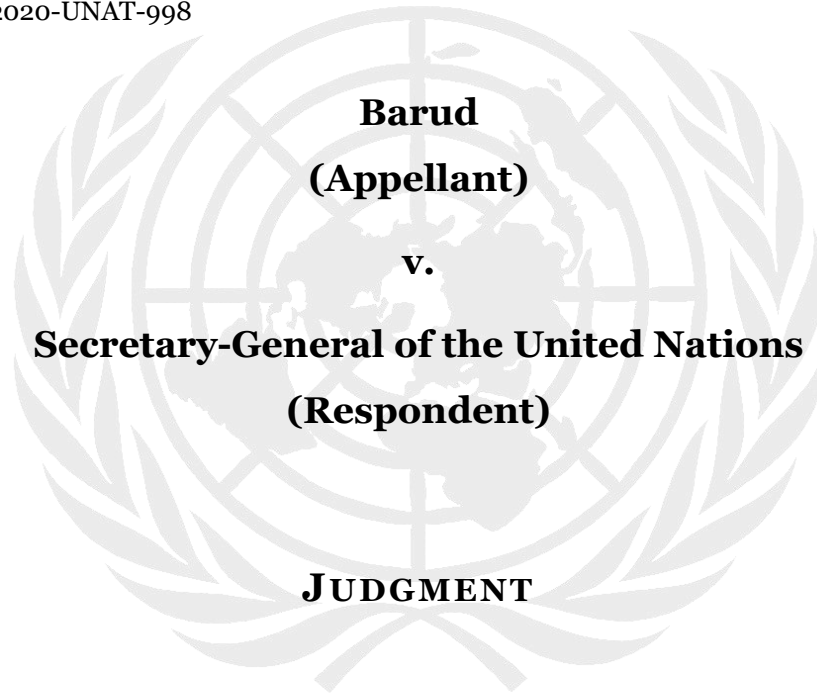




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-998



**Barud  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Kanwaldeep Sandhu
Case No.:	2019-1310
Date:	27 March 2020
Registrar:	Weicheng Lin

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Counsel for Ms. Barud:	Omar Al-Omar
Counsel for Secretary-General:	Maryam Kamali

**JUDGE GRAEME COLGAN, PRESIDING.**

1. This case arose from the non-renewal of Ms. Obah Yusuf Barud's fixed-term appointment (FTA) with the United Nations-African Union Hybrid Operation in Darfur (UNAMID) beyond 30 June 2019. Two days before the expiry of her contract, on 28 June 2019, Ms. Barud filed an application for suspension of the contested non-renewal decision. On the same day, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi issued Order No. 087 (NBI/2019) rejecting her application.<sup>1</sup> We dismiss Ms. Barud's appeal against the UNDT's Order in the following circumstances and for the following reasons.

**Facts and Procedure**

2. Ms. Barud was appointed on 20 June 2011 to UNAMID as an internationally recruited General Services Assistant at the FS-5 level, based in El Fasher, Sudan, under an FTA, which was last renewed through to 30 June 2019.

3. In March 2018, the Secretary-General submitted to the General Assembly the 2018/2019 budget for UNAMID proposing a reduction of 1,183 civilian staff to be implemented in three phases by 30 June 2019. In June 2018, the Chairperson of the African Union Commission and the Secretary-General issued a joint special report, in which they recommended a further reduction of UNAMID's civilian component, among other things. In July 2018, the Security Council endorsed the recommendations in the joint special report and extended UNAMID's mandate to 30 June 2019. Also, in July 2018, the General Assembly requested that the Secretary-General submit a revised 2018/2019 budget.

4. In a memo dated 10 September 2018 for mission-wide distribution, the Director of Mission Support, UNAMID, announced the establishment of two Comparative Review Panels (CRP), one of which would be charged with reviewing and comparing international staff members whose posts had been proposed to be abolished against the established comparative review criteria and providing a consolidated reporting detailing the outcome of the review.

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<sup>1</sup> Subsequently, the Dispute Tribunal issued a correction to Order No. 087 (NBI/2019), as Order No. 087 (NBI/2019)/Corr.1.

5. In an e-mail dated 29 October 2018 in response to Ms. Barud's request for more details about the CRP as it pertained to her post, the Human Resources Management Section, UNAMID, informed her:

Specific to your functions, Facilities Management Assistant, Engineering Section proposed to abolish 1 FS-5 and 3 FS-4 by 30 June 2019. You and another staff member performing FMA functions at the FS-5 level were reviewed by the CR panel to determine which post should be abolished. You were the staff member that was affected based on the outcome of the comparative review process. The review process was based on predetermined criteria that was shared with all staff members and is attached for ease of reference. Please note that gender was not established as a criterion for the CR process. I would also like to inform that the review for international staff was conducted across all duty stations for staff members in the same functions and level[s].<sup>2</sup>

6. On 22 December 2018, the General Assembly approved UNAMID's revised 2018/2019 budget for the period from 1 July 2018 to 30 June 2019.

7. In a letter dated 24 February 2019, the Acting Director of Mission Support, UNAMID, advised Ms. Barud that the UNAMID had begun its work to implement, *inter alia*, the reduction of 1,183 posts in the 2018/2019 budget for UNAMID. She continued:

In light of the proposed reductions, the Mission conducted a comparative review process where existing staff members on the same functions and levels exceed the number of posts proposed in the new structure in the 2018/2019 revised budget. You are one of the staff members in Facilities Management Assistant function at FS-5 level that were reviewed and based on the final outcome, it is with regret that I have to inform you that subject to the approval of the revised 2018/2019 budget by the General Assembly, your current appointment will not be renewed once it expires o[n] 30 June 2019.

This letter serves as an advance information in the interest of keeping you fully informed of these developments to enable you to prepare for this eventuality.

8. On 11 April 2019, Ms. Barud wrote to the Management Evaluation Unit (MEU) requesting management evaluation of the decision not to renew her FTA with UNAMID beyond 30 June 2019.

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<sup>2</sup> According to the available information, during the comparative review process, Ms. Barud scored 60.5 points whereas the retained staff member obtained a total score of 88 points.

9. In a letter dated 17 May 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance, informed Ms. Barud of the decision of the Secretary-General to accept the recommendation of the MEU to uphold the contested decision. Ms. Barud had contended that she should not have been included in the CRP with another colleague performing the functions of “Facilities Management Assistant” (FMA) as her functional title was that of “Administrative Assistant”. In response, the MEU noted that the 2018/2019 revised budget only indicated the number of posts in the Engineering Section to be abolished but did not specify which posts were for abolition. Moreover, her placement in the CRP for FMA was proper, as she was reviewed against another staff member performing similar functions at the same level as herself.

10. On 23 June 2019, Ms. Barud filed an application with the UNDT against the decision to separate her from service upon the expiry of her FTA. The Secretary-General as Respondent had 30 days within which to submit a reply.

11. On 28 June 2019, Ms. Barud filed an application for suspension of action of the decision to separate her from service pending the UNDT proceedings in respect of her substantive application of 23 June 2019.

12. The Dispute Tribunal issued Order No. 087 (NBI/2019) on the same day, 28 June 2019. It did so in reliance on Ms. Barud’s application alone, finding it unnecessary to wait for a reply from the Respondent. The Dispute Tribunal reviewed Ms. Barud’s application for suspension of action in accordance with the three-pronged test set forth in Article 2(2) of the UNDT Statute and Article 14 of the UNDT Rules of Procedure, what can be summarised as: *prima facie* unlawfulness; particular urgency; and irreparable damage. In the view of the Dispute Tribunal, Ms. Barud’s application failed the second prong of particular urgency, because she had not acted diligently and had therefore created any urgency herself. The Dispute Tribunal noted that Ms. Barud had been aware of the results of the CRP and UNAMID’s decision not to renew her appointment since 24 February 2019. Moreover, she received a negative response to her request for management evaluation on 17 May 2019. She did not, however, file an application for suspension of action until 28 June 2019. As the three test prongs were considered cumulative, the Dispute Tribunal did not review Ms. Barud’s application against the other two prongs since its finding on the particular urgency relieved it from considering the other two prongs.

13. On 25 August 2019, Ms. Barud appealed the UNDT Order No. 87 (NBI/2019) to the United Nations Appeals Tribunal (Appeals Tribunal). The appeal was transmitted to the Secretary-General on 5 September 2019, and the Secretary-General filed an answer on 7 October 2019.

14. On 8 November 2019, Ms. Barud filed a motion for additional pleadings, to which the Secretary-General filed his response on 21 November 2019.

### **Submissions**

#### **Ms. Barud's Appeal**

15. Ms. Barud says that it is surprising that the Dispute Tribunal issued the impugned Order on 28 June 2019 before the Respondent filed his reply to her substantive application. The Dispute Tribunal therefore erred in issuing the order in a very hasty manner, without taking the Secretary-General's reply into consideration or reviewing the merits of the case.

16. The Dispute Tribunal failed to appreciate the facts, causing serious grievance to Ms. Barud and resulting in a manifestly unreasonable decision. Ms. Barud was clearly performing administrative duties, but she was subjected to the CRP wrongly as an FMA, which she never was. The resulting decision to abolish her post was taken without any reason, logic, rationality and legality, and it should be declared as null and void.

17. Ms. Barud requests that the Appeals Tribunal accept her appeal, annul the impugned Order as "null and void", and order her reinstatement in service.

#### **The Secretary-General's Answer**

18. The Secretary-General submits that Ms. Barud's appeal is not receivable. She does not allege that the Dispute Tribunal exceeded the scope of its authority, but rather that the UNDT erred in its findings and its decision was unreasonable. She argues that the UNDT did not have all the facts, including that her post was incorrectly classified as being one of FMA. She claims that the UNDT made its decision hastily without taking into account the Respondent's reply to her substantive application, but even if this were to be substantiated, it would not provide a basis for reversing the Dispute Tribunal's decision to reject her application for a suspension of the contested decision.

19. The Secretary-General requests that the Appeals Tribunal dismiss Ms. Barud's appeal as not receivable and affirm the impugned Order.

### Considerations

20. The first matter we address is the Appellant's motion for special leave (filed on 8 November 2019) to add "additional pleadings" to her appeal. We take this to be an application for consideration of further evidence, rather than for additional pleadings, but the distinction is immaterial in this case for the reasons we set out.

21. Ms. Barud says that she wishes this Tribunal to consider documents which she says emerged only after her appeal was filed with the Tribunal. She attaches copies of these documents to her motion.

22. On 21 November 2019, the Respondent filed his submissions. The Secretary-General says that there is no provision under this Tribunal's Rules of Procedure (the Rules) for such additional pleadings to be made after an appeal and an answer have been filed, as is the case here. The Respondent acknowledges (and responsibly), however, that Articles 14 and 31(1) of the Tribunal's Rules, and Article 6 of the Tribunal's Statute, may allow such an application to be granted. He points out, however, that our judgments and orders have held consistently that where such documents simply constitute supplementary arguments to an original pleading, the requirement for exceptional circumstances under those provisions will not be met.<sup>3</sup> The Respondent submits that the documents sought to be relied on by the Appellant do not contain new information and thus fail to meet the exceptional circumstances' test. With one exception, he says that all these documents were available to the Appellant at the time of filing her appeal. Her omission to file them with her appeal is not an exceptional circumstance. Furthermore, the Respondent says that the probative value of the documents relates to an issue that is not for decision in the current appeal.

23. The documents at issue address the description of the Appellant's role, whether as an "Administrative Assistant" (as she says) or as a "Facilities Management Assistant" (as the Secretary-General says). This appeal, however, concerns the Dispute Tribunal's refusal to

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<sup>3</sup> Citing *Koda v. Secretary-General of the United Nations*, Order No. 20 (2010) and *Basenko v. Secretary-General of the United Nations*, Order No. 29 (2010).

order a suspension of the decision not to renew the Appellant's employment contract pending its consideration of her substantive claims.

24. There is another, and in this case ultimately determinative, test for admissibility of additional evidence, and indeed of any evidence at any stage in any proceeding. Such evidence must be relevant to the issue or issues to be decided. It is perhaps so fundamental that it does not need to be, and has not been, expressed in the tests for the admission of additional evidence after the parties' submissions have been filed. The requirement of relevance is, nevertheless, always essential.

25. We decline to admit these additional documents because they are not relevant to the issues before us for decision now. These additional documents relate to the Appellant's substantive issues of justification for the non-renewal of her employment contract still to be heard and decided by the UNDT. Not only are the documents irrelevant to the issues for decision by us, but for us to express any view about them and their significance might impinge upon the functions vested in the UNDT at first instance. But that said, we see no reason why these documents should not be used by the Appellant at that hearing before the UNDT if she wishes to do so.

26. The Appellant's motion to add further evidence to her appeal is dismissed accordingly.

27. The next matters for consideration on this appeal are the legislative and regulatory powers that enable this Tribunal to consider an appeal and, if so, to make the orders that Ms. Barud seeks.

28. The first sub-issue concerns this Tribunal's powers to entertain the appeal. There are two relevant and determinative provisions. The first (Article 7 of our Rules) affects the timeliness, or absence of it, in the filing of Ms. Barud's appeal. This power is relevantly:

**Article 7**

**Time limits for filing appeals**

*(Amended on 24 December 2011 and 22 December 2018) (January 2019 version)*

1. Appeals instituting proceedings shall be submitted to the Appeals Tribunal through the Registrar within:

(a) 60 calendar days of the receipt by a party appealing a judgement of the Dispute Tribunal;

(b) 30 calendar days of the receipt by a party appealing an interlocutory order of the Dispute Tribunal.

29. We start with the assumption (which we will find ultimately is false, but in case we are wrong in that assessment) that Ms. Barud was entitled to appeal the impugned UNDT Order. Because this was an interlocutory order of the UNDT, Ms. Barud was required to file her appeal within 30 days of the UNDT Order being received. She did not do so until almost 60 days had expired. No extension of this time limit was sought or allowed. Although the Respondent has not relied on this breach, compliance is fundamental to our jurisdiction and we cannot simply ignore it. Compliance with it is necessary to enable us to consider any appeal on its merits. Absent compliance, we have no power to do so. It does not matter that the Respondent has not taken the point. On this first ground alone, the appeal must fail.

30. As just mentioned, the second (and arguably even more fundamental) jurisdictional issue concerns the entitlement in law of Ms. Barud to appeal against the judgment of the UNDT. This is contained in Article 10(2) of the UNDT Statute and Article 14(1) and (4) of the UNDT Rules of Procedure, relevantly as follows:<sup>4</sup>

**Article 10**

2. At any time during the proceedings, the Dispute Tribunal may order an interim measure, *which is without appeal*, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

**Article 14 Suspension of action during the proceedings**

1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.
4. The decision of the Dispute Tribunal on such an application shall *not be subject to appeal*.

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<sup>4</sup> Emphases added.



Article 14(4) of the UNDT Rules of Procedure set out above is consistent with the exclusory words of Article 10 of the UNDT Statute also set out in italics above.

31. These provisions make it clear that Ms. Barud is not entitled to appeal against the UNDT interlocutory order. Her case does not fall within the exception to that otherwise absolute prohibition identified in the Appeals Tribunal judgments issued since at least 2010.<sup>5</sup> Ms. Barud's is not a case in which it is contended that the UNDT clearly exceeded its jurisdiction or competence. These are narrow and tightly constrained considerations that will rarely be applicable. Ms. Barud's grounds of appeal do not so contend.

32. We are, therefore, not empowered to undertake an examination of the UNDT's application of the tests (correctly stated by the UNDT) for making such an order: the Appellant is faced with this insurmountable difficulty of the prohibition under Articles 2 and 14(4), meaning that the UNDT's decision is not appealable. This Tribunal has consistently so found in earlier cases.<sup>6</sup>

33. In case Ms. Barud's allegation that the UNDT acted unlawfully by deciding her application to it without hearing from the Secretary-General is within that narrow range of decisions taken in excess of jurisdiction or competence, we decide as follows. If the case of an applicant for interlocutory relief suspending separation fails manifestly to meet the statutory threshold requirements, it is competent for the UNDT to reject it for these reasons without needing to call on the Respondent. In Ms. Barud's case, the UNDT found clearly that any (essential) element of urgency was the unexplained fault of Ms. Barud herself from which she could not benefit. That was fatal to her application and hearing from the Secretary-General could not have saved Ms. Barud.

34. In these circumstances, it is unnecessary, and would in any event be inappropriate, for us to now examine the merits of Ms. Barud's claims. We note here, however, that Ms. Barud's substantive claims relating to her separation from service remain for consideration and decision by the UNDT. Because of the delays occasioned by this unreceivable appeal, we urge the parties to bring these back before the UNDT for consideration and decision as soon as reasonably possible.

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<sup>5</sup> We will refer to only one in a consistent line of cases establishing this principle, *Villamorán v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160.

<sup>6</sup> See, for example, *Chemingui v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-641, paras 17-25.

35. For the foregoing reasons, Ms. Barud's application for special leave to add pleadings (in reality to admit further evidence) and her appeal must be and are dismissed.

**Judgment**

36. The application for leave to add pleadings and the appeal are dismissed and Order No. 087 (NBI/2019)/Corr.1 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of March 2020.

*(Signed)*

Judge Colgan, Presiding  
Auckland, New Zealand

*(Signed)*

Judge Murphy  
Cape Town, South Africa

*(Signed)*

Judge Sandhu  
Vancouver, Canada

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

*(Signed)*

Weicheng Lin, Registrar