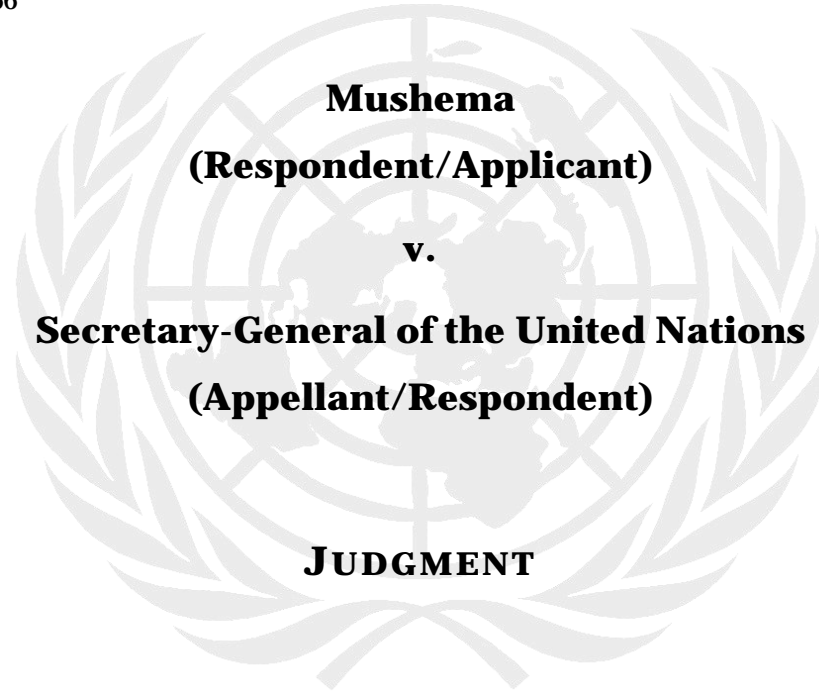




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-266



**Mushema
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Kamaljit Singh Garewal Judge Luis María Simón Judge Mary Faherty
Judgment No.:	2012-UNAT-247
Date:	29 June 2012
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: Stéphanie Cartier

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2011/162, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 16 September 2011 in *Mushema v. Secretary-General of the United Nations*. The Secretary-General appealed on 28 October 2011, and Mr. Severian Mushema answered on 12 December 2011.

Synopsis

2. The Secretary-General is appealing the UNDT's award of actual salary loss for the period from separation to the date of the UNDT's Judgment (two years, 11 months and 15 days) as compensation in lieu of re-instatement. The UNDT's award is too generous, in light of the statutory limit of two years' net base pay.

3. There are many factors to be considered in the award of compensation in lieu of re-instatement. The staff member may be separated from service on other non-disciplinary grounds like completion of the term of a fixed-term appointment, abolition of a post in a downsizing exercise, illness resulting in the staff member's inability to work, resignation in order to take a better job, other gainful employment after separation, or private business. As the possibilities are many, the award of full salary payable between separation and the date of the UNDT's Judgment is fraught with ambiguity and uncertainty.

4. Keeping all these factors in view we reduce the compensation in lieu of re-instatement to one year's net base pay. The Secretary-General's appeal is accepted to the extent indicated above.

Facts and Procedure

5. Mr. Mushema joined the World Food Programme (WFP) on 1 February 2001 as a Logistics Assistant on a Special Service Agreement. Effective 1 November 2004, he was granted a fixed-term appointment to serve as a Logistics Assistant at the GS-5 level in Dodoma, Tanzania. On 1 July 2007, he was promoted to the GS-6 level as a Senior Logistics Assistant in Dodoma. Effective 1 October 2008, Mr. Mushema's fixed-term appointment was terminated, as a disciplinary measure for reasons of misconduct pursuant to former Staff Rule 110.3(vii).

6. Mr. Mushema challenged before the UNDT the decision to terminate his appointment for misconduct. In Judgment No. UNDT/2011/162, the UNDT found that the facts on which the disciplinary measure was based had been established in relation to Mr. Mushema's failure to detect even one of 704 semi-empty/empty oil cartons in the warehouse during the regular physical inventory. The UNDT, however, found that the established facts did not constitute misconduct within the meaning of former Staff Rule 110.3, and that the penalty of separation from service was disproportionate and unwarranted.

7. The UNDT also found irregularities in the conduct of the investigation and the disciplinary proceedings.

8. The UNDT concluded that Mr. Mushema was unfairly dismissed. It ordered rescission of the administrative decision to terminate Mr. Mushema's appointment, his reinstatement and compensation for Mr. Mushema's loss of earnings from the date of his separation from service to the date of his reinstatement. In the alternative, the UNDT awarded compensation for the loss of earnings from the date of his separation from service to the date of the UNDT Judgment.

9. The UNDT further awarded compensation in the amount of six months' net base salary in effect at the time of his termination for the procedural irregularities during the investigation and disciplinary process.

Submissions

Secretary-General's Appeal

10. The Secretary-General submits that the UNDT erred in law in setting, as an alternative to rescission, compensation in the aggregate amount of almost three years' net base salary for loss of earnings beyond the duration of Mr. Mushema's appointment, which is the equivalent of two years, 11 months and two weeks of net base salary. Mr. Mushema only held an appointment of nine months, which was set to expire three months after his separation from service, on 31 December 2008.

11. Mr. Mushema's material damage was therefore three months' net base salary. The UNDT thus placed Mr. Mushema in a better position than he would have been in, had he not been separated from service. The UNDT awarded compensation based on the speculation that Mr. Mushema's service would have been extended until the day of the issuance of the UNDT

Judgment. Such speculation constitutes an error in law, since it is well established that fixed-term appointments carry no expectancy of renewal.

12. In the alternative, the Secretary-General submits that the UNDT erred in law in awarding compensation for loss of earnings beyond the two-year limit set out in the Statute of the Dispute Tribunal. Where compensation is calculated based on the loss of earnings, it should be limited to the equivalent of two years' net base salary, unless there are compelling reasons to award a greater amount of compensation. But there are no compelling reasons in this case warranting an exception. In other cases (*Liyanarachchige, Cohen* and *Harding*)¹ where the disciplinary process was tainted by similar or more serious irregularities and where none of the grounds for the dismissal had been established, the Appeals Tribunal reduced the award of compensation for loss of earnings to two years' net base salary, or set a lower amount of compensation. Further, the UNDT erred in relying on the *Borhom* case which is materially different from the case at bar.²

13. The Secretary-General requests that the Appeals Tribunal reduce the award of compensation accordingly.

Mr. Mushema's Answer

14. Mr. Mushema requests that the Appeals Tribunal dismiss the appeal with costs for having filed a meritless appeal. He requests compensation for moral damages in addition to the compensation granted by the UNDT.

15. Mr. Mushema states that while his contract was due to expire three months after his separation, he had worked with WFP for seven years and six months. In light of his outstanding performance, his appointment was renewed each time before it expired.

16. Mr. Mushema also states that the compensation awarded did not place him in a better position than in which he would have found himself had he not been separated. In fact, he could not get a job anywhere else because of the reason for his separation. If he had not been separated, he would have by now been in a more senior position. The unfair separation had consequences for his family, and his career and reputation were "seriously damaged".

¹ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087; *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131; *Harding v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-188.

² *Borhom v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/067.

17. Mr. Mushema maintains that the UNDT can order compensation exceeding two years' net base salary and his case was exceptional. The damage suffered in the present case was greater than that experienced in the cases cited by the Secretary-General. In the view of Mr. Mushema, the UNDT correctly relied on the *Borhom* case as it had similar material facts and produced the same impact on the parties as in the present case.

Considerations

18. The Secretary-General has appealed against the Dispute Tribunal's Judgment, setting alternative compensation for loss of earnings beyond the duration of Mr. Mushema's appointment. The Secretary-General's alternative plea is that should this Tribunal decline to find in favour of the management on the above issue, then this Tribunal should hold that the Dispute Tribunal erred on a question of law in awarding compensation beyond the two-year limit set by its Statute.

19. Obviously, the Dispute Tribunal's principal order that the contested administrative decision be rescinded as Mr. Mushema was unfairly dismissed goes unchallenged. Therefore, we are not required to re-examine the factual background of the allegations against Mr. Mushema and the disciplinary proceedings against him.

20. We are primarily concerned with the awards of compensation ordered by the UNDT as an alternative to rescission and reinstatement, which consist of (i) the lost earnings from the date of separation (1 October 2008) to the date of the UNDT's Judgment (16 September 2011), a period of two years, 11 months and 15 days; and (ii) six-months' net base pay for procedural irregularities. Prior to his separation, Mr. Mushema was informed on 25 August 2008 of the findings against him, and that as a disciplinary measure he was going to be separated from service for reasons of misconduct, pursuant to former Staff Rule 110.3(vii). On 27 August 2008, Mr. Mushema was informed that his fixed-term appointment with the WFP would be terminated effective 1 October 2008.

21. The question before us is whether in the circumstances of the present case, these awards were fair and adequate or excessive.

22. Under Article 10 of the Statute of the Dispute Tribunal, where the UNDT rescinds the contested administrative decision of termination, as in the present case, the Dispute Tribunal must necessarily set an amount of compensation in lieu of rescission or specific performance.

Article 10(5)(b) provides that in exceptional cases compensation may exceed two years' net base salary. In the present case, the Dispute Tribunal did not record any reasons for holding that this was indeed an exceptional case, warranting an award higher than two years' net base salary.

23. On the other hand, the Statute of the Dispute Tribunal provides no guidelines in the matter of determining the quantum of compensation. Is the Dispute Tribunal to fix an arbitrary or notional amount or award an amount equivalent to the real loss of salary for the period during which Mr. Mushema remained out of his job, i.e., from separation until the date of UNDT's Judgment?

24. In the present case, the Dispute Tribunal awarded the real loss of salary as compensation but without articulating any reasons. There is a drawback in this approach because it presumes that the staff member was going to remain in service during the entire period between separation and the date of UNDT's Judgment, but it ignores the fact that the staff member may be separated from service on other non-disciplinary grounds like completion of the term of a fixed-term appointment, abolition of the post in a downsizing exercise, illness of the staff member resulting in inability to work, resignation in order to take a better job, other gainful employment after separation, private business, etc. As the possibilities are many, the award of full salary payable between separation and the date of UNDT's Judgment is fraught with ambiguity and uncertainty.

25. The Secretary-General has relied on three judgments rendered by this Tribunal in *Liyanarachchige*, *Cohen* and *Harding*, and has compared the present case with those three cases in the context of the grounds on which the summary dismissals were set aside. In *Liyanarachchige*, the charges against the staff member were based solely on statements of anonymous witnesses. In *Cohen*, excessive weight was placed on the testimony of an anonymous witness. In *Harding*, the Disciplinary Committee and the Dispute Tribunal found that the dismissal decision was flawed by factual errors and violation of due process rights. It seems to us that the procedural irregularities were a determining factor in the award of compensation.

26. If we follow this approach, we should briefly examine the procedural irregularities which led to the impugned decision. There was the failure to take the testimony of certain relevant witnesses, the failure to give the staff member the allegations of misconduct in writing before he was subject to a formal investigation, and the taking of the testimony of one of the members of the Disciplinary Committee in the absence of Mr. Mushema.

27. However, in the present case the substantive findings in the UNDT Judgment have not been challenged before this Tribunal. We therefore need not go into the grounds on which the decision to dismiss was rescinded. This Tribunal is only requested to determine if the compensation awarded in lieu of rescission was fair, adequate and reasonable or if it was in need of an upward or downward change.

28. To that extent, the elements which can be considered are, among others, the nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed-term), the remaining time, chances of renewal, etc. It must also be taken into account that the two-year limit imposed by the Statute of the Dispute Tribunal constitutes a maximum, as a general rule with exceptions. As such, it cannot be the average “in lieu compensation” established by the court.

29. The assessment of compensation must also be done on a case-by-case basis. Contemplating the particular situation of each claimant, it carries a certain degree of empiricism to evaluate the fairness of the “in lieu compensation” to be fixed.

30. It is held that in the present case, it would be adequate, fair and reasonable to award compensation in lieu of re-instatement in an amount equal to one year’s net base pay, based on the pay that Mr. Mushema was drawing on the date of the termination of his fixed-term appointment, i.e., 1 October 2008. This amount shall be paid to Mr. Mushema with interest from the date of the Judgment of the UNDT at the US prime rate on that date. The compensation amount plus interest until the date of payment shall be released to Mr. Mushema within 60 days of the issuance of this Judgment, failing which an additional five per cent shall be added to the US prime rate from the date of the expiry of the 60-day period to the date of payment.

Judgment

31. The appeal is accepted to the extent indicated above. We reduce the quantum of compensation in lieu of reinstatement to one year’s net base salary in effect on 1 October 2008.

Original and Authoritative Version: English

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

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Simón

(Signed)

Judge Faherty

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

(Signed)

Weicheng Lin, Registrar