



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

Judgment No. 2015-UNAT-501

**Andreyev
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Deborah Thomas-Felix, Presiding
Judge Richard Lussick
Judge Sophia Adinyira

Case No.: 2014-570

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Mr. Andreyev: Alexandre Tavadian/Miles Hastie/OSLA

Counsel for Secretary-General: Wambui Mwangi

JUDGE DEBORAH THOMAS-FELIX, 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/2013/152, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 29 November 2013 in the case of *Andreyev v. Secretary-General of the United Nations*. The Secretary-General appealed the UNDT Judgment on 28 January 2014, and Mr. Sergei Andreyev answered on 13 March 2014.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case read as follows:¹

... In January 2007, the Applicant was appointed as the Chief of the Joint Mission Analysis Centre (JMAC) at the P-5 level in [United Nations Mission in Sudan (UNMIS)], Khartoum, Sudan and continued to serve in that position until his separation from service.

... In his performance appraisal (“e-Pas”) for the years 2008/2009 and 2009/2010, the Applicant was rated as “frequently exceeds performance expectations” while in his 2010/2011 e-Pas, he was rated as “successfully meets performance expectations”.

...

... [O]n 27 April 2011 the Security Council adopted resolution 1978 (2011) in which it was decided to establish a new mission to succeed UNMIS after the completion of its mandate.

...

... Pursuant to resolution 1978, on 17 May 2011 the Secretary-General provided a Special Report on Sudan to the Security Council in which he requested a three month technical rollover of UNMIS from 9 July 2011 to 9 October 2011 whereupon UNMIS would commence the downsizing of its staff in Khartoum. [...]

...

... Several [information circulars (ICs)] were issued by the Mission detailing the processes and procedures by which the transition was to take place.

...

¹ The following text is taken from Judgment No. UNDT/2013/152, paras. 3-25 (internal citations omitted).

... On 26 June 2011, IC No. 327/2011 was issued by the UNMIS [Director of Mission Support (DMS)] announcing the formation of a comparative review panel to review the international posts in UNMIS where the number of current staff in UNMIS was in excess of the proposed posts in the new mission. The IC also informed staff that the profiles of some of the existing posts may change and that these would be filled through the regular selection process.

... Following from this, IC No. 334/2011 was issued on 30 June 2011 updating UNMIS Staff on the impending draw-down process. Through this IC:

a. Staff members with fixed-term appointments that were to expire shortly were advised that their appointments would be extended for a further period of one year. Where a staff member's function would no longer be required by the mission prior to the expiration of his or her fixed-term appointment, the circular stated that a termination indemnity would be payable.

b. It was also indicated that where the staffing table for the new missions reflected new posts or where the functions of a post had changed by more than 30%, the post would have to be filled through the regular competitive selection process and not through the comparative review process.

... On 8 July 2011, the Security Council formally established [United Nations Mission in the Republic of South Sudan (UNMISS)] by resolution 1996 (2011). [...]

... Following the establishment of UNMISS, the Security Council passed a resolution on 11 July 2011 terminating the mandate of UNMIS and calling upon the Secretary-General to withdraw all UNMIS personnel by 31 August 2011 with the exception of those required for the mission's liquidation. [...] It was envisioned that appropriate staff and assets were to be transferred from UNMIS to UNMISS to ensure the achievement of the functions required of the new mission. [...] The resolution also reiterated the need for a smooth transition from UNMIS to UNMISS and the United Nations Interim Security Force for Abyei (UNISFA).

... On 12 July 2011 the Applicant's fixed-term appointment as Chief, JMAC was extended for a period of one year effective 1 July 2011 to 30 June 2012. This letter of appointment was signed by Martin Ojjero, [Chief Civilian Personnel Officer (CCPO)], UNMIS.

... Two weeks later, on 27 July 2011, Mr. Ojjero issued the Applicant with another letter effectively terminating him from service. The letter notified the Applicant that the organization was unable to transition him to either UNMISS or UNISFA.

... On 28 July 2011, the Applicant received another letter from Mr. Ojjerro asking him to check [...] out by 4 August 2011. On the same day, he wrote to Mr. Ojjerro and the Under-Secretary-General for the Department of Peacekeeping Operations (USG/DPKO) requesting an explanation as to why he was not being transitioned.

... He received a response from Mr. Ojjerro informing him that since the functions of his post had changed by more than 30%, the post would be subjected to a regular competitive selection process and not through a comparative review process.

... On 29 July 2011, Mr. Fabrizo Hochschild, Director, Field Personnel Division, Department of Field Support (FPD/DFS) addressed a memo to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resource[s] Management (ASG/OHRM), Department of Management requesting for approval to terminate the appointments of 62 UNMIS international staff members based on the mission[']s retrenchment plan. He forwarded the names of the 62 staff members. The Applicant was one of them. [...]

... On 1 August 2011, Ms. Pollard responded to the above email from Mr. Hochschild giving him the go ahead to terminate the appointments of the 62 staff members and authorizing the payment of termination indemnities to them.

... On 8 August 2011, Mr. Ojjerro wrote an email to the Applicant informing him that his termination was as a result of a 30% change in functions of the Chief, JMAC post in Juba. The Applicant wrote back on the same day requesting an explanation of how the 30% change of function criterion was established. He protested that all other incumbent JMAC analysts were transferred to UNMISS thus showing that there was no change in functions.

... The Applicant forwarded a request for management evaluation of the decision to the Management Evaluation Unit (MEU) on 15 August 2011 after which the decision to separate him was suspended until 29 September 2011 pending the outcome of the MEU review. Subsequently, the Applicant was separated from service on 1 October 2011 and filed an Application on the merits before the Dispute Tribunal on 29 December 2011.

3. On 29 November 2013, the UNDT in Nairobi issued Judgment No. UNDT/2013/152 making the following findings:

- a) The claimed re-profiling of the post of Chief, JMAC at UNMISS by the mission was carried out in bad faith, without authority, illegally and arbitrarily.
- b) The [Mission Leadership Team (MLT)] had no authority to re-profile any posts in the mission and that even with the claimed re-profiling, there was no substantial difference of up to 30% between the functions of the Chief, JMAC in UNMIS and UNMISS.

- c) The CCPO of UNMISS lacked the requisite delegated authority to terminate the Applicant's appointment and the retroactive rubberstamping of the decision by the ASG/OHRM did not cure the lack of authority. The decision was therefore *ultra vires*.
- d) The process of transitioning staff lacked transparency, credibility and good faith.

4. Therefore, the UNDT ordered rescission of the decision to separate Mr. Andreyev from service and his reinstatement, or in the alternative, compensation in the sum of two years' net base salary at the rate in effect at the date of the UNDT Judgment. Furthermore, the UNDT ordered that Mr. Andreyev be paid one- year net base salary for the substantive irregularity and four months' net base salary for the procedural irregularity as a result of the failure of the Administration to follow its own guidelines, rules and procedures.

5. The Secretary-General appealed the UNDT Judgment on 28 January 2014, and Mr. Andreyev answered on 13 March 2014. On 25 March 2014, Mr. Andreyev filed a motion to adduce fresh evidence, by which he sought to introduce a certificate from a psychologist dated 28 November 2012 and a list of vacancy announcements for which he said he had unsuccessfully applied. Of the vacancy announcements presented, only one post-dates the UNDT Judgment. On 7 April 2014, the Secretary-General filed observations opposing the motion. On 28 April 2014, the Registry notified the parties of the President's decision that, without prejudice to the decision by a panel in the future regarding the motion, the Secretary-General may submit a response to the proffered evidence and his response should be added to the case file. On 15 May 2014, the Secretary-General filed a response, in which he reiterated that the motion be denied.

Submissions

The Secretary-General's Appeal

6. The UNDT erred on questions of law and fact and exceeded its competence in awarding damages totalling three years and four months' net base salary. The UNDT erred by failing to provide reasons to justify such an award, and the UNDT's mere reference to "substantive and procedural irregularities occasioned ... by the failure by the Administration to follow its own guidelines, rules and procedures" does not constitute a sufficient basis to exceed the two-year limit on compensation in Article 10(5)(b) of the UNDT Statute. He requests that the Appeals Tribunal vacate or reduce such compensatory award.

7. The UNDT erred by setting compensation in lieu of rescission at two years' net base salary given that this amount of compensation was excessive. Mr. Andreyev was never appointed for a period greater than one year and he had only nine months left on his last appointment. Moreover, the Dispute Tribunal erred in failing to reduce the two years' in-lieu compensation by the amount that Mr. Andreyev had received as termination indemnity.

8. The UNDT awarded additional compensation for substantive and procedural irregularities that are not supported by any evidence of harm and which are furthermore duplicative. The UNDT made no specific finding that Mr. Andreyev suffered actual harm from the decisions taken by the Administration.

9. The UNDT relied on particular findings of fact which were erroneous and in turn influenced the quantum of damages awarded.

10. On the merits, Mr. Andreyev provided no evidence to support his assertions that the re-profiling exercise was a mere ruse or that the termination of his appointment was exercised in an arbitrary manner or tainted by bad faith or improper motive.

11. The UNDT erred in concluding that the 2012 vacancy announcement did not represent a 30 per cent change of functions, by comparing the 2012 vacancy announcement with the 2011 vacancy announcement. The requirements contained in the 2012 vacancy announcement, as well as the date it was published, were not an "afterthought" but a carefully considered decision taking into account the needs of the mission and the mandate given by the Security Council.

12. The UNDT failed to give sufficient weight to the evidence given by the Chair of the MLT, who was part of the MLT and was driving the process of establishing the new mission, and who was in a better position to assess the functional differences.

13. The mere failure of the MLT to keep notes of its meetings does not provide a basis for the UNDT's conclusion that the MLT had engaged in an "unwholesome cover-up". Mr. Andreyev does not make any allegation that his termination was engineered by a group of unnamed individuals and there was no evidence on the record to support the UNDT's extreme conclusions.

14. Had the Secretary-General chosen not to renew Mr. Andreyev's appointment, Mr. Andreyev would not have been eligible for termination indemnity. This demonstrated good faith, as opposed to improper motive.

15. Contrary to the consistent jurisprudence of the Appeals Tribunal, the UNDT reversed the burden of proof for improper motive by requiring the Secretary-General as Respondent to make a positive case that there was no improper motive.

16. The conclusion by the UNDT that "the entire process of transitioning staff was markedly lacking in transparency" was contradicted by the evidence on record before the Dispute Tribunal.

Mr. Andreyev's Answer

17. The Dispute Tribunal committed no error relating to the two-year threshold; the award as an alternative to rescission was clearly intended to be a pecuniary damage award.

18. The Secretary-General chose not to file any evidence before the Dispute Tribunal establishing that Mr. Andreyev had received a termination indemnity. A party may not raise new arguments and submit new evidence on appeal, especially when that party should have presented it before the Dispute Tribunal.

19. Mr. Andreyev was able to establish before the Dispute Tribunal that as a result of the impugned administrative decision, he remained without gainful employment for a significant period of time. In his view, the Dispute Tribunal took into account his employment situation at the time of the trial in awarding damages.

20. The award of additional and separate compensation for substantive and procedural irregularities is not duplicative. It is consistent with *Mmata* and *Cohen*.² Article 10(5) of the UNDT Statute permits such an award. Substantive irregularities relate to the outcome of the re-profiling. More specifically, Mr. Andreyev had successfully established before the Dispute Tribunal that: (a) the result had been reached in "bad faith"; (b) the process had been carried out "arbitrarily"; and (c) there had not been any substantial difference between his post at UNMIS and the new post at UNMISS. The procedural irregularities, on the other

² *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092; *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131.

hand, pertain to the process. In particular, he successfully established that: (a) UNMIS had no delegated authority to terminate his appointment; (b) the process had not been transparent; and (c) the reasons provided by UNMIS for terminating his appointment were contradictory, inconsistent and inaccurate.

21. Although the total award for moral injury may be on the high end of the discretionary range, an error of principle has not been demonstrated.

22. There is a significant body of evidence in support of the factual findings of the Dispute Tribunal, one of which was that Mr. Andreyev's appointment was terminated without any requisite authority. The Dispute Tribunal heard the evidence of four witnesses and was entitled to draw a negative inference as to the credibility of the witness called by the Secretary-General.

23. Mr. Andreyev requests that the Appeals Tribunal dismiss the present appeal in its entirety. Alternatively, he requests that if the Appeals Tribunal determines that the only defect in the UNDT's decision concerns the adequacy of reasons given, or there remain contested matters of fact, the matter be remanded to the Dispute Tribunal for reconsideration.

Considerations

24. Approximately two months after the Secretary-General filed an appeal to the Appeals Tribunal, Mr. Andreyev filed a motion to adduce fresh evidence. In that motion, Mr. Andreyev sought to introduce documentary evidence namely, a certificate from a psychologist and a list of vacancy announcements. Although these documents were in existence at the time of the hearing, with one exception, they were not produced before the UNDT.

25. Article 2(5) of our Statute provides, in part:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, [...] it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings.

26. Mr. Andreyev has not shown that “exceptional circumstances” exist for the admission of additional evidence or that it “is in the interest of justice and the efficient and expeditious resolution” of this proceeding for additional evidence to be received by this Tribunal.

27. As a consequence this motion is denied.

28. The Secretary-General is appealing the order of the award of damages and avers that the UNDT erred on questions of law and fact and exceeded its competence in awarding damages totalling three years and four months’ net base salary.

29. The main issue is therefore whether the UNDT exceeded its competence in awarding an alternative compensation of two years’ net base salary in lieu of rescission, plus an additional award of one year and four months’ net base salary for substantive and procedural irregularities.

30. The UNDT Statute at Article 10(5) outlines the power of the judges of the UNDT to make orders of compensation. Former Article 10(5) provided:³

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.

31. With respect to the alternative compensation award of two years’ net base salary in lieu of rescission, an examination of the evidence shows that Mr. Andreyev was recruited on a fixed-term one-year contract; this contract was renewed over time for periods of one year. Staff Rule 4.13(c) provides that “[a] fixed-term appointment does not carry any expectancy,

³ Article 10(5) was amended on 18 December 2014 by General Assembly resolution 69/203 as follows: 38. Decides [...] to amend article 10, paragraph 5 (b), of the statute of the Dispute Tribunal and article 9, paragraph 1 (b), of the statute of the Appeals Tribunal, by adding the words “for harm, supported by evidence” after the word “compensation”.

legal or otherwise, of renewal or of conversion, irrespective of the length of service, except as provided under staff rule 4.14(b)".⁴ Moreover, it is our settled jurisprudence that a fixed-term contract ends with the effluxion of time and a person so employed does not have a right or legitimate expectation of the renewal of same.⁵ It follows therefore that any consideration of an award of damages for persons who are recruited on fixed-term contracts must take into account, among other things, the term of the contract and the remainder of the said term, if any, at the time of any alleged breach.⁶ In our view the reasonable expectation of the duration of Mr. Andreyev's contract was one year. Since Mr. Andreyev had nine months remaining in his appointment, we set the alternative award of compensation in lieu of rescission at nine months' net base salary, less any amount which has been paid as termination indemnity.

32. With respect to the compensation award of one year and four months' net base salary for substantive and procedural irregularities, the Secretary-General argues that such amount is duplicative and not supported by any evidence of harm.

33. The Appeals Tribunal has consistently held that not every breach will give rise to an award of moral damages. Whether or not a breach will give rise to an award of moral damages will necessarily depend on the nature of the evidence put forward before the Dispute Tribunal.⁷ We concur with the Secretary-General's argument that there was no evidence of harm. Unlike in a prior UNDT Judgment which involved very similar circumstances regarding the failure to transition another staff member from UNMIS and UNMISS, there was no finding of animus against Mr. Andreyev.⁸ There is insufficient evidence to support the very strong findings by the UNDT of an "unwholesome cover-up" and improper motives on the part of the Secretary-General. Indeed, if there were improper motives, then the burden of proof would reside with Mr. Andreyev and not with the

⁴ Staff Rule 4.14(b) relates to continuing appointments for staff members recruited under a competitive examination, which is not the case here.

⁵ *Appellee v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-341; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

⁶ See *Gakumba v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-387.

⁷ *Marsh v Secretary-General of the United Nations*, Judgment No. 2012-UNAT-205; *Kozlov and Romadanov v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-228; *Wu v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-042; *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-076.

⁸ *Eissa v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/112.

Secretary-General.⁹ There was no such evidence forthcoming from Mr. Andreyev in this regard.

34. Accordingly, in light of our conclusion that there is a lack of evidence to support the finding of harm, we vacate the award of moral damages.

Judgment

35. The Secretary-General's appeal is granted. The UNDT's award of compensation in lieu of rescission is reduced from two years' net base salary to nine months' net base salary, less any amount which has been paid as termination indemnity. The award for moral damages is vacated.

36. The amount of compensation is payable with interest at the US Prime Rate accruing from the date on which Mr. Andreyev was separated from UNMIS to the date of payment. If the amount is 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.

⁹ *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201; *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-184; *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar