



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

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Judgment No. 2021-UNAT-1098

**Justin Mwetaminwa  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before: Judge Dimitrios Raikos, Presiding  
Judge Kanwaldeep Sandhu  
Judge Sabine Knierim

Case No.: 2020-1403

Date: 19 March 2021

Registrar: Weicheng Lin

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Counsel for Appellant: Julia Kyung Min Lee, OSLA

Counsel for Respondent: Francisca Lagos Pola

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. Justin Mwetaminwa (Mr. Mwetaminwa) contested the implied decision of the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) not to pay him termination indemnity when his fixed-term appointment (FTA) was allegedly terminated. The United Nations Dispute Tribunal (Dispute Tribunal or UNDT) by Judgment No. UNDT/2020/056 rejected his application finding that his FTA expired in its natural course and there was no basis for granting a termination indemnity.<sup>1</sup> For reasons set out below, we affirm that Judgment.

**Facts and Procedure**

2. Mr. Mwetaminwa joined service of the Organization in May 2013, on a FTA at the G-5 level, as a Programme Management Assistant in the Kisangani office of MONUSCO.

3. On 29 March 2019, the Secretary-General submitted to the General Assembly MONUSCO's budget proposal for 1 July 2019 to 30 June 2020 (the MONUSCO Budget), which proposed the closure of several field offices, including the one at Kisangani where the staff member worked, in addition to the abolition of 764 posts, which also included the post of a Programme Management Assistant.

4. On 2 April 2019, Mr. Mwetaminwa received a notice from MONUSCO's Chief Human Resources Officer that his post was amongst those proposed for abolition in the budget and that in anticipation of the General Assembly's approval, Mr. Mwetaminwa's FTA would not be extended beyond its expiration date of 30 June 2019. Mr. Mwetaminwa was also informed that the Human Resources Section (HRS) was going to commence his separation process, and thus, he was advised to start his check-out so as to effect his separation from service on 30 June 2019.

5. On 29 May 2019, the Kisangani office was closed, and all staff members were sent home. On 30 May 2019, Mr. Mwetaminwa was notified that all systems would be shut down by no later than 15 June 2019. On 9 June 2019, HRS sent Mr. Mwetaminwa a "Check out Memo upon Separation from MONUSCO," and on 30 June 2019, Mr. Mwetaminwa was separated from service.

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<sup>1</sup> *Mwetaminwa v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/056 dated 15 April 2020 (Impugned Judgment).

6. Prior to that, on 13 May 2019, Mr. Mwetaminwa had requested management evaluation of the decision not to renew his FTA and also sought termination indemnity for wrongful termination of his contract. On 31 May 2019, Mr. Mwetaminwa supplemented his management evaluation request with additional documents. He explained:

Voilà pourquoi à partir de 30 Mai 2019 j'ai commencé à rester à la maison. Cette interruption entre dans le cadre du licenciement par la MONUSCO et qui me donner droit à une indemnité. Pourtant je faisais encore le monitoring sur les activités des groupes armés dans les territoires de Bafwasende et d'Ubundu.

7. He explained because of the office closure, he started staying at home on 30 May 2019 even though at that time, he still had work and was monitoring the activities of armed groups in the territories of Bafwasende and Ubundu.

8. On 13 June 2019, in response to Mr. Mwetaminwa's request for management evaluation, the Administration informed him that the decision not to extend his FTA was being upheld as well as the decision not to grant him a termination indemnity since he was not being terminated but rather his FTA was expiring.

9. On 28 June 2019, Mr. Mwetaminwa filed an application (the First Application) with the Dispute Tribunal challenging the decision to abolish his post by way of a "dry-cut" and not to extend his FTA. His First Application was summarily dismissed.<sup>2</sup>

10. On 10 September 2019, Mr. Mwetaminwa filed a second application with the UNDT (the Second Application) challenging the decision to deny him termination indemnity by placing him on Special Leave with Full Pay (SLWFP) until the expiration of his FTA when his contract was *de facto* terminated.

11. The UNDT found that even though Mr. Mwetaminwa claimed that he was "informed" that he would be placed on SLWFP through 30 June 2019, he did not provide any such proof. Because a degree of formality is required in the grant of SLWFP, said leave cannot be presumed. Therefore, the tribunal found that Mr. Mwetaminwa was not placed on SLWFP between 29 May and 30 June 2019.

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<sup>2</sup> *Mwetaminwa v. Secretary-General of the United Nations*, Judgment No. UNDT/2019/122 dated 3 July 2019.

12. Further, the Dispute Tribunal ruled: (i) because the FTA expired in its natural course; (ii) because Mr. Mwetaminwa continued to receive his salary and entitlements until the expiration of the appointment as per its original terms, and (iii) given that he did not have his workstation only for a short period of time, Mr. Mwetaminwa's case could not be qualified as "disguised termination." Hence, there was no basis for indemnification as per Staff Regulation 9.3.

### **Submissions**

#### **Mr. Mwetaminwa's Appeal**

13. Mr. Mwetaminwa submits that the UNDT failed to consider the legality of the abolition of his post caused by the premature closure of his team site, which was executed prior to the approval and endorsement of the MONUSCO Budget by the Administrative and Budgetary Committee (Fifth Committee) and the General Assembly.

14. Mr. Mwetaminwa argues that closure of his team site effectively terminated his employment as he was left with no work to perform. By closing the team site, his contract was cut short as he no longer had any service to provide to MONUSCO in consideration of his salary. As such, he posits that his appointment had been *de facto* terminated on 29 May 2019.

15. Mr. Mwetaminwa claims that the Administration did not follow procedure pursuant to Staff Regulation 9.3 and Staff Rules 9.7 and 9.8, which dictate the legal steps that need to be followed upon the termination of a staff member.

16. Mr. Mwetaminwa submits further that the UNDT erroneously found that he worked from home and that his case was not that of a "disguised termination."

17. Finally, Mr. Mwetaminwa posits as a result of his *de facto* termination following the premature closure of his site, the Administration did not follow the procedures established in the United Nations Staff Rules and Regulations to compensate staff members where their appointment had been cut short before the expiry of their appointment.

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

18. The Secretary-General argues, *inter alia*, that not renewing Mr. Mwetaminwa's FTA and allowing it to naturally expire was within the Administration's discretion. There was no legal obligation on the part of the Administration to terminate the FTA. Given that the FTA was going to expire on its own in one month after the closure of the field office, the Administration chose to not renew it. Further, in accordance with the terms of the FTA, during that last month of June 2019, Mr. Mwetaminwa continued to be in receipt of his salary and benefits.

19. The Secretary-General argues the UNDT did not err when it ruled this was not a case of termination but rather non-renewal of FTA. The UNDT considered the fact that Mr. Mwetaminwa continued to receive his full salary and entitlements during the last month and that even though he did not have access to his workstation for the last month, it was in the context of downsizing the mission.

20. The Secretary-General claims that the Dispute Tribunal was correct in finding that Mr. Mwetaminwa could not be granted termination indemnity simply because his appointment was not terminated. Mr. Mwetaminwa's "employment relationship with the Organization did not cease before the expiration of his fixed-term appointment." Even though Mr. Mwetaminwa's office was closed, and he could not go to the office for the last month, he continued to be a staff member and continued to receive his full salary and accrue benefits and entitlements for the entire duration of his FTA.

### **Considerations**

21. The applicable law on this matter is as follows: Under Staff Regulation 9.3(a)(i), the Secretary-General may terminate a staff member's appointment (temporary, fixed-term or continuing) in a limited set of circumstances, among them, "if the necessities of service require abolition of the post or reduction of the staff". Should the Secretary-General elect to terminate an appointment, the staff member is entitled to notice and "such indemnity payment as may be applicable under the Staff Regulations and Rules."<sup>3</sup> As such, termination may happen through an authoritative act of the Administration or contractually; in any event, it is "coterminous with early cessation of the employment relation."<sup>4</sup>

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<sup>3</sup> Staff Regulation 9.3(c).

<sup>4</sup> Impugned Judgment, para. 29.

22. Mr. Mwetaminwa submits that the UNDT committed an error of law in accepting the Secretary-General's argument that there was no legal basis for unilateral termination when his team site closed down at the end of May 2019, prior to the expiry of his FTA. At that time, the abolition of his post had not yet been endorsed by the Fifth Committee and the General Assembly. He further argues that the Dispute Tribunal erred in fact and in law in finding that his case could not be qualified as "disguised termination".

23. We do not find merit in these submissions. For Mr. Mwetaminwa's ultimate goal, which is to receive termination indemnity, it is not sufficient to find that the Secretary-General could have terminated his appointment with effect from the end of May 2019. In order to reach this goal, it is necessary to find that Mr. Mwetaminwa's appointment actually was terminated. However, the UNDT correctly held that Mr. Mwetaminwa's appointment was not terminated. The Administration, by memorandum dated 2 April 2019, informed Mr. Mwetaminwa that his post had been proposed for abolition in the MONUSCO Budget and that, in anticipation of the General Assembly's approval of the budget, MONUSCO would not extend his FTA beyond its expiry on 30 June 2019. So, Mr. Mwetaminwa remained, as he himself concedes, on the payroll of the Organization and his appointment expired without further extension, as foreshadowed in that memorandum.

24. In the present case, the Secretary-General clearly did not terminate Mr. Mwetaminwa's appointment. The administrative decision in question, cannot be regarded as a "disguised termination," as the UNDT correctly pointed out. According to Staff Rule 9.6(a), a termination within the meaning of the Staff Regulations and Rules is a separation from service initiated by the Secretary-General. Mr. Mwetaminwa was not at all separated from service with effect from the end of May 2019. His FTA continued until its expiry on 30 June 2019; until then, he retained the full position, rights and entitlements of a staff member of the United Nations. The fact that he was not able to fulfill his obligation to work because the site had already been closed, and the Administration did not deem it possible to have him work from another site or from home is not sufficient for a finding that he was separated from service, when he clearly remained a staff member receiving his salary and all other entitlements.

25. Mr. Mwetaminwa contends that the Dispute Tribunal erred in fact and in law by denying him remedies related to termination indemnities resulting from the effective abolition of his post and the *de facto* termination of his appointment. However, a

staff member cannot request termination indemnity while, at the same time, keeping the advantages and benefits of remaining a staff member. As laid out above, termination is, by definition, a separation from service, that is, the end of all employment relations between a staff member and the United Nations. Had Mr. Mwetaminwa's appointment been terminated with effect from the end of May 2019, he would, for example, not have been under the Organization's health insurance system in June 2019, and that month would not have counted for his pension benefits. In some cases, even more benefits and entitlements could result depending on a person's continuing position as a staff member, i.e. education grants, allowances etc.

26. Finally, we find that the Dispute Tribunal correctly rejected Mr. Mwetaminwa's claim for compensation. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".<sup>5</sup>

27. Accordingly, the appeal fails.

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<sup>5</sup> *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 34; *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33.

**Judgment**

28. The appeal is dismissed, and Judgment No. UNDT/2020/056 is confirmed.

Original and Authoritative Version: English

Dated this 19<sup>th</sup> day of April 2021.

*(Signed)*

Judge Raikos, Presiding  
Athens, Greece

*(Signed)*

Judge Sandhu  
Vancouver, Canada

*(Signed)*

Judge Knierim  
Hamburg, Germany

Entered in the Register on this 23<sup>rd</sup> day of April 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar