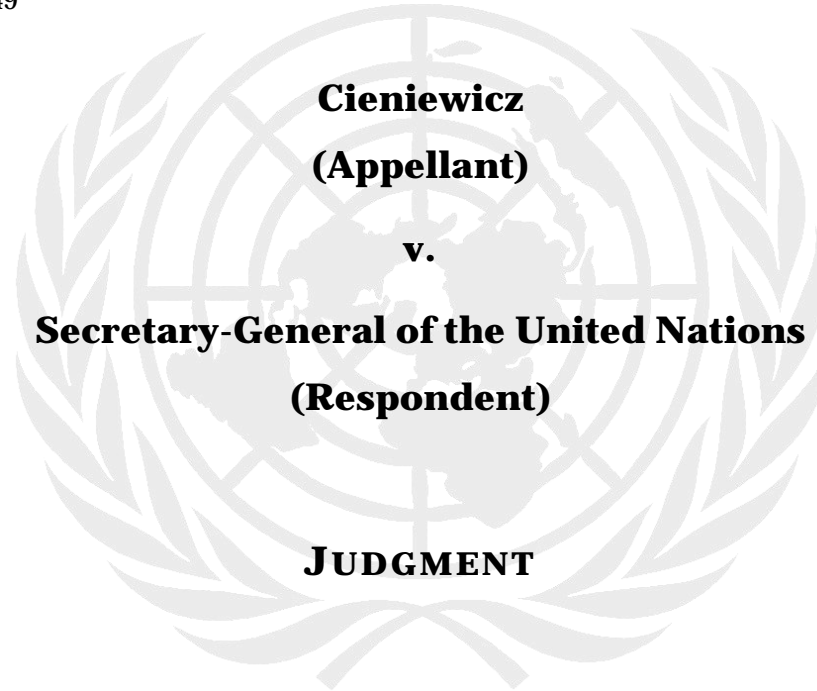




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

---

Case No. 2011-249



**Cieniewicz  
(Appellant)**

**v.**

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

**JUDGMENT**

---

Before:	Judge Mary Faherty, Presiding Judge Luis María Simón Judge Inés Weinberg de Roca
Judgment No.:	2012-UNAT-232
Date:	29 June 2012
Registrar:	Weicheng Lin

---

Counsel for Appellant: Ron Mponda

Counsel for Respondent: Amy Wood

**JUDGE MARY FAHERTY**, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Estanislao Jorge Cieniewicz on 27 August 2011 against Judgment No. UNDT/2011/048 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 8 March 2011. The Secretary-General filed an answer on 24 October 2011.

### **Synopsis**

2. The principal issue for consideration in this appeal is whether the UNDT correctly determined that the Appellant (the holder of a P-3 post) was not entitled to a Special Post Allowance (SPA) to the P-4 level for work he undertook at the P-5 level in the period 21 February 2000 to 13 August 2001.

3. The UNDT so held on the basis that the P-5 post, whose functions the Appellant carried out at the relevant time, was neither “vacant” nor “temporarily vacant” as required by the provisions of ST/AI/1999/17 (Special Post Allowance).

4. As part of his submissions in this appeal, the Appellant contends that the UNDT erred in law in choosing to apply a literal interpretation of Section 1.2(a) and (b) of ST/AI/1999/17.

5. Was the UNDT correct in applying a literal interpretation of the provisions of Section 1.2(a) and (b) of the relevant administrative instruction?

6. The Appeals Tribunal is satisfied that the UNDT properly determined that the transfer of the P-5 holder “with his post” had the effect that there remained no “vacant” or “temporarily vacant” post against which the Appellant, albeit performing the functions of the post holder, could point to for the purposes of either making the case, or having the case made on his behalf, for payment of an SPA. The UNDT therefore did not err in the manner in which it approached the issue.

7. We affirm the decision of the UNDT that the Appellant did not fulfill a necessary requirement pursuant to ST/AI/1999/17 for the payment of an SPA for the period in question, and the appeal on this issue is thus dismissed.

8. In the present case, the Appellant sought moral damages from the UNDT on the basis of the delays he encountered in his claims for SPAs. The UNDT declined to award such damages stating that, “in the absence of particular circumstances, which have not been alleged in this case and which are not apparent from the record, the Tribunal considers that the fact that the Administration delayed in dealing with a claim from a staff member for an SPA, however regrettable that might be, is not such as to cause moral damage giving rise to compensation”.

9. The Dispute Tribunal Judge is best placed to assess from the evidence, records or otherwise whether “particular circumstances” exist such as to give rise to a claim for moral damages. It is obvious from his determination on this issue that the Dispute Tribunal Judge was of the view that the circumstances of the present case did not meet the criteria necessary for an award of moral damages. In his submissions to this Tribunal, the Appellant, other than to recite cases where compensation for delays was awarded, has not made reference to what arguments he made before the UNDT to support his claim for moral damages.

10. For the record, we note that the Joint Appeals Board (JAB) recommended payment to the Appellant of compensation, for the delays he encountered in processing his SPA applications, equivalent to the SPA at the P-4 level he should have received for the period 21 October 2002 until 4 March 2003 (a time frame not the subject matter of appeal to either the UNDT or to this Tribunal). This payment was duly made by the Administration by way of an SPA to the P-4 level for the period 21 October 2002 to 4 March 2003.

11. We note that in the submissions the Appellant made to the former Administrative Tribunal, he contended that he should have received that SPA as a matter of course for work he had carried out. Be that as it may, at the end of the day, in awarding that period to the Appellant in 2008, the JAB took cognizance of delays that had occurred.

12. In all those circumstances, the Appellant has not satisfied this Tribunal that reasons exist to reverse the findings of the UNDT on the issue of delay giving rise to moral damages. The appeal on this issue is thus dismissed.

### **Facts and Procedure**

13. Mr. Cieniewicz joined the United Nations Office at Geneva (UNOG) in 1971 at the general service level. At the material time, he was an Administrative Officer at the P-3 level in the Office of the Coordination of Humanitarian Affairs (OCHA), UNOG.

14. On 21 February 2000, Mr. Cieniewicz was designated by the Director of OCHA Geneva as Officer-in-Charge (OiC) of the Financial and Administrative Unit, OCHA, following the reassignment of the P-5 Chief of the Unit to “other functions with his Post”. Mr. Cieniewicz acted as OiC for approximately 18 months from 21 February 2000 through 13 August 2001. Subsequently Mr. Cieniewicz also performed the functions of OiC of a re-organized Administrative Office for periods of varying duration, for which he was eventually granted an SPA. The present appeal concerns only the period from 21 February 2000 to 13 August 2001, during which he acted as OiC, but was not granted an SPA.

15. On 27 September 2002, OCHA asked the Human Resources Management Service (HRMS), UNOG, to grant to Mr. Cieniewicz a “long due SPA” to the P-4 level, for the periods of time he served as OiC, including the period at issue (21 February 2000 to 13 August 2001).

16. On 9 October 2002, OCHA reiterated its request of 27 September 2002. In the memorandum, OCHA specified that “GTA [general temporary assistance] funds [would] be used to support the additional salary costs stemming from the SPA” for the period 21 February 2000 to 13 August 2001.

17. Further exchanges and reminders ensued among OCHA, Mr. Cieniewicz and HRMS. It was not until 25 May 2004 that HRMS submitted Mr. Cieniewicz’s case to the SPA Committee. In August 2004, HRMS informed OCHA that the SPA Committee did not approve OCHA’s recommendation for the grant of an SPA to Mr. Cieniewicz for the period from 21 February 2000 to 13 August 2001, “due to the fact that the criteria outlined in ST/AI/1999/17 for the granting of an SPA [had] not been met since the post in question was not vacant during the period in question as the incumbent of the post was reassigned to other functions together with his post”.

18. Mr. Cieniewicz appealed to the JAB. In its report dated 14 December 2007, the JAB reviewed the chronology of the case leading to the refusal by the SPA Committee to grant an SPA to Mr. Cieniewicz on the ground that the post was not vacant from a budgetary point of view.

[The JAB] thought this was a rigid approach, the justification for which could not have been transparent to [Mr. Cieniewicz], especially since OCHA had proposed to finance the SPA from GTA funds... However, it acknowledged that the Administration’s decision was unassailable, as the case had been duly considered by the SPA Committee and the conditions for the granting of an SPA were indeed not fulfilled, the post being technically not vacant.

19. On the other hand, the JAB found the delays at each stage of the SPA approval procedure inexcusable, and recommended that Mr. Cieniewicz be awarded compensation in the amount equivalent to an SPA to the P-4 level for the period from 21 October 2002 to 4 March 2003 that he should have received. The Secretary-General accepted the JAB's recommendations on 10 March 2008.

20. Mr. Cieniewicz appealed to the former Administrative Tribunal. His case was subsequently transferred to the UNDT after the abolition of the former Administrative Tribunal on 31 December 2009.

21. In Judgment No. UNDT/2011/048, the UNDT rejected Mr. Cieniewicz's application in respect of the decision not to grant him an SPA for the period from 21 February 2000 to 13 August 2001. In the view of the UNDT, the prerequisite condition for the grant of an SPA was the existence of either a vacant, or temporarily vacant, post, and the transfer of the Chief of the Unit with his P-5 post was tantamount to the abolition of the post. Consequently there was no budgetary post left for Mr. Cieniewicz to be placed against in order for him to be paid an SPA. Moreover, the UNDT considered that the delays in dealing with Mr. Cieniewicz's claim for an SPA were "not such as to cause moral damage giving rise to compensation", but that interest could have been awarded on the delay in the payment of the SPA to Mr. Cieniewicz, only if he had claimed payment of such interest.

### **Submissions**

#### **Mr. Cieniewicz's Appeal**

22. Mr. Cieniewicz reiterates the arguments that he made before the UNDT because the UNDT had "ignored" or "failed to address" the points of law that he had raised: that the decision to designate him as OiC during the period 21 February 2000 to 13 August 2001 was not an administrative error but a deliberate organizational decision; that the argument about the transfer of the incumbent of the unit with his P-5 post was a fiction, and an attempt to avoid financial obligations due to him; and that even assuming that his designation as OiC was an administrative error, such an error was attributable to the Administration and the SPA entitlement cannot be withheld on the basis of such error, which was not Mr. Cieniewicz's making. Indeed there was no administrative error. Mr. Cieniewicz maintains that an employer

cannot rely on non-compliance with its own internal regulations to opt out of its contractual obligations related to the SPA at the expense of Mr. Cieniewicz.

23. Mr. Cieniewicz submits that the UNDT erred in fact by indirectly holding that he had not performed all the functions of the P-5 post. Mr. Cieniewicz maintains that neither OCHA and the SPA Committee nor the JAB questioned the fact that he discharged the functions related to the higher level post, when he was OiC during the period 21 February 2000 to 13 August 2001.

24. Mr. Cieniewicz also submits that the UNDT erred in law in interpreting the transfer of the incumbent of the unit with his post as the abolition of the post. Neither Mr. Cieniewicz nor the Secretary-General had advanced this argument.

25. Mr. Cieniewicz further submits that the UNDT erred in law in making reference to “interest” payment as a head of material damage, when this issue was not before it.

26. Mr. Cieniewicz maintains that the UNDT’s ruling on the issue of moral damages runs counter to the jurisprudence of the former Administrative Tribunal and the International Labour Organization Administrative Tribunal (ILOAT). Mr. Cieniewicz stresses that moral damages are payable in cases of clearly inordinate and unconscionable delays caused by the Management, as happened in the present case.

27. Mr. Cieniewicz believes that the UNDT erred in law in not following the jurisprudence of the former Administrative Tribunal or the ILOAT.

### **Secretary-General’s Answer**

28. The Secretary-General submits that the UNDT correctly affirmed the Administration’s determination that Mr. Cieniewicz was not entitled to an SPA for the February 2000 to August 2001 period, as he was not performing the functions of a vacant post during that period. In the view of the Secretary-General, the UNDT was correct in applying a literal interpretation of the requirements for the grant of an SPA pursuant to administrative instruction ST/AI/1999/17.

29. The Secretary-General maintains that the UNDT correctly determined that Mr. Cieniewicz was not entitled to moral damages, because he had failed to allege any specific harm or injury that he had suffered as a result of the delay, or to provide any evidence for such harm or injury.

30. Regarding the issue of interest, the Secretary-General submits that, irrespective of whether or not Mr. Cieniewicz had requested payment of interest, given that the UNDT held that he was not entitled to the payment of an SPA for the February 2000 to August 2001 period, it would be nonsensical to order the payment of interest on a sum that was never due.

### **Considerations**

31. The principal issue for consideration in this appeal is whether the UNDT correctly determined that the Appellant (the holder of a P-3 post) was not entitled to an SPA to the P-4 level for work he undertook at the P-5 level in the period 21 February 2000 to 13 August 2001.

32. The UNDT so held on the basis that the P-5 post, whose functions the Appellant carried out at the relevant time, was neither “vacant” nor “temporarily vacant” as required by the provisions of ST/AI/1999/17.

33. Section 1.2 of ST/AI/1999/17 defines the aforesaid terms as follows:

(a) “Temporarily vacant post” shall refer to a post which is blocked for a staff member on mission detail, special leave, secondment, temporary assignment or loan, who was previously selected for the post under established recruitment or placement and promotion procedures;

(b) “Vacant post” shall refer to a post approved for one year or longer which is not blocked for the return of a staff member under the conditions set out in subsection 1.2 (a) above and is to be filled under established procedures for recruitment or placement and promotion.

34. There is no dispute but that on 21 February 2000, the Appellant was designated by the Director of OCHA Geneva as OiC of the Financial and Administrative Unit, following the reassignment of the holder of the post (a P-5 post) “to other functions with his post”.

35. The Dispute Tribunal Judge determined, inter alia, that the issue to be decided was what were the “consequences” of the reassignment of the holder of the P-5 post “with his post”. The UNDT held as follows:

Having regard to the budgetary rules that require that there must be a budgetary post in order for a staff member to be paid, the transfer of a staff member with his post from one service to another can only be interpreted as the abolition, at least temporarily, of the financing of the post in the staff member’s original service, in other words the abolition of the post itself.

36. Having thus found, the Dispute Tribunal Judge stated:

In the present case, the P-5 post the functions of which the Applicant assumed from 21 February 2000 to 13 August 2001 was neither vacant, at least up to 9 July 2001, the date it was advertised, nor temporarily vacant within the meaning of [ST/AI/1999/17]. Therefore, the Applicant did not meet the conditions laid down in the administrative instruction to be eligible, during that period, for an SPA, and the Administration was within its rights in refusing to pay it.

37. As part of his submissions in this appeal, the Appellant contends that the UNDT erred in law in choosing to apply a literal interpretation of Section 1.2(a) and (b) of ST/AI/1999/17.

38. The Appellant contends that the Dispute Tribunal Judge ignored his argument, namely that the logical construction of the relevant provision is “supported by the OCHA Director’s action of unequivocally assigning the Applicant to the post in respect of which the SPA entitlement is claimed, as well as the Administration’s attempted resolution of the technicality posed by the budgetary issue by advising the SPA Committee that GTA funds would be used to fund the post”.

39. The Appellant also submits that the Dispute Tribunal Judge erred in law and misdirected himself when he ruled that the transfer of the holder of the post in question to another service could “only be interpreted as the abolition ... of the post itself”.

40. The Respondent submits that no error of law was made and that the UNDT properly came to the conclusion it did, relying on the plain language of ST/AI/1999/17 viewed against the circumstances of the case in hand, namely the transfer of the P-5 post holder “with his post”. This scenario, the Respondent submits, had the effect that the Appellant was not performing the functions and responsibilities of a *vacant* post, as required by the plain language of ST/AI/1999/17.

41. Was the UNDT correct in applying a literal interpretation of the provisions of Section 1.2(a) and (b) of the relevant administrative instruction?

42. The Appeals Tribunal is satisfied that the UNDT properly determined that the transfer of the P-5 holder “with his post” had the effect that there remained no “vacant” or “temporarily vacant” post against which the Appellant, albeit performing the functions of the post holder, could point to for the purposes of either making the case, or having the case made on his behalf,



for payment of an SPA. The UNDT therefore did not err in the manner in which it approached the issue.

43. With regard to the Appellant's contention that the Dispute Tribunal Judge erred in ruling that as a result of the reassignment of the post holder "with his post", the post in question was "abolished" temporarily or otherwise, we do not find it necessary to make a specific determination on the words used by the UNDT to articulate its analysis of the plain requirement of Section 1.2, having regard to our finding that the UNDT properly determined that there was no "vacant" or "temporarily vacant" post for the purposes of ST/AI/1999/17.

44. On the other argument made by the Appellant on the issue in question, the Appeals Tribunal notes that he advances the proposition that the transfer of the P-5 holder "with his post" was in effect a fiction and/or a conscious decision on the part of the Administration to avoid financial obligations due to him. A converse argument is also advanced, namely that what occurred was an administrative error in assigning him to a "non-existent" post and that that error, being attributable to the Administration, means that the latter cannot then lawfully withhold the Appellant's SPA entitlement.

45. Notwithstanding the Appellant's invitation to this Tribunal to rule on his claims that the UNDT failed to address either of the above arguments, we do not find it necessary to do so with any degree of particularity, given our finding that the Dispute Tribunal properly held that the Appellant had failed to establish a pivotal requirement of ST/AI/1999/17, namely, that at the relevant time he was carrying out the functions of a vacant post such as would have allowed the Secretary-General to exercise his discretion to pay an SPA.

46. In any event, we note that the Dispute Tribunal did take account of the argument that by reserving the right to transfer a post holder with his post from one service to another, the Administration was in effect preventing the person assuming the functions from obtaining an SPA. On this argument, the Dispute Tribunal determined that "it is not for the Tribunal to rule on the appropriateness or otherwise of decisions taken by the Administration in the redeployment of budgetary posts from one service to another", and thus found that the Appellant's argument in this regard could not succeed. We see no reason to impugn the approach adopted by the UNDT on this point.

47. The Appellant has suggested that, on the part of the Administration, there was a predetermination that he would not receive an SPA for the period in question (February 2000 to August 2001). This suggestion is however contradicted by a communication between HRMS and the Deputy Director, OCHA, dated 27 September 2002 when the latter suggested that the Appellant be granted a “long due SPA” for various periods (including February 2000 to August 2001) during which he had been carrying out P-5 functions.

48. It is not disputed but that for periods other than February 2000 to August 2001, the Appellant received SPAs, albeit that there was considerable delay on the part of the Administration in making said payments.

49. With regard to the period 21 February 2000 to 13 August 2001, the case made (from 2002 onwards) for the payment of an SPA to the Appellant did not succeed because a necessary statutory requirement could not be met by the Appellant, namely that he was the holder of a “vacant” or “temporary vacant post”. Albeit that the Appellant himself (and indeed the JAB) regarded this hurdle as a technicality, it remained the case that the Appellant was unable to overcome this hurdle.

50. In all the above circumstances, we affirm the decision of the UNDT that the Appellant did not fulfill a necessary requirement pursuant to ST/AI/1999/17 for the payment of an SPA for the period in question, and the appeal on this issue is thus dismissed.

51. The Appellant submits that the UNDT misdirected itself in law by ruling that moral damages are not awardable for excessive delays in dealing with claims from staff members. This Tribunal concurs with the general principle established by case law (including that of the former Administrative Tribunal) that when unconscionable delays occur on the part of the Administration in dealing with claims of staff members, such may give rise in certain circumstances to a compensatory award.

52. In the present case, the Appellant sought moral damages from the UNDT on the basis of the delays he encountered in his claims for an SPA. The UNDT declined to award such damages stating that, “in the absence of particular circumstances, which have not been alleged in this case and which are not apparent from the record, the Tribunal considers that the fact that the Administration delayed in dealing with a claim from a staff member for an SPA, however regrettable that might be, is not such as to cause moral damage giving rise to compensation”.

53. The Dispute Tribunal Judge is best placed to assess from the evidence, records or otherwise whether “particular circumstances” exist such as to give rise to a claim for moral damages. It is obvious from his determination on this issue that the Dispute Tribunal Judge was of the view that the circumstances of the present case did not meet the criteria necessary for an award of moral damages. In his submissions to this Tribunal, the Appellant, other than to recite cases where compensation for delays was awarded, has not made reference to what arguments he made before the UNDT to support his claim.

54. In all those circumstances, we see no basis to upset the findings of the UNDT on this issue.

55. For the record, we note that in December 2007, the JAB recommended payment to the Appellant of compensation, for the delays he encountered in processing his SPA applications, equivalent to the SPA at the P-4 level he should have received for the period 21 October 2002 until 4 March 2003 (a time frame not the subject matter of appeal to either the UNDT or to this Tribunal). This payment was duly made by the Administration by way of an SPA to the P-4 level for the period 21 October 2002 to 4 March 2003.

56. We note that in the submissions the Appellant made to the former Administrative Tribunal, he contended that he should have received that SPA as a matter of course for work he had carried out. Be that as it may, at the end of the day, in awarding that period to the Appellant in March 2008, the Administration took cognizance of delays that had occurred.

57. In all those circumstances, the Appellant has not satisfied this Tribunal that reasons exist to reverse the findings of the UNDT on the issue of delay. The appeal on this issue is thus dismissed.

### **Judgment**

58. The Appeals Tribunal dismisses the appeal in its entirety and affirms the UNDT Judgment.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 12<sup>th</sup> day of September 2012 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar