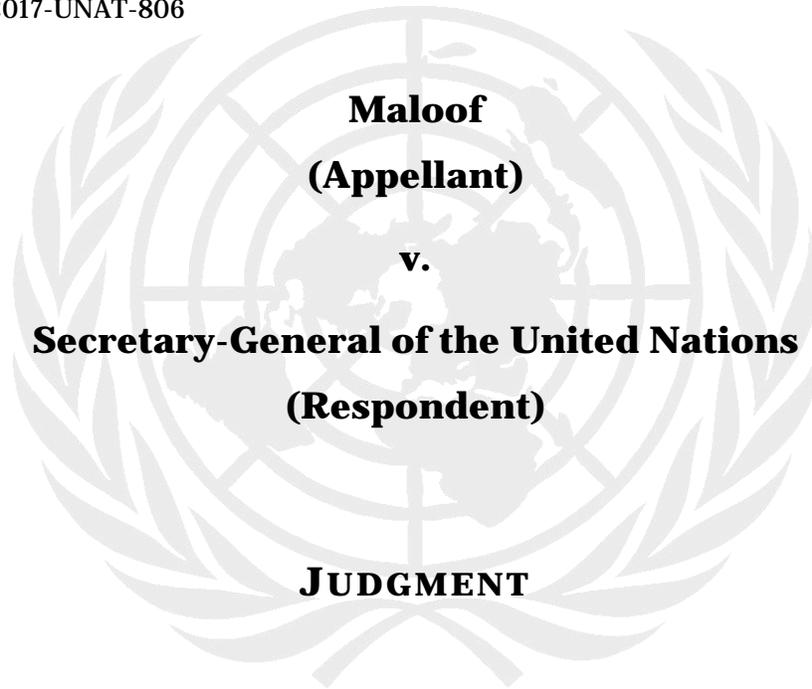




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-806



Before:	Judge John Murphy, Presiding Judge Deborah Thomas-Felix Judge Sabine Knierim
Case No.:	2017-1092
Date:	27 October 2017
Registrar:	Weicheng Lin

Counsel for Mr. Maloof:	George G. Irving
Counsel for Secretary-General:	Rupa Mitra

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/033, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 9 May 2017, in the case of *Malooof v. Secretary-General of the United Nations*. Mr. Salim Malooof filed the appeal on 29 June 2017, and the Secretary-General filed his answer on 29 August 2017.

Facts and Procedure

2. Mr. Malooof joined the United Nations Office for Project Services (UNOPS) in the Democratic Republic of the Congo (UNOPS Congo office) in 2007 at the P-5 level. In December 2013, he was temporarily moved to the UNOPS Sudan office as Head of Office at the P-5 level for an initial period of three to four months to assess the situation at that office.

3. In March 2014, UNOPS decided not to close down the UNOPS Sudan office and Mr. Malooof remained as interim Head of Office.

4. By letter dated 4 December 2014, the Deputy Executive Director, UNOPS, informed Mr. Malooof that UNOPS had received allegations of intimidation, harassment and other misconduct against him from various colleagues in the Sudan office and that, having reviewed these allegations, he considered that Mr. Malooof's continued presence on UNOPS' premises posed a risk to the Organization's best interest. Consequently, Mr. Malooof was placed on administrative leave with full pay with immediate effect.

5. By letter dated 13 March 2015, the Deputy Executive Director, UNOPS, informed Mr. Malooof that since the investigation into the allegations against him was still ongoing, he had decided to extend Mr. Malooof's administrative leave until 4 June 2015.

6. During a telephone conference on 16 March 2015, Mr. Malooof was informed that the job description for the long-term position of UNOPS Head of Office in Sudan had recently been finalized and that, consequently, his temporary assignment as the interim Head of Office in Sudan would end on 30 June 2015.

7. On 20 March 2015, the Deputy Director, People and Change Practice Group (PCPG), UNOPS, Mr. Nasser Shammout addressed a letter to Mr. Maloof informing him that his assignment as the interim head of the UNOPS Sudan office would end on 30 June 2015 and furthermore that he would be separated from UNOPS service from that date as a decision had been taken not to renew his appointment beyond 30 June 2015. The relevant part of the letter reads as follows:

I refer to the telephone conference of 16 March 2015 (...)

I have been informed that you were advised during this telephone conference that the job description for the long-term of the head of the UNOPS Sudan office has recently been finalized and that, consequently, your temporary assignment as the interim head of the UNOPS Sudan office will end on 30 June 2015.

Further to the above, I must with deep regret now give you formal notice that your appointment will not be renewed beyond COB 30 June 2015 and you will be separated from UNOPS service effective that date. Should you be appointed to a fixed-term post in the United Nations system on or before 1 July 2015, the foregoing would of course automatically cease to be applicable.

PCPG will provide any assistance you may require in your search for alternative employment. Between now and 30 June 2015 you should dedicate your office hours to searching for alternative employment. In this regard, you may wish to consider applying for the position of the head of the UNOPS Sudan office, which will be advertised shortly (...).

8. At the beginning of April 2015, UNOPS advertised the vacancy for the position of Head of Office/Programme Coordinator for the UNOPS Sudan office at the P-4 level. Mr. Maloof did not apply for this position.

9. On 13 May 2015, the UNOPS Internal Audit and Investigation Group (IAIG) completed the investigation in relation to the allegations against Mr. Maloof. It concluded that there was some evidence that Mr. Maloof had shouted at people in the office. Similarly, it appeared that he improperly favored a colleague in a recruitment exercise. The IAIG consulted the UNOPS General Counsel and in light of the intended separation of Mr. Maloof from UNOPS, it decided not to refer the matter for further consideration.

10. By e-mail dated 24 June 2015 to the UNOPS Human Resources Officer, Mr. Maloof requested clarification concerning his administrative leave. By e-mail dated 25 June 2015, the UNOPS Legal Specialist informed Mr. Maloof that his administrative leave had not been extended and that no disciplinary action would be taken against him regarding the allegations.

11. On 30 June 2015, Mr. Maloof was separated from UNOPS service.

12. By memorandum dated 18 August 2015 to the UNOPS Executive Director, Mr. Maloof requested management evaluation of the decision dated 25 June 2015. He primarily focused on the decisions not to extend his administrative leave and not to take disciplinary action against him, as communicated to him on 25 June 2015. The relevant part of the memorandum reads:

I am writing to request a formal management evaluation of the decision communicated to me on 25 June 2015 (...) informing me that my administrative leave has not been extended and that no disciplinary action is being taken against me (...)

This constitutes a final decision with regard to the decision to place me on administrative leave (...) It also implicitly represents a decision refusing to restore me to my prior status and to terminate my employment as of 30 June 2015 (...).

13. There was no response to his request for management evaluation.

14. On 4 December 2015, Mr. Maloof filed an application with the UNDT contesting the following decisions: (1) to cancel his administrative leave “without completing the investigation that had been initiated” against him; (2) the alleged refusal “to abide by the terms of [his] temporary reassignment” in Sudan; and (3) not to renew his contract beyond 30 June 2015. He requested the following remedies: (1) rescission of the decision to cancel his administrative leave; (2) reinstatement in a suitable post or, alternatively, placement on Special Leave With Full Pay pending the conclusion of the investigation and production of an investigation report exonerating him of any wrongdoing; (3) compensation in the amount of two years’ net base pay for loss of employment and an additional one year’s net base pay for loss of entitlements as well as moral damages for harm to his reputation, emotional stress and violations of due process; and, (4) reimbursement of 20 months of special operations living allowance (SOLA) payment.

15. After various preliminary proceedings, the UNDT held a hearing on 8 and 9 February 2017. The UNDT rendered its Judgment on 9 May 2017 dismissing the application in its entirety.

16. With respect to Mr. Maloof's first challenge, the UNDT found that the contested decision to discontinue his administrative leave did not adversely affect his conditions of employment and as such, he had no standing to contest it. It held further that a decision in terms of Staff Rule 10.4 to place a staff member on administrative leave and its duration were discretionary depending on the circumstances of each case. Staff Rule 10.4 provides that administrative leave (pending the investigation of alleged misconduct) may continue throughout an investigation and until the completion of the disciplinary process. Mr. Maloof's administrative leave could not have been extended beyond the completion of the disciplinary process, which in the present case concluded on 25 June 2015.

17. Regarding the alleged refusal "to abide by the terms" of his temporary reassignment in Sudan, the UNDT noted that while the assignment to Sudan took place in December 2013, Mr. Maloof only contested the terms of such assignment following the non-renewal of his appointment on 30 June 2015. The decisions to terminate his temporary assignment and not to reassign him back to the Democratic Republic of the Congo were communicated to him on 20 March 2015. He only sought management evaluation of these decisions in his memorandum of 18 August 2015. This was well after the 60-calendar day deadline provided in Staff Rule 11.2(c), which expired on 19 May 2015. Consequently, his management evaluation request as regards the decision not to reassign him back to his former duty station following the non-renewal of his appointment was time-barred and his application with respect to this decision was not receivable in terms of Article 8(3) of the UNDT Statute which provides *inter alia* that the UNDT may not waive or suspend the deadlines for management evaluation.

18. As for the decision not to renew Mr. Maloof's appointment, the UNDT found that since Mr. Maloof was informed of this decision as well by the letter of 20 March 2015, he had until 19 May 2015 to file his request for management evaluation and therefore his request of 18 August 2015 was time-barred and the application before the UNDT irreceivable for the same reasons as regards the decision not to re-assign him to the Democratic Republic of the Congo.

19. Based on the foregoing, the UNDT found that there were no grounds to award compensation for loss of employment or moral damages, considering in particular, that Mr. Maloof did not suffer any prejudice from the decision to cancel his administrative leave which was the only decision considered on the merits. Compensation may not be awarded in the absence of actual prejudice.

Submissions

Mr. Maloof's Appeal

20. Mr. Maloof submits that the UNDT failed to exercise the jurisdiction vested in it when it dismissed his claims regarding the non-renewal of his appointment and non-reassignment as time-barred, as it mistook and narrowly interpreted the decisions he was contesting. He claims to have actually been contesting a “decision to violate his procedural rights to due process as per the legal obligations prescribed on the handling of allegations of misconduct” defined in UNOPS Organizational Directive 36 and the Universal Declaration of Human Rights and the United Nations Charter. He argues that UNOPS in effect imposed a “disguised disciplinary penalty” that resulted in his separation from service based on a “pattern of irregularities” and without any efforts of retention on the part of the Administration in violation of Staff Regulation 4.4 and Staff Rule 9.6. The decision to reassign him from the Democratic Republic of the Congo was a “pretext for his non-renewal and (...) when he succeeded beyond any expectations, the disciplinary process was misused to ensure his final separation from service” and he was “subjected to a (...) procedurally flawed disciplinary process marred by a predetermined outcome”.

21. Mr. Maloof further asserts that the UNDT erred in law by “focusing solely on the issue of the time limit specified in the Staff Rules” to submit a request for management evaluation and thus “failed to consider the larger legal issues surrounding [his] right to due process and accountability”. In particular, the UNDT failed to consider the process that UNOPS used to address the allegations of misconduct made against him and UNOPS’ failure to place him in another position following his exoneration and to afford him any consideration as a staff member in need of a placement who had taken up a temporary assignment in good faith. He argues that his application was “clearly receivable” since he was not challenging his separation “because of the ending of his temporary assignment but due to the other violations of [his] rights that took

place later” and he had challenged these developments “upon being advised of the conclusion of the disciplinary process for the first time”.

22. Mr. Maloof also contends that the UNDT erred in rejecting his claims “for mishandling his administrative leave” on the basis that he suffered no harm since the investigation outcome was favourable.

23. He further contends that the UNDT committed an error of fact when it found that he had not submitted any evidence in support of his claim on the alleged agreement that he would be reassigned to his former position in the UNOPS Congo office at the end of his assignment in Sudan. He argues that this approach “turns the burden of proof on its head”. It was the Secretary-General who had failed to rebut the presumption that the original modalities of his appointment remained unchanged upon reassignment and that his contractual status should not depend on the disposition of the post he was temporarily assigned to. Moreover, the UNDT accepted the Secretary-General’s “unproven assertion” that his former post had been abolished in the interim and failed to take into consideration the evidence of bias that he had submitted.

24. Based on the foregoing, Mr. Maloof requests that the Appeals Tribunal grant his appeal, vacate the impugned Judgment, rescind the contested decision to separate Mr. Maloof from service and reinstate him in a suitable post or, alternatively, award him two years’ net base pay for loss of employment and loss of entitlements. He further asks for compensation in the amount of one year’s net base salary for the “violation of his rights” including by the mere fact of opening an investigation in the absence of any sufficient grounds to believe that he had engaged in misconduct and for harm to reputation, emotional stress and due process violations.

The Secretary-General’s Answer

25. The Secretary-General submits that the UNDT properly exercised its jurisdiction when it dismissed as irreceivable Mr. Maloof’s claims with respect to the non-renewal of his appointment and to his temporary reassignment. Mr. Maloof simply modified the descriptions of his claims on appeal to state that the UNDT had mistaken the decisions he was contesting while in fact the UNDT had plainly reviewed and ruled on the decisions contested by Mr. Maloof as articulated in his application before the UNDT. Regarding Mr. Maloof’s claim that UNOPS violated its legal obligations by cancelling the administrative leave, the Secretary-General argues that the UNDT

did indeed review this decision under the applicable legal framework and correctly found no procedural error and no merit in Mr. Maloof's claim to the contrary.

26. As for Mr. Maloof's complaint relating to the alleged refusal of the Administration to abide by the terms of his temporary assignment, the Secretary-General asserts that Mr. Maloof has pointed to no error of law on the part of the UNDT in addressing these claims.

27. The Secretary-General further contends that the UNDT did not commit any errors of law. It properly applied the time limits for challenging administrative decisions to Mr. Maloof's claims. In particular, the UNDT rightly found that Mr. Maloof had been informed by the letter dated 20 March 2015 of the decision not to renew his appointment and that the letter was unambiguous about his separation which was not contingent upon the outcome of the disciplinary process, or the exploration of any possibility of return to his previous position. Therefore, the UNDT correctly dismissed as inadmissible his challenges of the non-renewal decision and of the contested decision related to the terms of his reassignment. It was correct in finding that Mr. Maloof should have filed his request for management evaluation within the 60-day deadline contained in Staff Rule 11.2(c) which started to run from the 20 March 2015 non-renewal decision.

28. As to Mr. Maloof's assertion that the UNDT failed to consider the process used by UNOPS to address the allegations of misconduct, the Secretary-General argues that Mr. Maloof has not brought that challenge before the UNDT and now merely tries to redefine his claims. Regarding Mr. Maloof's claim that the Administration had an obligation to place him in another position following his exoneration, the Secretary-General argues that this claim is closely related to the non-renewal decision, which had not been timely challenged as correctly found by the UNDT.

29. Moreover, contrary to Mr. Maloof's assertion, the UNDT did not base its rejection of his claim regarding his administrative leave on the ground that he suffered no harm because the investigation had been favourable to him but rather that he had no standing to challenge the decision because his terms of appointment were not affected by the decision to discontinue the administrative leave. In addition, as the outcome of the investigation of which Mr. Maloof complains was that no disciplinary action would be taken against him and the non-renewal of his appointment was not contingent on the outcome of the investigation his claims would have been moot even if they had been considered by the UNDT.

30. The Secretary-General further contends that the UNDT did not commit any errors of fact. In particular, he argues that the UNDT correctly identified the applicable burden of proof and rightly found that Mr. Maloof had failed to provide evidence of any reassurance of reassignment in order to rebut the so-called presumption of regularity of official acts. In any event, the question whether Mr. Maloof had actually provided evidence of any such reassurances or whether the Secretary-General should have provided additional evidence on the abolishment of Mr. Maloof's post in the UNOPS Congo office would ultimately make no difference because his challenge of the non-reassignment was time-barred.

31. According to the Secretary-General, Mr. Maloof merely disagrees with the UNDT and reargues matters from his application before the UNDT or attempts to "reword" his challenges without actually identifying any errors by the UNDT in its Judgment. In accordance with its well-settled jurisprudence, the Appeals Tribunal should dismiss the appeal on this basis alone.

32. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

33. The Secretary-General is correct in his submission that the UNDT properly dismissed as irreceivable Mr. Maloof's claims in relation to the non-renewal of his appointment and his reassignment. Mr. Maloof now seeks to modify his claims on appeal to state that the UNDT misunderstood the decisions he was contesting. The UNDT ruled on the decisions challenged by Mr. Maloof in his application before the UNDT. Those claims, related to the non-renewal of his contract and non-reassignment to his former position in the UNOPS Congo office, are quite simply time-barred and not receivable in terms of Article 8(3) of the UNDT Statute. The UNDT properly applied the time limits for challenging administrative decisions. Mr. Maloof was informed by the letter dated 20 March 2015 of the decisions. The letter was unambiguous about his separation which was not contingent upon the outcome of the disciplinary process, or the exploration of any possibility of return to his previous position. Therefore, the UNDT correctly held that Mr. Maloof should have filed his request for management evaluation within the 60-day deadline contained in Staff Rule 11.2(c), which started to run from the 20 March 2015 non-renewal decision.

34. Regarding Mr. Maloof's claim that UNOPS violated its legal obligations by cancelling his administrative leave, the UNDT reviewed this decision under the applicable legal framework and correctly found that there was no adverse decision affecting his conditions of employment. It concluded that for such reason Mr. Maloof had no standing to contest the decision. More accurately, the decision to terminate the administrative leave was not an "administrative decision" in that it did not have any adverse legal consequences for Mr. Maloof. In terms of Article 2(1)(a) of the UNDT Statute, the UNDT may only hear appeals against "administrative decisions" alleged to be in non-compliance with the terms of appointment or the contract of employment. 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. 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. A decision to terminate administrative leave and not to pursue disciplinary action has no adverse legal consequences or impact and is accordingly not an "administrative decision" within the contemplation of Article 2(1)(a) of the UNDT Statute. The disputed decision in question was therefore not an administrative decision susceptible to challenge and hence is not receivable *ratione materiae*.¹

35. Moreover, in terms of Staff Rule 10.4(a), administrative leave must be terminated on completion of the disciplinary process, which is what happened here in June 2015 after the investigation was completed on 13 May 2015. There was no legal basis for Mr. Maloof to remain on administrative leave. In addition, as the Secretary-General submits, since the outcome of the investigation was that no disciplinary action would be taken, and the non-renewal of his appointment was not based on any findings of misconduct, Mr. Maloof's claims would have been moot even had they been considered by the UNDT.

36. Mr. Maloof's assertion that the UNDT failed to consider the process used by UNOPS to address the allegations of misconduct is an attempt to redefine his claims to avoid the problem of receivability. But even had there been due process violations, such procedural unfairness would have had no consequence in that the investigation did not lead to discipline or termination of employment. The decision not to proceed with discipline was predicated on the lawful decision of the Administration to allow Mr. Maloof's fixed-term contract to expire through the effluxion of

¹ *Faye v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-657, paras. 29-31 and 38-40; and *Pedicelli v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-555, paras. 24-32.

time. But even if disguised discipline was the motive in allowing the contract to expire, and it were found for some reason that such motive was unreasonable or improper, the decision to impose “disguised discipline” was taken on 20 March 2015, and the request for management evaluation of 18 August 2015 was accordingly time-barred. There was no other request for management evaluation of any disguised disciplinary decision. So, whatever the motive or proprieties of the decision not to renew Mr. Maloof’s fixed-term contract, any appeal in relation to it was time-barred under Staff Rule 11.2(c) and not receivable under Article 8(3) of the UNDT Statute. The UNDT accordingly did not err in reaching that conclusion.

37. Regarding Mr. Maloof’s claim that the Administration had an obligation to place him in another position following his exoneration, this claim is in substance a complaint against the non-renewal decision which is time-barred and not receivable.

38. Moreover, contrary to Mr. Maloof’s assertion, the UNDT did not base its rejection of his claim regarding his administrative leave on the ground that he suffered no harm because the investigation had been favourable to him but rather that he had no standing to challenge the decision because his terms of appointment were not affected by the decision to discontinue the administrative leave.

39. The UNDT correctly found that Mr. Maloof had failed to provide evidence of any reassurance of reassignment to the Democratic Republic of the Congo. In the final analysis, the issues of whether there was evidence of any such reassurances or the abolition of Mr. Maloof’s post in the UNOPS Congo office make no difference because his challenge to the decision of non-reassignment was time-barred.

Judgment

40. The appeal is dismissed and Judgment No. UNDT/2017/033 is affirmed.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Knierim

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar