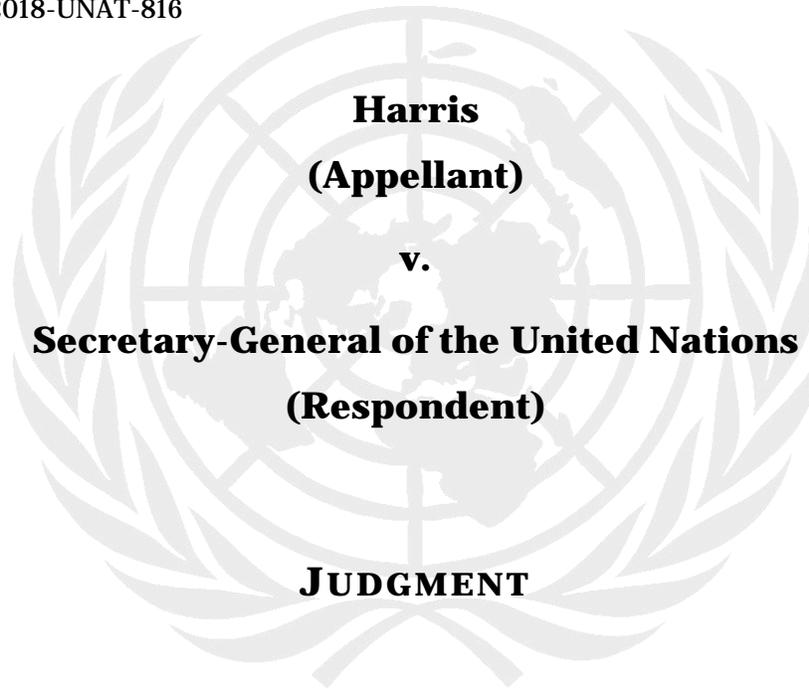




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-816



Before:	Judge Sabine Knierim, Presiding Judge Richard Lussick Judge Deborah Thomas-Felix
Case No.:	2017-1105
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Mr. Harris:	Self-represented
Counsel for Secretary-General:	Rupa Mitra

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 135 (NBI/2017), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 4 August 2017, in the case of *Harris v. Secretary-General of the United Nations*. Mr. Bryan Galakpai Harris filed the appeal on 16 August 2017, and the Secretary-General filed an answer on 25 September 2017.

Facts and Procedure

2. Mr. Harris joined the United Nations Interim Force in Lebanon (UNIFIL or the Mission) on a fixed-term appointment as an Information Technology Assistant (FS-4) on 23 September 2007. His fixed-term appointment was subsequently extended on several occasions.

3. On 11 January 2016, the UNIFIL Human Resources Management Service (HRMS) sent Mr. Harris a notification of non-extension of appointment effective 30 June 2016, due to changes in staffing in the budget for 2016/2017. On 23 March 2016, UNIFIL's Chief of Information Technology reported to HRMS that Mr. Harris had not reported to work in Sector West since 17 March 2016. That same day, HRMS/UNIFIL sent an e-mail notification to Mr. Harris advising him of the provisions of Administrative Instruction ST/AI/400 (Abandonment of post). On 30 March 2016, Mr. Harris sent to HRMS/UNIFIL a medical report regarding his anticipated surgery scheduled for 6 April 2016. On 20 April 2016, the Medical Services Division (MSD) approved certified sick leave from 21 March 2016 through 1 July 2016. On 2 August 2016, it was extended for a second period from 4 July 2016 to 7 October 2016.

4. On 23 June 2016, during his sick leave period, Mr. Harris was selected for an FS-5 Information Systems Assistant post in UNIFIL, thus enabling the Mission to retain him beyond 30 June 2016.

5. On 4 October 2016, Mr. Harris received an e-mail from the Chief, Regional Information Communications and Technology Services (RICTS) confirming an earlier June 2016 notification of his reassignment to UNIFIL Sector East in accordance with the RICTS rotation programme. On the same day, 4 October 2016, while still on approved certified sick leave, Mr. Harris visited the HRMS/UNIFIL office. He was required to provide a certificate from MSD that he had been

cleared to return to the Mission. On 10 October 2016, Mr. Harris submitted a medical clearance dated 7 October 2016 issued by his treating physician, but not MSD.

6. On 9 November 2016, Mr. Harris addressed e-mails to the Chief/RICTS requesting home leave and provided supporting documents to justify his leave request. On 10 November 2016, Mr. Harris wrote to the Chief/RICTS and requested him to reconsider his decision to remove him as a First Reporting Officer at his new assignment in Sector East. Following an internal meeting within RICTS, Mr. Harris informed the Chief of his inability to work under the conditions proposed by RICTS. On the same day, the Chief/RICTS requested a meeting with the Chief Human Resources Officer (CHRO) to discuss Mr. Harris's reassignment and his absence from work. The meeting was held on 15 November 2016 between Mr. Harris, the Chief/RICTS, the CHRO and the Chief, International Staff Unit.

7. On 28 November 2016, Mr. Harris received an e-mail from the Chief/RICTS enquiring as to why he had failed to report to work in Sector East and instructing him to explain his absence in accordance with the conclusions of the official meeting held on 15 November 2016. Mr. Harris informed the Chief/RICTS that he was unable to serve in Sector East.

8. By memorandum dated 29 November 2016, Mr. Harris was given the first warning by the CHRO that the process of separation for abandonment of post would be commenced against him as he had been absent from work at the RICTS Unit in Sector East since 16 November 2016.

9. On 1 December and again on 12 December 2016, Mr. Harris responded to the memorandum of 29 November 2016 and explained why he was unable to work in Sector East. On 8 December 2016, he addressed another e-mail to the Chief/RICTS and others requesting reconsideration of the decision to reassign him to Sector East.

10. Mr. Harris proceeded on home leave from 19 December 2016 until 3 January 2017.

11. By memorandum dated 16 January 2017, Mr. Harris received a final warning to report to work or else UNIFIL would initiate abandonment of post proceedings. He was also informed that his salary had been placed on hold effective January 2017 due to his unauthorized absence. The following day, Mr. Harris responded to this memorandum by e-mail to the Chief/RICTS and other UNIFIL staff managers stating that he considered the abandonment of post warning as part of systematic threats.

12. The proceedings for abandonment of post were ceased on 8 February 2017 upon receipt of the approved medical certificate for the period from 28 January to 17 February 2017. HRMS/UNIFIL, however, placed Mr. Harris on Special Leave without Pay (SLWOP) for the periods of unauthorized absence from 8 October 2016 to 8 December 2016 and 4 January 2017 to 22 January 2017.

13. On 17 March 2017, HRMS/UNIFIL was notified by MSD that a further extension of Mr. Harris's certified sick leave had been approved from 18 February 2017 through 31 March 2017.

14. On 27 March 2017, Mr. Harris sent an e-mail to the Chief/RICTS and other UNIFIL staff managers requesting Special Leave with Full Pay (SLWFP).

15. On 31 March 2017, the CHRO informed Mr. Harris that his entitlement to sick leave with full pay would be exhausted as of 3 April 2017. She suggested that any further sick leave approved by the MSD could be charged against sick leave with half pay. She awaited Mr. Harris's instructions in this respect.

16. Between 31 March 2017 and 25 July 2017, Mr. Harris engaged in an exchange of e-mails with the CHRO copying other UNIFIL senior managers, on the subjects of the termination of his health insurance, the release of his salary and on a request he made to the Secretary-General for SLWFP. On 7 April 2017, Mr. Harris requested management evaluation of, *inter alia*, the decision to cancel his health insurance and to withhold his salary for the periods from 8 October 2016 to 8 December 2016 and from 4 January 2017 to 22 January 2017, to which he received a response on 21 July 2017.

17. On 23 May 2017, in response to Mr. Harris's inquiry about his request for SLWFP, the CHRO informed Mr. Harris that as advised in the memorandum to him dated 7 April 2017, they explained to him how he should make a request for SLWFP and that as her office had not been copied on his memorandum to the Secretary-General dated 19 April 2017 requesting SLWFP, they had no oversight of his request and that they had asked their colleagues in the Field Personnel Division to follow up.

18. By memorandum of 24 July 2017, Mr. Harris was informed by the UNIFIL Officer-in-Charge of the Mission Support Division that the Secretary-General had approved the decision to separate him from service on the ground of abandonment of post effective 12 July 2017.

19. On 25 July 2017, Mr. Harris filed a management evaluation request contesting the decision to separate him from service on the grounds of abandonment of post. On 28 July 2017, he filed an application for suspension of action (SOA), pending management evaluation, challenging the Secretary-General's decision to separate him from service.

20. On 31 July 2017, Mr. Harris received notification that no approval for SLWFP had been received from the United Nations Headquarters in New York.

21. On 4 August 2017, the UNDT issued Order No. 135 (NBI/2017) in which it refused to order a suspension of action. The UNDT was of the view that while Mr. Harris's application was receivable as the administrative decision had not yet been implemented it was not successful on the merits as the impugned decision was not *prima facie* unlawful.

22. On 16 August 2017, Mr. Harris filed an appeal against the UNDT Order and on 25 September 2017, the Secretary-General filed an answer.

23. On 6 October 2017, Mr. Harris filed a "Motion for Additional Filing" in which he requested leave to submit a response to the Secretary-General's answer and the production of additional "material evidence" of "lack of objectivity and good faith" on the part of his supervisor, amongst others. By Order No. 298 (2017) dated 20 October 2017, the Appeals Tribunal denied the motion, "[w]ithout prejudice to a determination on the merits of the appeal".

24. On 15 December 2017, the UNDT issued its final judgment in this case, Judgment No. UNDT/2017/095/Corr.1, in which it dismissed Mr. Harris's application finding that the decision to separate him for abandonment of post was not unlawful.

25. On 13 and 19 February 2018, Mr. Harris addressed e-mails to the Appeals Tribunal through the Appeals Tribunal Registry.

Submissions

Mr. Harris's Appeal

26. Mr. Harris submits that his appeal is "aimed to safe[guard] [his] health insurance for an urgent cancer surgery, as well as the release of [his] entitled education grant for the last year 2016[/]2017, pending both the recently filed case with the [Management Evaluation Unit]" "and the current case before the UNDT".

27. Mr. Harris contends that during his nine years of service he has never taken any certified or uncertified sick leave. It was only in April 2016 that he took sick leave for the first time in his entire career for intramedullary nail fixation surgery and severe stress disorder weeks following the surgery. While on certified sick leave, his insurance was terminated and his salary withheld. He subsequently requested special leave, but was not given an appropriate response to his request and instead received a notice of separation from service.

28. Mr. Harris submits that the Organization's allegation of his authorized absences from 8 October 2016 to 8 December 2016 and from 4 January to 22 January 2017 lacks evidence and that there are "about 50 plus emails and records of tasks [he] physically performed in Sector East, until the report of [his] deteriorated health in November 2016". Mr. Harris makes a number of other claims in relation to his alleged unauthorized absences and his special leave without pay.

29. Mr. Harris requests that the Appeals Tribunal hold an oral hearing.

The Secretary-General's Answer

30. The appeal is not receivable. Under Article 2(2) of the UNDT Statute, the decision of the UNDT is not subject to appeal. The Appeals Tribunal has held that appeals from UNDT decisions on suspension of action will be receivable only if the UNDT, in adjudicating on such applications, clearly or manifestly exceeded its jurisdiction or competence. In the present case, Mr. Harris has submitted no argument and has presented no evidence that the UNDT exceeded its jurisdiction or competence in rejecting his SOA application pending management evaluation. He merely repeats arguments he already made in his application before the UNDT, many of which are irrelevant to the present case.

31. The UNDT properly found that Mr. Harris had failed to establish that the contested decision was *prima facie* unlawful. Under Article 2(2) of the UNDT Statute and Article 13 of its Rules of Procedure, the UNDT can only suspend the implementation of a contested administrative decision pending management evaluation if three criteria are cumulatively met: if the decision appears *prima facie* to be unlawful; in cases of particular urgency; and where its implementation would cause irreparable damage to the applicant. In the present case, the UNDT ruled that Mr. Harris had not provided evidence that he had, indeed, been reporting for duty during the periods of time in which he was found to have been absent without authorization.

32. The Secretary-General asks that the Appeals Tribunal reject the Annex attached to Mr. Harris's appeal entitled "Full medical report". This Annex includes documents that were created after the impugned Order was issued and that were not part of the UNDT case record. Under Article 10 of the Appeals Tribunal's Rules of Procedure (Rules), a party may seek to submit, with an appeal, documentary evidence in addition to that contained in the written record. However, the Appeals Tribunal may receive such additional evidence only in exceptional circumstances and where the facts are likely to be established with such additional documentary evidence. Mr. Harris made no motion before the Appeals Tribunal seeking leave to submit additional documentary evidence. Furthermore, the attached documents do not relate to Mr. Harris's failure to report to duty prior to July 2017 nor do they pertain in any other way to the contested decision or relate to any error in the UNDT Order.

33. The Secretary-General requests that the Appeals Tribunal affirm the Order of the UNDT and dismiss the appeal in its entirety.

Considerations

Preliminary matters

34. As a preliminary matter, Mr. Harris filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute and Article 18(1) of its Rules. The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. Moreover, 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.

35. Further, we reject the Annex "Full Medical Report" attached to Mr. Harris's appeal, as requested by the Secretary-General. Pursuant to Articles 2(5) and 8(1) of the Appeals Tribunal's Statute and Article 10(1) of its Rules of Procedure, the Appeals Tribunal may receive additional evidence in exceptional circumstances, if it is in the interest of justice and the efficient and expeditious resolution of the proceedings. As Mr. Harris filed no motion and we do not find that the admission of the documents is in the interest of justice and the efficient and expeditious resolution of the proceedings, the Annex "Full Medical Report" will not be included as part of the case file.

36. For the same reasons as stated above, Mr. Harris's e-mails dated 13 and 21 February 2018 will not be included as part of the case file.

Receivability of Mr. Harris's appeal

37. Mr. Harris's appeal against the UNDT Order must fail because it is not receivable. The UNDT's authority on applications requesting suspension of action is governed by Article 2(2) of the Dispute Tribunal Statute which reads as follows:¹

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. *The decision of the Dispute Tribunal on such an application shall not be subject to appeal.*

38. Article 10(2) of the Dispute Tribunal Statute provides:²

At any time during the proceedings, the Dispute Tribunal may order an interim measure, *which is without appeal*, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

39. Further, Article 13 of the UNDT Rules of Procedure (Suspension of action during a management evaluation) provides, in part:

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

...

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

¹ Emphasis added.

² Emphasis added.

40. Articles 2(2) and 10(2) of the UNDT Statute, in unequivocal terms, provide that the decision of the Dispute Tribunal on an application for suspension of action shall not be subject to appeal. Consequently, appeals against such decisions are not receivable.

41. However, there is one exception to this rule: In the past, we have held that an appeal against interlocutory decisions can be receivable in cases where the UNDT clearly exceeded its competence or jurisdiction.³ Such a situation could occur, if the UNDT granted suspension of action clearly outside the scope of Article 2(2) of the UNDT Statute (i.e. order of suspension of action after the administrative decision has been implemented) or Article 10(2) of the UNDT Statute (i.e. order of suspension of action in cases of appointment, promotion or termination). On the other hand, an order by the UNDT denying an application for suspension of action cannot be considered to be a case in which the UNDT clearly exceeded its jurisdiction or competence.⁴

42. Accordingly, Mr. Harris's appeal is not receivable *ratione materiae*.

³ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062 (full bench, Judge Boyko dissenting), para. 21.

⁴ *Auda v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-671, para. 25; *Elhabil v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-655, para. 34.

Judgment

43. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Thomas-Felix

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar