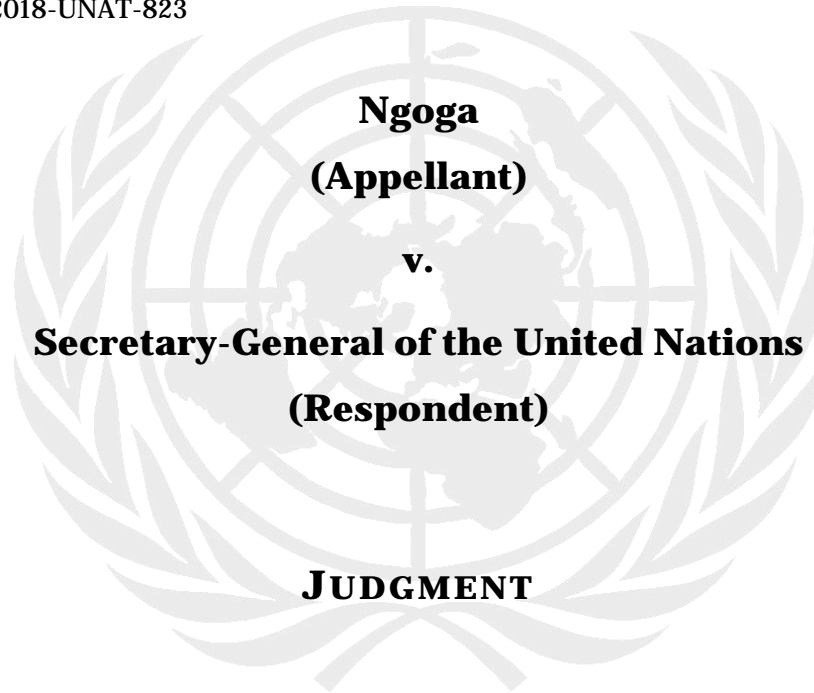




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-823



Before:	Judge Sabine Knierim, Presiding Judge John Murphy Judge Dimitrios Raikos
Case No.:	2017-1112
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Mr. Ngoga:	Angela Kobel/Sharon Kemitare
Counsel for Secretary-General:	Patrick Killebrew

JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Receivability No. UNDT/2017/056, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 July 2017, in the case of *Ngoga v. Secretary-General of the United Nations*. Mr. Pascal Gihana Ngoga filed the appeal on 13 September 2017, and the Secretary-General filed an answer on 8 November 2017.

Facts and Procedure

2. Mr. Ngoga was initially appointed in August 2006 as a P-5 Senior Political Advisor with the United Nations Mission in Sudan (UNMIS). In July 2011, he was reassigned to the United Nations Mission in South Sudan (UNMISS) in Juba, South Sudan at the same level, where he served until he reached the retirement age and retired on 30 April 2014.

3. Throughout his employment with the Organization, Mr. Ngoga was remunerated at the dependency rate based on his wife's dependent status.

4. On 8 March 2010, UNMISS hired Mr. Ngoga's wife as a P-3 Humanitarian Affairs Officer in a different duty station.

5. By memorandum dated 3 December 2014, UNMISS notified Mr. Ngoga that he had been overpaid by USD 109,034.04 because he continued to be remunerated at the dependency rate even though his wife had become a staff member in March 2010.

6. On 23 December 2014, the Chief, Payroll Operations informed Mr. Ngoga that after offsetting the overpayment against his separation entitlements, he owed the Organization USD 81,953.76.

7. On 30 January, 13 February and 23 March 2015, Mr. Ngoga requested management evaluation of the decision to retroactively change his dependency status as of March 2010. He claimed, *inter alia*, that throughout the period of his employment he had been entitled to receive dependency benefits for his four legally adopted children and that this fact should be taken into account.

8. In a response dated 14 April 2015, the Management Evaluation Unit (MEU) concluded that the decision to recover overpayments made in connection to Mr. Ngoga's failure to report the change of his wife's dependency status was made in accordance with the relevant rules and guidelines and was therefore lawful.

9. In October 2015, Mr. Ngoga applied for retroactive dependency benefits for his adopted children.

10. The Chief Human Resources Officer, UNMISS, responded to Mr. Ngoga on 1 November 2015 referring to the MEU decision dated 14 April 2015 and informing Mr. Ngoga that, as he had not followed the instructions of Section 1.9 of Administrative Instruction ST/AI/2011/5 (Dependency status and dependency benefits), had submitted conflicting documents concerning the age of his children and had not made a written claim within the time limits of Staff Rule 3.17 on Retroactivity of Payments, UNMISS was "not able to consider [his] request for post-facto consideration of dependency allowance benefits in respect of [his] children".

11. In his response dated 5 November 2015, Mr. Ngoga provided further information on his adopted children and reiterated his "request for special consideration to process retroactively [his] application for dependency benefit for [his] adopted children to enable [him] to refund the claimed overpayment". The Chief Human Resources Officer, UNMISS, replied to Mr. Ngoga on 25 January 2016 informing him that UNMISS was unable to exceptionally consider his request.

12. On 28 January 2016, Mr. Ngoga requested mediation assistance from the Ombudsman.

13. On 11 May 2016, Mr. Ngoga requested management evaluation of the UNMISS decision to deny his request for retroactive dependent child benefits. His request was found not receivable by letter dated 12 May 2016.

14. On 6 April 2017, Mr. Ngoga filed an application with the UNDT contesting the decision dated 25 January 2016. In the application, Mr. Ngoga's counsel characterized the contested decision as follows:

- a) The decision emanated from the claimed overpayment of dependency benefits for our client's spouse, Ms. Peace Ngoga, and the subsequent recovery of the monies by deducting funds from our client's pension.

b) [...] the decision of UNMISS in declining to consider our client's dependants (sic) benefits claim on behalf of his adopted children.

c) Our client requested that he claim dependency benefits retroactively for his adopted children, which he had not done during his stay with the [United Nations]. Our client had a right to receive those benefits on behalf of his children[. I]n view of the fact that he could not claim on behalf of his spouse, he requested that he claim on behalf of his children retroactively to offset the claimed overpayment.

15. On 8 May 2017, the Secretary-General filed a motion for summary judgment in which he argued that the application was not receivable *ratione materiae*.

16. The Secretary-General filed a reply to Mr. Ngoga's application before the UNDT on 15 May 2017.

17. The Dispute Tribunal decided, in accordance with Article 16(1) of the Dispute Tribunal's Rules of Procedure, that an oral hearing was not required in determining the preliminary issue of receivability in this case and that it would rely on the parties' pleadings.

18. The UNDT rendered its Judgment on 14 July 2017, rejecting the application as non-receivable. The UNDT considered that the two decisions properly before it for adjudication were (i) the decision affirmed by the MEU on 14 April 2015 to recover overpayments made in connection with Mr. Ngoga's failure to report a change in his wife's dependency status, and (ii) the decision by the UNMISS Chief Human Resources Officer dated 25 January 2016 informing Mr. Ngoga that UNMISS was unable to exceptionally consider his request for retroactive payment of dependency benefits for his adopted children. The UNDT found that since Mr. Ngoga had failed to file an application challenging the first decision within the applicable time limits, that aspect of his claim was not receivable. With respect to the second decision, the UNDT considered that he had failed to request management evaluation within the 60-calendar day time limit under Staff Rule 11.2(c) which had started to run from 25 January 2016 and his request for management evaluation dated 11 May 2016 had thus been time-barred. The UNDT found that the mediation efforts initiated by Mr. Ngoga did not automatically extend the deadline for seeking management evaluation as this time limit may only be extended by decision of the Secretary-General and an inference of such a decision from the Ombudsman's participation in the settlement negotiations is precluded by the fact that the MEU explicitly rejected Mr. Ngoga's management evaluation request as belated on 12 May 2016.

Submissions

Mr. Ngoga's Appeal

19. Mr. Ngoga submits that the UNDT erred in law and fact in finding that his application was time-barred as “he was attempting to have the matter resolved by engaging the Ombudsman and the Under[-]Secretary[-]General [for] Management”. He submits that the rejection of his application for dependency benefits for his adopted children was communicated to him on 25 January 2016 and only three days later, on 28 January 2016, he contacted the Office of the Ombudsman, suggesting, *inter alia*, to offset the repayment of the claimed overpayment of dependency benefits for his spouse with the dependency benefits for his adopted children to which he “would have been entitled”. Mr. Ngoga claims to have been subsequently “actively engaged” in finding a solution with the Office of the Ombudsman and argues that the UNDT failed to take into consideration the considerable delay caused by the Ombudsman’s late response in July 2016 to his request for advice on the way forward.

20. Mr. Ngoga further asserts that “[t]he (...) Dispute Tribunal committed an error in procedure, such as to affect the decision of the case when it failed to properly evaluate the evidence brought before it”. The UNDT “clearly ignored the fact that [he] was not in fact doing nothing but was trying to seek the [O]mbudsman’s efforts to resolve his case”. In addition, the UNDT erred in its conclusion that an inference of an extension of the time limit due to the Secretary-General’s participation in the settlement negotiations was belied by the fact that the MEU rejected his request as belated. In fact, the MEU rejected his request on the basis of lack of evidence and not for late filing.

21. In light of the foregoing, Mr. Ngoga requests that the Appeals Tribunal grant the appeal and vacate the UNDT Judgment in its entirety.

The Secretary-General's Answer

22. The Secretary-General submits that the UNDT correctly concluded that Mr. Ngoga’s application was not receivable. The MEU had notified Mr. Ngoga on 14 April 2015 that it considered the first decision to recover overpayments to be lawful and he submitted his application to the UNDT challenging this decision as late as 6 April 2017 and thus almost two years after the 90-day time limit prescribed in Article 8(1)(d)(i) of the UNDT Statute and Staff Rule 11.4(a) had expired. Regarding the second decision denying dependency allowance for

his adopted children, the UNDT correctly held that Mr. Ngoga had failed to seek management evaluation of the decision of which he had been notified on 1 November 2015 within the 60-day time limit as contained in Staff Rule 11.2(c) because he submitted his request for management evaluation as late as 11 May 2016.

23. Moreover, the Secretary-General submits that Mr. Ngoga's arguments are without merit. Pursuant to the Appeals Tribunal's case law, mediation has to be pursued within the time limit for filing an application with the UNDT. Therefore, the statutory time limit for filing an application against the decision to recover overpayments was "not extended by the fact that [Mr. Ngoga] wrote to the Office of the Ombudsman seeking mediation and proposing a repayment plan on 28 January 2016, more than half a year after the deadline had expired". With regard to the second contested decision denying dependency allowance for the adopted children, the UNDT did in fact consider that Mr. Ngoga had approached the Office of the Ombudsman but correctly concluded that mediation efforts do not automatically extend the deadline for seeking management evaluation and that Mr. Ngoga had failed to file for management evaluation or request an extension of the time limit for such a request. The UNDT correctly found that the inference of an implicit extension of the time limit due to a participation of the Secretary-General in settlement negotiations was "belied by the fact that [the] MEU on 12 May 2016 refused the management evaluation request as belated, without any reaction from [Mr. Ngoga]" who "waited (...) almost one year after receiving the management evaluation decision [] to file his [a]pplication with the UNDT".

24. Based on the foregoing, the Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

25. We find that the UNDT did not err in law or fact leading to a manifestly unreasonable decision and was correct in finding that Mr. Ngoga's application was not receivable.

Decision to recover overpayments

26. We note that neither in his application to the UNDT nor in his appeal did Mr. Ngoga challenge the decision to recover overpayments with regard to dependency benefits for his wife. Under Article 2(1) of the Appeals Tribunal's Statute,

[t]he Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

27. As Mr. Ngoga has not presented any reasons why the UNDT erred in its Judgment with regard to the decision to recover payments for dependency benefits for his wife, for this reason alone his appeal must fail.

28. Further, the UNDT correctly held that his application contesting the decision to recover overpayments was not receivable *ratione temporis*. The decision was notified to him by memorandum dated 3 December 2014. While Mr. Ngoga requested management evaluation within the time limit under Staff Rule 11.2(c) on 30 January 2015, he did not respect the time limit for filing his application to the UNDT. Article 8(1) of the UNDT Statute provides as follows:

An application shall be receivable if:

- (...)
- (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and
- (d) The application is filed within the following deadlines:
 - (i) In cases where a management evaluation of the contested decision is required:
 - a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; (...)
 - (...)
- (iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

29. Article 8(1)(d)(i)(a) of the UNDT Statute requires that an application to the UNDT be filed within 90 calendar days after the receipt of management evaluation. Mr. Ngoga, after having received the 14 April 2015 response by the MEU, waited nearly two years until filing his application to the UNDT on 6 April 2017, which is clearly outside the time limit.

30. The time limit for filing his application with the UNDT was not extended by application of Article 8(1)(d)(iv) of the UNDT Statute. Mr. Ngoga did not seek mediation until 28 January 2016 and thus not “within the deadlines for the filing of an application under subparagraph (d) of [Article 8(1) of the UNDT Statute].”

31. Consequently, as Mr. Ngoga missed the time limits by more than a year, his application was clearly irreceivable.

Decision to reject retroactive payment of dependency allowance for Mr. Ngoga's adopted children

32. The UNDT correctly held that Mr. Ngoga's application against the decision to reject retroactive payment of dependency allowance for his adopted children was irreceivable *ratione materiae*.

33. We find that Mr. Ngoga was notified of the rejection of his request by e-mail dated 1 November 2015 and that the 25 January 2016 letter was a mere reiteration of this decision. The 1 November 2015 e-mail gave several reasons why Mr. Ngoga had no claim for dependency benefits for his adopted children and concluded that UNMISS was not able to consider the request for *post facto* consideration of dependency allowance benefits in respect of his children. The 1 November 2015 e-mail clearly constituted an unequivocal and final decision in this matter indicating that the request for dependency benefits with regard to the children had been denied. The relevant time limits for management evaluation under Staff Rule 11.2(c) consequently started to run on 1 November 2015 when Mr. Ngoga received the e-mail. The 25 January 2016 response to Mr. Ngoga's 5 November 2015 letter did not reset the clock.¹

¹ See, *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 46, citing, e.g., *Samuel Thambiah v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-385.

34. Mr. Ngoga's application was not receivable *ratione materiae* as he had failed to request management evaluation within the time limits provided in Staff Rule 11.2 which reads as follows:

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(...)

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

35. 1 November 2015 being the relevant date to trigger the time limits under Staff Rule 11.2(c), Mr. Ngoga's request for management evaluation dated 11 May 2016 was filed outside the 60-day statutory time limit. His request for mediation assistance to the Ombudsman's Office dated 28 January 2016 could not extend the time limit for seeking management evaluation, as the 60-day statutory time limit had already lapsed at the beginning of January 2016.

36. Even if we, as the UNDT did, considered the 25 January 2016 letter to be a second administrative decision triggering new time limits for a request for management evaluation, Mr. Ngoga's application would still be irreceivable *ratione materiae*. His request for mediation assistance to the Ombudsman's Office dated 28 January 2016 did not automatically extend the time limit for filing for a request for management evaluation, and the Secretary-General's participation through the Ombudsman's Office in the mediation efforts did not implicitly extend the time limit to seek management evaluation. In accordance with Staff Rule 11.2(c), the Secretary-General has discretion to extend the management evaluation deadlines "pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General". In the present case, there is no evidence that the Secretary-General indeed extended the management evaluation deadline or specified the

conditions for extending it. While this Tribunal has found in *Wu*² that under certain circumstances the Secretary-General's participation in settlement negotiations through the Ombudsman's Office may amount to an implicit extension of the time limits to seek management evaluation, it did not establish a general principle to this effect. Usually, an explicit decision of the Secretary-General in favour of the staff member is necessary before the Dispute Tribunal, which itself "shall not suspend or waive the deadlines for management evaluation" (Article 8(3) of the UNDT Statute) may conclude that the deadlines for management evaluation have been extended by the Secretary-General. Further, in the case at hand, there is no indication that settlement negotiations actually took place. A mere request for assistance from the Ombudsman's Office is not sufficient in this regard.

² *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306, para. 25.

Judgment

37. The appeal is dismissed and Judgment No. UNDT/2017/056 is hereby affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Raikos

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar