



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

Judgment No. 2016-UNAT-698

**Nyasulu
(Respondent/Applicant)**

v.

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

JUDGMENT

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| Before: | Judge Richard Lussick, Presiding Judge Deborah Thomas-Felix Judge Martha Halfeld |
| Case No.: | 2016-928 |
| Date: | 28 October 2016 |
| Registrar: | Weicheng Lin |

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| Counsel for Mr. Nyasulu: | Nicole Washienko, OSLA |
| Counsel for Secretary-General: | Wambui Mwangi |

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment on Liability and Relief No. UNDT/2016/020, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 March 2016 in the case of *Nyasulu v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 13 May 2016, which was transmitted to Mr. Isaac Newton Kamudoni Nyasulu on 16 May 2016. Mr. Nyasulu did not file an answer.

Facts and Procedure

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

... [Mr. Nyasulu] joined the Organization as a Senior Judicial Affairs Officer at the P-5 level in January 2001 and served in that position in the United Nations Mission in Kosovo until 31 December 2003.

... He was reappointed to [the United Nations Mission in Liberia (UNMIL)] on 9 August 2005 as a Senior Legal Adviser at the P-5 level. Subsequently, he was promoted to the position of Chief Judicial Affairs Officer at the D-1 level on 1 July 2008 where he served as the head of the UNMIL Legal and Judicial Systems Support (LJSS) Division until his separation on 9 August 2013.

... The LJSS Division had 35 staff members and was part of the UNMIL Rule of Law pillar which is headed by the Deputy Special Representative of the Secretary-General[,] Rule of Law (D/SRSG/Rule of Law).

... In September 2012, the Special Representative of the Secretary-General (SRSG) at UNMIL directed that the Mission undertake a comprehensive review of its civilian staff in line with Security Council resolution 2066 (2012) and General Assembly resolution 66/264 with a view to aligning the Mission's staffing structure to support the requirements of the Mission's mandate. UNMIL's civilian staff members were advised that as a result of the comprehensive review, the structure of the Mission would change and revised staffing levels would be reflected in the 2013/14 budget.

... The proposed restructuring of the Mission, including the Rule of Law component was reflected in the 2013/14 budget dated 22 February 2013 and submitted by the Secretary-General in his report to the General Assembly.² The Secretary-General's report

¹ Impugned Judgment, paras. 5-18.

² [Citation omitted].

noted that the existing structure of the Rule of Law component would change under the 2013/14 budget.

... The report particularly proposed the dissolution of the LJSS Division which [Mr. Nyasulu] headed. Further, it proposed that the Rule of Law component be restructured along three thematic areas of focus being, access to justice and security, training and mentoring and legal and policy reforms with a view to improving the Mission's working methodologies so as to maximize the impact of UNMIL.

... As part of this restructuring, the report proposed that the Office of the D/SRSG Rule of Law be strengthened with a Director, Rule of Law at the D-1 level, to be accommodated through the reassignment of the D-1 post from the LJSS Division encumbered by [Mr. Nyasulu]. The same report also proposed the reassignment of two P[-]5 posts in LJSS and the re-deployment of 32 others.

... The Advisory Committee on Administrative and Budgetary Questions (ACABQ) endorsed the proposals in the Secretary-General's report to the General Assembly on 30 April 2013. Thereafter, the Mission leadership in anticipation of the General Assembly's approval of the proposals sought to not renew [Mr. Nyasulu's] contract and to separate him from service. At the same time it reassigned all the other 34 staff members who worked under [Mr. Nyasulu] in the LJSS Division to the new restructured Rule of Law unit including the staff member who had encumbered one of the two reassigned P-5 posts.

... On 22 May 2013, [Mr. Nyasulu] was served with a memorandum notifying him of the non-renewal of his contract. The memorandum dated 17 May 2013 stated that [Mr. Nyasulu's] post would cease to exist as of 30 June 2013 due to "the reassignment of the post (as of 1 July 2013) into a new post ((D-1), Director, Rule of Law in the Office of the D/SRSG Rule of Law."

... The Mission leadership decided to commence a competitive review process for this new position and to this end prepared a job opening for the said position.

... The ACABQ report for UNMIL which endorsed the proposals concerning the Mission's restructuring in the 2013/14 budget was approved by the General Assembly on 30 June 2013.³

... On 20 June 2013, [Mr. Nyasulu] filed a request for management evaluation of the decision to not renew his contract and to separate him and on 21 June 2013 he filed an application for suspension of action of the said decision to the [UNDT] pending management evaluation.

... The [Dispute] Tribunal found that [Mr. Nyasulu] had made out a *prima facie* case as required and upheld his suspension of action application on 28 June 2013.

³ [Citation omitted].

... On 9 August 2013, the [Under-Secretary-General, Department of Management (USG/DM)] conveyed his decision to [Mr. Nyasulu] to uphold the non-renewal of his contract and he was immediately separated.

3. On 7 November 2013, Mr. Nyasulu filed an application with the UNDT, contesting the decision not to renew his appointment, and the decision to require him to go through a competitive recruitment process for the position of Principal Rule of Law Officer, UNMIL at the D-1 level. The Secretary-General filed his reply on 13 December 2013.

4. On 29 February 2016, in Order No. 35 (NBI/2016), the UNDT directed Mr. Nyasulu to produce the terms and conditions of his appointment as a Special Prosecutor in Malawi, including all salaries and emoluments, following his separation from service.

5. On 4 March 2016, Mr. Nyasulu produced documentation that showed that he was contracted by the European Union to provide “Technical Support to the Office of the Director of Public Prosecutions (DPP) on Capacity Building and Prosecution of Fraud and Corruption Cases” from 22 November 2013 to July 2014. Mr. Nyasulu provided evidence of the financial mitigation, in the sum of Euros 59,000.

6. On 14 March 2016, the UNDT issued its Judgment. It concluded that “the UNMIL Administration did not follow the proper procedures in determining whether [Mr. Nyasulu] should be reassigned to the new D-1 position in the office of the D/SRSG Rule of Law”.⁴ The UNDT ordered rescission of the contested decision and reinstatement of Mr. Nyasulu and his deployment to the next similar position as at the time of his separation. In the alternative, the UNDT ordered one-year compensation as follows: (a) four months’ net base salary for the period that Mr. Nyasulu was not working, and (b) the “difference in pay for eight months between his last salary (a total of approximately USD 139,559) and his salary as a Special Prosecutor in Malawi (total of approx. USD 65,000)”.⁵

7. The UNDT also awarded Mr. Nyasulu compensation for the “substantive and procedural irregularities occasioned to him by the failure of UNMIL Administration to conduct a comparative review to determine his suitability for reassignment to a new position”⁶ in the

⁴ *Ibid.*, para. 127.

⁵ *Ibid.*, para. 130.

⁶ *Ibid.*, para. 131.

amounts of (a) one month's net base salary as compensation for the substantive irregularity and (b) one month's net base salary for the procedural irregularities.

Submissions

The Secretary-General's Appeal

8. The Secretary-General's appeal is limited to the calculation of compensation awarded in lieu of reinstatement. Specifically, the UNDT erred when it did not use a rate of exchange that was applicable during the contested period, namely from November 2013 to July 2014. The UNDT further erred by not using the United Nations' operational rate of exchange.

9. The Secretary-General is not challenging the amount of the net base salary awarded; he is only contesting the application of the exchange rate in the calculation of the "the difference in pay for eight months between his last salary [in UNMIL] (a total of approximately USD 139,559) and his salary as a Special Prosecutor in Malawi (total of approx. USD 65,000)".⁷

10. The UNDT converted the Euros 59,000 to US Dollars and arrived at an approximate figure of USD 65,000 for the Euros 59,000 received. It appears that the UNDT used a rate of exchange of approximately Euro 1 to USD 1.101; it is not clear why it did so. The Secretary-General submits that, had the UNDT used the applicable United Nations operational rate of exchange, the conversion of the Euros 59,000 would have amounted to USD 78,470 and not USD 65,000, and Mr. Nyasulu would receive an award of USD 61,089 instead of USD 74,559 according to the UNDT's calculation.

11. If the Judgment is executed as it currently stands, this will result in an overpayment to Mr. Nyasulu of approximately USD 13,470, which would place Mr. Nyasulu in a situation that is better than the one he would have been in had he not been separated. This is inconsistent with the jurisprudence as set forth in *Azzouni*⁸ and *Warren*.⁹ Those cases provide, respectively, that (i) when calculating the quantum of compensation, it must be set as of the date of the breach of the staff member's contractual rights and not the date of the UNDT judgment, and (ii) the

⁷ *Ibid.*, para. 130.

⁸ *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-162, para. 23.

⁹ *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059, para. 10.

purpose of compensation is to place the former staff member in the same position as he or she would have been in had the Organization complied with its contractual obligations.

12. The Secretary-General respectfully requests permission to recalculate the compensation due to Mr. Nyasulu using the United Nations' operational rate of exchange at the applicable time.

Considerations

13. The Secretary-General's appeal does not dispute the merits of the UNDT's Judgment. The appeal is limited to a challenge of its method of calculating the compensation awarded to Mr. Nyasulu as an alternative to the rescission.

14. In this regard, the UNDT decided as follows:¹⁰

... Should the Secretary-General decide, in the interest of the Administration, not to perform the obligation to reinstate [Mr. Nyasulu], as an alternative he must pay compensation to [Mr. Nyasulu]. The Respondent shall pay [Mr. Nyasulu] four months' net base salary at the level he encumbered prior to his separation and, in addition, USD 74,559 which represents the difference in pay for eight months between his last salary (a total of approximately USD 139,559) and his salary as a Special Prosecutor in Malawi (total of approx. USD 65,000).

15. The evidence before the UNDT was that the salary that Mr. Nyasulu earned for eight months as a Special Prosecutor was Euros 59,000. This is the sum, which the UNDT converted to USD 65,000 and treated as mitigation by Mr. Nyasulu of his loss of income. By deducting it from his last salary, which, for the eight-month period, would have been USD 139,559, the UNDT arrived at the compensation figure of USD 74,559.

16. However, the Secretary-General argues that a greater amount should have been deducted from the figure of USD 139,559 by way of mitigation. He claims that the UNDT was mistaken in calculating Euros 59,000 as being only the equivalent of "approx. USD 65,000". He submits that the UNDT erred in not applying the rate of exchange from Euros to US Dollars that was applicable during the contested period, namely from November 2013 to July 2014 and that the UNDT should have used the United Nations Operational Rate of Exchange for that period. According to the Secretary-General, had it done so, the conversion of Euros 59,000 to

¹⁰ Impugned Judgment, para. 130.

US Dollars would have equalled USD 78,470, not USD 65,000. This would result in USD 78,470 being deducted from the figure of USD 139,559, leaving a compensation figure of USD 61,089, instead of the USD 74,559 awarded by the UNDT.

17. The Secretary-General submits that if the UNDT Judgment is executed as it currently stands, this will result in an overpayment of approximately USD 13,470 to Mr. Nyasulu.

18. Accordingly, the Secretary-General asks the Appeals Tribunal to permit him to recalculate the compensation due to Mr. Nyasulu using the United Nations Operational Rate of Exchange at the applicable time.

19. Mr. Nyasulu does not rebut this appeal, so presumably he has no objection to the compensation being re-calculated in the manner suggested by the Secretary-General. It is therefore surprising that the matter cannot be settled between the parties without having to resort to the appeals process.

20. We make that observation because we have no option but to remand the case. The reason for this is that, in order to rule on the Secretary-General's request, we would first need to be satisfied that the UNDT's calculation of compensation in lieu of rescission was not correct. This cannot be done, because the UNDT gave no reasons whatsoever for applying the impugned exchange rate.

21. In this regard, the UNDT failed to observe its obligation under Article 11(1) of its Statute to state the reasons, facts and law on which its judgment is based.

22. It follows that the case must be remanded.

Judgment

23. Judgment No. UNDT/2016/020 is remanded to the UNDT to state the reasons, facts and law on which its method of calculating the compensation in lieu of rescission is based.

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

Entered in the Register on this 20th day of December 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar