



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

Judgment No. 2015-UNAT-506

Nwuke
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Inés Weinberg de Roca
Judge Deborah Thomas-Felix

Case No.: 2014-576

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Mr. Nwuke: Self-represented

Counsel for Secretary-General: Phyllis Hwang/Zarqaa Chohan

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/160, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 4 December 2013 in the case of *Nwuke v. Secretary-General of the United Nations* (Impugned Judgment). On 3 February 2014, the Secretary-General of the United Nations filed an appeal against the above-referenced UNDT Judgment. Mr. Kasirim Nwuke filed his answer and a cross-appeal on 6 April 2014, and the Secretary-General answered Mr. Nwuke's cross-appeal on 15 May 2014.

Background Matters

2. Mr. Nwuke has filed seven substantive applications before the Dispute Tribunal in which he challenges a number of administrative decisions taken between August 2008 and July 2011. He alleges that each of these administrative decisions is unlawful because they are not only in breach of specific regulations or rules but are also examples of a continuing pattern of abuse of authority against him by the Executive Secretary (ES) of the United Nations Economic Commission for Africa (ECA).¹

3. This particular case concerns the UNDT's Judgment on Mr. Nwuke's challenge to a June 2011 decision by the ES to fill the post of Director, Office of Strategic Planning and Programme Management (OPM) by way of a lateral transfer without advertising it, which Mr. Nwuke alleges denied him the opportunity to be fully and fairly considered for the post. He alleges that this decision was one of a series of retaliatory actions taken against him by the ES that began in 2009 when he made an allegation of prohibited conduct against the ES.

Facts and Procedure

4. Mr. Nwuke is a staff member of ECA. He joined the United Nations on 1 June 2001, and, in 2010, as a result of an internal restructuring of ECA, he was transferred to OPM effective from 16 August 2010. The then Director of OPM was due to retire in 2011.

¹ Impugned Judgment, para. 1.

5. On 27 May 2011, the ES announced to all staff that the Director, OPM, was retiring at the end of the month having attained the statutory retirement age and that he had decided to appoint Mr. A-M, at that time the Director, Regional Integration and Infrastructure and Trade Division (RIITD), to the post of Director, OPM, with effect from 1 June 2011.
6. On 30 May 2011, Mr. Nwuke requested management evaluation of, inter alia, the ES' decision to laterally transfer the Director of RIITD to the position of Director, OPM. Against a background where Mr. Nwuke had successfully challenged other administrative decisions through management evaluation, he considered that ECA decided not to advertise the OPM vacancy to prevent him from appearing before any more Advisory Selection Panels.²
7. On 31 May 2011, Mr. Nwuke also applied to the Dispute Tribunal for suspension of action of the decision, which the Dispute Tribunal refused on 23 June 2011.³
8. On 18 July 2011, the Management Evaluation Unit informed Mr. Nwuke that the ES' decision to, inter alia, fill the position of Director, OPM, by lateral transfer was upheld.
9. On 6 October 2011, Mr. Nwuke filed an application with the Dispute Tribunal challenging the refusal of the ES to advertise the position and to fill it instead by a lateral transfer.
10. The Dispute Tribunal held hearings in the seven cases over eight consecutive working days in September 2013. The Dispute Tribunal heard this case on 13 and 16 September 2013 and received documentary and oral evidence from the other hearings. The Dispute Tribunal also heard the oral evidence of Mr. Nwuke and the Chief of ECA's Human Resources Services Section.
11. On 4 December 2013, the Dispute Tribunal rendered its Judgment and found in favour of Mr. Nwuke. The Dispute Tribunal found that the combined effect of three General Assembly resolutions referred to indicated the intention of the General Assembly that recruitment and selection processes other than the established ones, such as advertising vacancies, should only be used on an exceptional basis in order to ensure transparency, equal opportunity and mobility.⁴ Accordingly, the Dispute Tribunal concluded that the filling of the post by lateral transfer upon the retirement of the incumbent breached Administrative

² Impugned Judgment, para. 23.

³ *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/107.

⁴ Impugned Judgment, paras. 48, 56.

Instruction ST/AI/2003/8.⁵ Further, as the Administration failed to give any adequate reasons to justify the use of a lateral transfer in this case, the Dispute Tribunal found the transfer constituted an arbitrary use of the discretion conferred by Administrative Instruction ST/AI/2010/3.⁶ The Dispute Tribunal also rejected the Secretary-General's submission that there was no evidence indicating that the lateral move decision was intended to block Mr. Nwuke from applying to the post, and found that "there is no evidence that it was not intended".⁷ The Dispute Tribunal also noted that an adverse inference may be drawn from the Secretary-General's failure to contradict or refute Mr. Nwuke's allegation of improper motives.⁸

12. The Dispute Tribunal declined to order rescission of the July 2011 decision in view of the wide-ranging practical effects such an order would have. Furthermore, relying on Mr. Nwuke's own acknowledgment that "he had no expectation of being appointed", it also decided there should be no order for compensation as Mr. Nwuke had not suffered any monetary or professional harm entitling him to compensation for the loss of the chance of being appointed to the position.⁹

Submissions

The Secretary-General's Appeal

13. The UNDT erred on a question of law in giving undue weight to the requirement outlined in Administrative Instruction ST/AI/2003/8 to advertise and fill posts that are expected to become vacant due to retirement through a competitive selection process. In so doing, the UNDT failed to adequately consider Staff Regulation 1.2(c) and Administrative Instruction ST/AI/2010/3, which grant the head of department the authority to reassign and laterally transfer a staff member within their department.

14. Furthermore, the UNDT erred in finding that the lateral move was an expedited method of recruitment, which could only be applied in exceptional circumstances. There was no legal basis for this conclusion. In view of Section 3.2 of ST/AI/2010/3, the use of lateral moves is authorized under, and therefore, fully consistent with, ST/AI/2010/3.

⁵ ST/AI/2003/8 (Retention in service beyond the mandatory age of separation and employment of retirees), 2 February 2009.

⁶ Impugned Judgment, para. 62. ST/AI/2010/3 (Staff Selection System), 21 April 2010.

⁷ Impugned Judgment, paras. 66-67.

⁸ Impugned Judgment, para. 67.

⁹ Impugned Judgment, paras. 70-71.

15. The UNDT also erred in concluding that the lateral move was motivated by a retaliatory intent or improper motivation on the part of the ES as the UNDT had failed to make any finding that Mr. Nwuke had proven that the ES had been motivated by an improper motive. Furthermore, two other UNDT judgments had concluded that there was insufficient evidence that the challenged acts showed that the ES subjected Mr. Nwuke to retaliation.¹⁰ Accordingly, there was no basis for the same UNDT judge to conclude that a preponderance of the evidence established that the ES had subjected Mr. Nwuke to retaliation in the present case.

16. The UNDT also erred in drawing an adverse inference against the Secretary-General for failing to refute Mr. Nwuke's allegation of improper motivation given the Secretary-General refuted the allegation in his reply and offered a reasonable explanation for the decision to fill the post through a lateral transfer. Lastly, in so finding, the UNDT seemingly misplaced the burden of disproving improper motives upon the Secretary-General rather than upon Mr. Nwuke, the staff member contesting the decision.

17. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety.

Mr. Nwuke's Answer

18. Mr. Nwuke submits that the UNDT did not err in law or in fact, correctly considered Administrative Instructions ST/AI/2010/3 and ST/AI/2003/8, and that there are no reversible errors in the Judgment.

19. Mr. Nwuke submits that there is no basis for ST/AI/2010/3 to be considered superior vis-à-vis other administrative issuances of the Organization. Insofar as retirement does not fall within the scope of the staff selection process, the Secretary-General's contention that ST/AI/2010/3 should prevail is baseless. Moreover, the issues of retirement and appointment are distinct matters governed by different rules and instruments.

20. Mr. Nwuke further challenges the Secretary-General's contention that the UNDT erred in finding that the lateral move was an expedited method of recruitment that could only be applied in exceptional cases; the absence of guidance from official documents as to when one may effect a lateral move leaves the matter open to interpretation. Mr. Nwuke contends that a lateral move may be used to expedite a recruitment process for instance, in the case of the death of a

¹⁰ See *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/157, para. 262; *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/161, para. 75.

staff member, in emergencies, or in disciplinary measures resulting in the immediate suspension or dismissal of the incumbent staff member. In any event, he submits that the UNDT's statement on this matter did not constitute a finding.

21. The requirement that all anticipated job vacancies be advertised seeks to restrict the use of lateral moves to fill an anticipated vacancy, such that once a position is advertised ST/AI/2010/3 is applicable. The laws of the Organization, such as ST/AI/2010/3, establish that every staff member has a right to apply to a vacancy, and such right is imperilled if the administration can arbitrarily use lateral moves to fill anticipated vacancies.

22. Mr. Nwuke further contends that the UNDT did not err when it concluded that the lateral move was motivated by a retaliatory intention, insofar as the UNDT had already previously concluded that the same decision was arbitrary and unlawful, independently of the allegations of retaliation and discrimination.

23. The Secretary-General also failed to prove that the UNDT actually drew an adverse inference or that the adverse inference constituted the main basis for the Judgment against him or would have been different were it not for that.

24. Mr. Nwuke requests that the Appeals Tribunal affirm the Judgment in its entirety.¹¹

Mr. Nwuke's Cross-Appeal

25. Mr. Nwuke contends that the UNDT erred in stating that he "did not expect to be promoted". He clarified that he did not expect to be promoted because of the continuing discrimination, victimization and abuse of authority exercised towards him by the ES. The UNDT recognised as much in finding at paragraph 73 that the "ES's decision to fill the OPM post, for which the Applicant was an obvious and inevitable candidate, by a lateral move was tainted by the improper motive of denying the Applicant his right opportunity to apply for the vacancy [...]".

26. The UNDT also erred by not awarding him monetary compensation on the basis that he had not explicitly sought compensation. By his request to be "made whole as the circumstances determine" he intended to request the Dispute Tribunal "to pay or award damages sufficient to

¹¹ Although the UNDT did not award any compensation, Mr. Nwuke also requests that this Tribunal affirm the UNDT's award of compensation and determine that "one month net base salary is an inadequate remedy for the abridgement of [his] rights and for the emotional and moral distress". Answer, para. 5.

put the party who was damaged back into the position he/she would have been without the fault of another". Moreover, although he had requested rescission of the challenged decision which the UNDT found not to be feasible, the UNDT Statute provides that the UNDT should also stipulate an amount that the Administration should pay in lieu of rescission.

27. Mr. Nwuke claims that he has suffered financial consequences of a continuing nature, has irreparably lost the chance to apply for this particular post, experienced stigmatization as a result of his ongoing UNDT proceedings, which has made finding a new position in other departments of the Organization or being considered for promotion by a new ES of ECA impossible, and gravely harmed his career. He also claims economic loss in the sum of "over USD 5,000" for expenses related to traveling from his duty station, Addis Ababa, to Nairobi for UNDT hearings, as well as having suffered moral and emotional distress.

28. Accordingly, Mr. Nwuke requests this Tribunal to affirm the UNDT Judgment in part, find that the UNDT erred in failing to award him compensation, and cure the defect by awarding him compensation in the sum of six months' net base salary for violation of his due process rights and lost opportunity to apply for the post, and three months' net base salary for emotional and psychological distress.

The Secretary-General's Answer

29. The Secretary-General submits that there is no legal basis to award compensation as the UNDT's determination that the lateral move decision had been improperly motivated was legally erroneous and relied on an adverse inference. Furthermore, relying on the Appeals Tribunal Judgment in *Debebe*,¹² the Secretary-General claims the Appeals Tribunal may not award Mr. Nwuke moral damages as he did not claim moral damages in his application to the UNDT, nor assert that he suffered any emotional or psychological distress caused by the contested decision. This claim only appeared for the first time in his cross-appeal.

30. The Secretary-General requests the Appeals Tribunal to dismiss the cross-appeal in its entirety and vacate the UNDT Judgment in its entirety.

¹² *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288, para. 21.

Considerations

Preliminary Matters

31. Mr. Nwuke requests this Tribunal not to admit the additional documents which the Secretary-General submitted in support of his appeal as they were not available to the UNDT during the hearings. Pursuant to Article 2(5) of the Appeals Tribunal Statute and Article 10(1) of the Appeals Tribunal Rules of Procedure, this Tribunal may receive additional evidence in “exceptional circumstances” and where it determines that “the facts are likely to be established with such additional documentary evidence”. In the present case, we are not so satisfied as to either criterion. Consequently, Mr. Nwuke’s request is granted and the additional documents annexed to the Secretary-General’s appeal brief are rejected.

The Secretary-General’s Appeal

32. The crux of the Secretary-General’s appeal is that:

- a) the UNDT erred in relying on Administrative Instruction ST/AI/2003/8 regarding vacancies arising from retirement; and
- b) the UNDT erred in concluding that the lateral move was motivated by retaliatory intent on the part of the ES.

Whether the UNDT erred in relying on ST/AI/2003/8 regarding vacancies arising from retirement

33. Section 3.2 of ST/AI/2003/8 requires that:¹³

Heads of departments and offices shall regularly monitor all vacancies that are foreseen to occur in their department or office, normally as a result of staff reaching mandatory age of separation, and shall take all necessary steps to ensure that such vacancies are advertised in accordance with the requirements of section 4 of administrative instruction ST/AI/2006/3 (**currently ST/AI/2010/3 of 21 April 2010**) [sic], at least six months before the anticipated vacancy occurs. No extension shall be granted if that requirement is not met.

¹³ Section 3.2 of ST/AI/2003/8 (original emphasis).

34. The post of Director of OPM became vacant by reason of the retirement of the incumbent. The UNDT held that, in the circumstances, the procedure to fill the post should have been governed by Section 3.2 of ST/AI/2003/8 cited above, and that the procedures for filling a job opening by advertisement under Section 4.1 of ST/AI/2010/3 should have been followed. As a result, the UNDT concluded that the filling of the post by lateral transfer upon the retirement of the incumbent was in breach of ST/AI/2003/8.

35. The Secretary-General submits that the UNDT failed to adequately consider Staff Regulation 1.2(c) and ST/AI/2010/3, which grant department heads the authority to reassign and laterally transfer a staff member within their department.

36. Mr. Nwuke submits that insofar as retirement does not fall within the scope of the “staff selection” process, the Secretary-General’s contention that ST/AI/2010/3 should prevail is baseless. Moreover, the issues of retirement and appointment are two distinct matters governed by different rules and instruments.

37. The Appeals Tribunal notes that, as its title reflects, ST/AI/2003/8 is an Administrative Instruction on “*Retention in service beyond the mandatory age of separation and employment of retirees*”. Part I, Sections 2 and 3, deal with the criteria, conditions and procedure for the retention of staff appointed under the 100 series of the Staff Rules, while Section 4 deals with project personnel employed under the 200 series of the Staff Rules. Part II deals with matters related to the employment of retirees including, inter alia, the conditions, contractual arrangements and pension related-issues.

38. So from the onset we hold that Administrative Instruction ST/AI/2003/8 is inapplicable to the filling of the vacant post of OPM, as the administration *was not seeking to retain the holder of the position beyond the mandatory age of separation*.

39. The relevant administrative instruction on staff selection is ST/AI/2010/3, which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat (Section 2.1).

40. Section 4 of ST/AI/2010/3 concerns “Job openings”. Section 4.1 requires that:

Immediate and anticipated job openings for positions of one year or longer shall be advertised through a compendium of job openings. The compendium shall include both

position-specific job openings and generic job openings. The compendium shall be published electronically and shall be updated regularly.

41. Section 1(a) of ST/AI/2010/3 defines “anticipated job openings” as:

[J]ob openings relating to positions expected to become available as identified through workforce planning or forecasting, for example due to the retirement of the incumbent within six months or for meeting future requirements[.]

42. However, notwithstanding Section 4.1, which requires the advertisement of immediate and anticipated job openings, Section 2.5 provides that:

Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body. [...]

43. Moreover, Section 3.2(l) explicitly provides that the staff selection system established through ST/AI/2010/3, shall not apply, inter alia, to:

Lateral movements of staff by heads of department/office/mission in accordance with section 2.5 above.

44. In our view, the authority to make lateral transfers to fill job openings at the same level extends to both immediate and anticipated job openings, including posts that will become vacant due to retirement.

45. In this case, the ES exercised his authority under Section 2.5 of ST/AI/2010/3 to transfer another staff laterally within the same ECA office, at the same level of director, to fill a vacant post. We find the decision complies with the foregoing legal framework.

46. Section 13.3 of ST/AI/2010/3 states that “the provisions of the present administrative instruction shall prevail over any inconsistent provisions contained in other administrative instructions and information circulars currently in force.” Having regard to the clear text of Section 13.3 and insofar as the filling of a vacancy due to retirement falls within the scope of the “staff selection” process, we confirm the contention of the Secretary-General that ST/AI/2010/3 should prevail.

47. Accordingly, we hold that the UNDT erred in law when it found that the filling of the position of Director, OPM, by lateral transfer upon the incumbent's retirement breached ST/AI/2003/8.

Whether the UNDT erred in concluding that the lateral move was motivated by retaliatory intent on the part of the ES

48. The Appeals Tribunal has on many occasions affirmed that the Secretary-General has a broad discretion in decisions regarding promotions and appointments.¹⁴

49. Nonetheless, the discretion is not unfettered, and is subject to judicial review. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate.¹⁵ The burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation.¹⁶

50. Mr. Nwuke alleged that the decision by the ES to fill the post by way of lateral transfer without advertising it was to prevent him from applying for the post for which he was qualified. He alleged that this decision was one of a series of retaliatory actions taken against him by the ES.

51. The UNDT accepted Mr. Nwuke's allegations of retaliation, noting that the Administration did not provide any direct evidence in the course of the hearing as to why the post was filled by way of lateral transfer, rather than by a competitive selection process.¹⁷ The UNDT noted that the Human Resources Officer made only a general statement to the Dispute Tribunal that lateral moves are used when there is an urgent need to fill a vacancy.¹⁸ The UNDT also rejected the explanation given by the Administration during the earlier suspension of action hearing that ECA could not afford to leave the function of Director of OPM uncovered as it was a critical post. In this regard, the UNDT opined:¹⁹

¹⁴ *Simmons v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-425; *Santos v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-415; *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110.

¹⁵ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹⁶ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 38.

¹⁷ Impugned Judgment, para. 27.

¹⁸ Impugned Judgment, para. 29.

¹⁹ Impugned Judgment, para. 61.

This begs the question of why the Administration did not meet its responsibility under ST/AI/2003/8 to anticipate the vacancy of such a critical post and advertise it six months before the holder of the post was due to retire.

52. In *Obdeijn*, the Appeals Tribunal held:²⁰

[T]he obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by [...] General Assembly Resolution [...] 63/253 and the principle of accountability of managers that the Resolution advocates for.

[...]

Whereas, normally, a staff member bears the burden of proof of showing that a decision was arbitrary or tainted by improper motives, the refusal to disclose the reasons for the contested decision shifts the burden of proof so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives.

53. Undoubtedly, the outcome of a case is determined by the preponderance of evidence, including adverse inferences that may be drawn where the party with the ability to refute or contradict a relevant fact does not do so.

54. The UNDT rejected the explanation proffered by the Administration as to why it filled the post by lateral transfer, namely that the position was critical, finding that it did not adequately address the point as to why the Administration did not act earlier. The Dispute Tribunal therefore drew the conclusion that the contested decision intended to deprive Mr. Nwuke of the possibility of applying for the post and was thus motivated by improper motives. This was largely based on the unchallenged evidence adduced by Mr. Nwuke that from early 2009 he had a strained relationship with the ES.

55. With due deference to the UNDT, in our view, it was not reasonable for the Dispute Tribunal to conclude, based on the sole fact of the existence of friction between the ES and Mr. Nwuke, that the failure to advertise the post was to prevent Mr. Nwuke from applying for it, especially as Mr. Nwuke's previous complaints of harassment and retaliation against the ES have not succeeded before the same Judge of the Dispute Tribunal.²¹

²⁰ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, paras. 36, 38.

²¹ See *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/157; *Nwuke v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/161.

56. Consequently, we agree with the Secretary-General that, in the absence of additional evidence in this case, there was no basis for the same UNDT Judge to conclude that the preponderance of evidence established that the ES had subjected Mr. Nwuke to retaliation in the present case.

57. From the foregoing, we also hold that the UNDT erred in placing the burden on the Secretary-General to prove that the lateral transfer was *not* intended to block Mr. Nwuke from applying for the post.

58. Accordingly, we find merit in this ground of appeal and hold that the UNDT erred in concluding that the lateral move was motivated by retaliatory intent or improper motivation on the part of the ES.

59. The appeal succeeds on this ground. For the foregoing reason, there is no need to consider the cross-appeal.

Judgment

60. The Secretary-General's appeal is allowed. The UNDT Judgment is hereby vacated.

61. Mr. Nwuke's cross-appeal is without merit and is hereby dismissed.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Thomas-Felix

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

(Signed)

Weicheng Lin, Registrar