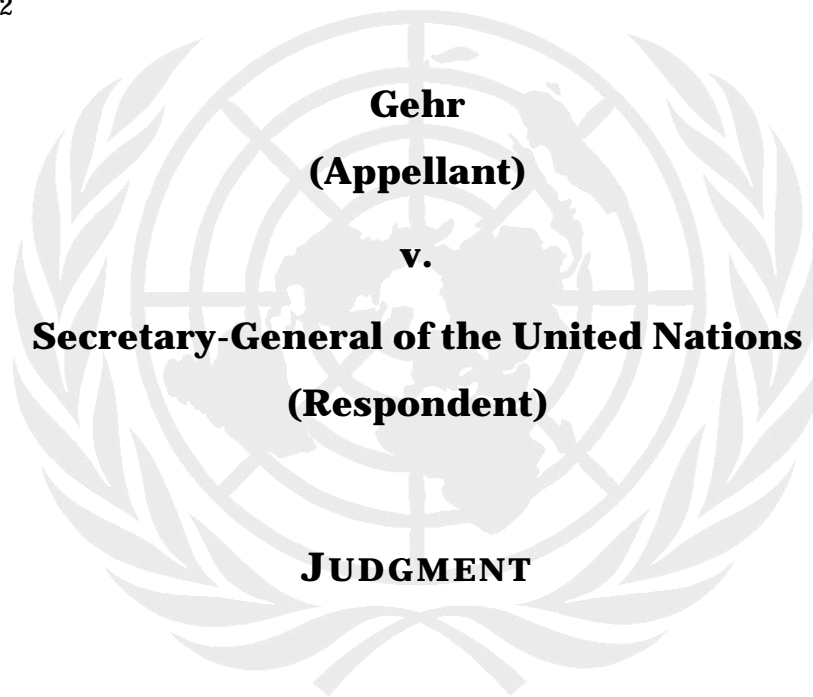




UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2011-252



**Gehr
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Inés Weinberg de Roca Judge Mary Faherty
Judgment No.:	2012-UNAT-234
Date:	29 June 2012
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Wambui Mwangi

JUDGE SOPHIA ADINYIRA, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Walter Gehr on 12 September 2011 against Judgment No. UNDT/2011/150, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 25 August 2011. The Secretary-General filed an answer on 31 October 2011.

Synopsis

2. Mr. Gehr, a former staff member of the United Nations Office on Drugs and Crime (UNODC) in Vienna, appeals the decision of the Dispute Tribunal that the renewal of his fixed-term appointment until 31 December 2011, in line with the alignment policy issued in 2008 by the Director of the Division for Management of UNODC and the United Nations Office at Vienna (UNOV), was lawful. He submits that the UNDT exceeded its jurisdiction and made errors of law and procedure.

3. The Appeals Tribunal has granted Mr. Gehr's request for an oral hearing finding that oral submissions would assist in the expeditious and fair disposal of this case.

4. From the written and oral submissions before this Tribunal, it appears to us that the Dispute Tribunal did not attach much weight to Mr. Gehr's submissions. This alone, however, does not necessarily mean that the UNDT has exceeded its jurisdiction or erred in law, as the UNDT has broad discretion as a court of first instance to determine the admissibility of any evidence and the weight to attach to it.¹

5. Mr. Gehr bears the burden to persuade this Court that there was a substantial error or flaw in the contested administrative decision, in the proceedings that led to it or in the UNDT Judgment.²

6. We affirm the decision of the UNDT that the alignment policy was properly issued by the Director of the UNOV/UNODC Division for Management and that Mr. Gehr had failed to show that the application of the alignment policy to his case was improperly motivated and unfair compared to other staff members who also received a contract extension until 31 December 2011.

¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-123.

² *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

Mr. Gehr has failed to establish that the UNDT made any error of law or procedure warranting a reversal of its decision. The appeal is dismissed and the UNDT Judgment is affirmed.

Facts and Procedure

7. The facts as set out in paragraphs 3 to 13 of the UNDT Judgment are not contested. They read as follows:

3. The Applicant joined the United Nations Office on Drugs and Crime (“UNODC”) in 2002. With effect from 1 November 2007, he was appointed under a fixed-term appointment, under the 100 series of the Staff Rules, to the post of Senior Terrorism Prevention Officer, at level P-5, in the Terrorism Prevention Branch (“TPB”), within the Division of Treaty Affairs (“DTA”).

4. By two “Messages of the Day” respectively dated 1 April and 18 August 2008, the Chief of the Human Resources Management Service (“HRMS”) informed UNODC staff of the decision of the Director of the Division for Management to implement changes in policies relating to appointment extensions. Those changes included the alignment of the expiry dates of fixed-term appointments with the last day of the calendar year (“alignment policy”), and the issuance of letters of appointments only for initial appointments, each subsequent extension being reflected solely through a personnel action form (“personnel action policy”).

5. With effect from 1 November 2008, the Applicant’s appointment was extended for a year until 31 October 2009. It was subsequently extended for three months until 31 January 2010.

6. With effect from 1 February 2010, the Applicant’s appointment was extended for a year, until 31 January 2011.

7. On 21 December 2010, the Chief of TPB wrote to the Applicant, stating her intention to further extend his appointment, though she explained that she could not at that stage confirm the duration of the proposed extension.

8. By an email of 12 January 2011 from the Officer-in-Charge of DTA, the Applicant was informed that his appointment would be extended for 11 months, until 31 December 2011, “to bring its time frame into alignment with UNODC’s policy that contracts should normally expire at the end of the calendar year”.

9. On 18 January 2011, the Applicant sent an email to the Officer-in-Charge of DTA, asking for an extension of his appointment until at least 31 January 2012.

10. On 25 January 2011, he submitted a request for management evaluation of the decision to renew his fixed-term appointment for only 11 months.

11. By a letter dated 11 March 2011, the Applicant was notified of the Secretary-General's decision to uphold the decision to renew his appointment until 31 December 2011.

12. On 12 March 2011, the Applicant filed his application with the Tribunal, challenging the decision "[t]o renew [his] appointment for only 11 months".

13. An oral hearing was held on 12 May 2011, to which the Applicant and Counsel for the Respondent attended by videoconference.

8. On 25 August 2011, the UNDT issued Judgment No. UNDT/2011/150, rejecting the Appellant's application in its entirety. It found that in accordance with the Staff Regulations and Rules and the relevant administrative issuances, there was no minimum duration for the renewal of a fixed-term appointment. The UNDT rejected the Appellant's submission that the wording of the Staff Rules suggests a distinction between an "extension" and a "renewal".

9. The UNDT found that under ST/SGB/1997/5 (Organization of the Secretariat of the United Nations)³ and ST/SGB/2004/6 (Organization of the United Nations Office on Drugs and Crime), the Director of the UNODC Division for Management did have authority to decide and adopt the alignment policy, for the purpose of "managing the human resources of the United Nations Secretariat entities in Vienna"; and could do so by way of "Messages of the day".

10. The UNDT rejected the Appellant's submission that there was legal uncertainty because the decisions reflected in the "Messages of the Day" were taken on the basis of the former Staff Rules which were abolished effective 1 July 2009. The UNDT noted that none of the successive sets of Staff Rules which had governed his appointment since the adoption of the alignment policy prevented the renewal of fixed-term appointments for a period of less than a year.

11. The UNDT also found that the alignment policy adopted by UNODC was properly and fairly implemented with respect to the Appellant. The UNDT found that the alignment policy had not been applied to Mr. Gehr from 1 November 2008 because of a change in the funding source of his post. The fact that the Administration could have mistakenly granted him an extension which contravened the alignment policy does not give him any right to have his contract subsequently extended in further breach of the policy.

³ ST/SGB/1997/5 was subsequently replaced by ST/SGB/2002/11, which entered into force on 1 October 2002.

12. Finally, the UNDT rejected the Appellant's allegation of unequal treatment. The UNDT found that the Secretary-General provided sufficient reasons to explain the differences in contractual situations and the Appellant failed to show that the application of the alignment policy to his case was unfair or tainted by improper motives.

13. Mr. Gehr appeals the UNDT Judgment. On 25 June 2012, and upon Mr. Gehr's request, the Appeals Tribunal held an oral hearing in Geneva, Switzerland. Both parties attended the hearing via video-link.

Submissions

Mr. Gehr's Appeal

14. The Appellant submits that the UNDT erred in concluding that there was no minimum duration for the renewal of a fixed-term appointment. The UNDT erred in finding that the words "renewal" and "extension" were used in an undifferentiated manner in the Regulations and Rules. These are two words with different meanings, particularly when compared to the equivalent meaning in French. While temporary appointments may be "extended" for less than one year, fixed-term appointments can only be "renewed" for a period of at least a year. The Appellant submits that according to the Secretary-General, the Administration could renew or extend a fixed-term appointment for only one day which would make the distinction between fixed-term and temporary appointments absurd. The Appellant submits that the ambiguity created by the undifferentiated use should not be interpreted to his detriment.

15. The Appellant submits that the UNDT erred in concluding that the issuance of the alignment policy was legal, and a proper exercise of the authority by the Director of UNOV/UNODC's Division for Management. The provisions of ST/SGB/1997/5 and ST/SGB/2004/6 do not delegate any authority, but describe functions within the context of the regulations, rules and instructions of the Organization.

16. The Appellant submits that the UNDT failed to address the issue of whether the alignment policy was properly issued by means of the "Messages of the Day".

17. The Appellant claims that the UNDT erred in concluding that the alignment policy was fairly applied to him. The Appellant seems to argue that the violation of the rights of the other similarly situated staff members does not make the violation of his rights legal. The Appellant

submits that the UNDT failed to provide any reason why the Administration was correct in departing from the core principle of equality.

18. The Appellant further submits that the UNDT committed several errors in procedure which affected the contested Judgment. In particular, he submits that the UNDT erred by failing to apply the standard of preponderance of evidence when examining his allegations of discrimination.

19. The Appellant submits that the UNDT exceeded its authority in considering the rationale put forward by the Secretary-General to motivate the rejection of the Appellant's application. The Appellant submits that the budgetary, fiscal or financial constraints were not stated as reasons by the Administration when it informed the Appellant that his appointment would be renewed for only 11 months. The only reason given was the alignment policy. In paragraph 39 of the UNDT Judgment, the UNDT however used the subsequent financial and budgetary consideration of the Administration to motivate the dismissal of the Appellant's application. The Appellant submits that the UNDT erred by endorsing the "shifting rationales of the Administration", which revealed that the contested decision was a measure of retaliation.

20. The Appellant submits that the UNDT failed to exercise its jurisdiction by not addressing his allegations of retaliation.

21. The Appellant also submits that the UNDT erred in denying his request to guarantee access, via video-conference, to the hearing at another duty station, namely Vienna. The Appellant submits that the UNDT erred in holding that only access to the Tribunal's courtrooms was to be guaranteed, considering that the parties, their representatives and other interested parties were in Vienna; and in failing to consider a change of venue.

22. The Appellant submits that the UNDT erred by declining to hear three of the four witnesses proposed by the Appellant.

23. The Appellant requests that the Appeals Tribunal reverse the UNDT Judgment; or in the alternative, remand the case to the UNDT for a public hearing which, if conducted by videoconference, should allow interested persons to attend the hearing from a videoconference room at the United Nations headquarters in Vienna. He also requests an oral hearing of his appeal.

Secretary-General's Answer

24. The Secretary-General submits that the UNDT correctly concluded that there was no minimum duration for the renewal of fixed-term appointments. The UNDT specifically noted that there was no ambiguity in Staff Rule 4.13, which provided that fixed-term appointments could be renewed “for any period up to five years at a time”. A renewal of an appointment for 11 months fell within the parameters of Staff Rule 4.13, as it was a period not exceeding five years. The Secretary-General submits that the UNDT’s reliance on the plain meaning of Staff Rule 4.13 and its interpretation of the term “up to five years” was reasonable.

25. The Secretary-General also submits that the UNDT correctly concluded that the words “renewal” and “extension” were used in an undifferentiated manner in the Staff Rules. The Appellant reiterates identical assertions to those already reviewed and rejected by the UNDT and has failed to identify any defects in the UNDT’s reasoning.

26. The Secretary-General contends that the UNDT correctly concluded that the alignment policy was properly issued and a proper exercise of the delegated authority. The Director of the UNOV/UNODC Division for Management derived his authority to develop, oversee, and manage the implementation of human resources from the provisions of ST/SGB/2004/6, promulgated by the Secretary-General. Since the alignment policy was an exercise in the management of human resources in UNOV, the Director of the UNOV/UNODC Division for Management had the authority to decide and adopt the alignment policy.

27. The Secretary-General submits that the alignment policy was properly issued by way of “Messages of the Day”. The rules, policies and procedures implemented for the purpose of “managing the human resources” specifically intended for UNOV do not fall within the purview of ST/SBG/1997/5 as they do not affect the Secretariat as a whole. In view of the limited application of the alignment policy, there was no requirement that it be promulgated as an administrative issuance. The Secretary-General also submits that the Appellant merely reiterates the arguments made before the UNDT and has therefore failed to meet the burden of Article 2(1) of the Statute of the Appeals Tribunal.

28. The Secretary-General submits that the UNDT correctly concluded that the alignment policy was fairly applied to the Appellant. The Appellant continues to allege improper motives and discrimination in his appeal, yet fails to present evidence to either Tribunal to suggest that his renewal for 11 months was tainted by extraneous motivation.

29. The Secretary-General submits that the Appellant has not established that the UNDT made any errors in procedure warranting a reversal of its Judgment. The Secretary-General submits that the UNDT correctly limited its determination of the matters to three issues, namely, (a) whether fixed-term appointments should be renewed for at least one year; (b) whether the alignment policy was properly issued; and (c) whether the alignment policy was fairly implemented with respect to the Appellant. The Secretary-General submits that, contrary to the Appellant's contention, the UNDT properly considered the rationale put forward by the Administration for the alignment policy and did not exceed its jurisdiction in doing so. The Secretary-General further submits that, contrary to the Appellant's contention, the UNDT did consider and address his allegations of retaliation.

30. The Secretary-General submits that the Appellant failed to establish that the UNDT erred in not guaranteeing access to the public to the United Nations premises in Vienna; and that the UNDT erred in not hearing witnesses.

Considerations

31. Mr. Gehr appeals the UNDT Judgment on the grounds that the UNDT exceeded its jurisdiction and made errors of law and procedure.

32. The Appeals Tribunal has granted Mr. Gehr's request for an oral hearing finding that oral submissions would assist in the expeditious and fair disposal of this case.

33. From the written and oral submissions before this Tribunal, it appears to us that the Dispute Tribunal did not attach much weight to Mr. Gehr's submissions. This alone, however, does not necessarily mean that the UNDT has exceeded its jurisdiction or erred in law, as the UNDT has broad discretion as a court of first instance to determine the admissibility of any evidence and the weight to attach to it.⁴

34. Mr. Gehr bears the burden to persuade this Court that there was a substantial error or flaw in the contested administrative decision, in the proceedings that led to it or in the UNDT Judgment.⁵

⁴ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-123.

⁵ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

Issuance of the Alignment Policy

35. Mr. Gehr submits that the UNDT erred in holding that the issuance of the alignment policy was a proper exercise of the authority of the Director of the UNOV/UNODC Division for Management. Mr. Gehr asserts that the provisions of ST/SGB/1997/5 and ST/SGB/2004/6 on which the UNDT relied relate to the organizational structure of UNODC, but they do not provide for the delegation of authority.

36. We think otherwise. ST/SGB/1997/5 and ST/SGB/2004/6 deal with not only the organizational structure of the Organization and UNODC, but also other matters such as the core functions of the Division for Management (see Section 8.2 of ST/SGB/2004/6).

37. Section 8.2(d) of ST/SGB/2004/6 provides that the core functions of the Division for Management inter alia include “[d]eveloping and overseeing the implementation of human resources policies and managing the human resources of the United Nations Secretariat entities in Vienna, including policy direction, guidance, supervision and implementation of personnel policies”. The UNDT rightly held that the alignment policy constituted an organizational measure aimed at simplifying administrative procedures in relation to staff appointments at UNODC.

38. Mr. Gehr further challenges the authority of the UNOV/UNODC Director of the Division for Management to issue the alignment policy by a “Message of the Day” instead of by an administrative issuance. We note that Section 1.2 of ST/SGB/1997/1⁶ (Procedure for the promulgation of administrative issuances) provides that “policies... intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative instructions”.

39. Since this alignment policy was intended for only the staff at UNODC we reject the submissions by Mr. Gehr on this point. We accordingly hold that the UNOV/UNODC Director of the Division for Management had authority to issue the policy by a “Message of the Day” which was the means used by UNODC to convey information intended for all or large groups of UNODC staff. We agree with the UNDT that as a result of the Secretary-General’s broad discretion in relation to decisions on internal management, this measure is subject to limited review by the Tribunal.

⁶ Abolished and replaced by ST/SGB/2009/4 of 18 December 2009.

Implementation of the alignment policy

40. The Secretary-General submits that the alignment policy did not amend or affect the Staff Regulations and Rules concerning initial appointments or the renewal of appointments and contracts and their duration.

41. Our concern here is whether the alignment policy was applied to Mr. Gehr in an inconsistent, arbitrary and discriminatory manner or for improper motives. In this respect, we recall our jurisprudence that the burden of proving that the allegations that the contested administrative decision was tainted by improper motives, discrimination, arbitrariness, retaliation, etc., lies with the staff member contesting the decision.⁷

42. Mr. Gehr's contention before the UNDT was that the decision to extend his appointment for only 11 months was based on improper motives and tainted with arbitrariness. In Mr. Gehr's view, the shortening of his appointment was motivated by retaliation for his having filed two applications with the Dispute Tribunal and reported misconduct by the UNODC Executive Director.

43. The Dispute Tribunal rejected Mr. Gehr's claim of unequal treatment, by finding that Mr. Gehr had failed to show that the application of the alignment policy to his case was motivated by improper motives and unfairness compared to other staff members who also received a contract extension until 31 December 2011. We affirm this finding and for the same reasons, we reject Mr. Gehr's complaint that the UNDT failed to address his allegation of retaliation.

44. Mr. Gehr further submits that the UNDT exceeded its authority in considering the reasons put forward by the Secretary-General to motivate the rejection of his application. He submits that the financial constraints put forward by the Secretary-General were not stated as reasons by the Administration when it informed him that his appointment would be renewed for only 11 months.

⁷ *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-178; *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.

45. The Secretary-General submits that, in response to Order No. 75 (GVA/2011), issued by the UNDT that requested further submissions from the parties, the parties filed submissions which included additional information on financial constraints faced by UNODC, and which assisted the UNDT in determining whether the contested decision was properly made.

46. We note that the e-mail dated 12 January 2011 referred to by Mr. Gehr in his appeal mentioned that his appointment was being renewed “notwithstanding [his] performance [...] and notwithstanding that, due to [his] performance”, it had not been possible “to make any appreciable progress towards the goal of a fully funded CBRN program for TPB which could cover the cost of [his] post”. This implies that his renewal for 11 months was not based only on his performance but also on budgetary reasons.

47. We therefore do not fault the UNDT in accepting the Secretary-General’s version, as it is within the competence of the UNDT to consider all the evidence presented by both parties and to determine the weight to attach to such evidence.⁸ The Appeals Tribunal defers to the determination of facts before the UNDT and would only interfere if it is satisfied that the UNDT considered irrelevant matters or ignored relevant matters placed before it by the parties.

48. Mr. Gehr also submits that the UNDT erred in its interpretation of the meaning of the terms “extension” and “renewal” in the staff regulations and rules with regard to contract renewal and contract extension. We find his arguments in support of this submission irrelevant in this appeal as, at the time the impugned decision was taken, the relevant staff rules governing fixed-term appointments were rule 4.13 (a) and (b) of ST/SGB/2011/11/1 that provided:

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time...

(b) A fixed-term appointment may be renewed for any period up to five years at a time.

49. In our view, staff rule 4.13(b) is clear and needs no further interpretation apart from that given by the UNDT Judge that the renewal of a fixed-term appointment may be for any period provided that each renewal does not exceed five years. We therefore do not fault the conclusion by the UNDT that it was open to the Administration to extend the appointment of Mr. Gehr for less than one year. The appeal is dismissed on this ground.

⁸ *Messinger v. Secretar-General of the United Nations*, Judgment No. 2011-UNAT-123.

Error of Procedure

50. Mr. Gehr also appeals the decision of the UNDT rejecting his request to grant access to the Organization's premises in Vienna to the public to attend via video-link the hearing in Geneva.

51. Though we appreciate Mr. Gehr's point that public hearings are important as a sign of transparency, we find his complaint unreasonable in the light of the provisions of the Rules of Procedure of the UNDT. Article 16(6) of the said Rules of Procedure provides not only that ordinarily proceedings shall be held in public, but also that they may be held by video link, telephone or other electronic means. In *Mezoui*,⁹ this Tribunal held that the assignment of the venue is a matter of the court's discretion; we therefore dismiss this ground of appeal, as Mr. Gehr has not shown that the choice of venue in any way affected the outcome of the case. Mr. Gehr attended the hearing of his case before the UNDT, upon his request, by video-link from the Vienna Conference Centre. Nothing prevented interested staff members to attend the hearing at the seat of the Tribunal in Geneva. The appeal on this ground is dismissed.

52. Mr. Gehr further submits that the UNDT erred by declining to hear three of the four witnesses proposed by him which, in his view, resulted from the Judge's bias. This ground concerns UNDT's Order No. 64 (GVA/2011) in which the UNDT noted that it was unable to "verify the prima facie relevance of such oral evidence" in the present case. As rightly pointed out by the Secretary-General, while Article 17(1) of the UNDT Rules of Procedure allows parties to call witnesses and experts to testify, Article 17(6) of the UNDT Rules of Procedure gives the UNDT the discretion to decide whether the presence of witnesses is required. Under Article 18(5) of the UNDT Rules of Procedure, the UNDT may limit oral evidence as it deems fit. Mr. Gehr has failed to substantiate the allegation of bias against the UNDT in this regard. The appeal is dismissed on this ground.

53. From the foregoing, we hold that the appeal is without merit and therefore fails.

Judgment

54. The appeal is dismissed in its entirety and the Judgment of the UNDT is affirmed.

⁹ *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-101.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Faherty

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar