



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-508

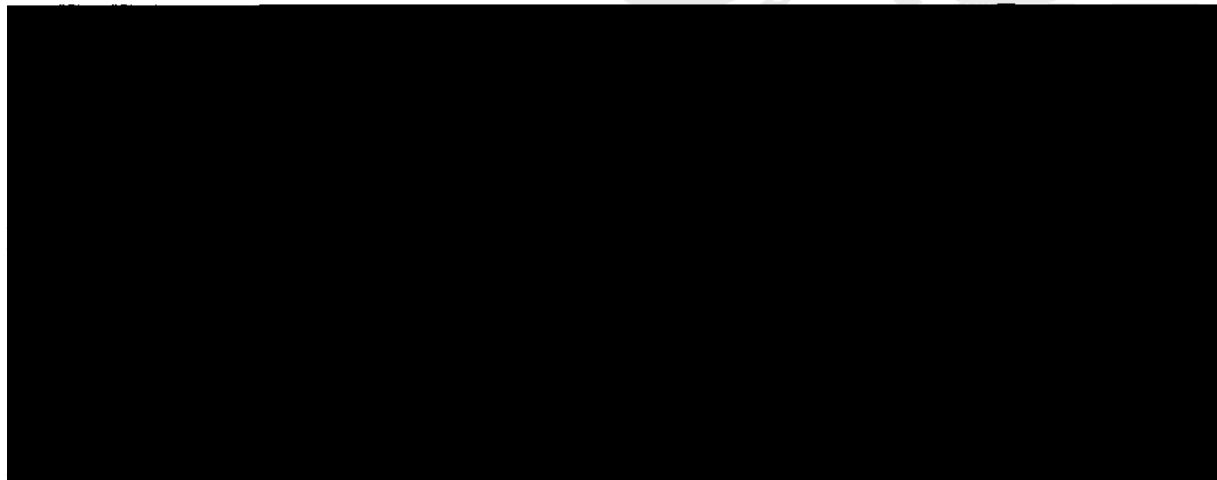
Nwuke

**(Respondent/Applicant and
Appellant on Cross-Appeal)**

v.

Secretary-General of the United Nations

**(Appellant/Respondent and
Respondent on Cross-Appeal)**



Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Mr. Nwuke: Self-represented

Counsel for Secretary-General: Noam Wiener

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/161, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 4 December 2013 in the case of *Nwuke v. Secretary-General of the United Nations*. The Secretary-General appealed on 3 February 2014, and Mr. Kasirim Nwuke answered on 6 April 2014. On 8 April 2014, Mr. Nwuke filed a cross-appeal, and on 29 May 2014, the Secretary-General filed an answer to the cross-appeal.

Facts and Procedure

2. The facts as established by the Dispute Tribunal read as follows:¹

... The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). He has filed seven substantive applications before the [Dispute] Tribunal challenging a number of administrative decisions taken between August 2008 and July 2011. He alleges that each of these administrative decisions is unlawful because they are not only in breach

... On 13 July 2011, the ES wrote to the Director of Administration advising her that he considered that it was appropriate and important given the urgent demands on ECA in the area of trade, to fill the position of Director/RIITD expeditiously. He said he had reviewed the roster and decided to make a selection from it as per paragraph 9.4 of ST/AI/2010/3. On the same day he selected Mr. K who had been rostered against the Director/RIITD post after it had been advertised in February 2010 and had applied for the post again. The ES set out the qualities to justify Mr. K's appointment and asked the Director of Administration to take the necessary steps to appoint Mr. K effective immediately. On the same day Mr. K was notified of his selection from the roster of pre-approved candidates. He accepted the appointment immediately.

... The appointment was effective 1 August 2011. On 27 July 2011 when it was announced by the ES to all staff, the Applicant requested management evaluation of the decision of the ES to fill the post of Director/RIITD from the roster and applied to the [Dispute] Tribunal for a suspension of action. This was rejected. The MEU decision dated 28 September 2011 upheld the decision to fill the post from the roster.

... The Applicant told the [Dispute] Tribunal that he waited and thought carefully about his next step. He was considering not proceeding with his challenge but because matters at the ECA were not improving, he filed his application with the Tribunal on 12 December 2011.

3. The issue before the Dispute Tribunal was whether Administrative Instruction ST/AI/2010/3 entitled "Staff selection system" dated 21 April 2010 enabled the Administration to lawfully fill a vacancy by appointing a roster candidate without evaluating other candidates who had applied for the vacancy. The UNDT concluded that the decision to appoint Mr. K. to the post of Director/RIITD from the roster without consideration of the other candidates including Mr. Nwuke who had applied to the post was unlawful, as it failed to give Mr. Nwuke full and fair consideration for the post and denied him due process. In the view of the Dispute Tribunal, such action was inconsistent with the paramount requirements of the United Nations Charter and the pertinent Staff Regulations, the proper interp

mandatory procedures.” “The manager’s discretion is exercised once all suitable candidates have been considered.” The UNDT considered that changes between section 7.8 of ST/AI/2006/3 and section 9.4 of ST/AI/2010/3 “did not remove the requirement for all candidates to be considered”. Accordingly, “[t]he actions of the ES in calling for the list of candidates from the roster and making a selection directly from that list without considering the proposal of the hiring manager were in violation of section 9.2 [of ST/AI/2010/3]”.³ However, the Dispute Tribunal did not find sufficient evidence of retaliation on the part of the ES/ECA against Mr. Nwuke as a result of his having lodged a complaint against the ES/ECA in 2009. Furthermore, the UNDT did not see any evidence of monetary or professional harm to Mr. Nwuke. However, the Dispute Tribunal felt that Mr. Nwuke was entitled to moral damages, which it affixed at one month net base salary.

Submissions

The Secretary-General’s Appeal

5. The UNDT erred by finding that the decision to select a rostered candidate for the position in the present case was unlawful. Specifically, the UNDT erred by finding that ST/AI/2010/3 required a review of all candidates for a post before a rostered candidate may be selected. The Secretary-General notes that this finding of the Dispute Tribunal was inconsistent with its own finding in another case also involving Mr. Nwuke,⁴ in which it found that the same procedure was taken in accordance with section 9.4 of ST/AI/2010/3 and not *per se* unlawful. The Secretary-General also notes that the administrative instruction on staff selection was revised in 2010 and the requirement that the programme manager review the applications of new candidates before the head of department may select a rostered candidate was “expressly removed” from the text of the 2010 administrative instruction. The Secretary-General notes that the administrative instruction on staff selection was revised in 2010 and the requirement that the programme manager review the applications of new candidates before the head of department may select a rostered candidate was “expressly removed” from the text of the 2010 administrative instruction.

7. The Dispute Tribunal erred by finding that the selection of rostered candidates without consideration of non-rostered candidates is inconsistent with General Assembly resolutions on the need for transparency and advertising the vacancy announcement, and the reference to “surge needs” in General Assembly resolution 61/244 (2006). The Dispute Tribunal erred in finding that the decision to select Mr. K. was unlawful and as such constituted a violation of Mr. Nwuke’s due process rights. Contrary to that finding, the vacancy announcement for the D-1 position had been advertised as required by the General Assembly and the ES/ECA had reviewed other rostered candidates before he selected Mr. K. The decision to select Mr. K. was properly taken pursuant to the applicable legal and regula

from this particular case, but rather were submitted for the purpose of “strategic positioning” with respect to future non-selection cases.

12. The General Assembly has never given the Administration the mandate to use a roster as the primary instrument for filling position-specific job openings. The practice of appointing from a roster without proper consideration of all candidates is inconsistent with the proper

19. Mr. Nwuke requests that this Tribunal “[r]eview upward” the UNDT compensation of one month net base salary so as to make it consistent with the compensation awarded in *Skourikhine*.⁵ Specifically, he requests that, in addition to the one-month net base salary that the Dispute Tribunal already awarded him, he be awarded USD 12,000 for material injury, USD 4,000 for moral injury and USD 4,000 if the Administration elects not to rescind the contested decision.

The Secretary-General’s Answer to the Cross-Appeal

20. Mr. Nwuke’s request to broaden the base of his cross-appeal to include documents that had not been part of the original record of the present case, if granted, would be inconsistent with the Statute of this Tribunal (Statute). Article 2(7) of the Statute explicitly limits the written record of a case to materials that have been “entered in the formal record of the Dispute Tribunal”, and any additional evidence accepted by the Appeals Tribunal under Article 2(5) of the Statute. Moreover, it will unnecessarily complicate the case. The consideration of Mr. Nwuke’s appeal and his cross-appeal does not require an examination of the history of his relationship with the ES/ECA.

21. Since the Appeals Tribunal has overturned

Considerations

24. The jurisprudence of the Appeals Tribunal in Charles⁸ is decisive for the outcome of the present case since it affirmed the validity of the type of selection and appointment process impugned by Mr. Nwuke, thereby, overturning the position adopted by the Dispute Tribunal prior to the issuance of the quoted case.

25. Therefore, the jurisprudence in Charles endorses the Secretary General's appeal, since this Tribunal stated therein that:

... ST/AI/2010/3 establishes the staff selection system. Section 9.4 of that instruction, the interpretation of which is the central issue in the instant cases, provides in part:

Section 9

Selection decision

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be

central review bodies if a roster candidate is considered the best candidate when compared to all other candidates.

... This is not a case where the written law is silent or has to be interpreted because it is not explicit. The plain wording of Section 9.4 makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position. There is no requirement in Section 9.4 for the head of department to first review all non-rostered candidates. If the head of department's discretion is subject to such a requirement, then it would be essential for the instruction to provide as much. On the contrary, as pointed out by the Secretary-General, Section 9.4 has been amended specifically to remove such a requirement.

... It was thus not open to the UNDT to come to the conclusion that Section 9.4 requires the head of department/office to first review all non-rostered candidates before selecting a rostered candidate.⁹

26.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Thomas-Felix

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

(Signed)

Weicheng Lin, Registrar