[redacted]

Counsel for Appellant: Self-represented

Counsel for Respondent: Stéphanie Cartier

**JUDGE MARY FAHERTY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Patrice Simon Robineau against Judgment No. UNDT/2012/175, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 9 November 2012 in the case of *Robineau v. Secretary-General of the United Nations*. Mr. Robineau appealed on 25 January 2013 and refiled his perfected appeal on 5 February 2013. The Secretary-General answered on 8 April 2013.

## Facts and Procedure

2. The following findings are taken from the UNDT Judgment,[1] which are not contested by the parties:

> ... Between 1989 and 2011, the Applicant was employed by the Organization under a series of fixed-term contracts. Between 1989 and 1997, he left the Organization several times upon expiration of his short-term contracts and was subsequently re-employed after short breaks in service. At the time of each of his separations from service, he received from the Organization a payment in commutation of the annual leave days he had not used, as reflected in the table below. On 1 May 1998 he was recruited under a two-year fixed-term contract which was subsequently regularly extended.

| Date of entry on duty | Date of separation from service | Number of days of annual leave accrued and paid by the Organization |
|---|---|---|
| 1 September 1989 | 31 July 1990 | 18 |
| 28 August 1990 | 31 July 1991 | 18.5 |
| 2 September1991 | 31 July 1992 | 25 |
| 1 September 1992 | 31 October 1993 | 0 |
| 1 November 1993 | 31 December 1993 | 0 |
| 1 January 1994 | 16 December 1994 | 25.5 |
| 3 January 1995 | 16 December 1995 | 8 |
| 8 January 1996 | 31 July 1997 | 30.5 |

[1] Judgment No. UNDT/2012/175, paragraphs 3 - 8.

| | | |
|---|---|---|
| 22 August 1997 | 31 December 1997 | 10 |
| 1 May 1998 | 15 April 2011 | 0 |

> ... On 4 April 2011, the Applicant attended a pre-retirement seminar; he then retired on 15 April 2011. On the date of his separation from service, he had a balance of 60 days of unused annual leave.
>
> ... On 7 May 2011, the Chief of the Payroll Unit informed the Human Resources Management Service ("HRMS") of the number of annual leave days accrued but not used by the Applicant during his successive short-term contracts and paid by the Organization at the end of each of these contracts. This calculation showed that between July 1990 and December 1997, the Applicant had been paid an amount corresponding to 135.5 days of annual leave.
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> ... By an email dated 3 June 2011, HRMS notified the Applicant that the Administration had paid him at the time of his previous separations from service the maximum entitlement (an amount corresponding to 60 days' salary) which he could claim under staff rule 9.9 for commutation of accrued annual leave days.
>
> ... On 6 June 2011 the Applicant responded to this email expressing surprise and disappointment; he subsequently met a staff member of HRMS and the Chief of that Service to discuss the matter. By a memorandum dated 30 June and then in an email dated 28 July 2011, the Applicant requested the Chief of HRMS to explore a solution that would allow him to receive payment corresponding to the 60 days of annual leave accrued between 1 May 1998 and 15 April 2011.
>
> ... By a letter dated 20 October 2011, the Chief of HRMS informed the Applicant that the Office of Human Resources Management of the United Nations Secretariat at New York had confirmed that the calculation of annual leave days made by HRMS was correct and that no payment in commutation of the 60 days of unused annual leave could be made to the Applicant.

3. Mr. Robineau appealed. In Judgment No. UNDT/2012/175, the Dispute Tribunal considered his application receivable *ratione temporis*, but rejected it on the merits. It concluded

Rule 104.3

Re-employment

(a) A former staff member who is re-employed shall either be given a new appointment or, if he or she is re-employed within twelve months of being separated

> such a way that the total payments for the first and second separation do not exceed the amounts which would have been paid had the service been continuous.

16. Presumably this rule was applied to his successive fixed-term contracts in the period between 1 January 1994 and 31 December 1997 and any first and second separations within that timeframe were totaled so as to ensure that his unused leave entitlements did not exceed the maximum limit of 60 days. It is obvious that a combination of any first or second period in that time did not exceed 60 days.

17. When Mr. Robineau was re-employed on 1 May 1998, the aforementioned staff rule was still in force and remained in force until amended in January 2003 to provide as follows:

> Rule 104.3
>
> Re-employment
>
> (a) A former staff member who is re-employed shall be given a new appointment or, if re-employed within twelve months of being separated from service or within any longer period following retirement or disability under the Joint Staff Pension Fund Regulations, he or she may be reinstated in accordance with paragraph (b) below. If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment. If he or she is given a new appointment, its terms shall be fully applicable without regard to any period of former service, except that such former service may be counted for the purpose of determining seniority in grade. However, when a staff member receives a new appointment in the United Nations common system less than twelve months after separation, any entitlement, benefit or accrual the staff member may have when separated at the end of the new appointment shall be adjusted to ensure that the total payments for the first and subsequent separations do not exceed the amounts that would have been paid had the service been continuous.

18. Between 1989 and 1997 Mr. Robineau received payments totaling 135.5 days by way of unused leave entitlements. The Secretary-General has described a portion of these payments (that is 75.5 days) as an "administrative error" on the basis that it exceeded the maximum threshold of 60 days. Mr. Robineau maintains that the fact that no adjustment was ever made by the Administration is an indicator that in both legal and practical terms his separations from the Organization in the period from 1989 to 1997 represented a discontinuation of service. The main thrust of Mr. Robineau's argument is that given the manner in which, on the face of it, the Administration dealt with his entitlement to unused leave in the relevant period, it should not be entitled to effectively engage in double accounting.

19. For reasons of equity and good faith we are more persuaded by Mr. Robineau's arguments than those put forward by the Secretary-General, although we do not accept the entirety of Mr. Robineau's arguments on the discontinuation issue. We are satisfied that in failing to give due consideration to the arguments raised by Mr. Robineau regarding the years 1989 to 1997, the UNDT erred in law in retroactively applying Rule 104.3 set forth in ST/SGB/2003/1 to the entirety of his service. Mr. Robineau was entitled to rely on the statutory provisions in force when he last entered the service of the Organization.

20.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

| *(Signed)* | *(Signed)* | *(Signed)* |
|---|---|---|
| Judge Faherty, Presiding | Judge Adinyira | Judge Simón |

Entered in the Register on this 13th day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar