



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/010/  
UNAT/1595  
Judgment No.: UNDT/2010/203  
Date: 22 November 2010  
Original: English

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**Before:** Judge Marilyn J. Kaman  
**Registry:** New York  
**Registrar:** Morten Albert Michelsen, Officer-in-Charge

O'NEILL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Clifford A. Arrey

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## Introduction

1. The matter before the UN Dispute Tribunal (“UNDT”) arises following the Applicant’s non-selection for a P-5 position as Section Chief, Peacekeeping Audit Service, Internal Audit Division (“IAD”), Office of Internal Oversight Services (“OIOS”) (Vacancy Announcement 408852). Another staff member was selected for the position, and the Applicant took the required steps of a) seeking administrative review of the decision not to select him for the post and b) submitting an appeal to the Joint Appeals Board (“JAB”).

2. Inexplicably, however, in its report no. 1942, the JAB *sua sponte* addressed as a formal issue before it the handling of a 26 June 2006 privileged and confidential letter (“Confidential Letter”) that the Applicant’s Counsel had sent to the Under-Secretary-General for OIOS (“USG”) regarding the pending JAB litigation, which Confidential Letter had been forwarded by the USG, without permission, to some OIOS staff members. The JAB refused the Applicant’s non-selection claim, but found that the Respondent owed the Applicant an apology for forwarding the Confidential Letter to staff members.

3. The Deputy Secretary-General (“DSG”) subsequently advised the Applicant of the decision to follow the recommendation of the JAB regarding affirmation of the non-selection decision, but rejected the issuance of an apology regarding the Confidential Letter, instead referring the Applicant for “any recourse” to the former UN Administrative Tribunal.

4. Following the JAB recommendation decision and the DSG’s letter, the Applicant filed an appeal with the former UN Administrative Tribunal, articulating the *only* issue on appeal before the Administrative Tribunal as being “whether the Respondent disclosed alleged confidential information .... and whether the Applicant suffered any consequential harm for which he is entitled to compensation”. Thus, the Applicant ostensibly abandoned before the Administrative Tribunal the original

grounds for his appeal before the JAB (the non-selection claim) and instead changed the basis of his appeal before the Administrative Tribunal to that of the Confidential Letter—an issue that had never been the subject of administrative review and that had not been formally preserved for appeal.

5. As to receivability of the matter pertaining to the Confidential Letter, the legal issue then may be framed as the following:

Where the JAB *sua sponte* issues a recommendation on an issue that had never been made the subject of prior administrative review and that had not been made the subject of appeal before JAB, but where the Respondent addresses the JAB's *sua sponte* recommendation in its administrative decision letter to the Applicant, is the new issue nevertheless receivable by the UNDT?

6. The present Judgment, thus, concerns both the receivability and the merits of the relief of a purported appeal against the decision to forward to certain staff members the Confidential Letter detailing the Applicant's non-selection case before the JAB.

### **The proceedings before the UNDT**

7. Per 1 January 2010, the present case was transferred from the former UN Administrative Tribunal to the Dispute Tribunal.

8. On 25 January 2010, the Tribunal forwarded the parties an acknowledgment email and informed them that the case had been assigned to Judge Adams.

9. On 25 March 2010, the Tribunal called the parties for a hearing for direction on 26 April 2010. By Order No. 92 (NY/2010) of 20 April 2010, the Tribunal informed the parties that the hearing had been cancelled and instead directed the Applicant to file and serve a jointly-signed statement outlining the legal issues and facts of the case. Since the parties were not able to agree on such statement, by Order No. 136 (NY/2010), the Tribunal (Duty Judge Ebrahim-Carstens) directed the parties

to file and serve separate statements stating the legal issues and facts, which the parties subsequently did.

10. On 29 July 2010, the Registry informed the parties that the case had been re-assigned to the sitting Tribunal due to the departure of Judge Adams from the UNDT.

11. Based on the case record before it and since the contested administrative decision regarding the Confidential Letter did not appear to have undergone administrative review, in Order No. 249 (NY/2010) of 17 September 2010, the Tribunal directed the Applicant to file and serve a written submission on receivability, the Respondent to file and serve a response to the Applicant's submission and, finally, the Applicant to file and serve his observations to the Respondent's response. The Tribunal also noted that it *ex officio* examines the question of receivability. As the Applicant did not reply within the time limit stipulated in Order No. 249, he was directed to do so in Order No. 266 (NY/2010) of 5 October 2010. The parties subsequently filed and served the mentioned submissions in which they also agreed to the Tribunal *ex officio* examining the receivability issues.

## **Facts**

12. On 17 September 2005, the Applicant applied to a vacant P-5 post of Section Chief, Peacekeeping Audit Service, IAD, OIOS. The Applicant was not selected for this position.

13. On 26 June 2006, Counsel for the Applicant forwarded a letter to the USG regarding "In the Matter of [name of the Applicant], staff member of the Internal Audit Division, P-5 Promotion Case Officer of Internal Oversight Services" (the Confidential Letter). On the top of the Confidential Letter was written, "**PRIVILEGED AND CONFIDENTIAL**" (emphasis in original). In the Confidential Letter, Counsel for the Applicant contested that the Applicant had not

been selected for some positions at the P-5 level, including 06-FIN-OIOS-408852-R-NEW YORK as “Chief of Field Section”, and outlined his positions in this regard.

14. In particular, the Confidential Letter expressed concern regarding the Applicant’s non-selection for several posts within OIOS at the P-5 level, due to alleged extraneous considerations and other procedural irregularities by OIOS management, including contended a pattern of discrimination against the Applicant and the promotion of candidates named in the Confidential Letter, who were ostensibly less-qualified than the Applicant for the posts in question.

15. By letter of 21 July 2006 to Counsel for the Applicant, the USG replied to the Applicant and, *inter alia*, stated regarding “the selection process for a P-5 [S]ection [C]hief [P]ost” that she had:

... reviewed and considered the contents of your letter and find that there is no merit to the concerns expressed ... I am satisfied that all applicable recruitment procedures have been followed and that the contention that there were “extraneous considerations and irregularities” in the selection process is without foundation.

16. In a letter of 24 July 2006 to the Secretary-General, the Applicant requested an administrative review of the decision not to select him for the Chief of Field Section post. In his request, the Applicant requested that:

... a de novo review should be taken on the administrative decision ... to promote [name of the successful candidate] against Vacancy Announcement 06-FIN-OIOS-408852-R-NEW YORK (P-5 Section Chief of the Field Section on Internal Audit Division-I, Office of Internal Oversight Services)

17. In this letter the Applicant further explained that:

I firmly believe that my rights as a staff member have been violated, and my promotion and career prospects impeded based on the fact that I was never granted an opportunity to be interviewed for this post. Against the backdrop, my Counsel submitted a privileged and confidential letter dated 26 June 2006 to [the USG] challenging the inconsistent promotion process and procedure in this pending matter. However, the USG/OIOS response ... letter to Counsel, dated 21 July

2006, does not meet, and will not pass, the standard test of time to the relevant JAB decisions and the jurisprudence of the UNAT [UN Administrative Tribunal] on such issues in the case law relating to the present matter.

18. The 24 July 2006 letter requesting administrative review makes no mention of the Confidential Letter, nor does it make any statement that the Confidential Letter was inappropriately handled by the USG. This can only be because, as the below facts recite, the USG only made its decision to release the Confidential Letter approximately three months *after* the Applicant made his request for administrative review of the non-selection decision.

19. On 24 August 2006, the Administrative Law Unit forwarded to the Applicant its administrative review decision in which the Applicant's request, in effect, was refused. The administrative review decision stated in an appended Interoffice Memorandum of 21 August 2006 from the OIOS that:

OIOS is of the view that the above recruitment [Vacancy Announcement No. 06-FIN-OIOS-408852-R-New York], which has already been implemented, was done in a fair and transparent manner in accordance with all applicable Personnel rules and regulations of the Organization. ...

20. The administrative review decision also does not make any mention of the Confidential Letter, or that it was in any manner inappropriately handled by the USG. Again, this can only be because, as the below facts recite, the USG only made its decision to release the Confidential Letter approximately two months *after* the Administrative Law Unit issued its 24 August 2006 administrative review decision.

21. In his 18 September 2006 "Request to file an Appeal Against an Administrative Decision" to the JAB, the Applicant identifies the contested administrative decision as "Administrative decision to promote [name of the successful candidate] against post 06-FIN-OIOS-408852-R-New York (P-5 Section Chief)".

22. In the Applicant's 25 September 2006 statement of appeal to the JAB, the Applicant defines the question on appeal as:

... whether the recent P-5 promotion exercise was conducted in a manner that contradicts fairness and transparency thereby making the Internal Audit Division's conclusion that the recent P-5 promotion exercise, and particularly the process in respect of Vacancy No. 06-FIN-OIOS-408852-R-New York, was conducted in accordance with all applicable rules, regulations and OHRM procedures was incorrect and abhorrent to the coveted ideals of fairness and transparency.

In addition, the Applicant stated that his applications for P-5 position were "not given full and fair consideration" and that he "was denied an opportunity to fairly compete in the recent P-5 promotion exercises".

23. On 11 October 2006, the USG sent the Confidential Letter to four named staff members with a "cc" to four other staff members, along with a cover letter. According to the Applicant, this 11 October 2006 communication to the staff members, which included a copy of the Confidential Letter, constituted prohibited release of confidential information about the Applicant who was in the midst of a JAB appeal process regarding the non-selection for the Chief of Field Section post.

24. The USG's 11 October 2006 cover letter reads, in its entirety, as follows:

Dear [names of four staff members,]

**Allegations from [the Applicant] on favouritism and improper promotions in IAD**

Some time ago I received a letter from [the Applicant's] lawyer presenting [the Applicant's] case of allegations for [sic.] favouritism and improper promotions in IAD, I responded to this letter refuting all the allegations brought forward. [The Applicant] has now submitted a formal complaint to the Joint Appeals Board.

As you are all mentioned by name in the complaint by [the Applicant] and in the interest of full transparency of this issue in the Office, I hereby submit to you for your perusal the exchange of documentation between [the Applicant's] lawyer and myself.

Best Regards,  
[USG, OIOS]

Cc: [names of four staff members]

25. In JAB report no. 1942 released on 8 November 2007, the Applicant's pleas are summarised as to include, in addition to some pleas concerning him not being selected for a position at the P-5 level, a plea regarding:

[12]e. that he be granted punitive damages for the Respondent's reprehensible conduct in forwarding confidential communications from Appellant's Counsel to colleagues in OIOS.

26. In its unanimous conclusion, the JAB dismissed the claim that the non-promotion decision(s) were unlawful, but also stated:

[46]c. that there was no legitimate rationale for the release of correspondence [i.e., also the Letter] pertaining to the present appeal to the staff members in question here.

27. As a remedy, the JAB unanimously recommended "that a written apology to Appellant by the Under-Secretary-General for OIOS be issued for non-observance of confidentiality in the present litigation".

28. In a letter of 25 January 2008, the DSG advised the Applicant about the decision to follow the recommendation of the JAB regarding affirmation of the non-selection decision, but also that:

... With respect to the release of the communication from your counsel [i.e., also the Confidential Letter], the Secretary-General has decided not to accept the JAB's recommendation that the USG for OIOS issue an apology for non-observance of confidentiality but nevertheless states that confidentiality is an important part of the appeals process and should be respected.

Pursuant to Staff Rule 111.2(p), this decision is "the final decision on the appeal". Any recourse in respect of it should be addressed to the Administrative Tribunal.

29. In the Applicant's application to the former UN Administrative Tribunal, filed on 2 May 2008, the Applicant defines the "Issues" as follows:



... The Applicant submits that the recommendation of the JAB falls far short as a remedy for the irreparable harm done both in terms of the actual damages to the Applicant as well as to punitive damages to deter further similar abuses of authority.

... The Joint Appeals Board erred in law and equity as it apparently experienced difficulty in arriving at adequate determination of the actual and consequential damages incurred ...

30. In his submission of 4 June 2010 of Counsel for the Applicant, when describing the legal issues of the case before UNDT, the only specific administrative decision that is identified is:

... the release by the Under-Secretary-General of the Office of Internal Oversight Services (USG/OIOS) of the Applicant's "privileged and confidential" correspondence dated 26 June 2006 [i.e., the Confidential Letter] which documented Applicant's grievance (selection process for the consideration for promotion) later distributed on 11 October 2006, to several of Applicant's Internal Audit Division (IAD) colleagues, (all of whom appear to have been fellow candidates in the selections) and copied to four others against the Applicant's pending litigation filed on 25 September 2006 with the JAB.

### **Applicant's submissions**

31. At the outset, the Tribunal wishes to emphasise that it is the parties' responsibility to see that submissions are properly filed and served as directed by the Tribunal's orders. The Applicant's Counsel did not do so in accordance with Order No. 249 (NY/2010). This is not acceptable and has caused delay in the determination of this case, as well as additional administrative burden for the Tribunal.

32. The Applicant's Counsel has attempted to explain the delay as being caused by technical problems; the Applicant as well claimed timely transmission of the original submissions under Order No. 249, as indicated by a receipt from the post office for an unidentified document being scanned to a PDF-format. The Tribunal is unconvinced by the explanations of Applicant's Counsel, but in the interest of justice and with reference to art. 19 of its Rule of Procedure, it will allow the submission to be included in the case file and for the matter to proceed.

33. The Tribunal notes that in addition to being late, the Applicant's submissions on receivability are unstructured, confusing and fall short of providing the Tribunal with comprehensible and useful guidance as to the legal and factual substance of the Applicant's case.

34. Below are what would appear as the Applicant's main contentions, quoted verbatim as presented to the Tribunal (irrelevant or repetitive contentions are omitted):

5. The Tribunal's account of the procedural history of the case in Order No. 249 (NY/2010) was, "inaccurate, selective, narrow and flawed" and did "not rest upon sound notions of procedural justice. It has committed errors in procedure, and erred on the question of facts, resulting in a manifestly unreasonable conclusion such as to affect the decision of the underlying case". Accordingly, "Order No. 249 is not compared with the copy of the file" and reference is instead made to the Joint Appeals Board report No. 1942, paras. 2 to 14.

6. ... the interrelated issues, for the request of administrative review in his 24 July 2006 letter to the Secretary-General is predicated on the Applicant's staff selection process to the P-5 level and the release of counsel's "privileged and confidential" letter dated 26 June 2006 by USG/OIOS, are so intertwined that it is hard to eliminate one issue without undermining the other, as they are the foundation's core in the underlying case.

...

8. Consequently, the Applicant's 24 July 2006 letter, to the Secretary-General, as a whole, is in compliance with the purpose and context of the controlling and governing instruments for an administrative review, as against, paragraphs 3, 4, 5, and 6, in Order No. 249, not compared with the copy file. Accordingly, the Administration granted leave (...) to the Applicant to proceed with an appeal against the administrative decision that is in non-compliance with the terms of his appointment/employment and constitutes breach of contract between the Applicant and the Organization.

9. The Respondent decided to remain and exercise a silent policy (...), as per, letter and attached comments, from the Administrative Law Unit dated 24 August, and the attached comments of the Internal Audit Division's Memorandum dated 21 August 2006 respectively, on the equally fundamental and relevant issue, concerning the release of

counsel's "privileged and confidential" letter dated 26 June 2006 (...), notwithstanding the fact that the Applicant has concurrently (...) raised the issues of Applicant's staff selection process to the P-5 level and the release of counsel's 'privileged and confidential' letter dated 26 June 2006.

10. Accordingly, Applicant's request for administrative review, to wit, "administrative decision" within the meaning of the Statute was made on behalf of the Secretary-General within former Staff Regulation 11.1 (ST/SGB/2001/8), was made in substance by the Administrative Law Unit, to wit, exercising 'decision-making power'. It follows that there is an administrative decision on the issues raised in the Applicant's 24 July 2006 letter to the Secretary-General (...). Moreover, experience dictates that in the previous system of justice where the administration had been known not to respond and to wait for time limits to expire even when a staff member had notified it of an impending appeal, and then to rely on this as a bar to an appeal. The application of such a narrow test in Order No. 249 (NY/2010) often resulted in injustice and incongruity, as in cases where the administration failed to respond whilst time ran out.

...

14. It is reasonably evident that Order No. 249, paragraph 13, not compared with copy file, erred not to include and make reference to the vital fact of the administrative decision by the Administration which by letter dated 25 January 2008, signed by the Deputy Secretary-General, the Respondent (...), to the Applicant refused to implement the purport written apology as per the unanimous recommendation by the JAB. An issue of contention by the Applicant's appeal to UNAT/UNDT, as well as, the issue of the staff selection process to the P-5 level.

...

20. ... Applicant is of the view that the administrative decision on his promotion exercises to the P-5 level, submitted to the JAB and subsequently reported in JAB report No. 1942, are the basis of his appeal to the UNAT [former UN Administrative Tribunal]. The UNDT Order 249 makes inaccurate conclusions in asserting that the release of the USG's letter remains an issue requiring administrative review, is the basis of Applicant's UNAT/UNDT appeal, and is not receivable. On the contrary, a full reading of the Applicant's UNAT submission will show that this incident has severely harmed his employment/appointment and contractual status. As remedy the JAB unanimously recommended that the USG apologize to the Applicant

but this was never implemented on the advice and consent of the Secretary-General (...). As a result, this issue is intertwined with the staff selection process to the P-5 level contested decisions appealed to the UNAT/UNDT.

35. In his submission of 7 October 2010, the Applicant claims that by virtue of the 24 July 2006 letter he also requested an administrative review “on the release by the [USG] of counsel’s ‘privileged and confidential’ letter dated 26 June 2006 [the Confidential Letter]”.

### **Respondent’s submissions**

36. In essence, the Respondent contends that the Tribunal’s account of the procedural history in Order No. 249 (NY/2010) was correct and submits that the appeal is not receivable for the following reasons:

a. The Applicant never submitted an administrative review regarding the decision of the USG to disclose the Letter, and the Applicant’s appeal is therefore not receivable.

b. There was no “silent policy” not to respond to his request for administrative review, as claimed by the Applicant.

c. The non-selection decision and the disclosure decisions were not inseparable, since the events surrounding the Confidential Letter arose after and separately from the Applicant’s non-selection, and the two different administrative decisions were based on different facts.

d. The Applicant is estopped from now appealing the JAB decision in its entirety and adding new claims to his appeal—more than three years have passed after his receipt of the contested decision and he is barred from jurisdiction under art. 8.4 of the UNDT Statute.

e. The Applicant is not permitted to request a generalised review of the JAB findings under the Statutes of both the Dispute Tribunal and the former

Administrative Tribunal and the Applicant must identify a specific contested decision.

f. The Applicant limited his “Application” to an appeal against the remedy recommended by the JAB in relation to the USG disclosure of the Confidential Letter.

### **Considerations**

#### *The Tribunal’s ex officio duty to examine receivability issues*

37. In General Assembly resolution of 17 March 2009, A/RES/63/253 (Administration of justice at the United Nations), pursuant to which the UNDT was constituted and its Statute adopted, the powers of the Tribunal are limited to those provided for in the Statute, as stated in its preamble that the General Assembly:

28. *Affirms* that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes.

38. Article 8 of the UNDT Statute lists a number of cumulative requirements that must be satisfied for an appeal to be receivable:

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

...

(c) An Applicant has previously submitted the contested administrative decision for management evaluation, where required;

...

39. In accordance with art. 2 of the Statute, if an appeal has not undergone a “management evaluation”—or an “administrative review” as it was referred to under the former internal system of internal justice (see below)—the appeal is irreceivable and the Tribunal cannot adjudicate the matter. Thus, the Tribunal is required to

examine ex officio whether an appeal is receivable, so that the Tribunal does not improperly act outside the authority given to it by the General Assembly. This principle has been affirmed in *Ibewke* UNDT/2010/159, which held that "... the Tribunal may only examine the conformity of the decisions that form the subject-matter of a request for review submitted to the Secretary-General ...". The Tribunal also notes that under art. 2.6 of its Statute, "In the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Dispute Tribunal shall decide on the matter".

*Receivability of the contested administrative decision identified by the Applicant: non-selection for P-5 post*

40. Neither in his application to the former UN Administrative Tribunal, nor in his submissions to this Tribunal, has the Applicant identified the appealed decision as being the one not to select him for the P-5 post of Section Chief, Peacekeeping Audit Service, IAD, OIOS (which was included in his 24 July 2006 request for administrative review and included in his 25 September 2006 appeal to the JAB). Thus, the Applicant is time-barred from appealing this non-selection decision now.

*Receivability of the sua sponte JAB recommendation regarding the Confidential Letter*

41. Pursuant to art. 2.1(a) of its Statute, the Dispute Tribunal is competent to adjudicate "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

42. As appears from the facts outlined above, the only decision purportedly before this Tribunal is that concerning the USG's distribution of the Confidential Letter to some other OIOS staff members by her cover letter of 11 October 2006 (and attachments thereto).

43. A mandatory first step in any appeal process before the Dispute Tribunal is that the Applicant has requested either an administrative review or a management evaluation of the contested administrative decision, depending on when the decision

was taken. In the present case, a request for an administrative review was required, which follows from former staff rule 111.2(a) stating that:

A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 *shall*, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing. [Emphasis added.]

44. That a request for administrative review is mandatory has consistently been reaffirmed by the Dispute Tribunal. Based on this well-established principle, in *Crichlow* UNDT/2009/028, the Tribunal narrowed the scope of the Applicant's appeal. In *Parmar* UNDT/2010/006 it was stated that “[r]equests for administrative review and management evaluation are mandatory first steps in the appeal process (*Crichlow*, UNDT/2009/028)”. In *Ibewke*, the Tribunal declared that “the appeal [was] not admissible” regarding the issues raised by the Applicant that had not undergone administrative review. In line herewith, the UN Appeals Tribunal in *Syed* 2010-UNAT-061 “affirmed the UNDT’s judgment in all aspects”, including that “[t]he UNDT declined to review [the claims raised by the Applicant] on the grounds that they had not been included in his request for administrative review”.

45. The rationale behind the requirement of administrative review (or management evaluation) was enunciated by the Tribunal in *Caldarone* UNDT/2009/035 at para. 8.7, a ruling regarding an application for suspension of action, but its reasoning is nevertheless valid:

Article 13(1) of the Rules of Procedure read together with Article 2.2 of the Statute of the Tribunal clearly state that an application may be filed for suspension of action of a disputed administrative decision that is the subject of an ongoing management evaluation. Staff Rule 111.2(a) required a staff member to first request a review of the contested decision. These provisions must be interpreted in such a way as to give effect to the underlying philosophy embodied in them. The Tribunal takes the view that the underlying philosophy of these provisions is to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff

member the opportunity to request a suspension of the impugned decision pending an evaluation by management. The provisions cannot be interpreted to mean that management evaluation is optional. It is not.

46. The quoted passage from *Caldarone* is also quoted verbatim in *Nwuke* UNDT/2009/054.

47. The Tribunal in *Planas* UNDT/2009/070 (para. 14), while also referring to *Nwuke* and *Caldarone*, further specified that:

However, in terms of receivability of an application before the Tribunal it is not sufficient merely to initiate the management evaluation procedure. Applicants have to await, in general, the outcome of this administrative review before they may submit an application to the Tribunal. Only when no response to a request for management evaluation is provided within the time limits of article 8.1 (d) (i) (b), a direct application to the Tribunal is receivable. A “response” in that sense is characterized by a decision from the Management Evaluation Unit which obviously has not yet been taken.

48. The Tribunal has also required the Applicant to clearly identify the administrative decision which she/he appeals, otherwise her/his application is not receivable. The Tribunal in *Planas* UNDT/2009/086 (affirmed by the UN Appeals Tribunal in 2010-UNAT-049) at para. 17 [note this is a different judgment than the *Planas* judgment quoted above] stated that:

In this regard, the Tribunal recalls the long-standing jurisprudence of the UNAT [the former Administrative Tribunal] which states that: ‘It is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one’s interest is predicated upon the condition that the impugned decision is stated in precise terms’ (Judgement No. 1329 (2007)).

49. From the recitation of facts in this case above, it is clear that the release of the Confidential Letter has never undergone any administrative review. This conclusion not only follows from the actual contents of the 24 July 2006 request for administrative review of the non-selection decision (the Confidential Letter was not mentioned in any respect), but also—and more significantly—from the fact that the



Confidential Letter was only released on 11 October 2006, while the request for administrative review itself was dated 24 July 2006 (approximately three months earlier).

50. It is impossible to incorporate the USG's subsequent decision to release the Confidential Letter into the Applicant's 24 July 2006 request for administrative review of the P-5 non-selection decision. In other words, the 11 October 2006 decision to release the Confidential Letter cannot be subsumed within the language of the Applicant's request for administrative review regarding non-selection. As outlined in the procedural history above, the issue of the USG releasing this Confidential Letter is not mentioned at all, until it was referred to in the JAB report of 8 September 2007.

51. Thus, the Applicant's application is not receivable under art. 8.1(a) of the Statute.

*Do the facts in this case merit a broader interpretation?*

52. In the DSG's 25 January 2006 letter (following the JAB's recommendations), the DSG specifically notes that the Secretary-General decided not to adopt the JAB recommendation of issuing an apology for disclosure of the Confidential Letter, and the Applicant is specifically told that "*any* recourse" (emphasis added) in respect of the decision (regarding the DSG's rejection of the apology) should be addressed to the Administrative Tribunal.

53. In this regard, it could be argued that the DSG's statement—that "*any* recourse" should be directed to the Administrative Tribunal—constitutes an acceptance by the Respondent of the JAB *sua sponte* decision and a waiver of the requirement of administrative review. While the Applicant has not made this contention, since the Tribunal has *ex officio* examined the receivability of the appeal, it will also examine this aspect of the case.

54. The Applicant might have argued that the DSG's reference to "any recourse" not only covers the narrow issue of the apology, but all circumstances and possible remedies arising out of the need for an apology (e.g., monetary compensation for the alleged breach of confidentiality). By rejecting the issuance of an apology, then by implication, the Respondent therefore also rejected any contention that releasing the Confidential Letter was improper

55. The Applicant might also have argued that by using the "any recourse" language, the Respondent, in effect, granted the Applicant an exception from the administrative review prerequisite pursuant to former staff rule 112.2(b) which states that:

... Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

56. The Tribunal finds that such a broad interpretation cannot be made, for a number of reasons. First, the decision to distribute the Confidential Letter stands on its own. That is, it would need to be determined whether the Confidential Letter is indeed a privileged and confidential communication and, if so, was it improper for the USG to forward the Confidential Letter to the staff members named in her cover letter of 11 November 2006. Neither of the parties, nor has the JAB, addressed these issues at any time during the proceedings in the present case. Second, the assessment of these issues surrounding the Confidential Letter bears nothing in common with whether the Applicant should have been selected for the P-5 post or whether an apology was an appropriate remedy for the release of the Confidential Letter. Third, nothing in the DSG's letter indicates that the Respondent had ever considered making an exception under former staff rule 112.2(b); this contention would therefore be purely speculative.

*Even if the release of the Confidential Letter is subsumed within the DSG's 25 January 2008 letter, is an appeal regarding the Confidential Letter nevertheless time-barred?*

57. The Applicant might have argued that he was misled by the Respondent's reference to "any recourse" in her 25 January 2008 letter and, as a result, the Applicant filed his case with the Administrative Tribunal, rather than requesting administrative review.

58. The Applicant might also have argued that the Respondent was clearly mistaken in not addressing the obvious receivability issue in her 25 January 2008 letter and that the Applicant should not be punished by the DGS's errors.

59. Nevertheless, the question remains: would any of these shortcomings of the Respondent actually have made a difference in the Applicant's case?

60. Under former staff rule 111.2(a), the Applicant in any event would have been required to submit his request for administrative review no later than two months after being notified in writing of the USG's release of the Confidential Letter. No information exists in the case record about when this occurred, but it must have been before the release of JAB report no. 1942 on 8 November 2007, in which explicit reference is made to the Applicant's appeal against the decision to release the Confidential Letter. At least, it could be argued, the Applicant was notified in writing by the receipt of the JAB report. The latest possible deadline for the Applicant to request an administrative review, therefore, would have been 8 January 2008.

61. It follows from the above that the Applicant was required to submit a request for administrative review by 8 January 2008, but this was never done. Thus, even if the "any recourse" language in the DSG's 25 January 2008 letter is interpreted as a waiver from the requirement of administrative review, and even if the Applicant was misled by the DSG's letter and was caused to present his case to the Administrative Tribunal, and even if the DSG's reasoning was deemed faulty, the Applicant's request for administrative review nevertheless would already have been time-barred by the time the DSG's letter was issued on 25 January 2008. In short, any defects

regarding receivability cannot be made attributable to the DSG's 25 January 2008 letter.

*Even if the Applicant's case were to be found to be receivable, what compensation, if any, would be owing for release of the Confidential Letter?*

62. Even if the Applicant's appeal were considered to be receivable, he has not substantiated the harm he has suffered from the distribution of the Confidential Letter—a mere reference to harm to career and reputation is not sufficient. In this regard, the UN Appeals Tribunal has pronounced that, “This court will not approve the award of compensation when no harm has been suffered” (see synopsis to *Sina* 2010-UNAT-094). No matter how the receivability issue is determined, the Tribunal finds no basis for awarding the Applicant any monetary damages.

63. As for the apology, the Tribunal would not be authorised to take action against the Respondent for not issuing it. Although the Tribunal may order specific performance to a contested decision under art. 10.5 of the Statute, this provision does not include specific performance of a JAB recommendation, which is advisory only and does not constitute a contestable administrative decision under the Statute. By nature, a recommendation is not binding and the JAB is merely an internal advisory body to the Administration which is established by the Secretary-General. See former staff rule 111.1, which derives from staff regulation 10.1:

The Secretary-General shall establish administrative machinery with staff participation *to advise* him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules. [Emphasis added.]

64. The Tribunal notes that its findings above regarding an apology are *not* to be interpreted as the Tribunal either approving or rejecting that the Tribunal is authorised to issue an apology as an appropriate remedy under its Statute.

**Conclusion**

65. The Applicant's appeal is dismissed as not receivable.

*(Signed)*

Judge Marilyn J. Kaman

Dated this 22<sup>nd</sup> day of November 2010

Entered in the Register on this 22<sup>nd</sup> day of November 2010

*(Signed)*

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry