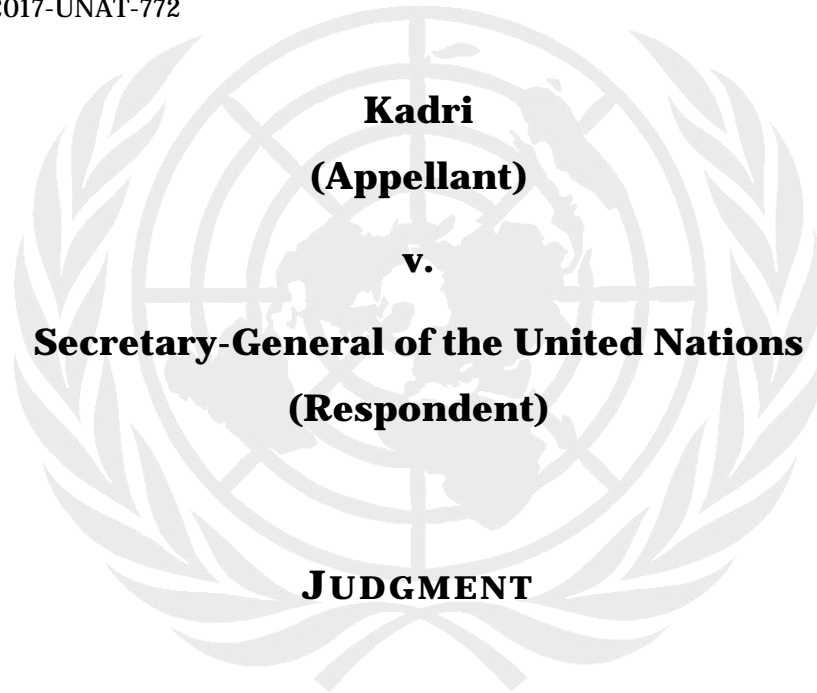




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-772



**Kadri
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge John Murphy Judge Sabine Knierim
Case No.:	2017-1053
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Kadri:	George G. Irving
Counsel for Secretary-General:	Amy Wood

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/211, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 1 December 2016, in the case of *Kadri v. Secretary-General of the United Nations*. Mr. Ali Kadri filed his appeal on 9 January 2017, and the Secretary-General filed the answer on 13 March 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant was a staff member of the United Nations Economic and Social Commission for Western Asia (ESCWA) from 24 August 2002 until 24 August 2012 [when he retired from service].

... On 29 March 2010, he filed an application with the Geneva Registry of the ... UNDT... , which was assigned Case No. UNDT/GVA/2010/079.

... Following the filing of that application, the Applicant engaged in settlement discussions with the Administration coordinated by the Ombudsman's office. On 24 April 2010, the Applicant entered into a Settlement Agreement with the Organization.

... On 27 April 2010, he applied to the UNDT in Geneva for a withdrawal of Case No. UNDT/GVA/2010/079 which he had earlier filed as it had been satisfactorily resolved through mediation. The said case was struck out on 3 May 2010 in Judgment No. UNDT/2010/079.

... Nearly three years later and specifically on 7 January 2013, the Applicant filed another application alleging that he had signed the Settlement Agreement under duress, that ESCWA had rejected his application for a position of Director, Economic Development and Globalization Division (EDGD) for which he had previously been rostered and that the ESCWA Administration continued to harass and discriminate against him.

... The Dispute Tribunal sitting in Nairobi which was seized of this latest application heard it and issued a judgment^[2] on the matter on 23 December 2013. The [Dispute] Tribunal held that where the subject matter of an application had been settled between parties through mediation leading to an agreement signed by both parties, the said matter was *res judicata* and cannot be re-litigated.

¹ Impugned Judgment on Liability and Relief, paras. 1-13.

² *Applicant v. Secretary-General of the United Nations*, Judgment on Receivability No. UNDT/2013/177.

... The [Dispute] Tribunal also held that the Applicant's acceptance of the implementation of the agreement, his failure to raise the allegations of duress until well after two years after the mediation including his failure to proffer any evidence in support of his allegation could only lead to the conclusion that the allegation was devoid of any merit.

... The Applicant subsequently appealed that judgment and on 26 February 2015, the ... Appeals Tribunal ... allowed the appeal^[3] in part and remanded the case to the Dispute Tribunal to make a decision on the Applicant's claim of continued harassment and discrimination.

... The [Dispute] Tribunal commenced a re-hearing of the Application on 2 August 2016.

... The [Dispute] Tribunal adjourned the hearing of the matter to 27 September 2016 and ordered the Applicant to seek the assistance of the Office of Staff Legal Assistance (OSLA) to file amended pleadings and witness statements by 12 August 2016.^[4]

... On 5 September 2016, the Applicant, by way of motion, sought to continue to represent himself and asked for one week's extension of time to file amended pleadings as ordered.

... On 21 September 2016, the [Dispute] Tribunal granted the Applicant leave to make the late submissions which he did on 27 September 2016. The Respondent filed a Reply to the amended Application on 30 September 2016.

... The [Dispute] Tribunal continued the hearing of the Application on 5 October 2016.

3. The UNDT rendered its Judgment on 1 December 2016, dismissing the application in its entirety. It held that Mr. Kadri's application was not receivable having been filed out of time. The UNDT stated that the "the gravamen of [Mr. Kadri's] case on the claim of continued harassment and discrimination [was] that he was unfairly excluded from competing for a D-1 level post in the ESCWA ... and that his [Official Status File (OSF)] contain[ed] adverse materials that imperil[ed] any efforts to secure future employment".⁵ The Dispute Tribunal further found that by arguing that he was excluded from being fully considered for the D-1 level post although the settlement agreement allowed him to apply for future positions at ESCWA, Mr. Kadri was essentially "asking the [Dispute] Tribunal to order the implementation of what he understands to be the true meaning of the ... [s]ettlement [a]greement"⁶ pursuant to Article 7(4)

³ *Kadri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-512.

⁴ *Kadri v. Secretary-General of the United Nations*, Order No. 404 (NBI/2016).

⁵ Impugned Judgment on Liability and Relief, para. 18.

⁶ *Ibid.*, para. 22.

of the UNDT Rules of Procedure. Under this provision, an application seeking to enforce the terms of a settlement agreement must - if the latter does not specify a date for its implementation - be filed within 30 calendar days of its signing. The settlement agreement in question having been signed on 24 April 2010, the application “challenging its meaning and implementation”⁷ filed in January 2013 was thus considered not receivable by the UNDT. In addition, the UNDT found that Mr. Kadri had tendered the settlement agreement into evidence in violation of the rule on confidentiality contained in Article 15(7) of the UNDT Rules of Procedure. With regard to Mr. Kadri’s claim on adverse material in his OSF, the UNDT held that a consideration of the issue also required an interpretation of the settlement agreement and was therefore not receivable. Moreover, the UNDT stated that Administrative Instruction ST/AI/292 (Filing of adverse materials in personnel records) provided clear guidelines in this regard and Mr. Kadri had legal recourse for having such materials expunged from his records.

Submissions

Mr. Kadri’s Appeal

4. As a preliminary matter, Mr. Kadri requests that his name be redacted from the Appeals Tribunal Judgment and previous judgment in this case, considering that he “is still eligible to apply for positions in the [United Nations] Common System”. He further asks that disclosure be “minimalized” with regard to the settlement agreement.

5. Mr. Kadri submits that the UNDT erred in law by incorrectly interpreting the nature of the claim which resulted in the finding of non-receivability. The UNDT erred in considering the case solely as an issue of implementation of the settlement agreement under Article 7(4) of the UNDT Rules of Procedure whereas Mr. Kadri was in fact “not seeking to implement the agreement upon its signing, but rather to enforce the terms of the agreement correctly during the course of its application” when ESCWA misapplied its terms to preclude his candidacy. The UNDT, as opposed to the Management Evaluation Unit (MEU), failed to distinguish between Mr. Kadri’s claim of duress challenging the settlement agreement itself and his claim of further retaliatory acts which took place later when he applied for the post in question. The second claim clearly does not fall under Article 7(4) of the UNDT Rules of Procedure (and Article 8(2) of the UNDT Statute) which are intended to address the implementation of the terms of an agreement to be put into effect without delay and which do not necessarily preclude jurisdiction over claims

⁷ *Ibid.*, para. 26.

arising over a breach of the agreement over the course of its operation. Even based on the UNDT's restrictive interpretation, Mr. Kadri could have availed himself of recourse within 90 days of the last day for implementation of the agreement, which was the date of his retirement from active service on 23 August 2012.

6. Having found the application non-receivable, the UNDT failed to exercise its jurisdiction on the merits and to comply with the Appeals Tribunal's Judgment which had remanded the case for a complete hearing on the claim of continued harassment and discrimination.

7. On the substantive issue of discriminatory treatment, Mr. Kadri claims to have identified a *prima facie* irregularity and to have adduced uncontested evidence showing that his candidacy was screened out and that he was denied the full and fair consideration he was entitled to as a rostered candidate. The UNDT did not review the evidence or inquire further into the allegations. It also failed to exercise jurisdiction over the legal issues as to whether the Administration could duly interpret the settlement agreement to preclude Mr. Kadri from further employment with ESCWA and whether the Administration had violated the requirements of good faith and fair dealing. Mr. Kadri argues that nothing in the spirit and the letter of the settlement agreement - when interpreted in accordance with the Appeals Tribunal's principles of interpretation - would warrant "blacklisting" him from any further positions with ESCWA. In addition, the agreement obligates the Organization to refrain from providing negative comments to any potential future employer, which Mr. Kadri submits precludes keeping negative materials in his OSF.

8. "In the interest of avoiding a further prolongation of the proceedings and since there remain only legal issues to be decided", Mr. Kadri requests that the Appeals Tribunal find in his favour and order payment of compensation for the breach of his rights. He claims to have suffered economic losses from the denial to compete for the D-1 level post for which, "as an experienced rostered candidate", he stood a reasonable chance of selection. Following his separation from service and early retirement at age 55, he had to take a lower paying position in an entirely different career path. He thus suffered the loss of potential remuneration and benefits in addition to a lowered pension benefit which he estimates to amount to two years' net base salary in total. Moreover, Mr. Kadri asks for compensation for moral damages in the amount of one year's net base salary occasioned by the "continued harassment and discrimination". He further prays this Tribunal to award USD 10,000 in costs for abuse of process, arguing that

the Secretary-General “initiated [the] entire adjudication” by “misusing” the settlement agreement with adverse consequences for Mr. Kadri and disclosing its terms without cause.

9. Based on the foregoing, Mr. Kadri requests that the Appeals Tribunal set aside the UNDT Judgment and award the aforementioned compensation and costs.

The Secretary-General’s Answer

10. The Secretary-General submits that the UNDT properly found that Mr. Kadri’s application was not receivable based on the requirements set forth in Article 7(4) of the UNDT Rules of Procedure. The findings and conclusions of the UNDT are consistent with the evidence on the record as well as with Mr. Kadri’s own pleadings. In addition, the events underlying the present case have been subject to numerous rounds of mediation and litigation over the course of the past seven years and the Appeals Tribunal has repeatedly stated that there must be an end to litigation to ensure stability and efficiency of the judicial process.

11. The Secretary-General further maintains that Mr. Kadri has failed to allege any error warranting a reversal of the Judgment. Mr. Kadri’s claim that the UNDT erred in finding his application not receivable *ratione temporis* because it improperly framed the issue as a matter related to the interpretation of the settlement agreement, is inconsistent with Mr. Kadri’s own pleadings before the UNDT which made it clear that he was in fact requesting the UNDT to interpret the terms of the settlement agreement. Moreover, Mr. Kadri has failed to establish that the UNDT erred when it declined to find that the Administration violated the terms of the settlement agreement by maintaining allegedly adverse information in his OSF: (i) Information contained in the OSF is treated confidentially and hiring managers do not have access to it in a selection process; (ii) Mr. Kadri has provided no evidence of a breach of the provision contained in the settlement agreement which prohibits the Administration from giving negative comments on him; (iii) Mr. Kadri does not have a right to determine which information is contained in his OSF without first establishing that the inclusion somehow violated his rights in accordance with paragraph 2 of ST/AI/292.

12. Furthermore, the Secretary-General argues that Mr. Kadri has not alleged any basis warranting an award of compensation. The UNDT properly found that the application was not receivable; consequently there was no basis for awarding compensation. Even if it were receivable, no award of compensation would be warranted as the Administration has complied

with its contractual obligations and Mr. Kadri has failed to demonstrate that his rights were violated in any way, and he has not provided any evidence of harm beyond the bare assertions in his pleadings. Finally, Mr. Kadri's claim for costs to be awarded against the Secretary-General is baseless since he has not demonstrated that the Secretary-General has manifestly abused the appeals procedure as required by Article 9(2) of the Appeals Tribunal Statute.

13. On this basis, the Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

Request for confidentiality

14. Mr. Kadri requests that his name not appear in this Judgment and that it be removed from prior judgments issued in this case. The reason given for this request is that he is still eligible to apply for positions in the United Nations Common System, so that "disclosure should be minimized" in the interest of "his own right to confidentiality insofar as the Settlement Agreement is concerned".

15. Published judgments of the Appeals Tribunal normally include the names of the parties.⁸ This is in the interests of transparency regarding the operations of the Organization and allows for openness, accountability and good governance. A request for redaction can only be granted where it is necessary to protect information of a confidential and sensitive nature.⁹ In the present case, Mr. Kadri's name has been in the public domain for a very long time owing to the publication of many court documents relating to his cases in the Dispute Tribunal and Appeals Tribunal. It would therefore be pointless to order redaction. Moreover, Mr. Kadri has not given any compelling reason as to why confidentiality should be granted at this late stage.

16. His request for confidentiality is therefore denied.

⁸ Article 20(2) of the Appeals Tribunal Rules of Procedure.

⁹ See *Utkina v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-524, paras. 18-19; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-456, paras. 18 and 20.

Appeal

17. In March 2010, Mr. Kadri filed an application with the UNDT contesting the decision to renew his appointment for a six-month period only and claiming that he had been subjected to harassment, discrimination and abuse of authority by various officials in ESCWA.

18. On 24 April 2010, he entered into a settlement agreement with the ESCWA Administration pursuant to mediation conducted by the United Nations Ombudsman and Mediation Services. Under the agreement, he agreed to withdraw any and all claims, demands, proceedings and/or appeals that he may have against the Organization. In return, the ESCWA Administration agreed to place him on special leave with full pay until the end of his current contract which expired on 23 August 2010 and, commencing 24 August 2010, to renew his appointment for a further two years through 23 August 2012, during which he would be placed on special leave with partial pay until he reached the age of early retirement at 55 years. Consequently, the UNDT declared his application withdrawn and closed the case.¹⁰

19. In May 2011, ESCWA advertised a director's post for which Mr. Kadri applied but was not selected. On 15 August 2012, he applied for management evaluation, alleging that he had been harassed into signing the settlement agreement and that "the very text of the agreement constitutes a continued harassment and discrimination" by ESCWA management and requesting the removal of all adverse materials from his OSF. These claims were evaluated as being not receivable and otherwise without merit.

20. Almost three years after entering into the settlement agreement, he filed another application with the UNDT on 7 January 2013, alleging that he had signed the settlement agreement under duress, that ESCWA had rejected his application for the position of Director for which he had previously been rostered and that the ESCWA Administration continued to harass and discriminate against him. The UNDT noted that, at paragraph 17 of the settlement agreement, Mr. Kadri had acknowledged that he had signed the agreement of his own free will and without any duress and that he had subsequently informed the UNDT and the Ethics Office that his case had been satisfactorily resolved through mediation. The UNDT found that "[n]o particulars have been tendered in support of this claim, no reference has been made either in his pleadings or other documents as to the nature of the threats. It is not known whether the alleged threats are physical or psychological. [Mr. Kadri ...] has not gone beyond merely making this

¹⁰ *Kadri v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/079, para. 4.

assertion and therefore this claim must fail.”¹¹ Accordingly, the UNDT dismissed his claim of duress as being devoid of any merit.

21. Mr. Kadri appealed this decision to the Appeals Tribunal, which upheld the UNDT’s Judgment dismissing his claim of duress. However, the Appeals Tribunal, although it was of the view that “the nature of the contested decision was not readily apparent from the face of Mr. Kadri’s application to the UNDT”,¹² noted that the UNDT had failed to deal with Mr. Kadri’s claim of continued harassment and discrimination, that is, a claim of harassment and discrimination subsequent to, and not related to, the implementation and interpretation of the settlement agreement. The Appeals Tribunal therefore held that the UNDT should have addressed this claim and remanded the case for the UNDT to deal with this aspect of his application.¹³

22. In the Judgment now under appeal, the UNDT, after considering Mr. Kadri’s amended pleadings and the evidence in the case, concluded that there was no evidence of any fresh act of harassment and discrimination by the Administration. The UNDT found that the basis of his claim of continued harassment and discrimination was his allegation that he was rejected for a position of Director when, under the terms of the settlement agreement, he was entitled to apply for future positions in ESCWA, and that his OSF contained adverse material which hindered his chances of future employment, making the settlement agreement self-contradictory by providing that he could be rehired at ESCWA or elsewhere within or outside the United Nations.

23. The UNDT accordingly dismissed Mr. Kadri’s application, holding that his claim of continued harassment and discrimination by the ESCWA Administration based on the terms of the settlement agreement was not receivable having been filed out of time.

24. Mr. Kadri claims that the UNDT failed to abide by the Appeals Tribunal’s order on remand by not holding a hearing on the merits. He further claims that the UNDT erred in misinterpreting the gravamen of his case. We reject those submissions. For the reasons which follow, we find that the UNDT fully and fairly considered the merits of his case and was in no doubt as to its substance.

¹¹ *Applicant v. Secretary-General of the United Nations*, Judgment on Receivability No. UNDT/2013/177, para. 28.

¹² *Kadri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-512, para. 20.

¹³ *Ibid.*, paras. 28-31.

25. In order to ensure that he received a fair hearing of the issues raised by Mr. Kadri, the UNDT ordered him to amend his pleadings “in order to better articulate the continued harassment and discrimination he alleged to have suffered”.¹⁴ It also advised him “[i]n the interests of proper access to justice and for a fair and expeditious disposal of the case” to “seek professional legal advice from the Office of Staff Legal Assistance with a view to properly drafting the amended pleadings”.¹⁵ Mr. Kadri did not accept this advice as he considered that it was in his best interests to be self-represented.¹⁶

26. The UNDT correctly considered that, having regard to the Appeals Tribunal’s remand of the case, “the legal issue arising for consideration ... is whether the Applicant suffered any continued harassment and discrimination subsequent to the Settlement Agreement entered into with ESCWA”.¹⁷

27. Having considered Mr. Kadri’s amended pleadings, the UNDT concluded that his claim of continued harassment and discrimination was not subsequent to the settlement agreement but was related to its implementation and interpretation. It found that his case was “that he was unfairly excluded from competing for a D-1 level post in the ESCWA Economic Development and Globalization Division and that his OSF contains adverse materials that imperil any efforts to secure future employment in ESCWA or elsewhere in the United Nations. ... [His] claim is that under the terms of the said Settlement Agreement he could apply for future positions in ESCWA and that his exclusion from being fully considered subsequently in a position at ESCWA constituted continued harassment and discrimination. This claim is the crux of the remanded case.”¹⁸

28. The UNDT considered that “in order to determine the allegations of continued harassment and discrimination here, it must recognize that [Mr. Kadri] is asking the Tribunal to order the implementation of what he understands to be the true meaning of the said Settlement Agreement”.¹⁹ In other words, “[his] interpretation of the Settlement Agreement which he signed with ESCWA management on 24 April 2010 is that he ought to have been shortlisted and interviewed for the new position at ESCWA to which he applied in May 2011.

¹⁴ Impugned Judgment on Liability and Relief, para. 17.

¹⁵ *Kadri v. Secretary-General of the United Nations*, Order No. 404 (NBI/2016), para. 12.

¹⁶ See Mr. Kadri’s motion dated 5 September 2016; also his amended pleadings, first paragraph.

¹⁷ Impugned Judgment on Liability and Relief, para. 17.

¹⁸ *Ibid.*, paras. 18 and 21.

¹⁹ *Ibid.*, para. 22.

His interpretation of the settlement agreement also includes that all adverse material in his OSF were to be removed. The facts that he was not invited to interview for the position and that adverse materials were not removed from his OSF form the basis of his claim of continued harassment and discrimination.”²⁰

29. We find no error by the UNDT in its findings. Mr. Kadri’s claim of continued harassment is clearly based on his interpretation of the settlement agreement as permitting him to apply for a job in ESCWA. In this regard, the only act of alleged continued harassment and discrimination that he relies on is his not being considered for the post of Director.

30. Mr. Kadri claims that the UNDT did not consider a number of witness statements presented in his case. This is not correct. The UNDT specifically refers to the statement of one of the witnesses in paragraphs 14.d and 28 of its Judgment. The UNDT obviously did not consider that the witness statements were sufficient to support his claim of continuing harassment and discrimination going beyond the subject matter of the settlement agreement. We find no reason to reverse the UNDT’s assessment of the evidence.

31. There was no evidence, and indeed no pleadings, of any continued harassment or discrimination not associated with the implementation or interpretation of the settlement agreement. In fact, the UNDT’s conclusions and findings in this regard are consistent with Mr. Kadri’s own pleadings. In paragraph 4 of his amended pleadings he alleges: “I was targeted and discriminated against by the management of ESCWA. ESCWA’s interpretation of the agreement is therefore subject to this inherent bias.”²¹

32. There is no need for us to rule on whether or not Mr. Kadri was correct in his argument that the terms of the settlement agreement entitled him to apply for future positions in ESCWA because, under the applicable law, he is simply out of time to make such a challenge.

33. Article 8(2) of the UNDT Statute provides:

An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day

²⁰ *Ibid.*, para. 23.

²¹ Italics in original omitted.

for the implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of signing of the agreement.

34. The implementation of the settlement agreement was concluded on 23 August 2012 because Mr. Kadri's contract was renewed only through 23 August 2012 and he was separated from service the following day in accordance with paragraphs 2 and 5 of the settlement agreement. Mr. Kadri filed his application with the UNDT on 7 January 2013. We find that his application was therefore not receivable as it was filed after the agreement had already been fully implemented and therefore, pursuant to Article 8(2) of the UNDT Statute, it was not subject to judicial review.

35. The UNDT's finding of non-receivability is not based on Article 8(2) of its Statute, but on Article 7(4) of its Rules of Procedure. Article 7(4) provides:

Where an application is filed to enforce the implementation of an agreement reached through mediation, the application shall be receivable if filed within 90 calendar days of the last day for implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after 30 calendar days from the date of the signing of the agreement.

36. In our view, the UNDT was not correct in finding that no date was specified in the settlement agreement for its implementation. The last day for implementation can be readily discerned as being 23 August 2012. Pursuant to Article 7(4) of the UNDT Rules of Procedure, Mr. Kadri's challenge to the settlement agreement was therefore out of time because it was filed more than 90 calendar days after the last day for implementation, and not because it was filed more than 30 calendar days from the signing of the agreement as held by the UNDT.

37. Mr. Kadri also argues that his personnel file contains adverse material as a result of which "it is impossible for me to be rehired at UN-ESCWA and anywhere else within or outside the UN, which makes the agreement self-contradictory since it includes a clause that allows me to be rehired".

38. There is no merit at all to this argument. Firstly, he is out of time to challenge the agreement. As held by the UNDT: “Insofar as this Application concerns what uses the adverse materials on the Applicant’s OSF could be put to by the Administration with regard to the terms of the Settlement Agreement, the claim is not receivable.”²²

39. Secondly, even assuming, *arguendo*, that such a claim is receivable, there was no evidence upon which the UNDT could find that the Administration had provided any negative information about him contrary to the terms of the agreement, nor that it had even been contacted by prospective employers.

40. In conclusion, we find that Mr. Kadri has failed to persuade us that the UNDT committed any error in arriving at its Judgment. It follows that the appeal must fail.

41. His claim for costs of USD 10,000 also fails.

42. Article 9(2) of the Appeals Tribunal Statute provides: “Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party.”

43. We find that Mr. Kadri has failed to establish that the Secretary-General has manifestly abused the appeals process in any way. There is therefore no justification for an award of costs.

²² Impugned Judgment on Liability and Relief, para. 29.

Judgment

44. The appeal is dismissed in its entirety and Judgment No. UNDT/2016/211 is affirmed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Knierim

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar