



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

GINIVAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Lennox S. Hinds

Claire Gilchrist

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 13 February 2012, the Applicant, a staff member of the Department of Management of the United Nations Secretariat in New York, filed an application contesting the Secretary-General's refusal "to conduct an investigation into the irregularities surrounding the 7–9 June 2011 United Nations Staff Union [(“UNSU” or “Staff Union”)] election[s], in light of the failure of the UNSU Arbitration Committee to adequately address the matter". The Applicant submits, *inter alia*, that as a result, his right to participate as a candidate for leadership in the UNSU through a free and fair election process and his right to equitable representation in the Staff Union were irreparably compromised.

2. As a remedy, the Applicant requests

an independent, impartial, and thorough investigation overseen by the Dispute Tribunal to determine whether there is sufficient evidence to conclude that the 2011 UNSU election results are safe. If the results of an independent investigation support the Applicant's contention that the election results are not safe, then the Applicant respectfully requests the Dispute Tribunal to order new elections on the basis that his rights were fundamentally violated by the irregularities and can only be remedied through the opportunity to participate in a new fair and confidential election process.

3. On 14 February 2012, the Registry of the United Nations Dispute Tribunal in New York transmitted the application to the Respondent, instructing him to file a reply by 13 March 2012.

4. On 16 February 2012, the Respondent filed and served a motion requesting leave to file his reply limited to the issue of receivability of the application, to be considered as a preliminary matter, contending that:

The Applicant requests the Tribunal to review and investigate matters relating to the internal affairs of the United Nations Staff Union elections. The Tribunal in *Hassanin* Order No. 83 (NY/2011) held that the Tribunal has no jurisdiction over matters involving the internal affairs of staff associations. In *Hassanin* Order No. 139 (NY/2011) at paragraph 48, the Tribunal further held that staff association elections concerned an area protected from employer interference not within the organizational authority of the Secretary-General.

5. By Order No. 44 (NY/2012), dated 6 March 2012, the Tribunal granted leave for the Respondent to file a submission on the issue of receivability. Having further reviewed the parties' submissions and supporting documentation, on 1 August 2013 the Tribunal issued Order No. 183 (NY/2013), stating that there appeared to be no substantial disputes of fact in the material particulars, and the receivability and merits issues were solely that of legal argument, extensive submissions on which have already been received. The Tribunal stated that the submissions before it were sufficient to determine the matter in full. The Tribunal stated that it found it appropriate to consider the matters of receivability and merits in one judgment. The parties were given two weeks to file additional submissions, if any, following which the matter was to be considered on the papers.

6. The Applicant had no objection to the Tribunal rendering a final judgment on receivability and merits. The Respondent, however, whilst consenting to the determination on the issue of receivability on the papers, submitted with respect to the consideration of the merits that "should a determination be made in this case which departs from the ruling in *Hassanin* [Order No. 83 (NY/2011), finding that the Tribunal has no jurisdiction over matters involving the internal affairs of staff associations], the Respondent may be in a position" to file a reply on the merits. It

does not behove the Respondent to straddle two horses at the same time, dependent upon an anticipated outcome. A party's submission in response to an order must be clearly indicative of its position. A party cannot hold a court to ransom or endeavour to negotiate its position or impose conditions under which it would file its submissions or comply with the Tribunal's orders. Therefore, having received no additional submission on the merits from the Respondent by the deadline of 15 August 2013, the Tribunal proceeded, under art. 19 of its Rules of Procedure and in the interests of justice and in order to ensure a fair and expeditious disposal of the case, with the consideration of the case on the papers before it.

Background

7. It is common cause that the Staff Union held elections for its 44th Staff Council and Leadership on 7–9 June 2011. The Applicant voted in the elections as a member of the Staff Union, and he also participated in them as a candidate for the post of the First Vice President on Leadership Ticket No. 2 (which ticket was not successful). These elections were organized and conducted by UNSU polling officers, headed by a Chairperson. The polling officers, with the approval of the UNSU Staff Council, conducted the elections via email voting, engaging a company called Election Services Corporation. This was a first for the Staff Union, previous elections having been conducted by manual voting. On 19 and 25 April 2011 the Chairperson of the polling officers dispatched emails to staff members detailing the measures that were put in place to ensure voter confidentiality and the integrity of the ballot, including audit trails which would track all activities for certification and validation. However, it transpired later that the responsible officers had chosen not to purchase the auditing services offered by the Election Services Corporation and this security measure was therefore not in place.

8. At this juncture, the Tribunal finds it appropriate to summarise briefly the Applicant's criticisms and alleged violations regarding the election. The Applicant essentially challenges the voting methodology and ensuing risks, particularly as the polling officers did not purchase the auditing services offered by Election Services Corporation. He maintains that a senior technology Security engineer in the Department of Management confirmed that the use of the UN email system to conduct online email voting posed a serious security threat and breached the confidentiality of voters. In this regard he itemises about four risk factors and scenarios, which for the purposes of this judgment need not be set out.

9. The Applicant also challenges the eligibility of nominees, in particular that of the successful candidate nominated for the position of President on Leadership Ticket No. 1. According to the Applicant, UNSU Regulations allow officers of the Executive Board to serve two consecutive terms, after which a mandatory one term break shall apply before they may run for election again. The Applicant maintains that this candidate, having served two consecutive terms on the Executive Board of the Staff Union, was ineligible as she did not take a one term break as required by the rules. Therefore, acceptance of her candidature was a violation of the UNSU Regulations by the polling officers.

10. The Applicant also challenges the successful candidate's ability to serve as President due to the time release restrictions placed by the General Assembly under resolution 51/226 that requires staff representatives to return to their UN career duties after four consecutive years of time release. The polling officers were put on notice prior to the election that the candidate would be unable to legally serve as President given the restrictions on time release, yet they accepted the nomination, constituting a further violation of the UNSU Regulations.

11. The Applicant further alleges irregularity in the voters roll that was provided in advance to the contracted Election Services Corporation, some four months before

the elections, whereby some retirees were wrongly included in the list, yet some new staff members employed during the interim period of four months were excluded. He cites by name at least one retiree who received a ballot and an invitation to vote.

12. Similarly, staff members who did not have email addresses did not receive ballots and were unable to vote, and it is unknown how many were affected, although the Applicant believes as many as hundreds of staff members have never been assigned UN email addresses by their supervisors. He states that no investigation has been conducted to confirm the accuracy of the list of eligible voters or to establish the number of would-be voters who had no access to the electronic voting. The Applicant contends the election results are not reliable all the more so as there was a marginal difference of 182 votes between the two leadership tickets and no investigation was carried out.

13. The Applicant complains that the results of the elections were published with undue haste although UNSU regulation 6.10 stipulates that the results shall be published within two days of the election provided there is no appeal. Instead the results were published with undue haste within one hour and 10 minutes and sent to all the staff at large, thus effectively denying candidates the right to challenge the exercise. The Applicant states that when Leadership Ticket No. 2 (the unsuccessful candidates for UNSU President and two Vice President posts, including the Applicant) sent an email to the Chairperson of the polling officers on 10 June 2011, one day after the elections, challenging the results, the Chairperson waited five days before responding to the alleged violations.

14. The Applicant states that following the election, the unsuccessful candidate (the former President of the Staff Union), requested an investigation into election violations by the Office of Internal Oversight Services and no action was taken. The Applicant apparently was alerted to all this when the unsuccessful candidate sent a letter expressing grave misgivings on the fairness of the election process.

The Applicant became concerned of his right to vote in free and fair Staff Union elections, and decided to appeal the results to the newly-elected Arbitration Committee of UNSU.

15. The Applicant submitted a complaint to the Arbitration Committee on 8 July 2011. His complaint was the second received by the Arbitration Committee, the first being the complaint of 5 July 2011, filed by Mr. JS. (Mr. JS also subsequently filed an application before the Tribunal, raising claims that are identical to the ones raised in this case. His application was registered under Case No. UNDT/NY/2012/007 and was disposed of by Judgment No. UNDT/2013/109.) Having ascertained that the Applicant's and Mr. JS's complaints were identical, the Arbitration Committee consolidated the two complaints and heard them jointly.

16. In his complaint to the Arbitration Committee the Applicant alleged that the polling officers and the Chairperson committed violations in the conduct of the election, including *inter alia*, violation of the right to vote, violation of the right to secret ballot, disregard for candidate ineligibility, the lack of independent monitoring and oversight, and refusal to allow a challenge to the election results.

17. With regard to the Arbitration Committee, the Applicant complains that the Committee also violated the UNSU Regulations. He states that they did not deal with his complaint within two weeks as per the UNSU Regulations, but informed him that they would be waiting until all the members of the Arbitration Committee had returned from leave before convening. Subsequently they informed the Applicant that they were awaiting the return from her leave of the polling officers' Chairperson, and ultimately notified him that they would only deal with the complaint in September 2011.

18. The Arbitration Committee transmitted its decision (dated 28 September 2011) to the Applicant on 6 October 2011, three months after he filed

his complaint. The Committee dismissed the Applicant's complaint, finding that his claims were unsubstantiated by the facts.

19. The Applicant alleges that the Arbitration Committee did not, *inter alia*, examine the accuracy of the voter list, the number of staff who did not have a UN email addresses, or the number of ineligible voters. He also alleges that the Arbitration Committee did not review the voting record to determine the number of ineligible retirees who voted, although the Committee acknowledged that at least one retiree was sent a ballot. With regard voter confidentiality, the Applicant states that the United Nations Information Technology specialists have confirmed that there was a risk that access could be obtained by an unauthorized person. He states that the Arbitration Committee without proper investigation could not reasonably conclude that the elections were secure and confidential. The Arbitration Committee also refused to look at candidate ineligibility and the issue of time release, thus leaving these matters unresolved. Thus, the Applicant submits that the Arbitration Committee failed to investigate or adequately address the violations.

20. By letter dated 7 November 2011, the Applicant, through his Counsel, requested the Secretary-General of the United Nations to conduct an investigation into the alleged irregularities surrounding the June 2011 elections, in light of the inadequacy of the Staff Union's internal arbitration process. In this letter, Counsel for the Applicant wrote the Secretary-General stating, *inter alia*, that:

This office has been retained by [the Applicant and Mr. JS] in connection with the dispute surrounding the conduct and outcome of the United Nations Staff Union (UNSU) election held on June 7th–9th of this year.

Our clients' position is that the election violated fundamental principles of fairness as well as specific provisions of the Statute of the UNSU, the United Nations Staff Rules and Regulations ("Staff Rules"), and General Assembly resolution 51/226.

...

The election process must be free and fair. Even though there are procedures for conducting Staff Union elections that are internal to the Staff Union, if they are flagrantly insufficient to protect the rights of staff, then they must be reviewed. Given the Arbitration Committee's failure to properly review the matter, we are writing to request that the Office of Legal Affairs (OLA) render an independent legal opinion on the conduct of the election.

In the past, your office and OLA have invoked the doctrine of abstaining from involvement in the internal affairs of the Staff Union as reason for not reviewing the procedural inadequacies of the election. In other circumstances, this is proper, but the 2011 election presents overarching considerations that go to the integrity of the process and the legitimacy of the Staff Union as a staff representative body. If the Secretary-General fails to review the conduct of the election he gives his imprimatur of approval to a set of procedures that violate an employee's fundamental rights.

Due to the irregularities of the election, any decisions taken by the new officers of the Executive Committee are suspect as to legal effect, including agreements reached between the Administration and the Staff Union in accordance with Staff Rule 8.1(f). We therefore emphasize the need for this matter to be expeditiously resolved.

21. On 2 December 2011, having received no reply to his letter dated 7 November 2011, the Applicant filed a request for management evaluation, seeking a review of the following decision:

The Secretary-General's failure to conduct an investigation into the irregularities surrounding the June 7th–9th, 2011 United Nations Staff Union (UNSU) election, in light of the failure of the UNSU arbitration committee to adequately address the matter. By failing to act, the Secretary-General thereby ratified the fatally flawed election, consequently violating my fundamental rights and eroding confidence in the electoral process.

22. According to the Applicant, he never received a response to his request for management evaluation. Instead, by letter dated 9 December 2011, the Under-Secretary-General for Management wrote to his Counsel as follows:

This is with reference to your letter dated 7 November 2011 addressed to the Secretary-General of the United Nations, which has been referred to this office for a reply. You inform us that you represent two United Nations staff members, [the Applicant and Mr. JS] in connection with their claims concerning the conduct and outcome of the United Nations Staff Union elections held on 7–9 June 2011.

In your letter, you claim that your clients' position is that the election "violated fundamental principles of fairness, as well as specific provisions of the UNSU Statute, the United Nations Staff Rules and Regulations ... , and General Assembly resolution 51/226". We also note that in your letter, you refer to the ruling of the Staff Union Arbitration Committee on the conduct of the election. Attaching the report of the Committee dated 28 September 2011, we understand that your clients find the report "lacking" and are requesting that the United Nations Office of Legal Affairs render an independent legal opinion on the conduct of the election.

In view of the principle of non-interference by management in union affairs, please be advised that it would not be appropriate for the Administration, or for the Office of Legal Affairs which advises the Administration, to interfere in the internal affairs of the Staff Union, which includes opining on the validity of the ruling of the Arbitration Committee.

In the event that staff members are unsatisfied with the conclusions of the Arbitration Committee, we are of the view that these are issues that should be resolved within the Staff Union itself.

23. The Applicant subsequently filed the present application with the Tribunal.

Consideration

24. Having considered the scope of the application and relief requested, the Tribunal finds that the Applicant is in effect making two types of claims. Firstly, claims concerning irregularities surrounding the Staff Union elections. Although these claims are launched through the challenge to the Secretary-General's refusal to investigate them, it is nevertheless clear from the relief sought by the Applicant that he seeks some form of intervention by the Tribunal into these matters by way of

“overseeing” the Administration’s investigation into the 2011 elections and an order for new elections depending on the outcome of such an investigation. Secondly, the Applicant makes claims concerning the Secretary-General’s subsequent refusal to investigate his claims regarding the elections, and the alleged irregularities committed by the Arbitration Committee.

25. The Tribunal will firstly make its findings with regard to the receivability and, if applicable, merits of the Applicant’s claims concerning the Staff Union elections, and secondly, with regard to the Applicant’s claims concerning the Secretary-General’s decision not to launch the requested investigation.

Claims regarding Staff Union elections

Union elections

26. With regard to the Applicant’s request for the Dispute Tribunal to oversee an investigation into his claims or to order new elections, the Respondent contends the Tribunal is not empowered to make such orders.

27. The ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948) confers the right of workers’ and employers’ organizations to draw up their own constitutions and rules and to organize their administration and activities without interference. The Convention also provides for the right of organizations to elect their representatives in full freedom.

28. Apart from ensuring the orderly conduct of free and fair elections, electoral procedures serve to democratise a trade union. Ballots are often used for the election of union officials, before a strike, etc. Generally a ballot must comply with whatever statutory or regulatory requirements are in place. In many jurisdictions both domestic and international, there are very specific provisions regarding union elections and

voting processes, e.g., regarding eligibility of candidates, the voters roll, the method for voting, requirements to be complied with regarding ballot papers and counting of ballots, and referral of the disputes or challenges. Some legislation provides for independent scrutineers or election monitors who may prepare a report on the voting results and process and publish the results of the election after this report.

29. With regard to remedies in case of disputes, in many jurisdictions there is often statutory provision for application to either a Certification Officer or Board, arbitration committee, or some other independent monitor that may make a determination endorsing the election process, setting it aside, or directing steps a union has to take to remedy any failures. There will also normally be a provision for appeals to be lodged with a High or Supreme Court within the jurisdiction; in some instances there may be a direct application to such court. In other instances an aggrieved person may pursue both remedies simultaneously, the advantage of approaching the judicial process is that courts often have additional powers to make enforcement orders declaring elections valid or invalid, order a re-election within a specific period, and also grant interlocutory relief. In the UN context, complaints regarding statutory or regulatory violations may be submitted to an Arbitration Committee (see discussion below).

30. The Applicant states, *inter alia*, that intervention by the Secretary-General and the Tribunal is warranted in terms of the *Freedom of Association – Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (2006) (“2006 Digest”), in particular:

Right of organizations to elect their representatives in full freedom

...

Challenges to trade union elections

...

[Paragraph] 442: In cases where the results of trade union elections are challenged, such questions should be referred to the judicial authorities in order to guarantee an impartial, objective and expeditious procedure.

...

Right of organization to organize their administration

...

Control over the internal activities of organizations

...

[Paragraph] 462: Events of an exceptional nature may warrant direct intervention by a government in internal trade union matters in order to re-establish a situation in which trade union rights are fully respected.

31. In the UN context, in terms of art. 13.1 of the UNSU Statute, “[t]he Polling Officers shall be independently responsible for organizing and conducting elections, and publishing its results, as required by the Statute, Regulations and rules of procedure”. Polling officers shall be “operationally independent”, “shall conduct the electoral process in such a way as to ensure the complete integrity and fairness of the ballot”, and “may request the assistance of electoral monitors to provide independent oversight of the electoral process” (UNSU regulations 6.5, 6.9, and 6.11). Article 13.4 of the UNSU Statute further states that the “[e]lections shall be by Secretariat-wide secret ballot and may be conducted electronically or manually as determined by the Council”. Various other provisions govern the duties of the polling officers, eligibility of candidates and various procedures and requirements. It is the Applicant’s contention that even though there are procedures internal to the Staff Union, they are flagrantly insufficient to protect the rights of Union members and need to be reviewed.

32. The Tribunal notes that the Applicant’s reference to para. 462 of the 2006 Digest (under the subheading “Control over the internal activities of organizations”), pertains to a trade union’s general rights to organize its administration and activities

without any interference from the administration save in exceptional circumstances, for example registration and dissolution procedures, the obligation to report on financial matters to the public authorities or administration, and so on. These provisions secure the rights of the workers' organization or the trade union itself to freely go about its business, and not necessarily that of individual members. Even if such were the case, para. 464 of the 2006 Digest provides:

[Paragraph] 464: The principles established in Article 3 of Convention No. 87 do not prevent the control of the internal acts of a trade union if those internal acts violate legal provisions or rules. Nevertheless, it is important that control over the internal acts of a trade union and the power to take measures for its suspension or dissolution should be exercised by the judicial authorities, not only to guarantee an impartial and objective procedure and to ensure the right of defence (which normal judicial procedure alone can guarantee), but also to avoid the risk that measures taken by the administrative authorities may appear to be arbitrary.

33. The Tribunal finds that more pertinent to the Applicant's argument (in addition to para. 442 of the 2006 Digest, relied on by the Applicant) would be the following provisions in the 2006 Digest under the section entitled "Challenges to trade union elections", as per the following paragraphs:

Right of organizations to elect their representatives in full freedom

...

Challenges to trade union elections

[Paragraph] 440: Measures taken by the administrative authorities when election results are challenged run the risk of being arbitrary. Hence, and in order to ensure an impartial and objective procedure, matters of this kind should be examined by the judicial authorities.

[Paragraph] 441: In order to avoid the danger of serious limitation on the right of workers to elect their representatives in full freedom, complaints brought before labour courts by an administrative authority challenging the results of trade union elections should not—

pending the final outcome of the judicial proceedings—have the effect of suspending the validity of such elections.

[Paragraph] 442: In cases where the results of trade union elections are challenged, such questions should be referred to the judicial authorities in order to guarantee an impartial, objective and expeditious procedure.

[Paragraph] 443: In order to avoid the danger of serious limitations on the right of workers to elect their representatives in full freedom, cases brought before the courts by the administrative authorities involving a challenge to the results of trade union elections should not—pending the final outcome of the proceedings—have the effect of paralysing the operations of trade unions.

34. In a 2002 publication of the International Labour Organization entitled “International Labour Standards: A global approach”, chapter 2 deals with freedom of association, and helps to put the relevant provisions of the 2006 Digest in context.

It states:

II. Summary of the principles of the Committee of Experts

The standards and principles concerning freedom of association derived from ILO Conventions and Recommendations, and the principles established by the Committee of Experts on the basis of these instruments, may be summarized as follows:

...

Right to elect representatives in full freedom

– The autonomy of organizations can be effectively guaranteed only if their members have the right to elect their representatives in full freedom. The public authorities should therefore refrain from any interference which might restrict the exercise of this right, whether as regards the holding of trade union elections, conditions of eligibility or the re-election or removal of representatives.

– The regulation of procedures and methods for the election of trade union officials is primarily to be governed by the trade unions’ rules themselves. The fundamental idea of Article 3 of Convention No. 87 is that workers and employers may decide for themselves the rules which should govern the administration of their organizations and the elections which are held therein.

– The intervention of the authorities in the exercise of this right *should not go beyond provisions to promote democratic principles* within trade unions or *to ensure the proper conduct of the election process* [emphasis added], with respect for members' rights, so as to avoid any dispute on their outcome.

35. Thus, international labour standards clearly articulate non-interference in union elections and restrict intervention by the Administration only to provisions that ensure the proper conduct of the election process.

Jurisdiction of the Dispute Tribunal with regard to challenges to Staff Union elections

36. Article 2.1(a) of the Tribunal's Statute states that the Tribunal is competent to "hear and pass judgement on an application ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". Thus, in the UN context, this Tribunal is empowered to deal with administrative decisions including alleged action or inaction by the Secretary-General but there appears to be no jurisdiction on the part of this Tribunal to entertain any disputes arising from the holding of, or a challenge to, union elections. Further, there is certainly no general jurisdiction to review or supervise internal union affairs. An aggrieved person, under the terms of the UNSU Statute, may approach the Arbitration Committee, which was established to "review alleged violations of the Statute of the Staff Union and decide on sanctions where warranted" (UNSU regulation 8.1) as well as to deal with issues of "interpretation of the Statute, its Regulations or any policy" (UNSU Statute, art. 17.2). In terms of UNSU regulation 8.2.3, "[t]he Arbitration Committee shall receive, consider and rule upon matters related to violations of the Statute and Regulations". Furthermore, if any member of the Staff Union is of the view that an act of the Staff Council, Executive Board or any of its officers is in violation of the Statute and Regulations,

a complaint may be submitted to the Arbitration Committee (see UNSU regulation 8.3.1). The rulings of the Arbitration Committee are binding on all bodies of the Staff Union (see UNSU regulation 8.1).

37. In the instant case the Applicant filed a complaint and the Arbitration Committee made findings. There is no provision for an appeal therefrom to any other body, or for any other recourse to any other forum. Indeed, UNSU regulation 8.1 unequivocally states that the “Rulings of the Arbitration Committee shall be binding on all bodies of the Staff Union”.

38. The international best practice principles are that arbitration rulings and awards are binding with limited scope for appeal. In some jurisdictions, appeals from arbitration bodies are often limited to points of law. Paragraph 442 of the 2006 Digest recommends that trade union election challenges should be referred to the judicial authorities. The Applicant’s request for the Tribunal “to order new elections” should any investigation by the Secretary-General (overseen by the Tribunal) prove the 2011 election results unsafe, is effectively asking the Tribunal to declare the previous elections null and void. There is no legal authority that empowers the Tribunal to adjudicate such a submission. What is evident in this instance is that there is an Arbitration Committee whose decision on such matters is binding and final, and there is neither an express provision in its Statute, nor an implied provision, for referral of any electoral challenge to the Tribunal, either by individual action, or on appeal from the Arbitration Committee. Thus this Tribunal lacks jurisdiction to entertain claims seeking its oversight of an investigation into the 2011 elections and an order for new elections. Whether an approach to a domestic court is possible in this instance is not a matter for this Tribunal. Likewise, it is not for this Tribunal to pronounce on whether the Staff Union should consider amending its Statute in the event its membership is dissatisfied with having a final and binding arbitration system in its current form.

Conclusion with respect to the Applicant's claims regarding the Staff Union elections

39. The Tribunal finds that the Applicant's claims regarding the Staff Union elections and, in particular, his claims for relief, are not properly before the Tribunal.

Claims regarding Secretary-General's decision not to conduct the requested investigation

Receivability

40. With regard to receivability of the Secretary-General's refusal to carry out the investigation, the Applicant submits that the Tribunal has jurisdiction over cases involving administrative decisions alleged to be in non-compliance with an individual's terms of appointment or contract of employment. He submits that the Secretary-General's decision not to investigate the irregularities in Staff Union elections held in the June 2011 violated his statutory rights under the Staff Regulations and Rules. The Applicant submits further that the fact that the contested decision concerns a matter involving the Staff Union does not mean that to examine it would constitute interference in Staff Union affairs.

41. The Respondent contends that the decision of the Under-Secretary-General for Management, as set out in her letter to the Applicant's Counsel dated 9 December 2011, not to interfere with "the conduct and outcome of the United Nations Staff Union elections held on 7–9 June 2011" is not an administrative decision within the scope of art. 2.1(a) of the Statute.

42. In his letter dated 7 November 2011, Counsel for the Applicant requested—acting as the designated legal representative of the Applicant—that the Secretary-General "conduct an investigation into the irregularities surrounding the 7–9 June 2011 UNSU elections". The impugned administrative decision was

communicated to the Applicant in the Under-Secretary-General for Management's letter dated 9 December 2011. This letter was specifically addressed to Counsel for the Applicant and makes direct reference to the claims of Applicant.

43. As to what constitutes an "administrative decision", in *Andati-Amwayi* 2010-UNAT-058, the United Nations Appeals Tribunal held that this depends "on the nature of the decision, the legal framework under which the decision was made, and the consequence of the decision". In *Schook* 2010-UNAT-013 and *Tabari* 2010-UNAT-030, the Appeals Tribunal held that, by implication, the failure, or omission, of the Administration to take a decision could also be an appealable administrative decision.

44. The language of art. 2.1(a) of the Dispute Tribunal's Statute is clear—the Tribunal is competent to hear and pass judgment on an application against the Secretary-General appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". The Applicant alleges just that.

45. The Tribunal finds that, with regard to the Secretary-General's refusal to carry out the requested investigation, the administrative decision is clearly identifiable, at least as an omission—the refusal to carry out the investigation requested by the Applicant in connection with the conduct of the 7–9 June 2011 UNSU elections. The decision is clearly attributable to the Secretary-General in that it was communicated by the Under-Secretary-General for Management in her letter dated 9 December 2011 to the Applicant's Counsel. The Applicant also alleges that the decision was in breach of his rights under the terms of his appointment with the United Nations (including staff regulations 1.1(c) and 8.1(b) and staff rule 8.1) and therefore also violated his individual rights under his employment contract. Whether or not the Applicant's rights were indeed breached is a matter for the merits.

46. Therefore, the Tribunal finds that the Applicant's application with respect to the Secretary-General's refusal to carry out the requested investigation is receivable.

Merits

47. With regard to the merits, the Respondent submits that the Secretary-General's refusal to interfere in Staff Union matters was proper. The Respondent contends that the Secretary-General's decision not to conduct an investigation into the alleged irregularities follows established jurisprudence affirming the principle of non-interference in internal Staff Union affairs, and the competency of the Tribunal. The Respondent states that this case falls outside the scope of art. 2.1 of the Tribunal's Statute, referring to *Hassanin* Order No. 83 (NY/2012), dated 10 March 2011, and *Hassanin* Order No. 139 (NY/2011), dated 23 May 2011, in which the Tribunal held that it did not have jurisdiction over matters involving the internal affairs of staff associations.

48. The Applicant contends that the Secretary-General had a duty to intervene in the 7–9 June 2011 UNSU elections because of some alleged irregularities and that, by not doing so, the Secretary-General violated the Applicant's rights under the terms of his appointment. The Applicant states that the Secretary-General has an obligation to facilitate the organizational rights of staff members, which includes the guarantee of free, fair and confidential staff union elections "that the Secretary-General has explicitly undertaken to protect". The Applicant further submits that international law provides for intervention in internal trade union matters in exceptional circumstances. Referring to staff rule 8.1, the Applicant submits that the Secretary-General "is obliged to ensure" the following staff rights:

- a) The fundamental right to vote in elections to a staff representative body through a free, fair, and confidential process ([staff] rule 8.1(d)).

b) The right to equitable representation in a staff representative body ([staff] regulation 8.1(b)).

c) The right to the enforcement of electoral regulations governing candidate eligibility for election to a staff representative body ([staff] rule 8.1(c)).

d) The right to enforcement of General Assembly resolutions, including resolution 51/226, which establishes a time limit on the number of consecutive years a staff member may be released from his or her U.N. staff member duties in order to perform official Staff Union functions ([staff] regulation 1.1).

49. The relevant provisions of staff rule 8.1 (Staff representative bodies and staff representatives) provide as follows:

(b) Staff representative bodies may be established for a duty station or for a group of duty stations. Staff members serving in duty stations where no staff representative body exists may seek representation through a staff representative body at another duty station.

(c) Each member of the staff may participate in elections to a staff representative body, and all staff serving at a duty station where a staff representative body exists shall be eligible for election to it, subject to any exceptions as may be provided in the statutes or electoral regulations drawn up by the staff representative body concerned and meeting the requirements of staff regulation 8.1(b).

(d) Polling officers selected by the staff shall conduct the election of the members of each staff representative body, on the basis of the electoral regulations of the staff representative body concerned, in such a way as to ensure the complete secrecy and fairness of the vote. The polling officers shall also conduct other elections of staff members as required by the Staff Regulations and Staff Rules.

(f) The staff representative bodies shall be entitled to effective participation, through their duly elected executive committees, in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies, and shall be entitled to make proposals to the Secretary-General on behalf of the staff.

50. In terms of staff regulation 1.1(c), the Secretary-General has an obligation to ensure that the rights and duties of staff members set out in the Charter and the Staff Regulations and Rules, as well as the relevant resolutions of the General Assembly, are respected. Although in terms of staff regulation 8.1(b) representative bodies “shall be organized in such a way as to afford equitable representation to all staff members, by means of elections ... under electoral regulations drawn up by the respective representative body and agreed to by the Secretary-General”, in terms of the UNSU Statute, polling officers “shall be *independently* responsible for organizing and conducting elections, and publishing its results, as required by the statute, regulations and rules of procedure” (art. 13.1 of UNSU Statute, emphasis added). Other statutory provisions stipulate that only members of the Staff Union may vote, that all candidates should be dues-paying members in good standing, and elections may be conducted “electronically or manually as determined by the Council” (arts. 13.1–13.5 of the UNSU Statute). Although the Applicant alleges that these provisions are woefully inadequate, it is not for the Tribunal to rewrite the UNSU Statute or Regulations.

51. In *Kisambira* Order No. 36 (NY/2011), dated 7 February 2011, to which the Applicant appears to refer, the Tribunal found, in para. 23, that “in accordance with general principles and international labour norms (including as expressed in international instruments on the right to freedom of association and collective bargaining), the Respondent has an obligation to facilitate organizational rights of staff members”.

52. Examples of organizational rights are the right of access to the employer’s premises, to have union subscriptions deducted from members’ salaries paid over to the union, the right to elect trade union representatives at the workplace, the right for the union office bearers to take paid leave for trade union activities, and so on.

53. There is no evidence that the Secretary-General hindered the electoral process or frustrated organizational rights in any manner. The Secretary-General's responsibility is to facilitate organizational rights and not to interfere in those. To actively direct the conduct and manner of elections (for example, directing that auditing services be purchased for the ballot from the Election Services Corporation) would not be in conformity with the independent status of the Staff Union and the applicable law. The Secretary-General may not intervene in the format or conduct of elections by virtue of the Staff Union's Statute. It is conceivable that there may be situations that may constitute misconduct under the Organization's regulations and rules, which may give rise to the initiation of appropriate procedures against individual members engaged in misconduct. However, the Applicant did not pursue the matter as a matter of individual misconduct. Rather, as was correctly assessed by the Secretary-General, the issues raised were internal Staff Union matters.

54. Neither staff rule 8.1 nor the Tribunal's case law appear to suggest, even implicitly, that the Secretary-General was obligated to intervene in the conduct of the UNSU elections of June 2011 or investigate them thereafter. This is particularly so as a mechanism has already been set in place to deal with issues such as the alleged irregularities, namely the Staff Union Arbitration Committee. This Committee has already examined and rendered a binding adjudication upon the issues that the Applicant describes as "irregularities" in connection with the June 2011 elections. In this regard, the Applicant has failed to show any proper legal basis in the legal framework regulating UNSU and the Arbitration Committee that would even allow for the Secretary-General to interfere with the Committee's ruling. On the contrary, as stated by the Under-Secretary-General for Management in her 9 December 2011 letter, in view of the principle of non-interference by management in union affairs, it would not be appropriate for the Administration to

do so, including by opining on the validity of the ruling of the Arbitration Committee.

55. The Tribunal finds that the Secretary-General's refusal to initiate investigation of the Staff Union elections of June 2011 was lawful.

Conclusion

56. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 26th day of August 2013

Entered in the Register on this 26th day of August 2013

(Signed)

Hafida Lahiouel, Registrar, New York