



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

Judgment No. 2019-UNAT-906

**Omwanda
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Dimitrios Raikos Judge Deborah Thomas-Felix
Case No.:	2018-1198
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Brandon Gardner, OSLA

Counsel for Appellant/Respondent: Jiyoung Kwon

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/078, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 30 July 2018, in the case of *Omwanda v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 28 September 2018, and Mr. Manasses Juhudi Omwanda filed his answer on 23 November 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... On 10 October 2005, the Applicant joined the Organization as a Security Officer with the United Nations Office at Nairobi (“UNON”) at the G-3 level on a fixed-term appointment. The Applicant was locally recruited for this position.

... On 7 January 2008, the Applicant was selected for the position of Security Officer in New York at the S-1 level on a fixed-term appointment, with effect from 19 February 2008. He was locally recruited for this position.

... On 10 January 2008, the Applicant tendered his resignation from UNON, effective 18 February 2008, to take up the appointment in New York in February 2008.

... On 19 February 2008, the Applicant was appointed as a Security Officer with the United Nations Department of Safety and Security (“UNDSS”) in New York on a fixed-term appointment under former staff rule 104.3(a).

[In December 2014, the Applicant fell ill and was placed on extended certified sick leave.]

... On 25 November 2015, the United Nations Staff Pension Committee notified the Applicant that it had determined on 18 November 2015 that he was incapacitated from further service, and he was consequently entitled to a disability benefit in the amount of USD 56,499.12 annually under art. 33 of the Regulations of the United Nations Joint Staff Pension Fund (“UNJSPF”).

... On 1 December 2015, the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) notified the Applicant that the Secretary-General had decided to authorize the termination of his fixed-term appointment under staff regulation 9.3(a)(iii), and further stating that:

... Accordingly, you are entitled to an indemnity equal to the indemnity provided for in Annex III(a) to the Staff Regulations reduced by the amount of the disability benefit you will receive from the United Nations Joint Staff Pension Fund for the number of months to which the indemnity rate corresponds. You are

¹ Impugned Judgment, paras. 6-23. The Applicant means Mr. Omwanda.

also entitled to compensation for one month in lieu of notice under Staff Rule 9.7(d) to the extent that the balance of sick leave falls short of the period of notice.

... The payment of your disability benefit will take effect on 5 February 2016, at which time you cease to be entitled to salary and emoluments from the United Nations.

... On 4 February 2016, the Applicant's appointment was terminated on medical grounds, with termination indemnity and compensation in lieu of notice.

... In or around March 2016, a salary advance in the amount of USD 2,377.21 was issued to the Applicant.

[By e-mail dated 7 April 2016, the Applicant requested the Human Resources Unit to issue his termination indemnity. The Human Resources Unit informed the Applicant that the disbursement of the termination indemnity depended on "multiple follow-ups" with UNJSPF and the Payroll Unit, but that efforts were being made to expedite the case.]

... In or around May 2016, the Applicant started receiving disability benefits through the UNJSPF system.

... On 20 May 2016, a Human Resources Officer advised the Applicant by email that no payment of termination indemnity was due to him, as he had been overpaid salary and other entitlements. On the same day, the Applicant responded to the email from the Human Resources Officer and requested that he be provided clarification on how the calculations were done. The Human Resources Officer responded to the Applicant informing him that the total amount of the overpayment had not been calculated yet, and further stated:

... Please note that the recovery is due to the dependency allowance you received for your daughter while she was not in full-time attendance in school and also due to the reason that you were receiving full-salary for several months when it should have been half-salary payment. Therefore[,] the amount to be recovered is yet to be determined.

... In addition, based on the Pension Fund's calculations, the termination indemnity due to you is \$773.24.

... On 24 June 2016, the Applicant filed a request for management evaluation with regard to the calculation of his termination indemnity and other entitlements.

... On 1 July 2016, the Administration wrote to the Applicant, informing him that it was determined that he was paid an overpayment. The termination indemnity of USD 773.40 due to the Applicant was offset against the overpayment of USD 5,821.44 resulting in the reduction of the overpayment to USD 5,040.20. The Administration requested that the Applicant repay this sum.

... On 11 July 2016, the Applicant wrote to the Management Evaluation Unit (“MEU”) via email stating:

... On 20th May 2016, I received an email correspondence from [a Human Resources Officer] that my termination indemnity shall not be paid to me and that I have been overpaid. She further wrote that I will be paid around USD 700. I would like to be kindly informed how the calculations were done and when I shall be paid. My requests from [Office of Human Resources Management, (OHRM)] for more information have remained unanswered to date.

...

... On 24 August 2016, the MEU wrote to the Applicant informing him that upon the review of his request for management evaluation dated 24 June 2016, the Secretary-General had decided to uphold the contested decision relating to the calculation of his termination indemnity and other entitlements.

... On 26 September 2016, the Applicant received a termination indemnity spreadsheet which stated his date of [entry on duty (EOD)] as 19 February 2008 and his termination date as 3 February 2016.

... On 14 October 2016, the Applicant sent an email to the MEU requesting assistance in correcting the dates on the basis of which his termination indemnity was calculated. The Applicant further requested that a hold be placed on the recovery of USD 5,040.20 from his disability funds pending the proper calculation of his termination indemnity.

... On 19 October 2016, the Applicant filed a request for management evaluation of the Administration’s calculation of his EOD and termination date in the spreadsheet received on 26 September 2016. The Applicant stated that the correct EOD date was 10 October 2005 and termination date was 4 February 2016.

... On 25 October 2016, the MEU wrote to the Applicant informing him that upon the review of his request for management evaluation dated [19 October] 2016 the MEU had determined that his request was not receivable.

3. On 24 August 2016, Mr. Omwanda filed two applications contesting, *inter alia*, the Administration’s decision not to pay him termination indemnity following an award of disability and the termination of his appointment on medical grounds. The two applications were registered as Case No. UNDT/NY/2016/040 and Case No. UNDT/NY/2016/041, respectively.

4. On 22 November 2016, Mr. Omwanda filed a third application before the UNDT, contesting the decision to change his EOD date from 10 October 2005 to 19 February 2008. The application was registered as Case No. UNDT/NY/2016/066.

5. On 9 January 2017, the UNDT ordered that the three cases be consolidated.

6. On 30 July 2018, the UNDT issued Judgment No. UNDT/2018/078, holding that the three applications filed by Mr. Omwanda succeeded in part. With regard to the decision to change Mr. Omwanda's EOD date from 10 October 2005 to 19 February 2008, the UNDT noted that the crux of the issue was whether Mr. Omwanda could be treated as having been in continuous service since he joined the Organization on 10 October 2005 for the purpose of calculating the termination indemnity due to him. In this regard, the UNDT found that the intended consequence of the provision in former Staff Rule 104.3(b)(ii), applicable at the time of Mr. Omwanda's resignation from UNON, was to facilitate movement of staff between various organizations within the United Nations Common System (and certainly not to disentitle or cause detriment to staff as they moved internally), to ensure that staff members were treated as being in continuous service as they moved through various United Nations organizations, and to ensure that any separation entitlements that a staff member might have following re-employment within 12 months of a separation would not exceed the amounts that the staff member would have received had his or her service been continuous. The UNDT found that Mr. Omwanda should have been deemed to have been in continuous service and, as such, his full period of service had to be taken into account in the computation of his termination indemnity. Consequently, the UNDT held that since Mr. Omwanda's EOD into the United Nations Common System was 10 October 2005, when he commenced service at UNON, the Administration used the incorrect EOD date for the calculation of the termination indemnity due to Mr. Omwanda.

7. Accordingly, the UNDT rescinded the Administration's calculation of Mr. Omwanda's termination indemnity and directed the Administration to provide him, within 30 days, i.e. by or before 30 August 2018, with a complete updated calculation sheet (reflecting Mr. Omwanda's continuous service since 10 October 2005) and make any necessary adjustments to his separation entitlements and benefits. In addition, the UNDT, having taken into account the nature of the irregularity and the length of the delay in administering the proper termination indemnity due to Mr. Omwanda, awarded him USD 5,000 of non-pecuniary damages with interest at the US Prime Rate for the procedural error in calculating his termination indemnity.

8. In relation to the decision to change Mr. Omwanda's termination date from 4 February 2016 to 3 February 2016, the UNDT found that the typographical error in the calculation spreadsheet had no discernable direct legal effect on Mr. Omwanda's terms of appointment since it had no impact on the calculation of the termination indemnity due to him. Accordingly, the UNDT held that Mr. Omwanda had no standing or right under the UNDT Statute to contest such an error.

9. As for the claim of discriminatory treatment, the UNDT found that Mr. Omwanda had provided no evidence in support of the claim; on the contrary, the record indicated that the Secretary-General had taken measures to ensure that Mr. Omwanda did not suffer hardship following his separation from service by issuing him a salary advance in or around March 2016, which resulted in an overpayment to Mr. Omwanda. Similarly, the UNDT found that Mr. Omwanda's claim of emotional distress did not satisfy the statutory requirements for an award of compensation.

Submissions

The Secretary-General's Appeal

10. The Secretary-General submits that the UNDT erred in fact and law in holding that the calculation of the termination indemnity owed to Mr. Omwanda should be based on the EOD date of his first appointment in Nairobi in 2005. The termination indemnity was calculated in accordance with Annex III to the then applicable Staff Regulations (ST/SGB/2014/1) which contains a table indicating the months of salary corresponding to "completed years of service". Further, former Staff Rule 9.8(b) provides that "[l]ength of service shall be deemed to comprise the total period of a staff member's full-time continuous service on fixed-term or continuous appointments". In the present case, Mr. Omwanda's continuity of service was interrupted when he resigned in February 2008 in order to take up a new appointment as a local recruit in New York. Accordingly, for the purposes of calculating the length of continuous service, the Administration correctly based its calculations on the date when Mr. Omwanda began his new appointment in New York (19 February 2008), rather than his first appointment in Nairobi (10 October 2005).

11. Former Staff Rule 104.3 makes a clear distinction between re-employment and reinstatement. While subsection (c) states that “[o]n reinstatement the staff member’s services shall be considered as having been continuous”, subsection (b) states that “[i]f the former staff member ... is given a new appointment, its terms shall be fully applicable without regard to any period of former service”. The Appeals Tribunal has acknowledged this distinction between reinstatement and re-employment, and has consistently held that a staff member’s resignation and subsequent re-employment cause a break in service with consequences for determining the length of a continuous appointment. The Administration correctly concluded that Mr. Omwanda’s resignation caused a break in service and therefore correctly calculated his termination indemnity based on the 2008 EOD date.

12. The UNDT exceeded its competence in reviewing Mr. Omwanda’s EOD date and treating him as if he had been reinstated rather than re-employed, when the decision was not subject to a timely request for management evaluation. In *Hajdari*² and *Kulawat*,³ the Appeals Tribunal held that staff members who did not file timely requests for management evaluation at the time of their resignation and subsequent re-employment cannot years later contest the consequences resulting from a resignation that interrupts continuity of service.⁴ In the present case, the determination of Mr. Omwanda’s EOD date was made in 2008, when he was re-employed as a Security Officer in New York. In the 19 February 2008 Letter of Appointment, which Mr. Omwanda signed, he acknowledged his understanding of all the terms and conditions of his re-employment under former Staff Rule 104.3. Therefore, he should have known the consequences flowing from his re-employment, which were that the terms of his new appointment should be fully applicable without regard to any former service. The Letter of Appointment did not stipulate that the appointment was a reinstatement. If Mr. Omwanda did not agree to the terms of re-employment, he should have requested that he be reinstated upon his EOD in New York.

13. The UNDT erred in law in concluding that Staff Rule 4.17(c) provided a basis for including periods of service prior to resignation for the purpose of calculating termination indemnity, even when the staff member had a break in service and was re-employed. In Staff Rule 4.17(c), reference is made to payments relating to “prior periods of service” for the sole

² *Hajdari v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-570.

³ *Kulawat v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-428.

⁴ In *Hajdari* and *Kulawat*, the staff members contested their non-eligibility for consideration for conversion to a permanent appointment due to a break in service.

purpose of preventing payments in excess of the regulatory maximum (12 months' salary). The rule is intended to address situations where payments had been made upon the staff member's previous separation in respect of prior periods of service. Such payments must be factored in when paying the staff members at the end of their new appointment so that they would not be paid more than what they would have been paid had their service been continuous.

14. Moreover, contrary to the UNDT's holding, the Secretary-General did not argue in *Couquet*⁵ that prior periods of service should be taken into account in the computation of a staff member's termination indemnity. The argument made by the Secretary-General in *Couquet* was to highlight that, under Staff Rule 4.17(b), a re-employed staff member should be treated as if he did not have any prior period of service, and that Staff Rule 4.17(c) provides exclusions for specific cases where payments already made at the time of the staff member's first separation could be taken into account. Nonetheless, the exclusion in Staff Rule 4.17(c) does not apply to Mr. Omwanda's case because he did not receive a termination indemnity at the end of his first appointment, as he resigned and was not eligible for termination indemnity. Therefore, the issue of deducting a termination indemnity paid at the end of Mr. Omwanda's first appointment from the termination indemnity paid at the end of his second appointment never arose in this case.

15. The UNDT erred in fact and in law in awarding Mr. Omwanda USD 5,000 as compensation for the procedural error in calculating his termination indemnity and in concluding that he had suffered harm from having to file five applications to the UNDT. Mr. Omwanda was informed of the exact amount of termination indemnity within three months of his separation and the calculations which Mr. Omwanda received in September 2016 were only a confirmation of what he had already received in May 2016. Therefore, there was no inordinate delay. The Appeals Tribunal has consistently held that not every administrative wrongdoing will necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute and that compensation is not awarded for claims of protracted litigation and legal fees, finding that any delay resulting from litigation is only a result of the parties' exercise of their right to appeal.

16. Moreover, the UNDT awarded Mr. Omwanda compensation while acknowledging that he had not provided any evidence to support his claim of emotional distress or discrimination. Article 10(5)(b) of the UNDT Statute and Article 9(1)(b) of the Appeals Tribunal Statute provide

⁵ *Couquet v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-574.

that the Tribunals may only order compensation for harm that is supported by evidence. In the present case, Mr. Omwanda was not harmed by any procedural delay, as he had already been overpaid in salary by the time he had separated from the Organization. Moreover, Mr. Omwanda was paid a salary advance, while the final calculation of termination indemnity was pending, to mitigate any potential harm from delays resulting from the determination of his entitlements. In addition, calculations of termination indemnity based on the 2005 EOD date would not have changed the outcome for Mr. Omwanda, as it would have only resulted in reducing his indebtedness by USD 315.90.

17. Finally, the UNDT erred in law and exceeded its competence in ordering the Secretary-General to take steps towards the execution of the Judgment, prior to the Judgment becoming executable. The UNDT directed the Administration to provide Mr. Omwanda with the updated calculation sheets within 30 days of the publication of the Judgment, prior to the expiry of the 60-day deadline provided for an appeal. Thus, the UNDT's order went beyond the limits of the Statutes of the Tribunals and placed the Secretary-General in jeopardy of acting in non-compliance. For the sole purpose of avoiding censure by the UNDT, the Secretary-General complied with the order.

18. The Secretary-General requests that the Appeals Tribunal vacate the Judgment in its entirety.

Mr. Omwanda's Answer

19. Mr. Omwanda submits that the UNDT did not err in fact and law in holding that the calculation of termination indemnity due to him should be based on the EOD date of his first appointment on 10 October 2005.

20. It is not disputed that, following Mr. Omwanda's resignation from UNON, he was re-employed by UNDSS in New York. Whether he was reinstated or re-employed is not the primary issue here. The question is whether, when calculating his entitlement to termination indemnity at the end of his career with the United Nations, the total number of years he was in service should be taken into account.

21. Mr. Omwanda avers that service is always deemed to be continuous for the purpose of calculating benefits and entitlements under former Staff Rule 104.3 which governed the re-employment of a former staff member. Subsection (b) states that where a staff member

receives a new appointment in less than 12 months after separation, any entitlements he or she received upon separation, including termination indemnity, will be adjusted such that the service is deemed to be continuous. Meanwhile, subsection (c) states that where a staff member is reinstated, all monies received, including the full amount of termination indemnity, will be returned. Clearly, there is a distinction between re-employment and reinstatement. Nonetheless, the result is the same in all cases: a staff member's termination indemnity will never be more than it would be had his or her service been continuous.

22. The Secretary-General relies on *Hajdari* and *Kulawat* in arguing that the act of resignation in and of itself is sufficient to cause a staff member to lose all entitlements he or she may have accrued over the period of service. The present case can be distinguished on the basis that the two cited cases concern the staff member's request to be considered for conversion to a permanent appointment. A staff member does not have a right to a permanent appointment. Termination indemnity, meanwhile, is an entitlement and it is a right owed to the staff member arising from the contractual relationship between him or her and the Organization. The obligation to pay termination indemnity is triggered upon the Administration's unilateral act of ending that contractual relationship.

23. Accordingly, when Mr. Omwanda's appointment was terminated on 4 February 2016, the obligation to pay him termination indemnity arose pursuant to former Staff Rule 9.8. It is pertinent to note that Mr. Omwanda, in effect, never left the employ of the United Nations Secretariat. Therefore, his total years of service should be taken into account and he should be able to benefit from his service deemed to be continuous so to maximize his termination indemnity.

24. Mr. Omwanda further submits that the UNDT did not err in fact and in law in awarding compensation for the procedural error in calculating his termination indemnity. The compensation is also justified given the difficulties faced by Mr. Omwanda throughout the process. Mr. Omwanda's requests for information were generally ignored and it was only when he resorted to the litigation process that his situation received the necessary attention. The Organization's payroll system is beset with delays, incoherence, and mistakes. When staff members leave the Organization, many, including Mr. Omwanda, rely on speedy disbursements of their separation entitlements as a source of livelihood until they are able to adjust their finances to their new situation. In Mr. Omwanda's case, his termination was not planned, and he had to make accommodations for his deteriorating health. Any delay was harmful to him.

25. Mr. Omwanda requests that the appeal be dismissed in its entirety.

Considerations

26. Mr. Omwanda joined the Organization as a Security Officer with UNON on 10 October 2005. In 2008, he was selected for the position of Security Officer in New York on a fixed-term appointment commencing 19 February 2008. Accordingly, he resigned from UNON with effect from 18 February 2008. On 4 February 2016, his appointment was terminated on medical grounds, with termination indemnity and compensation in lieu of notice.

27. Mr. Omwanda complained to the UNDT that the Administration had changed his EOD date from 10 October 2005 to 19 February 2008, thus unlawfully reducing the amount of termination indemnity due to him. He claimed that he was first notified of the EOD date of 19 February 2008 via a letter, dated 26 September 2016. He alleged that his correct EOD date was 10 October 2005 and not 19 February 2008, when he was reappointed without a break in service.

28. The Secretary-General submitted to the UNDT that Mr. Omwanda's application challenging the 2008 EOD date was not receivable as it was filed more than three years after notification of the contested decision. The UNDT decided in favour of Mr. Omwanda. It held:⁶

... it took some time for the Administration to confirm the methodology of the final calculations and on 26 September 2016, [Mr. Omwanda] finally received a termination indemnity spreadsheet which stated his date of EOD as 19 February 2008 and his termination date as 3 February 2016. [Mr. Omwanda] subsequently filed a timely request for management evaluation on 19 October 2016 of the Administration's calculation of his separation payments in the 26 September 2016 spreadsheet. His claim is therefore receivable.

29. The Secretary-General submits on appeal that the UNDT exceeded its competence in reviewing Mr. Omwanda's EOD date, as it was not subject to a timely request for management evaluation. We agree.

30. Mr. Omwanda's Letter of Appointment to the post in New York offered him a fixed-term appointment, with an effective date of 19 February 2008. He signed this document, acknowledging that he accepted the appointment "subject to the conditions therein specified and

⁶ Impugned Judgment, para. 62.

to those laid down in the Staff Regulations and in the Staff Rules governing temporary appointments for a fixed term. I have been made acquainted with these Regulations and Rules, a copy of which has been transmitted to me with this letter of appointment.”

31. Further, OHRM advised Mr. Omwanda by e-mail on 15 July 2008 that he had been re-employed under Staff Rule 104.3(a) following his separation from UNON on 18 February 2008 and had been paid the balance of his annual leave entitlements accrued during his previous service. He replied on 31 July 2008, stating that he had understood the message.

32. Staff Rule 104.3 is in the following terms:⁷

Re-employment

(a) A former staff member who is re-employed shall be given a new appointment or, if re-employed within twelve months of separation from service or a longer period following retirement or disability under the Joint Staff Pension Fund Regulations, he or she may be reinstated in accordance with paragraph (c) below.

(b) *If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment. If he or she is given a new appointment, its terms shall be fully applicable without regard to any period of former service, except as provided below:*

(i) Former service may be considered when establishing the level on recruitment and the record of mobility of the staff member; and

(ii) When a staff member receives a new appointment in the United Nations common system less than twelve months after separation, the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave shall be adjusted so that the number of months, weeks or days of salary to be paid at the time of the separation after the new appointment, when added to the number of months, weeks or days paid for prior periods of service, does not exceed the total of months, weeks or days that would have been paid had the service been continuous.

(c) On reinstatement the staff member’s services shall be considered as having been continuous, and the staff member shall return to the United Nations any moneys he or she received on account of separation, including termination indemnity under rule 109.4, repatriation grant under rule 109.5 and payment for accrued annual leave under rule 109.8. The interval between separation and reinstatement shall be charged,

⁷ Emphasis added.

to the extent possible and necessary, to annual leave, with any further period charged to special leave without pay. The staff member's sick leave credit under rule 106.2 at the time of separation shall be re-established; the staff member's participation, if any, in the Joint Staff Pension Fund shall be governed by the Regulations of that Fund.

33. Therefore, by 31 July 2008 (his reply to OHRM) at the latest, Mr. Omwanda knew or ought to have known from the Letter of Appointment that his appointment was effective from 19 February 2008, that he had been re-employed, not reinstated (reinstatement was not stipulated) and that its terms applied regardless of any period of former service.

34. If he had had any issue with the terms of his new appointment, he should have protested in a timely fashion by requesting a management evaluation. He cannot challenge the Administration's 2016 decision on the calculation of his entitlement to termination indemnity by now impugning the 2008 administrative decision on his EOD date.⁸

35. The UNDT was statutorily barred from hearing Mr. Omwanda's application by Article 8.4 of the UNDT Statute, which provides that "an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision".

36. Accordingly, we find that the UNDT exceeded its competence in reviewing Mr. Omwanda's EOD date.

⁸ *Hajdari v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-570; *Kulawat v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-428; *Santos v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-415; and *Schoone v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-375.

Judgment

37. The appeal is upheld and Judgment No. UNDT/2018/078 is vacated.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Thomas-Felix

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar