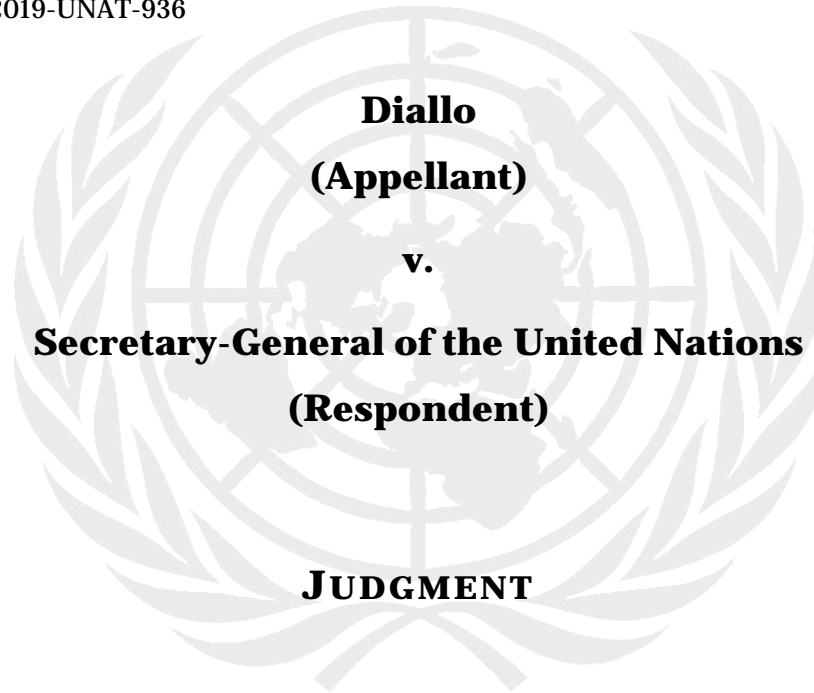




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-936



**Diallo
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2019-1232
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. Diallo	Amadou Ongoiba/Abdrahamane Kanoute
Counsel for Secretary-General:	Maryam Kamali

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Receivability No. UNDT/2019/002, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 8 January 2019, in the case of *Diallo v. Secretary-General of the United Nations*. Mr. Sambala Diallo filed the appeal on 6 February 2019, and the Secretary-General filed his answer on 8 April 2019.

Facts and Procedure

2. At the time of the contested decision, Mr. Diallo was a Logistics Assistant at the G-4 level with the United Nations Population Fund (UNFPA) holding a permanent appointment.

3. By memorandum dated 1 June 2018, the Director, Division for Human Resources (DHR) informed the UNFPA Executive Director that he had determined that Mr. Diallo's performance was unsatisfactory, and he recommended that Mr. Diallo's permanent appointment be terminated. He advised that same day, by way of a separate memorandum addressed to the UNFPA Headquarters Compliance Review Board (CRB), that he would recommend a review by the CRB of his recommendation to terminate Mr. Diallo's appointment.

4. On 26 June 2018, the Chairperson of the CRB sent a letter to the UNFPA Executive Director endorsing the recommendation of the termination of Mr. Diallo's permanent appointment due to his unsatisfactory service.

5. By interoffice memorandum dated 9 August 2018, the UNFPA Executive Director informed Mr. Diallo of the above findings and recommendations and invited him to submit his views and provide any information he deemed appropriate, by no later than 14 August 2018. In response, Mr. Diallo submitted written comments on 10, 13 and 14 August 2018.

6. By letter dated 26 September 2018, the UNFPA Executive Director informed Mr. Diallo of her decision to terminate his appointment.

7. By application dated 18 December 2018, Mr. Diallo contested the decision of the UNFPA Executive Director to terminate his permanent appointment for unsatisfactory service.

8. On 8 January 2019, the UNDT issued Judgment on Receivability No. UNDT/2019/002, dismissing Mr. Diallo's application on the ground that he had failed to request management evaluation of the impugned decision.

9. On 10 May 2019, Mr. Diallo filed a "Motion for Additional Pleadings" before this Tribunal and on 24 May 2019, the Secretary-General filed his response to the motion.

Submissions

Mr. Diallo's Appeal

10. Mr. Diallo's application before the UNDT should have been deemed receivable based on the exception to Staff Rule 11.2(b) which provides that staff members are exempted from the requirement to request management evaluation: (a) if the decision is taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General; or (b) if the decision relates to the imposition of a disciplinary or a non-disciplinary measure pursuant to Staff Rule 10.2.

11. The termination decision was issued by a technical body, the UNFPA CRB and therefore, no prior request for management evaluation was required. Mr. Diallo filed his application pursuant to Staff Rule 11.4(b) according to which, where a staff member is not required to request a management evaluation, pursuant to Staff Rule 11.2(b), he or she may file an application directly with the UNDT within 90 calendar days from the date on which the staff member received notification of the contested decision. Mr. Diallo filed his application within the specified time limit.

12. Moreover, the termination of Mr. Diallo's contract was a dismissal imposed as a disciplinary measure.

13. A permanent appointment cannot be terminated except for the reasons enumerated in the Staff Regulations. Pursuant to the jurisprudence of the former United Nations Administrative Tribunal, a permanent appointment can only be terminated upon a decision which has been reached by means of a complete, fair and reasonable procedure which must be

carried out prior to such a decision. Under the Staff Regulations, Mr. Diallo's appointment may only be terminated for gross negligence or serious misconduct and Mr. Diallo was not accused of either.

14. The decision to terminate Mr. Diallo's appointment was based on flawed reasoning, since in fact his employer requested him, unsuccessfully so, either to resign or to accept a change to his permanent appointment. In the termination decision, express and unlawful reference was made to Staff Rule 10.2(a)(viii), when in fact Staff Rule 10.3(a) was applicable given that Mr. Diallo held a permanent appointment.

15. Pursuant to Staff Rule 3.3(a) and paragraph 4 of Annex 1 (Salary scales and related provisions) to the Staff Regulations, salary increments shall be awarded annually, subject to satisfactory service. Mr. Diallo received, up until the termination of his appointment, salary increments annually. The alleged unsatisfactory service can therefore not be proven and the grounds for the termination of Mr. Diallo's appointment are incorrect.

16. Mr. Diallo has not received his salary for the remaining four years before he could claim his pension rights, the termination decision has affected him psychologically and, after more than 25 years of dedicated service, Mr. Diallo's honour has been compromised. Mr. Diallo requests compensation in the amount of USD 400,000 for the harm caused by the wrongful termination of his appointment. He further requests compensation for lost salary in the amount of 47 months' salary totaling CFAF 37,003,006. Finally, Mr. Diallo requests that the Appeals Tribunal order the Secretary-General to "pay all costs".

The Secretary-General's Answer

17. The UNDT's ruling that Mr. Diallo's application was not receivable absent a request for management evaluation is consistent with Staff Rule 11.2(a) and Article 8(1) of the UNDT Statute and the jurisprudence of the Appeals Tribunal which has held that, under Article 8(1) of the UNDT Statute, the UNDT has jurisdiction to receive applications appealing administrative decisions only when a staff member has previously submitted the impugned decision for management evaluation and the UNDT has no jurisdiction to waive the deadline for management evaluation or administrative review.

18. Mr. Diallo has not established that his application before the UNDT fell within the exceptions to the requirement for a request for management evaluation as defined in Staff Rule 11.2(b). Contrary to Mr. Diallo's contention, the decision to terminate his appointment was not issued pursuant to advice obtained from a technical body. In accordance with Administrative Instruction ST/AI/2018/7 (Technical Bodies) issued on 18 May 2018, technical bodies, for the purpose of Staff Rule 11.2(b), are "[m]edical boards or independent medical practitioners duly authorized to review medical decisions or medical recommendations" as well as Classification Appeals Committees. The UNFPA CRB is a review body that assists managers in ensuring that they have complied with the applicable staff rules and UNFPA's corporate staffing policies. The UNFPA Compliance Review Board does not apply any technical expertise in the same manner as medical boards or Classification Appeals Committees.

19. As to Mr. Diallo's contention that the termination of his contract was in fact a dismissal imposed as a disciplinary measure, this is a new argument that Mr. Diallo had not raised before the UNDT and moreover, is an assertion which is not supported by the facts of the case. The termination of Mr. Diallo's appointment arose from unsatisfactory evaluations from 2014 through 2017, as evidenced in the termination letter sent to him by the UNFPA Executive Director.

20. For the foregoing reasons, Mr. Diallo has not established that his application before the UNDT fell within the exceptions to the requirement for a request for management evaluation as defined in Staff Rule 11.2(b). Accordingly, the UNDT correctly concluded that, in the absence of a request for management evaluation, the application was not receivable. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Mr. Diallo's Motion for Additional Pleadings

21. The following exceptional circumstances warrant the filing of additional pleadings. The UNDT failed to review the facts of Mr. Diallo's case when it deemed his application not receivable. Mr. Diallo's separation from service was the result of a disciplinary measure and he was therefore not required to request management evaluation. Furthermore, despite having recommended that Mr. Diallo file his application through the e-filing system with the assistance of OSLA legal counsel, the UNDT incorrectly proceeded to rule on his initial self-represented application dated 17 December 2018, rather than his updated application dated 28 December 2018

22. Mr. Diallo requests that the Appeals Tribunal receive the appeal and vacate the UNDT Judgment.

The Secretary-General's Response to Mr. Diallo's Motion for Additional Pleadings

23. Mr. Diallo's Motion fails to satisfy the requirements for additional pleadings. He provides no reason as to why he was unable to submit in his appeal his claims that the UNDT failed to consider the facts of the case when it deemed his application not receivable and that it incorrectly ruled on his initial application dated 17 December 2018, rather than his updated application dated 28 December 2018. Thus, neither of these assertions constitutes an exceptional circumstance justifying the need to file an additional pleading. Furthermore, the motion repeats the arguments from the appeal. The Secretary-General requests that the Appeals Tribunal dismiss the motion in its entirety. Alternatively, if the Appeals Tribunal decides to grant the motion, he requests an opportunity to file a written submission in response to Mr. Diallo's additional pleadings.

Considerations

Mr. Diallo's motion seeking leave to file additional pleadings and an award of costs

24. Mr. Diallo's motion for leave to file additional pleadings is refused. Neither the Appeals Tribunal Statute (Statute) nor the Appeals Tribunal Rules of Procedure (Rules) provide for an appellant to file an additional pleading after the respondent has filed his or her answer. Article 31(1) of the Rules and Section II.A.3 of Practice Direction No. 1 of the Appeals Tribunal allow the Appeals Tribunal to grant a party's motion to file additional pleadings only if there are exceptional circumstances justifying the motion.¹ Mr. Diallo has not demonstrated any exceptional circumstances which would justify the Appeals Tribunal exercising its discretion to allow him to file additional pleadings.

Receivability of Mr. Diallo's application to the UNDT

25. Mr. Diallo believes that his application to the UNDT was receivable although he had failed to request management evaluation. We disagree. The UNDT did not err in dismissing Mr. Diallo's application as not receivable *ratione materiae*.

¹ *Afawubo v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-863, para. 18, citing *Fayek v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-739, para. 7.

26. The receivability of applications to the UNDT is governed by Article 8 of the UNDT Statute and Staff Rule 11.2 which read, respectively, as follows:

Article 8 of the UNDT Statute

1. An application shall be receivable if:
 - (a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;
 - (b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;
 - (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; (...)

(...)

3. 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.

Staff Rule 11.2

Management evaluation

- (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.
- (b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

27. It follows that an application before the UNDT without a prior request for management evaluation can only be receivable if the contested administrative decision has been taken pursuant to advice from a technical body or if the administrative decision has been taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2 following the completion of a disciplinary process. In all other cases, where the request for management evaluation is a mandatory first step before

coming to the internal justice system, this request and management evaluation shall provide the Administration with the opportunity to reassess the situation and correct possible mistakes or errors with efficiency.² The Tribunals have no jurisdiction to waive deadlines for requests for management evaluation.³

Whether the administrative decision in question was taken pursuant to advice from technical bodies

28. Technical bodies are defined in Administrative Instruction ST/AI/2018/7 where “the Under-Secretary-General for Management, pursuant to Section 4.2 of Secretary-General’s Bulletin ST/SGB/2009/4, and for the purpose of clarifying Staff Rule 11.2 (b), (...) promulgates the following”:

1. A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies is not required to request a management evaluation.
2. The list of technical bodies being referred to under staff rule 11.2 (b) are as follows:
 - (a) Medical boards or independent medical practitioners duly authorized to review medical decisions or medical recommendations, including reconsiderations referred to in article 5.1 of appendix D to the Staff Rules;
 - (b) Classification Appeals Committees.
3. The present administrative instruction enters into force on the date of its issuance.

29. The UNFPA CRB, which in Mr. Diallo’s case reviewed the recommendation to terminate his appointment, is not enumerated in ST/AI/2018/7 and hence does not constitute a technical body for the purpose of Staff Rule 11.2(b).

² *Newland v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-820, paras. 28 and 29.

³ *Khan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-559, para. 25.

Whether the administrative decision imposed a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2 following the completion of a disciplinary process

30. In his appeal, Mr. Diallo alleges that the administrative decision in question amounted to a dismissal, a disciplinary sanction. As he did not raise this issue before the UNDT, our well-settled jurisprudence dictates that Mr. Diallo is estopped from raising this issue on appeal.

31. Further, his contentions have no merit. A disciplinary process was not undertaken and completed nor did the administrative decision impose a disciplinary or non-disciplinary measure pursuant to Staff Rule 10.2. Mr. Diallo's appointment was terminated for poor performance. Whether this decision was a disguised disciplinary sanction would be an issue for consideration on the merits, but it cannot relieve Mr. Diallo from his obligation to request management evaluation as a mandatory first step before coming to the Tribunals.

Judgment

32. The appeal is dismissed and Judgment on Receivability No. UNDT/2019/002 is hereby affirmed.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Halfeld

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar