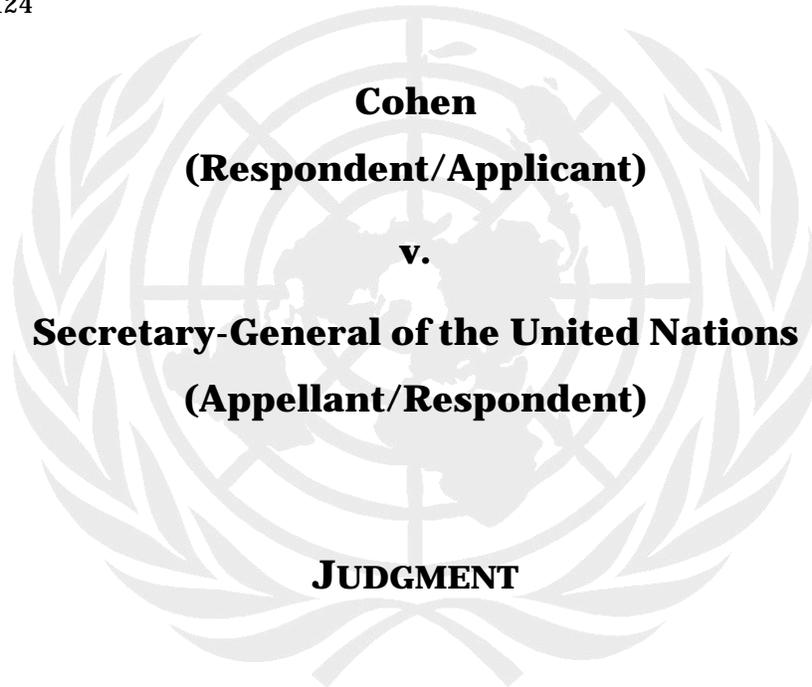




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2010-124



**Cohen  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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**Before:** Judge Jean Courtial, Presiding  
Judge Luis María Simón  
Judge Inés Weinberg de Roca

**Judgment No.:** 2011-UNAT-131

**Date:** 8 July 2011

**Registrar:** Weicheng Lin

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**Respondent/Applicant:** Edwin Nhliziyo

**Counsel for Appellant/Respondent:** Cristián Gimenez Corte

**JUDGE JEAN COURTIAL**, Presiding.

### Synopsis

1. This Court recalls that, in *Mmata*,<sup>1</sup> it interpreted article 10(5) of the Statute of the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) as limiting the total compensation awarded under subparagraphs (a) or (b), or both, to an amount which shall normally not exceed two years' net base salary of the applicant, unless the Tribunal orders the payment of higher compensation and gives the reasons for that decision. However, if, in lieu of execution of the judgment, the Administration elects to pay compensation in addition to the compensation which the Tribunal ordered it to pay for the damage suffered by the applicant, that election may, depending on the extent of the damage, render the circumstances of the case exceptional within the meaning of article 10(5)(b), of the Statute of the UNDT. In such a situation, the Tribunal is not compelled to state why it considers the circumstances of the case to be exceptional. Incidentally, in the present case, the findings set out in the Dispute Tribunal's Judgment No. UNDT/2010/118 show that the applicant suffered damage resulting from the disciplinary sanction of summary dismissal based on unproven allegations, thereby warranting a higher compensation.

2. That being said, this Court finds the compensation awarded to Ms. Cohen for the loss of salaries and other entitlements to be excessive. We believe that the period of compensation for loss of earnings resulting from the dismissal should be limited to, except where compelling reasons would lead to a different judgment, two years and that the compensation must be calculated taking into account the net base salary and entitlements not related to actual service performance after deducting any salaries and entitlements that the staff member received during the period considered, based on the situation as at the beginning of that period. This Court therefore reduces the compensation awarded to Ms. Cohen and replaces the interest rate of 8 per cent imposed by the contested judgment with the *US Prime rate* in effect on the due date of the entitlement.

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<sup>1</sup> *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

**Facts and procedure**

3. From September 2001, Ms. Cohen was a staff member of the United Nations Mission in the Democratic Republic of the Congo (MONUC), employed as a procurement assistant at the FS-4 level, handling the charter of barges and other boats.

4. In April 2004, there were rumours circulating that MONUC procurement staff members handling the charter of barges and other boats had requested, and received, money from the company Transport Fluvial et Commerce (TFCE) in return for favours in the awarding of contracts and the processing of invoices. Ms. Cohen, per some of the rumours, had requested and received 70,000 USD from TFCE in return for facilitating the awarding of MONUC contracts. She was also alleged to have issued purchase orders valued at over 9.7 million USD, including purchase orders issued to TFCE valued at more than 1.9 million USD.

5. In April 2007, the Procurement Task Force of the Office of Internal Oversight Services (OIOS) was tasked with conducting an investigation into the activities of five staff members within the Procurement Section, including Ms. Cohen. She was interviewed from 10 to 18 May 2007. On 24 July 2007, Ms. Cohen was formally charged with having solicited and received money from TFCE. She was first placed on special leave and then suspended with full pay until her summary dismissal.

6. On 21 August 2007, Ms. Cohen submitted her response to the charges against her. She stated that she lacked the authority to issue purchase orders or award contracts. She challenged the credibility of the charges, which were based on the statements of an anonymous witness and TFCE officers.

7. On 11 January 2008, the Secretary-General notified Ms. Cohen of his decision to summarily dismiss her for serious misconduct.

8. Thereafter, Ms. Cohen contested the Secretary-General's decision to summarily dismiss her before the New York Joint Disciplinary Committee. In its report issued on 8 June 2009, the Committee found that the summary dismissal had not been warranted by the evidence adduced in the investigation report and that the facts underlying the charges had not been established. The Committee recommended that the

Secretary-General should suspend its decision to dismiss Ms. Cohen. However, the Secretary-General refused to follow the Committee's recommendation.

9. On 10 August 2009, Ms. Cohen filed an application with the Dispute Tribunal contesting the decision to summarily dismiss her.

10. On 12 July 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/118. It found that the investigation had been unfair and prejudiced against Ms. Cohen and that there had been no evidence on the record to show that the applicant had solicited or received bribes. It also found that she had not in any way been responsible for the contract awards or delayed payments to TFCE. The Dispute Tribunal ordered the reinstatement of Ms. Cohen or, if the Administration so chooses, in lieu of her reinstatement, payment of compensation equivalent to two years' net base salary, at the rate in effect on the date of her dismissal, with interest payable at a rate of 8 per cent per year as from 90 days from the date of issuance of the judgment until payment was effected. The Dispute Tribunal also ordered that Ms. Cohen should be paid her salaries and entitlements from the date of her dismissal (11 January 2008) to the date of the judgment (12 July 2010), with interest at a rate of 8 per cent and that she should receive two months' net base salary as compensation for the breach of her right to due process.

### **Submissions**

#### **Secretary-General's Appeal**

11. The Dispute Tribunal exceeded its competence and erred on a question of law in awarding Ms. Cohen compensation totaling more than four years and eight months' net base salary without providing, in violation of article 10(5) of its Statute, an explanation as to the exceptional circumstances justifying an award in excess of the two years' net base salary limit set by this statute.

12. The Dispute Tribunal erred on a question of law in ordering that Ms. Cohen be paid her salaries and entitlements from the date of her dismissal to the date of its judgment at a rate of 8 per cent per year and also that the compensation payable, in lieu of Ms. Cohen reinstatement as from 90 days from the issuance of the judgment until payment was effected, be also paid at the same rate of 8 per cent per year. The appellant

recalls that this interest rate is inconsistent with the Appeals Tribunal decision in *Warren*.<sup>2</sup>

### **Cohen's Answer**

13. The respondent contends that the use of the word compensation in the Statute of the Dispute Tribunal is ambiguous. It masks the reality that compensation can be paid for a number of reasons. In the present case, there are three reasons for the payment of compensation. The first represents recovery of salary and benefits withheld as a result of wrongful dismissal; the second is compensation for moral damage; and the third is the option given the Secretary-General should he decide not to reinstate the respondent. The cap of two years' net base salary was not intended to limit the amount of compensation awarded but rather to provide an explanation, for each individual case, for exceeding the cap. The mere fact that by the nature of this case, there are three different elements of compensation may in itself constitute exceptional circumstances resulting in the award of higher compensation.

14. Ms. Cohen also requests the Court to order the payment of salary and entitlements retroactive to the date of her dismissal, including the reimbursement of any medical bills she might have incurred during the period when she had no medical coverage; the award of five years' net base salary for the prejudice caused by the Administration's conduct toward her, including humiliation and anxiety; and the payment of 5,000 USD in processing fees.

### **Considerations**

15. Article 10, paragraph 5, of the Statute of the Dispute Tribunal provides as follows:

As part of its judgment, the Dispute Tribunal may order one or both of the following:

- (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

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<sup>2</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059.

of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(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.

16. In *Mmata*,<sup>3</sup> this Court interpreted article 10(5), of the Statute of the Dispute Tribunal as limiting the amount of compensation that can be awarded under subparagraphs (a) or (b), or both, to the equivalent of two years' net base salary of the applicant, unless a higher compensation is warranted and that the Tribunal provide an explanation of the exceptional circumstances of the case.

17. In the present case, after rescinding the decision to summarily dismiss Ms. Cohen, the Dispute Tribunal ordered her reinstatement or, in lieu of the performance of this obligation, the payment of compensation equivalent to two years' net base salary based on the salary payable to the applicant on the date of her dismissal. The Dispute Tribunal also awarded Ms. Cohen compensation equivalent to two months' net base salary for the breach of her right to due process and compensation for the loss of earnings as from the date of her dismissal. Although the total amount of compensation awarded to Ms. Cohen as of the date of the judgment represented more than four years and eight months' net base salary, the Dispute Tribunal did not provide reasons for its decision.

18. In general, in keeping with the principle of the right to an effective remedy enshrined in article 8 of the Universal Declaration of Human Rights, the rescission of the illegal decision to dismiss a staff member implies, for the Administration, that it must both reinstate the staff member and pay compensation for loss of salaries and entitlements not related to actual service performance after deducting any salaries and entitlements that the staff member received during the period considered. The option given to the Administration, on the basis of article 10(5)(a) of the Statute of the Dispute Tribunal, to pay compensation in lieu of performance of a specific obligation such as reinstatement, combined with the cap fixed in article 10(5)(b), should not render ineffective the right to fair and equitable damages, which is an element of the right to an effective remedy.

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<sup>3</sup> *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

19. It follows from the foregoing that, when the Administration elects to pay compensation in lieu of the performance of a specific obligation ordered by the Tribunal, in addition to compensation rightly awarded by the Tribunal for damages, that election may result, depending on the extent of the damage, in the circumstances of the case becoming exceptional within the meaning of article 10(5)(b), of the Statute of the Dispute Tribunal. It follows, therefore, that in such a situation, the Tribunal is not bound to give specific reasons to explain what makes the circumstances of the case exceptional.

20. Moreover, this Court stated in paragraph 33 of its judgment in *Mmata* that article 10(5)(b), of the Statute of the Dispute Tribunal does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation.

21. In the present case, the UNDT judge summarized her findings of fact in paragraph 70 of the judgment. She found that there was no evidence on the record to show that Ms. Cohen had solicited or received bribes; that Ms. Cohen was not in any way responsible for the award of contract or delayed payments to TFCE; and that none of her actions amounted to serious misconduct or any misconduct deserving of summary dismissal. The UNDT judge noted that the OIOS Procurement Task Force investigation report had been unfair and prejudiced towards Ms. Cohen and that it submitted, in an unprofessional manner, accusations as facts in a case where the staff member's right to due process had been breached. Such findings not only warrant rescission of the decision to summarily dismiss Ms. Cohen, but also constitute aggravating factors in a case of irregular, prejudicial dismissal without corroborating evidence.

22. That being said, this Court finds the compensation awarded to Ms. Cohen for the loss of salaries and other entitlements from the date of her dismissal (11 January 2008) to the date of the judgment (12 July 2010) with interest at 8 per cent per year to be excessive. We believe that the period of compensation for loss of earnings resulting from the dismissal should be limited – except in cases where compelling reasons would lead one to decide differently – to two years, and that the compensation must be calculated taking into account the net base salary and entitlements not related to actual service performance after deducting any salaries and entitlements that the staff member received during the period considered, on the basis of the situation at the beginning of the period.

In the present case, Ms. Cohen was never alleged to have collected any remuneration during the two-year period following her dismissal.

23. With regard to the payment of interest on the compensation awarded, this Court held in *Warren* that interest should be awarded at the US Prime rate applicable on the due date of the entitlement, calculated from the due date of the entitlement to the date of payment of the compensation awarded by the Dispute Tribunal. It further held that if its judgment was not executed within 60 days, 5 per cent should be added from the date of expiry of the 60-day period to the date of payment of the compensation.

24. The Appeals Tribunal therefore replaces the interest rate fixed by the contested judgment with the US Prime rate applicable on the due date of the entitlement, which is the date of dismissal of Ms. Cohen with regard to the compensation for loss of earnings and the date of distribution of the judgment with regard to the two other compensation awards.

25. In view of the foregoing, the Court upholds the judgment of the Dispute Tribunal, subject to the changes set out in paragraphs 22 and 24 above.

**Judgment**

26. This Court amends the Dispute Tribunal's judgment as follows: the compensation awarded by the Dispute Tribunal for loss of earnings corresponding to the dismissal period is reduced to an amount equivalent to two years' net base salary plus entitlements not related to actual service performance, based on the situation as at the date of dismissal. The US Prime rate applicable on the due date of the entitlement replaces the rate attributed in the Dispute Tribunal's judgment.

27. The Court upholds, subject to the change in interest rate indicated above, the decision of the Dispute Tribunal to order Ms. Cohen's reinstatement or, if the Administration so chooses, the award of two years' net base salary in lieu of rescission of the dismissal, as well the payment of compensation equivalent to two months' net base salary for damages resulting from the breach of her right to due process.

Original and Authoritative version: French

Dated this 8<sup>th</sup> day of July 2011 at Geneva, Switzerland.

*(Signed)*

Judge Courtial, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 29<sup>th</sup> day of August 2011 in New York, United States of America.

*(Signed)*

Weicheng Lin, Registrar