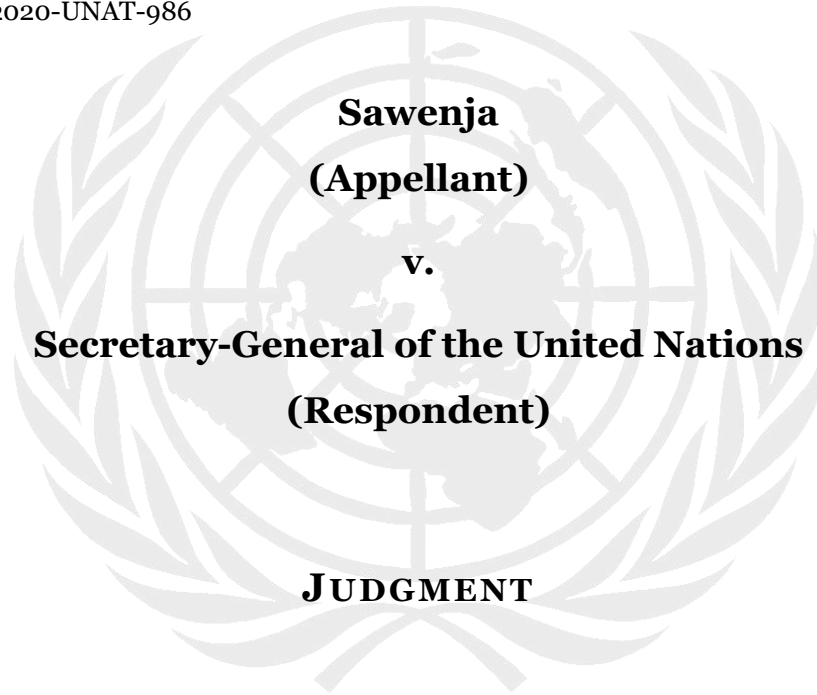




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-986



**Sawenja
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Sabine Knierim Judge Kanwaldeep Sandhu
Case No.:	2019-1288
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Mr. Sawenja:	Self-represented
Counsel for Secretary-General:	Maryam Kamali

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Nelson Waswa Sawenja¹ contested the decision by the United Nations Office for Project Services (UNOPS) to terminate the individual contractor agreement (ICA) between him and UNOPS and the decision by the United Nations Development Programme (UNDP) to recover money from him. The United Nations Dispute Tribunal in Nairobi (UNDT or Dispute Tribunal) dismissed Mr. Sawenja's application as irreceivable. For reasons set out below, we affirm.

Facts and Procedure

2. Mr. Sawenja was employed on 19 July 2005 by UNDP as a procurement assistant with UNDP Sudan under an appointment of limited duration. Effective 15 January 2008, he started working for UNDP Kenya under a fixed-term appointment, first as a procurement assistant and later as a human resources assistant.

3. In March 2015, the Office of Audit and Investigations (OAI), UNDP, received allegations of procurement improprieties implicating various UNDP Kenya staff members with travel and procurement related functions.

4. On 13 March 2015, Mr. Sawenja was notified that the OAI had started an investigation into allegations that he might have failed to disclose conflicts of interest, in that he had utilized his office for gain, colluded with vendors to engage in anti-competitive schemes and deviated from Financial Regulations, Rules and Procedures. In the same letter, Mr. Sawenja was also notified that he was being investigated for possible entitlements fraud and for falsely submitting a final thesis partially funded by UNDP as his own work.

5. The documents on file show that, effective 1 April 2016, Mr. Sawenja entered into an ICA with UNOPS Kenya, to work as a procurement officer for three months through 30 June 2016. Annex A to the ICA stated that “[t]h Individual Contractor shall have the legal status of an independent contractor vis-à-vis UNOPS, and shall not be regarded, for any purpose, as a staff member of UNOPS or any other entity of the United Nations”. It appears that this ICA was concluded between UNOPS and Mr. Sawenja while the latter was still in UNDP Kenya's employ as a human resources assistant.

¹ In the impugned UNDT Judgment, the Applicant's name in English was spelled as “Sawenjah”. We, however, adopt the English spelling of “Sawenja” that the Appellant uses in his appeal form.

6. On 13 April 2016, Mr. Sawenja resigned from UNDP Kenya.
7. Mr. Sawenja's ICA with UNOPS was subsequently renewed twice for a total of two years from 1 July 2016 through 30 June 2018.
8. Under cover of a letter dated 20 July 2017, the Deputy Director, OAI/UNDP, sent Mr. Sawenja two draft OAI investigation reports with related exhibits regarding the allegations of educational entitlements fraud and allegations of procurement fraud, and invited him for his comments. Mr. Sawenja provided his comments on 22 August 2017 and 15 September 2017.
9. In a memorandum dated 29 November 2017 to Mr. Sawenja, the Deputy Executive Director, UNOPS, referred to the conclusions in the two UNDP investigation reports that Mr. Sawenja had committed procurement fraud and forgery while in UNDP Kenya's employ. Noting that Mr. Sawenja had been involved in the procurement exercises for UNOPS' award of contracts to two of the vendors mentioned in the UNDP investigation reports, the Deputy Executive Director of UNOPS decided to place Mr. Sawenja on administrative leave with pay, as his conduct might pose a threat to the best interest of the Organization.
10. In a letter dated 14 March 2018, UNOPS charged Mr. Sawenja with committing procurement fraud, breaching conflict of interest rules, and committing entitlements fraud while he was employed by UNDP. UNOPS noted that the alleged misconduct had occurred while Mr. Sawenja worked for UNDP, but because he had subsequently moved to UNOPS, it was UNOPS' responsibility to conduct the disciplinary proceedings. On 11 April 2018, Mr. Sawenja submitted his response to the allegations of misconduct.
11. In a letter dated 26 March 2018, the Director, Legal Office, UNDP, informed Mr. Sawenja of the outcome of the review of the investigation into the allegations of fraud, misrepresentation, forgery and false certification against him. UNDP found that Mr. Sawenja had failed to maintain the standards of integrity required of him as a staff member in connection with seeking to receive the Educational Assistance Programme funds from UNDP by certifying that he had completed academic work that he knew was not his own. However, as he was no longer an UNDP staff member, Mr. Sawenja was not subject to disciplinary proceedings. Nonetheless, the Director advised Mr. Sawenja that UNDP would recommend a

recovery of USD 1,095.96 from him, which represented 50 per cent of his tuition fees for the fraudulently submitted dissertation subject.

12. By letter dated 4 May 2018, the UNOPS Deputy Executive Director informed Mr. Sawenja of the decision to terminate the ICA between UNOPS and him with immediate effect, given the serious nature of his misconduct, having considered, *inter alia*, his 14 years of service, the letters of recommendation and his performance evaluation, among other things.

13. On 31 July 2018, Ms. Sawenja filed with the Dispute Tribunal an application contesting two decisions: the termination by UNOPS of his ICA, and the “deduction of money” by UNDP. He did not request management evaluation of those two decisions.

14. In Judgment on Receivability No. UNDT/2019/082 issued on 13 May 2019, the Dispute Tribunal rejected Ms. Sawenja’s application as not receivable. Regarding UNOPS’ decision to terminate Mr. Sawenja’s ICA, the UNDT found that his application was not receivable, because he was an individual contractor, and not a staff member of UNOPS or any other entity of the Organization, and therefore had no *locus standi* before the Dispute Tribunal in relation to the termination decision. As for the decision to recover money from Mr. Sawenja, the Dispute Tribunal found that his application was also not receivable, because he, as a former UNDP staff member, had failed to request management evaluation of the contested decision, and the UNDT could not consider the merits of his case absent a request for management evaluation.

15. Mr. Sawenja appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal) on 12 July 2019. The Secretary-General filed his answer on 20 September 2019.

Submissions

Mr. Sawenja’s Appeal

16. Mr. Sawenja’s single intermittent two-month Skype discussion might have had a potential for creating a possible conflict of interest and demonstrated a poor judgment on his part, but it did not warrant such a punitive punishment, as his actions did not amount to serious misconduct.

17. Mr. Sawenja responded to both the UNDP and UNOPS reports at the same time, and he was twice punished by those two entities on the basis of the same allegations of misconduct. That was a double unwarranted punishment and a violation of his human rights. UNOPS took the action against him in bad faith in order to appease UNDP, which had failed to conduct due diligence, and whose investigation report was prejudicial and full of innuendos and ridiculous findings.

18. The Dispute Tribunal erred in rejecting his application on the ground that he had failed to request a management evaluation. He filed his application with the UNDT directly pursuant to the Staff Rule, under which a staff member is not required to request a management evaluation following the completion of a disciplinary process.

19. Mr. Sawenja requests that the Appeals Tribunal find his case receivable, hold oral hearings and order the production of all documents upon which UNDP and UNOPS relied. He also requests that the Appeals Tribunal rescind the contested decisions, order his reinstatement and back pay retroactively from the date of termination of his ICA, and award him 10 years' net base salary as compensation for his actual, consequential and moral damages and USD 12,000 as compensation for the expenses that he has incurred.

The Secretary-General's Answer

20. The Dispute Tribunal correctly concluded that Mr. Sawenja's application was not receivable *ratione personae* with respect to the termination of his ICA with UNOPS under Article 2(1) of its Statute, because he, as an individual contractor, did not have standing under Article 3 of its Statute. In his appeal, Mr. Sawenja does not address this aspect of the UNDT Judgment, but he reiterates the exact same arguments he made in his UNDT application. His appeal should be dismissed as not receivable under Article 2 of the Statute of the Appeals Tribunal.

21. The Dispute Tribunal correctly concluded that Mr. Sawenja's application was not receivable *ratione temporis* with regard to the deduction of money by UNDP. In his appeal, Mr. Sawenja claims that the exception mentioned in Staff Rule 11.2(b) applies to his case because he deems the actions taken by UNDP to be the result of a disciplinary process, thus obviating the need for him to request a management evaluation. This is not correct. The UNDP decision to recover money from Mr. Sawenja was taken not as a result of any

disciplinary process, because he had resigned from UNDP on 13 April 2016, and the decision was conveyed to him in a letter of 26 March 2018. Mr. Sawenja has failed to establish that his UNDT application falls under the exception to the requirement for a request for management evaluation.

22. Even if it were accepted that Mr. Sawenja did not need to request a management evaluation in respect of the deduction decision and could directly bring his case to the UNDT, his application was still not timely. Mr. Sawenja received the decision to recover USD 1,095.96 from him on 26 March 2018, and he should have filed his UNDT application within 90 days, i.e., by 25 May 2018, but did not do so until 31 July 2018, which was over one month late. Moreover, he did not request a suspension or waiver of the deadlines for filing an application with the Dispute Tribunal.

23. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the impugned Judgment.

Considerations

Oral hearing

24. As a preliminary matter, Mr. Sawenja requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute and Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules). The legal issue arising from the UNDT Judgment is related to the receivability of Mr. Sawenja's application and is in no way related to the merits of his claims. Therefore, at this stage, there is no point in holding a hearing to clarify the factual issues raised by Mr. Sawenja. Any hearing on the matter would have only possibly been necessary, had the application been received and, in any event, it would have been held by the UNDT, which is the normal procedure for the first instance fact-finding. Thus, the request for an oral hearing is denied.

Merits

25. The main issue in the present case is to determine whether the UNDT erred in law in finding Mr. Sawenja's application non-receivable (i) *ratione personae*, since he was an Individual Contractor when working for UNOPS (not a staff member/former staff member of the United Nations) and, therefore, had no standing before the UNDT; and

(ii) *ratione materiae*, since he had not requested management evaluation of the decision to deduct money as a result of the investigation report by the UNDP.

Receivability ratione personae of the application by the UNDT

26. Mr. Sawenja was working for UNOPS in Kenya as an individual contractor from 1 April 2016 to 4 May 2018, when his contract was terminated with immediate effect, following the allegations of misconduct while he was a staff member of UNDP, the decision to place him on administrative leave with pay, and, finally, the decision to terminate the ICA between Mr. Sawenja and UNOPS.²

27. With regard to the issue of individual contractor filing applications before the internal justice system, our jurisprudence is well established in the sense that, according to its Statute, the UNDT's jurisdiction is limited to cases brought by a) a staff member, b) a former staff member and c) any person making claims in the name of an incapacitated or deceased staff member of the United Nations. An individual contractor is not a staff member and does not have standing before the UNDT, in accordance with Articles 2(1) and 3(1) of the UNDT Statute.³

28. Indeed, Article 2 of the Dispute Tribunal Statute broadly sets out those matters which the Dispute Tribunal is competent to hear and pass judgment upon. In addition to applications against administrative decisions imposing disciplinary measures, and applications seeking enforcement of implementation of agreements reached through mediation, Article 2(1) provides, in relevant part, that:

... The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and

² UNOPS based its termination decision on the confirmation that it had received from the Executive Office of the Secretary-General of the United Nations that UNOPS should conduct the disciplinary proceedings over the misconduct allegedly committed by Mr. Sawenja while he was a staff member in the UNDP's employ, because he had moved from UNDP to UNOPS to become an individual contractor.

³ *Prempeh v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-904, paras.15-21.

rules and all relevant administrative issuances in force at the time of the alleged non-compliance[.]

29. Article 3(1) of the Dispute Tribunal Statute provides, in pertinent part, as follows:

... An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

30. In situations such as the present one, the terms of the individual contractor agreement signed by Mr. Sawenja are unequivocal. Article 6.1, under the subtitle “Legal status of the individual contractor” provides that “[t]he individual contractor shall have the legal status of an independent contractor *via-à-vis* UNOPS, and shall not be regarded, for any purpose, as a staff member of UNOPS or any other entity of the United Nations (...) under the Staff Regulations and Rules of the UN (...) Accordingly, nothing within or relating to this Agreement shall be interpreted as establishing a relationship of employer and employee, or of principal and agent, between UNOPS and the Individual Contractor.”

31. Therefore, having been an individual contractor and not a staff member, Mr. Sawenja did not fall under any of the categories of potential applicants and had no standing before the UNDT. In light of the above, the Appeals Tribunal is not permitted to assess any evidence or argument regarding the merits of Mr. Sawenja’s claims, however justified they might be.⁴ While the Appeals Tribunal notes the lack of judicial recourse within the Organisation’s internal justice system for situations such as the present one, where the person is not considered a staff member but an individual contractor, we acknowledge that this lack of judicial recourse is a matter for the General Assembly, and not this Tribunal. For this reason, having due regard for the interests of the Organisation, we refer the matter to the attention of the President of the General Assembly for consideration and possible action.

⁴ *Reda (Ben Osmane) v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-871, para. 14; *Ghahremani v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-171, paras. 28-29.

Receivability ratione materiae of the application by the UNDT

32. Mr. Sawenja previously worked for UNDP in Sudan and Kenya, first through an appointment of limited duration and later by means of a fixed-term appointment from July 2005 until April 2016. He then resigned from UNDP while investigations against him concerning allegations of improprieties were still pending. With regard to Mr. Sawenja's failure to request a management evaluation of the decision to deduct money as a result of the UNDP investigation report, we find no error in the UNDT Judgment.

33. It is true that management evaluation is not required in order to appeal a disciplinary measure imposed. This argument, however, is not valid in the present case, since the recovery of the amount from Mr. Sawenja was not a disciplinary measure; it was not imposed as a punishment for wrongdoing, but it was effected as a way for UNDP Kenya to recoup its losses. The contested administrative decision of 26 March 2018 clearly ruled out the possibility of disciplinary measures, given the fact that Mr. Sawenja had resigned from UNDP in April 2016 and thus was no longer a staff member at the time of this contested administrative decision. While there was no disciplinary measure in terms of Staff Rule 10.2, since Mr. Sawenja had already left, UNDP recommended the administrative recovery of the prejudice Mr. Sawenja had caused the Organization through his conduct or negligence. This course of action was in keeping with Staff Rule 10.2(b), which clarifies that recovery of monies owed to the Organisation is not a disciplinary measure.

34. In any event, given the circumstances of the case, there is no room for any argument of a possible double punishment. Even though the decision by UNOPS to terminate his ICA might well have been disciplinary in nature (this matter has not been the subject of appreciation by the Appeals Tribunal due to the threshold issue of receivability discussed above), the decision by UNDP to recover USD 1,095.96 from Mr. Sawenja, which represented 50 per cent of his tuition fees for the fraudulently-submitted dissertation subject, was not equal to a disciplinary measure; it was rather a mere recovery of the money to which Mr. Sawenja was not entitled.

35. Therefore, since the contested decision was an administrative decision of general nature rather than a disciplinary measure, the ordinary rule applies, namely, that management evaluation should have been requested. In these circumstances, it is the established case law that requesting management evaluation is a mandatory first step in the

appeal process.⁵ The Appeals Tribunal has noted many times that the requirement of management evaluation assures that there is an opportunity to resolve quickly a staff member's complaint or dispute without the need for judicial intervention.⁶ Neither the Dispute Tribunal nor the Appeals Tribunal has jurisdiction to waive deadlines for the filing of requests for management evaluation, or to grant any exceptions to this.⁷

36. Mr. Sawenja undoubtedly failed to comply with this requirement to request a management evaluation before filing his application before the UNDT. The UNDT Judgment contains no error in this regard.

37. Based on the aforementioned, this Tribunal finds that the UNDT did not fail to exercise its jurisdiction in not considering Mr. Sawenja's application under Article 2(2) of its Statute. Mr. Sawenja has not identified any errors of law or of fact committed by the UNDT which would warrant a reversal of its Judgment.

⁵ *Faye v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-654, para. 31; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293, para. 27.

⁶ *Vukasović v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-699, para. 13, citing *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, para. 17, in turn citing *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 22 and citations therein.

⁷ *Faust v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-695, para. 40, citing *Egglesfield v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-402, para. 23 and citations therein.

Judgment

38. The appeal is dismissed and Judgment No. UNDT/2019/082 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Halfeld, Presiding
Bournemouth, United Kingdom

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar