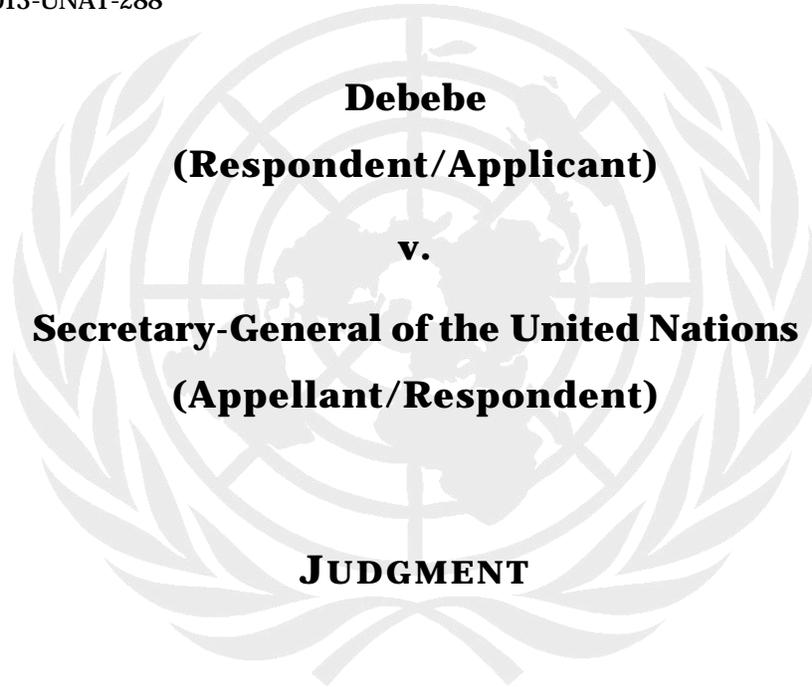




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-288



**Debebe
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Richard Lussick

Case No.: 2012-315

Date: 28 March 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Miles Hastie

Counsel for Appellant/Respondent: Rupa Mitra

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/019, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 10 February 2012 in the case of *Debebe v. Secretary-General of the United Nations*.

Facts and Procedure

2. Mr. Fasil Debebe joined the Economic Commission for Africa (ECA) in Addis Ababa as a Finance Assistant at the G-7 level in 1981. Between 1991 and 1998, he sat for the “G to P” examination on eight occasions, but did not pass. In December 2002, Mr. Debebe was transferred to the United Nations Health Care Centre (UNHCC), ECA, still as a G-7 Finance Assistant.

3. In July 2003, UNHCC approved the creation of a project personnel position of Administrative/Finance Officer at the L-1 level. In August 2003, UNHCC requested that Mr. Debebe’s G-7 post be reclassified to the L-1 level.

4. In May 2004, ECA’s Human Resources Services Section (HRSS) advised UNHCC that Mr. Debebe’s post had been reclassified to the L-1 level. On 31 May 2004, UNHCC wrote to HRSS asking about the effective dates of staff promotions as a result of the reclassification, but did not receive a reply. In July 2004, UNHCC requested a special post allowance (SPA) for Mr. Debebe, pending finalization of his promotion to the L-1 level, but again did not receive a reply. UNHCC’s follow-up inquiry met with silence.

5. On 3 June 2005, the Officer-in-Charge of UNHCC contacted the Office of Human Resources Management (OHRM) in New York on the matter. On 16 September 2005, OHRM responded, rejecting UNHCC’s SPA request and clarifying that SPA could only be granted for a “P”, and not “L”, post. OHRM also advised that the L-1 post in question had not yet been approved or created under UNHCC’s accounts and, if such a post were to be created, it would have to be circulated in Galaxy. Mr. Debebe could then apply, but must first resign from his G-7 post.

6. Mr. Debebe appealed by first writing to the Secretary-General requesting administrative review and then seizing the Joint Appeals Board (JAB). In a report dated 17 May 2007, the JAB concluded that Mr. Debebe had a reasonable expectation of promotion and that the L-1 post had been created in place of his G-7 post, resulting in Mr. Debebe performing the L-1 functions from the time of reclassification. The JAB recommended that Mr. Debebe be promoted to the L-1 level against his own reclassified post, and that he be paid the difference between his G-7 salary and the L-1 salary from May 2004, when the post was first reclassified, until his promotion.

7. In August 2007, Mr. Debebe was informed of the Secretary-General's decision in light of the JAB recommendations. The Secretary-General agreed that Mr. Debebe had a reasonable expectation of promotion and that he should be remunerated at the level of work that he performed, but did not agree that the tardy manner in which the Administration had reacted to ECA's improper practice justified a promotion for Mr. Debebe as to do so would violate the existing rules and policies. The Secretary-General decided to pay Mr. Debebe the equivalent of an SPA to the L-1 level from May 2004 for the duration of time in which he performed at the L-1 level.

8. Mr. Debebe appealed the decision not to promote him to the L-1 level to the former Administrative Tribunal, and his case was subsequently transferred to the Dispute Tribunal.

9. In Judgment No. UNDT/2012/019, the Dispute Tribunal rejected Mr. Debebe's request for promotion to the L-1 level, as he had not undergone competitive selection and the language in the resolutions of the General Assembly was clear in permitting staff movement from the General Service category to the Professional category, but not to the "L" category. However, the Dispute Tribunal concluded that the Secretary-General's acceptance of errors on the part of the ECA Administration in connection with reclassification, his acknowledgement of the delay in providing clarifications, and his payment of SPA did not "go far enough" as compensation for "the distress caused ... by the Respondent's admitted incompetence which created a legitimate expectation of promotion in [Mr. Debebe's] mind". The Dispute Tribunal ordered that Mr. Debebe be awarded four months' net base salary for such distress.

10. The Secretary-General appealed to this Tribunal on 10 April 2012, and Mr. Debebe answered on 29 May 2012. On 5 October 2012, Mr. Debebe filed a motion to submit additional authorities in the form of Appeals Tribunal Judgment No. 2012-UNAT-238 (*Massabni v. Secretary-General of the United Nations*), which was issued on 12 September 2012. The Secretary-General having expressed no objection, the Appeals Tribunal granted Mr. Debebe's motion in Order No. 116 of 21 November 2012 and also allowed the Secretary-General to file an additional submission, which he did on 10 December 2012.

Submissions

Secretary-General's Appeal

11. The Secretary-General clarifies that he does not challenge the UNDT's conclusion that Mr. Debebe has no right to be promoted and that, in any event, the UNDT lacked jurisdiction to order such promotion. In the present appeal, he only challenges the UNDT's award of four months' salary as compensation for distress.

12. The Secretary-General submits that the UNDT erred in law and exceeded its competence by awarding compensation for distress, when Mr. Debebe had neither claimed that he had suffered distress nor requested compensation for such distress. The Secretary-General notes that in his submissions to the JAB, the former Administrative Tribunal and the UNDT, Mr. Debebe only claimed that he had suffered pecuniary damages.

13. The Secretary-General also submits that the UNDT's approach is contrary to the jurisprudence of the Appeals Tribunal, which emphasizes the need for evidence of distress before compensation can be awarded. The UNDT appeared to have taken the words and tone of Mr. Debebe's pleadings as evidence of distress. In this connection, the Secretary-General notes that no oral hearing was held and no sworn testimony or medical certificate was adduced to substantiate the non-pecuniary damages. The UNDT's award of four months' salary was based on speculation and should therefore be vacated.

Mr. Debebe's Answer

14. Mr. Debebe submits that the Secretary-General has failed to demonstrate an error in principle or a manifestly unreasonable decision, or to adduce evidence showing that the UNDT's

factual findings were incorrect or prejudicial. Consequently, deference should be accorded to the UNDT's factual findings in respect of determination of distress or non-pecuniary damages.

15. Mr. Debebe submits that, contrary to the Secretary-General's assertions, he did claim non-pecuniary damages as a result of breach of his rights during his appeals. For instance, he claimed before the JAB two years' net base salary at the L-1 level in addition to an SPA. This could only have been a claim for non-pecuniary damages.

16. Mr. Debebe further submits that a failure of the UNDT to directly cite submissions does not constitute reversible error. In his view, the UNDT is not required to employ identical terminology to that appearing in submissions or evidence.

17. Mr. Debebe avers that the UNDT is entitled to consider claims for non-pecuniary damages in light of all the alleged circumstances of the case and draw appropriate inferences therefrom. In his view, neither the UNDT nor the Appeals Tribunal has ever held that an oral hearing or sworn testimony is required for non-pecuniary damages to be granted.

18. Mr. Debebe maintains that if the Administration had entertained doubt about the credibility of his claims for distress, it should have sought to test it at the UNDT level. That was not the case. The Secretary-General is raising this matter as an issue for the first time on appeal.

Considerations

19. This Tribunal holds that the UNDT erred in law and exceeded its competence by awarding compensation for distress without a previous claim for such damage and compensation.

20. In his submissions to the JAB, the former Administrative Tribunal and the UNDT, Mr. Debebe only claimed that he had suffered pecuniary damages. The specific requests that he made were related to pecuniary consequences of the alleged illegality: rescission of the contested decision not to promote him; payment of an SPA; "two years' net base salary at the L1 level as compensation for damages suffered as a result of the improper, or lack of action by ECA which deprived him of his right to proper remuneration for having performed higher level functions".¹

¹ Relief sought before the JAB, as quoted by Mr. Debebe in his answer.

21. Despite the fact that the staff member's submissions contained some references to unfair treatment, disturbing factors, discrimination and others that could have been interpreted as indicators of moral damage, at the time of expressing his concrete pleas, Mr. Debebe restricted his claim to material or pecuniary damages related solely to remuneration. Thus, the relief sought was in fact limited to the economic consequences of the Administration's wrongdoing, without a specific claim for moral damages. Any other way of reading Mr. Debebe's submissions would prejudice due process of law, affecting the ability of the opposing party to effectively answer his petition that vaguely referred to symptoms of moral injury, but failed to explicitly refer to that kind of damage or request adequate compensation for it. In the view of this Tribunal, a court may not award compensation for distress without a party having first requested it.

22. Therefore, in the present case, the UNDT did not have jurisdiction to award compensation for moral damage "for distress" in the sum of four months' net base salary at the L-1 level. Part of the UNDT Judgment is hereby vacated for the above-mentioned reasons.

Judgment

23. The appeal is allowed and the UNDT Judgment is vacated to the extent that it awards compensation for moral damages.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Lussick

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar