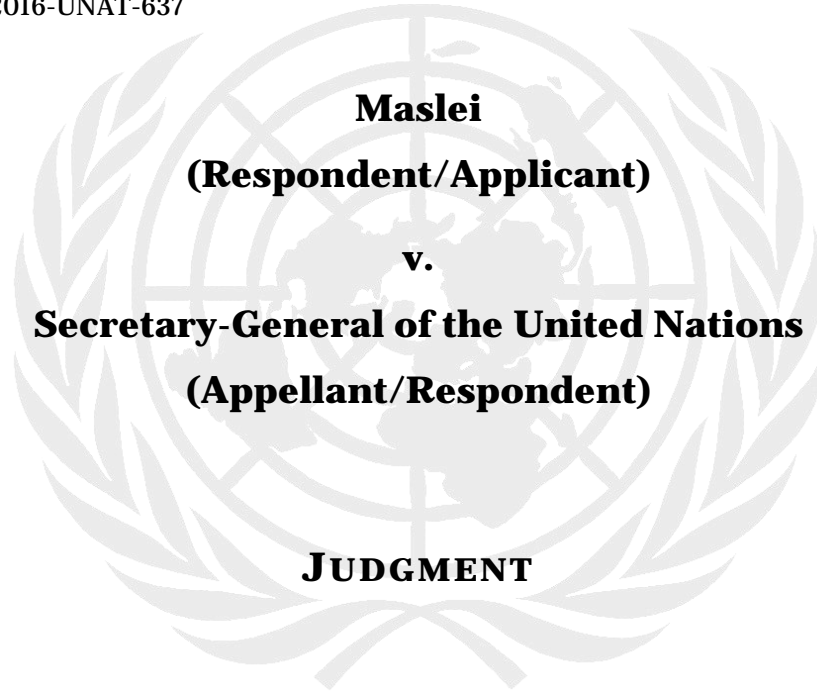




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-637



**Maslei
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Deborah Thomas-Felix
Judge Inés Weinberg de Roca

Case No.: 2015-846

Date: 24 March 2016

Registrar: Weicheng Lin

Counsel for Ms. Maslei: Robbie Leighton/OSLA

Counsel for Secretary-General: Stéphanie Cartier

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/041, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 27 May 2015 in the matter of *Maslei v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 27 July 2015, and Ms. Mariia Maslei filed her answer on 25 September 2015.

Facts and Procedure

2. Ms. Maslei was recruited in November 2010 as a Resettlement Officer at the P-3 level with the Country Office of the United Nations High Commissioner for Refugees (UNHCR) in Islamabad, Pakistan, on a one-year fixed-term appointment, which was subsequently renewed on an annual basis. In 2011 and 2012, Ms. Maslei received satisfactory performance ratings.

3. The UNHCR Policy on Procedures on Assignments and Promotions of 14 June 2010 governed the duration of Ms. Maslei's assignment with UNHCR in Pakistan. Paragraph 50 of that policy provided that the "period of time that an international professional staff member is normally expected to serve in a given duty station is based on its hardship classification, which is established by the International Civil Service Commission ("ICSC") according to prevailing living conditions". This period of time is referred to as the "Standard Assignment Length" or "SAL". At the material time, the SAL in Islamabad, Pakistan, was two years.

4. In March 2012, Ms. Maslei's initial SAL in Islamabad, Pakistan, was extended until December 2013. Consequently, in November 2012, her appointment was renewed for another year, running until 31 December 2013.

5. In December 2012, Ms. Maslei sought guidance from Human Resources about having her SAL extended until 31 December 2014 on personal grounds.

6. On 15 January 2013, the UNHCR Representative in Pakistan sent an inter-office memorandum to the Director of the Regional Bureau for Asia and the Pacific, UNHCR Headquarters, requesting an extension of Ms. Maslei's SAL in Islamabad, Pakistan,

until 31 December 2014. The request was approved on 22 March 2013, and Ms. Maslei was informed accordingly.

7. On 15 February 2013, a new Assistant Representative joined UNHCR, Pakistan and, effective 17 April 2013, became Ms. Maslei's supervisor.

8. In late September 2013, after having supervised Ms. Maslei for five months during which time a number of disagreements and interpersonal issues had arisen, which Ms. Maslei characterized as bullying, Ms. Maslei's supervisor gave Ms. Maslei a negative "mid-year development review" for the purpose of Ms. Maslei's electronic Performance Appraisal Document for the 2013 cycle.

9. On 28 November 2013, the UNHCR Representative in Pakistan informed Ms. Maslei that her supervisor had recommended not renewing her appointment beyond 31 December 2013 based on unsatisfactory performance and, on 4 December 2013, Ms. Maslei received a separation memorandum.

10. Ms. Maslei was subsequently placed on sick leave and her appointment was extended until 31 January 2014 for administrative purposes until the end of her sick leave.

11. On 27 January 2014, Ms. Maslei submitted a request for management evaluation of the reduction of her SAL, to which she received no reply.

12. On 1 February 2014, Ms. Maslei separated from service.

13. On 11 June 2014, Ms. Maslei filed an application with the UNDT contesting the decision to "unextend" her contract beyond 31 December 2013 on the grounds of unsatisfactory performance, although her SAL had been extended until 31 December 2014.

14. On 27 May 2015, the UNDT issued the Judgment, holding that the decision not to renew Ms. Maslei's appointment based on performance-related reasons was unlawful because the Administration had not followed UNHCR's policies on performance management. The UNDT also concluded that the extension of her SAL had given her a legitimate expectation that her one-year fixed-term appointment would be renewed until 31 December 2014. Accordingly, the UNDT ordered the rescission of the non-renewal decision and, as an alternative to rescission, the payment of compensation in the amount of

11 months' net base salary and entitlements, being her salary and entitlements from 1 February 2014 to 31 December 2014, less the salary received from her new employment for the period from September to December 2014. The UNDT additionally awarded Ms. Maslei compensation for moral damage in the amount of six months' net base salary, for the medical harm caused to her as a result of the decision not to renew her contract, based on Ms. Maslei's own evidence of her health and as evidenced by the fact of her sick leave for the period from 7 December 2013 to 31 January 2014.

Submissions

The Secretary-General's Appeal

15. The Secretary-General clarifies that he is contesting only the UNDT's award of compensation for moral damage. The Secretary-General submits that the UNDT's compensation award for moral damage was excessive and disproportionate and the UNDT erred in calculating this amount for two reasons. First, the award vastly exceeds the amounts of compensation awarded or affirmed by the Appeals Tribunal in similar unlawful non-renewal cases.¹ While the Appeals Tribunal has awarded six months' net base salary as moral damages in cases where the contested decisions involved an irregular performance evaluation leading to an unlawful reassignment decision, or concerned an unlawful separation from service, or were found to have been tainted by improper motives,² in the present case, the UNDT noted that Ms. Maslei had expressly declined to "pursue her allegation that extraneous factors motivated the impugned decision", and the UNDT did not make any findings of improper motives or extraneous factors on the part of the Administration.

16. Second, the evidence Ms. Maslei produced does not justify such a substantial amount of compensation. Although Ms. Maslei submitted a "Summary of Psychiatric Evaluation" dated 20 February 2014, in *Kozlov and Romadanov*, the Appeals Tribunal rejected a similar

¹ Citing *Leclercq v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-429, para. 23; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-400, para. 61; *Fradin de Bellabre v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-214, para. 34; *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 44; *Jennings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-184.

² Citing *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 41; and *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, paras. 68 and 82-83. See also *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433, paras. 28, 38 and 43.

note from a staff member's psychotherapist, finding that that alone did not discharge the staff member's burden of proving moral damage.³ Ms. Maslei did not present any medical evidence of moral harm in respect of the period following February 2014, or any bills or expenses that she had incurred as a result of her non-renewal. Further, Ms. Maslei's own written description of the effects of the non-renewal decision on her does not support the award of such a substantial compensation award. In total, Ms. Maslei's sick leave, which lasted less than two months, demonstrates that an award of six months' salary is excessive. Lastly, the UNDT also erred in holding that the harm caused to Ms. Maslei had been "aggravated by the fact that the decision was made on the grounds of alleged poor performance that [she] strenuously and to this day denies",⁴ insofar as this holding is the very basis of the UNDT's decision and is thus redundant.

17. The Secretary-General requests that the award of compensation for moral damage be reduced to an amount within the range of USD 8,000 to USD 10,000, or the equivalent of one month's net base salary, or to another lesser amount which the Appeals Tribunal deems fair and reasonable.

Ms. Maslei's Answer

18. Ms. Maslei provided candid evidence regarding the effect that being under her supervisor's supervision had had on her. Ms. Maslei referred to anxiety, stress and exhaustion that began shortly after her supervisor's arrival, as well as panic attacks, loss of sleep and an inability to eat, which culminated in her taking almost two months' sick leave. This was unchallenged by the Secretary-General in cross-examination. The UNDT also had before it evidence that following Ms. Maslei's departure, an e-mail was circulated, copied to UNHCR Pakistan's management, the Resettlement Section at the Headquarters and the Headquarters' Bureau covering Pakistan, indicating that her separation was based on performance reasons, thus causing aggravated reputational harm to Ms. Maslei.

³ Citing *Kozlov & Romadanov v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-228, para. 26.

⁴ Impugned Judgment, para. 142.

19. The Secretary-General's insinuation that any moral damage incurred by Ms. Maslei in relation to her mental health relates purely to the period of her sick leave should be rejected. The assertion that mental illness is like food poisoning, the symptoms of which appear overnight and disappear just as quickly, is unfounded and ignores the evidence that her symptoms first appeared in April 2013 and significantly deteriorated in September 2013, before culminating in her taking sick leave from 7 December 2013 to 31 January 2014. It was UNHCR's unlawful actions that resulted in a staff member, who had never previously experienced mental illness, being rendered sufficiently ill that she was unable to work for a period of nearly two months.

20. The UNDT's moral damages award does not relate exclusively to the period of Ms. Maslei's sick leave, but to the totality of the damage she incurred as a result of UNHCR's failure to follow its own rules. The calculation of moral damages is not merely based on a period of sick leave; it requires consideration of the nature of the breaches of rights, their intensity and impact. In the instant case, these breaches were numerous and occurred over a prolonged period of time as UNHCR failed to fulfil its obligations under performance evaluation rules. UNHCR's breaches resulted in Ms. Maslei's illness and ended her nascent career, leaving her with a performance evaluation that could not be subject to review, and professional reputation that could not be rehabilitated. The UNDT thus was also correct to find that this harm was aggravated in view of the fact that Ms. Maslei was left with no recourse forum to address the allegations of poor performance as her performance appraisal was never completed such that her supervisor's conclusions were insulated from review.

21. While the Secretary-General relies on *Kozlov and Romadanov* to suggest that Ms. Maslei's moral damage was not properly evidenced, he in fact contends that the quality of evidence used to demonstrate the harm should somehow affect the degree of damage found and therefore the quantum. Such proposition has no basis in law. While the quality of evidence might go to the question of whether moral damage has been proved, it cannot be relevant to the issue of the degree of such damage and thus to the quantum. The Secretary-General's argument also fails to address the reputational harm that Ms. Maslei suffered as a consequence of UNHCR's actions.

22. The Appeals Tribunal has repeatedly held that the UNDT is in the best position to decide on the level of compensation given its appreciation of the case.⁵ As the UNDT heard evidence over a two-day period, including evidence in person from Ms. Maslei, it was best placed to calculate the damage incurred by Ms. Maslei and the award cannot be disturbed on the basis of ill-founded comparisons to cases decided on distinguishable facts. The UNDT's award of moral damages in Ms. Maslei's case can also be distinguished on its facts from the cases relied upon by the Secretary-General.

23. Further, the Secretary-General's suggestion that a higher award of moral damages can only be made in cases where unlawful motive is found erroneously supposes that the award of moral damages relates not to the harm incurred, but to the cause of that harm. None of the cases relied upon indicate that improper motivation increased the award, and two of the cases do not even indicate that the decision challenged was improperly motivated. The seriousness of a breach of a staff member's rights is not dictated by the reason for that breach, nor is the damage that is incurred. Evidence of damage is required because it is the *extent* of that harm that is compensated. Further, the cases upon which the Secretary-General relies, such as *Rees*, in fact support the UNDT's award for the harm suffered by Ms. Maslei.

24. Ms. Maslei requests that the Appeals Tribunal affirm the UNDT Judgment and its moral damages award, and dismiss the appeal in its entirety.

Considerations

25. The Dispute Tribunal found that the non-renewal of Ms. Maslei's contract was unlawful. It ordered the rescission of that decision or compensation in lieu of the rescission. It also awarded Ms. Maslei six months' net base salary for moral damages.

26. The only part of the Dispute Tribunal Judgment challenged by the Secretary-General is the award of six months' net base salary for moral damages.

27. The Secretary-General does not contest that Ms. Maslei suffered moral damage, but claims that the award is excessive and disproportionate because it vastly exceeds the awards affirmed by the Appeals Tribunal in similar unlawful non-renewal cases and because the evidence does not justify such a substantial amount of compensation.

⁵ Citing *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 20.

28. The evidence on which the Dispute Tribunal based its award was the sworn testimony of Ms. Maslei, together with a summary of psychiatric evaluation from her physician. In addition, the Dispute Tribunal took into account that Ms. Maslei's condition had been accepted by the Administration to be a stress related illness from 7 December 2013 to 31 January 2014 sufficient to entitle her to sick leave and an exceptional extension of her contract to cover that period.⁶

29. We note that the summary of psychiatric evaluation recorded a history of "episodes of severe anxiety and panic lasting about half an hour in which she felt her heart was racing, she had trembling and shortness of breath and felt a discomfort in her chest". These episodes, which were said to have "started due to a stressful situation at work", were initially experienced in April 2013 but increased in intensity in September 2013. The psychiatrist, in his report of 20 February 2014, was of the opinion that she was "doing better" but was still showing symptoms of stress. The psychiatrist diagnosed Ms. Maslei as suffering from an "[a]djustment [d]isorder with mixed anxiety and depressed mood" and recommended that she continue with "[b]rief individual therapy".

30. We note also that at the hearing before the Dispute Tribunal, Ms. Maslei gave evidence of her state of health which was not challenged by the Secretary-General.⁷

31. We find that the award of moral damages was supported by the evidence before the Dispute Tribunal and was not manifestly excessive based on the evidence. The Secretary-General has not demonstrated any error of law or manifestly unreasonable factual findings on the part of the Dispute Tribunal. In such circumstances, the Appeals Tribunal gives deference to the Dispute Tribunal in the exercise of its discretion and will not lightly disturb the quantum of damages.⁸

32. We reject the Secretary-General's argument that the award in the present case should be compared with awards in similar non-renewal cases. The criterion for an award of moral damages is the degree of injury suffered by the individual staff member as a result of the unlawful decision. That the type of unlawful decision is the same as in a number of other cases does not establish that the degree of moral damage must be

⁶ Impugned Judgment, para. 141.

⁷ *Ibid.*

⁸ *Leclercq v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-429, para. 22, citing *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219.

similar in each case. The assessment of an award of moral damages is made on a case-by-case basis according to the discretion of the Tribunal.⁹

33. As we held in *Appleton*: “Generally, it is well within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case. The amount of moral damages awarded by the Dispute Tribunal may vary from case to case, as it should, depending on the factors considered by the Tribunal.”¹⁰

34. We find that the Dispute Tribunal did not commit any error in its assessment of the award of moral damages. The Secretary-General has not established any ground which would justify our interference.

35. The appeal fails.

Judgment

36. The appeal is dismissed and the Judgment of the Dispute Tribunal awarding six months’ net base salary for moral damages is affirmed.

⁹ *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 27, citing *Appleton v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-347/Corr. 1 and cites therein, and para. 30.

¹⁰ *Appleton v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-347/Corr. 1, para. 27, quoting *Morsy v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-298, para. 25 and cites therein.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar