



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

Judgment No. 2016-UNAT-661

**Kalashnik
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Deborah Thomas-Felix Judge Richard Lussick
Case No.:	2015-871
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Zarqaa Chohan

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The Appeals Tribunal has before it an appeal of Judgment on Receivability No. UNDT/2015/087, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 18 September 2015, in the case of *Kalashnik v. Secretary-General of the United Nations*. Mr. Andrew Kalishnik filed his appeal on 30 November 2015,¹ and on 29 January 2016, the Secretary-General filed his answer.

Facts and Procedures

2. Mr. Kalashnik is an investigator at the P-3, Step 14 level in the Investigations Division of the Office of Internal Oversight Services (“ID/OIOS”).

3. From 12 October 2014, through 6 March 2015, Mr. Kalashnik submitted the following requests for management evaluation:

(a) On 12 October 2014 - a request for management evaluation of the selection exercise of JO 33951 (P-4 Investigator OIOS) for rostering purposes (MEU/138-14/R);

(b) On 9 January 2015 - a request for management evaluation of the decision not to place him in the roster for JO 33951 (MEU/015-15/R);

(c) On 23 January 2015 - two requests for management evaluation of the decisions not to select him in JO 37908 (derivative action of JO 33951) and JO 37474 (derivative action of JO 33951) (MEU/057-15/R, MEU/058-15/R);

(d) On 6 February 2015 - a request for management evaluation of the decision not to select him in JO 38250 (derivative action of JO 33951) (MEU/107-15/R);

(e) On 12 February 2015 - a request for management evaluation of the decision not to select him in JO 39182 (derivative action of JO 33951) (MEU/108-15/R); and

(f) On 6 March 2015 - a request for management evaluation of the decision not to advertise P-4 posts in the United Nations Office at Vienna (UNOV), the United Nations Office at Nairobi (UNON) and the United Nations Stabilization

¹ As per Order No. 242 (2015) issued by the Appeals Tribunal on 19 November 2015.

Mission in Haiti (MINUSTAH) and the selection process for P-4 Investigator for JO 37476, JO 37910 and JO 39104 (MEU/142-15/R).

4. The Secretary-General responded to Mr. Kalashnik's requests for management evaluation, as follows:

(a) On 12 November 2014 - finding the request was premature as no final administrative decision had been made (MEU/1318-14/R);

(b) On 23 February 2015 – upholding the decisions and recommendations of the Management Evaluation Unit (MEU) and finding no merit to the claims Mr. Kalashnik raised regarding the decisions not to roster him for the position of P-4 Resident Investigator (JO 33951) and not to select him for the P-4 Investigator positions (JO 37474, JO 37908, JO 38250 and JO 39182) (MEU/015-15/R, MEU/057-15/R, MEU/058-15/R, MEU/107-15/R, and MEU/108-15/R);

(c) On 5 May 2015 - upholding the decisions and recommendations of the MEU and finding no merit to the claims Mr. Kalashnik raised regarding the decisions (MEU/142-15/R, MEU/228-15/R).

5. On 23 April 2015, Mr. Kalashnik submitted a request for management evaluation of the “[f]ailure to conduct a review of [his] requests for management evaluation of the administration of the selection processes for JO 33951, JO 37474, JO 37908, JO 38250 and JO 39182”. In this request for management evaluation, Mr. Kalashnik sought “[a] thorough and comprehensive and unbiased and impartial evaluation of [his] requests to MEU”.

6. On 8 August 2015, Mr. Kalashnik filed an application with the Dispute Tribunal contesting the decisions of the Under-Secretary-General for the Department of Management (USG/DM), dated 23 February 2015 and 5 May 2015 “to blindly endorse the MEU’s product without due review and consideration of its accuracy, veracity, objectiveness, impartiality, and fairness and effectively force the matter into litigation”. The Secretary-General filed his reply on 11 September 2015, contending that the application was not receivable *ratione materiae* since it failed to contest a reviewable administrative decision. The Secretary-General further claimed that, as to the JO decisions, Mr. Kalashnik had already filed an application before the UNDT and was precluded from filing another application challenging the same decisions.

7. On 18 September 2015, the UNDT issued Judgment on Receivability No. UNDT/2015/087, concluding Mr. Kalashnik's application was not receivable *ratione materiae* or, alternatively, was duplicative of Case No. UNDT/NY/2015/031, which Mr. Kalashnik had previously filed.

8. On 20 October 2015, Mr. Kalashnik filed an application for interpretation of Judgment on Receivability No. UNDT/2015/087. On 20 November 2015, the UNDT issued Judgment No. UNDT/2015/113, finding the application for interpretation was not receivable as Judgment No. UNDT/2015/087 "does not require clarification".

9. On 30 November 2015, Mr. Kalashnik filed an appeal and on 29 January 2016, the Secretary-General filed his answer.

Submissions

Mr. Kalashnik's Appeal

10. The UNDT erred on a question of fact, resulting in a manifestly unreasonable decision, when it failed to consider whether the USG/DM acted properly when he "rubber stamp[ed]" the MEU's decisions to condone the recruitment processes of the OIOS management. The application before the UNDT contested the failure of the Under-Secretary-General for Management to exercise the duties and responsibilities vested in him.

11. The UNDT committed an error of procedure, such as to affect the decision, when it misconstrued the application and did not give fair consideration to it. In this regard, Mr. Kalashnik notes that Judgment on Receivability No. UNDT/2015/087 was issued within four business days of the Secretary-General's Reply, and Judgment No. UNDT/2015/113 was issued within less than 24 hours of the Secretary-General's Reply. The UNDT "hurriedly issued" those judgments "without giving the Applicant a chance to comment".

12. The UNDT erred as a matter of law when it entered into a summary judgment, as "material facts [of the case were] in dispute".

13. The UNDT failed to exercise jurisdiction vested in it or exceeded its jurisdiction or competence when it determined that the response to a request for management evaluation was not an administrative decision subject to judicial review or, alternatively, found the

application duplicative of Case No. UNDT/NY/2015/031. This failure to exercise jurisdiction leaves the USG/DM unaccountable.

14. Mr. Kalashnik requests that the Appeals Tribunal remand the present case to the UNDT for consideration on the merits by a different judge.

The Secretary-General's Answer

15. The UNDT correctly determined that the application was manifestly inadmissible. The Secretary-General's response to a request for management evaluation does not constitute a reviewable administrative decision. The key characteristic of an administrative decision is that it must produce "direct legal consequences" or "have a direct impact" on the terms of appointment or contract of employment. The response to a request for management evaluation does not have this key characteristic.

16. Alternatively, piercing through the responses to the requests for management evaluation, the administrative decisions challenged by Mr. Kalashnik pertain to the same job opening administrative decisions he challenged in another case before the UNDT, Case No. UNDT/NY/2015/031. A staff member may not bring more than one action challenging an administrative decision.

17. The Appellant has not established any errors warranting a reversal of the UNDT Judgment. The Appellant does not raise any grounds for reversal under Article 2 of the Appeals Tribunal Statute; rather, he appears to be seeking a *de novo* hearing of his application. This is grounds to dismiss the appeal. Moreover, the Appellant also goes beyond the issue on appeal and addresses the merits of his claims, as well as the proper remedy. Neither the merits nor a remedy on the merits is before the Appeals Tribunal.

18. Finally, there is no merit to the Appellant's claim that the Dispute Tribunal "hurriedly issued" the Judgment. Although the Dispute Tribunal acted expeditiously, the Appellant cannot point to any evidence or argument that the UNDT failed to consider. In this regard, the Appellant also wrongly claims that the UNDT issued a summary judgment against him. It did not. In fact, the UNDT specifically found that summary judgment would not be a proper procedure for consideration of a receivability issue.

19. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgment and dismiss Mr. Kalashnik's appeal in its entirety.

Considerations

Request for Judicial Notice

20. On 9 June 2016, Mr. Kalashnik filed a request that the Appeals Tribunal take judicial notice of *Wilson v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/125 (*Wilson*). The Secretary-General filed his observations opposing the request on 16 June 2016. The Appeals Tribunal denies Mr. Kalashnik's request, noting that the *Wilson* Judgment by the UNDT is not *stare decisis* – or even persuasive – as it is currently on appeal before the Appeals Tribunal.²

The Appeal

21. The Dispute Tribunal determined that Mr. Kalashnik's case was not "suitable for summary judgement under art. 9 of the [UNDT's] Rule of Procedure".³ Thus, Mr. Kalashnik's claim that the UNDT erred procedurally by granting summary judgment against him is without foundation and has no merit.

22. Although the UNDT did not utilize the summary judgment procedure, it nevertheless concluded that the "matter may still be dealt with on an expedited basis as the application appears to be clearly manifestly inadmissible".⁴ Under our jurisprudence, the Dispute Tribunal is competent to consider – even on its own volition - whether it has jurisdiction or competence to receive an application.⁵ In this case, the Secretary-General raised the issue of whether the application was receivable *ratione materiae* in his reply and the UNDT was correct to address that issue before any other issue.⁶

23. As noted above, Mr. Kalashnik's application contested the decisions of the USG/DM, dated 23 February 2015 and 5 May 2015, "to blindly endorse the MEU's product without due review and consideration of its accuracy, veracity, objectiveness, impartiality,

² See *Wilson v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-679, also issued during the 2016 summer session (reversing Judgment No. UNDT/2015/125).

³ Impugned Judgment, para. 11.

⁴ *Ibid.*

⁵ *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335, para. 21.

⁶ See *Saka v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-075, para. 21.

and fairness and effectively force the matter into litigation”. In fact, Mr. Kalashnik sets forth dozens of ways in which he believes the USG/DM erred when he adopted the MEU’s evaluation that the several job-related decisions Mr. Kalashnik challenged should not be reversed.

24. The Dispute Tribunal determined that the application was not receivable *ratione materiae* stating:⁷

It is settled law that the contested decision which may be reviewed by the Dispute Tribunal is not the decision of the MEU, but the administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member. ...

The recommendations of the MEU, and the Secretary-General’s responses to the Applicant’s request for management evaluation, as communicated by the letters dated 23 February and 5 May 2015, not being subject to review by the [Dispute] Tribunal, this application is not receivable, and is manifestly inadmissible.

The Appeals Tribunal agrees for the reasons set forth below.

25. The Appeals Tribunal has “consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must ‘produce[] direct legal consequences’ affecting a staff member’s terms and conditions of appointment; the administrative decision must ‘have a direct impact on the terms of appointment or contract of employment of the individual staff member’”.⁸ Further, a reviewing tribunal should consider “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision” in determining whether an application challenges an administrative decision which is subject to judicial review.⁹

⁷ Impugned Judgment, paras. 12 and 13.

⁸ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49, citing former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V and *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 17.

⁹ *Ibid.*, para. 50, citing *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18 and cites therein.

26. Management evaluation is a vital component of our system for the administration of justice. As we have commented, “the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary ...”.¹⁰

27. To assure that the Administration has the opportunity to correct any errors before litigation is brought, Article 8(1)(c) of the UNDT Statute provides that “[a]n application shall be receivable if ... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required”.

28. However, Article 8 does not require that the Administration respond to the request for management evaluation in order for an application to be received by the UNDT. To the contrary, pursuant to Article 8(1)(d)(i)(b) of the UNDT Statute, an application shall be received by the UNDT despite the failure of the Administration to respond: “An application shall be receivable if ... [t]he application is filed ... [w]ithin 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided”.

29. Accordingly, it is fair to say that the General Assembly when enacting the provisions of the UNDT Statute did not consider the Administration’s response to a request for management evaluation to be a decision that “produced direct legal consequences” affecting a staff member’s terms and conditions of appointment. To the contrary, as discussed above, “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision” all support the conclusion that the Administration’s response to a request for management evaluation is not a reviewable decision. The response is an opportunity for the Administration to resolve a staff member’s grievance without litigation – not a fresh decision.

30. If the decision itself cannot be subject to judicial review, then the procedures utilized by the Administration in reaching the decision also cannot be subject to judicial review. Mr. Kalashnik cannot create a right to challenge the Administration’s procedures for responding to requests for management evaluation when that right does not exist in the

¹⁰ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-381, para. 37, citing *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 42.

Staff Rules or elsewhere. Management has discretion in how to consider and respond to staff members' requests for evaluation; the discretion is not subject to micro-managing by the staff members. In fact, as discussed, management may choose not to respond at all.

31. "The role of the Dispute Tribunal includes adequately interpreting and comprehending the application submitted by the moving party, whatever name the party attaches to the document."¹¹ In addition to finding the application was not receivable *ratione materiae*, the UNDT alternatively found that the application challenged "precisely the same job openings/administrative decisions" Mr. Kalashnik challenged under Case No. UNDT/NY/2015/031.¹² This alternative ground is supported by the record, and the UNDT did not err in fact or law in reaching this conclusion.

32. As the Appeals Tribunal has concluded that the UNDT did not err in law or fact when it refused to receive the application, the UNDT Judgment on Receivability should be affirmed, and the appeal denied.

Judgment

33. UNDT Judgment on Receivability No. UNDT/2015/087 is affirmed, and the appeal is denied.

¹¹ *Gakumba v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-591, para. 21, citing *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, paras. 2-3.

¹² Impugned Judgment, para. 14.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar