



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1422

John Njuguna Bernard
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Leslie F. Forbang, Presiding Judge Gao Xiaoli Judge Katharine Mary Savage
Case No.:	2023-1791
Date of Decision:	22 March 2024
Date of Publication	30 April 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Self-represented

Counsel for Respondent: Patricia C. Aragonés

JUDGE LESLIE F. FORBANG, PRESIDING.

1. Mr. John Njuguna Bernard (Mr. Bernard), a staff member of the United Nations Environment Programme (UNEP), contested the outcome of the 2010 reclassification process of his position (contested decision).
2. By Judgment No. UNDT/2023/014 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) determined that Mr. Bernard's application was premature and thus not receivable because he had not exhausted the remedy set out in Administrative Instruction ST/AI/1998/9 (System for the classification of posts) by submitting an appeal of the reclassification decision.
3. Mr. Bernard lodged an appeal against the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the appeal is dismissed and the impugned Judgment affirmed.

Facts and Procedure

5. At the relevant time of events, Mr. Bernard was employed as a Computer Information Systems Assistant at the G-6 level in the UNEP Governance Affairs Office (GAO) at the United Nations Office at Nairobi (UNON), Kenya.
6. On 4 August 2009, the reclassification of two positions to the next higher level, including the G-6 position that Mr. Bernard encumbered, was formally requested through the Human Resources Management Service, UNON (HRMS/UNON). The other position was a position of Team Assistant, at the G-4 level, encumbered by Mr. Paul Njoroge Ng'ang'a (Mr. Ng'ang'a).²
7. On 26 May 2010, the Recruitment and Classification Section, HRMS/UNON informed the Administration by interoffice memorandum that the reclassification requests for both positions had been processed and that the positions were respectively classified as G-6 and G-4 positions. Consequently, both positions remained at the same level without any upward reclassification, effective on 1 June 2010. However, there is no record that Mr. Bernard was

¹ *Bernard v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/014.

² Management evaluation response dated 24 October 2022. Mr. Ng'ang'a also filed an appeal before the UNAT that was decided during the 2024 Spring Session (case no. 2023-1793).

notified of the outcome of the reclassification process.³

8. On 17 November 2021, Mr. Bernard wrote to the Director, Corporate Service Division (CSD), expressing that he had not received the outcome of his request to reclassify his position. On the same date, Mr. Ng'ang'a sent a memorandum to the Administration to the same effect.⁴

9. On 25 January 2022, Messrs. Bernard and Ng'Ang'A sent a joint memorandum to the Administration inquiring on the progress of their respective requests.⁵

10. On 31 March 2022, the Acting Director, CSD, informed Mr. Bernard that "there [were] no records to show that the G-6 position was ever submitted for reclassification".⁶

11. On 30 August 2022, the Director, CSD informed Messrs. Bernard and Ng'ang'a by memorandum that:⁷

3. (...) [N]ew documentary evidence has recently been provided to the Administration confirming that contrary to [its] previous assessment, the requests for reclassification of both positions were duly submitted and processed by UNON in May 2010. According to the official Classification Notice memo issued by the Recruitment and Classification Section at [the HMRS/UNON] dated 26 May 2010 (...), the classification of positions 30600275 and 30601214 were confirmed and the G-4 and the G-6 levels respectively effective on 1 June 2010. The Classification Notice memo was addressed to the Secretary of Governing Bodies.

4. It is unfortunate that the Administration did not have available a copy of the Classification Notice when responding to your requests on 31 March 2022. However, it is now confirmed that the requests for classification are not outstanding and were duly processed in May 2010 confirming that the classification of both positions should be maintained at the same level (G-4 and G-6 respectively). (...)

5. In light of the above, the whole matter of the processing of the reclassification's requests of positions 30600275 and 30601214 initiated by the Secretary of Governing Bodies in 2009 has been resolved and is considered moot.

³ Interoffice memorandum dated 26 May 2010, Subject: Re: Classification notice. See also impugned Judgment, para. 6.

⁴ Memorandum dated 17 November 2021 from Mr. Bernard to the Administration, Subject: Request for your kind investigation and necessary action.

⁵ Memorandum dated 25 January 2022 from Messrs. Bernard and Ng'ang'a to the Administration, Subject: Progress of the HR Issue.

⁶ Memorandum dated 31 March 2022 from the Administration to Messrs. Bernard and Ng'Ang'A, Subject: Reclassification of Positions 30600275 and 30601214.

⁷ UNDT Application, Annex 13, Memorandum dated 30 August 2022 from the Administration to Messrs. Bernard and Ng'Ang'A, Subject: Follow-up on reclassification of positions 30600275 and 30601214.

6. On the way forward, kindly note that it is within the discretionary authority of the Director of [GAO] to assess whether the duties and responsibilities of the two positions have changed substantially and there are any merits to consider a reclassification of the positions in full accordance with the provisions in ST/AI/1998/9 (...), taking into consideration the current and future operational requirements of the Secretariat of Governing Bodies. You will be informed in due course of any further developments.

12. On 8 September 2022, Mr. Bernard was notified of the negative outcome of the reclassification process.⁸

13. On 28 September 2022, Mr. Bernard requested management evaluation of various decisions of the Administration, including the contested decision.⁹

14. On 24 October 2022, the Management Evaluation Unit (MEU) informed Mr. Bernard by letter that his management evaluation request was not receivable because “appeals of classification decisions are governed by (...) ST/AI/1998/9” and “must be submitted within 60 days from the date on which the classification decision is received, which in [his] case [was] 8 September 2022”. The MEU further noted that “it does not review classification decisions given that there is a separate internal process for such matter” and that, pursuant to [Administrative Instruction] ST/AI/2018/7 (Technical bodies), [Mr. Bernard was] (...) not required to request a management evaluation”.¹⁰

15. On 17 November 2022, Mr. Bernard filed an application with the Dispute Tribunal challenging the contested decision.

Impugned Judgment

16. On 2 March 2023, the Dispute Tribunal issued the impugned Judgment on receivability. The UNDT observed that “[w]here statutory provisions exist to provide internal remedies, it is proper that staff members should exhaust those remedies before resorting to litigation before the [Dispute] Tribunal”.¹¹ In the present case, the UNDT agreed with the Secretary-General’s argument that although Section 5 of ST/AI/1998/9 provides that “[t]he decision on the classification level of a post may be appealed”, “it is an internal remedy that is

⁸ Impugned Judgment, para. 6.

⁹ Management evaluation request dated 28 September 2022.

¹⁰ Management evaluation response dated 24 October 2022.

¹¹ Impugned Judgment, para. 9.

available to the Applicant, and one that must be exhausted before the jurisdiction of [the UNDT] is triggered”.¹²

17. The UNDT also observed that the MEU lacked authority to review the matter, as management evaluation is not “a remedy equivalent to that one provided in Section 5 of ST/AI/1998/9”.¹³

18. Therefore, the UNDT dismissed Mr. Bernard’s application as premature because he had not exhausted the remedy provided in Section 5 of ST/AI/1998/9 by submitting an appeal of the reclassification decision.

Procedures before the Appeals Tribunal

19. On 9 March 2023, Mr. Bernard filed an appeal against the impugned Judgment with the Appeals Tribunal, to which the Secretary-General responded on 15 May 2023.

Submissions

Mr. Bernard’s Appeal

20. Mr. Bernard requests the Appeals Tribunal “to recede the [impugned Judgment] (...) and allow the case to proceed to its conclusion so that [he] can be comprehensively compensated for the destroyed career progression, violation of [his] human basic rights and both psychological and mental turmoil which has really affected [his] health”.¹⁴

21. First, Mr. Bernard submits that by dismissing his application as premature, the Dispute Tribunal failed to afford him the chance “to defend [himself] from the allegations on why [he did not] appeal” under the process set forth in ST/AI/1998/9.

22. Second, Mr. Bernard also contends that the UNDT failed to “correctly interpret the policies and standards governing classification to determine the credibility [and authenticity] of the results and whether they warranted an [a]ppeal”. In this regard, Mr. Bernard further submits that the Dispute Tribunal failed to consider whether these policies and standards had been correctly applied. He also observes that the UNDT should have noted some “serious

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 10.

¹⁴ Appeal form.

breaches” in the applicable legal framework, in the United Nations core values as well as in several documents related to the reclassification process. With regard to the applicable legal framework, Mr. Bernard also contends that the Secretary-General wrongfully relied on Administrative Instruction ST/AI/1998/8 (Competitive examination for promotion to the Professional category of staff members from other categories) in his UNDT reply, which demonstrates that “wrong policies and standards were applied” during the reclassification process.¹⁵

23. Consequently, Mr. Bernard submits that if the UNDT had considered all these elements, it could only have concluded that “no classification process took place” and that, therefore, its “results could not warrant an [a]ppeal”.

24. Third, Mr. Bernard contends that the UNDT erred in concluding that he “must” file an appeal to contest the reclassification of his position, when such an appeal was “an option but not ‘mandatory’”, as Section 5 of ST/AI/1998/9 uses the word “may” and not “must”.

25. Last, Mr. Bernard argues that the MEU erred in finding that his request for management evaluation was not receivable. By doing so, Mr. Bernard contends that the MEU overlooked that, in its memorandum dated 30 August 2022, the Administration concluded that “the whole matter of the processing of the reclassification’s requests (...) ha[d] been resolved and [was] considered moot”.¹⁶ He contends that this “clear and precise conclusion (...) sen[t] signals that the [Administration] [would] not be involved in any other issue regarding the (...) [reclassification process]”.

26. Therefore, Mr. Bernard submits that it was “premature” for the UNDT to issue the impugned Judgment “without first hearing from [him]” and that this error is “a sign of retrogression in management of [the United Nations] legal system which defeats the purpose for which the [Tribunals] were created for”.

The Secretary-General’s Answer

27. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety. Should the UNAT determine that the appeal is receivable, in whole or in part, the

¹⁵ UNDT reply, para. 14ii).

¹⁶ UNDT Application, Annex 13, Memorandum dated 30 August 2022 from the Administration to Messrs. Bernard and Ng’Ang’A, Subject: Follow-up on reclassification of positions 30600275 and 30601214.

Secretary-General submits that “the appropriate remedy would be to remand the matter to the UNDT”, pursuant to Article 2(4)(b) of the Appeals Tribunal Statute (the Statute).¹⁷

28. The Secretary-General submits that the UNDT correctly found that Mr. Bernard’s application was premature and, consequently, not receivable. In this regard, the Secretary-General observes that most of Mr. Bernard’s arguments relate to the merits of the case, which do not establish an error on appeal. Therefore, the Secretary-General contends that these submissions fall outside the UNAT’s jurisdiction and should be disregarded on this basis alone. Nevertheless, even if the Appeals Tribunal were to consider his arguments, the Secretary-General submits that they have no merit.

29. First, the Secretary-General argues that Mr. Bernard failed to demonstrate how providing him a chance to defend himself on why he did not file an appeal pursuant to ST/AI/1998/9 would have altered the outcome of the impugned Judgment. Indeed, the Secretary-General contends that it was clear that Mr. Bernard had to first exhaust the remedies for appeal set forth in ST/AI/1998/9 before he could appeal the contested decision before the UNDT.¹⁸

30. Relying on Appeals Tribunal jurisprudence, the Secretary-General submits 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”.¹⁹

31. With regard to Mr. Bernard’s submission that Section 5 of ST/AI/1998/9 uses the word “may” and not “must” and that, therefore, such an appeal is not mandatory, the Secretary-General submits that this argument is misguided. Indeed, the Secretary-General observes that the use of the word “may” does not mean that the appeal procedure is not mandatory but only “indicates that a decision on a classification level of a post can be appealed (i.e., ‘may be appealed’) if a staff member decides to do so”.

32. Moreover, the Secretary-General notes that when reading Section 5 of ST/AI/1998/9 alongside with paragraph 6.1, which provides that “[a]ppeals shall be submitted in writing”, it

¹⁷ Answer form.

¹⁸ *Edward E. Hammond v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1142, paras. 51 and 54.

¹⁹ *Nguyen-Kropp & Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509, para. 32.

becomes “evident” that the appeal procedure is mandatory. The Secretary-General also submits that, pursuant to paragraph 6.3 of ST/AI/1998/9, Mr. Bernard failed to submit an appeal within 60 days from the date on which he received the reclassification decision, despite the fact that “he had two weeks (until 7 November 2022) to do so after the MEU had alerted him to the applicable appeals process and the 60-day deadline”.

33. Second, the Secretary-General contends that the fact that the UNDT did not consider the merits of the case cannot constitute a reversible error in the appeal on receivability and that, in any event, Mr. Bernard should have appealed the reclassification process following the procedure set out in ST/AI/1998/9. Indeed, the Secretary-General highlights that Section 5 of this Administrative Instruction specifically provides that the appeal procedure applies in cases where “the classification standards were *incorrectly* applied, resulting in the classification of the post at the wrong level”.²⁰

34. The Secretary-General also notes that the reference to ST/AI/1998/8 in his UNDT reply was clearly a typographical error.²¹

35. Third, in response to Mr. Bernard’s argument that the MEU erred in finding his request for management evaluation not receivable, the Secretary-General recalls that a response to a management evaluation request is not an appealable administrative decision and that, in any event, despite the wording of the Administration’s memorandum dated 30 August 2022, he still had to follow the appeal procedure set out in ST/AI/1998/9.²²

36. Fourth, with regard to annexes 12 and 16 of the appeal, namely a memorandum from Mr. Bernard to the Administration dated 11 April 2022 and the Administration’s e-mail exchanges dated 18 August 2009 and 1 September 2009, the Secretary-General observes that Mr. Bernard did not make a request to have them admitted as additional evidence.²³ Therefore, he failed to address whether there were any exceptional circumstances to permit the introduction of such additional evidence and if it would be in the interest of justice and the

²⁰ Emphasis added.

²¹ UNDT reply, para. 14 ii).

²² UNDT application, Annex 13, Memorandum dated 30 August 2022 from the Administration to Messrs. Bernard and Ng’Ang’A, Subject: Follow-up on reclassification of positions 30600275 and 30601214.

²³ Memorandum from Mr. Bernard to the Administration dated 11 April 2022, Subject: Request for Action on the existing posts: 30600275 and 30601214, pp. 82-85 of 139 and E-mail exchange from the Administration dated 18 August 2009 and 1 September 2009.

efficient and expeditious resolution of the proceedings to admit it.²⁴ In any event, the Secretary-General argues that this additional evidence “relates to the merits of the case and therefore is not relevant to the issue of receivability on appeal”.

37. Last, the Secretary-General submits that, in the absence of any error by the UNDT, the reliefs sought by Mr. Bernard have no legal basis and his request for remedies must be dismissed.

Considerations

38. At issue in this appeal is whether the UNDT erred in finding that Mr. Bernard’s application was premature and thus not receivable on the grounds that he failed to exhaust the remedy set out in ST/AI/1998/9 by filing an appeal against the reclassification decision.

39. The non-receivability of an action is a decision of the tribunal made in *limine litis*, at the threshold of ligation, rendering a judgment on the merits of the claim irrelevant. A tribunal will declare a matter not receivable when basic conditions for receivability are not met.

40. For the reasons analyzed hereunder, the appeal is dismissed and the impugned Judgment affirmed.

41. Before the Dispute Tribunal, Mr. Bernard filed an application against the reclassification decision of 30 August 2022 in which the Director, CSD informed him that the reclassification request for his position had been resolved and considered moot. Mr. Bernard was further informed that it was within the discretionary authority of the Administration to assess whether the duties and responsibilities of the positions had changed substantially and there were merits to consider a reclassification of his position, taking into account the current and future operational requirements of the Administration.

42. In paragraph 6 of the impugned Judgment, the Dispute Tribunal found that by requesting management evaluation of the negative outcome of the reclassification process, Mr. Bernard breached procedural prerequisites. Instead, he should have appealed the contested decision as laid down in Section 5 of ST/AI/1998/9, which provides:²⁵

²⁴ Article 2(5) of the Statute.

²⁵ Emphasis added.

The decision of the classification level of a post *may* be appealed by the head of the organizational unit in which the post is located, and/or the incumbent of the post at the time of its classification, on grounds that the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level.

43. Paragraph 6.1 further stipulates that appeals of classification decisions “*shall* be submitted in writing” to the appropriate responsible official who, in the matter at hand, is the head of office.²⁶ Pursuant to paragraph 6.3, appeals “*must* be submitted within 60 days from the date on which the classification decision is received”.²⁷ Such right to appeal may only be exercised on the “ground that the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level”.²⁸

44. Therefore, we agree with the Secretary-General’s submission that the use of the words “shall” and “must”, clearly expressed in Section 6 of ST/AI/1998/9, it is evident that the appeal procedure detailed above is mandatory. Indeed, the decision to appeal an administrative decision on classification is optional, as indicated by the use of the word “may” in Section 5. However, should a staff member decide to exercise the right to appeal, the nature of such appeal must be as laid down in Section 6 of ST/AI/1998/9.

45. Furthermore, following the principle of plain interpretation, where there is no ambiguity, codified law is interpreted according to the letter of the law. In that vein, Section 5 of ST/AI/1998/9, when read with its paragraph 6.1, reflects a mandatory internal appeal mechanism indicated by the use of the word “shall” and which, if not complied with, renders the application filed before the Dispute Tribunal not receivable.

46. In the present case, Mr. Bernard was notified of the negative outcome of the reclassification process on 8 September 2022. Upon receipt of the contested decision, Mr. Bernard never appealed. Instead, on 28 September 2022, he requested management evaluation of the decision. In the absence of an appeal as prescribed by ST/AI/1998/9, could his action prevail? This question is critical for our determination of the issues before us. We, however, answer the above in the negative, for the reasons analyzed below.

47. Mr. Bernard’s request for management evaluation, albeit erroneous, is an internal mechanism not applicable to the matter at hand. Indeed, the MEU does not review

²⁶ Emphasis added.

²⁷ Emphasis added.

²⁸ Section 5 of ST/AI/1998/9.

classification decision given that there is an internal process for such cases. In other words, as the Dispute Tribunal correctly found, the management evaluation of the contested decision was “not a remedy equivalent to that one provided in Section 5 of ST/AI/1998/9, which is specific for the reclassification of the posts and involves different levels and offices of the Organization”.²⁹

48. The Dispute Tribunal correctly concluded that “[w]here statutory provisions exist to provide internal remedies, it is proper that staff members should exhaust those remedies before resorting to litigation before the [Dispute] [T]ribunal”.³⁰

49. In this regard, paragraph 51 of General Assembly resolution 62/228, adopted on 22 December 2007, reaffirmed the “importance of the general principle of exhausting administrative remedies before formal proceedings are instituted”.

50. The purpose of exhausting internal administrative mechanisms is to avert formal litigation. A staff member who did not exhaust available internal remedies, cannot file an application before the Dispute Tribunal.

51. Furthermore, the UNAT has consistently held that the 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”.³¹

52. It is now well settled by Appeals Tribunal jurisprudence that ST/AI/1998/9 establishes a special procedure for challenging a decision not to reclassify a post at a higher level.³²

53. In *Edward E. Hammond*,³³ the Appellant did not follow the appeal procedure set out in Sections 5 and 6 of ST/AI/1998/9. Consequently, the Appeals Tribunal concluded that there was no final administrative decision on the matter and affirmed that the application before the UNDT was not receivable.

54. Therefore, Mr. Bernard’s contention that the UNDT erred in finding his application

²⁹ Impugned Judgment, para. 10.

³⁰ *Ibid.*, para. 9.

³¹ *Nguyen-Kropp & Postica* Judgment, *op.cit.*, para. 32.

³² *Fuentes v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-105, paras. 27-28.

³³ *Edward E. Hammond* Judgment, *op. cit.*, paras. 51-54.

premature and not receivable because he had not exhausted the remedy set out in ST/AI/1998/9 by submitting an appeal of the reclassification decision is, on the basis of the foregoing, not tenable and denied.

55. We equally disagree that by dismissing Mr. Bernard's application as premature, the Dispute Tribunal failed to afford him the chance to defend himself on the allegations on why he did not appeal under the process set forth in ST/AI/1998/9. Indeed, in the instant matter, failing to comply with the threshold issue of filing an appeal pursuant to ST/AI/1998/9 renders the UNDT application not receivable. Consequently, all his submissions and additional evidence concerning the merits of the case cannot be considered by this Tribunal.

56. Moreover, such arguments cannot be invoked since the matter was never litigated before the Dispute Tribunal. Indeed, once the threshold issue of non-receivability is successfully raised and upheld, the substantive matter can no longer be entertained on the merits of the case.

Request for compensation

57. Mr. Bernard's request to be compensated for the destroyed career progression, violation of his human rights and both psychological and mental turmoil cannot be entertained by this Tribunal in light of our decision to affirm the impugned Judgment on receivability.

Judgment

58. Mr. Bernard's appeal is dismissed, and Judgment No. UNDT/2023/014 is hereby affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2024 in New York, United States.

(Signed)

Judge Forbang, Presiding

(Signed)

Judge Gao

(Signed)

Judge Savage

Judgment published and entered into the Register on this 30th day of April 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar