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Case No.: UNDT/NY/2012/007

Judgment No.: UNDT/2013/109

Date: 26 August 2013



## **Introduction**

1. On 13 February 2012, the Applicant, a staff member of the Department for General Assembly and Conference Management (“DGACM”) of the United Nations Secretariat in New York, filed an application contesting the Secretary-General’s refusal “to conduct an investigation into the irregularities surrounding the 7–9 June 2011 United Nations Staff Union [(“UNSU” or “Staff Union”)] election[s], in light of the failure of the UNSU Arbitration Committee to adequately address the matter”. The Applicant submits, *inter alia*, that as a result, his rights to free and fair elections and to equitable representation in the Staff Union were irreparably compromised.

2. As a remedy, the Applicant requests

an independent, impartial, and thorough investigation overseen by the Dispute Tribunal to determine whether there is sufficient evidence to conclude that the 2011 UNSU election results are safe. If the results of an independent investigation support the Applicant’s contention that the election results are not safe, then the Applicant respectfully requests the Dispute Tribunal to order new elections on the basis that his rights were fundamentally violated by the irregularities and can only be remedied through the opportunity to participate in a new fair and confidential election process.

3. On 14 February 2012, the Registry of the United Nations Dispute Tribunal in New York transmitted the application to the Respondent, instructing him to file a reply by 13 March 2012.

4. On 16 February 2012, the Respondent filed and served a motion requesting leave to file his reply limited to the issue of receivability of the application, to be considered as a preliminary matter, contending that:

The Applicant requests the Tribunal to review and investigate matters relating to the internal affairs of the United Nations Staff Union elections. The Tribunal in *Hassanin* Order No. 83 (NY/2011) held that the Tribunal has no jurisdiction over matters involving the internal affairs of staff associations. In *Hassanin* Order No. 139 (NY/2011) at paragraph 48, the Tribunal further held that staff association elections concerned an area protected from employer interference not within the organizational authority of the Secretary-General.

5. By Order No. 43 (NY/2012), dated 6 March 2012, the Tribunal granted leave for the Respondent to file a submission on the issue of receivability. Having further reviewed the parties' submissions and supporting documentation, on 1 August 2013 the Tribunal issued Order No. 182 (NY/2013), stating that there appeared to be no substantial disputes of fact in the material particulars, and the receivability and merits issues were solely that of legal argument, extensive submissions on which have already been received. The Tribunal stated that the submissions before it were sufficient to determine the matter in full.

does not behove the Respondent to straddle two horses at the same time, dependent upon an anticipated outcome. A party's submission in response to an order must be clearly indicative of its position. A party cannot hold a court to ransom or endeavour to negotiate its position or impose conditions under which it would file its submissions or comply with the Tribunal's orders. Therefore, having received no additional submission on the merits from the Respondent by the deadline of 15 August 2013, the Tribunal proceeded, under art. 19 of its Rules of Procedure and in the interests of justice and in order to ensure a fair and expeditious disposal of the case, with the consideration of the case on the papers before it.

### **Background**

7. It is common cause that the Staff Union held elections for its 44th Staff Council and Leadership on 7–9 June 2011. The Applicant voted in the elections as a member of the Staff Union. These elections were organized and conducted by UNSU polling officers, headed by a Chairperson. The polling officers, with the approval of the UNSU Staff Council, conducted the elections via email voting, engaging a company called Election Services Corporation. This was a first for the Staff Union, previous elections having been conducted by manual voting. On 19 and

particularly as the polling officers did not purchase the auditing services offered by Election Services Corporation. He maintains that a senior technology Security engineer in the Department of Management confirmed that the use of the UN email system to conduct online email voting posed a serious security threat and breached the confidentiality of voters. In this regard he itemises about four risk factors and eesty thfDeparticul5[(r)-ty thnt em



15. The Applicant submitted a complaint to the Arbitration Committee on 5 July 2011. On 8 July 2011, another staff member, Mr. TG, who was on Leadership Ticket No. 2 as the First Vice President, submitted a duplicate complaint. (Mr. TG also subsequently filed an application before the Tribunal, raising claims that are identical to the ones raised in this case. His application was registered under Case No. UNDT/NY/2012/010.) Having ascertained that the Applicant's and Mr. TG's complaints were identical, the Arbitration Committee consolidated the two complaints and heard them jointly.

16. In his complaint to the Arbitration Committee the Applicant alleged that the polling officers and the Chairperson committed violations in the conduct of the election, including *inter alia*, violation of the right to vote, violation of the right to secret ballot, disregard for candidate ineligibility, the lack of independent monitoring and oversight, and refusal to allow a challenge to the election results.

17. With regard to the Arbitration Committee, the Applicant complains that the Committee also violated the UNSU Regulations. He states that they did not deal with his complaint within two weeks as per the UNSU Regulations, but informed him that they would be waiting until all the members of the Arbitration Committee had returned from leave before convening. Subsequently they informed the Applicant that they were awaiting the return from her leave of the polling officers' Chairperson, and ultimately notified him that they would only deal with the complaint in September 2011.

18. The Arbitration Committee transmitted its decision (dated 28 September 2011) to the Applicant on 6 October 2011, three months after he filed his complaint. The Committee dismissed the Applicant's complaint, finding that his claims were unsubstantiated by the facts.

19. The Applicant alleges that the Arbitration Committee did not, *inter alia*, examine the accuracy of the voter list, th



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Mr. TG] in connection with their claims concerning the conduct and outcome of the United Nations Staff Union elections held on 7–9 June 2011.

25. The Tribunal will firstly make its findings with regard to the receivability and, if applicable, merits of the Applicant's claims concerning the Staff Union elections, and secondly, with regard to the Applicant's claims concerning the Secretary-General's decision not to launch the requested investigation.

*Claims regarding Staff Union elections*

Union elections

26. With regard to the Applicant's request for the Dispute Tribunal to oversee an investigation into his claims or to order new elections, the Respondent contends the Tribunal is not empowered to make such orders.

27. The ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948) confers the right of workers' and employers' organizations to draw up their own constitutions and rules and to organize their administration and activities without interference. The Convention also provides for the right of organizations to elect their representatives in full freedom.

28. Apart from ensuring the orderly conduct of free and fair elections, electoral procedures serve to democratise a trade union. Ballots are often used for the election of union officials, before a strike, etc. Generally a ballot must comply with whatever statutory or regulatory requirements are in place. In many jurisdictions both domestic and international, there are very specific provisions regarding union elections and voting processes, e.g., regarding eligibility of candidates, the voters roll, the method for voting, requirements to be complied with regarding ballot papers and counting of ballots, and referral of the disputes or challenges. Some legislation provides for

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**Right of organization to organize their administration**

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*Control over the internal activities of organizations*

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**[Paragraph] 462:** Events of an exceptional nature may warrant direct intervention by a government in internal trade union matters in order to re-establish a situation in which trade union rights are fully respected.

31. In the UN context, in terms of art. 13.1 of the UNSU Statute, “[t]he Polling Officers shall be independently responsible for organizing and conducting elections, and publishing its results, as required by the Statute, Regulations and rules of procedure”. Polling officers shall be “operationally independent”, “shall conduct the electoral process in such a way as to ensure the complete integrity and fairness of the ballot”, and “may request the assistance of electoral monitors to provide independent oversight of the electoral process” (UNSU regulations 6.5, 6.9, and 6.11). Article 13.4 of the UNSU Statute further states that the “[e]lections shall be by Secretariat-wide secret ballot and may be conducted electronically or manually as determined by the Council”. Various other provisions govern the duties of the polling officers, eligibility of candidates and various procedures and requirements. It is the Applicant’s contention that even though there are procedures internal to the Staff Union, they are flagrantly insufficient to protect the rights of Union members and need to be reviewed.

32. The Tribunal notes that the Applicant’s reference to para. 462 of the 2006 Digest (under the subheading “Control over the internal activities of organizations”), pertains to a trade union’s general rights to organize its administration and activities without any interference from the administration save in exceptional circumstances, for example registration and dissolution procedures, the obligation to report on financial matters to the public authorities or administration, and so on. These

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communicated to the Applicant in the Under-Secretary-General for Management's letter dated 9 December 2011. This letter was specifically addressed to Counsel for the Applicant and makes direct reference to the claims of Applicant.

43. As to what constitutes an "administrative decision", in *Andati-Amwayi* 2010-UNAT-058, the United Nations Appeals Tribunal held that this depends "on the nature of the decision, the legal framework under which the decision was made, and the consequence of the decision". In *Schook* 2010-UNAT-013 and *Tabari* 2010-UNAT-030, the Appeals Tribunal held that, by implication, the failure, or omission, of the Administration to take a decision could also be an appealable administrative decision.

44. The language of art. 2.1(a) of the Dispute Tribunal's Statute is clear—the Tribunal is competent to hear and pass judgment on an application against the Secretary-General appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". The Applicant alleges just that.

45. The Tribunal finds that, with regard to the Secretary-General's refusal to carry out the requested investigation, the administrative decision is clearly identifiable, at least as an omission—the refusal to carry out the investigation requested by the Applicant in connection with the conduct of the 7–9 June 2011 UNSU elections. The decision is clearly attributable to the Secretary-General in that it was communicated by the Under-Secretary-General for Management in her letter dated 9 December 2011 to the Applicant's Counsel. The Applicant also alleges that the decision was in breach of his rights under the terms of his appointment with the United Nations (including staff regulations 1.1(c) and 8.1(b) and staff rule 8.1) and therefore also violated his individual rights under his employment contract. Whether or not the Applicant's rights were indeed breached is a matter for the merits.

46. Therefore, the Tribunal finds that the Applicant's application with respect to the Secretary-General's refusal to carry out the requested investigation is receivable.

Merits

47. With regard to the merits, the Respondent submits that the Secretary-General's refusal to interfere in Staff Union matters was proper. The Respondent contends that the Secretary-General's decision not to conduct an investigation into the alleged irregularities follows established jurisprudence affirming the principle of non-interference in internal Staff Union affairs, and the competency of the Tribunal. The Respondent states that this case falls outside the scope of art. 2.1 of



50. In terms of staff regulation 1.1(c), the Secretary-General has an obligation to ensure that the rights and duties of staff members set out in the Charter and the Staff Regulations and Rules, as well as the relevant resolutions of the General Assembly, are respected. Although in terms of staff regulation 8.1(b) representative bodies “shall be organized in such a way as to afford equitable representation to all staff members, by means of elections ... under electoral regulations drawn up by the respective representative body and agreed to by the Secretary-General”, in terms of the UNSU Statute, polling officers “shall be *independently* responsible for organizing and conducting elections, and publishing its results, as required by the statute, regulations and rules of procedure” (art. 13.1 of UNSU Statute, emphasis added). Other statutory provisions stipulate that only members of the Staff Union may vote, that all candidates should be dues-paying members in good standing, and elections may be conducted “electronically or manually as determined by the Council” (arts. 13.1–13.5 of the UNSU Statute). Although the Applicant alleges that these provisions are woefully inadequate, it is not for the Tribunal to rewrite the UNSU Statute or Regulations.

51. In *Kisambira*

53. There is no evidence that the Secretary-General hindered the electoral process or frustrated organizational rights in any manner. The Secretary-General's responsibility is to facilitate organizational rights and not to interfere in those. To actively direct the conduct and manner of elections (for example, directing that auditing services be purchased for the ballot from the Election Services Corporation) would not be in conformity with the independent status of the Staff Union and the applicable law. The Secretary-General may not intervene in the format or conduct of elections by virtue of the Staff Union's Statute. It is conceivable that there may be situations that may constitute misconduct under the Organization's regulations and rules, which may give rise to the initiation of appropriate procedures against individual members engaged in misconduct. However, the Applicant did not pursue the matter as a matter of individual misconduct. Rather, as was correctly assessed by the Secretary-General, the issues raised were internal Staff Union matters.

54. Neither staff rule 8.1 nor the Tribunal's case law appear to suggest, even implicitly, that the Secretary-General was obligated to intervene in the conduct of the UNSU elections of June 2011 or investigate them thereafter. This is particularly so as a mechanism has already been set

