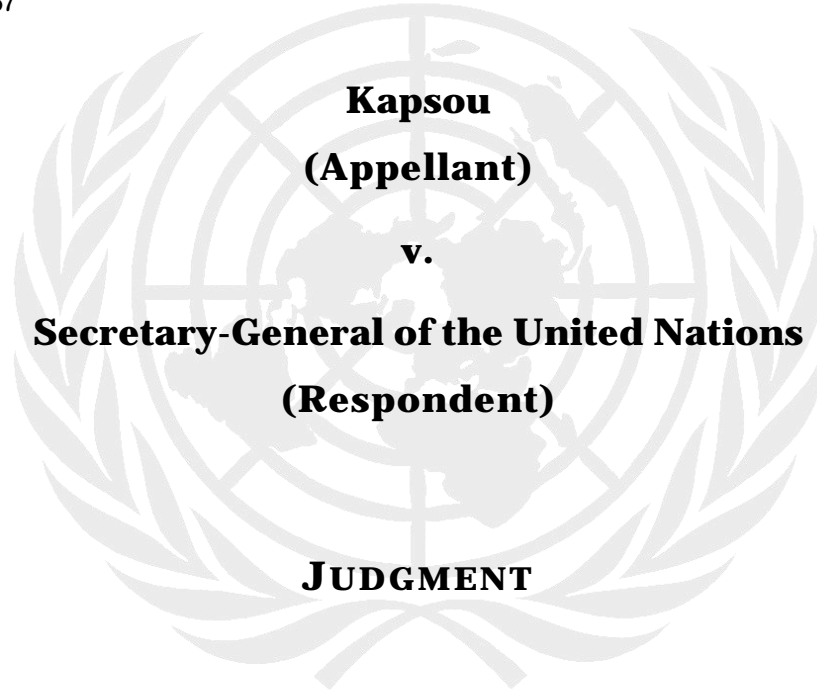




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-167



Before: Judge Sophia Adinyira, Presiding
Judge Mark P. Painter
Judge Jean Courtial

Judgment No.: 2011-UNAT-170

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Appellant: Duke Danquah

Counsel for Respondent: Amy Wood

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. Ms. Ellie Kapsou filed an appeal before the Joint Appeals Board (JAB) without first requesting administrative review of the contested decision. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) had no jurisdiction to waive this procedural requirement. Therefore, the case before the UNDT was not receivable. Ms. Kapsou's appeal before the United Nations Appeals Tribunal (Appeals Tribunal) against the dismissal of her case on the merits by the UNDT is dismissed because her application before the UNDT was not receivable.

Facts and Procedure

2. Ms. Kapsou began working for the Civil Affairs Branch (CAB), United Nations Peacekeeping Force in Cyprus (UNFICYP) on 30 August 2007 on a four-month fixed-term appointment as a GL-4 Records Clerk. Her appointment was subsequently extended several times.

3. On 25 February 2008, Ms. Kapsou had a meeting with her supervisors and the Chief, Conduct and Discipline Unit (CDU), concerning problems related to her work. On 27 February 2008, she had a second meeting with the Chief, CDU, on the same topic.

4. On 29 February 2008, Ms. Kapsou lodged a harassment complaint with the UNFICYP Personnel Section against one of her colleagues. A meeting between Ms. Kapsou, her supervisors and the Personnel Section was held that same day. Ms. Kapsou was informed that her first reporting officer had changed in mid-January and that the Staff Counselor would attempt to resolve the tension between Ms. Kapsou and the colleague against whom she had filed the complaint.

5. On 3 April 2008, a meeting was held between Ms. Kapsou and her first and second reporting officers to discuss her Performance Appraisal System report (PAS). That same day, the first and second reporting officers signed the PAS, rating Ms. Kapsou as "does not meet expectations".

6. On 11 April 2008 and 14 April 2008, respectively, the first and second reporting officers filed complaints against Ms. Kapsou, stating that she had made false allegations against them. A fact-finding panel was established to examine those complaints.

7. On 14 April 2008, Ms. Kapsou submitted a rebuttal of her PAS to the Chief, Mission Support, UNFICYP, claiming that her performance evaluation was the result of harassment, discrimination and abuse of authority by her supervisors.

8. On 20 April 2008, Ms. Kapsou sent an email to the Office of Internal Oversight Services (OIOS), requesting that it take action regarding her supervisors' alleged retaliation against her.

9. On 2 May 2008, the Rebuttal Panel submitted its report. It recommended that Ms. Kapsou's rating of "does not meet expectations" be changed to "partially meets performance expectations" and that she receive a work improvement plan, during the execution of which, her first and second reporting officers should monitor her performance and document her progress.

10. By memorandum dated 7 May 2008 addressed to the Chief, Mission Support, Ms. Kapsou pointed out that her memorandum of 14 April 2008 was not only a request for rebuttal of her PAS, but also a formal complaint against her supervisors, under ST/SGB/2008/5, for abuse of authority. That same day, Ms. Kapsou submitted a complaint against her supervisors to the Ethics Office in New York.

11. On 19 May 2008, the Chief, Mission Support, forwarded to Ms. Kapsou the Rebuttal Panel's report and informed her that a work improvement plan would be implemented until 31 August 2008. He advised that, should her performance not improve by the end of that period, her appointment might not be renewed. Ms. Kapsou signed the work improvement plan on 4 June 2008.

12. On 17 June 2008, Ms. Kapsou submitted to the Secretary-General a request for administrative review under former Staff Rule 111.2(a) of the 19 May 2008 decision. That same day, she filed a request for suspension of action with the JAB.

13. By memorandum dated 6 August 2008, the Chief, Mission Support, informed Ms. Kapsou that her contract would not be renewed beyond 6 September 2008 because

of her underperformance, particularly during the period of 30 August 2007 to 31 March 2008, and the lack of improvement during the initial period of her work improvement plan.

14. On 2 September 2008, the JAB recommended the suspension of the contested decision not to renew Ms. Kapsou's appointment beyond 6 September 2008 until the three-month work improvement plan was fully implemented. The Secretary-General accepted the JAB's recommendation and decided to extend Ms. Kapsou's appointment until 17 November 2008.

15. By letter dated 11 September 2008, the Officer-in-Charge, Administrative Law Unit, informed Ms. Kapsou that in light of the extension of her contract until 17 November 2008, the request for administrative review was moot.

16. On 28 September 2008, Ms. Kapsou filed a complaint against her supervisors with the Panel on Discrimination and Other Grievances.

17. On 6 October 2008, Ms. Kapsou informed the Chief, Mission Support, that she would no longer execute the work improvement plan because it should not have been drawn up by her supervisors. On 10 October 2008, the Chief, Mission Support, informed Ms. Kapsou that, in view of her refusal to execute the work improvement plan, her contract would not be renewed beyond 17 November 2008. That same day, Ms. Kapsou filed an incomplete statement of appeal before the JAB.

18. Following the end of Ms. Kapsou's employment on 17 November 2008, the Ethics Office sent Ms. Kapsou its report on her complaint. The Ethics Office's conclusion in the report was that there was no prima facie case of retaliation against Ms. Kapsou. The report also indicated that the complaints of April 2008 against her supervisors in the context of the PAS had been made after the alleged retaliation and therefore failed to meet the condition set forth in Section 5.2(c) of ST/SGB/2005/21.

19. On 15 January 2009, Ms. Kapsou filed her complete statement of appeal before the JAB contesting the non-renewal decision. The appeal was not considered before the abolition of the JAB on 30 June 2009 and was subsequently transferred to the UNDT in Geneva.

20. On 7 June 2010, the UNDT rendered Judgment No. UNDT/2010/104.

21. On its own motion, the UNDT first considered the issue of receivability of the application. It held that the decision of 10 October 2008 was not a new decision but a mere reminder and a confirmation of an earlier decision and that Ms. Kapsou could not be held responsible for not having requested its administrative review. The UNDT concluded that the application was receivable.

22. Turning to the merits of the application, the UNDT found that, when a staff member holding a fixed-term appointment obtains the rating “partially meets performance expectations”, the Administration cannot decide not to renew the staff member’s appointment on the ground of underperformance without having first taken steps, in consultation with the staff member, to enable improvement of the staff member’s performance. The UNDT was satisfied that the Administration took the required steps. The UNDT also rejected Ms. Kapsou’s claim that the Administration failed to act on her complaints. It concluded that Ms. Kapsou failed to discharge the burden of proving that her supervisors had harassed her, and that her performance appraisals and the non-renewal of her appointment resulted from such harassment. It found that Ms. Kapsou did not substantiate her claim that the decision not to renew her appointment on the ground of underperformance was illegal and rejected the application.

23. Ms. Kapsou appeals the UNDT Judgment.

Submissions

Ms. Kapsou’s Appeal

24. Ms. Kapsou submits that the UNDT erred in law by failing to consider that the work improvement plan and the non-renewal decision were affected by the appearance of bias against Ms. Kapsou by her supervisors. She further submits that the UNDT erred by concluding that there was insufficient evidence of actual bias against Ms. Kapsou by her supervisors. Ms. Kapsou submits that the UNDT committed several errors of fact as well as errors of procedure in reaching its conclusions. Ms. Kapsou requests that the Appeals Tribunal remand the case to the UNDT.

Secretary-General's Answer

25. The Secretary-General submits that Ms. Kapsou has not established that the UNDT committed any errors warranting a reversal of its decision to uphold the non-renewal of Ms. Kapsou's appointment.

Considerations

26. Before reviewing the grounds of Ms. Kapsou's appeal, this Tribunal will consider *sua sponte* the issue of receivability of Ms. Kapsou's application before the UNDT.¹

27. Former Staff Rule 111.2(a) provides as follows:

(a) A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing. The staff member shall submit a copy of the letter to the executive head of his or her department, office, fund or programme.

(i) If the Secretary-General replies to the staff member's letter, he or she may appeal against the answer within one month of the receipt of such reply;

(ii) If the Secretary-General does not reply to the letter within one month in respect of a staff member stationed in New York or within two months in respect of a staff member stationed elsewhere, the staff member may appeal against the original administrative decision within one month of the expiration of the time limit specified in this subparagraph for the Secretary-General's reply.

28. A review of the record reveals that Ms. Kapsou was informed on 19 May 2008 that a work improvement plan would be implemented until 31 August 2008; and that her appointment would not be renewed should her performance not have improved by the end of that period. On 17 June 2008, she filed a request for administrative review of that decision. The JAB recommended the suspension of the contested decision until the three-

¹ Cf. *Rosca v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-133.

month improvement plan was fully implemented. The Secretary-General accepted the JAB's recommendation and decided to extend Ms. Kapsou's appointment until 17 November 2008.

29. Through the Secretary-General's acceptance of the JAB report, Ms. Kapsou's request for administrative review of the 19 May 2008 decision became moot and Ms. Kapsou was informed accordingly by letter dated 11 September 2008. In that respect, the decision of 10 October 2008 not to renew Ms. Kapsou's contract beyond 17 November 2008 was a new administrative decision. At no time did Ms. Kapsou seek administrative review of the 10 October 2008 decision as required under former Staff Rule 111.2(a) before launching an appeal in front of the JAB. These steps must be exhausted before the jurisdiction of the UNDT can be invoked.²

30. Accordingly, the UNDT erred in considering that the decision of 10 October 2008 was merely a confirmation of an earlier decision. The UNDT has no jurisdiction to waive the requirement of a prior request for administrative review under the former staff rules. The UNDT therefore erred in finding Ms. Kapsou's application receivable.

31. For the foregoing reasons, we hold that the UNDT erred in finding that the application was receivable *ratione materiae*.

² Cf. *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049.

Judgment

32. The appeal is dismissed.

Original and authoritative version: English

Dated this 21st day of October 2011 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Painter

(Signed)

Judge Courtial

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar