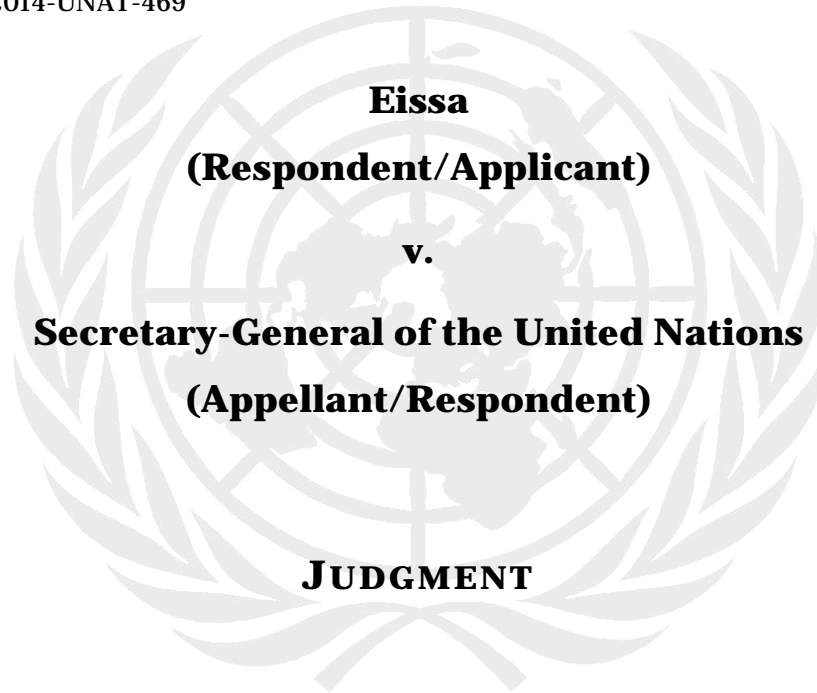




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-469



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

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Inés Weinberg de Roca
Judge Luis María Simón

Case No.: 2013-542

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Mr. Eissa: Duke Danquah/OSLA

Counsel for Secretary-General: Wambui Mwangi

JUDGE ROSALYN CHAPMAN, PRESIDING

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it the appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2013/112, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 4 September 2013, in the case of *Eissa v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 4 November 2013, and Mr. Ashraf Eissa filed his answer on 6 January 2014.

Facts and Procedure

2. Mr. Eissa joined the United Nations Mission in Sudan (UNMIS) on 11 May 2009 as Spokesperson. Effective 1 July 2011, he was given a one-year fixed-term appointment as Spokesperson with UNMIS at the P-5 level, Grade 6.

3. On 27 April 2011, the United Nations Security Council (Security Council) adopted Resolution 1978 (2011), which extended the UNMIS mandate to 9 July 2011 and stated the intention to establish a new mission to succeed UNMIS.

4. On 1 June 2011, UNMIS issued Information Circular (IC) No. 218/2011, "Movement of International Staff to South Sudan", to inform UNMIS personnel of the transition process for staff members currently in UNMIS posts. It provided, in part, that: "where the number of posts in the new mission is equal to or higher than the number of posts in UNMIS under the same occupational group and level, staff members currently encumbering those posts in UNMIS will automatically be reassigned to the new mission".

5. On 26 June 2011, UNMIS issued IC No. 327/2011, "Formation of a Comparative Review Panel to Review Transition of International Staff", which announced the formation of a Comparative Review Panel (CRP) to review the international posts in UNMIS where the number of current staff in UNMIS was in excess of the number of proposed posts in the new mission for particular job categories and post levels.

6. On 30 June 2011, UNMIS issued IC No. 334/2011, "Update to UNMIS Staff regarding the UNMIS Draw-down Process". It provided, in part, that: "Staff with fixed-term appointments that are due to expire shortly will have their appointments extended for one year. Should a staff member's function no longer be required by the mission prior to the expiration of his/her fixed-term appointment, a termination indemnity may be payable."

7. In July 2011, the Security Council adopted Resolution 1996 (2011) and Resolution 1997 (2011), which established the United Nations Mission in South Sudan (UNMISS) and called for the withdrawal of UNMIS personnel, other than those required for the mission's liquidation, by 31 August 2011. The Security Council also requested that the Secretary-General transfer appropriate staff from UNMIS to UNMISS and to the United Nations Interim Security Force in Abyei (UNISFA).

8. On 27 July 2011, Mr. Eissa received a Letter of Separation from the Chief Civilian Personnel Officer (CCPO) of UNMIS, advising him that he would not be transitioned to UNMISS or UNISFA. However, he would be part of the liquidation team until 31 August 2011, when he would be separated from UNMIS. Mr. Eissa immediately requested clarification of the Letter of Separation.

9. On 3 August 2011, Mr. Eissa sent an e-mail to the Special Representative of the Secretary-General (SRSG) of UNMIS requesting clarification of the Letter of Separation.

10. On 5 August 2011, Mr. Eissa sent an e-mail to the Under-Secretary-General for Management, who referred the e-mail to the Management Evaluation Unit. On 10 August 2011, Mr. Eissa filed a request for management evaluation of the decision to separate him from service.

11. On 23 August 2011, Mr. Eissa filed an application before the UNDT for suspension of action of the decision to separate him from service. In Judgment No. UNDT/2011/151 (which mistakenly referred to Mr. Eissa as "Ashraf"), the UNDT dismissed his application, concluding that "the decision does not appear *prima facie* unlawful".

12. On 30 September 2011, Mr. Eissa was separated from service with UNMIS. He was paid a termination indemnity.

13. On 7 October 2011, Mr. Eissa filed an application before the UNDT contesting the decision of 27 July 2011, to terminate his service. He claimed that the decision to terminate his contract was unlawful on the following grounds: (i) “[t]he ‘decision-maker’ lacked the delegated authority to exercise the power to terminate [his] contract; (ii) [t]he issuance of a fixed-term contract created a legitimate expectation [on his part] that the Secretary-General intended to honor its terms”, and that “legitimate expectation was not met; [and] (iii) [t]he decision-making process in respect of which personnel should be transferred from the former UNMIS to the newly mandated UNMISS lacked transparency, was arbitrary and was vitiated by bias borne of personal animus; further, the Secretary-General failed to follow ... his own administrative issuances in selecting which personnel to transfer between the two missions”. Mr. Eissa sought an order to reinstate his contract or, alternatively, “an award of damages for the unlawful termination of his contract, damage to his reputation and employment prospects and emotional distress”.

14. The UNDT held a hearing and took oral testimony on 27 and 28 June 2012. On 4 September 2013, the UNDT issued Judgment No. UNDT/2013/112, in which it concluded that the decision to terminate Mr. Eissa was unlawful. The UNDT ordered rescission of the decision and Mr. Eissa’s reinstatement; alternatively, the Secretary-General was ordered to pay two years’ net base salary as compensation in lieu of rescission. Further, the UNDT awarded Mr. Eissa “compensation for the substantive and procedural irregularities occasioned him by the failure by the Administration to follow its own guidelines, rules and procedures” in the amount of one year’s net base salary for the substantive irregularity and four months’ net base salary for the procedural irregularity.

Submissions

The Secretary-General’s Appeal

15. The UNDT exceeded its competence in awarding compensation and erred on a question of law in awarding compensation exceeding two years’ net base salary. Under Article 10(5) of the UNDT Statute, an award of compensation must be limited to two years’ net base pay unless reasons are given to explain why the case is exceptional. The UNDT made an error of law in awarding Mr. Eissa three years’ and four months’ net base pay without providing reasons to justify an award of more than two years’ net base salary.

16. The UNDT erred by setting compensation in lieu of rescission at two years' net base salary. Mr. Eissa was never appointed to a post for a period greater than one year. Moreover, he had served two months of his last appointment and had only ten months left. Finally, he was paid a termination indemnity. For all these reasons, the compensation in lieu of rescission is excessive.

17. The UNDT erred by awarding additional and separate compensation for "substantive" and "procedural" irregularities without evidence showing actual injury or harm to Mr. Eissa and without the UNDT making a finding of actual injury or harm.

18. The UNDT erred by awarding additional and separate compensation for "substantive" and "procedural" irregularities when the award is duplicative of the alternative compensation in lieu of rescission, which was based on irregularities in the process transitioning Mr. Eissa from UNMIS to the new mission. Additionally, the awards overlap each other since the UNDT erred in not explaining which irregularities were "substantive" and which were "procedural".

19. The UNDT's rescission of the termination decision and the award of compensation for substantive and procedural irregularities were based on errors of fact. The UNDT relied on particular findings of fact that were erroneous and not supported by the evidence, which, in turn, influenced the quantum of damages awarded. These erroneous factual findings were that: (a) Mr. Eissa's termination was motivated by personal animus against him by UNMIS Chief of Staff; (b) the transitioning process of staff from UNMIS to UNMISS lacked transparency; and (c) the Mission Leadership Team (MLT) did not have any authority to re-profile the post of UNMISS Spokesperson. (This finding stemmed, in part, from the UNDT's erroneous refusal to consider documentary evidence the Secretary-General attempted to submit on 4 July 2012, after the close of the hearing before the UNDT.)

Mr. Eissa's Answer

20. The UNDT did not exceed its competence and powers in awarding compensation exceeding two years' net base salary, because Mr. Eissa lost his job and was severely harmed by the egregious conduct surrounding his termination. Thus, it is an "exceptional" case. Under Article 10(5) of the UNDT Statute, it falls within the discretion of the UNDT, which makes factual findings as the tribunal of first instance, to determine whether a case is

“exceptional” and whether there was egregious conduct to justify an award exceeding two years’ net base salary.

21. The UNDT properly found egregious conduct in Mr. Eissa’s case, including: (a) the *ultra vires* nature of the decision to terminate Mr. Eissa’s service since it was taken by the CCPO, who lacked proper authority to make the decision; (b) the MLT disregarding the Information Circulars and re-profiling and changing the requirements for the post of UNMISS Spokesperson in violation of Mr. Eissa’s rights; and (c) the lack of transparency in the transition process for staff from UNMIS to UNMISS, including unauthorized actions by the MLT during the process. The Secretary-General has not shown these determinations to be unreasonable or unsupported by evidence. Thus, the UNDT did not err by setting compensation in lieu of rescission at two years’ net base salary.

22. The UNDT acted correctly by awarding additional and separate compensation for “substantive” and “procedural” irregularities. The UNDT specifically found, among other things, that the MLT did not have any delegated authority or business with the transitioning of staff members. Thus, the MLT committed substantive irregularities and procedural irregularities in re-profiling the post of UNMISS Spokesperson. The UNDT’s findings about the MLT were sufficient to explain the type of irregularities justifying additional compensation. Moreover, it cannot be denied that the irregularities in his separation caused Mr. Eissa to suffer actual harm by affecting his prospects for future employment.

23. The UNDT’s decision to rescind the termination and award compensation for substantive and procedural irregularities was proper in all respects. The Secretary-General’s challenges to the factual findings by the UNDT are not sufficient to undermine the decision since they fail to: (a) contradict any of the unimpeachable evidence or (b) prove that the findings were unreasonable. Moreover, under the Appeals Tribunal’s jurisprudence, it is within the discretion of the UNDT to determine whether to admit evidence under Article 18(1) of the Dispute Tribunal Rules of Procedure.

24. The quantum of compensation to be awarded is within the discretion of the UNDT provided it considers the nature of the irregularity that led to the rescission of the contested administrative decision and the staff member’s otherwise genuine prospects if the procedure had been regular. The UNDT considered both factors in awarding compensation to Mr. Eissa.

Considerations

25. On appeal, the Secretary-General does not contest the Dispute Tribunal's ultimate determination that the decision to terminate Mr. Eissa was unlawful. He challenges only the remedies afforded Mr. Eissa and requests that the Appeals Tribunal "vacate or reduce the award of compensation in the Judgment". It is solely in this context that the Secretary-General contends that the rescission of the termination decision was based on errors of fact.

26. Article 10(5) of the UNDT Statute provides:

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.

27. The Secretary-General challenges the award of two years' net base salary as alternative compensation in lieu of rescission, arguing it is beyond the UNDT's competence and excessive. There is no merit to this claim, as we have recently held in a similar case regarding the failure to transition another staff member from UNMIS to UNMISS.¹ Nevertheless, since Mr. Eissa was not as long-term an employee of UNMIS as Ms. Hersh, i.e., he had been employed only from 2009 as opposed to 2005, we conclude that the award of two years' net base pay as alternative compensation in lieu of rescission (which was awarded to Ms. Hersh) should be modestly reduced to one year and six months' net base pay. Such alternative compensation is not compensatory damages based on economic loss. Thus, there is no reason to reduce this award by the amount of the termination indemnity Mr. Eissa received.

¹ See *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433.

28. The Secretary-General also challenges the UNDT's award of one year and four months' net base pay as non-pecuniary or moral damages, based on the substantive and procedural irregularities attendant to Mr. Eissa's termination. He argues that the UNDT erred in making this award without evidence of harm and without a finding of harm.

29. He also contends that the UNDT erred in not explaining which irregularities were "substantive" and which were "procedural." Finally, he claims that the award is duplicative of the award of alternative compensation in lieu of rescission, which also was based on irregularities in the transition process.

30. Under our jurisprudence, "damages for a moral injury may arise: ... [f]rom a breach of the employee's substantive entitlements arising from his or her contract of employment. ... 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."² An award of moral damages for a breach of a staff member's rights, especially when the breach is of a fundamental nature as found by the UNDT, does *not* require evidence of harm or a finding of harm. As we held in similar circumstances in *Hersh*, "the breach of [the staff member's] rights was so fundamental that she was entitled to both pecuniary and moral damages".³

31. The UNDT set forth in great detail numerous substantive and procedural irregularities in the transition process that breached Mr. Eissa's rights as a staff member. Moral damages arise from a breach of a fundamental nature, whether the breach stems from substantive or procedural irregularities. Either type of irregularity may support an award of moral damages. There is no merit to the Secretary-General's contention that the UNDT erred in not explaining which irregularities were substantive and which were procedural. Lastly, there is no merit to the Secretary-General's contention that the award is duplicative of the award of alternative compensation in lieu of rescission. An award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages for the fundamental breaches of Mr. Eissa's rights not to be unlawfully terminated from service and to be automatically transitioned to the post of UNMISS

² *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36 (emphases in original and internal citation omitted).

³ *Hersh v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-433-Corr.1, para. 42 (internal citation omitted).

Spokesperson. It is not the same remedy and does not serve the same purpose. However, as we did in *Hersh*, we reduce the award of moral damages to six months' net base salary.

Alleged Errors of Fact

32. The Secretary-General contends that “the UNDT’s decision to rescind the termination decision and award compensation for substantive and procedural irregularities was based on errors of fact”. This claim cannot prevail in light of the UNDT’s conclusion that the decision to terminate Mr. Eissa’s service was unlawful. In other words, the conclusion that the termination decision was unlawful is sufficient, *by itself*, to support the rescission of that decision and the award of alternative compensation in lieu of rescission under Article 10(5)(a).

33. Article 2(1)(e) of the Appeals Tribunal Statute provides that the Appeals Tribunal is competent to hear appeals from judgments rendered by the UNDT asserting that the UNDT “[e]rrred on a question of fact, resulting in a manifestly unreasonable decision”.

34. Assuming the Secretary-General’s contention is based on this provision, the Appeals Tribunal finds that none of the alleged errors cited by the Secretary-General resulted in a manifestly unreasonable decision.

35. As the Appeals Tribunal has held:

In order to overturn a finding of fact by the UNDT, the Appeals Tribunal must be satisfied that the finding is not supported by the evidence or that it is unreasonable. The Appeals Tribunal considers that some degree of deference should be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of witnesses while they are giving evidence and this is critical for assessing the credibility of the witnesses and the persuasiveness of their evidence.⁴

36. The first finding of fact the Secretary-General alleges is erroneous is the purported “finding” set forth in paragraph 103 of the Judgment, where the UNDT stated that Mr. Eissa’s allegations of animus “are unchallenged” in that:

⁴ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 26.

the Respondent has neither answered to the allegations of fact [of animus] pleaded by [Mr. Eissa] nor addressed the documentary evidence adduced in support of the said facts [of animus toward him]. The Respondent's failure to deal with the particular allegations of [Mr. Eissa] leaves the Tribunal with no other course of action than to accept [Mr. Eissa's] version of the events.

37. A fair and reasonable reading of this statement shows it to be an unartful discussion of the evidence, specifically, the Secretary-General's failure to produce *evidence* contradicting Mr. Eissa's testimony about several *specific* instances of animus toward him. It is not a factual finding to the effect that the Secretary-General failed to deny Mr. Eissa's allegations of animus against him.⁵ Thus, the Secretary-General's claim of factual error has no merit.

38. The second finding of fact the Secretary-General alleges is erroneous is the purported "finding" that the transition process "lack[ed] transparency". This is not an erroneous factual finding or conclusion of law, based on the evidence in the record. To the contrary, the UNDT correctly found that the evidence showed the involvement of the MLT in the transition process and the MLT's disregard of the procedures in the Information Circulars, which the Administration was required to follow.⁶ Thus, the Secretary-General's claim of factual error has no merit.

39. The third finding of fact the Secretary-General alleges is erroneous is the purported "finding" that the MLT "did not have any authority ... to re-profile" the UNMISS Spokesperson post. Once again, we conclude that this is not an erroneous factual finding or conclusion of law, based on the evidence in the record. To the contrary, the evidence shows there was no change in the requirements of UNMISS Spokesperson – let alone a 30 per cent change,⁷ as the UNDT correctly found. Thus, this claim of factual error also has no merit.

⁵ The UNDT acknowledged in paragraph 98 of the Judgment that the Secretary-General *did* deny Mr. Eissa's allegations of animus and noted that the Secretary-General argued that Mr. Eissa had not met his burden to show animus.

⁶ See *Sannoh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-451, para. 13. ([T]he[] ... Information Circulars were not merely issued for information purposes; they also provided the legal framework for the transition from UNMIS to UNMISS.)

⁷ IC No. 334/2011 provides:

Where the staffing table for the new mission reflects new posts or where the functions of a post change by more than 30%, the post will be filled through the regular competitive selection process

40. Lastly, we find no merit to the Secretary-General's claim that the UNDT erred in failing to admit the documentary evidence he sought to be admitted post-hearing. As we have held, in order to establish reversible error stemming from erroneous failure to admit evidence, the moving party must "establish that the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case".⁸ In light of the UNDT's ultimate, unchallenged conclusion that the decision to terminate Mr. Eissa's service was unlawful, the admission of the document would not have led to a different decision.

Judgment

41. The Secretary-General's appeal is granted, in part. The UNDT Judgment is affirmed subject to reduction in the amount of compensation in lieu of rescission to one year and six months' net base salary and reduction in the amount of moral damages to six months' net base salary.

42. Both amounts of compensation are payable with interest at the US Prime Rate accruing from the date on which Mr. Eissa was separated from UNMIS to the date of payment, provided the Secretary-General does not rescind the unlawful decision and reinstate Mr. Eissa. If the amounts are not paid within the 60-day period counting from the date of issuance of this Judgment, an additional five percent shall be added to the US Prime Rate from the date after the expiration of the 60-day period until the date of payment.

⁸ *Abbassi*, *supra* note 4, para. 20.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar