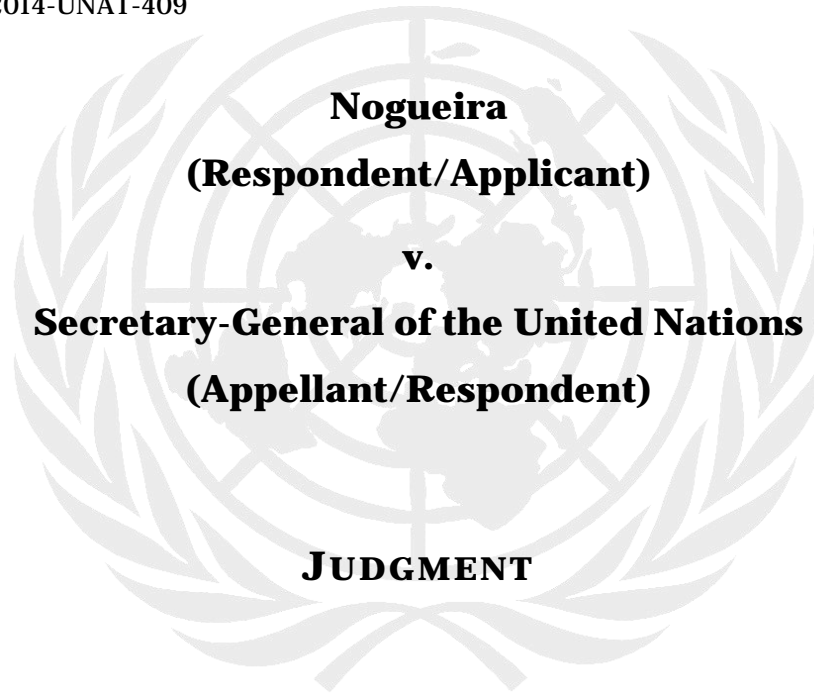




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-409



**Nogueira
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Mary Faherty Judge Rosalyn Chapman
Case No.:	2013-459
Date:	2 April 2014
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: Zarqaa Chohan

JUDGE SOPHIA ADINYIRA, PRESIDING.

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/2013/026, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 20 February 2013 in the case of *Nogueira v. Secretary-General of the United Nations*. The Secretary-General appealed on 18 April 2013 and Mr. Arthur Nogueira answered on 13 June 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties:¹

... The Applicant joined the [the Secretariat of the Convention on Biological Diversity (SCBD)] in Montreal on 20 November 2000 as Principal Officer, D-1, head of Implementation and Outreach (“I & O”). The Applicant historically received positive performance assessments; the Performance Appraising System (“PAS”) report dated 20 December 2005, described the Applicant as “a competent and reliable staff member” and a “valuable asset to the Convention on Biological Diversity (“CBD”)”.

... The Applicant claims that the catalyst for the current dispute was the appointment of Mr. Djoghlaflaf to succeed the then-Executive Secretary of the CBD Mr. Zedan, in January 2006. Mr. Djoghlaflaf and Mr. Zedan had a turbulent history, vying [with] each other for an identical post in 1998. Thus, there was a difficult personal history between Mr. Zedan and his successor, leading to an inability to arrange an orderly handover. Additionally, the timing of the handover complicated matters for staff that were under the authority of the Executive Secretary.

... This prelude to the current dispute did not provide a secure foundation for the Applicant’s working relationship with his new superior, Mr. Djoghlaflaf. The Applicant was dissatisfied with the conduct of his new boss. He asserted that Mr. Djoghlaflaf started harassing him when he “refused to introduce changes in an official United Nations document after it was consensually adopted by the Parties to the CBD.” In particular, the Applicant asserts that Mr. Djoghlaflaf infringed various United Nations rules and regulations, manipulated official documents and “creat[ed] a hostile work environment”. In addition, the Applicant stated that he was subjected to harassment from Mr. Djoghlaflaf in the form of multiple emails sent to “make the

¹ The following paragraphs are taken from Judgment No. UNDT/2013/026, paras. 5-24. Internal citations are omitted.

complainant change UN documents”, “discrimination, character assassinations, humiliation, abuse of authority, maladministration” and “monitoring of emails”.

... The Applicant complained that Mr. Djoghlaflaf “systematically harassed ... and consistently built up a constructed dismissal case against him”. Thus, the working relationship between the Applicant and his superior was strained at best.

... There was a similar conflict regarding the circulation of a “draft audit report” prepared by the Office of Internal Oversight Services (“OIOS”) by Mr. Djoghlaflaf. The draft audit contained unfavourable allegations against the previous administration, which reflected badly on the Applicant. However, these allegations had not yet been substantiated. It was later determined that Mr. Djoghlaflaf caused this draft report to be circulated to cast his predecessor in an unfavourable light. Mr. Djoghlaflaf caused the draft to be publicised against the express views of OIOS. A second OIOS team reviewed its previous audit on 17-21 July, and published a report on 1 February 2007. The report concluded that it was not possible to ascertain whether monitoring had taken place. The Applicant complains that the second report was not circulated in juxtaposition to the first, and therefore his reputation was not vindicated.

... The Applicant asserts that by April 2006, he was “completely divested of his responsibilities and mandate”. It was later determined that the Applicant was deprived of all of his supervisory functions by June 2006. This was because Mr. Djoghlaflaf had discussed with every staff member his or her work plan for 2006-2007, and the Applicant’s responsibilities as first or second reporting officer was taken away from the (“PAS”) of his staff.

The reason Mr. Djoghlaflaf gave, when asked by [the Applicant] for a clarification, was that the staff members themselves had made it clear to him, Mr. Djoghlaflaf, that they wanted to report directly to the Executive Secretary. There has been no corroboration of this so-called “preference” by the staff and the Panel finds this an extraordinary attitude and hardly believable. The direct result has been, however, that the complainant was left without staff to supervise and no work, which is contrary to what a UN staff member is entitled to. This amounts, in the view of the Panel, to not only abuse of authority but also discrimination vis-à-vis the complainant’s colleagues.²

... The Applicant filed a complaint of harassment on 9 June 2006 (“The First Complaint”) with UNEP senior management, including the Deputy Executive Director of UNEP, the then ASG/OHRM and the Director of the Investigations Division, OIOS. The complaint included in depth details of the Applicant’s grievance. The Applicant claimed that “my supervisor, Mr. Ahmed Djoghlaflaf ... has consistently and aggressively harassed me since he took over his duties ... and has systematically deprived me of my

² This paragraph is taken from the report of the preliminary investigation panel dated 22 October 2007, para. 107. The preliminary investigation panel was established in July 2007 to investigate allegations made by Mr. Zedan and three staff members including Mr. Nogueira against Mr. Djoghlaflaf and those made by Mr. Djoghlaflaf against the three staff members including Mr. Nogueira.

authority and functions as stipulated by my job description.” The Applicant asserted that this course of action was a form of “retaliation” in response to the Applicant’s (a) refusal to “violate UN rules at his request” and (b) “association with the previous administration.” The Applicant requested that these matters be thoroughly investigated and actions instituted to protect his rights as a staff member.

... UNEP Administration reacted on 15-17 August 2006 by sending Mr. Suleiman Elmi, Chief, Human Resources Management Services (“HRMS”) at the United Nations Office at Nairobi (“UNON”), to Montreal to assess the general situation at the SCBD. His asserted purpose was to: (i) try to calm the situation; and (ii) make recommendations for the resolution of the situation.

... Mr. Elmi concluded in a report dated 28 August 2008 that the crux of the problem in CBD was the “conflict” between Mr. Djoghlafl and three staff members, including the Applicant. He also concluded that the Applicant was exerting negative influence on other staff members. According to Mr. Elmi:

Mr. Djoghlafl has started dealing with the concerns of the other staff and is aware of the impact of his management style on some of the staff members. Most of the staff believe in his vision and he should therefore build on their enthusiasm to realize it. He should be encouraged and supported in his endeavour.

... By a memorandum dated 28 August 2006, Amedeo Buonajuti, Chief, Office of the Executive Director (“OED”), UNEP, informed the Applicant that he was to be reassigned within UNEP and that pending the reassignment he was to work from home. The relevant letter in question states:

I am pleased to inform you that the Executive Director (“ED”) has accepted your request for reassignment within UNEP and is actively looking for a suitable position for you before the end of November. I will inform you on the offer as soon as possible.

Pending your reassignment, the ED would expect you to undertake an assignment, working from home [...].

... By a memorandum dated 16 November 2006, Mr. Buonajuti informed the Applicant that he was being offered a one-year extension on his contract by the Executive Director of UNEP (“ED/UNEP”) and reassignment to the Division of Environmental Law and Conventions (DELIC) in Nairobi effective 01 December 2006. In another memorandum dated 17 November 2006, Mr. Buonajuti stated that,

[y]ou have applied for the Deputy Director position in the Division of Environmental Law and Conventions (“DECL”) and the offer of a one-year extension by the Executive Director is made without prejudging the results of the competition. If successful, you will be appointed to the Deputy position and if not, you will remain in the position offered to you, if you accept it.

... The Applicant sent some concerns and clarifications regarding his new post to Mr. Buonajuti on 21 November 2006. Following a reply from the OED on 27 November, clarifying the position of UNEP, the Applicant responded that he accepted the reassignment offer on 7 December 2006. This offer was accepted according to the Applicant, after “protracted discussions” and “resistance” on his part.

... On 14 May 2007, the Applicant complained once again from Nairobi [“The Second Complaint”], this time to the Secretary-General, as his complaint of June 2006 was “never acknowledged” and “a proper investigation was never established.”

... Accordingly, on 18 July 2007, Mr. Achim Steiner, the ED/UNEP informed the Applicant that a Panel would be established under ST/AI/371 to investigate allegations made by him against Mr. Djoghlaif.

... The “Investigative Panel” (IP) was established two months later to (i) provide the Executive Director of UNEP with a factual basis for a decision whether or not to pursue the allegations of the staff member and former staff members against the Executive Secretary of the CBD as a disciplinary matter and (ii) determine whether or not the allegations of the Executive Secretary against the staff member are to be pursued as a disciplinary matter.^[3]

... The report of the Panel was issued on 22 October 2007. The Panel concluded that “ample evidence is available to substantiate the accusations of – inter alia – harassment, abuse of authority, unfair treatment and violation of privacy by Mr. Djoghlaif.” This report was not disclosed to the Applicant.

... On 26 February 2008 the Applicant was separated from service following the non-renewal of his contract.^[4]

... Mr. Steiner informed the Applicant in October 2008 that the IP report had been submitted to Ms. Pollard [Assistant Secretary-General for Human Resources Management] for “her consideration and further action as appropriate”. On 4 June 2009, Ms. Pollard informed the Applicant that administrative action was warranted against Mr. Djoghlaif. The Applicant was thanked for his efforts:

OHRM reviewed the entire dossier of this case, including the investigation report, the supporting documentation and Mr. Djoghlaif’s comments on the matter. The record indicates that Mr. Djoghlaif did not act in a manner consistent with the standards of conduct expected of senior officials of the Organisation and, accordingly, administrative action has been taken against him. Thank you for your assistance and cooperation in this matter, and in

³ The report of the IP indicates that the IP was established, and commenced its work, shortly after 18 July 2007, and not “two months later”, as the Dispute Tribunal found in the Judgment.

⁴ Mr. Nogueira appealed the non-renewal decision. In Judgment No. UNDT/2009/088 dated 16 December 2009, the Dispute Tribunal found a number of violations of Mr. Nogueira’s due process rights prior to his non-renewal and awarded Mr. Nogueira two years’ net base salary. There was no appeal against that judgment.

particular, for bringing the matter to the attention of the Administration and diligently pursuing it.

... On 1 July 2009 the Applicant submitted a request to Ms. Angela Kane, Under-Secretary-General for Management, for a management evaluation of the Contested Decision. According to the Applicant, while the Contested Decision recognised that Mr. Djoghlaflaf had violated United Nations rules, it did not address his “professional and personal losses resulting from the abuse and harassment perpetrated by Mr. Ahmed Djoghlaflaf...and the final loss of [his] job”. The Applicant contested the lethargy with which the Administration responded to his complaints, the procedures employed by the Administration (which lacked “transparency”, and were ad hoc in manner), the lack of adherence to procedural guidance of the statutory framework (in particular administrative instructions), the lack of restraint on “abuse and harassment” and finally the loss of his job due to “mismanagement of his case”.

... The Management Evaluation Unit (“MEU) responded on 14 August 2009 with its deliberation. The MEU decided to evaluate the Applicant’s case in light of aspects of his case forming “new grievances directly emanating from Ms. Pollard’s 4 June 2009 letter; or grievances which were the subject of the findings and conclusions of the IP.” The MEU concluded that the Applicant’s complaint of “constructive dismissal” could not be upheld. The MEU observed that the Applicant was subject to “inordinate delay” and thus recommended that he be compensated with three months net base salary at his current level. Finally, the MEU concluded that their current ‘letter’ would serve to inform the Applicant that the IP had found Mr. Djoghlaflaf’s allegations against him lacked merit and therefore these allegations had been dismissed and the Applicant was henceforth exonerated of any wrongdoings in his interaction with Mr. Djoghlaflaf.

3. Mr. Nogueira appealed. In Judgment No. UNDT/2013/026, the Dispute Tribunal found that the Administration’s response was inadequate and inappropriate in light of the Investigation Panel’s conclusion that Mr. Nogueira had been subjected to harassment, when said behaviour was clearly in contravention of the core values set out in the Staff Regulations and Rules of the Organization. The UNDT also found that the Administration had not sufficiently remedied the wrongs suffered by Mr. Nogueira and thus the relief granted was not adequate. Accordingly, the Dispute Tribunal concluded that the Administration had failed to provide Mr. Nogueira with the requisite remedies (i.e., monetary compensation, rescission or injunctive or protective measures). Based on its statutory power to determine the appropriate remedy to rectify the wrong suffered, the UNDT concluded that the only effective and viable remedy that could be awarded was monetary compensation, given that Mr. Nogueira had been separated from service on 26 January 2008. The Dispute Tribunal

awarded Mr. Nogueira USD 25,000 as compensation for the violation of his right to be free from harassment at the workplace.

The Secretary-General's Appeal

4. The Secretary-General submits that the UNDT erred in concluding that compensation is a "requisite" remedy for harassment in the present case. In his view, the Dispute Tribunal erred in law when it applied a narrow definition of effective remedies rather than the more expansive definition under international human rights treaties, and when it failed to refer to any jurisprudence or best practices noted by the Human Rights Committee or other human rights mechanisms. In the present case, the Secretary-General notes that the Administration conducted an investigation, took a number of appropriate remedial measures to address Mr. Nogueira's different complaints and provided him with compensation for inordinate delays in informing him of the conclusions of the investigation. In a word, the Administration reacted appropriately to Mr. Nogueira's complaints and the measures that it applied were in line with the best practices identified by the Human Rights Committee.

5. The Secretary-General also submits that it was not reasonable for the Dispute Tribunal to base its award of monetary compensation on Secretary-General's Bulletin ST/SGB/2008/5, as it was not promulgated at the time the events took place and was thus not applicable to the instant case.

6. The Secretary-General cites *Abubakr*, *Appellant*, *Messinger* and *Mmata*⁵ that this Tribunal has decided over the years to support his position that in harassment cases there is a range of remedies available to the Dispute Tribunal, that monetary compensation has not been awarded in all cases, and that the above-referenced cases for which this Tribunal has awarded compensation for harassment have involved circumstances in which the Administration failed to conduct an investigation or conducted an egregiously poor investigation. That was not the case here.

⁵ *Abubakr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-272; *Appellant v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-143; *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; and *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

7. The Secretary-General further submits that the Dispute Tribunal erred in awarding compensation based on jurisprudence which is dissimilar to the instant case, and in the absence of any evidence of damages presented by Mr. Nogueira.

Mr. Nogueira's Answer

8. Mr. Nogueira submits that the Secretary-General has failed to identify any mistake in fact or in law made by the UNDT. That harassment occurred in his case is an established fact, and it caused damage, aggravated by the Administration's inappropriate response. It is within the mandate of the Dispute Tribunal to decide that he is entitled to compensation and to determine the amount of relief to be awarded.

9. Mr. Nogueira also submits that ST/SGB/2008/5 applies to his case because its provisions do not preclude its applicability to on-going cases filed before its entry into force. The facts of the instant case started with harassment in Montreal in 2006 and continued uninterrupted until 2009, and include the mishandling of the matters and the ASG/OHRM's decision of 4 June 2009.

10. Referring to the Secretary-General's argument that the Dispute Tribunal could not award financial compensation because ST/SGB/2008/5 does not make provision for monetary compensation, Mr. Nogueira submits that it is not clear why the Secretary-General presumes that the Dispute Tribunal's monetary award is based on ST/SGB/2008/5. It is not. In this connection, Mr. Nogueira believes that the UNDT has statutory power to determine the appropriate remedy to rectify the wrong suffered under Article 10(5)(b) of the UNDT Statute.

11. Lastly, Mr. Nogueira submits that the other verdicts awarded by both the Dispute Tribunal and the Appeals Tribunal contain higher compensation for harassment, and that the compensatory award in his case is not only reasonable, but also realistic and even modest. In this connection, he notes that the UNDT's award is smaller than that awarded by the MEU for administrative delays.

Considerations

12. The Secretary-General appeals on the grounds that the UNDT erred in:
- a) concluding that compensation is a requisite remedy for harassment in the present case;
 - b) awarding compensation based on jurisprudence which is dissimilar to the instant case; and
 - c) awarding compensation in the absence of any evidence of damages presented by the Mr. Nogueira.
13. The Secretary-General maintains in his submissions that the Administration reacted appropriately to Mr. Nogueira's complaints and the measures that it applied were in line with the best practices identified by the United Nations Human Rights Committee. The Secretary-General submits further that it was not reasonable for the Dispute Tribunal to base its award of monetary compensation on Secretary-General's Bulletin ST/SGB/2008/5, as it was not promulgated at the time the events took place and was thus not applicable to the instant case.
14. The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and holds that since the incidents in question occurred before ST/SGB/2008/5 was promulgated it is not applicable in this case.
15. The Appeals Tribunal notes that the Staff Rules in force prior to the promulgation of ST/SGB/2008/5 also prohibited "discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work".⁶ We are therefore of the view that it was unnecessary for the UNDT to apply ST/SGB/2008/5, which was clearly not in force at the time of the incidents.
16. However we do not think that the error committed by the UNDT resulted in a miscarriage of justice, as in any event Mr. Nogueira merited a compensatory award for harassment. For where there is a failure of the Administration to follow its own Rules and Regulations and that impacts and infringes the rights of a staff member, then as a general

⁶ Former Staff Rule 101.2(d).

principle of law and the jurisprudence of this Tribunal, the staff member is entitled to an effective remedy.

17. In *Asariotis*, this Tribunal stated, by way of general principle:

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From 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 (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise 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 and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

38. Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). With regard to (ii), it will depend on the contents of any medical or other professional report or evidence before the Dispute Tribunal.⁷

18. The moral injury suffered by Mr. Nogueira falls under (i) above. Mr. Nogueira is therefore entitled to an effective remedy for the violation of his legal rights to a workplace free of any form of harassment. Any form of compensation Mr. Nogueira has received thus

⁷ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, paras. 36-38 (internal citations omitted).

far was not in relation to the determination of harassment made by the Investigation Panel, but was related to the substantive claim raised by him.

19. The UNDT is thus vested with the discretion to determine the remedy it deems appropriate to rectify the wrong suffered by Mr. Nogueira. Any form of administrative measure to redress the breach was no longer feasible as Mr. Nogueira ceased to be a staff member of UNEP in 2008. In these circumstances, the UNDT correctly decided that the only effective remedy that could be awarded was monetary compensation.

20. On the issue of dissimilar jurisprudence, there is nothing in the submissions made by the Secretary-General which persuades this Tribunal that the UNDT deviated from the established principles to be applied in making awards of compensation. The jurisprudence referred to in the UNDT Judgment, e.g., *Fröhler, Appellant*, and *Abubakr*,⁸ though not identical, share enough features to warrant a comparison and to serve as a guide in measuring the quantum of damages.

21. On the award of the sum of USD 25,000 we find no reason to differ from the UNDT's determination, which was well within its discretion.

22. From the foregoing the appeal fails.

Judgment

23. The appeal is dismissed and the UNDT Judgment is affirmed.

⁸ *Abubakr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-272; *Appellant v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-143; and *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Chapman

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

(Signed)

Weicheng Lin, Registrar