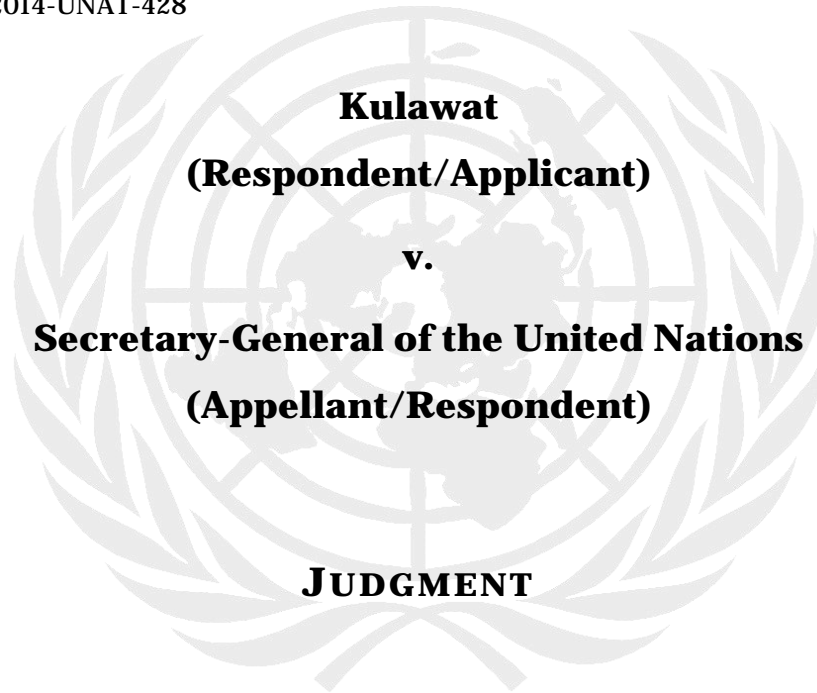




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-428



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**Before:** Judge Rosalyn Chapman, Presiding  
Judge Luis María Simón  
Judge Richard Lussick

**Case No.:** 2013-485

**Date:** 27 June 2014

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Duke Danquah

**Counsel for Appellant/Respondent:** Amy Wood

**JUDGE ROSALYN CHAPMAN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it the appeal by the Secretary-General of the United Nations of Judgment No. UNDT/2013/058, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 22 March 2013 in the case of *Kulawat v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 16 May 2013, and Ms. Suchada Kulawat answered on 19 July 2013.

**Facts and Procedure**

2. Ms. Kulawat joined the Organization on 25 May 1995 at the P-3 level, serving with United Nations Protection Force. On 1 July 1996, she was reassigned to the United Nations Mission in Bosnia and Herzegovina (UNMIBH), and on 1 December 1996 she separated from service with the Organization. On 7 September 1998, she was reappointed to UNMIBH, where she served until 30 September 2002. On 1 October 2002, she was again reappointed with UNMIBH, and on 30 November 2002 she separated from service with the Organization.

3. On 28 January 2003, Ms. Kulawat was reappointed to serve with the United Nations Mission of Support in East Timor. On 15 May 2004, she was reassigned to serve with the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) on a fixed-term appointment.

4. While serving with MONUC, Ms. Kulawat was advised that she had been selected for the post of Security Coordination Officer, at the P-4 level (Post), with the United Nations Department of Safety and Security (DSS) in New York. On 13 March 2006, she accepted and signed the offer for the Post, accepting a two-year fixed-term appointment under the 100-series Staff Rules. Under the terms of the offer, the appointment to the Post was to be “effective on the day [Ms. Kulawat] report[ed] for duty”.

5. On 28 June 2006, the Office of Human Resources Management (OHRM) in New York corresponded with Ms. Kulawat about the Post and requested that she notify OHRM of the date she would report for duty. In correspondence dated 19 July 2006, OHRM asked Ms. Kulawat to indicate the day she would be available to travel to New York. In response, Ms. Kulawat advised OHRM that following consultations with DSS, she planned to travel to New York by the end of August - early September.

6. On 2 August 2006, Ms. Kulawat advised MONUC's Chief Civilian Personnel Officer (CCPO): "I wish to end the assignment with MONUC by 1 September following my acceptance of an Offer for Employment with the UN Secretariat (New York). I would appreciate your kind consideration for appropriate acts in facilitating my repatriation by 31 August 2006."

7. On 10 August 2006, a MONUC Human Resources Assistant (HRA) requested that Ms. Kulawat advise him if her "departure from MONUC is separation or reassignment to UNHQ". That same day, Ms. Kulawat confirmed "after consultations with [her] new duty station in UN Secretariat, that [her] departure from MONUC is the separation". She attached a memorandum to her response requesting repatriation.

8. On 10 August 2006, MONUC's CCPO sent Ms. Kulawat a memorandum regarding her separation from service, detailing the procedures and setting forth her repatriation and other entitlements, and attaching pertinent forms.

9. On 12 August 2006, Ms. Kulawat advised OHRM that her "separation date" from MONUC would be 31 August 2006, that she planned to travel to New York on 10 September 2006, and that she would report to duty on 11 September 2006.

10. On 11 September 2006, Ms. Kulawat signed a letter of appointment with OHRM for the Post, agreeing to a fixed-term of two years.

11. Almost four years later, on 14 July 2010, Ms. Kulawat inquired of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), the successor agency to MONUC, about amending her personnel records to reflect that she did not separate from service when she left MONUC to take the Post with DSS. However, she was advised that "it [wa]s too late to challenge the decision" and her "record cannot be amended as requested".

12. On 4 August 2011, the Executive Officer, DSS, advised Ms. Kulawat that she was ineligible to be considered for conversion of her fixed-term appointment to a permanent appointment because she did not meet the requirement of five years of continuous service set forth in ST/SGB/2009/10, due to a break in service from 31 August to 9 September 2006.

13. On 9 August 2011, Ms. Kulawat made a request for management evaluation of the decision that she was not eligible for conversion since she did not have five years of continuous service. In her request, she argued that she had been “forced” to resign to take the Post, and she merely was related from MONUC to DSS or transferred “from one Office within the Secretariat to another”.

14. By letter dated 9 September 2011, the Secretary-General denied Ms. Kulawat’s request, determining that the impugned decision “was taken in accordance with the applicable rules and ... that it should be upheld”. The Secretary-General noted that Ms. Kulawat had “made no submission to support [her] contention that there was no genuine separation from the Organization or that the duration of the break-in-service ... was insufficient on some basis”. Further, the Secretary-General noted that since she had not challenged her break-in-service within the requisite time for filing a request for review, the legality of the break-in-service could not now be revisited.

15. On 22 September 2011, Ms. Kulawat, represented by counsel, filed an application in the Dispute Tribunal challenging the decision that she was ineligible for consideration to be converted to a permanent appointment because she did not have five years of continuous service as of 30 June 2009, due to a break in service from 31 August to 9 September 2006. The Secretary-General filed his reply on 21 October 2011. The Dispute Tribunal held an oral hearing on 22 January 2013.

16. On 23 March 2013, the Dispute Tribunal issued Judgment No. UNDT/2013/058, in which it found that Ms. Kulawat’s “break in service occurred at the insistence of the Organization”, rather than Ms. Kulawat “acting on her own free will”. Based on these findings, the UNDT concluded that it was not lawful for the Administration to consider the break in service when evaluating Ms. Kulawat’s eligibility for conversion to a permanent appointment and “the break in service that took place in 2006 shall not be taken into account for the purposes of consideration for conversion to a permanent appointment”. The UNDT rescinded the impugned decision, ordered the Administration to give Ms. Kulawat “full and fair consideration for conversion” and awarded Ms. Kulawat USD 7,000.

## **Submissions**

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

17. The Secretary-General claims that the UNDT erred on a question of law and fact in concluding that the impugned decision was improperly taken. In particular, the UNDT erred in determining that the break in service could not lawfully be taken into account for purposes of considering Ms. Kulawat's eligibility for conversion to a permanent appointment.

18. The UNDT exceeded its competence by substituting its own judgment for that of the Secretary-General in deciding how Ms. Kulawat's candidacy for conversion should have been considered by the Administration.

19. The UNDT erred on a question of law and fact, and exceeded its competence, in awarding moral damages to Ms. Kulawat. The award of moral damages was unlawful in light of the Administration's full and fair consideration of Ms. Kulawat's eligibility for conversion; Ms. Kulawat's failure to request damages in her application to the UNDT; and Ms. Kulawat's failure to present documentary evidence to support a claim of stress and anxiety.

20. The Secretary-General requests that the Appeals Tribunal find that the impugned decision was properly taken and that it vacate the award of compensation for moral damages.

### **Ms. Kulawat's Answer**

21. The UNDT acted correctly in determining that the impugned decision was erroneous. Ms. Kulawat's oral testimony and the documentary evidence from 2011 and 2013 support the UNDT's finding.

22. There was sufficient legal basis for the UNDT to determine that the Administration's decision was improper. The UNDT is in the best position to make credibility determinations, and it found that Ms. Kulawat's testimony was credible and, based on that testimony, that she did not make an informed decision when she separated from service. The decision was not based on a mistake by Ms. Kulawat, but rather on the Administration's inducements to her.

23. The UNDT acted within its discretion in awarding moral damages to Ms. Kulawat, based on her oral testimony. Deference should be given to the Dispute Tribunal's findings in this regard.

24. Ms. Kulawat requests the Appeals Tribunal to dismiss the appeal.

### **Considerations**

25. On 23 June 2009, the Secretary-General promulgated ST/SGB/2009/10 (Bulletin) to implement the provisions of former Staff Rules 104.12(b)(iii) and 104.13 for “staff members ... who have become or will become eligible for such consideration by 30 June 2009”.<sup>1</sup>

26. Section 1 of the Bulletin sets forth the requirements for a staff member to be eligible for consideration for a permanent appointment and Section 2 sets forth the criteria for granting a permanent appointment. Section 1 requires, in part, that to be eligible for consideration for conversion to a permanent appointment, a staff member must, by 30 June 2009, “[h]ave completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules”.

27. On 29 January 2010, the Assistant Secretary-General for the Office of Human Resources Management issued “Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered as at 30 June 2009” (Guidelines). Paragraph 5 of the Guidelines provides:

With respect to the requirement of five years of continuous service, the following should be noted:

a. A break in service of any duration prior to the date on which the staff member reached the five years of qualifying service will interrupt the continuity of service.

28. The impugned administrative decision Ms. Kulawat challenged in her application before the UNDT is the determination that she did not meet the eligibility requirement of “five years of continuous service” as of 30 June 2009, due to a break in service from 31 August to 9 September 2006; there is no dispute that she meets the other eligibility requirements. Yet, in her application, Ms. Kulawat does not contest that she incurred a break in service. Rather, she argues that it was not a genuine break in service for the purposes of Section 1 of the Bulletin and paragraph 5 of the Guidelines. She contends that the

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<sup>1</sup> Former Staff Rules 104.12(b)(iii) and 104.13 were promulgated to give every reasonable consideration for a permanent appointment to staff members who had completed five years of continuous service on fixed-term appointments, who met the high standards of efficiency, competence and integrity, and who were under the age of fifty-three years.

requirement of continuous service does not preclude staff members from consideration for conversion “who underwent a break in service for administrative or technical purposes [...] alone, in particular in conjunction with an intentional omission on the part of the Secretary-General not to utilize his power to transfer, reassign or reinstate such staff member”. And she claims that her break in service was not voluntary in that she was required to resign to start her new appointment with DSS.

29. The Dispute Tribunal agreed with Ms. Kulawat and found that “[i]n taking the decision to separate [she] was not acting on her own free will but was following what she had been told to do if she wished to take up the appointment at the United Nations Headquarters”; the “break in service occurred at the insistence of the Organization”. Based on these findings, the UNDT concluded that it was not lawful for the Administration to consider the break in service when evaluating Ms. Kulawat’s eligibility for conversion. Consequently, the UNDT rescinded the impugned decision, ordered the Administration to give Ms. Kulawat “full and fair consideration for conversion” and awarded her USD 7,000 as moral damages.

30. Judicial review of an administrative decision requires the Tribunal to examine whether the Administration reached its decision in a “reasonable and fair, legally and procedurally correct” manner.<sup>2</sup> In reviewing an administrative decision regarding a staff member’s eligibility for conversion, we have stated that the right of a staff member “is not to the granting of a permanent appointment but, rather, to be fairly, properly, and transparently *considered* for permanent appointment”.<sup>3</sup>

31. The Appeals Tribunal finds that the UNDT did not properly review the impugned administrative decision to determine whether the Administration gave full and fair consideration to Ms. Kulawat’s suitability for conversion. We find that the Administration fully complied with Section 1 of ST/SGB/2009/10 and paragraph 5 of the Guidelines, as it must in considering whether a staff member is eligible for conversion. Thus, the UNDT made a significant error of law in concluding that the impugned decision was unlawful.

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<sup>2</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

<sup>3</sup> *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 70 (emphasis in original).

32. The UNDT also erred in law when it refused to apply the Guidelines, which Ms. Kulawat had not challenged before the UNDT. In disregarding the Guidelines, the UNDT stated: “Even if the Tribunal were to accept that the Guidelines can be relied on for the purposes of this case, the Guidelines, issued more than three years after the events in 2006, do not take into account whether the break in service was lawful.” This is not correct. Moreover, the Dispute Tribunal’s refusal to apply the Guidelines, as well as its direction to the Administration that “the break in service that took place in 2006 shall not be taken into account for the purposes of consideration for conversion to a permanent appointment”, intruded on, and interfered, with the Administration’s exercise of its discretion under the Bulletin.

33. Further, the UNDT exceeded its competence by reconsidering the information in Ms. Kulawat’s personnel record and making purported findings of the “facts” underlying her 2006 separation or break in service. Based on the information in her personnel records, it is clear that Ms. Kulawat separated from service on 31 August 2006, and was not reappointed until 9 September 2006. And, as noted above, Ms. Kulawat does not dispute her separation from service and has never sought management review of it.

34. Our recent jurisprudence in *Santos*<sup>4</sup> is consistent with our determinations herein. In *Santos*, we held that the UNDT exceeded its competence “in reopening the ... [prior] disciplinary matter and purporting to make findings of fact in respect thereof”<sup>5</sup> when reviewing the Administration’s decision that a staff member was not eligible for conversion due to his prior discipline. As we noted, Mr. Santos had not sought administrative review of the discipline (and could not since he had agreed to it as part of a settlement) and it was part of his personnel records, which the UNDT was not competent to reconsider or change when reviewing the administrative decision that Mr. Santos was not eligible for conversion.

35. Finally, even assuming *arguendo* that the UNDT *is* competent to reconsider the nature of the 2006 break in service (which it is not), its purported finding that the separation from service was not “voluntary” resulted in a manifestly unreasonable decision. First, the documentary evidence contemporaneous with the 2006 event shows that *Ms. Kulawat* - not the Administration - selected the date she would start her appointment with DSS. Although she knew her appointment with MONUC was ending on 31 August 2006, *she* chose

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<sup>4</sup> *Santos v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-415.

<sup>5</sup> *Ibid.*, para. 29.



9 September 2006 as her starting date with DSS. The documentary evidence also shows that it was *Ms. Kulawat* - not the Administration - who decided she would separate from service. There are no contemporaneous documents to support Ms. Kulawat's claim that she was forced to resign, and the documents created after-the-fact are neither specific to Ms. Kulawat nor entirely reliable. Second, Ms. Kulawat's employment history with the Organization shows that she had a pattern of separation from service between her appointments. Prior to being reassigned to MONUC in 2004, she had separated from service in 1996 and again in 2002. Ms. Kulawat is an experienced, long-term employee of the Organization, who was expected to understand the pros and cons of separating from service between her appointments.

36. The Appeals Tribunal cannot help but note that the UNDT's approach is fraught with dangers. It would allow the Administration to treat one staff member who had a break in service differently than another staff member who had a break in service, depending upon a *post hoc* review made years later of the circumstances surrounding each separation from service. This could lead to favoritism and arbitrary and inconsistent decisions in the conversion process -- exactly what the Bulletin and Guidelines are designed to prevent.

37. Since Ms. Kulawat's rights were not infringed by the Administration during the conversion process, the UNDT erred as a matter of law in awarding moral damages to her.

### **Judgment**

38. The appeal is granted and Judgment No. UNDT/2013/058 is vacated.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Lussick

Entered in the Register on 29<sup>th</sup> day of August 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar