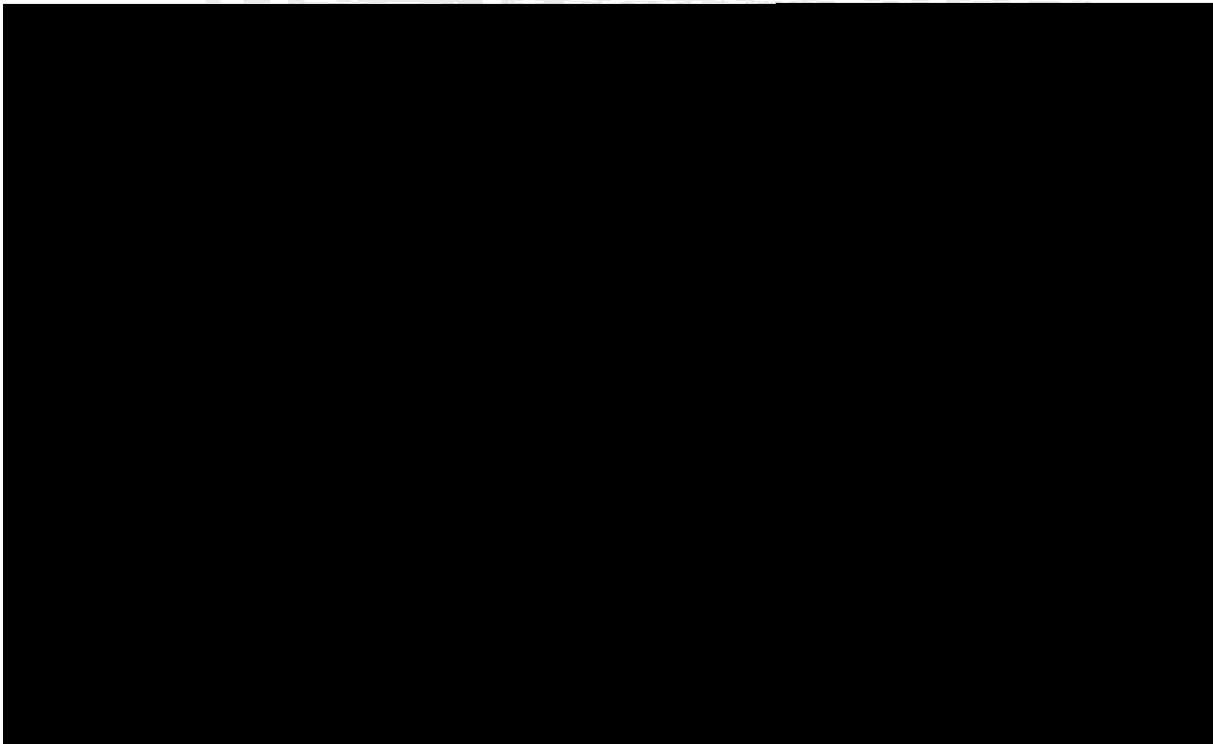




Judgment No. 2019-UNAT-946



Counsel for Mr. Tosi:

Self-represented

Counsel for Secretary-General:

John Stompor

JUDGE MARTHA HALFELD, PRESIDING.

1. This matter arises out of two applications filed by Mr. Alejandro Tosi before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) one challenging the non-renewal of his fixed-term appointment and the implementation of the settlement agreement and the second alleging discrimination and mistreatment as prohibited conduct by his former first reporting officer (FRO). In Judgment No. UNDT/2019/003,¹

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complaint against the SRSG, but not the complaint against the MONUSCO senior staff members since it had already been addressed by the SRSG.

... On 31 October 2015, and 12 and 26 November 2015, the USG/DFS received comments from the SRSG in response to the Applicant's complaint against him.

... On 12 November 2015, the Applicant requested management evaluation of the SRSG's decision not to convene a fact-finding panel to investigate the Applicant's 2008/5 complaint against the FRO, DMS and CoS of MONUSCO.

... On 14 January 2016, the USG/DFS informed the Applicant that he had reviewed the Applicant's complaint against the SRSG and decided there were insufficient grounds to warrant a formal fact-finding investigation.

... On 28 December 2015 and 19 January 2016, the Applicant requested management evaluation of the USG/DFS's decision not to convene a fact-finding panel to investigate his ST/SGB/2008/5 complaint against the SRSG. He requested management evaluation before he received the USG/DFS's decision on his complaint.

... On 20 January 2016, the Under-Secretary-General, Department of Management (USG/DM) informed the Applicant that the Secretary-General had upheld the SRSG's decision not to convene a fact-finding panel to investigate the three MONUSCO staff members.

... On 12 February 2016, the USG/DM informed the Applicant that the Secretary-General had upheld the USG/DFS's decision not to convene a fact-finding panel to investigate the allegations against the SRSG.

3. In the impugned Judgment the UNDT addressed Mr. Tosi's two applications: one challenging the non-renewal of his fixed-term appointment beyond 30 June 2015 and the implementation of the settlement agreement and the second alleging discrimination and mistreatment as prohibited conduct by his former FRO. With regard to the claims against his former FRO, the UNDT held that upon its review of the evidence the claims were unsustainable and dismissed them without elaboration.

4. The UNDT further held that Mr. Tosi filed an application requesting enforcement of the

implementation when Mr. Tosi's contract was not renewed beyond 30 June 2015. Mr. Tosi asserted that the agreement was entered into in w tOd survivNirestructue be IoTh 6 TJ20.868310 TD-.0163 Tc.

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e-PASes in accordance with paragraph 6 of the settlement agreement. The UNDT dismissed his request for moral damages due to lack of evidence.

7. Mr. Tosi filed an appeal on 11 March 2019 which was registered under Case No. 2019-1239, and the Secretary-General filed his answer on 13 May 2019. The Secretary-General also filed an appeal against this same Judgment on 11 March 2019, which was registered under Case No. 2019-1240, and Mr. Tosi filed his answer on 13 May 2019. On 13 May 2019, Mr. Tosi filed a cross-appeal in Case No. 2019-1240, and the Secretary-General filed an answer on 15 July 2019 to the cross-appeal.

8. On 26 June 2019 the United Nations Appeals Tribunal consolidated these cases by Order No. 351 (2019).

Submissions

Mr. Tosi's Appeal (Case No. 2019-1239)

9. Mr. Tosi requests this Tribunal to find that the UNDT failed to exercise its jurisdiction in dismissing his claims without providing any factual findings or reasons or conclusions of law as required by Article 11 of its Statute. This Tribunal held in *Kadr*³ that the UNDT's failure to

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30. At the present stage, there are no exceptional circumstances to justify the production of any additional evidence, as required by Article 2(5) of the Statute.⁷ Moreover, since Mr. Tosi has not justified how an oral hearing would help the understanding of the case before the Appeals Tribunal, we do not find that it would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules.

31. Thus, the request for an oral hearing is refused.

Receivability of the cross-appeal

32. Subsequent to the Secretary-General’s appeal, Mr. Tosi filed a cross-appeal, reiterating requests he had already made in his own appeal, as well as requesting that the Secretary-General

39. In connection with this matter, the UNDT found that the filing was 41 days after Mr. Tosi had been notified that he was to be separated from the Organisation following the response of the MEU to his challenge of the decision to separate him. The UNDT then clarified

agreement was breached when the appointment was not renewed, from which date Mr. Tosi could request management evaluation and thereafter implementation of the agreement. This finding involved merit consideration. The UNDT therefore erred on a matter of law, since it based its finding on the merits as a condition precedent to find that the application was timely filed and hence receivable.

43.

Case No. UNDT/NBI/2016/023: Mr. Tosi's appeal, failure to exercise jurisdiction vested in the UNDT with regard to allegation of prohibited conduct

46. Mr. Tosi claims that the UNDT failed to exercise jurisdiction vested in it with regard to his protection under ST/SGB/2005/21, since he had formally denounced his senior hierarchy.

47. We do not agree with Mr. Tosi that there was a failure by the UNDT to exercise its jurisdiction. It is true that two of Mr. Tosi's applications were consolidated long before the issuance of the UNDT Judgment and that the Judgment only addressed the issue of the settlement agreement being or not being tainted by bad faith or breached in its implementation when Mr. Tosi's contract was not renewed beyond 30 June 2015.¹⁴ This issue was the subject of one of the cases. However, in addressing the other issues at stake in the other case, the UNDT held that:¹⁵

In his second application UNDT/NBI/2016/023, the Applicant severally alleges discrimination and mistreatment and other prohibited conduct on the part of his former FRO and other Senior Administration officials at MONUSCO. The Tribunal has thoroughly examined the evidence presented and finds that the Applicant, who was

50. Although succinct, the UNDT's consideration satisfies the requirement of including stated reasons, as governed by Article 11 of the UNDT Statute, so as to enable Mr. Tosi to appeal against the Judgment by contesting its arguments, which he essentially did throughout his appeal. The case is therefore distinguishable from *Kadri*.¹⁷ While the UNDT could have detailed its reasoning

concern an administrative decision of the Secretary-General. Mr. Tosi was informed of this

non-renewal of his appointment, by virtue of the fact that his hierarchy was “seeking to separate him from service”.²²

58. Similarly, while Mr. Tosi claims that the UNDT erred in procedure when it admitted the testimony of Mr. Siri – by means of which new allegations were introduced that violated his due process rights – he fails to mention which new allegations these were and how they could have influenced the outcome of the Dispute Tribunal’s decision.

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65. The Secretary-General's appeal succeeds and Judgment UNDT/2019/003 is hereby vacated. Mr. Tosi's appeal and cross-appeal are dismissed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Neven

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar