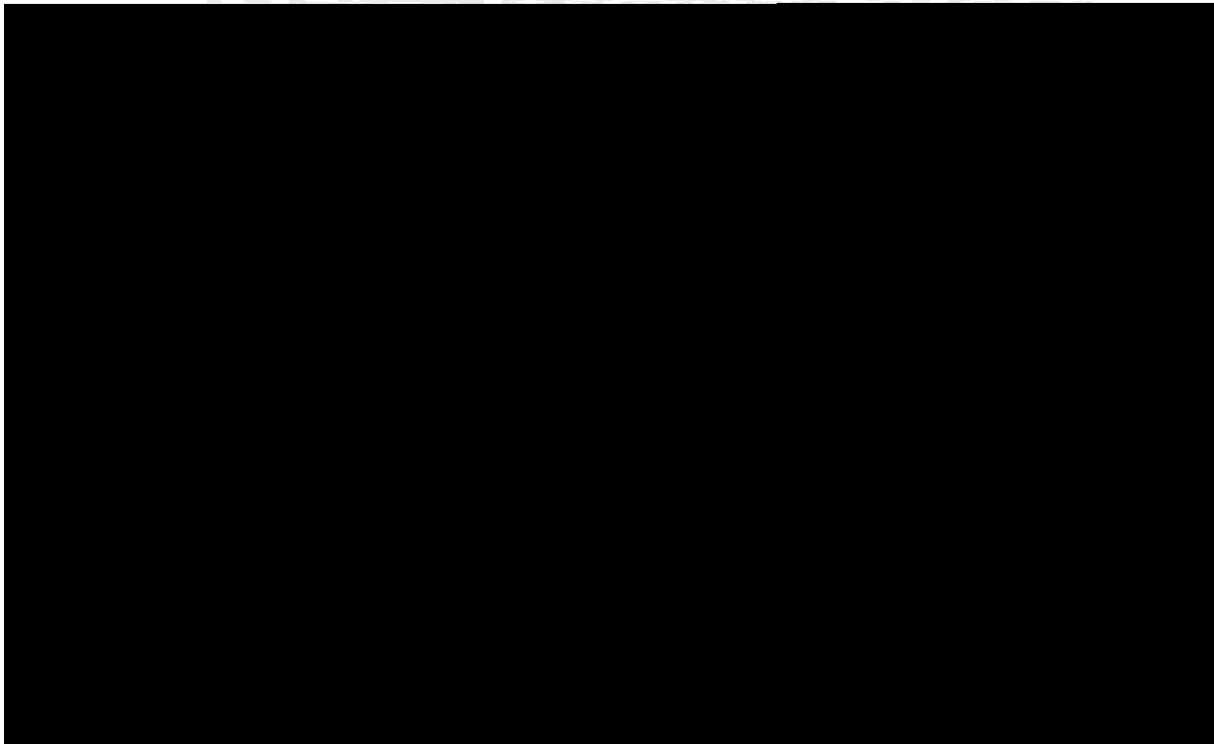




UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-657



Counsel for Mr. Faye: Self-represented

Counsel for Secretary-General: Carla Hoe

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment on Receivability, No. UNDT/2015/076, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 2 September 2015, in the case of *Faye v. Secretary-General of the United Nations*. Mr. Ibrahima Faye filed his appeal on 29 October 2015, and the Secretary-General filed a timely answer on 4 January 2016.

Facts and Procedure

2. The Dispute Tribunal made the following factual findings, which are undisputed:¹

... The Applicant is a Benefits Assistant at the GS-5 level at the United Nations Joint Staff Pension Fund (“UNJSPF”) and a staff representative. He contests what he describes as the “implementation” of job opening number 14-ADM-UNJSPF-33681-R-New York (R) (“the JO”) for the P-5 post of Chief of Section, Client Services, Records Management and Distribution Section, UNJSFP (“the Post”).

... The Applicant submits that it is unlawful for the UNJSPF to waive the requirement in the United Nations staff selection system that staff members must have two lateral moves in the Professional category before they are eligible to be considered for promotion to the P-5 level. He submits that he should have been consulted about the waiver of the policy in his capacity as a staff representative. The Respondent submits that the application is not receivable *ratione personae* (because the Applicant lacks legal standing), *ratione materiae* (because the contested decision does not fall within the Tribunal’s jurisdiction) and *ratione temporis* (because the request for management evaluation was not submitted within the applicable time limit).

Relevant background

... Section 6.3 of ST/AI/2010/3 (Staff selection system) provides:

Staff members in the Professional category shall have at least two prior lateral moves, which may take place at any level in that category, before being eligible to be considered for promotion to the P-5 level ...

... The JO was published on 16 April 2014 with a closing date of 15 June 2014. It included the following statement under the heading “Special Notice”:

¹ Impugned Judgment, paras. 1-9, 11-16.

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Case management

... By Order No. 153 (NY/2015), dated 20 July 2015, the parties were ordered to attend a case management discussion (“CMD”) to discuss the factual and legal issues arising in Cases No. UNDT/NY/2014/087 and UNDT/NY/2015/033^[2] and to give any

because, as a staff member at the GS-5 level, he was not eligible to apply for a post at the Professional P-5 level, in accordance with Section 6.1 of ST/AI/2010/3 and Staff Rule 4.16(b)(ii).

4. In reaching its decision, the Dispute Tribunal also rejected Mr. Faye's attempt to frame his case as challenging a breach of his rights as an individual staff member. Mr. Faye had submitted that, under Article 2(1)(a) of the UNDT Statute, he has legal standing as an individual staff member to challenge the breach of his contractual rights under Staff Regulations 8.1 and 8.2 on the grounds that they form part of his terms of appointment and contract of employment. The UNDT noted that Mr. Faye did not claim that he had "a right to be consulted as an individual staff member, but rather, [had a right] in his capacity as a staff representative".⁴ In rejecting Mr. Faye's argument, the Dispute Tribunal noted that, first, it did not have jurisdiction under its Statute to consider applications filed by or on behalf of the Organization's staff unions; and, second, that it had previously held that non-compliance with a duty to maintain consultations with staff representatives is only reviewable in the context of assessing the legality of an administrative decision affecting the rights of an individual staff member. The UNDT considered that Mr. Faye was "acting in his capacity as a staff representative to enforce his rights as a staff representative, and the rights of staff associations in general, to be consulted about human resource policies".⁵ Because Mr. Faye "[was] not identified as an individual staff member whose rights were affected by the contested decision",⁶ the UNDT had no jurisdiction to consider his claim.

5. Having found the application not receivable *ratione personae*, the Dispute Tribunal

costs against him pursuant to Article 10(6) of the UNDT's Statute; (b) it had found nothing in Mr. Faye's additional submissions to persuade it that there was any merit to his application; and, (c) that a challenge before the Dispute Tribunal was wholly inappropriate where it was clear that the Dispute Tribunal did not have the power to grant the relief sought. In assessing the costs, the Dispute Tribunal took into account the fact that Mr. Faye was self-represented and acted in his capacity as a staff representative.

Mr. Faye's Appeal

7. On 19 January 2015, The Dispute Tribunal issued Order No. 10 (NY/2015), in which it denied the Secretary-General's request to reply only on the receivability of the case, and ordered the Secretary-General to submit a reply on all relevant issues of the case, including the merits. Mr. Faye submits that Order No. 10 (NY/2015) created a legitimate expectation that the Judgment would therefore address all relevant issues of his claim. As the impugned Judgment did not properly rule on the case or give consideration to the merits, there is reasonable ground for him to appeal as it violates the principles of natural justice. The Dispute Tribunal erred both on procedural grounds and on questions of fact, resulting in an incoherent Judgment. It also failed to address the legitimate expectation that the merits of Mr. Faye's case would be fully addressed.

8. The Dispute Tribunal ordered Mr. Faye to respond to the issues raised by the Secretary-General in his reply and to provide a persuasive argument as it related to the UNDT's jurisdiction, which he did. Mr. Faye submits these arguments again in detail in his appeal to the Appeals Tribunal, as well as his explanation as to why he has the right to be consulted on policy changes. Mr. Faye submits that the Dispute Tribunal did have jurisdiction to consider the merits of his claim but failed to exercise its jurisdiction by only ruling on the question of receivability.

9. Mr. Faye submits that (a) the "prima facie deviation from established and promulgated

14. The Dispute Tribunal used the CMD as a vehicle to issue warnings, to threaten and pressure him to withdraw his claim or face an order of costs against him should he fail to win his case. This could be seen as an abuse of authority by the Dispute Tribunal and turns the UNDT into a “monopoly gamble”, which the parties must win or risk an order of costs if they are unable to present an effective application or challenge; this is contradictory to the spirit of the United Nations internal justice system. Mr. Faye submits that he was punished and chastised with severity by the Dispute Tribunal when costs were awarded against him and that there needs to be justification on how his application lacked in merits before any costs can be ordered. Mr. Faye submitted his claim out of frustration and as a last resort to seek relief, justice and a determination on the merits, not to end up exiting the formal justice system infuriated by the court and having to bear orders of costs for failing to win his case.

15. Mr. Faye requests that the Appeals Tribunal vacate the order of costs against him in the amount of USD 500 and to make a ruling on the merits of his Application, as he is not satisfied with the Dispute Tribunal’s Judgment on Receivability.

The Secretary-General’s Answer

16. The Dispute Tribunal correctly concluded that Mr. Faye’s application was not receivable based on its finding that Mr. Faye was not an individual staff member whose rights were affected by the contested decision. The Dispute Tribunal correctly found that Mr. Faye had challenged the application of a policy that had no direct legal consequences affecting him, because he was not eligible to apply for the Post. It was also correct in finding that he was acting in his capacity as a staff representative to enforce his rights as a staff representative, and the rights of staff associations in general, to be consulted about human resources policies.

17. An alleged deviation in the procedures of the staff selection system, set out in ST/AI/2010/3, did not create a procedural right for Mr. Faye to contest it before the Dispute Tribunal. The policy Mr. Faye contested is reflected in the JO for a position for which he is ineligible to be considered, insofar as he serves at the GS-5 level. According to Section 6.1 of ST/AI/2010/3, “[s]taff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade”. Mr. Faye’s rights and terms of appointment or contract of employment, thus, were not affected.

18. Mr. Faye's terms of appointment and contract of employment are based on his position as a Benefits Assistant at the UNJSPF, and not on his capacity as a staff representative. The right to challenge an administrative decision is an individual right and there is no right to do so as an "interested party" or as a representative of a st

22. The Secretary-General respectfully requests that the Appeals Tribunal affirm the impugned Judgment and dismiss the appeal in its entirety.

Considerations

23. Mr. Faye, a Benefits Assistant at the GS-5 level, brought an application before the UNDT contesting the “implementation” of a job opening for a P-5 post of Chief of Section, which he claimed contained an unlawful waiver of the requirement that staff members must have two lateral moves in the Professional category before they are eligible to be considered for promotion to the P-5 level. He complained that he should have been consulted about the waiver in his capacity as a staff representative.

24. The UNDT dismissed Mr. Faye’s application on the grounds that it was not receivable. The UNDT found that he had no legal standing to challenge a policy which had no direct legal consequences affecting him as he is not eligible to apply for the post. Accordingly, he had no stake in the administrative decision and his rights and terms of employment were not affected. The UNDT considered that Mr. Faye was “acting in his capacity as a staff representative to enforce his rights as a staff representative, and the rights of staff associations in general, to be consulted about human resources policies” and was “not identified as an individual staff member whose rights were affected by the contested decision”.⁸

25. Mr. Faye’s appeal challenges the UNDT decision on the following grounds: The UNDT, “without properly ruling and giving due consideration to the merits of the case, create[d] reasonable ground to appeal the UNDT judgement as being violative of the principle of Natural Justice. ... [The] UNDT [also] failed to address the legitimate expectation of [Mr. Faye] that the merits of his application would be fully addressed in adjudicating the case”.

26. Mr. Faye claims that his application is receivable “on the grounds that the Respondent breach (sic) guarantees of due process which the United Nations is legally bound to provide given that the rights for consultation [are] connected to [his] terms of appointment and contract of employment which includes all pertinent staff regulations, staff rules and administrative instructions in force”.

⁸ *Ibid.*, para. 24.

27. He alleges that the UNDT erred in finding that he “[did] not claim that he ha[d] a right to be consulted as an individual staff member”. He did not claim that he was filing his application on behalf of the Staff Unions or Associations, and “as such [the] UNDT manifestly decided to unjustly catalogue [his] status and route his judgment selectively”.

28. Mr. Faye claims the following relief from the Appeals Tribunal:

1. The Appellant requests the Appeals Tribunal to vacate the order for costs against him in the amount of US[D] 500 under [A]rt[icle] 10.06 which he views as an abusive use of [A]rt[icle] 10.6 by the UNDT.
2. The Appellant is not satisfied with the UNDT Judgement on Receivability which resulted in UNDT not considering the merits of his case and requests a ruling on the merits.

Mr. Faye, as a staff member, lacked standing

29. The UNDT made no error in finding that “[a]s a General Service staff member at the G-5 level, [Mr. Faye] was not eligible to apply for the vacancy advertised in the JO, which was a post in the Professional category at the P-5 level”⁹ and, therefore, the disputed decision had no legal consequences affecting him and no effect on his rights and terms of employment.

30. As held by this Tribunal in *Lee*,¹⁰ 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. That is to say, the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

31. The disputed decision in question was therefore not an administrative decision susceptible to challenge.

⁹ *Ibid.*, para. 20.

¹⁰ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, paras. 48 & 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.

Mr. Faye, as a staff representative, lacked standing

32.

38. Mr. Faye's alleged right to be consulted relates to his capacity as a staff representative and not to his terms of appointment and contract of employment as a Benefits Assistant at the UNJSPF. As such, the Dispute Tribunal was correct in holding that it did not have jurisdiction to hear and pass judgment on his application.

39. We find that Mr. Faye has not demonstrated any error of law or fact committed by the UNDT in arriving at its Judgment that his application was not receivable.

40. Furthermore, the UNDT was correct in holding that, having found Mr. Faye's application to be not receivable, it was not necessary to consider the merits. In fact, it did not have jurisdiction to do so.

Costs

41. Pursuant to Article 10(6) of its Statute, the UNDT may award costs against a party where it determines that the party has manifestly abused the proceedings before it.

The UNDT noted that:¹¹

[It had] provided guidance to [Mr. Faye] at the CMD [Case Management Discussion] on 22 July 2015 and by Order No. 159 (NY/2015), issued on the same day. The [Dispute] Tribunal also issued a clear warning that he risked facing an order for costs under Article 10(6) of the [UNDT's] Statute if he was unable to present an effective challenge to the legal conditions set out in the Respondent's reply. There is nothing in [his] additional submissions ... to persuade the [Dispute] Tribunal that there is any merit in his application.

42. For those reasons, the UNDT found that Mr. Faye "has manifestly abused the proceedings by his persistence in advancing a legally unsustainable contention, despite guidance offered at the CMD on the applicable legal principles settled by [the Appeals Tribunal]".¹²

43. The UNDT consequently ordered costs of USD 500 against Mr. Faye.

¹¹ Impugned Judgment, para. 29.

¹² *Ibid.*, para. 30.

44. In appealing the order for costs, Mr. Faye argues that “[t]he use of Case Management Discussions as a vehicle for [the] UNDT to issuing (sic) warnings, threatening pressure for the Appellant to withdraw his case and have an ‘honourable exit’ or face an order for costs ... is inappropriate ... and could be seen as an abuse of authority”.

45. We find merit in Mr. Faye’s arguments. It is obvious from his pleadings that he was under the impression that he could present an effective challenge. The cases of *Campos*¹³ and *Pellet*¹⁴ were considered in the UNDT Judgment. *Campos* was correctly distinguished by the UNDT and *Pellet* did not concern staff representatives. So there was certainly no jurisprudence directly on the point.

46. In the circumstances, Mr. Faye was entitled to his day in court and to have his cause adjudicated. In our view, he did not manifestly abuse the proceedings merely by proceeding with his application.

47. We therefore find that the UNDT’s order for costs was not justified and must be set aside.

Judgment

48. The Judgment No. UNDT/2015/076 finding Mr. Faye’s application not receivable is affirmed. However, the appeal is allowed in part to the extent that the UNDT’s order for costs against Mr. Faye is vacated.

¹³ *Campos v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-001.

¹⁴ *Pellet v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-073.

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