



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

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Judgment No. 2021-UNAT-1135

**Mohammad Tofazzel Hossain  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case Nos.:	2020-1460
Date:	25 June 2021
Registrar:	Weicheng Lin

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Counsel for Appellant: Self-represented

Counsel for Respondent: Andre Luiz Pereira de Oliveira

**JUDGE GRAEME COLGAN, PRESIDING.**

1. Mohammad Tofazzel Hossain (the Appellant), a former staff member with the United Nations Development Programme (UNDP), filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision of the UNDP's Rebuttal Panel to uphold his 2016 performance assessment rating of "partially satisfactory". The UNDT, in its Judgment on Receivability No. UNDT/2020/127, *Hossain v. Secretary-General of the United Nations*, dismissed the application as not receivable. This was on the grounds that the performance rating did not adversely affect him and thus did not have any direct legal consequences on his conditions of service that would make his application receivable by the UNDT as required by Article 2(1) of the UNDT Statute. For reasons set out below, we allow the appeal and remand the matter to the UNDT.

**Facts and Procedure**

2. Mr. Hossain had worked for the United Nations for 14 years. There is no suggestion from the parties' submissions or the Dispute Tribunal's Judgment that his performance during this period was anything other than satisfactory. For the first time, in 2016, he received a "partially satisfactory" performance rating, that is as we understand it, some of his work was assessed as having been performed satisfactorily and some unsatisfactorily. This was for his first year after appointment as a P-3 Finance Specialist with the UNDP. He had begun this appointment on 21 February 2016. Nevertheless, his initial one-year fixed-term appointment (FTA) in this role was thereafter extended successively and annually through to 30 June 2019.

3. Mr. Hossain had disputed his 2016 Performance Management and Development (PMD) assessment rating of "partially satisfactory", and this caused the implementation of a Talent Management Review Group (TMRG) review, as provided for by UNDP procedures. The TMRG review recommended the UNDP uphold the rating. The Appellant thereafter filed a formal rebuttal to his rating and, again as provided by UNDP procedures, a Rebuttal Panel was formed. The Rebuttal Panel issued a report setting forth the decision to maintain the rating, which the UNDT concluded was the contested decision before it when his rating was challenged by Mr. Hossain.

4. Mr. Hossain argued, among other things, that his supervisor was biased against him and had assessed his performance with the aim of “ousting” him from the post. Days after his supervisor’s assessment, his contract (presumably expiring on 20 February 2017) was extended for only six months instead of the one year he had expected. He also alleged that his post was set to be abolished with effect from 31 December 2018, but this was then not implemented after he challenged the decision. It is unclear from the UNDT’s Judgment whether his post was actually abolished and if so, when. Mr. Hossain also asserts some of his duties were stripped from him and given to a newly created unit. He further alleges various due process and procedural flaws by the Rebuttal Panel and alleges that his performance rating adversely impacted his success in applying for vacancies, thereby affecting adversely his career.

5. The Secretary-General argued before the UNDT that Mr. Hossain did not present evidence of any adverse impact on his terms of appointment, thus the decision to maintain his performance rating was not a contestable administrative decision within the meaning of Staff Rule 11.2(a) and Art 2.1(a) of the UNDT Statute and was not receivable.

6. The impugned Judgment was issued on 27 July 2020, was pertinently brief, and was based on preliminary issues only. The UNDT denied Mr. Hossain’s request for oral hearing and rejected his application as not receivable on the single ground that he failed to provide evidence of harm, or as the UNDT stated “provable direct legal consequences to his condition of employment from the contested decision and therefore, did not identify a challengeable administrative decision that can be received”. The UNDT found the decision had no adverse impact to Mr. Hossain noting that “the Rebuttal Panel’s decision not to review documents which it could not validate and to maintain the rating, ... did not adversely affect the Applicant”.

7. Regarding Mr. Hossain’s arguments that he had in fact suffered adverse consequence, the UNDT determined that his 6-month extension was subsequently changed back to a one-year term and that, ultimately, Mr. Hossain failed to provide evidence that his performance rating had any adverse impact on his pursuit of other vacancies. The UNDT quoted Mr. Hossain’s argument that for “some vacancy announcements, strong ratings of three consecutive performances is of dire necessity and that this is affecting [him] to apply for a few good jobs and thereby affecting [his] career”.<sup>1</sup> Regarding this assertion, the UNDT concluded Mr. Hossain’s appeal indicated he is a “former” staff member no longer employed with the

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<sup>1</sup> Impugned Judgment, para. 28, quoting his application.

United Nations, but it is unclear why, whether through non-renewal, abolition of post, or his own resignation that he had not disclosed any such vacancies, his applications therefor, or any negative responses thereto. Rather, he only cited his rating as the reason for not getting the job. The UNDT referenced this Tribunal's *Fairweather* case which noted that in the absence of applications for vacancies, a staff member such as the Appellant could not "presume" direct negative legal consequences.<sup>2</sup> In essence, the Appeals Tribunal determined in that case that absent evidence of applications and negative responses thereto, with direct causation stemming from the decision, any assertion of harm was speculative.

### **Submissions**

#### **Appellant's Grounds of Appeal**

8. The appeal's main arguments are as follows. First, the UNDT failed to consider that the decision was taken at the TMRG meeting to uphold the performance rating and phase out his position beyond 2018, which was in furtherance of his supervisor's agenda to oust him (as provided to UNDT in his final submission of 17 July 2020 annex 5). The minutes of this meeting were provided to UNDT, and these are clear evidence of adverse impact from the decision to his terms of employment and career. At the time of his appeal, he is no longer employed by UNDP. Thus, his final submission and the meeting minutes were evidence of adverse impact.

9. Second, the UNDT erred in fact by stating the 9 March 2017 meeting was a TMRG meeting. Rather, it was an informal meeting between the Resident Representative and Appellant. This contravened the policy requirement that a TMRG include three most senior members of the management team and be chaired by the Deputy Head of the Office. He made this point clear to the UNDT and is a procedural flaw which was overlooked. These flaws rendered the contested decision unlawful.

10. Third, the UNDT, by Order No. 126, requested his views on legal and policy issues within only 10 pages and so he highlighted the policy violations as noted above. However, the UNDT did not convene an oral hearing and 10 pages were insufficient to enable him to sufficiently advance his case as he wished. The UNDT did not allow him to provide evidence

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<sup>2</sup> *Fairweather v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1003.

or discuss anything pertaining to how the decision impacted on his career.

11. Fourth, the Appellant asserts that the UNDT did not allow him to present evidence of his non-selections to several positions, by denying him an oral hearing. He provides on appeal annexures containing documents related to his applications for: a position as a P-5 Finance Manager in Kuala Lumpur; a P-4 Finance Specialist with UNDP in Liberia for which he was being considered as a finalist and in which his performance appraisals were requested, including 2016; and the Roster for the Deputy Resident Representative which required 3 consecutive years of demonstrated strong performance, but due to his 2016 rating he was not included in the assessment process. He says the 2016 appraisal has affected his selection to posts and his career.

12. Finally, the Appellant requests this Tribunal to: 1) ensure justice by providing him the opportunity for his case to be heard; 2) issue an order to re-assess his 2016 performance based on evidence not his supervisor's bias; 3) assist with his job search including compensation for his period of unemployment; and 4) take action to eliminate corrupt practices from the justice process.

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

13. The main arguments by the Secretary-General are as follows: First, the UNDT correctly found the application not receivable. In *Lee*, the Appeals Tribunal established that a contested administrative decision must produce direct legal consequences to a staff member's terms and conditions of employment.<sup>3</sup> In *Staedler*, the Appeals Tribunal established that only *adverse* administrative decisions arising from final performance appraisals are reviewable.<sup>4</sup> No adverse administrative decision has been taken stemming from his appraisal rating and thus there is no adverse impact and no administrative decision that is reviewable.

14. Second, Mr. Hossain failed to demonstrate error warranting reversal. While he contends the UNDT failed to "show justice to him by not allowing him to provide evidence or discuss anything pertaining to his conditions that affected his career..." and did not allow him to present evidence at an oral hearing," he only assumes that the contested decision caused his non-selection to the Deputy Resident Representative pool recruitment and to the P-5 Finance Manger post in Kuala Lumpur, or the P-4 Finance Specialist with UNDP Liberia. Also, these submissions are repetitive and had already been made to UNDT. He fails to meet his burden as

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<sup>3</sup> *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481.

<sup>4</sup> *Staedler Lee v. Secretary-General of the United Nations* Judgment No. 2015-UNAT-546.

appellant to demonstrate the UNDT decision is defective. He also failed to demonstrate that the UNDT prevented him from presenting evidence and there is no right to an oral hearing before the UNDT.

### **Considerations**

15. We deal first with our reasons for declining a preliminary motion filed by Mr. Hossain. He sought to have his appeal heard in person. His grounds for doing so were set out in his Appeal form and include that the UNDT did not give due attention to his submissions and the evidence. He says that there are issues which require oral presentation, but he does not identify them or explain why this is so. Finally, Mr. Hossain says that it is not possible to put in writing, in a summarised way, “all the issues and the trail of events”.

16. This motion is governed by Article 8(2) of the Appeals Tribunal’s Statute. The Tribunal has a broad discretion to decide whether the personal appearance of the appellant is “required” at an oral hearing of the Tribunal.

17. Several factors persuaded us that Mr. Hossain’s request for an oral hearing at which he appears personally, must be refused. The usual practice of the Appeals Tribunal as an appellate tribunal with jurisdiction essentially to identify and appropriately rectify error on the part of the Dispute Tribunal, is to decide appeals on the record of the UNDT and by submissions. It is the UNDT that will more usually hold oral hearings, especially where disputed evidential findings must be made. Oral hearings in the Appeals Tribunal will, in these circumstances, be exceptional as will have to be the reasons for them. Mr. Hossain did not explain, at least sufficiently, why his appeal should be dealt with other than on papers filed. While one of his grounds of appeal is that the UNDT wrongly refused him a hearing in person, it is not necessary that there be a hearing in person of this ground to enable this Tribunal to deal with that submission justly.

18. For these reasons, the request for an in-person hearing was declined.

19. The next issue for decision that arises is Mr. Hossain’s wish for us to consider a number of documents that were not before the UNDT. The most potentially significant of these are e-mails relating to his applications for the three positions referred to earlier in this judgment. In one case the documents refer to the Appellant’s shortlisting for one role but, following a request for his performance assessments including the impugned 2016 assessment, record his

non-appointment to it. In another case, an e-mail records his non-appointment to another role. In neither case, however, do the documents record why he failed to be appointed, at least in effect beyond the rather bland advice that a better candidate was appointed.

20. While, therefore, these documents, had they been in evidence before the UNDT would probably have established the proof (which the UNDT commented was absent) that the Appellant had applied and been rejected for other roles, they could not in themselves have created the necessary third ingredient expected by the Dispute Tribunal, namely the causative link between the partially satisfactory assessment and the failure to be appointed.

21. Mr. Hossain's primary complaint, however, is that the UNDT improperly denied him a hearing at which he might either himself have called the evidence of the relevant hiring managers about why he was unsuccessful, or at least have persuaded the UNDT to have exercised its power to itself call for that evidence. While the UNDT has a very broad discretion, at least in non-disciplinary cases, to decide whether to conduct a hearing at which evidence is called orally or at which submissions can be made by parties on documents produced to the Tribunal, this is not an unlimited discretion. It must be exercised according to principle and be supported by reasons which can withstand scrutiny.

22. The UNDT's reasons for declining Mr. Hossain's request, as an unrepresented litigant, for an oral hearing were set out at paragraph 21 of the impugned Judgment and were as follows. The UNDT cited Article 2(e) of its Statute and Articles 16 and 19 of its Rules of Procedure, the latter empowering it to make orders or give for the fair and expeditious disposal of a case and to do justice between the parties directions. Having summarised the applicable principles, the Tribunal simply then said that an oral hearing would not assist it any further in resolving the issues on appeal and denied the request for an oral hearing.

23. Did the UNDT thereby err in law by not providing for a fair and expeditious disposal of the case and do justice as between the parties? Pertinent factors affecting this question include that Mr. Hossain was unrepresented and inexperienced in the ways of litigation. Also relevant is the fact that the Tribunal refused to receive his case so that it could be examined and determined on its merits. It did so by concluding that the Appellant had failed to prove matters evidentially that were beyond his control to prove, at least without the assistance of the Tribunal in calling for evidence from the relevant hiring managers, whether documentary or in person as it was empowered to under Article 9 of its Statute.

24. We conclude in the foregoing circumstances that the UNDT erred in law by rejecting Mr. Hossain's proceedings other than on their merits and for threshold jurisdictional reasons that it was empowered to examine and assist to establish. To use the words of the Articles governing these issues, the UNDT, while perhaps disposing of the case in an expeditious way, did not do so fairly, or certainly justly, as between the parties.

25. For these reasons and pursuant to Article 2(5) of our Statute we admit on appeal the documentary evidence establishing Mr. Hossain's applications for alternative positions, and the rejections of them. This is an exceptional case and we consider the admission of these documents that were not before the UNDT, for the reasons we have outlined, is in the interests of justice and for the efficient and expeditious resolution of the proceedings on their merits.

26. Mr. Hossain's performance assessment, affirmed by the Rebuttal Panel, as "partially satisfactory" was an administrative decision and was, by its very nature, adverse to him. His proceeding was therefore receivable by the Dispute Tribunal.

27. The appeal succeeds and we remand the case to the UNDT to decide Mr Hossain's claims on their merits following a hearing in which the Appellant is able to participate other than simply by filing documents.



**Judgment**

28. The appeal succeeds, the UNDT's Judgment No. UNDT/2020/127 is set aside and the case is remanded, as receivable, to the Dispute Tribunal for hearing.

Original and Authoritative Version: English

Dated this 25<sup>th</sup> day of June 2021.

*(Signed)*

Judge Colgan  
Auckland New Zealand

*(Signed)*

Judge Murphy  
Cape Town, South Africa

*(Signed)*

Judge Knierim  
Hamburg, Germany

Entered in the Register on this 4<sup>th</sup> day of August 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar