



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2011-229

Simmons
(Appellant/Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations
(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Kamaljit Singh Garewal Judge Jean Courtial
Judgment No.:	2012-UNAT-221
Date:	29 June 2012
Registrar:	Weicheng Lin

Counsel for Appellant/Respondent on cross-appeal: Self-represented

Counsel for Respondent/Appellant on cross-appeal: Wambui Mwangi

JUDGE MARY FAHERTY, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Ms. Sheryl Simmons on 30 June 2011 against Judgment No. UNDT/2011/084 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 16 May 2011. The Secretary-General filed an answer to the appeal and a cross-appeal on 29 August 2011. But no answer to the cross-appeal has been received.

Synopsis

Ms. Simmons' appeal

2. Ms Simmons contends that the UNDT erred in law and fact in the manner in which it determined that compensation of USD 500 was reasonable compensation for the procedural breaches which occurred with regard to her electronic performance appraisal system (e-PAS) for 2007-2008.

3. It is the considered view of this Tribunal that the Dispute Tribunal in its assessment of compensation placed undue weight on the Appellant's omissions and/or actions. We so find taking into consideration that ultimate responsibility for the completion of the e-PAS report rests with the employer and noting, in particular, that some three months of the relevant timeframe had elapsed before Ms. Simmons was circulated with the general work plan.

4. Accordingly, we are of the view that the compensation awarded for the breach in question was manifestly insufficient and we thus substitute the UNDT sum for an award of three months' net base pay to be computed on the basis of the salary the Appellant was drawing on 31 March 2008.

The UNDT finding that the Appellant received full and fair consideration with regard to her candidacy for Post 1

5. Having reviewed the Dispute Tribunal's findings on this issue and having regard to the submissions advanced by both parties, the Appeals Tribunal finds no reason to disagree with the Dispute Tribunal's assessment that, notwithstanding the fact that some of the Appellant's e-PAS reports were not available to the interview panel, ultimately that did not impact the decision not to recommend her for the post. The Dispute Tribunal is in the best position to assess matters of a factual nature and in the instant case we see nothing to suggest that the Dispute Tribunal's

assessment of the reasons for the Appellant's non-selection was manifestly unreasonable. Moreover, we accept the Respondent's contention that a completed e-PAS report for 2007-2008 could never have been available to the interview panel, given the timeframe of the interview process - October/November 2007.

6. The Appeals Tribunal is equally satisfied to uphold the Dispute Tribunal's finding that Ms. Simmons has not substantiated claims of bias or prejudice on the part of the interview panel.

7. Her appeal in this regard is dismissed.

The breach of Ms. Simmons' employment rights by virtue of the late completion of her e-PAS report for 2008-2009

8. Ms. Simmons appeals on the basis that the UNDT failed to award her reasonable compensation for the breach which occurred in this case and the stress caused to her as a result.

Secretary-General's cross- appeal

9. The Respondent has cross-appealed on the basis that the UNDT erred in law in determining that Ms. Simmons' application concerning her 2008-2009 e-PAS report was receivable. The Respondent submits that the delay in the finalizing of the e-PAS 2008-2009 report was never the subject of a request for administrative review on the part of the Appellant. It is therefore contended that in the absence of adherence to former Staff Rule 111.2(a), then in force, Ms. Simmons' application to the Dispute Tribunal should not have been received.

10. In urging the Appeals Tribunal to find that the UNDT erred on a question of law in receiving Ms. Simmons' complaint concerning her 2008-2009 e-PAS report, the Respondent cites the jurisprudence of this Tribunal in *Crichlow* that where a staff member "failed to request an administrative review on the matters the UNDT has no jurisdiction *ratione materiae*" to consider the request.¹ While this Tribunal unequivocally endorses this principle, the procedural sequences and developments in this case raise the question whether the Respondent is entitled to make the case in this appeal that the UNDT erred in law in determining the 2008-2009 e-PAS report issue.

¹ *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 31.

11. It is our considered view that by virtue of the absence of any specific argument as to whether the claim with regard to the 2008-2009 report was receivable *ratione materiae* having been made prior to the UNDT Judge's ruling of 10 December 2010, the Respondent is now estopped from raising such issue on appeal before this Tribunal. Thus, given the particular circumstances of this case, the Appeals Tribunal is not satisfied to entertain the cross- appeal and it is accordingly dismissed.

UNDT's monetary award

12. The Appellant maintains that an award of USD 3,000 is not reasonable compensation for the breach which occurred in relation to her 2008-2009 e-PAS report. In the course of her Judgment, the Dispute Tribunal Judge described the breach- a year's delay - as "clearly improper" and ruled that the Appellant had "swiftly and diligently undert[aken] her duties in the process". On this basis and having regard to the history of violations of her employment rights, we are of the view that manifestly the UNDT did not take sufficient cognizance of the seriousness of the breach, and the stress caused thereby. Accordingly, we substitute the award of USD 3,000 with compensation equivalent to three months' net base salary computed on the basis of the salary the Appellant was drawing on 31 March 2009.

Facts and Procedure

13. Ms. Simmons joined the Organization in 1995 as an Associate Internal Auditor at the P-2 level with the Office of Internal Oversight Services (OIOS) in Geneva. In 1998, she was promoted to the P-3 level as a Programme Budget Officer with the Office of Programme Planning, Budget and Accounts (OPPBA) in New York.

Non-promotion to the P-4 level

14. Vacancy announcements for two OPPBA posts at the P-4 level (Post 1 and Post 2) were circulated, on 23 August 2007 and 18 September 2007, respectively. Ms. Simmons applied for Post 1 in a timely manner. She was short-listed and interviewed, but was not recommended for the position. She was advised of her non-selection for Post 1 by letter dated 5 November 2007. On 8 November 2007, Ms. Simmons applied for Post 2, but her application was not considered as it was submitted beyond the 30-day mark and was thus deemed to be late.

Non-completion or delay in completion of 2007-2008 and 2008-2009 ePAS reports

15. The UNDT found that, when reviewing Ms. Simmons' candidacy for Post 1, the OPPBA's interview panel did not have her 2007-2008 e-PAS report. The chronology of the steps taken to complete Ms. Simmons' 2007-2008 e-PAS report is as follows: the general work plan for Ms. Simmons' office was not circulated until 18 June 2007, though the 2007-2008 e-PAS cycle began on 1 April 2007; Ms. Simmons submitted a draft individual work plan on 16 July 2007; discussions between Ms. Simmons and her first reporting officer on the former's individual work plan took place on 27 June 2007 and 24 September 2007; the first reporting officer suggested that Ms. Simmons revise her individual work plan, but Ms. Simmons re-submitted her individual workplan on 9 October 2007, without revision or change. It appears that Ms. Simmons' 2007-2008 e-PAS report was never finalized.

16. As for the 2008-2009 e-PAS report, whose cycle began on 1 April 2008, the UNDT found that both Ms. Simmons and her first reporting officer signed off her individual work plan on 22 April 2008 and her mid-point review on 27 February 2009. Ms. Simmons completed her end-of-cycle self-appraisal on 27 April 2009, but the first reporting officer did not sign off the end-of-cycle appraisal for Ms. Simmons until almost a year later, on 31 March 2010.

Procedure

17. On 31 December 2007, Ms. Simmons wrote to the Secretary-General requesting administrative review of the decisions not to select her to fill either Post 1 or Post 2, and the failure to approve her work plan for her 2007-2008 ePAS report. Her appeal was subsequently transferred to the UNDT on 1 July 2009.

18. In Judgment No. UNDT/2011/084, the UNDT rejected Ms. Simmons' application in respect of her non-selection for either Post 1 or Post 2. Specifically, the UNDT concluded that the selection process for Post 1 was conducted properly and that there was no evidence to support either Ms. Simmons' claims of harm caused by the missing e-PAS reports or her allegations of bias and prejudice on the part of the interview panel. The UNDT found that though some of Ms. Simmons' e-PAS reports were not available to the OPPBA's interview panel when it reviewed her candidacy, "this ultimately did not impact the decision not to recommend her for Post 1, since [Ms. Simmons] failed to convince the interview panel that she possessed the necessary competencies". In the view of the UNDT, Ms. Simons had failed to demonstrate that she was

actually harmed by the missing e-PAS reports, as she had made it to the interviews. As for Post 2, the UNDT found that Ms. Simmons had applied too late in time, and concluded that the appeal in that regard had no merits.

19. However, in the same Judgment, the UNDT found that the required procedures for completing Ms. Simmons' 2007-2008 and 2008-2009 e-PAS reports were not followed, for which Ms. Simmons should be compensated. The UNDT awarded her a total of USD 3,500 as compensation: USD 500 for the delay in completing the 2007-2008 e-PAS report and the resulting stress caused to Ms. Simmons, and USD 3,000 for the delay in completing the 2008-2009 e-PAS report and the resulting stress caused to her.

Submissions

Ms. Simmons' Appeal

20. Ms. Simmons submits that the UNDT erred in fact in finding that she did not provide any explanation for the resubmission of her individual work plan for the 2007-2008 e-PAS report without revision or change, and in finding that she had desired a one-way dialogue with her first reporting officer.

21. Ms. Simmons also submits that the UNDT erred in law by failing to award her reasonable compensation commensurate with the level of injury due to the emotional stress caused by the Respondent's breaches of the Staff Regulations and Rules and its violation of her contractual and due process rights. While the UNDT is not allowed to impose punitive or exemplary damages, the repetitive nature of the Respondent's breach may well justify such an award in the present case. Ms. Simmons recalls that the former Administrative Tribunal awarded her compensation in the aggregate amount of 18 months' net base salary in respect of violations of her procedural rights in respect of her e-PAS reports for the periods 2001--2006.²

22. Ms. Simmons maintains that the UNDT erred in both fact and law in determining that her candidature had received full and fair consideration and that the unavailability of some of her e-PAS reports had no impact on the assessment of her candidacy. Ms. Simmons believes that the

² Former Administrative Tribunal Judgment No. 1437 (2009); Former Administrative Tribunal Judgment No. 1462 (2009).

OPPBA had followed all the procedures on paper, but with a predetermination that she would not be the candidate. The results obtained from the Central Review Committee revealed that her competencies were not fairly considered and/or were unfairly assessed by a biased and prejudiced interview panel.

23. Ms. Simmons also maintains that the UNDT disregarded or minimized the weight and importance of her evidence while it appeared to be keen on accepting the biased and inadmissible evidence from the Respondent. In this regard, Ms. Simmons stresses that while the UNDT Judge, in Order No. 47 (NY/2011), decided not to allow any new facts and evidence introduced by the Respondent in his closing statement, she proceeded to do that by basing her Judgment on the inadmissible statements of the Respondent without exercising the UNDT's jurisdiction to award cost.

Secretary-General's Answer

24. The Secretary-General submits that Ms. Simmons has failed to establish any errors, in fact or in law, warranting an increase in the amount of compensation as ordered by the UNDT. The compensatory award for procedural violations is within the discretionary parameters of the UNDT.

25. The Secretary-General maintains that Ms. Simmons' two previous cases before the former Administrative Tribunal were based on different facts, and those factual determinations are not admissible in the present case. Moreover, the UNDT is not bound to follow the reasoning of the former Administrative Tribunal in those previous cases.

26. The Secretary-General also submits that the UNDT correctly concluded that the selection process for Post 1 was properly conducted.

Secretary-General's Cross-Appeal

27. The Secretary-General submits that the UNDT erred in fact and law in finding Ms. Simmons' appeal of the delay in the completion of her e-PAS report for 2008-2009 receivable. The Secretary-General notes that the issue of the e-PAS report for 2008-2009 appeared in the amended appeal filed by Ms. Simmons on 15 June 2009, but it did not figure in Ms. Simmons' request for administrative review. Consequently, in his view, such an issue is not receivable since Ms. Simmons failed to request administrative review of that issue as a first step of the appeal.

Considerations

28. The issues to be considered in this appeal and cross-appeal are as follows. Ms. Simmons contends that the UNDT erred in law and fact in the manner in which it determined that compensation of USD 500 was reasonable for the procedural breaches which occurred with regard to her e-PAS report for 2007-2008. She also contends that an award of USD 3,000 was not reasonable compensation for the procedural violation with regard to her 2008-2009 e-PAS report. Ms. Simmons further maintains that the Dispute Tribunal Judge erred in law and fact in determining that her candidature for Post 1 received full and fair consideration, and that the untimely preparation of Ms. Simmons' e-PAS reports did not impact on the decision not to recommend her for Post 1.

29. It is further pleaded that the UNDT erred in law in taking into account matters raised by the Respondent in his closing arguments despite the UNDT's own ruling in Order No. 47 (NY/2011) that it would not admit such matters.

30. The Respondent contends that the Appellant's pleas are without merit. The Respondent cross-appeals on the basis that the Dispute Tribunal Judge erred in law in finding Ms. Simmons's claim with regard to her 2008-2009 e-PAS report receivable. It is the Respondent's case that the delay in the completion of the 2008-2009 e-PAS report was never the subject of a request by Ms. Simmons for administrative review.

The award of USD 500 for the violation of Ms. Simmons' rights with regard to her 2007-2008 e-PAS report

31. On a perusal of the facts set out in the UNDT Judgment, it is not altogether clear whether in fact Ms. Simmons ever received her performance appraisal for 2007-2008. What is apparent is that the appraisal process stalled at the work plan stage. Indeed the Appellant's principal complaint was the delay in the completion of the work plan.

32. The Dispute Tribunal noted that once she received, on 11 June 2007, the general work unit plan for 1 April 2007 to 31 March 2008, Ms. Simmons submitted her first draft plan (as she was required to do under ST/AI/2002/3) on 16 July 2007, a response deemed by the Dispute Tribunal Judge to be "timely".

33. Discussions took place between the Appellant and her first reporting officer for two months. On 25 September 2007 her draft plan was returned to her and on 26 September 2007, she was requested to resubmit a new draft plan, using her Work Plan for 2006-2007 as a template to make her 2007-2008 work plan more “objective, measurable and specific”. Ms. Simmons responded on 27 September 2007 requesting that her first reporting officer provide her with “proposed alternative language which would address in a timely manner [his] concerns”.

34. It is not disputed that two weeks later the Appellant duly resubmitted her original draft plan, without having taken on board the earlier suggestions made by the first reporting officer. It was at this time that the appraisal process for 2007-2008 stalled and the 2007-2008 work plan preparations effectively “withered on the vine”.

35. The performance appraisal system in force with regard to the relevant period was governed by ST/AI/2002/3. In the course of a very detailed Judgment the Dispute Tribunal Judge analyzed the obligations imposed on staff members and the Administration by ST/AI/2002/3. The respective actions of the Appellant and her first reporting officer were then analyzed against the requirements of ST/AI/2002/3.

36. The Dispute Tribunal Judge properly determined that “The [...] relevant portions of ST/AI/2002/3 make clear that it is the Organization, through its head of department or office and supervisory managers (including the first reporting officer), which remains ultimately responsible for the implementation of the e-PAS system, including the work plan”. Moreover, the UNDT found, again quite properly, that even in instances where staff are uncooperative, “the responsibility for implementing the work plan remains with the Organization”. The Dispute Tribunal thus found in favour of the Appellant, to wit, that “the required procedures were not followed for completing [Ms. Simmons’] electronic e-PAS reports for 2007-2008”.

37. It is clear that in awarding Ms. Simmons USD 500 for the procedural violations which occurred and the stress caused to her as a result, the UNDT took into consideration what it found was the Appellant’s non-cooperation in progressing the completion of the 2007-2008 work plan.

38. It is the considered view of this Tribunal that whatever the deficiencies in the Appellant’s responses in September/October 2007, the Dispute Tribunal in its assessment of compensation placed undue weight on the Appellant’s omissions and/or actions. We so find taking into

consideration that the ultimate responsibility for the completion of the e-PAS report rests with the employer and noting, in particular, that some three months of the relevant timeframe had elapsed before Ms. Simmons was circulated with the general work unit plan.

39. Accordingly, we are of the view that the compensation awarded for the breach in question was manifestly insufficient and we thus substitute the UNDT's sum for an award of three months' net base pay to be computed on the basis of the salary the Appellant was drawing on 31 March 2008, with interest thereon at the US Prime Rate applicable on 31 March 2008 calculated from 31 March 2008 to the date of payment of the compensation. If payment of the compensation is not made within 60 days, an additional five per cent shall be added to the relevant US Prime Rate from the date of expiry of the 60-day period to the date of payment.

The UNDT's finding that the Appellant received full and fair consideration with regard to her candidacy for Post 1.

40. Having reviewed the Dispute Tribunal's findings on this issue and having regard to the submissions advanced by both parties, the Appeals Tribunal finds no reason to disagree with the Dispute Tribunal's assessment that, notwithstanding the fact that some of the Appellant's e-PAS reports were not available to the interview panel, ultimately that did not impact the decision not to recommend her for the post. The Dispute Tribunal is in the best position to assess matters of a factual nature and in the instant case we see nothing to suggest that the Dispute Tribunal's assessment of the reasons for the Appellant's non-selection was manifestly unreasonable. Moreover, we accept the Respondent's contention that a completed e-PAS report for 2007-2008 could never have been available to the interview panel, given the timeframe of the interview process - October/November 2007.

41. The Appeals Tribunal is equally satisfied to uphold the Dispute Tribunal's finding that Ms. Simmons has not substantiated her claims of bias or prejudice on the part of the interview panel.

42. Accordingly, we affirm the Dispute Tribunal's finding that the selection process for Post 1 did not infringe the Appellant's rights and her appeal in this regard is dismissed.

The claim that the Dispute Tribunal erred in law in basing its Judgment on inadmissible statements made by the Respondent

43. By Order No. 47 (NY/2011), the UNDT directed that new facts and evidence (relating to a specific alleged incident) introduced by the Respondent in his closing statement be struck from the record. The Appellant claims that, notwithstanding Order No. 47 (NY/2011), the UNDT Judge based her Judgment on “inadmissible statements of the Respondent”. Having perused both the Judgment and Order No. 47 (NY/2011), the Appeals Tribunal finds no merit in the Appellant’s contentions.

The breach of Ms. Simmons’ employment rights by virtue of the late completion of her e-PAS report for 2008-2009

44. Ms. Simmons appeals on the basis that the UNDT failed to award her reasonable compensation for the breach which occurred in this case and the stress caused to her as a result.

45. The Respondent has cross-appealed on the basis that the UNDT erred in law in determining that Ms. Simmons’ application concerning the 2008-2009 e-PAS report was receivable. The Respondent submits that the delay in the finalizing of the 2008-2009 e-PAS report was never the subject of a request for administrative review on the part of the Appellant. It is therefore contended that in the absence of adherence to Staff Rule 111.2(a), then in force, Ms. Simmons’ application to the Dispute Tribunal should not have been received.

46. On 10 December 2010 the UNDT issued Order No. 325 (NY/2010) on receivability.³

47. In the main, the argument advanced by the Respondent before the Dispute Tribunal on the issue of receivability was that the Appellant had abandoned her incomplete statement of appeal filed with the JAB in 2008 and that the complete statement of appeal filed on 15 June 2009 was thus time-barred. The Respondent also submitted that one aspect of the application, namely a claim of workplace harassment and intimidation, was too general and non-specific to be the subject of the UNDT’s jurisdiction.

48. After reviewing the protracted history of the issues presently before this Tribunal and indeed having made reference to another related issue, which ultimately also was the subject of a separate Judgment of the UNDT, the Dispute Tribunal Judge deemed the application (the subject

³ In his submissions, the Respondent quotes from this Order, but refers to it as Order No. 326 and in fact includes Order No. 326, not Order No. 325, as Annex 1 to his submission.

matter of this appeal) receivable. On the issue of the time limits, the Dispute Tribunal rejected the Respondent's submissions and found that the Appellant had not abandoned her appeal before she submitted her full statement of appeal to the JAB on 15 June 2009.

49. The respondent's submission that the claim of harassment and intimidation was not receivable was upheld by the Dispute Tribunal.

50. The UNDT determined that the legal issues to be tried were whether Ms. Simmons' employment rights were violated by reason of the delay in the completion of her e-PAS reports for 2007-2008 and 2008-2009 and whether the Respondent's handling of the selection process concerning the two vacancies breached the Appellant's employment contract.

51. When refusing jurisdiction on the harassment issue, the Dispute Tribunal Judge observed as follows: "In the instant case, the Applicant explicitly requested an administrative review of: 1) two selection processes [...] and 2) her e-PAS reports (from 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007) and her work plan for 2007-2008." Ms. Simmons sought such review on 31 December 2007. As a matter of logic, she could not have sought administrative review regarding delay in completing her 2008-2009 e-PAS report on 31 December 2007. The complaint regarding her 2008-2009 e-PAS report was included in her complete statement of appeal filed with the JAB on 15 June 2009.

52. In that complete statement of appeal Ms. Simmons narrowed the scope of her claims to her e-PAS reports for 2007-2008 and 2008-2009 (the issues determined by the UNDT Judgment and the issues which are the subject of appeal before this Tribunal) and to the issue of alleged delays in the completion of her e-PAS rebuttal for 2006-2007 (an issue which is the subject of a separate UNDT Judgment, also appealed to this Tribunal).⁴

53. In urging the Appeals Tribunal to find that the UNDT erred on a question of law in receiving Ms. Simmons' complaint concerning her 2008-2009 e-PAS report, the Respondent cites the jurisprudence of this Tribunal in *Crichlow* that where a staff member "failed to request an administrative review on the matters the UNDT has no jurisdiction *ratione materiae*" to consider the request.⁵ While this Tribunal unequivocally endorses this principle, the procedural sequences and developments in this case raise the question whether the Respondent is entitled to

⁴ *Simmons v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-222.

⁵ *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 31.

make the case in this appeal that the UNDT erred in law in determining the 2008-2009 e-PAS report issue.

54. The Respondent submits that “...instead of treating the inclusion of the delay in the completion of [Ms. Simmons’] performance evaluation for the period 2008-2009 in the same manner”, as the claim of harassment/intimidation, that is by excluding it, the Dispute Tribunal “erred by simply noting that [Ms. Simmons] had added this aspect to her 15 June 2009 Statement of Appeal, and on this basis alone considered the appeal receivable”.

55. As already set out, the UNDT issued Order No. 325 on 10 December 2010, following a consideration of the submissions made by the Respondent (as the moving party) and the Appellant. The arguments advanced by the Respondent, as recited in Order No. 325, do not make any specific claim that the 2008-2009 e-PAS issue was not receivable *ratione materiae*, although the Respondent advanced a detailed argument in this regard in relation to another aspect of the Appellant’s case.

56. In his submission to the UNDT on “Preliminary Issues” dated 16 March 2009, the Respondent, *inter alia*, at paragraphs 34 to 36 set out the applicable principle of law on the issue of receivability *ratione materiae*. Under the heading “Contentions” the Respondent, *inter alia*, set out as follows:

The subject matter of the Application are the decisions not to select the Applicant for the posts and the timely completion of her e-Pas and not the alleged harassment.

41. By her request for administrative review submitted on 31 December 2007 (appended as Annex I) the Applicant sought review of the decisions not to select her for the posts of Programme Budget Officer P4 OPPBA–VA#07-ADM-DM-41519 New York and Programme Budget Officer P4 OPPBA–VA#7–ADM–DM-415428. She also sought review of the alleged “refusal of the administration to conduct [her] e-PAS in accordance with the Staff Rules.

42. In support of her request for review the Applicant refers to what she characterizes as a hostile (paragraph 4) and/or unhealthy work environment (paragraph 6). In accordance with the decision of *de Porres*, since the reference to these matters is merely in support of her complaint regarding the rejection of her candidacy, these matters are not properly before the Tribunal. Furthermore, these matters do not constitute “administrative decisions” and are [...] too general and non specific to be the subject of the Tribunal’s jurisdiction. (Italics in original)

57. Thus, while the Respondent set out a clear case (paragraph 42 above) as to why the Appellant's claim of harassment was not receivable *ratione materiae*, he did not under the heading "Contentions" highlight with any degree of particularity the claim that the 2008–2009 e-PAS issue was not receivable *ratione materiae*.

58. It is apparent that prior to formulating his submissions on receivability the Respondent had sight of the Appellant's complete statement of appeal of 15 June 2009, yet the specific argument the Respondent is now making does not appear to have been clearly canvassed before the UNDT. We are satisfied that had it been it would have been recited and addressed by the Dispute Tribunal Judge on 10 December 2010.

59. As part of his submissions to this Tribunal, the Respondent appended a "Request for Leave to Produce Evidence" as Annex 2, made to the UNDT on 3 March 2011, and maintains, at paragraph 41 of his submission, that in that Request the argument on the non-receivability of the 2008-2009 e-PAS issue had been "reiterated" before the UNDT.

60. The arguments advanced by the Respondent at paragraph 41 of his submissions, presumably in reference to the contents of paragraph 12 of Annex 2, do not find favour with this Tribunal on the basis that although the Respondent made passing reference to the issue of the receivability *ratione materiae* of the 2008-2009 e-PAS complaint at paragraph 12 of the Request, this reference was made *subsequent* to the time (which was prior to December 2010) when the Respondent specifically sought a ruling on whether the Appellant's claims were receivable.

61. It is our considered view that by virtue of the absence of any specific detailed argument as to whether the claim with regard to the 2008-2009 e-PAS report was receivable *ratione materiae* having been made prior to the UNDT Judge's ruling of 10 December 2010, the Respondent is now estopped from raising such issue on appeal before this Tribunal. Thus, given the particular circumstances of this case, the Appeals Tribunal is not satisfied to entertain the cross- appeal and it is accordingly dismissed.

62. The Appellant maintains that an award of USD 3,000 is not reasonable compensation for the breach which occurred in relation to her 2008-2009 e-PAS report.

63. In the course of her Judgment, the Dispute Tribunal Judge described the breach- a year's delay -as "clearly improper" and ruled that the Appellant had "swiftly and diligently under[taken] her duties in the process". On this basis and having regard to the history of violations of her

employment rights, we are of the view that manifestly the UNDT did not take sufficient cognizance of the seriousness of the breach, and the stress caused thereby. Accordingly, we substitute the award of USD 3,500 with compensation equivalent to three months' net base salary computed on the basis of the salary the Appellant was drawing on 31 March 2009, with interest on the award of compensation at the US Prime Rate applicable on 31 March 2009 calculated from 31 March 2009 to the date of payment of the compensation. If payment of the compensation is not made within 60 days, an additional five per cent shall be added to the US Prime Rate in effect on 31 March 2009 from the date of expiry of the 60-day period to the date of payment.

Judgment

64. The appeal is granted in part. The cross-appeal is rejected. The UNDT's award of USD 3,500 is modified. The Respondent is ordered to pay Ms. Simmons compensation equivalent to three months' net base salary in effect on 31 March 2009.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Courtial

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar