



## Introduction

1. On 20 January 2012, the Applicant, a former staff member of the United Nations Office for Project Services (“UNOPS”), who was employed by the Organization for over 20 years until his separation from service in February 2009, filed an application contesting the decision not to pay him a termination indemnity after his separation from UNOPS. This decision was communicated to the Applicant on 21 August 2011 by the UNOPS General Counsel in compliance with *Sprauten* UNDT/2011/094, which ordered, *inter alia*, that UNOPS determine by 1 September 2011 “whether [the Applicant] was wrongly deprived of a standard enhanced separation package of 18 months’ net base salary” (see para. 87 of *Sprauten* UNDT/2011/094).

2. On 2 February 2012, the Respondent filed a motion for leave to file a reply limited to the question of the receivability of the application. In this motion, the Respondent contended that the Applicant’s application is time-barred and requested leave to first file submissions regarding the receivability of the application and to later file submissions regarding the merits of the application, if the Tribunal were to find the application receivable.

3. By Order No. 18 (NY/2012), dated 2 February 2012, the Tribunal granted leave to the Respondent to file and serve a reply limited to the issue of receivability. The Tribunal also allowed the Applicant to file and serve a response to the reply on receivability. Both parties duly filed their submissions.

4. With respect to the receivability of the present application, the Applicant submits, *inter alia*, that the Dispute Tribunal in *Sprauten* UNDT/2011/094 on compensation correctly ordered the Respondent to determine whether the Applicant was wrongly deprived of his entitlement ... and to notify the Applicant by 1 September 2011 of its determination”. The Applicant states that the Tribunal’s

order, and the Respondent's resultant decision of 31 August 2011, gave rise to a new decision based on new legal considerations resulting in a new determination, which the Applicant timeously challenged through a new request for management evaluation. The Applicant submits that, although it relates back to his prior period of service, the decision being contested was clearly articulated on 31 August 2011, in writing, by the Respondent pursuant to a specific order of the Tribunal. He further states that, in matters of compensation involving staff members who have separated from service, it has been the Tribunal's consistent practice to examine the applicant's termination entitlements along with other financial factors in assessing appropriate compensation. It would be incorrect to place undue restrictions on the ability of the Tribunal to assess appropriate compensation on the basis that every element of compensation must be the subject of a sepa

the restatement of the claims made in March 2009 does not stop the relevant deadline from running and does not give rise to a new administrative decision.

## Background

6. On 6 May 2010, the Dispute Tribunal (Judge Adams) issued *Sprauten* UNDT/2010/087, which joined together for purposes of determining liability two separate cases of the Applicant: Case No. UNDT/NY/2009/85/JAB/2009/049 (Case 1: the Applicant's non-selection for a portfolio manager post in Copenhagen) and Case No. UNDT/NY/2009/118 (Case 2: whether it was lawful for UNOPS to withdraw its subsequent offer to the Applicant concerning a post in Johannesburg). Judge Adams concluded as follows:

... As to case 1 [Copenhagen post] –

The panel recommendation cannot stand and the decision of [the Appointment and Promotion Board], based as it was upon a fatally flawed process, was in breach of the applicant's contractual rights to have his candidacy adequately and properly considered.

... As to case 2 [Johannesburg post] –

The respondent was in breach of its contract with the applicant to appoint him to the post in Johannesburg at P-4 for the term of six months.

7. As regards the Applicant's "separation package", *Sprauten* UNDT/2010/087, Judge Adams stated as follows:

I mention, as a footnote, that when the applicant had secured such a position [i.e. the Johannesburg post] parallel to the discussions concerning his start date, the parties were also engaged in negotiations concerning the possibility of a "separation package" for the applicant. This would not make sense unless both parties acted under the assumption that although negotiations about the start date were on foot, the applicant was still employed.

8. On 19 April 2011, the Appeals Tribunal issued *Sprauten* 2011-UNAT-111, in which it annulled the Dispute Tribunal's Judgment of 6 May 2010 regarding Case 2



11.

... For ease of reference, [the General Counsel] attach[es] herewith a copy of the e-mail from ... UNOPS Human Resources to [the Applicant] dated 30 March 2009 setting out UNOPS' decision regarding separation packages. [The General Counsel] note[s] that [UNOPS Human Resources] also stated that: "[the Applicant] is not entitled to any termination indemnity under the UN Staff Regulations and Rules (independently of the abovementioned HR Framework [which established "separation packages"] because, as was also noted in the Executive Director's letter, [the Applicant's] appointment was not terminated".

... To return to paragraph 87 of *Spauten* UNDT/2011/094]: in view of the above, [the Applicant] was not "wrongly deprived of any entitlement to a standard separation package of 18 months' net base salary as termination indemnity".

... Since the actual decision was already made in 2009 on the basis of clearly-established law, [the General Counsel] would like to note that nothing in this letter is to be construed as a waiver of the time limits set out in the UN Staff Regulations and Rules. I note that the [Appeals Tribunal] stated in *Bethia* 2010-UNAT-079 that a mere restatement of a staff member's earlier claim does not give rise to a new administrative decision starting the time period to contest the decision.

... Finally, I note that the [Appeals Tribunal] reiterated in *Ajdini et al.* 2011-UNAT-108 that the [Dispute Tribunal] has no jurisdiction to waive deadlines for management evaluation or administrative review. Presumably, the [Dispute Tribunal] in this case made its order not appreciating—this issue not having been argued by [the Applicant]—that a written decision on this specific issue had already been conveyed in March 2009.

13. Attached to the General Counsel's 31 August 2011 letter was an email of 30 March 2009 from UNOPS Human Resources to the Applicant, stating:

While the Human Resources Framework For Transition (UNOPS Organizational Directive No. 11/2<sup>nd</sup> Revision, 28 December 2006) provides for termination indemnities and separation payments to be made to "individuals whose posts are abolished and who do not secure alternate employment with UNOPS", [the Applicant does] not fall within the foregoing description.

As noted in the Executive Director's letter to [the Applicant] dated 27 March 2009, UNOPS' preferred outcome, as evidenced by

the unconditional written offer to [the Applicant] dated 19 December 2008 was to have [him] as part of the AFO [Africa Regional Office] team with effect from 1 February 2009. When [the Applicant] chose not to accept that offer [for the Johannesburg post], UNOPS extended both the time for acceptance and the starting date to 1 March 2009. But since [the Applicant] chose not to accept UNOPS' offers, UNOPS had no choice but to seek an alternate candidate.

Because UNOPS actually offered [the Applicant] another post, a P-4 level post which [the Applicant] himself applied for—but [the Applicant] later decided not to accept it, [the Applicant] cannot be considered an individual who did not secure alternate employment with UNOPS, but are instead an individual who refused alternate employment with UNOPS after securing it.

Moreover, you are not entitled to any termination indemnity under the UN Staff Regulations and Rules (independently of the abovementioned HR Framework) because, as was also noted in the Executive Director's letter, your appointment was not terminated. Instead, your appointment simply expired, after you chose not to accept UNOPS' offer of the abovementioned P-4 level post.

14. On 31 September 2011, the Applicant filed a request for management evaluation “of the decision communicated to the Applicant on 31 August 2011 by the UNOPS General Counsel ... constituting a negative reply to the order of the United Nations Dispute Tribunal in *Sprauten* UNDT/2011/094 that UNOPS determine by 1 September 2011 whether [Applicant] was wrongly deprived of a standard enhanced separation package of 8 months' net base salary”.

15. The Secretary-General appealed *Sprauten* UNDT/2011/094. On 16 March 2012, the Appeals Tribunal rendered *Sprauten* 2012-UNAT-219, in which the Secretary-General's main point of appeal was the award of compensation in the amount of six months' net base salary for non-pecuniary loss caused by the irregularities in relation to the Copenhagen post (Case 1). *Sprauten* 2012-UNAT-219, the Appeals Tribunal dismissed the Secretary-General's appeal and affirmed *Sprauten* UNDT/2011/094.



## Consideration

16. Under art. 19 of its Rules of Procedure, the Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties. The Appeals Tribunal has held that the Tribunal may consider the receivability of an application as a preliminary issue, (see *Pellet* 2010-UNAT-073 and *Saka* 2010-UNAT-075). Should the Tribunal find an application not receivable, it will dismiss this application and not proceed with the consideration of the merits of the case before it.

17. In *Sprauten* UNDT/2011/094, the Tribunal ordered the Respondent to determine, by 1 September 2011, in view of the Tribunal's findings, whether the Applicant was wrongly deprived of his entitlement to a standard enhanced separation package. *Sprauten* UNDT/2011/094 was appealed by the Respondent with respect to the award of compensation in the amount of six months' net base salary for the substantial and unwanted irregularities in the selection process, which



their reach. The parties are to consider ~~carefully~~ whether informal dispute resolution is possible, and promptly ~~advise~~ the Tribunal in the event they wish to attempt it.

24. The present Judgment is without ~~prejudice~~ to any findings the Tribunal may reach in respect of the merits ~~of~~ the Applicants claims.

#### Conclusion

25. In all the circumstances, the Tribunal ~~finds~~ that this application is receivable.

26. By Monday, 12 May 2014 the parties are ordered to file a joint submission stating whether they agree to attempt ~~resolving~~ this case informally. If the parties are unable to pursue informal resolution, the ~~Tribunal~~ will issue further orders as it deems appropriate.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 1<sup>st</sup> day of April 2014

Entered in the Register on this 1<sup>st</sup> day of April 2014

*(Signed)*

Hafida Lahiouel, Registrar, New York