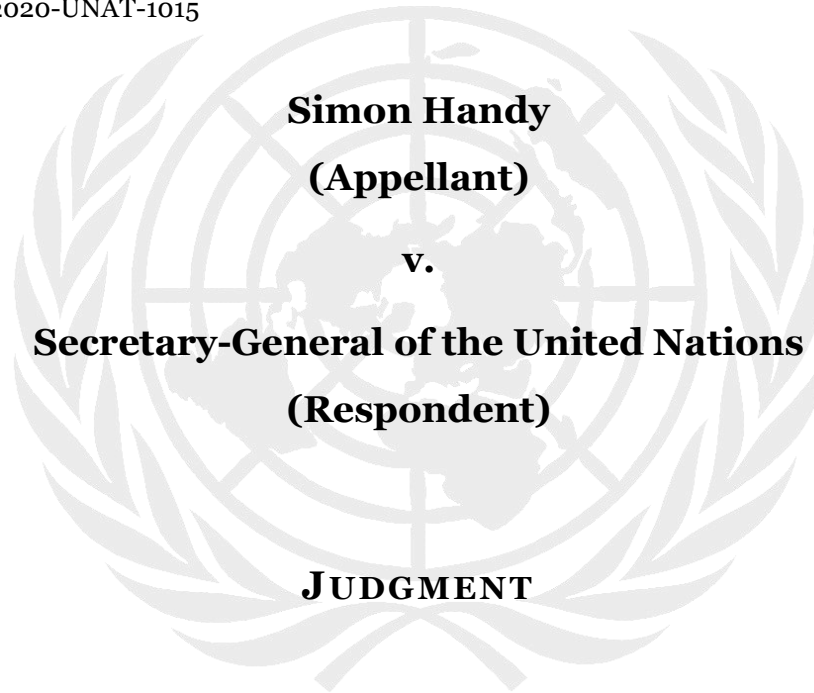




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-1015



**Simon Handy  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge Jean-François Neven
Case No.:	2020-1346
Date:	26 June 2020
Registrar:	Weicheng Lin

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Counsel for Mr. Handy:	Brandon Gardner, OSLA
Counsel for Secretary-General:	Christos Ravanides

*Reissued for technical reasons on 16 June 2020*

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Appellant, a staff member with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), contests the decision to not renew his fixed-term appointment beyond 31 July 2019 (the impugned decision). On 15 July 2019, the Appellant requested a management evaluation of the non-renewal of the fixed-term appointment, however, before the management evaluation could be completed, the Appellant's appointment was renewed as of 1 August 2019 on a month to month basis. The Appellant appeals. By Judgment No. UNDT/2019/160, the United Nations Dispute Tribunal (Dispute Tribunal) determined the Appellant's application was moot because the subsequent monthly renewals effectively rescinded and superseded the impugned decision.

2. We find the Dispute Tribunal erred in its decision for reasons set out below and remand the matter back for proper determination of the matter.

**Facts and Procedure**

3. The Appellant is a Political Affairs Officer at the P-4 level with MINUSCA on a fixed-term appointment in Bangui, Central African Republic.

4. On 2 July 2019, the Appellant was notified by MINUSCA of the decision to not renew his fixed-term appointment expiring 31 July 2019.

5. On 4 July 2019, the Director of Mission Support-MINUSCA advised the Appellant that the non-extension was not related to his performance.

6. On 15 July 2019, the Appellant submitted a request for management evaluation to the Management Evaluation Unit (MEU) and on 16 September 2019, he filed an application to the Dispute Tribunal contesting the decision to not renew his fixed-term appointment.

7. On 23 September 2019, the Appellant received a response from the MEU that his application was moot and that his appointment would be extended on a monthly basis pending the outcome of the rebuttal process of his e-PAS for 2018-2019.

## Submissions

### Appellant's Appeal

8. The Appellant submits the Dispute Tribunal erred in fact or law or exceeded its competence in concluding the application was moot.

9. The Appellant contends that he is seeking that the decision not to renew his fixed-term appointment be rescinded and that the Tribunal erred by finding that the month to month extensions amounted to a rescission of the decision. The month to month extensions related to the introduction of the rebuttal process are unrelated to the decision not to renew his appointment.

10. Further to Administrative Instruction ST/AI/2010/5 (Performance Management and Development System), the Administration is obligated to extend a staff member's appointment during the currency of the rebuttal process. Following the conclusion of the rebuttal process, the Administration can determine whether a staff member's appointment would be terminated.

11. The Appellant says the decision to extend his appointment on a month to month basis pending the outcome of the rebuttal process did not constitute a rescission of the contested decision because the decision not to renew had already been made and communicated to the Appellant and because the Administration has exhibited no genuine intention to renew his appointment.

12. He says the Administration has put forward a fabricated *ex post facto* excuse for the monthly renewal related to performance which does not equate to rescission of the contested decision.

13. The Appellant also submits that the Dispute Tribunal erred in finding the Appellant's application contained grievances directed against an essentially different decision and by interpreting the application as expressing discontent with the short-term renewals.

14. The short-term renewals and the illegitimate excuse for them demonstrate that the Administration had no genuine intention of renewing his fixed-term appointment.

15. Finally, the Appellant says the Dispute Tribunal erred in finding that the application was unsubstantiated in respect of causing any damage. He says he has suffered stress and anxiety and the Administration's actions affected his ability to make long term plans and financial commitments due to the uncertain position he was placed in.

16. The Appellant requests the Dispute Tribunal's Judgment be vacated in its entirety.

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

17. The Respondent says the Appellant's arguments must fail.

18. The Respondent submits that when the challenged administrative decision has not taken effect because it has been rescinded or superseded by subsequent decisions of the Administration, there is no justiciable matter before the Dispute Tribunal and thus the Dispute Tribunal lacks subject-matter jurisdiction to examine the merits of the case.<sup>1</sup>

19. The very fact of the renewal of the Appellant's appointment beyond 31 July 2019 provided adequate notice to the Appellant that the impugned decision was not going to be implemented.

20. The Appellant's complaints about the duration of the renewals and the Respondent's motives are not judicially cognizable because the renewals deprived the impugned decision of any practical significance, rendering the challenges moot.

21. The decisions to renew his appointment on a monthly basis are not the subject of the Appellant's request for management evaluation and of the current proceeding which only involves the question of whether the decision to not renew the Appellant's fixed-term appointment was unlawful.

22. As a result, the Appellant is precluded from seeking compensation for alleged losses from the impugned decision. The Appellant has suffered no material harm from the series of renewals for short periods of time since he is still working with the Administration.

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<sup>1</sup> *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742; *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870; *Crotty v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-763; and *Ishak v Secretary-General of the United Nations*, Judgment No. 2011-UNAT-152.

23. The Respondent requests the United Nations Appeals Tribunal (the “Appeals Tribunal”) dismiss the appeal and affirm the Dispute Tribunal Judgment.

### **Considerations**

24. As prescribed in Article 2(1) of the United Nations Appeals Tribunal Statute, the function of the Appeals Tribunal in this matter is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, when it determined that the application contesting the impugned decision was moot.

25. We find the Dispute Tribunal factually erred in determining that the impugned decision had been effectively rescinded and superseded by the subsequent month to month renewals of the Appellant’s appointment beyond 31 July 2019. This resulted in a manifestly unreasonable decision.

26. As a starting point, there was no express rescission of the impugned decision by the Administration.

27. Rather, the Administration simply advised the Appellant the fixed-term appointment was not being renewed and that this non-renewal was not related to his performance. The Appellant’s appointment was subsequently renewed monthly pending the outcome of the rebuttal of his 2018-19 performance evaluation (see ST/AI/2010/5, Section 15.6).

28. Therefore, the decision to not renew the fixed-term appointment and the decision to renew on a month to month basis were different, unrelated decisions based on different considerations and rationales. If so, the monthly renewals did not rescind nor supersede the impugned decision and the Appellant’s application cannot be considered moot.

29. As there are two unrelated administrative decisions, this is a different factual situation than in the Appeals Tribunal's decision in *Gehr*.<sup>2</sup> In *Gehr*, the Dispute Tribunal held that the complaint of the Secretary-General's decision not to finalize the staff member's performance appraisal ceased to exist when the appraisal and report finalizing it was issued shortly after the filing of the application to the Dispute Tribunal. The issuance of the report rendered the appeal moot as it resolved the applicant's complaint therefore, there was no administrative decision on which the Dispute Tribunal was competent to pass judgment. This is not the case here. Monthly renewals pending the outcome of the rebuttal of a performance evaluation do not resolve the complaint of the non-renewal of the fixed-term appointment not based on performance. The application to the Dispute Tribunal cannot, therefore, be considered moot.

30. In *Kallon*, the Appeals Tribunal explained that:<sup>3</sup>

... A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. ....

... Since a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution. ... It is of valid judicial concern in the determination of mootness that injurious consequences may continue to flow from wrongful, unfair or unreasonable conduct. ...

31. In this appeal, the Dispute Tribunal held that there could be no injury to the Appellant as the impugned decision never took effect. However, the Dispute Tribunal did not review the legality of the impugned decision or make the factual findings required in determining the nature of injurious consequences because it held there was no longer a justiciable matter once the Appellant obtained monthly renewals of his appointment. As indicated above, this was an error, therefore, it is incorrect to determine that the decision never took effect due to the monthly renewals so that there could be no injury to the Appellant.

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<sup>2</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2011/UNDT/211, para. 37.

<sup>3</sup> *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, paras. 44 and 45.

32. In his application to the Dispute Tribunal, the Appellant raised allegations that the impugned decision was unlawful for two primary reasons: i) the Administration failed to provide reasons in support of its decision not to extend his fixed-term appointment, and ii) the decision was predicated on improper motives. The Appellant argued this unlawful conduct has been injurious. As a result of the erroneous finding that the application was moot, the Dispute Tribunal failed to consider these allegations, and the parties' submissions and evidence on them.

33. In particular, the Dispute Tribunal did not review the validity of the Administration's exercise of discretion in not renewing the Appellant's fixed-term appointment and whether the impugned decision was unreasonable, unfair, illegal, irrational, procedurally incorrect or disproportionate.<sup>4</sup>

34. Although a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service (Staff Rule 4.13(c)), the first instance tribunal can review whether it was vitiated by bias or bad faith or taken for an improper purpose.<sup>5</sup> In doing so, a review of the validity of the reasons underpinning the impugned decision is required.<sup>6</sup>

35. In order to conduct this judicial review, there is an obligation on the Secretary-General to provide reasons for an administrative decision, in particular:<sup>7</sup>

[...] the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

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<sup>4</sup> *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. 33.

<sup>5</sup> *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, para. 44, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

<sup>6</sup> *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. 34; *Toure v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-660, para. 30.

<sup>7</sup> *El-Arqa v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-911, para. 26, quoting *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 36.

36. Consequentially, the exercise of the Secretary General's discretion to not renew the Appellant's fixed-term appointment as well as reasons for the non-renewal, or any failure to provide reasons for the non-renewal, must be subjected to review by the first instance tribunal.

37. Since the Dispute Tribunal erred in law and fact, as we have detailed above, we find the appropriate remedy is to remand this case to the Dispute Tribunal pursuant to Article 2(3) of the Statute so that the Dispute Tribunal may properly review the Secretary-General's reasons for the impugned decision and determine whether the impugned decision constituted a lawful exercise of his discretion.



**Judgment**

38. The Dispute Tribunal Judgment is vacated. The matter is remanded to the Dispute Tribunal for appropriate consideration of the application in accordance with our decision.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of June 2020.

*(Signed)*

Judge Sandhu, Presiding  
Vancouver, Canada

*(Signed)*

Judge Colgan  
Auckland, New Zealand

*(Signed)*

Judge Neven  
Brussels, Belgium

Entered in the Register on this 10<sup>th</sup> day of July 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar