



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Mushema
(Respondent/Applicant)

v.

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

JUDGMENT

Before:	Judge Kamaljit Singh Garewal Judge Luis María Simón Judge Mary Faherty
Judgment No.:	2012-UNAT-247
Date:	29 June 2012
Registrar:	Weicheng Lin

JUDGE KAMALJIT SINGH GAREWAL , Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by the Secretary-General of the United Nations ag

6. Mr. Mushema challenged before the UNDT the decision to terminate his appointment for misconduct. In Judgment No. UNDT/2011/162, the UNDT found that the facts on which the disciplinary measure was based had been established in relation to Mr. Mushema's failure to detect even one of 704 semi-empty/empty oil cartons in the warehouse during the regular physical inventory. The UNDT, however, found that the established facts did not constitute misconduct within the meaning of former Staff Rule 110.3, and that the penalty of separation from service was disproportionate and unwarranted.

7. The UNDT also found irregularities in the conduct of the investigation and the disciplinary proceedings.

8. The UNDT concluded that Mr. Mushema was unfairly dismissed. It ordered rescission of the administrative decision to terminate Mr. Mushema's appointment, his reinstatement and compensation for Mr. Mushema's loss of earnings from the date of his separation from service to the date of his reinstatement. In the alternative, the UNDT awarded compensation for the loss of earnings from the date of his separation from service to the date of the UNDT Judgment.

9. The UNDT further awarded compensation in the amount of six months' net base salary in effect at the time of his termination for the procedural irregularities during the investigation and disciplinary process.

Submissions

Secretary-General's Appeal

10. The Secretary-General submits that the UNDT erred in law in setting, as an alternative to rescission, compensation in the aggregate amount of almost three years' net base salary for loss of earnings beyond the duration of Mr. Mushema's appointment, which is the equivalent of two years, 11 months and two weeks of net base salary. Mr. Mushema only held an appointment of nine months, which was set to expire three months after his separation from service, on 31 December 2008.

11. Mr. Mushema's material damage was therefore three months' net base salary. The UNDT thus placed Mr. Mushema in a better position than he would have been in, had he not been separated from service. The UNDT awarded compensation based on the speculation that Mr. Mushema's service would have been extended until the day of the issuance of the UNDT

Judgment. Such speculation constitutes an error in law, since it is well established that fixed-

17. Mr. Mushema maintains that the UNDT can order compensation exceeding two years' net base salary and his case was exceptional. The damage suffered in the present case was greater than that experienced in the cases cited by the Secretary-General. In the view of Mr. Mushema, the UNDT correctly relied on the *Borhom* case as it had similar material facts and produced the same impact on the parties as in the present case.

Considerations

18. The Secretary-General has appealed against the Dispute Tribunal's Judgment, setting alternative compensation for loss of earnings beyond the duration of Mr. Mushema's appointment. The Secretary-General's alternative plea is that should this Tribunal decline to find in favour of the management on the above issue, then this Tribunal should hold that the Dispute Tribunal erred on a question of law in awarding compensation beyond the two-year limit set by its Statute.

19. Obviously, the Dispute Tribunal's principal order that the contested administrative decision be rescinded as Mr. Mushema was unfairly dismissed goes unchallenged. Therefore, we are not required to re-examine the factual background of the allegations against Mr. Mushema and the disciplinary proceedings against him.

20. We are primarily concerned with the awards of compensation ordered by the UNDT as an alternative to rescission and reinstatement, which consist of (i) the lost earnings from the date of separation (1 October 2008) to the date of the UNDT's Judgment (16 September 2011), a period of two years, 11 months and 15 days; and (ii) six-months' net base pay for procedural irregularities. Prior to his separation, Mr. Mushema was informed on 25 August 2008 of the findings against him, and that as a disciplinary measure he was going to be separated from service for reasons of misconduct, pursuant to former Staff Rule 110.3(vii). On 27 August 2008, Mr. Mushema was informed that his fixed-term appointment with the WFP would be terminated effective 1 October 2008.

21. The question before us is whether in the circumstances of the present case, these awards were fair and adequate or excessive.

22. Under Article 10 of the Statute of the Dispute Tribunal, where the UNDT rescinds the contested administrative decision of termination, as in the present case, the Dispute Tribunal must necessarily set an amount of compensation in lieu of rescission or specific performance.

27. However, in the present case the substantive findings in the UNDT Judgment have not been challenged before this Tribunal. We therefore need not go into the grounds on which the decision to dismiss was rescinded. This Tribunal is only requested to determine if the compensation awarded in lieu of rescission was fair, adequate and reasonable or if it was in need of an upward or downward change.

28. To that extent, the elements which can be considered are, among others, the nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed-term), the remaining time, chances of renewal, etc. It must also be taken into account that the two-year limit imposed by the Statute of the Dispute Tribunal constitutes a maximum, as a general rule with exceptions. As such, it cannot be the average "in lieu compensation" established by the court.

29. The assessment of compensation must also be done on a case-by-case basis. Contemplating the particular situation of each claimant, it carries a certain degree of empiricism to evaluate the fairness of the "in lieu compensation" to be fixed.

30. It is held that in the present case, it would be adequate, fair and reasonable to award compensation in lieu of re-instatement in an amount equal to one year's net base pay, based on the pay that Mr. Mushema was drawing on the date of the termination of his fixed-term appointment, i.e., 1 October 2008. This amount shall be paid to Mr. Mushema with interest from the date of the Judgment of the UNDT at the US prime rate on that date. The compensation amount plus interest until the date of payment shall be released to Mr. Mushema within 60 days of the issuance of this Judgment, failing which an additional five per cent shall be added to the US prime rate from the date of the expiry of the 60-day period to the date of payment.

Judgment

31. The appeal is accepted to the extent indicated above. We reduce the quantum of compensation in lieu of reinstatement to one year's net base salary in effect on 1 October 2008.

Original and Authoritative Version: English

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

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Simón

(Signed)

Judge Faherty

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

(Signed)

Weicheng Lin, Registrar