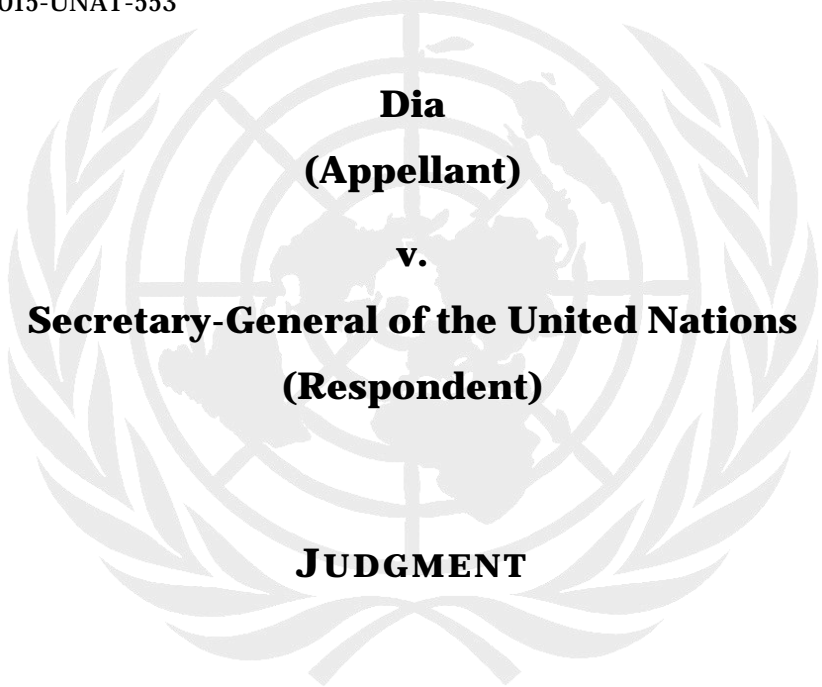




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-553



**Dia
(Appellant)
v.
Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Deborah Thomas-Felix, Presiding
Judge Luis María Simón
Judge Mary Faherty

Case No.: 2014-638

Date: 2 July 2015

Registrar: Weicheng Lin

Counsel for Mr. Dia: Cheikh Ahmadou Ndiaye

Counsel for Secretary-General: Nathalie Defrasne

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/066, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 18 June 2014, in the matter of *Dia v. Secretary-General of the United Nations*. Mr. Ousmane Sambia Dia filed his appeal on 16 August 2014, and the Secretary-General filed his answer on 31 October 2014.

Facts and Procedure

2. On 6 January 2003, Mr. Dia took up a temporary assignment with the United Nations Children's Fund Country Office in Senegal (UNICEF Senegal CO) as a Finance Assistant at the GS-5 level. On 12 March 2007, he was appointed to the post on a fixed-term basis.

3. In March 2011, Mr. Dia's post was abolished as a result of the Program and Budget Review. After reviewing the functions of the post, the Job Classification Panel substantially changed the job description and a new position of finance assistant was classified at the GS-5 level.

4. On 6 July 2011 and again on 29 September 2011, Mr. Dia was formally informed of the abolition of his post effective 31 December 2011.

5. In October 2011, UNICEF advertised the newly created GS-5 Finance Assistant post within the Senegal CO and Mr. Dia applied.

6. On 20 December 2011, the UNICEF Senegal CO Representative and the Human Resources Specialist informed Mr. Dia that his application had been removed from the short list for the newly created Finance Assistant post because of his prior performance and an incident in 2009 whereby he had compromised the integrity of a procurement process.

7. On 29 December 2011, Mr. Dia received a letter of separation indicating his entitlements and the conditions of his separation. In return for payment of an additional termination indemnity, he signed a waiver agreeing not to contest his separation from UNICEF.

8. On 17 January 2012, Mr. Dia submitted a request for management evaluation to UNICEF's Deputy Executive Director (DED) challenging the withdrawal of his name from the shortlist of candidates for the GS-5 post.

9. On 9 February 2012, those candidates for the GS-5 level post who had already successfully passed the written test administered in January 2012 were interviewed by a panel.

10. On 2 March 2012, the DED decided on Mr. Dia's management evaluation request having regard, *inter alia*, to his status as a staff member on an abolished post. With respect to the procurement incident, the DED noted that no investigation or disciplinary case had been pursued against Mr. Dia at the time and his contract with UNICEF was extended shortly thereafter indicating that UNICEF did not consider the incident sufficiently grave to consider him unsuitable for continued employment. The DED consequently instructed the UNICEF Senegal CO to put forward Mr. Dia's candidature to the recruitment panel considering the GS-5 Finance Assistant post.

11. On 5 March 2012, Mr. Dia took the same test as the other candidates, which was marked by the same persons, namely the Finance Officer and the Chief of Operations. On 14 March 2012, he was also interviewed by the same interview panel.

12. On 30 March 2012, the panel finalized the Candidate Comparison Matrix for the post. It found Mr. Dia not suitable and recommended another candidate for the post.

13. On 10 May 2012, Mr. Dia requested management evaluation of the decision not to select him for the Finance Assistant post claiming that the process was flawed as he underwent the recruitment process after all the other candidates, thereby depriving him of anonymity. He also stated that the abolishment of his post was not justified, and that UNICEF should have identified a suitable post for him.

14. On 21 June 2012, the DED responded and informed Mr. Dia that his challenge to the abolishment of his post was time-barred. His challenge to the recruitment process was also rejected insofar as the process was legitimate and no impropriety or extraneous factors were identified.

15. On 22 September 2012, Mr. Dia filed an application with the UNDT challenging the decision of 29 September 2011 to separate him from service following the abolition of his post, as well as the decision not to select him for the post of Finance Assistant at the GS-5 level.

16. On 18 June 2014, the UNDT issued its Judgment in which it found, in part, in favour of Mr. Dia. The UNDT rejected Mr. Dia's claim concerning the abolishment of his post and ensuing separation from service, finding it to be time-barred. As to the recruitment process for the

Finance Assistant post, while the UNDT found that there was no evidence of actual bias, it nonetheless held that the process was marred by the *perception* of bias insofar as the same members who first decided that Mr. Dia's application should not be put forward for consideration, were subsequently part of the interview panel that concluded he was not suitable for the position. As such, a reasonable observer would be bound to conclude that the possibility of bias existed in the recruitment process. Noting that rescission was not feasible, the UNDT set an award of alternative compensation in the amount of three months' net base salary, on the basis that Mr. Dia, as a staff member on an abolished post, would have been given preference for selection for the new Finance Assistant position had he been one of the recommended candidates. In the circumstances, he lost this important advantage as he was not one of the recommended candidates.

Submissions

Mr. Dia's Appeal

17. Mr. Dia challenges the amount of compensation which the UNDT awarded him, claiming that the UNDT's award of three months' net base salary does not adequately compensate him for the prejudice he suffered as a result of the breach of his right to due process in the recruitment procedure. As his contract was to run until 31 March 2012 instead of being abolished as of 31 December 2011, the UNDT's award simply corresponds to the money due to him until the end of his contract. As such, it does not compensate him for the violation of his right to a fair recruitment process and a missed opportunity, which give rise to separate damages. Nor does the award sanction UNICEF for the dual injustice it caused him. Instead, Mr. Dia requests this Tribunal to grant him compensation amounting to two years' net base salary, or to remand the Judgment to the UNDT which should award him two years' net base salary.

The Secretary-General's Answer

18. The award of compensation is a matter for the discretion of the UNDT which is in the best position to decide on the level of compensation to award given its appreciation of the case. Further, according to the Appeals Tribunal's jurisprudence, compensation should be set by the UNDT on a case-by-case basis, taking into consideration the nature of the irregularity and the chance that the staff member would have been recommended for the position had the breach not occurred. The role of the Appeals Tribunal is only to ensure that the UNDT was correctly guided

by the nature of the irregularity and the chance the staff member would have had to be selected had the correct procedure been followed.

19. Mr. Dia's claim for two years' net base salary is premised on the assertion that he had a certain chance of being selected had the composition of the panel been different and therefore he should be compensated for the salary he lost as a result of not being appointed. However, the UNDT made no finding that the panel's assessment of Mr. Dia was flawed or that Mr. Dia had a certain chance of being selected. While Mr. Dia relies on the fact of being accorded priority consideration by virtue of the abolishment of his post, "priority consideration" cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for.¹

20. Insofar as Mr. Dia claims that the award does not address the termination of his appointment before its date of expiry, the UNDT found this part of his challenge was not receivable, and thus properly declined to take this factor into account in determining the award of compensation. Further, Mr. Dia is precluded from claiming additional compensation on the ground of his early separation given that upon his separation, Mr. Dia accepted an enhanced termination indemnity and expressly agreed not to contest his separation from UNICEF. Last, as Article 10(7) of the UNDT Statute precludes the award of punitive damages, it would have been improper for the UNDT to award damages for the purpose of sanctioning UNICEF for any violations of Mr. Dia's rights.

21. Mr. Dia failed to establish that any increase to the compensation awarded by the UNDT is warranted. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

22. The Appellant's application before the UNDT was decided partly in his favour. The crux of the Appellant's appeal is that the UNDT erred in failing to award him moral damages by reason of the violation of his right to a fair recruitment process and a missed opportunity. We find there is merit in the Appellant's appeal.

¹ *Megerditchian v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-088, para. 28.

23. This is not a matter where the Appellant did not request moral damages.² In his application to the UNDT, the Appellant requested, inter alia, payment of damages and interest for the “incommensurable economic and moral prejudice” he suffered as a result of the loss of his position and income since 31 December 2011.

24. The UNDT found that the Appellant’s challenge relating to his separation from service as a result of the abolition of his post was not receivable, and we find no fault with that finding. The UNDT consequently limited itself to considering the propriety of the recruitment process and concluded that it was flawed. Accordingly, on the matter of compensation, the UNDT held:³

... Article 10.5 of the UNDT statute materially provides that in cases of appointment the Tribunal may as part of its judgment order rescission of the contested administrative decision and/or compensation that shall not normally exceed the equivalent of two year’s net base salary of the Applicant.

... Due to the passage of time, rescission of the selection decision is not a feasible option. However, in light of the fact that the Applicant was a staff member on an abolished post, if he had been one of the recommended candidates, he would have been given preference for selection for the new Finance Assistant position in accordance with the 22 September 2011 memorandum on “Corporate support to Staff on Abolished Posts”. Unfortunately, he lost this important advantage since he was not one of the recommended candidates.

... Accordingly, the Tribunal awards him three months net base salary as at the time of the selection decision.

There is no evidence in the foregoing that the Appellant’s claim for moral damages in relation to the flawed recruitment process was properly considered by the Dispute Tribunal. The UNDT’s award was clearly set as an alternative amount of compensation that the Administration may elect to pay the Appellant in lieu of rescinding the contested selection decision.

25. Insofar as the Secretary-General submits that the Appellant is precluded from seeking additional compensation as he previously waived his rights to contest his separation in return for an enhanced termination indemnity, this submission fails to distinguish between the two challenges brought by the Appellant. In our view, the Appellant’s request for damages to the UNDT also extended to his loss of opportunity to be properly recommended for the Finance Assistant post, a matter which is separate and independent from his early separation

² Cf. *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009.

³ Impugned Judgment, paras. 57-59.

resulting from the abolition of his post, and which may have been the subject of an agreement with the Administration. Consequently, the Secretary-General's submission is rejected.

26. Pursuant to Article 9(1)(b) of the Appeals Tribunal Statute, this Tribunal may award:

Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

27. With respect to the award of moral damages, in *Asariotis* we held that:⁴

Th[e] identification [of the moral injury sustained by the employee] 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 [...] [f]rom 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.

28. It is our finding on the totality of the evidence that the Appellant has a claim for moral damages. In this regard, we uphold the UNDT's finding that the recruitment process was flawed in that it was affected by the perception of bias, a finding that was not challenged by the Secretary-General on appeal. The UNDT correctly found that as a result of the flawed recruitment process, the Appellant was denied the opportunity of being given preference for selection for the new Finance Assistant position.

29. Based on this flaw we are minded to award the Appellant moral damages. We are not however persuaded that the effects of the breach are sufficient to warrant the level of compensation that he now claims, namely two years' net base salary, being the maximum this Tribunal may award in non-exceptional cases. The moral injury which occurred does not merit the level of compensation which the Appellant seeks. Nonetheless, in view of the moral harm suffered by the Appellant, we award him two months' net base salary at the rate in effect on the date of his separation from UNICEF.

⁴ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

Judgment

30. The appeal is granted in part. The Judgment of the UNDT is upheld and we order payment to the Appellant for moral damages in the sum of two months' net base salary, with interest at the US Prime Rate accruing from 30 March 2012, the date Mr. Dia was found not suitable for the contested post. This amount shall be paid within 60 days from the date this Judgment becomes executable. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Faherty

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar