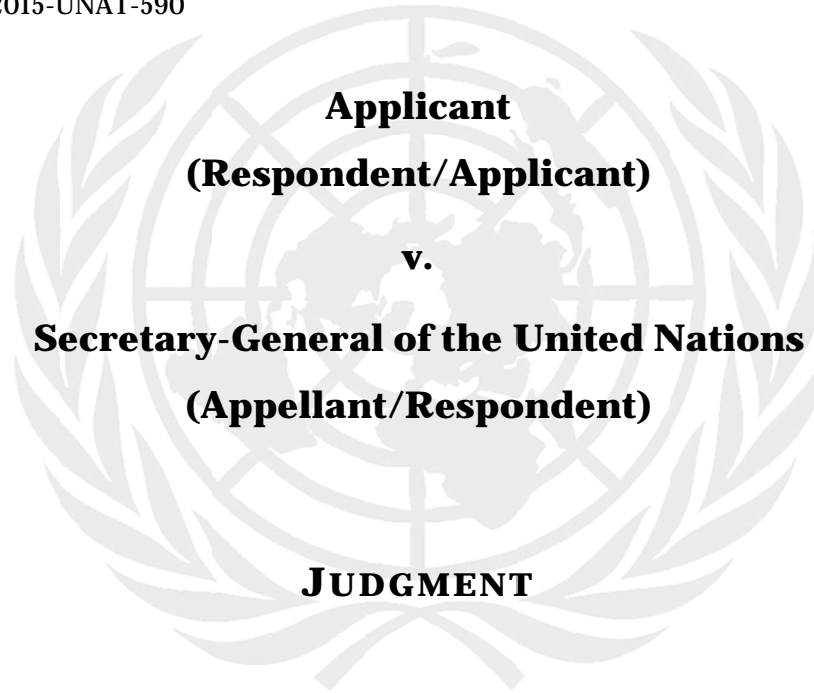




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-590



**Applicant
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Deborah Thomas-Felix Judge Mary Faherty
Case No.:	2015-687
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Applicant: Harry B. Wilson

Counsel for Secretary-General: Stéphanie Cartier

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2013/004 (Judgment on receivability) and Judgment No. UNDT/2014/128 (Judgment on the merits), rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 17 January 2013 and 30 October 2014, respectively, in the case of *Applicant v. Secretary-General of the United Nations*. The Secretary-General's appeal against both the Judgment on receivability and the Judgment on the merits was registered on 5 January 2015, and on 9 March 2015, the Applicant filed an answer. On 19 May 2015, the Applicant filed a motion for confidentiality in relation to the appeal. In Order No. 228, the Appeals Tribunal granted her motion to continue the anonymity protection granted by the Dispute Tribunal.

Facts and Procedure

2. The Applicant joined the United Nations Office for Project Services (UNOPS) in February 2009 at the P-5 level as Head of Programme of the Iraq Operations Centre based in Amman, Jordan. In September 2009, she was transferred to the Jerusalem Operations Centre (JMOC) on an emergency basis as its Interim Director, before the departure of the then Director. The JMOC functioned under the supervision of UNOPS' Europe and Middle East Office (EMO) based in Copenhagen, Denmark. It operated in Israel and was subject to the Israeli visa and movement requirements although the primary beneficiary of its projects was the Palestinian Authority.

3. According to the Dispute Tribunal, it was well known and accepted that the working conditions in the JMOC made it a difficult duty station. The office that the Applicant inherited was in both physical and operational disarray. There was a large number of unread e-mails in the outgoing Director's official computer as well as a back-log of approvals for the payment of salaries, and certain files were missing. The physical premises that the JMOC occupied did not meet the Minimum Operating Security Standards (MORSS) and were not environmentally safe while also being located in a volatile neighborhood. There were insufficient funds to pay for overheads due to miscalculation of project budgets, and there was no new business in the pipeline for the future.

4. After she joined the JMOC, the Applicant set up a team to initiate a strategic audit in order to find a way forward for the centre. The recommendations made by the strategic audit team, which were approved by the Regional Director, included the relocation of the JMOC to new MORSS-compliant premises.

5. Effective 1 February 2010, the Applicant was reassigned on a one-year fixed-term contract at the P-5 level as the JMOC's substantive Director.

6. On 6 September 2010, the Applicant wrote to the Acting Regional Director, asking whether her contract would be extended to enable her to make some tax-related decisions as required by her accountant. The Acting Regional Director replied the same day that the Applicant was seen in the EMO Regional Office as an able Director and that he had no reason to believe that her contract would not be extended through 2011.

7. At the beginning of November 2010, no action had been taken on the Applicant's Performance Review and Assessment (PRA) and it remained at stage one. On 5 November 2010, the Applicant sent an e-mail to the Acting Regional Director and the new EMO Regional Director, seeking advice as to whom she should indicate as her supervisor as well as on how to set her objectives for the purposes of preparing her PRA.

8. The Acting Regional Director responded the same day informing the Applicant that the new EMO Regional Director was her supervisor and that it was not always easy to come up with measurable objectives. He advised the Applicant to come up with objectives relevant to her targets and business plan and finalize them with the input from the EMO Regional Director. The Applicant drafted her objectives but received no input from the EMO Regional Director at that time.

9. On 24 November 2010, the Acting Regional Director wrote to the Applicant on the subject of targets for 2011. He stated that the targets and administrative budget allocation for the region had been reduced and that the JMOC had been allocated USD 100,000. He requested that the JMOC prepare and submit a budget narrative as well as budget details based on the USD 100,000 allocation. The Applicant sent an administrative budget proposal to the Acting Regional Director on 30 November 2010 that was higher than the sum indicated, stating that the budget proposal had been prepared based on the need to

comply with the minimum legal and ethical standards and that only four core categories of costs had been included.

10. The Acting Regional Director replied on the same day asking the Applicant to resend the budget based on the USD 100,000 allocated to the JMOC. The Applicant responded seeking guidance on what could be eliminated from the four categories of costs on which the JMOC had based the budget preparation.

11. The EMO Regional Director, who was copied on these e-mails, also replied on the same day stating that, although there was a need to strengthen the JMOC's office capacity and its security, it was impossible to meet those needs and demanded that the Applicant submit a budget for USD 100,000 as instructed.

12. The Applicant submitted a revised administrative budget for the JMOC on 1 December 2010, but stated that she would not accept management responsibility where she was being put in a position in which she could not comply with rules, regulations, legal agreements, ethical standards and targets.

13. The EMO Regional Director was unhappy with the Applicant's response and stated as much in an e-mail dated 2 December 2010.

14. On 3 December 2010, the Applicant asked the EMO Regional Director about the renewal of her contract pointing out that there was little time left to renew her Israeli Ministry of Foreign Affairs card (yellow card), her United Nations Laissez-passer and her Israeli visa if she was extended.

15. The EMO Regional Director replied on 6 December 2010 confirming to the Applicant that what the Acting Regional Director had told her about her contract extension in September 2010 was still valid.

16. The EMO Regional Director and the Acting Regional Director visited Jerusalem from 13 to 16 December 2010. On 16 December, during a reception for the JMOC's donors and partners at a restaurant in Ramallah, the EMO Regional Director told the Applicant about the negative reports that she had received regarding the latter's management style. She also told the Applicant that the latter's reputation at the EMO was seen to be tough, bordering on negative.

17. In an e-mail dated 21 December 2010, the EMO Regional Director informed the Applicant, *inter alia*, that she had recommended that the latter's contract be renewed for six months to see how the issues raised would be resolved before she would consider a further extension.

18. The Applicant responded to the EMO Regional Director on 28 December 2010, maintaining *inter alia* that a six-month contract extension would not be in the JMOC's interest due to the negative impact it would have on stability, employee morale as well as business organization. She noted that the Israeli regulations required at least a year's contract for the issuance of a yellow card which would enable her to effectively manage field operations.

19. In a reply on 4 January 2011, the EMO Regional Director expressed disappointment that the Applicant did not see the positive feedback in her e-mail of 21 December 2010 and concentrated only on issues to be resolved. She refused to discuss the Applicant's response and asked to be sent a step-by-step plan to address the issues she had raised. The Applicant responded the next day offering suggestions as to how to address the issues that the EMO Regional Director had raised and asked for feedback on any other actions that she could take.

20. In early January 2011, the Applicant wrote to the Office of the Ombudsman seeking assistance in respect of the "shortened contract extension of [her] fixed-term contract". A consultant ombudsman was assigned to the Applicant's case. According to the Applicant, in the ensuing months through summer 2011, she and the consultant ombudsman discussed by telephone and e-mail how best the consultant ombudsman could intervene with UNOPS' management on her behalf.

21. On 17 January 2011, the Applicant received an e-mail informing her that her fixed-term contract had been extended for six months until 31 July 2011.

22. On 7 March 2011, the Applicant requested management evaluation of the decision to extend her contract for six months, and she received a response on 28 March 2011 maintaining the decision.

23. The Applicant's 2010 PRA was initiated on 8 March 2011 and her PRA was finalised on 1 April 2011 with an overall rating of "partially met expectations".

24. On 26 April 2011, the Applicant received an e-mail attaching a letter from UNOPS' Executive Director dated 19 April 2011. The letter informed the Applicant that her fixed-term contract would not be renewed beyond its expiry date of 31 July 2011 and that she was being placed on special leave with full pay with effect from 1 May 2011 due to lack of improvement in her management style in spite of an improvement plan put in place for her.

25. Meanwhile, in April 2011, the informal efforts spearheaded by the consultant ombudsman made progress when he contacted first UNOPS' Executive Director and then UNOPS' Human Resources Director. In May 2011, the consultant ombudsman and UNOPS' management explored the option of reassigning the Applicant to the post of Senior Partnership and Liaison Advisor with the UNOPS office in Brussels.

26. The Applicant submitted a request for rebuttal of her 2010 PRA on 1 May 2011. She challenged her overall performance rating and the individual ratings she received regarding each of her four objectives, as well as the ratings in six competencies.

27. On 30 June 2011, UNOPS informed the Applicant by e-mail that she had not been selected for the Brussels post.

28. On 29 July 2011, the Applicant received an e-mail informing her that the rebuttal panel had decided to uphold her PRA rating of "partially met expectations".

29. The Applicant's six-month contract expired on 31 July 2011 and she was separated from UNOPS. The Applicant thereafter sought other work and commenced service with the United Nations Children's Fund (UNICEF) on 5 October 2011.

30. The Applicant filed three applications with the Dispute Tribunal. The first dated 26 September 2011 contested the decision to extend her fixed-term contract only for six months; the second dated 19 December 2011 contested the rebuttal panel's decision to uphold her PRA; and the third dated 20 December 2011 challenged the decision not to renew her fixed-term contract and to place her on special leave.

31. In its Judgment on receivability, the Dispute Tribunal decided that, of the three applications that the Applicant had filed, only her applications challenging the decision to issue her a shortened contract extension and the decision to uphold her PRA ratings were receivable. The Dispute Tribunal rejected the Secretary-General's receivability challenge in

respect of the decision to extend the Applicant's appointment for only six months, finding that the Applicant had sought the services of the Ombudsman by 10 January 2011 within the deadlines for filing a UNDT application and the Administration had agreed to mediation. The UNDT rejected the Secretary-General's argument that the mediation broke down on 26 April 2011 when the Applicant was notified of the decision not to renew her contract beyond 31 July 2011, because, nearly a month later on 24 May 2011, the consultant ombudsman wrote to the Applicant reporting progress of his informal efforts with the UNOPS Administration and intimating to her that UNOPS thought that the Brussels post would be a good match for her. That showed that mediation was on-going even after the non-renewal decision had been taken. Then on 30 June 2011, UNOPS informed the Applicant that she was not successful for the Brussels post. In the view of the Dispute Tribunal, "[b]y this email, mediation effectively broke down". The UNDT concluded that as the 90 days for filing an application with the Dispute Tribunal commenced on 1 July 2011 and the Applicant filed her application on 26 September 2011, her application was timely filed and therefore receivable.

32. In its Judgment on the merits, the Dispute Tribunal found that the e-mail of 6 September 2010 by the Acting Regional Director and the e-mail of 6 December 2010 by the EMO Regional Director created an expectation in the Applicant's mind that her contract would be extended through 2011 for a period of one year. It awarded the Applicant the equivalent of six months' net base salary on this basis for frustration of that reasonable expectation. The UNDT also awarded the Applicant additional compensation totaling six months' net base salary: three months for procedural irregularities in connection with the conduct of the Applicant's PRA and three months for violation of her due process rights during the 2010 PRA rebuttal process.

Submissions

The Secretary-General's Appeal

33. The Secretary-General challenges the UNDT's conclusion that the Applicant's application against the decision to renew her contract for six instead of 12 months was receivable. He also contests the UNDT's award of six months' net base salary related to that decision. However, he does not appeal the other two grounds for compensation awarded by the UNDT in relation to the conduct of the Applicant's PRA and the rebuttal process.

34. The Dispute Tribunal exceeded its jurisdiction by finding receivable the Applicant's application against the six-month renewal decision. Her application was filed on 26 September 2011, some six months after she had received the outcome of management evaluation on 28 March 2011, and she did not request a waiver of the time limit to file her application. Further, no exception set forth in Article 8(1)(d) of the UNDT Statute applied in the present case, and the discussions between the Applicant and the consultant ombudsman did not constitute mediation proceedings within the meaning of Article 8 of the UNDT Statute.

35. Alternatively, the Secretary-General maintains that the Dispute Tribunal erred in law by awarding the Applicant six months' net base salary for renewing her contract for six instead of 12 months, as such award was inconsistent with the purpose of compensation articulated in *Warren*.¹ In the present case, UNDT awarded the Applicant six months' net base salary in compensation for the loss of her salary, although she commenced employment with UNICEF on 5 October 2011 without a reduction in level or step from her previous service with UNOPS. Consequently, her actual loss of earnings corresponded to the salary that she did not receive from 1 August 2011, when she separated from UNOPS, to 4 October 2011, the day before she started with UNICEF.

36. The Secretary-General requests that the Appeals Tribunal vacate the UNDT's conclusion in respect of the six-month renewal decision and its award of six months' net base salary on that basis. Alternatively, the Secretary-General requests that the Appeals Tribunal reduce that award of compensation from six months' net base salary to an amount corresponding to her actual loss of earnings from 1 August 2011 to 4 October 2011.

The Applicant's Answer

37. The UNDT correctly found the Applicant's application against the six-month renewal decision receivable, because she was engaged in informal dispute resolution with the assistance of the Office of the Ombudsman from January through "the summer" of 2011. Both the Applicant and UNOPS engaged with the Office of the Ombudsman to informally resolve their dispute. At all times, the Applicant engaged with the consultant ombudsman in good faith and with the understanding that she was seeking informal resolution without prejudice to her right to pursue the matter formally if the informal efforts were unsuccessful.

¹ *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.

38. The Secretary-General's interpretation is not supported by the text of Article 8(1)(d)(iv) of the UNDT Statute or Staff Rule 11.1. Article 8(1)(d)(iv) of the UNDT Statute does not require formal mediation proceedings or identify a specific mediation procedure that the parties must follow. Staff Rule 11.1, on the other hand, requires the participation by the Office of the Ombudsman, but it does not require staff members to nominate a mediator or formally participate in mediation proceedings. Moreover, his interpretation contradicts the Organization's policy encouraging informal resolution of disputes as stated in General Assembly resolution 66/237.

39. The Dispute Tribunal correctly awarded the Applicant six month's net base salary for UNOPS' violation of her legitimate expectation of a one-year contract extension. The UNDT did not state that the six-month award corresponded only to her loss of earnings. That award can be seen to correspond with both the compensatory damages and moral damages in relation to her shortened contract extension. Contrary to the Secretary-General's argument, the UNDT Judgment did not place the Applicant in a better position than she would have been in had the Organization complied with its contractual obligations, because, if she had not been improperly separated on 31 July 2011, she would have joined UNICEF in October 2011 without a break in service, consequently entitling her to mobility allowance. By requesting that the amount of compensation awarded by the UNDT be decreased from six months' net base salary to approximately two months' net base salary, the Secretary-General is seeking to penalize the Applicant for obtaining gainful employment while he reaps a benefit at her expense.

40. The Applicant requests that the Appeals Tribunal affirm both the Judgment on receivability and the Judgment on the merits rendered by the Dispute Tribunal, including its award of six months' net base salary for UNOPS' failure to extend her contract for a period of one year.

Considerations

41. The Secretary-General challenges the UNDT's conclusion that the Applicant's application concerning the decision to renew her contract for six instead of 12 months was receivable. He also contests the UNDT's award of six months' net base salary related to that decision.

Appeal on Receivability

42. The Appeals Tribunal recalls resolution 66/237 where the General Assembly “[r]eaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation, ... to encourage recourse to informal resolution of disputes and to avoid unnecessary litigation; ... and stresses the importance of developing a culture of dialogue and amicable resolution of dispute through the informal system”.²

43. In accordance with this, the Staff Rules expressly encourage a staff member who considers that his or her contract of employment or terms of appointment have been violated to approach the Office of the Ombudsman to have the matter resolved informally. This may result in the extension of the deadlines applicable to management evaluation and to the filing of an application with the Dispute Tribunal.

44. Staff Rule 11.1 governing “informal resolution”, states:

A staff member who considers that his or her contract of employment or terms of appointment have been violated is encouraged to attempt to have the matter resolved informally. To that end, a staff member who wishes to pursue informal channels should approach the Office of the Ombudsman without delay, without prejudice to the right to pursue the matter formally in accordance with the provisions of the present chapter.

45. To ensure that the staff member does not lose his or her right to file a formal action in the event that the informal resolution is unsuccessful, Staff Rule 11.4(c) permits the staff member to apply for an extension of time to file an application with the Dispute Tribunal within 90 calendar days of the end of mediation. Staff Rule 11.4(c), in relation to the UNDT, states:

Where mediation has been pursued by either party within the deadline for filing an application with the United Nations Dispute Tribunal specified in staff rule 11.4 (a) or (b) and the mediation is deemed to have failed in accordance with the rules of procedure of the Mediation Division of the Office of the Ombudsman, the staff member may file an application with the Dispute Tribunal within 90 calendar days of the end of the mediation.

² General Assembly resolution 66/237 of 24 December 2011, paras. 16-17 (Italics in original).

This rule is repeated in Article 8(1)(d)(iv) of the Statute of UNDT, which states:

... An application shall be receivable if:

...

(d) The application is filed within the following deadlines:

...

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

46. The Secretary-General submits that the UNDT exceeded its jurisdiction and erred in law by holding that the exception to the time limit for filing an application as set out in Article 8(1)(d)(iv) of the UNDT Statute was applicable to the present case as there was no mediation process between the parties within the meaning of the said Article. The Secretary-General maintains that “[b]ased on the express wording of Article 8[(1)(d)(iv)] of the UNDT Statute, it is axiomatic that only an actual mediation process would defer the time-limit for filing an application with the UNDT until 90 days after the mediation has broken down. ... In addition, Article 8[(1)(d)(iv)] requires the involvement of the Mediation Division.”

47. We note that the Secretary-General does not contest the fact that the Applicant engaged with the Office of the Ombudsman for United Nations Funds and Programmes to informally resolve the dispute, but contends that the discussions between the Applicant and the consultant ombudsman did not constitute mediation proceedings within the meaning of Article 8 of the UNDT Statute. He submits that no mediation process was sought or commenced by either party, in that there was no evidence of any common agreement to nominate a mediator or to formally participate in mediation proceedings or any involvement by the Mediation Division in a mediation process.

48. We agree with the submission by the Applicant that the Secretary-General’s interpretation of Article 8(1)(d)(iv) of the UNDT Statute or Staff Rule 11.1 is unsupported by the text of the UNDT Statute or the Staff Rules.

49. Article 8(1)(d)(iv) does not identify any specific mediation process that the parties must follow, such as nomination of a mediator, though it is reasonable to expect that the mediator be acceptable to both parties.

50. Furthermore, the said article does not require the institution of a formal procedure as that would defeat the very purpose of encouraging dialogue and amicable resolution of dispute through mediation reached through a mutually agreeable solution. We do not think that a valid mediation process, being an informal method of resolution of disputes, needs to follow a certain or fixed format.

51. In our considered opinion, what is envisaged or required by the UNDT Statute and the Staff Rules is that: mediation has to be pursued by either party within the deadline for filing an application with the UNDT; such informal dispute resolution is carried out through the Office of the Ombudsman;³ the time limits may be tolled when the Mediation Division of the Ombudsman's Office is involved in settlement or mediation discussions;⁴ and the staff member may file an application within 90 calendar days of the breakdown of the mediation.

52. Annex 12 attached to the Applicant's answer brief unequivocally shows that the Office of the Ombudsman was engaged in the informal dispute resolution on the Applicant's behalf.

53. The UNDT held that the parties sought mediation of their dispute and within the deadlines for filing an application. The UNDT stated:⁵

... Based on the documentary evidence submitted by both parties, the Tribunal finds that by 10 January 2011, the Applicant sought the services of the Ombudsman and the Respondent agreed to mediation of their dispute.

... The Tribunal finds that the Applicant began the process by requesting the Ombudsman to engage with the Respondent about 'the shortened contract extension of her fixed-term contract['] and the Respondent participated in these negotiations by offering alternatives to the dispute.

... The Tribunal therefore finds that the parties sought mediation of their dispute.

...

³ *Eng v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-520, para. 23; *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, para. 29.

⁴ *Eng, ibid.*, para. 24.

⁵ Judgment No. UNDT/2013/004, paras. 25-29.

... The Applicant received the outcome of management evaluation on 28 March 2011; therefore the deadline for filing an Application with the Tribunal was 26 June 2011.

... The Applicant first made contact with the Consultant Ombudsman for the Funds and Programs on 10 January 2011 which was still within the time frame for the Applicant to file her Application with the Tribunal. The Tribunal therefore finds that the Office of the Ombudsman was seized of the matter and as such mediation was sought within the deadline for filing Applications.

54. We find no reason to upset this finding.

55. The UNDT found it necessary to determine the specific date on which mediation broke down, as under the UNDT Statute and the Staff Rules the time limits begin to run again after a settlement or the breakdown of mediation.

56. The discussion with the Ombudsman included the possibility of the Applicant being considered for other positions with UNOPS and as such she submitted an application for the Brussels post. On 30 June 2011, she received an e-mail notifying her of her non-selection for the Brussels post. Thus, the Dispute Tribunal correctly found that the mediation broke down on 30 June 2011 and concluded that because the Applicant had filed her application on 26 September 2011, it was filed within the 90 calendar days' limit.

57. Accordingly, we affirm that the Applicant's application was receivable by the UNDT, and the appeal on this ground fails.

Appeal on quantum of damages

58. The UNDT, in considering the merit of the application, held that the Secretary-General erred in failing to extend the contract of the Applicant for one year, having created a legitimate expectancy of a one-year renewal. It thus awarded the Applicant six months' net base salary on this basis for the frustration of her reasonable expectation of a one-year contract renewal.

59. The question before us is whether, in the circumstances of the present case, this award was fair and adequate or excessive. The Secretary-General has relied on two judgments rendered by this Tribunal - *Mushema*⁶ and *Mwamsaku*⁷ - where the

⁶ *Mushema v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-247.

Appeals Tribunal has held that in awarding compensation for loss of salary several factors must be taken into consideration, including gainful employment after separation.

60. The Secretary-General submits that the UNDT erred on a question of law by awarding compensation in the amount of six months' net base salary for renewing the Applicant's contract for six instead of 12 months, when the Applicant commenced employment with another entity within approximately two months of being separated from service with UNOPS with no reduction in level or step from her previous service with UNOPS.

61. In *Warren*,⁸ the Appeals Tribunal held that "the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations".

62. The Applicant was separated from service on 31 July 2011 and commenced employment with UNICEF in less than three months on 5 October 2011 with no reduction in level or step from her previous service with UNOPS.

63. In effect, the Applicant's actual loss of earnings does not correspond to the six months' net base salary, but rather to what she actually lost before commencing employment with another entity. In that respect, the award of six months' net base salary is far in excess of her actual loss of earnings.

64. We hold that in the present case, it would be adequate, fair and reasonable to award to the Applicant compensation in the amount equivalent to three months' net base salary.

65. The award of compensation is therefore varied from six months' net base salary to three months' net base salary.

66. Subject to this variation, the appeal is dismissed.

Judgment

67. The appeal is dismissed. The UNDT Judgment is affirmed, subject to a variation of the award of six months' net base salary to three months' net base salary.

⁷ *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246.

⁸ *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059, para. 10.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Faherty

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar