



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

GUZMAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Steven Dietrich, ALS/OHRM  
Alister Cumming, ALS/OHRM

## **Introduction**

1. The Applicant is the former Chief, Conduct and Discipline Unit at the P-4 level at the United Nations Assistance Mission for Afghanistan (UNAMA).
2. On 15 December 2013, she filed an Application challenging her “unlawful separation based on the alibi of post abolishment; separation from service pending completion of ePAS rebuttal”.
3. The Respondent filed a Reply to the Application on 7 January 2014.

## **Background and Facts**

4. On 23 July 2013, the Applicant initiated a formal rebuttal process in relation to her Performance Appraisal (ePAS) for the period 1 April 2012 to 31 March 2013. The Field Personnel Section, Department of Field Support, agreed to establish an *ad-hoc* Rebuttal Panel to carry out this process.
5. By letter dated 15 September 2013 from the Chief Civilian Personnel Officer (CCPO) of UNAMA, the Applicant was advised that, due to restructuring of the mission, the post she encumbered had been identified for downsizing. As a result, the post was to be abolished, effective 31 December 2013.
6. On 4 October 2013, the Applicant requested for expedition in the convening of a rebuttal panel in view of her impending separation.
7. On 22 October 2013, the Applicant filed for management evaluation to determine, *inter alia*, the lawfulness of abolishing the P-4 Conduct and Discipline Officer (CDO) post she encumbered vis-à-vis the upgrade of the said post to a P-5 and for suspension of action of her separation from UNAMA pending the completion of her ePAS rebuttal.

8. On 28 October 2013, the Special Representative of the Secretary-General and the Chief of Mission Support of UNAMA presented the draft UNAMA budget to the Advisory Committee on Administrative and Budgetary Questions (ACABQ). The proposed budget sought the approval of the General Assembly to reclassify the post the Applicant encumbered from the P-4 level to the P-5 level.

9. On 29 November 2013, ACABQ released a report on the proposed programme budget for 2014-2015. In this report, the Committee stated that they had no objection to the proposed reclassification of the Applicant's post.

10. On 10 December 2013, the Applicant received a response in relation to her substantive request from the Management Evaluation Unit (MEU). The Under-Secretary-General for Management decided that as the separation from service was due to the abolition of the post she encumbered, and not unsatisfactory performance, section 15.6 of ST/AI/2010//5 (Performance management and development system), did not apply. It was therefore not necessary to extend the Applicant's appointment pending completion of this process.

11. By decision dated 13 December 2013, the Applicant was informed that the MEU had denied her request for management evaluation and for suspension of action.

12. On 15 December 2013, the Applicant filed a substantive Application and a Motion for Interim Measures Pending Proceedings before the Dispute Tribunal, with an addendum filed on 17 December 2013. On 20 December 2013, the Dispute Tribunal issued Order No. 264 (NBI/2013) which suspended the implementation of a decision to separate the Applicant from service on 31 December 2013 pending the determination of her Application on the merits.

13. On 27 December 2013, the General Assembly approved the UNAMA programme budget for 2014-2015, including the reclassification of the post encumbered by the Applicant.

14. On 8 January 2014, UNAMA formally informed the Applicant that the 15 September notification of separation from service was withdrawn and that she was to continue performing her current duties and responsibilities in accordance with her appointment. On the same date, UNAMA formally informed the Applicant that a reclassification exercise under ST/AI/1998/9 (System for the classification of posts), had been initiated, to reclassify the post she was encumbering from the P-4 to the P-5 level.

15. The Applicant participated in the reclassification process.

16. On 27 February 2014, the Rebuttal Panel issued its report, in favor of the Applicant, which was conveyed to her on 6 March 2014.

17. On 24 March 2014, the Applicant was informed of the outcome of the reclassification.

18. The Tribunal held a hearing on 5 November 2014. Neither party called any witnesses during the hearing.

19. On 10 November 2014, the Applicant sought leave to adduce additional evidence related to the processes followed during the rebuttal of her performance evaluation and the classification of the post previously encumbered by her. The Tribunal has taken these documents into consideration in this Judgment.

### **Applicant's Case**

20. The Applicant's case as deduced from her pleadings and from the oral hearing is summarized below.

21. The Applicant submits that during the oral hearing of 5 November 2014, while examining the Applicant, Respondent's Counsel argued that the separation notification of 15 September 2013 was withdrawn on 8 January 2014 and that para. 2 of the withdrawal notification/inter office memorandum (IOM) justifies nullification of the separation notification of 15 September 2013. The Applicant submits that

whilst the Respondent's agents in UNAMA correctly cited the General Assembly's approval of the reclassification of the P-4 post she encumbered to a P-5 as well as correctly cited the reclassification process as well as ST/AI/1998/9, they, however, were not truthful in their justification as per para. 2 of said withdrawal notification/IOM.

22. The Applicant submits that she responded by email communication calling the attention of several UNAMA Administrators to the misleading information contained in said IOM, that is, that she was never advised in December 2013 that she would not be separated, that she was never advised of the reclassification of her post and that the true spirit of UNDT Order No. 264 (NBI/2013) should be reflected in the withdrawal notification. The Respondent's agents issued the said withdrawal notification/IOM, not in good faith but to save face.

23. The Respondent's citation of the General Assembly's approval of the Applicant's post reclassification does not justify the withdrawal notification of 8 January 2014 neither does it nullify the separation notification of 15 September 2013. Instead, citation of the General Assembly's approval of the Applicant's post reclassification by the Respondent's agents in UNAMA proves that there was no basis – more so no legal basis - for the issuance of the separation notification of 15 September 2013 by the CCPO, thereby reinforcing that the Applicant's argument that the alibi of post abolishment provided by UNAMA to separate the Applicant on 31 December 2013 was unlawful, untrue, malicious and prejudicial.

24. The contradicting terms of the separation notification of 15 September 2013 vis à vis the withdrawal of separation of 8 January 2014 meant that there were available funds existing to fund the post at the P-4 level and the General Assembly agreed to provide additional funds to enable the post to function at the P-5 level.

25. The UNAMA administration commenced soliciting inputs to UNAMA's budget for 2014-2015, including from the Applicant, on 23 April 2013. The Respondent's agents all had knowledge that the Applicant's post was not abolished

but was proposed for reclassification. The UNAMA Administration was aware that compliance with Order No. 264 (NBI/2013) was the true reason behind UNAMA's withdrawal of the Applicant's separation notification but chose to serve as agents of bad faith dealings on behalf of the Administration.

26. The Applicant submits that the issuance of the separation notification of 15 September 2013 was tainted with strong prejudicial and malicious intent against her to forcibly and hastily remove her. The intent is evident in the comments written, in her ePAS of 2012-2013, that is, "[for the Applicant's] immediate resumption of counselling session" and "rotation to another duty station ASAP". The Rebuttal Panel in its report found that the above comments were inappropriate and should be disregarded.

27. The Applicant also takes serious note of the comments relating to "rotation to another duty station ASAP". It is not known to her when the decision to upgrade her post was made. The Applicant is certain that the decision to separate her using a false alibi of post abolishment was made after she filed her rebuttal to her ePAS. Thus, issuance of the 15 September separation notification, to take effect on 31 December 2013, was a quick and easy way to remove the Applicant while blatantly breaching and circumventing the ePAS rebuttal process.

28. In January 2014, the Applicant participated in the reclassification process of her post from P-4 to P-5 only because her separation was suspended. The Applicant submits that her participation should not be used to mask the blatant breaches and unlawful conduct of the Respondent's agents in their attempt to circumvent the reclassification process and disregarding her due process rights.

29. The Applicant seeks the following damages for moral injuries accruing due to emotional and physical stress, shame and stigma – especially since September 2013 to date - and noting that she has not been successful to secure further/continuing employment with the United Nations:

- a. Compensation in the amount of 24 months' net base salary for moral injury associated with flagrant violation of important rights, and stress – physical, mental and emotional - and damage to social and professional reputation and future economic status;
- b. Pre-judgment interest - from the date of notice of separation, that is, 15 September 2013, in the case of moral damages; and
- c. Post-judgment interest, including through any period of unsuccessful appeal, at US Prime Rate until 60 days after judgment, and at the US Prime Rate plus 5% thereafter compounded semi-annually.

30. In addition, the Applicant seeks compensation for expenses incurred due to sudden dental implant failure in November/December 2013, as a result of the physical stress brought about by these circumstances. The said dental implant treatment lasted for seven months from December 2013 – June 2014. The cost of USD 1,000 was covered by the Applicant's insurance carrier, the additional cost incurred to fix her dental implant amounting to about USD 1,500 were unforeseen expenses to the Applicant

### **Respondent's Case**

31. The Respondent submits that the UNAMA Administration withdrew the 15 September 2013 notification of separation of service on 8 January 2014. The Applicant was formally advised thereof, and she continued to perform her duties and responsibilities in accordance with her appointment until she was separated when her fixed-term appointment expired on 30 September 2014.

32. At the hearing held on 5 November 2014, the Applicant attempted to characterize her Application as a challenge to an alleged decision to abolish the post previously encumbered by her. This is not correct. The Application specifically states that the contested decision is "unlawful separation". The remedy sought in the Application is "rescission of the contested decision, that is, MEU's decision denying

suspension of separation from the United Nations/UNAMA until completion of the rebuttal process.”

33. In granting the Applicant’s earlier application for interim measures pending proceedings, the Dispute Tribunal held that the contested decision was the decision to separate the Applicant from service. Accordingly, it is clear the contested decision is the previous decision to separate the Applicant from service on 31 December 2013. The Applicant has a duty to clearly specify the contested decision, and she did so. An applicant may not seek to change the contested decision at such a late stage in the proceedings.

34. The Applicant seeks “rescission of the contested decision” and “continued encumbrance” of the P-4 post. The withdrawal of the 15 September 2013 notification of separation provided these remedies. In this situation, the question of alternative remedies does not arise.

35. The withdrawal of the 15 September 2013 notification of separation means that the Applicant suffered no pecuniary loss or damage to her future economic status. She continued to receive the appropriate salary, allowances and benefits in accordance with the terms of her appointment until its expiry.

36. In *Asariotis*, 2013-UNAT-309, the Appeals Tribunal held that damages for moral injury may arise in two situations: first, for a fundamental breach of the employee’s substantive entitlements arising from his or her contract, and/or from a breach of procedural due process entitlements; secondly, where the employee has produced evidence of harm, stress or anxiety caused by the breach.

37. There was no breach of the Applicant’s entitlements. The 15 September 2013 notification of separation did not serve to terminate her appointment. The memorandum simply identified that the post she encumbered had been identified for downsizing, subject to the General Assembly’s decision. The notification was a preparatory step in the budget process. The reclassification process was carried out. It



did not negatively affect the Applicant, who remained in her current position in accordance with the terms of her appointment until its expiry.

38. The Applicant has provided no evidence of any harm, stress or anxiety. The Appeals Tribunal held in the case of *Zhouk* 2012-UNAT-224 that compensation can only be awarded if the staff member actually suffered damages. A simple averment that she has suffered stress is not sufficient. The Applicant bears the burden of proving stress. The allegation by the Applicant that she suffered dental injuries due to stress is unsupported by any medical evidence. All documents submitted after the hearing should be disregarded as the Applicant has not been granted leave to adduce this evidence by the Dispute Tribunal.

39. Accordingly, in the absence of any evidence of damage in this case, no compensation should be awarded.

40. In light of the foregoing, the Respondent requests that the Application be dismissed.

### **Considerations**

41. The legal issues arising for consideration in the present case are:

- a. Whether the Applicant's separation from the Organization was unlawful?
- b. If the Applicant is entitled to the remedies sought?

*Was the Applicant's separation from the Organization unlawful?*

42. In her Application, the Applicant characterizes the administrative decision that she is challenging as "unlawful separation based on the alibi of post abolishment; separation from service pending completion of ePAS rebuttal." This was premised on a separation notice dated 15 September 2013.

43. Upon receipt of this notice, on 22 October 2013, the Applicant sought the intervention of MEU to suspend the decision to separate her from service pending the completion of a performance evaluation rebuttal process. She also made a request for management evaluation of the abolition of her post and impending separation that was to take effect on 31 December 2013.

44. Subsequently, on 15 December 2013, she filed two applications with the Tribunal: the present Application on the merits and an application for Interim Measures Pending Proceedings (suspension of action) under art. 10.2 of the Statute of the Dispute Tribunal. On 20 December 2013, the Tribunal issued Order No. 264 (NBI/2013) in which the application for interim measures was granted and the implementation of the decision to separate the Applicant from service on 31 December 2013 was suspended pending the substantive hearing and determination of this Application on the Merits.

45. On 27 December 2013, the General Assembly approved the UNAMA programme budget for 2014-2015, including the reclassification of the post encumbered by the Applicant. The Applicant participated in the reclassification process and, on 24 March 2014, the Applicant was informed of the outcome of the reclassification.

46. It is clear from the preceding that following the Tribunals' interim Order of 20 December 2013, the Respondent withdrew his separation notification of 15 September 2013 which was addressed to the Applicant. In so doing the Application challenging the separation that ought to have taken effect on 31 December 2013 was determined.

47. Oral and documentary evidence presented to the Tribunal at the hearing of this Application show that a reclassification exercise for the Applicant's P-4 post to P-5 was later conducted in early 2014 and that the Applicant participated. That reclassification process and the resulting separation of the Applicant is not the subject

matter of the present Application. The Tribunal is therefore not in a position to rule or decide on its lawfulness.

*Is the Applicant entitled to the remedies sought?*

48. The Applicant seeks damages for moral injury “associated with flagrant violation of important rights, and stress – physical, mental and emotional - and damage to social and professional reputation and future economic status.” She also seeks compensation for expenses incurred due to sudden dental implant failure in November/December 2013, as a result of the physical stress brought about by these circumstances.

49. In *Asariotis* the Appeals Tribunal held that damages for moral injury may arise in two situations: first, for a fundamental breach of the employee’s substantive entitlements arising from his or her contract, and/or from a breach of procedural due process entitlements; secondly, where the employee has produced evidence of harm, stress or anxiety caused by the breach.

50. The Tribunal notes that the Applicant might have incurred stress caused by the separation notice of 15 September 2013 and the conflicting reasons given by the UNAMA Administration in respect to whether her post was being reclassified or abolished, however, the Tribunal’s Order of 20 December 2013 and the withdrawal of the notice meant that she suffered no pecuniary loss as she continued to receive the appropriate salary, allowances and benefits in accordance of the terms of her appointment until its expiry.

51. With regards to her claims of moral injuries and stress, the Applicant has not produced medical or other evidence to establish these claims as the burden of proof lies on her. In the circumstances, there is no basis for the award of any compensation.

## **Conclusion**

52. The Application is refused.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 29<sup>th</sup> day February of 2016

Entered in the Register on this 29<sup>th</sup> day February of 2016

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi