



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

Case No. 2011-196



**Harding
(Respondent/Applicant)**

v.

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

JUDGMENT

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| Before: | Judge Luis María Simón, Presiding Judge Sophia Adinyira Judge Kamaljit Singh Garewal |
| Judgment No.: | 2011-UNAT-188 |
| Date: | 21 October 2011 |
| Registrar: | Weicheng Lin |

Counsel for Respondent/Applicant: Not represented

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. The discussion in this case was about the amount of compensation awarded by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal). This Tribunal considered that the total of two and a half years' net base salary was an adequate compensation for *all of the claims* submitted by Ms. Harding, taking into account all the negative consequences that the unlawful summary dismissal and the non-reinstatement had on her situation: alternative to non-reinstatement, violation of due process rights and emotional distress, shame and humiliation. Hence, we reduce the compensation awarded by the UNDT to the amount already awarded by the Secretary-General. Ms. Harding's particular circumstances did not constitute an exceptional case that would merit the excessive compensation awarded by the UNDT.

Facts and Procedure

2. Ms. Harding joined the Organization in April 1991 as a Secretary at the GL-4/1 level. From December 2004 through 31 March 2005, Ms. Harding went on mission to Harper, Liberia, where she served on a special post allowance (SPA) at the P-2 level. At the time of the administrative decision to summarily dismiss her, she was employed as a Programme Assistant on a fixed-term contract at the GL-6 level with the Office of the United Nations High Commissioner for Refugees (UNHCR) in Freetown, Sierra Leone.

3. On 11 April 2005, Ms. Harding was charged with serious misconduct for allegedly submitting fraudulent medical insurance claims for reimbursement. On 8 June 2005, she was informed of the decision to summarily dismiss her. On 1 August 2005, she requested review of the decision by the Joint Disciplinary Committee (JDC). In its report dated 13 July 2007, the JDC found that the decision was flawed by factual errors and violations of Ms. Harding's due process rights and recommended the rescission of the summary dismissal. The JDC further recommended that Ms. Harding be reinstated and be paid compensation in the amount of six months' net base salary.

4. On 17 October 2007, the United Nations High Commissioner for Refugees (High Commissioner) informed Ms. Harding that he accepted the findings of the JDC. As it was not possible to reinstate her, the High Commissioner informed her that she

would be paid two years' net base salary as compensation in lieu of reinstatement, in addition to six months' net base salary for the violation of her due process rights. The amount of two and a half years' net base salary was subsequently paid to Ms. Harding on or around 18 February 2008.

5. On 2 July 2008, Ms. Harding filed an application with the former Administrative Tribunal. Her application was not heard before the abolition of the former Administrative Tribunal and was subsequently transferred to the UNDT in Nairobi.

6. On 20 January 2011, the UNDT rendered Judgment No. UNDT/2011/017 disposing of Ms. Harding's application. Noting that the Secretary-General accepted that the summary dismissal was flawed, the UNDT expressly limited itself to the issue of compensation and other entitlements due to the plaintiff.

7. The UNDT found that the payment of a sum equivalent to two years' net base salary to the claimant in the circumstances was sufficient compensation for non-reinstatement. It further found that the payment of a sum equivalent to six months' salary to Ms. Harding was sufficient compensation for a breach of her due process rights.

8. The UNDT, however, found that in addition to the two and a half years' net base salary, the Secretary-General should pay the equivalent of six months' salary to Ms. Harding as compensation for emotional distress, shame and humiliation which the UNDT found she suffered as a result of her wrongful dismissal on the erroneous ground of fraudulent medical claims.

9. Further, having rescinded Ms. Harding's dismissal, the UNDT found that Ms. Harding was deemed to still be in the employment of the Secretary-General up until 1 December 2010, the date on which the UNDT Judgment was orally delivered. It ordered that the Secretary-General pay all salaries and entitlements due to her under the terms of her employment as a Programme Assistant from 8 June 2005, when she was wrongfully summarily dismissed, to 1 December 2010, with interest at the US Prime Rate applicable on the date the Judgment was rendered orally.

10. The UNDT also ordered that the SPA, to which Ms. Harding was entitled on account of her four-month mission to Liberia from 1 December 2004 to 31 March 2005, be paid to her with interest at the above US Prime Rate.

11. The Secretary-General appeals the UNDT Judgment.

Submissions

Secretary-General's Appeal

12. The Secretary-General submits that the UNDT exceeded its jurisdiction or competence and erred in law by finding that Ms. Harding was entitled to reinstatement and compensation totaling eight years and six months' net base salary. The Secretary-General does not appeal the order for the payment of SPA.

13. The Secretary-General submits that the UNDT erred in law in awarding compensation exceeding two years' net base salary, without stating the reasons, facts or law justifying such an award.

14. The Secretary-General further submits that the UNDT exceeded its competence and erred in law in awarding compensation for the non-material harm stemming from Ms. Harding's due process rights violations, when Ms. Harding had already received compensation on this ground.

15. Finally, the Secretary-General submits that the UNDT exceeded its competence and erred in law in ordering him to both rescind the summary dismissal and to pay compensation which was set as an alternative to rescission.

16. The Secretary-General requests the Appeals Tribunal to adjust the amount of compensation awarded by the UNDT, by confirming that the amount of two years and six months' net base salary already paid to Ms. Harding constitutes sufficient compensation for her wrongful dismissal.

Ms. Harding's Answer

17. Ms. Harding submits that the UNDT has not exceeded its jurisdiction or erred in law in rendering the impugned Judgment.

Considerations

18. Article 10(5) of the UNDT Statute reads as follows:

As part of its judgement, 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 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.

19. It follows, from Article 10(5)(a) of the UNDT Statute, that the UNDT did not err when it ordered the rescission of the summary dismissal (previously recommended by the JDC and accepted by the High Commissioner) and also set an amount of compensation that the Secretary-General could elect to pay in lieu of the rescission of the summary dismissal. A separate issue arising from that conclusion is to determine whether or not that compensation was adequately graduated and motivated.

20. The compensation as an alternative to non-reinstatement paid to Ms. Harding before the trial took place was considered sufficient by the UNDT, but the UNDT also awarded her *other* compensations, which we read as based on Article 10(5)(b) of the UNDT Statute.

21. This Tribunal finds excessive the compensation awarded to Ms. Harding for the loss of salaries and other entitlements from the date of her dismissal (8 June 2005) to the date of the UNDT Judgment (1 December 2010) with interest. From our point of view and as we held in *Cohen*,

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.¹

22. It must be taken into account that Ms. Harding received compensation as an alternative to non-reinstatement (two years' net base salary) plus compensation for the breach of her rights (six months' net base salary) *on or around 18 February 2008*. Consequently, we cannot consider loss of earnings as an actual harm *after that date*, when the non-reinstatement was known to the claimant and the offered compensation caused by that circumstance had already been paid.

23. Seeing that six months' net base salary was added as compensation for the breach of her due process rights, we consider that the total of two and a half years' net base salary constitutes adequate compensation for *all of the claims* submitted by Ms. Harding, taking into account all the negative consequences that the unlawful summary dismissal and the non-reinstatement had on her situation: alternative to non-reinstatement, violation of due process rights and emotional distress, shame and humiliation. Hence, we reduce the compensation awarded by the UNDT to the amount already awarded by the Secretary-General. Ms. Harding's particular circumstances did not constitute an exceptional case that would merit the excessive compensation awarded by the UNDT.

¹ *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131.

Judgment

24. The appeal is upheld. We reduce Ms. Harding's compensation to a total of two years and six months' net base salary, plus the special post allowance which has not been appealed.

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