



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

Judgment No. 2022-UNAT-1306

**Gautam Mukhopadhyay
(Respondent/Appellant on Cross-Appeal)**

v.

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

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2021-1642
Date of Decision:	28 October 2022
Date of Publication:	30 December 2022
Registrar:	Juliet Johnson

Counsel for Mr. Mukhopadhyay:	George G. Irving
Counsel for Secretary-General:	Amanda Stoltz

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Gautam Mukhopadhyay, a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) contested the termination of his continuing appointment due to abolition of his post.

2. On 22 July 2021, in Judgment No. UNDT/2021/085 (the First Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) held that the termination was unlawful and ordered rescission. It ordered that Mr. Mukhopadhyay “shall be reinstated in his position from the date of his separation”.¹ But it allowed the Secretary-General to elect to pay two years’ net base salary as compensation *in lieu* of rescission pursuant to Article 10(5) of the UNDT’s Statute. It, however, rejected Mr. Mukhopadhyay’s claim for compensation for harm to his career and reputation. There is no appeal to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) of the First Judgment.

3. The Secretary-General elected not to pay the compensation *in lieu* of rescission as ordered and says that Mr. Mukhopadhyay was reinstated effective 11 September 2020. Mr. Mukhopadhyay disputes this reinstatement. They also disagree on the date of Mr. Mukhopadhyay’s retirement, however, it is not disputed that it occurred subsequent to the suspension of the July 2019 termination decision.

4. Separately, Mr. Mukhopadhyay also contested the Administration’s decision to withhold three months’ compensation *in lieu* of notice as part of termination indemnities (the contested decision); this contested decision is before us.

5. By Judgment No. UNDT/2021/119 dated 15 October 2021 (the Second Judgment), the Dispute Tribunal found that this contested decision was unlawful, rescinded that decision and ordered the Secretary-General to pay the three months’ compensation *in lieu* of notice. The Secretary-General appeals and argues that, because the termination was rescinded and Mr. Mukhopadhyay reinstated further to the First Judgment, the appeal of the Second Judgment is moot as there can be no entitlement to termination notice pursuant to the applicable Regulations and Rules. Mr. Mukhopadhyay cross appeals for additional compensation, damages, and costs.

¹ *Mukhopadhyay v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/085, para. 64.

6. For the reasons given below, we grant the Secretary-General's appeal and dismiss the cross-appeal.

Facts and Procedure

7. The facts and procedure of this matter are somewhat convoluted and therefore, are set out in chronological order from the First and Second Judgments.

8. Mr. Mukhopadhyay joined the Organization in November 2003. In 2018, he held a P-4 Airport Engineer position. On 26 September 2018, his fixed-term appointment was converted to a continuing appointment.

9. On 29 November 2018, he learned that his post would be proposed for abolishment in MONUSCO's 2019-2020 budget year.

10. On 29 March 2019, the Secretary-General submitted MONUSCO's 2019-2020 proposed budget to the General Assembly. The budget proposed the abolition of several posts in the Engineering and Facilities Maintenance Section.

11. On 1 April 2019, MONUSCO's Chief Human Resources Officer (CHRO) gave Mr. Mukhopadhyay notice of the proposed termination of his continuing appointment.

12. On 10 June 2019, Mr. Mukhopadhyay went on certified sick leave.

13. On 3 July 2019, the General Assembly approved the MONUSCO Budget for 2019-2020.

14. On 12 July 2019, the CHRO notified Mr. Mukhopadhyay of the decision to terminate his appointment, effective 2 August 2019. Mr. Mukhopadhyay was not separated because his certified sick leave extended beyond 2 August 2019.

15. On 2 August 2019, Mr. Mukhopadhyay requested management evaluation of the decision to terminate his continuing appointment and requested suspension of the implementation of this decision.

16. On 7 August 2019, the Management Evaluation Unit (MEU) suspended the implementation of the termination decision, pending management evaluation.

17. Mr. Mukhopadhyay was then placed on special leave with full pay (SLWFP) from 29 October 2019 as the management evaluation as to whether his termination was lawful, proceeded.

18. By 16 December 2019, the management evaluation had not been concluded and Mr. Mukhopadhyay filed an application before the Dispute Tribunal contesting the decision to terminate his appointment.

19. On 9 September 2020, the MEU upheld the termination decision. One day later, on 10 September 2020, MONUSCO informed Mr. Mukhopadhyay that he was separated from the Organization effective that day and provided details for leaving or “checking out” of the post.

20. On 13 and 14 September 2020, respectively, Mr. Mukhopadhyay wrote to MONUSCO Human Resources (HR), requesting payment of three months’ salary *in lieu* of notice of termination that he did not receive.

21. On 14 September 2020, MONUSCO HR informed him that he was not entitled to payment of salary *in lieu* of notice of termination.

22. On 19 September 2020, Mr. Mukhopadhyay requested management evaluation of the decision to “deny [him] payment of three months’ salary *in lieu* of notice as part of [his] termination indemnities”.

23. On 22 July 2021, the Dispute Tribunal issued the First Judgment rescinding the termination decision, reinstating Mr. Mukhopadhyay, and awarding compensation *in lieu* of rescission.

24. On 15 October 2021, the Dispute Tribunal issued the Second Judgment. It rescinded the contested decision (i.e. the withholding of three months’ compensation *in lieu* of notice) and awarded three months’ compensation *in lieu* of termination notice. It found that there was a “July termination decision” and a “more recent September [2020] termination decision” that established the requirement for termination notice or payment *in lieu*.

25. According to the Secretary-General, on 25 November 2021, in response to the First Judgment, the Administration elected not to pay compensation *in lieu* of rescission but to implement the rescission of the termination decision by reinstating Mr. Mukhopadhyay effective

11 September 2020. Mr. Mukhopadhyay disputes this and says there have been “no steps taken to reinstate him” or to pay him for the period since his separation. The Secretary-General also states that he retired on 30 November 2021, his mandatory date of retirement, which Mr. Mukhopadhyay again disputes. He says he retired as of 10 November 2020 when he separated from service. No evidence to support the date of retirement is provided.

26. On 14 December 2021, the Secretary-General appealed the Second Judgment to the Appeals Tribunal. On the same day, he also filed a motion seeking leave to file additional evidence in the form of a memorandum dated 25 November 2021, which informed Mr. Mukhopadhyay of the decision to reinstate him effective 11 September 2020. On 21 December 2021, Mr. Mukhopadhyay filed his objections to the motion.

27. Mr. Mukhopadhyay submits that on 6 January 2022, he filed a motion for execution of Judgment No. UNDT/2021/085 which, he contends, was necessitated by the Secretary-General’s “continued refusal” to implement the Judgment. In Judgment No. UNDT/2022/010/Corr.1, the Dispute Tribunal dismissed the motion as the Secretary-General had complied with the impugned Judgment and taken steps to reinstate Mr. Mukhopadhyay.

28. On 13 January 2022, Mr. Mukhopadhyay filed an answer to the appeal that the Secretary-General had submitted on 14 December 2021. That same day, he also submitted his cross-appeal.

29. By Order No. 437 (2022) dated 24 January 2022, the Appeals Tribunal granted the Secretary-General’s motion and gave Mr. Mukhopadhyay 15 days, effective from the date of the Order, within which to file a supplement to his answer limited to the additional evidence that UNAT had decided to receive if he wished to do so. On 28 January 2022, Mr. Mukhopadhyay filed a supplementary answer in accordance with Order No. 437 (2022).

Submissions

The Secretary-General’s Appeal

30. The Secretary-General submits that the second application has become moot following the First Judgment’s rescission of the termination decision. On 25 November 2021, the Administration decided to execute the First Judgment by accepting the Dispute Tribunal’s

rescission of the termination decision and reinstating Mr. Mukhopadhyay effective 11 September 2020. Mr. Mukhopadhyay's continued employment with the Organization, by virtue of his reinstatement (and until his retirement on 30 November 2021), has rendered moot his claim for compensation *in lieu* of notice of termination. There was no longer any "termination of service" capable of giving rise to termination entitlements.

31. Should the Appeals Tribunal wish to consider the Second Judgment on the merits, the Secretary-General maintains that the Dispute Tribunal also committed errors of fact when it found the check-out memorandum and/or the MEU decision was a second "termination decision" capable of giving rise to the obligation to provide Mr. Mukhopadhyay with three months' termination notice. The Dispute Tribunal erroneously assumed that there were two termination decisions in the present case, the first taking place in July 2019, which was the date of the termination decision, and the second taking place in September 2020.

32. Contrary to the Dispute Tribunal's findings, Mr. Mukhopadhyay was notified of the termination of his appointment on or about 12 July 2019 and as such, the notice period ran from the date of receipt of the termination letter on that date. The check-out memorandum dated 10 September 2020 was not a second termination decision, capable of giving rise to a new notice period.

33. The Dispute Tribunal erroneously concluded Mr. Mukhopadhyay was entitled to be given three months' notice of termination from the date of 10 September 2020. In so finding, the Dispute Tribunal conflated the termination decision of July 2019 with the subsequent September 2020 check-out memorandum. Further, the management evaluation decision upholding the July 2019 termination decision itself cannot constitute a separate administrative decision.

34. The Dispute Tribunal erred in fact and law in finding that the granting of SLWFP did not supplant or equate to a notice period. The Dispute Tribunal's finding is based on its erroneous conclusion that there were two termination decisions, as well as on its erroneous interpretation of the reasoning stated in the case of *Ahmed*.²

² *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-386.

35. The Secretary-General requests that the Appeals Tribunal vacate the Second Judgment and uphold the contested decision that there is no termination indemnity payable.

Mr. Mukhopadhyay's Answer

36. In response, Mr. Mukhopadhyay says the Secretary-General's appeal, insofar as it alleges mootness, is procedurally defective because the Secretary-General relies on his own decision made subsequent to the issuance of the judgments as support. He thereby seeks to avoid responsibility for the violation of Mr. Mukhopadhyay's contractual rights that was noted in the Judgment. By pursuing this course of action, instead of seeking revision of Judgment pursuant to Article 12 of the UNDT Statute, the Secretary-General has abused the process, causing additional costs to Mr. Mukhopadhyay and the Appeals Tribunal which should dismiss the appeal along with an appropriate award for the costs for abuse of process.

37. Mr. Mukhopadhyay says the facts as set out in the Second Judgment are acceptable but the Secretary-General conflates that Judgment with the First Judgment and most of the facts now being put forward by the Secretary-General are not established. For example, the Secretary-General purports to introduce as a new fact that Mr. Mukhopadhyay has been reinstated as of 11 September 2020. However, as of this date, there have been no steps taken to reinstate Mr. Mukhopadhyay in service or to pay him for the period since his separation. While the Secretary-General had since 22 July 2021 to make the election set out in the First Judgment, he waited until 25 November 2021 to announce his intention to not pay compensation *in lieu* of rescission, ostensibly to obviate the need to reintegrate Mr. Mukhopadhyay into service since he reached the mandatory retirement age of separation from service in November 2021. However, the Secretary-General seems to be unaware that Mr. Mukhopadhyay retired (which in his submissions is stated on 10 November 2020 when he "separated" from service).

38. Rather than rendering this case moot, the proposed reinstatement of Mr. Mukhopadhyay appears to merely be a device for avoiding the Secretary-General's obligations, which was the original claim sustained by the UNDT.

39. Turning to the alleged errors of fact, Mr. Mukhopadhyay submits the Administration's communication of 10 September 2020 was more than a mere check out memorandum as it determined the effective date of termination (and of retirement) on 10 September 2020 and conveyed a decision on entitlements.

40. The Secretary-General appears to merely reargue that the SLWFP replaced the need for notice and asserts that Mr. Mukhopadhyay was given fourteen months' notice, instead of three. Mr. Mukhopadhyay never received any notification that his contract would be terminated in three months' time or that he would be paid compensation *in lieu* thereof. In the absence of such notice, payment of three months' compensation is mandated by Staff Rule 9.7(d) (*sic.*). The Dispute Tribunal's decision in that regard is not predicated on any misunderstanding but on a distinction between two administrative actions. Placement on SLWFP for entirely separate reasons is not a substitute for notice.³

Mr. Mukhopadhyay's Cross-Appeal seeking Additional Compensation and Damages

41. Should UNAT find the appeal receivable and proceed to a determination of the merits, Mr. Mukhopadhyay asks the Appeals Tribunal for additional awards of compensation for the violation of his rights. He further reiterates his request for an award of costs in the amount of USD 3,000 for abuse of process.

42. Mr. Mukhopadhyay argues that upon termination of his permanent appointment without notice, Mr. Mukhopadhyay was suddenly left unemployed and sent home, at the age of 63. He lost the possibility of an agreed termination bridging him to maximum retirement age (65) and forced him to retire sooner than expected. Three months' notice would have made a difference both in terms of his pension as well as in terms of securing a possible reassignment. He was also deprived of the use of the three months' payment in lieu of notice when it was most needed for his abrupt repatriation.

43. Moreover, the abrupt decision to separate Mr. Mukhopadhyay without notice was a *de facto* summary dismissal with all the attendant embarrassment and personal and professional dislocation associated with a quasi-disciplinary action. He was put under considerable stress, disappointment and embarrassment and his reputation and health, already affected by the unfair treatment, were further jeopardized. As per *Kallon*, compensation for harm to *dignitas*, loss of opportunity and damage to one's professional reputation is warranted notwithstanding a subsequent rectification of a breach of the staff member's rights.⁴

³ In support of this contention, Mr. Mukhopadhyay quotes *Ahmed op. cit.*

⁴ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

The Secretary-General's Answer to the Cross-Appeal

44. In response, the Secretary-General says Mr. Mukhopadhyay's claims for additional remedies are not receivable for two reasons.

45. First, Mr. Mukhopadhyay's appears to conflate two separate challenges. The Dispute Tribunal awarded a remedy in its First Judgment and the Secretary-General executed the First Judgment by accepting the rescission of the termination decision. Any compensation warranted for the improper termination decision was fully addressed in the First Judgment. A cross-appeal in this case does not provide a second opportunity to be awarded further compensation for the termination decision, which was adjudicated in the First Judgment, an entirely separate case.

46. Second, Mr. Mukhopadhyay identified these alleged damages for the first time in his cross-appeal. Before the Dispute Tribunal and the Second Judgment, he only sought payment of three months' compensation *in lieu* of notice and did not identify, or request compensation for, any other alleged damage or injury resulting from the contested decision. The Secretary-General's subsequent election to accept the rescission of the termination decision did not generate any additional damages.

47. If the claims are receivable, the Secretary-General contends that Mr. Mukhopadhyay has failed to establish any loss or damage and there is no basis for an award of additional compensation. The decision not to pay compensation *in lieu* of rescission has no relation to his unemployment at the age of 63 or the date at which he took retirement. Also, Mr. Mukhopadhyay is not entitled to any agreed termination package, or a reassignment, which are both speculative and irrelevant. Further, Mr. Mukhopadhyay's claim that he was deprived of payment *in lieu* of notice when it was needed for his repatriation is immaterial because the purpose of a notice period, or compensation *in lieu* thereof, is not to meet the costs of repatriation. In fact, Mr. Mukhopadhyay had in fact received both his termination indemnity and repatriation grant at the relevant time in accordance with Staff Rules 9.8 and 3.19, respectively.

48. Finally, his claims of additional moral damage are not supported by any evidence. Compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred and that it was directly caused by the unlawful decision.

Considerations

49. Both parties argue the other's appeal of the Second Judgment on the decision to withhold termination *in lieu* of notice are not receivable but if the appeals are receivable, they say the Dispute Tribunal erred, but for different reasons.

Are the Appeal and Cross-Appeal Receivable?

50. The Secretary-General says Mr. Mukhopadhyay's claim for compensation *in lieu* of notice of termination is moot because his termination was rescinded, and he continued employment in his post (until his retirement). Mr. Mukhopadhyay disputes that he was reinstated and disputes the retirement on the date alleged by the Secretary-General.

51. It is not disputed that the First Judgment rescinded the termination decision and reinstated Mr. Mukhopadhyay and provided the Secretary-General the option to instead pay compensation *in lieu* of rescission. Subsequent to the First Judgment, the Secretary-General accepted the rescission of the termination and elected not to pay compensation *in lieu* of rescission. Therefore, the question is whether there is still an entitlement to compensation in lieu of notice.

52. Staff Regulation 9.3(a) provides that "[t]he Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment", and "[i]f the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Rules".

53. On notice of termination, Staff Rule 9.7 provides that "[a] staff member whose continuing appointment is to be terminated shall be given not less than three months' written notice of such termination" and "[i]n lieu of the notice period, the Secretary-General may authorize compensation equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period at the rate in effect on the last day of service".

54. Therefore, the provisions on entitlement to termination notice and compensation *in lieu* of termination notice apply to a staff member with a continuing appointment who is terminated by the Secretary-General.

55. In the present case, it is not disputed that the Secretary-General terminated Mr. Mukhopadhyay in July 2019. However, in the Second Judgment, the Dispute Tribunal incorrectly found that there was a second termination decision in September 2020 that gave rise to the entitlement to termination notice.

56. The Dispute Tribunal failed to consider that the MEU had suspended the July 2019 termination until after it completed its review which it did in September 2020. The suspension did not revoke or overturn the termination decision but suspended the *implementation* of the decision and postponed the effective date of the termination decision. So, when the September 2020 MEU's decision upheld the July 2019 termination, the suspension was lifted, and implementation of the termination decision could be affected. This did not result in a separate administrative decision.

57. The Administration's letter that the effective date of termination was the following day of the MEU decision was also not a separate administrative decision. Rather, the 10 September 2020 communication from the Secretary-General was a confirmation of the effective date of separation and provided details of the implementation of the termination decision of July 2019. This cannot be a separate administrative decision as there can only be one termination decision taken (in July 2019 that was suspended until September 2020). It would be absurd and unreasonable to have two termination decisions arising from the same circumstances as this would mean the staff member would be entitled to two different termination indemnities and notices.

58. In the circumstances in this case, the entitlement to the termination indemnities and notice arose from the termination decision taken in July 2019, but suspended until September 2020.

59. However, the Dispute Tribunal rescinded the termination decision and ordered Mr. Mukhopadhyay to be reinstated in his position from the date of separation. As the Secretary-General elected to accept the rescission and reinstatement, there is no termination and therefore no entitlement to termination notice; therefore, we agree that the application for termination notice is moot.

60. The doctrine of mootness was reiterated in *Kallon* as:⁵

... A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter

⁵ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, para. 44.

beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect.

61. We find there is no actual controversy here. In the First Judgment, the Dispute Tribunal ordered Mr. Mukhopadhyay be reinstated effective 11 September 2020 and this was confirmed by the Administration's communication of 25 November 2021. As there is no termination and as his employment has been reinstated, there is no entitlement to termination notice and therefore, the matter has been resolved.

62. Mr. Mukhopadhyay says the Secretary-General's appeal is procedurally defective because he relies on his own decision made subsequent to the issuance of the judgments to argue mootness. This submission is not supportable as the Secretary-General did not make the decision to rescind the termination and order reinstatement; the Dispute Tribunal did in its First Judgment. The Dispute Tribunal gave the Secretary-General discretion to pay compensation *in lieu* of rescission. The Secretary-General elected not to exercise this discretion as contemplated by the Dispute Tribunal in the First Judgment. This election to not pay compensation *in lieu* (which option was given in the First Judgment) does not render the appeal procedurally defective and there is no requirement to seek revision of the First Judgment to do so.

63. Mr. Mukhopadhyay raises some confusion or doubt about reinstatement as he says that no further action has been taken to implement the purported reinstatement decision and no financial adjustment has been made or proposed, either of Mr. Mukhopadhyay's emoluments or his pension. However, the Dispute Tribunal in the First Judgment specifically rescinded the termination and "reinstated" Mr. Mukhopadhyay. Therefore, Mr. Mukhopadhyay's concerns have to do with the execution of the First Judgment but this does not change his lack of entitlement to termination notice once the termination was rescinded.

64. Similarly, there is some confusion in the parties' submissions on the date of his retirement (the Secretary-General saying his mandatory retirement age was 20 November 2021 but Mr. Mukhopadhyay arguing it occurred in November 2020 and/or the date of separation). However, the exact date of retirement is not relevant for the purposes of this appeal and does not affect his lack of entitlement to termination notice due to rescission of the termination.

65. In Mukhopadhyay's cross-appeal, he requests an award for consequential damages in the amount of three months' net base pay plus interest from 10 September 2020 plus compensation for moral damages and costs. We find the cross-appeal is not receivable as he has raised these

claims for the first time and/or is attempting to re-litigate the outcome of the remedy awarded by the Dispute Tribunal in the First Judgment.

66. The Dispute Tribunal awarded a remedy in its First Judgment and the Secretary-General implemented the First Judgment by accepting rescission of the termination decision. Any compensation warranted for the improper termination decision was fully addressed in the First Judgment. A cross-appeal in this case does not provide a second opportunity to be awarded compensation arising from the termination decision, which was adjudicated in the First Judgment, i.e., in an entirely separate case; the matter is *res judicata*.

67. Therefore, Mr. Mukhopadhyay's cross-appeal requesting compensation and moral damages is not receivable and dismissed.

68. We also dismiss Mr. Mukhopadhyay's claims for legal costs in the amount of USD 3,000 for alleged abuse of process. Under Article 9(2) of the UNAT Statute, costs may be awarded by this Tribunal if it considers that a party has "manifestly abused the appeals process". The Appeals Tribunal has previously held that such an order will be rarely made, and usually after the party has been fairly warned of that consequence if the party's abuse of process continues.⁶ We find this threshold has not been met.

69. In light of our decisions on the appeal and cross-appeal, we have no need to deal with the other issues and arguments raised by the parties which are adequately disposed of by our findings.

⁶ *Ashraf Zaqqout v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2022-UNAT-1219, para. 59.

Judgment

70. The Secretary-General's appeal is granted, and Judgment No. UNDT/2021/119 is reversed. Mr. Mukhopadhyay's cross-appeal is dismissed.

Original and Authoritative Version: English

Decision dated this 28th day of October 2022 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Raikos

Judgment published and entered into the Register on this 30th day of December 2022 in New York, United States.

(Signed)

Juliet Johnson, Registrar