



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

Judgment No. 2015-UNAT-586

Alobwede
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Mary Faherty
Judge Richard Lussick

Case No.: 2014-681

Date: 30 October 2015

Registrar: Weicheng Lin

Counsel for Mr. Alobwede: Self-represented

Counsel for Secretary-General: Rupa Mitra

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has received an appeal from the Secretary-General of the United Nations against Judgment No. UNDT/2014/120, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 30 September 2014 in the case of *Alobwede v. Secretary-General of the United Nations*. The Secretary-General appealed on 28 November 2014, and on 29 January 2015, Mr. Johnny Sone Alobwede filed an answer as well as a cross-appeal. The Secretary-General filed an answer to the cross-appeal on 6 April 2015.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:¹

... The Applicant entered the service of [the International Criminal Tribunal for Rwanda (ICTR)], in the Language Services Section (“LSS”), on 26 August 1997, as a Translator/Interpreter at the P-3 level. On 1 February 2001, he was promoted to the P-4 level [...].

... Around 18 July 2012, the Applicant was assigned without prior notice to interpretation duties effective 23 July 2012. There is a dispute about who took the assignment decision but it is not necessary to re[s]olve that dispute for the purposes of this case.

... The Applicant became aware of the assignment by an email he received from another staff member in the Interpretation Unit (“IU”) on 19 July 2012. The Applicant considered that the assignment had been made contrary to the established practice and immediately replied to the email, expressing his surprise at the assignment and asking who had done it, hoping that “[they] w[ould] not go back to the chaotic situation that was the order of the day some time ago”.

... On the same day, the Applicant was emailed an “assignment sheet” for the interpretation task on 23 July 2012. Still on the same day, the Applicant sent an email to Mr. K., who was then Officer-in-Charge of the IU (“OiC/IU”), LSS, ICTR, copied to the Chief, LSS. He explained his problem with being assigned in such a manner, pointed to his existing work commitments and advised that he was due [for] approved leave. He stated that he found that “this manner of putting the cart before the horse is quite inappropriate and totally uncalled for”.

¹ Impugned Judgment, paras. 10-44 (internal footnotes omitted).

... The Chief, LSS, responded to the Applicant by email of the same day. She acknowledged the points he had made, took responsibility for the situation and advised that the Applicant would be replaced by another interpreter.

... The Applicant replied in an open email to the Chief, LSS, and his fellow interpreters, reiterating that his complaint was that Mr. K. had failed to inform him in a timely fashion that he had been assigned to interpretation duties. He ended this email as follows:

While hoping that this matter should now be laid to rest, each and every one of us should learn to assume responsibility for the tasks we freely accepted to perform.

... On 20 July 2012, Mr. K. sent the Applicant a long email, which was copied to 29 colleagues in LSS. In that email, Mr. K. said he had “profound contempt” for the Applicant who he described as “a mentally retarded individual”; and “an ill-bred little miserable man”, “a seventy-year old and moribund individual” who was “hypocritical and despicable”. He referred to him as “the petty dissatisfied nutcase (mad or foolish person) that [the Applicant had] always been, the mean person who has made dishonesty his daily bread”, and said that “[the Applicant’s] memory [was] affected by some disorders that verge on Alzheimer’s disease”.

... Towards the end of this tirade after a string of sarcastic epithets, Mr. K. wrote:

You should know that I, [Mr. K.], have nothing but contempt for clowns of your ilk. Life has already rendered me very strong and if your intention is to wage war against me, well a piece of advice: find out from those who know me and you will have a better idea of the person you are getting ready to confront. I will stop at nothing, with no holds barred.

... The Head, IU, saw this email exchange while he was on leave. He called the Applicant and asked him to avoid writing any further emails to colleagues, while at the same time telling him not to react and to wait for his return to the office.

... Also on 20 July 2012, the Chief, LSS, replied to Mr. K.’s email, copying all colleagues to whom it had been sent (email as translated from French by the Applicant):

Dear Colleagues,

I have just read this message and all I can say to each and everyone is that, whatever be the circumstances, we owe one another respect and courtesy. There is a tone which is appropriate in verbal and written communications between colleagues. It would be proper for all of us to always remember the “essential values” of the Organization we are working for. I hope all of us will understand this and that this type of mail will no longer be circulated among us. [...]

... The Chief, LSS, says that on 20 July 2012, she called Mr. K. to her office, and verbally reprimanded him for his behaviour. The Applicant disputes this as he believes that in spite of her email to all staff, the Chief, LSS, was complicit in the sending of Mr. K.'s email.

... Upon his return from leave, the Head, IU, met with the Applicant and Mr. K. He says that the Applicant told him that he and Mr. K. were good friends, even showing him a tie he had received from Mr. K. as a present.

... On 4 August 2012, the Applicant lodged a formal complaint of harassment and abuse of authority against Mr. K., pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The complaint was addressed to the then Registrar of the ICTR.

... On 29 August 2012, the Applicant was requested to submit a report of the prohibited conduct in accordance with sec. 5.13 of ST/SGB/2008/5. By reply of 13 September 2012, the Applicant pointed out, *inter alia*, that his complaint of 4 August 2012 already contained all the elements set out in sec. 5.13 of ST/SGB/2008/5.

... On 1 September 2012, the then Registrar ceased his functions and was replaced by an Acting Registrar of the ICTR.

... The Acting Registrar set up a fact-finding panel ("the panel") of three members to investigate the Applicant's complaint on 20 September 2012 and informed the Applicant on 1 October 2012. On 3 October 2012, the Applicant was notified of the names of the panel members and asked to submit a list of witnesses, which he did on 8 October 2012.

... In an email dated 18 October 2012 addressed to the Chief, LSS, and entitled "Apologies", Mr. K. took full responsibility for the contents of his email of 20 July 2012. He acknowledged that his email was unprofessional and unbecoming of a UN staff member. He expressed regret, but stated that the email had to be read against the backdrop of a certain context of tensions in the working environment of the IU.

... Mr. K.'s email was forwarded to the panel. In view of Mr. K.'s admission, the panel restricted its interviews to the Applicant, Mr. K. and the Chief, LSS, who were interviewed on 19 October 2012.

... At the end of November 2012, the Applicant met with the Chairperson of the panel, who explained that one of the panel members was away on leave but that the panel intended to complete its report before 31 December 2012.

... On 1 January 2013, the new Registrar of the ICTR ("the Registrar") [...] took up his functions.

... On 29 January 2013, the Chairman of the panel sent an email to Mr. M., a member of the panel who had separated from the ICTR on 31 December 2012. He said that he and the third member of the panel “[had] now agreed on a draft with a different outcome as proposed by [Mr. M.]”. The draft was attached for his consideration and comments. Mr. M. replied the following day, expressing his disagreement on the principles that “intention to harass is critical to the question” and that conduct “must not be a happenstance”. It was his opinion that there was no abuse of authority from Mr. K., but that there was harassment, and that “these were the views expressed by the panel when I prepared the report”.

... On 1 February 2013, the Applicant asked the Registrar of the ICTR about the status of his complaint. The Registrar replied on the same day, stating that he was not aware of the Applicant’s complaint, but that “preliminary investigations [had] informed [him] that the panel had had a problem finalizing its report because one of its members was separated from the ICTR at the end of 2012”. The Registrar had also been informed that the report had been submitted to the Chief, Division of Administrative Support Services (“DASS”), ICTR, “two or three days ago for processing”, and that he would keep the Applicant informed of any decision taken.

... The Applicant acknowledged receipt of the Registrar’s email on 4 February 2013, and drew attention to some alleged violations of ST/SGB/2008/5 in the processing of his complaint.

... In fact, the panel had submitted its report—dated 31 December 2012—to the Chief, DASS, on 1 February 2013. In his cover memorandum to the Chief, DASS, the Chairperson of the panel noted that the other two members had separated from the ICTR on 31 December 2012, and that there was a dissenting opinion that would be circulated by one of the former panel members. Given that information, the Registrar “decided to wait for the dissenting opinion in the hope that it would be coming within a reasonable time”.

... By email of 12 February 2013, the Chairman of the panel asked Mr. M. to send him his dissenting opinion to the draft report.

... On 6 May 2013 and despite his request for “protective measures”, the Applicant was assigned to service the same hearing with Mr. K., which he found provocative and traumatizing.

... On 19 July 2013, the Applicant filed his first request for management evaluation of the “failure to act” on his complaint.

... By email of 23 July 2013, the Chairman repeated his request for Mr. M’s dissenting opinion.

... On 30 July 2013, the Registrar met with the Applicant. He informed him that if [...] Mr. M’s dissenting opinion was not received “by the end of the week”, he would proceed to consider the report of the panel as it was and issue a decision.

... By memorandum of 2 August 2013, the Registrar informed the Applicant that the dissenting opinion had not arrived and that he had decided to consider the report of the panel as it was. He noted that the panel had concluded the following:

[T]he investigative panel, by majority, found that the language used by Mr. [K.] was unprofessional and unbecoming of a United Nations staff member;

[H]owever, referring to paragraph 1.2 of ST/SGB/2008/5, the panel found and expressed the view, Mr. [M.] dissenting, that the language used, only at one instance without any previous or subsequent similar behavior, does not amount to harassment as harassment normally implies a series of incidents;

[T]he investigative panel also found, by a unanimous decision, that Mr. [K.] did not abuse authority by writing and sending his email message of 20 July 2012, given that he was not in a supervisory position vis-à-vis [the Applicant].

... The full report, which was released to the Applicant by order of the [Dispute] Tribunal, gave further reasons for the decision. It stated:

The Majority could not find any intent or motive for this behaviour save for the immediate provocation perceived by Mr [K.]. In addition, Mr. [K.]’s apology, which the Majority finds to be sincere and unqualified, confirms the panel’s opinion that Mr [K.]’s email was a one-off emotional response and not indicative of any intent to harass or intimidate [the Applicant].

... The Registrar noted that having considered the report and the Applicant’s complaint, he had concluded that the conduct of Mr. K., “while reprehensible, did not constitute harassment or an abuse of authority”. In view of this, he advised the Applicant that “the UN-ICTR hereby closes the matter [he] raised alleging harassment and abuse of authority”.

... On 19 August 2013, the Registrar addressed a “Letter of Caution” to Mr. K. He referred to the email of 20 July 2012 which Mr. K. had addressed to the Applicant and which he had copied to 29 colleagues of LSS, and reminded him of the importance of strictly adhering to the UN code of conduct. He asked him to “avoid a repeat of this unfortunate incident”, and to register his commitment to the core values of the UN by signing an agreement to a commitment to adhere to the UN code of conduct, which Mr. K. did on 20 August 2013. The Applicant was not advised of this action by the Registrar.

... On 17 September 2013, the Applicant filed a second request for management evaluation against the decision of 2 August 2013 [to close the case].

... By letter dated 9 September 2013, sent to the Applicant by email on 18 September 2013, the Secretary-General concluded that the delay in providing the Applicant with a final outcome on his complaint was unreasonable and merited compensation of USD 1,000. In that letter, the Secretary-General also considered and upheld the substantive decision of the Registrar to close the case.

3. Mr. Alobwede retired from the Organization on 31 January 2014.
4. On 30 September 2014, the Dispute Tribunal issued Judgment No. UNDT/2014/120, granting Mr. Alobwede's appeal, in part. It found that both the fact-finding panel and the responsible official had misinterpreted the definition of harassment as set forth in ST/SGB/2008/5 by finding that a one-off action such as in the present case did not amount to harassment and by focusing on the intentions and mitigating circumstances of the alleged offender rather than the effect of the misconduct on the victim. It was those misinterpretations that led to the finding that there was no prohibited conduct and to the fundamentally erroneous decision to close the case. The Dispute Tribunal also found that the delays in addressing Mr. Alobwede's complaint of harassment and abuse of authority resulted in the failure to give it prompt and concrete action in breach of ST/SGB/2008/5. It rejected the Respondent's position that the outcome would have been the same had such misdirection not occurred.
5. The Dispute Tribunal considered remanding the case to the decision-maker for reconsideration of Mr. Alobwede's claim on a proper legal position, but ordered compensation instead as Mr. Alobwede had advised the UNDT that he did not request a fresh investigation into his complaint. The UNDT awarded Mr. Alobwede a total of USD 15,000: USD 5,000 for the excessive delay in violation of his right to prompt action on his complaint and the resultant embarrassment and humiliation in the interim (less the award of USD 1,000 as a result of management evaluation), and USD 10,000 for moral damages caused by the erroneous interpretation of the definition of harassment by the fact-finding panel and the responsible official and the resultant finding of no harassment and the decision to close the case.

Submissions

The Secretary-General's Appeal

6. The Dispute Tribunal erred in law and exceeded its jurisdiction in substituting its own opinion for that of the ICTR Registrar's regarding the contested conduct. Neither the fact-finding panel nor the UNDT found that the contested e-mail by Mr. K. was so exceptional that the norm of requiring harassment to "impl[y] a series of incidents" as per Section 1.2 of ST/SGB/2008/5 should not apply. The ICTR Registrar did not specifically base his decision solely on the fact that the complaint referred to a single incident. It was neither absurd nor perverse for the ICTR Registrar to determine that Mr. K.'s July 2012 e-mail did not rise to the level of harassment.

7. The Dispute Tribunal erred in law in imposing USD 10,000 as moral damages. The UNDT provided no reasoning as to why Mr. K.'s July 2012 e-mail constituted harassment. The UNDT should have constrained itself to awarding compensation based only on the Registrar's failure to apply the correct definition in reaching his conclusion, not on its own assumption of the outcome or result of such an application.

8. The Dispute Tribunal also erred in fact and law in its determination of the sum of compensation for the delay in the Registrar's decision. It is factually incorrect to say that there was an 11-month delay. The Secretary-General noted that Mr. Alobwede filed the harassment complaint on 4 August 2012. Consequently, the fact-finding panel should have submitted its report to the ICTR Registrar by 4 November 2012, but did not do so until 1 February 2013, accounting for a delay of three months only. While ST/SGB/2008/5 provides a specific amount of time for the report of the investigation panel to be submitted, it does not specify a period within which the ICTR Registrar must issue a decision thereon. It is therefore an error in law for the Dispute Tribunal to state that Section 5.17 of ST/SGB/2008/5 "indicates the period of time a staff member can normally expect to wait for an outcome of his or her complaint".² In this regard, the UNDT took no notice of the fact that Section 5.17 of ST/SGB/2008/5 also uses the word "normally" and thus allows for exceptions, which was the case here.

9. The Dispute Tribunal had no basis to conclude that Mr. Alobwede suffered any enduring consequences as a result of Mr. K.'s e-mail.

10. The present case is distinguishable from the three UNDT cases that the Dispute Tribunal cited as the basis for its award of compensation for delay.

11. The Secretary-General requests that the Appeals Tribunal vacate the Judgment, except to the extent it held that the ICTR Registrar had, properly, found no abuse of authority on the part of Mr. K.

² Impugned Judgment, para. 90.

Mr. Alobwede's Answer

12. In his appeal, the Secretary-General deliberately distorted the UNDT's finding that the fact-finding panel and the ICTR Registrar had "misinterpreted", and not "misapplied", the definition of harassment in ST/SGB/2008/5. This alone warrants a summary dismissal of the appeal.

13. The Secretary-General has impermissibly amended his case on appeal in respect of the period and the length of the delay and should not be allowed to use amended arguments to challenge the UNDT Judgment. The Secretary-General also should not be allowed to introduce for the first time on appeal the argument that for a one-time incident to be considered as harassment, the facts of that incident would have to evince exceptional circumstances. No authority has been cited in support of that argument.

14. Contrary to the Secretary-General's contentions, the UNDT did not address the substance of the ICTR Registrar's decision, substitute its own opinion for that of the ICTR Registrar regarding the contested conduct, or make its own assessment that Mr. K.'s conduct constituted harassment.

15. The UNDT was empowered to review the failure by the fact-finding panel and the ICTR Registrar to properly interpret the definition of harassment.

16. The Secretary-General has failed to establish any error by the UNDT in its reasoning or in its award of compensation for delay warranting a reversal of the impugned Judgment.

17. Mr. Alobwede requests that the Appeals Tribunal dismiss the appeal.

Mr. Alobwede's Cross-appeal

18. The Dispute Tribunal erred in fact and law in determining the amount of compensation. It disregarded the precedents that Mr. Alobwede had invoked and the Secretary-General had discussed, and abused its discretion by substituting its own precedents for those discussed by the parties. In the precedents that he had cited, the UNDT and the Appeals Tribunal awarded substantially higher amounts of compensation.

19. The Dispute Tribunal was required to address all the heads of damages that Mr. Alobwede had requested before determining the quantum of compensation. It had no discretion to select only one of the heads of damages that he had identified without explaining why and how the remaining ones were irrelevant.

20. The Dispute Tribunal exceeded its competence and erred in fact and law and violated the principle of *audi alteram partem* by offering *proprio motu* unsolicited anonymity to Mr. K. The UNDT did not find that Mr. K. was in greater need of confidentiality than all other employees of the Organization accused of misconduct. Anonymity may only be requested by the parties and is designed to protect victims, not perpetrators. There were no exceptional circumstances or compelling considerations that would justify Mr. K.'s anonymity.

21. The UNDT erred in fact and law by finding the report of the fact-finding panel formally and procedurally valid. It is a fatal irregularity for the report to be signed by only two members of the panel. The evidence in the report suggested that the panel members were not qualified for the task as they did not appear to have received the training required by Section 5.14 of ST/SGB/2008/5.

22. Mr. Alobwede requests that the Appeals Tribunal set aside the UNDT's awards of USD 5,000 and USD 10,000 and substitute them with one year's net base salary and two years' net base salary, order the Dispute Tribunal to issue a revised version of the Judgment identifying Mr. K. by his full name, and reverse the UNDT's finding that the report of the fact-finding panel was valid.

The Secretary-General's Answer to the Cross-appeal

23. The Dispute Tribunal was not required to analyse and discuss every case that Mr. Alobwede had cited in his UNDT application. Nor was it required to explain systematically why it had not considered relevant or applicable a specific case or cases that the parties had cited.

24. Contrary to Mr. Alobwede's assertions, the Dispute Tribunal did in fact provide a reasoned opinion. That the parties may disagree as to the validity of the UNDT's reasoning does not mean that there was a failure on the part of the UNDT to provide a reasoned opinion.

25. The cases that Mr. Alobwede cited in his UNDT application do not support his claim for an award of a higher compensation, as they involve either considerably longer periods of delay or substantially different facts.

26. The Dispute Tribunal based its awards of compensation on a properly reasoned opinion. In seeking additional compensation, Mr. Alobwede is simply attempting to re-litigate his case. In his appeal, he has failed to show any error on the part of the UNDT on either the merits or the procedure.

27. The Secretary-General takes no position with regard to Mr. Alobwede's claim to remove the confidentiality accorded to Mr. K by the Dispute Tribunal.

28. Regarding the report of the fact-finding panel, the UNDT properly found that the report was formally and procedurally valid. There is no requirement in ST/SGB/2008/5 or anywhere else that all members of a panel must sign the panel report. In the present case, it would not have made any difference whether the third panel member had signed the report. The briefing of the panel members on the correct procedure to be followed in investigating Mr. Alobwede's complaint is evidence that the ICTR Administration wanted to ensure that the proper process would be followed in the handling of his complaint.

29. The Secretary-General requests that the Appeals Tribunal dismiss the cross-appeal in its entirety.

Considerations

30. In Judgment No. UNDT/2014/120 now under appeal, the Dispute Tribunal found that both the fact-finding panel and the responsible official had misinterpreted the definition of harassment as set forth in ST/SGB/2008/5 by finding that a one-off action, such as in the present case, did not amount to harassment and by focusing on the intentions and mitigating circumstances of the alleged offender rather than the effect of the misconduct on the victim. It was those misinterpretations, according to the UNDT, that led to the finding that there was no prohibited conduct and to the fundamentally erroneous decision to close the case.³

³ See impugned Judgment, para. 112.

31. Section 1.2 of ST/SGB/2008/5 defines harassment as follows:

Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

32. The fact-finding panel unanimously did not find that Mr. K. had committed any abuse of authority given that he was not in a supervisory position vis-à-vis Mr. Alobwede and, by majority, concluded that no harassment had occurred. The majority held that Mr. K.'s behaviour, for which he apologized, was a one-off emotional response that did not indicate intent to harass or intimidate.

33. Section 5.18(b) of ST/SGB/2008/5 provides:

If the report [of the fact-finding panel] indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken[.]

34. The ICTR Registrar concluded, having considered the report of the fact-finding panel, that the conduct of Mr. K., although reprehensible, did not constitute harassment and addressed him a letter of caution on 19 August 2013 after closing the case. The ICTR Registrar did not specifically base his decision solely on the fact that the complaint referred to a single incident.

35. The Dispute Tribunal erred in law and exceeded its jurisdiction in substituting its own opinion for that of the ICTR Registrar regarding the contested conduct. The UNDT held that the panel should have focused on the effect of the misconduct on the victim. However, the adverse effect on Mr. Alobwede is not supported by evidence.

36. According to the testimony of the Head of the IU, after the e-mail incident he had a discussion with Mr. Alobwede, during which Mr. Alobwede indicated that he and Mr. K. were good friends and Mr. K. had given him a tie as a present.

37. In all the circumstances, we find that the ICTR Registrar's decision was lawful, and the UNDT erred in not so finding, as well as in its consequent award of moral damages in the amount of USD 10,000 for the substantive breach of ST/SGB/2008/5.

38. The Dispute Tribunal found that the delays in addressing Mr. Alobwede's complaint of harassment and abuse of authority breached ST/SGB/2008/5, which required prompt and concrete action. It concluded that Mr. Alobwede's due process rights to prompt action were violated and awarded him USD 5,000 as moral damages for delay less USD 1,000 previously awarded by the Secretary-General.

39. We are satisfied that the UNDT erred in the level of award. We find that the Secretary-General's acknowledgement of the undue delay and his award of USD 1,000 to be sufficient recompense for the injury caused by the delay.

40. Regarding Mr. Alobwede's request that the Dispute Tribunal be ordered to revise the impugned Judgment so that Mr. K. will be identified by full name in the revised judgment, we are of the view that it was within the discretion of the UNDT to decide to refer to Mr. K., who was not a party in the UNDT proceedings, only by the initial letter of his last name. We will not interfere with the UNDT's exercise of its discretion in this regard. In this Judgment, we decide to follow the UNDT's practice in respect of Mr. K.

Judgment

41. The UNDT's finding that Mr. Alobwede was subject to harassment and its consequent award of moral damages are hereby vacated. The UNDT Judgment on the issue of delay is affirmed, save that the compensation for delay is hereby reduced to USD 1,000 previously awarded by the Secretary-General.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar