UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2010-092

Mmata

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Rose Boyko, Presiding Judge Sophia Adinyira Judge Luis María Simón
Judgment No.:	2010-UNAT-092
Date:	29 October 2010
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant:	Katya Melluish
Counsel for Appellant/Respondent:	Phyllis Hwang

JUDGE ROSE BOYKO, Presiding.

Synopsis

1. This case involved disciplinary proceedings which led to the separation from service of Lawrence Chore Mmata (Mmata) without notice. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that the Secretary-General unfairly dismissed Mmata and that the charge of serious misconduct was not well founded. The UNDT ordered reinstatement of Mmata with loss of earnings up to the date of reinstatement. In the alternative, the UNDT ordered compensation for loss of earnings up to the date of Judgment and an additional amount of compensation of 2 years' net base salary.

2. This Tribunal upholds the total award of compensation in paragraph 66 of the UNDT's Judgment under Article 10(5) of the Statute of the Dispute Tribunal (UNDT Statute) on the grounds that the egregious conduct found by the UNDT surrounding the investigation and dismissal of Mmata justified an award that exceeded two years' net base salary.

3. This Tribunal also affirms the award of interest; however we adjust the amount of interest to follow the interest rate applied in the Judgment in *Warren*.[1]

Facts and Procedure

4. Mmata was a staff member of the United Nations Children's Fund (UNICEF). He commenced employment with UNICEF in February 1990 in Nairobi. In January 2003, Mmata was assigned as an Operations Manager in Windhoek, Namibia, at the P-3 level.

5. In September 2008, Mmata visited the United Nations Office at Nairobi (UNON) and he used his UNON identity card to obtain access to the premises. A security officer confiscated the identity card on the basis that Mmata was not entitled to have the card as his duty station was no longer in Kenya. No further action was taken at this time. Prior to September 2008, Mmata and his wife had visited the United Nations Commissary on UNON's premises on 11 occasions since 2003, and their purchases over a period of approximately five years came to USD 933.29. On those occasions, the use of their UNON identity cards to gain entry to UNON's premises was unchallenged.

[1] *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.

6. On 6 April 2009, Mmata attended meetings at the regional office of UNICEF in Kenya to discuss UNICEF's concerns about financial losses in the Windhoek office. These concerns included alleged performance shortcomings on the part of Mmata. At one meeting, the Regional Human Resources Officer discussed with Mmata the possibility of his separation from service through resignation, a voluntary severance package, or separation from service for poor performance after following the performance evaluation procedures. Mmata indicated that he would not resign and would follow the performance evaluation procedures. During this meeting, the Regional Human Resources Officer mentioned the incident involving Mmata's UNON identity card.

7. Following a report, dated 6 April 2009, from the Regional Human Resources Officer, UNICEF's Office of Internal Audit (OIA) conducted an investigation of the circumstances surrounding the confiscation of Mmata's UNON identity card. On 14 July 2009, Mmata was charged with abuse of privileges and immunities for failing to surrender his and his wife's UNON identity cards when he was transferred from Nairobi and subsequently using the cards to make purchases at the Commissary. He was also charged with abuse of authority for retaining the identity cards as he was responsible for ensuring that the cards were returned. After responding to the charges in writing, Mmata was informed, by letter dated 31 August 2009, that he would be separated from service without notice. Mmata was separated from service as from 1 September 2009.

8. Mmata challenged the disciplinary measure and on 31 March 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/053, which held that the Secretary-General unfairly dismissed Mmata and that the charge of serious misconduct was not well-founded. The Dispute Tribunal found that the charge relating to the unauthorized use of the UNON identity card was correctly brought. In relation to the charge of abuse of privileges and immunities, the Dispute Tribunal found that Mmata did not have an intention to defraud and therefore the Secretary-General did not have the necessary evidential basis to prove a charge of serious misconduct within the meaning of former Staff Rule 110.1. Further, the penalty of separation from service without notice was disproportionate to the offence. The Dispute Tribunal also found that, based on the evidence concerning the meetings on 6 April 2009, UNICEF had come to a considered view that it was in the interests of the Organization to part company with Mmata. When UNICEF failed to secure his agreement to the termination of his contract by consent, pressure was applied to him to force a decision to

accept severance terms by mentioning that the incident with his UNON identity card could be used against him as a charge of misconduct.

9. The Dispute Tribunal ordered as follows:

> 65. The Tribunal orders rescission of the administrative decision and orders the [Secretary-General] to reinstate [Mmata] and to make good all his lost earnings from the date of his separation from service to the date of his reinstatement with interest at 8%.
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> 66. In the exceptional circumstances of this case, the [Secretary-General is] further ordered, in the event that reinstatement is not possible, to compensate [Mmata] for loss of earnings from the date of his separation from service to the date of this Judgment with interest at 8% thereon. Additionally, the [Secretary-General is] ordered to compensate [Mmata] in the amount of two years' net base salary at the rate in effect on the date of [Mmata's] separation from service with UNICEF with interest thereon at 8% after 45 days from the date of this Judgment.

10. The Secretary-General filed an appeal against the Judgment on 17 May 2010. After receiving the appeal on 18 May 2010, Mmata filed an answer to the appeal on 2 July 2010.

Submissions

Secretary-General's Appeal

11. The Secretary-General submits that the Dispute Tribunal exceeded its competence in awarding compensation exceeding two years' net base salary, without explaining the exceptional circumstances justifying such an award. In paragraph 66 of the Judgment, the Dispute Tribunal ordered compensation in lieu of rescission of the decision to terminate Mmata in the amount of two years and seven months' net base salary. Article 10(5)(b) of the UNDT Statute requires the Dispute Tribunal to provide reasons for ordering compensation beyond two years' net base salary. The Judgment does not particularize any reasons why there were exceptional circumstances warranting compensation exceeding two years' net base salary.

12. The Secretary-General also submits that the Dispute Tribunal erred on a question of law in determining that there were exceptional circumstances in the present case warranting compensation exceeding two years' net base salary. The Secretary-General refers to a number of similar cases of the former Administrative Tribunal in which it was found that summary dismissal or termination of the staff member was disproportionate, yet compensation of two years' net base salary or less was ordered.

13. The Secretary-General contends that the Dispute Tribunal erred on a question of law and exceeded its competence in awarding interest. The legislative history of the UNDT Statute demonstrates that the General Assembly did not intend to grant the Dispute Tribunal the power to award interest, and, further, it expressly considered and rejected such a proposal.

14. Should the Appeals Tribunal hold that the Dispute Tribunal has the power to award interest, the Secretary-General submits that the Dispute Tribunal failed to provide compelling reasons for departing from the jurisprudence of the former Administrative Tribunal, which limited the award of pre-judgment interest to certain exceptional circumstances. In this case, there are no exceptional circumstances justifying an award of interest.

15. The Secretary-General also submits that the Dispute Tribunal erred on a question of law in setting the interest rate at eight per cent per annum, as the rate is excessive.

16. The Secretary-General requests that the Appeals Tribunal make a number of findings and modify the amount of compensation awarded within the limits permitted by the UNDT Statute.

Mmata's Answer

17. Mmata submits that the Dispute Tribunal did not exceed its competence or err on a question of law in ordering the relief under Article 10(5) of the UNDT Statute. Mmata contends that the interpretation of Article 10(5) articulated by the Secretary-General is incorrect. Article 10(5) provides for two separate and distinct remedies: rescission of the contested administrative decision or specific performance in Article 10(5)(a), and compensation in Article 10(5)(b), which shall normally not exceed two years' net base salary. Where rescission (and reinstatement, in this case) is ordered in cases of termination, the Dispute Tribunal must set an amount of compensation which the respondent may elect to pay instead of rescission under Article 10(5)(a) (alternative compensation).

18. Under Article 10(5)(b) of the UNDT Statute, the Dispute Tribunal may order "[c]ompensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision." Mmata

argues that, for the purposes of the compensation limit in Article 1o(5)(b), an order for alternative compensation under Article 10(5)(a) is not to be aggregated with separately ordered compensation under Article 1o(5)(b). Alternative compensation awarded under Article 10(5)(a) is subject to a separate compensation limit of two years' net base salary as provided for under Article 10(5)(b). To hold otherwise would allow a respondent to transform an "unexceptional" case into an "exceptional" case merely by electing to pay the alternative compensation which, when aggregated with other compensation ordered by the Dispute Tribunal, exceeds two years' net base salary.

19. Mmata contends that the Dispute Tribunal did not treat the case as an exceptional case under Article 10(5)(b) of the UNDT Statute. Mmata argues that the order for compensation for loss of earnings in paragraph 66 of the Judgment falls under Article 10(5)(b), whereas the award of two years' net base salary in paragraph 66 replaced the order for reinstatement and constitutes the award of alternative compensation under Article 10(5)(a). The award of alternative compensation does not exceed two years' net base salary and therefore the case is not an exceptional case for the purposes of Article 10(5)(b).

20. Mmata contends that the Dispute Tribunal has the power to award interest under the UNDT Statute. Further, the power to award interest is not limited to exceptional circumstances in accordance with the jurisprudence of the former Administrative Tribunal. Mmata also submits that the interest rate of eight per cent per annum is not excessive in the circumstances.

21. Mmata requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

22. Mmata's request for an oral hearing is denied because the issues are largely legal in nature and full arguments have been made by both him and the Secretary-General. It is therefore not necessary to receive oral submissions.

23. This appeal only concerns the amount of compensation awarded by the UNDT and the justification therefor. The findings of the UNDT are not disputed. The Secretary-General contends that the UNDT did not give reasons to justify an award of compensation beyond the limit of two years' net base salary set out in Article 10(5)(b) of the UNDT Statute, there are no grounds to award a higher amount, and to make such an order departs from existing law.

24. As set out in paragraph 9 above, the Dispute Tribunal ordered reinstatement of Mmata and loss of earnings to the date of his reinstatement (paragraph 65 of the Judgment), or, as an alternative to reinstatement, loss of earnings to the date of Judgment plus additional alternative compensation of two years' net base salary (paragraph 66 of the Judgment).

Interpretation of Article 10(5) of the UNDT Statute

25. Article 10(5) of the UNDT Statute provides as follows:

> As part of its judgement, the Dispute Tribunal may order *one or both* of the following:
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> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, *subject to subparagraph (b) of the present paragraph*;
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> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. *The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision*. [2]

26. The issue raised on appeal is the application of the two years' net base salary compensation limit in article 10(5)(b) to the two compensation orders made in paragraph 66 of the Judgment for (1) loss of earnings to the date of Judgment, plus (2) two years' net base salary. Is each of the two compensation orders subject to the limit of two years' net base salary, or is the total of the two amounts subject to the limit of two years' net base salary?

27. Article 10(5)(a) authorizes orders for rescission, specific performance and in certain cases compensation in lieu of rescission or specific performance. There is no definition given of the term "compensation" in the UNDT Statute and without any ambiguity, the ordinary meaning of the term "compensation" applies. No ambiguity is suggested, and the term is capable of being given its ordinary meaning. Compensation could include compensation for loss of earnings up to the date of reinstatement, as was ordered in the case on appeal, and if not reinstated, then an amount determined by the UNDT to compensate for loss of earnings in lieu of reinstatement up to the date of judgment, as was also ordered in the case on appeal.

[2] Emphasis added.

Post-judgment compensation may include loss of future earnings taking into account mitigation. These orders are however subject to Article 10(5)(b).

28. Article 10(5) of the UNDT Statute, although poorly drafted, on its face limits the total of all compensation ordered under subparagraphs (a), (b), or both, to the equivalent of two years' net base salary of the applicant, unless higher compensation is warranted and reasons are given to explain what makes the case exceptional.

29. In the instant case judgment was obtained only after seven months and so the length of time to obtain judgment from the UNDT was not a reason for justifying higher compensation for the loss of income to the date of Judgment. The justification arose from the egregious wrongful dismissal conduct of the Organization. There may be cases that take longer to be heard by the UNDT, which may provide a reason justifying compensation beyond the two-year limit.

30. In paragraph 66 of its Judgment, the UNDT ordered, as an alternative to reinstatement of Mmata, compensation for loss of earnings for the seven months from the date of his separation to the date of Judgment, plus an additional amount in the sum of two years' net base salary. Because the total of these amounts exceeds two years' net base salary, the UNDT must give reasons to justify an increased award under Article 10(5)(b) of the UNDT Statute.

This is clearly an exceptional case justifying increased compensation

31. The Secretary-General submits that the Dispute Tribunal exceeded its competence in awarding compensation in excess of two years' net base salary by failing to specify the exceptional circumstances justifying such an award and departing from decisions of the former Administrative Tribunal where even on similar facts such a high award was not made.

32. It is apparent from the reasons given in the UNDT Judgment that this case is particularly egregious, commencing with the findings of the obviously biased investigation of Mmata from the outset. The Dispute Tribunal found that during the meetings held on 6 April 2009, prior to any investigation by the OIA, it was evident that UNICEF wanted Mmata to leave the Organization on performance grounds. However UNICEF did not discuss performance issues with Mmata; instead Mmata was presented with severance

options and when he did not consent to the proposed severance terms and a termination of his contract, he was pressured to resign with the threat of facing misconduct charges for improper use of his UNON identity card on visits after leaving the country. This is evidence of blatant harassment prior to any investigation. The threat was carried out, there was a speedy investigation and Mmata was dismissed. The Dispute Tribunal found that the charge of serious misconduct was not proved and the penalty of separation from service without notice was disproportionate to the offence, resulting in the unfair dismissal of Mmata. There was in essence an abuse of power by the employer which added to the aggravating factors apparently taken into consideration by the Dispute Tribunal. While the Dispute Tribunal may not have spelled it out in the terms just used, the Dispute Tribunal did find that the 6 April 2009 meetings with Mmata "were clearly designed with a single purpose in mind; namely to explore the options or alternative ways in which separation from service could take place". The due process rights of Mmata were dispensed with before he even attended the meetings he was summoned to attend in order to address performance issues. From the Dispute Tribunal Judge's comments in his reasons, it was evident to the Judge that the investigators had no interest in verifying the accuracy of Mmata's historical account pertaining to his retention and use of the UNON identity card.

33. Article 10(5)(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation. The findings of fact made by the UNDT in paragraphs 51 to 63 of the Judgment point to evidence of blatant harassment and an accumulation of aggravating factors that support an increased award. Blatant harassment and an accumulation of aggravating factors in administrative and investigative conduct in the course of wrongful dismissal cases are consistent with the principles of law applied in the former Administrative Tribunal to justify increased compensation.[3] Accordingly we find no error by the Dispute Tribunal on the issue of whether there were reasons to justify an increased award under Article 10(5)(b) of the UNDT Statute.

[3] See UNAT Judgment No. 936, *Salama* (1999) and UNAT Judgment No. 1008, *Loh* (2001).

Jurisdiction to award interest

34. The Judgment of this Tribunal in *Warren* held that the UNDT has the authority to award interest. Further, in *Warren*, this Tribunal held that interest is to be paid at the US Prime rate from the date on which the entitlement becomes due, which in this case is the date of the UNDT Judgment.

35. The Appeals Tribunal holds that the award of interest by the UNDT in the instant case at the rate of eight per cent per annum is unreasonable. To conform with *Warren*, this Tribunal orders that interest is to be paid at the US Prime Rate and that an extra five per cent shall be added to the US Prime Rate if this Judgment is not executed within 60 days of its issuance to the parties.

Judgment

36. The appeal is allowed in part.

37. We find no error in law or in fact concerning the UNDT's finding that this is an exceptional case justifying the amount of compensation awarded. This Tribunal upholds the compensation ordered by the UNDT in paragraph 66 of its Judgment.

38. The Appeals Tribunal holds that the UNDT was unreasonable in ordering the payment of interest on the compensation awarded at the rate of eight per cent per annum. The Appeals Tribunal decides to award interest at the US Prime Rate applicable at the date of the UNDT Judgment. If the Judgment of this Tribunal is not executed within 60 days, five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of the compensation.

Dated this 29th day of October 2010 in New York, United States.

Original and authoritative version: English

(*Signed*)	(*Signed*)	(*Signed*)
Judge Boyko, Presiding	Judge Adinyira	Judge Simón

Entered in the Register on this 29th day of December 2010 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar