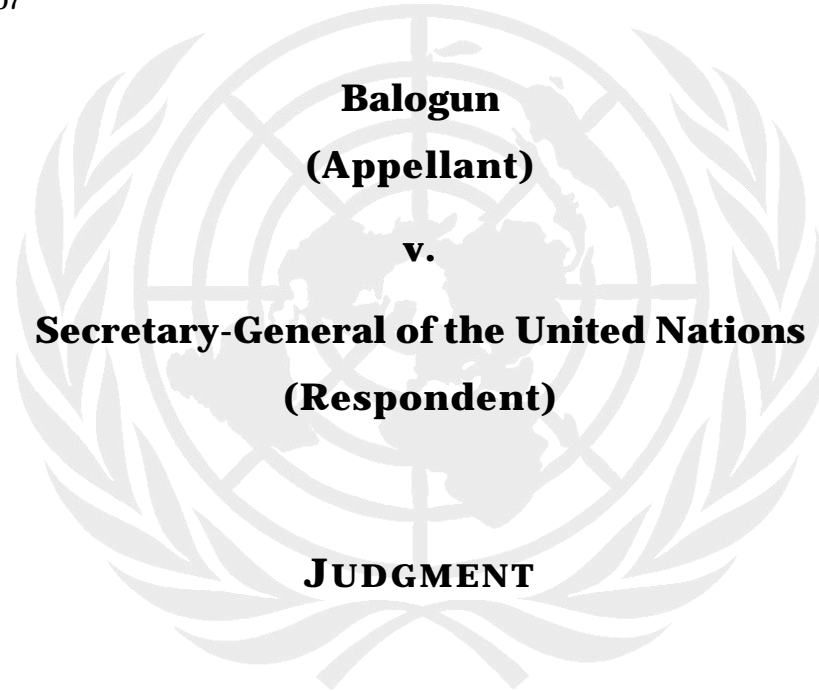




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2012-307



Before: Judge Luis María Simón, Presiding
Judge Inés Weinberg de Roca
Judge Mary Faherty

Judgment No.: 2012-UNAT-278

Date: 1 November 2012

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Simon Thomas

JUDGE LUIS MARÍA SIMÓN, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Murtala Jimoh Balogun against Judgment No. UNDT/2012/026, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 15 February 2012 in the case of *Balogun v. Secretary-General of the United Nations*.

Synopsis

2. This Tribunal holds that when the staff member contested before the former United Nations Administrative Tribunal (UNAdT) his separation from the Organization, he should have also submitted the request for payment of a termination indemnity so as to be able to collect it in the event that he did not succeed in the first part of his application.

3. At that time, Mr. Balogun had a course of action which entitled him to challenge the separation and eventually the issue of the payment of termination indemnity if his separation was not reversed.

4. As Mr. Balogun failed to do so and only submitted his request some six years later, it is time-barred

5. This Tribunal holds that there is no question at all about the authority of the Dispute Tribunal to impose costs in cases where there has been abuse of litigation by a party.

6. Although the Tribunal upholds that principle, in the present case it considers that the exercise of that discretion was not warranted, because despite the fact that Mr. Balogun revisited the issue of his separation on several occasions under the old system, he may have been misguided into believing that he could bring the matter before the UNDT.

7. Therefore, the Tribunal considers that the principles of good faith and of due process of law granting access to Justice, which must also be upheld, lead us to vacate the award of litigation costs imposed by the UNDT.

Facts and Procedure

8. Mr. Balogun joined the United Nations in August 1983 as a Regional Advisor in the Public Administration and Management Section of the Economic Commission for Africa (ECA) on a

one-year intermediate-term appointment under the 200-Series of the Staff Rules. In May 1992, his appointment was converted to a fixed-term contract.

9. On 10 January 2002, in response to the concern expressed by some Regional Advisors including Mr. Balogun about their contractual status, the Officer-in-Charge (OiC) of the ECA's Human Resource Service Section (HRSS) informed all Regional Advisors that ECA was undertaking "a review of the needs for advisory services in the different areas of expertise". The OiC continued:

As you know, contracts of Advisory staff expire at the dates shown in the Letter of Appointment. If HRSS is extending someone for six months, the new expiration of the appointment will not be considered as a termination date for indemnity purposes, because HRSS is not terminating an existing contract.

10. On 30 September 2002, Mr. Balogun and five other Regional Advisors were notified in writing that their contracts would not be renewed beyond the expiry date of 31 December 2002.

11. Mr. Balogun appealed the decision not to renew his contract all the way to the UNAdT. In Judgment No. 1232 issued on 22 July 2005, the UNAdT rejected Mr. Balogun's application. The issues that the UNAdT addressed included whether Mr. Balogun had legal expectancy to renewal of his fixed-term contract under the 200-Series of the Staff Rules and whether the reasons given for the non-renewal of Mr. Balogun's service were supported by the facts. There was no reference to the matter of termination indemnity in the said judgment. Mr. Balogun's subsequent applications for revision of Judgment No. 1232 were rejected by the UNAdT.

12. On 23 October 2009, Mr. Balogun wrote to the Secretary-General requesting "management evaluation of application for payment of termination indemnity" for his ECA service that ended on 31 December 2002. Mr. Balogun made reference to the 10 January 2002 letter from the OiC/HRSS/ECA, which, in his view, "leave[s] no room for legal quibbling or gymnastics" about the Organization's obligation to pay him the termination indemnity. In a letter dated 20 November 2009, the Chief of Management Evaluation Unit (MEU) informed Mr. Balogun that his request was not receivable since the two-month limitation period had long expired.

13. Mr. Balogun appealed. In Judgment No. UNDT/2012/026, the UNDT dismissed Mr. Balogun's application and awarded USD 500 as costs against him for abuse of process of the court. The UNDT recalled UNAdT's Judgment No. 1232, and determined that all issues reviewed by the UNAdT were res judicata. The UNDT rejected Mr. Balogun's application as it contained "the same facts and rais[ed] the same issues as the three previous applications with the former UN Administrative Tribunal". The UNDT found that Mr. Balogun had abused the proceedings and decided to award costs against him, as a matter of principle, though he was no longer a staff member and it might be difficult, if not impossible, to recover those costs from him.

14. Mr. Balogun appealed on 20 March 2012. The Secretary-General answered on 22 May 2012. On 7 June 2012, Mr. Balogun filed a motion seeking leave to file additional pleadings. By Order No. 98(2012), the Appeals Tribunal denied his motion.

15. On 16 October 2012, Mr. Balogun filed another motion to correct a typographical error in paragraph 19 of his appeal brief.

Submissions

Mr. Balogun's Appeal

16. Mr. Balogun submits that when he requested payment of termination indemnity, there was no decision taken in that regard. The MEU confused the termination decision in respect of his contract taken in September 2002 with a decision to pay termination indemnity.

17. Mr. Balogun maintains that the UNDT failed to address the substantive issue of termination indemnity that he had brought to it for determination. The UNDT thus failed to exercise the jurisdiction vested in it.

18. Mr. Balogun also maintains that the UNDT committed procedural errors when it issued a summary judgment on the assumption that there was no dispute to the material facts of his case. In his view, the Respondent and the Appellant held conflicting views regarding the latter's separation and his eligibility for termination indemnity.

19. Mr. Balogun requests that the UNDT Judgment be vacated and that his case be remanded to the UNDT for trial on merits.

Secretary-General's Answer

20. The Secretary-General submits that the UNDT correctly found that Mr. Balogun's application was not receivable because his request for management evaluation was time-barred.

21. The Secretary-General also submits that the UNDT correctly found that Mr. Balogun was aware that he would not be paid a termination indemnity as of the date that his contract expired on 31 December 2002. The Secretary-General recalls the UNAdT's determination that Mr. Balogun's case was one of non-renewal and not termination.

22. The Secretary-General further submits that Mr. Balogun failed to establish any factual or legal errors on the part of the UNDT that would warrant a reversal of its conclusion that his application was not receivable.

Considerations

23. The Court notes that it granted the motion to correct a typographical error in the appellate brief submitted by M. Balogun.

24. This Tribunal holds that the main issue in the present case is the receivability of Mr. Balogun's request for management evaluation of his application for payment of termination indemnity, as well as his subsequent application before the Dispute Tribunal, rather than matters which are *res judicata*.

25. Mr. Balogun's separation from the Organization dates back to 31 December 2002, and he has since then been involved in judicial procedures before the UNAdT, trying to reverse the decision not to renew his fixed-term contract. On 22 July 2005 that Tribunal rejected his application. His subsequent applications for revision of the respective judgment had the same outcome.

26. It is clear to this Court that, at the time of his separation, Mr. Balogun was perfectly aware that he was not going to receive a termination indemnity as the Administration considered his case as one of non-renewal, and not of termination.

27. Thus, when Mr. Balogun contested before the UNAdT his separation from the Organization he should have also submitted the request for payment of a termination indemnity, so as to be able to collect it in the event that he did not succeed in the first part of his application.

28. At that time, he had a course of action which entitled him to challenge the separation and, eventually, the issue of termination indemnity if the separation was not reversed.

29. He failed to follow that course of action, however. Mr. Balogun focused instead on claims related to his separation. Only approximately six years later, in October 2009, after the installation of the new system of internal justice, did he address his request directly on the issue of termination indemnity.

30. Therefore, the decision by the MEU, which considered Mr. Balogun's request not receivable as time-barred, was correct, and leads to the conclusion of the consequential non-receivability of his application before the Dispute Tribunal. The main part of the first instance Judgment is hereby affirmed.

31. The remaining issue under appeal is related to the award of costs for abuse of the proceedings which was imposed against the former staff member.

32. There is no question at all about the authority of the Dispute Tribunal to impose such a sanction in cases where there has been abuse of litigation by a party. Although this Tribunal upholds that principle, in the present case we consider that the exercise of that discretion was not warranted.

33. An imposition of costs would probably have been the case if the application had been brought to the UNAdT, before which Mr. Balogun had already submitted his repeated claims three times. However, the application before the UNDT was the first one filed by Mr. Balogun under the new system. Strictly speaking, it contained not only a mere repetition of the claims covered by *res judicata* but also what could have been considered as a new claim related to the issue of termination indemnity. Despite the fact that Mr. Balogun revisited the issue of his separation on several occasions under the old system, he may have been misguided into believing that he could bring the matter before the UNDT.

34. Therefore, this Tribunal considers that the principles of good faith and of due process of law granting access to justice must also be upheld. In the present case those principles lead us to vacate the award of litigation costs imposed by the UNDT.

Judgment

35. The appeal is allowed in part; the UNDT Judgment is vacated partially with regard to the award of litigation costs.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Faherty

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar