



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

Judgment No. 2023-UNAT-1389

**Maryam H. Wathanafa
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Abdelmohsen Sheha, Presiding Judge Gao Xiaoli Judge Katharine Mary Savage
Case No.:	2022-1749
Date of Decision:	27 October 2023
Date of Publication:	27 November 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant: Sètonджи Roland Adjovi

Counsel for Respondent: Noam Wiener

JUDGE ABDELMOHSEN SHEHA, PRESIDING.

1. Ms. Maryam H. Wathanafa contested a decision of the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) not to renew her fixed-term appointment (FTA) beyond 30 June 2021 and, accordingly, to separate her from service (contested Decision).¹
2. By Judgment No. UNDT/2022/080, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed her application (impugned Judgment).²
3. Ms. Wathanafa lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure³

5. Ms. Wathanafa was a P-3 Disarmament, Demobilization and Reintegration (DDR) Officer with MONUSCO in Goma.⁴
6. On 26 October 2020, the Secretary-General established a joint strategy on the progressive and phased drawdown of MONUSCO with the Government of the Democratic Republic of the Congo (Joint Strategy).⁵ According to the Joint Strategy, the Government of the Democratic Republic of the Congo resolved to pursue a new, community-based national disarmament, demobilization, and reintegration approach in preparation for the drawdown.
7. On 19 February 2021, the Secretary-General submitted his proposed 2021-2022 MONUSCO budget (Budget) to the General Assembly.⁶ The Budget proposed the abolition of 113 posts (23 international staff, 67 national staff and 23 United Nations Volunteers), effective 1 July 2021. The Budget specified, *inter alia*, that four international staff posts, including

¹ Ms. Wathanafa maintains that the contested Decision also included separating her from service “on retirement”.

² *Wathanafa v. Secretary-General of the United Nations*, Judgment dated 13 September 2022.

³ Summarized from the impugned Judgment as relevant to the appeal.

⁴ Impugned Judgment, para. 1.

⁵ *Ibid.*, para. 6.

⁶ *Ibid.*, para. 7.

three P-3 DDR posts, would be nationalized and converted to DDR National Professional Officer posts in line with the Joint Strategy.

8. On 2 April 2021, the Officer-in-Charge of Human Resources Section, MONUSCO (HR/M), informed Ms. Wathanafa that the anticipated approval of the proposed Budget would result in the abolishment of the post she encumbered through a “dry cut” and of the non-renewal of her FTA, expiring on 30 June 2021.⁷

9. On 26 April 2021, the Advisory Committee on Administrative and Budgetary Questions recommended the approval of some parts of the Budget.⁸

10. In a separation notice of 18 May 2021, Ms. Wathanafa received the contested Decision; it informed her that her FTA with MONUSCO would expire on 30 June 2021 and that her “separation with MONUSCO on retirement” would take effect close of business on 30 June 2021.⁹ Having reached the normal age for retirement (62 years),¹⁰ she was eligible for retirement and, according to Ms. Wathanafa, it seemed to her that she was forced into retirement before her mandatory retirement age (65 years).¹¹

11. On 9 June 2021, she submitted a management evaluation request concerning the contested Decision.¹²

12. On 14 June 2021, Ms. Wathanafa filed an application for suspension of action, seeking to suspend the contested Decision, pending management evaluation.¹³ On 22 June 2021, by Order No. 125 (NBI/2021), the UNDT granted her application for suspension of action. The UNDT considered that MONUSCO should not proceed, “given that the General Assembly ha[d] not approved the Secretary-General’s final budget proposal for 2021-2022”.¹⁴

13. On 29 June 2021, the General Assembly approved the MONUSCO Budget.¹⁵

⁷ *Ibid.*, para. 8.

⁸ *Ibid.*, para. 9.

⁹ *Ibid.*, para. 10; separation notice of 18 May 2021 (Annex 5 to the Secretary-General’s answer).

¹⁰ 16 July 2021 memorandum (found in Annex 7 to the Secretary-General’s answer); reply to the application before the UNDT, para. 21 (found in Annex 1 to the Secretary-General’s answer).

¹¹ Impugned Judgment, para. 15.

¹² Impugned Judgment, para. 11.

¹³ UNDT Order No. 125 (NBI/2021), para. 2.

¹⁴ *Ibid.*, para. 31.

¹⁵ *Ibid.*, para. 12.

14. On 16 July 2021, the Management Evaluation Unit issued its decision, upholding the contested Decision.¹⁶

15. On 19 July 2021, the Chief of HR/M notified Ms. Wathanafa that her separation was effective 19 July 2021 close of business.¹⁷

16. On 14 October 2021, she filed an application before the UNDT, describing the decision concerned as a decision not to extend her FTA and to separate her on retirement.¹⁸

The impugned Judgment

17. By Judgment No. UNDT/2022/o80, the UNDT dismissed the application for lack of merit, finding the decision lawful.

18. The UNDT, referring to the subject heading and the first sentence of the separation notice, found that its import was to inform Ms. Wathanafa that her separation was upon expiration of her FTA and that she had been aware of the date of expiry since her letter of appointment.¹⁹ The separation notice only restated and did not purport to vary the terms of her appointment. The Chief of HR/M indeed explained that the suggestion in the separation notice that she was proceeding on retirement was made in error and that it was subsequently corrected. The separation notice, read together with her letter of appointment, leaves no doubt that hers was a case of non-renewal of appointment. She was not forced to retire.

19. The UNDT pointed out that Ms. Wathanafa did not dispute the fact that MONUSCO had not renewed her appointment following a lawful downsizing exercise which involved abolition, by the General Assembly, of her post effective 30 June 2021.²⁰ She did not dispute the fact that these were legitimate reasons which were supported by facts, in keeping with established jurisprudence.

¹⁶ Impugned Judgment, para. 13.

¹⁷ 19 July 2021 letter on separation (Annex 8 to the Secretary-General's answer).

¹⁸ Impugned Judgment, para. 2; Ms. Wathanafa's application before the UNDT (Annex 1 to the Secretary-General's answer).

¹⁹ Impugned Judgment, para. 28. The UNDT noted that among the terms of her appointment was that it did not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment and that it was to expire without notice.

²⁰ Impugned Judgment, para. 30.

20. The UNDT was of the view that the Administration had no obligation to retain her in service beyond the expiration of her FTA.²¹ Since the present case is not a case of termination, but rather a case of non-renewal of her appointment, Staff Rule 9.6(e) is inapplicable. The Administration bears no obligation to place fixed-term appointees whose posts are abolished, in other posts outside of the regular recruitment process. The type of her appointment did not afford her any priority for retention or reassignment. Gender is not one of the priorities for staff retention provided for in Staff Rules 9.6(e) and 13.1(d).

21. The UNDT noted that the evidence given during the hearing of 16 and 17 August 2022 by witnesses P.-C., C. and W. had been premised on the narrative that Ms. Wathanafa had been forcibly retired; their testimony was therefore not helpful to her case.²²

22. The UNDT held that her non-selection for posts she had applied for concerned distinct administrative decisions outside the scope of the present application and that any such claims were not receivable.²³

Procedure before the Appeals Tribunal

23. On 14 November 2022, Ms. Wathanafa filed an appeal against the impugned Judgment with the Appeals Tribunal, to which the Secretary-General filed an answer on 23 January 2023.

Submissions

Appellant's Appeal

24. Ms. Wathanafa requests that the Appeals Tribunal declare the application receivable, uphold the appeal and vacate the impugned Judgment.

25. She argues that the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision. While the Chief of HR/M testified that the error of mentioning in the separation notice that she would be separated upon retirement was corrected in a following communication to her, there was no proof that this communication ever reached her.²⁴ The parties to the legal relationship of an administrative decision are inherently in unequal positions of power.

²¹ *Ibid.*, para. 31.

²² *Ibid.*, para. 36.

²³ *Ibid.*, para. 35.

²⁴ According to Ms. Wathanafa, she testified that she no longer had access to her United Nations e-mail account when the communication was sent, and this was corroborated by witness C.

It was unfair of the UNDT to construe the meaning of the statement in the contested Decision against its plain language. The fact that her FTA was expiring had nothing to do with the notification of separation due to retirement. If a reason is provided in an administrative decision, it must be factually true.

26. Ms. Wathanafa submits that the UNDT failed to fully provide the reasons for the impugned Judgment. Moreover, in Order No. 125 (NBI/2021), the UNDT found that the separation notice was *prima facie* unlawful. It is not clear what could have led the UNDT to reverse its prior finding.

The Secretary-General's Answer

27. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the impugned Judgment.

28. The Secretary-General argues that the UNDT correctly held that Ms. Wathanafa was lawfully separated upon expiration of her FTA. Her sole basis for asserting that she was forced into retirement is the wording of a single phrase in the 18 May 2021 letter, which she has taken out of context. The evidence relied upon by the UNDT follows from the downsizing process documented in the 2 April 2021 letter informing her of the non-renewal of her appointment due to the abolition of her post.

29. The Secretary-General submits that the mere fact that a final judgment contains holdings incongruent with the findings in an *in-limine* order does not demonstrate any error. Furthermore, on 29 June 2021, the General Assembly approved the Budget and Ms. Wathanafa's post was abolished, rendering the non-renewal of her FTA lawful. Thus, the reason prompting the UNDT to hold in the Order that the contested Decision was *prima facie* unlawful no longer existed.

Considerations

30. Two main issues arise in this appeal. We first examine whether the UNDT erred in fact, resulting in a manifestly unreasonable decision, when it did not consider "separation on retirement" to be the reason for the contested Decision. Secondly, we address whether the UNDT, having previously suspended the contested Decision because of its *prima facie* unlawfulness in Order No. 125 (NBI/2021) of 22 June 2021, erred in fact or in law in accepting its lawfulness in the impugned Judgment.

Whether the UNDT erred in fact, resulting in a manifestly unreasonable decision, when it did not consider “separation on retirement” to be the reason for the contested Decision

Preliminary remarks

31. In the impugned Judgment, the UNDT identified two issues as requiring consideration: whether Ms. Wathanafa was forced to retire, and whether the contested Decision was lawful.²⁵

32. In our view, the two issues identified by the UNDT are not different but intertwined. Thus, they should be analyzed in conjunction with each other.

33. It was not disputed that the case before the UNDT was one of non-renewal following the end of term of Ms. Wathanafa’s FTA.²⁶ The Appellant claimed that the Administration had not extended her FTA because of her age of retirement. The Administration submitted that the reason underpinning the contested Decision was rather the abolition of the post she encumbered. Therefore, it was disputed whether the reason for the contested Decision was her age of retirement or the abolition of her post, or both.

34. We now turn to the merits of the appeal.

Merits of the appeal

35. The jurisprudence of this Tribunal is consistent in matters related to the reasons of administrative decisions. As we have noted in *Respondent*:²⁷

(...) When a tribunal is called upon to judicially review an administrative decision on the ground of irrationality, it is required to examine whether the decision is rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the Administration, or the reasons given for it by the Administration. That task of judicial review depends on the furnishing of adequate and coherent reasons for the decision. The giving of reasons is one of the fundamentals of good administration. It encourages rational and structured decision-making and minimizes arbitrariness and bias.

²⁵ Impugned Judgment, para. 24.

²⁶ Ms. Wathanafa’s application before the UNDT, paras. 12 and 14.

²⁷ *Respondent v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1097, para. 44.

36. In addition to stating the reasons behind the impugned decision, we ruled in *Islam* that:²⁸

[W]hen a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts.

37. Hence, to determine the lawfulness of an administrative decision, the Tribunals rely on the reasons furnished by the Administration, provided either in the contested decision itself, or afterwards. Either way, the reasons must be “sufficiently clear, precise, and intelligible”.²⁹ They must be supported by true and relevant facts in respect of factual reasons, or by an established legal situation in respect of legal reasons.

38. The UNDT referred to the letter of the Officer-in-Chief of HR/M, dated on 2 April 2021, indicating that the reason for the non-renewal was the new budget proposal for MONUSCO that was being considered by the legislative bodies for implementation effective 1 July 2021 and the proposed abolition of posts in MONUSCO’s budget for 2021-2022, including the post encumbered by Ms. Wathanafa. The subsequent letter of HR/M, dated on 18 May 2021, informing her of the expiry of her FTA on 30 June 2021 was in line with these strategic and budgetary orientations. The UNDT considered the mention of retirement included in that letter and found it having no import on her separation. The UNDT was satisfied, based on the testimony provided at the hearing, that the statement about her retirement was made in error,³⁰ and that she was in any case aware that her position had been lawfully abolished.³¹

39. Contrary to that finding, Ms. Wathanafa draws on the specific wording of the separation notice of 18 May 2021. It stated, *inter alia*, that her “separation with MONUSCO *on retirement* will take effect close of business 30 June 2021”.³² Ms. Wathanafa contends that the UNDT made an error of fact, resulting in a manifestly unreasonable decision, when it disregarded the reason furnished by the Administration, i.e., her age of retirement, as the reason for the contested Decision.

²⁸ *Islam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-115, para. 29.

²⁹ *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-927, para. 36.

³⁰ Impugned Judgment, para. 29.

³¹ *Ibid.*

³² Separation notice of 18 May 2021 (emphasis added) (Annex 5 to the Secretary-General’s answer).

40. We do not agree with Ms. Wathanafa's contention. It is true that the separation notice mentioned her retirement. However, the UNDT rightly accepted that this reason had been given "in error".³³ The Administration recognized its error, understood as an error of law regarding the interpretation and application of Article 28 of the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund (UNJSPF).³⁴ In normal circumstances, when a contested decision is based on that reason alone, the recognition of error in that reason renders the decision baseless, and the Administration has the obligation to withdraw it. Absent withdrawal, the judge shall rescind the baseless decision. This is, however, not the case here. The recognition of error regarding the age of retirement does not impact the lawfulness of the contested Decision as it relied on a different legal reason of abolition of post. Undisputed by Ms. Wathanafa, the abolition of the post she encumbered was based on verifiable facts, including a clear pattern of chronological events preceding the issuance of the contested Decision and following it. These facts were examined by the UNDT and were found sufficient to uphold the contested Decision.

41. Therefore, we find that the UNDT did not err in fact when it did not consider the indicated separation on retirement to be the reason for the contested Decision.

Whether the UNDT, having previously suspended the contested Decision because of its prima facie unlawfulness, erred in fact or in law in accepting its lawfulness in the impugned Judgment

42. The appeal before us is not a challenge to the UNDT's Order No. 125 (NBI/2021) of 22 June 2021. Ms. Wathanafa's contention is rather that the UNDT's decision on the issue of lawfulness of the non-renewal in the impugned Judgment was at variance with its previous order. Her argument might originate from a misunderstanding of the nature of the UNDT's competencies.

³³ Impugned Judgment, para. 29; Transcripts of Hearings of 17 August 2022, p. 44, para. 16 and p. 45, paras. 21 & 22.

³⁴ United Nations Joint Staff Pension Board issuance JSPB/G.4/Rev.25 (Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund), in effect in 2021. Article 28(a) provided that a retirement benefit was to be payable to a participant whose age on separation was the normal retirement age or more and whose contributory service was five years or longer.

43. Suspending the implementation of a contested decision (suspension of action or *suspension d'exécution*), pending management evaluation, is governed by Article 2(2) of the UNDT Statute. It reads:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

44. The UNDT is therefore authorized, upon request of the moving party, to suspend the implementation of the administrative decision that is subject to an ongoing management evaluation. This special judicial process provides a temporary protective measure for staff members against irreversible harmful effects of an apparently unlawful administrative decision.

45. For the UNDT to order suspension of action, the Statute provides that three criteria must be cumulatively met: (1) a *prima facie* unlawfulness of the contested decision; (2) a particular urgency; and (3) irreparable damage to the staff member to be caused by the implementation of the contested decision.

46. In the first prong of the test for suspension of action, the UNDT reviews the contested decision to verify its lawfulness. The judicial review in this context is however different from the review conducted by the Tribunal on the merits of an application contesting the administrative decision. The UNDT Statute provides for a *prima facie* unlawfulness. This means that the intensity of review conducted by the UNDT is limited. The Tribunal examines whether the contested decision appears, after a summary review, to be unlawful. It is a matter of having serious doubts as to the lawfulness of the decision rather than an exhaustively established unlawfulness. This type of cursory judicial review is fundamental to the effectiveness of the process of suspension of action that is intended to respect the urgency of the situation.³⁵ A full judicial review would require the Tribunal to spend more time and would contradict the spirit of urgency in which the process of suspension of action occurs.

³⁵ Article 13(3) of the UNDT Rules of Procedure specifies that the UNDT shall consider an application for interim measures within five working days of the service of the application on the respondent.

47. Hence, findings made for suspension of action do not restrict the UNDT in its judicial review on the merits. Albeit being enforceable, an order for suspension of action does not have a *res judicata* effect vis-à-vis the Tribunal that issued it while reviewing the application contesting the administrative decision. A subsequent full judicial review enables the UNDT to examine the contested decision thoroughly and possibly to arrive at a different conclusion. The contrary is also possible. The UNDT may reject the request for suspension of action due to lack of *prima facie* unlawfulness and later find the contested decision unlawful on the merits.

48. In the present case, Ms. Wathanafa questions the correctness of the impugned Judgment on grounds of divergence of outcome between that Judgment and the prior UNDT Order on suspension of action. She does not point out any finding of fact in the UNDT's Order to attempt to demonstrate the alleged error in the conclusion of the impugned Judgment. She merely contends that this difference of outcome is proof of contradiction and a consequent error of law.

49. We cannot agree with Ms. Wathanafa on this point. As previously noted, the process of suspension of action follows somewhat different objectives and is subject to different rules than those of judicial review of applications on the merits. Therefore, we agree with the Secretary-General that the difference of outcome *per se*, between the Order and the impugned Judgment, is neither a valid argument for illegality nor a censorable error of law.

50. Furthermore, in the present case, the divergence between the findings in the UNDT's Order No. 125 (2021/NBI) and the impugned Judgment was due to obvious reasons. In the Order, the UNDT held that the contested decision was *prima facie* unlawful because the General Assembly of the United Nations had not yet approved the proposed budget of MONUSCO that provided for the abolishment of the three DDR posts. As the Budget was subsequently approved on 29 June 2021, this reason for the unlawfulness of the contested Decision did not stand any longer. Therefore, we do not find any "logical gymnastic" in the difference between the outcomes of the Order and the impugned Judgment. It is simply a difference in the legal circumstances of each type of judicial review.

51. The appeal accordingly fails.

Judgment

52. Ms. Wathanafa's appeal is dismissed, and Judgment No. UNDT/2022/080 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)

Judge Sheha, Presiding

(Signed)

Judge Gao

(Signed)

Judge Savage

Judgment published and entered into the Register on this 27th day of November 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar