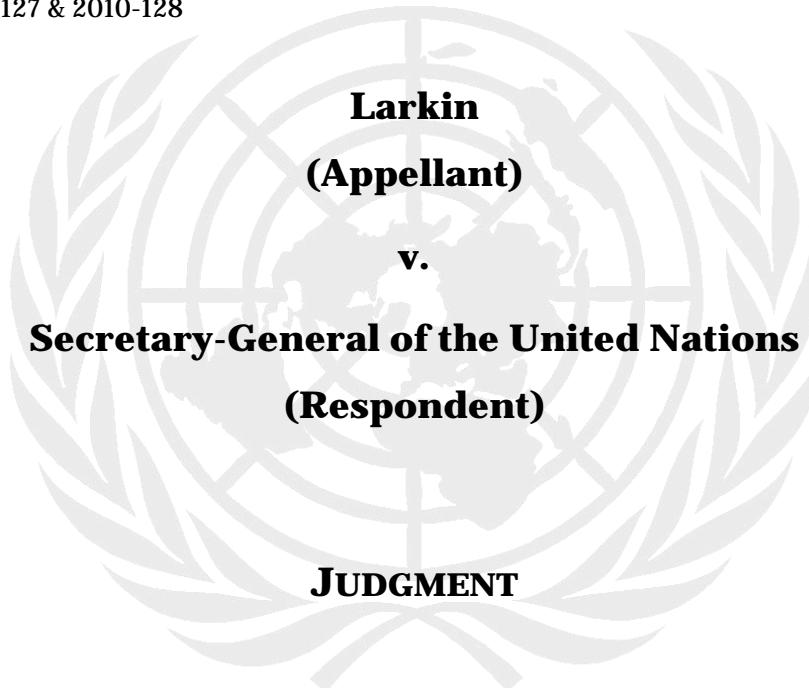




UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Case Nos. 2010-127 & 2010-128



Before: Judge Inés Weinberg de Roca, Presiding

Judge Kamaljit Singh Garewal

Judge Luis María Simón

Judgment No.: 2011-UNAT-134

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Stephanie Cartier/Wambui Mwangi

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) correctly ascertained that the failure by the Appointments, Posting and Promotions Committee (APPC), Office of the United Nations High Commissioner for Refugees (UNHCR), to share with Brian Larkin (Larkin) an inter-office memorandum prepared by his supervisor regarding the non-extension of his appointment did not affect in any way his legal situation.
2. This Court has repeatedly held that it is not sufficient for an appellant to state that he or she disagrees with the findings of fact or to repeat the arguments submitted before the UNDT. An appellant must identify the apparent error of fact in the judgment and the basis for contending that an error was made.¹ The appellant must satisfy this Tribunal that the UNDT's finding of fact was not supported by the evidence or that it was unreasonable.²
3. In *Rasul* and *Sefraoui*,³ this Tribunal held that the party in whose favour a case has been decided is not permitted to appeal against the judgment on legal or academic grounds. The same principle applies in this case.
4. The Dispute Tribunal has broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure and the weight to be attached to such evidence. This Tribunal is also mindful that the trial court hearing the case has an appreciation of all the issues to be determined as well as the evidence before it.⁴
5. The UNDT has discretion to determine the amount of damages awarded, taking into account the circumstances of the case. In light of the short duration of Larkin's service and the amount of compensation awarded by the Secretary-General, we do not find that the UNDT erred in the exercise of its discretion.

¹ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

² *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

³ *Rasul v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-077; *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048.

⁴ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

6. The UNDT ruled that the Administration had offered Larkin a reasonable chance to finalize the separation formalities during his last two months of service, as well as after his separation and that, having been in charge of this process in his office, he was fully aware of the procedures to follow in case of separation.

7. Larkin has not shown that the UNDT erred in its Judgments.

Facts and Procedure

8. Larkin joined the UNHCR Branch Office in London as a Finance Assistant at the G-6 level on a fixed-term appointment in September 2006. Larkin's appointment was extended twice. In April 2007, the APPC granted Larkin a six-month probationary appointment as Administrative and Financial Assistant. This appointment was extended once until 30 November 2007, after which date Larkin was separated from service.

Judgment No. UNDT/2010/108

i) Non-extension of Larkin's appointment

9. On 29 June 2007, the Office of Internal Oversight Services (OIOS) issued an audit report on "UNHCR Operations in the United Kingdom" which was critical of the internal control mechanisms in the area of administration and finance. According to Larkin, during a meeting of the UNHCR held in August 2007 at the Branch Office of London, the Representative and the Deputy Representative criticized the OIOS audit report while Larkin defended it.

10. On 5 October 2007, the Representative informed Larkin, via a memorandum, that he had approved a new fixed-term appointment from 1 October to 30 November 2007. This memorandum included a one-month notice that his appointment would not be extended. The memorandum also set out the concerns of the Representative regarding Larkin's performance. Larkin contends that the non-extension of his fixed-term appointment constituted a form of retaliation for his endorsement of the OIOS audit report.

11. On 28 November 2007, Larkin submitted a request for administrative review of the non-extension of his appointment. On 14 January 2008, he was informed that the non-extension of his appointment had been confirmed. On 13 March 2008, Larkin filed an appeal with the Joint Appeals Board (JAB) in Geneva. In its report, the JAB concluded that the reason given for Larkin's extension had not been duly established, and recommended an award of compensation of three months' net base salary at the rate in effect as of the date of the contested decision. By letter dated 6 May 2009, the Deputy Secretary-General accepted the JAB's findings and conclusions, and the recommended compensation was paid to Larkin.

12. On 8 September 2009, Larkin filed an application with the UNDT. On 16 October 2009, the Secretary-General filed his reply.

ii) Non-transmittal of an inter-office memorandum received by the APPC

13. On 12 October 2007, a confidential inter-office memorandum was sent by Larkin's supervisor to the APPC Secretary informing the APPC that she would not recommend the extension of Larkin's appointment. In the memorandum, she also explained that Larkin had been informed on 5 October 2007 of her decision not to extend his appointment. Moreover, the issuance of the additional two months' fixed-term contract was intended to give him sufficient notice and to allow him to comply with his outstanding responsibilities in relation to the conclusion of his performance appraisal report. The memorandum of 12 October 2007 included the 5 October 2007 memorandum to Larkin.

14. In September 2008, in the course of the exchanges with the JAB, the Secretary-General submitted a memorandum in which reference was made to the inter-office memorandum of 12 October 2007. Larkin subsequently informed the JAB that he had never seen that memorandum.

15. On 9 February 2009, Larkin requested administrative review of the non-transmittal by the APPC of the inter-office memorandum. On 7 April 2009, the Administrative Law Unit (ALU) informed Larkin that the request was not receivable because it did not challenge an administrative decision. On 12 May 2009, Larkin appealed to the JAB in Geneva. The appeal was not considered by the JAB before its

abolition on 30 June 2009, and was subsequently transferred to the Dispute Tribunal. On 31 August 2009, the Secretary-General filed his reply.

16. On 22 June 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/108, holding that the non-transmittal of the inter-office memorandum did not constitute an administrative decision and Larkin's claim on this matter was not receivable. The Dispute Tribunal further held that the decision not to extend Larkin's fixed-term appointment did not follow the established procedures and was not in conformity with Larkin's terms of appointment. However, the Dispute Tribunal did not find that Larkin had discharged his burden of showing that the non-renewal decision was based on improper motives or other extraneous factors. The Dispute Tribunal rescinded the non-extension decision, but held that the Secretary-General could opt, as an alternative to the rescission, to pay compensation of four months' net base salary at the rate in effect at the time the decision was made.

17. On 6 September 2010, Larkin appealed the UNDT Judgment. On 29 October 2010, the Secretary-General filed his answer.

Judgment No. UNDT/2010/109

18. Judgment No. UNDT/2010/109 consolidates two applications filed by Larkin, dated 6 October 2009 and 8 February 2010, respectively, both of which are related to the non-renewal of Larkin's appointment. Larkin alleged that UNHCR had failed to observe the applicable separation procedures, and that UNHCR had failed to pay all his annual leave days in commutation which he was entitled to.

19. From 23 to 28 November 2007, Larkin was on certified medical leave, but reported to the office to attend to several issues. On 29 November, he reported to work for the last time. On 30 November, UNHCR sent, and Larkin received, a memorandum of separation listing the separation formalities Larkin should undertake. Two weeks later, Larkin was paid 80 per cent of his November salary.

20. From December 2007 to March 2008, Larkin was repeatedly invited in writing to conclude his separation obligations to enable the settlement of his final emoluments. Larkin responded on three occasions expressing his concerns regarding the implementation of the relevant procedures, including the payment of his final

emoluments which should have included 80 per cent of his commuted annual leave. On 7 March 2008, UNHCR informed Larkin that as of 8 February 2008, the Administration had inter alia (a) archived and saved his emails and the contents of his personal hard drive; (b) replaced the office locks; (c) sent Larkin's personnel file and personal folder to the UNHCR Global Service Centre in Budapest; and (d) gathered Larkin's personal effects which would be destroyed by 31 March 2008 if not collected. On 2 May 2008, Larkin requested administrative review of the decision "to ignore the staff rules relating to separation from service" referring to inter alia the non-payment of 80 per cent of his accrued annual leave.

21. UNHCR processed Larkin's P.35 form (Personnel Payroll Clearance Action) and checklist, and they were received by the relevant budget office on 27 May 2008. Having ascertained and recorded that Larkin had accrued a balance of 36 days of annual leave, UNHCR paid Larkin 80 per cent of the accrued annual leave, which was received in Larkin's bank account on 19 June 2008. On 1 July 2008, the ALU informed Larkin that in light of the payment the request to review the decision to withhold monies from him was moot. On 28 October 2008, the payment of the balance of Larkin's final emoluments was effected.

22. On 8 September 2008, Larkin filed an appeal with the JAB in Geneva. On 27 May 2009, the JAB rejected Larkin's appeal, finding that he had been afforded "ample opportunity to attend the separation formalities", with the "Organization creat[ing] favourable conditions for him to do so". The JAB found that the lack of completion of the relevant procedures was "largely due to the lack of cooperation by [Larkin]" and therefore any "[l]oss, damage or inconvenience resulting from [Larkin's] own behaviour may not be attributable to the Organization". On 5 June 2009, Larkin was notified of the Deputy Secretary-General's endorsement of the recommendation. On 6 October 2009, Larkin filed an application with the UNDT against the decision by the Deputy Secretary-General in light of the JAB recommendation.

23. Regarding the issue of payment for accrued annual leave days in commutation, Larkin sought management evaluation on 29 September 2009 after having received his P.35 form in July 2009. On 5 January 2010, the Assistant High Commissioner for Refugees informed Larkin of the outcome of the management evaluation that his request for management evaluation was time-barred and thus not receivable.

24. On 8 February 2010, Larkin filed an application with the Dispute Tribunal. The UNDT concluded that the Administration had conducted his separation procedures in accordance with the applicable rules, and that his application relating to the commutation of Larkin's annual leave was time-barred. The UNDT found that in October 2008 Larkin had received his final emoluments regarding his accrued annual leave, and from that moment he knew the exact amount that he would be paid under this account. The UNDT therefore held that the relevant time limit to contest the amount of his final emoluments began to run from that day.

25. On 6 September 2010, Larkin appealed Judgment No. UNDT/2010/109. On 29 October 2010, the Secretary-General filed his answer.

26. Upon Larkin's request, the Appeals Tribunal held a hearing in his case on 1 July 2011 in Geneva, Switzerland. Both parties attended the hearing.

Submissions

Judgment No. UNDT/2010/108

Larkin's Appeal

27. Larkin submits that the UNDT erred by holding that the non-transmittal by the APPC of an inter-office memorandum did not constitute an administrative decision subject to review by the UNDT. Larkin further submits that the UNDT's Registry committed procedural errors. In addition, Larkin contests the UNDT's findings of fact, and submits that the UNDT should have concluded that extraneous factors prompted the decision not to extend his fixed-term appointment. Finally, Larkin asserts that the amount of compensation awarded to him by the UNDT was insufficient.

Secretary-General's Answer

28. The Secretary-General submits that the UNDT correctly concluded that there was no obligation for the APPC to transmit an inter-office memorandum to Larkin and such non-transmittal did not constitute an administrative decision. The Secretary-General also submits that Larkin has not established any factors warranting an increase of the compensation ordered by the UNDT. Larkin's requests for the production of new

documents in his appeal form and in his appeal are not in accordance with the Statute of the Appeals Tribunal. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Judgment No. UNDT/2010/109

Larkin's Appeal

29. Larkin seeks the reversal of the UNDT's finding that the decision related to the commutation of his accrued annual leave was time-barred, and requests that the Appeals Tribunal find instead that the Secretary-General "colluded in the theft of [Larkin's] salary". Secondly, Larkin requests the reversal of the UNDT's conclusions regarding the conduct of the separation proceedings whereby it held that Larkin could have met the separation requirements and was "partly to blame for the retaliatory measures directed at him". In addition, Larkin alleges a number of procedural errors committed by the UNDT. Larkin further alleges several errors, including the UNDT's failure to hear the testimony of his former supervisor, the "conflict of interest" on the part of the Office of Staff Legal Assistance (OSLA), and the failure of the UNDT Registry to provide him with the Secretary-General's 18 March 2010 reply to his submissions.

Secretary-General's Answer

30. The Secretary-General submits that the UNDT correctly concluded that the Organization's conduct of the separation formalities was in accordance with the rules. The Secretary-General submits that the UNDT correctly determined that the application related to the commutation of Larkin's accrued annual leave days was time-barred. The Secretary-General further submits that Larkin has failed to establish any procedural errors committed by the UNDT such as to affect the decision of the case. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

31. The appeals against UNDT Judgment No. UNDT/2010/108 and No. UNDT/2010/109 will be considered jointly in this Judgment.

32. This Tribunal readily dismisses Larkin's submission that the UNDT erred by holding that the non-transmittal by the APPC of an inter-office memorandum did not constitute an administrative decision subject to review by the UNDT. The UNDT correctly ascertained that the omission by the APPC to share with Larkin the memorandum of 12 October 2007 did not affect in any way his legal situation because, at the time, he had already been notified of the non-renewal decision. The inter-office memorandum therefore had no impact on his case.

33. Further, this Tribunal rejects Larkin's contention that the UNDT committed errors of fact and that it erred by not concluding that extraneous factors prompted the decision not to extend his fixed-term appointment. This Court has repeatedly held that it is not sufficient for an appellant to state that he or she disagrees with the findings of fact or to repeat the arguments submitted before the UNDT. An appellant must identify the apparent error of fact in the judgment and the basis for contending that an error was made.⁵ The appellant must satisfy this Tribunal that the UNDT's finding of fact was not supported by the evidence or that it was unreasonable.⁶ Larkin does not demonstrate this.

34. Furthermore, since the UNDT rescinded the decision not to renew his appointment, an alleged error, even if proven, would not have an impact on the outcome of the case. In *Rasul* and *Sefraoui*,⁷ this Tribunal held that the party in whose favour a case has been decided is not permitted to appeal against the judgment on legal or academic grounds. The same principle applies in this case.

35. This Tribunal now turns to consider Larkin's contention that the non-extension of his fixed-term appointment constituted a form of retaliation for his endorsement of the OIOS audit report. Under Article 2 of the UNDT Statute, the UNDT has no jurisdiction to conduct investigations into retaliation complaints. However, for the purpose of determining if an impugned administrative decision was improperly motivated, it is within the competence of the UNDT to examine such allegations. But such examination

⁵ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

⁶ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

⁷ *Rasul v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-077; *Sefraoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-048.

is judicial in nature and does not constitute a *de novo* investigation into a complaint of retaliation.

36. In Judgment No. UNDT/2010/108 the UNDT accepted the procedural flaws and ruled that the decision not to renew Larkin's fixed-term appointment was not in conformity with his terms of appointment. It therefore rescinded the decision.

37. In addition, Larkin alleges several errors, including the failure to hear the testimony of his former supervisor, the "conflict of interest" on the part of OSLA resulting in ineffective legal assistance, and the failure of the UNDT Registry to provide him with the Secretary-General's 18 March 2010 reply to his submissions.

38. The Dispute Tribunal has broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure and the weight to be attached to such evidence. This Tribunal is also mindful that the trial court hearing the case has an appreciation of all the issues for determination and the evidence before it.⁸ In the present case, Larkin has not demonstrated that the UNDT erred in not requiring his former supervisor to provide oral testimony to the UNDT.

39. The Appeals Tribunal has taken note of Larkin's claim against OSLA. It will consider and dispose of it in a separate judgment.

40. Finally, Larkin asserts that the amount of compensation awarded to him by the UNDT was insufficient.

41. The Statutes of the Dispute Tribunal and the Appeals Tribunal provide that compensation shall normally not exceed the equivalent of two years' net base salary of an applicant.

42. The UNDT has discretion to determine the amount of damages awarded taking into account the circumstances of the case. In light of the short duration of Larkin's service and the amount of compensation awarded by the Secretary-General on the basis of the JAB's recommendation, we do not find that the UNDT erred in the exercise of its discretion.

⁸ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

43. Larkin seeks the reversal of the UNDT's finding that the decision related to the commutation of his accrued annual leave days was time-barred and requests that the Appeals Tribunal find instead that the Secretary-General "colluded in the theft of [Larkin's] salary".

44. The UNDT decided that, under Staff Rule 111.2(a) in force at the time, Larkin had two months to request the review of the decision regarding the balance of his leave. He received his final emoluments regarding his accrued annual leave days in October 2008, but did not file a request for review of the concerned decision until 29 September 2009 and was therefore time-barred. Larkin has not shown that the UNDT committed any error of law. Moreover, during the hearing held on 1 July 2011 before this Court, Larkin admitted to having challenged, by telephone, the calculation of his days of leave when receiving his attendance record upon separation.

45. The UNDT ruled that the Administration offered Larkin a reasonable chance to finalize the separation formalities during his last two months of service, as well as after his separation and that, having been in charge of this process in the office, he was fully aware of the procedures to follow in case of separation.

46. Larkin has not shown that the UNDT erred in its Judgments.

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2011-UNAT-134

Judgment

47. Larkin's appeals are dismissed in their entirety.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

(Signed)

(Signed)

Judge Weinberg de Roca,
Presiding

Judge Garewal

Judge Simón

Entered in the Register on this 29th of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar