAD Report for 2013 to reflect her revised ratings. On 4 May 2015, the Secretary-General filed his observations.

29. On 17 May 2015, Ms. Nielsen filed a motion with, inter alia, "Some Requests to UNAT" which provided this Tribunal with updates as to her complaints of harassment and abuse of authority by senior members of UNFPA, including in particular in relation to her PAD Rebuttal.

30. On 26 May 2015, Ms. Nielsen filed a motion that requested, inter alia, that this Tribunal take note of Judgment No. UNDT/2015/039 rendered on 19 May 2015 concerning her complaints of harassment and abuse of authority by UNFPA's Director of Human Resources, Legal and Executive Director's Offices, as well as the alleged inaction of the UNFPA Investigation Office.

31. On 29 May 2015, the Registry transmitted Ms. Nielsen's motions of 17 and 26 May 2015 to the Secretary-General for information only.

32. On 30 June 2015, while her matter was still under deliberations, Ms. Nielsen filed two additional motions. The first was titled "Urgent Motion Regarding UNDT's Last 4 Judgments of June 29 2015, Lies from UNFPA OASIS and Transfer of Cases", and the second an "Application for Intervention by a Person Not Party to a Case". She filed the motions considering that they may "influence" this Tribunal's judgment in her matter.

Submissions

Ms. Nielsen's Appeal

33. Ms. Nielsen submits that the UNDT Judgment is not objective as it portrays her in an undeservedly bad light and only reflects UNFPA's position. The UNDT Judgment also purports to make conclusions on "facts" although she had not had the opportunity to provide her comments on documentation provided by UNFPA which she alleges contains lies. The UNDT exceeded its jurisdiction in stating such were "facts" whereas they merely repeated UNFPA arguments.

34. The UNDT Judgment should state that she completed medical school, in order to show that she is a highly qualified person and demonstrate the unfairness in according such a highly qualified person a low evaluation in her PAD. In relation to her rebuttal case, she requests that a number of "facts" be added to the UNDT Judgment, while she submits that other paragraphs should be amended to reflect the reality of her submissions, rather than UNFPA's position.

35. The UNDT Judgment does not adequately reflect that she lost an opportunity to be considered for employment with WHO because of UNFPA's actions. Whereas the UNDT Judgment states that Ms. Nielsen was denied access to UN City, in reality, after entering, United Nations Security contacted the Human Resources Assistant from WHO to inform her that Ms. Nielsen was not authorized to enter UNFPA premises. As a direct result, WHO thereafter asked Ms. Nielsen to leave the building and deemed that she was not eligible to sit future assessments. E-mail exchanges between UNFPA and WHO demonstrate that WHO decided not to allow her to take future written assessments only after speaking with UNFPA and that, therefore, UNFPA prejudiced her chances of reemployment. As there are "no locks" on doors in UN City, a prohibition on her entry to UNFPA premises necessarily means that other agencies in UN City will not seriously consider her candidature with them.

36. Ms. Nielsen requests that this Tribunal remove quotations from the UNDT Judgment of the e-mail sent by WHO advising her of its decision to exclude her from the written assessment, and clarify the order from UNFPA to United Nations Security, as these affect her reputation and future career.

37. Ms. Nielsen otherwise makes factual submissions concerning the substance of her disputes with UNFPA, her relations with particular UNFPA management staff and their allegedly improper behaviour towards her and inopportune handling of the situation, including in relation to her placement on SLWFP, which is the subject of Case No. UNDT/GVA/2014/009.

38. Ms. Nielsen claims that she filed two motions with the UNDT requesting to file additional comments with respect to the Secretary-General's answer, which went unanswered, whereas, by Order No. 63 (GVA/2014) the UNDT granted the Secretary-General the right to file comments on her motion. As such, the Secretary-General was granted the right to file more documents than her, and she was denied the possibility to defend herself against those filings. Ms. Nielsen requests that this Tribunal require the UNDT to allow her to provide her additional comments and evidence.

The Secretary-General's Answer

39. The UNDT correctly concluded that Ms. Nielsen's challenges to four of the "decisions" she contested were not receivable, and appropriately disposed of these by summary judgment, as permitted under Article 9 of the UNDT Rules of Procedure (UNDT Rules).

40. With respect to being denied access to UN City and the alleged blocking of her e-mails after the end of her appointment, the UNDT correctly concluded that Ms. Nielsen had no standing to challenge these decisions which were taken after she was no longer a staff member. When Ms. Nielsen tried to enter UN City on 13 February 2014, she was no longer a UNFPA staff member, and thus no longer enjoyed any rights as a staff member to enter the premises. Further, it was WHO and not UNFPA who decided not to allow the Appellant to enter UN City. The UNDT's finding and the facts at hand are consistent with the Appeals Tribunal's jurisprudence in *Sims*.⁴

41. Further, in accordance with the Appeals Tribunal's jurisprudence in *Gehr*,⁵ the UNDT was also correct to conclude that it was premature to examine the rebuttal process, which was ongoing at the time of Ms. Nielsen's request for review by the UNDT.

42. Lastly, the UNDT was correct in its conclusion that it did not have jurisdiction to examine challenges to policy, as per this Tribunal's judgment in *Bauzá Mercére*.⁶

⁴ *Sims v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-154.

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

43. Concerning the blocking of her e-mails, UNFPA management had decided even before the expiration of her temporary appointment to re-direct personal e-mails sent by Ms. Nielsen while on SLWFP to UNFPA staff members, to the PSB Chief's e-mail. Her current challenge is limited to the decision to continue to block her e-mails after her appointment had expired.

44. As concerns Ms. Nielsen's challenge to Order No. 63 (GVA/2014), this Tribunal has consistently affirmed the right of parties to the proceedings to have their pleadings heard, and its jurisprudence in *Gehr* and *Khambatta* highlights that this Tribunal usually defers to the UNDT on matters related to case management.⁷

45. Ms. Nielsen has not established any errors warranting a reversal of either the UNDT Judgment or Order No. 63 (GVA/2014). The remainder of Ms. Nielsen's submissions fail to respond to, or in any way undermine, the Judgment's conclusion that four of her claims were not receivable. The Secretary-General requests that this Tribunal affirm the UNDT Judgment and dismiss the Appellant's appeal in its entirety.

Considerations

Preliminary issue – Request for a hearing

46. Ms. Nielsen requested "case management hearings" so that she "could clarify any unclear moments". This Tribunal does not find that an oral hearing is necessary or would "assist in the expeditious and fair disposal of the case" within the meaning of Article 18(1) of the Appeals Tribunal's Rules of Procedure (Appeals Tribunal Rules). Accordingly, her request is denied.

Preliminary issue - Ms. Nielsen's Motions

47. Ms. Nielsen's appeal against Judgment No. UNDT/2014/061 and Order No. 63 (GVA/2014) was filed on 25 June 2014 and resubmitted on 9 July 2014.

48. The Secretary-General's answer to the present appeal was filed on 27 October 2014.

⁶ *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404.

⁷ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313; *Khambatta v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-252.

49. Between 28 October 2014 and 30 June 2015, Ms. Nielsen filed 12 motions with the Appeals Tribunal with reference to her present appeal. Three of the motions, dated 13 January 2015, 16 May 2015 and 26 May 2015 respectively advised, or purported to advise,⁸ the Appeals Tribunal, inter alia, of Ms. Nielsen's unavailability on certain dates throughout 2015 and otherwise apprised the Appeals Tribunal of matters which the Appeals Tribunal considers do not relate to the substance of Ms. Nielsen's appeal of Judgment No. UNDT/2014/061. Accordingly, insofar as Ms. Nielsen sought relief therein, the same is denied by this Tribunal.

50. In response to the filing of the Secretary-General's answer on 27 October 2014, Ms. Nielsen filed a motion on 28 October 2014 taking issue with the contents of the Secretary-General's answer and with the Secretary-General having annexed to his answer the replies with annexes attached that he submitted in Case No. UNDT/GVA/2014/009 (challenging Ms. Nielsen's placement on SLWFP) and in Case No. UNDT/GVA/2014/028 (the matter currently under appeal). In her motion, Ms. Nielsen sought to file with the Appeals Tribunal additional pleadings which, she maintained, would contradict the contents of the documents which the Secretary-General had put before the Appeals Tribunal. Much of the information Ms. Nielsen sought to put before the Appeals Tribunal relate to a myriad of matters which were not the subject of the UNDT Judgment presently being considered by the Appeals Tribunal in the course of this appeal. On 13 November 2014, the Secretary-General provided his observations on the motion and argued that Ms. Nielsen had not met the "exceptional circumstances" requirement for the admission of the information set out in her motion.

51. Articles 8 and 9 of the Appeals Tribunal Rules respectively provide for an appellant to submit an appeal form, accompanied by a brief, and for a respondent to submit an answer form, accompanied by a brief. Under Article 31(1) of the Appeals Tribunal Rules and Section II.A.3 of Practice Direction No. 1 of the Appeals Tribunal, the Appeals Tribunal may allow additional pleadings if there are exceptional circumstances justifying the motion.⁹

52. Having considered the matter, we find that the matters Ms. Nielsen seeks to address in her motion do not demonstrate any exceptional circumstances justifying the need to file additional pleadings in response to the Secretary-General's answer. Accordingly, the motion of 28 October 2014 is denied.

⁸ The motion of 26 May 2015, while titled "Motion about not being available during few weeks in summer and some requests to UNAT", is silent as to the issue of her availability.

⁹ *Wu v. Secretary-General of the United Nations*, Order No. 225 (2015) of 1 July 2015.

53. On 23 November 2014, Ms. Nielsen filed a motion in which she sought leave to place before the Appeals Tribunal, in the context of the present appeal, the case filings and annexes she submitted in Case No. UNDT/GVA/2014/009 (challenging Ms. Nielsen's placement on SLWFP) together with other information which pertained to her four management evaluation requests which are appended to her present appeal. On 15 January 2015, the Secretary-General filed his observations on this motion objecting to Ms. Nielsen's request.

54. On 19 January 2015, Ms. Nielsen filed a motion protesting against the Secretary-General's observations of 15 January 2015, and on 20 January 2015, Ms. Nielsen filed a further motion by which she requested the Appeals Tribunal to remand Judgment No. UNDT/2014/061, the subject of the present appeal, to the UNDT for "further work" by that Tribunal. The Secretary-General responded to both motions through observations filed on 27 February 2015.

55. On 3 March 2015, Ms. Nielsen filed yet another motion commenting on the Secretary-General's observations of 27 February 2015.

56. The Appeals Tribunal has considered the aforesaid sequence of motions and has concluded that there are no exceptional circumstances which warrant the inclusion of any of the UNDT filings and materials referred to by Ms. Nielsen in the appeal presently before us. In so far as matters of relevance are alluded to in the said material, the Appeals Tribunal is satisfied that same are a replication of matters already brought to the attention of this Tribunal by Ms. Nielsen in the pleadings and annexes already filed by her in connection with this appeal. Accordingly, the reliefs sought by Ms. Nielsen in the motions dated 23 November 2014, 19 January 2015, 20 January 2015 and 3 March 2015 are denied.

57. On 8 March 2015, Ms. Nielsen filed a motion seeking the leave of the Appeals Tribunal to submit a report from the UNFPA PAD Rebuttal Panel which accorded her better ratings than her 2013 PAD process had afforded her. Further, she sought to provide clarification of certain information she had provided to the Rebuttal Panel.

58. The Secretary-General responded with observations on 4 May 2015 stating that there were no exceptional circumstances which warranted the inclusion of the material and clarifications in this appeal. The Appeal Tribunal agrees, finding no exceptional circumstances

exist that justify the need to file additional pleadings and, for reasons which are expounded on in this Judgment, the motion is therefore denied.

59. On 30 June 2015, Ms. Nielsen filed two further motions, under cover of the present appeal, essentially requesting the Appeals Tribunal to intervene in matters in respect of which she has initiated separate applications before the UNDT and which fall wholly outside the scope of the present appeal. On that basis alone, the motions are denied.

Ms. Nielsen's appeal of UNDT Order No. 63 (GVA/2014)

60. In the course of Case No. UNDT/GVA/2014/009 (relating to her placement on SLWFP), the UNDT issued Order No. 63 (GVA/2014) (Order on Case Management), by which the UNDT rejected the Secretary-General's motion to strike out part of the evidence Ms. Nielsen had submitted on 9 and 24 April 2014 in connection with that application. This ruling was in favour of Ms. Nielsen. Under cover of the same Order, the Dispute Tribunal set the time limit for the Secretary-General to respond to a motion filed by Ms. Nielsen on 25 April 2014 seeking leave to provide additional evidence or comments on the Secretary-General's reply to her application.

61. In the course of the present appeal, Ms. Nielsen argues that the UNDT acted unfairly in allowing the Secretary-General to reply to her motion of 25 April 2014 annexing additional documentation, which she claims she had not seen previously, and thereafter issuing Judgment No. UNDT/2014/061 without giving her an opportunity to contradict the additional material furnished by the Secretary-General. Furthermore, Ms. Nielsen requests that the Appeals Tribunal "amend" paragraphs 5 and 6 of the impugned Order.

62. Firstly, we hold that Ms. Nielsen's appeal grounds do not approach the requisite threshold for the Appeals Tribunal to interfere with the case management exercise embarked on by the UNDT. Ms. Nielsen does not advance any persuasive argument that the UNDT exceeded its jurisdiction or erred in matters of law or procedure or manifestly in fact in the course of making Order No. 63 (GVA/2014) or consequent on the said Order such as would compel this Tribunal to render the UNDT Judgment invalid as a result of Order No. 63 (GVA/2014). Her appeal against Order No. 63 (GVA/2014) is rejected.

Ms. Nielsen's appeal of Judgment No. UNDT/2014/061

63. In the course of its Judgment, the Dispute Tribunal identified the decisions contested by Ms. Nielsen in the following terms:

- a. Not to select [her] for the position of Quality Assurance Assistant, G6 (one of 2 positions);
- b. Not to select [her] for the position of Procurement Assistant, G5 (one of 5 positions);
- c. Continuation of blocking [her] personal emails even after the end of [her] TA contract with UNFPA PSB;
- d. Continuation of UNFPA PSB ordering UN City Security (in UN City Copenhagen) to inform any inviting [her] person/UN agency in UN City Copenhagen that [she was] not allowed to enter UNFPA Copenhagen premises (2 PSB's wings inside the UN City) even after the end of [her] TA contract with UNFPA PSB;
- e. UNFPA not conducting [her] PAD Rebuttal process in principle or not following the due process and not communicating with [her];
- f. The UNFPA Policy on PAD Rebuttal ... saying that the Rebutted PAD is final [...].

64. Regarding the first and second challenges, the UNDT went on to properly find that the decisions not to select Ms. Nielsen for the G-5 and G-6 positions were receivable and it directed that those proceedings continue before the UNDT. Indeed, on 9 July 2014, the Secretary-General furnished his reply on these issues.

65. With respect to the fifth issue Ms. Nielsen raised, the Appeals Tribunal agrees with the UNDT's rejection of Ms. Nielsen's complaint concerning her PAD rebuttal procedure as premature. In *Gehr*, the Appeals Tribunal stated:¹⁰

... In Summary Judgment No. UNDT/2012/103, the Dispute Tribunal rejected Mr. Gehr's application as not receivable, as he had failed to identify any appealable decision. In the view of the Dispute Tribunal, the alternative proposed by HRMS did not qualify as a "final decision", nor could it be considered as a decision not to proceed with the rebuttal process. The Dispute Tribunal concluded that the rebuttal process regarding Mr. Gehr's 2011 ePAS was ongoing and his application was therefore premature.

...

... The issue for this Tribunal is whether the Dispute Tribunal was correct in law in rejecting Mr. Gehr's application as premature. Article 2(1) of the Dispute Tribunal Statute

¹⁰ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313, paras. 9, 18-19.

provides that the Dispute Tribunal is competent to hear and pass judgment on an application appealing “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

... We are satisfied that the Dispute Tribunal, in assessing whether the actions of the Administration vis-à-vis the rebuttal process concerning Mr. Gehr’s 2011 ePAS constituted an administrative decision for the purpose of Article 2(1) of the UNDT Statute, correctly determined that no appealable administrative decision was identified by Mr. Gehr. We are further satisfied that the Dispute Tribunal, in reaching its decision, correctly assessed the complained-of actions and/or omissions against the definition of an administrative decision provided by the former United Nations Administrative Tribunal in Judgment No. 1157, *Andronov* (2003). Accordingly, the Dispute Tribunal was correct in law when it stated, at paragraph 20 of its Judgment, that “[t]he Administration’s proposed alternative does not in any way qualify as a ‘final decision’. Nor can it be considered as a decision ‘not to proceed’ with the rebuttal process in relation to [Mr. Gehr’s] 2011 performance appraisal.

66. We emphasize this issue not because we can discern any relevant ground in Ms. Nielsen’s appeal upon which to challenge the Dispute Tribunal’s ruling on the PAD rebuttal issue - indeed it is not clear whether in fact she is appealing this aspect of the UNDT Judgment. Rather, we wish to make clear the following, in light of the myriad motions brought by Ms. Nielsen in the course of this appeal: processes with which Ms. Nielsen may take issue, be they administrative decisions or the conduct of UNDT proceedings once such administrative decisions are challenged by her, or the UNDT judgments following such proceedings, must be allowed to run their proper course before being challenged by Ms. Nielsen before the UNDT or the Appeals Tribunal, respectively.¹¹

67. Ms. Nielsen, in the course of the present appeal, has filed numerous motions in which she repeatedly conflated issues more properly the subject of other fora, for example, management evaluation and the Dispute Tribunal, with the narrow confines upon which the UNDT decided the issues which constitute the subject matter of the present appeal. While giving due regard to some level of ignorance on her part regarding procedural matters on this occasion, this cannot nevertheless account for her persistent motions. Ms. Nielsen must herself appreciate that if an application is under consideration before the Dispute Tribunal or indeed if an administrative decision challenged by her is the subject of an ongoing management evaluation process,

¹¹ Although, as concerns the conduct of UNDT proceedings, the Appeals Tribunal has received interlocutory appeals in exceptional cases where the Dispute Tribunal has clearly exceeded its jurisdiction or competence. See *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-560, para. 27, and cites therein.

the Appeals Tribunal, in the context of the present appeal, is constrained from embarking on a consideration of such matters. All in all, having regard to the numerous motions she brought in the context of the present appeal that raised matters falling wholly outside the scope of the present appeal, Ms. Nielsen's actions verge on an abuse of the appeal process.

68. The UNDT also rejected Ms. Nielsen's sixth claim that challenged the UNFPA Policy on PAD Rebuttal, properly holding that the Rebuttal Policy was a regulatory instrument which did not have the characteristics of an "administrative decision" capable of judicial review pursuant to Article 2(1) of the UNDT Statute. Ms. Nielsen did not challenge this finding in her appeal.

The blocking decisions

69. With regard to Ms. Nielsen's third and fourth complaints, the Dispute Tribunal stated:¹²

... As regards the decisions challenged in the application under lit. c) and d), namely the fact that the Applicant was denied access to the UN City Building on 13 February 2014 and that her emails were blocked after the end of her contract, the Tribunal notes that they refer to situations that happened after the expiration of her TA with UNFPA on 26 January 2014, as underlined by the Applicant herself. In view of the fact that the Applicant had no appointment at the time of the contested decisions, she has no legal standing to bring those matters before the Tribunal since, as already recalled above, pursuant to art. 2.1 of its Statute the Tribunal is competent to consider applications to appeal an administrative decision "that is alleged to be in non-compliance with the terms of appointment or the contract of employment". Since the Applicant's appointment ended on 26 January 2014, for the time following this date and with respect to the issues she challenged under lit c) and d) of her application, she cannot claim any breach of rights as a staff member.

70. In her appeal, Ms. Nielsen asks the Appeals Tribunal, inter alia, to "cancel the rejection by [the] UNDT of [her] request to UNFPA to provide explanations and reasons for [its] order to UN City Security [...] as th[e] order was given by UNFPA only [...] to prevent [her] further employment in UN City and [it] is not allowed by UN rules to prevent somebody from getting a contract...".

71. The Secretary-General submits that the decisions complained of relate to events which took place after Ms. Nielsen ceased to be a staff member and relies on the Appeals Tribunal's decision in *Sims*.¹³

¹² Impugned Judgment, para. 22.

72. The Appeals Tribunal considers that, in essence, Ms. Nielsen's complaints must be addressed by looking at the procedural tool utilized by the UNDT to decide on the non-receivability of Ms. Nielsen's applications in respect of the blocking of e-mails and access to UN City. As is clear from paragraph 23 of its Judgment, the Dispute Tribunal was satisfied that the matters in question could be decided as matters of law "which may be adjudicated even without serving the application to the Respondent for reply".

73. The Appeals Tribunal agrees that there are issues which may come before the Dispute Tribunal that are capable of being dealt with by summary judgment pursuant to Article 9 of its Rules. The Dispute Tribunal's invocation of that procedure in respect of the UNFPA PAD Rebuttal and the UNFPA Rebuttal Policy are cases in point.

74. However, we are of the view, having regard to the overall context of the present case, that the question of the blocking of Ms. Nielsen's e-mails and her access to UN City could not be so summarily determined solely as a question of law without the UNDT embarking on an assessment of the factual matrix which gave rise to the impugned decisions. On any reading, the basis for the decisions now contested harkened back to issues which arose in the course of Ms. Nielsen's temporary appointment with the Organization, notwithstanding that their effect continued after Ms. Nielsen's appointment expired. Thus, the question of whether there was a decision which was not in compliance with Ms. Nielsen's terms of appointment or contract of employment required a factual enquiry to establish Ms. Nielsen's standing at the time she brought her application to the UNDT. This factual enquiry, as a matter of course and fairness, will necessitate a reply from the Secretary-General to Ms. Nielsen's specific complaints.

75. Therefore, with regard to the Dispute Tribunal's determination on the two blocking decisions, we find that the UNDT erred procedurally, such as to affect the decision in the case. Accordingly, we are remanding the matter back to the UNDT for *de novo* consideration on these discrete issues.

76. With regard to the balance of Ms. Nielsen's arguments where she essentially requests the Appeals Tribunal to rewrite certain portions of the UNDT Judgment with language and information supplied by her, the Appeals Tribunal finds no merit therein. Pursuant to Article 2(1) of the Appeals Tribunal Statute, this Tribunal's appellate function is to ascertain whether it has been established that the Dispute Tribunal:

¹³ *Sims v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-154.

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

77. Save for the procedural deficiencies pertaining to the UNDT's determination on the blocking decisions, none of the other arguments put forward by Ms. Nielsen satisfies the requirements of Article 2(1) of the Appeals Tribunal Statute.

Judgment

78. The appeal succeeds in part. We hereby vacate the UNDT's rejection of Ms. Nielsen's complaints regarding the two blocking decisions and remand these issues to the Dispute Tribunal for *de novo* consideration.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar