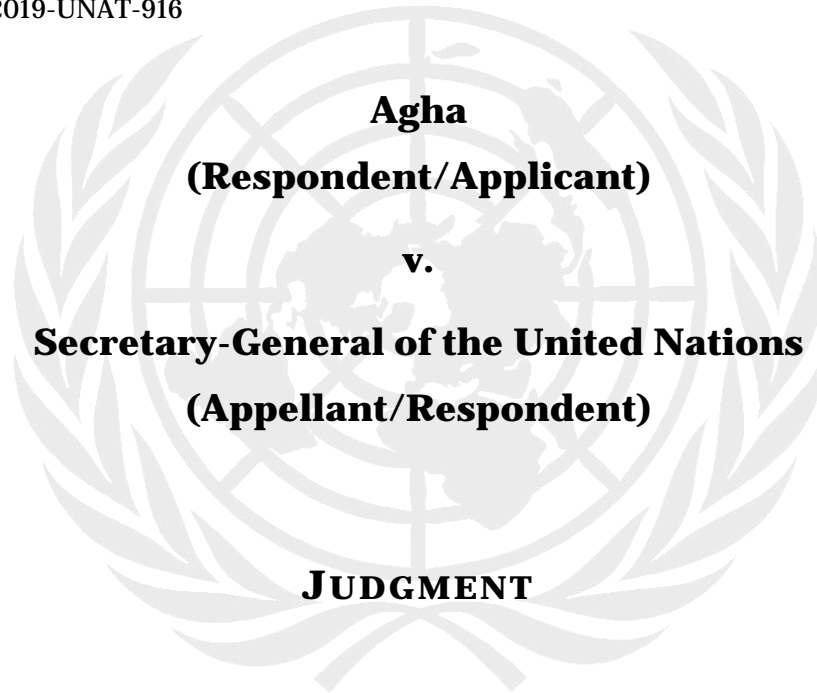




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-916



**Agha
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Martha Halfeld Judge Deborah Thomas-Felix
Case No.:	2018-1211
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Respondent:	Self-represented
Counsel for Appellant:	Wambui Mwangi

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/092, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 20 September 2018, in the case of *Agha v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 19 November 2018, and Mr. Mujtaba Agha filed his answer on 17 January 2019.

Facts and Procedure

2. The following facts are uncontested:¹

... [Mr. Agha] joined the [Department of Safety and Security (DSS)] as a Security Officer in 2005. He was promoted [to] Senior Security Officer in February 2016. According to the uncontested statement from Mr. Agha, he was last issued with a fixed-term appointment from 1 March 2015 to 28 February 2017.

... From 20 February 2016 to 16 April 2016, Mr. Agha was on approved annual leave and, from 19 April 2016 to 30 April 2016, he was on approved certified sick leave.

... [Mr. Agha] applied for additional certified sick leave for the period from 1 May 2016 to 18 May 2016, which was not approved by the Medical Services Division (MSD) due to lack of supporting documents.

... In May 2016, [Mr. Agha] requested [Special Leave Without Pay (SLWOP)] for the period from 18 May 2016 to 15 February 2017.

... On 16 August 2016, DSS informed [Mr. Agha] that SLWOP [could] go up until end of December 2016 [...] but that he was required to return to work after that period.

... On the same date, [Mr. Agha] requested that his SLWOP be extended until the end of January 2017.

... On 4 October 2016, DSS advised [Mr. Agha] that his request for SLWOP had not been approved due to insufficient documentary evidence in support of his request despite repeated reminders from the DSS. [Mr. Agha] was instructed to return to work without further delay and that “failure to return within a reasonable period of two weeks may result in administrative actions for abandonment of post”.

... [Mr. Agha] responded to the 4 October 2016 email providing new information and documentation to support his request for SLWOP. The Senior Human Resources Officer of DSS replied stating that the additional information would be brought to the attention of the Chief of the Security and Safety Section (SSS). The Senior Human

¹ Impugned Judgment, paras. 3-15.

Resources Officer further asked [Mr. Agha] to clarify what would be his availability to return to work if his request for SLWOP was granted.

... On 3 February 2017, [Mr. Agha] received an email from the Acting Administrative Officer at DSS requesting an explanation as to why he had not reported back to duty following expiration of the approved leave period. [Mr. Agha] was requested to provide an explanation for his absence, or a medical certificate of illness within 10 working days.

... On 22 February 2017, [Mr. Agha] wrote to DSS indicating that his mother had been discharged from the hospital and his doctor had allowed him to travel, so he was returning to New York.

... On 24 February 2017, the Senior Human Resources Offices of DSS informed [Mr. Agha] that SSS had recommended non-extension of his fixed-term appointment beyond its expiry on 28 February 2017.

... On 13 March 2017, [Mr. Agha] wrote to the Under-Secretary-General for Security and Safety (USG/DSS) explaining that he overstayed his leave due to his medical condition and the critical health condition of his mother, which he considered to be extraordinary.

... On 28 March 2017, the Director of the Division of Headquarters, SSS, wrote to [Mr. Agha] on behalf of the USG/DSS. He informed [Mr. Agha] that SWLOP was not approved in his case amid multiple follow-up attempts by SSS and that [Mr. Agha] failed to respond in a timely manner to a request regarding his continued absence. The Director noted that [Mr. Agha] had been given an opportunity to return to work and/or provide medical certification on 4 October 2016 as well as on 3 February 2017.

3. Mr. Agha filed an application before the UNDT which issued its decision on 20 September 2018. The UNDT ordered the contested decision not to renew his fixed-term appointment be rescinded and Mr. Agha be retroactively reinstated from 1 March 2017 until 28 February 2019. In addition, the UNDT ordered the Secretary-General to retroactively pay Mr. Agha his salary from 1 March 2017 to the effective date of his reinstatement together with his and the Organization's contributions to the Pension Fund for this period, as compensation for loss of earnings in accordance with Article 10(5)(a) of the UNDT Statute. As an alternative to reinstatement, the UNDT ordered in-lieu compensation in the amount of two years' net base salary, which would include the compensation for loss of earnings.

4. The Administration admitted that the decision not to extend Mr. Agha's fixed-term appointment was based on his unauthorized absence. The UNDT concluded that the non-renewal decision constituted a separation decision for abandonment of post, which was issued unlawfully, without following the mandatory procedures of Administrative

Instruction ST/AI/400 (Abandonment of post). For the Administration to infer Mr. Agha's intention to abandon his post it first had to follow the procedures. The UNDT noted there was no evidence that the Administration followed the procedures set forth in ST/AI/400. Mr. Agha had been in contact with the Organization during his absence and he had clearly confirmed his will and interest in maintaining the post. The four-month delay in considering his initial request for SLWOP from May to October 2016 cannot be attributed to Mr. Agha who had submitted his request and documentation timely. Upon notice of rejection on 6 October 2016, Mr. Agha submitted additional documents and renewed his request. On the same day, the Senior Human Resources Officer of DSS informed Mr. Agha that his request would be discussed with the Chief of SSS, which gave Mr. Agha the indication that his request for SLWOP was under consideration. While there is no expectation of renewal of fixed-term appointments, the Organization must act fairly, justly, and transparently. The UNDT found that the Administration failed to act fairly, justly, and transparently as it had led Mr. Agha to believe that it was still considering granting him SLWOP, while at the same time it recommended the non-extension of his fixed-term appointment due to his unauthorized absence.

5. The UNDT distinguished the facts of this case from that of *Abdallah*,² wherein the Administration's decision not to renew a staff member for a pattern of absenteeism was upheld as lawful. In the instant matter, Mr. Agha's request for SWLOP was under review and the Administration cannot argue that his absences were unjustified when it had failed to properly respond to Mr. Agha's request for SLWOP. In addition, unlike in *Abdallah*, Mr. Agha's absences were not recorded in an annual report or in his performance review. Accordingly, the UNDT found that the non-renewal of Mr. Agha's appointment was unlawful.

Submissions

The Secretary-General's Appeal

6. The Secretary-General requests the Appeals Tribunal to vacate the impugned Judgment in its entirety. The contested decision of non-renewal was lawful as it was solely based on Mr. Agha's unauthorised absence from work, which was detailed in the 28 March 2017 e-mail from DSS to Mr. Agha. Mr. Agha requested SLWOP from 18 May 2016 to 15 February 2017. On 22 June 2016, DSS informed him that in order to process his request further documentation was required. On 16 August 2016, based on the information Mr. Agha had provided to DSS, DSS

² *Abdallah v. Secretary General of the United Nations*, Judgment No. 2010-UNAT-091.

offered him SLWOP until 31 December 2016, but this offer was conditional on his return to duty on 1 January 2017. Mr. Agha, however, requested that SLWOP run until 31 January 2017. Accordingly, no agreement was concluded as to his request for SLWOP. On 4 October 2016, DSS wrote to Mr. Agha and informed him that because of the lack of supporting documentary evidence, his request for SLWOP had not been approved. Mr. Agha was told to report for duty on 1 November 2016. He did not report for duty but instead e-mailed DSS in February 2017 to indicate he was returning to New York. On 24 February 2017, DSS informed Mr. Agha that his appointment would not be renewed upon its expiry on 28 February 2017. Mr. Agha was thereafter separated. On 28 March 2017, Mr. Agha requested the reason for his non-renewal and he was told that it was because of his failure to provide justification for his absence from work from 1 May 2016 to 15 February 2017. Mr. Agha had a pattern of absences which were unsupported by documentation, which formed the basis of the non-renewal since the supporting documents from his medical providers, which Mr. Agha had furnished on 12 June 2016, 18 June 2016, 11 July 2016, 3 November 2016, and 24 February 2017 had documented his illness, but had not stated that he was required to be absent from work.

7. The Secretary-General also argues that the UNDT erred in distinguishing *Abdallah* from the present case. In *Abdallah*, the staff member's frequent absences were recorded in his performance appraisal reports and despite warnings he did not improve. The staff member challenged his non-renewal as a violation of his due process rights because he was separated without completion of his performance appraisal. In the instant matter, the contested decision was also based on work absences. Mr. Agha's request for SLWOP was not under consideration in February 2017, and as early as May 2016, Mr. Agha had been made aware that his absences were unauthorized and yet he still failed to return to work. In August 2016, DSS attempted to obtain relevant information in order to approve his SLWOP, but four months later in October 2016, having not heard from Mr. Agha, the DSS instructed Mr. Agha to report for duty by 1 November 2016. At this point, it had been made clear that his request for SLWOP was no longer under consideration and he was expected to return to work. Just like in *Abdallah*, Mr. Agha was absent for a considerable length of time (1 May 2016-22 February 2017). Mr. Agha's absences had been recorded in internal attendance records. The UNDT erred in requiring a performance appraisal report to document Mr. Agha's absence for the *Abdallah* case to be relevant. Moreover, Mr. Agha had been absent an entire year throughout the entire 2016-2017 performance cycle so there would have been no evaluation report to document his absence. Mr. Agha's absence had been documented by other means. The Administration had taken

appropriate steps to document his absences, and in this regard Mr. Agha fails to meet his burden of demonstrating there was ill motivation or bias in the contested decision.

8. The Secretary-General also argues that the UNDT erred in concluding the Administration did not act fairly and transparently toward Mr. Agha. There is no expectancy of renewal. The discretion not to renew an appointment will be upheld where the reason provided by the Administration is supported by the facts. If it is based on valid reasons and in compliance with procedural requirements, the fixed-term appointment may not be renewed. In Mr. Agha's case, the reason for his non-renewal was his absence, which was supported by facts. The Administration had acted fairly and transparently by informing him as early as October 2016 that his request for SLWOP had not been approved. Mr. Agha had been given several opportunities to provide additional documentation to certify his sick leave and support his SLWOP request. The recommendation not to renew Mr. Agha's contract was made several months after Mr. Agha had been informed that he had been expected to report for duty. Mr. Agha fails to demonstrate how the non-renewal decision was not supported by facts and/or based on a valid reason. The Administration had the discretionary authority not to renew Mr. Agha's appointment and exercised its authority appropriately.

9. Further, the Secretary-General argues that the UNDT erred in concluding that the basis for the contested decision was abandonment. There is no support for this conclusion. Mr. Agha has not provided any evidence that the Administration had considered his absence as an abandonment of post. The DSS' e-mail of 4 October 2016 to Mr. Agha merely stated that his request for SLWOP had been rejected and if he did not report to work it "may result in administrative actions for abandonment of post". Also, the e-mail from DSS to Mr. Agha of 3 February 2017, wherein DSS had requested an explanation as to why Mr. Agha did not report to duty, did not state that any administrative actions regarding abandonment of post were being taken. An email to Mr. Agha from DSS representative, Ms. S., raising abandonment of post as an issue was her own opinion and not the view of the Administration. Moreover, *Abdallah* indicates that absenteeism may be the basis for non-renewal and confirms that it is not constructive dismissal on the basis of abandonment and does not fall under ST/AI/400. Thus, the UNDT erred in concluding that the non-renewal decision was actually a separation decision for abandonment of post.

10. Lastly, the Secretary-General argues that the UNDT erred in awarding Mr. Agha relief as the contested decision was a lawful decision based on the aforementioned reasons.

Mr. Agha's Answer

11. Mr. Agha requests the Appeals Tribunal to uphold the UNDT Judgment in its entirety and specifically ensure he is reinstated to the post that he encumbered since 2005 and for which he was almost eligible to receive 15-year pension benefits. The UNDT did not err in finding his separation was unlawful. On 23 February 2017, the date he was notified he would not be renewed, his request for SLWOP was still pending and thus the Administration could not consider this time as unauthorized absence. The Administration did not act justly, fairly, and transparently as it took several months to respond to his request for SLWOP despite his repeated provision of additional documents that they had requested. The Administration had led him to believe it was considering his request.

12. Mr. Agha argues that the UNDT correctly held that the contested administrative decision was actually separation based on abandonment of post and that the Administration had not followed the requisite procedures. At all times, he had been in contact with DSS and expressed his will and intent to continue in his post. In turn, the Secretary-General's argument that he failed to meet any duties or obligations of a staff member is unfounded.

13. Mr. Agha submits that the UNDT correctly distinguished *Abdallah* from his situation. In *Abdallah*, the absences were found to be a justified reason for non-renewal, and the absences were documented as unauthorized and had formed part of the performance review. In Mr. Agha's situation, however, the Administration was considering his request for SLWOP and could not therefore argue his absences were unauthorized.

14. Lastly, as to relief, Mr. Agha argues that the UNDT did not err in fact or in law and accordingly was correct in its award of relief.

Considerations

15. The Secretary-General appeals the UNDT Judgment rescinding his decision not to renew Mr. Agha's fixed-term appointment. The Secretary-General contends that the non-renewal decision was lawful as it was solely based on Mr. Agha's absence from work. He submits that the UNDT erred in concluding that the Administration did not act fairly and transparently towards Mr. Agha and also erred in concluding that the basis for the contested decision was abandonment of post.

16. On appeal, we must determine whether the UNDT erred in law or fact when it ultimately concluded that the Administration's decision not to renew Mr. Agha's fixed-term appointment was unlawful. Before considering that question, we turn to the standard of judicial review in non-renewal cases. We recall the well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.³ Even the renewal of the appointment of a staff member on successive contracts does not, in and of itself, give grounds for an expectancy of renewal, unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended.⁴ Separation as a result of expiration of a fixed-term appointment takes place automatically, without prior notice, on the expiration date specified in the letter of appointment.⁵

17. Nevertheless, an administrative decision not to renew a fixed term appointment can be challenged on the grounds that the Administration has not acted fairly, justly, or transparently with the staff member or was motivated by bias, prejudice or improper motive.⁶ The staff member has the burden of proving such factors played a role in the administrative decision.⁷

18. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate.⁸ The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.⁹

³ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-949, paras. 25-27; *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25; *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 33.

⁴ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-949, para. 25.

⁵ *Koumoin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-119.

⁶ *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32.

⁷ *Ibid.*

⁸ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-949, para. 27.

⁹ *Ibid.*

19. An administrative decision not to renew a fixed-term appointment must not be deemed unlawful on the sole ground that the decision itself does not articulate any reason for the non-renewal. But that does not mean that the Administration is not required to disclose the reasons not to renew the appointment.¹⁰

20. Rather, the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunal's ability to judicially review the validity of the Administration's decision.¹¹

21. In the present case, the UNDT concluded that the Administration's decision not to renew Mr. Agha's fixed-term appointment was unlawful for two reasons. Firstly, it found that the non-renewal decision following the expiration of Mr. Agha's contract constituted a separation decision for abandonment of post, which was issued unlawfully, without following the mandatory procedure established in ST/AI/400. Secondly, it found that the Administration failed to act fairly, justly, and transparently in leading Mr. Agha to believe that it was still considering granting him SLWOP while at the same time recommending the non-renewal of his fixed-term appointment due to his unauthorized absence.

Was the non-renewal decision a separation decision for abandonment of post?

22. The UNDT's conclusion that the non-renewal decision following the expiration of Mr. Agha's contract constituted an unlawful separation decision for abandonment of post was apparently based on a warning given to Mr. Agha by DSS on 4 October 2016, that failure to report to work may result in administrative actions for abandonment of post. However, that warning was not taken any further. There was no evidence that the Administration initiated any administrative actions with respect to abandonment of post. In fact, the management evaluation, dated 24 May 2017, made it clear to Mr. Agha that the Administration had not pursued his separation on grounds of abandonment of post, and that the non-renewal of his appointment had been "based on [his] failure to meet basic obligations to report for duty or to respond to queries in a timely manner regarding [his] prolonged unauthorized absence". On that basis, the Management Evaluation Unit recommended upholding the decision not to renew his fixed-term appointment and the Secretary-General decided to accept that recommendation. Also, the e-mail

¹⁰ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201.

¹¹ *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825; *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780.

to Mr. Agha from the Director of the Division of Headquarters, SSS on 28 March 2017 pointed out to Mr. Agha “that [he] did not report for duty after being advised that [his] leave was not approved. Moreover, [he] also failed to respond in a timely manner to a request regarding [his] continued absence.”

23. The UNDT’s finding that the non-renewal decision constituted a separation decision for abandonment of post was not supported by the evidence and was, therefore, an error in fact and in law. The evidence very clearly established that the non-renewal decision was solely based on Mr. Agha’s unauthorized absence from duty.

24. We further find that the UNDT erred in law in distinguishing *Abdallah*¹² from the present case. The *ratio decidendi* in *Abdallah* is that chronic absenteeism may be a lawful basis for a decision not to renew a fixed-term contract. *Abdallah* is, therefore, pertinent to the present case. The matters considered by the UNDT as distinguishing *Abdallah* are not relevant.

Did the Administration act fairly towards Mr. Agha?

25. The evidence on which the UNDT based its finding that the Administration failed to act fairly, justly, and transparently towards Mr. Agha emerged from an exchange of e-mails between DSS and Mr. Agha between 4 October and 6 October 2016.

26. On 4 October 2016, DSS informed Mr. Agha that his request for SLWOP had not been approved because of lack of supporting evidence. He was directed to return to work within two weeks and he was warned that failure to do so may result in administrative actions for abandonment of post. Mr. Agha replied on 6 October 2016, attaching some documents. The Senior Human Resources Officer of DSS replied, saying that he found the documents difficult to understand. He also asked the following question on which the UNDT based its finding that Mr. Agha had been treated unfairly: “Could you please clarify your plans? If your SLWOP is approved, can you commit to returning to work in January 2017?”

27. The UNDT found that “from this language ... at the relevant time, [Mr. Agha’s] request for SLWOP was still under consideration by DSS”. It concluded that the Administration failed to act fairly in leading Mr. Agha to believe that it was still considering granting him SLWOP while at the same time recommending the non-renewal of his fixed-term appointment.

¹² *Abdallah v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-091.

28. The UNDT erred in finding that this was evidence of unfairness. The e-mail from the Senior Human Resources Officer did not say that Mr. Agha's request for SLWOP was being considered. It indicated that consideration was conditional upon Mr. Agha committing to return to work in January 2017, which he never did. Moreover, even if Mr. Agha mistakenly believed that his SLWOP was still being considered, it was clear that the leave would not be approved if he did not commit to returning to duty in January 2017.

29. The burden of proving that the Administration did not act fairly, justly, or transparently rests with Mr. Agha. In our view, there was overwhelming evidence that he has not satisfied this burden. The evidence not only showed that the Administration had treated Mr. Agha fairly, but, that it had treated him with amazing patience.

30. In total, Mr. Agha was absent from his duty station for more than one year, that is from 20 February 2016 to the end of his contract on 28 February 2017. Of that period, 10 months were unauthorized absence from duty. From May 2016, his absence from duty became unauthorized, yet he still failed to return to work. In August 2016, DSS attempted to obtain his commitment to return to duty in January 2017 so that his SLWOP could be approved. By October 2016, nothing had been heard from him, so he was directed to report for duty. Even then, DSS was prepared to consider granting him SLWOP if he would commit to returning to duty in January 2017. He was given many opportunities to provide justification for his leave requests but neglected to do so.

31. The evidence in the case establishes that the Administration acted fairly and transparently towards Mr. Agha. It cannot be said that the decision not to renew his fixed-term appointment on the basis of his failure to report for duty was in any way arbitrary. The facts support the conclusion that such a decision was a reasonable exercise of the Administration's discretion.

32. For the foregoing reasons, we find that the UNDT erred in fact and in law, resulting in a manifestly unreasonable decision.

Judgment

33. The appeal is granted, and Judgment No. UNDT/2018/092 is hereby vacated.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Thomas-Felix

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar