



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1479

Polino Malish Abbas

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Abdelmohsen Sheha, Presiding Judge Katharine Mary Savage Judge Graeme Colgan
Case No.:	2024-1892
Date of Decision:	25 October 2024
Date of Publication:	15 November 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Hydar Majook

Counsel for Respondent: Agnieszka Martin

JUDGE ABDELMOHSEN SHEHA, PRESIDING.

1. Mr. Polino Malish Abbas (Mr. Abbas), a former staff member with the United Nations Mission in South Sudan (UNMISS), contested the Administration's decision of 1 April 2022 (contested decision).
2. On 16 November 2023, by Judgment on Receivability No. UNDT/2023/126 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed Mr. Abbas's application as not receivable *ratione materiae* or *ratione temporis*.
3. Mr. Abbas lodged an appeal against 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, albeit for different reasons, the impugned Judgment.

Facts and Procedure

5. At the relevant time of events, Mr. Abbas was a Supply Assistant with UNMISS.
6. On 11 March 2022, Mr. Abbas was informed by letter from the Assistant Secretary-General for Human Resources of the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) that the following allegations against him had been established by clear and convincing evidence and that his actions constituted serious misconduct in respect of which the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity was imposed in accordance with Staff Rule 10.2(a)(viii):²

[O]n 2 October 2019, while driving [a United Nations] Vehicle, you failed to take reasonable care by: (i) driving the Vehicle while under the influence of alcohol; and (ii) causing damage to the Vehicle, repair of which cost the Organization the total amount of USD 437.00.

7. The 11 March 2022 letter was notified to Mr. Abbas by e-mail, which also specified that, in accordance with Section 9.3 of Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct,

¹ *Abbas v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/126.

² Sanction letter dated 11 March 2022.

investigations and the disciplinary process), the decision would be deemed received on the date it was electronically communicated to him.³

8. On 1 April 2022, the UNMISS Special Representative of the Secretary-General and Head of Mission (Special Representative) issued a letter regarding an Investigation Report received on 24 February 2022 concerning Mr. Abbas, in which the Special Investigation Unit (SIU) found that he had been abusive toward his supervisor and colleagues and had thrown away an attendance register on 22 September 2021. In his letter, the Special Representative stated that he agreed with the SIU's findings, took note of Mr. Abbas's separation from service on 11 March 2022, and, therefore, requested the UNMISS Officer-in-Charge, Mission Support Division, to place a note in his Official Status File (OSF).⁴

9. On 5 June 2023, Mr. Abbas filed an application with the Dispute Tribunal challenging the contested decision. In his application, Mr. Abbas stated that the decision that he was challenging was the Administration's "abusive behavior" dated 1 April 2022, of which he first became aware at the end of June 2022. He requested that the UNDT reinstate him to his previous position, to pay him three months' salary for the period from April to June 2022, and to award him compensation in an amount equivalent to four years' net base salary.⁵

Procedure before the UNDT

10. On 13 June 2023, the Secretary-General filed a Motion requesting, *inter alia*, that receivability be determined as a preliminary matter.⁶

11. On 27 June 2023, the UNDT issued Order No. 113 (NBI/2023),⁷ partly granting the Secretary-General's Motion and instructing Mr. Abbas to file a rejoinder on the issue of receivability by 10 July 2023.

12. On 8 July 2023, Mr. Abbas, through his representative, filed his Rejoinder to the Secretary-General's Motion. He stated that he was incapacitated and requested to benefit from the

³ Annex 2 of the Secretary-General's response to Order No. 155 (NBI/2023).

⁴ Letter dated 1 April 2022 from the Special Representative to the UNMISS Officer-in-Charge, Subject: Outcome of Investigation into Allegations of Abusive Behavior Implicating an UNMISS National Staff Member in Juba, South Sudan.

⁵ UNDT application.

⁶ Secretary-General's Motion to have receivability determined as a preliminary matter dated 13 June 2023.

⁷ *Abbas v. Secretary-General of the United Nations*, Order No. 113 (NBI/2023), para. 6.

one-year deadline set out in Article 8(1)(d)(iii) of the Dispute Tribunal Statute (UNDT Statute) and Article 7(2) of the Dispute Tribunal Rules of Procedure (UNDT Rules). He also specified that he had been officially informed of the contested decision on 30 June 2022.⁸

13. On 5 October 2023, the UNDT issued Order No. 155 (NBI/2023),⁹ in which it requested Mr. Abbas to submit documentation in support of his claim of incapacity by 6 November 2023. The UNDT also ordered the Secretary-General to submit “a copy of the contested decision and clearly clarify the ground on which [Mr. Abbas] was separated from service” by 12 October 2023.

14. On 12 October 2023, the Secretary-General indicated that Mr. Abbas was separated from service for misconduct and submitted a copy of the sanction letter dated 11 March 2022.¹⁰

15. On 13 November 2023, Mr. Abbas filed a copy of a medical report dated 9 November 2023 indicating a “simple [linear] fracture (...) of tibia and dislocation on ankle joint”. The medical report further specified that Mr. Abbas showed “good healing” of his left leg and ankle joint.¹¹

Impugned Judgment

16. On 16 November 2023, the Dispute Tribunal issued the impugned Judgment, dismissing Mr. Abbas’s application. The UNDT first observed that the decision challenged by Mr. Abbas was unclear, especially since “[t]he termination decision submitted by the [Secretary-General did] not accord with [Mr. Abbas’s] allegation that the decision was made on 1 April 2022 and arose from an incident in September 2021 [while] (...) that termination decision was made on 11 March 2022 and rose from an incident on 2 October 2019”.¹²

17. The UNDT then examined two possible scenarios. First, it held that if Mr. Abbas was separated from service for non-disciplinary reasons, his application was not receivable *ratione materiae* because he had not previously requested management evaluation of the contested decision, a requirement set out in Article 8(1)(c) of the UNDT Statute.¹³

⁸ Mr. Abbas’s Rejoinder to the Secretary-General’s Motion to have receivability determined as a preliminary matter.

⁹ *Abbas v. Secretary-General of the United Nations*, Order No. 155 (NBI/2023), paras. 9-11.

¹⁰ Annex 2 of the Secretary-General’s response to Order No. 155 (NBI/2023). See also sanction letter dated 11 March 2022.

¹¹ Medical report dated 9 November 2023.

¹² Impugned Judgment, para. 16.

¹³ *Ibid.*, para. 17.

18. Second, the UNDT found that even if Mr. Abbas was separated from service for disciplinary reasons, his application was still not receivable because he failed to file it within 90 days from his receipt of the administrative decision as required by Article 8(1)(d)(ii) of the UNDT Statute and Article 7(1)(c) of the UNDT Rules. Indeed, the UNDT highlighted that Mr. Abbas himself stated that he became aware of the contested decision on 30 June 2022. Therefore, the deadline for filing his application was on 28 September 2022. Since Mr. Abbas filed his application on 5 June 2023, the UNDT concluded that it was not receivable *ratione temporis*.¹⁴

19. The UNDT rejected Mr. Abbas's argument that the time limit to file his application was three years pursuant to Article 8(4) of the UNDT Statute and Article 7(6) of the UNDT Rules. It found that, contrary to Mr. Abbas's contentions, these Articles do not establish a deadline of general applicability but rather "permits the Tribunal, upon written request by the applicant, to suspend or waive 'the deadlines for a limited period of time and only in exceptional circumstances'".¹⁵ In the present case, the UNDT found that since "there [had] been no request to suspend or waive the deadlines nor any presentation of exceptional circumstances", these Articles did not apply.¹⁶

20. With regard to Mr. Abbas's argument that he was incapacitated and should thus benefit from an extended one-year deadline as provided for in Article 8(1)(d)(iii) of the UNDT Statute and Article 7(2) of the UNDT Rules, the Dispute Tribunal found that neither Mr. Abbas's basic knowledge of English (highlighted in his application), nor his leg injury (mentioned in his medical report dated 9 November 2023) constituted an incapacity.¹⁷ On the contrary, the UNDT, relying on the Merriam-Webster Dictionary as well as on Appeals Tribunal jurisprudence, found that the term "incapacitated" referred to "a staff member who is unable to bring a claim on their own behalf, just like if they were deceased. It implies an inability to manage one's own legal affairs, usually due to mental health reasons".¹⁸ Last, the UNDT also emphasized that if Mr. Abbas "was able to authorize Mr. Hydar Majook to act as his legal representative, he was not incapacitated".¹⁹

¹⁴ *Ibid.*, paras. 18-20.

¹⁵ *Ibid.*, para. 21.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, paras. 22-25.

¹⁸ *Ibid.*, para. 24, citing *Howard Andrew Giles III v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1106, para. 57.

¹⁹ *Ibid.*, para. 26.

21. Therefore, the UNDT rejected Mr. Abbas’s request for an extended deadline on the grounds that he was incapacitated and found his application not receivable.

Procedure before the Appeals Tribunal

22. On 22 January 2024, Mr. Abbas filed an appeal against the impugned Judgment with the Appeals Tribunal, to which the Secretary-General responded on 21 March 2024.

Submissions

Mr. Abbas’s Appeal

23. Mr. Abbas requests the Appeals Tribunal “to dismiss the [impugned] Judgment [in] its entirety”.²⁰

24. Mr. Abbas also requests an oral hearing because witnesses “need to (...) appear before the (...) UNAT to testify because they know about [his] continued [work] for a period [of] three months without pay from April to June 2022”.²¹

25. Mr. Abbas submits that the UNDT failed to exercise jurisdiction vested in it by finding that he had “not clarified the nature of the challenged termination decision nor even submitted a copy of the decision”.²² In this regard, Mr. Abbas submits that the UNDT failed to recognize that “the time [he received] the contested administrative decision has three different dates [11 March, 1 April and 30 June 2022]”. Mr. Abbas also contends that he could not have known the nature of the contested decision as he received it for the first time on 12 November 2023, when the UNDT informed him that the contested decision had already been sent by the Secretary-General, and not on 30 June 2022, as erroneously determined by the UNDT.

26. Mr. Abbas argues that the Administration failed to attach the sanction letter (i.e., the contested decision) to its correspondence dated 11 March and 30 June 2022. In any event, Mr. Abbas asserts that even if the sanction letter had been attached to the Administration’s e-mails, it would still be null as it was sent just minutes before he left the compound, and he therefore never received it.

²⁰ Appeal form.

²¹ *Ibid.*

²² Impugned Judgment, para. 16.

27. Mr. Abbas submits that the UNDT erred on a question of law by failing to consider that since he continued to work for a period of three months between April and June 2022, his notice of termination shall be deemed null and void pursuant to Article 82 of the South Sudan Labour Law Statute.

28. Mr. Abbas contends that the UNDT erred in concluding that he was not incapacitated. He argues that he is incapacitated because he broke his leg on 2 October 2019 and is still undergoing treatment for the mental consequences of this injury. Mr. Abbas also submits that the UNDT exceeded its jurisdiction by referring to the Merriam-Webster Dictionary's definition of "incapacitated", arguing that only medical experts should determine what qualifies as an incapacity.

29. Last, Mr. Abbas argues that the UNDT erred in concluding that he was not incapacitated because he was able to authorize Mr. Majook to act as his legal representative.

The Secretary-General's Answer

30. The Secretary-General requests the Appeals Tribunal to uphold the impugned Judgment and dismiss the appeal in its entirety.

31. The Secretary-General contends that the UNDT correctly concluded that Mr. Abbas's application was not receivable.

32. The Secretary-General argues that Mr. Abbas has failed to demonstrate any error in the impugned Judgment, but merely indicated that he disagrees with the UNDT's findings.

33. The Secretary-General contends that Mr. Abbas has failed to show that the UNDT did not exercise jurisdiction vested in it by finding that he did not clarify the nature of the contested decision. On the contrary, the Secretary-General argues that the UNDT correctly found that the contested decision was unclear.

34. The Secretary-General argues that Mr. Abbas has failed to demonstrate that the UNDT erred on a question of fact in determining that the date of receipt of the contested decision was 30 June 2022, rather than 12 November 2023. By doing so, the UNDT properly relied on the information provided by Mr. Abbas himself. In this regard, the Secretary-General contends that the UNDT did not need to determine the exact date of Mr. Abbas's receipt of the contested decision, as it was "incumbent upon the staff member to clearly identify the contested administrative

decision” and the UNDT “cannot be held responsible for [Mr. Abbas’s] errors”. The Secretary-General also observes that the sanction letter was sent to Mr. Abbas on 11 March 2022 and, therefore, pursuant to Section 9.3 of ST/AI/2017/1, the contested decision was deemed to be received on the date it was electronically communicated, i.e., 11 March 2022.²³

35. The Secretary-General also points out that Annexes 12 and 13 to Mr. Abbas’s appeal were not presented before the UNDT and should not be considered.²⁴ Indeed, the Secretary-General contends that Mr. Abbas did not demonstrate the existence of exceptional circumstances justifying the admission of these documents by seeking leave to file additional evidence, as required by Article 2(5) of the Appeals Tribunal Statute (Statute).²⁵ Moreover, the Secretary-General challenges the authenticity of Annex 12, which, he contends, has the same content and timestamp as Annex 13.

36. The Secretary-General also notes that domestic laws are not part of the legal framework applicable before the United Nations Tribunals.

37. The Secretary-General submits that Mr. Abbas failed to demonstrate any error in the UNDT’s finding that he was not incapacitated. On the contrary, the Secretary-General argues that the UNDT correctly determined that a broken leg does not meet the definition of “incapacitated” in Article 8(1)(d)(iii) of the UNDT Statute and Article 7(2) of the UNDT Rules.

38. Last, the Secretary-General contends that the UNDT’s reference to “the legal representative authorization and Merriam-Webster Dictionary” is not erroneous.

Considerations

39. Mr. Abbas requests this Tribunal to hold an oral hearing to hear testimonies intended to prove that he worked for three months without pay, from April to June 2022.

40. We recall that this Tribunal is not a trial court. Under Article 2(4)(a) of its Statute, the UNAT relies on the written record of the case as presented to the lower court. Only where exceptional circumstances are shown to exist, as outlined in Article 2(5) of the Statute, may this Tribunal accept additional documentary evidence. However, when oral testimony is

²³ Annex 2 of the Secretary-General’s response to Order No. 155 (NBI/2023). See also sanction letter dated 11 March 2022.

²⁴ E-mail dated 30 June 2022 from the Administration to Mr. Abbas; copy of Mr. Abbas’s identity documents.

²⁵ *Haydar v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-821, para. 20.

necessary to establish the facts of the case, the UNAT is required to remand it to the UNDT to hear the witnesses.²⁶

41. It follows that the UNAT is not empowered to hear the witnesses Mr. Abbas seeks to provide. We also do not find any necessity to remand the case to the UNDT to hear these witnesses, as their testimonies, as advanced by Mr. Abbas, are irrelevant to the issues at stake in the present case. Mr. Abbas's request must, therefore, be denied.

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

43. Mr. Abbas contends, at least implicitly, that the UNDT erred in jurisdiction and in fact, resulting in a manifestly unreasonable decision, when it identified the contested decision as that of 1 April 2022. Instead, Mr. Abbas attempts to convince this Tribunal that he was, in fact, contesting the termination decision of 11 March 2022, of which he claims to have been unaware until 12 November 2023.

44. The burden of identifying the contested decision lies primarily with the applicant, who must: (i) identify the administrative decision he or she wishes to contest; and (ii) demonstrate that the contested decision is in non-compliance with the terms of his or her appointment.²⁷

45. This does not, however, mean that the Dispute Tribunal plays a passive role in this regard. As we have ruled in *Massabni*:²⁸

... The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions (...)

... Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

46. We further ruled in *Mohammed Abed AlRaheam ElShanti*, regarding the elements used to identify the challenged administrative decision—an approach applicable to both UNDT

²⁶ *Enrico Muratore Apro시오 v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1371, para. 68.

²⁷ *Adnan-Tolon v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-970, para. 28.

²⁸ *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, paras. 25-26.

and UNRWA DT cases—that “[t]he UNRWA Dispute Tribunal was not limited to the staff member’s description of the contested or impugned decision; quite properly, it could consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed”.²⁹

47. In any event, the UNAT shall not intervene lightly in this exercise, as far as the first instance tribunal’s determination is supported by a “primary legal or factual basis” from which such determination emanates.³⁰

48. In the present case, the UNDT correctly found it difficult to identify the decision that Mr. Abbas sought to contest. Mr. Abbas’s application was, indeed, contradictory and confusing. On the one hand, he contested the decision of 1 April 2022, which placed a note in his OSF. On the other hand, as relief, he requested his reinstatement to his previous position. However, the rescission of the decision of 1 April 2022 would not have led to his reinstatement. In these circumstances, only the decision of 11 March 2022, separating Mr. Abbas from service, would be consistent with his requested relief.

49. To resolve that difficulty, the UNDT opted for a third option, the reasoning for which we cannot follow. Ignoring the documents submitted by both parties, the Dispute Tribunal followed Mr. Abbas in his allegation that he was subject to a termination decision on 1 April 2022. Based on this characterization, the UNDT speculated about the nature of the presumably contested decision. According to the Dispute Tribunal, if the termination decision was non-disciplinary, then Mr. Abbas’s application was not receivable absent a request for management evaluation. If the termination decision was disciplinary, then Mr. Abbas’s application was not receivable because it was filed more than 90 days after receipt of the contested decision.³¹

50. Although we understand the difficulties the UNDT faced in resolving Mr. Abbas’s case, we find that the UNDT’s approach was not appropriate. The identification of the contested decision, and thus the application of tests of receivability *ratione materiae* and *ratione temporis*, must rely on objective elements. The case record clearly shows that while a termination decision was made on 11 March 2022, another decision placing a note in

²⁹ *Mohammed Abed AlRaheam ElShanti v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1022, para. 45.

³⁰ *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, para. 39.

³¹ Impugned Judgment, paras. 18-20.

Mr. Abbas's OSF was made on 1 April 2022. There was no termination decision dated 1 April 2022, as claimed by Mr. Abbas. Therefore, the UNDT, exercising its inherent judicial powers under its Statute, should have identified either decision as the contested decision. However, in any case, it should not have followed Mr. Abbas in his erroneous allegation that a termination decision on 1 April 2022 ever existed. By doing so, we find that the UNDT's determination lacked factual and legal basis and, consequently, that the Dispute Tribunal committed an error of jurisdiction and an error of fact, which resulted in a manifestly unreasonable decision.

51. This does not mean that Mr. Abbas's application had any chance of success. Even if the UNDT had correctly identified the contested decision as that of 11 March 2022, separating Mr. Abbas from service for misconduct, his case would still not have been receivable.

52. Pursuant to Article 8(1)(d)(ii) of the UNDT Statute and Staff Rule 11.2(b), where management evaluation is not required, the application contesting the administrative decision must be filed within 90 days of its receipt by the staff member. This is the case when the contested administrative decision concerns a disciplinary measure taken following a disciplinary process.

53. In this regard, we have "repeatedly and consistently strictly enforced the time limits for filing applications and appeals. Strict adherence to filing deadlines assures one of the goals of our new system of administration of justice: the timely hearing of cases and rendering of judgments."³²

54. The case record shows that the termination decision of 11 March 2022 was electronically notified to Mr. Abbas on that same date. Even if we were to accept Mr. Abbas's claim that he had no access to his e-mail immediately following his separation from service, the letter of 1 April 2022 clearly indicated that he "was separated from service whilst the current matter was unresolved". The clear meaning of the words expressed in the decision of 1 April 2022 is that Mr. Abbas had already been separated from service before the issuance of that decision. Therefore, this inference demonstrates that Mr. Abbas had acquired knowledge about his separation from service. Since Mr. Abbas filed his application only on 5 June 2023, far beyond the legal deadline of 90 days for submission of his application, it was not receivable *ratione temporis*.

³² *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, para. 26 (internal footnote omitted).

55. Mr. Abbas’s argument that he was incapacitated also does not assist him in his appeal.

56. Article 8(1)(d)(iii) of the UNDT Statute extends the deadline to submit applications for one year when the claim is made in the name of an incapacitated or deceased staff member.

57. Mr. Abbas submits that the UNDT erred when it defined and evaluated his state of incapacity through the Merriam-Webster Dictionary. In his view, incapacity must only be established by a medical report.

58. Mr. Abbas’s argument confuses the objective definition of a term with its application to the facts of a specific case. The UNDT rightly relied on the Merriam-Webster Dictionary to define the word “incapacitated”. As we held in *Howard Andrew Giles III*, the word “incapacitated” is defined as “deprived of capacity or natural power; made incapable of or unfit for normal functioning”.³³ Incapacity thus involves an inability to manage a person’s own affairs including, in such cases, an inability to file proceedings in the UNDT or to have filed them on that person’s behalf.

59. Drawing on that definition, the Dispute Tribunal then examined the medical report submitted by Mr. Abbas to ascertain whether his illness impacted his ability to file his application, or to authorize a representative to do so. However, as rightly noted by the UNDT, a “simple [linear] fracture” or a “dislocation on ankle joint” do not affect one’s ability to manage one’s own affairs.³⁴ Furthermore, as correctly observed by the Dispute Tribunal, if Mr. Abbas was able to provide a legal authorization to a representative in the manner required, then he was not incapacitated.³⁵

60. For these reasons, Mr. Abbas’s appeal cannot succeed.

³³ *Howard Andrew Giles III* Judgment, *op. cit.*, para. 57.

³⁴ Impugned Judgment, paras. 24-25.

³⁵ *Ibid.*, para. 26.

Judgment

61. Mr. Abbas's appeal is dismissed, and Judgment No. UNDT/2023/126 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 25th day of October 2024 in New York, United States.

(Signed)

Judge Sheha, Presiding

(Signed)

Judge Savage

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 15th day of November 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar