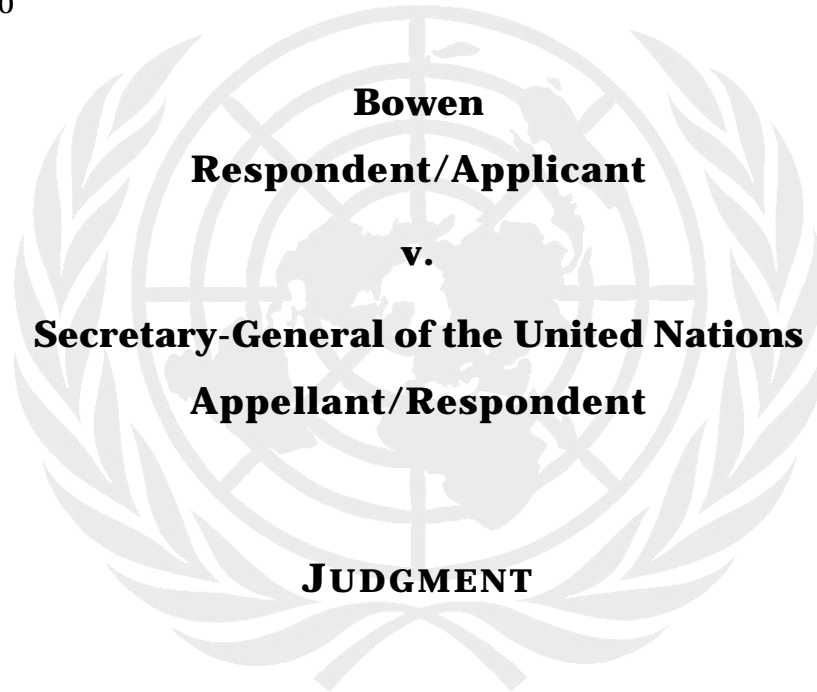




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-190



Bowen
Respondent/Applicant
v.
Secretary-General of the United Nations
Appellant/Respondent

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal

Judgment No.: 2011-UNAT-183

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Lyndon Barnes

Counsel for Appellant/Respondent: John Stompor

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. Following concerns with regards to his performance, Mr. Maurice John Bowen's engagement with the United Nations Development Programme (UNDP) was curtailed. Upon review, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi determined that the termination procedures had not been properly followed and ordered the rescission of the decision to terminate Mr. Bowen's appointment or, as an alternative, the payment of the salary and entitlements he would have received until the end of his appointment less the payments in lieu of notice. In addition the Secretary-General was ordered to pay two years' net base salary for "the negative effects on [Mr. Bowen] of the early termination and the failures of procedure".
2. The Secretary-General appealed the quantum of compensation awarded to Mr. Bowen.
3. The United Nations Appeals Tribunal (Appeals Tribunal) finds that both parties agree, and so orders, that the termination indemnity paid to Mr. Bowen, in addition to the payment effectuated in lieu of notice, should be deducted from the compensation awarded to him as an alternative to reinstatement. This Tribunal also reduces the compensation awarded for the effects of the early termination to six months' net base salary at the rate and with the interest established by the UNDT.
4. The appeal is allowed in part.

Facts and Procedure

5. On 28 June 2003, Mr. Bowen joined UNDP in Nairobi, Kenya, on a one-year contract as the Programme Manager of the Data Exchange Platform for the Horn of Africa (DEPHA) at the A-4 level under the 300 Series of the former Staff Rules.
6. On 5 November 2003, the UNDP Programme Officer in Kenya recorded concerns regarding Mr. Bowen's performance. However, the Dispute Tribunal found that Mr. Bowen did not receive a copy of the said note nor did he get a chance to respond to it.

7. On 18 February 2004, the DEPHA Project Steering Committee (Committee) held a meeting in which it reviewed the progress of DEPHA and, as a result of concerns regarding Mr. Bowen's performance, the Committee considered cutting short Mr. Bowen's engagement with DEPHA. On 12 March 2004, Mr. Bowen was allegedly provided with the opportunity to comment on a copy of the minutes of the 18 February 2004 Committee meeting. On 23 March 2004, the UNDP Resident Representative informed Mr. Bowen that his appointment would be curtailed as of 1 April 2004, and that pursuant to his letter of appointment he would receive one-month salary as compensation as well as an indemnity equal to one-week salary for each month of uncompleted service.

8. On 30 March 2004, Mr. Bowen contacted the UNDP Resident Representative to request a stay of the decision to terminate his appointment and, in May 2004, Mr. Bowen requested administrative review of the decision to terminate his appointment. On 19 October 2006 the Joint Appeals Board (JAB) unanimously concluded that the decision did not violate the terms of Mr. Bowen's appointment and recommended that the Secretary-General reject his appeal, which the Secretary-General did on 6 March 2007.

9. On 28 February 2008, Mr. Bowen filed an application with the former Administrative Tribunal and the case was later transferred to the UNDT, which issued its Judgment on 19 November 2010. The UNDT found, in part, in favour of Mr. Bowen and ordered the rescission of the decision to terminate his appointment or, as an alternative, the payment of the salary and entitlements Mr. Bowen would have received until the end of his appointment less the payments in lieu of notice. In addition, the Secretary-General was ordered to pay two-years' net base salary for "the negative effects on [Mr. Bowen] of the early termination and the failures of procedure".

10. On 19 January 2011, the Secretary-General appealed Judgment No. UNDT/2010/197 and Mr. Bowen filed his answer on 28 February 2011.

Submissions

Secretary-General's Appeal

11. The Secretary-General submits that the Dispute Tribunal, in ordering compensation in lieu of the rescission of the contested decision, erred in law and also exceeded its competence in failing to deduct the termination indemnity from the compensation and other entitlements that Mr. Bowen would have received until the end of his appointment.

12. The Secretary-General contends that in *Warren*¹ this Tribunal held that the “very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations”. The Secretary-General therefore submits that the award of compensation as an alternative to rescission “should be commensurate with the extent of the injury that the staff member would suffer if the Administration opted not to rescind the decision”. Consequently, and in accordance with Article 10(7) of the UNDT Statute, failing to deduct the termination indemnity from the compensation award in lieu of rescission would be akin to ordering exemplary and punitive damages.

13. The Secretary-General submits that the UNDT erred in law and exceeded its competence in finding that “in addition to his actual monetary losses, Mr. Bowen is entitled to an award of compensation for the negative effects on him of the early termination and the failures of procedure” in the amount of two-years’ net base salary. He requests that the Appeals Tribunal set this award aside and replace it by “no more than \$20,000, the amount that [Mr. Bowen] requested in moral damages”.

14. The Secretary-General recalls that the Appeals Tribunal held in *Wu*² that “not every violation of due process rights will necessarily lead to an award of compensation” and that Mr. Bowen did not, as held in *James*,³ show that he suffered actual damages.

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

² *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

³ *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009.

15. The Secretary-General further argues that seeing that Mr. Bowen only had three months of his contract remaining, the UNDT's award of compensation for "the fact of and manner of the termination" and the "enormous stress and anxiety" suffered by Mr. Bowen is excessive and out of line with the UNDT's jurisprudence, especially when taking into consideration the fact that the UNDT also stated that Mr. Bowen's failure to gain employment over the two years following his dismissal was only "in part a consequence of his abrupt termination".

16. The Secretary-General finally submits that the UNDT "failed to satisfy its obligation under Article 10(5)(b) to provide reasons for awarding compensation beyond two years' net base salary" and that none of Mr. Bowen's circumstances support the presence of exceptional circumstances that could result in "the payment of a higher compensation".

Mr. Bowen's Answer

17. Mr. Bowen submits that, as expressed in *Solanki*,⁴ "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case". Furthermore, as a result of more than seven years of delays in the administration of justice, the severity of the violation of his due process rights and the resulting pecuniary, reputational and emotional harm he suffered, the award of two-years' net base salary is appropriate.

18. Mr. Bowen contends that in line with the jurisprudence from the UNDT in *Wu*, the quantum of compensation should reflect the severity of the breach identified by the UNDT. Indeed, as a result of the UNDP's disregard for proper procedures, Mr. Bowen's due process rights were not only severely breached, but he also suffered reputational damage in a very specialized industry which resulted in him, as expressed by the UNDT, being unable to obtain a new position for a period of two years. Consequently,

[i]n certain cases compensation may be necessary even if no financial damage can be found...Whenever an infringement to a person's rights has been established, compensation of this breach has to be taken into consideration. Otherwise judicial remedy runs the risk of becoming ineffective.

⁴ *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044.

19. Mr. Bowen further submits that the former Administrative Tribunal⁵ and the Appeals Tribunal⁶ both expressed the fact that an accumulation of aggravating factors, especially with regards to unlawful termination, justifies the award of increased compensation and therefore, in this case, the waiving of the two-year cap on the compensation award regardless of the limits of Mr. Bowen's initial contract. Indeed, "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".

20. Among such aggravating factors, Mr. Bowen submits that "anxiety about damage to one's professional reputation after an unlawful termination is not dependent on the length of time worked". Compensation corresponding to the three remaining months of his contract is not commensurate with the reputational damage that resulted from having his position terminated. Similarly, Mr. Bowen suffered acute emotional distress as a result of UNDP's attempt to stifle his complaint by threatening to confiscate his severance entitlements, the extensive delays in processing his complaints and, as the sole breadwinner in his household, the effect these decisions had on his family.

21. Mr. Bowen submits that the Secretary-General misrepresents the facts when stating that he requested USD 20,000 as a satisfying amount to compensate him for moral damages. Rather, Mr. Bowen contends that, in his original application in front of the former Administrative Tribunal, the referred amount was "specifically for emotional distress due to the almost four year [which is now seven] delay in receiving justice".

22. Mr. Bowen requests that, but for the termination indemnity which Mr. Bowen agrees should be deducted from the UNDT's award of compensation in lieu of rescission, the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety.

23. Mr. Bowen further requests that under Article 9(2) of the Statute of the Appeals Tribunal, costs be awarded to him for the exceptional delays incurred in concluding this case and the abuse of process by the Secretary-General in appealing the termination indemnity awarded by the Dispute Tribunal.

⁵ Former Administrative Tribunal Judgment No. 1008, *Loh* (2001).

⁶ *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

Considerations

24. The issues raised in the present appeal relate only to compensation. The rescission of the contested administrative decision to terminate Mr. Bowen's service, as decided by the UNDT, is not on appeal.

25. With respect to the first ground of appeal, both parties agree that the termination indemnity paid by the Administration upon Mr. Bowen's appointment being curtailed must, in addition to the payment effectuated in lieu of notice, be deducted from the compensation awarded to him as an alternative to rescission, under Article 10(5)(a) of the UNDT Statute. Therefore, acting upon the parties' will, this Tribunal partially modifies the Judgment under appeal.

26. The second and third grounds of appeal refer to the amount of compensation awarded for the negative consequences of the early termination of Mr. Bowen's appointment and the failure to follow the termination procedure. We share the Secretary-General's view and hold that considering the particular circumstances of this case and the jurisprudence of the Appeals Tribunal, the compensation awarded by the UNDT is excessive.

27. Despite the actual breach of Mr. Bowen's rights, resulting from the denial to provide him with the possibility to defend himself against the negative evaluation of his work, the long duration of the administrative and judicial proceedings, and the moral damages caused, the effects of the breach are not sufficient to warrant the level of compensation awarded by the UNDT.

28. While the termination of Mr. Bowen's contract was illegally rendered, it only affected the three remaining months of his one-year term. Moreover, a termination indemnity was paid by the Administration as a result of the early termination.

29. Mr. Bowen has not produced evidence of exceptional circumstances that would justify the award of compensation equivalent to the statutory maximum limit of two years' net base salary. Nevertheless, and contrary to the Secretary-General's submission, the sum of USD 20,000 does not represent the total amount of compensation requested by Mr. Bowen. This Tribunal therefore considers that in this case it is adequate to reduce the compensation of two years' net base salary awarded by the UNDT to six months' net base salary, at the rate and with the interest established by the trial court.

30. Furthermore, the outcome of the case leads this Tribunal to conclude that the appeal filed by the Secretary-General was not an abuse of process and Mr. Bowen's request for the award of costs must be rejected.

Judgment

31. The appeal is allowed in part.

32. The termination indemnity paid to Mr. Bowen, in addition to the payment effectuated in lieu of notice, should be deducted from the compensation awarded to him as an alternative to reinstatement.

33. The compensation awarded for the effects of the early termination is reduced from two years to six months' net base salary at the rate and with the interest established by the UNDT.

Original and authoritative version: English

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

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

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

(Signed)

Weicheng Lin, Registrar