



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

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Judgment No. 2013-UNAT-387

**Gakumba  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Luis María Simón, Presiding  
Judge Mary Faherty  
Judge Inés Weinberg de Roca

**Case No.:** 2013-441

**Date:** 17 October 2013

**Registrar:** Weicheng Lin

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**Counsel for Mr. Gakumba:** Self-represented

**Counsel for Secretary-General:** Amy Wood

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/2012/192, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 6 December 2012 in the case of *Gakumba v. Secretary-General of the United Nations*. The Secretary-General appealed on 1 February 2013 and Mr. Nzamwita Gakumba answered on 18 March 2013.

### **Facts and Procedure**

2. The Dispute Tribunal made the following findings of fact:<sup>1</sup>

... [Mr. Gakumba] joined the United Nations on 22 July 2002 for a probationary period of three months as a Programme Analyst in the United Nations Development Programme (UNDP) in Kigali, Rwanda. This probationary period was extended on 22 October 2002 for two months through to 31 December 2002.

... On 1 January 2003, his contract was converted to a fixed-term appointment and extended through to 31 December 2003. At the expiration of [Mr. Gakumba's] contract in December 2003, he was offered a fixed-term contract to run from 1 January 2004 to 31 December 2004.

...

... Sometime in 2003, the UNDP Rwanda Kigali office supported [Mr. Gakumba's] participation in UNDP's Virtual Development Academy course for 2003 which he completed successfully. [Mr. Gakumba] was also elected President of the Staff Association in December 2003.

... In April 2003, UNDP's Career Review Group (CRG), concluded [Mr. Gakumba's] Results and Competency Assessment (RCA) for 2002 with a recommendation of "partially met expectations".

... In early 2004, Mr. Kamau [, UNDP's Resident Representative (RR),] informed UNDP staff that the involvement of the Staff Association in the CRG would be discontinued. On 28 February 2004, [Mr. Gakumba] wrote to Mr. Kamau, on behalf of the Staff Association, disputing this decision.

... In May 2004, [Mr. Gakumba's] immediate supervisor, Mr. Gana Fofang, Deputy Resident Representative (DRR), assessed [Mr. Gakumba's] performance as "fully met expectations" for the period from 1 February 2003 through 31 January 2004. Thereafter, Mr. Fofang proceeded on a new assignment in Mozambique. On 17 May 2004, the CRG, under the chairmanship of Mr. Kamau,

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<sup>1</sup> The facts here are taken from Judgment No. UNDT/2012/192, paragraphs 1 – 21.

disagreed with the views of [Mr. Gakumba's] immediate supervisor and assessed [Mr. Gakumba's] performance for the period as "unsatisfactory".

... By email dated 19 May 2004, addressed to Mr. Kamau and copied, *inter alia*, to all the UNDP Rwanda Staff, [Mr. Gakumba] contested the CRG's findings and conclusions and alleged that Mr. Kamau had "manipulated" the CRG.

... On 21 May 2004, Mr. Kamau addressed an email to all UNDP Rwanda staff in which he informed them that [Mr. Gakumba's] contract had been terminated effective immediately because his performance had not demonstrated any positive change or growth in the year following an appraised performance below a fully satisfactory level. Mr. Kamau stated that [Mr. Gakumba] would be relieved of all responsibilities to allow him time to seek alternate employment. Mr. Kamau further stated that [Mr. Gakumba's] contract was terminated that very day in accordance with guideline number 54 of the 2003-2004 RCA Guidelines.<sup>2</sup>

... On 24 May 2004, [Mr. Gakumba] denounced Mr. Kamau's decision to terminate his contract as being contrary to [articles]. 1 through 68 of the RCA 2003-2004 Guidelines. [Mr. Gakumba] also alleged that his election as President of the Staff Association in 2003 had upset the UNDP Rwanda management as he did not take their side on issues. [Mr. Gakumba] requested that Mr. Kamau review the contested decision.

... On 8 June 2004 [Mr. Gakumba] filed a rebuttal to the RCA Rebuttal Panel wherein he disputed the downward revision of his rating by the CRG from "fully met expectations" to "unsatisfactory". He alleged that he had been denied due process and that Mr. Kamau had violated numerous articles of the 2004 RCA Guidelines and of the UNDP Staff Association Constitution.

... By email dated 9 June 2004, to Mr. Fofang, Ms. Yewande Odia, Legal Advisor, Office of Legal and Procurement Support, UNDP, sought his opinion regarding [Mr. Gakumba's] performance in light of the CRG's rating.

... On 9 June 2004, Mr. Fofang responded stating that he was neither privy to the CRG rating nor the justification offered and that he first learned of the issue from Ms. Odia's email. Mr. Fofang declared that he stood by his assessment of [Mr. Gakumba's] performance.

... On 10 June 2004, Ms. Odia ... also sought Mr. Fofang's opinion regarding Mr. Kamau's claims that he (Mr. Fofang) was frustrated over [Mr. Gakumba's] poor performance and misbehaviour. On 13 June 2004, Mr. Fofang denied the statements attributed to him by Mr. Kamau. Mr. Fofang explained that,

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<sup>2</sup> According to Mr. Gakumba, he was locked out of the UNDP premises from 21 May 2004 through 31 December 2004.

I expressed equal frustration with [Mr. Gakumba] and others periodically as performance and deadline pressures occasioned and not as stated and I know of no aggressive behaviour what ever that means.

... On 21 August 2004, Ms. Odette Murat, Deputy Resident Representative, UNDP, Kigali, Rwanda notified [Mr. Gakumba] that the UNDP Management had received, on 20 August 2004, two official complaints against him from two former consultants who claimed, *inter alia*, that he had threatened and intimidated his colleagues at UNDP, Rwanda. Copies of the complaints were attached for [Mr. Gakumba's] review and comments.

... On 23 August 2004, [Mr. Gakumba] refuted the allegations. He stated that his election as President of the Staff Association attested to the trust and confidence that staff had put in him, especially in promoting their interests which was disturbing to the senior management because he did not allow management to manipulate him. [Mr. Gakumba] stated that he was not aware of any written or signed memorandum addressed to him regarding these allegations of misbehaviour as was required by the United Nations Regulations and Rules. He rejected the allegations as unfounded.

... On 9 December 2004, the RCA Rebuttal Panel submitted its report concluding, *inter alia*, that:

- a. the CRG did not provide adequate justification for its decision to downgrade [Mr. Gakumba's] RCA rating by two levels from "fully met expectations" to "unsatisfactory";
- b. [Mr. Gakumba's] performance review lacked due process in terms of lack of documentary evidence and feedback on [his] performance and "substantially different" assessments of [his] performance by Mr. Kamau and Mr. Fofang and the non-participation of Mr. Fofang in the CRG meeting even though he was willing to participate via telephone;
- c. [Mr. Gakumba's] behavioural issues had a negative impact on his performance which was documented by the CRG;
- d. given the severity of the CRG comments, the Panel was concerned that management did not take timely and appropriate steps to address [Mr. Gakumba's] alleged behavioural issues;
- e. there was insufficient evidence to justify the final RCA/CRG rating of "unsatisfactory"; and
- f. the Panel recommended that [Mr. Gakumba's] CRG rating be changed to "partially met expectations" having taken into account Mr. Kamau's information on behavioural issues.

... On 9 December 2004, the RCA Rebuttal Panel forwarded its report to Mr. Brian Gleeson, Director, Office of Human Resources/Bureau of Management, UNDP.

... On 15 December 2004, Mr. Kamau informed [Mr. Gakumba], who was still not allowed into the [United Nations] premises, that the RCA Rebuttal Panel's recommendation to upgrade his overall rating did not change the basis on which the decision to terminate his contract was made and that his contract would therefore expire on 31 December 2004 as he had previously been informed.

...

... By email dated 20 December 2004, addressed to Mr. Mark Malloch Brown, then Administrator, UNDP, [Mr. Gakumba] sought administrative review of the decision to allow his appointment to expire on 31 December 2004.

... On 27 January 2005, Mr. Jan Mattsson, Assistant Administrator and Director, Bureau of Management, UNDP, informed [Mr. Gakumba] that UNDP had undertaken the request for administrative review focusing only on the decision to allow his appointment to expire at its term in view of his unsatisfactory performance. Mr. Mattsson reiterated that [Mr. Gakumba's] performance was not satisfactory for the entire period of his employment with UNDP; that his performance had not demonstrated any positive change or growth in the year following an appraised performance below a fully satisfactory level and that he was encouraged to seek alternative employment opportunities with the view to separation from UNDP.

3. Mr. Gakumba appealed first to the former Joint Appeals Board and then to the former United Nations Administrative Tribunal. His case was subsequently transferred to the Dispute Tribunal.

4. In Judgment No. UNDT/2012/192, the Dispute Tribunal determined that, by placing Mr. Gakumba on *de facto* special leave with full pay (SLWFP), and barring him from entering the office premises or carrying out his duties while allowing him to draw a full salary at the expense of the Organization, Mr. Kamau had acted illegally outside the scope of his authority. However, the UNDT found that Mr. Gakumba's application in respect of his termination was not receivable as he had failed to challenge the decision to terminate his service and to deny him access to his workplace. The Dispute Tribunal also found due process and procedural violations in respect of Mr. Gakumba's performance evaluations, and abuse of authority on the part of Mr. Kamau in respect of the non-renewal of Mr. Gakumba's fixed-term appointment. As remedy, the Dispute Tribunal ordered the rescission of the decision not to renew Mr. Gakumba's contract. It further ordered Mr. Gakumba's reinstatement or, in the

alternative, two years' net base salary in lieu of reinstatement. In addition, the Dispute Tribunal ordered that Mr. Gakumba be paid seven months' net base salary in compensation for "several procedural and due process violations, humiliation and embarrassment" resulting from administrative actions including Mr. Kamau's letter of 21 May 2004 and the CRG's flawed evaluation.

### **Submissions**

#### **The Secretary-General's Appeal**

5. The Secretary-General submits that the Dispute Tribunal erred in setting compensation at two years' net base salary in lieu of reinstatement when the duration of Mr. Gakumba's previous appointment did not exceed one year. In the opinion of the Secretary-General, this amount of compensation for this head of damage is excessive and should be reduced to no more than one year's net base salary in lieu of rescission. In this regard, the Secretary-General notes that Mr. Gakumba was offered and accepted two previous fixed-term appointments, each of which was for a period of one year. The Secretary-General maintains that UNDT's award of two years' net base salary in lieu of reinstatement is inconsistent with the sums that have been ordered by the Appeals Tribunal in other comparable cases including *Mushema*. And *Liyanarachchige*<sup>3</sup>

6. The Secretary-General also submits that the UNDT erred on a question of law in considering the factors of humiliation and embarrassment; placing Mr. Gakumba on SLWFP; and procedural irregularities in the evaluation of his performance, in making the award of seven months' net base salary as additional compensation, without a necessary and sufficient evidentiary basis of harm shown and proven.

7. The Secretary-General further submits that the UNDT erred in law and exceeded its competence by awarding compensation for any alleged harm resulting from the decision to terminate Mr. Gakumba's service and bar him from the UNDP premises, after it had determined that Mr. Gakumba's application in respect of the termination was not receivable.

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<sup>3</sup> *Mushema v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-247; *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087;

8. Lastly, the Secretary-General submits that the UNDT's award of seven months' net base salary is impermissibly duplicative, as it is an award of compensation for the same violation of Mr. Gakumba's rights under two different headings. In this regard, the Secretary-General maintains that the flaws in the manner in which the non-renewal decision was taken formed the basis for the rescission of that decision, but such a finding does not constitute a sufficient basis for exceeding the two-year limit on compensation set forth in Article 10(5) of the UNDT Statute. Further evidence of aggravating factors is needed to justify why compensation exceeding the two-year limit was warranted in the present case.

**Mr. Gakumba's Answer**

9. Mr. Gakumba stresses that, contrary to the Secretary-General's claim, his fixed-term appointment due to expire on 31 December 2004 was terminated on 21 May 2004, as he was locked out of the premises from 21 May 2004 onwards, in contravention of former Staff Rule 109.3.

10. Mr. Gakumba submits that the CRG's process leading to the downgrading of his performance rating was seriously flawed, in that his immediate supervisor was prevented from participating therein, resulting in his right to a fair hearing being severely compromised. In this regard, Mr. Gakumba notes that he completed only one RCA cycle from 1 January 2003 through 31 January 2004, and maintains that the 2004 RCA rating of "fully met expectations" given by his immediate supervisor was the only one issued in accordance with the RCA Guidelines.

11. Mr. Gakumba also submits that he was the victim of Mr. Kamau's baseless allegation of "aggressive behaviour" and that he was victimized due to his involvement in the staff association activities.

12. Mr. Gakumba believes that he is entitled to compensation for the wrongs done to him. He requests reinstatement and/or redeployment and monetary compensation for loss of earnings; professional, moral and material damage; and the indignity and trauma he sustained in the wake of being locked out of the UNDP premises.

**Considerations**

13. Having considered both parties' submissions, the Appeals Tribunal is satisfied that the issues arising therefrom can be determined without an oral hearing and therefore did not grant Mr. Gakumba's petition in this regard.

14. It must be pointed out that there is only one appeal in the present case, introduced by the Secretary-General and restricted to the matter of compensation.

15. Although Mr. Gakumba's answer could be interpreted as his rebuttal to the appeal, he does not formally submit a cross-appeal. Mr. Gakumba mainly seeks to have the monetary awards at the first instance level affirmed.

16. The Tribunal holds that the appeal from the Secretary-General must be allowed in part, because the Dispute Tribunal erred in setting the compensation in lieu of reinstatement at two years' net base salary, without taking into account that Mr. Gakumba's previous fixed-term appointments were one year each. The expectancy of renewal could not be fixed beyond such period or else it would not be reasonable. Therefore, the compensation established in the Judgment under appeal will be reduced to a total of one year's net base salary.

17. This Court affirms the UNDT's Judgment on compensation for non-pecuniary damages. With respect to this part of the decision, no error of law was committed, since the circumstances of the case allow the inference that the claimant suffered relevant harm. As the President of the Staff Association he was subject essentially to a termination that was illegally couched as SLWFP, arbitrarily graded and denied a renewal of his fixed-term appointment.

18. Certainly those circumstances support the finding of humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member, which led the UNDT to award the reasonable amount of seven months' net base salary as compensation.

19. This compensation is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1)(a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the

Administration, and it is regulated in Article 9(1)(b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling. Thus, the Judgment under appeal does not violate the UNDT Statute, Article 10(5) of which mirrors Article 9(1) of the Statute of the Appeals Tribunal and reads:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

### **Judgment**

20. The appeal is allowed in part and the award of compensation in lieu of reinstatement ordered by the UNDT in its Judgment is reduced to one year's net base salary.

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2013 in New York, United States.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Faherty

*(Signed)*

Judge Weinberg de Roca

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

*(Signed)*

Weicheng Lin, Registrar