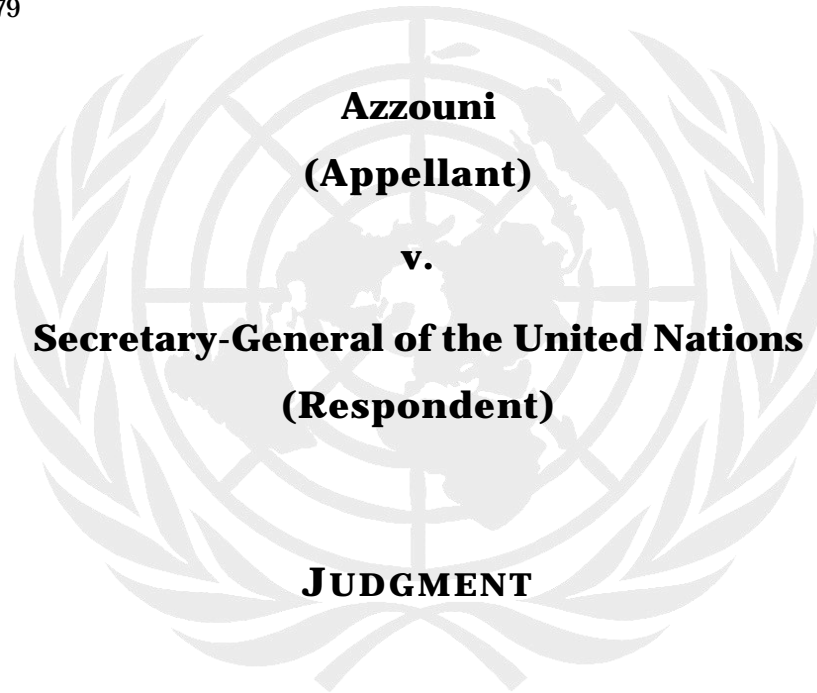




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-079



Before: Judge Rose Boyko, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal

Judgment No.: 2010-UNAT-081

Date: 29 October 2010

Registrar: Weicheng Lin

Counsel for Appellant: Edward Patrick Flaherty

Counsel for Respondent: John Stompor

JUDGE ROSE BOYKO, Presiding.

Synopsis

1. Suheir Mahshi Azzouni (Azzouni) appealed on the grounds that the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) erred in admitting testimony that was given without any promise, affirmation, or oath to tell the truth. We agree. Also the UNDT failed to give Azzouni an adequate opportunity to prove her case. She was alleging discrimination and had to produce evidence to prove that discrimination occurred, which evidence was not allowed.

2. The main case against Azzouni was based on the evidence of Bader Omar Al-Dafa (Al-Dafa), which was contradictory and not given under a promise, oath or affirmation to tell the truth. The Rules of Procedure of the UNDT (UNDT Rules) provide in Article 17(3) that “[e]ach witness shall make the following declaration before giving his or her statement: ‘I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth’”. Al-Dafa did not make such a declaration, which leaves open to question whether he testified on his honour and conscience. The UNDT Judge failed to respect this requirement.

3. For these reasons the appeal is allowed. The UNDT Judgment is set aside, and this Tribunal orders that Azzouni be reinstated, failing which, alternative compensation in lieu of reinstatement is fixed in the amount of two years’ net base salary.

Facts and Procedure

4. Azzouni joined the Economic and Social Commission for Western Asia (ESCWA) on 27 November 2005 as an Advisor at the P-5 level with the Centre for Women on a five-week short-term appointment under the 300 series of the former Staff Rules. Her appointment was extended for three months through 31 March 2006. She thereafter received an appointment of three months through 30 June 2006 with the same functional title under the 200 series of the former Staff Rules. On 7 June 2006, Azzouni was appointed as Chief of Centre for Women, ESCWA, on a two-year fixed-term appointment (FTA) under the 100 series of the former Staff Rules through 6 June 2008.

5. Azzouni's overall performance, recorded on her e-PAS, for the period June 2006-March 2007 was rated "fully successful" and all of her core values and competencies were rated "fully competent".

6. In August 2007, a new Executive Secretary Al-Dafa took up his duties at ESCWA and became Azzouni's first and second reporting officer. For the e-PAS covering the period from April 2007 to March 2008, which was completed on 12 April 2008, Al-Dafa gave Azzouni an overall rating of "fully successful performance." He rated her "fully competent" in respect of five of the 19 core values and competencies, but "developing" in respect of the other 14.

7. In response to a request as to whether he would extend Azzouni's FTA beyond 6 June 2008, Al-Dafa indicated that he wished to let her contract expire. In a memorandum dated 15 April 2008, the Chief of the Administrative Services Division of ESCWA informed Azzouni of Al-Dafa's decision not to extend her FTA.

8. During the second half of April 2008, Azzouni initiated a rebuttal process in respect of her e-PAS (April 2007-March 2008). She also wrote to the Secretary-General requesting administrative review of the decision not to renew her contract beyond 6 June 2008.

9. On 2 May 2008, Azzouni filed a complaint with the Panel on Discrimination and other Grievances (PDOG) alleging religious discrimination and professional harassment by Al-Dafa. On 7 May 2008, she filed with the Joint Appeals Board (JAB) in New York a request for suspension of action of the decision not to renew her contract beyond 6 June 2008. Subsequently Azzouni's appointment was extended for a total of two months through 6 August 2008 so as to give the time needed for the PDOG to complete its investigation. However, the PDOG did not finish its work until the end of September 2008.

10. On 25 June 2008, the rebuttal panel issued a report on Azzouni's e-PAS. It concluded that there were no grounds to change Al-Dafa's original overall rating of "fully successful performance", but that eight of the 14 core values and competencies which had been rated "developing" should have been given a higher "fully competent" rating. The Chief of the Administrative Services Division of ESCWA requested advice as to how to implement the rebuttal panel's conclusions, and was informed that the observations of the rebuttal panel regarding Azzouni's core values and competencies were not binding on the Administration.

11. On 5 August 2008, the JAB recommended that the decision not to renew Azzouni's appointment be suspended until the PDOG completed its report. However, the Secretary-General did not accept that recommendation, though he instructed the PDOG to complete its investigation by the end of September 2008.

12. Azzouni was separated from service on 6 August 2008.

13. In its report adopted on 30 September 2008, the PDOG concluded that there was inadequate evidence to support a consistent pattern of discrimination and harassment, but that the decision not to renew Azzouni's contract was tainted by improper influence and abuse of authority. It also concluded that Azzouni suffered moral injury, distress, and anxiety aggravated by the violation of her due process rights, though her injury may not have been irreparable. The PDOG recommended that the impugned decision be rescinded and Azzouni be offered a new FTA, or in the alternative that she be compensated with six months' net base salary. In addition, it recommended that Azzouni receive no less than three months' net base salary for the injury to her due process rights. According to Azzouni, the Administration rejected the PDOG's findings and recommendations.

14. On 30 October 2008, Azzouni filed an appeal with the JAB against the decision not to renew her appointment. However, the JAB did not have an opportunity to review her case before it was abolished on 30 June 2009. Azzouni's case was subsequently transferred to the UNDT in Geneva.

15. On 14 January 2010, Cousin, J. issued Judgment No. UNDT/2010/005, in which he rejected Azzouni's application. A review of the judgment reveals that Cousin, J. had the files of the e-PAS rebuttal panel and the PDOG made available to him, and that he held a hearing on 7 January 2010 during which the parties examined Al-Dafa, and Khaled Galal Abdelhamid, former Secretary of ESCWA. Cousin, J. found that following Al-Dafa's decisions not to take action on Azzouni's work-related proposals, the professional relationship between the two deteriorated. Cousin, J. concluded that Al-Dafa "might have considered it legitimate to take the opportunity presented by the expiration of [Azzouni's] contract in order to end a conflictive situation that was bound to adversely affect the efficient functioning of the Centre for Women", "which in itself justified bringing that situation to an end as soon as possible, especially when [Azzouni's] contract was to expire". On the allegations of discrimination and harassment, Cousin, J. found the PDOG report

“contradictory and insufficiently substantiated”, and concluded that Azzouni “has failed to demonstrate that the decision was discriminatory or that any of the motives for that decision were improper”.

16. The original Judgment No. UNDT/2010/005 was issued in French. The English translation of the Judgment was issued to Azzouni on 12 February 2010. On 29 March 2010, Azzouni appealed the Judgment. Her appeal was forwarded to the Secretary-General on 14 April 2010. The deadline for the respondent’s answer to the appeal was therefore 1 June 2010. On 27 May 2010, the Secretary-General requested a 30-day extension to file the answer, and on 1 June, he filed a note to clarify the reasons for his extension request. The President approved the 30-day extension request. On 1 July 2010, the Secretary-General filed an answer to the appeal.

17. On 2 August 2010, Azzouni filed a supplemental submission in rebuttal to the Secretary-General’s answer, in which she essentially reasserts the arguments made in her appeal.

Submissions

Azzouni’s Appeal

18. Azzouni argues that the UNDT based its decision to reject Azzouni’s claim on mistakes and omissions of fact. The UNDT failed to consider, ignored, or mischaracterized the important facts presented by Azzouni, which supported her allegations of religious discrimination and professional harassment on the part of Al-Dafa.

19. The UNDT’s decision was based on errors of law and must thus be vitiated. The UNDT erred in law in deciding that the testimony on religious and gender discrimination was irrelevant, and that, if a supervisor had difficult relations with a subordinate, he could use the non-expectancy of renewal of contract to support the decision not to renew.

20. Azzouni submits that the UNDT failed to duly consider the PDOG report and give weight to the conclusion in the report that the decision not to renew her contract was made in violation of Azzouni’s due process rights. In finding that the PDOG report was unsubstantiated, and in light of the UNDT’s earlier order of 24 November 2009 refusing her

request to call six witnesses, she was denied the opportunity to submit evidence in support of her claim of harassment.

21. Azzouni contends that the UNDT relied on faulty or non-existent evidence and gave greater weight to Al-Dafa's testimony over the other witnesses such as Abdelhamid, without basis or foundation.

22. The UNDT failed to apply the correct burden of proof as set forth in UNDT Judgment in *Sefraoui*,¹ and improperly placed the burden of proof on Azzouni to prove the unlawfulness of the impugned decision. The UNDT Judge considered the PDOG finding unsubstantiated, yet he considered the unsubstantiated evidence presented by Al-Dafa against Azzouni, namely alleged written complaints about Azzouni made by her subordinates. Azzouni had never been made aware of those alleged criticisms by her subordinates.

23. Assouni argues that the UNDT failed to swear in the witnesses before they testified. The Judge adopted Al-Dafa's undocumented claims against Azzouni without placing him under oath or verifying whether or not he was telling the truth. He also accepted Al-Dafa's denials without question.

24. Azzouni submits that she received ineffective assistance from counsel. She requests that this Tribunal verify the qualifications of the two counsel who represented her, including their educational degrees and the bars to which they are admitted in good standing. Her former counsel failed to adequately prepare the witnesses for the hearing and seemed at times confused and/or intimidated by the UNDT. One counsel, Mr. Wallace, was late for the UNDT hearing, and thus missed the opportunity to examine his witness fully. In his absence, Mr. Danquah, had to examine the witness totally unprepared. Had it not been for such faulty representation, the hearing might have resulted in a different outcome for Azzouni.

Secretary-General's Answer

25. The UNDT correctly concluded that a staff member serving on an FTA such as Azzouni did not have a right to the renewal of his or her contract. This finding was consistent

¹ *Sefraoui v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/095.

with former Staff Rule 104.12 and the jurisprudence of the former Administrative Tribunal. The Administration did not have to justify its decision not to renew. The UNDT noted that Azzouni did not allege that ESCWA might have given her assurance of a continued employment beyond 6 August 2008.

26. The UNDT correctly considered that it was Azzouni's responsibility to prove discrimination and other improper motives. This finding is supported by the long-standing jurisprudence of the former Administrative Tribunal that the burden of proving discrimination or improper motivation rests with the party making the allegation. Moreover, this finding is confirmed by several UNDT Judgments. In this regard, the Secretary-General has expressed his disagreement with the *Sefraoui* Judgment, which stands for the proposition that neither party should be in a favoured position, that preponderance of evidence should be the general rule and that, in the absence of preponderance of evidence, the impugned decision should be regarded as unjustified.

27. The UNDT rightly noted that the fact that Al-Dafa criticized the content of a study on sensitive religious issues related to Sharia should not in itself be considered to demonstrate religious discrimination. It was Al-Dafa's prerogative to determine whether the name of ESCWA should be used to intervene in individual cases, and his decision in a particular case could not be considered as an act of religious discrimination. The UNDT found Al-Dafa's denials sufficiently credible for it to doubt that he had actually made the statements as alleged by Azzouni about the superiority of the values of Islam over those of the United Nations and the unsuitability of Azzouni for her position due to her Christian beliefs.

28. Regarding Azzouni's assertion of omissions of fact by the UNDT, the Secretary-General maintains that the fact that certain facts were not expressly addressed in the Judgment does not mean that the UNDT did not consider them, let alone erred in relation to them.

29. The Secretary-General submits that Azzouni has mischaracterized the UNDT's findings. The UNDT did not find that a supervisor could decide not to renew the FTA of a subordinate because of difficult relations with that subordinate. Rather, the UNDT found that Azzouni had lost confidence in Al-Dafa, while she considered her supervisor unsupportive of her work. Such a mutual loss of confidence was a proper motive for the non-renewal of Azzouni's FTA.

30. Contrary to Azzouni's assertion, the UNDT duly considered the PDOG report. It may not have given the report the weight that she had hoped for. However, it is for the UNDT to assess the weight of the evidence. The fact that the UNDT reached a different conclusion does not mean that it did not consider the PDOG report or that its assessment constituted an error of fact leading to a manifestly unreasonable decision.

31. The Secretary-General submits that Azzouni has failed to establish that the UNDT, in not placing Al-Dafa under oath, committed an error in procedure "such as to affect the decision of the case". Even without being placed under oath, Al-Dafa was under an obligation to be truthful in his statements before the UNDT. Azzouni fails to provide any evidence that Al-Dafa did not tell the truth.

32. Azzouni's request that the UNDT Judgment be quashed due to ineffective representation is without merit. The Office of Staff Legal Assistance (OSLA) was established by the General Assembly to provide legal assistance to staff members. The acceptance of OSLA's assistance is voluntary. Azzouni could have availed herself of other counsel of her own choosing. She is responsible for her own case. That responsibility extended to her choice of legal representative.

33. Azzouni's request for an order from this Tribunal for the production of complaints by subordinates against her and proof of the legal qualifications and bar membership of her former counsel is not in accordance with the Statute of this Tribunal (Statute). Article 2(5) of the Statute does not provide a right for the parties to request this Tribunal to order the production of documents, because neither the parties nor this Tribunal are supposed to be engaged in fact-finding at this stage. Azzouni has failed to provide any arguments in support of her request.

Considerations

34. Azzouni's additional submissions were admitted as part of her appeal before this Tribunal. They were considered but afforded little weight for purposes of this appeal.

35. The UNDT erred in failing to adequately consider Azzouni's evidence. When a staff member alleges discrimination, he or she bears the burden of proving on a preponderance of evidence that discrimination occurred. In the instant case, Azzouni was not given the

opportunity she required to establish her allegations at the UNDT hearing, which included the opportunity to call evidence and to effectively challenge the Administration's evidence.

36. The main case against Azzouni was based on the evidence of Al-Dafa, which was contradictory and not given under any promise, oath or affirmation to tell the truth. The Dispute Tribunal must take care to admit credible and reliable evidence that will then be weighed by the Tribunal Judge.

37. We find that the Dispute Tribunal erred in law in allowing testimony to be given at its hearing that was neither sworn, affirmed, nor made under a promise to tell the truth. The UNDT Rules provide in Article 17(3) that "[e]ach witness shall make the following declaration before giving his or her statement: 'I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth'".

Judgment

38. For the reasons given, the appeal is allowed, the UNDT Judgment is set aside and reinstatement is ordered, or if not reinstated, then alternative compensation is fixed in the amount of two years' net base salary.

Dated this 29th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Boyko, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar