



JUDGE JOHN MURPHY , PRESIDING .

1. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York issued a Summary Judgment on Receivability No. UNDT/2016/106 on 4 August 2016 in the case of Auda v. Secretary-General of the United Nations . The UNDT subsequently issued two corrigenda, respectively as UNDT/2016/ 106/Corr.1 (issued on 8 August 2016) and UNDT/2016/106/Corr.2 (dated 22 August 2016).

2. Mr. Hersham A. Auda filed an appeal against UNDT/2016/106/Corr.1 on 15 August 2016. After the UNDT issued UNDT/2016/106/Corr.2, Mr. Auda filed an amended appeal on 31 August 2016. The Secretary-General filed his “observations” on 16 September 2016.

The Factual Background

3. Mr. Auda is a former staff member with the Department for General Assembly and Conference Management (DGACM). He separated from the Organization on 31 December 2015.

4. On 23 June 2016, Mr. Auda filed an application on the merits before the UNDT (Case No. UNDT/NY/2016/028) to contest a decision to appoint a candidate for the position of Chief of Service, Strategic Information and Communication Technology Management, Office of Information and Communications Technology (OICT), for which he had not applied (contested decision). This vacant position was first circulated under Job Opening (JO) No. 38496 in February 2015 and was subsequently re-circulated under JO No. 41653. On 23 June 2016, Mr. Auda also filed an application for interim measures in terms of Article 10(2) of the UNDT Statute.

5. Mr. Auda was rostered for the vacant position, but did not apply after the post was recirculated under JO No. 41653, because he was of the opinion that the post is defunct and the JO invalid. However, he had applied for the vacant position at an earlier time, but under a different JO. He was informed on 15 June 2016, via e-mail, that he had not been selected for the position. The selected candidate was offered a one-year fixed term appointment which he accepted on 28 June 2016, and he still encumbers the post.

6. Pursuant to the General Assembly resolution 70/247, a new organizational structure and post distribution were established in OICT with effect from 1 January 2016, which involved the proposed establishment of five new posts, the inward redeployment of 42 posts from other

offices of the Department of Management and an increase in the number of senior-level staff through the upward reclassification of six posts. Mr. Auda maintained that the post advertised in JO No. 41653, forming one of

10. In paragraph 1 of the application for interim relief, Mr. Auda sought “suspension of the implementation of the decision of the Under-Secretary General, [Department of Management (DM)] not to cancel then make a selection pursuant to an invalid Job Opening ... for the defunct position of Chief of Service (D1), Strategic Information and Communication Technology Management, OICT”. He stated:

The Applicant is not contesting that he has not been selected, or, for that matter the

In order to clarify the acknowledgement sent on 27 June 2016, the [Dispute] Tribunal confirms that both the application on the merits and the “application for interim relief” were received on 23 June 2016 in two separate cases.

15. By Order No. 156 (NY/2016) dated 30 June 2016, the UNDT (Judge Greceanu) rejected Mr. Auda’s application for interim relief on the grounds that the application concerned a case of appointment and hence in terms of Article 10(2) of its Statute, the UNDT was not competent to order interim relief. The UNDT rejected Mr. Auda’s reliance on *Siri*¹ as that case was distinguishable in that it was concerned not with an appointment but with an erroneous calculation of Mr. Siri’s retirement age. In the present matter, the evidence established that the selection process for the post of Chief of Service, Strategic Information and Communication Technology Management, OICT, for which Mr. Auda had previously applied under a different JO, was finalized on 14 June 2016 when the selected candidate was informed of his selection to the post, and to which he was appointed on 28 June 2016. The UNDT therefore held that the contested decision was directly related to a new appointment and was thus a clear “case of appointment” as contemplated in Article 10(2) of its Statute and hence the UNDT was not competent to grant interim relief. Mr. Auda has not challenged that finding, but has raised other grounds of review.

16. On 22 July 2016, Mr. Auda submitted a request for management evaluation of what he described to be the “arbitrary and baseless decision” of the New York Registry of the UNDT (not the order of the UNDT itself) to “reject [his] application for interim relief without informing him”. In the management evaluation request he identified the Registrar of the UNDT as the decision-maker.

17. In a letter dated 25 July 2016, Mr. Marco Madriz, the Officer-in-Charge (OIC) of the Management Evaluation Unit (MEU), informed Mr. Auda that the MEU had decided his request was not receivable for various reasons. The OIC drew an important distinction, which in subsequent events has been the source of some confusion. He stated:

The MEU further noted that, according to the documentation provided by you, the UNDT New York Registry did not reject your application for interim relief but rather requested you to refile it under a different case number.

18. Later in the e-mail, Mr. Madriz added:²

Finally, to the extent that your request may be construed as contesting the decision of the UNDT New York Registry to request you to refile your motion in a different case file, the MEU noted that, pursuant to Article 21 of the UNDT Rules of Procedure, “[the] Registrars shall discharge the duties set out in the rules of procedure and shall support the work of the Dispute Tribunal **at the direction of the President or the judge at each location**”. ... The MEU further noted that, pursuant to ST/SGB/2010/3, para. 5.3:

“Under the authority of the Principal Registrar, without prejudice to the authority of the judges of the United Nations Dispute Tribunal in relation to judicial matters, each Registrar is responsible for the management and proper functioning of the tribunal in the relevant duty station.”

19. As regards the decision to reject or dismiss the application for interim measures, Mr. Madriz said:

On 30 June 2016, the UNDT rejected your request for interim measures. The MEU noted that, pursuant to Staff Rule 11.2, only a decision taken by the Administration may be subject to a management evaluation. The MEU considered that the decision to reject your motion for interim measures was taken by the UNDT and not by the Administration and that your request was further not receivable on this basis.

20. Mr. Madriz concluded the letter as follows:

The MEU considered that the contested actions of the UNDT Registry in this specific instance related to judicial matters and fell under the authority of the judges. The MEU considered that such actions could not be imputed to the Administration and that to do so, given that the Secretary-General was the Respondent in the underlying UNDT case, would constitute improper interference in the independence of the judiciary.

21. In response to this, two days later, on 27 July 2016, Mr. Auda filed an application with the UNDT contesting “the arbitrary and baseless decision” of the New York Registry of the UNDT “to reject [his] application for interim relief without informing him”. He identified Ms. Hafida Lahiouel, Registrar, New York Registry of the UNDT, as the official who made

22. In the body of the application, Mr. Auda evinced a measure of confusion in relation to the decision he sought to review. In paragraph 12 of the application, he stated:

As per its email dated 27 June 2016, the New York Registry has admittedly rejected the application for interim relief submitted on 23 June 2016 without informing the Applicant, and tried to cover its tracks by pretending that the motion was filed on 24 June 2016 instead of 23 June 2016, except for the Applicant's pursuit and the UNDT Judge's instructions. The United Nations Appeal Tribunal (UNAT) has held ... that the failure of

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the norm even when not all necessary documents and forms were filed initially. ... Applying the same standards in the present case, the Respondent would have been serviced on 23 June 2016 and instructed to file a response by the close of business on 27 June 2016. The action by the New York Registry in the present case was not only baseless and arbitrary, but also unfairly extended the time period for addressing the Applicant's motion by one and one-half days, thereby allowing the Respondent to file a belated response and bring as evidence signed documents dated 28 June 2016, which worked to the advantage of the Respondent.

25. With this narrative, Mr. Auda then introduced a fifth possible cause of action, namely, that the *dies induciae* afforded to the Respondent were unfairly generous. He requested the UNDT to order compensation for the violation of his due process rights, abuse of process and moral and other damages resulting from it.

26. What is notable about the complaint is that Mr. Auda did not specify any prejudice he suffered as a consequence of his being requested to refile the application for interim measures on 24 June 2016, and pointed only to the opportunity that the Respondent was given to submit contemporaneous documentation. He did not identify the document, address its relevance or indicate how its admission prejudiced him. It is possible, though it is not clear, that Mr. Auda laboured under the incorrect impression that his application for interim relief was rejected on account of the misfiling. This is incorrect. His application for interim relief was rejected because the UNDT lacked jurisdiction to grant interim relief, as is spelt out unambiguously in Order No. 156 (NY/2016). The clear terms of the Order leave no doubt as to its reasons.

27. On 4 August 2016, the UNDT issued Summary Judgment No. UNDT/2016/106, without instructing, or waiting for, the Respondent to file a reply, and rejected Mr. Auda's application as not receivable *ratione materiae*.

28. The impugned Judgment identified the contested decision as being the alleged decision of the Registrar of the United Nations Dispute Tribunal in New York to "reject his application for interim relief without informing him" – thus the second possible cause of action described above and not the fourth. The Judge then went on to determine the third and fourth causes of action. At paragraph 9 of the Judgment, he considered the 29 June 2016 e-mail sent by the UNDT Registry to Mr. Auda and concluded that the decision not to open a separate case for the application for interim relief had been taken by Judge Greceanu and not the Registrar. The *ratio decidendi* in paragraph 10 of the Judgment reads:

From the Registry's 29 June 2016 email, it follows without question that the rejection of creating a "separate case" for the Applicant's motion for interim relief in Case No. UNDT/NY/2016/028 was done pursuant to the instructions of Judge Greceanu. The contested decision not to open a separate case for this motion was made by Judge Greceanu and not the Registrar, whose role was merely to communicate this decision to the Applicant.

29. The UNDT then rightly stated that the competent entity to review and adjudicate on appeals against decisions of the UNDT was this Tribunal and accordingly held that the UNDT therefore did not have jurisdiction and was not competent to assess and determine whether the UNDT erred or not when declining to open a separate case for the motion for interim measures and requesting Mr. Auda to instead file the said motion under "the correlated substantive case". Mr. Auda's application was thus rejected as not receivable *ratione materiae*. It is important to stress that the UNDT did not decide whether the UNDT correctly rejected the application for interim measures for want of jurisdiction under Article 10(2) of its Statute because the underlying case was one of appointment. Nor, despite its characterization of the issue in paragraph 1 of the Judgment, did it determine whether Mr. Auda had been properly informed of the decision.

30. On 8 August 2016, the UNDT re-issued its Judgment No. UNDT/2016/106 as No. UNDT/2016/106/Corr.1, which corrected a typographical error in paragraph 2 of the original Judgment. This correction is uncontroversial. However, on 22 August 2016, the UNDT issued another correction, Corrigendum No. UNDT/2016/106/Corr.2. This correction has prompted an objection from Mr. Auda. The corrections change the original Judgment

c.0913 Tw[(that substantially) 51(16)(f) E:29.5268.2147-013.015, Ed- (ref: UNDT/2016/106/Corr.1) 353(w652)72(6) 5(5) 4(11)75(6)]

Applicant. There is no explanation on record accounting for the Judge's decision to make this change. The Judge merely ordered the changes after noting paragraphs 1 to 7 of Order No. 156 (NY/2016) issued on 30 June 2016, and relying on the provisions of Article 12(2) of the UNDT Statute and Articles 28 and 31 of the UNDT Rules of Procedure.

32. As noted above, Mr. Auda filed an amended appeal on 31 August 2016 and the Secretary-General filed his "observations" on 16 September 2016. On 22 November 2016, Mr. Auda filed a motion to submit documentary evidence, seeking to introduce Order No. 256 (NY/2016) that Judge Greceanu issued on 4 November 2016 as evidence insubmit d1868 T

35. In his amended appeal, Mr Auda complained that the corrections introduced in Corrigendum No. UNDT/2016/106/Corr.2 fell outside the scope of allowable corrections permitted under the UNDT Statute and the Rules of Procedure.

36. Article 12 of the UNDT Statute reads:

1. Either party may apply to the Dispute Tribunal for a revision of an executable judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

2. Clerical or arithmetical mistakes, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Dispute Tribunal, either on its own motion or on the application of any of the parties.

37. As the UNDT acted on its own motion to amend the Summary Judgment, it indisputably acted under Article 12(2) which is repeated in almost identical terms in Article 31 of the Rules of Procedure. Mr. Auda submitted that the corrections brought about in Corrigendum Two are not of a clerical or arithmetical type, nor do they appear to be mad to (the D(a)87.9(a)87.9 Tw [(ac)8c.5(t)9t

Considerations

39. Mr. Auda's criticisms of the UNDT's decision to amend its own Judgment are well

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Halfeld

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar