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Factual background

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20. On 26 September 2016, the Applicant received a termination indemnity spreadsheet which stated his date of EOD as 19 February 2008 and his termination date as 3 February 2016.

21. On 14 October 2016, the Applicant sent an email to the MEU requesting assistance in correcting the dates on the basis of which his termination indemnity was calculated. The Applicant further requested that a hold be placed on the recovery of USD5,040.20 from his disability funds pending the proper calculation of his termination indemnity.

22. On 19 October 2016, the Applicant filed a request for management evaluation of the f his EOD and termination date in the spreadsheet received on 26 September 2016. The Applicant stated that the correct EOD date was 10 October 2005 and termination date was 4 February 2016.

23. On 25 October 2016, 25 Oct

> for it was dismissed as irreceivable. The second one is a follow up on another request for payment and I have not received any response from MEU. If the dismissal of the earlier case has no consequences then the two cases can be merged.

25. On 26 September 2016, the Respondent, without leave, and in the absence of a conso

Applicant was challenging the same administrative decision in both cases and that the second application should be dismissed as not receivable.

26. On 3 October 2016, the Applicant sent an email to the Registry, not copied to the Respondent, requesting that this matter be fast-tracked as he was unwell.

27. By Order No. 245 (NY/2016), dated 20 October 2016, the parties were ordered to file a joint submission by 9 November 2016 on whether they agreed to attempt informal resolution of the two cases. In the event that the parties were not interested in pursuing informal resolution, the Applicant was ordered to file a submission by 23 November 2016 addressing the contentions raised in the Respond

28. On 9 November 2016, the parties filed a joint submission informing the Tribunal that they did not agree to attempt informal resolution of the two cases.

29.

Applicant's submissions

37.

Case Nos. UNDT/NY/2016/040 and UNDT/NY/2016/041

a. The termination indemnity due to the Applicant has not been paid to him by the Respondent. The Respondent s refusal to pay the termination indemnity is unlawful.

d. The inaction by the Respondent not to respond to enquiries and non-payment of the indemnity after several months of request amounts to unfair treatment, harassment and discrimination;

e. The Applicant continues suffering emotional distress, financial hardship and discrimination based

reappointed to UNDSS in New York. He was reappointed without a break-in-service and was not paid any benefits upon departure from UNON. The Staff Rules in effect at the time did not indicate he would receive a new EOD date. In support, the Applicant prior electronic performance appraisal system - reports and his personnel action form in 2015 reflects his EOD date as 10 October 2005;

j. As remedy, the Tribunal should order 24 months net base salary for the unlawful change of EOD and termination date and 24 months net base salary for emotional distress;

38.

overpaid by the Organization in the amount of USD5,821.44. The termination indemnity of USD773.40 was applied to this overpayment, resulting in the reduction of the overpayment to USD5,040.20. The Administration has written to the Applicant and asked him to repay this sum;

b. The second application is not receivable. Case No. UNDT/NY/2016/041 should be dismissed as the Applicant is challenging the same decision as in Case No. UNDT/NY/2016/040. Both cases challenge the decision not to pay the Applicant his termination indemnity. The Applicant may not challenge the same decision in two separate applications. In *Kalashnik* UNDT/2015/087, para. 15 (affirmed by the United Nations Appeals Tribunal in 2016-UNAT-661), the Dispute Tribunal held that:

51. Former staff rule 104.3 (ST/SGB/2004/1) on re-employment in force at the -employment to UNDSS in New York on 19 February 2008

indemnity, and whether the Applicant can be treated as being in continuous service since 10 October 2005 for the purpose of calculating the termination indemnity.

54. Former staff rule 104.3(b)(ii) provides that when a staff member receives an appointment in the United Nations common system less than twelve months after UNDSS in New York the very next day following his separation by resignation from UNON, the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave shall be adjusted so that the payment does not exceed what would have been paid had the service been continuous.

55. Having reviewed the legislative history of the provision in former staff rule 104.3 (b)(ii), it is clear that the intention of the drafters was to facilitate movement of staff between various organizations within the United Nations Common System, and to ensure that staff members are treated as being on continuous service as they move through various United Nations organizations.

> 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 shall be counted for the purpose of determining seniority in grade. *However, where a former staff member of the United Nations common system is granted a new appointment within twelve months of separation, any entitlement, benefit or accrual the staff member may have when separated for a second time should be adjusted in 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.*

57. The agreement reached at the Consultative Committee on Administrative Questions in 1963 states as follows (emphasis added):

> XIII. OTHER ADMINISTRATIVE MATTERS
>
> Inter-Organization Transfer Agreement
>
> 69. CCAQ completed its revision of the 1949 Agreement which governs the conditions of transfer, secondment or loan of staff members between the various organizations of the United Nations Common System, and recommends that ACC should approve the new text which is attached as Appendix G to this Report. To allow time for legislative approval where that is necessary the date of entry into force generally has been set at 1 January 1964, but it is agreed that any two organizations may apply the Agreement from an earlier date if they so wish. The Committee noted with appreciation a statement by the representative of the IMF that his organization, though not part of the Common System, shared the desire to facilitate movement of staff between organizations and, would endeavour to follow the spirit of the Agreement in any case with which it was concerned.

> 70. The Agreement sets forth the position both for organizations and for staff in case of transfer, secondment or loan between organizations. The extent to which the same principles could be applied as appropriate to movement between different programmes within a single organization will be studied.
>
> 71. *The Committee recognized that problems analogous to those dealt with in the Agreement may arise when a staff member is separated from one organization and is subsequently re-employed by the same or another organization. It agreed, therefore, that where the re-employment occurred within twelve months of the separation any entitlement which the staff member may have on account of repatriation grant, or service benefit, or accrued annual leave, on the second separation, should be adjusted in such a way that the total payments on these entitlements on the first and second separations do not exceed the amounts which would have been paid had the service been continuous. This will entail amendments to the Staff Rules of various organizations.*

58. The intended consequence of the provision in former staff rule 104.3 (b)(ii) is apparent from the face of it. The provision intends to simplify mobility of staff members, and certainly not to disentitle or cause detriment to staff as they move internally within a United Nations organization or through various United Nations organizations. It is clear from the text that the intention was to ensure that any separation entitlements that a staff member may have following re-employment within twelve months of a separation would not exceed the amounts that the staff member would have received had his or her service been continuous. The intention simply being to ensure that staff members do not speculate by several moves to unduly or doubly accrue benefits beyond the maximum entitlements. It follows quite logically that the staff member would be considered to be in continuous service and that his or her final separation entitlements would be adjusted to reflect this.

59. Furthermore, staff rule 9.8(b) of ST/SGB/2014/1 states that length of service for purposes of calculating termination indemnity shall be deemed to comprise the

-time continuous service on fixed-term or continuing appointments. That periods of former service are relevant in termination indemnity cases was submitted (and thus admitted) by the Respondent in the matter of *Couquet* 2015-UNAT-574 at paragraph 35 where the Appeals Tribunal quotes the Secretary General s submission as follows:

> Staff rule 4.17 makes it clear that subparagraph (c) is intended to enumerate exclusions to the general rule, set out in the preceding subparagraphs, that a staff member who is reemployed is treated as having a new appointment without regard to any period of former service. Periods of former service will be relevant only in cases enumerated in staff rule 4.17(c) - termination indemnity, repatriation grant or commutation of accrued annual leave .

60. The Respondent submitted in the present case that the Applicant was in the General Service and related categories and locally recruited, without possibility of transfer to another country as an international recruit. The Consultative Committee on Administrative Questions (*supra* at para 57 of this judgment), at para 71. recognized that problems analogous to those dealt with in the Agreement (on transfer, loan and secondment of staff members), may arise when a staff member is separated from one organization and is subsequently re-employed by the same or another organization and recommended that provision be made in this regard specifically for repatriation grant, service benefit (termination indemnity), and accrued leave. Furthermore, staff rule 9.8 makes no distinction between national and international recruitment status. It has not been disputed that the Applicant was on fixed-term contracts throughout his service with the United Nations. He was re-employed in the United Nations within 12 months of his resignation. In accordance with ST/SGB/2014/1 rule 9.11 (a)(i), the Applicant was expected to, and did perform his duties during the period of notice of his resignation. It is certainly not alleged otherwise. He commenced employment in New York the very next day after his day of separation in Nairobi. There was in reality no separation and no effective break in service. In any event, in terms of staff

rule 9.8, and as admitted by the Respondent and determined in *Couquet*, the his termination indemnity. The Applicant is deemed to have been in continuous

for the calculation of the termination indemnity due to the Applicant. Therefore, the contested decision is unlawful and stands to be rescinded. In view of the rescission of the decision, the Tribunal directs the Administration to provide the Applicant with an updated calculation sheet and make any necessary

separation entitlements and benefits in line with this Judgment and staff rules 9.8 (b) and 104.3 (b)(ii).

corresponds. Therefore, the Respondent contends that the amount of termination indemnity is reduced by the amount of the

The reduction of termination indemnity by an amount equal to the Applicant's disability benefit (Case No. UNDT/NY/2016/041)

75.

be paid in full both a termination indemnity and EOSA, a specific allowance paid as a component of salary in Vienna, based on local conditions, as an end-of-service allowance.

79.

benefits to the commencement of his receipt of disability benefit, the Administration titlements within a reasonable time. The Administration was in regular contact with the Applicant. It took measures to ensure that the Applicant did not suffer hardship. This included the payment of a salary advance, which resulted in an overpayment to the Applicant. The Administration has treated the Applicant fairly. At no time has he been harassed or discriminated against.

83. Under the consistent jurisprudence of the Appeals Tribunal, the onus is on the Applicant to prove a claim of discrimination on the preponderance of the evidence (see, for instance, *Parker* 2010-UNAT-012, *Azzouni* 2010-UNAT-081, *Charles* 2013-UNAT-284, *Nwuke* 2015-UNAT-506).

84. The Tribunal finds that the Applicant has placed no evidence whatsoever, illustrating any discriminatory treatment against him. On the contrary, the record indicates that the Respondent took measures to ensure that the Applicant did not suffer hardship following his separation from service by issuing him a salary advance in the amount of USD2,377.21 in or around March 2016.

Compensation

85. The Applicant seeks compensation for the unlawful change of EOD date and compensation as he has suffered financial loss occasioned by delay and violation of human rights.

86. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the United Nations General Assembly amended art. 10.5 of the

(b) [c]ompensation for harm, supported by evidence . (See also *Antaki*

but arguing to the contrary in the present case. Indeed, in the aforesaid summary Judgment No. UNDT/2016/098, the Tribunal observed that it would be regrettable if the matter ended up in costly prolonged litigation considering all its particular circumstances, the nature of the claim, the sums involved, the exchanges generated between the Applicant and the Administration, and the attendant costs of potential litigation to both parties and the Tribunal, impressing upon the parties to amicably resolve the matter; to no avail.

90. Having taken into account the nature of the irregularity and the length of delay in administrating the proper termination indemnity due to the Applicant, the Tribunal finds that a fair and equitable compensation would be the sum of USD5,000.

91. As the Applicant has provided no evidence to support his claim of emotional distress, the Tribunal does not find that he satisfies the requirements for an award for moral injury.

Conclusion

92. In view of the foregoing, the Tribunal decides that the three applications filed by the Applicant under Case Nos. UNDT/NY/2016/040, UNDT/NY/2016/041 and UNDT/NY/2016/066 succeed in part.

93.
rescinded. The Tribunal directs the Administration to provide the Applicant with a complete and updated calculation sheet

breakdown and including all salary advances and disability benefits (identifying the month they pertain to and the date of such payments), and other payments which were required to be set off from such entitlements and benefits.

94. The Administration shall provide the Applicant with the updated calculation sheets within 30 days of the publication of this judgment, that is, by or before Thursday, 30 August 2018, and shall notify the Tribunal of the outcome by the same date.

95. The Tribunal awards the Applicant USD5,000