



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

Judgment No. 2020-UNAT-1064

**Richard Kerby
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Graeme Colgan Judge Jean-François Neven
Case No.:	2020-1376
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Appellant:	Mohamed Abdou, OSLA
Counsel for Respondent:	Jiyoung Kwon

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Richard Kerby, a former staff member of the Department for Economic and Social Affairs (DESA), who had served as the Inter-Regional Adviser (IRA) at the Division for Public Administration and Development Management (DPADM), has appealed against Judgment on Receivability No. UNDT/2020/008 of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), which found the application contesting the non-renewal of his fixed-term appointment (FTA) not receivable.
2. On appeal, the United Nations Appeals Tribunal (Appeals Tribunal) dismisses the appeal and affirms the UNDT decision.

Facts and Procedure

3. In 2010, Mr. Richard Kerby was selected as the IRA with DPADM within the Department for Economic and Social Affairs (DESA) on an FTA, at the P-5 level. His function was to provide support on e-government and public administration services. His FTA was renewed on a yearly basis, until 1 January 2016, when his FTA was extended for shorter periods.
4. On 6 February 2017, a job opening for the position of “IRA on Public Service Delivery for the SDGs”, at the P-5 level in DESA, was advertised for a posting period to be closed on 8 March 2017. The function of this advertised position was substantially different from Mr. Kerby’s position, as it was designed to provide policy advice and to develop capacities in relation to the implementation of the 2030 Agenda for Sustainable Development.
5. By e-mail of 31 March 2017, the Chief of Human Resources Management (HRM), DESA, informed Mr. Kerby that his appointment had been renewed for another six months until 30 September 2017 on an exceptional basis and that this would be the final renewal.
6. On 4 April 2017, a meeting was held between Mr. Kerby and the Director of his Division during which Mr. Kerby was advised that this was the final extension of his contract and that he should not be starting new activities. Mr. Kerby asked about the newly advertised Inter-Regional Adviser post and the Director explained the steps to be taken for the recruitment of that post.

7. On 8 April 2017, Mr. Kerby accepted an FTA of six months from 1 April 2017 through 30 September 2017 by signing a letter of appointment (LOA) dated 4 April 2017. The letter noted that this was the final renewal of appointment.

8. On 14 September 2017, the Chief of Human Resources Management, DESA sent a memorandum titled “Preliminary notification of contract expiration” reiterating that as set out in the 4 April 2017 LOA, this was the final renewal of his FTA and that an FTA carried no expectation of renewal. The memorandum noted that while there was no requirement for the information given therein to be sent to Mr. Kerby, it was considered to be a good practice to give him advance notice and thereby enable him to finalize the work at hand and to complete all separation formalities which would follow shortly.

9. On 1 October 2017, the recruitment process for the new position of IRA for Public Service Delivery for the SDGs was completed, and Mr. Kerby was not selected.

10. On 13 November 2017, Mr. Kerby requested management evaluation of the decision not to renew his appointment beyond 30 September 2017.

11. On 29 January 2018, Mr. Kerby received a management evaluation decision which upheld the contested decision.

12. On 26 April 2018, Mr. Kerby filed an application with the Dispute Tribunal. On 17 January 2020, the UNDT issued Judgment on Receivability No. UNDT/2020/008 dismissing the application as not receivable *ratione materiae*, finding that Mr. Kerby had been “notified of his final renewal in writing and with a substantial degree of gravitas on 31 March 2017”,¹ that the “communication on 14 September 2017 was merely a reiteration of the contested non-renewal decision”,² and that Mr. Kerby had failed to timeously request management evaluation. Further, the UNDT found that the outcome of the newly advertised IRA position was a separate matter from the non-renewal of Mr. Kerby’s fixed-term appointment.

¹ Impugned Judgment, para. 23.

² Impugned Judgment, para. 17.

Submissions

Mr. Kerby's Appeal

13. Mr. Kerby requests that the Appeals Tribunal vacate the UNDT Judgment and remand the case back to the UNDT for consideration of its merits. According to Mr. Kerby, the UNDT erred in finding that the 31 March 2017 communication constituted a final administrative decision when the non-renewal of Mr. Kerby's appointment was subject to the realization of his non-selection for the newly created IRA position.

14. The UNDT erred in finding that the discussion during the meeting of 4 April 2017 that Mr. Kerby's candidacy for the newly advertised IRA position would be given full and fair consideration was a separate matter. The Administration sought to unilaterally determine the date of the contested administrative decision by including a statement of finality in three of Mr. Kerby's last letters of appointment. None of these "ultimatums" had any direct legal consequences for his terms and conditions of appointment as he was awaiting the outcome of an ongoing recruitment process.

15. The UNDT erred in finding that the 14 September communication was a reiteration of the 31 March 2017 decision. The 14 September 2017 communication was based on entirely new facts and circumstances, i.e. the results of the redesign process and the outcome of the selection process for the refocused IRA position and could therefore not be considered as a mere reiteration of the 31 March 2017 decision.

The Secretary General's Answer

16. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment. For the Secretary-General, Mr. Kerby's application was not receivable as Mr. Kerby failed to timeously request management evaluation within the 60-day deadline. Mr. Kerby requested management evaluation more than seven months after Mr. Kerby had received the 31 March 2017 notification of the contested decision.

17. The Secretary-General also contends that the 31 March 2017 communication constituted a final, unequivocal administrative decision. On 31 March 2017, the Chief HRM clearly, unambiguously and objectively communicated the decision to Mr. Kerby that his FTA had been renewed for another six months on an exceptional basis and that this was the final

renewal. The 31 March 2017 decision produced direct legal consequences affecting his terms and conditions of appointment.

18. The 31 March 2017 decision was not subject to the realization of his non-selection for the newly created IRA position which was a separate matter from the renewal of his position at the time.

19. The UNDT correctly found that the 14 September 2017 communication constituted a reiteration of the contested administrative decision which did not reset the clock with respect to the statutory timelines.

20. The Secretary-General claims that Mr. Kerby has failed to establish any error that would warrant a reversal of the UNDT Judgment but has only repeated the arguments submitted before the UNDT. Mr. Kerby has not justified his claims for relief. As the application before the UNDT was not receivable, the UNDT was precluded from considering the substance of his claims.

Considerations

21. The issue before this Tribunal is whether the Dispute Tribunal correctly concluded that Mr. Kerby's application was not receivable *ratione materiae* on the grounds that he had failed to submit a timely request for management evaluation. For the reasons set out below, this Tribunal determines that the UNDT's conclusion is correct.

22. Article 8 of the UNDT Statute sets forth the necessary requirements for an application to be received. Specifically about the deadlines, Article 8(1)(d)(i)a. establishes that for an application to be receivable, in cases where a management evaluation of the contested decision is required, it must be filed "[w]ithin 90 calendar days of the applicant's receipt of the response by management to his or her submission".

23. Further, Staff Rule 11.2(c) provides that "[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".

24. In the present case, the Dispute Tribunal determined that the request for management evaluation filed on 13 November 2017 “was filed more than 60 days after the notification of the decision on 31 March 2017”³ and, therefore, Mr. Kerby failed to comply with the 60-day time limit as required under Staff Rule 11.2(c). The UNDT also found that the communication dated 14 September 2017 was a mere reiteration of the contested decision which Mr. Kerby had already been notified of since 31 March 2017. Therefore, Mr. Kerby failed to submit a timely request for management evaluation and, by doing it after the time limit, his application was not receivable *ratione materiae*.

25. In his appeal, Mr. Kerby contends that the non-renewal of his appointment was due to his non-selection for a newly created position which had been advertised on 6 February 2017 and for which he had applied. Mr. Kerby further argues that the 31 March 2017 communication could not be considered as the final one, because a recruitment process to a newly revised position to which he had applied was pending. He claims that the basis for the non-renewal decision was his unsuccessful application to his post and that the final decision was the one dated 14 September 2017.

26. About the issue raised by Mr. Kerby, the UNDT found that the non-selection process was a separate matter. Specifically, the UNDT stated that:⁴

The 31 March 2017 communication makes no reference to a newly advertised Inter-Regional Adviser position. While this new position was discussed in the meeting held on 4 April 2017, it was discussed as a separate matter in response to the Applicant’s inquiry. There is no evidence that the 31 March 2017 decision was conditioned on the outcome of the recruitment for a new position.

27. The Appeals Tribunal finds no error in the UNDT’s interpretation of the facts. The new post had significant differences in terms of functions, when compared to the one occupied by Mr. Kerby, which is why he could not be chosen to fill the place, unless he succeeded in a selection process. Further, the evidence before us suggests that there is no link between the non-renewal of his FTA and his non-selection for the advertised post he had applied for. First, no mention of the competitive process for a new post was made in the 14 September 2017 letter; therefore, there is no evidence that the latter was issued as a result of the former.

³ Impugned Judgment, para. 24.

⁴ Impugned Judgment, para. 19.

28. Second, according to the minutes of the meeting held on 4 April 2017, only after Mr. Kerby had been definitively informed of a “final six months” extension of his contract (until the end of September)⁵, did Mr. Kerby ask for news about the new post. This clearly indicates that the matters of the non-renewal of the appointment and the competitive selection for the new post were indeed treated separately by his superiors. Third, how could the 14 September 2017 letter have any relation to the outcome of the non-selection decision, if this latter was only completed on 1 October 2017? It follows that the selection process was still pending when the 14 September 2017 letter was issued and could not be the basis for the contested administrative decision.

29. For the sake of argument, the chronology of the events shows that the non-renewal decision contained in the 31 March 2017 e-mail was sent just after the new post had been advertised on 6 February 2017. If there were to be any link between Mr. Kerby’s non-selection to said post and the decision not to renew his appointment, this would also have occurred when the 31 March 2017 e-mail was sent. Furthermore, the extract cited in the appeal as an argument to construct a link between “non-renewal” and “non-selection” does not help Mr. Kerby. The passage was taken from the Secretary-General’s reply to the application before the UNDT under the heading “The decision not to renew the Applicant’s appointment was lawful” and must be interpreted within its context. In other words, given the whole situation, Mr. Kerby was separated from service because his contract had not been renewed beyond 30 September 2017 and because he was not selected for the new post by a decision issued on 1 October 2017.

30. In light of the foregoing and from every angle, the Appeals Tribunal finds that the UNDT was correct in its finding that the non-renewal decision was treated as a separate matter from the then ongoing selection exercise.

31. Mr. Kerby further claims that the successive renewals of his appointment, despite their wording that they would be final, created in his mind the impression that the 31 March 2017 decision was not definitive. According to his line of reasoning, the challenged decision was not the one communicated on 31 March 2017, but rather the one issued by the 14 September 2017 letter, in which case management evaluation would have been timeously requested.

⁵ Mr. Kerby was also directed not to start new activities, as the focus should be to complete what was on-going.

32. In *Ruyffelaere*, the Appeals Tribunal found that a later negative decision to an administrative request already denied by an implied administrative decision effectively re-set the clock under Staff Rule 11.2(c) for a staff member to file her or his request for management evaluation.⁶ The subsequent express decision containing both the rejection of a staff member's complaint and the reasons thereof is not a mere confirmation of the previous implied administrative decision, but a new appealable decision.

33. The present case, however, does not seem to deal with the same situation, as here there was an explicit communication, via the 31 March 2017 e-mail, that Mr. Kerby's appointment would be renewed for another six months "on an exceptional basis" and that "this [would] be the final renewal". The situation is therefore different from the one dealt with in the case mentioned above. In the present case, the matter at stake is not whether it was implicitly and then explicitly communicated to Mr. Kerby that his appointment would no longer be renewed, since it is indisputable that he had received written communication of this decision by means of the 31 March 2017 e-mail. There was no implied administrative decision.

34. The real issue here is whether the preceding renewals of his appointment could have legitimately created in Mr. Kerby's mind the expectation that his contract would be renewed, despite the explicit indication otherwise. If the answer to this question is negative, then the contested administrative decision will undoubtedly be the one set out in the 31 March 2017 e-mail and the application before the UNDT would have indeed been untimely. The UNDT Judgment will be affirmed in this case.

35. However, if the answer to this same question is affirmative, that is to say, if the successive previous renewals could have legitimately created an expectancy of a further renewal, an interpretation could be drawn according to which the 31 March 2017 e-mail was a mere signal that the appointment would not be renewed. Thus, the successive renewals of the appointment, despite the clear indication that this would not be the case, could have created a legitimate expectation of renewal. This is what Mr. Kerby seems to have claimed in his appeal.

⁶ *Ruyffelaere v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-993, para. 21.

36. Mr. Kerby's reasoning has no merit in light of the law and the Appeals Tribunal's jurisprudence. Although practice and custom law could sometimes create rules of conduct and even entitlements within some national labour legal frameworks, our case law has so far steadily established that an FTA carries no expectancy of renewal.⁷ Therefore, when Mr. Kerby received the 31 March 2017 communication advising that his appointment had been renewed for another six months on an exceptional basis and that this would be the final renewal, he ought to have challenged it accordingly, had he wished to contest it.

37. As established in our jurisprudence, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".⁸ Moreover, "[t]he Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made".⁹

38. In light of the foregoing, the Appeals Tribunal finds no error in the UNDT's finding that the 14 September 2017 letter conveyed a mere reiteration of the previous final challengeable administrative decision communicated by the 31 March 2017 e-mail and that the request of management evaluation was untimely filed, leading to the conclusion that the application was not receivable *ratione materiae*.¹⁰

39. To conclude, the Appeals Tribunal highlights that successive renewals of a staff member's appointment, despite previous information that the FTA would be the last and there would be no renewal, is not a good practice. By doing so, the Secretary-General might, at some point, run a risk of establishing such a pattern of conduct that this could lead to some other legal consequence.

40. The appeal, in the circumstances of the present case, must fail.

⁷ *Simon Handy v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1015, para. 34.

⁸ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 28 citing *Rabee v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-296, in turn citing *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

⁹ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 46; see also *Massi v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1002, para. 29; *Ngoga v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-823, para. 33.

¹⁰ Impugned Judgment, paras. 17 and 24.

Judgment

41. The appeal is dismissed and Judgment No. UNDT/2020/008 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 17th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar