



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

Judgment No. 2021-UNAT-1161

Asr Ahmed Toson

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case No.:	2020-1498
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: André Luiz Pereira de Oliveira

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Mr. Toson appeals Judgment No. UNDT/2020/182 (impugned Judgment) dated 22 October 2020, which found his application contesting the United Nations Population Fund's (UNFPA) decision to renew his fixed-term appointment (FTA) by three months instead of two years not to be receivable.
2. For the reasons set out below, we affirm the UNDT Judgment.

Facts and Procedure

3. Mr. Asr Ahmed Toson (Appellant) is a staff member of the United Nations Population Fund (UNFPA) serving as a Representative at the Oman Country Office on a fixed-term appointment (FTA) at the P-5 level.
4. The subject of the instant litigation concerns the decision to renew his FTA by three months instead of two years (from the expiration date of 19 March to 19 June 2019).
5. On 1 November 2018 Mr. Toson was informed of the extension of his appointment and, from his Personnel Action (PA) form, he learned it was a renewal for three months until 19 June 2019 (First PA decision). On 2 November 2018, Mr. Toson contacted the Regional Director (RD), who informed him that the justification for the length of his appointment extension was linked to the establishment of a new office in Abu Dhabi which would immediately abolish the post in Oman. On 5 November 2018, Mr. Toson wrote to the Director, *ad interim*, of UNFPA's department of Human Resources (DHR) requesting him to take action to renew his appointment for two years as was usually the case. The DHR advised Mr. Toson to discuss the issue with the RD. Mr. Toson did contact the RD who responded that he would consult with DHR and revert.¹

¹ Impugned Judgment, paras. 4-7.

6. On 10 December 2018, Mr. Toson sought management evaluation of the First PA.
7. On 20 February 2019, Mr. Toson received a new PA form (Second PA decision) granting him a further extension of appointment until 19 March 2020.²

The Administration issued a third PA on 2 July 2019, granting Mr. Toson an extension of his FTA until 31 March 2021 (Third PA Decision).

8. On 22 October 2020, the Dispute Tribunal issued the impugned Judgment, regarding Mr. Toson's challenge to the First PA decision (extending him only three months). The UNDT held that his application was not receivable *ratione materiae* as the Second PA Decision of 20 February 2019 superseded the First PA decision, since Mr. Toson did not demonstrate how his rights remained adversely affected by the First PA decision, and as any remedy would have had no effect, his application was dismissed as irreceivable *ratione materiae*.³

9. The Dispute Tribunal further noted that, for a decision to be challengeable under Article 2.1(a) of the UNDT Statute, it must be final and produce direct legal consequences to the legal order and conversely if a decision is final but produced no direct legal consequences on a staff member's terms of appointment or the contract of employment is not receivable by the Tribunal. The jurisprudence requires firm commitment of renewal in writing otherwise there is no legitimate expectation of renewal. The fact consultations took place between Mr. Toson, the RD and the DHR means the decision was not final. Further the argument that the decision affected his terms of appointment because it caused irreparable damage to his reputation is wrongly premised as there can be no injury where there is no right. Per the above, the Tribunal found there was no direct legal consequence on Mr. Toson's contract of employment and so the Tribunal was not competent to hear and pass judgment.⁴

10. On 7 December 2020, Mr. Toson filed an appeal against Judgment No. UNDT/2020/182, and the appeal was registered with the Appeals Tribunal as Case No. 2020-1498. On 8 February 2021, the Secretary-General filed an answer.

² Mr. Toson filed an application before the UNDT challenging the Second PA decision on 4 June 2019, which was addressed by the UNDT in Judgment No. UNDT/2020/183, which held that the Third PA Decision superseded the Second PA decision and was not receivable *ratione materiae*. This Judgment was appealed and is disposed of by the Appeals Tribunal in Judgment No. 2021-UNAT-1159.

³ Impugned Judgment, para.31.

⁴ *Ibid*, paras. 22-28.

Submissions

Mr. Toson's Appeal

11. Mr. Toson requests an oral hearing on grounds that the UNDT violated his due process rights when it disregarded all of his motions, including those related to an oral hearing, witness examination, preservation and discovery of evidence. He requests this Tribunal to amend his PA to show the expiry date of his appointment as 19 March 2021, which he asserts represents the usual 2 years contract extension. In the event his PA expires while his case is pending, he seeks reinstatement for two years from the date of our Judgment to a representative post at same grade and step. He seeks protection from further retaliation via an order recusing the RD from all administrative decisions related to his employment, including performance appraisal, rotation and assignment decisions. He also seeks compensation for moral damages in the amount of 2 years' net-based salary at his step and grade plus interest. Lastly, he requests the case be remanded to the UNDT for additional fact finding with a different judge, if it determines that further findings of fact are necessary.

12. First, Mr. Toson submits the Dispute Tribunal erred in law and on a question of fact, resulting in a manifestly unreasonable decision, when it considered that the extension of his FTA for a period less than two years was not a decision that was incompliant with the terms of his appointment. The UNDT ignored his central claim which was not about expectancy of renewal but that the decision itself was arbitrary, abused authority and was retaliatory, constituting harassment. Decisions rendered in bad faith, with bias or ill-motive, which are retaliatory or abusive of authority are receivable and reviewable by the Tribunal's jurisprudence. Thus, the contested decision is final and produced direct legal consequence.

13. The UNDT erred in concluding that "since there can be no injury where there is no right" that the contested decision did not produce direct legal consequences affecting his terms of appointment. As noted, the UNDT ignored his claims related to harassment, retaliation, and abuse of authority, but as for harm, he suffered moral damages and reputational harm as evidenced by medical reports. The staff rules require renewals to be two years for those holding FTAs, once the decision to renew is made, this also indicates non-compliance with the terms of his appointment rendering the contested decision receivable.

14. The UNDT failed to address his claims related to abuse of authority despite an ongoing investigation. The UNDT should have followed due process principles and considered the investigation outcome. The UNDT failed to answer any of his three motions dated 31 May, 2 October, and 5 October 2020 submitted for discovery and production of evidence and witness examination. The UNDT failed to grant access to the first investigation report and grant a stay of proceedings pending the second investigation's report. The UNDT failed to examine the reasons behind the contested decision, the evidence, and the circumstances which would have led to a conclusion that the shorter renewal was arbitrary and an abuse of authority. The Administration should not be permitted to issue multiple consecutive shorter renewals as a means to intimidate staff members from reporting wrongdoing and seeking protection from retaliation. The Ethics Office determined the shorter renewal decisions were *prima facie* case of retaliation, yet the UNDT ignored this wholesale.

15. In addition, the UNDT erred in finding the matter is moot given subsequent PA decisions. The claims remain that the shorter successive renewals were a means to intimidate, such arbitrary and abusive action caused harm, and the controversy is ongoing. The two PAs covered different renewal periods and did not supersede or rescind the prior. Further, by having shorter renewals he became ineligible for rotation which requires a minimum of two-year contract. Thus he was not selected for nine posts of Representative, harming his reputation and career development.

16. Mr. Toson argues he had a legitimate expectation of renewal of his appointment for two years, as evidenced by exchanges and firm commitments he received from the UNFPA Deputy Director of Human Resources and the UNFPA Office of Ombudsman. He argues that he received an explicit commitment twice in writing that his renewal would be for two years, namely one e-mail from the Deputy Director for Human Resources and thereafter confirmed in writing by the Ombudsman. This provided legitimate expectation of renewal as required by UNAT's jurisprudence.

17. Finally, Mr. Toson also alleges that the UNDT Judge has a conflict of interest and was biased against him because she has previously rejected his application regarding the same contract renewal and disregarded certain of his motions in the present case.⁵

⁵ Mr. Toson has filed three applications before the UNDT, regarding the extension of his FTA. See Case No. UNDT/NBI/2019/008 related to the First PA Decision; Case No. UNDT/NBI/2019/051 related to the Contested Decision (the present case), and Case No. UNDT/NBI/2019/163 related to the Third PA Decision.

The Secretary-General's Answer

18. The Secretary-General requests this Tribunal to uphold the impugned Judgment and dismiss the appeal in its entirety. In support, the Respondent submits the UNDT was correct to dismiss the application because the Second PA Decision superseded the Contested Decision. As such, there was no longer an actual controversy between the parties. He also has failed to provide meaningful evidence of a written promise. As there were no direct legal consequences to his terms of appointment, the UNDT was correct to find they did not have competence to receive the application. Furthermore, the Appellant has failed to identify an error warranting reversal of the impugned Judgment.

19. By the Second PA decision, the Appellant's extension of his appointment was granted. He therefore fails to demonstrate how the contested decision negatively affected his non-selection for other positions. Furthermore, the UNFPA rotation exercise does not provide a guarantee that he would have been selected. He has failed to demonstrate any harm or negative consequence. The Respondent also argues that the Appellant has failed to demonstrate how the contested decision continued to have a negative impact on the terms of his appointment and his professional reputation.

20. Regarding Mr. Toson's claim that the contested decision had been retaliatory, the Secretary-General submits that such claims are outside the scope of the present case. The Respondent explained that Mr. Toson's claims are currently being investigated by the UNFPA Office of Audit and Investigation Services (OAIS) and that no final administrative decision had been reached yet regarding whether there was a case of retaliation.

21. The Secretary-General also submits that Mr. Toson's allegations that Judge Tibulya had a conflict of interest and was biased against him are meritless. The Respondent noted that the UNDT Judge President concluded that Mr. Toson failed to demonstrate any such conflict and that a ruling against an applicant in a previous case does not automatically render a Judge incompetent to adjudicate any future case of the same applicant.⁶

⁶ See *Toson v. Secretary-General of the United Nations*, Order No. 216 (NBI/2020), para. 16.

22. Finally, the Secretary-General argues the remainder of Mr. Toson's arguments are mere repetitions of arguments made before the UNDT and therefore fail to satisfy the requirements of Article 2.1 of the Appeals Tribunal Statute (Statute).

Considerations

Preliminary issue: Oral hearing before the Appeals Tribunal

23. Mr. Toson requests an oral hearing, which he believes will be of assistance to the Appeals Tribunal. Oral hearings are governed by Article 8(3) of the Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). Under Article 18(1) of the Rules, a request for an oral hearing may be granted when it would "assist in the expeditious and fair disposal of the case". As the Appeals Tribunal does not find that an oral hearing would assist it any further in resolving the issues on appeal, the request for an oral hearing is denied.

Merits of the Case

24. The issue on appeal is whether the UNDT was correct in finding Mr. Toson's application contesting the Administration's decision to renew his fixed term appointment by three months instead of two years not to be receivable.

25. Article 2(1) of the UNDT Statute provides, in part:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

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 alleged non-compliance.

26. In terms of the definition of an administrative decision that is subject to judicial review, we recall that 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.⁷

27. We have further held that when the contested administrative decision ceases to have any legal effect, the decision has been rendered moot and there is no longer a live issue upon which the UNDT or this Tribunal is competent to pass judgment. Applying the doctrine of mootness is consistent with the purpose behind the establishment of the two-tier system of administration of justice, which was to adjudicate existing disputes; not to interpret the law when there is no live dispute before it.⁸

28. The mootness doctrine is a logical corollary to the court's refusal to entertain suits for advisory or speculative opinions. Just as a person may not bring a case about an already resolved controversy (*res judicata*) so too he should not be able to continue a case when the controversy is resolved during its pendency. The doctrine accordingly recognises that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision.⁹In the present case, the Dispute Tribunal concluded that Mr. Toson's application was not receivable for two alternative reasons. First, the UNDT found that the application was not receivable, because the 20 February 2019 decision superseded that of 31 October 2018, and since Mr. Toson had not demonstrated how his rights remained adversely affected by the 31 October 2018 decision, and any remedy issued would have had no concrete effect, the application was dismissed as irreceivable *ratione materiae*.¹⁰ Second, the UNDT found Mr. Toson's application was not receivable *ratione materiae*, because the Tribunal was not competent to hear and pass Judgment on his application as "[t]he decision to extend the contract for a shorter period than the Applicant expected cannot be said to be in noncompliance with his terms of appointment or the contract of employment which are that

⁷ *Kennes v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1073, para.41; *Larriera v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1004, para.29; *Olowo-Okello v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-967, para. 31; *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para. 38.

⁸ *Crotty v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-763, paras. 13–18, citing *Finniss v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-708, para. 24; *Wilson v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-709, para. 26.

⁹ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, para. 44.

¹⁰ Impugned Judgment, para.31.

he had no expectancy, legal or otherwise, of renewal or conversion, irrespective of length of service.”¹¹

29. The UNDT’s reasoning on the first question of receivability is set out in paragraphs 29 and 30 of the impugned Judgment where it held:

The Applicant’s argument that the decisions of 31 October 2018 and 20 February 2019 provide renewals for two different renewal periods is without merit. The two decisions concern the same issue (contract renewal). The 20 February 2019 renewal decision came up in the context of the Applicant’s complaint over the short renewal period and by that decision the period was extended for one year.

... It is an established principle that where the Administration rescinds the contested decision during the proceedings, the Applicant’s allegations may be moot unless he can prove that he still sustains an injury for which the Tribunal can award relief. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect.

30. Mr. Toson appeals on the ground that the UNDT erred in law and fact when it found that his application was not receivable for the above reasons. He contends that the decision dated 20 February 2019 did not supersede or rescind the contested decision dated 31 October 2018 as nothing in its content explicitly or implicitly stated so. He further asserts that these two administrative decisions provide renewals for two different periods of time, as the first renewed his FTA from 19 March 2019 to 19 June 2019 while the other from 20 June 2019 to 19 March 2020, and therefore the 20 February 2019 decision could not supersede or rescind the contested one since the respective renewals cover different periods of time.

31. Arguably, the subsequent decision of 20 February 2019 to renew Mr. Toson’s FTA from 19 March 2019 to 19 June 2019 did not supersede or rescind the challenged decision dated 31 October 2018 to renew his FTA by three months from 19 March 2019 through to 19 June 2019 as both were regulatorily self-contained, referring to different periods of time,

¹¹ *Ibid*, para.21.

and additionally the issuance of the first did not entail, expressly or impliedly, the revocation of the second. The UNDT's reasoning to the contrary is not correct.

32. Nevertheless, our finding that the Dispute Tribunal erred in law with regard to the above matter is not dispositive of this appeal in Mr. Toson's favour as his application before the UNDT was not receivable on the grounds of another basis of mootness, which is examined *sua sponte* by this Tribunal. Indeed, under the specific circumstances of the case at bar and the nature of the decision, the contested decision of the Administration dated 31 October 2018 to renew his FTA by three months from 19 March 2019 through to 19 June 2019, instead of two years, did not constitute an appealable administrative decision for the purpose of Article 2(1) of the UNDT Statute for the simple reason that this decision to extend his FTA, -even though not for the desired by Mr. Toson time period of two years-, from 19 March 2019 through to 19 June 2019, advantaged him by adding, in total, three months to his last FTA.¹² It was a positive decision which did not have a present and direct adverse impact on the terms and conditions of Mr. Toson's employment. Hence, this head of appeal must fail.

33. Be that as it may, on 2 July 2019, Mr. Toson received a new Personnel Action form (Third PA decision) granting him a further extension of appointment until 31 March 2021. Under these circumstances, the contested decision of the Administration dated 31 October 2018 to renew Mr. Toson's FTA by three months from 19 March 2019 through to 19 June 2019, instead of the claimed two-year extension, was never implemented because he obtained consecutive renewals of his employment with the Organization, which covered the whole period from 19 March 2019 to 31 March 2021.

34. Mr. Toson's continued employment with the Organization rendered moot his claim for a two-year extension of his employment. Thus, the administrative decision Mr. Toson challenged in his application was no longer a live issue and the Dispute Tribunal was not competent to pass judgment on the application.

35. Our finding on the irreceivability of Mr. Toson's application, which was moot, renders it unnecessary to examine the other grounds of appeal advanced by Mr. Toson that the UNDT erred in not finding that the contested administrative decision was retaliatory in nature and tainted by bias, harassment and abuse of authority, and that there was a firm and explicit

¹² *Zaqqout v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1055, para.32.

commitment to two years renewal and a legitimate expectancy of renewal of his appointment for two years.

36. The same reasoning applies to Mr. Toson's contention that the UNDT erred in not answering to any of his set of motions, submitted by him for discovery and production of evidence, witness examination, etc. Therefore, Mr. Toson's grounds of appeal to the contrary are without merit. In these circumstances, no questions of remedies for Mr. Toson arise.

Whether the UNDT Judge should have recused herself from the hearing

37. Mr. Toson claims that the UNDT ignored the position put forward by him that the contested decision had been allegedly tainted by bias, retaliation, harassment, and abuse of authority. In this regard, Mr. Toson notes that the UNFPA Ethics Office officially determined that there was a *prima facie case* of retaliation and had recommended protective measures to be taken by the UNFPA Administration with respect to any such retaliation. He further asserts that the UNDT has not answered any of his motions "for discovery and production of evidences [sic] (email data base)", witnesses' examination, order respondent to grant access to grant access to first investigation report, inform on date of completion of pending second report and grant leave for him to review report and allow evidences [sic] to materialize". Consequently, Mr. Toson submits that the UNDT Judge assigned to this case exceeded her jurisdiction and erred in procedure when she failed to declare her conflict of interest, "which arose by flagrant violations of rules of procedures related to motions and issuing two adverse judgments in [the Appellant's] cases UNDT/NBI/2019/008, and UNDT/NBI/2019/051 addressing same contract renewals subject of current pending case."

38. Article 4(9) of the UNDT Statute provides: "A judge of the Dispute Tribunal who has, or appears to have, a conflict of interest shall recuse himself or herself from the case. Where a party requests such recusal, the decision shall be taken by the President of the Dispute Tribunal".

39. Article 27(1) of the UNDT Rules of Procedure defines the term "conflict of interest" as meaning "any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her".

40. Article 27(2) of the UNDT Rules of Procedure explains:

A conflict of interest arises where a case assigned to a judge involves any of the following:

- (a) A person with whom the judge has a personal, familiar or professional relationship;
- (b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;
- (c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.

41. Further, Article 28 of the UNDT Rules of Procedure stipulates:

1. A judge of the Dispute Tribunal who has or appears to have a conflict of interest as defined in article 27 of the rules of procedure shall recuse himself or herself from the case and shall so inform the President.
2. A party may make a reasoned request for the recusal of a judge on the grounds of a conflict of interest to the President of the Dispute Tribunal, who, after seeking comments from the judge, shall decide on the request and shall inform the party of the decision in writing. A request for recusal of the President shall be referred to a three-judge panel for decision.
3. The Registrar shall communicate the decision to the parties concerned.

42. The Code of Conduct for Judges of the Dispute and Appeals Tribunals provides at paragraph 2(c) that "Judges must recuse themselves from a case if: (i) They have a conflict of interest; (ii) It may reasonably appear to a properly informed person that they have a conflict of interest; (iii) They have personal knowledge of disputed evidentiary facts concerning the proceedings".

43. During pendency of his application before the UNDT, Mr. Toson did not request recusal. We therefore will not permit the issue to be raised for the first time on appeal.¹³ By motion dated 26 October 2020, Mr. Toson requested the Judge President of the Dispute Tribunal to order that the Dispute Tribunal Judge assigned to Case No. UNDT/NBI/2019/163,

¹³ *Masri v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-626, para.25; *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049, para. 13.

namely Judge Tibulya, be recused by contending that Judge Tibulya had a conflict of interest and was biased against him because she had previously rejected his applications in two other cases as not receivable (Case No. UNDT/NBI/2019/008, and Case No. UNDT/NBI/2019/051) and disregarded certain of his motions in the same cases, which motion by Order No. 216 (NBI/2020) of the UNDT President was rejected, this motion concerned a different case.

44. Be that as it may, we do not find that Judge Tibulya had, or appeared to have, a conflict of interest preventing her from independently and impartially adjudicating the case before her. The sole circumstance that Judge Tibulya had ruled against Mr. Toson in previous cases before the Dispute Tribunal by rejecting the pertinent applications as not receivable as well as that Mr. Toson disagreed with the way she had handled certain motions in the case at bar, did not automatically render her incompetent to adjudicate any future case, including the present. Therefore, there is no merit in Mr. Toson's submission that Judge Tibulya had placed herself in a conflict of interest.

45. In view of the foregoing, the appeal fails.

Judgment

46. Mr. Toson's appeal is dismissed and the UNDT Judgment No. UNDT/2020/182 is upheld.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Knierim
Hamburg, Germany

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

(Signed)

Weicheng Lin, Registrar