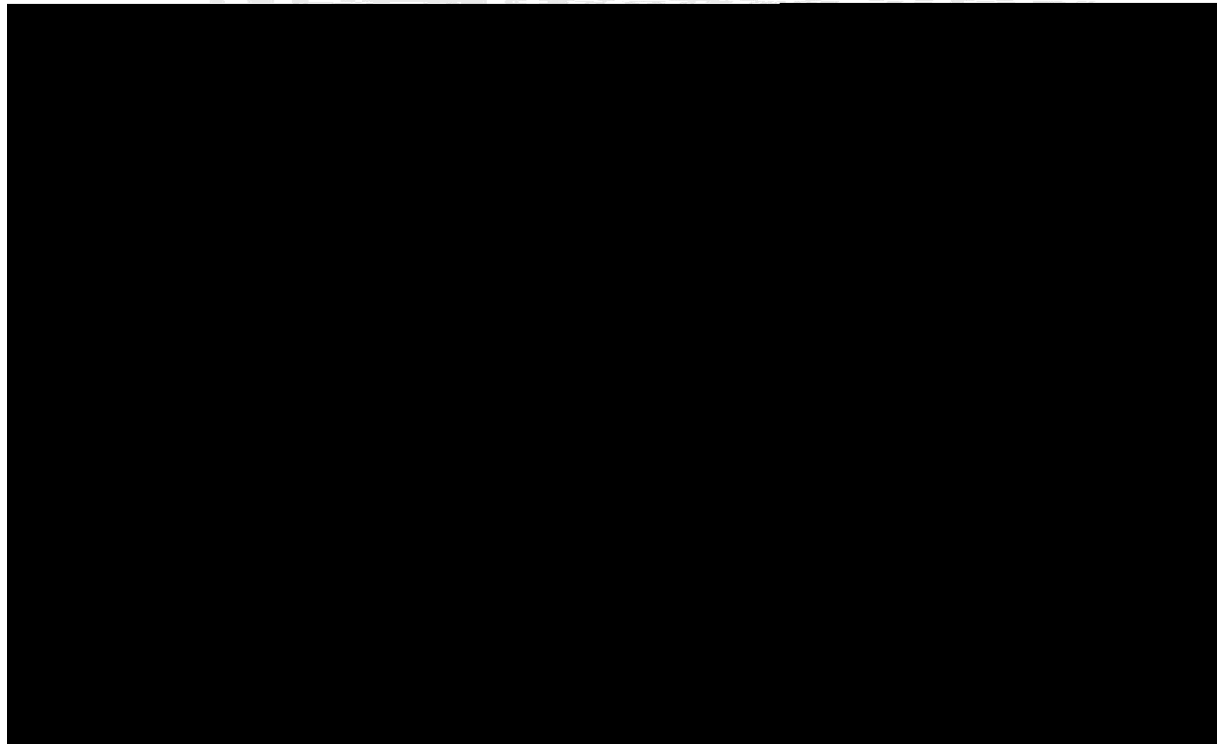




UNITED NATIONS

Judgment No. 2017-UNAT-733/Corr.1



Counsel for Mr. Nadeau: Self-represented

Counsel for Secretary-General: Ms. Nathalie Defrasne

JUDGE SABINE KNIERIM , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/116, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 26 August 2016, in the case **Nadeau v. Secretary-General of the United Nations**. Mr. Yves Nadeau filed the appeal on 23 October 2016, and the Secretary-General filed an answer on 9 January 2017.

#### Facts and Procedure

2. Mr. Nadeau joined the Office of Internal Oversight Services (OIOS) in 2005. At the time of his application before the UNDT, he served as an Investigator at the P-4 level.

3. On 27 December 2013, Mr. Nadeau submitted to the Under-Secretary-General for Internal Oversight Services (USG, OIOS) a complaint against his first reporting officer Ms. B pursuant to Secretary-General's bulletin **SB/2008/5** (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority). He claimed *inter alia* that Ms. B had not responded to his e-mails regarding his interest in training or his perceived conflicts of interest and he took issue with her assignments and the general work environment.

4. Following a meeting in person on 9 January 2014 to discuss the complaint, the USG, OIOS sent Mr. Nadeau an e-mail that same day, in which she stated: I do not believe the behavior you have identified rises to the level that would attract a finding of misconduct under 2008/5, even if substantiated. She noted, however, that Mr. Nadeau's complaint reflected several examples of actions that are not helping contribute to a harmonious working environment that should be addressed and informed him of actions she would be taking in that regard.

5. On 18 February 2015, Mr. Nadeau wrote to the USG, OIOS informing her that in his view the complaint remained unresolved and asking whether she would close the matter or establish a fact-finding panel. In her response of the same day, the USG, OIOS pointed out that on 9 January 2014, she had informed Mr. Nadeau in person and in her subsequent e-mail that none

6. The next day, on 19 February 2015, Mr. Nadeau filed a request with the Management Evaluation Unit (MEU) for management evaluation of the USG, OIOS decision to reject his complaint of prohibited conduct.

7. In his response to the request for management evaluation dated 4 March 2015, the Officer-in-Charge of the MEU (OIC, MEU) informed Mr. Nadeau that his request for management evaluation was not receivable on temporary grounds, stating as follows:

Section 5.14 of ST/SGB/2008/5 requires the responsible official to review the complaint to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation. The MEU noted that, on 9 January 2014 the USG, OIOS informed you, in a meeting and in a subsequent email, that she had reviewed your submissions and that nothing in your complaint would attract a finding of misconduct under ST/SGB/2008/5, if substantiated. The MEU considered that this e-mail clearly and unequivocally conveyed to you, a seasoned investigator that the USG, OIOS had reviewed your complaint pursuant to section 5.14 and had concluded that a fact-finding investigation was not warranted. The MEU further noted that the USG, OIOS informed you of how she would proceed to address the issues you had raised. None of the actions she described either indicated or even implied that she would establish a fact-finding panel. The MEU considered that the communication conveyed a final decision following her section 5.14 review. Her subsequent email to you on 18 February 2015, over a year later, did no more than reiterate her communication of 9 January 2014. The MEU therefore considered that the USG, OIOS had reviewed your complaint pursuant to section 5.14 and had concluded that a fact-finding investigation was not warranted within 60 calendar days following your request.

tion of prior decision by the USG, OIOS following your request  
and not rest the time limit.

8. On 29 May 2015, Mr. Nadeau filed an application before the UNDT in New York against the USG, OIOS decision of 18 February 2015 not to convene an investigation<sup>2</sup> panel.

<sup>1</sup> Impugned Judgment, par.8.1(a).5. 3 (itali)5.1(cs)Judgment No. 2015-UNAT-4890, para.4.81.79.2 6Js7801 Tm 0 T

9. On 28 August 2015, Mr. Nadeau filed two complaints against the OiC, MEU with the Under-Secretary-General for Management (USG, DM) regarding:

- i. comments made by [the OiC, MEU] in his response of 4 March 2015 to [Mr. Nadeau s] request for a management evaluation pursuant to ST/SGB/2008/5 (Complaint 1); and,
- ii. the failure of [the OiC, MEU] to discharge his responsibilities under the applicable legal framework, as evidenced by the contents of the [abovementioned] response [of] 4 March 2015 pursuant to Administrative Instruction ST/AI/371 (Revised Disciplinary Measures and Procedures) (Complaint 2).

With respect to Complaint 1, he referred to the following passage of the OiC, MEU s 4 March 2015 answer, which he described as objectionable, abusive, alarming and demeaning :

The MEU considered that this e-mail clearly and unequivocally conveyed to you, a seasoned investigator, that the USG, DM had reviewed your complaint pursuant to section 5.14 and had concluded that there was no basis for a fact-finding investigation.

10. On 15 October 2015, the UNDT in Geneva issued Judgment No. UNDT/2015/097 in Case No. UNDT/GVA/2015/152 in French language dismissing the application as irreceivable *ratione materiae* as a result of Mr. Nadeau s failure to timely seek management evaluation.

11. On 24 November 2015, Mr. Nadeau submitted two further requests for management evaluation arguing that the USG, DM had violated paragraph 5.14 of ST/SGB/2008/5 and ST/AI/371 by not responding to his complaints of 28 August 2015.

12. On 27 November 2015 the Director of the Office of the USG, DM informed Mr. Nadeau of the following:

In response to the two letters you sent [the USG/DM] on 28 August 2015 with respect to the non-receivability letter dated 4 March 2015 that you received from [OiC/MEU] of the MEU.

I understand you received a letter from the MEU informing you that based on its review of the chronology of facts, your request for management evaluation was time-barred.

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<sup>3</sup> Impugned Judgment, para. 3.

<sup>4</sup> *Ibid*, para. 27.

<sup>5</sup> *Ibid*, para. 3.

Having reviewed the matter in question, I can report that [the USG/DM] does not consider that any action is warranted under the ST/SGB/2008/5 or the ST/AI/371 based on the content of such letter.

I am aware that you have already received a decision from the [Dispute Tribunal] confirming the MEU decision of non-receivability. As you may be aware, decisions or findings of the MEU are not new administrative decisions which can be contested before the Tribunals.

13. On 3 December 2015, the MEU informed Mr. Nadeau that his two management evaluation requests had become moot because he had received a response from the Office of the USG, DM.

14. On 1 January 2016, Mr. Nadeau submitted two new requests for management evaluation of the administrative decisions following the USG's refusal to take action to address the complaints against the OiC, MEU allegedly violating paragraph 5.14 of ST/SGB/2008/5 and ST/AI/371. The MEU received the requests on 4 January 2016.

15. On 26 January 2016, the MEU informed Mr. Nadeau that his requests were not receivable considering that he was substance challenging the outcome of the MEU decision [of 4 March 2015], which does not constitute a new administrative decision. In M-1.7322TD -.0172(d received).( paragr1-6(m99(g 6.6(7)-8251 TD -.01qavail22T[himself] o)(om f)4.4(t

**THE UNITED N**

18. The UNDT issued the impugned Judgment on 26 August 2016. As of the date of the Judgment, the Secretary-General's reply had not been translated into French. In its Judgment, the UNDT dismissed the application in its entirety. With regard to the language of the proceedings, the UNDT first denied Mr. Nadeau's request that the proceedings be conducted in French stating that no such right was conferred by the legal framework governing the UNDT proceedings and that English was the only official working language of the United Nations Headquarters in New York, adding that the deciding Judge was Anglophone. As to Mr. Nadeau's objection to the translations of the documents, the UNDT considered itself

21. He further argues that the UNDT erred ~~in~~ and violated his right to procedural fairness in various respects concerning the language of the proceedings: (i) The UNDT erroneously declined his request to have his ~~case~~ heard in French. It incorrectly stated that English was the only working language of United Nations Headquarters in New York in contradiction to ~~inter alia~~ General Assembly resolution 2(~~0~~) and Article 8(6) of the UNDT Statute. The language skills of judges are to be taken into account when assigning cases, as exemplified by the transfer of the parallel case



23. Mr. Nadeau therefore requests the Appeals Tribunal to vacate the impugned Judgment, to remand the case to the UNDT for new proceedings before a new Judge, to order the UNDT to hear his case in French and to award compensation in the amount of USD 5,000 for the violation of his language rights.

**The Secretary-General's Answer**

24. The Secretary-General responds that the UNDT did not err in concluding that the USG, DM's decision not to proceed with investigation of either of Mr. Nadeau's complaints was lawful. He reiterates the Appeals Tribunal's jurisprudence affirming that the investigation of disciplinary charges is a matter of managerial discretion and the Administration cannot be forced to take disciplinary action. In this regard, UNDT's role is limited to a determination of whether a decision not to investigate the alleged prohibited conduct under ST/SGB/2008/5 and ST/AI/371 affected the staff member's rights and whether it was taken in accordance with the applicable law.

25. He further submits that Mr. Nadeau has failed to establish any error by the UNDT warranting reversal of the impugned Judgment. First, the UNDT did not commit a procedural error in a way that affected the decision of the UNDT in denying his request for his case to be heard in French. While the Secretary-General concedes that English is not the only working language of the United Nations Headquarters in New York, he underscores that it is a matter of case management for the UNDT to decide which Judge to assign to a particular case and that the Appeals Tribunal has consistently held that it will not interfere lightly with the UNDT's broad discretion in case management. In addition, the fact that an applicant submits his application in a specific language does not give the right to have the judgment issued in, or all materials translated into, a specific language. Both the 4 March 2015 letter and the subsequent decision not to act upon Mr. Nadeau's complaints issued in English and Mr. Nadeau's application was officially translated. Therefore, the UNDT had all the necessary documents to make a fair and reasoned determination.

26. Secondly, the Secretary-General argues that Mr. Nadeau has failed to establish that the UNDT erred on a question of procedure by denying his request for an oral hearing. Pursuant to Articles 16(1) and 16(2) of the UNDT Rules of Procedure, the denial falls within the UNDT's discretion in the management of its cases, which the Appeals Tribunal does not lightly

interfere. Moreover, Mr. Nadeau has not provided any evidence that the denying of his request

and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. Additionally, we do not find that an oral hearing would assist in the expeditious and fair disposal of the case, as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is denied.

**Did the UNDT commit an error of procedure such as to affect the decision of the case by denying Mr. Nadeau's request for an oral hearing?**

31. Under Article 2(1)(b) of its Statute, the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the UNDT in which it is asserted that the UNDT has committed an error in procedure such as to affect the decision of the case. It follows that a party, in order to be successful on appeal, not only has to assert and show that the UNDT committed an error in procedure but also that this error affected the decision on the case. As Mr. Nadeau has given no convincing reasons on appeal as to why and how an oral hearing before the UNDT would have had an impact on the decision of the case, on this ground alone his appeal must fail. Furthermore, we do not find that by denying Mr. Nadeau's request for an oral hearing the UNDT committed an error of procedure. The Judge lawfully exercised the discretion vested in him by Article 16(1) of the UNDT Rules of Procedure. In stating that the reason behind the Applicant's request for an oral hearing is that he wishes to present any new evidence or legal contentions which he has otherwise been prevented from submitting during the proceedings but rather that he wishes to present himself in person in French to the Tribunal, the UNDT has given a reasonable explanation for not holding an oral hearing.

**Did the UNDT err in law and in procedure so as to affect the decision of the case 1) by denying Mr. Nadeau's request for the proceedings to be conducted in French; 2) by dismissing Mr. Nadeau's objections to the English translations of his application and other documents; 3) by not having the Secretary-General's reply translated into French before issuing its Judgment; and, 4) by failing to have annexes 2, 3, 8, 10, 14, 16 and 19 to Mr. Nadeau's application to the UNDT translated into English?**

32. We cannot find any error in the proceedings before the UNDT. Mr. Nadeau's due process

The Appeals Tribunal must not interfere lightly with the exercise of its jurisdictional powers conferred on the tribunal of first instance and cases to be judged fairly and expeditiously and for dispensation of justice. This Tribunal has also ruled that the determination of venue is a matter entirely for the Dispute Tribunal. Following Article 8(6) of the UNDT Statute, Mr. Nadeau was able to file his application in French. Mr. Nadeau has not, on appeal, identified weaknesses of the English translation of his application which could be relevant for the decision of the case. Mr. Nadeau's due process rights were not violated by the fact that the Respondent's reply was not translated into English. This Tribunal has explicitly stated that the respondent's reply does not have to be translated. Furthermore, the documentary evidence shows that Mr. Nadeau understands English perfectly, so the lack of translation was not prejudicial to him. With regard to annexes 2, 3, 8, 10, 14, 16 and 19 of his application, we find that it is irrelevant that they were not translated into English and the Judge could not read and understand them. The 4 March 2015 MEU letter and the (translated) application which the Judge could read and understand contain all the facts which are relevant and necessary for the case.

Did the UNDT err in law and/or exceed its jurisdiction by considering that there was no basis for finding that the MEU's 4 March 2015 letter amounted to a breach of either ST/SGB/2008/5 or ST/AI/371 and thus, the dismissal of Mr. Na

**THE UNITED NATIONS APPEALS TRIBUNAL**

are no such grounds or reasons, the Administration is not allowed to initiate an investigation against a staff member. This is due to the fact that the mere undertaking of an investigation under ST/SGB/2008/5 or ST/AI/371 can have a negative impact on the staff member concerned.

35. In the present case, we find that the UNDT correctly held that Mr. Nademet This is du

Original and Authoritative Version: English

Dated this 31<sup>st</sup> day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

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

(Signed)

Weicheng Lin, Registrar