



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

Judgment No. 2021-UNAT-1160

**Asr Ahmed Toson
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Martha Halfeld Judge Dimitrios Raikos
Case Nos.:	2020-1494
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for the Secretary-General: André Luiz Pereira de Oliveira

JUDGE GRAEME COLGAN, PRESIDING.

1. Asr Ahmed Toson (the Appellant) appeals against Order No. 226 (NBI/2020), entitled “Order on the Applicant’s Motions” (the impugned Order), issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 13 November 2020 in relation to the case registered as UNDT/NBI/2019/163.
2. For the reasons set out below, we dismiss the appeal.

Facts and Procedure

3. The Appellant is a staff member at the United Nations Population Fund (UNFPA) serving as a Representative at the P-5 level in the Oman Country Office. He filed three applications before the UNDT regarding extensions of his fixed-term appointment (FTA) as follows:

- (a) **UNDT Case No. UNDT/NBI/2019/008** in which he contested his contract renewal from 19 March 2019 to 19 June 2019 (for three months instead of two years). By Judgment No. UNDT/2020/182, of 22 October 2020, the UNDT dismissed his application as not receivable *ratione materiae*. This appeal is registered as **UNAT Case No. 2020-1498**;
- (b) **UNDT Case No. UNDT/NBI/2019/051** in which he contested his contract renewal from 20 June 2019 to 19 March 2020 (for nine months instead of two years). By Judgment No. UNDT/2020/183, of 22 October 2020, the UNDT dismissed his application as not receivable *ratione materiae*. This appeal is registered as **UNAT Case No. 2020-1483**; and
- (c) **UNDT Case No. UNDT/NBI/2019/163** (related to the present Appeal) in which he contested his contract renewal from 20 March 2020 until 31 March 2021 (for one year instead of two years).

Each of the foregoing appeals will be decided by a separate UNAT judgment.

4. The current appeal concerns the Appellant's challenge to the terms of an Order made by the UNDT before a hearing on the merits.

5. The Appellant filed an application with the UNDT on 8 December 2019, in Case No. UNDT/NBI/2019/163. This, as noted above, contested his FTA extension or renewal for one year instead of his preferred two years. On 31 May 2020 the Appellant announced (because this was only orally at a directions conference) his first motion (first Motion) requesting, among other things, the UNDT to order UNFPA "to preserve and produce evidence, namely, the email database starting from 1 December 2017 to date of all emails that have his name either directly or by means of reference" of a list of staff members.¹ He also requested the UNDT to stay the proceedings until the Investigation and Ethics offices provided their report(s) pertaining to various complaints he had made. He also asked the UNDT to hold an oral hearing on the merits of his claims and order the appearance of six witnesses.

6. The Appellant's motion of 31 May 2020, reiterated on 5 October 2020, indicates it was filed in respect of all three of his pending cases, UNDT/NBI/2019/008, UNDT/NBI/2019/051 and UNDT/2019/163. However, only one Order was issued under the number of one of his cases, namely UNDT/2019/163.

7. On 8 June 2020, the Appellant filed a second motion with the UNDT (second Motion) seeking to adduce supporting evidence of the harm he alleged he had suffered.

8. On 2 October 2020, he filed a third motion (third Motion) related to cases UNDT/NBI/2019/008 and UNDT/NBI/2019/051. This third Motion requested that the Respondent be directed to produce a copy of the UNFPA Office of Audit and Investigations Services Report. Those cases are, however, not the subject of this appeal. On 5 October 2020, the Appellant filed a fourth motion (fourth Motion). This was repetitious in the sense that it simply reiterated the requests made in his first and third motions.

9. On 22 October 2020, the UNDT issued judgments on those two other cases noted above finding the applications were not receivable as the contested decisions had been superseded and that the Appellant had failed to demonstrate that his rights were adversely affected.

¹ Impugned Order, para. 4(a).

The Impugned UNDT Order

10. On 13 November 2020, the UNDT issued the impugned Order. The UNDT denied the Appellant's request for an order directing the preservation and production of e-mails that he argued would establish that the Respondent made explicit written commitments for a two-year renewal of his FTA through multiple offers conveyed by the Ombudsman. The UNDT noted that the Applicant needed to address the evidentiary questions presented by the application and their materiality to the resolution of the issues arising out of the pleadings.² Proceeding from the premise that FTAs carry no expectation, legal or otherwise, of renewal, but that an expectation of renewal may arise in cases where the Administration gives a "firm commitment of renewal" the UNDT noted it would review the impugned decision to examine whether the Appellant had such a legitimate expectation.³ It rejected his request for production of the e-mails. The UNDT held:⁴

It is clear that he cannot specify by nature and content the particular e-mail(s) relevant to his claim and is not even sure whether those emails exist. Even if the email data bases and 'all emails that have the applicants name either directly or by means of reference i.e. staff member, respondent etc' exist the 'fact that they were not conveyed to him, (the reason he wants them produced), negates the assertion that they constitute an express promise or a firm commitment by the Administration to renew his contract. The Applicant could not have acted to his detriment on the basis of information in documents he did not receive.

11. The UNDT also rejected the Appellant's request for production of the reports of the Investigation and Ethics offices which it held related to the Applicant's complaints about retaliation and were "clearly not material to the issues at hand".⁵ The UNDT further held "[t]he Tribunal finds that the email databases and the investigation report which the Applicant seeks to have produced are not material to the application."⁶

² *Ibid*, para. 10.

³ *Ibid*, para. 11.

⁴ *Ibid*, para. 12.

⁵ *Ibid*, para. 13.

⁶ *Ibid*, para. 13.

12. Regarding his request for a hearing including the availability of certain named witnesses, the UNDT granted the request in part but rejected two witnesses stating as follows:⁷

Mr. [F] need not be called as a witness because evidence about the outcome of an investigation conducted by his office regarding retaliation against the Applicant related to contract renewals and referral of the same by Ethics office is not material to this application.

Appeal to the Appeals Tribunal

13. On 25 November 2020, the Appellant filed an appeal against the impugned Order and on 6 January 2021, the Secretary-General filed his Answer.

Submissions

Appellant's Appeal

14. The Appellant requests this Tribunal to order the Respondent to preserve and produce evidence (namely the e-mail database noted above) and to order an oral hearing which will include the two witnesses denied by the UNDT in the impugned Order. In the alternative, the Appellant requests the case be remanded to the UNDT for additional fact finding by a different judge. He also requests an oral hearing before the Appeals Tribunal.

15. He submits that the UNDT erred in law and fact in focusing only on whether he had a legitimate expectation of renewal and ignoring the grounds for his motions and application which claimed that such extensions were retaliatory, ill motivated and an abuse of authority. The motion's requests should have been considered in the context of the pending investigation report on his claim of abuse of authority regarding a shorter contract extension which was the subject of his application. Decisions taken in bad faith rooted in abuse of authority are receivable and reviewable. The jurisprudence provides that the Tribunal may examine the circumstances surrounding decisions to determine whether they were tainted by abuse of authority and the UNDT failed to even remotely address or examine any of Appellant's claims and circumstances related to abuse of authority which were under investigation by UNFPA.

⁷ Impugned Order, para. 18.

16. The UNDT erred in law in rejecting his request for production of the e-mail database and the calling of witnesses. The UNDT concluded the legitimate expectation of his contract renewal was based on written promises, whereas the requested evidence related to ill motivation and abuse of authority behind the contested administrative decision. The e-mails would establish the retaliatory nature of the decision, whether addressed to him or not, and his request specified dates of four written offers, giving sufficient specificity to the motioned requests.

17. The UNDT erred in rejecting his request to call the lead investigator into his claim for abuse of authority as a witness in his case. The testimony of the investigator is essential to proving that the decision was an abuse of authority. The UNDT further erred in law in rejecting to call as a witness the individual from the Ombudsman's office, noting she cannot testify due to the confidential nature of the information she has on the matter. This is not applicable as Article 15.7 of the UNDT Rules of Procedure addresses cases referred to mediation. In the instant matter there was no referral to mediation by the Tribunal nor was the witness involved in any formal mediation. The privilege of confidentiality rests with the staff member and it was revoked or waived by requesting the Ombudsman to testify.

18. The UNDT violated the Appellant's due process rights. The impugned Order is actually a judgment and not an interlocutory Order. It was a decision on substance and merits of his application as it determined whether the impugned administrative decision was retaliatory or an abuse of authority. The Judge also refused to stay the case pending outcome of the investigation report. The UNDT pre-determined the legal issues on the merits through this Order and not a judgment. Not issuing a decision on merits in the context of a judgment potentially denied his right to an appeal process as interlocutory orders are receivable only when the UNDT clearly exceeds its competence.

19. The UNDT failed to exercise jurisdiction vested in it and committed an error in procedure, so as to affect the decision of the case and flagrantly violated his due process rights including UNDT's own Rules of Procedure related to interim orders on evidence. The Judge should have self-recused from the case, displayed bias and deprived the Appellant of his right to appeal the outcome of the Order when it should have been issued as a judgment because it determined the legal issues and merits of his case. The UNDT failed to rule on the Appellant's motion requesting a stay of proceedings pending the outcome of the investigation which is a grave procedural error. The UNDT also did not decide, in a timely way, his motions filed on

14 May and repeated on 31 May and 5 October. The evidence requested to be preserved was both time-sensitive and vulnerable to tampering and this delay caused irreparable harm. The Judge was not a fair-minded observer. The Appellant's three cases are before the same Judge who has ruled in two of his cases without responding to any of his motions, rejected his request for recess to allow critical evidence to materialise, and refused leave to appeal the adverse Order.

Secretary-General's Answer

20. The Respondent requests this Tribunal to find the appeal is not receivable and dismiss the appeal in its entirety. The appeal is not receivable as the Appellant failed to demonstrate that the UNDT exceeded its jurisdiction or competence in the impugned Order. Following *Villamorán*,⁸ an interlocutory appeal is only receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence. The UNDT has already issued Judgments UNDT/2020/182 and UNDT/2020/183 relating to his two other applications. In those Judgments the UNDT held that the Appellant's applications were not receivable *ratione materiae* since the contested decisions in those cases were superseded and the Appellant failed to demonstrate that his rights had been adversely affected. Therefore, the claims the Appellant presented in connection with these two cases are not receivable. The UNDT issued the impugned Order to address only the claims that the Appellant had presented relating to case management issues. It informed the parties that a hearing on the merits would be held and that the four witnesses would testify. The denial of the other requests in no way exceeds the competence and authority of the UNDT. In contrast the UNDT followed the precedent in *Rangel*, wherein the Appeals Tribunal determined that requests to produce a large number of documents justified in the most general terms are impermissible fishing expeditions and ought to be refused.⁹

Considerations

21. We deal first with the Appellant's request for an oral hearing of his appeal. His grounds were as follows: "Demonstrate UNDT flagrant violations of due process, right of defence, equal access to evidence provided by parties related to oral hearing, witnesses examination, preservation and discovery of emails data base (time-sensitive), recess until investigation

⁸ *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160, para. 36.

⁹ *Rangel v. Registrar of the International Court of Justice*, Order No. 256 (2016), para. 5.

report is issued, access to other investigation report & others as articulated in my appeal brief. All are critical discovery of evidences [sic].”

22. This request was declined for the following reasons. The statutory grounds for departing from the default position of deciding appeals on the papers filed the Tribunal are contained in Article 8(2) of our Statute and are as follows: “The Appeals Tribunal shall decide whether the personal appearance of the appellant or any other person is required at oral proceedings and the appropriate means to achieve that purpose.”

23. An applicant for an oral hearing must establish that it is “required”. The interests of justice in the particular case will need to be considered in so deciding. Mr. Toson’s grounds set out above all addressed the merits which can be considered at least as well from written submissions. We were not persuaded that an oral hearing was necessary in the interests of justice.

24. Turning to the substantive appeal, there is a fundamental jurisdictional hurdle in the Appellant’s way. Under Article 2 of the Statute of the Appeals Tribunal, appeals are allowed against “judgments” of the UNDT. The Appellant’s complaint is against an interlocutory order of the UNDT, that is against procedural directions affecting the consideration and decision of the case that would result in a judgment. This is an element of UNDT case management. There is previous authority of this Tribunal that confirms that in a narrow range of cases, a disaffected party can appeal against such an order, but only on grounds that the UNDT exceeded its jurisdiction or competence: see *Nadeau*¹⁰ and *Igunda*¹¹. Appeals against interlocutory orders affecting such matters as evidence, procedure and trial conduct are not receivable, at least not until they may form part of an appeal against the UNDT’s substantive judgment.

25. There is no question that the UNDT had the jurisdiction or competence to make the orders it did. Article 9 of the UNDT’s Statute empowers it with a broad discretion to order the production of documents or other evidence, and to direct that witnesses should appear at its hearings. The UNDT is empowered to determine the relevance and admissibility of any evidence in proceedings before it under Article 18 of its Rules of Procedure. Article 19 of its Rules of Procedure gives it similarly broad discretionary powers to manage the cases before it.

¹⁰ *Nadeau v Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1058.

¹¹ *Igunda v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-979, paras. 18, 20, and 22.

26. The Appellant's complaints are about the contents of the orders made, not about whether the UNDT was empowered to make such orders. As such his appeal is not receivable and must be dismissed.

27. We turn now to the merits of the Appellant's appeal. Because of our dismissal of the appeal as unreceivable the following are observations for the benefit of parties. It is necessary to simplify the complexities of his multiple proceedings before the UNDT and to do likewise with his multiple motions within those proceedings and in the one which is the subject of this appeal.

28. On 14 May 2020, at a directions conference with the UNDT, the Appellant advanced several motions orally. They were, first, for an order requiring the Respondent to preserve and present evidence at the hearing, being an e-mail database compiled by reference to his name and those of five others, dating from 1 December 2017. His second oral motion was for an order staying the proceedings before the UNDT until the reports on the Appellant's complaint of intimidation was produced by the Investigation and Ethics offices. Third, he sought an order that the UNDT hold an oral hearing into his claims and requiring the appearance at that hearing of six named persons. Finally, and in the nature of a substantive order rather than an interlocutory one, the Appellant claimed a remedy, but which claim was subsequently overtaken by the UNDT's decision that the claim to which it attached was unreceivable. The UNDT Judge said that these would be responded to "in due course".

29. On 31 May 2020, the Appellant filed written submissions in support of his earlier oral motions which included the written terms of these orders he sought. These, by-then written, motions, covered all three of his proceedings then before the UNDT, including for the purposes of this judgment, UNDT/NBI/2019/163. On 8 June 2020 he filed a further motion seeking to adduce evidence of harm suffered by him allegedly because of the contested decision.

30. On 2 October 2020 he filed a motion affecting the two other cases he had before the UNDT, but which cases were subsequently held not to be receivable.

31. On 5 October 2020 he filed a further written motion reiterating those claims for orders he had previously made in this proceeding.

32. The UNDT issued its decision on these motions for orders in the impugned Order dated 13 November 2020. It allowed some and dismissed others.

33. First, it disallowed the application for an order preserving the e-mails, essentially because there was insufficient connection between the documents sought (if indeed they existed) and the disputed evidentiary questions raised by the application. It also held that the Appellant's application was speculative in the sense that he did not know whether documents of the sort he claimed in fact existed and could not point to evidence that this was or might even have been so. The UNDT concluded that if the Appellant was able to establish a legitimate expectation of extension to or renewal of his FTA, he would need to establish that there had been an express promise or other assurance of such made to him and that he had acted upon that to his detriment. The purpose of his motion being to establish the existence of evidence of such a communication, the UNDT concluded that if such a document existed, it would necessarily have had to have been in his possession at the relevant time, that is that any relevant document in the Respondent's possession or control would have had to have been sent to and received by him. Put another way, the UNDT concluded that the Appellant could not have acted on information received by him and on which he acted to his detriment, if that information was unknown to him.

34. Regarding the application for stay to await the receipt of the reports of the Investigation and Ethics offices, the UNDT held that, absent a complaint of intimidation to it by the Appellant, such a report was not material to the proceedings at hand. This motion was therefore refused.

35. The UNDT agreed to make an Order for an oral hearing and that four of the six named persons be required to give evidence at that hearing. The UNDT refused to require the attendance of the Mediator who had attempted to assist the parties to settle the Appellant's claims and, by necessary implication, to produce in evidence emails containing offers of settlement of his claims that were ultimately not agreed upon between the parties. It declined

to make these orders in reliance on Article 15.7 of the UNDT Rules of Procedure which classifies such information as confidential and privileged, that is inadmissible in proceedings before the Tribunal. The UNDT refused to require the final person (from the Investigation and Ethics Office) to attend to give evidence, for reasons associated with its refusal to stay the case pending that Office's report.

36. Finally, it is unclear whether and if so, how and when, the UNDT addressed the motion to adduce evidence of harm done to him by the allegedly wrongful acts of the Respondent. That is (and was), however, an academic consideration because the UNDT held the proceedings themselves to be unreceivable. In these circumstances, it did not get to examine the merits of the Appellant's claims, let alone any remedies for any liability that the Organisation may have had to him. Although the UNDT should perhaps ideally have addressed this motion, the fact that it may not have does not affect him disadvantageously.

37. Although the Appellant's motions were not dealt with for several months after they had been confirmed in writing by him, this is well understandable in the circumstances faced by the UNDT. They could not reasonably be responded to and then considered and decided by the UNDT, until they were submitted by him in writing. As already mentioned, he had multiple proceedings and there were multiple active issues within each of those. No doubt he was occupying much of the Tribunal's valuable time which had also to be allocated to other litigants. The UNDT had to be mindful of the very arguable non-receivability of at least some of the Appellant's cases: if they were not receivable, there was no point in preparing for a complex hearing including addressing evidence on the merits. The UNDT was entitled to determine such issues of receivability as it did in priority to these interlocutory issues. There is nothing in the UNDT's procedure by which it dealt with these motions that was erroneous in law or otherwise can be criticised.

38. As to the outcomes of the motions (the substance of the Orders made), there is likewise no error on the part of the Tribunal. The Appellant cannot criticise those Orders he requested and were made in his favour. The UNDT was correct to decline to require evidence of alleged intimidation of him when this was not the subject of his proceeding and was still then being investigated in any event. His rights were, in these circumstances, otherwise preserved. This reasoning applied also to the correctness of the UNDT's decision not to stay its hearing requested on the same grounds by the Appellant.

39. The UNDT did not exceed its competence by refusing to order the preservation of a potentially large volume of inadequately defined e-mails in what might be described as a drift-net fishing expedition embarked upon by the Appellant in the hope of finding something valuable to his case. But more importantly, the UNDT did not exceed its competence by identifying that if the Appellant sought, as he did, to discover a document evidencing a promise to renew or extend his FTA, this could not assist him in circumventing the statutory prohibition upon legitimate expectations of such contract extensions. To have succeeded, the Appellant would have had to establish that such an assurance had been expressed to him and that he had acted to his detriment in reliance on that. Discovering documentation within the Organisation that the Appellant did not already himself have, would not have assisted him or the UNDT to decide the case in his favour.

40. Finally, we should say a little about the confidentiality, privilege and inadmissibility afforded to communications made in attempts to settle such claims as the Appellant's otherwise than by litigation. That is because his apparent misunderstanding of this widespread legal principle might be shared by other unrepresented litigants. As the UNDT identified correctly, Art 15.7 of its Rules of Procedure is of broader application than simply Tribunal-directed mediation. It provides:

All documents prepared for and oral statements made during any informal conflict-resolution process or mediation are absolutely privileged and confidential and shall never be disclosed to the Dispute Tribunal. No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Dispute Tribunal.

41. Especially if, as here, referral in such documents to proposals or offers of settlement, whether by the other party, the mediator, Ombudsman, or other neutral facilitator appears to assist a party in proof of his or her claim, the exclusion of such evidence may appear counterintuitive and even obstructive to justice. Making such evidence inadmissible, however, is intended to encourage parties to settle their actual or potential litigation by allowing them to communicate frankly and to encourage settlements that might not be able to be achieved otherwise. The prohibition upon later revelation of, and reliance on, such offers and counteroffers of settlement is the necessary corollary of such encouragement to avoid the win/loss outcomes that litigation brings to these disputes. What party is going to make, sometimes reluctantly, an offer that may be a better alternative to the risk of losing in litigation,

if the making of that offer might later be used as a self-incriminating admission of liability against that party?

42. The UNDT was clearly competent to refuse the attendance at the hearing of the Ombudsman and to admit into evidence the emails exploring genuine possibilities for settlement in this case. Indeed, it had no choice under its Statute.

43. We would have concluded that, even if they had been appealable, the Appellant's relevant motions were correctly decided and there is nothing to support his appeal against the Order in which they were dealt with.

Judgment

44. The appeal against the impugned Order is dismissed and the Order is affirmed.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Colgan, Presiding
Auckland New Zealand

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 4th day of January 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar