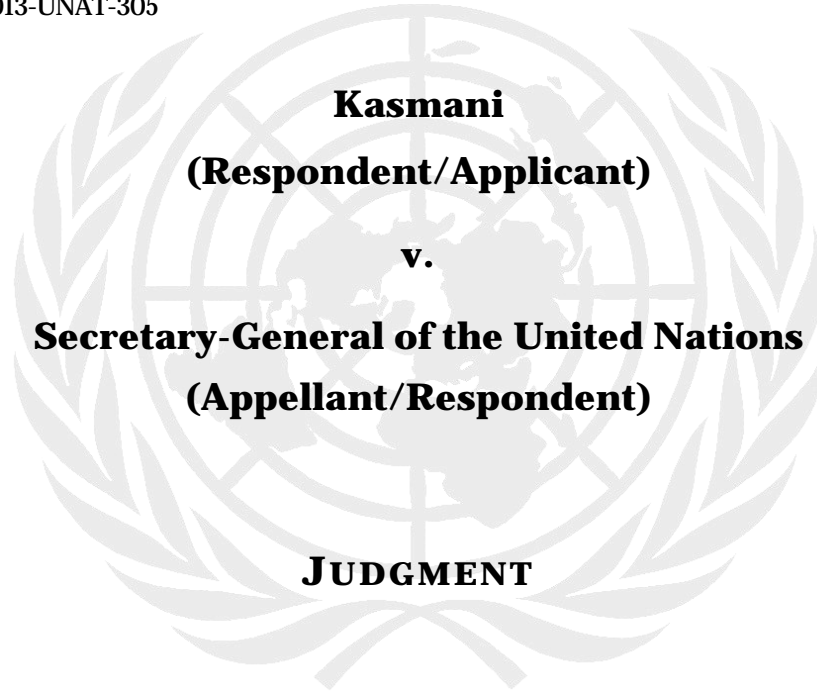




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-305



**Kasmani
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Sophia Adinyira, Presiding Judge Luis María Simón Judge Inés Weinberg de Roca
Case No.:	2012-337
Date of Judgment:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Seth Levine

Counsel for Appellant/Respondent: Amy Wood

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/2012/049, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 26 April 2012 in the case of *Kasmani v. Secretary-General of the United Nations*. The Secretary-General appealed on 25 June 2012 and Mr. Mohammed Rizwan Kasmani answered on 6 September 2012.

Facts and Procedure

2. On 4 June 2009, Mr. Kasmani joined the United Nations Office in Nairobi (UNON) as a G-4 Procurement Assistant with the Procurement, Travel and Shipping Section (PTSS) on a three-month temporary appointment. His immediate supervisor, Officer-in-Charge of PTSS, subsequently recommended that Mr. Kasmani's appointment be extended for further three months from 4 September 2009 to 3 December 2009. His recommendation was not approved, however, after the Chief of PTSS returned to UNON.

3. On 25 August 2009, Mr. Kasmani received an e-mail from the UNON Human Resources Management Services (HRMS) of UNON, requesting that he complete the check-out formalities for the purposes of his separation from service upon expiration of his temporary appointment on 3 September 2009.

4. On 28 August 2009, Mr. Kasmani requested management evaluation of the decision not to extend his service beyond 3 September 2009. On the same day, he applied to the Dispute Tribunal for suspension of the implementation of the said decision.

5. On 3 September 2009, the UNDT ordered that the contested decision be suspended pending the review to be undertaken by the Management Evaluation Unit (MEU). Mr. Kasmani's temporary appointment was accordingly extended through 3 November 2009.

6. On 9 October 2009, the Under-Secretary-General for Management communicated to Mr. Kasmani the Secretary-General's answer to his request for management evaluation. In the Secretary-General's view, Mr. Kasmani had not presented evidence of improper motive behind the contested decision, but an express promise of extension made by the OiC of PTSS had created an expectancy of renewal, which Mr. Kasmani had relied upon in

good faith. Therefore, the Secretary-General decided to award Mr. Kasmani three months' net base salary as compensation.

7. On 15 October 2009, UNON notified Mr. Kasmani that he was to be separated from service on 16 October 2009. Mr. Kasmani again applied to the UNDT for suspension of action. The UNDT granted Mr. Kasmani's motion and ordered suspension of the decision of 15 October 2009 "until further notice".

8. On 3 November 2009, the UNDT issued Judgment No. UNDT/2009/063, ordering the suspension of the decision not to renew Mr. Kasmani's appointment until the substantive application was heard and determined on the merits. A three-judge panel was then constituted to review his case.

9. The Secretary-General appealed Judgment No. UNDT/2009/063. On 30 March 2010, the Appeals Tribunal annulled the said UNDT judgment, finding that the UNDT had exceeded its competence by ordering the suspension of the contested decision beyond the period of management evaluation.¹ Effective 29 April 2010, Mr. Kasmani was separated from service.

10. In Judgment No. UNDT/2012/049, the Dispute Tribunal concluded that extraneous factors impacted the decision not to extend Mr. Kasmani's contract as a result of personal animosity between the Chief of PTSS and the OiC of PTSS. The UNDT also concluded that the Chief of PTSS had abused the authority vested in her and created a hostile and offensive work environment for Mr. Kasmani, and the resulting decision not to renew Mr. Kasmani's appointment was tainted with bad faith and improper motive. It further concluded that the senior managers of UNON had facilitated and supported the Chief of PTSS in her plans to have Mr. Kasmani's service terminated. By way of compensation, the UNDT ordered that Mr. Kasmani be paid six months' net base salary for breach of contract/loss of employment, three months' net base salary for violation of due process, USD 15,000 for mistreatment by the Chief of PTSS, and USD 5,000 for loss of reputation. The UNDT stressed:

In calculating the compensation awarded, the Tribunal has considered the provision in the Statute limiting compensation to two years net base salary unless there are exceptional circumstances to go above that figure. From a reading of that provision, the Tribunal

¹ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011. The written judgment was issued on 26 April 2010.

takes the view that the framers had in mind only a breach of the contract of employment and therefore provided for compensation on that basis alone. However, in the process of a termination of a contract of employment, there are other considerations that come into play in addition to the strictly monetary compensation that results from the loss of employment.²

11. The UNDT ordered that “the Ethics Office remain seized of the matter and monitor the situation for further action should there arise allegations of violation of this Order”.³

Submissions

Secretary-General’s Appeal

12. The Secretary-General submits that the UNDT erred in law by concluding that the two-year cap on compensation in Article 10(5)(b) of the UNDT Statute applied only to compensation for economic damages. That interpretation is inconsistent with the clear jurisprudence of the Appeals Tribunal. Moreover, the UNDT failed to offer any explanation as to why the facts of the case created “exceptional circumstances” warranting compensation in excess of two years’ net base salary.

13. The Secretary-General also submits that the UNDT’s award of an additional nine months’ compensation for economic loss is not supported by the evidence of the case, and appears punitive in nature. Furthermore, the UNDT’s awards of compensation for breach of contract and violation of due process rights compensate the same breach and are thus duplicative.

14. The Secretary-General maintains that the UNDT’s award of a total of one year’s net base salary for economic damages is excessive. In this regard, the Secretary-General notes that Mr. Kasmani continued to be in the employ of UNON for nearly six months due to the illegal decision of the UNDT, from 3 November 2009 to 29 April 2010. The Secretary-General also notes that Mr. Kasmani was hired on a temporary appointment for only three months. Given that the Organization had paid him 12 months’ net base salary, any additional compensation is excessive.

² Judgment No. UNDT/2012/049, para. 120.

³ Judgment No. UNDT/2012/049, para. 139 (iv).

15. The Secretary-General also maintains that the UNDT exceeded its competence and erred in law in awarding moral damages when Mr. Kasmani had not provided any evidence of such injury.

16. The Secretary-General further maintains that the UNDT exceeded its competence in ordering the Ethics Office to take actions beyond the scope of that office's mandate.

17. The Secretary-General requests that the Appeals Tribunal vacate the UNDT's orders for compensation and its order relating to the Ethics Office.

Mr. Kasmani's Answer

18. Mr. Kasmani submits that the UNDT did not err in awarding a total amount of compensation that exceeded two years' net base salary, given the exceptional circumstances and aggravating factors of the case. The findings of fact justify such an award.

19. Mr. Kasmani submits that the UNDT did not err in law or exceed its competence by awarding compensation for moral harm. The moral harm to him is largely self-evident. The wrongs committed against him were such that it would have been odd for the UNDT not to have found that he had suffered substantial moral injury. The UNDT was entitled to take note of those injuries when awarding damages.

20. Mr. Kasmani maintains that, contrary to the Secretary-General's assertion, the UNDT properly ordered the Ethics Office to monitor for signs of retaliation as a form of specific performance in line with Article 10(8) of the UNDT Statute and within the mandate of the Ethics Office.

21. Mr. Kasmani requests that the Appeals Tribunal uphold the UNDT Judgment in its entirety.

Considerations

22. This appeal only concerns the amount of compensation awarded by the UNDT and the justification for it.

23. The UNDT awarded Mr. Kasmani compensation in the amount of six months' net base salary for breach of contract/loss of employment, three months' net base salary for violation of his due process rights, USD 15,000 for harassment, and USD 5,000 for loss of reputation. This award exceeds the normal maximum compensation in the amount of two years' net base salary as, at the time, Mr. Kasmani's gross annual salary was approximately USD 15,183. In this instance, the award amounted to approximately 28 months' net base salary for Mr. Kasmani.

24. Article 10(5) of the UNDT Statute provides as follows:

As part of its judgement, the Dispute Tribunal may order one or both of the following:
(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

25. The Secretary-General submits that the UNDT misinterpreted the parameters of the two-year cap on damages set forth in Article 10(5)(b) of the UNDT Statute. The Secretary-General challenges the UNDT's findings that the two-year cap on damages only governs a breach of a contract of employment and provides for compensation on that basis alone; that "in the process of a termination of a contract of employment, there are other considerations ... in addition to the strictly monetary compensation that results from the loss of employment";⁴ and that the Tribunal, "by virtue of its powers under Article 19 of the Rules of Procedure[,] ... may go over and above the strict monetary compensation provided for by the Statute".⁵

26. We agree with this submission as the two-year cap is not limited to awards for breach of contract but for other heads of damages that directly flow from the breach.

⁴ Judgment No. UNDT/2012/049, para. 120.

⁵ Judgment No. UNDT/2012/049, para. 121.

27. The Appeals Tribunal expressly held in *Mmata*⁶ that Article 10(5) of the UNDT Statute limits the total of all compensation ordered under subparagraphs (a), (b), or both, to the equivalent of two years' net base salary of the applicant, unless higher compensation is warranted and reasons are given to explain what makes the case exceptional.

28. The Secretary-General further submits that the UNDT erred by failing to establish any exceptional circumstances warranting an award in excess of two years' net base salary. In *Mmata*, this Tribunal held:

Article 10(5)(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation. The findings of fact made by the UNDT in paragraphs 51 to 63 of the Judgment point to evidence of blatant harassment and an accumulation of aggravating factors that support an increased award. Blatant harassment and an accumulation of aggravating factors in administrative and investigative conduct in the course of wrongful dismissal cases are consistent with the principles of law applied in the former Administrative Tribunal to justify increased compensation. Accordingly we find no error by the Dispute Tribunal on the issue of whether there were reasons to justify an increased award under Article 10(5)(b) of the UNDT Statute.⁷

29. It is apparent from the reasons given in the UNDT Judgment that this case is exceptional, commencing with a series of orders for suspension of action. In these circumstances, a three-member panel was constituted by the President of the UNDT in accordance with Article 10(9) of the UNDT Statute and Article 5(2) of the Rules of Procedure of the UNDT to hear the substantive application.

30. The findings of fact made by the UNDT in paragraphs 105 to 111 of the Judgment point to evidence of abuse of authority, retaliatory threats, a hostile and offensive environment to the extent that protective measures were granted to ensure that Mr. Kasmani's witnesses were not prejudiced, intimidated or retaliated against for testifying in the present case and accumulation of aggravating factors that support an increased award.

31. Ruling on the merit of the case itself, the UNDT held:

The Respondent's actions in respect of the non-renewal of the Applicant's contract and the manner in which it was done cannot be justified. The Tribunal's findings on

⁶ *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092.

⁷ *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092, para. 33.

the facts of this case clearly showed that the treatment meted out to the Applicant strike most unfortunately at the core values, standards and issuances of the United Nations. Extraneous factors rarely manifest themselves as clearly as they have done in this case.⁸

32. The UNDT determined: “[T]he Applicant sufficiently discharged his burden of proof. He showed that the actions of the Respondent’s agents were unfair, improperly motivated and wholly arbitrary.”⁹

33. We, however, find the award of 28 months’ net-base salary to be excessive. Mr. Kasmani was originally recruited on a three months’ fixed term appointment against a General Temporary Assistance post. His supervisor recommended an extension of his contract for another three months. In our view the reasonable expectation of the duration of his contract was six months. It is noted that Mr. Kasmani has already received compensation in the amount of three months’ net base salary, for frustration of his reasonable expectation of renewal of his temporary appointment.

34. We note that the UNDT took into account the compensation from the Secretary-General and ordered compensation equivalent to six months’ net base salary for breach of contract/loss of employment and three months’ net base salary for the violation of his due process rights.

35. The Secretary-General submits that the award of nine months’ net base salary was duplicative and excessive. Mr. Kasmani had already received three months from the Secretary-General. He also received the benefit of an additional six months of employment as a consequence of the UNDT’s order of suspension of action which was determined by the Appeals Tribunal to be unlawful.¹⁰

36. We do not think that it is fair to consider the salary paid to Mr. Kasmani for work done as compensation, especially when the error was made by the UNDT. On the other hand, we find it unusual for a staff member on a temporary appointment to be compensated for a period higher than the expectation of the duration of his contract. In this case, the reasonable expectation for the renewal of Mr. Kasmani’s three-month contract was three months only. Yet, the UNDT awarded him nine months’ net base salary for loss of employment less the three months

⁸ Judgment No. UNDT/2012/049, para. 112.

⁹ Judgment No. UNDT/2012/049, para. 114.

¹⁰ *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011.

compensation that the Secretary-General already paid. The amount of compensation depends on the particular circumstances of each case and should be proportionate to the established harm. Accordingly, we reduce the amount of compensation to three months' net base salary, which he already received from the Secretary-General.

37. The Dispute Tribunal awarded Mr. Kasmani a further three months' net base salary for violation of due process. We find this amount to be duplicative of the compensation already made by the Secretary-General. We hereby set this aside.

38. From the foregoing Mr. Kasmani is only entitled to compensation for harassment and loss of reputation. Even though there were extraneous factors in this case warranting substantial damages, we find the award of USD 20,000 for harassment and loss of reputation, which is approximately 16 months salary for Mr. Kasmani, overgenerous. The Appeals Tribunal sets compensation at USD 10,000 for both heads of damages.

39. In conclusion, we allow the appeal and set aside the award of 28 months' net base salary and substitute it with the following:

- (i) Breach of contract/Loss of employment: three months' net base salary (already paid by the Secretary-General);
- (ii) Harassment: USD 5,000;
- (iii) Loss of reputation: USD 5,000.

40. The Secretary-General further appeals the consequential order of the UNDT that "the Ethics Office remain seized of the matter and monitor the situation for further action should there arise allegations of violation of this Order".¹¹ He submits that the UNDT exceeded its competence as the order is beyond the scope of that Office's mandate.

41. We do not find any merit in this ground of appeal. This order emanates from several orders previously issued by the UNDT addressing protective measures for witnesses presented by Mr. Kasmani. By Order No. UNDT/NBI/O/2010/25, the UNDT ordered that "the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations

¹¹ Judgment No. UNDT/2012/049, para. 139 (iv).

of violation of this Order". The contested UNDT order is therefore merely an extension of its previous order. It is presumed that the Ethics Office would only act upon the basis of a report.

Judgment

42. The appeal against the quantum of compensation by the UNDT is allowed and the compensation awarded by the UNDT is set aside. We award Mr. Kasmani compensation in the amount of USD 10,000. The award is subject to interest at the US Prime Rate calculated from the date of the UNDT Judgment.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Simón

(Signed)

Judge Weinberg de Roca

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

(Signed)

Weicheng Lin, Registrar