



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

Judgment No. 2019-UNAT-946

**Tosi
(Appellant/Respondent)**

v.

**Secretary-General of the United Nations
(Respondent/Appellant)**

JUDGMENT

Before: Judge Martha Halfeld, Presiding
Judge Sabine Knierim
Judge Jean-François Neven

Case Nos.: 2019-1239 & 2019-1240

Date: 25 October 2019

Registrar: Weicheng Lin

Counsel for Mr. Tosi: Self-represented

Counsel for Secretary-General: John Stompor

JUDGE MARTHA HALFELD, PRESIDING.

1. This matter arises out of two applications filed by Mr. Alejandro Tosi before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) one challenging the non-renewal of his fixed-term appointment and the implementation of the settlement agreement and the second alleging discrimination and mistreatment as prohibited conduct by his former first reporting officer (FRO). In Judgment No. UNDT/2019/003,¹ the UNDT dismissed his claims against his former FRO and found with regard to his settlement agreement that the Administration acted in bad faith in violation of the spirit of the settlement agreement and consequently rescinded the non-renewal decision and awarded him compensation. For the reasons set forth below, this Tribunal affirms the UNDT's Judgment to dismiss the claims against Mr. Tosi's FRO, but vacates the Judgment as it relates to the settlement agreement and compensatory awards.

Facts and Procedure

2. The following facts have been established by the UNDT:²

... The Applicant was appointed to the post of Legal Officer at the P-4 level with the MONUSCO Legal Affairs Office on 24 September 2011.

... On 22 October 2012, he formally complained of harassment and abuse of authority against senior management in MONUSCO.

... On 25 July 2014, following several applications by the Applicant to the UNDT in Nairobi, the parties were urged by the Tribunal to enter into settlement discussions with a view to mediating their disputes.

... The settlement discussions started late in 2014 and the parties entered into a Settlement Agreement [(agreement)], which the Applicant signed on 5 May 2015.

... Two days later, on 7 May 2015, an email was sent to the Applicant by a Human Resources (HR) officer informing him that he was part of a pool of staff members who had not submitted his documents for an ongoing Comparative Review Process (CRP). He was asked to submit his e-PAS reports for 2013/14 and 2014/15 and an updated PHP for the completion of the CRP by Tuesday, 12 May 2015.

¹ *Tosi v. Secretary-General of the United Nations*, Judgment No. UNDT/2019/003, rendered by the UNDT in Nairobi on 9 January 2019 (Impugned Judgment).

² Impugned Judgment, paras. 7-33.

... Based on the Settlement Agreement the Applicant moved to the Security Sector Reform (SSR) Unit on 11 May 2015 with his post from the Legal Affairs Section. The Settlement Agreement stipulated that the move was until the end of the fiscal year, 30 June 2015.

... On 22 May 2015, the Applicant received a memorandum from the Chief Human Resource Officer (CHRO) informing him that his appointment would not be renewed upon its expiration on 30 June 2015 in accordance with Staff Rule 9.4. This decision was made following a comparative review of the two P-4 Legal Officers who were serving in the Mission at the time.

... On 25 May 2015, the Applicant submitted a formal written complaint of prohibited conduct to the [Special Representative to the Secretary-General (SRSG)] against his [FRO], the Mission's P-5 Senior Legal Officer, in accordance with ST/SGB/2008/5 [(Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)]. In his complaint, the Applicant requested the SRSG to appoint a panel to review his allegations of harassment, abuse of authority, and retaliation against his FRO in accordance with ST/SGB/2008/5 and ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with the duly authorized audits or investigations).

... On 2 June 2015, the Applicant amended his complaint against his FRO to include additional allegations against the Director of Mission Support (DMS) and the Chief of Staff (CoS) of MONUSCO. He alleged that the DMS and the CoS worked in concert with his FRO in seeking to separate him from service by not renewing his appointment beyond 30 June 2015 and that the effort was tainted by bad faith.

... On 10 June 2015, the Applicant requested management evaluation of the decision not to renew his appointment beyond 30 June 2015. The Applicant's appointment was subsequently extended pending the outcome of his management evaluation.

... On 16 June 2015, the Applicant submitted a request for protection from retaliation to the Ethics Office pursuant to ST/SGB/2005/21. He alleged that his FRO, the DMS, and the CoS had retaliated against him. Specifically, the Applicant attributed the decision not to renew his appointment beyond 30 June 2015 to a prior ST/SGB/2008/5 complaint he had made against his FRO in October 2012, and that the FRO had been abetted by the DMS and the CoS.

... On 20 July 2015, the Applicant submitted an amended complaint to MONUSCO's Conduct and Discipline Team to include the SRSG as an alleged offender of his complaint because the SRSG had not responded to him with a timely response to his complaint of 25 May 2015 within sixty (60) [days] after its receipt.

... On 31 July 2015, the Applicant was separated from the Organization. On the same day, the Management Evaluation Unit (MEU) issued a letter affirming the impugned decision. The Applicant received a memorandum from the DMS on the same day informing him that he would be separated from service at close of business.

... On 3 August 2015, the Director of the Ethics Office informed the Applicant that his request had been reviewed and determined that the information he provided did not establish a *prima facie* case of retaliation in accordance with ST/SGB/2005/21.

... On 16 September 2015, the Applicant requested management evaluation of the Ethics Office's decision dated 3 August 2015.

... On 20 September 2015, the Applicant made additional allegations of retaliation with the Ethics Office. He alleged that the decision not to renew his appointment beyond 30 June 2015 as well as various other actions taken by the DMS related to his checkout from MONUSCO constituted retaliation.

... On 22 September 2015, MEU informed the Applicant that his 16 September 2015 request for evaluation of the Ethics Office's 3 August 2015 decision was not receivable because it was not an administrative decision of the Secretary-General.

... On 6 October 2015, the Applicant requested the Under-Secretary-General, Department of Field Support (USG/DFS) to appoint an investigation panel to review his allegations of prohibited conduct under ST/SGB/2008/5 against four members of MONUSCO's senior management.

... On 11 September 2015, the SRSG determined that there were insufficient grounds to warrant convening a fact-finding investigation panel. On 15 October 2015, the Applicant amended his complaint to the USG/DFS against the SRSG, to allege that the SRSG's 11 September 2015 decision was motivated by personal animus against him and contributed to a pattern of harassment, abuse of authority, and retaliation against him.

... On the same day, 15 October 2015, MEU informed the Applicant that his 9 October 2015 request for management evaluation of an Ethics Office decision was not receivable for the same reasons stated in 22 September 2015.

... On 21 October 2015, the USG/DFS requested comments from the SRSG in response to the Applicant's 6 October 2015 complaint. On 22 October 2015, the Chief Conduct and Discipline Team informed the Applicant of the same. On 23 October 2015, the USG/DFS informed the Applicant that he would review the

complaint against the SRSG, but not the complaint against the MONUSCO senior staff members since it had already been addressed by the SRSG.

... On 31 October 2015, and 12 and 26 November 2015, the USG/DFS received comments from the SRSG in response to the Applicant's complaint against him.

... On 12 November 2015, the Applicant requested management evaluation of the SRSG's decision not to convene a fact-finding panel to investigate the Applicant's 2008/5 complaint against the FRO, DMS and CoS of MONUSCO.

... On 14 January 2016, the USG/DFS informed the Applicant that he had reviewed the Applicant's complaint against the SRSG and decided there were insufficient grounds to warrant a formal fact-finding investigation.

... On 28 December 2015 and 19 January 2016, the Applicant requested management evaluation of the USG/DFS's decision not to convene a fact-finding panel to investigate his ST/SGB/2008/5 complaint against the SRSG. He requested management evaluation before he received the USG/DFS's decision on his complaint.

... On 20 January 2016, the Under-Secretary-General, Department of Management (USG/DM) informed the Applicant that the Secretary-General had upheld the SRSG's decision not to convene a fact-finding panel to investigate the three MONUSCO staff members.

... On 12 February 2016, the USG/DM informed the Applicant that the Secretary-General had upheld the USG/DFS's decision not to convene a fact-finding panel to investigate the allegations against the SRSG.

3. In the impugned Judgment the UNDT addressed Mr. Tosi's two applications: one challenging the non-renewal of his fixed-term appointment beyond 30 June 2015 and the implementation of the settlement agreement and the second alleging discrimination and mistreatment as prohibited conduct by his former FRO. With regard to the claims against his former FRO, the UNDT held that upon its review of the evidence the claims were unsustainable and dismissed them without elaboration.

4. The UNDT further held that Mr. Tosi filed an application requesting enforcement of the agreement pursuant to Article 8 of the UNDT Statute within the 90-day deadline. It also held that the agreement was disclosed to the UNDT because compliance with same was before the Tribunal. The UNDT addressed whether the settlement agreement was properly before the Tribunal for its enforcement and if it was, whether it was tainted by bad faith in its

implementation when Mr. Tosi's contract was not renewed beyond 30 June 2015. Mr. Tosi asserted that the agreement was entered into in bad faith as regarding the paragraph in the agreement that stated his contract would expire on 30 June 2015, but he was told that it was a mere technicality.

5. On this issue, the UNDT found that the Administration had acted in bad faith. Mr. Tosi had filed three different cases before the UNDT alleging harassment, abuse of authority, and retaliation. The Chief of Mission had offered him to work in the SSR Unit in exchange for withdrawing the cases and engaging in mediation. During the mediation negotiations management was in the process of nationalizing his post unbeknownst to him. While he was told he would be moved to the SSR Unit with his post, which would be loaned to that unit, he was not informed or notified that the said post was to undergo a comparative review and may be nationalized. Other staff impacted by the comparative review and structure were informed by 18 April 2015. He was only notified on 7 May 2015, barely two days after he signed the settlement agreement. The UNDT found that Mr. Tosi's testimony was credible and that it did not make sense for him to enter into the agreement to give him good e-PASes for four years and move to another unit, if he was not going to keep his employment with MONUSCO for more than six weeks. He testified that the Administration assured him his post was secure and gave him a new chart of the SSR Unit which showed the post he would encumber as a core position which would survive restructuring in the Mission. The UNDT found bad faith by the Administration noting that the unrebutted evidence from Mr. Tosi showed that he was lied to and false explanations were made to him in order for him to sign the settlement agreement. Beyond the language of the agreement there is unrebutted evidence of bad faith. To transfer Mr. Tosi to another unit as condition for mediation and then to show him to the door before the ink dried on the agreement under the guise of a restructuring was unacceptable in a transparent and fair Organization such as the United Nations. For these reasons, the UNDT concluded the agreement was tainted with bad faith and the Administration breached the spirit and intent of the settlement agreement by not renewing his contract.

6. The UNDT denied Mr. Tosi's requested remedies relating to his complaints around harassment, abuse of authority, and retaliation. However, the UNDT ordered the following: (i) rescission of his non-renewal decision; (ii) payment of his net base salary from 1 August 2015 to 31 October 2015; (iii) one month's net base salary as compensation for the procedural irregularity of separating him in June and not October 2015; and (iv) amendment of his

e-PASes in accordance with paragraph 6 of the settlement agreement. The UNDT dismissed his request for moral damages due to lack of evidence.

7. Mr. Tosi filed an appeal on 11 March 2019 which was registered under Case No. 2019-1239, and the Secretary-General filed his answer on 13 May 2019. The Secretary-General also filed an appeal against this same Judgment on 11 March 2019, which was registered under Case No. 2019-1240, and Mr. Tosi filed his answer on 13 May 2019. On 13 May 2019, Mr. Tosi filed a cross-appeal in Case No. 2019-1240, and the Secretary-General filed an answer on 15 July 2019 to the cross-appeal.

8. On 26 June 2019 the United Nations Appeals Tribunal consolidated these cases by Order No. 351 (2019).

Submissions

Mr. Tosi's Appeal (Case No. 2019-1239)

9. Mr. Tosi requests this Tribunal to find that the UNDT failed to exercise its jurisdiction in dismissing his claims without providing any factual findings or reasons or conclusions of law as required by Article 11 of its Statute. This Tribunal held in *Kadri*³ that the UNDT's failure to address a claim of harassment and discrimination violated his due process rights, namely, his right to a fully reasoned judgment on his application. The UNDT erred in law in failing to consider Mr. Tosi was a protected staff member under the Administration's policies on retaliation, which protect staff members who reported violations of rules and regulations from retaliation. The Ethics Office reviewed his allegations of retaliation, but its determination is not an administrative decision reviewable leaving the UNDT as his only recourse. In addition, the UNDT erred in not finding MONUSCO had failed to investigate his complaint under ST/SGB/2008/5, as he had presented ample evidence that the SRSG for MONUSCO, Mr. Kobler, had refused to conduct an intake of his complaint and had only done so after he had been urged by the Conduct and Discipline Unit in New York, which was 140 days after his complaint. This is not prompt as required by Section 3.2 of ST/SGB/2008/5. Even the MEU held it was a delay in this case, yet the UNDT did not find there was a delay and failure to investigate. In *Benfield-Laporte*,⁴ the Appeals Tribunal awarded damages for a delay of four months.

³ *Kadri v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-772.

⁴ *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505.

10. The UNDT erred in law in not concluding that MONUSCO had an obligation to place him in the vacant P-3 position which existed at the time of the restructuring. This Tribunal has held in *El-Kholy*⁵ that Staff Rule 9.6(e) mitigates the effect of retrenchment on staff members and creates an obligation to consider a staff member for suitability to a post in an effort to retain staff. The UNDT thus erred as a matter of law when it failed to hold that MONUSCO had the obligation to place him on the vacant post.

11. The UNDT committed errors in procedure, namely, it erred when it refused to set aside the testimony of Mr. Siri, which had been submitted extemporaneously in violation of the Tribunal's order in an attempt to allow allegations that had not been properly pled earlier. This deprived Mr. Tosi of the ability to provide rebuttal witnesses and evidence hampering his due process rights.

12. The UNDT erred in not addressing his claim that the nationalization of his post had been done because he had formally accused MONUSCO senior management of misconduct. The Secretary-General failed to provide convincing evidence showing the nationalization of the post was not affected by such extraneous factors. The UNDT ignored testimonial evidence from MONUSCO's human resources officer who testified she believed Mr. Tosi's conflict with Mr. Maia was the reason he was not reassigned. The UNDT likewise failed to determine that the Mission did not treat him with respect and dignity and it amounted to harassment, abuse of authority and retaliation. In particular, the UNDT failed to consider that Mr. Siri cancelled Mr. Tosi's Laissez-Passer and informed the local authorities that Mr. Tosi was an illegal immigrant, which had risked his safety in a dangerous country like the Congo. The Secretary-General did not rebut these facts, having never once addressed these claims in any of his responsive submissions. Thus, these facts are uncontested and the UNDT failed to consider them as harassment and abuse of authority.

13. Lastly, the UNDT erred in not awarding him moral damages as he provided sufficient evidence. He therefore requests USD 75,000 in moral damages. He also requests the Appeals Tribunal order his reinstatement to a P-4 legal position with payment of his salary from his unlawful separation to the day he is reinstated. In the alternative, he requests three years' net base salary. He further requests damages for MONUSCO's failure to investigate and the undue delay. He requests that Mr. Siri be referred for accountability.

⁵ *El-Kholy v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-730.

The Secretary-General's Answer (Case No. 2019-1239)

14. Mr. Tosi's appeal is not receivable as relates to the UNDT's findings on his fourth application as the UNDT has ruled in his favour and he fails to identify how any errors had a negative impact on the outcome. Even if the Appeals Tribunal receives the appeal regarding his various claims on harassment and retaliation, he has made no showing that any such errors negatively impacted the outcome. Such an appeal should be dismissed. Contrary to Mr. Tosi's assertion that the UNDT failed to address his main claims, the UNDT expressly stated it had thoroughly examined the presented evidence and found the claims unsustainable. Thus, the UNDT did not fail to exercise its jurisdiction regarding these claims. Likewise, Mr. Tosi fails to establish any error of fact and law. With regard to his claim that the UNDT failed to conclude he was a protected staff member, this was a determination made by the Ethics Office. Mr. Tosi failed to meet his burden to show that management had acted with improper motives to rebut the presumption that official acts had been regularly performed. He failed to prove that the nationalization of his post was improperly motivated. He claims the UNDT failed to determine that MONUSCO should have placed him on a vacant P-3 post. However, this does not constitute an error, as MONUSCO had no authority to assign him to a lower grade post.

15. Mr. Tosi has failed to establish that the UNDT erred in procedure. The UNDT has wide discretion in its case management and the weight it gives to evidence and witness testimony. Contrary to his assertion, Mr. Tosi was given advanced notice prior to the oral hearing that the DMS of MONUSCO would testify, and therefore his due process rights were not negatively affected by the admission of this testimony into the record.

16. Mr. Tosi has failed to establish that the UNDT erred in its awards. Mr. Tosi fails to establish why he should be reinstated and paid additional compensation. The UNDT ordered the decision be rescinded but did not order his reinstatement. Mr. Tosi has failed to identify any error with this decision. The UNDT was correct to reject his request for moral damages for lack of evidence as Mr. Tosi based his request solely on his pleadings and testimony without corroborating evidence.

The Secretary-General's Appeal (Case No. 2019-1240)

17. The Secretary-General has also filed an appeal and requests this Tribunal to vacate the UNDT's Judgment as relates to Mr. Tosi's fourth application before the UNDT. In the alternative, if the Appeals Tribunal determines the decision not to renew Mr. Tosi's fixed-term appointment was unlawful, the Appeals Tribunal is requested to vacate the additional award of compensation for procedural irregularity.

18. The UNDT erred in fact and law in finding Mr. Tosi's claim regarding the settlement agreement was receivable. The UNDT erred in finding that Mr. Tosi's application was filed within the 90-day deadline. The UNDT erred when it found that the last day for implementation of the settlement agreement was 31 July 2015, the date Mr. Tosi had been notified that he would be separated per the MEU's response. The settlement agreement is silent with respect to the renewal of his appointment. As there was no implementation date for renewal, the UNDT had no basis to conclude the last day of implementation was the date of his notice from the MEU.

19. The UNDT erred in fact, law and procedure in finding that the non-renewal decision breached the settlement agreement. The UNDT held that the Administration breached the intent of the settlement agreement by not renewing his contract beyond 31 July 2015 and on this basis found the non-renewal was unlawful. The UNDT erred in this finding. In *Abdalla*,⁶ the Appeals Tribunal held that legitimate expectation of renewal must be based on more than mere verbal assertions but a firm commitment to renewal revealed by the circumstances. In this case, there was no express promise in the agreement and the agreement supersedes prior verbal assertions. The Secretary-General has wide discretion in appointments and the Tribunals have limited review. Mr. Tosi was not renewed because of a budget reduction and a comparative review process that was properly conducted.

20. The UNDT erred in procedure in finding that un rebutted evidence showed that Mr. Tosi was lied to so he would sign the agreement. However, at the hearing, the Secretary-General objected to testimony about statements made during mediation and the UNDT decided to admit the testimony only at the time it issued its Judgment, which placed the Secretary-General in an impossible position as he was unable to lead evidence in rebuttal to Mr. Tosi's testimony without prejudicing the argument that any evidence made during mediation violated the confidentiality provisions under the UNDT's Rules of Procedure.

⁶ *Abdalla v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-138, para. 24.

21. The UNDT erred in law in its orders of rescission and compensation. Even if the Appeals Tribunal were to uphold the rescission, the UNDT erred in law in awarding additional compensation for procedural irregularity. Compensation must be supported by evidence of harm and not just because of perceived procedural breach. Mr. Tosi has not proffered any evidence of harm to support this award and the UNDT erred in awarding compensation without demonstrated harm.

Mr. Tosi's Answer (Case No. 2019-1240)

22. Mr. Tosi requests the Appeals Tribunal to find that the UNDT did not err in holding that his claims for breach of the settlement agreement were receivable. This is a new argument that should be precluded on appeal. The UNDT correctly held the last day of implementation was 31 July 2015 when he was dismissed from his role at the SSR Unit as working there was part of the agreement and as such this date was the date of the breach of the agreement. His application filed on 11 September 2015 was well within the 90-day deadline and was receivable.

23. The UNDT did not err in its finding that the Secretary-General did in fact breach the agreement. The UNDT properly admitted Mr. Tosi's testimony regarding the settlement negotiation as such testimony was central to the breach. The UNDT correctly found that the Secretary-General breached the agreement and on appeal the Secretary-General failed to meet his burden to demonstrate how the UNDT erred. The Secretary-General merely dislikes the findings.

24. The UNDT correctly held that there were express promises that his contract would be renewed based on the evidence in the record whereby Human Resources via e-mail expressly stated there would be a contract renewal following the conclusion of the mediation related to his e-PAS.

25. The UNDT did not err in relying upon testimony about settlement negotiations. The UNDT noted that the Secretary-General voluntarily disclosed what had been discussed at the hearing and in his submissions provided information about mediation discussions. The Secretary-General's contention that he was denied a fair opportunity to submit evidence rebutting Mr. Tosi's testimony about the negotiations is false as the Judge specifically at the hearing invited counsel for the Secretary-General to convince her that his testimony should not be part of the case. The Judge decided that Mr. Tosi's testimony on this issue should be heard.

26. The Secretary-General argues that Mr. Tosi should not receive compensation but fails to show any error. As noted above, the UNDT correctly found that the Administration made express promises about renewing his contract and in turn found that he suffered damages as a consequence of the bad faith actions taken by the Mission.

Mr. Tosi's Cross-Appeal (Case No. 2019-1240)

27. The UNDT erred in fact and law in concluding that under the settlement agreement he should have stayed at the SSR Unit only until 31 October 2015 as he merged two distinct matters: the express promises made by the Human Resources Officer to renew his yearly contract until 31 October 2015 and the three key provisions of the agreement which included a new position in the SSR Unit and a new e-PAS. The express promise of the Human Resources Officer was unrelated to the settlement agreement. In addition, the UNDT erred in denying his discovery request as it would have showed that the agreement reached entailed his long-term stay at the SSR Unit.

The Secretary-General's Answer to Cross-Appeal (Case No. 2019-1240)

28. Mr. Tosi's cross-appeal is not receivable as he has already submitted an appeal and permitting this cross-appeal is tantamount to allowing him to submit two appeals and is not permitted by the Appeals Tribunal's Statute. Mr. Tosi argues that the UNDT erred in failing to order production of documents, but he has not demonstrated how this was an error.

Considerations

Request for oral hearing

29. As a preliminary matter, Mr. Tosi requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (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. In the present case, there was an extended hearing before the UNDT, where the parties were able to produce ample oral evidence in support of their allegations.

30. At the present stage, there are no exceptional circumstances to justify the production of any additional evidence, as required by Article 2(5) of the Statute.⁷ Moreover, since Mr. Tosi has not justified how an oral hearing would help the understanding of the case before the Appeals Tribunal, we do not find that it would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules.

31. Thus, the request for an oral hearing is refused.

Receivability of the cross-appeal

32. Subsequent to the Secretary-General’s appeal, Mr. Tosi filed a cross-appeal, reiterating requests he had already made in his own appeal, as well as requesting that the Secretary-General provide certain documentation.

33. Article 9 of the Rules, under the title “Answers, cross-appeals and answers to cross-appeals”, provides, in relevant part:

1. The respondent’s answer shall be submitted on a prescribed form. ...
- ...
4. Within 60 days of notification of the appeal, a party answering the appeal may file a cross-appeal, accompanied by a brief which shall not exceed 15 pages, with the Appeals Tribunal stating the relief sought and the grounds of the cross-appeal. The cross-appeal may not add new claims.

34. In the present case, we find that the cross-appeal is irreceivable, since Mr. Tosi has already had the opportunity to file his own independent appeal. What he seems to have done, *via* his cross-appeal, is to complement his appeal, by adding new arguments, reiterating and introducing claims, as well as requesting the production of new evidence. However, a party is not entitled to appeal the same judgment twice. Moreover, if Mr. Tosi found it was necessary to complement his appeal, he should have requested leave to submit additional pleadings with the appropriate justification for doing so, as determined by the applicable legal framework, which he did not do. We thus dismiss the cross-appeal as not receivable.

⁷ *Mbok v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-824, para. 37.

Case No. UNDT/NBI/2015/095: the Secretary-General's appeal and the receivability of the application regarding the settlement agreement (the deadline)

35. In his appeal, the Secretary-General insists on the non-receivability of the application with regard to the implementation of the settlement agreement. On this subject, the Secretary-General avers that Mr. Tosi's claims regarding the implementation of the settlement agreement were not timely filed.

36. Article 8(2) of the UNDT Statute governs the time limits for filing an application to enforce the implementation of an agreement reached through mediation, "which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of the signing of the agreement".

37. The UNDT Statute provides hence two types of deadlines, depending on whether or not the settlement agreement has specified a date for its implementation. If it mentions a specific day for implementation, then the application must be filed within 90 calendar days after the last day for said implementation. In situations where the agreement is silent about the date of implementation, the deadline for filing an application is 90 days after the 30th day from the date of the signing of the agreement. This interpretation is in keeping with the last sentence of Article 8(2) of the UNDT Statute which sets out that the receivability of the application for implementation of an agreement reached through mediation is "90 calendar days *after* the last day for the implementation as specified in the mediation agreement, or when the mediation agreement is silent on the matter, *after* the thirtieth day from the signing of the agreement".⁸

38. According to the Secretary-General, since there was not an implementation date for the renewal of Mr. Tosi's fixed-term appointment inserted in the settlement agreement, the second part of Article 8(2) applies. As the *agreement was signed on 5 May 2015*, the deadline for filing the application with the UNDT would be *2 September 2015*; however, Mr. Tosi only filed his application on *11 September 2015*, nine days after the deadline.

⁸ Emphasis added.

39. In connection with this matter, the UNDT found that the filing was 41 days after Mr. Tosi had been notified that he was to be separated from the Organisation following the response of the MEU to his challenge of the decision to separate him. The UNDT then clarified that “this was the last day when implementation of the settlement agreement concluded”.⁹

40. We cannot agree with the UNDT’s interpretation of the term implementation here, because the decision of the MEU is not an administrative decision subject to challenge but is a mere instance of reassessment of the original – and challengeable – administrative decision. In the present case, the challengeable administrative decision would be the non-implementation of the agreement, not its reassessment or demand for reconsideration.

41. Further, it is clear that, while the UNDT applied part one of Article 8(2) of its Statute (considering a specific day for implementation of the agreement), in his appeal, the Secretary-General invokes part two of said article (claiming that the agreement was silent with regard to its date of implementation). Indeed, it is undisputed that the settlement agreement did not explicitly mention any date of implementation. On the contrary, it stated the day when Mr. Tosi’s loan would cease. The UNDT’s reasoning hence seems to derive from the fact that it considered the agreement in itself tainted by deception. Also, it found that its spirit and intent were breached in its implementation since Mr. Tosi had been promised to have his contract extended as soon as mediation was over.¹⁰ The “implementation”, in the UNDT’s view, would be the renewal of Mr. Tosi’s appointment.

42. However, this finding could only have been reached after the UNDT had embarked on a merit-based review. Indeed, only after deciding that it was appropriate to go beyond the bare wording of the settlement agreement – which clearly stated that Mr. Tosi’s loan would last until 30 June 2015¹¹ – and establishing that the “spirit” of the agreement contained a promise of renewal of the appointment could the UNDT find that it had been breached in its implementation.¹² It follows that the UNDT undertook a merit-based assessment of the entire situation and reached the conclusion that the breach was not to the plain language of the settlement agreement, but rather to its spirit. This finding on the merits was the premise for the receivability of the application. In other words, the UNDT concluded that the settlement

⁹ Impugned Judgment, para. 80.

¹⁰ *Id.*, paras. 97 and 98.

¹¹ *Id.*, para. 89.

¹² *Id.*, paras. 92 and 94.

agreement was breached when the appointment was not renewed, from which date Mr. Tosi could request management evaluation and thereafter implementation of the agreement. This finding involved merit consideration. The UNDT therefore erred on a matter of law, since it based its finding on the merits as a condition precedent to find that the application was timely filed and hence receivable.

43. Having said that, the question remains whether the Secretary-General is right in this appeal by saying that the application was time-barred. According to the Secretary-General, the application was due within 90 days after the thirtieth day from the date of the signing of the agreement (5 May 2015), i.e., by 2 September 2015. We agree with the Secretary-General. It was clear from the lawsuit that Mr. Tosi was informed, just two days after he had signed the settlement agreement, that his post would be subject to a comparative review.¹³ Specifically, on 22 May 2015, he was informed that his appointment would not be renewed upon its expiration on 30 June 2015. If Mr. Tosi wished implementation of the settlement agreement beyond its plain language, it was in his interest to file the application on implementation of said agreement within the time limits considering the literal rule he wished to challenge. Although this literal interpretation could be most disadvantageous to him, it would still be disputable after the application was received.

44. In reaching its conclusion that the last day for the implementation of the settlement agreement concluded was when Mr. Tosi received notification from the MEU to uphold the contested administrative decision of non-renewal of his contract, the UNDT erred on a matter of law. The Secretary-General's appeal succeeds in this regard and the application concerning the settlement agreement (Case No. UNDT/NBI/2015/095) is dismissed on grounds of receivability.

45. Having reached this conclusion, there is no need to address Mr. Tosi's requests related to the other UNDT findings in respect of this particular application, including reinstatement, nationalization of his post and placement on a vacant P-3 legal post following the abolition of his own post, since the administrative decision not to renew his fixed-term appointment stands.

¹³ *Id.*, para. 13.

Case No. UNDT/NBI/2016/023: Mr. Tosi's appeal, failure to exercise jurisdiction vested in the UNDT with regard to allegation of prohibited conduct

46. Mr. Tosi claims that the UNDT failed to exercise jurisdiction vested in it with regard to his protection under ST/SGB/2005/21, since he had formally denounced his senior hierarchy.

47. We do not agree with Mr. Tosi that there was a failure by the UNDT to exercise its jurisdiction. It is true that two of Mr. Tosi's applications were consolidated long before the issuance of the UNDT Judgment and that the Judgment only addressed the issue of the settlement agreement being or not being tainted by bad faith or breached in its implementation when Mr. Tosi's contract was not renewed beyond 30 June 2015.¹⁴ This issue was the subject of one of the cases. However, in addressing the other issues at stake in the other case, the UNDT held that:¹⁵

In his second application UNDT/NBI/2016/023, the Applicant severally alleges discrimination and mistreatment and other prohibited conduct on the part of his former FRO and other Senior Administration officials at MONUSCO. The Tribunal has thoroughly examined the evidence presented and finds that the Applicant, who was representing himself, made a number of unsustainable claims and clutched at straws, perhaps based on his frustration with the turn of events. Even though the Respondent countered that some of these claims are not receivable due to late filing by the Applicant, the Tribunal finds them to be mostly unsustainable and therefore will not address them beyond dismissing them.

48. In a footnote, the UNDT clarified to which "unsustainable claims" it referred:¹⁶

These claims included: restructuring of MONUSCO and the Legal Affairs Office, nationalization of the Applicant's post; the comparative review process; placement of the Applicant on the vacant P-3 post in the Legal Affairs Office; the Applicant's complaints under ST/SGB/2008/5 and his complaint to the Ethics Office.

49. The UNDT's consideration has thus laid down that, after having thoroughly examined the evidence presented before it, the main reason for dismissing the claims was that they were unsustainable. In other words, the requests in the application were unsupported by evidence. The UNDT also stated that Mr. Tosi introduced such claims "perhaps based on his frustration with the turn of events".

¹⁴ *Id.*, para. 71.

¹⁵ *Id.*, para. 70.

¹⁶ *Id.*, para. 70, footnote 1.

50. Although succinct, the UNDT's consideration satisfies the requirement of including stated reasons, as governed by Article 11 of the UNDT Statute, so as to enable Mr. Tosi to appeal against the Judgment by contesting its arguments, which he essentially did throughout his appeal. The case is therefore distinguishable from *Kadri*.¹⁷ While the UNDT could have detailed its reasoning further, there was no error in this respect in the Judgment that could justify a possible remand for additional considerations on the matter.

Case No. UNDT/NBI/2016/023: Mr. Tosi's alleged errors of law, fact, and of procedure by the UNDT and the issue of non-receivability raised by the Secretary-General in his answer to Mr. Tosi's appeal

51. In his appeal, Mr. Tosi claims that the UNDT erred in not applying the protection set forth by ST/SGB/2005/21, in light of his several complaints of harassment, abuse of authority and retaliation. He argues, *inter alia*, that it was the Secretary-General's burden to prove that the actions taken against him were unrelated to his complaints.

52. We must first turn to the Secretary-General's argument of non-receivability *ratione materiae* of this specific application, since it challenges a mere recommendation by the Ethics Office, which is not an administrative decision subject to judicial review. In addition, the Secretary-General claims that this application was not receivable *ratione temporis*, as its filing did not respect the time limits as prescribed by Article 8(1) of the UNDT Statute, that is, within 90 days of the outcome of his management evaluation request in respect of the determination by the Ethics Office, which concluded on 3 August 2015 that the information so far provided did not establish a *prima facie* case of retaliation in accordance with ST/SGB/2005/21.¹⁸ On 22 September 2015, the MEU considered Mr. Tosi's request not receivable due to the fact that the Ethics Office's determination was not a decision of the Secretary-General, hence not a contestable administrative decision.¹⁹

53. We agree with the Secretary-General that the filing of the application registered as UNDT/NBI/2016/023 on 24 March 2016 was time-barred, but only with regard to the 3 August 2015 Ethics Office's determination. This determination was subsequently subject to management evaluation, which considered Mr. Tosi's request not receivable because it did not

¹⁷ *Kadri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-512.

¹⁸ Impugned Judgment, para. 20.

¹⁹ *Id.*, para. 23.

concern an administrative decision of the Secretary-General. Mr. Tosi was informed of this outcome on *22 September 2015*²⁰ and thus failed to comply with the relevant time limits to file an application before the internal justice system.

54. With regard to the two other contested decisions in this application—the *11 September 2015* decision of the SRSG and the *14 January 2016* decision of the Under-Secretary-General, Department of Field Support—some facts must be recalled. The former decision concerned Mr. Tosi’s complaint of prohibited conduct against three senior MONUSCO staff members, while the latter was related to Mr. Tosi’s complaint against the former MONUSCO SRSG, who had issued the 11 September 2015 decision. Mr. Tosi then alleged that the former MONUSCO SRSG’s decision had been motivated by personal animus and contributed to a pattern of harassment, abuse of authority and retaliation against him.²¹

55. Mr. Tosi claims in his appeal that he was only notified of the SRSG 11 September 2015 decision on *12 October 2015*. This appears to be the reason why shortly afterwards, on 15 October 2015, Mr. Tosi amended his complaint to include the SRSG in person, the USG decision on the matter having been issued on *14 January 2016*. Subsequently, Mr. Tosi requested management evaluation of these decisions, having been informed of the respective outcomes on *20 January 2016* and *12 February 2016*. The filing of the present application on 24 March 2016 hence did respect the 90-day time limit as prescribed in Article 8(1)(a) of the UNDT Statute. Moreover, and contrary to the Secretary-General’s claim, the contested decisions were issued by the USG. Therefore, the application was receivable *ratione materiae*.

56. The question that remains to be considered is whether Mr. Tosi satisfied his burden to establish any error of law or of fact resulting in a manifestly unreasonable decision when the UNDT found that his claims, with regard to these decisions, were unsustainable.

57. On this issue, we conclude that, if this application of prohibited conduct was filed with the intent to provide evidence to sustain the background of the “substantive claim” of challenging the non-renewal of Mr. Tosi’s contract, as it appears to be the case by the reading of his appeal, then this request of protection against prohibited conduct is moot in light of the fact that the “substantive claim”, as discussed, was dismissed on grounds of receivability. This reasoning is in keeping with the fact that Mr. Tosi appears to state that there was improper motive for the

²⁰ *Id.*

²¹ *Id.*, para. 25.

non-renewal of his appointment, by virtue of the fact that his hierarchy was “seeking to separate him from service”.²²

58. Similarly, while Mr. Tosi claims that the UNDT erred in procedure when it admitted the testimony of Mr. Siri – by means of which new allegations were introduced that violated his due process rights – he fails to mention which new allegations these were and how they could have influenced the outcome of the Dispute Tribunal’s decision.

59. To his appeal Mr. Tosi annexes some sort of evidence. He highlights part of Mr. Siri’s statement according to which he was the only staff member to have lost his job at the Office of Legal Affairs, though the budget indicated that the Office had to be augmented. However, this fact does not directly relate to the contested administrative decisions. Apart from Mr. Tosi’s own testimony, the other statements, although indicating distressing and possibly regrettable situations, refer to facts that occurred *after the relevant administrative decisions* under scrutiny had been issued and they were directly connected with Mr. Tosi’s separation from service.²³

60. This same reasoning could be applied to dismiss Mr. Tosi’s allegation of prohibited conduct during the period from 31 July until 21 August 2015, just after his separation from service, since it occurred after the complaints and amendments which had been submitted before his separation from service (between 25 May 2015 and 20 July 2015)²⁴ and which ultimately led to the contested administrative decisions. In other words, since the contested actions of the Administration relate to a specific contextual and previous period in time, it is not permissible to request this Tribunal to embark on a broader assessment of later actions on the part of the Administration.

61. The only evidence brought before us that could possibly relate to prohibited conduct stemming from the contested administrative decisions is the information that Mr. Tosi had issues with his manager. But that would be an exaggerated interpretation. The fact that a staff member

²² *Id.*, para. 15.

²³ Allusion was made to the fact that security guards escorted Mr. Tosi inside the compound after separation, which was considered unusual, as well as to Mr. Tosi being forbidden access to the MONUSCO premises, his Laissez-Passer being cancelled before he left the country and the local immigration authorities being informed of his separation from MONUSCO, which was considered to be dangerous for Mr. Tosi’s physical integrity, since he was no longer a legal immigrant in the country. There is also a copy of an e-mail from Mr. Siri to Mr. Tosi, dated 17 August 2015, explaining some possible reasons why these actions had been taken.

²⁴ Impugned Judgment, paras. 14-18.

has had difficulties in the relationship with his manager does not mean that he would necessarily be the subject of prohibited conduct by this same manager.

62. By a similar token, although it is regrettable that the Administration took almost four months to complete the review of Mr. Tosi's complaints, this fact *per se* is, in the circumstances of the present case, not enough to justify a finding of prohibited conduct by his managers, particularly in light of the complex situation at hand, which involved successive complaints and amendments, as well as a number of alleged offenders.

63. In light of the foregoing, the UNDT was correct in its decision that this application was unsustainable. Having considered all of Mr. Tosi's submissions, we find that he has failed to persuade us that the UNDT committed any error of law, fact or procedure in reaching its decision.

64. Mr. Tosi's appeal fails.

Judgment

65. The Secretary-General's appeal succeeds and Judgment UNDT/2019/003 is hereby vacated. Mr. Tosi's appeal and cross-appeal are dismissed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Neven

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar