



Judgment No. 2017-UNAT-746



Counsel for Mr. Auda: Self-represented

Counsel for Secretary-General: Wambui Mwangi



... On 4 October 2013, a personnel action was approved formally reassigning the Applicant within DGACM effective 1 October 2013.

... On 15 May 2014, a personnel action approved extending the Applicant's fixed-term appointment for six months from 29 May 2014 until 31 December 2014.

... On 19 June 2014, the Applicant's performance assessment was completed for the 2013-2014 performance cycle. The Applicant listed four goals for the performance period,

On 3 occasions—9 June, 11 June and 29 June 2015—Ms. Pollard scheduled a meeting at the request of the Applicant to discuss a work plan, only to cancel it shortly before the meeting. Upon the Applicant's insistence, the Applicant finally met Ms. Pollard on 2 October 2015 for the mid-point performance review ... In this meeting, Ms. Pollard verbally informed the Applicant that his appointment will not be renewed when it expires on 31 December 2015 because his initial assignment was ad-hoc and there has not been any work for him in DGACM since the beginning of the year. There was no performance discussion and Ms. Pollard had no work plan to offer to the Applicant!

... The parties also agree that on 6 October 2015, Mr. Gettu, ... again informed the Applicant, verbally, that his fixed-term appointment would not be renewed. On 5 November 2015, Mr. Gettu informed his colleagues in DGACM that he had been appointed Under-Secretary-General and Associate Administrator of the United Nations Development Programme ("UNDP") and that his last day in the office would be 13 November 2015.

... By email dated 12 November 2015, the Applicant was provided with an interoffice memorandum (dated 6 November 2015) from the Executive Officer, DGACM, which informed him as follows (emphasis in original):

This is to confirm that your fixed-term appointment expiring on 31 December 2015 will not be renewed. As earlier conveyed to you by the Assistant Secretary-General on 2 October and confirmed by the Under-Secretary-General on 6 October, the decision is due to the completion of your assignment on [the Compendium Project].

The Applicant was then advised of his separation procedures.

[On 30 November 2015, Mr. Abdelaziz replied to a request from Mr. Auda to confirm the content of the 19 June 2013 meeting e-mail stating as follows:

... As requested, I hereby confirm that the meeting referred to in your email was held in my office on 19 June 2013. In that meeting, Mr. Gettu, you and me discussed your situation as chief of the office of the USG of DGACM. During that discussion, Mr. Gettu stated that he would extend your contract with DGACM until you have found an alternative position at the same level somewhere else. This is only my recollection.

... On 3 December 2015, the Applicant filed an application for suspension of action pending management evaluation, requesting suspension of the decision not to renew his fixed-term appointment on 31 December 2015. The case was registered under Case No. UNDT/NY/2015/064.

... By Order No. 301 (NY/2015) dated 8 December 2015 and issued in

5. Mr. Auda filed an appeal against the judgment with the Appeals Tribunal on 23 October 2016. On the same day, filed a motion requesting leave to submit additional documentary evidence. On 28 November 2016, the Secretary-General submitted his response to the motion. In response to the Secretary-General's observations, Mr. Auda filed an additional "Motion for Leave to File Response to the Observations of the Respondent on the Motion to Submit Documentary Evidence" on 4 December 2016. The Secretary-General submitted his response to this motion on 9 January 2017.

6. On 25 October 2015, Mr. Auda submitted another motion requesting leave to file annex 4 to his appeal *ex parte* in view of protecting confidential tax information. By Order No. 271 (2016), the Appeals Tribunal denied the motion and ordered Mr. Auda to file an amended appeal without the concerned annex and reference it to his appeals brief. By e-mail of 14 November 2016, Mr. Auda informed the Appeals Tribunal of his decision to keep the annex as part of the appeal for a "fair and expeditious disposal of the [c]ase" and therefore withdrew the motion *ex parte* filing.

#### Submissions

##### Mr. Auda's Appeal

7. Mr. Auda appeals the UNDT Judgment "on the merits only". First, he submits that the UNDT "did not follow its own proceedings" when contrary to its e-mailed case management directions of 28 March 2016 - failed to identify the assignment to the UNDT Judge and thus violated his due process rights by denying him opportunity to move by way of motion "at a meaningful time".

8. Further, he asserts that the UNDT erred on question of fact and failed to exercise the jurisdiction vested in it when it found that AMTA did not meet the burden of proving that the Administration had offered a firm commitment confirmed in writing, to renew his fixed-term contract. In particular, the UNDT "downplayed" the provided written testimony and failed to order the production of further evidence or to call an oral hearing with regard to the special meeting held on 19 June 2013 during which Mr. Auda claims to have received an "express



he reaches his mandatory retirement age on the basis that his current earnings as an adjunct professor are significantly lower than those during his employment with the United Nations. In addition, Mr. Auda argues that if the Appeals Tribunal finds that he did not have a legitimate expectancy of renewal, he is still entitled to compensation because the Administration violated his rights by failing to establish a work plan. Finally, he requests that the Appeals Tribunal award him moral damages in an amount of six months' net base salary for "breach of [his] due process rights". In the alternative, he prays the Appeals Tribunal to vacate the impugned Judgment on the merits and to refer the case to a different UNDT Judge.

The Secretary-General's Answer and Cross-Appeal

14. In response to Mr. Auda's submission regarding the UNDT's failure to inform him of the Judge assigned to his case, the Secretary-General submits that this was a case management



renewal because they were reasonable ~~and~~ when it was unclear at what point the Compendium Project would be terminated.

17. The UNDT also correctly found that the ~~renewal~~ decision was not arbitrary. There was sufficient evidence that the Compendium ~~Project~~ was completed in early 2015 offering a valid reason for not renewing Mr. Auda's appointment. Moreover, the UNDT did not err in finding that there was no evidence that ~~the~~ renewal decision was motivated by bias, prejudice, discrimination or other extraneous ~~considerations~~. Mr. Auda's allegation that the USG/DGACM "wanted him out of the Secretariat ~~together~~" is inconsistent with the purported creation of a legitimate expectancy of renewal ~~of~~ contract. The absence of a work plan does not provide sufficient evidence of improper motives.

18. With regard to the remedies requested ~~by~~ Mr. Auda, the Secretary-General submits that Mr. Auda has not demonstrated a legal basis for compensation nor has he provided the Appeals Tribunal with any evidence of harm ~~suffered~~ to enable it to assess his request for compensation. Moreover, "[s] ~~his~~ disagreement. . . ove

20. The Secretary-General respectfully requests the Appeals Tribunal to hold that the UNDT erred in finding Mr. Auda's application receivable. In the event that the Appeals Tribunal finds his application before the UNDT receivable, the Secretary-General prays the Appeals Tribunal to affirm the Judgment on the merits and to dismiss the appeal in its entirety.

Considerations

*Oral hearing*

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*Receivability of the application before the UNDT*

24. Staff Rule 11.2 sets out the requirements for a request by a staff member for management evaluation. It states, in relevant part, that:

- (a) A staff member wishing to formally

28. It is our finding that Ms. Pollard's verbal communication of 2 October 2016 to Mr. Auda was in fact the notification of the non-renewal decision within the meaning of Staff Rule 11.2. Mr. Auda should therefore have filed a request for management evaluation by 1 December 2016 at the very latest.

29. The UNDT erred in its reasoning that the ~~limit~~ <sup>time</sup> to file for management evaluation began on 12 November 2015 which was ~~date~~ <sup>date</sup> when Mr. Auda received the written confirmation of the non-renewal decision and, ~~as~~ <sup>as a</sup> result, when it concluded that Mr. Auda's

32. Consequently, we find that Mr. Auda undisputedly knew all the relevant facts, and was officially made aware with *sufficient* gravitas and, thus, properly notified of the non-renewal decision on 2 October 2015 for purposes of Staff Rule 11.2(c). Staff members are presumed to know the rules applicable to them and it is a staff member's responsibility to ensure that he or she is aware of the applicable procedure in the context of the administration of justice at the United Nations.<sup>9</sup> On the totality of the facts and circumstances of this case, we find it reasonable to conclude that Mr. Auda ought to have recognized that he had been notified for purposes of Staff Rule 11.2(c) and drawn legal consequences therefrom.

33. The Appeals Tribunal and the jurisprudence mandate that both Tribunals (Appeals Tribunal and UNDT) strictly adhere to the statutory requirement for filing deadlines, and in this case there is no exception as the application to extend waives the time limits.

34. In the circumstances, we find that the Dispute Tribunal erred in finding Mr. Auda's application receivable *ratione materiae*.

35. Therefore, the Secretary-General's cross-appeal succeeds. Since Mr. Auda's application before the UNDT was not receivable, we are precluded from considering the merits of the appeal.

#### Judgment

36. The Secretary-General's cross-appeal is awarded. The UNDT Judgment dismissing Mr. Auda's application is affirmed, but its finding that the application was receivable is set aside and we find that the application was not receivable *ratione materiae*, with Judge Halfeld partially dissenting,

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<sup>10</sup> *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, para. 18, citing *Kissila v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-470, para. 24 and quotes therein,

<sup>11</sup> *Eng v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-520, para. 22

Original and Authoritative Version: English

Dated this 31<sup>st</sup> day of March 2017 in Nairobi, Kenya.

*(Signed)*

Judge Thomas-Felix

*(Signed)*

Judge Lussick

Entered in the Register on this 22<sup>nd</sup> day of June 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

Partial dissent by Judge Halfeld

1. I respectfully dissent from the majority opinion in this case, as I agree with the well-reasoned, comprehensive and meticulous Judgment of the UNDT and find no error in law in the UNDT's conclusion that the application was waivable. I would therefore have dismissed the cross-appeal as well as the appeal and affirmed the UNDT's Judgment in its entirety.
2. In my view, the UNDT correctly found that Mr. Auda's application was receivable *ratione materiae* since Mr. Auda requested management action within the prescribed time

under the previous internal system of justice that, therefore, notification of the contested decision could be either verbal or written, or both.

6. I disagree. While it is true that a plain reading of Staff Rule 11.2(c) does not preclude that notification of a contested administrative decision be made verbally, non-renewal decisions—as we recently stated in *Babiker*—“must be given in writing and must be given with some degree of gravitas.” In *Babiker*, the Tribunal reaffirmed the long standing rationale for this position:

... [U]nless the decision is notified in writing to the staff member, the limit of sixty calendar days for requesting management evaluation of that decision does not start.

... Without receiving a notification of a decision in writing, it is not possible to determine when the period of sixty days for appealing the decision under Staff Rule 11.2(c) starts. Therefore, a written decision is necessary if the time limits are to be correctly calculated, and strictly, calculated. Where the Administration chooses not to provide a written decision, it cannot rightly argue receivability ... .

7. When issuing *Babiker* and the jurisprudence it cites, the Appeals Tribunal was aware of the abolition of former Staff Rule 11.2(a), which expressly stated that the time limit to appeal a contested decision began from written notification of such a decision. This jurisprudence is not in contravention of a plain reading of Staff Rule 11.2(c). The Tribunal's interpretation of Staff Rule 11.2(c) is consistent with the principle of legal certainty and the principle of legal certainty.





12. This did not occur in this case. In my view, the record does not support a reasonable finding that Mr. Auda was notified for purposes of Staff Rule 11.2(c) during the 2 October 2015 meeting—which was scheduled to discuss his work plan—with the effect of triggering the time limits thereunder for request for management evaluation. Moreover, to extract from that meeting the legal consequence of a legal notification implies extending their meaning to purposes not expressly specified by the parties.

13. The present case does not deal with a mere reiteration of a previously unchallenged original decision, but rather with a decision that had been informally, casually and verbally communicated without the consequences of official notice. In such cases, communication in writing prevails, since it is the correct and undisputed way for the staff member to inform the Organization, particularly when, as in the present case, the contract had been extended twice and there was no controversy about an oral “promise” of future extensions.

14. In my view, the Dispute Tribunal did not exceed its jurisdiction nor did it err in law. No extension of time was granted, it did nothing more than interpret the law in accordance with our jurisprudence and the objectives of the system of administration of justice.

15. On the merits, the Dispute Tribunal did not err in finding that the Appellant failed to demonstrate that he had a legitimate expectation of renewal based on an express and firm promise. Furthermore, the UNDT correctly found the decision not to renew the Appellant’s contract was not arbitrary, nor was it motivated by bias, prejudice, discrimination or other inappropriate considerations.

Original and Authoritative Version: English

Dated this 31<sup>st</sup> day of March 2017 in Nairobi, Kenya.

*(Signed)*

Judge Halfeld

Entered in the Register on this 22<sup>nd</sup> day of June 2017 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar