Mindua

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2018-1214
Date:	28 June 2019
Registrar:	Weicheng Lin

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Receivability, Judgment No. UNDT/2018/097, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 2 October 2018, in the case of *Mindua v. Secretary-General of the United Nations*. Mr. Antoine Kesia-Mbe Mindua filed the appeal on 23 November 2018, and the Secretary-General filed his answer on 4 February 2019.

Facts and Procedure

2. Mr. Mindua, a former *ad litem* judge at the International Criminal Tribunal for the former Yugoslavia (ICTY), challenged the decision of the Registrar, ICTY, not to pay him for his part-time service at the ICTY after he was appointed to the International Criminal Court (ICC) as a judge.

3. On 24 August 2005, the General Assembly elected Mr. Mindua as an *ad litem* judge of the ICTY. He took office on 25 April 2006. In 2014, he was elected as a judge of the ICC and he took his judicial oath on 15 March 2015. From 15 March 2015 to 30 April 2016, Mr. Mindua remained as a full-time judge at the ICTY and served on the bench in *Prosecutor v. Goran Hadži*

6. By memorandum of 29 August 2016, the Registrar of the ICTY informed Mr. Mindua that the ICTY Conditions of Service, which were promulgated by the General Assembly, did not provide "any basis to create an allowance to supplement the salary Mr. Mindua received while being compensated under the ICC Conditions of Service during the overlap of ICTY and ICC terms of office between May and July 2016". On 30 August 2016, Mr. Mindua met with the Registrar of the ICTY, and it was agreed that the Registrar would arrange to meet with the Chef de Cabinet of the President of the ICC within the next few weeks to discuss the matter.

7. By e-mail of 30 December 2016, the Registrar of the ICTY confirmed the content of his meeting with Mr. Mindua on 21 December 2016 and also noted that he had met with the Chef de Cabinet of the President of the ICC and that the position expressed in his memorandum of 29 August 2016 stood. This e-mail, however, was sent to Mr. Mindua's ICTY e-mail address, which he no longer used, and was re-sent to him on 19 May 2017, at his request.

8. On 7 July 2017, Mr. Mindua submitted a request for management evaluation, which was rejected on 25 August 2017. On 24 November 2017, Mr. Mindua filed an application with the UNDT. On 5 December 2017, the Secretary-General filed a motion requesting the UNDT to determine the issue of receivability as a preliminary matter. On 11 December 2017, the UNDT issued Order No. 244 (GVA/2017) and granted the motion.

9. On 2 October 2018, the UNDT issued the impugned Judgment, which dismissed Mr. Mindua's application on grounds that it was not receivable *ratione personae*. The UNDT held that Mr. Mindua was not a staff member of the United Nations as he was not subject to the authority of the Secretary-General. Rather, Mr. Mindua had been appointed by the General Assembly and was therefore considered a "non-Secretariat United Nations official" pursuant to General Assembly resolution 61/262 of 4 April 2007. His conditions of service were those of the Judges of the International Court of Justice (ICJ) as fixed by the General Assembly. For these reasons, the UNDT held that Mr. Mindua was not a staff member and did not fall under any of the categories of potential applicants described in Article 3(1) of the UNDT Statute, which governs the UNDT's jurisdiction and competence. Accordingly, Mr. Mindua had no legal standing before the UNDT and the UNDT likewise did not have jurisdiction to receive his application.

10. The UNDT distinguished Judgment No. 3359 of the International Labour Organization Administrative Tribunal (ILOAT) upon which Mr. Mindua relied. In Judgment No. 3359, the ILOAT had accepted jurisdiction in an application filed by ICC judges because the ILOAT Statute included jurisdiction over "officials" of certain international organizations.

Submissions

Mr. Mindua's Appeal

11. Mr. Mindua requests the Appeals Tribunal to reverse the UNDT's Judgment, declare his application before the UNDT as receivable and remand his case to the UNDT for a determination on the merits. He argues that the UNDT erred in law when it concluded that he could not be considered a former staff member within the meaning of the UNDT Statute. Mr. Mindua argues that the UNDT's reasoning that his functional relationship with the Secretary-General was not similar to that of a staff member as he was not under the Secretary-General's authority

can hear claims from current or former staff members. The Statute, however, does not define "staff members". Therefore, the UNDT should have interpreted this term in accordance with Article 31(1) of the Vienna Convention, *i.e.* in accordance with its ordinary meaning read in context and in the light of its object and purpose. In respect of its object and purpose, Mr. Mindua notes that Article 2 of the UNDT Statute is broad and refers to "individuals". Furthermore, citing to General Assembly resolutions 61/261 and 63/253, the UNDT was established to provide the United Nations with "a system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process". While the UNDT correctly identified that judges have no legal recourse, it ignored this issue and is therefore in breach of this provision and the law on the interpretation of treaties.

The Secretary-General's Answer

14. The Secretary-General requests the Appeals Tribunal to uphold the impugned Judgment and dismiss the appeal in its entirety. The Secretary-General submits that the UNDT correctly concluded that it did not have jurisdiction *ratione personae* as Mr. Mindua was not a former staff member within the meaning of the UNDT Statute. Mr. Mindua had been appointed as an *ad litem* judge of the ICTY by the General Assembly pursuant to Article 13*ter* of the Statute of the ICTY and had the status of "officials other than Secretariat Officials" of the United Nations, not of a staff member. Moreover, he was not issued an appointment letter pursuant to the United Nations Staff Regulations and Rules and was not subject to the authority of the Secretary-General. His conditions of service, rather, were established by the General Assembly as those applicable to judges of the ICJ and were not those set in the Staff Regulations and Rules. Being subject to the authority of the Secretary-General is far from "immaterial" as Mr. Mindua indicated; rather, it is central to the status of being a staff member. The jurisprudence of the UNDT and the Appeals Tribunal consistently provides that individuals such as consultants, interns, and those on service contracts are not staff members. Mr. Mindua, accordingly, fails to identify any errors warranting reversal of the impugned Judgment.

15. In addition, the Secretary-General argues that the UNDT correctly distinguished Judgment No. 3359 of the ILOAT from Mr. Mindua's situation, pointing out that the ILOAT's jurisdiction was broader than the UNDT's jurisdiction. The ILOAT's jurisdiction is defined by "officials" which the ILOAT held includes judges. The UNDT's jurisdiction, by contrast, is defined by "staff members", a narrower category. Accordingly, the UNDT did not err in law in finding that Mr. Mindua was not a staff member within the meaning of the UNDT Statute.

other than Secretariat officials and are thus not staff members. Secretary-General's Bulletin ST/SGB/2002/9 (Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission) records that the United Nations has persons performing full-time services for it, at the direction of its legislative organs, who are not staff. For example, Article 13 of the Statute of the Joint Inspection Unit (approved by the General Assembly in its resolution 31/192 of 22 December 1976) provides that the Inspectors shall have the status of officials of the Organization but shall not be staff members. Those persons are usually the presiding officers of United Nations organs performing functions for the Organization on a substantially full-time basis but are referred to as "officials other than Secretariat officials".

25. Mr. Mindua accordingly was not a staff member. He was not appointed by the Secretary-General in terms of Staff Regulation 4.1 and was not subject to his authority. He was elected by the General Assembly. Hence, the UNDT did not err in dismissing the application as not receivable *ratione personae*.

26. Mr. Mindua's argument that the UNDT erre

Secretary-General notes, when the General Assembly defined the scope of the UNDT's jurisdiction, it specifically considered and rejected proposals to include non-staff personnel. The General Assembly has in turn emphasized that the Tribunals shall not have powers beyond those statutorily conferred on them by their respective statutes. If the current situation is in violation of the norms of customary international law, as it appears to be, such is a matter for the General Assembly, and not this Tribunal, to rectify. It will therefore be prudent and in the interests of the Organization for this Judgement to be brought to the attention of the President of the General Assembly for consideration and possible action.

28. In the premises, the appeal must be dismissed.

Judgment

29. The appeal is dismissed and Judgment No UNDT/2018/097 is hereby affirmed.

30. The Registrar is instructed to transmit a copy of this Judgment to the President of the General Assembly.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy, Presiding	Judge Raikos	Judge Knierim

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar