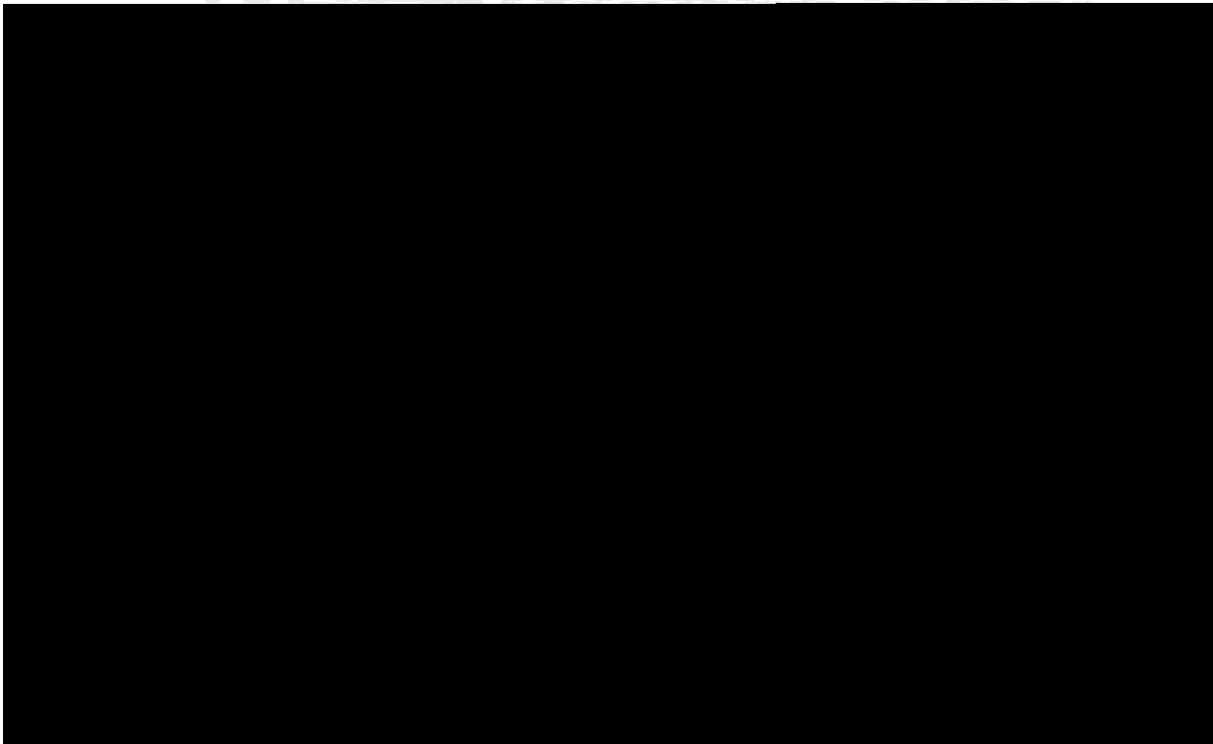


Judgment No. 2016-UNAT-708



Counsel for Mr. Finnis: Anna Paula Silfverstolpe

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 116 (GVA/2016), rendered by the United Nations Dispute Tribunal (UNDT

thus receivable. In making this determination, the UNDT distinguished between internal and external candidates, noting that:²

... Despite different jurisprudential approaches with respect to the determination of the proper date of the implementation of a selection decision [...], there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of an offer of appointment [...]. However, the [UNDT] finds that such a procedure is reserved for selection decisions involving an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

... With respect to selection procedures that entail promotion of internal candidates, like in the present case, the [UNDT] recalls that [Section 10(2)] of [Administrative Instruction] ST/AI/2010/3 [dated 21 April 2010 titled "Staff selection system"] clearly states that:

When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision.

... It follows from this provision that the implementation of the contested selection decision, which was taken on 2 June 2016, cannot be implemented before 1 July 2016. Therefore, the contested decision has not yet been implemented, and the application for suspension of action is receivable.

4. On 28 June 2016, the Secretary-General appealed. On 14 July 2016, the same day

Submissions

The Secretary-General's Appeal

7. The appeal is receivable because the UNDT exceeded its jurisdiction and competence when it suspended a selection decision (i) in a case of promotion notwithstanding the prohibition set forth in Article 10(2) of the UNDT Statute and (ii) because, contrary to the UNDT's erroneous finding, the selection decision had already been implemented.

8. The subject matter of the suspended decision was a promotion, falling within the purview of Article 10(2) of the UNDT Statute. It was thus non-receivable *ratione materiae* and legally impermissible for the UNDT to adjudicate the matter. The UNDT failed to consider the limitations to its competence. The prohibition as contained in Article 10(2) of the UNDT Statute recognizes that decisions on, *inter alia*, the promotion of staff members are not subject to suspension by the UNDT at any stage in the proceedings. Suspending promotion decisions negatively impacts the Organization's functioning and also puts it at risk of defending claims by selected candidates for failure to effect the promotion on the statutorily determined date.

9. The UNDT erroneously relied on Section 10(2) of ST/AI/2010/3 when determining whether the contested decision had been implemented. That provision identifies the earliest possible effective date of a promotion and does not change the implementation date, which corresponds to the date the Administration receives an unconditional acceptance of the offer (in this case, 2 June 2016, via telephone with the selected candidate who accepted the same day). The UNDT's reasoning is flawed and means that selection decisions would not be "implemented" until the future date upon which the selected candidate assumes the position, resulting in the suspension of any appointment/promotion decision and adversely impacting the Organization.

10. In reaching its decision in this regard, the UNDT also erred when it held that the determination of the implementation date of a selection decision differs between internal and external candidates. This holding is not supported by the legal framework or jurisprudence.

11. The Secretary-General requests that the Appeals Tribunal find the appeal receivable, review it on an expedited basis, find that the UNDT exceeded its competence and jurisdiction under both Articles 2(2) and 10(2) of its Statute and annul the impugned Order.

Mr. Finniss' Answer

12. The appeal is not receivable because the Secretary-General has failed to demonstrate that

doctrine recognized by many jurisdictions,

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Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar