UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2018-UNAT-891

Vattapally

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2018-1184
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Appellant:	Robbie Leighton, OSLA
Counsel for Respondent:	Wambui Mwangi

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/054, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 30 April 2018, in the case of *Vattapally v. Secretary-General of the United Nations.* Mr. Sojan Vattapally filed the appeal on 29 June 2018, and the Secretary-General filed his answer on 4 September 2018.

Facts and Procedure

2. Mr. Vattapally was first employed by the Organization in 1993 in the General Service category. He resigned on 1 August 2014, and on the same day received a temporary appointment with the Office of the United Nations High Commissioner for Refugees (UNHCR) that lasted until 1 January 2015. On 1 January 2015, he resigned from UNHCR and joined the Department of Management on another temporary appointment until 12 June 2015 when he joined the United Nations Assistance to the Khmer Rouge Trials (UNAKRT), once again on a temporary appointment. On 1 September 2015, he separated from his temporary appointment at UNAKRT and was re-appointed as Chief of Budget and Finance P-4 under a fixed-term appointment with the same organization. It is undisputed that there has not been a day between 2 August 1993 and the date of filing this appeal when Mr. Vattapally has not held an appointment with the Organization.

3. Not long after taking up his fixed-term appointment in September 2015, Mr. Vattapally requested UNAKRT to pay him mobility allowance effective 1 September 2015 in terms of Staff Rule 3.13(i) of ST/SGB/2014/1 (Staff Regulations and Rules of the United Nations; hereinafter referred to as the former Staff Regulations and Rules) and section 2.4 of Administrative Instruction ST/AI/2011/6 (Mobility and hardship scheme) which provide *inter alia* that a non-pensionable mobility allowance may be paid to staff members in the Professional and higher categories, in the Field Service category, and to internationally recruited staff in the General Service category, provided they: a) hold a fixed-term or continuing appointment; b) are on an assignment of one year or more and are installed

at the new duty station; and c) have served for five consecutive years in the United Nations common system of salaries and allowances.[1]

4. On 10 October 2015, Mr. Vattapally was informed that although he had never taken a break in service, he was not entitled to be paid a mobility allowance because he had resigned from the Secretariat to join UNHCR, and former Staff Rule 4.17 provides that when a staff member is re-employed, service shall not be considered as continuous between the prior and new appointments. The contested decision to refuse Mr. Vattapally a mobility allowance was upheld in management evaluation on 20 January 2016.

5. On 19 April 2016, Mr. Vattapally filed an application with the UNDT contesting the decision not to pay him mobility allowance.

6. On 30 April 2018, the UNDT issued Judgment No. UNDT/2018/054, dismissing Mr. Vattapally's application. In considering what amounts to qualifying service for the grant of a mobility allowance, the UNDT held that both former Staff Rule 3.13 and Section 2.4 of ST/AI/2011/6 exclude staff members holding temporary appointments from consideration. Former Staff Rule 3.13 provides that the staff member must hold a fixed-term or continuing appointment. From this, the UNDT reasoned, the period when Mr. Vattapally held temporary appointments should not count towards the requirement of five years' prior consecutive service. Mr. Vattapally resigned in 2014 from his appointment in the General Service category, which he had held since 1993, and later received successive temporary appointments for a period of one year before being re-employed on a fixed-term appointment on 1 September 2015. Although his employment with the Organization was consecutive, part of the consecutive employment "was marked by a type of contract that does not amount to qualifying service for the purposes of being granted mobility allowance". Additionally, former Staff Rule 4.17 provides that when a former staff member is re-employed, he or she is given a new appointment and the service shall not be considered as continuous between the prior and new appointments. Consequently, the UNDT rejected Mr. Vattapally's application.

[1] In terms of Section 1.3 of ST/AI/2011/6, eligibility for the mobility allowance requires an appointment to a duty station, or a reassignment to a new duty station, for a period of one year or longer.

Submissions

Mr. Vattapally's Appeal

7. Mr. Vattapally submits that the UNDT erred in fact and law by conflating "category" of service with "type" of appointment. By failing to properly distinguish the two concepts, the UNDT misconstrued the eligibility requirements for receipt of the mobility allowance and confused them with the requirements for qualifying service. A category relates to a post and not to a type of appointment.

8. Staff members falling into one of the three categories (Professional and higher, Field Service and internationally recruited General Service) in former Staff Rule 3.13 are eligible for a mobility allowance provided that at the moment of receipt of the benefit he or she holds the specified type of appointment (fixed-term or continuing) and meets the requirement for qualifying service being service "for five consecutive years in the United Nations common system of salaries and allowances". There is no prohibition in former Staff Rule 3.13, or elsewhere in the former Staff Rules, against service on a temporary appointment counting towards the five-year requirement.

9. The only relevance of temporary service is the requirement in Section 2.4 of ST/AI/2011/6 that a staff member must not hold a temporary appointment at the time of receipt of the entitlement. The provision makes no reference to requirements for qualifying service.

10. Although Section 2.4 of ST/AI/2011/6 precluded Mr. Vattapally from receiving a mobility allowance while actually on a temporary appointment, it did not preclude service under a temporary appointment from contributing to the requirement of five years' qualifying service. Mr. Vattapally's temporary appointments were in the United Nations common system of salaries and allowances. The only issue is whether his service in that "category" was "consecutive".

11. The UNDT erred in law by failing entirely to address his principal arguments contained in the pleadings. In particular, the UNDT provided no explanation as to why Section 2.4 of ST/AI/2011/6—which relates to the "type" of appointment—should be construed as acting upon a requirement for service in a particular "category". While a reasoned decision does not need to discuss every particular plea that is advanced by a party,

a judgment must not be so deficient in reasoning as to amount to a denial of the right to a fair hearing.

12. Mr. Vattapally further submits that the use of the word "consecutive" instead of "continuous" in former Staff Rule 3.13 demonstrates that a different meaning was intended and the two words do not bear the same meaning in normal usage. Mr. Vattapally's service with the Organization was "consecutive" and, as such, former Staff Rule 4.17, which relates to the issue of whether service was "continuous", is irrelevant to the present case. Mr. Vattapally maintains that "continuous" service is not a requirement for mobility allowance articulated in former Staff Rule 3.13 and ST/AI/2011/6.

13. Mr. Vattapally requests that the Appeals Tribunal a) overturn the UNDT's finding that his service on a temporary appointment could not count towards the requirement of five years' prior consecutive service for the purposes of mobility allowance; and b) grant him a mobility allowance.

The Secretary-General's Answer

14. The Secretary-General submits that Mr. Vattapally has not established any error on questions of law or fact by the UNDT warranting reversal of the Judgment.

15. Mr. Vattapally maintains the same arguments that he made before the UNDT. Specifically, he maintains his argument that the Administration, and subsequently the UNDT, conflated the "category" of service with the "type" of appointment in determining his eligibility for a mobility allowance. Mr. Vattapally also reiterates his arguments concerning the consecutive nature of his service to the Organization. The Appeals Tribunal has consistently held that it is not sufficient for an appellant to merely state that he disagrees with the UNDT's decision and to repeat the arguments that did not succeed in the lower court. Accordingly, consistent with its well settled jurisprudence, the Appeals Tribunal should, on this basis alone, dismiss Mr. Vattapally's appeal.

16. Moreover, the UNDT concluded, upon review of former Staff Rule 3.13(a) and the relevant provisions of ST/AI/2011/6 governing eligibility and qualifying service for the granting of a mobility allowance, that "staff members holding temporary appointments are not eligible to receive mobility allowance" and the period when Mr. Vattapally held temporary appointments was therefore excluded in the count towards the requirement of five years' prior

consecutive service. It is not clear what more Mr. Vattapally expected the UNDT to opine on in order for the Judgment to be considered a "reasoned decision". Simply because Mr. Vattapally disagrees with the UNDT's findings does not automatically render the Judgment "deficient in reasoning as to amount to a denial of the right to a fair hearing".

17. The Secretary-General contends that the contractual break in service resulting from Mr. Vattapally's resignation from service severed the contractual relationship that he had with the Organization, notwithstanding that he did not take a *temporal* break in service. Moreover, Mr. Vattapally's contractual status during the period between his resignation as a General Service staff and his appointment on a fixed-term appointment as a staff member in the Professional category did not constitute qualifying service under the legislative framework in place at the time. Accordingly, the UNDT correctly held that while the "employment (...) was consecutive", the part of the "consecutive employment was marked by a type of contract that [did] not amount to qualifying service for the purposes of being granted mobility allowance".

18. As for Mr. Vattapally's argument that his service as a staff member in the General Service category from August 1993 to July 2014 should be considered as qualifying service under the exceptional provisions in Section 2.6(c) of ST/AI/2011/6 because he was granted a mobility allowance prior to August 2014, the Secretary-General does not dispute that Mr. Vattapally qualified for a mobility allowance prior to August 2014. However, once he resigned on 1 August 2014 and was re-employed by the Organization on successive temporary appointments, the period that he served on these temporary appointments did not qualify as consecutive service for the purposes of a mobility allowance.

19. The Secretary-General requests the Appeals Tribunal to reject Mr. Vattapally's appeal in its entirety.

Considerations

20. The submission by the Secretary-General that it is not sufficient for Mr. Vattapally to merely disagree with the UNDT's decision and to repeat the arguments that did not succeed in the lower tribunal is misplaced. Mr. Vattapally explicitly asserts that the UNDT erred in law by incorrectly interpreting the relevant provisions. The appeal is one contemplated in Article 2(1)*(c)* of the Statute of the Appeals Tribunal (Statute).

21. The questions for decision are whether: i) Mr. Vattapally fell within the eligibility criteria for mobility allowance; and ii) the UNDT erred in law and fact in interpreting the relevant provisions to exclude him from eligibility.

22. Former Staff Rule 3.13 provides:

> (a) A non-pensionable mobility allowance may be paid under conditions established by the Secretary-General to staff members in the Professional and higher categories, in the Field Service category, and to internationally recruited staff in the General Service category pursuant to staff rule 4.5 (c), provided that they:
>
> (i) Hold a fixed-term or continuing appointment;
>
> (ii) Are on an assignment of one year or more and are installed at the new duty station; and
>
> (iii) Have served for five consecutive years in the United Nations common system of salaries and allowances.

23. The requirements for eligibility are straightforward. Firstly, the staff member at the time of receiving the benefit must be a staff member falling into one of the following three categories: i) Professional and higher; ii) Field Service; or iii) internationally recruited staff in the General Service category. Secondly, the staff member must hold a fixed-term or continuing appointment. Thirdly, the staff member must be on an assignment of one year or more and be installed at the new duty station. Fourthly, the staff member must have served for five consecutive years in the United Nations common system of salaries and allowances.[2]

24. It is common cause that when Mr. Vattapally applied for mobility allowance in October 2015, he was employed by UNAKRT in the professional category as Chief of Budget and Finance at the P-4 level. It is therefore indisputable that he met the first criterion of eligibility. It is also not contested that his type of appointment was a fixed-term contract. He accordingly satisfied the second requirement of eligibility. Likewise, he was on assignment of more than a year and was installed at his new duty station. The only question then is whether at the time he applied for a mobility allowance he met the fourth criterion by having "served for five consecutive years in the United Nations common system of salaries and allowances".

[2] Sections 1.2 and 1.3 of ST/AI/2011/6 repeat exactly the same eligibility criteria.

25. It may be recalled that Mr. Vattapally has held an appointment with the Organization without any temporal interruption since 1993. He has been employed in different categories (General Service and Professional) and held different types of appointment (fixed-term, continuing and temporary). There has been no time in the past 25 years where he has not held an appointment.

26. The UNDT found that although Mr. Vattapally's employment with the Organization was consecutive, part of the consecutive employment "was marked by a type of contract that does not amount to qualifying service for the purposes of being granted mobility allowance". Likewise, the Secretary-General contends that the contractual break in service resulting from Mr. Vattapally's resignation from service severed the contractual relationship that he had with the Organization, notwithstanding that he did not take a temporal break in service and that his contractual status during the period between his resignation as a General Service staff member and his appointment on a fixed-term appointment as a staff member in the Professional category did not constitute qualifying service.

27. While former Staff Rule 3.13 requires that a staff member be employed in a particular category (Professional, Field Service or internally recruited General Service) and hold a fixed-term or continuing appointment when applying for the benefit, there appears to be no prohibition in former Staff Rule 3.13(a)(iii) against service on a temporary appointment counting towards the qualifying requirement of five years of consecutive service. Mr. Vattapally concedes that by virtue of the provisions of former Staff Rule 3.13(a)(i) he would not have been eligible for mobility allowance while holding temporary appointments during August 2014 and September 2015 - the allowance is payable only to the holders of fixed-term or continuing appointments. However, former Staff Rule 3.13(a)(iii) says nothing at all about the type of prior service which qualifies as service by current holders of fixed-term or continuing appointments eligible for mobility allowance. The only requirements are that their prior service be: i) consecutive; ii) for five years; and iii) in the United Nations common system of salaries and allowances.

28. There can be no doubt on the evidence that in the five years before applying for the mobility allowance Mr. Vattapally was in service in the United Nations common system of salaries and allowances. The only question is whether his employment under a temporary type of appointment (between 1 August 2014 and 1 September 2015) had the consequence of rendering his service non-consecutive. The UNDT held that it did because temporary

appointments, in its view, did not amount to qualifying service. But, as just intimated, there is no such requirement. The reasoning of the UNDT conflates the eligibility requirement in former Staff Rule 3.13(a)(i), which allows mobility allowances to be granted only to staff members holding fixed-term or continuing appointments, with the eligibility requirement in former Staff Rule 3.13(a)(iii), which requires distinctly that the applicant for mobility allowance have five years' consecutive service. These are different requirements; and there is no legal basis for modifying the express language of former Staff Rule 3.13(a)(iii) to introduce a requirement that consecutive service be of a particular type.

29. The reasoning of the UNDT and the submission of the Secretary-General are partly predicated upon their understanding of former Staff Rule 4.17. Former Staff Rule 4.17 reads:

> (a) A former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18.
>
> (b) The terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments.
>
> (c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances less than 12 months after separation, the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave shall be adjusted so that the number of months, weeks or days of salary to be paid at the time of the separation after the new appointment, when added to the number of months, weeks or days paid for prior periods of service, does not exceed the total of months, weeks or days that would have been paid had the service been continuous.

30. Former Staff Rule 4.17 deals with the general consequences of re-employment and is not directly related to former Staff Rule 3.13 which is concerned with the special requirements for mobility allowance. Former Staff Rule 4.17 provides that re-employment will generally not lead to service being regarded as continuous presumably for the purpose of determining benefits, seniority and so on. The eligibility for mobility allowance under former Staff Rule 3.13 is dealt with differently however. Former Staff Rule 3.13 recognized that persons who worked consecutively for five years or more in the United Nations common system deserve to benefit from this special allowance, even when they are re-employed, provided they have remained in consecutive service. The entitlement is not defined by the

legal nature and commencement of the staff member's contractual arrangement with the Organization; it is defined by the fact that the staff member had been in service of the Organization for a relatively lengthy period. The general provisions of former Staff Rule 4.17 do not limit the meaning of the specific provisions governing mobility allowances – *generalia specialibus non derogant*.

31. Additionally, the use of the word "consecutive" instead of "continuous" in former Staff Rule 3.13(a)(iii) demonstrates that a different meaning was intended. The two words do not bear the same meaning in normal usage. Consecutive means proceeding in logical sequence or occurring adjacently. Continuous means uninterrupted in time or sequence. While it is correct that Mr. Vattapally's service arguably may not have been continuous by reason of the interruption of his successive contracts, his service was consecutive in that his service proceeded in sequence without any chronological intermission. To repeat: the requirement under former Staff Rule 3.13 was not five years of continuous service but five years of consecutive service. Mr. Vattapally's service with the Organization was consecutive and, as such, former Staff Rule 4.17, which relates to the continuity of service, is for present purposes irrelevant. Continuous service was not a requirement for mobility allowance under former Staff Rule 3.13 and ST/AI/2011/6.

32. Moreover, the Administration has acknowledged that there is a difference between a requirement of consecutive service and one of continuous service. It has recently amended Staff Rule 3.13 to change the requirements for eligibility and to give effect to its preferred policy to limit the entitlement to mobility allowance to staff members in continuous service on fixed-term or continuing appointments. Rule 3.13(a)(iii) was amended and substituted in ST/SGB/2018/1 (the new Staff Regulations and Rules) to specifically provide that from now on five years or more of "continuous service on a fixed-term or continuing appointment" is required.[3] The amendment is not retrospective and has no bearing upon Mr. Vattapally's eligibility for mobility allowance in October 2015 under former Staff Rule 3.13.

33. In sum, therefore, although former Staff Rule 3.13 and Section 2.4 of ST/AI/2011/6 precluded Mr. Vattapally from receiving a mobility allowance while actually on a temporary appointment, they did not preclude service under a temporary appointment from

[3] Rule 3.13(a)(iii) of ST/SGB/2018/1 now reads: "(iii) Have served five years or more of continuous service on a fixed-term or continuing appointment in the United Nations common system of salaries and allowances."

contributing to the qualifying requirement of five years' consecutive service once he held a fixed-term appointment. The type of appointment (fixed-term, continuing or temporary) is of no relevance to the enquiry under former Staff Rule 3.13(a)(iii). The type of appointment is only relevant under former Staff Rule 3.13(a)(i). As explained, and to repeat, the sole criterion under former Staff Rule 3.13(a)(iii) is that the prior five years' consecutive service should be in the United Nations common system of salaries and allowances. Mr. Vattapally's temporary appointments were indeed such and thus when he applied for a mobility allowance he satisfied all four of the then existing criteria of eligibility.

34. The contested decision is accordingly wrong and invalid. The UNDT hence erred in holding otherwise and by excluding the periods of temporary appointments from the calculation of consecutive service as contemplated in former Staff Rule 3.13(a)(iii). It follows that the appeal must succeed and the contested decision rescinded in terms of Article 9(1) of the Statute.

35. Mr. Vattapally requests this Tribunal to grant the mobility allowance. There is no basis for that relief. Former Staff Rule 3.13(b) provides:

> (b) The amount of mobility allowance, if any, and the conditions under which it will be paid, shall be determined by the Secretary-General taking into account the length of the staff member's continuous service in the United Nations common system of salaries and allowances, the number of duty stations at which he or she has previously served for a period of one year or longer and the hardship classification of the new duty station to which the staff member is assigned.

36. The Secretary-General has not determined or made any decision about the conditions under which a mobility allowance will be paid to Mr. Vattapally. Consequently, the only order of specific performance that can be made is an order directing the Secretary-General to exercise his discretion under former Staff Rule 3.13(b).

Judgment

37. The appeal is upheld and Judgment No. UNDT/2018/054 is hereby vacated and modified as follows:

1. The contested decision of 10 October 2015 is rescinded.

2. The Secretary-General is directed to make a decision in terms of former Staff Rule 3.13(b) in relation to Mr. Vattapally's application for a mobility allowance.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

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

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar