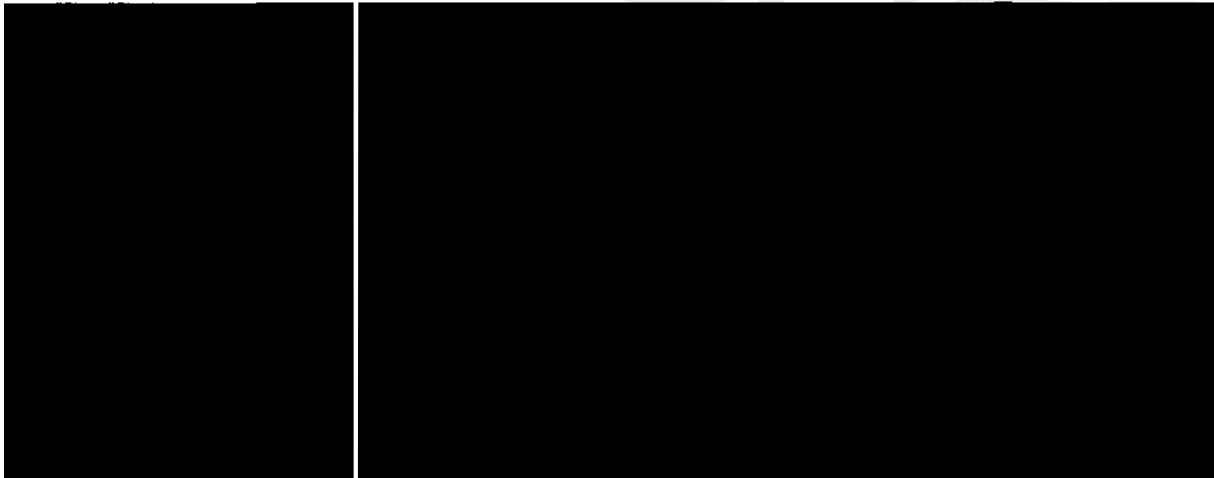




# UNITED NATIONS APPEALS TRIBUNAL T

Judgment No. 2015-UNAT-533



Counsel for Mr. Onana: Self-represented

Counsel for Secretary-General: Nathalie Defrasne

**JUDGE INÉS WEINBERG DE ROCA, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2014/003, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 15 January 2014 in English in the case of Onana v. Secretary-General of the United Nations . Mr. Pius Onana received the French translation on 5 March 2014 and filed his appeal on 3 May 2014. The Secretary-General answered on 25 July 2014.

**Facts and Procedure**

2. Mr. Onana joined the International Criminal Tribunal for Rwanda (ICTR) as a French Court Reporter at the FS-4 level in April 1999.

The non-renewal decision and separation

3. On 26 June 2009, Mr. Onana was informed that his appointment would not be renewed beyond 30 September 2009 because some posts, including his, had been marked for abolition as part of the completion strategy for the ICTR.

4. On 22 September 2009, Mr. Onana filed an application with the UNDT to suspend the implementation of the decision not to renew his appointment, which the UNDT granted on 13 October 2009 in Judgment No. UNDT/2009/033 (Ruling on an Application for Suspension of Action).

5. On 13 November 2009, Mr. Onana also filed an application with the UNDT challenging the non-renewal decision.

6. The Appellant's contract was subsequently renewed on a month-to-month basis during the course of subsequent proceedings before the UNDT and the Appeals Tribunal concerning his application for suspension.

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8. On 16 April 2010, Mr. Onana signed the last extension of his fixed-term appointment for a period of one month covering 1 May to 31 May 2010.
9. According to his appeal brief, Mr. Onana was notified on 28 April 2010 that the Appeals Tribunal had annulled the UNDT's order for suspension of action.
10. By letter dated 30 April 2010, the ICTR sought to notify Mr. Onana that he would be separated from service effective the same day. The subsequent response of the Management Evaluation Unit (MEU) makes clear that Mr. Onana sought to avoid receiving the letter over 29 and 30 April 2010.
11. On 4 May 2010, the ICTR's Human Resources wrote to Mr. Onana to ask him to complete his checkout formalities, in view of his separation which was effective as of 30 April 2010.
12. On 31 May 2010, Mr. Onana acknowledged receipt of the separation letter of 30 April 2010. According to his appeal brief, Mr. Onana found this letter after returning to work from a period of sick leave.
13. On 29 July 2010, Mr. Onana requested management evaluation of the ICTR's decision to separate him on 30 April 2010 without providing him 30 days' notice pursuant to the terms of the last appointment he signed, which was to expire on 31 May 2010.
14. On 30 July 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/136, and rejected Mr. Onana's challenge to the non-renewal of his fixed-term appointment filed on 13 November 2009, finding that it was not based on improper motives, nor were his due process rights breached when the ICTR decided his post would be abolished. The UNDT dismissed his application in its entirety.
15. On 12 August 2010, the MEU responded to Mr. Onana's 29 July 2010 request concerning his separation without notice. The MEU considered that Mr. Onana had been notified that he would be separated as of 4 May 2010, the date on which the ICTR's Human Resources wrote to him to ask him to complete his checkout formalities, in view of his separation which was effective as of 30 April 2010. Consequently, his request for management evaluation of 29 July 2010, not having been filed within 60 days of 4 May 2010, was therefore time-barred and rejected.



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### **Submissions**

#### **Mr. Onana's Appeal**

27. The Appellant asks the Appeals Tribunal to find errors of law, errors of assessment and errors of fact in the UNDT Judgment.

28. Concerning the separation issue, the UNDT erred when it ruled that his challenge was *res judicata* given that his claim concerning the lack of notice when he was separated in April 2010 was not part of the original application he submitted to the UNDT in 2009. Moreover, his challenge to being separated without notice could not have been the subject of a decision as the MEU had found his request to be time-barred.

29. In declaring his claim concerning the separation issue *res judicata*, the UNDT ruled contrary to its established jurisprudence on separation from service and undermined the Charter of the United Nations, the Universal Declaration of Human Rights and the Staff Rules, to the detriment of the Appellant and his due process rights. Moreover, the Administration breached Staff Rule 9.7(b) and (c) and Article 3 of his employment contract, signed on 16 April 2010, both of which provided for 30 days' written notice in the case of termination. His contract, which had been renewed until 31 May 2010, established rights for Mr. Onana, such that his termination without notice breached the Staff Regulations.

30. In relation to the non-selection issue, the UNDT erred in affirming the Administration's decision upholding the correctness of the recruitment process when Mr. Onana had not been properly considered as a 15-day candidate, in breach of ST/AI/2006/3. The UNDT erred in law by failing to review the hiring criteria, including the eligibility of each candidate for the posts in question. Mr. Onana requests that this Tribunal order the Administration to produce documentation to prove the eligibility of the candidates appointed to the posts. The UNDT erred by endorsing the candidates' eligibility without prior verification.

31. The UNDT also erred when it found that Section 11 of ST/AI/2006/3, which concerned the placement of staff members whose posts were abolished outside the normal recruitment process, did not allow the Administration to take a decision in his favour although his post was abolished in 2008.

32. The UNDT also erred when it found that although the Applicant's rights had been breached, he had nevertheless failed to establish that either violation had had an impact on him. To the contrary, he had suffered harm and significant adverse consequences and was entitled to compensation; he lost an opportunity to continue his career with the Organization due to the Administration's failure to follow the rules for selection of internal candidates whose posts were abolished. The UNDT erred in rejecting his claim for compensation for the violation of his fundamental rights as the former United Nations Administrative Tribunal held that "proof of prejudice is rendered unnecessary when procedural requirements have not been observed".<sup>2</sup> Further, although the UNDT recognised that procedural errors flawed the selection process, it failed to rescind the process as required by this Tribunal in *Rolland*.<sup>3</sup>

33. The UNDT Judgment contravenes Article 11 of the Dispute Tribunal Statute insofar as it is based on insufficient and ambiguous reasoning and is an "unreasoned judgment" that does not define the rights and facts on which it is based.

34. Mr. Onana asks that the Appeals Tribunal remand the case to the Dispute Tribunal or, alternatively, that the Appeals Tribunal reverse and modify the Judgment on the merits in relation to the separation issue as the UNDT excluded its consideration. The Appellant also asks that the Appeals Tribunal order rescission of the Administration's decision and reinstatement of the Appellant in his employment as a Document Control Assistant, as well as payment of an amount equivalent to two years' base salary as of the date of his separation from service as compensation for the damage and humiliation he suffered as a result of the manner in which he was separated from the Organization after 11 years of service.

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

35. The Dispute Tribunal correctly concluded that Mr. Onana's claims challenging the April 2010 separation decision were not receivable, given that they had become *res judicata* as a result of the Appeals Tribunal Judgment No. 2011-UNAT-157 in July 2011. Furthermore, the UNDT's decision to dismiss this claim was correct given that Mr. Onana had failed to submit a timely request for a management evaluation of the 2010 separation decision, and it is settled case

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<sup>2</sup> Former Administrative Tribunal Judgment No. 1060, Baddad (2002), quoting Administrative Tribunal of the International Labour Organization, Judgment No. 495, in *re Olivares Silva* (1982).

<sup>3</sup> *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122.

law that a timely request for management evaluation is a mandatory first step in the appeal process. In its absence, an application filed with the UNDT is not receivable.<sup>4</sup>

36. Concerning the separation issue, the UNDT correctly concluded that the Administration properly exercised its discretionary authority in deciding not to select Mr. Onana. Moreover, even where a procedural irregularity has been found to mar a selection exercise, the Administration's selection decision can only be rescinded where the staff member challenging the decision had a real chance for selection.<sup>5</sup> The UNDT conducted a full review of the case record and correctly found that the error in considering Mr. Onana's candidacy together with, rather than prior to, those of the 30-day candidates, did not warrant a rescission of the contested decision since he did not have a real chance of being selected as he did not meet the required competencies of the position. Accordingly, the UNDT correctly found that this procedural failure did not have any impact on the outcome of the selection exercise.

37. Insofar as Mr. Onana claims priority preference pursuant to ST/AI/2006/3 as his post had been abolished, this provision does not give a staff member a right to be appointed to a post for which he/she is not suitable. The UNDT correctly found that Section 11 of ST/AI/2006/3 did not apply in this case as the Administration chose to follow the normal process and conduct a selection exercise.

38. The UNDT was also correct to conclude that the Appellant was not entitled to any compensation as it is well established that not every failure by the Administration will necessarily lead to the award of compensation, and it is for the Appellant to prove the existence of any adverse consequences.<sup>6</sup> The UNDT found that Mr. Onana failed to meet the required competencies for the position such that any breach of his rights as a "priority candidate" caused him no prejudice. Accordingly, any award of compensation relating to the non-selection decision would have been inconsistent with the Appeals Tribunal's jurisprudence disapproving of an award of compensation where no actual prejudice was established. Moreover, as the UNDT had no jurisdiction to review the separation issue, it could not award any compensation on this ground.

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<sup>4</sup> Citing *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-299, para. 17, and *Wamalala v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300.

<sup>5</sup> Citing *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172, paras. 17-19; *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174, paras. 27-28; *Dualeh v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-175, paras. 18-19.

<sup>6</sup> Citing *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, para. 32; *Hastings v. Secretary-General of the United Nations*



39. Lastly, the Appellant's request that the Appeals Tribunal order the production of additional evidence related to the selection process for the Document Control Assistant positions should not be granted as the request is not in accordance with the Appeals Tribunal Statute, and the matter was not raised before the UNDT.

40. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

### **Considerations**

41. The function of the Appeals Tribunal, as prescribed by Article 2(1) of its Statute, is to determine whether the Dispute Tribunal erred in fact or in law, committed an error in procedure, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction. The burden of satisfying the Appeals Tribunal that the Judgment of the Dispute Tribunal is defective rests with the Appellant.

42. In our view, the UNDT correctly found that the separation issue was not receivable because it was *res judicata*.

43. As this Court has stressed in *Shanks* and *Costa* the authority of a final judgment – *res judicata* – cannot be readily set aside.<sup>7</sup> There must be an end to litigation and the stability of the judicial process requires that final judgments by an appellate court not be set aside unless for the gravest of reasons.<sup>8</sup> There are only limited grounds, as enumerated in Article 11 of the Statute of the Appeals Tribunal, for review of a final judgment,<sup>9</sup> and those are not applicable in the present matter.

44. As relates to the non-selection issue, this Tribunal has held that the Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute

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<sup>7</sup> *Shanks v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-26bis; *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-063.

<sup>8</sup> *Meron v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-198.

<sup>9</sup> *Beaudry v. Secretary-General of the United Nations*, Judgment on "Request for Guidance and Ruling on Issues of Appellate Jurisdiction, Approach and Reconsideration", Judgment No. 2011-UNAT-129, citing *Shanks v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-26bis and *Costa v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-063.



staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.<sup>12</sup>

49. In view of the foregoing, Mr. Onana's requests for relief are denied.

**Judgment**

50. We dismiss the appeal and affirm the UNDT Judgment.

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<sup>12</sup> Akyeampong v. Secretary-General of the United Nations , Judgment No. 2012-UNAT-192; Bofill v. Secretary-General of the United Nations , Judgment No. 2011-UNAT-174, para. 28; Vangelova v. Secretary-General of the United Nations , Judgment No. 2011-UNAT-172, para. 19.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Weinberg de Roca,  
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar