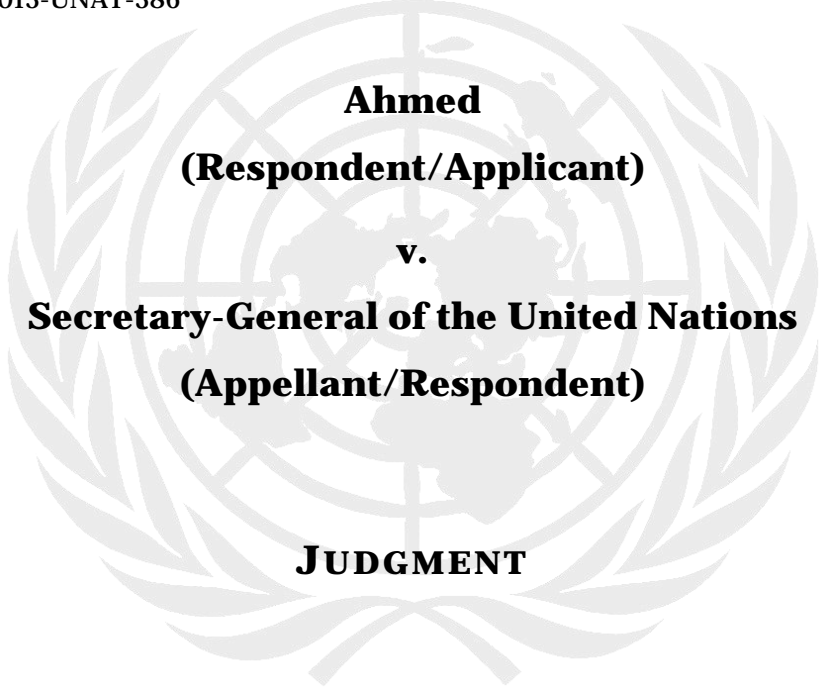




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-386



Ahmed
(Respondent/Applicant)
v.
Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Mary Faherty
Judge Richard Lussick

Case No.: 2013-440

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Mr. Ahmed: Salim U. Shaikh

Counsel for Secretary-General: Stéphanie Cartier

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/2012/186, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 30 November 2012 in the case of *Ahmed v. Secretary-General of the United Nations*. The Secretary-General appealed on 29 January 2013 and Mr. Amin Ahmed answered on 16 March 2013.

2. On 25 April 2013, the Appeals Tribunal issued Order No. 132 (2013), rejecting a “Motion for Confidentiality” filed by Mr. Ahmed in which he appeared to seek that his answer be “restricted” from the Secretary-General until the Appeals Tribunal had ruled on the receivability of his appeal, as well as the redaction of his name.

Facts and Procedure

3. The facts established by the Dispute Tribunal in this case, which are not contested, read as follows:¹

... [Mr. Ahmed], a former staff member with the United Nations Information Centre (“UNIC”) in Islamabad, Pakistan, contests the non-payment, upon his separation, of “termination indemnity”, of interest on his reimbursement for unused annual leave days, and of three months’ salary in lieu of notice promised to him by the Organization.

... The present case arises from the same background described in *Ahmed v. Secretary-General of the United Nations*, Judgment No.] UNDT/2010/161, rendered on 9 September 2010. In that case, the Dispute Tribunal found no basis to support [Mr. Ahmed’s] allegation that his due process rights had been violated when the Administration decided not to renew his contract on the basis of poor performance appraisals. [Mr. Ahmed’s] appeal before the United Nations Appeals Tribunal ... was unsuccessful. In *Ahmed v. Secretary-General of the United Nations*, Judgment No.] 2011-UNAT-153, published on 29 August 2011, the [Appeals Tribunal] affirmed ... UNDT/2010/161. The [Appeals Tribunal] held that the Dispute Tribunal did not err in limiting the scope of the application to the non-renewal of [Mr. Ahmed’s] fixed-term appointment. Following the promulgation of the [Appeals Tribunal] Judgment, the Administration processed [his] final separation payments, which give rise to the dispute in this case.

¹ The facts here are taken from Judgment No. UNDT/2012/186, paragraphs 1–18.

...

Factual background

... Although the facts pertaining to [Mr. Ahmed's] separation are set out in detail in the Dispute Tribunal's and the [Appeals Tribunal's] judgments, it is necessary for the purposes of consideration of the present application to include additional facts specifically relevant to the issues raised in this case.

Communication regarding post-separation payments

... On 20 December 2005, the Chief of the Centres Operations Section, Department of Public Information ("DPI"), sent a memorandum to [the Office of Human Resources Management ("OHRM")], with copies to other senior officials in DPI. The memorandum stated that, due to [Mr. Ahmed's] poor performance, his contract would not be extended beyond 31 December 2005. However, it stated that to afford [him] time to seek alternative employment and, taking into account the length of his service, consideration should be given to providing him with "a three-month extension [which] would serve as notice of non-renewal". The Chief further requested that "in view of security considerations that have been raised concerning his performance and continued presence at the UNIC, we would request that his extension be granted as special leave with pay and that the local security coordinator be requested to prevent [Mr. Ahmed] henceforth from visiting the centre". [Mr. Ahmed] was not copied in on this memorandum.

... OHRM disagreed with the suggestion to place [Mr. Ahmed] on special leave with full pay ("SLWFP"). An internal OHRM memorandum from [an] Associate Human Resources Officer to the Director of Operational Services Division, OHRM, dated 29 December 2005, expressed the view that the best resolution to this matter was not to place [Mr. Ahmed] on SLWFP but "to separate [him] effective 31 December 2005 at the close of business, and pay him three months' salary in lieu of notice in recognition of his 19 years of service". The memorandum stated that thus any security threat would be minimized since [Mr. Ahmed] would not have access to the Centre with effect from 1 January 2006. The Associate Human Resources Officer, OHRM, sought the approval of the Director, Operational Services Division, OHRM, "to separate [Mr. Ahmed] effective 31 December 2005 [close of business] and pay him three month[s]' salary in lieu of notice, as per our recommendation". [Mr. Ahmed] was not copied in on this memorandum.

... On 30 December 2005, the Associate Human Resources Officer, OHRM, sent an email to OHRM and DPI officials stating that [Mr. Ahmed's] fixed-term appointment would not be extended beyond 31 December 2005 and that "[i]n recognition of his years of service, he would be paid

three months' salary in lieu of notice, which should be reflected in his separation personnel action [form]". [Mr. Ahmed] was not copied in on this communication.

... On 3 January 2006, [Mr. Ahmed] was informed by email from the Chief of Programme Support Section, DPI, that his contract would not be renewed beyond 31 December 2005. He was further informed that OHRM had approved the payment of "three months' full salary in lieu of termination notice, in recognition of many years of service with the Organization". The email contained no references to [his] being placed on SLWFP.

... However, despite the communications described above, [Mr. Ahmed] was placed on SLWFP for the period of 1 January to 31 March 2006. As a staff member on SLWFP, [he] was paid salary between January and March 2006 on a monthly basis. In total, during the period of January and March 2006 [Mr. Ahmed] was paid 487,649 Pakistani rupees. The [Secretary-General] now submits that this was the payment in lieu of notice in recognition of many years of service with the Organization.

... On 10 April 2006, the Administration wrote to [Mr. Ahmed] requesting his signature on paperwork related to his separation from service. Although the email mentioned his placement on SLWFP, it did not state that it was equivalent to his payment in lieu of notice in recognition of many years of service with the Organization. The email simply stated that "[a]s you know 31st March 2006 was your last day (special leave with full pay) at the UNIC Islamabad" ...

... [Mr. Ahmed] did not sign the forms that were attached to the email because he believed that by doing so he would be acquiescing in what he considered to be an unlawful separation from service.

... On 16 June 2006, the Executive Officer, DPI, sent a memorandum to OHRM, explaining that "taking into consideration [Mr. Ahmed's] length of service and to afford him sufficient time to seek alternative employment, DPI recommended and OHRM approved, a three-month extension of his contract". The memorandum further stated that, "[i]n view of the security considerations that had been raised concerning [his] performance and continued presence at the UNIC, the extension was approved as special leave with pay".

September 2011 payment

... On 19 July 2011, following the judgment in [Judgment No.] 2011-UNAT-153, [Mr. Ahmed] emailed the Administration requesting "payment of dues against accrued leave of sixty days". On 20 July 2011, the Administration responded, informing [him] that in order to address his claim he would have to sign and return the paperwork sent to him in April 2006.

[Mr. Ahmed] was also informed that he had accrued 56.5 days of annual leave, and not 60 days. [He] does not dispute this calculation.

... [Mr. Ahmed] filled out the forms and submitted them to the Administration on 11 August 2011.

... On 13 September 2011, the Administration provided [Mr. Ahmed] with a final statement and payment in the sum of 505,218 Pakistani rupees. The final payment consisted of several components. It included payment in respect of unused accrued annual leave (460,404 Pakistani rupees), without any interest for the time the money was held by the Organization. The final payment also included 44,815 Pakistani rupees in relation to the three months' salary in lieu of notice in recognition of many years of service with the Organization. According to the Respondent, the payment in lieu of notice had been made to [Mr. Ahmed] in January–March 2006 in the form of SLWFP (487,649 Pakistani rupees), but it was later determined that the amount paid to him should have been higher by 44,815 Pakistani rupees, which sum was provided to [him] on 13 September 2011.

... In October 2011, [Mr. Ahmed] submitted a request for management evaluation of the decision not to pay interest on the amounts of money paid to him and not to pay the three months' salary in lieu of notice. He provided further clarification to the Management Evaluation Unit on 30 November and 21 December 2011. On 18 January 2012, he received a negative response to his request for management evaluation.

4. Mr. Ahmed filed an application with the UNDT on 28 March 2012. The Dispute Tribunal found that he was not entitled to termination indemnity, as both the Dispute Tribunal and the Appeals Tribunal had already held that his separation from service resulted from the non-renewal of his contract rather than termination.

5. With respect to interest on the compensation he received for his unused annual leave days, the Dispute Tribunal found that, in delaying the payment pending Mr. Ahmed's signature of his separation papers, the Administration lacked legal basis for refusing to pay his entitlements. It held "[i]t could be said that the Administration had the benefit of a sum of money for which they did, should, and could have earned interest and to deny such reimbursement to [Mr. Ahmed] offends against the principle of unjust enrichment".² The UNDT noted that "such mistaken beliefs [as those held by Mr. Ahmed] are not uncommon and ... it was reasonable for [him] to suppose that since his appeal against the [Dispute] Tribunal's judgment was still outstanding he should not

² Judgment No. UNDT/2012/186, para. 23.

sign any document which he may feel, albeit mistakenly, would jeopardize his rights”³ and found that there was “no evidence that the [Administration] reminded [him], at any point after April 2006, to sign the papers or ... warned him of the risk that he may forfeit interest payment on the sums outstanding if he did not sign and return the forms”.⁴

6. Accordingly, the UNDT ordered interest on this sum, “not merely [as] compensation for pecuniary loss, but [as] a recovery of accumulated interest on [Mr. Ahmed’s] funds that were temporarily held by the Organization”. Citing *Warren v. Secretary-General of the United Nations*,⁵ the Dispute Tribunal ordered interest at the U.S. Prime Rate until 13 September 2011, when the payments should have been made following receipt of his paperwork, and, thereafter, interest at the State Bank of Pakistan rate.

7. With respect to Mr. Ahmed’s claim for three months’ salary in lieu of notice, the Secretary-General had argued that the matter of his SLWFP was not receivable, being both time-barred and *res judicata*. The Dispute Tribunal disagreed with the Secretary-General, finding that Mr. Ahmed was not appealing his placement on SLWFP but the notification he received on 13 September 2011, that the salary he received whilst on SLWFP was his payment in lieu of notice. As such, his claim was neither time-barred nor could it possibly be *res judicata*.

8. On the merits of this claim, the UNDT held:

Equating salary paid while on SLWFP with payment in lieu of notice in recognition of many years of service with the Organization would be tantamount to allowing Staff Rules and corresponding rights and obligations to be overtaken by considerations of administrative convenience. The Tribunal will not give the decision to place the Applicant on SLWFP any meaning that is different from the one assigned by the Staff Rules. Once the Applicant was placed on SLWFP, under the Staff Rules, he had a *right* to full salary, which the Organization was *required* to pay, this being distinct from the payment in lieu of notice in recognition of the Applicant’s service, which the Organization *undertook* to pay. It is not legally permissible to view salary paid while on SLWFP as payment in lieu of notice ... (Emphases in original.)⁶

³ *Ibid.*, para. 24.

⁴ *Ibid.*

⁵ Judgment No. 2010-UNAT-059.

⁶ Judgment No. UNDT/2012/186, para. 36.

Accordingly, the Dispute Tribunal found that Mr. Ahmed was entitled to receive three months' salary in lieu of notice, as promised by the Organization in recognition of his long service, with interest at the U.S. Prime Rate from 1 April 2006 to 13 September 2011 and the State Bank of Pakistan rate from 13 September 2011 to the date of payment.

Submissions

The Secretary-General's Appeal

9. The Secretary-General argues that, as the delay in payment in respect of his unused leave was "entirely attributable" to Mr. Ahmed, the Dispute Tribunal erred in awarding him interest on the sum.

10. He also argues that the UNDT erred in finding that there was no legal basis for the Administration's delay in payment or that the Organization was unjustly enriched. Indeed, he asserts that the interest awarded by the UNDT (which significantly exceeds interest actually payable on savings accounts) would create unjust enrichment on the part of Mr. Ahmed and, if sustained, "would create an inappropriate financial incentive for staff members to delay administrative procedures necessary to finalize the disbursement of payments".

11. The Secretary-General submits that the Dispute Tribunal erred in finding receivable Mr. Ahmed's claim in respect of compensation in lieu of notice. He claims that Mr. Ahmed first raised this issue, albeit unsuccessfully, before the former Joint Appeals Board in 2006, and that he proceeded to include it in his application to the former United Nations Administrative Tribunal, which was transferred to the UNDT. Accordingly, the claim is *res judicata*.

12. The Secretary-General requests the Appeals Tribunal to vacate the findings of the UNDT that (a) Mr. Ahmed was entitled to interest on the compensation he received for his unused annual leave; and (b) his claim in respect of payment in lieu of notice was receivable.

Mr. Ahmed's Answer

13. Mr. Ahmed submits that the Secretary-General has shown no reversible error on the part of the Dispute Tribunal.

14. He argues that the Dispute Tribunal did not err in awarding interest on the payment in respect of unused annual leave. He avers that there was no reason he could have known that signing the necessary forms would not prejudice his right to appeal, as such information is not disseminated to the staff. Furthermore, he argues that the payment of interest does not harm the Organization, which has already benefited from receipt of such interest whilst the funds remained in its accounts.

15. Mr. Ahmed contends that the Dispute Tribunal correctly found in his favour with respect to the payment of compensation in lieu of notice and that the Secretary-General "is erroneously taking shelter on technical grounds".

16. He asks the Appeals Tribunal to consider the issue of his termination indemnity which, he argues, the Secretary-General earlier conceded.

17. Mr. Ahmed requests the Appeals Tribunal to dismiss the appeal in its entirety, uphold the Judgment of the Dispute Tribunal, except with respect to termination indemnity, and order payment of the sums due, with interest.

Considerations

18. The Appeals Tribunal is presented with the case of Mr. Ahmed who, somewhat unusually, was to be separated at the end of his fixed-term contract with certain emoluments. It is these payments which form the basis of the instant matter, his non-renewal having been addressed in Judgment No. 2011-UNAT-153.

19. The Secretary-General appeals the Judgment of the Dispute Tribunal, awarding Mr. Ahmed interest on delayed reimbursement for unused vacation days and finding that SLWFP did not constitute the compensation in lieu of notice he had been promised.

20. Insofar as the interest awarded by the UNDT on the payment of Mr. Ahmed's accrued vacation days is concerned, the Appeals Tribunal agrees with the Secretary-General that such payment is undue. The delay in completion of Mr. Ahmed's

separation formalities was entirely attributable to him. As such, he cannot be compensated for the delay in payment, by way of interest or in any other manner. There is no question of *mala fides* on the part of the Administration, nor does the UNDT's analysis that the Organization was unjustly enriched stand scrutiny. The Dispute Tribunal Judgment is, therefore, vacated in this respect.

21. Mr. Ahmed's reluctance to sign the paperwork was apparently due to a misconception that he was waiving any outstanding claims against the Organization. This was inaccurate and it would have behooved him to check first with an appropriate official. That said, the Appeals Tribunal is mindful of the fact that staff members are unlikely to be conversant with separation formalities and recalls the language of the former United Nations Administrative Tribunal in its Judgement No. 1212, *Stouffs* (2004):

XI. ... The Tribunal observes, on the one hand, that the staff member's disagreement with the content of the form does not exempt her from the general obligation to sign it in order to be able to receive the benefits deriving from her service with the United Nations. On the other hand, the Tribunal emphasizes that the staff member's signature does not deprive her of the possibility of challenging a contested component of its content or pursuing her action. *The Tribunal points out that the Administration must ensure that a staff member's signing of the P.35 form is not considered as the signing of a general release from the Organization's obligations towards the staff.* ... (Emphasis added.)

22. With respect to Mr. Ahmed's compensation in lieu of notice, the Appeals Tribunal upholds the Judgment of the UNDT. We find the matter was properly before that court, and that it could not be construed as *res judicata*, as argued by the Secretary-General, because the previous litigation centred upon his non-renewal, *per se*, and did not enter into the merits of separation entitlements or this head of compensation.

23. Regardless of the "administrative convenience" apparently offered by placing Mr. Ahmed on SLWFP rather than paying him three months' compensation in lieu of notice, SLWFP is not a substitute for the payment promised to him by the Chief of Programme Support Section, DPI, on 3 January 2006. Mr. Ahmed was not copied on the various memoranda and internal correspondence which discussed how to compensate him. Rather, he was informed that he would be paid compensation in lieu of notice and

then informed he had been placed on SLWFP, his contract having been extended for three months accordingly. These are independent administrative decisions and Mr. Ahmed was entitled to view them as such. SLWFP is, by its very nature, fully paid. It is not a substitute for lump sum payment. The Appeals Tribunal agrees with the Dispute Tribunal that the Administration made a commitment to pay Mr. Ahmed compensation in lieu of notice, and that commitment must be met.

24. Finally, the Appeals Tribunal notes that Mr. Ahmed seeks to raise pleas in his answer before this Tribunal. In the absence of a cross-appeal, such pleas are not properly before the Tribunal and will not be considered.

25. From the foregoing, the appeal succeeds in part.

Judgment

26. The UNDT Judgment is affirmed in part.

27. The Secretary-General's appeal of the award of interest on compensation for unused leave days is allowed and the UNDT's award of such interest is hereby vacated. Subject to that, the other ground of appeal is dismissed.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

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

(Signed)

Weicheng Lin, Registrar