



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

Judgment No. 2020-UNAT-1072

**Yves P. Nadeau
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2020-1378
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Appellant: Peter A. Gallo

Counsel for Respondent: André Luiz Pereira de Oliveira

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. Mr. Yves Nadeau filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision to terminate his continuing appointment. By Judgment No. UNDT/2020/013, the UNDT dismissed the application. Mr. Nadeau appealed to the United Nations Appeals Tribunal (Appeals Tribunal). For the reasons set out below, we dismiss the appeal.

Facts and Procedure

2. Mr. Nadeau, the Appellant, is a former staff member of the Office of Internal Oversight Services (OIOS).

3. For the performance period from 1 April 2016 to 31 March 2017, Mr. Nadeau's electronic performance assessment system report was completed by his First Reporting Officer (FRO) on 10 May 2017, by his Second Reporting Officer (SRO) on 28 May 2017 and by himself on 31 May 2017.

4. The FRO gave Mr. Nadeau an overall rating of "partially meets expectations" (the second lowest out of four ratings). In the FRO's narrative comments, detailed appraisals were given. The SRO endorsed the FRO's appraisal. In his final comments, Mr. Nadeau stated that the FRO's assessment was "news to [him]", as the FRO had failed to "communicate any perceived shortcoming before the end of the appraisal cycle". Mr. Nadeau described that the office environment in which he worked was toxic and dysfunctional and that the comments of the FRO and SRO were inappropriately biased against him. He, however, acknowledged that his performance had not been optimal this year but also stated that "some of [his] accomplishments were overlooked and [his] serious health problems were not taken into consideration".¹

5. For the period from 8 May 2017 to 31 March 2018, Mr. Nadeau's FRO and SRO launched a performance improvement plan. The detailed appraisal of Mr. Nadeau's performance in the completed performance improvement plan was signed by the FRO and SRO on 29 June 2018 and reflected that Mr. Nadeau's performance had not adequately improved. Mr. Nadeau did not sign the report.

¹ Impugned Judgment, para. 8.

6. On 29 June 2018, the FRO and SRO also signed Mr. Nadeau's "Manual Appraisal Form" for the performance period from 1 April 2017 to 31 March 2018. The form was signed by Mr. Nadeau's Additional Supervisor on 28 June 2018, but it was not signed by Mr. Nadeau.

7. As an introduction to the Additional Supervisor's comments it was stated that in order to assist Mr. Nadeau to recover from a long-term illness, the FRO and SRO together with the Under-Secretary-General, OIOS (USG/OIOS) had arranged a temporary assignment for Mr. Nadeau in the Office of the Under-Secretary-General (OUSG). During the temporary assignment, Mr. Nadeau was supervised by the Additional Supervisor. The Additional Supervisor gave a detailed appraisal of Mr. Nadeau's performance and generally noted that he satisfactorily met the goals set for this assignment and that his work was thorough. The FRO, however, rated Mr. Nadeau's overall performance as "does not meet expectations", which is the lowest of four ratings. In the narrative comments, the FRO gave a detailed assessment of Mr. Nadeau's performance, which generally reflected the various performance ratings. The SRO endorsed the FRO's ratings.

8. By interoffice memorandum dated 2 November 2018 from the SRO to the Executive Office of OIOS, the SRO requested that Mr. Nadeau's continuing appointment be terminated for unsatisfactory performance based on Mr. Nadeau's poor performance over the last two years.

9. By interoffice memorandum dated 6 November 2018 from the Executive Officer of OIOS to the Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM), copying the ASG of OIOS, the SRO's request for termination of Mr. Nadeau's continuing appointment was shared, indicating that OIOS supported the proposed termination which complied with Section 10 of Administrative Instruction ST/AI/2010/5 (Performance Management and Development System).

10. By interoffice memorandum dated 30 November 2018 from the ASG/OHRM to the Under-Secretary-General of the Department of Management (USG/DM), the ASG/OHRM sought approval to proceed with the termination of Mr. Nadeau's continuing appointment effective upon his approval. The USG/DM countersigned the memorandum on 7 December 2018 and gave his approval.

11. By letter dated 10 December 2018, the ASG and Officer-in-charge of OIOS informed Mr. Nadeau that the Secretary-General had decided to terminate his continuing appointment effective 10 December 2018 in accordance with Staff Regulation 9.3(a)(ii) due to unsatisfactory service, that the Secretary-General had decided to pay him three months' compensation in lieu of notice as stipulated in Staff Rule 9.7(d) and that he would be paid a termination indemnity of five and a half months in accordance with Annex III(a)(c) of the Staff Regulations.

12. On 19 December 2018, Mr. Nadeau filed a request for management evaluation challenging the decision to terminate his continuing appointment. On 19 February 2019, the Secretary-General upheld the contested decision.

13. On 19 March 2019, Mr. Nadeau filed an application with the UNDT.

14. By Case Management Order No. 169 (NY/2019), dated 29 November 2019, the UNDT rejected Mr. Nadeau's requests for the UNDT to hear 37 witnesses and for a stay of the proceedings. The UNDT ordered Mr. Nadeau and the Secretary-General to file their closing statements, stressing that any new submissions and/or evidence would be struck from the record.

15. On 24 December 2019, Mr. Nadeau requested the UNDT to withdraw Order No. 169 (NY/2019) and asked for an oral hearing as well as for the production of written documentation. On 26 December 2019, the UNDT issued Order No. 184 (NY/2019), rejecting Mr. Nadeau's requests for an oral hearing and for the production of written documentation and extended the deadlines for the parties to file their closing submissions, stressing again that any new submissions and/or evidence would be struck from the record.

16. On 21 January 2020, Mr. Nadeau filed a "Notice of Appeal" and informed the UNDT that an appeal against Case Management Order No. 184 (NY/2019) had been filed with the Appeals Tribunal. Mr. Nadeau requested the UNDT to suspend the execution of the contested order.

17. On 27 January 2020, the UNDT issued Judgment No. UNDT/2020/013, rejecting Mr. Nadeau's application. The UNDT did not suspend the execution of the contested order, holding that the contested order was, for all intents and purposes, only a case management order in accordance with General Assembly resolution 69/203 and Article 11(3) of the

UNDT Statute and therefore immediately executable. The UNDT found that the contested decision was lawful, holding that the USG/DM possessed the authority to terminate Mr. Nadeau's continuing appointment; the termination of his appointment had followed proper procedure; and Mr. Nadeau had failed to substantiate that the decision to terminate his continuing appointment was tainted by improper motives.

18. On 23 March 2020, Mr. Nadeau filed an appeal of the Judgment with the Appeals Tribunal and the Secretary-General filed his timeous answer on 27 May 2020.

Submissions

Appellant's Appeal

19. The UNDT exceeded its jurisdiction by issuing the Judgment while his appeal filed against the contested order was still pending with the Appeals Tribunal. The wording of Article 7(5) of the Appeals Tribunal Statute is clear; once an order has been appealed, the execution of the order is suspended. Pursuant to Article 7(5) of the Appeals Tribunal Statute, the UNDT should have suspended the execution of the contested order and thereby should have been prevented from issuing the Judgment on the merits. The UNDT's interpretation would mean that there is a conflict between the Statutes of the two Tribunals and that the UNDT takes precedence over the Appeals Tribunal, rendering the right in the Appeals Tribunal Statute to appeal an order nugatory. This would mean that the UNDT can legally ignore an appeal against an interim order and proceed to issue a judgment on the basis of a flawed argument. If that appeal is successful, the UNDT is seeking to enforce a course of action where the final judgment will still be subject to a second appeal.

20. The UNDT's statement that Mr. Nadeau requested production of further evidence in his closing statement is incorrect; he did not request additional evidence but pointed out how the exclusion of evidence of disparate treatment and bad faith compromised the UNDT's ability to determine whether the impugned decision was reasonable and fair. After filing his application, and as a result of ongoing investigations, Mr. Nadeau was able to identify further evidence of widely disparate treatment and selective actions taken by his FRO and SRO, indicative of the decision to terminate Mr. Nadeau being predicated on information that was not entirely accurate, not reliable and patently not offered in good faith. All of this was disallowed by the UNDT on the basis that counsel had an obligation to introduce the evidence

earlier, disregarding the fact that neither Mr. Nadeau nor his counsel were actually able to show reasonable grounds to believe that the information sought even existed at the time the application was filed. The UNDT's findings are not consistent with *Sanwidi*².

21. Mr. Nadeau raises several claims concerning the UNDT's finding that the USG/DM had the authority to terminate his appointment. The UNDT erred in law by applying Secretary-General's Bulletin ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules), which was not in effect at the time the contested decision was taken. The UNDT also erred in fact when disregarding that, in compliance with the system of checks and balances established by the legal framework, the USG/DM had an obligation to conduct some form of independent review of the information presented by OIOS. The UNDT further failed to consider the hierarchy of legal norms, particularly with regard to General Assembly resolutions stressing the operational independence aspect of the OIOS mandate.

22. The UNDT erred in fact and law when it found that Mr. Nadeau had not tried to rebut his performance appraisals. It is not relevant to the case whether or not he had rebutted his overall performance ratings, since the USG/DM had failed to consider the fact that Mr. Nadeau performed well when working in OIOS divisions other than the Investigations Division. The UNDT failed to take into consideration that his performance shortcomings were directly attributable to a serious medical condition, and that medical condition being further aggravated by disparate treatment and bad faith towards him. The underlying and fundamental question which neither the UNDT nor the Secretary-General is willing to address is whether a staff member can be properly terminated for alleged unsatisfactory performance after receiving performance ratings to the contrary that postdate the ratings upon which the termination decision is based.

23. The UNDT's references to Mr. Nadeau's counsel's previous failure to comply with the UNDT's orders and to the Code of Conduct appear to be discriminatory and further indicative of bias.

24. Mr. Nadeau requests that the Appeals Tribunal reverse the UNDT Judgment and remand the case to the UNDT for a *de novo* hearing with additional findings of fact.

² *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

The Secretary-General's Answer

25. The UNDT did not exceed its competence when issuing the Judgment. Mr. Nadeau's submission that under Article 7(5) of the Appeals Tribunal Statute, the UNDT should have suspended the execution of the contested order and should thereby have been prevented from issuing the Judgment on the merits while Mr. Nadeau's interlocutory appeal was pending is misleading. The UNDT Judgment relied on Article 11(3) of the UNDT Statute, which provides that case management orders or directives shall be executable immediately. The Appeals Tribunal has allowed interlocutory appeals against orders in very limited circumstances, none of which were applicable to the contested order. It was, therefore, no error by the UNDT to issue the Judgment even if the Appeals Tribunal subsequently were to have another view than the UNDT concerning the merits of the issues raised in the contested order. The UNDT correctly relied on its Statute and Mr. Nadeau has failed to demonstrate that the UNDT exceeded its competence when it issued the Judgment.

26. The UNDT correctly denied Mr. Nadeau's requests for production of further evidence. The evidence Mr. Nadeau sought to proffer related to the alleged disparate treatment and bad faith by his FRO and SRO as well as his performance appraisals and therefore fell outside the scope of this case. Mr. Nadeau's reliance on *Sanwidi* in support of his arguments is misplaced. Contrary to the *Sanwidi* case, Mr. Nadeau's case was not a dismissal for serious misconduct but termination for unsatisfactory performance. The two issues are regulated by different legal rules.

27. The UNDT correctly struck Mr. Nadeau's submissions on lack of authority of the USG/DM from the case as Mr. Nadeau raised this matter for the first time in his closing statements without seeking leave to present new submissions. Even if the submission would have been allowed, Mr. Nadeau's argument had no merit, as the USG/DM had the authority to take the contested decision. While the UNDT erred in law by applying ST/SGB/2019/2, which was not in effect at the relevant time, ST/SGB/2015/1 (Delegation of authority in the administration of the Staff Regulations and Staff Rules), the legal framework in force at the time, did provide that the USG/DM had the authority to terminate appointments at Mr. Nadeau's level. Thus, the UNDT's error did not affect the outcome of the case. Further, there is no evidence that the USG/DM acted unfairly or was motivated by bias.

28. The UNDT correctly concluded that the contested decision was lawful. The termination of Mr. Nadeau’s continuing appointment followed proper procedure and Mr. Nadeau had failed to demonstrate that the decision was tainted by ulterior motives. The contested decision was based on the established findings of Mr. Nadeau’s unsatisfactory performance and as such rests on sound legal grounds. Mr. Nadeau’s performance shortcomings were reflected in both the 2016-2017 and 2017-2018 performance cycles during which he received ratings of “partially meeting expectations” and “not meeting expectations”, respectively. Due to the lateness of Mr. Nadeau’s attempted rebuttal of the 2016/2017 performance appraisals, made past the 14-day window provided in Section 15 of the ST/AI/2010/5, it was deemed not receivable. Mr. Nadeau attempts to broaden the scope of the case by arguing facts that occurred during the performance appraisal process. The UNDT correctly declined to take into consideration facts that were outside the scope of the case.

29. Mr. Nadeau’s contention that the UNDT’s references to his counsel appear to be discriminatory and indicative of bias was not corroborated by any evidence in the case records.

30. The Secretary-General requests that the Appeals Tribunal uphold the Judgment and dismiss the appeal.

Considerations

Did the UNDT exceed its jurisdiction by issuing a Judgment on the merits while Mr. Nadeau’s appeal against Order No. 184 (NY/2019) was still pending with the Appeals Tribunal?

31. Article 2(1) of our Statute provides, *inter alia*, that “[t]he Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has ... [e]xceeded its jurisdiction or competence”. This provision does not clarify whether the Appeals Tribunal may only hear an appeal from a final judgment of the Dispute Tribunal or whether an interlocutory or interim decision made during the course of the Dispute Tribunal’s proceedings may also be considered a judgment subject to appeal. However, our Tribunal has consistently decided that “[a]n interlocutory appeal is only receivable in cases where the Dispute Tribunal has *clearly* exceeded its jurisdiction or competence”.³

³ *Reilly v Secretary-General of the United Nations*, Judgment No 2019-UNAT-975, para. 28, citing *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160; *Bertucci v.*

32. Article 7(5) of our Statute states that “[t]he filing of appeals shall have the effect of suspending the execution of the judgement or order contested”. Article 11(3) of the UNDT Statute provides:

The judgements and orders of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal. Case management orders or directives shall be executable immediately.

33. The UNDT did not exceed its jurisdiction by applying Article 11(3) of its own Statute and confirming, in accordance with that provision, that an appeal against a case management order has no suspending effect.

34. Furthermore, as suggested by the impugned Judgment,⁴ there is no conflict between Article 7(5) of our Statute, which is a general rule, and Article 11(3) of the UNDT Statute. This provision is a more specific one that was amended to reflect our jurisprudence that an appeal against orders is only possible in very exceptional circumstances. It clarifies that if the filing of appeals shall have the effect of suspending the execution of the contested judgment or order, “[c]ase management orders or directives shall be executable immediately”. This exception refers to our jurisprudence that appeals will not be receivable against “decisions on matters of evidence, procedure, and trial conduct”.⁵

35. Consequently, the UNDT did not exceed its jurisdiction by rejecting the Appellant’s submission of 21 January 2020 that Article 7(5) of the Statute of the Appeals Tribunal has the effect of suspending the execution of Order No. 184 (NY/2019) and issuing a Judgment on the merits while Mr. Nadeau’s appeal against the contested order was still pending with the Appeals Tribunal.⁶

Secretary-General of the United Nations, Judgment No. 2010-UNAT-062; *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008; and *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

⁴ Impugned Judgment, paras. 19-25.

⁵ *Reilly v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-975, para. 28.

⁶ This appeal was dismissed by Judgment No. 2020-UNAT-1058.

Did the UNDT err in denying Mr. Nadeau's requests for further evidence?

36. The Appellant alleges that he was able to identify further evidence of “widely disparate treatment and selective actions being taken by his First and Second Reporting Officers, including evidence of a failure to impose any performance management measures on staff with demonstrable performance shortcomings and manipulation of posts”. He argues that all of this is “indicative of the decision to terminate [his appointment] being predicated on information that was not entirely accurate, not reliable and patently not offered in good faith”. However, the Appellant states that he did not request additional evidence, but pointed out how the exclusion of evidence of disparate treatment and bad faith compromised the Dispute Tribunal’s ability to determine whether the impugned decision was reasonable and fair. Finally, he regrets that the UNDT did not call a case management discussion to resolve the matter.

37. Article 18(1), (3) and (5) of the UNDT Rules of Procedure provides, *inter alia*, that “[t]he Dispute Tribunal shall determine the admissibility of any evidence”, “[a] party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence”, and “[t]he Dispute Tribunal may exclude evidence which it considers irrelevant, frivolous or lacking in probative value”.

38. The UNDT correctly decided that the production of further evidence and the case management discussion that Mr. Nadeau requested regarding the disparate treatment and bad faith allegedly shown by his FRO and SRO were not relevant. Mr. Nadeau did not provide any *prima facie* evidence of the alleged disparate treatment or bad faith, did not substantiate that he discovered various facts “as a result of ongoing investigations”, did not provide adequate and convincing reason why his requests for further evidence or new case management discussion were not made earlier in the process, and did not specify why any of his requests would be relevant to the determination of this case since the only substantive issue is the termination of his continuing appointment and not his performance appraisals.

39. The UNDT did not err in deciding that Mr. Nadeau’s requests fell outside the scope of the case.

Did the UNDT err in striking Mr. Nadeau's submissions on lack of authority of the USG/DM from the case?

40. Mr. Nadeau argues that the USG/DM had no authority to take the contested decision.

41. Secretary-General's Bulletin ST/SGB/2015/1 regarding Delegation of authority in the administration of the Staff Regulations and Staff Rules provides, at paragraph 3.2, that "[w]ith the exception of the matters reserved exclusively for the Secretary-General or as otherwise indicated in the annex, all other matters related to the administration of the Staff Regulations and Rules are delegated to the Under-Secretary-General for Management". This Bulletin was replaced by Bulletin ST/SGB/2019/2, which entered into force on 1 January 2019.

42. The impugned decision to terminate Mr. Nadeau's continuing appointment effective 10 December 2018 was made by the USG/DM and notified by letter of the ASG and Officer-in-charge of OIOS. While the UNDT erred in law by applying ST/SGB/2019/2, which was not in effect at the relevant time, ST/SGB/2015/1, the legal framework in force at the time, did provide that the USG/DM had the authority to terminate appointments at Mr. Nadeau's level.

Did the UNDT err in concluding that the contested decision was lawful?

43. Mr. Nadeau alleges the procedure followed to terminate his continuing appointment was not proper and the USG/DM did not investigate issues he considered essential.

44. Under Staff Regulation 9.3(a), the USG/DM, on behalf of the Secretary-General, may, "giving the reasons therefor, terminate the appointment of a staff member who holds a ... continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons: ... [i]f the services of the staff member prove unsatisfactory".

45. The UNDT found that in all the recommendations from the SRO, OIOS and the ASG/OHRM to terminate the appointment, the reason provided was the same, namely the Appellant's unsatisfactory service. This was also the reason given in the termination letter. In reviewing the Appellant's previous two performance appraisals, the Tribunal found that the conclusion that the Appellant's performance was unsatisfactory had been properly documented both in the FRO's ratings and the narrative comments of the FRO and SRO for two consecutive performance cycles (2016-2017 and 2017-2018). We see no error in this.

Accordingly, the Tribunal correctly decided that the termination was only made after the Administration established that the Appellant's performance amounted to unsatisfactory service, which was not contradicted by the fact that the Additional Supervisor found that the Appellant's performance had been adequate during a temporary assignment in the office of the USG/OIOS.

46. Section 15.7 of ST/AI/2010/5 provides that "[t]he rating resulting from an evaluation that has not been rebutted is final and may not be appealed". Since the Appellant had never contested the performance appraisals, the Dispute Tribunal was bound by the findings and conclusions made therein and correctly decided that Mr. Nadeau could not initiate a review of the performance appraisals within the present case. Mr. Nadeau attempts to broaden the scope of the case by arguing facts that occurred during the performance appraisal process. The UNDT correctly declined to discuss facts that were outside the scope of the case.

47. The UNDT decided that the decision to terminate the Appellant's continuing appointment was not tainted by ulterior motives. It found that no information and/or documentation in the case file indicated that the USG/DM was influenced by improper motives. The Appellant reiterates arguments that did not succeed before the UNDT. It is necessary to recall that:⁷

The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal's Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.

48. The Appellant's submissions regarding the alleged ulterior motives or improper reasons are without merit.

⁷ *Abu Salah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-974, para. 33 (internal footnote omitted); *Harris v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-896, para. 51; *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15; and *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

49. In closing, the contested decision was based on Mr. Nadeau's unsatisfactory performance. The UNDT did not err in deciding that the termination was lawful.

Are the UNDT's references to Mr. Nadeau's counsel discriminatory and indicative of bias?

50. Mr. Nadeau's allegation that the UNDT's references to his counsel's previous failure to comply with the UNDT's orders and the Code of Conduct appear to be discriminatory and indicative of bias was not corroborated by any evidence in the case records.

Judgment

51. The appeal is dismissed and Judgment No. UNDT/2020/013 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Neven, Presiding
Brussels, Belgium

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 18th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar