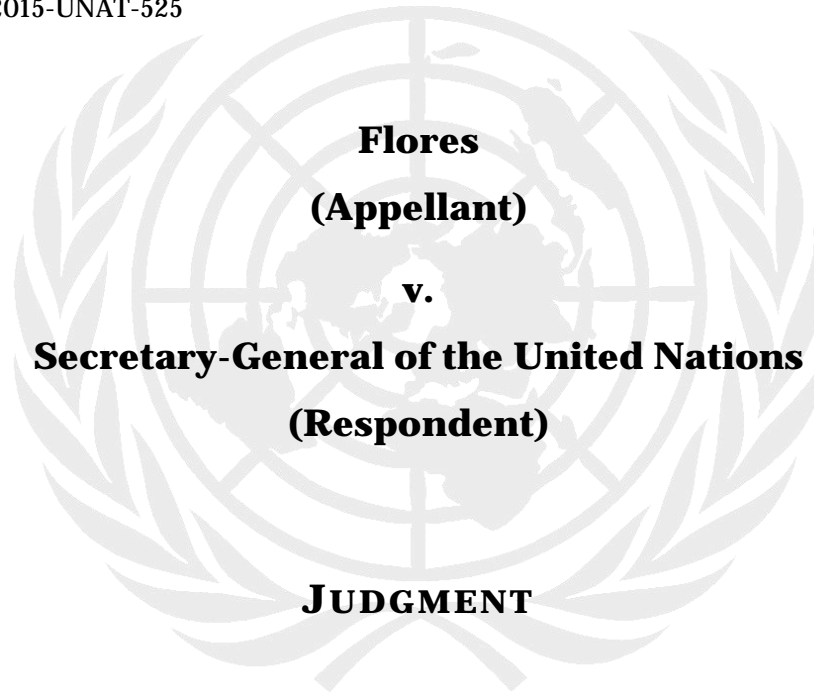




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-525



Before: Judge Inés Weinberg de Roca, Presiding
Judge Luis María Simón
Judge Deborah Thomas-Felix

Case No: 2014-602

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Zarqaa Chohan

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Wendolyn Sofia Flores against Judgment No. UNDT/2014/025 (Impugned Judgment), rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 28 February 2014 in the case of *Flores v. Secretary-General of the United Nations*. Ms. Flores appealed on 28 April 2014, and the Secretary-General answered on 30 June 2014.

Facts and Procedure

2. The following facts are uncontested:¹

... On 4 March 1999, [Ms. Flores] joined the Honduras Country Office, [the World Food Programme (WFP)], as a Logistics Assistant under Service Contract (locally-recruited staff). This contract was renewed on several occasions until June 2005, at which time she was appointed to a GS-7 fixed-term contract as a Senior Logistics Assistant.

... On 10 October 2008, [the Office of Inspections and Investigations (OSDI)] received a written complaint regarding [Ms. Flores]'s conduct which stated, *inter alia*, that a supervisor in the Logistics Unit [who in turn was supervised by Ms. Flores] had insulted and threatened another staff member in [Ms. Flores]' presence, that [Ms. Flores] had ordered the distribution of damaged goods from WFP's warehouses and that [Ms. Flores] deviated from the Financial Regulations, Rules and Procedures of WFP.

... On 6 August 2009, [Ms. Flores] was interviewed by OSDI as part of their investigation into the October 2008 allegations, following which she was suspended and placed on administrative leave with pay pending the completion of the investigation.

... On 20 November 2009, OSDI provided the Director, Human Resources Division ("HRD"), WFP, with its "Investigation Report on [Ms. Flores]: Investigation into alleged violation of WFP Policy on Harassment, Sexual Harassment and Abuse of Authority and allegations of Unsatisfactory Conduct", whereby they recommended that "appropriate disciplinary action be taken against [Ms. Flores]". The analysis and conclusions section of the investigation report addressed [Ms. Flores]'s role in:

¹ Impugned Judgment, paras. 3-10.

A. [The] failure to intervene and correct [the Logistics Unit supervisor's] offensive conduct in violation of the WFP HSHAP [Harassment, Sexual Harassment and Abuse of Authority] Policy.

B. [The] deviation from Financial Regulations, Rules and Procedures of the Organization.

C. Directing the distribution of damaged beans and oil and permitting the removal of expiration dates from boxes and bottles containing expired vegetable oil.

D. Directing the removal of expiration dates from bottles containing vegetable oil and ordering the repacking of the expired oil in new boxes to conceal the expiration date.

... On 29 December 2009, the Director, HRD, WFP, informed [Ms. Flores] that the OSDI investigation had found that she had “breached various WFP Staff Rules and Regulations and related issuance and ha[d] displayed a standard of conduct which is below that required in international civil service”. [...]

... On 26 March 2010, [Ms. Flores] provided WFP with her responses to the charges filed against her. As part of her response, [Ms. Flores] raised a number of concerns regarding the investigation and disciplinary process, including that she was interviewed on the final day of the investigation; that prior to her interview she had no idea that she was being investigated; that she was not advised of her right to have a lawyer present during the interview; that a number of witnesses who were favorable to her case were not interviewed (e.g., regional and international logistics officers and food monitors).

... On 24 June 2010, following a review of her responses to the findings of the investigation report, the Director, HRD, WFP, informed [Ms. Flores] that (emphasis in original)

[t]he confirmed findings against you are of such serious nature that they entail the irretrievable breach of the trust on which your employment with the Programme is based.

Your actions are found to amount to fraud in that they aimed at misrepresenting the conditions of the commodities to food monitors and WFP beneficiaries. [Your] actions had the potential to negatively impact the Organization's reputation ... [and] had a very serious risk to the health and/or lives of WFP beneficiaries ... [T]he findings against you highlight a pattern of

serious misconduct and a series of grave incidents protracted over a significant period of time, from 2007 to 2009. The gravity of your confirmed misconduct is compounded by your significant seniority and experience with the Programme ...

In light of the foregoing ... this is to inform you of the decision to impose the proposed disciplinary measure of “***Separation from Service***” with no termination indemnities in accordance with UN Staff Rule 10.2(viii).

... On 22 September 2010, [Ms. Flores] filed an application with the Dispute Tribunal contesting the decision to separate her from service.

3. On 28 February 2014, the Dispute Tribunal issued its Judgment. It found that there were procedural irregularities in the handling of the investigation against Ms. Flores. Specifically, the Dispute Tribunal found that Ms. Flores was not informed at the beginning of the interview of the specific allegations held against her and did not get the opportunity to respond to them in full. Ms. Flores was also not re-interviewed in relation to any of the allegations against her before they were included as evidence in the investigation report sent to the Director, HRD.

4. Based on the interview transcript, the Dispute Tribunal considered that Ms. Flores was not informed of her rights: (i) to be treated fairly, including the right to defend herself; (ii) to be offered reasonable and appropriate support to deal with the impact of any harassment or abuse of authority; (iii) to be accompanied during the interview by a willing colleague; and (iv) to identify witnesses or evidence to support her version of events with a single exception.

5. The Dispute Tribunal considered that Ms. Flores’s due process rights were not respected during the interview nor were the violations cured during the procedure in front of the HRD. The Dispute Tribunal found that the decision-maker wrongly determined that the investigation had been conducted properly, noting that the decision-maker had erroneously found that Ms. Flores had not proposed any witnesses and no additional testimonies of field monitors were necessary for the case.

6. The Dispute Tribunal rescinded the decision of 24 June 2010 imposing the disciplinary measure of separation from service without termination indemnity, and ordered the removal of any references relating to Ms. Flores’ sanction from her official status file.

Noting that Ms. Flores' appointment was due to expire on 30 June 2010, the Dispute Tribunal rejected her request for reinstatement with payment of salaries and benefits since the time of her separation. The Dispute Tribunal considered that the rescission of the decision per se was a fair and sufficient remedy for the moral prejudice caused to Ms. Flores. As an alternative to rescission, the Dispute Tribunal set an award of USD 5,000 which WFP may elect to pay.

Submissions

Ms. Flores' Appeal

7. The Dispute Tribunal erred in law and in fact in failing to provide an appropriate award for actual pecuniary losses and moral damages. Ms. Flores contests the finding that she would have been separated on 30 June 2010 in accordance with her terms of appointment. Ms. Flores avers that the short term nature of her last appointment was on account of the illegal disciplinary action. Given that she had good performance appraisals and her appointment had been repeatedly renewed for ten years, she had a reasonable expectation that her contract would have been extended but for the improper finding of misconduct.

8. The remedy ordered by the Dispute Tribunal failed to compensate Ms. Flores sufficiently for the violation of her due process, emotional distress and harm that she has suffered, including harm caused to her reputation which has largely contributed to her inability to find permanent re-employment. Ms. Flores requests to admit correspondence on her job searches and the fact that she had been anticipating going on maternity leave when the investigation report was being finalized.

9. Ms. Flores requests two years' net base pay for lost earnings, two years' net base pay in lieu of reinstatement as well as USD 60,000 in moral damages.

The Secretary-General's Answer

10. If the arguments in the Secretary-General's cross-appeal are not accepted, the Secretary-General submits in the alternative that Ms. Flores has not established any errors on the part of the Dispute Tribunal warranting an increase in compensation.

11. While Ms. Flores has requested consideration of her loss of earnings of three and a half years between her separation and the issuance of the Judgment, this Appeals Tribunal has held that the award of full salary between separation and the date of a judgment is “fraught with ambiguity and uncertainty” as any number of change of circumstances could result in separation of a staff member on other non-disciplinary grounds.² The Dispute Tribunal took into account all the circumstances of the case, including Ms. Flores’ request for loss of earnings, but did not find any exceptional or compelling reasons to grant such request. Ms. Flores failed to provide evidence that she had a reasonable expectation of her appointment being renewed. Further, Ms. Flores’ additional documentation does not provide any evidence that she was not able to be re-employed due to the dismissal.

12. With respect to moral damages claimed by Ms. Flores regarding emotional distress and damage to her professional reputation, the Secretary-General notes that there is no entitlement to moral damages for each alleged violation and furthermore, as noted by the Appeals Tribunal, “not every breach will give rise to an award of moral damages” and any award will depend on the evidence before the Dispute Tribunal.³

The Secretary-General’s Cross-Appeal

13. The Dispute Tribunal erred in concluding that Ms. Flores was not given an opportunity to respond to the allegations in full. The record of the OSDI interview of Ms. Flores indicates that she was questioned about her knowledge of the inappropriate behaviour of her supervisee and her responsibilities to intervene as well as the distribution of the expired food products. These questions gave Ms. Flores a full opportunity to understand the subject matters of the investigation and to explain her role and conduct in such matters. For instance, she was asked to describe the process that was followed when food reached their expiration dates and to explain why expiration dates were removed from the expired food. In response, Ms. Flores admitted that she instructed her supervisees to remove the expiration dates with nail polish in order to distribute the food.

14. The Secretary-General notes that the Appeals Tribunal has held that former Staff Rule 110.4, which provides that disciplinary proceedings may not be instituted against a staff member without notification in writing as to the allegations against him or her,

² *Mwamsaku v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-246, para. 24.

³ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 37.

applied only when the disciplinary proceedings have been initiated.⁴ In other words, the staff member has to be informed of the charges in writing when s/he is charged with misconduct, but not during the preliminary investigation.

15. The Secretary-General highlights that, after the interview, Ms. Flores was given a letter on 29 December 2009 outlining the specific charges of misconduct to which she responded on 20 May 2010.⁵ The Administration took into consideration Ms. Flores' comments as noted in its dismissal letter of 24 June 2010, but found them unsatisfactory in light of the evidence against her.

16. The Dispute Tribunal also erred in determining that Ms. Flores was not asked by investigators if she wished to identify additional witnesses. The interview transcript indicates that she was asked whether the investigators should speak with anyone regarding the issues discussed and Ms. Flores had not suggested any names. Further, Ms. Flores could have specified the names of witnesses who were "favorable" to her case instead of making a general reference to such individuals not being interviewed in her written response to charges of misconduct.⁶ The Secretary-General submits that there is no positive duty to request Ms. Flores to identify the specific witnesses who may be helpful to her case.

17. As the Dispute Tribunal erred in ordering the rescission of the decision, no compensation to Ms. Flores is warranted.

Considerations

18. Ms. Flores raised a number of procedural concerns regarding the investigation and disciplinary process, i.e., that she was interviewed late and that her witnesses were not interviewed.

19. The UNDT concluded that the dismissal of Ms. Flores was unlawful because it breached the Organization's rules and procedures for disciplinary investigations as well as the general requirements of due process.

20. The applicable OSDI's Quality Assurance Manual on Investigations states in paragraph 5.2 that:

⁴ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209, para. 43.

⁵ According to para. 8 of the Impugned Judgment, Ms. Flores responded on 26 March 2010.

⁶ It should be noted that Ms. Flores' response to the charges included the names of potential witnesses.

An investigation must follow due process to ensure a basic level of fairness, transparency, and consistency. Due process in the context of an investigation means that the subject of any allegations should be informed of these allegations by the investigator(s) prior to being interviewed. The time and manner of such disclosure should be made keeping in mind fairness to the subject and the need to protect the integrity of the investigation and the interests and rules of the Programme. During the interview the subject must be given the opportunity to respond to these allegations and should be invited to name witnesses and indicate evidence to support his or her version of events.

21. It also states in paragraph 5.28 that:

Interviews are a key part of the information-gathering process for any investigation. Investigators are obliged to interview the complainant and the subject of any allegations, as well as any persons that either of these parties may indicate in order to support their respective versions of events. Depending on the seriousness of an allegation and the nature of the information being sought investigators may arrange face-to-face interview sessions or contact interviewees by phone. In certain circumstances, an investigator may send questions and receive responses by email, paying due respect to the confidentiality of the matters at hand.

22. The Dispute Tribunal did not err neither in determining that there were procedural violations which warranted rescission of the separation decision, nor in its determination that Ms. Flores was not entitled to reinstatement (justifying a material award) as her contract was due to expire shortly after receipt of the dismissal letter.

23. The record of the case shows that the investigation was not conducted according to the provisions of OSDI's Quality Assurance Manual. The Secretary-General argues that the questions asked during the interview were sufficient for Ms. Flores to understand the allegations against her. However, he does not contradict the fact that she was not informed prior to the interview what the allegations were. Questioning is not informing. The Appeals Tribunal notes that the jurisprudence cited by the Secretary-General regarding the obligation of the Administration to inform staff members of the charges only when the disciplinary proceedings have been initiated, but not during the preliminary investigation, is immaterial to this case.⁷ Ms. Flores, by the terms of her Letter of Appointment, is governed by and subject to the provisions of not just the Organization's Staff Regulations and

⁷ See para. 14, above.

Rules but all WFP policies and issuances applicable to locally recruited field staff, including OSDI's Quality Assurance Manual.

24. Furthermore, the records indicate that Ms. Flores provided the names of witnesses in her response to the charges and that there was no action taken by the Administration to interview such individuals. The Appeals Tribunal finds that the failure of the Administration in this regard was an undeniable breach of Ms. Flores' due process rights.

25. Regarding the UNDT decision not to order reinstatement in light of the fact that Ms. Flores' appointment expired shortly after the dismissal letter, we are mindful of the established jurisprudence, that unless the Administration has made an "express promise ... that gives a staff member an expectancy that his or her appointment will be extended', or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful".⁸

26. As for the quantum of compensation set by the UNDT, the Appeals Tribunal has previously stated that it will not interfere with the UNDT's decision absent a finding of error of law or fact on the part of the UNDT, in accordance with Article 2(1)(c) and (e) of its Statute. Specifically, the Appeals Tribunal has held that "[t]he trial judge is best placed to assess the nature and evidential value of the information being provided by an applicant to the UNDT to justify an award of damages, including pecuniary damages. In the absence of a compelling argument that the UNDT erred on a question of law, or on a question of fact resulting in a manifestly unreasonable decision, we will not lightly interfere with the findings of the Dispute Tribunal."⁹ We find that Ms. Flores has not provided a compelling argument.

27. We therefore uphold the UNDT Judgment.

Judgment

28. The appeal and cross-appeal are dismissed.

⁸ *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, para. 47.

⁹ *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-346, para. 23.

Original and Authoritative Version: English

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

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Thomas-Felix

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

(Signed)

Weicheng Lin, Registrar