



**Before:** Judge Rachel Sophie Sikwese

**Registry:** New York

**Registrar:** Isaac Endeley

SCHIFFERLING

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Cristian Gimenez Corte

**Counsel for Respondent:**

Kong Leong Toh, UNOPS

Casey Morin, UNOPS

## **Introduction**

1. On 15 December 2022, the Applicant, a former staff member in the United Nations Office for Project Services (“UNOPS”) based in New York, filed an application in which he contests the decision to charge him with misconduct.

2. On 16 January 2023, the Respondent filed his reply in which he contends that the application is not receivable as the contested decision is an intermediate, and not a final, decision.

3. On 11 October 2023, the undersigned Judge started her deployment with the New York Registry.

4. Following a Case Management Discussion (“CMD”) on 26 October 2023, by Order No. 118 (NY/2023) of the same date, the Tribunal ordered the parties to file their respective closing statements on the receivability of the application by 9 November 2023.

5. On 9 November 2023, the parties duly filed their closing statements.

6. For the reasons set out below, the Tribunal finds that the application is not receivable.

## **Facts**

7. By letter dated 22 June 2022 from a UNOPS legal advisor, the Applicant was charged with misconduct for certain allegations of wrongdoing.

8. On 27 July 2022, the Applicant filed a reply to the charge letter in which he requested UNOPS to “dismiss all charges against him”.

9. On 20 August 2022, the Applicant filed a request for management evaluation of “the UNOPS decision dated 22 June 2022 to charge him with three cases of misconduct”.

10. At the end of August 2022, the Applicant was separated from service. The Tribunal takes judicial notice of the fact that prior to the present case, the Applicant filed a separate case registered under Case No. UNDT/NY/2022/057 from which it follows that his separation from service was the result of his fixed-term appointment not being renewed and *not* the outcome of the disciplinary process.

11. On 16 December 2022, the Acting Executive Director of UNOPS responded to the Applicant's request for management evaluation, finding that "the decision to charge [him] was not an administrative decision" and that his request was consequently "not receivable".

12. On 9 January 2023, according to the Respondent's reply of 16 January 2023, the Applicant was "notified [that] the UNOPS Executive Director determined his misconduct [to warrant] a measure of dismissal and that, pursuant to a UNOPS policy provision, his UNOPS records [would] be changed to state the reason for his separation was dismissal". The Respondent has provided no documentation for this decision, but in the Applicant's 15 August 2023 submission he confirms that it "was only after [he] had submitted his case before the Tribunal on 15 December 2022 that the Respondent eventually decided to, finally, formally sanction him on 9 January 2023".

## **Consideration**

### *Whether the present case is receivable*

13. The Dispute Tribunal may determine and issue judgment on a matter concerning the receivability of an application if there is a dispute as to whether the Tribunal is competent under its Statute to hear and pass judgment on the merits of an application. See, art. 2.6 of the Dispute Tribunal's Statute and the Appeals Tribunal in *Christensen* 2013-UNAT-335 at para 21, holding that: "This competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law, and the Statute prevents [the Dispute Tribunal] from receiving a case which is actually non-receivable".

14. Under art. 3.1(b) of the Statute of the Dispute Tribunal, any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes, like the Applicant, may file an application, to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance pursuant to art. 2.1(a) or to appeal an administrative decision imposing a disciplinary measure under art. 2.1(b) of the Statute.

15. The Dispute Tribunal shall receive the application if filed within specified time limits provided under staff rule 11.2(c) and art. 8.1(d) of the Tribunal’s Statute.

16. Further, an application shall be receivable, in accordance with art. 8.1(c) of the Dispute Tribunal’s Statute, if the applicant has previously submitted the contested administrative decision for management evaluation, where required.

17. It should be pointed out at the outset that requesting the parties to clarify their positions or to agree to streamline the issues by filing submissions whether as rejoinder or counter-rejoinder or otherwise does not signify that a matter is receivable. Therefore, the Applicant’s argument that the question of receivability is rendered moot due to the several steps taken by the parties prior to this judgment is without the support of the law.

18. In the application, the Applicant defined the contested decision as the “decision to charge [him] with misconduct”. (See, Application, Part V.1 and Part VII. I (2)).

19. At the 26 October 2023 CMD, whose purpose was to identify, discuss and agree on the claims and issues in the Applicant’s case and to generally deal with any other matter which might facilitate a fair and expeditious disposal of the case and to do justice to the parties, the Applicant confirmed that he was challenging the decision to charge him with misconduct.

20. The issue before the Tribunal is therefore to determine whether an administrative decision to charge a staff member with misconduct is an appealable decision before the Dispute Tribunal.

21. The starting point in resolving this issue is to highlight the elements that constitute an appealable administrative decision. These have been well established through jurisprudence and recently reiterated by the Appeals Tribunal in *Neupane* 2023-UNAT-1378 at para 26, restating that: “According to the consistent jurisprudence of this Tribunal, an administrative decision is defined as ‘a unilateral decision of an administrative nature taken by the administration involving the exercise of a power or the performance of a function in terms of a statutory instrument, which adversely affects the rights of another and produces direct legal consequences’”.

22. The onus is on the staff member to show on a balance of probabilities that the impugned decision meets the criteria as consistently defined and applied by the Tribunals.

23. In the present case, there is no dispute that the decision was unilaterally made by the administration and that it involved the exercise of a power or the performance of a statutory instrument. The dispute is on whether the decision adversely affected the rights of the Applicant and produced direct legal consequences.

24. In this regard, it is useful to refer to the qualities that satisfy the elements of adverse effects on the rights of a staff member and produce direct legal consequences, as settled by the Appeals Tribunal’s jurisprudence.

25. For purposes of resolving the issue in this case, the Dispute Tribunal reminds itself that it has “no jurisdiction to hear appeals against decisions which may potentially affect a staff member’s terms of appointment or contract of employment in the future” (see, the Appeals Tribunal in *Mirella et al.* 2018-UNAT-842 at para. 42).

26. The Tribunal finds that the Applicant's argument that "UNOPS not only decided to charge [him], but also to maintain him in an indefinite status of "charged person," leaving him indeterminately prosecuted; since as—at the time of the Application—he had not been sanctioned, and but also never absolved"; (see para. 18 of the Application) does not address the issue of adverse effects on his rights nor direct legal consequences on his contract of employment. His reference to the fact that at the time of the Application he had not been sanctioned or absolved speaks of future action with the potential to affect his rights—sanction or not.

27. The Applicant refers to being maintained on indefinite status as a charged person, but this assertion is not evidence of a violation of any specific right under his contract.

28. It is not correct that the Applicant's due process rights were violated as argued in para. 19 of the Application. The charge letter was at the very core of granting him an opportunity to defend himself or to state his case with a view to allowing the Administration to make a fair and just final decision by either sanctioning or absolving him. While the Applicant was so charged, he continued to exercise his rights and freedoms under his contract of employment.

29. There was at this stage of the disciplinary process, i.e., the charge stage, no certainty as to whether the Applicant after responding to the charge would be sanctioned or absolved. It was therefore premature to file the application.

30. Contrary to the Applicant's averment, in para. 20 of his closing statement, that the impugned decision is in "direct violation of one of the very basic principles of law: ... *audi alteram partem*", the Applicant was accorded a chance of being heard through the charge letter. He has not shown that he was "condemned unheard".

31. A charge letter containing allegations of misconduct is an internal managerial intermediary step taken in a disciplinary process aimed at putting the staff member on notice and giving the staff member an opportunity to make representations

before a final administrative decision is issued. The jurisprudence is consistent on the principle that an intermediary step taken by the Administration towards fact-finding of an allegation of unsatisfactory conduct is not reviewable as it lacks the finality that produces legal consequences on a staff member's terms of appointment.

32. In *Nguyen-Kropp & Postica* 2015-UNAT-509, para. 32, the Appeals Tribunal cautioned that: "tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality". The appellants in the cited case had challenged the decision to investigate them. This principle was applied in *Birya* 2015-UNAT-562, para. 47, a case concerning institution of a fact-finding panel to investigate possible acts of harassment. The case of *Auda* 2017-UNAT-786, para. 30, reiterates the *Nguyen-Kropp & Postica* principle that: an "administrative decision that concludes the compound administrative process in administering the staff member's complaint is the only challengeable one and absorbs all the previous preliminary steps".

33. Finally on jurisprudence on this issue, the Appeals Tribunal has settled the law by holding that (see *O'Brien* 2023-UNAT-1313, para. 24):

... [W]here a decision requires several steps to be taken by different functionaries, only the last of which is directed at the staff member, the previous decisions or actions of the administration lack direct effect, and only the final decision is appealable or reviewable.

34. Consequently, and in conclusion, the Applicant's submission that the "contested UNOPS decision to charge him [had] already produced direct legal effects on the Applicant's personal and employment rights" is not supported by evidence of any particulars of specific legal effects on his terms of appointment. A charge is but one of several steps in a disciplinary process. It lacks direct legal effect and, hence, is not reviewable.

*Other matters not receivable for other reasons*

Delay in concluding disciplinary process

35. The Tribunal has not considered whether the handling of the Applicant's disciplinary proceedings was delayed, as argued in paras. 18-26 of the Application, because there is no evidence in these proceedings that the issue of delay was subjected to management evaluation as required under staff rule 11.2(a). This staff rule provides that, a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

36. Consequently, the Tribunal is not competent to make any finding on the matter.

Placement on administrative leave

37. The reasoning above on staff rule 11.2(a), applies to the Applicant's contention that he was "placed on administrative leave for more than nine (9) months without being formally and legally found guilty of any misconduct". Once again, he "has been penalized without a decision taken from any competent authority, following a due and fair process of law". See para. 45 of the Application.

38. The issue of the administrative decision to place the Applicant on administrative leave is therefore not before this Tribunal for judicial review.

Secretariat as a necessary party

39. On 25 October 2023 the Applicant filed a motion entitled: "Joining a Party". In this motion the Applicant's plea was (emphasis in the original): "Given the current status of the procedure, the Applicant hereby respectfully request the Tribunal **to join the Secretariat to this judicial process a necessary party**".

40. Prior to this motion, on 18 September 2023, the Respondent had filed a motion urging the Tribunal to issue summary judgment in favour of the Respondent because “there is no dispute as to the material facts of the case and a party is entitled to judgment as a matter of law” pursuant to art. 9 of the Dispute Tribunal’s Rules of Procedure.

41. The motions of 25 October 2023 and of 18 September 2023 were contested. On 26 October 2023 during the CMD, the Tribunal allowed each party to make oral submissions on the two motions. The Applicant insisted that the Secretariat was a necessary party to the proceedings and ought to be joined. The Respondent did not agree. The Respondent withdrew his motion for summary judgment instead opting that the Tribunal should dismiss the application as not receivable. After the submissions, the Tribunal issued a CMD Order on the same date, allowing the Respondent to withdraw the motion for summary judgment and to proceed to hear the matter on receivability. The Tribunal dismissed the Applicant’s motion to join the Secretariat as party.

42. The Tribunal has taken judicial notice of the fact that the Applicant has filed a notice of appeal with the Appeal Tribunal to challenge Order No. 118 (NY/2023) denying the Applicant’s motion to join the Secretariat as a party to these proceedings. As such the Tribunal will refrain from making any further observation on this matter. Suffice it to mention that the Applicant’s Application in these proceedings is clearly and unequivocally against the UNOPS decision as his former employer and not the Secretariat. Further, the Applicant did not cite any rule of procedure or practice of this Tribunal that entitles him to join a party in the manner requested.

**Judgment**

43. The application is dismissed as not receivable *ratione materiae*.

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 4<sup>th</sup> day of December 2023

Entered in the Register on this 4<sup>th</sup> day of December 2023

*(Signed)*

Isaac Endeley, Registrar, New York