

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.

Yvonne Bernard (Mr. Bernard), a staff member of the United Nations Environment Programme (UNEP), contested the outcome of the 2010 reclassification process of (Decision).

No. UNDT/2023/014 (impugned Judgment),
at 10.

on was

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

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 receiva76 0 Td m11 (e)-3.1 (r)10.8 3l i13.3 (ts)11.

Secretary-

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 litigation, 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 was not receivable. The Tribunal found that the request was not receivable because it was filed after the deadline for filing appeals against reclassification decisions. The Tribunal also found that the request was not receivable because it was not supported by sufficient evidence. The Tribunal therefore dismissed the request and affirmed the reclassification decision.

The decision of the classification level of a post *maybe* 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

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

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