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Before

Case N

Date:

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JUDGE RICHARD LUSSICK, PRESIDING.

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/2015/020, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 4 March 2015 in the case of *Roberts v. Secretary-General of the United Nations*. The Secretary-General appealed on 4 May 2015, and Mr. Glenn Roberts answered on 3 June 2015.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:¹

Disciplinary sanction

... On 7 May 2008, the Office of Internal Oversight Services (“OIOS”) received a complaint of possible misconduct regarding a number of staff members, including the Applicant. The Applicant was interviewed by OIOS on 3 October 2008. On 24 October 2008, OIOS issued its investigation report.

... On 19 December 2008, the then Executive Officer, [Department of Safety and Security (DSS)], sent a memorandum to the Acting Chief, Administrative Pw[(S)4.(r)305.1Rc884.2(iv[(S),.00

... On 3 December 2010, the Applicant was informed that the Under-Secretary-General for Management (“USG/DM”), acting on behalf of the Secretary-General, had concluded that there was sufficient evidence that he had misused United Nations’ ICT resources by receiving and distributing emails containing prohibited material and failing to report such actions by other staff members. In light of these findings, the USG/DM imposed on the Applicant the disciplinary measure of a letter of censure to be placed in his Official Status File.

Consideration for permanent appointment

... On 1 April 2011, Mr. Saunders, Executive Officer, DSS, sent Ms. Pollard, the Assistant Secretary-General, OHRM (“ASG/OHRM”) a memorandum setting out the recommendation in relation to the Applicant’s candidacy for conversion to permanent appointment. The memorandum was formatted so that Mr. Saunders could record, through checking a box, whether the Applicant met or failed to meet a number of criteria. In this way it was recorded that the Applicant: (a) received performance evaluations indicating that he had successfully met or exceeded performance expectations during the relevant period; (b) had been subject to an administrative or disciplinary measure; and (c) was serving in an entity that was not downsizing or expected to close. The memorandum then stated:

6. On the basis of the above, we have determined that:

The staff member has NOT met the high standards of efficiency, competence and integrity or has NOT demonstrated [his] suitability as an international civil servant or the granting of a permanent appointment to the staff member would NOT be in the interests of the Organization	[X]	[X]
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7. Accordingly, we hereby:

Do NOT recommend that [the Applicant] be offered a permanent appointment, pursuant to ST/SGB/2009/2010	[X]	[X]
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... In a memorandum dated 15 August 2011, Mr. Shahinyan, Chief, Section 1, Human Resources Services, Learning, Development and Human Resources Services Division (“HRS/LDSD”) informed the Chairperson, Central Review Panel (“CRP”), that having taken into account the provisions of staff rule 13.4 and sec. 2 of the [the Secretary-General’s Bulletin ST/SGB/2009/10 “Consideration for Conversion to Permanent Appointment of Staff Members of the Secretariat Eligible to be Considered by 30 June 2009” (Bulletin on CPA)], the Section concurred with the recommendation of DSS not to grant a permanent appointment to the Applicant. The memorandum further stated that “[t]his decision is based on the fact that [the Applicant’s] records show that a disciplinary measure has been taken against him” (emphasis added). This was the sole reason given by Mr. Shahinyan for the decision.

... On 1 February 2012, the Chairperson of the CRP informed Ms. Pollard that the CRP had reviewed submissions for conversion to permanent appointment for three staff members, including the Applicant. The memorandum stated (emphasis added):

The Panel took into consideration recommendations received from the substantive Department and the respective Human Resources Office, and was of the view that the staff members should not be granted a permanent appointment. *The Panel noted that the staff members have been the subject of a disciplinary measure and therefore they should not be considered suitable for conversion.*

... On 29 February 2012, Ms. Pollard informed the Applicant that pursuant to the Bulletin on CPA it had been decided not to grant him a permanent appointment. The memorandum further stated that (emphasis added):

This decision is taken after a careful review of your case. It takes into account all the interests of the Organization, and is *based on the fact that your records show that a disciplinary measure has been taken against you.*

Therefore, the granting of a permanent appointment would not be in the interest of the Organization.

... On 12 March 2012, the Applicant appealed against the decision. He noted his distinguished record of over 22 years’ service with the Organization, during which he had received numerous commendations.

... On 5 April 2012, the Applicant requested management evaluation of the decision.

... On 9 May 2012, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to endorse the decision.

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Appeals Tribunal awarded EURO 3,000, without providing justification for such differential treatment.⁵

10. The Secretary-General requests that the UNDT's award of USD 10,000 as moral damages be vacated.

Mr. Roberts' Answer

11. The appeal is moot, because, on 31 March 2015, a decision was taken to convert Mr. Roberts' fixed-term appointment to a permanent one effective retroactively as of 30 June 2009, and, on 10 April 2015, an amount of USD 10,000 described as "COMPENSATION TO MR. GLENN ROBERTS UNDT CASE ..." was credited to Mr. Roberts' bank account. In this regard, Mr. Roberts provided a copy of his personnel action form dated 16 April 2015 confirming his conversion to permanent appointment and a copy of transaction information showing the United Nations had deposited USD 10,000 in his checking account and requested that the two documents be admitted into evidence, as they were relevant to the appeal.

12. The launching of an appeal after having paid the UNDT's award of moral damages in full constitutes an abuse of process on the part of the Secretary-General. It undermines the purpose of the justice system and the staff confidence in its rulings. It also occasioned added stress, anxiety, uncertainty and expense for Mr. Roberts.

13. If the impropriety of the contested decision is upheld, then Mr. Roberts is entitled not only to receive the consideration he was due but also to be compensated for the violation of his rights and for the stress and humiliation the contested decision caused him. The Secretary-General has failed to demonstrate that the UNDT's award of moral damages is unreasonable or inconsistent with its findings.

14. Contrary to the assertion on the issue of lack of evidence that the Secretary-General is raising for the first time on appeal, there is no requirement in the Appeals Tribunal's jurisprudence or in General Assembly resolution 69/203 that a doctor's report is a precondition to an award of moral damages. In addition, Mr. Roberts was never requested to provide such a report or records of his consultation with private medical practitioners at a later time. In this

⁵ *Ademagic et al. and McIlwraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357. On 17 October 2013, when the Appeals Tribunal handed down that judgment and three others related to the ICTY cases of conversion to permanent appointment, the exchange rate between the US Dollar and the Euro stood at 1:1.35.

connection, Mr. Roberts notes that the Secretary-General never contested Mr. Roberts' sworn testimony. For this purpose, Mr. Roberts provides a list of recourse he had for stress counselling to substantiate his testimony about the emotional stress and professional embarrassment that he had experienced and requests that it be admitted into evidence.

15. The UNDT followed the jurisprudence of the Appeals Tribunal and reached its

statutorily executable. Should the Appeals Tribunal agree with the Secretary-General that the award of USD 10,000 was a legal error on the part of the UNDT or was unjustifiable, such payment should be recovered.

20. The Appeals Tribunal should not admit the additional documents annexed to Mr. Roberts' answer, as they were submitted in violation of the Statute and the Rules of Procedure of the Appeals Tribunal. There are no exceptional circumstances warranting the introduction of such documents. As Mr. Roberts has conceded, he could have "easily" provided them to the UNDT. Additionally, Mr. Roberts has failed to demonstrate that the facts will be more likely established by those additional documents. Moreover, as the new documents were not tendered before the Dispute Tribunal, the Secretary-General was deprived of an opportunity to cross-examine Mr. Roberts or call or cross-examine other witnesses in relation to the documents.

Considerations

21. The Secretary-General's appeal challenges only the Dispute Tribunal's award of USD 10,000 as compensation for moral damages. He does not challenge the Dispute Tribunal's order rescinding as unlawful the decision not to grant Mr. Roberts a permanent appointment, nor does he contest the other remedies ordered by the Dispute Tribunal.

22. The Secretary-General alleges that the Dispute Tribunal erred by awarding moral damages when there was no specific or medical evidence to support such award. In the alternative, the Secretary-General argues that the award of USD 10,000 was excessive when compared to awards in similar cases and that it should be reduced to a maximum of the equivalent in US Dollars of 3,000 Euros.

23. Mr. Roberts responds that the appeal is moot, as the Secretary-General has already paid the Judgment sum of USD 10,000. He contends that the Secretary-General's appeal is an abuse of process and claims USD 2,500 in costs. He also submits that the Secretary-General's arguments on moral damages are without merit.

Is the appeal moot?

24. It is common ground that the Judgment sum of USD 10,000 was paid into Mr. Roberts' bank account. Mr. Roberts has produced evidence that the amount was paid into his account on 10 April 2015 by the United Nations Headquarters Payroll Unit, showing the Transaction Information as "Compensation to Mr. Glenn Roberts UNDT Case ...".

25. The Secretary-General argues that his appeal is not moot. He claims that:⁷

The payment of the amount of USD 10,000 was made in error and cannot be construed as evidence of the Secretary-General's acceptance of, or consent to, the UNDT's award of moral damage. The procedures set in place for these types of payment were not followed. The normal process is for the Administrative Law Section ("ALS") of ... OHRM ... to request the Controller to instruct the relevant payroll office to effect a payment in respect of a UNDT judgment. This is because ALS is the Secretary-General's counsel before the UNDT. As part of its functions, it provides recommendations on whether or not to appeal

staff members” (ST/AI/2009/1). Therefore, the payment did not constitute acceptance of, or consent to, the UNDT’s award of moral damage.

26. The Secretary-General does not provide any explanation of how the case ended up in the hands of the Budget and Finance Officer, who, according to the Secretary-General, was not part of the normal payment process. This officer’s request for payment of what was quite a large sum of money, i.e. USD 10,000, was apparently not regarded as warranting a query by the Chief of the Payroll and Disbursement Section, who accordingly paid the money into Mr. Roberts’ bank account, describing the payment as compensation relating to his UNDT case. We therefore find that the Secretary-General’s claim that the Budget and Finance Officer did not have the authority to make such a request is not plausible.

27. Moreover, we reject the Secretary-General’s submission that the “premature” request for payment “six weeks before the Judgment became statutorily executable” is proof that the payment was made in error. An appeal must be filed within 60 calendar days of the receipt

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Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar