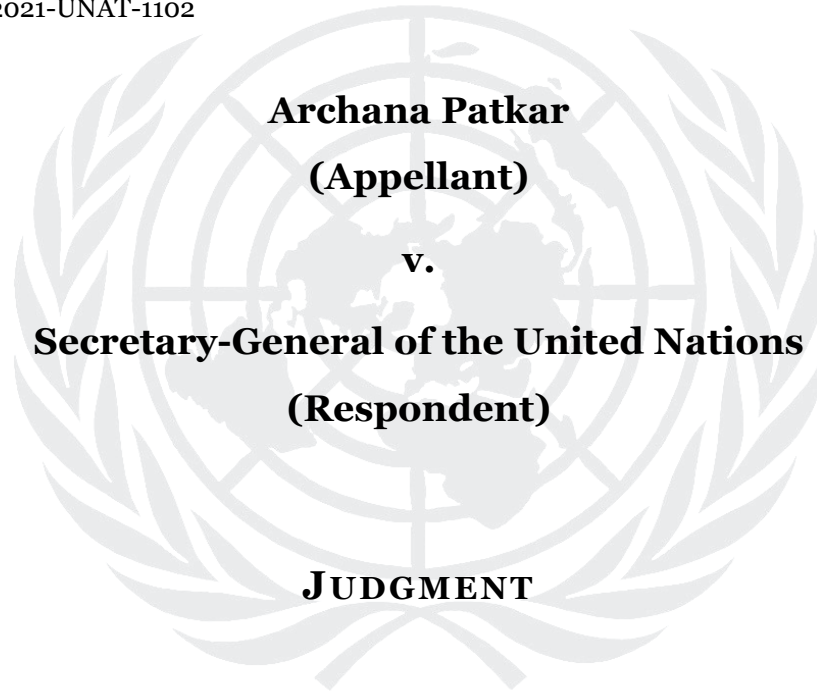




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1102



Archana Patkar

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge Sabine Knierim
Case Nos.:	2020-1422
Date:	19 March 2021
Registrar:	Weicheng Lin

Counsel for Appellant: Robbie Leighton, OSLA

Counsel for Respondent: Noam Wiener

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Ms. Patkar contested the Administration's decision not to renew her fixed-term appointment. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment on Receivability No. UNDT/2020/105 and rejected her application as not receivable being time-barred for not submitting a timely request for a management evaluation as required by Article 8.1 of the UNDT Statute and Staff Rule 11.2. The United Nations Appeals Tribunal (Appeals Tribunal) upholds the UNDT Judgment and affirms that Ms. Patkar's application was not receivable.

Facts and Procedure

2. Ms. Patkar is a former staff member with the Water Supply and Sanitation Collaborative Council (WSSCC) at the P-5 level with the United Nations Office for Project Services (UNOPS).

3. On 24 November 2017, the Deputy Director, People and Change Group (Deputy Director), sent a letter to Ms. Patkar informing her that because the WSSCC was being restructured, that all of the current posts therein were being abolished effective 31 March 2018. The letter further informed her that she had not been matched against any position in the new structure. She was invited to apply for three new WSSCC posts. She was given formal notice that her appointment would not be renewed beyond 31 March 2018, and that she would be separated from service. She was also informed that, if she were selected for one of the new posts or if she accepted any other fixed-term appointment to another UNOPS post commencing on or before 1 April 2018, the non-renewal and separation would not apply.

4. On 19 December 2017, Ms. Patkar was informed that she had not been selected to the position of Head of Global Policy and Innovation at the P-5 level, to which she had applied.

5. On 7 February 2018, Ms. Patkar requested management evaluation of the decision not to renew her appointment and on 26 March 2018 she received a management evaluation response.

6. On 22 June 2018, Ms. Patkar submitted an application to the UNDT contesting the decision not to renew her fixed-term appointment. In his reply of 26 July 2018, the Secretary-General contended that her application was not receivable.

7. The Dispute Tribunal held that Ms. Patkar’s application was not receivable because it was time-barred. The Dispute Tribunal found that the contested decision had been communicated to Ms. Patkar by letter on 24 November 2017, however, she requested management evaluation of the contested decision on 7 February 2018, which was after the 60-day deadline required by Staff Rule 11.2(c).

8. Further, the Dispute Tribunal considered Ms. Patkar’s claim that, given the restructuring process had two stages (a matching process and then a job fair for displaced staff members), the matching process could not, on its own, have resulted in a final non-renewal decision, since it was not the end of the process; and that only when the decision not to select her during an internal “job fair” was notified to her on 19 December 2017, did the non-renewal decision become final. The Dispute Tribunal found this argument to have no merit. Instead, the Dispute Tribunal determined the letter of 24 November 2017 was “unambiguous and unconditional about the separation of [Ms. Patkar] upon the expiration of her appointment on 31 March 2018”.¹

9. The Dispute Tribunal was mindful that if Ms. Patkar had been selected for another position, the non-renewal decision would have ceased to apply, but noted that this did not mean that it was not a final decision, stating: “Any subsequent decision to rescind the earlier non-renewal decision due to [Ms. Patkar’s] selection for another position would have been simply a new administrative decision superseding a previous decision.”²

10. Ms. Patkar filed an appeal on 29 July 2020.

11. The Secretary-General filed his answer on 28 September 2020.

Submissions

Ms. Patkar’s Appeal

12. Ms. Patkar requests the Appeals Tribunal to find her application to the UNDT receivable and remand the matter for consideration of the merits. She maintains that the Dispute Tribunal failed to make a finding about the nature of the two-stage restructuring process, which was relevant to the questions of when a completed final decision had been communicated to her.

¹ Impugned Judgment, para. 19.

² *Id.*, para. 20.

13. Ms. Patkar submits that the Dispute Tribunal erred in law by relying on the communication of the abolition of her post to conclude a final decision had been communicated. Noting that decisions regarding the abolition of a post are not reviewable by the Dispute Tribunal as they are not decisions producing direct legal consequences, the abolition of the post and the communication of the abolition of post were irrelevant to the Dispute Tribunal's determination on whether a final decision had been communicated.

14. Ms. Patkar claims that the Dispute Tribunal erred in fact and law in finding that any non-renewal decision communicated in the 24 November 2017 letter was "unambiguous and unconditional" regarding her separation. The paragraph in the letter of 24 November 2017 must be read as a whole, with its plain meaning, and the sentence indicating separation cannot be divorced from the subsequent one indicating the conditionality of the first statement. Specifically, the letter contains a conditional decision; Ms. Patkar's renewal (or otherwise) was conditional upon the job fair. The communication of a conditional decision does not meet the requirement of finality.

15. She further claims that the Dispute Tribunal erred in fact and law in proposing that success in the job fair would have resulted in a new administrative decision reversing the former one. The Appeals Tribunal jurisprudence is clear that where, in light of new information, a decision is subject to a genuine review, a new decision occurs which triggers a new deadline, even when that new decision is confirmatory. It was arbitrary and an error in fact and law for the Dispute Tribunal to find that a new decision would only result where the outcome of the job fair was to reverse the contested decision.

The Secretary-General's Answer

16. The Dispute Tribunal correctly held that the application was not receivable. The decision was communicated clearly by letter dated 24 November 2017, and the finality of the administrative decision is clearly manifested in that letter. The Dispute Tribunal correctly held that the letter was unambiguous and unconditional and communicated a final decision not to renew Ms. Patkar's appointment.

17. In response to Ms. Patkar's claims that the letter did not constitute a final decision due to its conditionality, the Respondent contends this claim is without merit for three reasons: i) the fact that the Deputy Director recommended different options by which Ms. Patkar could stay

with the Organisation did not imply the decision was not final as from the moment that contested decision was made, no further action or decision was necessary to carry it into effect and that, hence, it was a final decision with direct legal effect on the Appellant; ii) if Ms. Patkar's logic is applied, the last sentence of the last paragraph of the letter ("the foregoing would also not apply if you are selected for and accept any other fixed-term UNOPS post commencing on or before 1 April 2018") would lead to the nonsensical conclusion that the decision not to renew her would only take place at the moment of separation; and iii) contrary to Ms. Patkar's view, the Dispute Tribunal did not hold or imply that a selection decision is a new administrative decision and a non-selection decision is not, but rather, the entire premise of the UNDT's holding is that the decision not to select the Appellant for the post to which she applied is a new administrative decision, and that, therefore, she cannot rely on the date of that decision to contest the decision not to renew her appointment.

18. Ms. Patkar's conclusion that the decision not to select her for the post for which she applied was the relevant administrative decision was a *non sequitur*. The Dispute Tribunal correctly held that the decision not to renew Ms. Patkar's fixed-term appointment was the contestable administrative decision.

Considerations

19. Under Article 8(1)(c) of the UNDT Statute, an application shall be receivable if the Applicant has previously and timely submitted a contested administrative decision for management evaluation where required. This obligation upon the Applicant is also prescribed in Staff Rule 11.2(a), which provides that a staff member wishing to formally contest an administrative decision shall, as a first step, submit to the Secretary-General in writing a request for management evaluation. Pursuant to Staff Rule 11.2(c), a request for management evaluation is to be submitted to the Secretary-General within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

20. It is settled case law that requesting management evaluation is a mandatory first step in the appeal process.³ The Appeals Tribunal has noted many times that the requirement of management evaluation assures that there is an opportunity to quickly resolve a staff member's complaint or dispute without the need for judicial intervention.

³ *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 25.

21. Moreover, the Appeals Tribunal has held that it is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties' contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review.⁴

22. Per our jurisprudence, an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment. Further, the date of an administrative decision is based on objective elements that both the Administration and staff members can accurately determine.⁵

23. Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision.⁶ What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

24. In the present case, the letter, sent to Ms. Patkar on 24 November 2017, stated, in relevant part, that:

I must with regret now give you formal notice that your current appointment will not be renewed when it expires on 31 March 2018 and you will be separated from service. Should you be selected for one of the new WSSCC posts, the foregoing would of course cease to be applicable. The foregoing would also not apply if you are selected for and accept any other fixed-term UNOPS post commencing on or before 1 April 2018.

⁴ *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 26; *Cardwell v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-876, para. 23; *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 20.

⁵ *Larriera v. United Nations Joint Staff Pension Board*, Judgment No. 2020-UNAT-104, para. 29; *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 31; *Farzīn v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para. 36.

⁶ *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 32; *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 62; *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 50.

25. By applying the above provisions and principles to the present case, we find no fault with the UNDT's reasoning in that, "the letter was unambiguous and unconditional about the separation of [Ms. Patkar] upon the expiration of her appointment on 31 March 2018. It should have been challenged [...] within the deadline provided for by the applicable staff rule," and "the 24 November 2017 letter in question provided that should [Ms. Patkar] be selected for another position before 31 March 2018, the non-renewal decision would cease to be applicable. However, this does not mean that the decision communicated to [Ms. Patkar] on 24 November 2017 was not final."⁷

26. Ms. Patkar takes issue with the UNDT's findings arguing that the UNDT erred in not finding that she had timely filed a request for management evaluation because it was only on 19 December 2017 that she was notified that she had not been selected for the post to which she applied. In this regard, she argues that it was only at this time that the contested non-renewal of her fixed-term appointment became final. She claims, further, that because the Deputy Director had informed her that were she to be selected for a new position in the upcoming selection exercise she would not be separated from service, the challenged decision was not final, but rather conditional and subject to the future selection of her, which constituted the final administrative decision.

27. We do not find merit in these arguments. Contrary to Ms. Patkar's assertions, the letter of 24 November 2017 clearly conveyed the final decision of the Administration not to renew her appointment, as demonstrated by the language in the letter emphasizing that it constituted a "formal notice" of such decision and at the same time indicating the relevant consequence of it, namely, Ms. Patkar's separation from service upon the expiration of her appointment on 31 March 2018. So, as per its unambiguous wording, that letter produced a direct adverse consequence which was not contingent upon the possibility of Ms. Patkar's selection for any other post. Nor did the relevant provision in the letter that should Ms. Patkar be selected for another position before 31 March 2018, the non-renewal decision would cease to be applicable, detracts from such finality of the non-renewal decision, as it is clearly not set to function as a suspensory condition of this decision coming into effect. Rather, as the Secretary-General correctly submits, it was just a recommendation by the Deputy Director of the avenues by which Ms. Patkar could

⁷ Impugned Judgment, paras. 19 and 20.

have tried to remain in the service of the Organization, which does not impact on or diminish the finality of the decision not to renew Ms. Patkar's appointment beyond 31 March 2018.⁸

28. Consequently, at the material time, on 24 November 2017, Ms. Patkar knew or reasonably should have known of the content and finality of the above appealable decision, which triggered the time-limit for her to request management evaluation. By failing to do so within the following 60 days, her request for management evaluation was time-barred, as correctly held by the UNDT, and therefore her application was not receivable *ratione materiae*.

29. Finally, Ms. Patkar submits that the UNDT's holding that the selection decision is a second and separate administrative decision is wrong because when the UNDT held that "a new decision to rescind the earlier non-renewal due to the Appellant's selection for another position would have been simply a new administrative decision superseding a previous decision" the UNDT effectively stated that a selection decision would have been a new administrative decision, while a non-selection is not. However, this argument does not assist her because, regardless of the misplaced reading of this holding by Ms. Patkar –as the UNDT simply made a reference to the appealable nature of a possible selection decision for another post without pronouncing further on the nature of the non-selection decision, this does not in any way impact on the UNDT's correct ultimate conclusion that the letter conveyed a final administrative decision not to renew Ms. Patkar's appointment beyond 31 March 2018.

30. In light of the foregoing, the appeal is dismissed.

⁸ *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764, para.20.

Judgment

31. The appeal is dismissed and Judgment No. UNDT/2020/105 is confirmed.

Original and Authoritative Version: English

Dated this 19th day of March 2021.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 28th day of April 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Graeme Colgan's dissenting opinion:

1. I respectfully disagree with the decision of the majority and dissent for the following reasons.

2. The Judgment of the Appeals Tribunal in *Zachariah*⁹ cited by the majority in their Judgment is distinguishable. It addressed the question whether a similar, but not identical letter to that received by Ms. Patkar, conveyed an administrative decision that was contestable before the UNDT following a management evaluation. The Appeals Tribunal held that it did, and I do not disagree with that legal analysis. Ms. Patkar's letter likewise conveyed an administrative decision capable of founding jurisdiction for proceedings in the UNDT. In my assessment, however, when that notification took effect so creating finality in the decision conveyed, was when the conditions contained in the letter were not fulfilled. The Appeals Tribunal in *Zachariah* held:¹⁰

The termination letter of 31 December 2013, resulting from the abolishment of Mr. Zachariah's post, was a final decision of the Administration to terminate his permanent appointment with the Organization, as demonstrated by the language in the letter stating that "the present letter ... constitutes the formal notice of termination of your permanent appointment under staff rule 9.7". The mere fact that Mr. Zachariah's separation from service would not occur if he were selected for another position does not diminish the fact that the decision to terminate his permanent employment had been made.

3. To the extent that *Zachariah* regards such a situation as final despite leaving open (at least in this case) not only the possibility but indeed the mutual hope that the affected staff member will get another role and so not be separated from service is the position in law, I respectfully disagree with it.

4. I would hold that the letter of 24 November 2017 to the Appellant was a conditional advice of her separation from service. As the majority of this Tribunal accepts, and the UNDT accepted, the ascertainment of the date of an administrative decision is to be based on objective elements that both parties can accurately determine. To set the date of finality as the date of delivery of the conditional letter is to deprive the communication of its mutually ascertainable import.

⁹ *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764.

¹⁰ *Id.*, para. 20.

5. The letter of 24 November 2017 advised Ms. Patkar that, unless she obtained another post, either by being appointed to one of the new WSSCC posts or, by 1 April 2018 she had taken up another fixed-term UNOPS post, then she would be separated from service when her then-current fixed-term appointment expired on 31 March 2018. The separation by non-renewal would not take place unless and until those conditions were not fulfilled. The decision would become final and unconditional at that time, which, in the event transpired to be 19 December 2017 when she was advised that she had been unsuccessful in her application for the new WSSCC post for which she had applied. She sought management evaluation of the decision to terminate her employment on 7 February 2018, that is within the 60-day period for doing so.

6. I would find that the UNDT erred in law by concluding as it did at paragraph 19 of its Judgment that the 24 November letter was “...unambiguous and unconditional...” about Ms. Patkar’s separation from service on 31 March 2018. The majority of this Tribunal endorses that as a correct finding, but I respectfully disagree. It was not unconditional and therefore it was not final in the sense of being unconditional.

7. It would follow in my conclusion that the UNDT Judgment should be set aside, the case remanded to the UNDT and Ms. Patkar’s claims considered on their merits.

Original and Authoritative Version: English

Dated this 19th day of March 2021.

(Signed)

Judge Colgan,
Auckland, New Zealand

Entered in the Register on this 28th day of April 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar