UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-987

Avramoski

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge Jean-François Neven
Case No.:	2019-1289
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Ms. Avramoski:	Self-represented
Counsel for Secretary-General:	Patricia C. Aragonés

JUDGE KANWALDEEP SANDHU, PRESIDING.

Introduction

1. The Appellant is staff member with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). Prior to this, she was appointed on various missions, starting with an international staff member appointment to the United Nations Transitional Administration in East Timor (UNTAET). She was also with the United Nations Support Office for the African Union Mission in Somalia (UNSOA) and, previous to that, on a fixed-term appointment in the United Nations Secretariat as a Budget Assistant at the United Nations Mission in Sudan (UNMIS) after which she was reappointed to the United Nations Logistics Base (UNLB) in Brindisi effective 1 September 2008.

2. She disputes her entry on duty (EOD) date for UNLB, which is recorded as 2 September 2008, and requests that it be changed to 28 February 2000 (the date she was appointed to UNTAET). The Appellant filed an application to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the April 2018 refusal by the Department of Field Support/Field Personnel Division (DFS/FPD) to amend the date.

3. The UNDT issued Judgment No. UNDT/2019/085 dismissing the Appellant's application. The UNDT held that she had requested a timely management evaluation of the impugned decision as the relevant administrative decision triggering the time limits was the decision refusing to change the EOD date. However, the UNDT held that the underlying decision in 2008 to enter 2 September 2008 as the EOD date was outside of the UNDT's temporal jurisdiction.

4. The Appellant appeals and argues that she had been misled by human resources personnel in UNMIS and had not been told the reappointment to UNLB in 2008 was considered a separation from UNMIS. The Respondent requests the Appeals Tribunal to dismiss the appeal but also submits that the Dispute Tribunal should have held the application was time-barred and not receivable.

5. We find the Dispute Tribunal correctly dismissed the application.

Facts and Procedure

5. On 28 February 2000, the Appellant was appointed to UNTAET as an international staff member on a 300-series appointment. On 20 May 2002, UNTAET was succeeded by the United Nations Mission of Support in East Timor (UNMISET).

6. On 13 January 2004, the UNMISET Chief, International Staffing Support Unit, informed the Appellant that she had been reappointed from the 300-series to the 100-series Staff Rules effective 1 January 2004.

7. On 17 July 2005, the Appellant signed a letter of appointment to serve on a fixed-term appointment in the United Nations Secretariat as a Budget Assistant at UNMIS.

8. On 10 July 2008, DFS/FPD informed UNMIS that the Appellant had been selected to be reappointed to UNLB effective 1 September 2008.

9. On 18 August 2008, the Appellant signed a memorandum of understanding (MoU) regarding her annual leave balance. In the MoU, she acknowledged, *inter alia*, that she would be separated on 1 September 2008 and reappointed on 2 September 2008.

10. The Appellant was separated effective 1 September 2008. Effective 2 September 2008, she was reappointed to UNLB and was issued a new letter of appointment. The personnel action (PA) notification for the reappointment reflected her EOD date as 2 September 2008.

11. On 29 June 2010, the Appellant was selected as a Budget Assistant at the FS-5/9 level with UNSOA. On 3 November 2014, she was reassigned from UNSOA to MINUSCA.

12. On 12 March 2018, the Appellant exchanged a series of e-mails with the Regional Service Centre Entebbe (RSCE) claiming that her EOD date was incorrect and requesting that it be changed from 2 September 2008 to 28 February 2000. She was informed that her EOD date had been correctly reset to 2 September 2008 due to her separation from UNMIS and her reappointment to UNLB.

13. On 12 and 13 March 2018, the Appellant raised the matter of her EOD date with the MINUSCA Chief Human Resources Officer (CHRO), who informed her that her case would be reviewed by DFS/FPD. By e-mail from DFS/FPD dated 10 April 2018, the Appellant was informed that the EOD date in UMOJA correctly reflected her last separation and reappointment based on

Staff Rule 4.17, and that as such her EOD date had been correctly reset to 2 September 2008 following her reappointment to UNLB. The e-mail emphasized that this had no impact on the Appellant's entitlements and rights. DFS/FPD also noted that the reset of the EOD date to 2 September 2008 was in accordance with the standard procedure prior to the Human Resources Transition effective 1 July 2009, where a move from non-family to family duty station or *vice versa* triggered separation and reappointment without break-in-service. By letter dated 26 May 2018, the Appellant sought management evaluation of the decision to put 2 September 2008 and not 28 February 2000 as her EOD date.

Submissions

The Appellant's Appeal

14. The Appellant requests that DFS/FPD correct her employment records to reflect 28 February 2000 as her EOD date, the date when she started working for the United Nations as an international staff member. She had not been told that she was going to have a break in service and the Human Resources Section at UNMIS convinced her that the documents she was signing were in accordance with the Regulations and Rules. When she asked about the words "separation" and "reappointment" in the MoU, she was told that the correct procedure was being followed and she was not being separated. She therefore understood that she was going to be reassigned.

15. The Appellant contends that she could not have been "reappointed" since her appointment was valid until the end of June 2009 and she had been selected for reassignment within the same Organization and at the same level before the expiration of her appointment.

16. When inquiring about the legal basis for her "reappointment", the Management Evaluation Unit (MEU), the Office of Staff Legal Assistance (OSLA) and the UNDT pointed her to the Standard Operating Procedure on the On-boarding of Staff for United Nations peace operations (On-boarding SOPs). She has however never been provided with the On-boarding SOPs and questions whether they exist and in the affirmative, whether they were accepted by the Organization, when they were established and when they were signed and by whom.

17. The Appellant signed a MoU regarding her annual leave balance and in that MoU she acknowledged, *inter alia*, that she would be separated on 1 September 2008 and reappointed on 2 September 2008. When the Appellant inquired about the term "separation", she was assured that it was just a procedure applicable to her annual leave balance.

18. The Appellant was not separated from service under current Staff Rule 9.1 (Definition of separation). Her reassignment does not fall under any of the categories listed in that Staff Rule.

19. The UNDT erred in stating that the Appellant had never contested the date of her eligibility for mobility allowance of which she was informed in June 2010 and upon her first payment in February 2011. In support of her contention, she submits an e-mail dated 27 January 2011 to the Human Resources Section in which she inquired about the meaning of "Return from SLWOP with UNMIS – separation for administrative purposes upon expiration of appointment" and stated that she had never been separated. When signing the mobility form, she made the following handwritten comment at the bottom of the page: "All information above correct. The only one question I have is regarding period 1-Jul-08 – 1 Sept 08 – separation for administrative purposes etc. – not sure what is a meaning of separation as I have never had separation." The UMOJA screen shot showing mobility demonstrates errors in the entries, since instead of 6,570 days of service, only 3,471 days are recorded.

20. The UNDT erred in finding that the Appellant had failed to show that her continuing appointment had been delayed or that, even if it had been delayed, she had suffered any harm as a result. She questions on what basis the UNDT concluded that in determining her eligibility for a continuing appointment DFS/FPD counted her service prior to her separation from UNMIS.

21. The letters of appointment the Appellant had previously signed were the same as the ones she signed to join UNLB and she questions why her reassignment to UNLB should be considered a reappointment.

22. By facsimile dated 24 July 2008, the Officer-in-Charge, Mission Support UNMIS, advised DFS/FPD that the Appellant would be available for "reassignment" on 1 September 2008. DFS/FPD did not respond stating that the Appellant was being reappointed and not reassigned.

23. The Appellant requests that DFS/FPD correct her UMOJA record relating to her EOD date. She also asks that any of her benefits affected by the erroneous entry should be calculated and paid to her accordingly.

The Secretary-General's Answer

24. The UNDT correctly concluded that the Administration's decision to reappoint the Appellant in 2008 was outside its temporal jurisdiction. The UNDT was statutorily barred from receiving the application to the extent that it challenged the lawfulness of her reappointment, instead of reassignment, in 2008 that caused the change in her EOD date. It is well established that under Article 8(3) and (4) of the UNDT Statute, applications filed more than three years after an applicant's receipt of the contested decision are not receivable and the UNDT has no discretion to suspend or extend the time limit once three years have passed.

25. The Appellant knew or should have known that she was being separated and then reappointed in 2008. The MoU she signed stated that following her "separation" she would be "re-appointed" under the same terms and conditions of her previous appointment. Her letter of appointment to UNLB did not stipulate that she was being reinstated and the Personnel Action form issued in connection with her reappointment clearly indicated that her EOD date had been changed to 2 September 2008.

26. While the UNDT correctly dismissed the application insofar as it related to the 2018 refusal to correct the Appellant's EOD date, the Secretary-General submits that the UNDT's reasoning leading to the dismissal of the application is erroneous. A staff member may not rely on a subsequent decision on an entitlement to re-open a past decision on an EOD date that had not been challenged at the time. The Appellant seeks to challenge an EOD date changed a decade earlier not because it served as the basis for a more recent decision on any entitlement but because the Administration had refused to change it. These circumstances do not provide a basis to override the clear prohibition to litigate matters older than three years as set out in the UNDT Statute. The UNDT should have therefore dismissed the entire application as not receivable *ratione temporis*. Mindful of the general rule that a party in whose favour a case has been decided is not permitted to appeal against a judgment on legal or academic grounds, this view is offered in case the Appeals Tribunal wishes to consider an alternative basis to affirm the UNDT Judgment and dismiss the appeal.

27. Should the Appeals Tribunal consider that the UNDT had jurisdiction to review the refusal to change the EOD date, the UNDT correctly concluded that this decision was lawful. The Appeals Tribunal has consistently acknowledged the distinction in the Staff Rules between re-employment and reinstatement and the resetting of the EOD dates upon re-employment.

In the present case, the Appellant's letter of appointment with UNLB which she signed on 17 September 2008 did not stipulate that she was being reinstated following her separation from UNMIS, and by signing the letter, she accepted the appointment described in the letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and Rules. The record thus clearly shows that the Appellant was re-employed within the meaning of Staff Rule 104.3 without regard to any period of former service and her EOD date was accordingly reset to her reappointment date. Additionally, the Appellant has failed to demonstrate that the change of her EOD date had resulted in any adverse consequences for her appointment or entitlements.

28. The Appellant has failed to demonstrate that the UNDT made any errors warranting a reversal of the Judgment. She mostly repeats arguments submitted before the UNDT, none of which establishes any error warranting a reversal of the Judgment.

29. The Secretary-General also submits that the Dispute Tribunal erred to the extent it held the refusal to change the EOD date was correct and appeared to suggest that if an EOD date has legal consequences for a staff member's entitlement, it can be challenged even after a decade in the context of challenging a later decision on the entitlement. Therefore, the Secretary-General submits that the Dispute Tribunal correctly dismissed the application, albeit not for the reasons set out in its Judgment.

Submissions

Preliminary Issue

30. As a preliminary issue, the Secretary-General objects to the inclusion of new evidence, namely correspondence from 2011 regarding the Appellant's mobility allowance. The Secretary-General says this evidence was not part of the record before the Dispute Tribunal. Instead of including it in her submissions, the Appellant should have applied for leave to file additional evidence under Article 2(5) of the Statue which gives authority to the Appeals Tribunal to receive additional evidence in "exceptional circumstances" where the documentary evidence is likely to establish facts and its admission is in the "interest of justice and the efficient and expeditious resolution of the proceedings".

31. The Appellant has not applied for leave to file the additional evidence. Therefore, she has failed to address whether there are exceptional circumstances and why the evidence could not have been introduced before the Dispute Tribunal. As a result, we disregard this new evidence in our considerations.

Merits of the Appeal

32. In considering an appeal, the Appeals Tribunal determines whether the Dispute Tribunal exceeded its jurisdiction or competence, or failed to exercise the jurisdiction vested in it, or committed an error of law, procedure or fact that resulted in a manifestly unreasonable decision (see Article 2(1) of the Statute of the Appeals Tribunal).

33. The Appellant says the Dispute Tribunal erred in stating that she had never contested the date of her eligibility for a mobility allowance of which she was informed in June 2010 and in finding that she had failed to show that her continuing appointment had been delayed, or that, even if it had been delayed, she had suffered any harm as a result.

34. However, the Dispute Tribunal's reasons for dismissing the application relied on determination that the application was receivable because the refusal to amend the EOD date was an "administrative decision" pursuant to Article 2(1)(a) of the UNDT Statute. But, it then held that the EOD date had no unlawful impact on the Appellant's terms of appointment, therefore, the decision to refuse to change the EOD date was correct. In addition, it found the choice of reappointment as the "modality" in the EOD date (though supported by the evidence) was outside of the temporal jurisdiction of the Dispute Tribunal.

35. Therefore, the substantive issues in the appeal are:

a) Did the Dispute Tribunal err in finding the application was receivable because the request for management evaluation of the administrative decision was timely? The Secretary-General argues that the Dispute Tribunal correctly dismissed the application but not for the reasons set out in its Judgment as it erred in determining that the April 2018 refusal to amend the EOD date was the relevant administrative decision for the purposes of determining receivability;

b) if the application is receivable, did the Dispute Tribunal err in finding the entry of the EOD date was outside its temporal jurisdiction?

Did the Dispute Tribunal err in determining the application was receivable because the refusal to change the EOD date was the relevant administrative decision?

36. The Secretary-General, not the Appellant, raises this issue and submits that the Dispute Tribunal's reasoning in dismissing the application was in error. However, the Secretary-General also acknowledges that an "appeal of the rationale by which the UNDT dismissed the Application is precluded".

37. A general principle has developed from prior cases such as *Rasul,*[1] *Sefraoui,*[2] and other cases[3] that the party in whose favour a case has been decided is not permitted to appeal against the judgment on legal or academic grounds. As a result, the successful party is prevented from filing an appeal as "an instrument to pursue a change of a judicial decision, in the form of modification, annulment or vacation, used as a way to repair a concrete grievance directly caused by the impugned judgment. The concrete and final decision adopted by a court must generate the harm that constitutes the *conditio sine qua non* of any appeal."[4] In this instance, the alleged error by the Dispute Tribunal comes from the reasoning of the judgment and not from the outcome. This means that the "judgment can contain errors of law or fact, even with regard to the analysis of the tribunal's own jurisdiction or competence and yet, it may still be not appealable".[5]

38. However, we are concerned that the Dispute Tribunal incorrectly found that the refusal to amend the EOD date was an "administrative decision", and consequently, incorrectly determined the application was receivable. Therefore, despite the general *Sefraoui* principle, the Appeals Tribunal has authority to review errors of jurisdiction by the first instance tribunal regardless of who raised the issue.[6]

39. Article 2(1)*(a)* of the UNDT Statute defines an "administrative decision" as one "alleged to be in non-compliance with the terms of appointment or contract of employment". As indicated above, this has been interpreted to mean an allegation of non-compliance that has a

[1] *Rasul v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-077, para. 15.
[2] *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048, para. 18.
[3] *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, paras. 14-23; *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134, para. 34.
[4] *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 10.
[5] *Ibid.*
[6] *Rosca v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-133, para. 9.

direct impact on the terms of contract of employment or appointment. As stated in the oft-cited *Andronov* Judgment*:* "There is no dispute as to what an 'administrative decision' is. It is acceptable by all administrative law systems, that an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order."[7]

40. This reasoning has been followed in a long line of authorities. In *Andati-Amwayi*, the Appeals Tribunal held that "(w)hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision."[8] Again, in *Lee*, this Tribunal recalled that: "[T]he key characteristic of an administrative decision subject to judicial review is that the decision must 'produce [] direct legal consequences' affecting a staff member's terms and conditions of appointment; the administrative decision must 'have a direct impact on the terms of appointment or contract of employment of the individual staff member'."[9]

41. Here, there was no evidence before the Dispute Tribunal that the EOD date or the refusal to amend it had a direct impact or legal consequences on the Appellant's terms of appointment or contract of employment. The Dispute Tribunal stated that there "may be numerous"[10] benefits that could be negatively affected "including: eligibility for continuous appointment, accrual of various entitlements, regime determining retirement age and access to after service health insurance".[11] However, the Dispute Tribunal did not reference what benefits were specifically affected in this case nor what evidence substantiated the direct impact or legal consequences to these benefits. In fact, the Dispute Tribunal acknowledged this when it stated that the "EOD date as determined has had no unlawful impact on the Applicant's terms of appointment including all her benefits and entitlements".[12]

[7] See *Reid v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-563, para. 32, citing Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).
[8] *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 19.
[9] *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49 (internal citation omitted), citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 17 and former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.
[10] Impugned Judgment, para. 33.
[11] *Ibid.*
[12] *Ibid.*, para. 34.

42. As a result, we are unable to follow the Dispute Tribunal's rationale that the refusal to change the EOD date was an administrative decision because if the EOD date entry in 2008 had "no unlawful impact on the Applicant's terms of appointment including all her benefits and entitlements",[13] it follows that the refusal to amend that date would also have no impact. As there was no direct impact or legal consequences to either the EOD date or the refusal to amend it, neither can be an "administrative decision" as per *Lee, supra*.

43. Consequently, we find the Dispute Tribunal erred in finding the application was receivable based on the relevant administrative decision being the refusal to amend the EOD entry.

Did the Dispute Tribunal err in finding that the 2008 entry of the EOD date was outside the temporal jurisdiction of the Tribunal?

44. As for the Dispute Tribunal's finding that the 2008 entry of the EOD was outside its temporal jurisdiction, we find the Tribunal did not err.

45. The Dispute Tribunal relied on the MoU signed in 2008 which indicated that the Appellant was being reappointed and on the personnel actions of separation and reappointment. In addition, the letter of UNLB supports the finding that the Appellant was reappointed and not reinstated. The Appellant was presumably aware of the status when she signed the MoU and received the letter of appointment to UNLP in 2008 that she was being separated and reappointed.

46. As stated in *Omwanda*, if the staff member "had had any issue with the terms of his new appointment, he should have protested in a timely fashion by requesting a management evaluation. He cannot challenge the Administration's 2016 decision on the calculation of his entitlement to termination indemnity by now impugning the 2008 administrative decision on his EOD date."[14] The Appellant says that she was verbally "misled" and given different advice at the time. But, she had been given formal written notification of her status in 2008 and if she wanted to challenge her status as "reappointed", she should

[13] *Ibid.*
[14] *Omwanda v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-906, para. 34.

have done so then; she is statutorily barred from doing so now by operation of Article 8(4) of the UNDT Statute.

47. Article 8(4) provides that "an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision". There is no discretion given to the Dispute Tribunal to accept an application filed more than three years after receipt of the contested administrative decision regardless of circumstances.[15]

48. Therefore, the Dispute Tribunal was correct in dismissing the application as beyond its "temporal jurisdiction". Pursuant to Article 8(4), the Dispute Tribunal had no jurisdiction to consider or review the decision and/or process in 2008 to reappoint, as opposed to reassign, her to the UNLB as the Appellant's application to the Dispute Tribunal was filed more than three years after the impugned decision and the entry of the EOD date.

Conclusion

49. We find that the Dispute Tribunal was correct in dismissing the application. The Dispute Tribunal should have dismissed the application on receivability *ratione materiae* as both the entry of the EOD date and the subsequent refusal to amend it were not administrative decisions.

50. The Dispute Tribunal did not err in dismissing the application on receivability *ratione temporis* as it did not have jurisdiction to review the decision in 2008 to reappoint, and not reassign, the Appellant and the subsequent EOD entry.

[15] See *Khan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT 727, paras. 23 and 24; *Leboeuf v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-568.

Judgment

51. The appeal is dismissed and Judgment No. UNDT/2019/085 is hereby affirmed, in part.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding Vancouver, Canada	Judge Colgan Auckland, New Zealand	Judge Neven New York, United States

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar