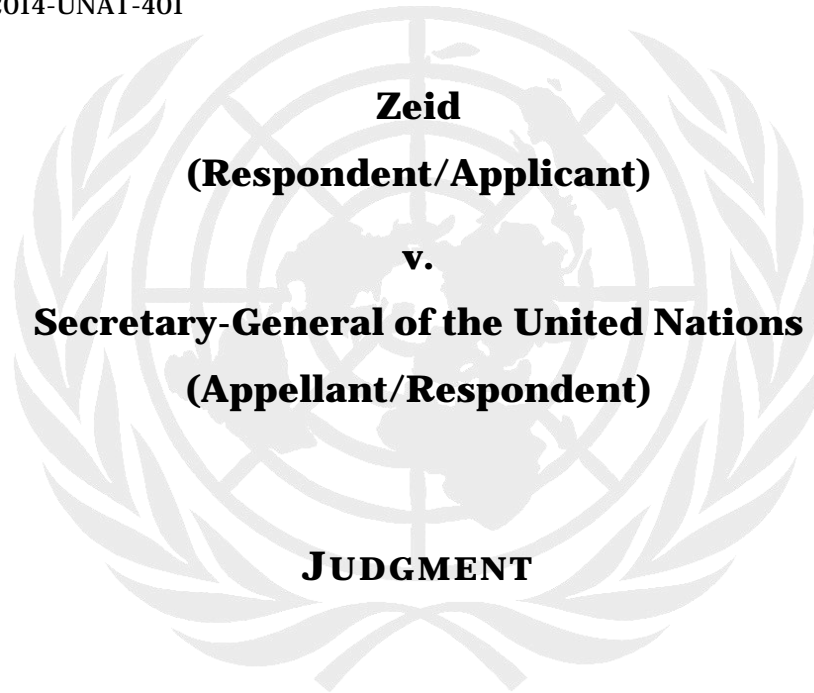




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-401



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

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Inés Weinberg de Roca
Judge Sophia Adinyira

Case No.: 2013-451

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Duke Danquah

Counsel for Appellant/Respondent: Zarqaa Chohan

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. On 17 January 2013, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York issued Judgment No. UNDT/2013/005, in the case of *Zeid v. Secretary General of the United Nations*. On 18 March 2013, the Secretary General of the United Nations filed an appeal of the Judgment to the United Nations Appeals Tribunal (Appeals Tribunal), and on 20 May 2013, Mr. Galal Zeid filed his answer.

Facts and Procedure

2. Mr. Zeid was given a probationary appointment at the P-2 level as an Associate Interpreter in June 1984. Subsequently, he was promoted to the position of Interpreter at the P-4 level. He was later reassigned at this level as an Interpreter in the Arabic Interpretation Section in New York.

3. The facts of this case are almost identical to the ones established in *Kamal*,¹ which considered the same selection exercise for P-5 Arabic interpreters that we consider in the present case. Ms. Kamal and Mr. Zeid were candidates for promotion in the same selection process, which each challenged, and both were, and are, represented by the same counsel before the UNDT and the Appeals Tribunal.

4. The Appeals Tribunal adopts the following findings made by the Dispute Tribunal:²

... In April and September 2004, respectively, two vacancy announcements were issued for the post of Senior Interpreter (Arabic) at the P-5 level for the Interpretation Section, Department for General Assembly and Conference Management (“DGACM”). The Applicant was not among those recommended. These vacancy announcements were cancelled in April 2005 when it was established, following complaints by two staff members, including Mr. Zeid, that the evaluation criteria were not consistent with ST/AI/2002/4 (Staff selection system).

... On 14 April 2005, a single vacancy announcement for the two posts was re-issued. As a result of the selection process that followed, the Applicant and Ms. Kamal were recommended for appointment. The recommendations were forwarded to the CRB [Central Review Body] in October 2005.

¹ *Kamal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-204.

² Impugned Judgment, paras. 12-15, 17-19, 21, 23, 25-29, 33, 35 and 38.

... On 17 October 2005, a group of interpreters sent a written complaint to the President of the Staff Union, expressing their concern about the procedures and recommendations and asking for a suspension of the process and the setting up of a joint staff-management working group.

... On 20 October 2005, the Staff Council adopted Resolution No. 66, proposing the establishment of a joint staff-management working group to review the matter and determine whether the existing rules had been complied with, and to submit a report with findings and recommendations to the Assistant Secretary-General, Office of Human Resources Management (“OHRM”). ...

...

... On 6 December 2005, OHRM decided to establish a working group to review the selection process and to interview interested staff members.

... On 27 January 2006, the Applicant wrote to the Under-Secretary-General for Management and the Assistant Secretary-General for DGACM expressing his concerns regarding the process, but received no reply.

... On 30 January 2006, the Applicant met the working group that was conducting a fact-finding exercise.

...

... On 14 April 2006, the Applicant wrote to the Under-Secretary-General for Management protesting about the continuing delays in the selection process ...

...

... The working group submitted its report in May 2006. It made several recommendations including the dissemination of evaluation criteria to all potential candidates prior to any interview process and the maintenance of these criteria throughout the entire process.

...

... On 2 June 2006, three staff members submitted a complaint regarding the composition of the working group and requested that a newly constituted panel look at the selection process afresh. OHRM rejected this request.

... In November 2006, a joint decision was taken by OHRM and DGACM to cancel the two vacancy announcement[s] of 2005 and to issue a new vacancy announcement making it clear that all candidates would be assessed on the basis of the final version of the selection criteria established by DGACM.

... The Applicant, along with other staff members affected by the delayed process, had a meeting with the Assistant Secretary-General for DGACM on 8 November 2006.

... On 5 December 2006, the Applicant received a letter from the Assistant Secretary-General proposing to re-advertise the vacancy announcement. The Applicant was provided with a copy of the working group's report.

... On 12 December 2006, the Applicant submitted his detailed comments to the Assistant Secretary-General for DGACM on the note of 5 December 2006, on the report of the working group, and on the proposal to re-advertise the vacancy.

...

... On 12 July 2007 ...a third vacancy announcement was advertised. The Applicant applied. As a result of this third selection exercise, he and Ms. Kamal were once more recommended for selection.

...

... On 26 December 2007, the Applicant was informed of his selection. In January 2008, it was decided to promote the Applicant to the P-5 level retroactively, effective 14 April 2005 (the date of the posting of the second vacancy announcement), with all related payments backdated to that date, which was six months earlier than October 2005, when the recommendation for the Applicant's promotion had been sent for consideration to the CRB during the second selection exercise.

...

... On 22 September 2008, the Applicant filed an application with the former Administrative Tribunal complaining about the circumstances surrounding his promotion to the P-5 level. The case was subsequently transferred to the Dispute Tribunal.

5. The Dispute Tribunal held a hearing on the merits on 14 November 2012. Evidence was taken from several witnesses, including Mr. Zeid.

6. On 17 January 2013, the UNDT issued Judgment No. UNDT/2013/005, in which it determined that the cancellation of the second selection exercise and its subsequent recommencement were appropriate and lawful. The UNDT determined, however, that there were "excessive and unjustifiable delays in concluding the selection process" and that "[t]he Organization ... consistently and without just cause failed to respond to [Mr. Zeid's] reasonable requests for information and action". Further, the UNDT concluded that the delays and failures to respond to Mr. Zeid's communications "amounted to maladministration" and caused Mr. Zeid emotional distress. Thus, the UNDT awarded Mr. Zeid USD 10,000 as moral damages.

Submissions

The Secretary General's Appeal

7. The UNDT erred in concluding there were excessive delays on the part of the Administration in completing the promotion exercise within a reasonable time. The first selection process in 2004 was undertaken within eight months; the second selection process in 2005 was undertaken within six months; and the third selection process in 2007 was undertaken within five months. These delays were not excessive. And, in any event, the delays were the result of various candidates complaining about and challenging irregularities in the selection process and the need for the Administration to investigate and address those complaints. In *Kamal*, the Appeals Tribunal concluded that the delays surrounding the selection process “do not show any negligence or violation of specific rules by the Administration”. This conclusion in *Kamal* is correct.

8. The UNDT erred in concluding that the Administration failed to acknowledge or reply to Mr. Zeid's inquiries regarding the delay. Although Mr. Zeid made numerous inquiries to the Administration about the status of the selection exercise, he was not the only staff member to do so – all six of the interpreters in the Arabic Interpretation Section complained. Separately responding to each staff member was not possible, and it was more appropriate to respond to the candidates collectively in a group, which was done. Moreover, there were some individual responses to Mr. Zeid's inquiries in June 2005, March 2006 and November 2006 and he personally met with the Working Group in January 2006.

9. The UNDT erred in concluding that Mr. Zeid suffered emotional distress from the excessive delays and failures to reply to his inquiries. The UNDT determined that the cancellation of the second selection exercise and the implementation of the third selection exercise (which selected Mr. Zeid) were valid and lawful. It did not identify any procedural errors in the selection process or any breach of Mr. Zeid's rights. In light of this, the UNDT is precluded from awarding compensation for moral damages, and the UNDT erred as a matter of law in awarding Mr. Zeid USD 10,000.00.

10. Mr. Zeid did not suffer any humiliation or harm to his professional reputation since he ultimately was placed in a better position than if he had been selected earlier; he was promoted retroactively to 14 April 2005 and paid two years and eight months additional salary beyond what

the Organization was required to pay him. If his selection had proceeded to the CRB, the earliest he could have been promoted would have been November 2005. Thus, the UNDT erred in awarding compensation for moral damages.

11. The Secretary-General seeks to vacate the award of compensation to Mr. Zeid.

Mr. Zeid's Answer

12. The UNDT correctly determined that there were excessive delays by the Administration in completing the promotion exercise within a reasonable time. These delays were substantially caused by the Administration ignoring Mr. Zeid's repeated complaints. Although there was no rule requiring notice within a certain period, it was an abuse of power and maladministration to fail to respond to Mr. Zeid's requests for information.

13. The UNDT correctly determined that the Administration failed to acknowledge or reply to Mr. Zeid's inquiries concerning the delays. Mr. Zeid made numerous inquiries about the selection process from October 2005 through April 2006, but the Administration did not reply. This was a breach of duty on the part of the Administration since Mr. Zeid was one of the two candidates recommended for promotion in the second selection process and he had a legitimate interest in the timely resolution of the process. The persistent nature of Mr. Zeid's inquiries distinguishes him from Ms. Kamal.

14. The UNDT correctly determined that Mr. Zeid suffered emotional distress from excessive delays and the "conspicuous failure" of the Administration to respond to his inquiries. At the hearing on the merits, Mr. Zeid testified about the emotional distress he suffered as a direct result of his "long ordeal", i.e., that he felt insulted, humiliated, and his reputation was damaged. Thus, Mr. Zeid's case must be distinguished from *Kamal*.

15. The UNDT was justified in awarding monetary compensation to Mr. Zeid. There is ample jurisprudence from the Appeals Tribunal supporting a monetary award when the delay suffered by the staff member was directly caused by the negligence of the Administration or by an act of malfeasance. The retroactive payment to Mr. Zeid was compensation for economic loss and as a gesture of good will; it was not compensation for emotional harm. The Dispute Tribunal is in the best position to decide whether Mr. Zeid suffered emotional harm and to quantify its extent.

16. The Appellee requests that the award of compensation be upheld for the reasons put forth by the UNDT in its Judgment.

Considerations

17. The Secretary General seeks to vacate the award of moral damages to Mr. Zeid in the amount of USD 10,000, based on excessive delays in the promotional selection process and the Administration's "negligence" or "maladministration" in failing to respond to his persistent inquiries about the status of the selection exercise. We hold that it was an error of law for the Dispute Tribunal to award Mr. Zeid USD 10,000 as moral damages.

18. As a "general principle", the Appeals Tribunal has held that "damages for moral injury" may arise "[f]rom a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed ... [or] ...where there is evidence produced ... of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights".³

19. The facts underlying Mr. Zeid's claims cannot be distinguished from the facts the Appeals Tribunal considered in *Kamal*, in which the exact same selection process was reviewed. In *Kamal*, we held:

[T]he circumstances of the case do not show any negligence or violation of specific rules by the Administration. To the contrary, those circumstances suggest that during a highly contested selection process, with many claims from different staff members and the intervention by the Staff Union, the Administration was cautious to consider all views and respect the rights of all the persons interested in the selection process and its outcome.⁴

Accordingly, the UNDT found in Mr. Zeid's case that "the cancellation of the second selection exercise and its subsequent recommencement were, in the circumstances, appropriate and lawful".⁵

³ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

⁴ *Kamal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-204, para. 26.

⁵ Impugned Judgment, para. 42.

20. The absence of any breach of Mr. Zeid's substantive or procedural rights during the selection exercise precludes the award of moral damages to Mr. Zeid; he cannot show a breach "of a fundamental nature" or that he suffered "harm, stress or anxiety ... directly linked or reasonably attributed to a breach of his ... substantive or procedural rights".⁶ Thus, the UNDT erred as a matter of law in awarding moral damages to Mr. Zeid.

21. Additionally, the UNDT erred in fact and law when it improperly concluded, in direct conflict with our findings in *Kamal*, that there was an excessive delay in the selection process and based an award of moral damages, in part, on such delay. In *Kamal*, we found:

The delay in completing the selection process cannot be considered a valid ground for compensation, since the circumstances of the case do not show any negligence or violation of specific rules by the Administration. ... It is true that the proceedings took more time than usual, but it is also true that there was no deadline to be respected and that Ms. Kamal cannot identify a right to have been selected earlier.⁷

22. Our determination *a fortiori applies* to the present case. The Dispute Tribunal is bound by the Appeals Tribunal's findings and determinations in *Kamal*.

23. When a promotional selection process is challenged by one or more candidates, the Administration has a duty to determine whether the candidates' complaints require that the selection process must be re-started or can continue.⁸ It will take the Administration time to fully consider the staff members' complaints and to make an informed decision about the status of the selection process. Undoubtedly, the consideration process will cause some delay in the selection exercise. However, when the delay is not a breach of a candidate's substantive or procedural rights, it cannot be the basis for an award of moral damages, as we have consistently stated:

While the delays and deficiencies which attached to the selection process in this case were certainly lamentable, [the staff member] was placed in no worse a situation than the other candidates for the post. There was no breach of [the staff member's] substantive contractual entitlements nor ... can it be said that [the staff member's] procedural entitlements were breached.⁹

⁶ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

⁷ *Kamal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-204, para. 26.

⁸ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

⁹ *Ibid*, para. 39.

24. The UNDT also based its award of moral damages to Mr. Zeid on the failure of the Administration to respond to his repeated requests for information about the status or progress of the selection exercise. The UNDT relied on this factor to distinguish Mr. Zeid's case from *Kamal*. But that is a difference without any substance. The Administration's failure to respond to Mr. Zeid's repeated requests for information was not a breach of his substantive contractual entitlements or his procedural rights. A staff member cannot create a duty where none exists in the Staff Regulations and Rules. Thus, the UNDT erred in fact and law when it concluded that the Administration was negligent or malfeasant in failing to respond to Mr. Zeid's repeated inquiries about the status of the selection process and based an award of moral damages, in part, on this so-called failure.

25. To require the Administration to respond to each and every inquiry about the status of a promotional selection exercise -- even an inquiry from a candidate recommended by a process that might be cancelled -- would unduly interfere with the Administration's duty to fully consider candidates' complaints about alleged deficiencies in the selection process and to correct such deficiencies.¹⁰ Moreover, as the Secretary-General argues, Mr. Zeid was reasonably kept apprised of developments in the selection exercise when he received group information in 2005 and 2006, met with the Working Group in January of 2006, and received responses to his individual inquiries in June 2005, March 2006 and November 2006.

26. Finally, the Appeals Tribunal notes that Mr. Zeid was ultimately appointed to the P-5 post retroactive to 14 April 2005 and, as such, he received salary and entitlements that he would not have gotten even if his recommendation to the CRB had led to his appointment. As we commented in *Kamal*:

[T]he fact of Ms. Kamal's appointment was an acknowledgment of Ms. Kamal's ability to fill the position after a fair and competitive process, leaving no doubts of the way she obtained it. In light of the moral satisfaction arising from the outcome of the selection exercise, Ms. Kamal could not have suffered special damage from the opportunity of the appointment ...¹¹

27. For all these reasons, the UNDT erred in awarding moral damages to Mr. Zeid.

¹⁰ See *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100.

¹¹ *Kamal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-204, para. 27.

Judgment

28. The appeal is granted. Judgment No. UNDT/2013/005 is reversed and the award of moral damages to Mr. Zeid is vacated.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Adinyira

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar