Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AKILIMALI KAFACHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Thomas Jacob, UNDP

Introduction

1. The Applicant is a former Driver with the Office for Coordination of Humanitarian Affairs (OCHA), in Goma, the Democratic Republic of Congo (DRC).

2. On 17 September 2008, he joined the Organization on a United Nations Development Programme (UNDP) Letter of Appointment (LOA), at the G-2 level.

3. On 1 May 2017, he separated from the Organization.

4. On 31 December 2017, he filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting a decision not to pay him termination indemnities, which he identifies as taken on 7 June 2017 and reiterated on 19 December 2017.

5. The Respondent filed his reply on 3 February 2018, to which the Applicant was invited to comment by 4 March 2019 vide Order No. 026 (NBI/2019). The Applicant did not make any additional submissions.

Factual and procedural background

6. On 20 January 2017, Mr. Rein Paulsen, Head of Office (HoO), OCHA/DRC, announced the restructuring of OCHA/DRC to staff members and presented to them an organigram which reflected the new structure.

7. On 27 January 2017, Mr. Boureima Younoussa, Deputy Country Director-Operations, UNDP/DRC, informed the Applicant that his post had not been retained under the new OCHA/DRC structure.[1] The Applicant was therefore invited to participate in a "job fair" process in which he was encouraged to apply to vacancies. Between 30 January 2017 and 31 March 2017, the Applicant participated in the

[1] Annex 2 - application.

recruitment exercise whereby he applied to two vacant posts that had been advertised, but to no avail.[2]

8. On 7 March 2017, Ms. Amineta Blondin Beye, Human Resources Specialist (HRS), UNDP/DRC participated in a videoconference organized by OCHA/DRC for the benefit of the staff members affected by reorganization and informed them in general terms of separation entitlements and procedures.[3]

9. On 9 March 2017, Mr. Seraphin Kazadi, an Associate Humanitarian Affairs Officer, OCHA/DRC, sent an email to all OCHA/DRC staff members providing a link to a UNDP tool that enables its users to estimate the amount of separation benefits UNDP staff members may receive upon their separation from service.[4]

10. On the same day, Mr. Paulsen sent a clarification email to all OCHA DRC staff members stating:

> In answer to the messages going around concerning separation indemnities, by this message I would like to reaffirm that all separation entitlements will be paid in accordance with the United Nations Staff Regulations and Rules which were amended in January 2017. I also take this opportunity to draw your attention to the following distinction: even if national staff members are on UNDP letters of appointment, they are not "UNDP STAFF" but rather OCHA staff administered by UNDP. Therefore, policies that are specific to "UNDP STAFF" cannot be applied to "OCHA STAFF" which is the reason why the document of reference remains the "United Nations Staff Regulations and Rules.[5]

11. On 30 March 2017, Mr. Younoussa informed the Applicant that his applications at the job fair were not successful and that his fixed-term appointment would not be renewed after 30 April 2017 due to budgetary constraints which had been prompted by the restructuring of OCHA/DRC. Mr. Younoussa also informed

[2] Ibid.
[3] Application, page 6, para. 23.
[4] Annex 12 to the reply.
[5] Annex 13 to the reply.

the Applicant that his post had been abolished and that he would be separated from the Organization on 1 May 2017.[6]

12. On 31 May 2017, the Applicant received his final payslip which reflected payment of his unused accrued leave days but in which termination indemnities were not included.[7]

13. On 7 June 2017, the HoO, OCHA/DRC held a meeting with OCHA/DRC staff members during which he reaffirmed that pursuant to the terms of their letter of appointment, staff members on fixed-term appointments separated upon the expiration of their appointment were not eligible to receive termination indemnities. Even though presently the Applicant identifies 7 June 2017 as the date of the impugned decision, it is dubious whether he had participated in the meeting having separated by then from OCHA.[8]

14. On 8 and 29 June 2017, the Applicant and several other OCHA/DRC staff members sent a memorandum to, inter alia, the HoO, OCHA/DRC and the Country Director (CD), UNDP/DRC expressing their views regarding the non-payment of their termination indemnities. The Applicant, and other staff members listed as signatories, stated that this decision was in breach of staff rule 9.3(c) which states that "[p]ayments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III.[9]

15. On 20 June 2017, the Applicant filed a management evaluation request (MER) of the decision not to award him termination indemnities which he claimed amounted to USD12,396.32 upon the expiration of his fixed-term appointment on 1 May 2017. The impugned decision was identified as one issued on 31 May 2017.[10]

[6] Annex 4 to the reply.
[7] Application para. 6.
[8] Application para. 4.
[9] Annex 6 and 7 to the reply.
[10] Annex 5 - application.

16. By email dated 2 August 2017, Ms. Alemstahaye Girma, Human Resources Business Partner, Office of Human Resources, Regional Bureau for Africa (RBA) of UNDP informed the Applicant that UNDP was reconsidering the decision not to pay him termination indemnities. The email reads in relevant part:

> Please note that in consultation with OCHA, UNDP will be reconsidering the decision that you were not eligible to receive termination indemnities. We will contact you shortly for the remaining administrative formalities.[11]

17. In a letter dated 2 August 2017, Ms. Susan McDade, Assistant Administrator and Director, Bureau for Management Services of UNDP, informed the Applicant that his request for management evaluation was moot. The letter reads in relevant part:

> Further to your request, on 1 August 2017 you were notified in writing by OHR of UNDP's decision to reconsider your eligibility for the award of termination indemnities. In effect, this written notice by OHR constitutes a notice of the reconsideration for which you sought management evaluation. In light of the reconsideration of the decision contested by you, your request for management evaluation is now moot.[12]

The MER response also stated:

> …emphasize[s] that the decision to reconsider your eligibility for the award of terminations indemnities does not mean that the underlying decision was improper, nor does it mean that a similar decision could or would never occur.[13]

18. On 6 August 2017, the Applicant acknowledged receipt of the notice of UNDP's reconsideration to pay him termination indemnities.[14]

19. Through intense correspondence carried out between 8 August 2017 and 25 October 2017, the Applicant pursued his claim with Human Resources UNDP/OCHA

[11] Annex 7 to the application, at page 51.
[12] Annex 6 to the application.
[13] Ibid.
[14] Annex 7 to the application, at page 1.

in Geneva and New York and the Ombudsman - Office of Mediation.[15]

20. On 25 October 2017, the Applicant filed a motion for an extension of time to file an application to the Dispute Tribunal. The date of the contested decision was indicated as 7 June 2017. On 3 November 2017, by Order No. 189 (NBI/2017) the Dispute Tribunal granted the Applicant's request setting the deadline to file the application by 2 January 2018. The Applicant's motion and Order No. 189 were registered under Case No. UNDT/NBI/2017/096. In granting the motion the Tribunal held, among others:

> The persistent indecision on the part of the administration, who, on the one hand, refused the management evaluation while, on the other hand, neither rescinded the impugned decision nor replaced it with a new one, creates exceptional circumstances wherein the Applicant faces the risk of failing the deadline to file an application while he is being deferred.
>
> […]
>
> [T]he Applicant has displayed prudence in his dealings with the administration and moreover, has initiated an informal resolution process to obtain an articulated outcome of the management evaluation.

21. On 9 November 2017, Mr. Barnaby Jones, Executive Officer (EO), Administrative Service Branch, OCHA emailed Mr. Diego Ruiz, Officer-in-Charge, OHR, UNDP stating that:

> OCHA national staff administered by UNDP would not be eligible for consideration under the UNDP's Agreed Separation Package" and "all separation entitlements, whether on termination or expiration of appointment, will be governed by the relevant UN staff rules and regulations.[16]

22. On 19 December 2017, the "Human Resources Business Partner", UNDP informed the Applicant by email that UNDP "maintains its decision that [the Applicant was] not eligible to receive termination indemnities." The UNDP had determined:

[15] Annex 3, Annex 5a and 5b to the application.
[16] Annex 9 to the reply.

> As per the United Nations Staff Rules and Regulations, Annex III (d)(ii) – no termination indemnity payments shall be made to a staff member on a fixed-term appointment who separates upon the completion of his/her appointment. Considering that [the Applicant] separated following the 30 April 2017 expiration of [his] appointment, [the Applicant was] not eligible to receive termination indemnities. [17]

23. The Applicant filed the present application on 31 December 2017, within the deadline determined by Order No. 189 (NBI/2017). The Applicant, however, uploaded it in the Registry's Court Case Management System (CCMS) as a new case. It has, therefore, been registered under the present number, UNDT/NBI/2017/133 whereas by Order No. 030 (NBI/2018) dated 16 March 2018, Case No. UNDT/NBI/2017/096 was struck out from the Tribunal's docket. This order has become final. Given that there has never been a duplicity of pending cases and no rights have been infringed by Order No. 030, the Tribunal considers that the current state of affairs is in conformity with the law and does not require any further action.

Applicant's case

24. The Applicant did not avail himself of the opportunity to provide comments on the receivability issue. On the merits, the Applicant's position is that due to the succession of his fixed-term appointments with OCHA/UNDP and the fact that his position was abolished as part of restructuration, he should be treated in the same way as a permanent staff member in the aspect of entitlement to termination indemnity.

25. Further, he argues, in essence, that representations made by the Administration, consisting of assurances given at a March 2017 videoconference and the undertaking to reconsider the initial refusal of the termination indemnity, demonstrate that the Organization, having created expectation on the part of the staff, was aware of its duty in this respect. The Administration violated the Applicant's right to a fair and reasonable procedure by promising the agreed separation entitlements and thus effectively barring a recourse against the non-extension of appointment as such.

[17] Annex 10 to the reply.

26. The Applicant seeks the payment of termination indemnity with proper interest and compensation for financial and moral damage.

Respondent's case

27. The Respondent submits that the application is irreceivable. At no time has the Applicant requested management evaluation of the decision communicated on 9 March 2017 that "all separation entitlements will be paid in accordance with the United Nations Staff Regulations and Rules which were amended in January 2017 [and] policies that are specific to "UNDP STAFF" cannot be applied to "OCHA STAFF". The only decision for which the Applicant sought management evaluation was the 31 May 2017 decision by OCHA to not pay him termination indemnities. Therefore, the decisions which the Applicant presently attempts to contest before the Dispute Tribunal are not the decisions put forward by the Applicant in his MER.

28. On the merits, the Respondent submits that the United Nations Staff Regulations and Rules do not allow for the payment of termination indemnities to a staff member on a fixed-term appointment who is separated from service upon the expiration of his/her appointment (Annex III(d)(ii)). During a videoconference held on 7 March 2017 between staff members on permanent and fixed-term appointments and the person from the UNDP Human Resources, the latter explained that separation indemnities awarded further to the restructuring of OCHA/DRC would be determined in accordance with Annex III of the United Nations Staff Rules and Regulations. The Human Resources specialist did not make any representations as to the application of UNDP's Agreed Separation Arrangements for the purpose of determining termination indemnities for staff administered for OCHA. UNDP's Agreed Separation Arrangements, a policy that does not apply to "[s]taff administrated by UNDP on behalf other UN agencies and staff with contracts limited to another agency".

Considerations

Receivability

29. A starting point for the receivability issue is the identification of the contested decision. The Respondent seems to suggest that the Applicant should have contested a "decision communicated on 9 March 2017 that all separation entitlements will be paid in accordance with the United Nations Staff Regulations and Rules which were amended in January 2017 and that policies that are specific to "UNDP STAFF" cannot be applied to "OCHA STAFF", that is, communication sent by email by the OCHA HoO to staff. The Tribunal disagrees, for the following reasons:

30. It is recalled that in *Hamad*[18], the UNAT adopted the former United Nations Administrative Tribunal's definition forged in *Andronov*, which describes an administrative decision as:

> a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry legal consequences. [19]

31. As seen from the above, the notion of an administrative decision for proceedings before the UNDT resembles what in the European continental system is sometimes referred to as an administrative act *sensu stricto*, and which is reached by an agency to regulate a single case in the area of public law and thus being characterised as unilateral, concrete, individual, and producing direct external effect, *i.e.*, whose legal consequences are not directed inward but outward the administrative

[18] *Hamad* 2012-UNAT-269, at para. 23.
[19] Judgment No. 1157, *Andronov* (2003) V.

apparatus.[20] Concreteness of an administrative decision, as opposed to the abstract nature of norms contained in regulatory acts, has been explained in the second sentence of the *Andronov* definition reproduced above. When it comes to the requirement of external effect, the UNAT made it explicit in *Andati-Amwayi*[21] that, in accordance with the UNDT Statute, the proceedings are concerned with decisions having impact not just on the legal order as a whole but on the terms of appointment or contract of employment of the staff member. What has proven to require interpretation though, is the criterion of "precise individual case" and direct effect. In this regard, the *Andronov* definition was not explicit as to whether the UNAT jurisdiction extends over decisions which, albeit not expressing norms *par excellence* abstract, are nevertheless directed toward general criterion or a defined or definable circle of people (decisions of general disposition or general order).[22]

32. The question arose in *Tintukasiri et al.*, where the appellants had challenged the Secretary-General's decision to accept the Headquarters Salary Steering Committee's recommendations for the promulgation of revised salary scales for the General Service and National Officer categories of staff in Bangkok, which announced a freeze of the salaries for extant staff members at then-existing rates and established a second tier of salaries for staff members hired on or after 1 March 2012. The UNAT agreed with the UNDT's reasoning that the decision to issue secondary salary scales for staff members recruited on or after 1 March 2012 did not amount to an administrative decision under art. 2.1(a) of the UNDT's Statute, as per the terms of *Andronov*, because, at the moment of their issuance, the secondary salary scales were

[20] See *e.g.*, section 35 of the German VwVfG, 1st sentence: "An administrative act is any decision, order or other unilateral measure taken by an authority to settle an individual case in the field of public law and which is directed to the external legal effect, see also Polish High Administrative Court decision SA/Wr 367/83, ONSA 1983, no 2m, item 75, p. 183 '"unilateral decision issued by state administration which has binding consequences for an individually determined entity and a specific case, given by this authority in external relations".

[21] *Andati-Amwayi* 2010-UNAT-058, at para 17.

[22] For comparison, see section 35 of the German VwVfG 2nd sentence: "A general order is an act of administration addressed to a group of persons determined or determinable by general characteristics or concerning public property or its use by the general public"; also, in French administrative law, décisions collectives (concernant plusieurs personnes dont la situation est solidaire) et les décisions particulières (pour une situation individualisée qui a des effets sur un nombre indéterminé de personnes (Yves Gaudemet, *Traité de Droit administratif* Tome 1 16e édition, 2001).

to apply exclusively in the future, for an undefined period and to a group of persons which at that time could not be identified. Regarding the appellants' challenge to the freeze of the then-existing salary scales, the UNAT upheld the UNDT's finding that the applications were not receivable *ratione materiae* because the contested decision was of a general order, in that the circle of persons to whom the salary freeze applied was not defined individually but by reference to the status and category of those persons within the Organisation, at a specific location and at a specific point in time.[23] However, the UNAT opened the possibility for the concerned staff members to challenge decisions implemented in their individual cases. Specifically, it agreed with the UNDT that:

> … [i]t is only at the occasion of individual applications against the monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-General to fix and apply a specific salary scale to him/her, in which case the Tribunal could examine the legality of that salary scale without rescinding it. As such, the Tribunal confirm[ed] its usual jurisprudence according to which, while it can incidentally examine the legality of decisions with regulatory power, it does not have the authority to rescind such decisions.[24]

33. With minor variation, the UNAT restated the holding in *Tintukasiri et al.* in *Ovcharenko et al.*, where the appellants contested the Secretary-General's refusal to pay post adjustment based on a multiplier promulgated by the ICSC. The UNAT found that the administrative decision not to pay the appellants their salary with the post adjustment increase, the execution of which was temporarily postponed, was a challengeable administrative decision, despite its general application because it had a direct impact on the actual salary of each of the appellants who filed their application after receiving their pay slips for the relevant period. [25] The UNAT held also: "It was not the ICSC or the General Assembly's decision to freeze their salaries, but the

[23] *Tintukasiri et al.* 2015-UNAT-526, paras. 35-37.
[24] Ibid., at para. 38.
[25] *Ovcharenko et al.* 2015-UNAT-530 at para. 30.

execution of that decision that was challenged insofar as it affected the staff members' pay slips."[26]

34. Without ever withdrawing from the terms of *Andronov,* the jurisprudence of UNAT affirmed receivability of applications when an act of general order has resulted in norm crystallization in relation to individual staff members by way of a concrete decision expressed through a payslip or personnel action. This is precisely the holding of *Tintukasiri et al.*, the leading case on the issue. The other UNAT judgments, notwithstanding occasional intertwining elements pertinent to legality rather than receivability[27], express the same concept and are directed toward the same legal effect.[28]

35. It falls to be noted that the distinguishing decisions of general application and individual decisions taken in the implementation of the former and the attendant question of appealability is a classic doctrinal and practical issue in major European continental systems (German, French and Italian, among other); moreover, it is also adopted and rather painlessly applied in the International Labour Organization Administrative Tribunal (ILOAT) jurisprudence, including attaching the moment of individual decision to receipt of a payslip in remuneration matters.

36. In accordance with the foregoing, even assuming, for the sake of argument, that the communication from 9 March 2017 is a decision rather than merely an information on the rules such as the author understood them, it cannot be accepted as "a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences" on the terms of *Andronov.* At the time of the 9 March 2017 communication, the Applicant

[26] Ibid., at para. 32.
[27] As in *Obino* 2014-UNAT-405, where the question of the Secretary-General being bound by ICSC decision was pertinent to the issue of proving non-compliance with terms of appointment or contract of employment (para 19), that is, legality of the constrained decision, rather than to non-existence of a reviewable administrative decision) or in *Kagizi* 2017-UNAT-750 where UNAT found that "the Appellants have intertwined their challenge of the non-renewal of their appointments with the decision of the General Assembly to abolish their posts".
[28] E.g. in *Pedicelli* 2015-UNAT-555, the UNAT confirmed that decisions of a general application are not reviewable but found that the applicant had indeed suffered adverse direct consequence when she had received her personnel action form.

had not even been notified of the non-extension of his appointment; neither had he received any individual communication regarding his separation entitlements. In short, his individual terms of appointment have not been affected and he had nothing to challenge yet.

37. On the facts of the case, the first time when the individual decision may have transpired was on the occasion of receipt of a payslip which did not contain termination indemnity. This was the date of the contested decision indicated in the management evaluation.

38. In the application, the Applicant indicates that the contested decision was taken on 7 June 2017 when OCHA DRC's staff members were informed during a meeting with the Head of Office that separating staff members would not receive termination indemnities. It is unclear to the Tribunal why the Applicant indicated a different date in the present application from the one in the MER. The Tribunal recalls, however, its deliberations in a case arising from the same set of facts, *Mulipi*[29], where it stressed that a fact that an implied negative administrative decision has been taken and communicated must convincingly result from the circumstances. As noted by UNAT, "the date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine"[30] while "the Appeals Tribunal is mindful of the fact that staff members are unlikely to be conversant with separation formalities".[31] For a payslip to be accepted as such communication, the matter would need to have been obvious under the staff rules or established practice or have specifically arisen between the parties. Moreover, it is common knowledge, and indeed part of the caseload of the Tribunal, that separation payments are often made with delays and in installments. As such, even though the date of the issuance of the individual decision would precede the 7 June meeting, the Tribunal accepts as possible that only information derived from the

[29] *Mulipi* UNDT/ 2018/007.
[30] *Rosana* 2012-UNAT-273; *Kazazi* 2015-UNAT-557.
[31] *Ahmed* 2013-UNAT-386, at para. 21.

meeting – whether attended by the Applicant or not - allowed the Applicant to comprehend the position of the administration on the matter concerned.

39. The above considerations, however, have no bearing on the receivability of the present application. There is no question between the parties that the payslip of 31 May reflected a negative decision on the termination indemnity: the principle was foreshadowed in the communication form 9 March 2017 and confirmed, again in general terms, in the meeting of 7 June 2017. There was, in any event, one decision on the matter. Whether to take the date of 31 May or the date of 7 June 2017 as the communication triggering procedural deadlines, in accordance with staff rule 11.2(c), the Applicant had until August 2017 to submit his request for management evaluation. He submitted it on 20 June 2017, squarely within the time-limits. The refusal to conduct the management evaluation pertained to that same decision.

40. A slightly more complicated issue is posed by the decision issued as a result of reconsideration, one dated 19 December 2017. In this regard, the jurisprudence of the Appeals Tribunal confirms that for a new decision to be appealable, it must be submitted afresh for management evaluation, no matter if the reconsideration and the management evaluation would have been carried out on the same level and in the same office.[32] On the other hand, a mere reiteration of the previous decision, does not reset the clock.[33] In the absence of promulgated rules, or a set of established criteria for the procedural frame of "reconsideration", the determination whether a communication originating from the administration and pertaining to the same matter is a "mere reiteration", or a fresh administrative decision, turns on the facts of the case. The practice of administration in this respect is not informative. The criteria and scope of cognizance in the process of reconsideration are unknown[34], the

[32] *Muhsen* 2017-UNAT-793.
[33] UNAdT Judgment No. 1211, *Muigai* (2005), para. III, affirmed in *Sethia* 2010-UNAT-079 and *Cremades* 2012-UNAT-271; also UNAdT Judgment No. 1301 (*Waiyaki* 2006) para. III.
[34] The jurisprudence held that repeated restatement, or explanation of the decision, upon request form the applicant did not constitute a fresh determination. Among the proposed criteria was also "new circumstances", *see Ryan* UNDT/2010/174. In *Aliko* 2015-UNAT-539, however, UNAT stated that a review of the applicant's case, even when undertaken on the motion of the administration and

administration often does not announce whether the first decision is rescinded[35]; the language used is inconsistent[36]; and, as a rule, the second time around staff members are not informed of the remedies.[37]

41. This situation is problematic. As evidenced by case law, it creates problems for the Tribunal, but, more importantly, obscures the appealability issue for the applicants who, especially where the decision is of the same content, have no way of telling whether the new communication is a "mere reiteration" as opposed to a "thoughtful", "profound" or "meaningful" reiteration resulting from some kind of a process of reconsidering the merits. In effect, by the time the case is considered by the Tribunal, an aggrieved staff member may have failed the applicable deadlines. *De lege ferenda*, reconsideration, as a procedural category, should be marked by clearly announced steps that allow the complainant to determine with enough precision where his or her action stands at any given moment. At minimum, as a matter of fairness, there should be a standard formula used by the administration to the effect of: "Your case is being reconsidered whereupon the contested decision may be upheld, amended or rescinded. You will be informed of the new decision, which you would be able to challenge in the regime of staff rule… etc.", to be applied alternatively with "the administration finds no basis for reconsideration of the decision".

42. Meanwhile, the rule of a thumb in making the distinction appears to be whether the administration conceded to carry out some kind of a review and determine the matter afresh[38] or, rather, summarily denied an applicant's request for reconsideration.

43. In the case at hand, the Tribunal finds that it is dealing with the first situation; that is, the matter was reconsidered afresh. This conclusion is based on the following

involving additional information, did not reset the clock with respect to the applicable time limits in which the original decision is to be contested.
[35] *Afeworki* UNDT/2017/011.
[36] As in the present case, see also *Muhsen* UNDT/2017/015.
[37] As in the present case, see also *Muhsen* UNDT/2017/015; *Afeworki* UNDT/2017/011.
[38] *Afeworki* 2017-UNAT-794.

facts:

a. the Administration found the MER moot;

b. the Administration, actig on a high level, gave formal notice of the reconsideration;

c. the language used implied that the old decision no longer stood and was to be replaced by a new one; this is shown by the statement that "[reconsideration] does not mean that the underlying decision was improper, nor does it mean that a similar decision could or would never occur"; and

d. the Administration took ample time to arrive at its final position, which had been discussed on a high level between OCHA and UNDP, and for which a new reasoning was supplied.

44. In light of these representations, the email communication on 19 December 2017 from UNDP Human Resources Business Partner to the Applicant, that the Administration "maintains its decision", must be read to the effect that the Administration, having considered the matter de novo, in issuing - on the words of the communication form 2 August 2017 - a "similar" decision, maintained the previous conclusion as to the outcome.

45. At the premises, the decision of 31 May 2017 was rendered moot and the challenge pertinent to it became irreceivable.[39] In turn, in accordance with the Statute of the United Nations Dispute Tribunal, art. 8.1, in order to pursue his claim, the Applicant was required to request a management evaluation of the decision of 19 December 2017.[40] Failing this, insofar as the application purports to challenge the decision of 19 December 2017, it is also irreceivable. As such, the application must be rejected.

[39] *Gehr* 2013-UNAT-328; *Lackner* UNDT/2016/105, *Castelli* UNDT/2015/057.
[40] Art. 8.1: "An application shall be receivable if: […] (*c*) An applicant has previously submitted the contested administrative decision for management evaluation, where required". Similar assessment of the notice of reconsideration was expressed in the case of *Mulipi* UNDT/2018/007.

46. The Tribunal regrets that the Applicant, having invested a considerable effort to pursue his claim, has not obtained a decision on the merits. Inasmuch as this Tribunal avoids commenting on the merits of irreceivable applications, in this case, it finds that a *dictum* is warranted in order not to leave the Applicant with an impression that he nearly missed his goal because of a procedural nicety. The Tribunal considers that the Applicant's claim was, in any event, untenable for the reasons stated by the Respondent. The Agreed Separation Arrangement applicable to the UNDP staff, specifically excluded from its purview staff members on appointments administered by the UNDP for other agencies. The Applicant, having held a fixed-term appointment, was not eligible for the termination indemnity under general provisions of the Staff Rules, annex III. Moreover, it is noted that the Appeals Tribunal endorsed in *Ahmed* a payment of termination indenmnities outside the applicable regime where such payment clearly resulted from a written agreement.[41] No such agreement was entered in this case. The submitted content of the transcript of the meeting of 7 March 2017 does not reflect any representations as to the application of UNDP's Agreed Separation Arrangements for the purpose of determining termination indemnities. At best, it signals that the Administration was "looking into the matter".[42] Whatever wishful impression about termination indemnity could have been derived from that meeting, it would have been corrected upon the communication from 9 March 2017. In conclusion, notwithstanding the convoluted procedural history of the application, it was innately not capable of succeeding.

Conclusion

47. The application is rejected as irreceivable.

[41] *Ahmed* 2013-UNAT-386.
[42] Application, para 23.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 7th day of March 2019

Entered in the Register on this 7th day of March 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi