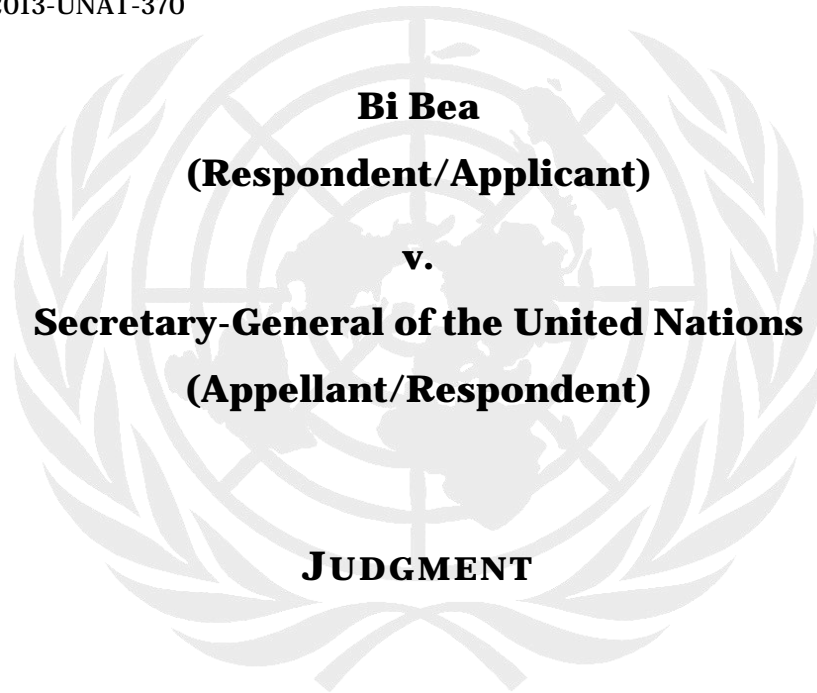




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-370



**Bi Bea
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Inés Weinberg de Roca
Judge Rosalyn Chapman

Case No.: 2012-421

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Alexandre Tavadian

Counsel for Appellant/Respondent: Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/150, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 11 October 2012 in the case of *Bi Bea v. Secretary-General of the United Nations*. The Secretary-General appealed on 7 December 2012, and Mr. Théodore Bali Bi Bea answered on 28 January 2013.

Facts and Procedure

2. Mr. Bi Bea joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in Côte d'Ivoire on 4 February 1991 as an Administrative/Finance Assistant at the GL-7 level. Thereafter, he served on a series of fixed-term appointments until he was granted an indefinite appointment. He was separated from service effective 30 June 2004 due to the abolition of his post.

3. Mr. Bi Bea subsequently served on a temporary assistance appointment from 8 November 2004 to 31 December 2004. He has had no employment with the Organization since then.

4. On 3 March 2005, the head of the investigation unit at UNHCR informed Mr. Bi Bea that an investigation had been conducted concerning him with no resulting evidence of misconduct or criminal activity. Until that time, Mr. Bi Bea had not been notified of any investigation.

5. Mr. Bi Bea subsequently liaised with the Administration, seeking his reinstatement. Absent an informal resolution of the matter, Mr. Bi Bea filed an appeal with the secretariat of the former UNHCR Joint Appeals Board (JAB) on 1 October 2006. A JAB panel was constituted and issued its report and recommendations on 13 May 2008. According to the UNDT, the JAB found that

... there was a set of disturbing and mutually corroborating clues that tipped the balance in favour of [Mr. Bi Bea's] contention that there was indeed a link between the decision not to renew his assignment and the investigation concerning him that was not closed until March 2005.

... The JAB held that it could not presume that had the misuse of procedure not been committed, [Mr. Bi Bea] would still hold an indefinite contract. In light of the information in the Inspector-General's report, it was clear [Mr. Bi Bea] would have remained in M'banza Congo for at least the last six months of 2004.

... The JAB awarded [Mr. Bi Bea] compensation equivalent to six month's net salary, and compensation of three month's net salary for the moral injury suffered. It stressed the lack of notice of the investigation concerning the "very serious allegations" made against him. The JAB noted that it took fourteen (14) months for the Inspector-General's Office to prepare the report and found that as [Mr. Bi Bea] did not find out until March 2005 that very serious allegations had been made against him and finally cleared, [this] gave rise to severe stress and to fears that his reputation had been tarnished for 14 months.¹

6. The JAB report was transmitted to the Secretary-General on 19 May 2008 and Mr. Bi Bea received a copy on 23 June 2008.

7. On 8 September 2008, having received no response from the Secretary-General to the JAB report, Mr. Bi Bea applied to the former Administrative Tribunal seeking the "execution" of the JAB's recommendations.

8. On 24 October 2008, Mr. Bi Bea was informed that the Secretary-General accepted the JAB's findings and had decided to award him nine months' net base salary at the rate in effect on 30 June 2004 in respect of the post Mr. Bi Bea held at that time. On 30 March 2009, the Secretary-General submitted before the former Administrative Tribunal that in light of the payment, the nine months' salary compensation was no longer disputed.

9. On 6 April 2009, Mr. Bi Bea filed additional observations in which he requested an additional six months' salary in compensation, as the compensation paid to him was less than the amount specified in the JAB report. He further claimed costs to compensate him for UNHCR's actions leading to lengthy proceedings which were "wear[ing] him down".

10. Mr. Bi Bea's case was subsequently transferred to the UNDT.

11. In Judgment No. UNDT/2012/150, the UNDT denied Mr. Bi Bea's request for additional compensation on the ground that the amount of compensation awarded to him by the JAB had been correctly paid. The UNDT also rejected his claim for pension contributions. In order to compensate Mr. Bi Bea for the delays in the implementation of the JAB's recommendations, the UNDT ordered the payment of interest on the nine months' salary already paid. The UNDT further found that there had been a manifest abuse of the JAB proceedings by the Secretary-General which entitled Mr. Bi Bea to costs in the amount of CHF 5,000, pursuant to Article 10(6) of the UNDT Statute.

¹ Impugned Judgment, paras. 17 to 19.

12. The Secretary-General appeals the UNDT Judgment.

Submissions

The Secretary-General's Appeal

13. The Secretary-General submits that the UNDT exceeded its competence in awarding costs against the Secretary-General when it made no determination that he had abused the proceedings before the UNDT. Article 10(6) of the UNDT Statute provides for the UNDT's authority to award costs where there has been a manifest abuse of the proceedings before the UNDT only and not in relation to proceedings in other contexts. The UNDT therefore erred in awarding costs for a manifest abuse of proceedings before the JAB.

14. The Secretary-General submits that even if proceedings before the JAB could be considered as proceedings before the UNDT for the purpose of Article 10(6) of the UNDT Statute, an abuse of process "necessarily involves" "some degree of intention to act frivolously or to abuse the proceedings". In accordance with the Appeals Tribunal's jurisprudence, the party prevailing in a case is not entitled to costs when the opposing party has not abused the process. In the present case, any delay in process was remedied by 24 October 2008, when the Deputy Secretary-General informed Mr. Bi Bea that a decision had been taken to accept the JAB's recommendation for compensation. He was paid shortly thereafter and the Administration made efforts to finalize Mr. Bi Bea's claim as soon as practicable. There is no evidence of any abuse or intention to act frivolously.

15. In addition, the Secretary-General submits that the UNDT erred in concluding that Mr. Bi Bea had expended costs in relation to filing his claim, as he failed to present any evidence of costs actually incurred.

16. The Secretary-General requests that the Appeals Tribunal vacate the order of costs. The Secretary-General does not contest the award of interest.

Mr. Bi Bea's Answer

17. Mr. Bi Bea submits that the reliance on Article 10(6) of the UNDT Statute is misplaced as this provision was not meant to govern transitional cases which were transferred from the former Administrative Tribunal to the Dispute Tribunal. Where an applicant filed an application

before the former Administrative Tribunal, a request for costs must be determined in accordance with the rules applicable under the former internal justice system. The former Administrative Tribunal ruled that the Administration is liable for lengthy or unreasonable delays before the JAB. The UNDT therefore has the power to award costs for abuse of proceedings that occurred before the JAB or the former Administrative Tribunal. To find otherwise would result in unfair treatment of those litigants who were entitled to costs under the former system.

18. Mr. Bi Bea challenges the Secretary-General's contention that in accordance with the jurisprudence of the Appeals Tribunal, only a manifest abuse of the proceedings, and therefore some degree of intention to act frivolously, justifies an award of costs. He submits that the rules applicable under the former system apply to his case and that therefore the jurisprudence of the Appeals Tribunal is not relevant. The practice of the former Administrative Tribunal was to award costs in exceptional circumstances, for example "when the Applicant has been urged by the Administration to file an application before the Tribunal".² In the case at bar, the Secretary-General "obliged [Mr. Bi Bea] to file an application before the Tribunal" and, accordingly, Mr. Bi Bea is entitled to costs.

19. Mr. Bi Bea submits that, in any event, the Secretary-General's conduct was "either intentional or grossly negligent". In particular, Mr. Bi Bea points to the fact that the Secretary-General waited several months before implementing the JAB's recommendations and that once he implemented them, he failed to pay interest. He also unduly delayed the proceedings before the former Administrative Tribunal by requesting three extensions of time to file his reply.

20. Finally, Mr. Bi Bea submits that it would be unreasonable to expect him to produce evidence of incurred expenses after many years of litigation. He submits that it is reasonable to assume that he would have spent no less than CHF 5,000 over a period of ten years.

21. Mr. Bi Bea requests that the appeal be dismissed.

² Mr. Bi Bea's answer, quoting former Administrative Tribunal Judgment No. 665, *Gonzalez de German* (1994).

Considerations

22. Article 10(6) of the UNDT Statute states: “Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.”

23. The UNDT’s power to award costs is thus restricted by Statute to cases in which it determines that a party has manifestly abused the proceedings before it. In the absence of such a determination, the basic principle applicable in international courts on the question of costs is that each party shall bear its own costs.

24. We reject the Secretary-General’s argument that the UNDT erred in awarding costs where it determined that there had been a manifest abuse of JAB proceedings, since such proceedings cannot be considered as UNDT proceedings. This argument is refuted by the transitional provisions of the UNDT Statute.

25. Article 2(7) of the UNDT Statute states:

As a transitional measure, the Dispute Tribunal shall be competent to hear and pass judgement on:

(a) A case transferred to it from a joint appeals board or a joint disciplinary committee established by the United Nations, or from another similar body established by a separately administered fund or programme;

(b) A case transferred to it from the United Nations Administrative Tribunal;
as decided by the General Assembly.

26. It follows that we also reject Mr. Bi Bea’s argument that the question of costs must be determined by the rules applicable in the former Administrative Tribunal, which did not require a manifest abuse of proceedings, so that costs could be awarded for lengthy or unreasonable delays before the JAB. The former Administrative Tribunal did not have any statutory power to award costs, although it did so in some of its early cases on the basis of a perceived inherent power. However, the UNDT is not bound by the jurisprudence of the former Administrative Tribunal³ and the applicable law is that of its own Statute.

³ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 37: “Consequently, the jurisprudence of the former Tribunal, though of persuasive value, cannot be binding precedent for the new Tribunals to follow.”

27. The Secretary-General is on stronger ground with his submission that the UNDT exceeded its competence in concluding that he had manifestly abused the proceedings before it and consequently awarding costs when there was no evidence of any abuse of proceedings.

28. The sole evidence relied upon by the UNDT as constituting a manifest abuse of proceedings was the delay by the Secretary-General in responding to the JAB report. The UNDT's finding was: "If the [Secretary-General] had reacted without delay to the JAB report, [Mr. Bi Bea] would not have been put to the expense of filing a claim. In the absence of any reason given by the [Secretary-General] for the delay, the Tribunal finds that it was a manifest abuse of the proceedings which entitles [Mr. Bi Bea] to an award of costs".⁴

29. The delay between the transmission of the JAB report to the Secretary-General and the Secretary-General responding to it was, in our opinion, not inordinate. In any event, in reaching its finding, the UNDT did not indicate what aspect of the delay rendered it a manifest abuse of the proceedings.

30. A delay, in and of itself, is not a manifest abuse of proceedings. In order to award costs against the Secretary-General, it was necessary for the UNDT to be satisfied on the evidence that, in causing the delay, the Secretary-General had "manifestly abused the proceedings". The plain language of those words meant that before the UNDT could lawfully award costs against the Secretary-General, it was necessary to determine on the evidence that the delay was clearly and unmistakably a wrong or improper use of the proceedings of the court. Proof that the delay was frivolous or vexatious would have satisfied this requirement.

31. However, the UNDT failed to make such a determination and therefore erred in law in making the impugned order for costs.

Judgment

32. The appeal is allowed and the UNDT's award of costs of CHF 5,000 is vacated.

⁴ Impugned Judgment, para. 44.

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar