



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

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Judgment No. 2017-UNAT-746

**Auda**  
**(Appellant/Respondent on Cross-Appeal)**  
**v.**  
**Secretary-General of the United Nations**  
**(Respondent/Appellant on Cross-Appeal)**

**JUDGMENT**

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**Before:** Judge Martha Halfeld, Presiding  
Judge Deborah Thomas-Felix  
Judge Richard Lussick

**Case No.:** 2016-975

**Date:** 31 March 2017

**Registrar:** Weicheng Lin

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**Counsel for Mr. Auda:** Self-represented

**Counsel for Secretary-General:** Wambui Mwangi

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/117, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 26 August 2016, in the case of *Auda v. Secretary-General of the United Nations*. Mr. Hesham Auda filed his appeal on 23 October 2016, and the Secretary-General filed an answer and cross-appeal on 16 January 2017. Mr. Auda did not file an answer to the cross-appeal.

**Facts and Procedure**

2. The UNDT made the following factual findings:<sup>1</sup>

... On 23 December 2015, the Applicant, a former Principal Officer at the D-1 level in the Department for General Assembly and Conference Management (“DGACM”), filed an application contesting the decision to separate him from service upon the expiration of his fixed-term appointment on 31 December 2015.

... The Respondent submits that the application is not receivable because the Applicant did not submit a request for management evaluation within 60 calendar days from the date on which he received notification of the contested decision, as required by staff rule 11.2(c). Should the [Dispute] Tribunal find the application receivable, the Respondent submits that it is without merit because the decision not to renew the Applicant’s fixed-term appointment was a lawful exercise of discretion.

...

... The parties agree that on 19 June 2013 a meeting took place between the Applicant, Mr. Tegegnetwork Gettu, who was the Under-Secretary-General, DGACM (“USG/DGACM”) at the time, and Mr. Magel Abdelaziz, the Under-Secretary-General and Special Adviser to the Secretary-General on Africa [(“USG/OSAA”)]. The Applicant submits that during the meeting, Mr. Gettu provided an express promise regarding the Applicant’s future employment with the Organization. The Respondent disputes this claim.

... By interoffice memorandum dated 27 September 2013 from Mr. Gettu, the Applicant was informed that effective 1 October 2013, he would be reassigned from his position to implement a project referred to as “Update and Digitization of the DGACM Compendium of Administrative Policies, Practices and Procedures” (“the Compendium Project”). The memorandum further stated (emphasis added): “While the project timeline should be completed by June 2014, *it is my intention to provide you with other challenging and interesting assignments based on a high quality outcome.*”

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<sup>1</sup> Impugned Judgment, paras. 1-20.

... 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 was 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, including acting as Project Coordinator for the Compendium Project. He received an overall rating for the performance period of "Successfully meets expectations". His First Reporting Officer [FRO], Ms. Heather Landon, Director of the Documentation Division, DGACM, at the time, stated that the Applicant had "demonstrated a significant amount of initiative and creativity" in the implementation of the Compendium Project.

... On 4 December 2014, Ms. Landon responded via email to a query from another United Nations office about progress on the Compendium Project. She stated:

While indeed it was our expectation that the Compendium would be available in July 2014, it appeared that this project was more time consuming and more complicated than originally envisioned ... We anticipate that the first electronic draft will be available at the end of January for Departmental review and then, depending on the type and number of changes required, the Compendium may be available for external use by end March 2015.

... On 31 December 2014, a personnel action was approved extending the Applicant's fixed-term appointment for one year, from 1 January 2015 until 31 December 2015.

... By email dated 20 February 2015, the Applicant advised other staff members on how to access the Compendium.

... By email dated 11 September 2015, the Executive Officer, DGACM, reminded colleagues that in accordance with ST/AI/2010/5 (Performance Management and Development System), [FROs] should be undertaking midpoint performance reviews with their staff.

... In an email dated 16 September 2015, addressed to a number of colleagues, including Ms. Catherine Pollard, the then Assistant Secretary-General, DGACM ("ASG/DGACM"), and Mr. Gettu, the Applicant noted that he did not have a work plan for the 2015–2016 performance cycle and that "none seems to be interested in discussing it with me." He stated that three scheduled meetings with Ms. Pollard—on 9, 11, and 29 June 2015—had all been cancelled. By email response to the Applicant the same day, Ms. Pollard stated that she would arrange to meet with him the following week.

... It is stipulated by the parties that on 2 October 2015, the Applicant was verbally informed by Ms. Pollard that his fixed-term appointment would not be renewed beyond 31 December 2015. In his application on the merits, the Applicant stated:

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 midpoint 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 various 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 in an 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 of the meeting. ... ]

... On 2 December 2015, the Applicant submitted a request for management evaluation of the decision not to renew his fixed-term appointment.

... 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 beyond 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 Case No. UNDT/NY/2015/064, the [Dispute] Tribunal suspended the implementation of the contested decision pending the outcome of the request for management evaluation.

... On 17 December 2015, the Applicant was informed by the Management Evaluation Unit that his request for management evaluation was considered not receivable.

3. On 28 March 2016, the UNDT New York Registry sent an e-mail to the parties which stated, *inter alia*, as follows: “Once the present matter is assigned to an available Judge for consideration, the parties will be notified accordingly by the New York Registry.”

4. The UNDT issued its Judgment on 26 August 2016 dismissing the application in its entirety. It found that the application was receivable *ratione materiae* since Mr. Auda had requested management evaluation within the prescribed time limit on the grounds that the time limit started to run from the date of the written notification of the previously verbally communicated non-renewal decision. On the merits, the Dispute Tribunal concluded that Mr. Auda had not met the burden of proving an “express promise” in writing containing a “firm commitment” of the Administration to renew his fixed-term appointment, so as to support his contention that he had a legitimate expectancy of renewal beyond 31 December 2015.<sup>2</sup> The UNDT further held that the reason given for the non-renewal, namely the completion of the Compendium Project, was legitimate and “sufficiently supported by the weight of the credible evidence” provided by both parties.<sup>3</sup> Finally, the Dispute Tribunal found that Mr. Auda had not met his burden of proving that the non-renewal decision was “motivated by bias, prejudice, discrimination, or other extraneous considerations”.<sup>4</sup>

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<sup>2</sup> *Ibid.*, para. 64.

<sup>3</sup> *Ibid.*, para. 72.

<sup>4</sup> *Ibid.*, para. 75.

5. Mr. Auda filed an appeal against the Judgment with the Appeals Tribunal on 23 October 2016. On the same day,<sup>5</sup> he 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 references to it in 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 for *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 it - contrary to its e-mailed case management directions of 28 March 2016 - failed to notify him of the assignment to the UNDT Judge and thus violated his due process rights by denying him the opportunity to move by way of motion "at a meaningful time".

8. Further, he asserts that the UNDT erred on a question of fact and failed to exercise the jurisdiction vested in it when it found that Mr. Auda 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

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<sup>5</sup> The motion was filed separately under a different case number than the appeal. For this reason, the Appeals Tribunal Registry did not locate the motion until 25 October 2015 and it was registered in the e-filing system under that date. For the sake of clarity, in this Judgment the motion will be treated as having been filed on the same day as the appeal.

promise” containing a “decision waiting to be implemented” that his contract would be extended until he found another suitable position within the Organization.

9. Mr. Auda maintains that he received a promise of renewal of his contract which fulfilled the requirements set out in the Appeals Tribunal’s case law. He argues that “while a written promise provides evidence that the Administration made an express promise giving a staff member expectancy of the renewal of appointment, it need not necessarily be in writing by the responsible official in person”. In his case, Mr. Abdelaziz’ e-mail of 30 November 2015 contained a sufficient “written record” confirming Mr. Gettu’s “express promise” during the meeting of 19 June 2013.

10. Moreover, he alleges that the Administration failed to make a good faith effort to consider him for several positions he applied for within DGACM and outside the department in spite of being obliged to do so as a result of Mr. Gettu’s promise.

11. The UNDT also erroneously accepted “without scrutiny” that the Compendium Project was discontinued and did not give him the opportunity to dispute this claim once new evidence to the contrary became available. Since the project was in fact “ongoing”, the decision to separate him had no factual or legal basis. In this context, Mr. Auda points to his separate motion seeking leave to proffer “new evidence” of a “relaunch” of the project.

12. Further, the UNDT erred on a question of fact when it found that the non-renewal decision was not arbitrary. In particular, the DGACM failed to establish a work plan for Mr. Auda in violation of its obligation under Administrative Instruction ST/AI/2010/5 (Performance Management and Development System). In the absence of a work plan, the alleged lack of work could not serve as a justification for not renewing his contract. The UNDT also erred in law by failing to consider that Mr. Auda - having shown that the Compendium Project resumed after his separation - has made a *prima facie* case of improper motives which shifted the burden to the Administration to refute such motives.

13. By way of remedy, Mr. Auda requests rescission of the non-renewal decision based on the Appeals Tribunal jurisprudence in the case of *Cohen*.<sup>6</sup> He further seeks compensation in the amount of two and a half years’ net base salary in lieu of rescission for loss of income until

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<sup>6</sup> *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131, para. 18.

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 even 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 the 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 remand 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 matter without any implications for Mr. Auda's terms and conditions of employment. He further asserts that Mr. Auda did not show how this lack of information specifically prejudiced his case or that he was denied the opportunity to file any motions or submissions.

15. The UNDT correctly determined that Mr. Auda failed to identify any error of fact or law in the UNDT Judgment warranting intervention by the Appeals Tribunal. He merely disagrees with the UNDT's findings and repeats the arguments already submitted before the UNDT.

16. Specifically, the UNDT did not err in finding that Mr. Auda failed to demonstrate, on the basis of "written evidence of an ... express promise", that he had a legitimate expectancy of renewal of his fixed-term appointment. The UNDT correctly found that there were undisputedly two "promises" made during the 19 June 2013 meeting. The first "promise", namely that Mr. Auda would "continue in his position as Chief of the Office of the USG/DGACM until he found another position", was in fact fulfilled because he stayed in this position until his reassignment effective 1 October 2013. The second "promise", namely that "he would not be terminated for as long as he stays with DGACM" was also fulfilled because Mr. Auda was not "terminated" within the meaning of Staff Rule 9.6(a) but rather his fixed-term appointment simply expired. Neither of those alleged promises "amounted to a legitimate expectation that the appointment [he] held in 2015 would be renewed upon expiry. An evidentiary hearing [as requested by Mr. Auda] would not have altered the factual or jurisprudential conclusions of the UNDT" in this regard. The previous extensions of his contract did not create any expectancy of



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

17. The UNDT also correctly found that the non-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 non-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 altogether" is inconsistent with the purported creation of a legitimate expectancy of renewal of his 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 so as to enable it to assess his request for compensation. Moreover, "[s]ave his disagreement", he has not pointed to the legal basis for a remand of the matter to the UNDT.

19. In his cross-appeal, the Secretary-General submits that the UNDT erred on a question of law and exceeded its jurisdiction by finding that Mr. Auda's application before the UNDT was receivable. It erroneously found that Mr. Auda's request for management evaluation was not time-barred based on the incorrect assumption that the time limit to file for management evaluation only started to run on 12 November 2015, when he received the written confirmation of the non-renewal decision. Rather, the UNDT should have concluded that the time limit began to run on 2 October 2015, the date on which Mr. Auda was verbally informed by his FRO that his fixed-term appointment would not be renewed. The fact that the decision was verbally reaffirmed on 6 October 2015 and again in writing on 12 November 2015 does not "restart the clock". Neither Staff Rule 11.2(c) nor the Appeals Tribunal jurisprudence requires written notification of administrative decisions; instead they determine that a time limit starts to run from the notification of the contested decision, whether verbally or in written form. Pursuant to the Appeals Tribunal jurisprudence, the decisive moment is when "all the relevant facts were known, or should have reasonably been known" which was undoubtedly the case on 2 October 2015. Moreover, in accordance with Article 8(3) of the UNDT Statute, the UNDT has no discretion to waive the deadline for management evaluation. Therefore, the time limit expired on 1 December 2015 and Mr. Auda did not file a timely request on 2 December 2015.

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 dismiss the appeal in its entirety.

### **Considerations**

#### *Oral hearing*

21. As a preliminary matter, Mr. Auda has filed a request for an oral hearing before the Appeals Tribunal. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, since the documentary evidence before this Tribunal is sufficient, we do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Thus, the request for an oral hearing is denied.

#### *Motion to submit additional documentary evidence and motion for leave to file a response to the observations of the Secretary-General*

22. Mr. Auda has requested that the Tribunal grant him leave to submit additional evidence, arguing that he became aware of e-mail correspondence dated after the issuance of the UNDT Judgment, which he claims proves a relaunch of the Compendium Project that calls into question the justification for the non-renewal of his appointment.

23. Article 2(5) of the Appeals Tribunal Statute provides for the admission of new documentary evidence "[i]n exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony", and if it is "in the interest of justice and the efficient and expeditious resolution of the proceedings". Having reviewed the document sought to be admitted, we find that it is not relevant to the specific UNDT decision under appeal. In addition, Mr. Auda has not demonstrated any exceptional circumstances for the evidence to be admitted nor for him to file a response to the Secretary-General's observations. The motion is therefore refused.

*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 contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

25. In the instant case, Mr. Auda accepts that he was verbally informed on 2 October 2015 by Ms. Pollard, the then ASG/DGACM, that his fixed-term appointment would not be renewed beyond 31 December 2015. He also admits that the non-renewal decision was further communicated to him on 6 October 2015 by Mr. Gettu, the then USG/DGACM, and that on 12 November 2015, he was again informed by memorandum (in writing) that his fixed-term contract would not be renewed. On 2 December 2015, Mr. Auda submitted a request for management evaluation of the decision not to renew his fixed-term appointment.

26. Staff Rule 11.2, simply put, requires a staff member to request management evaluation within 60 calendar days of receiving notification of the administrative decision. The question to be determined is what amounts to “notification of the administrative decision to be contested” in accordance with Staff Rule 11.2 and when the time limit thus starts to run.

27. The UNDT ruled that the time limit started to run from the date of the written notification of non-renewal even though the decision had been previously verbally communicated to Mr. Auda.

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 time limit to file for management evaluation began on 12 November 2015 which was the date when Mr. Auda received the written confirmation of the non-renewal decision and, as a result, when it concluded that Mr. Auda's request for management evaluation was not time-barred.

30. The fact that the original decision was made verbally is, by itself, of no consequence since there is no explicit requirement in law for such notification to be in writing. Staff Rule 11.2(c) does not require a written notification as a prerequisite to contest an administrative decision.

31. The Appeals Tribunal has repeatedly ruled that the decisive moment of notification for purposes of Staff Rule 11.2(c) is when "all relevant facts ... were known, or should have reasonably been known"<sup>7</sup> which was undoubtedly the case on 2 October 2015. In the instant case, the Dispute Tribunal found that it was "stipulated by the parties" and stated by Mr. Auda in his application on the merits before the UNDT that he was explicitly informed on 2 October 2015 that his contract would not be renewed upon expiry.<sup>8</sup> The e-mail of 12 November 2015 expressly served to "confirm" the preceding, orally communicated decision.<sup>9</sup> There is thus no dispute as to the date and content of the administrative decision in question. The non-renewal decision was also communicated with sufficient gravitas as it was conveyed by Ms. Pollard, a high ranking official, and in the course of an official meeting on Mr. Auda's midpoint review. The situation is therefore different from one involving an informal or casual verbal communication or one where the content of the verbal communication is disputed and the facts do not support a reasonable basis upon which to make the necessary findings of "clear and unambiguous" and "sufficient gravitas".

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<sup>7</sup> *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 21, citing *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 31 and citations therein.

<sup>8</sup> Impugned Judgment, para. 13.

<sup>9</sup> Indeed, the fact that the decision was verbally reiterated on 6 October 2015 and again in writing on 12 November 2015 does not "restart the clock". There is no evidence to suggest that there was a waiver of the time limit to request management evaluation. Consequently, the time limit for Mr. Auda to seek management evaluation began to run on 2 October 2015.

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 the 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>10</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 the 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,<sup>11</sup> and in this case there is no exception as there is no application to extend or waive 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 allowed. 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 receivable. 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 evaluation within the prescribed time limit which started to run from the date of the written notification of the non-renewal decision by e-mail dated 12 November 2015.

3. Staff Rule 11.2(a) requires a staff member who wishes "to formally contest an administrative decision" to submit a written "request for a management evaluation of the administrative decision". Pursuant to Staff Rule 11.2(c), the management evaluation request will not be receivable "unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

4. As established by our jurisprudence, a determination of the date of receipt of notification for purposes of Staff Rule 11.2(c) turns on the facts and circumstances of each case. As we stated most recently in *Babiker*:<sup>12</sup>

... One of the most important circumstances to consider, of course, is the nature of the administrative decision. ... An administrative decision not to renew a staff member's fixed-term appointment is perhaps the most significant administrative decision affecting a staff member and is not a decision casually communicated.

In addition, it is necessary to keep in mind that "[a] staff member's knowledge of a decision is not necessarily the same thing as a staff member receiving notification of a decision".<sup>13</sup>

5. In reaching its conclusion that Mr. Auda failed to timely request management evaluation, the majority opinion notes that Staff Rule 11.2(c) does not include a mandatory requirement that an administrative decision be made in writing (in contrast to former Staff Rule 11.2(a) in effect

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<sup>12</sup> *Babiker v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-672, para. 38.

<sup>13</sup> *Ibid.*, para. 42, citing *Bernadel v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-180, para. 24.

under the previous internal system of justice); and 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”.<sup>14</sup> In *Babiker*, the Tribunal reaffirmed the long standing rationale for this position:<sup>15</sup>

... [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 lightly 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 stipulated that the time limit to appeal a contested decision began from the *written* notification of such a decision. This jurisprudence is not in contravention of a plain reading of Staff Rule 11.2(c). Although in Staff Rule 11.2(c) there is no reference to written notification of the original administrative decision as a prerequisite for the time limit to request management evaluation to run, this omission does not lead, *per se*, to the conclusion that an administrative decision of non-renewal of appointments may also only be made orally, particularly in light of the long-standing jurisprudence of the Appeals Tribunal.

8. In other words, the omission of “in writing” or “written” in Staff Rule 11.2(c) does not necessarily lead to the conclusion that a verbal notification of an administrative decision constitutes “notification” for purposes of Staff Rule 11.2(c). Like the Dispute Tribunal, I am of the view that the omission of the requirement of a written notification in current Staff Rule 11.2(c) seems to be related to implied decisions, rather than the verbal notification

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<sup>14</sup> *Ibid.*, para. 35.

<sup>15</sup> *Manco v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-342, paras. 19-20, citing *Bernadel v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-180 and *Schook v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-013.



of other administrative decisions, particularly when they are also issued in writing, they are not a mere reiteration of a previous decision and they concern issues as important as the non-renewal of a fixed-term appointment.

9. The determination—with precision—of the date of notification for purposes of Staff Rule 11.2(c) is crucial, and beneficial, for both the Organization and staff members. | This is why, as a general rule, written notification most effectively satisfies the commitment to clarity and transparency, which are priority interests and ongoing concerns of the Organization. This commitment to transparency includes distinguishing actual notice from legal notice. I note that this rationale is also reflected in current Staff Rule 11.2(d) which stipulates that the “response, reflecting the outcome of the management evaluation, shall be communicated *in writing* to the staff member...”.<sup>16</sup> Therefore, the underlying rationale in *Babiker* remains valid, particularly when bearing in mind the purposes time limits serve in the system of administration of justice and the need for certainty about the date and content of a contested decision.

10. Applying the rationale in *Babiker* to the present case involving a non-renewal decision, the first written communication that Mr. Auda received informing him in clear and unambiguous terms of the contested decision was the e-mail dated 12 November 2015. This communication provides the only date upon which it is possible to state with precision that Mr. Auda received notification of the contested decision for purposes of Staff Rule 11.2(c). The 12 November 2015 e-mail is hence the only communication that “is based on objective elements that both parties (Administration and staff member) can accurately determine”.<sup>17</sup>

11. Assuming, for the sake of argument, that a verbal communication of a non-renewal decision could constitute “notification” for the purposes of Staff Rule 11.2(c), the record would need to demonstrate that such a communication was made clearly and unambiguously with sufficient gravitas to support a reasonable finding that the staff member had been notified of an administrative decision for purposes of Staff Rule 11.2(c).

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<sup>16</sup> Emphasis added.

<sup>17</sup> *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273, para. 25.

12. This did not occur in this case. I am of the view that the Dispute Tribunal did not commit an error of law 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 his request for management evaluation. Moreover, to extract from that meeting the legal consequences 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 to inform the staff member that he will no longer continue in the Organization, particularly when, as in the present case, the contract had been extended twice and there was a 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 that 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