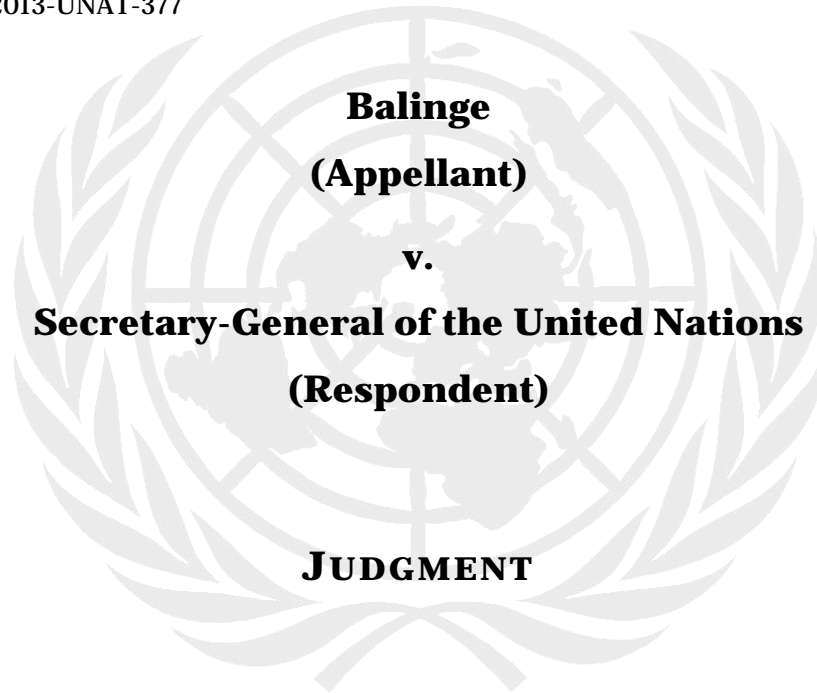




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-377



**Balinge
(Appellant)**

v.

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

JUDGMENT

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

Case No.: 2013-429

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Amy Wood

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Idrissa Balinge against Judgment No. UNDT/2012/180, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 19 November 2012 in the case of *Balinge v. Secretary-General of the United Nations*.

Facts and Procedure

2. Mr. Balinge was a staff member of the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. He worked as an Associate Translator/Interpreter on a fixed-term appointment at the P-2 level in the Language Services Section (LSS).

3. The following findings of fact are taken from the Dispute Tribunal's Judgment No. UNDT/2012/180, paragraphs 4 to 16:

... The ICTR was established on 8 November 1994 by Security Council Resolution 955. In 2003, the ICTR initiated a completion strategy which *inter alia*, was geared towards downsizing the organization's human resources capacity. In this regard, the Registrar of the ICTR established an *ad hoc* Staff Retention Task Force (SRTF) on 16 July 2007 following two Security Council Resolutions of the United Nations General Assembly in 2003 and 2004. Criteria established by the SRTF were promulgated by the ICTR and circulated among its entire staff by way of the Information Circular no. 77 of 3 October 2007.

... The SRTF was to develop the criteria which would enable Programme Managers to determine the composition of the staff members they would need during the final phase of the Tribunal's mandate and to ensure that the downsizing of staff members was done in the most transparent, consultative and objective manner. A Retention Panel was established to conduct standard evaluation of staff members.

... In November 2007, about 45 posts were earmarked for abolition in the LSS by 31 December 2008. [Mr. Balinge's] post was among those earmarked for abolition but all the 45 posts continued to be funded under a General Temporary Assistance (GTA) funding until 30 June 2011.

... On 13 October 2011, [Mr. Balinge] was orally informed by his supervisor that his contract would not be renewed beyond 31 December 2011 because he had scored low marks with the Retention Panel.

... On 2 November 2011, [Mr. Balinge] received an inter-office memorandum from the Chief of Human Resources and Planning Section notifying him that his fixed-term appointment would not be renewed beyond 31 December 2011.

... On 8 December 2011, [Mr. Balinge] wrote a memorandum, in French, to the ICTR Registrar requesting him to open an investigation into alleged excessive abuse of discretionary powers and other irregularities committed by the Chief of the Language Services Section (“Chief/LSS”) as it concerned the work of the Retention Panel.

... The Registrar did not respond to [Mr. Balinge’s] memorandum and on 12 December 2011, [Mr. Balinge] forwarded the same memorandum to the Chief of Staff Administration Unit and the Legal Officer, Human Resources and Planning Section (“Legal Officer/HRPS”). On 19 December 2011, [Mr. Balinge] provided an English translated version of the memorandum.

... [Mr. Balinge] was thereafter informed by the Legal Officer/HRPS that the matter would be submitted to the Independent Retention Appeal Panel (“Appeal Panel”). Subsequently, on 20 December 2011, [Mr. Balinge] submitted a request for review of the Staff Retention Panel’s recommendations and ratings to the Appeal Panel.

... The Legal Officer/HRPS invited [Mr. Balinge] to a meeting to be held on 21 December 2011 regarding his complaint about the retention exercise and [Mr. Balinge’s] personnel ratings. However, [Mr. Balinge] did not attend the said meeting, because according to him, he had met with some of the panelists and was not satisfied with their explanations and that he had written to the Appeal Panel.

... On 23 December 2011, [Mr. Balinge] filed a request for management evaluation of the decision not to renew his fixed-term appointment beyond 31 December 2011.

... The next day, 24 December 2011, [Mr. Balinge] filed his [a]pplication for suspension of action in which he was not successful. A judgment rejecting the [a]pplication was issued on 12 January 2012.

... A substantive application dated 10 May 2012 challenging the decision not to extend [Mr. Balinge’s] fixed term contract was subsequently filed. The [Secretary-General] in turn sought to challenge its receivability. The essence of the receivability motion was that [Mr. Balinge’s] substantive [a]pplication was late by one day. While [Mr. Balinge] claimed that he had first received the [Dispute] Tribunal’s confirmation that his [a]pplication was received on 11 May 2012, the [Secretary-General] submitted that even if that was the case, the [a]pplication was still one day over the time limit.

... Having given thought to the issue of time limits and whether this [a]pplication was indeed late by one day, the [Dispute] Tribunal has decided to resolve the matter of receivability by simply taking the [a]pplication at face value. The date of the [a]pplication is 10 May 2012, the last day on which a filing of the [a]pplication can properly be allowed. I accordingly find the [a]pplication receivable.

4. The Dispute Tribunal rejected Mr. Balinge's application as "it is entirely based on unsubstantiated allegations". The UNDT found that Mr. Balinge did not show the unlawfulness of the contested administrative decision beyond mere assertions and allegations.

5. The Registry of the Appeals Tribunal received Mr. Balinge's appeal on 7 January 2013. The Secretary-General answered on 8 March 2013. On 29 April 2013 Mr. Balinge submitted a motion for leave to file a reply to the Secretary-General's answer. In Order No. 142 (2013), the Appeals Tribunal rejected Mr. Balinge's motion, as he failed to show exceptional circumstances.

Submissions

Mr. Balinge's Appeal

6. Mr. Balinge submits that the UNDT erred on questions of fact by ignoring or not thoroughly considering the evidence or "facts" submitted by him. Mr. Balinge claims that had the UNDT considered his evidence, the unlawfulness of the contested administrative decision would have been evident. In particular, he submits that the various facts, as established by the Dispute Tribunal in its Judgment, are false.

7. Specifically, Mr. Balinge contests the following facts as found by the UNDT, claiming:

- The Retention Panel did not follow the criteria established by the SRTF in the downsizing process;
- His post was not one of those "earmarked for abolition in the LSS";
- The UNDT did not adequately assess the case, before it concluded at paragraph 7 that Mr. Balinge "had scored low marks with the Retention Panel".

8. Mr. Balinge requests that the Appeals Tribunal accept his evidence so as to enable it to adequately address the flaws of the UNDT Judgment. Mr. Balinge draws the attention of the Appeals Tribunal to an undated one-page document, which lists his post as a non-abolished post. Mr. Balinge had submitted the same document to the UNDT.

9. In addition, Mr. Balinge submits that the UNDT erred on questions of law, fact and procedure by not considering the issue of the ICTR's failure to conduct a preliminary investigation. He asserts that he addressed this issue before the ICTR and the UNDT, but no

action was taken by either. In particular, Mr. Balinge notes that although the UNDT acknowledged the fact that he had made attempts to have a preliminary investigation opened, the UNDT did not draw the appropriate conclusions and thus did not consider the issue of a preliminary investigation.

10. Mr. Balinge therefore requests the Appeals Tribunal to rescind the UNDT Judgment.

The Secretary-General's Answer

11. The Secretary-General submits that the UNDT did not err in fact or law in dismissing Mr. Balinge's application for want of evidence. It is up to an applicant to provide proof in support of his or her claims. However, Mr. Balinge failed to discharge the initial burden of proof to rebut the presumption of regularity which attached to the administrative decision at issue.

12. Furthermore, Mr. Balinge has not demonstrated any errors warranting reversal of the Judgment. Mr. Balinge has failed to establish that the Dispute Tribunal erred in finding that he had not produced sufficient evidence. In his appeal brief, Mr. Balinge merely expresses his disagreement with the UNDT's assessment of the evidence and resubmits the evidence already presented to, and reviewed by, the UNDT. It is not sufficient for an appellant to merely resubmit the evidence to the Appeals Tribunal, as the Appeals Tribunal does not re-try a case.

13. In addition, the UNDT did not err on questions of fact, law or procedure by not considering the issue of the ICTR's alleged refusal to conduct a preliminary investigation into Mr. Balinge's allegations of abuse of power and other irregularities against the Chief/LSS. Pursuant to Article 8(1)(c) of the Statute of the Dispute Tribunal, the Dispute Tribunal had no jurisdiction to consider this issue, as Mr. Balinge had failed to raise it in his request for management evaluation.

14. The Secretary-General requests the Appeals Tribunal to reject the appeal in its entirety.

Considerations

15. The Appeals Tribunal holds that the UNDT did not err on questions of fact by ignoring or failing to examine what the Appellant calls "evidence", which, we find, constitutes mere allegations and unsubstantiated argumentation on his part.

16. While Mr. Balinge contests the specific findings of fact made by the UNDT, he does not support his submission by any grounds which would bring the issue within the remit of this Tribunal. He simply uses the statements and observations that he made before the UNDT to endorse his criticism. A litigant's past allegations and arguments cannot be considered evidence *per se* and Mr. Balinge has not provided any additional element to sustain his appeal.

17. As stated in *Ilic*:¹

The function of this Tribunal under Article 2 was considered in *Tsoneva*. When the Appeals Tribunal hears an appeal, it does not simply re-try the case. The function of the Appeals Tribunal is to determine if the Dispute Tribunal has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. The appellant has the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective. It is not sufficient for an appellant to state that he or she disagrees with the outcome of the case or repeat the arguments submitted before the Dispute Tribunal.

18. Furthermore, it was not the task of the UNDT, or for that matter, the role of this Tribunal, to step into the shoes of the Administration and repeat the Retention Panel procedure, or to assess the staff members' possibilities during the downsizing exercises or post abolition.

19. In a case concerning a selection procedure, useful for the present case *mutatis mutandis*, this Court held:

[I]t is not the function of the Dispute Tribunal, or indeed of this Tribunal, to take on the substantive role with which the interview panel was charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in the Dispute Tribunal is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy it deems appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found.²

¹ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29. (Internal citation omitted.)

² *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141, para. 32.

20. No procedural flaw of the Retention Panel was established by Mr. Balinge before the UNDT or this Tribunal. Neither can any irregularity be inferred from an undated document, which supposedly listed his post as non-abolished.

21. Finally, the issue related to the non-initiation of a preliminary investigation was adequately considered by the UNDT as not being part of Mr. Balinge's management evaluation request. Furthermore, the failure to undertake that kind of investigation does not constitute a sufficient ground to cause the illegality of the impugned decision or to render incorrect the first instance court's conclusions on this matter.

22. Essentially, the Appellant has not shown any real error of fact or law in the impugned Judgment which would warrant its reversal. The contested Judgment is, therefore, affirmed.

Judgment

23. The appeal is dismissed in its entirety and the UNDT Judgment affirmed.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar