UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-599

Ten Have

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Rosalyn Chapman Judge Richard Lussick
Case No.:	2015-702
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Ms. Ten Have:	Alexandre Tavadian/Nicole Washienko/OSLA
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/007, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 28 January 2015, in the case of *Ten Have v. Secretary-General of the United Nations*. On 27 March 2015, the Secretary-General filed his appeal, and on 1 June 2015, Ms. Claudia Ten Have filed her answer.

Facts and Procedure

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

> ... At the time of this Application [in October 2013], the Applicant served as a Programme Officer in the Division of Environmental Law and Conventions (DELC) at the United Nations Environment Programme (UNEP). She serves on a fixed-term appointment at the P4 level.
>
> ...
>
> ... The Applicant used to live at the Rosslyn Lone Tree Estate, a property classified by the Security and Safety Service of [the United Nations Office at Nairobi (UNON)] (SSS/UNON) as a stand-alone house on its own compound within the meaning of the Revised Kenya Minimum Operating Residential Security Standards (MORSS). She was therefore entitled to claim the cost of monthly guard and alarm contracts, the KES 40,000 [monthly residential security allowance (MRSA)], and the one-off lump sum for capital expenditures, capped at USD 3000.[2]
>
> ... On 1 April 2011, the Applicant moved out of Rosslyn Lone Tree and into Rosslyn Valley Estate (RVE). This house was classified by SSS/UNON as a stand-alone house in a shared compound, within the meaning of the Revised Kenya MORSS. As per the MORSS, residents of shared compounds are not entitled to claim the MRSA for guard and alarm contracts nor the additional MRSA of 40,000 shillings per month.
>
> ... On 24 June 2011, the Applicant submitted a fresh claim for MRSA via the online Lotus Notes application. She claimed the "Shared Security Portion" and not the cost of a monthly alarm and guards' contract.
>
> ... On 10 August 2011, SSS/UNON approved the Applicant's claim for the Shared Security Portion, calculated at the rate of USD 800 per month. This was calculated on the basis of the amount specified in the Applicant's Lease Agreement. The approved

[1] Impugned Judgment, paras. 1-21.
[2] The exchange rate between the US Dollar and the Kenyan Shilling was 1: 80.75 on 30 December 2010, and 1: 101.90 on 30 October 2015.

amount of USD 800 was indicated in the online Lotus Notes Application, a copy of which was shared with the Applicant.

... From April 2011, the Applicant received the USD 800 MRSA which she had claimed and continued to receive the monthly payment of KES 40,000.

... In December 2012, during the course of a review of another staff member's rental subsidy application, it was discovered that some United Nations staff residing in RVE had been paid incorrect amounts of security allowance. As a result of this discovery, an analysis was undertaken of the payments made to all staff members living in the same compound.

... In February 2013, the Applicant stopped receiving the KES 40,000.

... On 16 April 2013, the Human Resource Management Service (HRMS) advised SSS/UNON of the overpayments. The Special Investigations Unit (SIU) of SSS/UNON initiated an investigation into the overpayments received by the Applicant and other staff members residing at RVE.

...

... On 17 April 2013, Mr. Philip Migire of the Budget and Financial Management Service (BFMS) wrote to the Applicant informing her of overpayments totalling KES 800,000. The mail reads:

> Dear [Applicant]
>
> A review of our records indicate[s] that you received a total of 800,000 KES between the period April 2011-Jan 2013. This amount paid to you for additional security allowance to cover expenses related to increased lighting, generator etc. you were not entitled to as you are staying in a shared compound where this service are provided by your Landlord/lady. (*sic*)
>
> Please let us know how you want us to recover this amount effectively from April 2013.

... The Applicant responded immediately:

> Dear Phillip
>
> I believe UNON is mistaken in this regard.
>
> Can you kindly let me know a time slot tomorrow when I may be able to meet with you[?]

... In addition to her objection the Applicant produced a detailed argument as to why she believed she was entitled to the KES 40, 000.

... On 22 April 2013, Mr. Migire advised the Applicant to contact SSS/UNON. The Applicant did not do so.

> ... The SIU completed its investigation report on 25 April 2013 and concluded that the overpayment was the result of administrative error. It also added that although the Applicant was "expected to declare the irregular payment, it [was] possible that she could have failed to notice the same in good faith". Ms. Martha Gumunyu of SSS/UNON provided a detailed explanation of the rationale behind the classification of the Applicant's residence and her non-eligibility for the additional MRSA and concluded that the Applicant "was irregularly paid KES 40,000 per month for recurrent security related expenditure only applicable to a stand-alone house. BFMS UNON did not fully effect changes of her entitlements in tandem with security report".
>
> ... HRMS/UNON invited the Applicant to a discussion on the security report and the overpayments on 4 June 2013. The Applicant maintained that she was entitled to the additional MRSA.
>
> ... On 4 June 2013, the Applicant received an Inter-Office Memorandum dated 3 June 2013 informing her that she was no longer entitled to the MRSA of KES 40,000 that she had been receiving since February 2011 because the residence that she was occupying was part of a shared compound and not a standalone house. She was advised that a total amount of KES 889,000 would be recovered from her salary in accordance with section 3 of ST/AI/2009/1 (Recovery of overpayments made to staff members).

3. In Judgment No. UNDT/2015/007, the Dispute Tribunal found that Ms. Ten Have's application was timely and receivable. It held that the words "calendar days" in Staff Rule 11.2 did not include the days on which the Organization is not working. Consequently when the deadline for Ms. Ten Have to request management evaluation fell on Saturday, 3 August 2013, it devolved onto the following working day, Monday, 5 August 2013. Regarding the merits of the case, the UNDT found that Ms. Ten Have was not entitled to the MRSA for the security guard and alarm service and upheld UNON's decision to recover the overpayments between June 2011 and January 2013. However, as the Administration made an administrative error by paying her MRSA from April 2011 to January 2013 and Ms. Ten Have was "realistic[ally]" not aware of the overpayments until 4 June 2013 when she received the 3 June 2013 memorandum notifying her of the recovery of the overpayments, the two-year recovery rule set forth in ST/AI/2009/1 applied such that the Administration could only recover two years of overpayments made to Ms. Ten Have dating back to 4 June 2013. Consequently, the UNDT ordered the refund of the recovery of the first two months of overpayment (April and May 2011). As the UNDT had no doubt that the UNON Administration's error caused Ms. Ten Have "some stress", it ordered that

Ms. Ten Have be paid three months' net base salary "for the moral injury and financial stress she suffered as a result of the Organization's negligence and errors".

Submissions

The Secretary-General's Appeal

4. The UNDT erred in law and fact in ordering the refund of the recovery of the overpayment for April and May 2011. Considering that the UNDT concluded that Ms. Ten Have was aware of the overpayment, it should have upheld the decision to recover the overpayment in full, applying the general rule of Section 3.1 of ST/AI/2009/1. The UNDT contradicted itself in concluding that Ms. Ten Have was aware of the overpayment on the one hand, but in not upholding the full recovery of the overpayment on the other.

5. Even if it had a legal basis to limit recovery to only a two-year period, the UNDT erred in taking the date of the notification of the recovery of the overpayment as its reference date, namely, 4 June 2013, when it should have used 17 April 2013, the date on which Ms. Ten Have was notified of the discovery of the overpayment. Even assuming that Ms. Ten Have was not aware of the overpayment, the UNON Administration was entitled to recover the full amount unduly paid between April 2011 and January 2013.

6. The UNDT erred in law in finding that it had jurisdiction to award moral damages to Ms. Ten Have. The Dispute Tribunal found that Ms. Ten Have did not "expressly" plead moral damages, but determined that such a plea could be inferred from her 24 June 2013 e-mail. In the view of the Secretary-General, that e-mail cannot be considered as a request to the Dispute Tribunal for moral damages, given that it responded to HRMS in Nairobi after Ms. Ten Have had been notified of the recovery of overpayment and was not even addressed to the UNDT. As he was not duly notified of a potential award of compensation for moral damages, the Secretary-General did not have the opportunity to submit any arguments in response.

7. The Secretary-General requests that the Appeals Tribunal vacate the UNDT order to refund the recovery of the overpayment for April and May 2011 to Ms. Ten Have and vacate its award for moral damages.

Ms. Ten Have's Answer

8. There is no error of law or fact for the UNDT to hold that the two-year limitation on recovery of overpayments was applicable to Ms. Ten Have and to apply the two-year limitation period on the recovery of overpayments. Contrary to the Secretary-General's assertion, the UNDT used the date of 4 June 2013 because it was the day on which Ms. Ten Have was notified of the discovery of the overpayments, after the SIU had completed its investigation report on 25 April 2013. The Secretary-General fails to recognize the important distinction, as noted by the UNDT and implicitly by the SIU, between a staff member's awareness of the rules governing the entitlements and his or her awareness of any overpayment related to those entitlements. Since the UNDT determined that Ms. Ten Have was unaware of the overpayments in her pay-check and noted that the Administration had conceded to an administrative error, it properly ordered that the Administration was limited to a two-year period on the amount that it could recover from Ms. Ten Have. In any event, this is not an issue properly before the Appeals Tribunal, since the Secretary-General does not challenge this factual finding made by the Dispute Tribunal.

9. The Dispute Tribunal did not exceed its jurisdiction when it awarded compensation to Ms. Ten Have for moral injury and financial stress, in light of its inherent power to issue decisions *proprio motu* or *sua sponte*. Nowhere in the UNDT Statute is the compensation for moral damages restricted to relief that was specifically requested in a staff member's written submission to the UNDT. In *Marsh* and *Wu*,[3] the Appeals Tribunal validated the Dispute Tribunal's decisions to grant the staff members' moral damages even though such relief was not specifically requested.

10. Ms. Ten Have requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

11. This Tribunal holds that the Dispute Tribunal erred in law and fact in ordering the refund of the recovery of the overpayments for April and May 2011.

[3] *Marsh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-205; *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

12. On 17 April 2013, Ms. Ten Have received an e-mail from UNON's BFMS that clearly informed her of the past overpayments of security allowance and the Administration's intention to recover the sums erroneously paid.

13. Thus, it becomes reasonable to conclude that she was aware of the overpayment situation on 17 April 2013.

14. In light of this, the general rule of Section 3.1 of ST/AI/2009/1 was applicable,[4] and the recovery of the April and May 2011 overpayments was not excessive since the limit of two years cannot be applied due to the staff member's awareness of the overpayments as of 17 April 2013, regardless of her previous ignorance or *bona fide*.

15. In *Debebe*,[5] this Tribunal held that the UNDT erred in law and exceeded its competence by awarding compensation for distress without a previous claim for such damage and compensation. In the present case, no request for such compensation was made and the Dispute Tribunal lacked jurisdiction to award moral compensation *sua sponte*.

16. Moreover, the notification and recovery process in accordance with ST/AI/2009/1 did not cause any injury to Ms. Ten Have's rights as a staff member. Consequently, even if the compensation had been requested, it would not have been awarded in the instant case.

17. Accordingly, the UNDT's award of compensation for moral damages will also be vacated.

[4] Paragraph 3.1 of Section 3 "Amounts to be recovered" of ST/AI/2009/1 reads:

> Overpayments shall normally be recovered in full. However, when the Controller determines that the overpayment resulted from an administrative error on the part of the Organization, and that the staff member was unaware or could not reasonably have been expected to be aware of the overpayment, recovery of the overpayment shall be limited to the amounts paid during the two-year period prior to the notification under section 2.3 of the present instruction, or to the advice under section 2.4 of the present instruction, if earlier. Such recovery could, if circumstances so warrant, be made in instalments as determined by the responsible officials referred to in section 2.2 above. Any overpayment in excess of the same entitlement that may be made after the date of such notification or advice shall be recovered in full.

[5] *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288, para. 19.

Judgment

18. The Secretary-General's appeal is upheld and Judgment No. UNDT/2015/007 is vacated.

Original and Authoritative Version: English

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

(Signed)	*(Signed)*	*(Signed)*
Judge Simón, Presiding	Judge Chapman	Judge Lussick

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

(Signed)

Weicheng Lin, Registrar