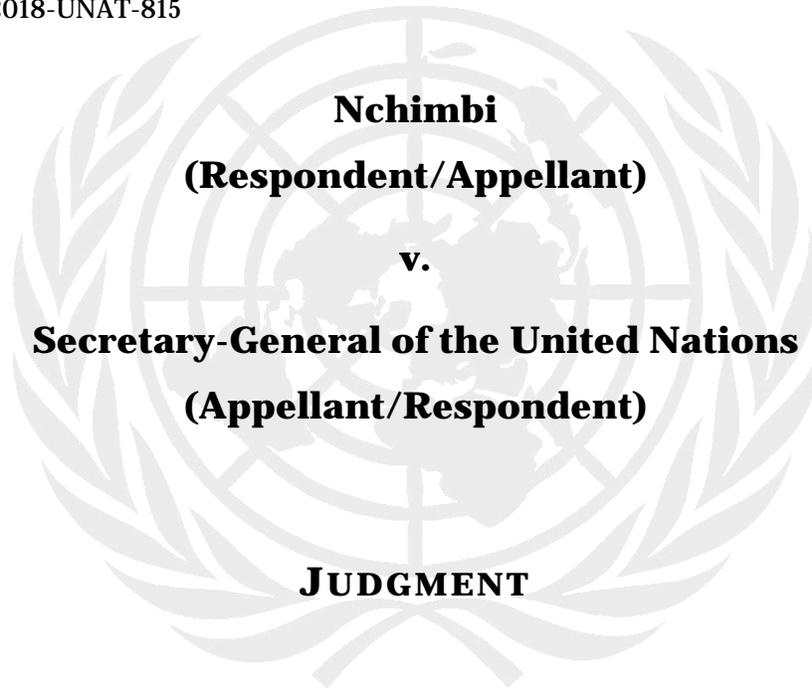




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-815



**Nchimbi
(Respondent/Appellant)**

v.

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

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case Nos.:	2017-1103 & 2017-1104
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Mr. Nchimbi:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals against Judgment No. UNDT/2017/042/Corr.1, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 16 June 2017, in the case of *Nchimbi v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 14 August 2017, which was assigned case number 2017-1103, and Mr. Optatus Henry Nchimbi filed his answer on 18 August 2017. Mr. Nchimbi filed an appeal against the same Judgment on 16 August 2017, which was assigned case number 2017-1104. The Secretary-General filed an answer on 17 October 2017.
2. On 20 October 2017, the Appeals Tribunal issued Order No. 297 (2017) consolidating the two cases.

Facts and Procedure

3. The following facts are uncontested:¹

... On 10 September 1998, the Applicant[, a former staff member of the International Criminal Tribunal for Rwanda (ICTR),] was initially appointed as a Records Clerk at the level of GL-4. At the time of his separation in December 2015, he was serving as an Information Network Assistant at the GL-6 level. The Applicant was paid his last month's salary upon separation from service on 31 December 2015.

... On 6 January 2015, the ICTR issued Information Circular No.1 to all its staff members setting forth frequently asked questions about the separation process. The circular explained, among other matters, the check-out process and the timeline for receiving final benefits, which for locally recruited staff like the Applicant, consisted of the last month's salary and the payment for the balance of accrued leave days.

... On 11 November 2015, the Property Control and Inventory Unit ("PCIU") provided the Applicant with a list of all assets assigned to him from the ICTR asset database.

... In emails sent during the period from 23 to 26 November 2015, the Applicant expressed his desire to purchase certain assets assigned to him. On 13 January 2016, the Applicant informed the Information Technology Services Section ("ITSS") that some of the items that he had expressed an interest in purchasing were missing. The Applicant stated that, if the items could not be found, the ICTR should instruct the

¹ Impugned Judgment, paras. 3-14 and 18 (emphases in original).

Finance Section to deduct the value of the missing items from his final pay and proceed with his check out.

... On 20 January 2016, the PCIU informed the Applicant that, in accordance with the financial regulations and rules, he would be charged with the current depreciated value of the lost items assigned to him.

... On 25 January 2016, the Applicant reiterated that he bore full responsibility for the missing items and that their value should be deducted from his final pay.

... On 27 January, the ICTR requested the Safety and Security Unit (“SSU”) to conduct an investigation into the lost items that had been assigned to the Applicant.

... On 24 February 2016, the Applicant filed a request for management evaluation before the Management Evaluation Unit (“MEU”).

... On 16 March 2016, the SSU’s investigation report was submitted to the ICTR Coordinator, Liquidation Services, stating as follows:

6. **OBSERVATIONS. EVIDENTIAL AND FACTUAL SUMMARY**

6.1 From the information received the following facts can be established:

As per ICTR SAU [unknown abbreviation] Asset Record and Galileo [United Nations] Asset Record the following missing items were under the name and signature of [the Applicant]:

6.1.1 Video Cassette Recorder VHS or Multi System VCR, ITR-03658

6.1.2 DEL E1910 Monitor 19”, Black Widescreen, TC003 DVI-D Flat Panel 1440x900, ITR-14158

6.1.3 EPSON Stylus R270, Printer Ink Jet, Photo Printer Color, ITR-12188

6.1.4 DEL E1910 Monitor 19”, Black Widescreen, TC003 DVI-D Flat Panel 1440x900, ITR-14182

6.1.5 Studio Audio Recorder T ASCAM 202 MKIII, ITR- 13411

6.1.6 Computer Notebook, DELL, LAP-TOP, ITR-O 1 062

6.1.7 Scanner Image, Pro - Canon, ITR-09267

6.1.8 Computer Desktop, Range 2-3 GHZ, ITR-13839

6.2 [The Applicant] signed the items for his office to be used for the organization for work purposes, not for his sole use but for other users also such as the interns and staff members who come in for [temporary duty].

6.3 [The Applicant] failed in complying with the [United Nations] Property Management Procedure by not keeping proper records of the items issued under his name nor keeping tabs on the movement of each item.

- 6.4 [The Applicant] failed in his responsibilities as the assignee of the items by failing to report the matter to SSU when he discovered that the items were missing in November 201[5].
- 6.5 The ICTR PCIU appeared to have failed [the Applicant] in that it did not give him the time nor forewarn him regarding the items under his name considering the closing down of the ICTR and the Liquidation Team process. This is evidenced in the records, showing some of the items issued to [The Applicant] as last checked by the ICTR PCIU in 2011.
- 6.6 The total depreciation value for all the missing items was US \$1,006.21

...

8. **CONCLUSION**

- 8.1 All the missing [United Nations Owned Equipment, “UNOE”] were under the responsibility of [the Applicant]. He declared in his voluntary statement that he did not follow up to check on the items when they were relocated to another office even though he was informed about the relocation of the items.
- 8.2 [The Applicant] did not exercise proper care and caution on the items issued under his name. Hence the two different lists of items he submitted to the Investigator as the lists of missing items under his name. And he did not report the matter to SSU after he had discovered that the items under his name were missing.
- 8.3 The absence of updated property track records in the ICTR PCIU making it difficult to track the movement of the items and their locations.
- 8.4 Since most of the items signed by [the Applicant] were not for his sole use but for the organization and other ICTR Staff Members, it wouldn't do justice to [the Applicant] to be held solely responsible for the missing items.
- 8.5 Based on the findings the investigations cannot establish that there was any fraudulent activity such as theft of the UNOE involved. However the investigation can safely conclude that the U[nited Nations] Property Management Control Procedures were not properly adhered to by both parties involved, the Staff Member and the ICTR Property Management Unit.

9. **RECOMMENDATIONS**

Considering that each of the missing item's life expectancy have all expired, the unavailability of ICTR PCIU updated verification inspection records and the fact that all these items were headed for the ICTR Liquidation process, it is

recommended that the appropriate written off process/disposal of missing [United Nations] Owned Equipment be applied to the missing items.

... On 12 May 2016, the Applicant was paid the cash value of his annual leave balance, less USD 687.97 as he was charged for depreciated value of the lost items assigned to him.

... On 18 May 2016, the ICTR provided the United Nations Joint Staff Pension Fund (“UNJSPF”) instructions for payment of benefits to the Applicant.

... On 30 June 2016, the Applicant filed an application to the Dispute Tribunal in Nairobi [contest[ing] the following decisions: (a) to withhold his final payments and the delay in submitting forms for his pension for over six months after checking out from ICTR on 31 December 2015; (b) to unlawfully deduct his final leave days; (c) not to provide him with a copy of the report of an investigation conducted against him; and (d) the failure of the Secretary-General and the Office of Internal Oversight Services (“OIOS”) to intervene in the matter.]^[2] The case was registered as Case No. UNDT/NBI/2016/047.

...

... By Order No. 438 (NBI/2016) dated 21 September 2016, as neither party had objected to the transfer, the case was transferred to the Dispute Tribunal in New York. The case was registered under Case No. UNDT/NY/2016/043.

4. On 16 June 2017, the UNDT rendered its Judgment. At the outset, the UNDT found that Mr. Nchimbi had not requested management evaluation of (a) the decision to deduct his final leave days; (b) the decision not to provide him with a copy of the report on the investigation conducted against him; and (c) the failure of the Secretary-General and OIOS to intervene in the matter. The UNDT therefore concluded that his application was not receivable *ratione materiae* with respect to these decisions. On the merits, the UNDT concluded that “the Administration [had] unlawfully delayed [Mr. Nchimbi’s] check-out from the end of January 2016 until the middle of May 2016, including his final payments and the submission of the required forms for his pension”,³ as there was “no justification (...) to request and conduct an investigation to replace the unavailable PCIU inspection records”⁴ and all the relevant information was available to the ICTR Administration in January 2016. The UNDT, thus, granted the application with respect to the decisions to withhold his final payment and to delay submitting the required forms for his

^[2] *Ibid.*, para. 1.

³ *Ibid.*, para. 53.

⁴ *Ibid.*, para. 52.

pension. By way of relief, the UNDT ordered payment of compensation in the amount of USD 1,500 “for the three months’ unlawful procedural delay”.⁵

5. As stated above, Mr. Nchimbi filed his appeal on 16 August 2017 and the Secretary-General filed an answer on 17 October 2017. On 8 November 2017, Mr. Nchimbi filed a motion seeking leave to file additional pleadings in response to the Secretary-General’s answer to his appeal. By Order No. 304 (2017) dated 4 December 2017, the Appeals Tribunal denied the motion finding that Mr. Nchimbi had failed to demonstrate the existence of exceptional circumstances.

Submissions

Case No. 2017-1103

The Secretary-General’s Appeal

6. The Secretary-General submits that the UNDT erred on a question of law in finding that the ICTR Administration had unlawfully delayed Mr. Nchimbi’s check-out process. Under United Nations Financial Regulation 6.5 and Financial Rule 106.7, the Organization has an obligation to investigate any missing items in order to determine whether said items were lost or stolen and who is responsible for the disappearance, irrespective of whether the life expectancy of such assets may have been reached. In the present case, there was confusion as to the number of lost items assigned to Mr. Nchimbi and the circumstances under which those items had disappeared. Accordingly, the ICTR Administration could not simply write off the items but rather exercised due diligence in requesting an investigation. The delay of three and a half months in Mr. Nchimbi’s check-out process was, therefore, not only reasonable but necessary to account for the loss of property in accordance with the Financial Regulations and Rules.

7. Furthermore, the Secretary-General asserts that the UNDT erred in its award of compensation for delay. He claims that there was no procedural delay warranting the award of compensation. As stated above, the ICTR Administration had an obligation to investigate the missing items and the period of three and a half months to investigate and proceed with Mr. Nchimbi’s check-out was not unreasonable. Even if there had been such unreasonable delay, the UNDT erred in awarding compensation without evidence of harm in contravention of

⁵ *Ibid.*, para. 57.

Article 10(5)(b) of the UNDT Statute. Mr. Nchimbi's "vague statements" that he had suffered emotional distress and anxiety and that the ICTR Administration had acted in bad faith against him are not sufficient evidence of harm.

8. Based on the foregoing, the Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment, "except to the extent that it held that the decisions (a) to unlawfully deduct his final leave days; (b) not to provide him with a copy of the report of an investigati[on] conducted against him; and (c) the failure of the Secretary[-]General and [... OIOS to intervene in the matter] were not receivable *ratione materiae*".

Mr. Nchimbi's Answer

9. Mr. Nchimbi submits that the Secretary-General's appeal misstates or disregards important facts. He asserts that the amount he was charged for the alleged missing items was incorrectly calculated under the ICTR Information Circular No. 62 dated 15 December 2015 on "Sale of items to staff members – prices" (Circular No. 62). Moreover, it was incorrectly stated that the items had been lost, whereas in fact some of them had been removed when he was on leave. Mr. Nchimbi further claims that he was "discriminated, humiliated and singled out as a scapegoat for the investigation that was conducted" in particular because there was no evidence that such investigation was conducted against any other staff member, as correctly found by the UNDT. The language of Financial Regulation 6.5 does not give the Secretary-General the mandate of misusing the powers vested in him and to arbitrarily decide to conduct investigations in certain cases and not in others.

10. Mr. Nchimbi contends that the UNDT did not err on a question of law by concluding that the investigation conducted against him was unwarranted and that the ICTR Administration had unlawfully delayed his check-out process and asks that the Appeals Tribunal "affirm that position in the interest of justice and available facts and evidence".

11. Regarding the compensation award, Mr. Nchimbi submits that the UNDT should have granted a much higher compensation in line with previous UNDT cases and asks the Appeals Tribunal to "reconsider" the amount. Moreover, there was sufficient evidence that procedural delays occurred and it was the Secretary-General who failed to discharge the evidentiary burden to show, through clear and convincing evidence, that the procedural delay did not warrant compensation.

12. Mr. Nchimbi adds that the UNDT erred in finding his application in part non-receivable *ratione materiae*, arguing that his request for management evaluation did in fact encompass the aforementioned decisions. He asks the Appeals Tribunal to vacate the impugned Judgment in this regard. He further requests the Appeals Tribunal to “rule that the (...) Secretary-General (...) should stop instituting discrimination against [his] employees” and to “order such other measures or remedies as [it] may deem appropriate”.

Case No. 2017-1104

Mr. Nchimbi’s Appeal

13. Mr. Nchimbi asserts that the UNDT erred in finding his application partly not receivable *ratione materiae*. He claims to have in fact requested management evaluation of the decisions to deduct his final leave days and not to provide him with a copy of the investigation report. In support of his claim, Mr. Nchimbi refers to a memorandum titled “request for humanitarian intervention” which he sent to the MEU on 24 February 2016.

14. Mr. Nchimbi further argues that the UNDT erred on a question of fact resulting in a manifestly unreasonable decision by failing to consider several of his submissions, including his response to the Secretary-General’s closing submissions and his “Reply to Order on Case Management” dated 3 November 2016, in particular regarding his allegations that the ICTR Administration was seeking revenge against him. Moreover, the UNDT failed to “honour its own order” as contained in Order No. 244 (NY/2016) dated 20 October 2016 requesting the Secretary-General to provide a list of the allegedly lost items which has not been presented to date. The UNDT also failed to note that the prices of the lost items as deducted from Mr. Nchimbi’s final payment were “inflated” in violation of Circular No. 62 and the UNDT was incorrect about the actual date on which the ICTR had submitted Mr. Nchimbi’s information to the UNJSPF. Such irregularities led to a “cumulative prejudicial effect”.

15. According to Mr. Nchimbi, the UNDT, while it found that he had been subject to discrimination, disregarded the provisions contained in Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

16. Lastly, Mr. Nchimbi submits that the UNDT erred on a question of fact in relation to the amount of compensation awarded. He claims that the amount of USD 1,500 is not sufficient and that the UNDT has displayed a double standard when compared to compensation awards in other cases. The UNDT should have awarded him further compensation for alleged harassment and intimidation and for the “proven unlawful procedure” resulting from the UNDT finding that no similar investigations were conducted for any other missing items. In addition, the “emotional distress, anxiety suffered by him and the damage caused to his reputation” were not sufficiently compensated. In support of his claim of damage to reputation, Mr. Nchimbi, *inter alia*, refers to “a criminal suit” filed against him by the Secretary-General before a national court.

17. For these reasons, Mr. Nchimbi asks the Appeals Tribunal to (a) allow the appeal in its entirety; (b) vacate the UNDT Judgment; (c) assess “[r]emedies for character slander and humiliation”; (d) “order that deductions made from [Mr. Nchimbi’s final payment] were not warranted and hence should be reimbursed”; (e) “reconsider” the amount of compensation awarded; (f) “endorse” Mr. Nchimbi’s request for correction of the UNDT Judgment; (g) “issue a decree” on the aforementioned criminal matter before the local court; and, (h) grant “[g]eneral damages” as the Appeals Tribunal deems fit.

The Secretary-General’s Answer

18. The Secretary-General submits that Mr. Nchimbi has failed to show that the UNDT erred on a question of fact in finding that part of his application was not receivable *ratione materiae*. Contrary to Mr. Nchimbi’s claim, the memorandum titled “Request for Humanitarian Intervention” dated 24 February 2016 was not a management evaluation request as he did not refer to any of the contested administrative decisions. His actual management evaluation request of the same day does not refer to the decisions which he now claims to have submitted for management evaluation. As he challenged these decisions for the first time before the UNDT, it correctly held that his application was not receivable *ratione materiae* in this regard.

19. Further, the Secretary-General maintains that Mr. Nchimbi has failed to show that the UNDT erred in failing to consider several of his submissions. In this regard, Mr. Nchimbi merely reiterates arguments and claims already presented before the UNDT and fails to provide evidence to show that the UNDT has committed errors of fact but simply criticizes the findings of the UNDT. In accordance with the consistent Appeals Tribunal jurisprudence, the UNDT is only

required to address the points of argument that it considers relevant to resolve the case. In addition, Mr. Nchimbi's submission that no list of the lost items has been provided is incorrect.

20. Finally, according to the Secretary-General, Mr. Nchimbi has failed to demonstrate that the UNDT erred in its award of compensation. In accordance with Article 10(5)(b) of the UNDT Statute, the UNDT may only award compensation supported by evidence of harm for which the applicant bears the burden of proof. The ICTR Administration had an obligation under the Financial Regulations and Rules to undertake an investigation into the disappearance of missing items and it promptly and lawfully conducted the investigation within a period of three and a half months. Mr. Nchimbi has failed to provide evidence with regard to alleged harassment, intimidation or damage to his reputation. He merely argues that the UNDT jurisprudence awards higher compensation than the one he received for emotional harm and harm to reputation without showing that he actually suffered such harm. His "vague statements" do not constitute evidence of harm warranting any compensation, let alone higher compensation. Mr. Nchimbi has not presented any evidence as to how the alleged criminal suit supports his arguments. If anything, this evidence demonstrates serious misconduct on his part.

21. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal dismiss Mr. Nchimbi's appeal in its entirety.

Considerations

22. The UNDT in its Judgment observed that Mr. Nchimbi's application with the Dispute Tribunal challenged the following decisions of the Secretary-General:

- a) To withhold his final payment and the delay in submitting forms for his pension;
- b) To deduct his final leave days;
- c) Not to provide him with a copy of the report of an investigation conducted against him; and
- d) The failure of the Secretary-General and OIOS to intervene in the matter.

23. The UNDT examined the content of the management evaluation request which was filed by Mr. Nchimbi and noted that he had, however, made no request for management evaluation of the following decisions:

- a) To deduct his final leave days;

- b) Not to provide him with a copy of the report of an investigation conducted against him; and
- c) The failure of the Secretary-General and OIOS to intervene in the matter.

24. The UNDT concluded that Mr. Nchimbi's application was not receivable *ratione materiae* with respect to these three decisions. Having considered the trial record, we agree with the finding of the UNDT in this regard.

25. We disagree, however, with the UNDT's finding that "the Administration [had] unlawfully delayed [Mr. Nchimbi's] check-out from the end of January 2016 until the middle of May 2016, including his final payments and the submission of the required forms for his pension".⁶

26. We reiterate that each case must be examined on its own facts and merits before a determination can be made on whether or not there was undue procedural delay by the Administration to attend to and process a claim.

27. In this case, we accept the assertion that the ICTR Administration had an obligation to properly investigate the missing items to ensure there was proper accountability. Therefore, the period of three and a half months which was taken by the Administration to investigate and proceed with Mr. Nchimbi's "check-out" was not unreasonable in the given circumstances.

28. The Appeals Tribunal finds that what has been ruled as unlawful delay on the part of the Administration in this case was a necessary step to ensure that there is proper governance within the Organization and accountability for its property. We rule that the delay was not unlawful and does not warrant an award of compensation.

29. Moreover, we note that the Dispute Tribunal's Statute (except for the specific case of remands under Article 10(4) of the UNDT Statute) does not provide for compensation to be awarded merely because there is a perceived procedural breach or delay. Instead, Article 10(5)(b) of the UNDT Statute only provides for an award of compensation for harm when supported by evidence. It follows that the UNDT stepped outside of its statutory remit when it made such an award.

⁶ *Ibid.*, para. 53.

30. As a result, the award by the UNDT for the payment of compensation in the amount of USD 1,500 “for the three months’ unlawful procedural delay”⁷ cannot be supported in law or by the facts. The order for compensation of USD 1,500 is hereby rescinded.

Judgment

31. The Secretary-General’s appeal is upheld and Mr. Nchimbi’s appeal is dismissed. Judgment No. UNDT/2017/042/Corr.1 is vacated, except to the extent that it held that the appeal of (a) the decision to unlawfully deduct Mr. Nchimbi’s final leave days; (b) the decision not to provide him with a copy of the investigation report, and (c) the failure of the Secretary-General and OIOS to intervene in the matter as not receivable *ratione materiae*.

Original and Authoritative Version: English

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

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

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

(Signed)

Weicheng Lin, Registrar

⁷ *Ibid.*, para. 57.