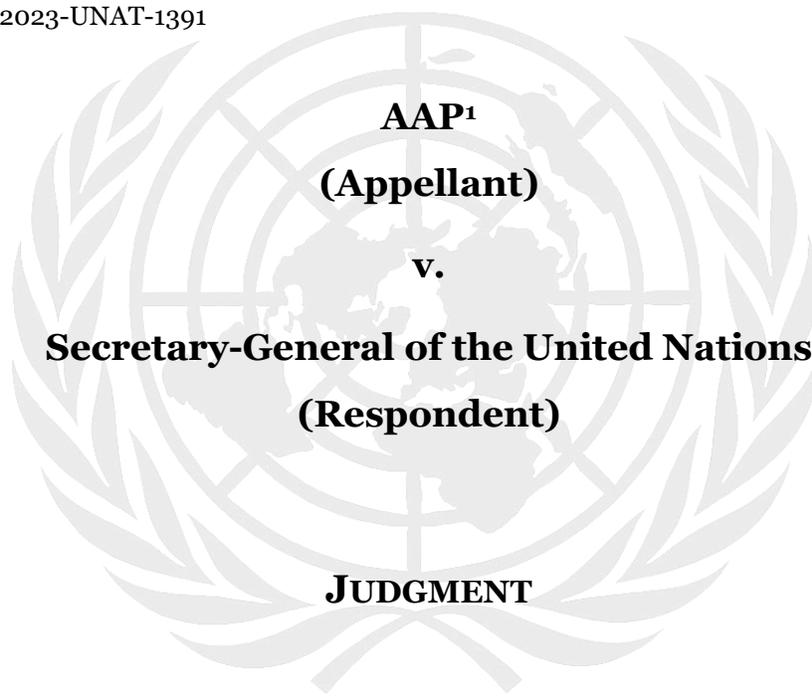




UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1391



Before:	Judge Katharine Mary Savage, Presiding Judge Kanwaldeep Sandhu Judge Graeme Colgan
Case No.:	2022-1755
Date of Decision:	27 October 2023
Date of Publication:	29 November 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Francisca Lagos Pola

¹ This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE KATHARINE MARY SAVAGE, PRESIDING.

1. AAP, a Human Resources Officer engaged with a United Nations Mission, contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the decision not to recommend/select them for the Logistics Officer position at the P-4 level, Job Opening (JO) X (contested decision). By Judgment No. UNDT/2022/094 dated 30 September 2022, the Dispute Tribunal dismissed the application (impugned Judgment).
2. AAP has filed an appeal before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
3. For the reasons that follow, we dismiss the appeal.

Facts and Procedure

4. On 13 September 2021, AAP applied for JO X with a United Nations Mission. At that time, AAP was a Human Resources Officer at the P-3 level engaged with that same Mission.
5. On 25 September 2021, AAP wrote to the Human Resources Section requesting for a change of gender, from male to female. AAP indicated that they now identified as female and that their national passport was issued with “sex” marked as “X”. They further indicated that their request was based on the Danish national laws whereby registration of gender identity is notated as “X” based on the person’s declaration of belonging to the other gender.
6. On 13 October 2021, AAP was interviewed for JO X and was identified amongst the recommended candidates as male.
7. On 20 October 2021, an internal Interoffice Memorandum (Memorandum) containing a list of four recommended candidates, including AAP, was transmitted from the hiring manager to the Director of the Mission (Director) for his selection decision. Attached to the Memorandum was a comparative analysis report of all of the candidates interviewed. After further consideration of the four recommended candidates, one of the candidates was selected for the position.
8. On 18 November 2021, the Administration confirmed receipt of the selected candidate’s interest for the position.

9. On 21 November 2021, AAP requested management evaluation of the decision to select another candidate for JO X as well as suspension of action.
10. On 22 November 2021, the UNDT issued Order No. 254 (NBI/2021) granting the request for suspension of action pending management evaluation.
11. On 7 December 2021, the Management Evaluation Unit (MEU) informed AAP in writing that the recruitment process for the position had been cancelled and re-advertised as a recruit-from roster with oversight by a different hiring manager and that AAP's request for management evaluation had therefore become moot.
12. On 24 February 2022, AAP filed an application with the UNDT, contesting the Director's decision not to recommend/select them for the Logistics Officer position at the P-4 level, JO X.
13. On 30 September 2022, the UNDT issued the impugned Judgment, dismissing the application. The UNDT found that absent a reviewable administrative decision, the application was not receivable. The UNDT further found that the Administration had acted within the scope of its discretion and that no compensation was therefore due.
14. On 26 November 2022, AAP appealed the impugned Judgment, and the Secretary-General filed his answer on 30 January 2023.

Submissions

AAP's Appeal

15. AAP submits that the UNDT erred in law in dismissing their application by summary judgment without allowing the parties to comment or submit closing statements. The UNDT further erred in fact resulting in a manifestly unreasonable decision by proceeding to a summary judgment without allowing AAP the opportunity to make submissions on certain facts which had come to light relating to the selection process after the date of his application. These included that despite the MEU's decision the new position was advertised nine months later and administered by the same hiring manager, which was "deliberately dishonest" and aimed at undermining AAP's case before the MEU; and that a further selection exercise was cancelled by the Mission because there were insufficient female candidates, with AAP not considered amongst those female candidates despite being a trans-female applicant.

16. In addition, AAP submits that the UNAT had decided the matter despite an appeal pending before the UNAT on a case which was “indistinguishable from the case at bar” having not been determined.

17. AAP also seeks leave on appeal, in the interest of justice, to submit into evidence several documents on the basis that these documents detail facts which arose subsequent to their application to the UNDT. These documents are sought to be relied upon to show a pattern of systematically and consistently denying them full and fair consideration for positions as Logistics Officer at the P-4 level with the Mission and the violation of the commitment by the MEU.

18. AAP seeks the rescission of the contested decision to select another candidate and the grant of in-lieu compensation in the amount of 24 months’ base salary at the P-4 level; and compensation for harm amounting to the difference between AAP’s P-3 level salary and the salary they would have received at the P-4 level, including the difference in mobility, hardship and pension contributions from 1 December 2021 when their selection to the P-4 level would have been effective, until 1 September 2022, when they were promoted to an unrelated position at the P-4 level. In the alternative, AAP asks that the case be remanded to the UNDT for a full consideration on the merits.

The Secretary-General’s Answer

19. The Secretary-General submits that the UNDT correctly dismissed the application as moot and not receivable in that there was no reviewable administrative decision challenged. The UNDT’s finding is in conformity with the legal framework and the Tribunals’ jurisprudence in which it has been held that if the alleged unlawfulness is eliminated and, unless an applicant can prove that he or she still sustains an injury for which the Tribunals can award relief, then an application is moot and not receivable. In the present case, the alleged unlawfulness in the decision to select a candidate other than AAP, was eliminated by the Administration following AAP’s management evaluation request and prior to the filing of his application.

20. In the absence of a selection decision to review, the UNDT correctly found that there was no reviewable administrative decision and consequently dismissed the application as not receivable. AAP did not prove that they sustained an injury owing to the contested decision or the rescission of the selection exercise when the Administration has wide discretion to cancel selection exercises.

21. The Secretary-General submits that the UNDT committed no error in law in dismissing the case by summary judgment since in terms of Article 9 of the UNDT Rules of Procedure (UNDT Rules), the UNDT may determine summary judgment to be appropriate, and the UNAT has previously held that summary judgment is an appropriate tool to deal with issues of receivability.

22. The Secretary-General also contends that the UNDT committed no errors of fact since the facts identified by AAP took place after the submission of the application and an appeal is not an opportunity to raise new grievances which are unrelated to the receivability of the present case. In addition, the UNDT was also not required to await the decision of the UNAT in an entirely different and unrelated case before issuing its own Judgment.

23. The Secretary-General opposes AAP's application to submit into evidence the four documents on grounds that these are unrelated to the case and relate to events that occurred after the contested decision. As such, the documents fall outside of the scope of the appeal against the UNDT's finding that the application was not receivable. Furthermore, the documents, two of which are internal confidential documents, do not show that AAP was denied full and fair consideration for P-4 positions and their admission would not serve the interests of justice and will not enhance the efficient and expeditious resolution of the proceedings as none of them are relevant to the current proceedings.

24. The Secretary-General submits that AAP's request for relief should be rejected since the contested decision had been rescinded prior to AAP submitting the application; and that the request for rescission and compensation is disingenuous since the Administration has already rescinded the decision on its own account. Given that the contested decision is not an appealable administrative decision, a remedy such as rescission, specific performance or compensation for harm pursuant to Article 9(1) of the UNAT Statute is not available to AAP. In addition, the request for compensation for harm should be rejected in that no contractual entitlement has been breached and AAP has not demonstrated that they sustained direct and certain injury from any violation in that the selection process was canceled prior to the selection of any candidate becoming effective, and consequently no harm was done.

25. The Secretary-General therefore requests that the UNAT dismiss the appeal and affirm the impugned Judgment.

Considerations

26. Article 9 of the UNDT Rules provides that “(t)he Dispute Tribunal may determine, on its own initiative, that summary judgment is appropriate”.

27. In *Auda*,² this Tribunal confirmed, with reference to *Kazazi*,³ that the summary judgment procedure under Article 9 is a proper procedure for the Dispute Tribunal to adopt in order to determine whether an application is receivable or not since the issue in such circumstances is one of law and not fact. In proceeding by way of summary judgment, the Dispute Tribunal may determine the issue without receiving any argument or evidence from the parties because the UNDT Statute prevents the Dispute Tribunal from receiving a case which is not receivable.

28. The UNDT is competent, under Article 2(1)(a) of the UNDT Statute to hear and pass judgment on an application filed by an individual against the Secretary-General *inter alia* to “appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms ‘contract’ and ‘terms of appointment’ include all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance”.

29. An applicant has the statutory burden to establish that the administrative decision in issue was in non-compliance with the terms of their appointment or contract of employment. Such a burden is met where the applicant identifies an administrative decision capable of being reviewed, that is, a specific decision which has a direct and adverse impact on his or her contractual rights.⁴

30. In *Adnan-Tolon*, it was stated that the key characteristic of an administrative decision “is that the decision must ‘produce ... direct legal consequences’ affecting a staff member’s terms and conditions of appointment”.⁵ What is required is a “specific, recognizable decision, declaration or ruling made by the Administration (express or implied) that can then be challenged and on which the MEU deadlines can be imposed”.⁶

² *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-740, para. 18.

³ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, paras. 41-42.

⁴ *Haydar v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-821, para. 13.

⁵ *Adnan-Tolon v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-970, para. 29.

⁶ *Ibid.*, para. 31.

31. AAP was informed on 7 December 2021 by the MEU that the recruitment process for the position had been cancelled and re-advertised with the process to be overseen by a different hiring manager. As a result, AAP was informed that their request made on 21 November 2021 for management evaluation had become moot. AAP accepts that a further selection exercise was thereafter embarked upon.

32. In *Ponce-Gonzalez*, this Tribunal recognized that “[a] selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process but cannot alone be the subject of an appeal to the UNDT.”⁷

33. In *Belsito*, it was accepted that “[i]t is within the discretionary authority of the Administration to cancel a recruitment procedure on rational grounds on account of irregularities occurring in the recruitment process”.⁸ Similarly, *Canova* recognized that “the Administration is not obliged to pursue or complete a recruitment process once begun” and that the Administration “has a wide discretion to cancel a procedure for sound reasons and in the interest of the Organization”.⁹

34. This authority was reiterated in *Kinyanjui* in which it was stated that “the Administration is not under an obligation to pursue a recruitment procedure once begun, by filling the post which has become vacant. This falls within the discretionary authority of the Administration to terminate a recruitment procedure and/or to initiate a new one.”¹⁰

35. The decision to cancel the appointment process and initiate a new process was one which fell squarely within the discretionary authority of the Administration. Given that a new appointment process was embarked upon, there was no longer any administrative decision alleged to be in non-compliance with AAP’s terms of appointment or contract of employment. Any dispute concerned with the initial appointment process was moot in the sense that there was no live issue

⁷ *Antonio Ponce-Gonzalez v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1099, para. 35.

⁸ *Giuseppe Belsito v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1250, para. 37.

⁹ *Alejandro Frederico Izurieta Canova v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1252, para. 35.

¹⁰ *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, para. 21.

in dispute which required determination by the Dispute Tribunal. AAP's application was therefore not receivable as a matter of law on this basis.

36. The Dispute Tribunal was entitled under Article 9 of the UNDT Rules to exercise its discretion to determine the matter by way of summary judgment, without receiving closing statements or additional evidence from the parties, on the legal issue of receivability.

37. The fact that a similar matter may have been pending before this Tribunal which, AAP submits, would provide clarity on the authority of the Respondent to cancel a recruitment exercise without becoming liable for compensation, does not permit a finding in this matter that an administrative decision had been taken in non-compliance with AAP's terms of appointment, nor that AAP's application was receivable. Since the application was not in law *receivable ratione materiae*, AAP's request to submit further documents pursuant to Article 2(5) of the UNAT Statute is without merit.

Judgment

38. AAP's appeal is dismissed, and Judgment No. UNDT/2022/094 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)

Judge Savage, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 29th day of November 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar