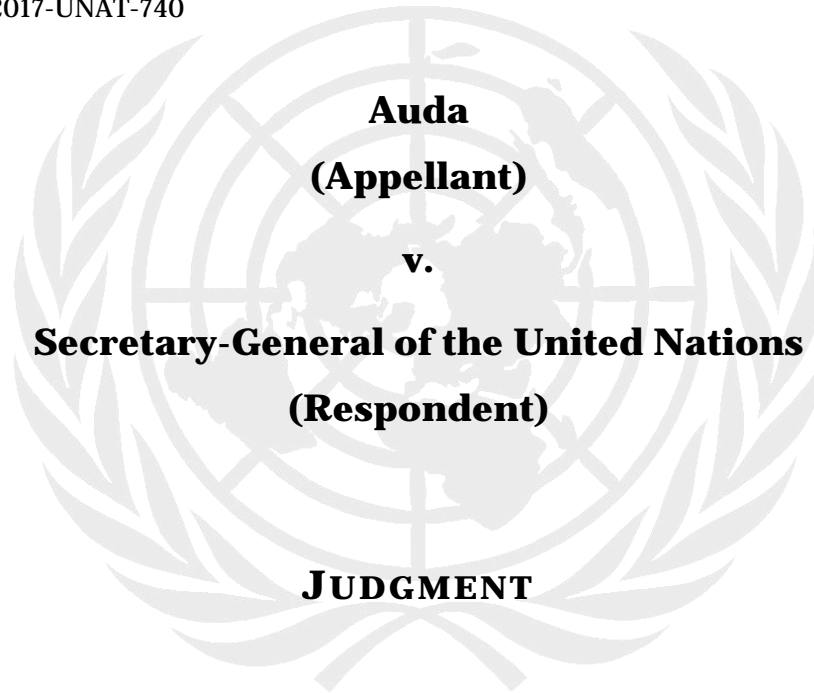




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-740



Auda

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge John Murphy Judge Dimitrios Raikos
Case No.:	2016-967
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Auda:	Self-represented
Counsel for Secretary-General:	Ernesto Bondikov

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment on Receivability No. UNDT/2016/107, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 10 August 2016, in the case of *Auda v. Secretary-General of the United Nations*. Mr. Hesham A. Auda filed his appeal on 7 September 2016, and on 4 October 2016, the Secretary-General filed his answer.

Facts and Procedure

2. Mr. Auda is a former staff member of the Organization who separated from service on 31 December 2015, when his fixed-term appointment was not renewed. Prior to his separation, Mr. Auda was a Principal Officer at the D-1 level within the Department for General Assembly and Conference Management.

3. Mr. Auda challenged his separation from service before the Dispute Tribunal and requested a suspension of action pending judicial review of the contested decision.¹ The Dispute Tribunal denied the suspension of action request, which Mr. Auda appealed to the Appeals Tribunal; however, the interlocutory appeal was determined not to be receivable *ratione materiae*.

4. The facts underlying the pending appeal are set forth by Mr. Auda in his application to the UNDT, as follows:

... On 16 June 2016, [I] requested a management evaluation of the decision ... not to cancel [and] then make a selection pursuant to Job Opening number 15-IST-OICT-41653-R-NEW YORK (R) ...

... On the same day, 16 June 2016, the [Management Evaluation Unit (MEU)] responded ...

... [I] in turn responded instantly ...

... Later on the same day, the MEU responded ...

... On 17 June 2016, the MEU sent a letter of acknowledgment, and, shortly afterwards, another, corrected letter of acknowledgment. Both letters were copied widely ...

¹ The Appeals Tribunal takes *sua sponte* judicial notice of its prior judgment, *Auda v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-671.

... On 20 June 2016, [I] submitted a request for management evaluation of the MEU decision to send a letter of acknowledgment including misleading representations with regard to deadlines for filing an appeal before the UNDT ...

5. On 29 July 2016, Mr. Auda submitted an application to the UNDT contesting the decision of the MEU “to send a letter of acknowledgment including misleading representations with regard to deadlines for filing an appeal before the UNDT”.²

6. In his application to the UNDT, Mr. Auda requested that the UNDT order “[t]he MEU to adopt a standardized acknowledgment of a management evaluation request ... including a paragraph unequivocally stating the deadline for completion of management evaluation and the deadline for the filing [of] an application ...; [and] ... [c]ompensation for the violation of [his] due process rights”.

7. On 3 August 2016, the Secretary-General filed a Motion for Summary Judgment, arguing that the application was not receivable *ratione materiae*.

8. The Registry of the UNDT did not serve the Motion for Summary Judgment on Mr. Auda and he did not file a response to it.

9. On 10 August 2016, the UNDT issued Judgment No. UNDT/2016/107, granting the Secretary-General’s Motion for Summary Judgment on the ground the application was not receivable *ratione materiae*.

10. On 7 September 2016, Mr. Auda filed his appeal of the UNDT Judgment, and on 4 October 2016, the Secretary-General filed his answer.

Submissions

Mr. Auda’s Appeal

11. The Appellant contends that the Dispute Tribunal failed to exercise the jurisdiction vested in it and erred on a question of law and a question of fact, resulting in a manifestly unreasonable decision.

² Impugned Judgment, para. 1.

12. The UNDT erred in granting the Secretary-General's Motion for Summary Judgment, as summary judgment is not the proper procedure for considering issues of jurisdiction; rather it is for consideration of the merits of the dispute.

13. The "impugned decision" is an appealable administrative decision that is subject to judicial review, as the MEU made misleading statements in its response to his grievance. Moreover, the Appellant has contested two distinct administrative decisions, and the UNDT erroneously referenced the other case in determining that the impugned decision in this case is not a reviewable administrative decision.

14. Mr. Auda requests that the Appeals Tribunal find the appeal receivable, review the appeal on an expedited basis, vacate the UNDT Judgment and remand the case to the UNDT "outside New York for reconsideration".

The Secretary-General's Answer

15. The UNDT correctly determined that summary judgment can properly be used to determine whether the application is receivable. Under the Appeals Tribunal jurisprudence, the UNDT can *sua sponte* dispose of cases on jurisdictional grounds even if the parties do not raise the issue of jurisdiction. And under the Appeals Tribunal jurisprudence, summary judgment can be used to address the issue of receivability. Thus, the UNDT did not commit an error of law in summarily disposing of the application.

16. The UNDT correctly determined that the MEU's letter and format are not administrative decisions that are reviewable under the Appeals Tribunal jurisprudence. Moreover, as a practical matter, the letter Mr. Auda contests was merely a step in the MEU's review process and not any sort of decision. Thus, the UNDT did not commit an error of law in concluding that the application was not receivable *ratione materiae*.

17. Finally, the UNDT correctly found that the letter being contested by the Appellant related to a matter already pending before the UNDT in another context; thus, it was not receivable under the doctrine of *lis pendens*. Accordingly, the UNDT did not make a factual error that resulted in a manifestly unreasonable decision.

Considerations

Summary Judgment

18. The Appeals Tribunal has previously concluded that the summary judgment procedure under Article 9 of the UNDT's Rules of Procedure is a proper procedure for the Dispute Tribunal to determine that an application is not receivable. Mr. Auda's reliance on contrary holdings by the Dispute Tribunal does not avail him. We restate what we held in *Kazazi*:³

Regarding the Dispute Tribunal's decision to proceed by way of summary judgment, summary judgment is an appropriate tool to deal with issues of receivability in the United Nations internal system of administration of justice. Article 9 of the UNDT's Rules of Procedure provides:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

The only issue to be addressed by the UNDT was that of the application's receivability, which, ... is a matter of law and not a matter of fact. As such, in assessing its own competence, the Dispute Tribunal can choose to proceed by way of summary judgment without taking any argument or evidence from the parties because the Dispute Tribunal Statute prevents the UNDT from receiving a case which is not receivable.

19. In this case, the Secretary-General filed a Motion for Summary Judgment; the UNDT did not utilize the summary judgment procedure on its own initiative. The UNDT then reviewed the material facts, specifically the nature of the "impugned" decision Mr. Auda challenged in the application -- which was not in dispute -- and determined that, as a matter of law, the "impugned decision" was not subject to judicial review (as discussed below). Accordingly, there is no merit to Mr. Auda's claims that the UNDT failed to exercise its jurisdiction or erred in law by using the summary judgment procedure to determine the application was not receivable *ratione materiae*.

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

Receivability before the UNDT

20. It is clear that Mr. Auda's application to the UNDT did not challenge an "administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" of the staff member.⁴ In fact, Mr. Auda did not challenge any sort of decision. Rather, he challenged the MEU's wording in a letter to him acknowledging the receipt of his grievance or complaint.

21. There is no dispute that Mr. Auda's application to the UNDT contests the language of the MEU's acknowledgment of his grievance or complaint. The application states that it is for the purpose of contesting the purported decision of the MEU to send "a letter of acknowledgment including misleading representations with regard to deadlines for filing an appeal before the UNDT". And the relief Mr. Auda sought in the application was that the UNDT order "[t]he MEU to adopt a standardized acknowledgment of a management evaluation request ... including a paragraph unequivocally stating the deadline for completion of management evaluation and the deadline for the filing [of] an application".

22. Recently, the Appeals Tribunal has explained that when the MEU issues a "decision" in response to a grievance or complaint, the MEU's "decision" is not an administrative decision subject to judicial review by the Dispute Tribunal. Rather, the judicially reviewable administrative decision is the underlying decision "that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member".⁵

23. We repeat what we explained in *Kalashnik* and reiterated in *Nwuke*:⁶

[T]he provisions of the UNDT Statute d[o] not consider the Administration's response to a request for management evaluation to be a decision that "produced direct legal consequences[]" affecting a staff member's terms and conditions of appointment. To the contrary, ... "the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision" all support the conclusion that the Administration's response to a request for management evaluation is not a reviewable decision. ...

⁴ Article 2(1)(a) of the Dispute Tribunal Statute (UNDT Statute).

⁵ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-697, para. 22, quoting *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661, paras. 25-30 (internal citations omitted).

⁶ *Ibid.*

24. We have further stated that “[m]anagement has discretion in how to consider and respond to staff members’ requests for [management] evaluation; the discretion is not subject to micro-managing by the staff members”.⁷ Although Mr. Auda appears to be of the opinion that he could write a better acknowledgment letter than he received from the MEU, his opinion is just that – an opinion; he has no legal right to challenge the MEU’s procedures:⁸

If the [MEU’s] decision itself cannot be subject to judicial review, then the procedures utilized by the Administration in reaching the decision also cannot be subject to judicial review. Mr. Kalashnik cannot create a right to challenge the Administration’s procedures for responding to requests for management evaluation when that right does not exist in the Staff Rules or elsewhere.

25. For the foregoing reasons, we determine that the UNDT did not err in law or fact, resulting in a manifestly unreasonable decision, when it found that Mr. Auda’s application was not receivable *ratione materiae*.

26. Nevertheless, we acknowledge that the Dispute Tribunal’s rationale in finding the application was not receivable *ratione materiae* is not identical to ours. The Dispute Tribunal found the application was not receivable *ratione materiae* on the ground that Mr. Auda “has actually filed an application concerning th[e] [selection] decision (Case No. UNDT/NY/2016/028) and the case is, therefore, already pending before the Dispute Tribunal”.⁹

27. Under recognized principles of appellate review, we may affirm a lower tribunal’s judgment as a matter of law based on any supporting legal theory. To some extent, this is the obverse of our holding that we may reverse a lower tribunal’s judgment as a matter of law based on any error of law, without addressing each issue raised on appeal.¹⁰ In our opinion, it was unnecessary to consider any other applications before the UNDT in order to determine the receivability of Mr. Auda’s application contesting language in an acknowledgment letter. We do this now in affirming the Dispute Tribunal’s Judgment holding the application was not receivable *ratione materiae*.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Impugned Judgment, para. 14.

¹⁰ *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503, para. 38.

28. Finally, the Appeals Tribunal notes that, if the Secretary-General had requested costs on appeal, we would have granted the request and awarded costs against Mr. Auda under Article 9(2) of the Appeals Tribunal Statute, as Mr. Auda has “manifestly abused the appeals process” by bringing this patently frivolous appeal.

Judgment

29. The appeal is denied; Judgment No. UNDT/2016/107 is affirmed.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Raikos

Entered in the Register on this 26th day of May 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar