



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

Case No. 2011-282

**Seddik Ben Omar
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Luis María Simón Judge Inés Weinberg de Roca
Judgment No.:	2012-UNAT-264
Date:	1 November 2012
Registrar:	Weicheng Lin

Counsel for Appellant: François Lorient

Counsel for Respondent: John Stompor

JUDGE RICHARD LUSSICK, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Mohammed Seddik Ben Omar against Judgment No. UNDT/2011/182, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 26 October 2011. Mr. Seddik Ben Omar appealed on 12 December 2011, and the Secretary-General filed his answer on 30 January 2012.

Synopsis

2. Mr. Seddik Ben Omar appeals the UNDT Judgment that there was not sufficient evidence to warrant compensation for emotional distress. The Appeals Tribunal dismisses the appeal and affirms the Judgment of the UNDT. Further, Mr. Seddik Ben Omar's claims for accountability under Article 9(5) of the Statute of the Appeals Tribunal (Statute) and for an award of costs under Article 9(2) of the Statute are rejected.

Facts and Procedure

3. Mr. Seddik Ben Omar joined the United Nations Assistance Mission for Iraq (UNAMI) in October 2003 as a Political Affairs Officer at the P-4 level. His fixed-term contract was renewed several times until 12 March 2005.

4. Approximately five months after the expiration of his contract, Mr. Seddik Ben Omar made a series of serious allegations concerning the conduct of the Special Representative of the Secretary-General for Iraq (SRSG). Subsequently, an investigation into the 13 allegations against the SRSG made by the Appellant, as well as three complaints from other sources, was initiated by the Office of Internal Oversight Services (OIOS).

5. In its report, OIOS found that two of Mr. Seddik Ben Omar's allegations were substantiated; the SRSG subsequently reimbursed the Organization sums for personal telephone bills, food and beverages that he could not justify. The rest of the allegations were either refuted or were found to have insufficient evidence to support them. Further, OIOS observed that Mr. Seddik Ben Omar was imprecise and vague when providing information and noted that his carelessness raised questions about the bases for his complaints.

6. In a letter dated 13 July 2006, the Officer-in-Charge of the Office of Human Resources Management (OHRM) notified Mr. Seddik Ben Omar of the OIOS findings and informed him that a Note would be placed in his Official Status File (OSF), stating that he should not be employed by the Organization in the future.

7. Neither the letter from OHRM nor the Note mentioned the right to comment on or rebut the contents of the Note, but Mr. Seddik Ben Omar submitted a request to the Joint Appeals Board (JAB) on 14 July 2006 for suspension of the placement of the Note in his file. His request was rejected, as the Note had already been placed in his OSF.

8. On 18 October 2006, following an unsuccessful administrative review, the Appellant filed a statement of appeal with the JAB, challenging the decisions not to renew his fixed-term appointment, to deny him payment of his salary and entitlements, and to place the Note on his OSF, and claiming loss of employment opportunities and defamation. The JAB rejected his claims except that related to the Note. It found that not having been given the opportunity to rebut and respond to the allegations against him constituted a violation of Mr. Seddik Ben Omar's rights.

9. On 31 August 2007, the Secretary-General ordered the release of the OIOS report and gave the Appellant the opportunity to comment on its merits. Instead of providing comments, however, Mr. Seddik Ben Omar appealed to the former United Nations Administrative Tribunal on 28 January 2008, reiterating the requests he made before the JAB. The case was transferred on 17 March 2010 to the Dispute Tribunal upon the abolition of the former Administrative Tribunal.

10. The UNDT issued Judgment No. UNDT/2011/182 on 26 October 2011. The Dispute Tribunal found that the placement of the Note in the OSF was unlawful and ordered its removal. Mr. Seddik Ben Omar was awarded six months' net base salary as compensation for the prejudice to him caused by the placement of the Note. As he had not produced sufficient evidence of distress linked specifically to the placement of the Note, his request for compensation for emotional distress was rejected. The Dispute Tribunal also dismissed his claims regarding the non-renewal of his appointment and the non-payment of salary and other entitlements.

11. On 12 December 2011, Mr. Seddik Ben Omar appealed the UNDT Judgment. On 14 March 2012, he filed a motion for leave to file additional pleadings and adduce evidence. By Order No. 86 (2012),¹ the Appeals Tribunal denied his application as his motion did not demonstrate any exceptional circumstances.

Submissions

Mr. Seddik Ben Omar's Appeal

12. Mr. Seddik Ben Omar submits that the UNDT committed an error of procedure in refusing to hear evidence about his emotional distress related to the placement of the Note in his OSF and his efforts to seek employment after 18 August 2006. The Appellant contends that, pursuant to the joint agreement and Order No. 90 (NY/2011)² rendered in his case, the UNDT Judge had the obligation to invite the Appellant to adduce evidence if such evidence was necessary.

13. Mr. Seddik Ben Omar submits that the handling of his case by three different judges before the Dispute Tribunal resulted in a misperception of his distress. He notes in this regard that the UNDT Judge who rendered the Judgment did not take into consideration the hearing held before another UNDT Judge. He contends that he mentioned during the hearing his efforts to find employment outside the United Nations after 2006.

14. The Appellant accordingly requests the Appeals Tribunal to order “a UNAT hearing of the Appellant and of his witnesses” on the issue of his “extreme distress and anxiety”. Alternatively, he requests that the case be remanded to the UNDT and that he be granted three months’ net base salary as compensation for the inconvenience caused by such remand.

15. The Appellant requests two years’ net base salary as compensation for the loss of employment, moral suffering and physical distress caused by the placement of the Note in his OSF, which constituted unfair punishment and an abusive disciplinary measure.

16. The Appellant also requests that the case be referred to the Secretary-General to enforce accountability proceedings under Article 10(8) of the Statute of the Dispute Tribunal against the officials responsible for inserting the false, adverse and damaging material in his

¹ *Ben Omar v. Secretary-General of United Nations*, Appeals Tribunal Order No. 86 (2012), 29 March 2012.

² *Ben Omar v. Secretary-General of United Nations*, Order No. 90 (NY/2011), 16 March 2011.

OSF. He further requests that he be awarded 20,000 US dollars in costs against the Respondent for his protracted and frivolous proceedings.

Secretary-General's Answer

17. The Secretary-General submits that the Appellant has not established that the Dispute Tribunal made any errors of procedure warranting a remand of the case. He contends that the Dispute Tribunal has broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure.

18. The Secretary-General contends that Mr. Seddik Ben Omar, contrary to his allegation, gave no oral testimony related to his distress and employment loss during the hearing on 28 September 2010.³ He also notes, on the one hand, that UNDT Order No. 90 never guaranteed that the Appellant would be invited to make further submissions on remedies and, on the other hand, that UNDT Order No. 111 (NY/2011),⁴ issued in this case, informed the Appellant that it was his responsibility to seek leave to submit any additional evidence.

19. The Secretary-General contends that the additional evidence relied upon by the Appellant is not admissible under Article 2(5) of the Statute of the Appeals Tribunal as it was known to him at the time of the hearing before the Dispute Tribunal and should have been disclosed before the Dispute Tribunal.

20. The Secretary-General submits that there is no evidence that the case is appropriate for referral to enforce accountability under Article 9(5) of the Statute. He further submits that the Appellant has not established a case for the award of costs under Article 9(2) of the Statute.

Considerations

21. As a preliminary matter, the Appeals Tribunal rejects the Appellant's request for an oral hearing. The factual and legal issues have already been clearly defined by the parties and no further submissions are necessary.

³ *Ben Omar v. Secretary-General of United Nations*, Order No. 257 (NY/2010), 28 September 2010.

⁴ *Ben Omar v. Secretary-General of United Nations*, Order No. 111 (NY/2011), 14 April 2011.

22. Judge Shaw found that the Applicant had not produced sufficient evidence of distress linked specifically to the placement of the Note to warrant compensation for emotional distress, despite having been granted sufficient time, including being granted extensions to comply with orders, to have provided statements and/or evidence of such distress.

23. The Appellant claims that the UNDT erred in this finding. He submits that his “deposition on his distress and employment losses described before Hon. Kaman at the 28 September 2010 hearing appear[s] nowhere in the judgment”. Judge Kaman’s Order No. 257 recites that a case management discussion was held in which both counsel and Mr. Seddik Ben Omar participated. However, Judge Kaman makes no mention of any claim for compensation relating to distress, nor was such a claim mentioned as one of the agreed issues to be determined. In fact, the word “distress” does not appear anywhere in that Order.

24. The Appellant, referring to Judge Shaw’s finding that there was no evidence that he attempted to gain employment in any outside field, alleges that, at the 28 September 2010 hearing before Judge Kaman, he had “already made some reference to his efforts to gain employment outside the UN, after 2006”, but that no mention of this appears in Judge Shaw’s reasoning. Again, the Appeals Tribunal observes that Judge Kaman’s Order makes no mention of any efforts by Mr. Seddik Ben Omar to obtain employment.

25. The Appellant claims that evidence of his employment efforts was scheduled to be submitted as a second step under Order No. 90 “after the trial judge would have ruled on the merit of the Appellant’s legal claims”. The Appeals Tribunal finds that there is no merit in this claim. Order No. 90 granted the parties one further opportunity to make submissions, not to adduce further evidence. The Order made it clear that no new information was to be introduced without leave of the Dispute Tribunal.

26. In Order No. 111, Judge Kaman allowed certain emails to be put into evidence but ruled that “[n]o further submissions or evidence shall be accepted by either party without the prior leave of the Tribunal having been sought and granted”.

27. There is no record of the Appellant ever seeking or being granted leave to submit further submissions or evidence prior to the UNDT decision under appeal. Consequently, the Appellant has failed to establish that Judge Shaw erred in finding that the Appellant had not produced sufficient evidence of distress linked specifically to the placement of the Note to

warrant compensation for emotional distress. Moreover, the evidence contemplated by the Appellant would not be admissible as it was known to the Appellant and should have been presented at the level of the Dispute Tribunal pursuant to Article 2(5) of the Statute.

28. The Appellant seeks an order from the Appeals Tribunal referring the case to the Secretary-General for action to enforce accountability. The Appellant had ceased to be a staff member when he made 13 serious allegations concerning the conduct of the SRSG for Iraq. Two of these allegations were found to be substantiated and the rest were either refuted or were not proved. In the process, OIOS observed that Mr. Seddik Ben Omar's information was vague and imprecise and that his carelessness raised questions about the bases for his complaints. This report led to the placement in the Appellant's OSF of the Note in question. The Appellant was informed of this procedure by the Officer-in-Charge of OHRM. The Appellant appealed to the JAB, which rejected his claim for compensation but found that the retention of the Note on his file without an opportunity to respond would be a violation of his rights. The Secretary-General consequently decided to give the Appellant the opportunity of commenting on the OIOS report so that such comments could be placed on his OSF. The Appellant did not provide any comments but, instead, appealed to the former United Nations Administrative Tribunal. Considering that at the time of the placement of the Note in the Appellant's file he was not even a staff member of the United Nations, and also considering the subsequent action by the Secretary-General to allow the Appellant the opportunity of place his comments in his file, there are no circumstances, in the Appeals Tribunal's view, which would warrant calling on any official to account for his or her actions under Article 9(5) of the Statute.

29. With regard to the Appellant's application for costs, under Article 9(2) of the Statute costs can be awarded against a party who has manifestly abused the appeals process. There is no evidence before the Appeals Tribunal which would permit a finding that the Respondent has been guilty of such conduct.

30. For the above reasons, the Appeals Tribunal finds that the Appellant has failed to establish that the UNDT erred in finding that there was insufficient evidence of emotional distress. The Appeals Tribunal further finds that the Appellant has not made out a case for referral for accountability, nor for an order for costs. Accordingly, the Judgment of the UNDT is affirmed.

Judgment

31. The appeal is dismissed and the Judgment of the Dispute Tribunal is affirmed.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Simón

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar