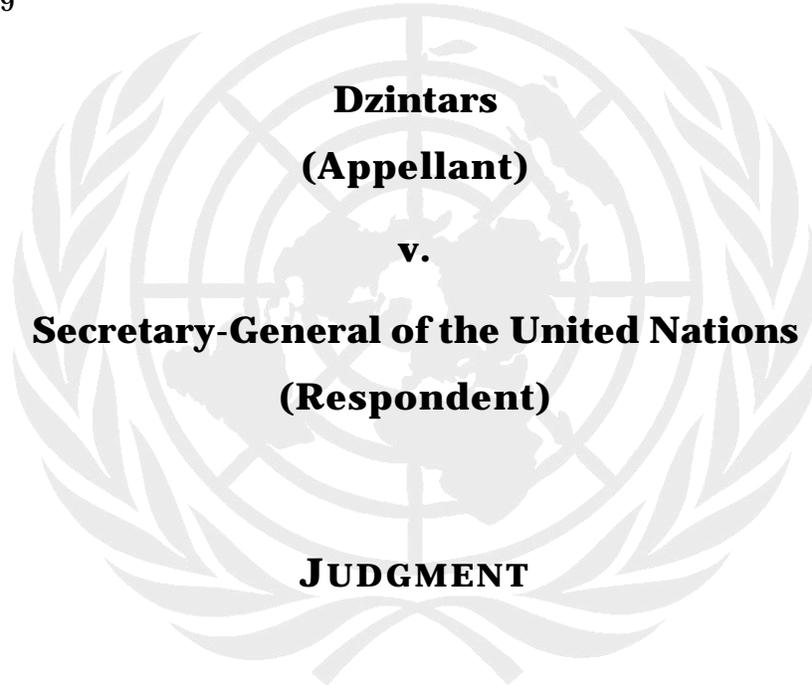




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-179



**Dzintars
(Appellant)**

v.

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

JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Luis María Simón
Judge Mark P. Painter

Judgment No.: 2011-UNAT-176

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Appellant: Not represented

Counsel for Respondent: Wambui Mwangi

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Mr. Juris Dzintars was on a two-year fixed-term appointment (FTA). When the non-renewal decision was taken Mr. Dzintars' performance rating was "does not meet expectations". Mr. Dzintars started the rebuttal proceedings, which resulted in an upgrade of his performance rating from "[d]oes not meet expectations" to "[p]artially meets performance expectations".
2. We hold that the failure to consider the upgraded rating constituted a denial of the due process rights, but it was not necessarily enough to rescind the non-renewal decision, because Mr. Dzintars had no legitimate expectation of renewal.
3. We do not rescind the non-renewal decision, but decide to award Mr. Dzintars compensation, under Article 9(1)(b) of the Statute of the United Nations Appeals Tribunal (Appeals Tribunal), for moral damages caused by the denial of the due process rights, and order that he shall be paid two-months' net base pay plus interest.
4. The appeal is allowed and Judgment No. UNDT/2010/150 is modified to the extent indicated above.

Facts and Procedure

5. Mr. Dzintars joined the United Nations Economic Commission for Europe (ECE) in Geneva on 13 May 2005 as a Mechanical Engineer at the P-3 level with the Technology Section, Transport Division, under a two-year FTA. That FTA was extended several times on a monthly basis until 2 September 2007, when Mr. Dzintars was separated from service.
6. Mr. Dzintars' main responsibilities were to provide secretariat services, technical advice and follow-up actions to three inter-governmental bodies subsidiaries to the World Forum for Harmonization of Vehicle Regulations. On 31 January 2006, at the mid-point review of the Performance Appraisal System (PAS) for the cycle 2005-2006, Mr. Dzintars' first reporting officer (FRO) informed him in writing that his performance did not meet expectations in terms of quality of work and knowledge of the Vehicle Regulations. The FRO prepared a nine-point improvement plan for Mr. Dzintars. But at the end of the PAS period, the FRO noted only "a certain improvement" in Mr. Dzintars'

performance and gave Mr. Dzintars an overall rating of “[p]artially meets performance expectations” for the 2005-2006 cycle. Mr. Dzintars did not raise any objection to the FRO’s overall evaluation.

7. The PAS cycle for 2006-2007 began on 1 April 2006. On 7 November 2006, in his mid-point comments, the FRO stated that “Mr. Dzintars’ performance does not meet expectations”. The FRO instituted another improvement plan with specific benchmarks in five areas of Mr. Dzintars’ responsibilities.

8. In a memorandum dated 5 April 2007 to the ECE Executive Secretary, the Director of ECE’s Transport Division stated that Mr. Dzintars had not been able to satisfactorily perform the tasks inherent to his position and that he would not recommend the extension of Mr. Dzintars’ contract due to expire on 12 May 2007.

9. Mr. Dzintars’ 2006-2007 PAS was completed on 25 April 2007, when Mr. Dzintars signed off and expressed his disagreement with the overall rating of “[d]oes not meet expectations”.

10. On 8 May 2007, Mr. Dzintars initiated the rebuttal proceedings in respect of his 2006-2007 PAS. His FTA was extended in order to allow him to take paternity leave, complete the rebuttal process, and use his sick leave entitlements.

11. The Rebuttal Panel issued its report on 1 June 2007, in which it concluded that the overall rating should be upgraded from “[d]oes not meet expectations” to “[p]artially meets performance expectations”. That report was transmitted to Mr. Dzintars on 5 June 2007 and placed in his Official Status File as an attachment to his 2006-2007 PAS. Mr. Dzintars’ 2006-2007 PAS was accordingly amended to reflect the decision of the Rebuttal Panel.

12. On 22 June 2007, Mr. Dzintars wrote to the Secretary-General seeking administrative review of the decision not to renew his FTA. On the same date, he filed a request for suspension of action of the impugned decision with the Joint Appeals Board in Geneva (JAB/Geneva). After he received a negative response to his request for administrative review and the JAB/Geneva rejected his request for suspension of action, Mr. Dzintars filed a statement of appeal with the JAB/Geneva on 25 October 2007.

13. In a report dated 14 August 2008, the JAB/Geneva found that the Administration did not violate administrative instruction ST/AI/2002/3 by not extending Mr. Dzintars' FTA since his performance had been twice assessed as "[p]artially meets performance expectations". But the JAB/Geneva recommended that Mr. Dzintars be awarded USD 3,000 as compensation, because he had not signed off on his 2006-2007 PAS or had had an opportunity to respond to his performance evaluation, before the decision not to extend his service was made. The JAB/Geneva found that this amounted to a "due process violation" warranting compensation. But the Secretary-General did not accept the JAB/Geneva's finding of due process violation or its recommendation for the payment of USD 3,000 as monetary compensation.

14. Mr. Dzintars then appealed to the former Administrative Tribunal, which did not have an opportunity to review the case before its abolition at the end of 2009. Mr. Dzintars' case was subsequently transferred to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva.

15. In Judgment No. UNDT/2010/150 dated 20 August 2010, Judge Cousin rejected Mr. Dzintars' application. Judge Cousin considered that the Administration had made the reason not to renew Mr. Dzintars' contract very clear.

While it follows from the provisions of administrative instruction ST/AI/2002/3 that the Administration cannot refuse to renew a staff member's appointment when he/she first receives the rating "Partially meets performance expectations", the Tribunal considers that the Administration is entitled to refuse renewal when, after it has taken steps to try to improve his/her work, the staff member receives that rating for the second consecutive year.

16. Judge Cousin observed that when the recommendation not to renew Mr. Dzintars' contract was made on 5 April 2007, his supervisors took into account his work over a period of 23 months. While the 2006-2007 appraisal cycle was already over, Mr. Dzintars had not yet signed off on his 2006-2007 PAS.

17. The UNDT Judgment was issued in French. On 28 October 2010, Mr. Dzintars received the English translation of the Judgment. He appealed the UNDT Judgment on 9 December 2010. The Secretary-General filed an answer on 27 January 2011.

18. On 15 February 2011, Mr. Dzintars submitted a request for leave to file an additional submission. On 2 March 2011, the President of the Appeals Tribunal decided to admit Mr. Dzintars' additional submission. On 18 March 2011, the Secretary-General filed an additional answer.

Submissions

Mr. Dzintars' Appeal

19. In his additional submission, Mr. Dzintars claims that he only recently realized that Mr. Rodriguez had served as the JAB/Geneva Secretary, which had considered his appeal. Mr. Dzintars also claims that Mr. Rodriguez had failed to recuse himself from the UNDT review of his application, and that the UNDT Judgment was the result of bias and conflict of interest. Mr. Dzintars alleges that Mr. Rodriguez, being of the same Spanish nationality as his former supervisors, had questionable impartiality, but he did not disclose that problem to the UNDT Judge. Mr. Dzintars questioned the English language sufficiency of the UNDT Judge and doubted his impartiality.

20. On the merits, Mr. Dzintars alleges that the UNDT Judge made errors in fact and law. He alleges that the UNDT Judge was unwilling to recognize the facts presented by him, ignored all prima facie evidence pointing to discrimination or arbitrary actions by the ECE Administration, and failed to see a concerted plan by the ECE Administration to get rid of him at any price. In contrast, the UNDT Judge took the Administration's position as "established".

21. Mr. Dzintars seeks the reversal of the UNDT Judgment and the remand of his case to the UNDT to be reviewed by a different judge. He also reiterates his claim for unspecified moral damages arising from the pain, humiliation and verbal abuse, the dashed career prospects, the lost reputation, and the emotional injury.

Secretary-General's Answer

22. In response to Mr. Dzintars' allegations against the UNDT Registrar and Judge, the Secretary-General states that Mr. Rodriguez had communicated with Mr. Dzintars and his counsel both as the JAB/Geneva Secretary and the UNDT Registrar at different times. Consequently, Mr. Dzintars could not claim that he had only "recently" discovered this information. The Secretary-General also states that, contrary to Mr. Dzintars'

assertions, Mr. Rodriguez is not Spanish, but Mexican, and that he was not substantively involved in Mr. Dzintars' case before the JAB/Geneva. The Secretary-General rejects Mr. Dzintars' accusations against the UNDT Judge as either "lacking in foundation", "not borne out by the facts", or "irrelevant to the issue at hand".

23. On the merits, the Secretary-General submits that the UNDT correctly concluded that Mr. Dzintars had no legitimate expectancy of renewal of his FTA, that his unsatisfactory PAS ratings constituted a proper basis for the non-renewal decision, and that the ECE Administration was entitled to decide not to renew Mr. Dzintars' contract after he had received a rating of "[p]artially meets performance expectations" for two consecutive years. The Secretary-General also submits that Mr. Dzintars has failed to substantiate his accusations about the UNDT ignoring prima facie evidence of discrimination and improper motives, or about the UNDT engaging in a "cover-up" on behalf of the Administration. In the view of the Secretary-General, the UNDT Judge did not err either in fact or in law.

Considerations

24. Our main concern is to see if Mr. Dzintars was fairly treated. And if not so, then what should be done about it.

25. Mr. Dzintars was on a fixed-term contract for two years from 13 May 2005 onwards. While considering Mr. Dzintars' performance appraisals for the two years 2005-2006 and 2006-2007, we noted that in the first year during the mid-point review, his FRO graded Mr. Dzintars' performance as "does not meet expectations". A nine-point improvement plan was put in place. The plan seemed to work because Mr. Dzintars' final grading for the first year was changed to "[p]artially meets performance expectations".

26. But we also noted that for the second year Mr. Dzintars' performance again slipped to "does not meet expectations" during the mid-point review in November 2006. He was again placed on an improvement plan in five areas of his responsibilities.

27. While this process was ongoing, a memorandum dated 5 April 2007 was sent to the ECE Executive Secretary by the Director of ECE's Transport Division, stating that Mr. Dzintars had not been able to satisfactorily perform the tasks inherent to his position and that he would not recommend the extension of Mr. Dzintars' contract.

28. Mr. Dzintars signed off on his 2006-2007 PAS, expressed his disagreement with the overall rating of “does not meet expectations”, and initiated the rebuttal proceedings. His contract was subsequently extended. The Rebuttal Panel issued its report on 1 June 2007 and upgraded Mr. Dzintars to “[p]artially meets performance expectations”. As a result, Mr. Dzintars’ PAS was amended in accordance with the decision of the Rebuttal Panel.

29. From the above it becomes apparent that Mr. Dzintars’ contract was not renewed on the basis of an un-rebutted rating that he “[did] not meet expectations”. But by the time his contract ended Mr. Dzintars’ PAS had been upgraded to “[p]artially meets performance expectations”.

30. We are of the opinion that an improvement of the performance rating should have automatically led to the withdrawal of the non-renewal order and a reconsideration of the decision based on the improved rating. The UNDT misread ST/AI/2002/3, which is applicable to the case. There is no provision for an automatic non-renewal even if a staff member receives two consecutive ratings of “[p]artially meets performance expectations”. ST/AI/2002/3 is quite clear in that respect.

31. However, this will make no difference to the outcome of this appeal because a staff member who has received two consecutive ratings of “[p]artially meets performance expectations” has no legitimate expectation of renewal of contract at the end of the contract period. If at all, his only grievance can be the denial of due process. The non-renewal in his case was based on the 2006-2007 PAS rating that was subsequently upgraded. Therefore, the decision of non-renewal ought to have been taken on the basis of the upgraded PAS rating. The relief that Mr. Dzintars is entitled to is compensation for moral damages caused by the denial of his due process rights, payable under Article 9(1)(b) of the Statute of the Appeals Tribunal. He is not entitled to the relief of the rescission of the non-renewal decision under Article 9(1)(a) of the same Statute, since he had no legitimate expectation of renewal on the basis of two consecutive PAS ratings of “[p]artially meets performance expectations”.

Judgment

32. This appeal is allowed in part; the UNDT Judgment is modified. Mr. Dzintars is awarded compensation in the amount of two-months' net base pay, plus interest, under Article 9(1)(b) of the Statute of this Tribunal. For the purpose of fixing the amount of two months' net base pay and the date for calculating the interest, the relevant date shall be the date of Mr. Dzintars' separation from service, 2 September 2007.

Original and authoritative version: English

Done this 21st day of October 2011 in New York, United States.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Simón

(Signed)

Judge Painter

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar