



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

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Judgment No. 2016-UNAT-654



**Faye  
(Appellant)**

**v.**

**Secretary-General of the United Nations**

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Counsel for Mr. Faye: Self-represented

Counsel for Secretary-General: Simon Thomas



4. On 22 July 2015, the UNDT held a case management discussion (CMD) to discuss the

8. The UNDT determined that Mr. Faye's application was also not receivable on the grounds that he "does not have standing to challenge a decision affecting his right to consultation as a staff representative".<sup>8</sup> In reaching its decision, the UNDT took note of the fact that the General Assembly considered and rejected a proposal to grant staff associations standing to bring applications before the UNDT and that the proposed articles were not included in the UNDT Statute. The UNDT also found that Mr. Faye's arguments were "in effect an attempt to enforce rights which the General Assembly specifically considered and decided not to confer upon staff associations and those acting in the capacity of staff association representatives".<sup>9</sup>

9. The UNDT also concluded that Mr. Faye's application was not receivable on the grounds that the contested decision was not an administrative decision subject to judicial review. It found that Mr. Faye "ha[d] not identified the direct legal consequences that the submission of the budget estimates had on his welfare and conditions of employment".<sup>10</sup> Having found the application not receivable, the UNDT did not consider the merits.

10. The UNDT ordered costs against Mr. Faye in the amount of USD 500, having found that Mr. Faye had manifestly abused the process. The UNDT explained its reasons, noting that it had advised Mr. Faye during the CMD that he may face an order for costs against him pursuant to Article 10(6) of the UNDT Statute if he was unable to present an effective challenge to the legal contentions regarding receivability raised by the Respondent. Finding "nothing in [Mr. Faye's] additional submissions ... to persuade the [UNDT] that there is any merit in his application ..., [t]he [UNDT] finds that [Mr. Faye] has manifestly abused the proceedings by his persistence in advancing a legally unsustainable contention, despite guidance offered".<sup>11</sup>

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<sup>8</sup> Ibid., para. 13.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., para. 15.

<sup>11</sup> Ibid., para. 24.



14. The Dispute Tribunal further committed an error of procedure such as to affect the decision of the case in awarding costs against Mr. Faye. The Dispute Tribunal manifestly abused its power granted under Article 10(6) of its Statute. As the UNDT did not reach a decision on the merits of the case, it therefore could not “reasonably conclude that cost should be awarded against [him] for filing an appeal lacking in merits”.<sup>15</sup>

15. The UNDT failed to demonstrate how Mr. Faye’s submissions in response to the Respondent’s legal contentions were unsuccessful. Furthermore, the UNDT did not provide any persuasive arguments to illustrate how his application was a frivolous filing nor how there was clearly and unmistakably a wrong or improper use of the proceedings of the court, especially as Mr. Faye complied with the UNDT’s orders issued during the proceedings.

16. Mr. Faye’s persistence in seeking justice for what he perceived to be a breach of his contractual rights should not be construed as an abuse of proceedings. If indeed his application had been lacking in merits or was clearly non receivable, it would have been disposed of at the initial stage of the proceedings.

17. Mr. Faye requests the Appeals Tribunal to vacate the order of costs against him in the amount of USD 500. He also seeks a ruling on the merits of his application as “he is not satisfied with the UNDT Judgment on Receivability which resulted in [it] not considering the merits”.<sup>16</sup>

### **The Secretary-General’s Answer**

18. The Dispute Tribunal did not make any errors when it concluded that Mr. Faye’s application was not receivable. First, the UNDT correctly found that Mr. Faye had failed to request management evaluation of the contested decision when it concluded his request for management evaluation, filed before the contested decision of 2 June 2015, was clearly related to a different decision. As Mr. Faye did not request management evaluation of the contested decision, the UNDT was correct to conclude his application was not receivable.

19. In addition, the Dispute Tribunal correctly determined that Mr. Faye did not have standing to challenge a decision in his capacity as a staff representative. The Dispute Tribunal has consistently held that a staff member must have individual standing to challenge an

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid., page 2.

administrative decision, and cannot do so in capacity as a staff representative. The UNDT Statute does not provide for filing of applications by staff representatives or a staff association in the name of, or on behalf of, the collective interests

22. The Dispute Tribunal's order of costs against the Appellant is consistent with General Assembly resolution 67/241, which recognizes "the importance of effective measures against the filing of frivolous applications" and "encourages the judges to make full use of those measures currently available to them".<sup>17</sup> The filing of frivolous applications causes delays in justice for staff members with legitimate claims and causes the Organization to expend efforts to defend itself against such cases.

23. Furthermore, Mr. Faye's current appeal fails to advance any legal argument which might reasonably support a finding that the UNDT erred in the Judgment, which is further evidence of his ongoing abuse of the proceedings.

24. The Secretary-General requests that the UNDT Judgment be affirmed and the appeal be dismissed. However, should the Appeals Tribunal determine that the UNDT erred in concluding that Mr. Faye's application was not receivable, the Respondent requests that the case be remanded to the UNDT to be adjudicated on the merits.

### **Considerations**

25. The UNDT rejected Mr. Faye's application on the following three grounds:

1. Mr. Faye failed to request management evaluation of the contested decision.
2. Mr. Faye did not have standing to challenge a decision affecting his rights as a staff representative.
3. The contested decision did not have direct legal consequences affecting him.

Mr. Faye failed to request management evaluation of the contested decision

26. The decision contested before the UNDT by Mr. Faye was the decision by the CEO of the UNJSPF to submit budget estimates for the 2016-2017 biennium to the UNJSPF Board on 2 June 2015 without consultation with staff members.

27. Mr. Faye's request for management evaluation on 26 May 2015, which predated the contested decision, was a request for management evaluation of the failure by UNJSPF management to comply with the Assistant Secretary-General for the Office of Human Resources

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<sup>17</sup> General Assembly resolution 67/241, of 24 December 2012, para. 42.



Management (ASG/OHRM)'s directive dated 10 February 2015 in regard to consultation with staff representatives.

28. The UNDT decided as follows:<sup>18</sup>

... The application states that [Mr. Faye] requested management evaluation of the 2 June decision by the request dated 26 May 2015.

... The Tribunal finds that the Applicant relies on a request for management evaluation that contested a different decision to the decision contested in his application. Indeed, the request for management evaluation that he relies upon was submitted prior to the date of the decision contested in his application.

... On a strict interpretation of the Statute, this application can be dismissed, without more, because the decision contested in the request for management evaluation does not match the decision contested in the application.

29. Mr. Faye argues that the UNDT is “confusing the nature of both the Applicant’s Management Evaluation Request and the contested decision”. We disagree. The UNDT made no error in distinguishing the two issues. The earlier management evaluation request contested the UNJSPF’s non-compliance with a directive to consult with Staff Representatives. The later application to the UNDT contested a specific decision to submit the budget estimates to the UNJSPF Board without consultation.

30. The UNDT made no error in holding that Mr. Faye’s application could be dismissed by reason of the contested decision not having been submitted for management evaluation. In reaching that decision, the UNDT was cognizant of Article 8(1)(c) of its Statute, which provides that an application shall be receivable if an applicant has previously submitted the contested decision for management evaluation, where required. The UNDT also noted that Staff Rule 11(2)(a) requires a staff member to submit a request for management evaluation prior to filing an application challenging an administrative decision.

31. Moreover, it is settled case law that requesting management evaluation is a mandatory first step in the appeal process. Staff Rule 11.2 is unambiguous and requires that the request for management evaluation must be submitted before an application is filed before the Dispute Tribunal. A staff member must be familiar with the Staff Rules and understand his

or her obligation to act in conformance with those rules. This means that a request for management evaluation must be submitted prior to bringing an application before the Dispute Tribunal.<sup>19</sup> The Appeals Tribunal has noted many times that the requirement for management evaluation assures that there is an opportunity to quickly resolve a staff member's complaint or dispute without the need for judicial intervention.<sup>20</sup>

32. We hold that the UNDT did not err in fact or in law in finding that Mr. Faye did not request management evaluation of the disputed decision of 2 June 2015 to submit budget estimates without engaging in consultation with staff representatives, and that his application was therefore not receivable.

33. That decision was sufficient to dispose of the case, although the UNDT then proceeded to consider other reasons why Mr. Faye's application was not receivable.

Mr. Faye did not have standing to challenge a decision affecting his rights as a staff representative

34. The UNDT concluded that Mr. Faye "does not have standing to challenge a decision affecting his right to consultation as a staff representative".<sup>21</sup>

35. We hold that the UNDT was correct in finding Mr. Faye's application to be not receivable for that reason.

36. There is no statutory provision or other law which gives the UNDT jurisdiction to entertain an application by a staff representative on behalf of staff members. The only recognition given to a staff association in the UNDT Statute is in Article 2(3), which gives the UNDT discretion to permit or deny leave to an application to file a friend-of-the-court (*amicus curiae*) brief by a staff association. However, one of the essential characteristics of a friend-of-the-court is that he or she is someone who is not a party to the case.

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<sup>19</sup> Terragnolo v. Secretary-General of the United Nations , Judgment No. 2015-UNAT-566, paras. 32-33; Amany v. Secretary-General of the United Nations , Judgment No. 2015-UNAT-521, para. 17; Servas v. Secretary-General of the United Nations , Judgment No. 2013-UNAT-349, paras. 20-22.

<sup>20</sup> Amany v. Secretary-General of the United Nations , Judgment No. 2015-UNAT-521, para. 17, citing Servas v. Secretary-General of the United Nations , Judgment No. 2013-UNAT-349, para. 22 (citing Neault v. Secretary-General of the United Nations , Judgment No. 2013-UNAT-345 and Pirnea v. Secretary-General of the United Nations , Judgment No. 2013-UNAT-311).

<sup>21</sup> Impugned Judgment, para. 13.

37. The UNDT noted in its decision that Mr. Faye complained in his application that “he should have been consulted about the budget estimates in his capacity as a staff representative”.<sup>22</sup> Mr. Faye claims in his appeal that: “While the Statute of the [Dispute] Tribunal does not recognize the standing of staff association[s] to bring suit on behalf of their membership, it does recognize the right of individual staff members to bring claims related to their official capacity as staff representatives insofar as these relate to their own right and conditions of service”.

38. The UNDT then considered the relationship of the disputed decision to Mr. Faye’s terms and conditions of service.

The contested decision did not have direct legal consequences affecting Mr. Faye

39. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and by the Appeals Tribunal.<sup>23</sup> In Andronov , the former Administrative Tribunal stated:<sup>24</sup>

... There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

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a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

... In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objects, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

41. In short, as held by this Tribunal in *Lee*, the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment.<sup>26</sup> That is to say, the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

42. The UNDT, in citing the applicable law, correctly found that "the submission of the 2016-2017 UNJSPF budget estimates did not have direct legal consequences on the Applicant's terms and conditions of appointment".<sup>27</sup>

Costs

45.

**Judgment**

51. The UNDT Judgment No. UNDT/2015/077 finding Mr. Faye's application not receivable is affirmed. However, the appeal is allowed in part to the extent that the UNDT's order for costs against Mr. Faye is vacated.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of June 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 24<sup>th</sup> day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar