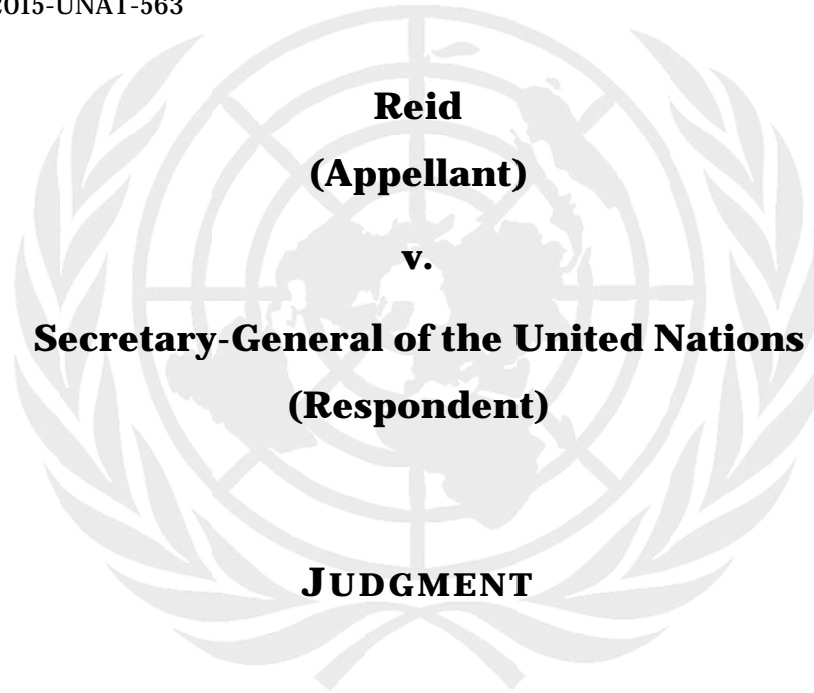




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-563



**Reid
(Appellant)**

v.

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

JUDGMENT

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| Before: | Judge Mary Faherty, Presiding Judge Luis María Simón Judge Deborah Thomas-Felix |
| Case Nos.: | 2014-652, 2014-653, 2014-654 & 2014-655 |
| Date: | 2 July 2015 |
| Registrar: | Weicheng Lin |

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|--------------------------------|--|
| Counsel for Mr. Reid: | Self-represented |
| Counsel for Secretary-General: | Amy Wood/Zarqaa Chohan/Stéphanie Cartier/ Noam Wiener |

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it four appeals filed by Mr. Timothy Bancroft Reid against Judgments No. UNDT/2014/095, No. UNDT/2014/096, No. UNDT/2014/097 and No. UNDT/2014/098, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 July 2014. Mr. Reid appealed on 12 September 2014 and the Secretary-General of the United Nations filed his answers on 7 November 2014, 14 November 2014, and 17 November 2014.

Facts and Procedure

2. The following facts are uncontested:¹

... On 14 February 2012, the Applicant was offered a three-month temporary appointment [...] as Senior [Disarmament, Demobilization and Reintegration (DDR)] Adviser [with the United Nations Support Mission in Libya (UNSMIL)] at the D-1 level expiring on 18 May 2012. This temporary appointment was subsequently extended for three-month periods on 19 May 2012, 19 August 2012 and on 19 November 2012.

... On 15 December 2012, a position specific job opening for the D-1 Principal Security Sector Reform [SSR] Officer was issued.

... [On] 31 December 2012, the Security Sector Advisory and Coordination Division (SSACD) Director, made a request for an exceptional extension of the Applicant's [temporary appointment] until 1 April 2013. The [temporary appointment] was then extended from 18 February until 1 April 2013 for one month and 15 days, from 2 April to 12 May 2013 for one month and 11 days and from 13 May to 30 August 2013 for three months and 12 days.

... During the course of his employment the Applicant received the same annual leave entitlements granted to all staff serving under temporary appointments.

... On 29 May 2013, in an email to UNSMIL's Chief, Human Resources Officer (CHRO) the Applicant asked questions about his relocation and assignment grants, annual leave, home leave, post assignment and health coverage. He received a response to his questions on 5 June 2013 advising that temporary appointments are administered in accordance with ST/AI/2010/4/Rev. 1 (Administration of temporary appointments).

... On the same date, the Applicant emailed the CHRO asking for advice about the appropriate person to pursue his claims with.

¹ Judgment No. UNDT/2014/095, paras. 8-14.

... On 15 July 2013, the Applicant filed a request for management evaluation of the decisions to cancel the selection process for the post of Principal Security Sector Officer and the failure to apply to him the same conditions of service as those offered to staff members on [fixed-term appointments].

3. On 20 December 2013, Mr. Reid signed a settlement agreement with respect to the decision to cancel the job opening for the post of Principal SSR Officer (D-1) and not to select him for the post.

4. On 2 January 2014, Mr. Reid filed four separate applications challenging the Administration's decision that he was not entitled to accrual of annual leave at the rate of two and a half days per month and the same relocation and assignment grants as staff members on fixed-term appointments.

5. On 14 July 2014, the UNDT issued four Judgments on Receivability: Judgments Nos. UNDT/2014/095, UNDT/2014/096, UNDT/2014/097, and UNDT/2014/098. The UNDT held that Mr. Reid was "effectively asking the Tribunal to find that the Rules on annual leave[, assignment grant and relocation grant] for temporary employees are unlawful". Noting that the Rules are based on General Assembly resolutions, the UNDT found that its jurisdiction was limited to a review of the Administration's *application* of the Organization's legal framework and that it was not vested with the power to review General Assembly resolutions. The UNDT therefore concluded that Mr. Reid's applications were not receivable *ratione materiae*.

Submissions and Considerations

Did the UNDT err in law or fail to exercise its jurisdiction when it found that it had no jurisdiction to consider Mr. Reid's claim of discrimination regarding the annual leave, relocation and assignment grants paid to staff on temporary contracts?

6. Before this Tribunal, Mr. Reid claims that the UNDT sought to avoid exercising its jurisdiction by invoking Article 2(1)(a) of its Statute. This was in circumstances where it had established that there was discrimination regarding the annual leave, relocation and assignment grants paid to staff on temporary contracts. He asserts that the Administration's discriminatory practices violated the principle of "equal pay for equal work" enshrined in

international human rights conventions and the United Nations Charter which refers directly to those rights.

7. Mr. Reid submits that the General Assembly resolutions in respect of which the UNDT stated it had no jurisdiction are in clear contradiction of the Universal Declaration of Human Rights (itself the product of a General Assembly resolution). Moreover, the United Nations is subject to international human rights conventions which are at the top of the Organization's legal hierarchy. Furthermore, he submits that the jurisprudence of the UNDT and the Appeals Tribunal has recognized the primacy of the United Nations Charter in the hierarchy of the Organization's internal legislation, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins and administrative issuances.² The need for the Organization to respect the Charter was confirmed in former Administrative Tribunal Judgments *Balogun*,³ *Merani*,⁴ and *Berghuys*.⁵ Thus, Mr. Reid claims that the General Assembly resolutions and administrative issuances on temporary appointments are not only in violation of international human rights conventions which apply to the United Nations ranking higher in the legal hierarchy, and in contradiction of other General Assembly resolutions, they are also ultra vires the powers of the General Assembly since they are directly contrary to the goals set by the Member States when the Organization was founded.

8. Mr. Reid emphasizes that the Appeals Tribunal in *Tabari* has stated that the basis of any discrimination between categories of workers or staff members must be based on "lawful goals".⁶ Moreover, the Appeals Tribunal in *Chen* held that the principle of equal pay for equal work as espoused in the Universal Declaration of Human Rights applied to United Nations staff and that "[b]udgetary considerations' may not trump the requirement of equal treatment".⁷

² In support of this contention, Mr. Reid cites *Hastings v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/030, affirmed on appeal, *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109; as well as *Amar v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/040.

³ Former Administrative Tribunal Judgment No. 852, *Balogun* (1997).

⁴ Former Administrative Tribunal Judgment No. 942, *Merani* (1999).

⁵ Former Administrative Tribunal Judgment No. 1063, *Berghuys* (2001).

⁶ *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-177.

⁷ *Chen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-107, para. 1.

9. Mr. Reid argues that the UNDT did not address the issue in the context of Article 7(b) and (d) of the International Covenant on Economic, Social and Cultural rights which provides for the right to safe and healthy working conditions and for the right to rest, leisure and reasonable limitation on working hours. He further submits that the discriminatory policies towards staff on temporary appointments violate the *Noblemaire* Principle.

10. As to the provisions of ST/AI/2010/4/Rev.1., the concept of a temporary appointment for less than a year for “seasonal & short term/surge” work as set out therein has not been respected in his case. Mr. Reid contends that despite noting that the extended use of temporary appointments was the reason for the disparity between him and staff members on fixed-term contracts, the UNDT did not elaborate on the abuse of the temporary appointment system or order any compensation.

11. Furthermore, he maintains that the UNDT also failed to exercise its jurisdiction by accepting the Secretary-General’s contention that Mr. Reid’s claims regarding entitlements under a fixed-term appointment had been addressed in the settlement agreement for the cancellation of the D-1 position. These issues were not dealt with in the settlement agreement and the UNDT failed to address the clear statement by the MEU that the settlement agreement did not in any way prejudice the other claims.

Legal framework applicable to temporary appointments

12. The Appeals Tribunal considers it apposite in the context of the arguments advanced by Mr. Reid in the course of his appeals to set out the legislative history which led to the enactment of the rules and administrative issuances which governed his employment with the Organization.

13. On 15 August 2008, in a report to the General Assembly entitled “Detailed proposals for streamlining United Nations contractual arrangements: a way forward” (A/63/298), the Secretary-General set out a proposal to reorganize United Nations’ contractual entitlements under a single set of Staff Rules. The proposal introduced the concept of temporary, fixed-term and continuing appointments.

14. The General Assembly addressed the proposals in resolution 63/250 (Human resources management) adopted on 24 December 2008. In section II, paragraphs 7 and 8, it decided that “temporary appointments are to be used to appoint staff for seasonal or peak

workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates”. It further decided that “staff on temporary contracts would be eligible to receive only the following benefits and allowances: post adjustment; rental subsidy; hazard pay; hardship allowance; the daily subsistence allowance portion of the assignment grant; leave (depending on the length of contract); home leave (per classification of duty station); and limited shipment allowance”.

15. On 1 July 2009, the Secretary-General promulgated provisional Staff Rules which duly established a new regime of appointments and contracts which included temporary appointments. By decision 64/546, the General Assembly decided that the provisional Staff Rules should remain provisional pending their further consideration at its sixty-fifth session. The provisional Staff Rules were abolished and replaced by ST/SGB/2010/6, approved by the General Assembly in December 2010 and effective 1 January 2011.

16. ST/AI/2010/4 established terms to apply to staff members on temporary appointments. This was abolished and replaced by ST/AI/2010/4/Rev. 1. as of October 2011.

17. In his report (A/65/202) to the General Assembly, the Secretary-General provided information on the provisional Staff Rules he was promulgating to implement the new contractual arrangements approved in resolution 63/250. In paragraph 11, he specifically referred to temporary appointments, as follows:

Chapter III, on salaries and related allowances, reflects the harmonization of conditions of service resulting from contractual reform, and in particular the new compensation package for staff on temporary appointments, who will receive reduced benefits and entitlements in comparison with staff on fixed-term and continuing appointments, as approved by the General Assembly in section II, paragraph 8, of its resolution 63/250. In particular, staff on temporary appointment will not receive annual within-grade increments, language allowance, education grant, mobility allowance, non-removal element of the mobility and hardship allowance, repatriation grant or special post allowance.

18. In the course of its Judgment, the Dispute Tribunal opined:⁸

Resolution A/Res/63/250 of the General Assembly ... is evidence that the changes to the Rules implemented a deliberate and considered policy change by the General Assembly

⁸ Judgment No. UNDT/2014/095, para. 42.

to the nature and entitlements of staff members on temporary contracts. The effect of the changes was to render obsolete previous rules and any case law that had specifically evolved from them.

Annual leave entitlements of staff members on temporary appointments post 1 July 2009

19. Prior to 2009, the entitlement to annual leave by United Nations staff members on appointments of limited duration under Staff Rule 301.1(a)(ii) was governed by Section 5.1 of ST/AI/2001/2 (Appointments of Limited Duration). Appointments for activities of limited duration were intended for inter alia “peacekeeping and peacemaking, humanitarian, technical cooperation and emergency operations”. Such appointments were granted to staff members appointed to serve at special missions or field locations where the Office of Human Resources Management had specifically authorized the use of appointments of limited duration. Under this Administrative Instruction, annual leave accrued at the rate of two and a half days for each complete calendar month of continuous service.

20. Post resolution 63/250, the new rules on annual leave insofar as staff on temporary appointments are concerned are regulated by ST/SGB/2010/6 and ST/AI/2010/4/Rev.1. The latter provides:

Annual leave

8.1 A staff member who holds a temporary appointment shall accrue annual leave while in full pay status at the rate of one and a half days per month in accordance with staff rule 5.1 (a). Upon separation, pursuant to staff rule 9.9 and subject to staff rule 4.17, any accrued annual leave not utilized by the end of the temporary appointment may be commuted into a sum of money for the period of such accrued annual leave up to a maximum of 18 working days. Between successive temporary appointments pursuant to sections 2.5 to 2.8 above, up to a maximum of 18 days of accrued annual leave may be carried forward.

21. Adjudicating on Mr. Reid’s complaint about his annual leave entitlements, the Dispute Tribunal stated: “The new rules on annual leave do not contemplate any difference between entitlements to leave by reason of the total period of service as opposed to the type of contract a staff member is employed on. They specifically refer to successive temporary contracts.”⁹

⁹ Judgment No. UNDT/2014/095, para. 42.

22. As is clear from the quoted provision, it covers the effect of successive temporary appointments on leave entitlements.

Travel related entitlements of staff members on temporary appointments post 1 July 2009

23. Section 11 of ST/AI/2010/4/Rev.1 provides:

Travel-related entitlements

11.1 A staff member who holds a temporary appointment serving in posts subject to international recruitment as defined in staff rule 4.5 may be eligible, if not recruited at the duty station or from within commuting distance from the duty station, for the following travel-related entitlements in accordance with the applicable staff rules and the conditions specified in the present administrative instruction:

- (a) The daily subsistence allowance portion of the assignment grant in accordance with staff rule 7.14 (d);
- (b) Travel expenses pursuant to staff rule 7.1 and excess baggage entitlement pursuant to staff rule 7.15, for the staff member only, as applicable;
- (c) Unaccompanied shipment pursuant to staff rule 7.15 (h) (i) for the staff member only, as applicable. The relocation grant option shall be available[.]

24. Since 2009, staff members on temporary appointments are entitled to the travel-related entitlements stipulated in Staff Rules 7.1 and 7.15:

Staff Rule 7.1

(a) Subject to conditions established by the Secretary-General, the United Nations shall pay the travel expenses of a staff member under the following circumstances:

- (i) On initial appointment, provided that the staff member is considered to have been internationally recruited under staff rule 4.5;
- (ii) When required to travel on official business;
- (iii) On change of official duty station, as defined in staff rule 4.8;
- (iv) On separation from service, as defined by article IX of the Staff Regulations and chapter IX of the Staff Rules, except in cases of abandonment of post, and in accordance with the provisions of paragraph (b) below;
- (v) On travel authorized for medical, safety or security reasons or in other appropriate cases, when, in the opinion of the Secretary-General, there are compelling reasons for paying such expenses;

- (vi) On home leave, in accordance with the provisions of staff rule 5.2;
- (vii) On family visit.

(b) Under subparagraph (a) (iv) above, the United Nations shall pay the expenses of a staff member to travel to the place of recruitment. However, if the staff member had an appointment for a period of two years or longer or had completed not less than two years of continuous service, the United Nations shall pay his or her expenses to travel to the place recognized as his or her home for the purpose of home leave under staff rule 5.2. Should a staff member, on separation, wish to go to any other place, the travel expenses borne by the United Nations shall not exceed the maximum amount that would have been payable for the return of the staff member to the place of recruitment or home leave, as applicable.

(c) The Secretary-General may reject any claim for payment or reimbursement of travel or removal expenses which are incurred by a staff member in contravention of any provision of the Staff Rules.

Staff Rule 7.15

...

Unaccompanied shipments for staff holding a temporary appointment or staff assigned for less than one year

(h) (i) A staff member holding a temporary appointment may be reimbursed for the shipment of personal effects and household goods, up to a maximum of 100 kilograms or 0.62 cubic metres, by the most economical means on appointment and on separation from service[.]

25. As stipulated in Section 4 of ST/IC/2006/60, entitled “Relocation grant (lump-sum option for unaccompanied shipments) – Rates”, the rate for assignments of less than one year and an unaccompanied shipment entitlement of 100 kilos is USD 1,200.

DSA entitlements for temporary appointments post 1 July 2009

26. Section 11.1 (a) of ST/AI/2010/4/Rev.1 governs the travel related entitlements of staff members on temporary appointments. It provides:

11.1 A staff member who holds a temporary appointment serving in posts subject to international recruitment as defined in staff rule 4.5 may be eligible, if not recruited at the duty station or from within commuting distance from the duty station, for the following travel-related entitlements in accordance with the applicable staff rules and the conditions specified in the present administrative instruction:

(a) The daily subsistence allowance portion of the assignment grant in accordance with staff rule 7.14(d).

27. Rule 7.14 of the Staff Rules provides:

Assignment grant

Definition and computation of the grant

(a) The assignment grant is intended to provide staff with a reasonable amount of cash at the beginning of an assignment for costs incurred as a result of the appointment or assignment and is based on the assumption that the main expenses of installation are incurred at the outset of an assignment.

(b) The assignment grant consists of two portions:

(i) The daily subsistence allowance portion, which shall be equivalent to:

a. Thirty days of daily subsistence allowance at the daily rate applicable under subparagraph (c) (i) below; and

b. Thirty days of daily subsistence allowance at half the daily rate in respect of each eligible family member for whom travel expenses have been paid by the United Nations under staff rule 7.2 (d) (i)-(iii);

...

(d) A staff member holding a temporary appointment who travels at United Nations expense pursuant to staff rule 7.1 (a)(i) above shall be paid only the daily subsistence allowance portion of the assignment grant, for himself or herself only, as specified in subparagraph (b) (i) above.

28. As noted by the Dispute Tribunal, Mr. Reid did not deny that he received the leave entitlements, travel and subsistence entitlements which pertained to staff on temporary appointments, as set out in the relevant statutory instruments. Nor is it the case that he says that he was treated less favourably than other employees on temporary contracts. Rather, he claims that the relevant Regulations, Rules and Administrative Instructions discriminate between staff members on fixed-term contracts and those on temporary appointments.

29. In effect, the basis of Mr. Reid's challenge in the four applications before the UNDT was the allegation that the General Assembly resolutions which gave rise to the Rules and administrative issuances regulating his employment did not adhere to the principle of equal pay for equal work and were contrary to a myriad of international human rights instruments

to which the Organization, including the General Assembly, were bound to adhere. The Dispute Tribunal summed up Mr. Reid's complaints as follows:¹⁰

It is clear from his submission that the gravamen of the Applicant's case is that the changes to the Human Resources regime and the rules which apply to staff since 2010 discriminate against staff members engaged for extended periods on [temporary assignments]. He alleges the Rules are in breach of principles of equal pay for equal work and the Noblemaire principle. He does not allege in this case that the rules were incorrectly applied to him.

30. The first question to be addressed therefore is whether the UNDT erred in concluding that it lacked the jurisdiction to review General Assembly resolutions. In the course of its various Judgments, the UNDT stated:¹¹

[I]n this Application the Applicant is effectively asking the Tribunal to find that the Rules on annual leave[, relocation grants and assignment grants] for temporary employees are unlawful. Those rules were based on resolutions of the General Assembly. Pursuant to art. 2 of the UNDT Statute, the Tribunal's jurisdiction is limited to a review of the Respondent's application of the Organization's regulations, rules and administrative issuances. The Tribunal has not been vested with the power to review General Assembly resolutions.

31. The UNDT referred to Article 2(1)(a) of its Statute which provides:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance[.]

32. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and by the Appeals Tribunal. In *Andronov*, the former Administrative Tribunal stated:¹²

¹⁰ Judgment No. UNDT/2014/096, para. 50.

¹¹ Judgment No. UNDT/2014/095, para. 46.

¹² Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

... There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is 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 direct legal consequences.

33. In *Obino*, the Appeals Tribunal opined:¹³

... The Appeals Tribunal has had the opportunity to define what constitutes an administrative decision susceptible to challenge. In *Andati-Amwayi*, the seminal case on this issue, the Appeals Tribunal considered:

... What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

... In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

... In the instant matter, the UNDT correctly found that Mr. Obino did not identify an administrative decision capable of being reviewed, as he failed to meet his statutory burden of proving non-compliance with the terms of his appointment or his contract of employment.

... The [International Civil Service Commission (ICSC)] takes decisions in some matters (e.g. establishment of daily subsistence allowance; schedules of post adjustment, i.e. cost-of-living element; hardship entitlements); in other areas, it makes recommendations to the General Assembly which then acts as the legislator for

¹³ *Obino v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-405, paras. 18-21.

the rest of the common system. Such matters include professional salary scales, the level of dependency allowances and education grant. On still other matters, the ICSC makes recommendations to the executive heads of the organizations; these include, in particular, human resources policy issues.

... In the instant case the ICSC made a decision binding upon the Secretary-General as to the reclassification of two duty stations and Mr. Obino has not shown that the implementation of this decision affects his contract of employment.

Was there an administrative decision affecting Mr. Reid's contract of employment which Mr. Reid challenged before the UNDT?

34. It is clear that Mr. Reid called into question the administrative decisions to grant him annual leave and make him financial payments pursuant to ST/SGB/2010/6 and ST/AI/2010/4/Rev.1. However, Mr. Reid did not allege any breach by the Administration in the *application* of the relevant statutory instruments to the calculation of his annual leave and other financial entitlements pursuant to his contract of employment, as found by the UNDT. He received his due financial and leave entitlements in accordance with the relevant statutory instrument.

35. As noted by the Dispute Tribunal, what Mr. Reid effectively challenged vis-à-vis his financial and leave entitlements was a policy decision of general applicability, in the words of the UNDT, the implementation of “a deliberate and considered policy change by the General Assembly to the nature and entitlements of staff members on temporary contracts”.¹⁴

36. The Appeals Tribunal is satisfied that the aforesaid policy change was binding on the Secretary-General who was mandated to implement the change by the promulgation of the necessary staff rules and administrative issuances. Mr. Reid entered into his contract of employment against the background of the changed landscape for employees on temporary contracts brought about by the General Assembly resolutions in 2008, 2009 and 2010. Before the UNDT and this Tribunal he has sought essentially to impugn the General Assembly resolutions which mandated the promulgation of the aforementioned statutory instruments which gave rise to the different terms and conditions for staff members on temporary appointments as opposed to those on fixed-term contracts. We are satisfied that the UNDT did not have the competence to examine administrative and budgetary

¹⁴ Judgment No. UNDT/2014/095, para. 42.

decisions taken by the General Assembly, including decisions on the entitlements to be accorded to different categories of staff members. Having regard to our referred-to jurisprudence, the Appeals Tribunal finds that the UNDT did not err in law or fail to exercise its jurisdiction in deeming Mr. Reid's challenge to the General Assembly resolutions not receivable. His appeal on the above issues is rejected.

Did the UNDT err by not finding that Mr. Reid's temporary appointment to UNSMIL did not respect the nature of a temporary contract under ST/AI/2010/4/Rev.1?

37. In his appeal submissions, Mr. Reid also argued that the UNDT erred by not finding that his temporary appointment to UNSMIL was unlawful because the nature of a temporary appointment as per ST/AI/2010/4/Rev.1 was not respected. Mr. Reid's argument before the UNDT was that temporary appointments were for seasonal and short-term surge work lasting less than a year. In his answer to the appeal, the Secretary-General maintains that Mr. Reid's temporary appointment to UNSMIL adhered to the policy of the General Assembly and to the letter of ST/AI/2010/4/Rev.1. In particular, the Secretary-General refers to Section 14 of ST/AI/2010/4/Rev.1 which explicitly permits the extension of a temporary contract for up to 729 days.

38. In its Judgments respectively on Mr. Reid's applications concerning annual leave and assignment grants (UNDT/2014/095 and UNDT/2014/098), the Dispute Tribunal opined:¹⁵

... The Applicant is critical of the Administration's use of continual temporary contracts which led to his lengthy engagement on [temporary appointments] rather than placing him on a fixed-term appointment that would have entitled him to the allowances and increased leave that accrue from such an appointment. The Tribunal accepts that the extended use of the temporary appointments was the reason for the disparity in leave entitlements between the Applicant and staff members on fixed term contracts [and for the disparity in the amount of the assignment grant that the Applicant was entitled to] and that this negatively affected the Applicant.

¹⁵ Judgment No. UNDT/2014/095, para. 45 and Judgment No. UNDT/2014/098, para. 50.

39. The exact sentiments were expressed by the UNDT in Judgment Nos. UNDT/2014/096 and UNDT/2014/097 (relating to the issue of relocation grants) save that the following was added: “This however was the subject of the settlement agreement between the parties.”¹⁶

40. However, the UNDT did not embark on an analysis of Mr. Reid’s argument that the nature of a temporary contract vis-à-vis his actual appointment was not respected. Effectively, Mr. Reid’s argument appears to have been rejected under cover of the paragraph in the UNDT Judgment which rejected his challenge to the General Assembly resolutions:¹⁷

However, in this Application the Applicant is effectively asking the Tribunal to find that the Rules on annual leave[, relocation grants and assignment grants] for temporary employees are unlawful. Those rules were based on resolutions of the General Assembly. Pursuant to art. 2 of the UNDT Statute, the Tribunal’s jurisdiction is limited to a review of the Respondent’s application of the Organization’s regulations, rules and administrative issuances. The Tribunal has not been vested with the power to review General Assembly resolutions.

41. Furthermore, it is not apparent to this Tribunal, when the UNDT referred to: “[t]his however was the subject of the settlement agreement between the parties”, whether the UNDT had in mind Mr. Reid’s particular argument about the Administration not respecting the concept of temporary appointments. The Appeals Tribunal finds that if the UNDT purported to dismiss this particular aspect of Mr. Reid’s claim on the basis of the reasoning used with regard to Mr. Reid’s claims about General Assembly policy, the UNDT erred in so doing. Whatever the merits of Mr. Reid’s claims, his complaint related to the Administration’s *application* of the policy vis-à-vis his actual circumstances and as such fell within the jurisdiction of the UNDT.

42. Whether the UNDT intended its reference to the settlement agreement as the basis to reject this aspect of his claim is not apparent to this Tribunal, since the UNDT did not embark on any analysis of what the settlement agreement contained and made only passing reference to it in paragraphs 52 respectively in Judgment Nos. 2014/096 and 2014/097.

¹⁶ Judgment No. UNDT/2014/096, para. 52 and Judgment No. UNDT/2014/097, para. 52.

¹⁷ Judgment No. UNDT/2014/095, para. 46.

43. We note that in the Secretary-General's answer to the appeal, he does not dispute Mr. Reid's assertion that the UNDT failed to deal with the merits of the claim, rather he makes the case as to why there is no merit in Mr. Reid's assertions and invites the Appeals Tribunal to find accordingly. What the Secretary-General is inviting the Appeals Tribunal to do is more properly the function of the UNDT as the forum of first instance judicial review.

44. The complaint made by Mr. Reid on this issue required factual findings in order to ascertain whether the claim was meritorious or otherwise. As this was not done, we are remanding this discrete issue to the UNDT, pursuant to Article 2 (e) and (4) (b) of our Statute.

Did the UNDT commit an error of procedure in failing to address whether Mr. Reid's appointment should have been converted to a fixed-term contract?

45. Mr. Reid argues that the UNDT failed to exercise its jurisdiction with respect to his claim regarding the Administration's failure to convert his temporary appointment to a fixed-term contract. Moreover, he claims that the UNDT wrongly accepted the Secretary-General's erroneous assertion that issues regarding his claim to a fixed-term contract were subsumed into a settlement agreement on 20 December 2013.

46. The Secretary-General submits that the Dispute Tribunal did not err by refusing to accept Mr. Reid's arguments regarding his conversion to a fixed-term appointment. Before the Appeals Tribunal, the Secretary-General argues that the issue was raised for the first time in Mr. Reid's applications to the UNDT and that he had not sought management evaluation of this issue. The Secretary-General contends that while Mr. Reid sought management evaluation of the decision to cancel the recruitment process for a D-1 position that was not the same decision as the alleged decision regarding his claim for conversion to a fixed-term appointment. The Secretary-General also submits that were the Appeals Tribunal minded to regard the decisions as one and the same, the question of the cancellation of the recruitment process was disposed of by a settlement agreement which included an obligation by Mr. Reid to refrain from all claims "arising from or by reason of the decision to cancel the job opening for [the D-1 position]".

47. The four Judgments rendered by the UNDT recite that “the Applicant submitted that he was offered and accepted conversion to [a fixed-term appointment] but this offer was then reneged upon”. The Secretary-General is recorded in all four Judgments as stating:¹⁸

The Applicant entered into a settlement agreement concerning his claim that he should have been appointed to [a fixed-term appointment] following the conduct of a selection exercise. His claim is not receivable since he has released the Organization from any liability for any failure not to appoint him to a fixed-term position. The Applicant is accordingly estopped from raising any issues concerning allegations of a right to appointment to [a fixed-term appointment] in this case.

48. Other than summarizing the parties’ arguments on the alleged promise to convert Mr. Reid’s temporary appointment into a fixed-term appointment, the UNDT does not mention it or consider it.

49. The Appeals Tribunal notes that the UNDT alluded to the issue of the settlement in the “Introduction” to all four UNDT Judgments which recites that on 27 March 2014, the UNDT ordered the Secretary-General “to file a copy of a settlement agreement entered into with the Applicant concerning his claim that he should have been appointed to a Fixed-Term Appointment [...] following the conduct of a selection exercise for a D-1 position”.

50. The Secretary-General duly filed a copy of the agreement, as noted by the Dispute Tribunal. In Judgment Nos. UNDT/2014/096 and UNDT/2014/097, the UNDT alluded to the settlement agreement, as follows:¹⁹

The Applicant is critical of the Administration’s use of continual temporary contracts which led to his lengthy engagement on [temporary assignments] rather than placing him on a fixed-term appointment that would have entitled him to the allowances and increased leave that accrue from such an appointment. The Tribunal accepts that the extended use of the temporary appointments was the reason for the disparity in the amount of relocation grant that the Applicant was entitled to and that this negatively affected the Applicant. This however was the subject of the settlement agreement between the parties.

¹⁸ Judgment No. UNDT/2014/095, para. 27.

¹⁹ Judgment No. UNDT/2014/097, para. 52.

51. This paragraph makes no reference to Mr. Reid's claim of a reneged promise to convert him to a fixed-term contract or whether the UNDT considered such a promise to have been subsumed into the settlement agreement reached on 20 December 2013 regarding the cancellation of the job opening for Principal SSR Officer.

52. We hold that there is no evidence on the face of the UNDT Judgment that the UNDT considered this complaint, even in the first instance as to whether it itself had competence to adjudicate on the matter, having regard to the arguments the Secretary-General made to the UNDT in his reply and submissions to the UNDT. There is no conceivable way that the Appeals Tribunal can consider the UNDT's rationale to (properly) reject Mr. Reid's particular complaints about his leave and financial benefits (that the General Assembly's policy breached international norms) as encompassing either a consideration or rejection of Mr. Reid's complaint regarding the failure to honour an alleged promise to convert his temporary appointment to a fixed-term appointment. Thus, the UNDT erred in failing to consider the complaint. Of course, whether the UNDT had competence to adjudicate on Mr. Reid's complaint having regard to the arguments put forward by the Secretary-General in his reply and submissions before the UNDT is a matter for it to adjudicate upon as the forum of first instance judicial review.

53. While the Appeals Tribunal could determine on appeal whether Mr. Reid's failure to seek management evaluation renders the matter not receivable – as the Secretary-General contends - rather than sending the matter back to the UNDT, we find that the various factual claims made by the parties as to what was or was not the subject matter of the settlement agreement renders the determination of whether Mr. Reid's complaint was the subject of the management evaluation request made by him a matter more properly for determination by the UNDT. This respects the two-tier system of judicial review, where the first stage must be completed before issues may be addressed on appeal, as provided for in the Statutes of the two Tribunals. Accordingly, pursuant to Article 2(1) of our Statute, the discrete complaint as to the alleged failure to convert Mr. Reid's temporary appointment to a fixed-term appointment is remanded to the UNDT for it to make the necessary factual findings, that will allow it then to determine if it has competence to review the complaint and if so, whether there is merit in the complaint.

Judgment

54. The Dispute Tribunal's rejection of Mr. Reid's claim that the Rules governing entitlements for temporary staff members are unlawful is affirmed. The discrete issues of (i) whether Mr. Reid's temporary appointment was unlawful because ST/AI/2010/4/Rev.1 was not properly applied and (ii) whether his temporary appointment should have been converted to a fixed-term appointment are hereby remanded to the UNDT for consideration.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Simón

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar