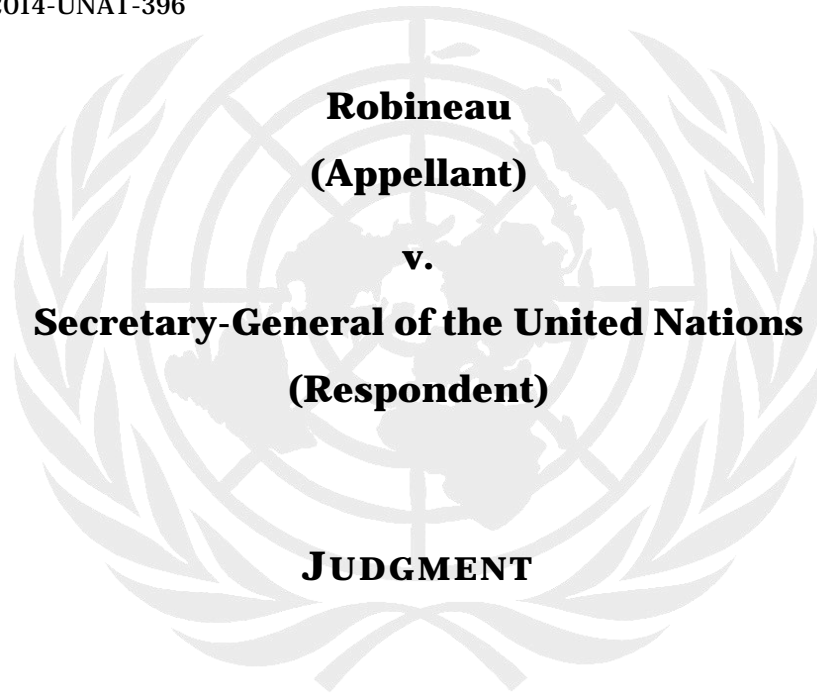




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

---

Judgment No. 2014-UNAT-396



**Robineau**

**(Appellant)**

**v.**

**Secretary-General of the United Nations**

**(Respondent)**

**JUDGMENT**

---

**Before:** Judge Mary Faherty, Presiding  
Judge Sophia Adinyira  
Judge Luis María Simón

**Case No.:** 2013-444

**Date:** 2 April 2014

**Registrar:** Weicheng Lin

---

**Counsel for Appellant:** Self-represented

**Counsel for Respondent:** Stéphanie Cartier

**JUDGE MARY FAHERTY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Patrice Simon Robineau against Judgment No. UNDT/2012/175, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 9 November 2012 in the case of *Robineau v. Secretary-General of the United Nations*. Mr. Robineau appealed on 25 January 2013 and refiled his perfected appeal on 5 February 2013. The Secretary-General answered on 8 April 2013.

**Facts and Procedure**

2. The following findings are taken from the UNDT Judgment,<sup>1</sup> which are not contested by the parties:

... Between 1989 and 2011, the Applicant was employed by the Organization under a series of fixed-term contracts. Between 1989 and 1997, he left the Organization several times upon expiration of his short-term contracts and was subsequently re-employed after short breaks in service. At the time of each of his separations from service, he received from the Organization a payment in commutation of the annual leave days he had not used, as reflected in the table below. On 1 May 1998 he was recruited under a two-year fixed-term contract which was subsequently regularly extended.

Date of entry on duty	Date of separation from service	Number of days of annual leave accrued and paid by the Organization
1 September 1989	31 July 1990	18
28 August 1990	31 July 1991	18.5
2 September 1991	31 July 1992	25
1 September 1992	31 October 1993	0
1 November 1993	31 December 1993	0
1 January 1994	16 December 1994	25.5
3 January 1995	16 December 1995	8
8 January 1996	31 July 1997	30.5

<sup>1</sup> Judgment No. UNDT/2012/175, paragraphs 3 - 8.

22 August 1997	31 December 1997	10
1 May 1998	15 April 2011	0

... On 4 April 2011, the Applicant attended a pre-retirement seminar; he then retired on 15 April 2011. On the date of his separation from service, he had a balance of 60 days of unused annual leave.

... On 7 May 2011, the Chief of the Payroll Unit informed the Human Resources Management Service (“HRMS”) of the number of annual leave days accrued but not used by the Applicant during his successive short-term contracts and paid by the Organization at the end of each of these contracts. This calculation showed that between July 1990 and December 1997, the Applicant had been paid an amount corresponding to 135.5 days of annual leave.

... By an email dated 3 June 2011, HRMS notified the Applicant that the Administration had paid him at the time of his previous separations from service the maximum entitlement (an amount corresponding to 60 days’ salary) which he could claim under staff rule 9.9 for commutation of accrued annual leave days.

... On 6 June 2011 the Applicant responded to this email expressing surprise and disappointment; he subsequently met a staff member of HRMS and the Chief of that Service to discuss the matter. By a memorandum dated 30 June and then in an email dated 28 July 2011, the Applicant requested the Chief of HRMS to explore a solution that would allow him to receive payment corresponding to the 60 days of annual leave accrued between 1 May 1998 and 15 April 2011.

... By a letter dated 20 October 2011, the Chief of HRMS informed the Applicant that the Office of Human Resources Management of the United Nations Secretariat at New York had confirmed that the calculation of annual leave days made by HRMS was correct and that no payment in commutation of the 60 days of unused annual leave could be made to the Applicant.

3. Mr. Robineau appealed. In Judgment No. UNDT/2012/175, the Dispute Tribunal considered his application receivable *ratione temporis*, but rejected it on the merits. It concluded that Mr. Robineau’s entitlement to payment for unused annual leave arose only on the day of his retirement from service, on 15 April 2011, and that the applicable law could only be the law in force on that date. The UNDT held that Mr. Robineau was statutorily entitled to payment for unused annual leave days limited to 60 days, in accordance with the applicable Staff Rules, and that the commutation payments that he had received for the period from 1989 to 1997 had to be taken into account in calculating the commutation payment, if any, that was owed to him upon his retirement in 2011. Applying Staff Rules 4.17 and 9.9, both of which were in force when Mr. Robineau retired, the Dispute Tribunal concluded that Mr. Robineau could not claim any

payment in commutation of accrued leave at the time of his retirement, as between 1989 and 1997 he had been employed continuously for the purpose of commutation payments and during that same period of time he had already received a series of commutation payments corresponding to 135.5 days of accrued leave in excess of the 60-day statutory limit.

### **Submissions**

#### **Mr. Robineau's Appeal**

4. Mr. Robineau submits that the UNDT erred in law by finding that the commutation payments in connection with his prior service between 1989 and 1997 must be taken into account in calculating commutation payments upon his retirement in 2011. In his view, none of the amendments to Staff Rule 104.3, in 1993 and 2003, were applicable to his situation and all his separations during the period from 1989 to 1997 “represented a discontinuation of service”, which explained why the Organization continued to pay, during that period, in commutation of accrued leave, after having paid him more than 60 days of unused leave.

5. Mr. Robineau further submits that the Dispute Tribunal erred in law when it failed to take into consideration the fact that the Administration had never put him on notice prior to his retirement that Staff Rule 104.3 as amended in 2003 would apply to his situation retroactively and that he would not be entitled to any commutation payments upon retirement since the payments in commutation of accrued leave had already exceeded the 60-day limit. He had in good faith accumulated 60 days of unused annual leave at the time of his retirement in April 2011.

6. Mr. Robineau therefore requests that the Appeals Tribunal rescind the UNDT Judgment and order commutation payment for his unused annual leave days upon retirement.

#### **The Secretary-General's Answer**

7. The Secretary-General submits that the UNDT correctly concluded that Mr. Robineau was not entitled to an additional payment for unused annual leave days upon his retirement, pursuant to the Staff Rules 4.17 and 9.9 in force on 15 April 2011.

8. The Secretary-General also submits that, contrary to Mr. Robineau's assertion that the previous versions of Staff Rule 4.17 operate to discontinue his contractual relationship with the Organization upon each of his separations from service from 1989 to 1997, the previous versions of Staff Rule 4.17 are not only obsolete, but also irrelevant. His entitlement to payment for unused annual leave arose on 15 April 2011. Only Staff Rule 4.17 in effect on that date, and not its previous versions, had the force of law binding on all parties on that date. The Secretary-General states that Staff Rule 4.17 in force on 15 April 2011 was not applied retroactively as Mr. Robineau claims, since it was applied to his entitlement arising from his retirement on 15 April 2011.

9. The Secretary-General further submits that Mr. Robineau's claim of reliance on his own mistaken belief does not provide a legal basis for the UNDT to order an additional payment for 60 days of unused annual leave when he had already been paid 135.5 days of commutation payments in excess of the maximum 60-day statutory limit. In this connection, the Secretary-General notes that the former Staff Rule 104.3, to which the present Staff Rule 4.7 was substantially similar in effect, was last amended in 2003. At any point in time during the eight-year period from 2003 to 2011 before his retirement, Mr. Robineau could have requested clarification regarding commutation payments, but failed to do so until after he had retired.

10. The Secretary-General therefore requests the Appeals Tribunal to affirm the UNDT Judgment and reject the appeal in its entirety.

### **Considerations**

11. The issues to be determined in this appeal are, as contended by Mr. Robineau, (i) whether the UNDT erred in disregarding the legal consequences of payments of unused leave which he received between 1989 and 1997, and (ii) whether the UNDT erred in retroactively applying Staff Rule 4.17 (previously Staff Rule 104.3, as amended on 1 January 2003) when assessing Mr. Robineau's unused leave entitlements upon his retirement on 15 April 2011.

12. As is evident from the chart set out in paragraph 3 of the UNDT Judgment, for his periods of employment between 1 September 1989 and 31 July 1992, Mr. Robineau accrued and received payment for three tranches of leave, calculated at 18 days, 18.5 days and 25 days respectively. It is noteworthy that when he received those payments, the Staff Rule in force was Rule 104.3 from ST/SGB/Staff Rules/1/Rev.7 dated 26 February 1990, which provided as follows:

Rule 104.3

Re-employment

(a) A former staff member who is re-employed shall either be given a new appointment or, if he or she is re-employed within twelve months of being separated from service or within any longer period following retirement on disability under the Joint Staff Pension Fund Regulations, he or she may be reinstated in accordance with the provisions of paragraph (b) hereunder. If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment. If the former staff member is given a new appointment, its terms shall be fully applicable without regard to any period of former service. However, such former service shall be counted for the purpose of determining seniority in grade.

13. A reading of that rule satisfies us that each of Mr. Robineau's fixed term contracts between 1 September 1989 and 31 July 1992 were deemed to be distinct and separate appointments, save for determining seniority in grade. Thus, for example, when Mr. Robineau was paid 18 days commutation of leave on 31 July 1990, there was no provision in force which provided that if he were re-employed, those 18 days would be part of the maximum 60 days to which staff members leaving their employment were entitled, pursuant to the rules then in force.

14. Between 1 January 1994 and 31 December 1997 and following the expiry of fixed-term contracts, Mr. Robineau received four payments of 25.5 days, 8 days, 30.5 days and 10 days respectively, by way of commutation of accrued annual leave.

15. The staff rule in force during those periods was Rule 104.3 as found in ST/SGB/Staff Rules/1/Rev.7/Amend.3 dated 1 January 1993 as follows:

Rule 104.3

Re-employment

(a) A former staff member who is re-employed shall be given a new appointment or, if re-employed within twelve months of being separated from service or within any longer period following retirement or disability under the Joint Staff Pension Fund Regulations, he or she may be reinstated in accordance with paragraph (b) below. If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment. If he or she is given a new appointment, its terms shall be fully applicable without regard to any period of former service, except that such former service shall be counted for the purpose of determining seniority in grade. However, where a former staff member of the United Nations common system is granted a new appointment within twelve months of separation, any entitlement, benefit or accrual the staff member may have when separated for a second time should be adjusted in

such a way that the total payments for the first and second separation do not exceed the amounts which would have been paid had the service been continuous.

16. Presumably this rule was applied to his successive fixed-term contracts in the period between 1 January 1994 and 31 December 1997 and any first and second separations within that timeframe were totaled so as to ensure that his unused leave entitlements did not exceed the maximum limit of 60 days. It is obvious that a combination of any first or second period in that time did not exceed 60 days.

17. When Mr. Robineau was re-employed on 1 May 1998, the aforementioned staff rule was still in force and remained in force until amended in January 2003 to provide as follows:

Rule 104.3

Re-employment

- (a) A former staff member who is re-employed shall be given a new appointment or, if re-employed within twelve months of being separated from service or within any longer period following retirement or disability under the Joint Staff Pension Fund Regulations, he or she may be reinstated in accordance with paragraph (b) below. If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment. If he or she is given a new appointment, its terms shall be fully applicable without regard to any period of former service, except that such former service may be counted for the purpose of determining seniority in grade. However, when a staff member receives a new appointment in the United Nations common system less than twelve months after separation, any entitlement, benefit or accrual the staff member may have when separated at the end of the new appointment shall be adjusted to ensure that the total payments for the first and subsequent separations do not exceed the amounts that would have been paid had the service been continuous.

18. Between 1989 and 1997 Mr. Robineau received payments totaling 135.5 days by way of unused leave entitlements. The Secretary-General has described a portion of these payments (that is 75.5 days) as an “administrative error” on the basis that it exceeded the maximum threshold of 60 days. Mr. Robineau maintains that the fact that no adjustment was ever made by the Administration is an indicator that in both legal and practical terms his separations from the Organization in the period from 1989 to 1997 represented a discontinuation of service. The main thrust of Mr. Robineau’s argument is that given the manner in which, on the face of it, the Administration dealt with his entitlement to unused leave in the relevant period, it should not be entitled to effectively engage in double accounting.

19. For reasons of equity and good faith we are more persuaded by Mr. Robineau's arguments than those put forward by the Secretary-General, although we do not accept the entirety of Mr. Robineau's arguments on the discontinuation issue. We are satisfied that in failing to give due consideration to the arguments raised by Mr. Robineau regarding the years 1989 to 1997, the UNDT erred in law in retroactively applying Rule 104.3 set forth in ST/SGB/2003/1 to the entirety of his service. Mr. Robineau was entitled to rely on the statutory provisions in force when he last entered the service of the Organization.

20. Thus, we are satisfied that the period of service in respect of which the cumulative counting of accrued leave for commutation should have begun, bearing in mind the continuum provided for in ST/SGB/Staff Rules/1/Rev.7/Amend.3 (in force when Mr. Robineau last entered the service of the Organization), was his service from 22 August 1997. Accordingly, we determine that the maximum accrued leave days Mr. Robineau was entitled to on his retirement on 15 April 2011 was 50, his having been paid 10 unused leave days for his period of service which immediately preceded his final entry into service with the Organization.

### **Judgment**

21. The appeal is upheld and Mr. Robineau is entitled to a payment of 50 days in commutation of annual leave not used.



Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Simón

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar