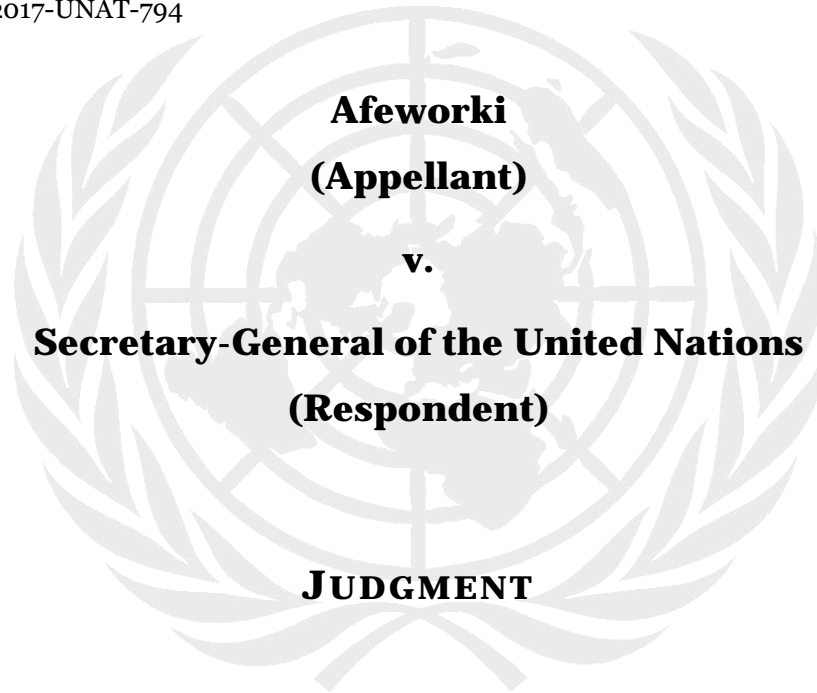




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-794



Before: Judge John Murphy, Presiding
Judge Deborah Thomas-Felix
Judge Sabine Knierim

Case No.: 2017-1078

Date: 27 October 2017

Registrar: Weicheng Lin

Counsel for Ms. Afeworki: Self-represented

Counsel for Secretary-General: Nathalie Defrasne/Isavella Maria Vasilogorgi

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Receivability No. UNDT/2017/011, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 3 March 2017, in the case of *Afeworki v. Secretary-General of the United Nations*. Ms. Kibra Afeworki filed her appeal on 27 April 2017, and the Secretary-General filed his answer on 7 July 2017.

Facts and Procedure

2. The appellant, Ms. Afeworki, commenced employment with the Organization on 16 August 2001, and has subsequently worked as an Administrative Assistant in various peacekeeping missions.

3. On 1 July 2013, she was reassigned as an Administrative Assistant at the FS-4 level to the Travel Unit of the Regional Service Centre in Entebbe (RSCE). Her last fixed-term appointment was from 1 July 2014 until 30 June 2015.

4. Ms. Afeworki requested, and was granted, special leave without pay (SLWOP) from 21 October 2013 through 30 June 2015, i.e., through the end of her appointment.

5. By a circular dated 3 March 2015, RSCE staff members, including Ms. Afeworki, were informed of a retrenchment exercise in which 75 Field Service (FS) staff posts would be converted to national posts for the financial year commencing 1 July 2015 and the appointments to them would not be renewed beyond 30 June 2015.

6. The proposed staffing structure was submitted for review and approval by the General Assembly. In anticipation of the approval of the proposed staffing structure, a comparative review process (CRP) was to be conducted to determine which posts would and would not survive the nationalisation exercise.

7. By a circular dated 5 March 2015, the RSCE staff received further information about the process, its criteria, and projected timeline. Staff were informed that the results of the comparative review would be communicated by individual letters and that termination notices were subject to appeal or challenge through the Management Evaluation Unit (MEU).

Staff members were directed to the Office of Staff Legal Assistance for advice. A further circular dated 12 March 2015 informed of the evaluation criteria for the comparative review.

8. On 13 May 2015, Ms. Afeworki was informed through a letter from the Chief, RSCE that following completion of the CRP, her fixed-term appointment would not be extended beyond 30 June 2015. The relevant part of the letter reads:

The Secretary-General proposed a reduction in international posts in the RSCE budget for 2015-2016. The budget proposal is currently being considered by the General Assembly for implementation effective 1 July 2015.

A comparative review of staff members in functions where there are more civilian staff than the number of posts proposed to be retained in the new structure was conducted. The comparative review process has been finalized. It is with regret that I have to inform you that you are among those identified for retrenchment effective 1 July 2015.

As a result, your fixed term appointment will not be renewed beyond 30 June 2015, in line with Staff Rule 9.4.

In the interim, we encourage you to apply to suitable job openings in INSPIRA. This is especially important if you are not on a [Field Central Review Board (FCRB)] roster since selection for other missions is made primarily from the rosters.

9. On 25 June 2015, the Chief, RSCE informed all staff by e-mail that the Fifth Committee of the General Assembly had decided to implement the nationalisation plan for RSCE in a phased manner, over a two-year period, by nationalizing 34 FS posts in 2015-2016, and a further 34 posts in 2016-2017. The relevant part of the e-mail reads:¹

The General Assembly's Fifth Committee, which is in charge of administrative and budgetary matters, reached agreement yesterday on a number of cross-cutting issues related to the financing of United Nations peacekeeping operations.

In its draft resolution (A/C.5/69/L.60 – para 59-65), the Committee decided to give operational and management independence to the Regional Service Centre, and indicates that a separate budget for the RSCE should be submitted to the General Assembly for 2016/17.

The resolution also endorses the Secretary-General's initiative that the Centre report directly to the Department of Field Support.

¹ Emphases in original.

The Committee furthermore decided to implement the nationalization plan for the RSCE in a phased manner, over a two-year period, by nationalizing 34 FS posts (50 per cent) in 2015/16, and a further 34 posts in 2016/17.

In light of this decision a review of affected staff is being conducted and notifications will be sent shortly. Also, given the decision to phase the nationalization over two years, the plan to temporarily extend 40 FS posts through December 2015 to ease the impact of nationalization was no longer being pursued.

10. A few days later, on 30 June 2015, Ms. Afeworki received a formal letter informing her that her fixed-term appointment was not to be renewed beyond that date. The relevant part of this letter reads:

Re: Notice of non-extension of your fixed-term appointment with the Regional Service Centre, Entebbe (RSCE)

Pursuant to the General Assembly's approval of the mission's budget for 2015-2016, it is with regret that I have to inform you that your fixed-term appointment will not be renewed in line with Staff Rule 9.4.

11. Ms. Afeworki sought management evaluation of the decision on 28 August 2015.

12. On 30 September 2015, the MEU found Ms. Afeworki's request for management evaluation time-barred as the requisite 60-day time period stipulated in Staff Rule 11.2(c) had started to run from the first notification of non-renewal on 13 May 2015 and had expired on 13 July 2015, about six weeks before Ms. Afeworki referred the matter to management evaluation. The MEU nevertheless addressed the merits of the complaint and found that Ms. Afeworki suffered no prejudice in the CRP that led to the impugned decision.

13. On 28 December 2015, Ms. Afeworki filed an application with the UNDT contesting the decision not to extend her fixed-term appointment beyond 30 June 2015.

14. The UNDT rendered its Judgment on 3 March 2017 dismissing the application. It agreed with the MEU that Ms. Afeworki's application was not receivable as she had not submitted her request for management evaluation within the stipulated time limit. The time limit began to run when Ms. Afeworki was informed of the decision not to renew her appointment on 13 May 2015 by the notice of separation whose terms were "unequivocal" and in which nothing was suggested that the decision was preliminary or conditional. The decision was presented to her as a final decision and the subsequent e-mail of 25 June 2015 did not indicate that the decisions on separation which had already been communicated were withdrawn, suspended, modified in any

way or rendered the results of the CRP immaterial. Hence, the UNDT concluded, the e-mail of 25 June 2015 did not create any direct legal consequences for Ms. Afeworki or any other staff member. The notification given to Ms. Afeworki on 30 June 2015 merely affirmed that the earlier administrative decision remained in force and was a mere reiteration of the administrative decision of 13 May 2015. To the extent that Ms. Afeworki directed her claim against the procedure and results of the comparative review and the alleged omission to convert her post into a permanent one, the process was completed and Ms. Afeworki was notified on 13 May 2015 of its results. The time for a challenge of that decision began to run on that date. On these grounds, the UNDT found that Ms. Afeworki's request for management evaluation submitted on 28 August 2015 had not been timely in light of Staff Rule 11.2(c) and her application before the UNDT was thus not receivable.

15. On 6 October 2017, Ms. Afeworki filed a motion asking the Appeals Tribunal to order the Secretary-General to produce additional evidence.

Submissions

Ms. Afeworki's Appeal

16. Ms. Afeworki submits that the UNDT erred in finding her application not receivable as she had submitted her request for management evaluation within the stipulated timelines. The time limit to request management evaluation began to run as of 30 June 2015, the date she claims she was properly notified of the decision not to extend her fixed-term appointment. The notification she received on 13 May 2015 was based on a mere assumption that 75 FS posts would be abolished and the subsequent communication by the Chief RSCE to all RSCE staff members on 25 June 2015 occurred in "completely changed circumstances". She claims that a fresh review of staffing (or CRP) took place between 25 June and 30 June 2015 and it was in terms of that review that her fixed-term contract was not extended. The non-renewal notification dated 30 June 2015 was therefore not a mere confirmation of prior decisions but the relevant administrative decision not to renew her contract.

17. Ms. Afeworki contends that the UNDT erred in not determining whether she suffered discrimination in the CRP of the FS-4 level posts and in deciding not to order the production of additional evidence by the Secretary-General. She asserts that had the UNDT examined her arguments and had such evidence been produced as requested, the UNDT would have decided

in her favour on the issue of receivability. She requests the Appeals Tribunal to order the Secretary-General to produce additional evidence on the retrenchment and CRP and to be permitted to make further submissions on the basis of such evidence. She filed a separate motion with this Tribunal on 6 October 2017 for an order directing the Secretary-General to produce the documentary evidence in relation to the CRP.

18. Ms. Afeworki asks that the Appeals Tribunal vacate the UNDT Judgment.

The Secretary-General's Answer

19. The Secretary-General contends that the UNDT was correct in finding that Ms. Afeworki's request for management evaluation was time-barred and thus dismissing her application as not receivable. He submits that the UNDT correctly distinguished simple reiteration of an earlier decision from the making of an entirely new administrative decision. The 13 May 2015 notification was the administrative decision that triggered the time limit to request management evaluation as Ms. Afeworki was clearly and unequivocally informed that her fixed-term appointment would not be renewed. The UNDT did not err in finding that the communications of 25 and 30 June 2015 did not alter the original administrative decision of 13 May 2015 and thus did not reset the clock to seek management evaluation.

20. The Secretary-General further submits that Ms. Afeworki has not established any other error warranting the reversal of the impugned Judgment. With respect to Ms. Afeworki's submissions on the merits and the UNDT's decision not to order production of evidence, the Secretary-General claims that she merely reargues matters from her application before the UNDT and since the application was time-barred, the UNDT correctly refrained from addressing the substantive parts of Ms. Afeworki's claims or her request for production of evidence.

21. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

22. The essential question for determination in this appeal is whether the UNDT erred when it found that Ms. Afeworki's application was not receivable on the ground that her request for management evaluation was time-barred. Did the UNDT correctly find that the relevant administrative decision triggering the time limit to request management evaluation was the

separation notification received by Ms. Afeworki on 13 May 2015 and that the subsequent communications did not reset the clock for requesting management evaluation?

23. The relevant provisions of Article 8(1) of the UNDT Statute provide:

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required.

24. Staff Rule 11.2(c) provides as follows:²

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. Article 8(3) of the UNDT Statute provides:

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

26. As stated, the UNDT held that the application was not receivable *ratione materiae* on the ground that Ms. Afeworki's request for management evaluation was time-barred in that there had been non-compliance with Staff Rule 11.2(c).³

27. This Tribunal has repeatedly and consistently strictly enforced the time limits for filing applications and appeals. Strict adherence to filing deadlines assures one of the goals of the system of administration of justice—the timely hearing of cases and rendering

² Secretary-General's Bulletin ST/SGB/2014/1 (Staff Regulations and Staff Rules of the United Nations).

³ An application is not receivable *ratione temporis* if the application to the UNDT was not filed within the time period stipulated in Article 8(1)(d) of the UNDT Statute, being within receipt of a response or within 90 days of the expiry of the relevant response period (30 or 45 days) by management to the submission to management evaluation; whereas in cases in which the request for management evaluation was not timely in terms of Staff Rule 11.2(c), the application is considered not receivable *ratione materiae*.

of judgments.⁴ The question, therefore, is whether Ms. Afeworki sought management evaluation within the stipulated time period so as to make her application receivable before the UNDT. For this determination it is necessary to decide which of the communications triggered the running of the 60-day time period.

28. An administrative decision will have the effect of triggering the running of a time limit if it is intended to have final effect in the form of direct legal consequences on the rights and obligations of the staff member. An adverse administrative decision may be withdrawn or suspended so as to render it moot and no longer subject to challenge.⁵

29. The e-mail of 13 May 2015 unequivocally informed Ms. Afeworki that on the basis of the completed comparative review an administrative decision had been taken not to renew her fixed-term contract and that her employment consequently would terminate on 30 June 2015. The general e-mail of 25 June 2015 addressed to all staff, however, conveyed that there had been a significant change and that the suppositions informing the earlier decision had altered. In particular, the Fifth Committee of the General Assembly had decided to give operational and managerial independence to the RSCE, called for a separate budget from the RSCE and changed its reporting line by requiring it to report directly to the Department of Field Support. It also decided to change the implementation of the restructuring and nationalisation plan.

30. While it is correct that the e-mail of 25 June 2015 does not overtly rescind or suspend the earlier decision of 13 May 2015 to terminate the employment of those employees selected for termination in the CRP, it is clear though that the intention was to revisit the earlier decisions by conducting a review of affected staff, to decide the matter afresh and to issue new notifications. Such intention is confirmed by the terms and wording of the letter of 30 June 2015, which was headed and described in its own terms as a “Notice of non-extension” of the fixed-term appointment. Had the intention merely been to confirm or reiterate the decision of 13 May 2015, one would have expected the letter to refer to that earlier decision, which it does not, and to confirm that the original decision still stands. Instead the decision (read with the e-mail of 25 June 2015) is communicated as a decision taken after a review of the earlier decision and is a pronouncement in final terms that the contract would not be renewed. As such, the decision goes beyond mere reiteration

⁴ *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, para. 26.

⁵ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-328.

and constitutes a fresh administrative decision impliedly substituting the decision of 13 May 2015.

31. Accordingly, the UNDT erred in its findings that Ms. Afeworki was obliged in terms of Staff Rule 11.2(c) to request management evaluation within 60 calendar days from 13 May 2015, the date she received notification that her fixed-term contract would not be renewed, that she had failed to do so and hence that the application to the UNDT was not receivable. Ms. Afeworki sought management evaluation on 28 August 2015 within 60 days of the contested administrative decision of 30 June 2015 and hence her application was receivable. Her appeal must, accordingly, be upheld.

32. Regarding her motion to compel the discovery of the documentary evidence and her submissions in relation to the merits of the non-renewal of her contract, these are matters properly reserved for the UNDT which rightly did not canvass them in its Judgment in light of its decision on receivability.

Judgment

33. The appeal is upheld and Judgment No. UNDT/2017/011 is vacated. The case is remanded to the UNDT for a consideration of the merits.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Knierim

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar