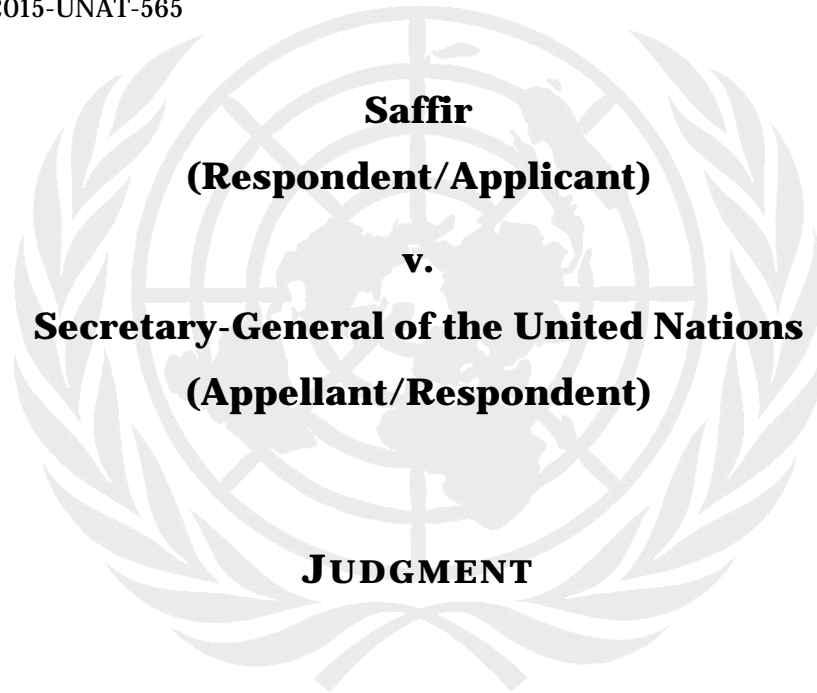




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-565



**Saffir
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Sophia Adinyira Judge Mary Faherty
Case No.:	2014-659
Date:	2 July 2015
Registrar:	Weicheng Lin

Counsel for Mr. Saffir:	Not represented
Counsel for Secretary-General:	Stéphanie Cartier

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/105, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 24 July 2014 in the matter of *Saffir v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 22 September 2014. Mr. Saffir has not filed an answer.

Facts and Procedure

2. Mr. Saffir was a Document Clerk at the G-5 level with the Publishing Section of the Department of General Assembly and Conference Management (DGACM) at the time of the contested decision.

3. On 10 February 2013, the Assistant Secretary-General of DGACM (ASG/DGACM) sent an e-mail to all the staff members of the Publishing Section, recalling the plan to transition from off-set to digital printing by the end of 2013, and informing them that the off-set printing equipment which had been extensively damaged during the hurricane in October 2012 would not be replaced. In light of these circumstances, the ASG/DGACM advised that 19 positions would be announced on *Inspira* to fulfil the need for in-house printing services using digital equipment or distribution services. The ASG/DGACM also announced measures to mitigate the sudden change to the operations of the Publishing Service, including assistance with placing staff, and the provision of training sessions to assist staff with the transition.

4. On 11 February 2013, DGACM posted in *Inspira* Job Opening No. 26759 for three of the 19 new posts it anticipated within the Meetings and Publishing Division.

5. On 20 February 2013, Mr. Saffir requested management evaluation of the decision to initiate recruitment for 19 staff members in the Publishing Section and on 21 February 2013, he filed a request for suspension of action with the UNDT.

6. On 22 February 2013, by Order No. 49 (NY/2013), the UNDT granted the request for suspension of action pending the outcome of the management evaluation. It held, inter alia, that the decision appeared prima facie unlawful insofar as DGACM did not have the authority to undertake such a large-scale restructuring exercise without prior approval of its budget by the

General Assembly. The UNDT considered that it did not require a response to the motion from the Secretary-General.

7. On 25 March 2013, Mr. Saffir filed an application with the UNDT contesting the decision of the ASG/DGACM to initiate the recruitment of 19 candidates for the future operation of the Publishing Section without the prior approval and authorization of the General Assembly.

8. On 27 March 2013, Mr. Saffir filed a motion for interim measures seeking suspension of the implementation of the contested decision pending a resolution of the present matter on its merits. On the same day, by Order No. 77 (NY/2013), the UNDT granted the requested interim relief suspending implementation of the decision for 60 days or until a final determination of the substantive merits of the application, whichever came first. The UNDT considered that it did not require a response to the motion from the Secretary-General before issuing the order.

9. On 5 April 2013, the acting head of DGACM held a town-hall meeting and notified DGACM staff members that the decision to initiate a recruitment exercise for the 19 positions had been rescinded, and that these posts would be re-advertised at a later date should the General Assembly approve the 2014-2015 budget.

10. On 9 April 2013, the Management Evaluation Unit informed Mr. Saffir that his request for management evaluation was rendered moot as a result of the rescission of the decision to conduct a recruitment exercise.

11. On 10 April 2013, the Secretary-General filed a motion with the UNDT for leave to have receivability considered as a preliminary issue, arguing that the decision to rescind the recruitment of the 19 posts rendered Mr. Saffir's UNDT application moot and not receivable.

12. On 11 April 2013, by Order No. 95 (NY/2013), the UNDT granted the motion thereby allowing the Secretary-General to file a reply limited to receivability, and a response by Mr. Saffir to follow one week thereafter.

13. On 26 April 2013, the Secretary-General filed a response repeating the substance of his motion of 10 April, i.e., that Mr. Saffir's UNDT application had become moot and therefore not receivable. Moreover, the contested decision was not an "appealable administrative decision".

14. On 31 March 2014, the UNDT informed the parties that “a hearing on the merits and compensation” would take place on 10 April 2014 in order to “receive any additional submissions regarding the [Secretary-General’s] contention that there [wa]s no contestable administrative decision” at hand, and to receive evidence regarding Mr. Saffir’s compensation claim.

15. On 10 April 2014, the UNDT held the oral hearing.

16. On 24 July 2014, the UNDT issued its Judgment and found in favour of Mr. Saffir. The UNDT found that Mr. Saffir’s application challenging the initiation of the recruitment process for 19 posts was receivable in that there was a contestable administrative decision which affected his rights under his contract of employment. The UNDT rejected the Secretary-General’s submission that the contested decision was purely preparatory in nature as it had in fact been subsequently implemented in advertising several posts in *Inspira*. Further, the UNDT held that Mr. Saffir was entitled to compensation for any harm that he could prove that he suffered as a result of the impugned decision until it was rescinded on 5 April 2013. On the basis of Mr. Saffir’s oral evidence regarding his history of mistrust with the Organization and the injury he suffered, the UNDT found his compensation claim to be well founded. The UNDT assessed that the matter rated at the lower end of the scale of severity and awarded Mr. Saffir USD 1,000 as compensation for the anxiety and stress he suffered.

The Secretary-General’s Appeal

17. The UNDT erred in accepting the application as receivable. Firstly, the application was not receivable since a decision to initiate recruitment is not an “administrative decision” subject to review by the UNDT as defined by the jurisprudence of the Appeals Tribunal or the former Administrative Tribunal. The UNDT’s finding that the contested decision “could adversely affect” Mr. Saffir is hypothetical and the impugned decision did not have any direct or actual effect on Mr. Saffir’s terms of appointment and conditions of employment. The application was also not receivable since the contested decision had been withdrawn, thereby rendering the matter moot. The Appeals Tribunal has repeatedly declined to examine the merits of administrative decisions that have been rescinded or superseded by subsequent actions by the Administration. Not only was the contested decision rescinded on 5 April 2013 but in October 2013, Mr. Saffir was reassigned to a position that was not subject to the restructuring exercise.

18. The UNDT erred on a question of procedure by failing to allow the Secretary-General to make submissions in support of his defence on the merits of the case on three separate occasions: first, when it issued Order No. 49 (NY/2013) suspending implementation of the contested decision; second, when it relied on Order No. 49 (NY/2013) as the basis to reach its conclusion in its Judgment that the contested decision was unlawful; and three, when it held at the oral hearing that it only wished to hear submissions as to Mr. Saffir's claim for moral damages, as the other matters, i.e. the issue of receivability, were sufficiently addressed by the parties' filings. The UNDT erred in law in relying on *Kananura*¹ as authority for the proposition that it was not necessary to allow the Secretary-General to respond before deciding a motion and, in doing so, it contravened the Appeals Tribunal's more recent jurisprudence to the effect that the parties must be given an opportunity to be heard. Further, the UNDT erred in basing its final conclusion on the merits, i.e., that the contested decision was unlawful, on its preliminary findings in Order No. 49 (NY/2013), given that: (i) the standard of proof at the two stages of proceedings is not the same;² and (ii) the findings in Order No. 49 (NY/2013) were based only on Mr. Saffir's allegations as the UNDT had not allowed the Secretary-General to respond to the application on suspension of action.

19. The UNDT erred in reaching the merits of the case when it had confirmed in Order No. 95 (NY/2013) that receivability would be addressed as a preliminary issue. In accordance with the Appeals Tribunal's jurisprudence, the UNDT thus ought to have limited itself to ruling solely on receivability.³ The UNDT thus erred on a question of procedure in proceeding to judge the merits without having given the Secretary-General the opportunity to make submissions to defend the merits of the case.

20. The UNDT exceeded its jurisdiction and erred in awarding compensation to Mr. Saffir insofar as, firstly, his claims were not receivable. Even if the claims were to be considered receivable, in accordance with the Appeals Tribunal's jurisprudence, there were "no legal grounds" to justify the award "when no actual prejudice was found".⁴

21. The Appeals Tribunal should vacate the UNDT Judgment in its entirety.

¹ *Kananura v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-258, para. 23.

² Citing *Wang v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-454, para. 49.

³ Citing *Ngoma-Mabiala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-361 and *Bauzá Mercère v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404.

⁴ Citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209, para. 48, and *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-114, para. 18.

Considerations

22. This Tribunal will allow the Secretary-General's appeal on the ground that the Dispute Tribunal erred in reaching the merits of the present case in circumstances where it had confirmed in Order No. 95 (NY/2013) that it would only address receivability as a preliminary issue.

23. This Tribunal also disagrees with the impugned Judgment on the matter of receivability. As the Secretary-General correctly contends, we conclude that there was no administrative decision capable of being appealed before the Dispute Tribunal.

24. Pursuant to our jurisprudence, a reviewable administrative decision is one that has a direct impact and negative consequences on a staff member affecting his or her terms of appointment or contract of employment.⁵

25. The administrative decision that Mr. Saffir now impugns did not deprive Mr. Saffir of his work, or affect his functions. It was limited to announcing a recruitment round to fill three of the 19 positions considered necessary for the restructuring exercise. Therefore, in the absence of any direct impact or negative consequences for Mr. Saffir or his terms of appointment, it was not appealable by him.

26. Moreover, the Administration ultimately rescinded the impugned decision, changing its view about holding the recruitment process, and thereby rendering the claim before the Dispute Tribunal moot.

27. We thus find that it was legally impermissible for the Dispute Tribunal to rule on the merits of the matter and award compensation since, firstly, the UNDT lacked jurisdiction and secondly, even if the contested decision could have been considered to constitute an "administrative decision", the Dispute Tribunal had determined that the receivability issue would be addressed as a preliminary matter without yet going into the merits.

28. Hence, the UNDT's award of compensation must equally be vacated.

⁵ *Nguyen-Kropp and Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509, and cites therein.

Judgment

29. The appeal is allowed and the Dispute Tribunal Judgment is vacated in its entirety.

Original and Authoritative Version: English

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

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

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

(Signed)

Weicheng Lin, Registrar