



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

Judgment No. 2016-UNAT-614

**Roberts
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sophia Adinyira Judge Inés Weinberg de Roca
Case No.:	2015-710
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Roberts: George G. Irving

Counsel for Secretary-General: Stéphanie Cartier/Noam Wiener

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2015/020, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 4 March 2015 in the case of *Roberts v. Secretary-General of the United Nations*. The Secretary-General appealed on 4 May 2015, and Mr. Glenn Roberts answered on 3 June 2015.

Facts and Procedure

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

Disciplinary sanction

... On 7 May 2008, the Office of Internal Oversight Services (“OIOS”) received a complaint of possible misconduct regarding a number of staff members, including the Applicant. The Applicant was interviewed by OIOS on 3 October 2008. On 24 October 2008, OIOS issued its investigation report.

... On 19 December 2008, the then Executive Officer, [Department of Safety and Security (DSS)], sent a memorandum to the Acting Chief, Administrative Law Unit, informing her that in “October and December 2008 [DSS] received from [OIOS] seven investigation reports on misuse of information and communication technology resources by DSS staff members”. The Applicant was one of the staff members identified.

... On 12 January 2009, the Applicant received a memorandum from the Chief, Human Resources Policy Service (“HRPS”), Office of Human Resources Management (“OHRM”) informing him that following the conclusion of an investigation by OIOS, he was charged with misconduct. Specifically, the Applicant was charged with the improper use of the Organization’s information and communication technology (“ICT”) resources and failing to comply with his obligation under ST/SGB/2004/15 (Use of information and communication technology resources and data) to promptly report violations of that bulletin.

... By email dated 26 January 2009, the Applicant responded to the Chief, HRPS, OHRM, showing the appropriate degree of contrition and taking full responsibility for his actions. He expressed the hope that the Organization would take into account that this was a single, isolated incident in over 18 years of exemplary service.

¹ Impugned Judgment, paras. 3-14.

... On 3 December 2010, the Applicant was informed that the Under-Secretary-General for Management (“USG/DM”), acting on behalf of the Secretary-General, had concluded that there was sufficient evidence that he had misused United Nations’ ICT resources by receiving and distributing emails containing prohibited material and failing to report such actions by other staff members. In light of these findings, the USG/DM imposed on the Applicant the disciplinary measure of a letter of censure to be placed in his Official Status File.

Consideration for permanent appointment

... On 1 April 2011, Mr. Saunders, Executive Officer, DSS, sent Ms. Pollard, the Assistant Secretary-General, OHRM (“ASG/OHRM”) a memorandum setting out the recommendation in relation to the Applicant’s candidacy for conversion to permanent appointment. The memorandum was formatted so that Mr. Saunders could record, through checking a box, whether the Applicant met or failed to meet a number of criteria. In this way it was recorded that the Applicant: (a) received performance evaluations indicating that he had successfully met or exceeded performance expectations during the relevant period; (b) had been subject to an administrative or disciplinary measure; and (c) was serving in an entity that was not downsizing or expected to close. The memorandum then stated:

6. On the basis of the above, we have determined that:

The staff member has NOT met the high standards of efficiency, competence and integrity or has NOT demonstrated [his] suitability as an international civil servant or the granting of a permanent appointment to the staff member would NOT be in the interests of the Organization	[X]	[X]
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7. Accordingly, we hereby:

Do NOT recommend that [the Applicant] be offered a permanent appointment, pursuant to ST/SGB/2009/2010	[X]	[X]
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... In a memorandum dated 15 August 2011, Mr. Shahinyan, Chief, Section 1, Human Resources Services, Learning, Development and Human Resources Services Division (“HRS/LDSD”) informed the Chairperson, Central Review Panel (“CRP”), that having taken into account the provisions of staff rule 13.4 and sec. 2 of the [the Secretary-General’s Bulletin ST/SGB/2009/10 “Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered by 30 June 2009” (Bulletin on CPA)], the Section concurred with the recommendation of DSS not to grant a permanent appointment to the Applicant. The memorandum further stated that “[t]his decision is based on the fact that [the Applicant’s] records show that a disciplinary measure has been taken against him” (emphasis added). This was the sole reason given by Mr. Shahinyan for the decision.

... On 1 February 2012, the Chairperson of the CRP informed Ms. Pollard that the CRP had reviewed submissions for conversion to permanent appointment for three staff members, including the Applicant. The memorandum stated (emphasis added):

The Panel took into consideration recommendations received from the substantive Department and the respective Human Resources Office, and was of the view that the staff members should not be granted a permanent appointment. *The Panel noted that the staff members have been the subject of a disciplinary measure and therefore they should not be considered suitable for conversion.*

... On 29 February 2012, Ms. Pollard informed the Applicant that pursuant to the Bulletin on CPA it had been decided not to grant him a permanent appointment. The memorandum further stated that (emphasis added):

This decision is taken after a careful review of your case. It takes into account all the interests of the Organization, and is *based on the fact that your records show that a disciplinary measure has been taken against you.*

Therefore, the granting of a permanent appointment would not be in the interest of the Organization.

... On 12 March 2012, the Applicant appealed against the decision. He noted his distinguished record of over 22 years’ service with the Organization, during which he had received numerous commendations.

... On 5 April 2012, the Applicant requested management evaluation of the decision.

... On 9 May 2012, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to endorse the decision.

3. On 4 March 2015, the UNDT handed down Judgment No. UNDT/2015/020 now under appeal. The Dispute Tribunal found that the Administration had unlawfully applied an informal and unpromulgated policy denying conversion to a permanent appointment to any staff member who had had a disciplinary measure in his or her official records, regardless of the timing and the gravity of the underlying misconduct. The UNDT also found that the Administration's assessment of Mr. Roberts' suitability for conversion to permanent appointment was not aligned with the "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009" (2009 Conversion Guidelines), which require the Administration to take into account two criteria (timing and gravity) in determining whether a staff member is suitable for conversion. It concluded that Mr. Roberts had not been afforded individual, full and fair consideration of his suitability for conversion to a permanent appointment.

4. The Dispute Tribunal consequently ordered that the decision to deny Mr. Roberts conversion to a permanent appointment be rescinded, and that the ASG/OHRM consider whether Mr. Roberts' fixed-term appointment should be converted retroactively to a permanent appointment. The Dispute Tribunal also ordered that Mr. Roberts be paid USD 10,000 as moral damages for the anxiety and stress that he had suffered as a direct consequence of the decision to deny him conversion and the manner in which he had been treated, after having "heard [Mr. Roberts'] evidence" and "had the opportunity to form its own assessment as to the degree to which the Administration's flawed decision [had] impacted on [Mr. Roberts'] well-being".² Moreover, the Dispute Tribunal referred the case to the Secretary-General, pursuant to Article 10(8) of the UNDT Statute, "to consider any appropriate action to ensure that proper oversight and accountability measures are in place, with particular reference to the role of the CRP in ensuring procedural propriety in decision making within its remit".³

5. As noted above, the Secretary-General appealed on 4 May 2015 and Mr. Roberts answered on 3 June 2015. On 10 June 2015, the Secretary-General submitted a motion for leave to file additional pleadings, to which Mr. Roberts objected. In Order No. 233 (2015) dated 7 August 2015, the President of the Appeals Tribunal granted the Secretary-General's

² Impugned Judgment, para. 76.

³ *Ibid.*, para. 78(iv).

motion so that he could respond to the new facts and evidence, which had not been part of the UNDT record which Mr. Roberts had proffered in his answer.

6. On 17 August 2015, the Secretary-General filed additional pleadings. Mr. Roberts did not file any comments thereon.

Submissions

The Secretary-General's Appeal

7. The Secretary-General clarifies that he is challenging only the UNDT's award of USD 10,000 as moral damages. He is not contesting the substantive findings and the other remedies ordered by the Dispute Tribunal as set out in paragraphs 3 and 4 above.

8. The Secretary-General maintains that the Dispute Tribunal erred by awarding moral damages, since Mr. Roberts had not provided any specific or medical evidence to support his assertion that he had suffered such damage. In this regard, the Secretary-General draws the attention of the Appeals Tribunal to the amendment that the General Assembly made on 18 December 2014 to the UNDT Statute,⁴ which required an award of monetary compensation to be "supported by evidence" of harm. In the present case, Mr. Roberts asserted that he had consulted a psychologist on three occasions for his alleged lack of sleep and other health-related issues, but did not provide any evidence of the alleged consultations. Contrary to the UNDT's finding that it was obvious from the expiration date that appeared on Mr. Roberts' United Nations identification card that he had not been granted a permanent appointment, at best others viewing such a card can only speculate about whether the expiration date on the card is indicative of a permanent, continuing, fixed-term or temporary appointment. However, such speculation is not sufficient as evidence for the award of moral damages.

9. In the alternative, the Secretary-General argues that the Dispute Tribunal erred by awarding compensation in the amount of USD 10,000, which is over three times more than that awarded by the Appeals Tribunal to each individual staff member of the International Criminal Tribunal for the former Yugoslavia (ICTY) in comparable cases concerning conversion to permanent appointment, such as *Ademagic et al.*, where the

⁴ General Assembly resolution 69/203 was distributed on 21 January 2015.

Appeals Tribunal awarded EURO 3,000, without providing justification for such differential treatment.⁵

10. The Secretary-General requests that the UNDT's award of USD 10,000 as moral damages be vacated.

Mr. Roberts' Answer

11. The appeal is moot, because, on 31 March 2015, a decision was taken to convert Mr. Roberts' fixed-term appointment to a permanent one effective retroactively as of 30 June 2009, and, on 10 April 2015, an amount of USD 10,000 described as "COMPENSATION TO MR. GLENN ROBERTS UNDT CASE ..." was credited to Mr. Roberts' bank account. In this regard, Mr. Roberts provided a copy of his personnel action form dated 16 April 2015 confirming his conversion to permanent appointment and a copy of transaction information showing the United Nations had deposited USD 10,000 in his checking account and requested that the two documents be admitted into evidence, as they were relevant to the appeal.

12. The launching of an appeal after having paid the UNDT's award of moral damages in full constitutes an abuse of process on the part of the Secretary-General. It undermines the purpose of the justice system and the staff confidence in its rulings. It also occasioned added stress, anxiety, uncertainty and expense for Mr. Roberts.

13. If the impropriety of the contested decision is upheld, then Mr. Roberts is entitled not only to receive the consideration he was due but also to be compensated for the violation of his rights and for the stress and humiliation the contested decision caused him. The Secretary-General has failed to demonstrate that the UNDT's award of moral damages is unreasonable or inconsistent with its findings.

14. Contrary to the assertion on the issue of lack of evidence that the Secretary-General is raising for the first time on appeal, there is no requirement in the Appeals Tribunal's jurisprudence or in General Assembly resolution 69/203 that a doctor's report is a precondition to an award of moral damages. In addition, Mr. Roberts was never requested to provide such a report or records of his consultation with private medical practitioners at a later time. In this

⁵ *Ademagic et al. and McIlwraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357. On 17 October 2013, when the Appeals Tribunal handed down that judgment and three others related to the ICTY cases of conversion to permanent appointment, the exchange rate between the US Dollar and the Euro stood at 1:1.35.

connection, Mr. Roberts notes that the Secretary-General never contested Mr. Roberts' sworn testimony. For this purpose, Mr. Roberts provides a list of recourse he had for stress counselling to substantiate his testimony about the emotional stress and professional embarrassment that he had experienced and requests that it be admitted into evidence.

15. The UNDT followed the jurisprudence of the Appeals Tribunal and reached its conclusion as to the amount of compensation on the basis of the facts of the present case. The Secretary-General's reliance on *Baig et al.* is misplaced, as there are important distinctions between *Baig et al.* and the present case.⁶ While the *Baig et al.* case concerned the conversion to a permanent appointment of a group of staff members based on the operational realities of the Organization, the present case turned on individual consideration based on the staff member's personal history.

16. The holding in the *Baig et al.* case appears to contradict the Secretary-General's argument that no moral damages may be awarded absent evidence of some physical or mental manifestation of impact. There is no indication that the applicants in *Baig et al.* made any submissions on moral damages. The compensation awarded by the Appeals Tribunal in *Baig et al.* was for a fundamental breach of due process and not on the basis of any medical evidence.

17. In the face of the appeal submitted by the Secretary-General and having lost confidence in the Office of Staff Legal Assistance in its initial handling of the matter, Mr. Roberts had to engage a private counsel and has thus incurred additional expenses in the amount of USD 2,500.

18. Mr. Roberts requests that the Appeals Tribunal order the Secretary-General to pay him USD 2,500 in legal expenses. He also requests that this Tribunal reject the present appeal in its entirety.

The Secretary-General's additional pleadings

19. Contrary to Mr. Roberts' assertion, the appeal is not moot. The payment of USD 10,000 was made in error and cannot be construed as evidence of the Secretary-General's acceptance of, or his consent to, the UNDT's award of moral damages, because the Administration's procedure for the disbursement of awards made by the Dispute Tribunal was not followed and the request for payment was raised prematurely, i.e., six weeks before the UNDT Judgment became

⁶ *Baig et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.

statutorily executable. Should the Appeals Tribunal agree with the Secretary-General that the award of USD 10,000 was a legal error on the part of the UNDT or was unjustifiable, such payment should be recovered.

20. The Appeals Tribunal should not admit the additional documents annexed to Mr. Roberts' answer, as they were submitted in violation of the Statute and the Rules of Procedure of the Appeals Tribunal. There are no exceptional circumstances warranting the introduction of such documents. As Mr. Roberts has conceded, he could have "easily" provided them to the UNDT. Additionally, Mr. Roberts has failed to demonstrate that the facts will be more likely established by those additional documents. Moreover, as the new documents were not tendered before the Dispute Tribunal, the Secretary-General was deprived of an opportunity to cross-examine Mr. Roberts or call or cross-examine other witnesses in relation to the documents.

Considerations

21. The Secretary-General's appeal challenges only the Dispute Tribunal's award of USD 10,000 as compensation for moral damages. He does not challenge the Dispute Tribunal's order rescinding as unlawful the decision not to grant Mr. Roberts a permanent appointment, nor does he contest the other remedies ordered by the Dispute Tribunal.

22. The Secretary-General alleges that the Dispute Tribunal erred by awarding moral damages when there was no specific or medical evidence to support such award. In the alternative, the Secretary-General argues that the award of USD 10,000 was excessive when compared to awards in similar cases and that it should be reduced to a maximum of the equivalent in US Dollars of 3,000 Euros.

23. Mr. Roberts responds that the appeal is moot, as the Secretary-General has already paid the Judgment sum of USD 10,000. He contends that the Secretary-General's appeal is an abuse of process and claims USD 2,500 in costs. He also submits that the Secretary-General's arguments on moral damages are without merit.

Is the appeal moot?

24. It is common ground that the Judgment sum of USD 10,000 was paid into Mr. Roberts' bank account. Mr. Roberts has produced evidence that the amount was paid into his account on 10 April 2015 by the United Nations Headquarters Payroll Unit, showing the Transaction Information as "Compensation to Mr. Glenn Roberts UNDT Case ...".

25. The Secretary-General argues that his appeal is not moot. He claims that:⁷

The payment of the amount of USD 10,000 was made in error and cannot be construed as evidence of the Secretary-General's acceptance of, or consent to, the UNDT's award of moral damage. The procedures set in place for these types of payment were not followed. The normal process is for the Administrative Law Section ("ALS") of ... OHRM ... to request the Controller to instruct the relevant payroll office to effect a payment in respect of a UNDT judgment. This is because ALS is the Secretary-General's counsel before the UNDT. As part of its functions, it provides recommendations on whether or not to appeal UNDT judgments and on the implementation of such judgments when they are not appealed. Once the Controller receives the request for payment from ALS, he or she then writes to the Director of the Accounts Division to request that the payment be made to the concerned staff member.

In the present case, ALS recommended an appeal of the award of moral damage to the Secretary-General, and therefore, did not instruct the Controller to pay [Mr. Roberts] the amount of USD 10,000. As there was no payment instruction from ALS to the Controller, the Controller did not write to the Director of the Accounts Division to request that the payment be made to [Mr. Roberts].

Instead, a Budget and Finance Officer of the Executive Office of the Department of Safety and Security wrote directly to the Chief of the Payroll and Disbursement Section, Accounts Division, to request the payment of the amount of USD 10,000. The Payroll staff members processed the payment based on an erroneous belief that the Budget and Finance Officer had the necessary authority to request such payments in respect of UNDT judgments. Furthermore, the payment was requested prematurely, that is, six weeks before the Judgment became statutorily executable.

Consequently, since the payment was not properly instructed by ALS, the Controller, and the Director of the Accounts Division, and given that such payment was made on the basis of an erroneous belief and prematurely, it cannot be construed as evidence of the Secretary-General's acceptance of, or consent to, the UNDT's award of moral damage. The error invalidated the payment and, if the [Appeals Tribunal] rules favourably on the Secretary-General's Appeal, the Secretary-General will lawfully seek recovery of such payment, pursuant to Administrative Instruction on the "Recovery of overpayments to

⁷ The Secretary-General's Motion for leave to file additional pleadings dated 10 June 2015, paras. 12-15.

staff members” (ST/AI/2009/1). Therefore, the payment did not constitute acceptance of, or consent to, the UNDT’s award of moral damage.

26. The Secretary-General does not provide any explanation of how the case ended up in the hands of the Budget and Finance Officer, who, according to the Secretary-General, was not part of the normal payment process. This officer’s request for payment of what was quite a large sum of money, i.e. USD 10,000, was apparently not regarded as warranting a query by the Chief of the Payroll and Disbursement Section, who accordingly paid the money into Mr. Roberts’ bank account, describing the payment as compensation relating to his UNDT case. We therefore find that the Secretary-General’s claim that the Budget and Finance Officer did not have the authority to make such a request is not plausible.

27. Moreover, we reject the Secretary-General’s submission that the “premature” request for payment “six weeks before the Judgment became statutorily executable” is proof that the payment was made in error. An appeal must be filed within 60 calendar days of the receipt of a Dispute Tribunal judgment. The filing of the appeal has the effect of suspending the execution of the judgment.⁸ In the absence of an appeal, the Dispute Tribunal judgment becomes executable following the expiry of the time provided for an appeal.⁹ Either party may then apply to the Dispute Tribunal for an order for execution of the judgment.¹⁰ However, there is no law that prevents a UNDT order for payment from being effected before it becomes executable, which is what was done in the present case.

28. We are satisfied that the payment was not made by mistake, notwithstanding the second thoughts of ALS some time later. We find that the payment of the moral damages by the Secretary-General constitutes an acceptance of the UNDT Judgment. The appeal is therefore moot.

29. Although the Secretary-General’s submissions do not persuade us that the payment in question was made in error, they do serve to underscore an appalling lack of coordination between the various officers involved in the payment process.

⁸ Articles 7(1)(c) and 7(5) of the Appeals Tribunal Statute. See also Article 8(6) of the Rules of Procedure of the Appeals Tribunal.

⁹ Article 11(3) of the UNDT Statute.

¹⁰ Article 12(4) of the Statute and Article 32(2) of the Rules of Procedure of the Dispute Tribunal.

30. Finally, we reject Mr. Roberts' claim for costs of USD 2,500. Under Article 9(2) of the Appeals Tribunal Statute, this Tribunal may award costs against a party who has manifestly abused the appeals process. Although the Secretary-General's appeal has no merit, it falls well short of an abuse of process.

Judgment

31. The appeal is dismissed and the UNDT's award of USD 10,000 for moral damages is affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(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