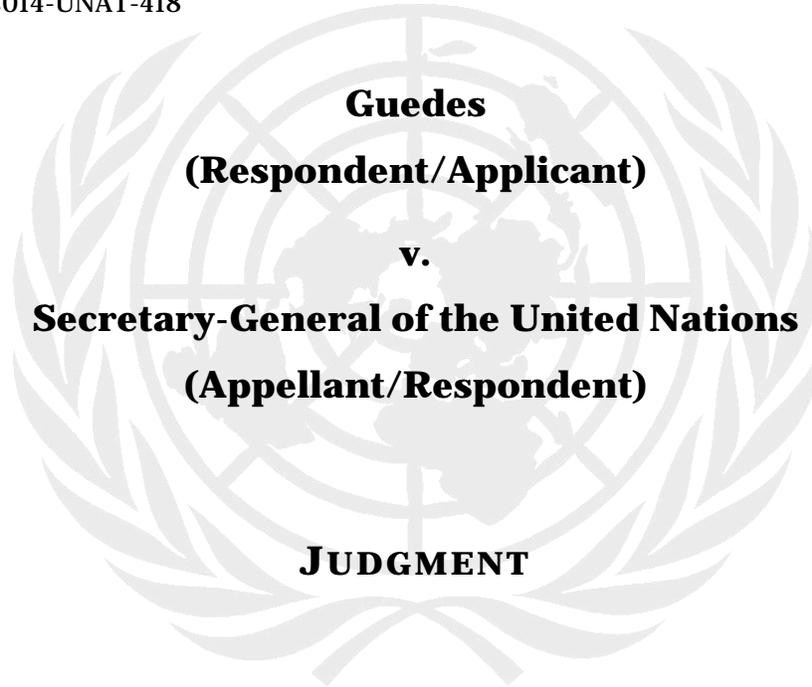




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-418



**Guedes
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Luis María Simón
Judge Richard Lussick

Case No.: 2013-470

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Jeffrey C. Dahl

Counsel for Appellant/Respondent: Simon Thomas

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/031 (Judgment on Liability) and Judgment No. UNDT/2013/042 (Judgment on Relief), rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in New York on 25 February 2013 and 4 March 2013, respectively, in the case of *Guedes v. Secretary-General of the United Nations*. The Secretary-General appealed both Judgments on 1 May 2013 and, on 2 July 2013, Mr. Cesar Guedes submitted an answer, which he perfected on 24 July 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact, which are not contested by the parties:¹

... The Applicant began his service in December 1991 as a Privatization Specialist with the United Nations Volunteers (“UNV”) in Guyana. He held different posts over the years until March 2000 when he was appointed to a 300-series contract as a Programme and Operations Specialist.

... On 1 May 2004, the Applicant’s 300-series contract was converted to a 100-series fixed-term appointment and, on 4 August 2004, the Applicant was reassigned to the United Nations Office on Drugs and Crime (“UNODC”). The Applicant is currently the Country Representative in Bolivia for UNODC.

... From 1 July 2008 through 31 December 2008, the Applicant took SLWOP [Special Leave without Pay].

... By memorandum dated 12 June 2012, the Applicant was notified that he was not eligible to be considered for conversion to a permanent appointment due to the fact that his six months SLWOP resulted in him having not acquired five years of continuous service on a fixed-term appointment under the 100-series of the Staff Rules by 30 June 2009.

... On 10 August 2012, the Applicant requested management evaluation of the 12 June 2012 decision. On 24 September 2012, the Under-Secretary-General for Management, on behalf of the Secretary-General, affirmed the administrative decision. On 21 December 2012, the Applicant submitted his application to the [Dispute] Tribunal contesting the finding that he was not eligible for consideration to permanent appointment.

¹ The following text is taken from Judgment No. UNDT/2013/031, paras. 3-7.

3. In its Judgment on Liability, the Dispute Tribunal held that the decision to deny Mr. Guedes conversion to a permanent appointment was unlawful and it should therefore be rescinded. The UNDT considered the only issue before it was whether the Administration had correctly applied the “Guidelines on Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to Be Considered as at 30 June 2009”, issued by the Office of Human Resources Management (OHRM) on 29 January 2010 (Guidelines), in a manner consistent with Secretary-General’s Bulletin ST/SGB/2009/10 dated 23 June 2009, entitled “Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to Be considered by 30 June 2009”. It concluded that the Administration had incorrectly interpreted ST/SGB/2009/10 and taken an unlawful decision by declaring Mr. Guedes ineligible for conversion because of his SLWOP. The UNDT found that:

there were no provisions within ST/SGB/2009/10 or the Staff Rules that would enable the [Dispute] Tribunal to consider that [Mr. Guedes’] SLWOP affected the continuous duration of his appointment. For the [Dispute] Tribunal to rule otherwise would be to give legitimacy to the misconception that OHRM Guidelines may overrule a duly promulgated administrative issuance.

4. Following the issuance of the Judgment on Liability, the Dispute Tribunal held a hearing on 4 March 2013, during which Mr. Guedes gave evidence as to the damages that he suffered as a result of the decision not to consider him for conversion to a permanent appointment. In its Judgment on Relief, the Dispute Tribunal found that Mr. Guedes suffered distress and anxiety in the wake of the contested decision, but that the severity of the distress level was “at the lower end” of the scale. Taking into account all the circumstances, the UNDT decided to award Mr. Guedes USD 3,000 as compensation for emotional harm.

Submissions

The Secretary-General’s Appeal

5. The Secretary-General submits that the UNDT erred in finding that the Administration was not entitled to rely on the Guidelines because section 5(c) of the Guidelines was contrary to ST/SGB/2009/10 and the Staff Rules. He maintains that the Administration may promulgate guidelines to clarify how its administrative issuances are to be implemented and that the Guidelines are not contrary to ST/SGB/2009/10 or the

Staff Rules and are authoritative having been issued by OHRM. He also maintains that the six months' SLWOP that Mr. Guedes undertook did not count towards the five years' service that he was required to attain by 30 June 2009.

6. The Secretary-General also submits that there is not any inconsistency or conflict between the Guidelines and ST/SGB/2009/10 or the Staff Rules. In his view, the Guidelines were issued to clarify what is not explicitly stated in ST/SGB/2009/10 in order to ensure consistent application for all staff.

7. The Secretary-General stresses that the determination that Mr. Guedes was not eligible to be considered for a permanent appointment was not based on a determination that he had a break in the continuity of his service, but was based on the fact that he did not have the required five years of service, due to his SLWOP. Just as he did not accrue "service credits" while on SLWOP as per Staff Rule 5.3, Mr. Guedes did not accrue credit towards the five years of service. The Secretary-General believes that this interpretation is logically consistent with the intention of the Staff Rules and ST/SGB/2009/10.

8. Regarding the issue of moral damages, the Secretary-General submits that the Dispute Tribunal erred in its award of compensation. The evidence on which the UNDT based its conclusion was solely Mr. Guedes' statements in response to the UNDT's questions at the hearing. There was no documentary evidence or other testimony supporting his claim of stress. The Secretary-General notes that the "rational basis" test that the UNDT has formulated for assessing moral damages is a far lower threshold than the "actual damages" test endorsed by the Appeals Tribunal.

9. The Secretary-General contends that the UNDT erred in awarding compensation to Mr. Guedes, as its factual findings on this issue could not have led to a finding of actual damages.

10. The Secretary-General requests the Appeals Tribunal to find that the Guidelines are lawful and do not contradict ST/SGB/2009/10 or the Staff Rules and that Mr. Guedes was not eligible for consideration for permanent appointment. He also requests the Appeals Tribunal to vacate the UNDT's award of USD 3,000 as compensation for moral damages.

Mr. Guedes' Answer

11. Mr. Guedes submits that the Dispute Tribunal correctly concluded that SLWOP could not be used to shorten the qualifying time for eligibility for conversion to a permanent appointment, and that the Administration unlawfully used the Guidelines to interpret ST/SGB/2009/10 more restrictively than intended. The plain language of ST/SGB/2009/10 requires “five years of continuous service” without qualifying or restrictive language. The Administration’s interpretation of “continuous” as “active” is without support. ST/SGB/2009/10 means only five years of uninterrupted service. Using the Guidelines to introduce a new requirement in excess of the requirements set forth in ST/SGB/2009/10 is unlawful.

12. Mr. Guedes contends that the Guidelines also exceed the dictates of Staff Rule 5.3(e). Staff Rule 5.3(e) contains a finite list of benefits; continuous service for consideration for permanent appointment is not one of them.

13. Mr. Guedes maintains that the UNDT awarded moral damages on the basis of his testimony within its discretion and the compensation should not be disturbed on appeal.

Considerations

14. General Assembly Resolution 37/126 of 17 December 1982 decided that upon completion of five years of continuing good service, staff members on fixed-term appointments shall be given every reasonable consideration for a career appointment.

15. ST/SGB/2009/10, in Section 1, adds that to be eligible for consideration for conversion to a permanent appointment, a staff member must, by 30 June 2009: (a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and (b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.

16. The UNDT Judgment affirms the right of Mr. Guedes to be considered for conversion.

17. The Secretary-General appeals this decision on the ground of error in law since, according to the Guidelines promulgated by the Administration, Mr. Guedes did not attain the five years of service by 30 June 2009, taking into account that a period of six months of SLWOP had to be deducted.

18. Staff Rule 5.3(e) entitled “Special leave” as set forth in ST/SGB/2011/1 applicable at the time stated: “Staff members shall not accrue service credits towards sick, annual and home leave, salary increment, seniority, termination indemnity and repatriation grant during periods of special leave with partial pay or without pay exceeding one month. Continuity of service shall not be considered broken by periods of special leave”.

19. The UNDT did not commit an error of law when it accepted one of the possible reasonable interpretations of this rule and decided that the SLWOP did not affect the continuous duration of Mr. Guedes’ appointment. Article 2 of the Statute of the Appeals Tribunal allows appeals of UNDT judgments when they erred on a question of law. In the instant case, the Administration alleges an error of law because the Judgment did not concur with its own interpretation of the rule. Internal OHRM guidelines cannot prevail over a judicial interpretation of the rule itself.

20. The appeal is dismissed; so is the Secretary-General’s appeal on moral damages. We find, contrary to the assertions made by the Secretary-General, that Mr. Guedes had in fact an expectation of being granted a permanent appointment and the evidence was produced at a special hearing on 4 March 2013.

Judgment

21. Both appeals are dismissed.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar