



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

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Judgment No. 2014-UNAT-429

**Leclercq  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Inés Weinberg de Roca, Presiding Judge Luis María Simón Judge Rosalyn Chapman
Case No.:	2013-486
Date:	27 June 2014
Registrar:	Weicheng Lin

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Counsel for Respondent/Applicant: Alexandre Tavadian/OSLA  
Counsel for Appellant/Respondent: Stéphanie Cartier

**JUDGE INÉS WEINBERG DE ROCA, 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/2013/055, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 20 March 2013, in the case of *Leclercq v. Secretary-General of the United Nations*. The Secretary-General submitted his appeal on 20 May 2013, and Mr. Fabrice Leclercq filed his answer on 28 June 2013.

**Facts and Procedure**

2. The UNDT made the following findings of fact, which are not contested by the parties:<sup>1</sup>

... The Applicant was recruited on 13 January 2003 by the International Trade Centre (“ITC”), in Geneva, as a Trade Promotion Adviser at the L-3 level in the Division of Technical Cooperation Coordination. In 2007, he was promoted to the L-4 level, as Senior Trade Promotion Adviser in the same Division. His contract was converted [to] a fixed-term contract on 1 January 2010.

... In January 2008, the Applicant and his unit were transferred to the Division of Market Development, Sector Competitiveness Section (“DMD/SC”), ITC. In mid-2009, a new Chief of DMD/SC was recruited and problems in the management of the unit began to appear.

... On 10 June 2010, the majority of staff in DMD/SC, including the Applicant, sent a memorandum to the Executive Director of ITC criticizing the Division Chief’s poor management.

... Following several meetings in June, July and August 2010, DMD/SC was restructured and divided into three subdivisions. On 19 August, the Applicant was assigned to one of these new subdivisions, namely the Export-led Poverty Reduction Programme (“EPRP”), which led to a change of appraising officer. From then on his new appraising officer was the Chief of EPRP. The Applicant kept the same post and job title and remained in charge of the same team as before.

... On 4 November 2010, the Chief of DMD/SC signed the Applicant’s performance appraisal report for 2009, giving him a rating of “partially meets performance expectations”. The Applicant initiated a rebuttal process in that connection and on 8 February 2011, the Rebuttal Panel changed the rating for 2009 to “fully meets performance expectations”.

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<sup>1</sup> The following text is taken from the English translation of Judgment No. UNDT/2013/055, paras. 3 - 25.

...

... On 16 December 2010, the Applicant wrote to the Deputy Executive Director of ITC to complain about the management of EPRP by his new first appraising officer.

... The same day, his supervisor recommended that the Applicant's contract should be renewed for a period of six months only. The Applicant requested a management evaluation of that decision in February 2011. ITC then rescinded that decision and granted him a one-year contract, expiring on 31 December 2011.

... On 21 March 2011, the Chief of EPRP signed the Applicant's performance appraisal report for 2010, as first appraising officer. The same day, the Chief of DMD/SC also signed the performance appraisal report for 2010, as second appraising officer. The two appraising officers had put a cross between the boxes "partially meets performance expectations" and "fully meets performance expectations". Following the intervention of the Chief of Human Resources, ITC, both appraising officers ticked the box "fully meets performance expectations" on 26 August 2011, and the Applicant signed the performance appraisal report on 29 August 2011.

... At its meetings of 23 March and 4 May 2011, the ITC Senior Management Committee decided to merge EPRP with, among others, the Ethical Fashion Programme, under a new Poor Communities and Trade Programme ("PCTP"). At the meeting of 23 March 2011, the ITC Senior Management Committee, pending further details on the logical framework of the new programme, made provision for a three-month budget and funding for an additional P-4 level post until 31 December 2011. It is noted in the minutes of the meeting that the goal of the new Programme, as well as EPRP and the Ethical Fashion Programme, is to reduce "poverty through the generation of trade opportunities for marginalized communities".

... By e-mail of 25 March 2011, the Applicant asked to be transferred immediately to another unit, given the problems and shortfalls in the management of EPRP that he had observed.

... By letter dated 23 May 2011, the Applicant was informed that his lateral transfer request had been approved and that he had been assigned to the Office for Asia and the Pacific of the Division of Country Programmes, with a new supervisor, with retroactive effect from 15 April 2011. It was specified that the Applicant would be transferred with his post; thus his job title, terms of reference and conditions of service would remain unchanged.

...

... On 24 October 2011, at a meeting with the Director of the Division of Country Programmes, the Applicant was informed that, owing to a lack of project funding, his contract would not be renewed beyond its expiration date of 31 December 2011. ...

... On 1 December 2011, the Applicant filed a formal complaint with the Executive Director of ITC for harassment and abuse of authority by his first appraising officer.

... On 16 December 2011, the Applicant was placed on sick leave until 16 January 2012.

... On 20 December 2011, he filed a request for management evaluation of the decision not to renew his contract.

...

... On 19 January 2012, the Executive Director of ITC informed the Applicant that she had found no *prima facie* evidence of harassment or abuse of authority in his allegations and that the case was dismissed.

... The Applicant's contract was then renewed several times until 30 June 2012, solely to cover the period that he was on sick leave.

...

... On 26 March 2012, the Applicant was informed that his management evaluation request had been rejected and he filed [the UNDT] application on 21 June 2012. ...

3. The Dispute Tribunal concluded that the reason given for the non-renewal of Mr. Leclercq's fixed-term contract, namely the lack of project funding, was not supported by the facts. In particular, the UNDT found that the merger was never really implemented and that a P-4 level post with a generic job description which was published on 13 March 2012 could have been filled by Mr. Leclercq, who "was qualified to perform the duties". Moreover, Mr. Leclercq's final two contracts had not indicated that his extension was contingent upon the availability of funds for EPRP or another specific programme.

4. Accordingly, the Dispute Tribunal held that Mr. Leclercq had successfully discharged his burden in refuting the reasons given by the Organization for his non-renewal. The UNDT was of the opinion that the "real reason" for the non-renewal of Mr. Leclercq's contract was "his first appraising officer's desire to have him separate from service". Having found that the impugned decision was unlawful, and that Mr. Leclercq could reasonably have expected his contract to have been renewed, absent the illegality, the UNDT awarded him material damages corresponding to one year's gross base salary and moral damages of CHF 8,000.

## **Submissions**

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

5. The Secretary-General submits that the Dispute Tribunal erred in fact and in law in awarding material damages in the amount of one year's salary.
6. He argues that the UNDT erred in assuming Mr. Leclercq would have otherwise been extended for one year and also that it erred in neglecting to offset the salaries and entitlements Mr. Leclercq received following the date on which he was intended to separate from service. The Secretary-General points out that Mr. Leclercq's contract was ultimately extended until 28 October 2012 "as part of his entitlement to sick leave".
7. Moreover, the Secretary-General asserts that the UNDT erred when it failed to consider Mr. Leclercq's duty to mitigate his losses<sup>2</sup> and failed to deduct salaries received by Mr. Leclercq following his separation from service.
8. The Secretary-General requests the Appeals Tribunal to vacate or reduce the material damages awarded by the UNDT.

### **Mr. Leclercq's Answer**

9. Mr. Leclercq submits that the Secretary-General is attempting to enter new evidence before the Appeals Tribunal.
10. He argues that the UNDT did not err with respect to the extension of his contract, because the evidence before that Tribunal indicated only an extension until 16 January 2012. As the Secretary-General failed to introduce evidence at first instance concerning the total extent of the extensions of Mr. Leclercq's contract, he cannot now argue that the UNDT erred in relying on the information with which it was presented.
11. Similarly, Mr. Leclercq argues that as the UNDT was presented with no evidence that he was employed following his separation (nor, for that matter, is the Appeals Tribunal), the Secretary-General cannot properly sustain an argument that the UNDT erred in not considering such "facts".

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<sup>2</sup> The Secretary-General makes reference to *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

12. Rather, Mr. Leclercq submits, the UNDT properly considered he would have been extended for a one-year period, but for the illegality, and compensated him appropriately.

13. He requests that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety.

### **Considerations**

14. The Secretary-General does not challenge the UNDT's finding that the impugned decision was unlawful, nor the award of moral damages. His appeal is limited to the award of material damages.

15. He submits that Mr. Leclercq's appointment was extended for nearly ten months beyond expiration due to his sick leave and that he had a duty to mitigate the losses.

16. ST/AI/2005/3 ("Sick Leave") establishes that an appointment shall be extended for the period of certified illness up to the maximum entitlement to sick leave. The Administrative Instruction clearly states that sick leave is an entitlement. Credit for material damages for non-renewal and moral damages may accrue while the staff member is on sick leave because sick leave is not granted in compensation for the loss of earning or loss of expectations but because of incapacitation for service by reason of illness that continues beyond the date of expiration of the appointment.

17. Mr. Leclercq is entitled to one year's gross base salary apart from sick leave for the period of his certified illness.

18. The award of twelve months' gross base salary for material damages as a result of the non-renewal is not disproportionate taking into account his service from 2003 to 2011.

19. The UNDT was aware of the circumstances of the case when awarding material and moral damages. Compensation has been determined separately for each of these because they are different grounds.

20. The Appeals Tribunal affirms that there is no set way for a trial court to set damages for loss of chance of non-renewal and that each case must turn on its facts.

21. Having regard to the facts, we find substantial differences between the present case and the *Mmata* case<sup>3</sup> quoted by the Secretary-General at paragraph 16 of his appeal.

22. The UNDT thoroughly examined the governing principles in awarding damages and followed the jurisprudence of the Appeals Tribunal. The Appeals Tribunal gives deference to the UNDT in the exercise of its discretion and will not lightly disturb the quantum of damages.<sup>4</sup>

### **Judgment**

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

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<sup>3</sup> *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

<sup>4</sup> See *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2014 in Vienna, Austria.

*(Signed)*

Judge Weinberg de Roca,  
Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Chapman

Entered in the Register on 29<sup>th</sup> day of August 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar