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

**Nielsen
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Luis María Simón Judge Deborah Thomas-Felix
Case No.:	2014-623
Date:	2 July 2015
Registrar:	Weicheng Lin

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 63 (GVA/2014) and Summary Judgment No. UNDT/2014/061, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 7 May 2014 and

which is also the subject of the present appeal.¹ By that order, the UNDT invited the Secretary-General to respond to a motion filed by Ms. Nielsen requesting leave to provide additional evidence and comment on the Secretary-General's reply to the UNDT application.

7. On 10 January 2014, Ms. Nielsen received a letter notifying her that her temporary appointment would not be renewed upon its expiration.

8. On 14 January 2014, Ms. Nielsen's Performance Appraisal and Development Report (PAD) was completed. Her supervisors gave her the following ratings: for core competencies-"not proficient", for functional competencies-"developing proficiency", and for developmental outputs-"partially achieved outputs", which Ms. Nielsen also contests.

9. On 26 January 2014, Ms. Nielsen's contract expired and she was separated from UNFPA.

10. On 13 February 2014, Ms. Nielsen sought to access the United Nations City building (UN Citybus gations s6(e)8es,s also n the Uo

additional e-mail sent the same day, WHO informed Ms. Nielsen that she could not attend the next testing session.

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Submissions

Ms. Nielsen's Appeal

33. Ms. Nielsen submits that the UNDT Judgment is not objective as it portrays her in an undeservedly bad light and only reflects UNFPA's position. The UNDT Judgment also purports to make conclusions on "facts" although she had not had the opportunity to provide her comments on documentation provided by UNFPA which she alleges contains lies. The UNDT exceeded its jurisdiction in stating such were "facts" whereas they merely repeated UNFPA arguments.

34. The UNDT Judgment should state that she completed medical school, in order to show that she is a highly qualified person and demonstrate the unfairness in according such a highly qualified person a low evaluation in her PAD. In relation to her rebuttal case, she requests that a number of "facts" be added to the UNDT Judgment, while she submits that other paragraphs should be amended to reflect the reality of her submissions, rather than UNFPA's position.

35. The UNDT Judgment does not adequately reflect that she lost an opportunity to be considered for employment with WHO because of UNFPA's actions. Whereas the UNDT Judgment states that Ms. Nielsen was denied access to UN City, in reality, after entering, United Nations Security contacted the Human Resources Assistant from WHO to inform her that Ms. Nielsen was not authorized to enter UNFPA premises. As a direct result, WHO thereafter asked Ms. Nielsen to leave the building and deemed that she was not eligible to sit future assessments. E-mail exchanges between UNFPA and WHO demonstrate that WHO decided not to allow her to take future written assessments only after speaking with UNFPA and that, therefore, UNFPA prejudiced her chances of reemployment. As there are "no locks" on doors in UN City, a prohibition on her entry to UNFPA premises necessarily means that other agencies in UN City will not seriously consider her candidature with them.

36. Ms. Nielsen requests that this Tribunal remove quotations from the UNDT Judgment of the e-mail sent by WHO advising her of its decision to exclude her from the written assessment, and clarify the order from UNFPA to United Nations Security, as these affect her reputation and future career.

37. Ms. Nielsen otherwise makes factual submissions concerning the substance of her disputes with UNFPA, her relations with particular UNFPA management staff and their allegedly improper behaviour towards her and inopportune handling of the situation, including in relation to her placement on SLWFP, which is the subject of Case No. UNDT/GVA/2014/009.

38. Ms. Nielsen claims that she filed two motions with the UNDT requesting to file additional comments with respect to the Secretary-General's answer, which went unanswered, whereas, by Order No. 63 (GVA/2014) the UNDT granted the Secretary-General the right to file comments on her motion. As such, the Secretary-General was granted the right to file TD.005ee0.15our tfis Tc7261l6 745. Or

49. Between 28 October 2014 and 30 June 2015, Ms. Nielsen filed 12 motions with the Appeals Tribunal with reference to her present appeal. Three of the motions, dated 13 January 2015, 16 May 2015 and 26 May 2015 respectively advised, or purported to advise,⁸ the Appeals Tribunal, inter alia, of Ms. Nielsen's unavailability on certain dates throughout 2015 and otherwise apprised the Appeals Tribunal of matters which the Appeals Tribunal considers do not relate to the substance of Ms. Nielsen's appeal of Judgment No. UNDT/2014/061. Accordingly, insofar as Ms. Nielsen sought relief therein, the same is denied by this Tribunal.

50. In response to the filing of the Secretary-General's answer on 27 October 2014, Ms. Nielsen filed a motion on 28 October 2014 taking issue with the contents of the Secretary-General's answer and with the Secretary-General having annexed to his answer the replies with annexes attached that he submitted in Case No. UNDT/GVA/2014/009 (challenging Ms. Nielsen's placement on SLWFP) and in Case No. UNDT/GVA/2014/028 (the matter currently under appeal). In her motion, Ms. Nielsen sought to file with the Appeals Tribunal additional pleadings which, she maintained, would contradict the contents of the documents which the Secretary-General had put before the Appeals Tribunal. Much of the information Ms. Nielsen sought to put before the Appeals Tribunal relate to a myriad of matters which were not the subject of the UNDT Judgment presently being considered by the Appeals Tribunal in the course of this appeal. On 13 November 2014, the Secretary-General provided his observations on the motion and argued that Ms. Nielsen had not met the "exceptional circumstances" requirement for the admission of the information set out in her motion.

51. Articles 8 and 9 of the Appeals Tribunal Rules respectively provide for an appellant to submit an appeal form, accompanied by a brief, and for a respondent to submit an answer form, accompanied by a brief. Under Article 31(1) of the Appeals Tribunal Rules and Section II.A.3 of Practice Direction No. 1 of the Appeals Tribunal, the Appeals Tribunal may allow additional pleadings if there are exceptional circumstances justifying the motion.⁹

52. Having considered the matter, we find that the matters Ms. Nielsen seeks to address in her motion do not demonstrate any exceptional circumstances justifying the need to file additional pleadings in response to the Secretary-General's answer. Accordingly, the motion of 28 October 2014 is denied.

⁸ The motion of 26 May 2015, while titled "Motion about not being available during few weeks in summer and some requests to UNAT", is silent as to the issue of her availability.

⁹ *Wu v. Secretary-General of the United Nations*, Order No. 225 (2015) of 1 July 2015.

53. On 23 November 2014, Ms. Nielsen filed a motion in which she sought leave to place before the Appeals Tribunal, in the context of the present appeal, the case filings and annexes she submitted in Case No. UNDT/GVA/2014/009 (challenging Ms. Nielsen's placement on SLWFP) together with other information which pertained to her four management evaluation requests which are appended to her present appeal. On 15 January 2015, the Secretary-General filed his observations on this motion objecting to Ms. Nielsen's request.

54. On 19 January 2015, Ms. Nielsen filed a motion protesting against the Secretary-General's observations of 15 January 2015, and on 20 January 2015, Ms. Nielsen filed a further motion by which she requested the Appeals Tribunal to remand Judgment No. UNDT/2014/061, the subject of the present appeal, to the UNDT for "further work" by that Tribunal. The Secretary-General responded to both motions through observations filed on 27 February 2015.

55. On 3 March 2015, Ms. Nielsen filed yet another motion commenting on the Secretary-General's observations of 27 February 2015.

56. The Appeals Tribunal has considered the aforesaid sequence of motions and has concluded that there are no exceptional circumstances which warrant the inclusion of any of the UNDT filings and materials referred to by Ms. Nielsen in the appeal presently before us. In so far as matters of relevance are alluded to in the said material, the Appeals Tribunal is satisfied that same are a replication of matters already brought to the attention of this Tribunal by Ms. Nielsen in the pleadings and annexes already filed by her in connection with this appeal. Accordingly, the reliefs sought by Ms. Nielsen in the motions dated 23 November 2014, 19 January 2015, 20 January 2015 and 3 March 2015 are denied.

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exist that justify the need to file additional pleadings and, for reasons which are expounded on in this Judgment, the motion is therefore denied.

59. On 30 June 2015, Ms. Nielsen filed two further motions, under cover of the present appeal, essentially requesting the Appeals Tribunal to intervene in matters in respect of which she has initiated separate applications before the UNDT and which fall wholly outside the scope of the present appeal. On that basis alone, the motions are denied.

Ms. Nielsen's appeal of UNDT Order No. 63 (GVA/2014)

60. In the course of Case No. UNDT/GVA/2014/009 (relating to her placement on SLWFP), the UNDT issued Order No. 63 (GVA/2014) (Order on Case Management), by which the UNDT rejected the Secretary-General's motion to strike out part of the evidence Ms. Nielsen had submitted on 9 and 24 April 2014 in connection with that application. This ruling was in favour of Ms. Nielsen. Under cover of the same Order, the Dispute Tribunal set the time limit for the Secretary-General to respond to a motion filed by Ms. Nielsen on 25 April 2014 seeking leave to provide additional evidence or comments on the Secretary-General's reply to her application.

61. In the course of the present appeal, Ms. Nielsen argues that the UNDT acted unfairly in allowing the Secretary-General to reply to her motion of 25 April 2014 annexing additional documentation, which she claims she had not seen previously, and thereafter issuing Judgment No. UNDT/2014/061 without giving her an opportunity to contradict the additional material furnished by the Secretary-General. Furthermore, Ms. Nielsen requests that the Appeals Tribunal "amend" paragraphs 5 and 6 of the impugned Order.

62. Firstly, we hold that Ms. Nielsen's appe

provides that the Dispute Tribunal is competent to hear and pass judgment on an application appealing “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

... We are satisfied that the Dispute Tribunal, in assessing whether the actions of the Administration vis-à-vis the rebuttal process concerning Mr. Gehr’s 2011 ePAS constituted an administrative decision for the purpose of Article 2(1) of the UNDT Statute, correctly determined that no appealable administrative decision was identified by Mr. Gehr. We are

the Appeals Tribunal, in the context of the present appeal, is constrained from embarking on a consideration of such matters. All in all, having regard to the numerous motions she brought in the context of the present appeal that raised matters falling wholly outside the scope of the present appeal, Ms. Nielsen's actions verge on an abuse of the appeal process.

68. The UNDT also rejected Ms. Nielsen's sixth claim that challenged the UNFPA Policy on PAD Rebuttal, properly holding that the Rebuttal Policy was a regulatory instrument which did not have the characteristics of an "administrative decision" capable of judicial review pursuant to Article 2(1) of the UNDT Statute. Ms. Nielsen did not challenge this finding in her appeal.

The blocking decisions

69. With regard to Ms. Nielsen's third and fourth complaints, the Dispute Tribunal stated:¹²

... As regards the decisions challenged in the application under lit. c) and d), namely the fact that the Applicant was denied access to the UN City Building on 13 February 2014 and that her emails were blocked after the end of her contract, the Tribunal notes that they refer to situations that happened after the expiration of her TA with UNFPA on 26 January 2014, as underlined by the Applicant herself. In view of the fact that the Applicant had no appointment at the time of the contested decisions, she has no legal standing to bring those matters before the Tribunal since, as already recalled above, pursuant to art. 2.1 of its Statute the Tribunal is competent to consider applications to appeal an adoim-8d.1(n776(S)4.3(t)o9(i)T(t)o9(iiv.1(h)9 her)TJT*.0235 T.4(br76.2(the e6JT2gSu)1 th)-4.3(a.8(l)7(l

72. The Appeals Tribunal considers that, in essence, Ms. Nielsen's complaints must be addressed by looking at the procedural tool utilized by the UNDT to decide on the non-receivability of Ms. Nielsen's applications in respect of the blocking of e-mails and access to UN City. As is clear from paragraph 23 of its Judgment, the Dispute Tribunal was satisfied that the matters in question could be decided as matters of law "which may be adjudicated even without serving the application to the Respondent for reply".

73. The Appeals Tribunal agrees that there are issues which may come before the Dispute Tribunal that are capable of being dealt with by summary judgment pursuant to Article 9 of its Rules. The Dispute Tribunal's invocation of that procedure in respect of the UNFPA PAD

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

77. Save for the procedural deficiencies pertaining to the UNDT's determination on the blocking decisions, none of the other arguments put forward by Ms. Nielsen satisfies the requirements of Article 2(1) of the Appeals Tribunal Statute.

Judgment

78. The appeal succeeds in part. We hereby vacate the UNDT's rejection of Ms. Nielsen's complaints regarding the two blocking decisions and remand these issues to the Dispute Tribunal for *de novo* consideration.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar