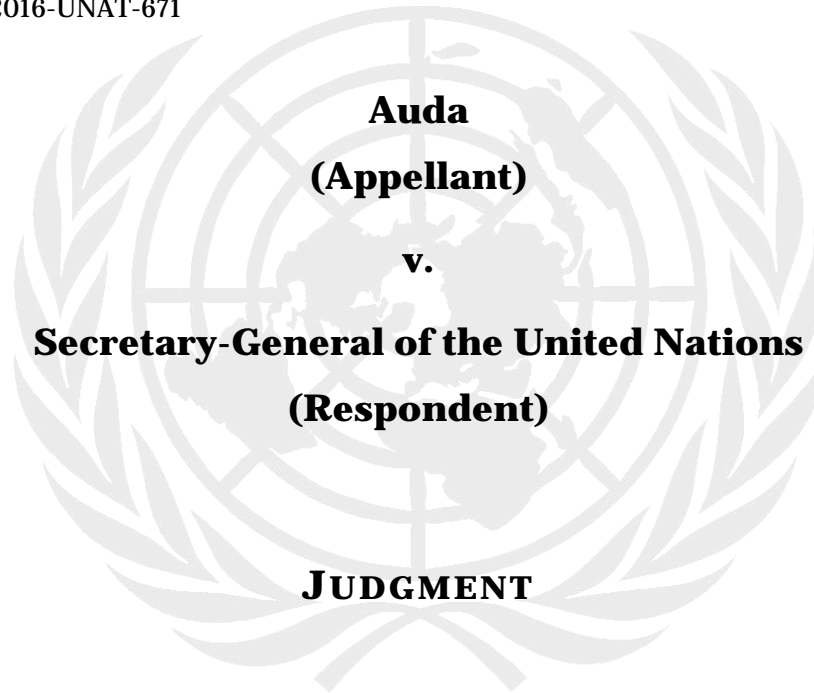




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2016-UNAT-671



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Before:	Judge Rosalyn Chapman, Presiding Judge Inés Weinberg de Roca Judge Richard Lussick
Case No.:	2016-882
Date:	30 June 2016
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-represented
Counsel for Respondent:	Carla Hoe

**JUDGE ROSALYN CHAPMAN, PRESIDING.**

1. The Appeals Tribunal has before it an appeal of Order No. 313 (NY/2015) issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 December 2015, in the case of *Auda v. Secretary-General of the United Nations*. Mr. Hesham A. Auda filed his appeal on 7 January 2016 and, on 8 February 2016, the Secretary-General filed his answer.

**Facts and Procedure**

2. Mr. Auda was a Principal Officer at the D-1 level within the Department for General Assembly and Conference Management (DGACM) in October 2015. On 2 October 2015, the Assistant Secretary-General of DGACM verbally advised Mr. Auda that his fixed-term appointment would not be renewed when it expired on 31 December 2015. On 6 October 2015, the Under-Secretary-General of DGACM also verbally advised Mr. Auda that his appointment would not be renewed.

3. On 12 November 2015, Mr. Auda received a written memorandum dated 6 November 2015, advising him that his appointment would not be renewed when it expired on 31 December 2015.

4. On 2 December 2015, Mr. Auda requested management evaluation of the decision “not to renew [his] fixed term appointment on 31 December 2015”, which was communicated to him on 12 November 2015.

5. On 3 December 2015, Mr. Auda filed an application for suspension of action pending management evaluation, which the Dispute Tribunal granted in Order No. 301 (NY/2015) on 8 December 2015.

6. On 17 December 2015, the Management Evaluation Unit (MEU) responded to Mr. Auda’s request for management evaluation and advised him that his request was untimely and not receivable as it was not filed within sixty days of 2 October 2015.

7. On 23 December 2015, Mr. Auda filed an application before the UNDT challenging the decision of DGACM “to separate [him] upon the expiration of his fixed-term appointment on 31 December 2015 following the decision to not renew [his] appointment” and an application for suspension of action and interim measures pending judicial review of the contested decision.

8. On 29 December 2015, the Dispute Tribunal issued Order No. 313 (NY/2015) denying Mr. Auda’s request for suspension of action and interim measures.

9. On 7 January 2016, Mr. Auda filed an interlocutory appeal of Order No. 313 (NY/2015), and on 8 February 2016, the Secretary-General filed his answer.

### **Submissions**

#### **Mr. Auda’s Appeal**

10. The interlocutory appeal is receivable by the Appeals Tribunal as the UNDT exceeded its competence or jurisdiction when it refused to suspend the action due to its mistaken view that the Appellant was contesting the decision not to renew his appointment, whereas he was contesting the decision to separate him upon expiration of his fixed-term appointment.

11. Article 10(2) of the UNDT Statute does not explicitly exclude cases of separation of service resulting from the expiration of an appointment; it refers only to appointment, promotion and termination. Thus, challenges to separation from service upon expiration of an appointment are not an exception to UNDT’s jurisdiction under Article 10(2).

12. The Appeals Tribunal should not assume the role of the General Assembly and amend Article 10(2) through judicial interpretation to include as an exception, within the term “appointment”, separation from service resulting from expiration of an appointment.

13. Mr. Auda requests that the Appeals Tribunal annul Order No. 313 (NY/2015) and order suspension of the action so as to allow the parties to resolve their dispute through mediation.

#### **The Secretary-General’s Answer**

14. The Dispute Tribunal correctly found that it lacked jurisdiction as the matter is a case of appointment within the meaning of Article 10(2) of the UNDT Statute. As the Dispute Tribunal found, if the appointment were extended beyond 31 December 2015, a new

letter of appointment would have to be issued; thus, the matter is a case of appointment within the meaning of Article 10(2).

15. The UNDT's interpretation of Article 10(2) of the UNDT Statute is fully consistent with the jurisprudence of the Appeals Tribunal in both *Igbinedion* and *Benchebbak*,<sup>1</sup> which held that decisions not to renew appointments qualify as cases of appointment within the meaning of Article 10(2) of the UNDT Statute.

16. In his request for management evaluation, the Appellant asked the MEU to review the decision not to renew his fixed-term appointment. His separation from the Organization was a consequence of the administrative decision not to renew his fixed-term appointment. As a matter of law, "cases of separation following non-renewal constitute a case of appointment and fall under the exclusionary clause of Article 10(2) of the UNDT Statute".<sup>2</sup> Thus, even if the Appellant is contesting the decision to separate him from service, under the facts of the present case, his case still comes within the exclusionary clause of Article 10(2) of the UNDT Statute.

17. The appeal is not receivable as the UNDT acted within its jurisdiction or competence. Interlocutory appeals are not receivable unless the Dispute Tribunal exceeded its jurisdiction or competence. As the UNDT did not exceed its jurisdiction or competence, the appeal is not receivable.

18. The appeal should be dismissed.

### **Considerations**

19. Article 2(1) of the Appeals Tribunal Statute (Statute) sets forth five specific grounds for a litigant to appeal a judgment of the Dispute Tribunal. It provides that an appeal may be brought against a judgment issued by the Dispute Tribunal on the grounds that the UNDT exceeded its jurisdiction or competence, failed to exercise jurisdiction vested in it, erred on a question of law, committed a procedural error such as to affect the decision, or erred on a question of fact resulting in a manifestly unreasonable decision. Each of these grounds is separate and distinct from the other grounds listed in Article 2(1).

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<sup>1</sup> *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-159 and *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-256.

<sup>2</sup> Citing *Siri v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-609, para. 33.

20. Initially, the Appeals Tribunal concludes that the Appellant—although claiming the UNDT “exceeded its competence” when it denied his application for suspension of action in Order No. 313—is really claiming that the UNDT, based on an error of law, failed to exercise its jurisdiction when it refused to issue an order suspending the action pending determination of its merits.<sup>3</sup>

21. When the Dispute Tribunal denies an application for suspension of action, it is refusing to exercise its jurisdiction—not acting in excess of its competence or jurisdiction. Of course, under Article 2(1), an appellant may also claim that the failure to act was based on an error of law, as Mr. Auda asserts.

22. Article 2(2) of the Dispute Tribunal Statute grants the UNDT “power to suspend the implementation of an administrative decision during the pendency of management evaluation”.<sup>4</sup> However, Article 2(2) further provides that “[t]he decision of the Dispute Tribunal on such an application shall not be subject to appeal”. Article 2(2) does not address whether the Dispute Tribunal has jurisdiction or power to suspend the implementation of a contested administrative decision following management evaluation or pending consideration of the merits of an application challenging an administrative decision.

23. However, Article 10(2) of the Dispute Tribunal Statute provides that the UNDT has authority to issue interim relief, including suspension of action, as follows:<sup>5</sup>

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, *except in cases of appointment, promotion or termination*. (Italics added).

24. Our jurisprudence generally establishes that interlocutory orders, such as Order No. 313 denying a request for suspension of action pending consideration of the merits, may be appealed only when the UNDT has clearly exceeded its jurisdiction or competence.<sup>6</sup>

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<sup>3</sup> Cf. *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 44; *Mpacko v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-314, para. 17.

<sup>4</sup> *Tiwathia v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-327, para. 8.

<sup>5</sup> Articles 13 and 14 of the UNDT Rules of Procedure reiterate this provision, though with slightly different wording.

25. Failing to exercise jurisdiction or erring on a question of law is not a ground for an appeal of an interlocutory order. Any fair reading of the claims on appeal clearly demonstrates that Mr. Auda is really complaining that the UNDT failed to exercise its jurisdiction — and issue an order granting his application for suspension of action—based on an error of law, i.e., that a case contesting separation from service following non-renewal of a fixed-term appointment is a case regarding appointment within the meaning of Article 10(2) of the UNDT Statute. It would torture the jurisprudence of the Appeals Tribunal to hold that the appeal raises the ground that the UNDT exceeded its jurisdiction or competence.

26. In *Siri*,<sup>7</sup> we recently had the opportunity to reiterate the general principles governing our jurisdiction over appeals of interlocutory orders. We again opined that, under Article 2(1) of our Statute, “only final judgments of the UNDT are appealable”.

27. We noted, however, that “there may be exceptions to the general rule” prohibiting appeals of interlocutory orders “where the UNDT has clearly exceeded its jurisdiction or competence”.<sup>8</sup> As determined above, an order denying an application for suspension of action cannot be considered to be a case in which the UNDT clearly exceeded its jurisdiction. Accordingly, the appeal is not receivable *ratione materiae*.

28. Although the merits of the appeal are not before the Appeals Tribunal, we note that the UNDT correctly determined in Order No. 313 denying Mr. Auda’s request for suspension of action, that it had no jurisdiction to grant his application, stating:<sup>9</sup>

The Tribunal finds that, pursuant to art. 10.2 of its Statute and the Appeals Tribunal’s rulings in *Benchebbak* and *El-Komy*, a request to suspend the implementation of a contested administrative decision pending proceedings cannot be granted in this case as [Mr. Auda’s] fixed-term appointment expires on 31 December 2015, and, under the Staff Rules, its extension would require a new letter of appointment. Thus, this case falls under the exclusionary provision of art. 10.2 of the [Dispute] Tribunal’s Statute, and the

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<sup>6</sup> *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300, para. 18; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 21.

<sup>7</sup> *Siri v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-609, para. 26, quoting *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para. 8.

<sup>8</sup> *Ibid.*, para. 27, citing *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 21.

<sup>9</sup> Impugned Judgment, para. 34, referring to *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-256 and *El Komy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-324.

Tribunal does not have jurisdiction to suspend the contested decision pending determination of the case on its merits.

29. As the UNDT noted, Mr. Auda separated from service solely because his appointment was not renewed. Despite Mr. Auda's attempt to distinguish between the non-renewal of his appointment and his separation from service, based on the facts of Mr. Auda's case, these circumstances are not distinguishable when considering an application for suspension of action under Article 10(2) of the Dispute Tribunal Statute.<sup>10</sup>

30. For these reasons, the Appeals Tribunal determines that Mr. Auda's interlocutory appeal of Order No. 313 is not receivable *ratione materiae*.

### **Judgment**

31. The appeal is not received *ratione materiae*.

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<sup>10</sup> Mr. Auda clearly stated that he was contesting the decision not to renew his appointment in his request for management evaluation. Although he later attempted in his application to avoid coming within the exclusion of Article 10(2) by wording the claim in his application differently than in his request for management evaluation, so as to contest his separation from service rather than non-renewal of his fixed-term appointment, that attempt is to no avail.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of June 2016 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Lussick

Entered in the Register on this 24<sup>th</sup> day of August 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar