



UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

---

Judgment No. 2015-UNAT-506

Nwuke

(Respondent/Appellant on Cross-Appeal)

v.

Secretary-General of the United Nations  
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

---

Before:	Judge Sophia Adinyira, Presiding Judge Inés Weinberg de Roca Judge Deborah Thomas-Felix
Case No.:	2014-576
Date:	26 February 2015
Registrar:	Weicheng Lin

---

Counsel for Mr. Nwuke:	Self-represented
Counsel for Secretary-General:	Phyllis Hwang/Zarqaa Chohan



5. On 27 May 2011, the ES announced to all staff that the Director, OPM, was retiring at the end of the month having attained the statutory retirement age and that he had decided to appoint Mr. A-M, at that time the Director, Regional Integration and Infrastructure and Trade Division (RIITD), to the post of Director, OPM, with effect from 1 June 2011.
  
6. On 30 May 2011, Mr. Nwuke requested management evaluation of, inter alia, the ES' decision to laterally transfer the Director of RI

Instruction ST/AI/2003/8.<sup>5</sup> Further, as the Administration failed to give any adequate reasons to justify the use of a lateral transfer in this case, the Dispute Tribunal found the transfer constituted an arbitrary use of the discretion conferred by Administrative Instruction ST/AI/2010/3.<sup>6</sup> The Dispute Tribunal also rejected the Secretary-General's submission that there was no evidence indicating that the lateral move decision was intended to block Mr. Nwuke from applying to the post, and found that "there is no evidence that it was not intended".<sup>7</sup> The Dispute Tribunal also noted that an adverse inference may be drawn from the Secretary-General's failure to contradict or refute Mr. Nwuke's allegation of improper motives.<sup>8</sup>

12. The Dispute Tribunal declined to order rescission of the July 2011 decision in view of the wide-ranging practical effects such an order would have. Furthermore, relying on Mr. Nwuke's own acknowledgment that "he had no expectation of being appointed", it also decided there should be no order for compensation as Mr. Nwuke had not suffered any monetary or professional harm entitling him to compensation for the loss of the chance of being appointed to the position.

15. The UNDT also erred in concluding that the lateral move was motivated by a retaliatory intent or improper motivation on the part of the ES as the UNDT had failed to make any finding that Mr. Nwuke had proven that the ES had been motivated by an improper motive. Furthermore, two other UNDT judgments had concluded that there was insufficient evidence that the challenged acts showed that the ES subjected Mr. Nwuke to retaliation.<sup>10</sup> Accordingly, there was no basis for the same UNDT judge to conclude that a preponderance of the evidence established that the ES had subjected Mr. Nwuke to retaliation in the present case.

16. The UNDT also erred in drawing an adverse inference against the Secretary-General for failing to refute Mr. Nwuke's allegation of improper motivation given the Secretary-General refuted the allegation in his reply and offered a reasonable explanation for the decision to fill the post through a lateral transfer. Lastly, in so finding, the UNDT seemingly misplaced the burden of disproving improper motives upon the Secretary-General rather than upon Mr. Nwuke, the staff member contesting the decision.

17. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety.

Mr. Nwuke's Answer

staff member, in emergencies, or in disciplinary measures resulting in the immediate suspension or dismissal of the incumbent staff member. In any event, he submits that the UNDT's statement on this matter did not constitute a finding.

21. The requirement that all anticipated job vacancies be advertised seeks to restrict the use of lateral moves to fill an anticipated vacancy, such that once a position is advertised ST/AI/2010/3 is applicable. The laws of the Organization, such as ST/AI/2010/3, establish that every staff member has a right to apply to a vacancy, and such right is imperilled if the administration can arbitrarily use lateral moves to fill anticipated vacancies.

22. Mr. Nwuke further contends that the UNDT did not err when it concluded that the lateral move was motivated by a retaliatory intention, insofar as the UNDT had already previously concluded that the same decision was arbitrary and unlawful, independently of the allegations of retaliation and discrimination.

23. The Secretary-General also failed to prove that the UNDT actually drew an adverse inference or that the adverse inference constituted the main basis for the Judgment against him or would have been different were it not for that.

24. Mr. Nwuke requests that the Appeals Tribunal affirm the Judgment in its entirety. <sup>11</sup>

#### Mr. Nwuke's Cross-Appeal

25. Mr. Nwuke contends that the UNDT erred in stating that he "did not expect to be promoted". He clarified that he did not expect to be promoted because of the continuing discrimination, victimization and abuse of authority exercised towards him by the ES. The UNDT recognised as much in finding at paragraph 73 that the "ES's decision to fill the OPM post, for which the Applicant was an obvious and inevitable candidate, by a lateral move was tainted by the improper motive of denying the Applicant his right opportunity to apply for the vacancy [...]".

26. The UNDT also erred by not awarding him monetary compensation on the basis that he had not explicitly sought compensation. By his request to be "made whole as the circumstances determine" he intended to request the Dispute Tribunal "to pay or award damages sufficient to

---

<sup>11</sup> Although the UNDT did not award any compensation, Mr. Nwuke also requests that this Tribunal affirm the UNDT's award of compensation and determine that "one month net base salary is an inadequate remedy for the abridgement of [his] rights and for the emotional and moral distress". Answer, para. 5.

put the party who was damaged back into the posi

Considerations

Preliminary Matters

31. Mr. Nwuke requests this Tribunal not to admit the additional documents which the Secretary-General submitted in support of his appeal as they were not available to the UNDT during the hearings. Pursuant to Article 2(5) of the Appeals Tribunal Statute and Article 10(1) of the Appeals Tribunal Rules of Procedure, this Tribunal may receive additional evidence in “exceptional circumstances” and where it determines that “the facts are likely to be established with such additional documentary evidence”. In the present case, we are not so satisfied as to either criterion. Consequently, Mr. Nwuke’s request is granted and the additional documents annexed to the Secretary-General’s appeal brief are rejected.

The Secretary-General’s Appeal

32. The crux of the Secretary-General’s appeal is that:

- a) the UNDT erred in relying on Administrative Instruction ST/AI/2003/8 regarding vacancies arising from retirement; and
- b) the UNDT erred in concluding that the lateral move was motivated by retaliatory intent on the part of the ES.

Whether the UNDT erred in relying on ST/AI/2003/8 regarding vacancies arising from retirement

33. Section 3.2 of ST/AI/2003/8 requires that: <sup>13</sup>

Heads of departments and offices shall regularly monitor all vacancies that are foreseen to occur in their department or office, normally as a result of staff reaching mandatory age of separation, and shall take all necessary steps to ensure that such vacancies are advertised in accordance with the requirements of section 4 of administrative instruction ST/AI/2006/3 ( currently ST/AI/2010/3 of 21 April 2010 ) [sic], at least six months before the anticipated vacancy occurs. No extension shall be granted if that requirement is not met.

---

<sup>13</sup> Section 3.2 of ST/AI/2003 /8 (original emphasis).



34. The post of Director of OPM became vacant by reason of the retirement of the incumbent. The UNDT held that, in the circumstances, the procedure to fill the post should have been governed by Section 3.2 of ST/AI/2003/8 cited above, and that the procedures for filling a job opening by advertisement under Section 4.1 of ST/AI/2010/3 should have been followed. As a result, the UNDT concluded that the filling of the post by lateral transfer upon the retirement of the incumbent was in breach of ST/AI/2003/8.

35. The Secretary-General submits that the UNDT failed to adequately consider Staff Regulation 1.2(c) and ST/AI/2010/3, which grant department heads the authority to reassign and laterally transfer a staff member within their department.

36. Mr. Nwuke submits that insofar as retirement does not fall within the scope of the “staff selection” process, the Secretary-General’s contention that ST/AI/2010/3 should prevail is baseless. Moreover, the issues of retirement and appointment are two distinct matters governed by different rules and instruments.

37. The Appeals Tribunal notes that, as its title reflects, ST/AI/2003/8 is an Administrative Instruction on “Retention in service beyond the mandatory age of separation and employment of retirees”. Part I, Sections 2 and 3, deal with the criteria, conditions and procedure for the retention of staff appointed under the 100 series of the Staff Rules, while Section 4 deals with project personnel employed under the 200 series of the Staff Rules. Part II deals with matters related to the employment of retirees including, inter alia, the conditions, contractual arrangements and pension related-issues.

38. So from the onset we hold that Administrative Instruction ST/AI/2003/8 is inapplicable to the filling of the vacant post of OPM, as the administration was not seeking to retain the holder of the position beyond the mandatory age of separation.

39. The relevant administrative instruction on staff selection is ST/AI/2010/3, which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat (Section 2.1).

40. Section 4 of ST/AI/2010/3 concerns “Job openings”. Section 4.1 requires that:

Immediate and anticipated job openings for positions of one year or longer shall be advertised through a compendium of job openings. The compendium shall include both

position-specific job openings and generic job openings. The compendium shall be published electronically and shall be updated regularly.

41. Section 1(a) of ST/AI/2010/3 defines “anticipated job openings” as:

[J]ob openings relating to positions expected to become available as identified through workforce planning or forecasting, for example due to the retirement of the incumbent within six months or for meeting future requirements[.]

42. However, notwithstanding Section 4.1, which requires the advertisement of immediate and anticipated job openings, Section 2.5 provides that:

Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body. [...]

43. Moreover, Section 3.2(l) explicitly provides that the staff selection system established through ST/AI/2010/3, shall not apply, inter alia, to:

Lateral movements of staff by heads of department/office/mission in accordance with section 2.5 above.

44. In our view, the authority to make lateral transfers to fill job openings at the same level extends to both immediate and anticipated job openings, including posts that will become vacant due to retirement.

45. In this case, the ES exercised his authority under Section 2.5 of ST/AI/2010/3 to transfer another staff laterally within the same ECA office, at the same level of director, to fill a vacant post. We find the decision complies with the foregoing legal framework.

46. Section 13.3 of ST/AI/2010/3 states that “the provisions of the present administrative instruction shall prevail over any inconsistent provisions contained in other administrative instructions and information circulars currently in force.” Having regard to the clear text of Section 13.3 and insofar as the filling of a vacancy due to retirement falls within the scope of the “staff selection” process, we confirm the contention of the Secretary-General that ST/AI/2010/3 should prevail.

47. h16144 P043 Tc[(PPE.398[(JudgmUNDT no.ed that the Human Reso-)149o)-215(urces OfficI)4.e19

This begs the question of why the Administration did not meet its responsibility under ST/AI/2003/8 to anticipate the vacancy of such a critical post and advertise it six months before the holder of the post was due to retire.

52. In *Obdeijn*, the Appeals Tribunal held:<sup>20</sup>

[T]he obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals'

56. Consequently, we agree with the Secretary-General that, in the absence of additional evidence in this case, there was no basis for the same UNDT Judge to conclude that the preponderance of evidence established that the EShad subjected Mr. Nwuke to retaliation in the present case.

57. From the foregoing, we also hold that the UNDT erred in placing the burden on the Secretary-General to prove that the lateral transfer was not intended to block Mr. Nwuke from applying for the post.

58. Accordingly, we find merit in this ground of appeal and hold that the UNDT erred in concluding that the lateral move was motivated by retaliatory intent or improper motivation on the part of the ES.

59. The appeal succeeds on this ground. For the foregoing reason, there is no need to consider the cross-appeal.

#### Judgment

60. The Secretary-General's appeal is allowed. The UNDT Judgment is hereby vacated.

61. Mr. Nwuke's cross-appeal is without merit and is hereby dismissed.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of February 2015 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Thomas-Felix

Entered in the Register on this 17<sup>th</sup> day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar