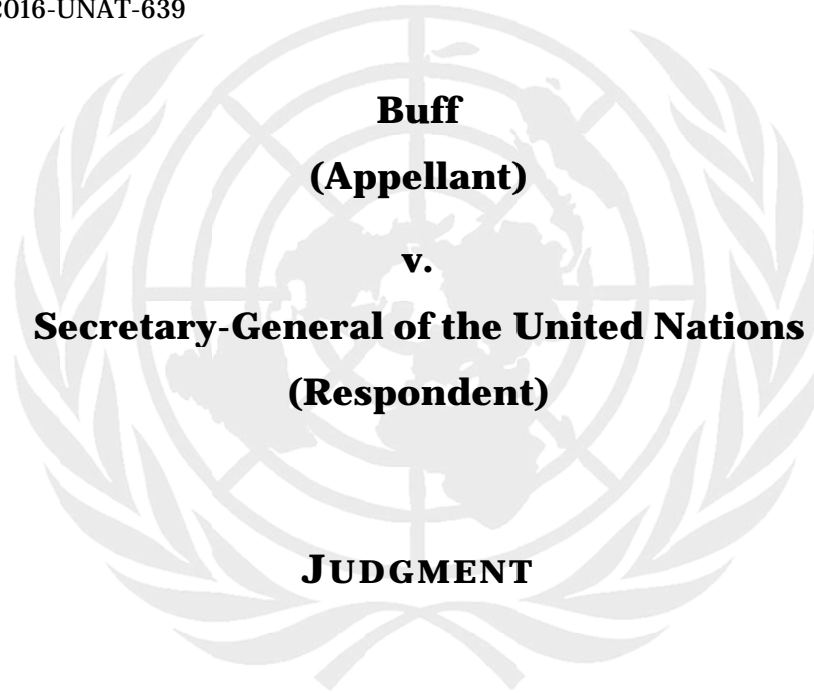




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2016-UNAT-639



**Buff  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Luis María Simón, Presiding Judge Rosalyn Chapman Judge Inés Weinberg de Roca
Case No.:	2015-848
Date:	24 March 2016
Registrar:	Weicheng Lin

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Counsel for Ms. Buff:	Self-represented
Counsel for Secretary-General:	Stéphanie Cartier

**JUDGE LUIS MARÍA SIMÓN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/052, “Judgment on Receivability and Anonymity” rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 17 June 2015 in the case of *Buff v. Secretary-General of the United Nations*. Ms. Carolyn Buff appealed on 13 August 2015 and the Secretary-General answered on 16 October 2015.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... The Applicant began working with [the International Criminal Tribunal for Rwanda (ICTR)] as a P3 Legal [O]fficer in the Chambers Section of the ICTR in 2009 and continued in that role until 31 December 2012.

... By resolution 1966 of 22 December 2010, the Security Council requested that [the] ICTR take all possible measures to expeditiously complete all its remaining work no later than December 2014 and to prepare for its closure.

... In 2012, the cases for which the Applicant had been responsible came to a close and she understood that there would be no more legal work in Chambers. She applied for and was appointed to the position of P-3 Legal [O]fficer in the Defence Counsel and Detention Management Section (DCDMS) of the Judicial and Legal Services Division (JLSD) of [the] ICTR effective 1 November 2012 for a one year term. Her contract was subsequently extended from November 2013 to December 2013.

... The Applicant maintains that in addition to the job functions of her position she also performed legal tasks for the Registry as requested by the Registrar. In January 2013, the Applicant reported what she believed to be serious irregularities in DCDMS finances. She states that throughout 2013 she drew attention to these financial irregularities.

... In September 2013, the Applicant advised the Registrar that she would not seek renewal of her contract when it expired in December 2013.

... On 4 October 2013, [the] ICTR issued a policy on Contracts Extension Beyond 2013, which set out the basis upon which decisions would be made to renew appointments to 2014 and beyond. This included the nature and extent of the remaining workload, the critical nature of the functions performed by the staff member in relation to that workload and the projected time frame for the completion of those functions.

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<sup>1</sup> Impugned Judgment, paras. 9-27.

... On 28 October [2013,] the Applicant reversed her earlier decision and requested an extension of her contract.

... The Applicant says that in October 2013 she was asked to take responsibility for managing the day to day care of acquitted persons.

... According to the Applicant, by November 2013 she was engaged in tense exchanges with her second reporting officer. She alleges that less than three hours after one of these exchanges a Temporary Vacancy Announcement (TVA) for a legal officer post in [the Judicial and Legal Affairs Section (JLAS)] was circulated.

... On 2 December 2013, the Applicant learned from the Chief of Human Resources that her contract would be extended until 31 March 2014. She wrote to the Registrar on 2 December 2013 requesting reconsideration of that decision and asked for an extension of her contract to 30 June 2014. She described the proposed contract as “inadequate, inappropriate and unfair” and “made with the ulterior purpose of disadvantaging me”. The Applicant pointed out that there was funding for her position through December 2014 and that there were sufficient tasks remaining for her to undertake during that time. She reiterated her belief that there was a desire to ensure that she would no longer be working for the Tribunal by the time that an anticipated audit would take place due to the allegations she had previously made. The Registrar met with her to discuss the issue.

... On 19 December 2013, the Registrar informed her in writing of his decision to maintain the extension of her contract to 31 March 2014 with a possibility of review if there was a determination that there would be work beyond March 2014. He informed her that he had spoken to both her reporting officers about the foreseeable workload in DCDMS and had been told that there would be insufficient work remaining in the section to justify an extension of her contract past 31 March 2014. He stated:

My view is that we maintain the extension of your contract to 31 March 2014 on the understanding that if it is demonstrated that there is or will be work beyond March 2014 justifying its further extension, the case will be reviewed and a decision taken whether to extend your contract further.

... On 27 January 2014, the Applicant met with the Registrar and advised him that on 23 January she had received an offer for a temporary P-3 position with a United Nations entity in a non-family duty station. She stressed that she had only two days to decide whether to accept the position, and asked that he extend her contract through 31 July 2014 to enable her to have a real choice. Given the delays in appeals cases and the consequent workload in DCDMS, the Applicant believed that 31 July 2014 was now a more appropriate date than 30 June. She said in her [a]pplication that the Registrar was non-committal, and stated that a contract extension would depend on the work remaining in her section.

... On 30 January 2014, the Applicant requested management evaluation of the 19 December 2013 decision. The request was rejected by the Management Evaluation Unit (MEU) on 13 February 2014 as premature because the 19 December decision was not a final decision.

... On 11 February 2014, the Applicant accepted an offer of appointment with [the United Nations Stabilization Mission in Haiti (MINUSTAH)] in writing. However she continued to request that the Registrar reconsider the decision not to extend her contract with [the] ICTR beyond 31 March 2014.

... On 14 February 2014, the Applicant filed a complaint of retaliation with the Ethics Office. She was advised that the Ethics Office could not review her case because it did not involve a final administrative decision.

... In late February 2014, the Applicant learned that her childcare giver was ill. She informed her first reporting officer that she would have to cancel her plans with MINUSTAH and requested that her contract be extended beyond 31 March 2014. She received no response to this request.

... On 13 March 2014, the Applicant was informed by the Chief of Human Resources, that the ICTR [A]dministration had accepted a request from MINUSTAH for a loan agreement.

... On 18 March 2014, the Applicant's appointment with [the] ICTR was further renewed until 3 July to facilitate her secondment to MINUSTAH from 19 March 2014 to 18 June 2014. The Applicant requested management evaluation of the decision not to renew her appointment with [the] ICTR beyond 3 July 2014.

... [The] MEU responded to that request on 2 July 2014 stating:

On 2 July 2014 the MEU received confirmation from the ICTR that your appointment had been extended through 3 October 2014. This effectively renders your request for management evaluation moot. Accordingly we are proceeding to close your file.

3. On 8 May 2014, Ms. Buff filed an application with the UNDT. On 17 June 2015, the UNDT rendered its Judgment, finding the application not receivable.

4. As to the 19 December 2013 decision, the UNDT noted that while the Registrar reiterated his original decision to extend Ms. Buff's contract until 31 March 2014, he added that a further extension would depend on a subsequent determination of whether there was work beyond that date. This was therefore not a final decision but one dependent on the circumstances which were yet to be finally determined. The UNDT further found that the fact that she was offered and accepted further extensions at the time the ICTR actively downsized did not support her case that the Administration's decisions were retaliatory.

5. As to the 13 March 2014 decision, the UNDT found Ms. Buff's challenge not receivable because it had no legal consequences which caused her material harm or otherwise affected her terms or conditions of appointment. Her secondment to MINUSTAH and its later extension to October 2014 went well beyond the extension that she had originally sought.

6. Having found Ms. Buff's case not receivable, the UNDT rejected her request for disclosure of documents as moot. The UNDT also declined Ms. Buff's request for anonymity, concluding that there was no evidence that her reputation had been damaged outside the ICTR and that the pleadings and associated documents did not reveal any information requiring protection.

7. Ms. Buff appealed on 13 August 2015, and the Secretary-General answered on 16 October 2015. On 29 October 2015, Ms. Buff filed a motion seeking leave to file additional pleadings. The Secretary-General opposed the motion in his observations on 12 November 2015. On 3 March 2016, Ms. Buff filed a "Motion seeking leave to present additional information" and the Secretary-General filed his observations on 9 March 2016.

### **Submissions**

#### **Ms. Buff's Appeal**

8. Ms. Buff contends that the UNDT's denial of her request for anonymity is inconsistent with Section 3 of ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) and Section 5.2 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). Based on these provisions, she had a legitimate expectation that her identity would be protected when raising concerns about the financial mismanagement in her section. By publishing her name in the Judgment, the UNDT "outed" her as a whistleblower. Any dispute between herself and her supervisor arose solely as a result of her allegations of mismanagement and such circumstance is exceptional and warrants anonymity. Furthermore, her employment prospects "appear to have diminished dramatically" since her name got published in the Judgment. Ms. Buff also criticizes the UNDT for issuing an order *proprio motu*, directing the Secretary-General to respond to her request on anonymity.

9. The Administration took the decision to provide her with a shorter contract than she had been promised in order to retaliate against her.

10. Ms. Buff states that she never claimed that the 19 December 2013 decision was a final decision. Rather, she was contesting the assumption that a non-final decision, or the extension of a contract for a short period of time, can have no legal consequences. ST/SGB/2005/21 and ST/SGB/2008/5 establish legal rights for protection from retaliation and abuse of authority respectively, and any challenge to a decision taken in violation of these administrative issuances, whether final or not, is receivable as it has direct legal consequences on a right to be protected from retaliation or harassment.

11. The “final decision” requirement adopted by the UNDT fundamentally alters the definitions of retaliation and abuse of authority. It changes the definition to mean “any behaviour terminating the employment of an individual or individuals for raising concerns”. However, if for example abuse of authority is a factor in decision-making, that decision cannot be lawful regardless of the precise nature of the impact of the decisions (such as the staff member still has a job). By limiting review to final decisions, the UNDT has effectively given carte blanche to managers to discriminate, harass or retaliate against a staff member, despite all the legal provisions to the contrary, as long as they do not definitely terminate his/her contract.

12. Ms. Buff requests that the Appeals Tribunal reverse the UNDT decisions on anonymity and receivability in this case. She also requests anonymity in the present appellate proceedings.

### **The Secretary-General’s Answer**

13. The appeal is not receivable because Ms. Buff has no cause of action. While Ms. Buff did not prevail before the UNDT, she is no longer seeking any of the remedies that she had requested before the UNDT. Therefore, if she were to prevail on appeal, the judgment of the Appeals Tribunal would only serve to declare the law in her favour.

14. The UNDT correctly concluded that the application was not receivable because the contested decisions had no adverse legal consequences for Ms. Buff. The first contested decision to extend Ms. Buff’s appointment for three months rather than for six months as requested by Ms. Buff was not final since the Registrar had expressly indicated that it

would be reviewed and that a further extension of Ms. Buff's appointment would be granted if it were demonstrated that there would be sufficient work to justify a further extension beyond 31 March 2014. Even if such decision were to be deemed final, the UNDT found that it had no direct legal consequences for Ms. Buff's terms and conditions of employment, since it preserved such terms and conditions by continuing her employment beyond the original term of her appointment.

15. The UNDT further correctly concluded that the second contested decision to further extend Ms. Buff's appointment for only another three months was not receivable. The Administration made the decision in response to Ms. Buff's advice that she had received and accepted an offer of employment with MINUSTAH. She subsequently accepted an extension with MINUSTAH for another three months. While the secondment to MINUSTAH had caused Ms. Buff emotional stress and personal inconvenience, these were personal rather than legal consequences and in any event, Ms. Buff had accepted the appointment and its later extension, well beyond the period of extension she had originally sought.

16. Ms. Buff's allegations in respect of ST/SGB/2005/21 and ST/SGB/2008/5 fall outside the scope of the UNDT's jurisdiction. Had Ms. Buff wished to raise concerns in respect of ST/SGB/2005/21 and ST/SGB/2008/5, she was required to avail herself of the remedies under each of these instruments. The record shows that the Ethics Office fully engaged with Ms. Buff in accordance with ST/SGB/2005/21 and the UNDT did not find any denial of her right to seek protection from retaliation. Furthermore, the record does not contain any evidence of a formal complaint pursuant to ST/SGB/2008/5.

17. Ms. Buff has not established any error by the UNDT in declining her request for anonymity nor has she established any exceptional circumstances warranting anonymity before the Appeals Tribunal. The UNDT's decision declining to grant anonymity is fully aligned with the applicable legal framework and the Appeals Tribunal jurisprudence. The present case does not deal with any sensitive or confidential information regarding Ms. Buff's medical history or any allegation of misconduct. Therefore, no exceptional circumstances warrant the granting of her request for anonymity either by the UNDT or the Appeals Tribunal.

18. Moreover, contrary to Ms. Buff's contention, there can be no legitimate expectation of anonymity in every case where allegations of retaliation or harassment are made, absent any exceptional circumstances. Further, Ms. Buff has not tendered any evidence to support her assertion that her employment prospects have diminished since her name was published in the Judgment or otherwise demonstrated that she has a greater need than any other litigants for confidentiality during the appeal proceedings. The UNDT acted well within its broad discretion in requesting comments from the Secretary-General on her request for anonymity.

19. Ms. Buff's claims on the merits fall outside the Appeals Tribunal's jurisdiction. The UNDT did not address these claims as it only looked at the issue of receivability and not the merits of this case. Should the Appeals Tribunal find that the application should have been treated as receivable, the appropriate remedy would be to remand the matter to the UNDT.

20. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

### **Considerations**

#### *Request for anonymity*

21. As a preliminary matter, this Tribunal denies the Appellant's request for anonymity at the appellate level and affirms the Dispute Tribunal's respective denial. As stated in *Kazazi*, "Article 10(9) of the Appeals Tribunal Statute provides that '[t]he judgements of the Appeals Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal'".<sup>2</sup> Our jurisprudence shows that the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality.<sup>3</sup>

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<sup>2</sup> *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 21.

<sup>3</sup> *Fedorchenko v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2015-UNAT-499; *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, citing *Servas v. Secretary-General of the United Nations*, Order No. 127 (2013); *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-456.



22. In *Pirnea*, we held that<sup>4</sup>

the judgments of the Appeals Tribunal are published and made available to the Organization's staff and the general public. Public dissemination of the appellate judgments helps to assure there is transparency in the operations of the Appeals Tribunal. It also means, sometimes fortunately and other times unfortunately, that the conduct of individuals who are identified in the published decisions, whether they are parties or not, becomes part of the public purview.

23. There are no exceptional circumstances that could warrant departing from the general principles and from the well-established jurisprudence in the present case. The goals of transparency and accountability set out by the General Assembly when establishing the new system of internal justice lead to conclude that cases where eventual mismanagement is alleged are particularly apt to be openly considered and decided. The theoretical fear of upcoming uncomfortable relationships between members of the staff as a consequence of not granting anonymity does not have merit.

24. Thus, the request for anonymity is dismissed.

*Motion to reply to Respondent's answer*

25. The Appeals Tribunal denies the Appellant's request to file a reply to the Respondent's answer finding no exceptional circumstances justifying an additional pleading.

*Motion to present additional "information"*

26. The Tribunal also rejects the Appellant's second motion seeking leave to present additional "information" which she claims relates to further allegations of retaliation. According to our Rules of Procedure and jurisprudence, there are no exceptional circumstances to grant leave for such a request, which constitutes an attempt to supplement the appeal or to make submissions that could have been previously presented,<sup>5</sup> as the Appellant herself admits in her brief.

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<sup>4</sup> *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-456, para. 18.

<sup>5</sup> *McCluskey v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-332, para. 18.

27. Neither could it be admissible to introduce new grounds for appeal which were not part of the original plea or to request only now remedies that were not a content of the original petition. Moreover, since in her appeal before this Tribunal the Appellant has expressly withdrawn her request for the remedies originally submitted before the UNDT, she is not able to go against her steps and ask now for compensation (*non venire contra factum proprium*) for activity which has not even been challenged through the required management evaluation step.<sup>6</sup>

*Appeal against receivability of the case before the UNDT*

28. The application that Ms. Buff filed before the UNDT, in its amended version, requested the following remedies: an extension of the contract for the P-4 Legal Officer position, without special conditions; cancellation of the P-4 position if the budget and workload do not allow for both P-3 and P-4 legal officer positions; USD 10,000 to cover costs; follow through complaints regarding financial mismanagement and transfer of assets pertaining to persons acquitted by the ICTR out of her name.<sup>7</sup>

29. In paragraph 6 of her appeal brief before this Tribunal, Ms. Buff expressly stated: “Given the passage of time, I no longer seek any of the remedies requested in my 8 May 2014 submission to the UNDT. However, as it is my view that the UNDT judgment in this case is wholly antithetical to the meaning and purpose of UN Rules.... and the intent of member states and the Secretary-General to enhance the efficiency of the United Nations system, I am compelled to appeal.”

30. It is our view that Ms. Buff’s express withdrawal of the remedies originally requested has rendered her appeal moot. Before the Appeals Tribunal, she only pursues an advisory or academic declaration about errors allegedly contained in the UNDT Judgment, and no longer seeks concrete remedies. As stated in *Saffir and Ginivan*, an appeal “is an instrument to pursue a change of a judicial decision, in the form of modification, annulment or vacation, used as a way to repair a concrete grievance directly caused by the impugned judgment”.<sup>8</sup> We further held:<sup>9</sup>

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<sup>6</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293.

<sup>7</sup> Chapter 9, page 4 of the amended application before the UNDT

<sup>8</sup> *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, para. 15.

<sup>9</sup> *Ibid.*, paras. 18-19.

The right to appeal arises when the decision has a negative impact on the situation of the affected party. That means that a judgment can contain errors of law or fact, even with regard to analysis of the tribunal's own jurisdiction or competence and yet, be not appealable.

If the errors attributed to the judgment do not have an impact on the final outcome of the process, an appeal concerning those errors would become moot because it would be merely academic or theoretical...

31. Judicial economy and efficiency require that we decline to examine appeals which do not seek any concrete remedy which could be awarded and only rely on the party's will to be found to be right in its position against the judgment under appeal, without seeking any actual change in the judgment itself.

32. Therefore, as the appeal is moot, we will not address whether the claims are receivable or the merits of the claims before the UNDT.

### **Judgment**

33. The appeal is dismissed in its entirety.

Original and Authoritative Version: English

Dated this 24<sup>th</sup> day of March 2016 in New York, United States.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 13<sup>th</sup> day of May 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar