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Judgment No. 2016-1

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Before:

Case No.:

Date:

Registrar:

Counsel for Aly et

Counsel for Secret

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/031, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 1 April 2015, in the matter of *Aly et al. v. Secretary-General of the United Nations*. The staff members,¹ hereafter *Aly et al.*, filed their appeal on 1 June 2015, and the Secretary-General filed his answer on 14 July 2015.

Facts and Procedure

2. The following facts are uncontested:²

... On 22 June 2007, the Applicants filed a statement of appeal to the former Joint Appeals Board (“JAB”) against the implied decision not to submit their appeals to the NYGSCAC for review[.]

... [... In paragraphs 36 and 37 of] JAB Report No. 2001 [the Panel held that] (emphasis in original):

... [it] *unanimously concluded* that [the] Appellants’ due process rights had been violated by the Administration’s failure to review their cases in a timely manner [and] *unanimously agreed* to recommend for the moral injury suffered, Appellants be granted three months net-base salary at the rate in effect as at end August 2008, i.e. the date of this report.

... [it] *unanimously agreed* to recommend that [the] Appellants [re]submit their cases to the [NYGSCAC] as expeditiously as possible and no later than 90 days from the date of the Secretary-General’s decision on the [JAB Report].

... [On] 6 November 2008, the Deputy Secretary-General informed the Applicants of the Secretary-General’s decision to reject the JAB’s first recommendation relating to compensation for moral injury and to accept the second recommendation that the Applicants [re]submit their cases to the NYGSCAC[.]

... The Applicants appealed the Secretary-General’s decisions to the former United Nations Administrative Tribunal ... [and the] appeal was later transferred to the Dispute Tribunal [...].

... On 29 October 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/195 [First UNDT Judgment].³ [...]

...

... The [Dispute] Tribunal concluded that the decision to remand the case to the NYGSCAC was reasonable and fair, awarded USD 20,000 to each of the Applicants for excessive delays and procedural non-compliance, and rejected the rest of the pleas [...]. [... T]he [Dispute] Tribunal ordered:

- a. The case to be remanded to the NYGSCAC for classification decisions on the proviso that each applicant submitted the case[] for review within sixty days of the date the Judgment became executable;
- b. For all such cases submitted in accordance with the above order, the NYGSCAC shall render decision within 180 days of the date that the Judgment became executable; and

³ *Aly et al. v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/195.

c. The Respondent to pay USD 20,000 to each of the Applicants within 60 days of the date the Judgment became executable.

... Neither of the parties appealed [Judgment No.] UNDT/2010/195.

... [On] 21 December 2010, the Chief, Human Resources Policy Service (“HRPS”), OHRM advised Counsel for the Applicants that the NYGSCAC was in the

After undertaking a preliminary discussion on the circumstances of the cases, the documents available, and the structure of the review, the Committee proceeded with a factor-by-factor analysis of the existing job descriptions under appeal on their merits and separate from other issues within the UNDT judgment. In their evaluation, the Committee applied the General Service Job Classification Standards that were in effect at the time of the initial classification of the job descriptions.

... The NYGSCAC did not conduct a review of the cases of three of the Applicants, finding that [since] a classification decision had not been made in respect of two of the Applicants' job descriptions [Mr. Ejaz and Mr. Elizabeth] [...] there was therefore no initial classification to review. In respect to the case of a third Applicant [Mr. Cherian], the NYGSCAC stated that "due to the fact that neither the staff member, OHRM or DGACM could [...] locate, [or] confirm the existence of revised and completed job description, the Committee could not conduct a review of that case". The NYGSCAC found that the posts of the other [21] Applicants had been appropriately classified, and recommended upholding the initial classification decisions.

... On 8 June 2011, the ASG/OHRM [...] approve[d] the NYGSCAC report.

... [On] 9 June 2011, [...] the Compensation and Classification Section, OHRM advised Counsel for the Applicants that the NYGSCAC had completed the review of the appeal of the classification decisions ordered by the [Dispute] Tribunal [and a]ttached [...] the final approved copy of the report of the NYGSCAC.

3. On 6 September 2011, *Aly et al.* filed a

- a) the NYGSCAC began its deliberations before its members had been properly appointed under Section 7.3 of ST/AI/1998/9;⁴
- b) there was no evidence that the Secretary-General had properly appointed the NYGSCAC chairperson and its members, as required by Section 7.3 of ST/AI/1998/9;⁵
- c) Aly *et al.*'s right to be informed of the comp

6. The UNDT rejected Aly *et al.*'s requests for moral damages and compensation for excessive delays, finding that the claim for compensation for the period from 2000 until 2009 was *res judicata*, having been adjudicated in the first UNDT Judgment, and that there was no delay given that the NYGSCAC issued its recommendation concerning Aly *et al.*'s appeal within 180 days from 21 December 2010, as ordered in the first UNDT Judgment. It also rejected Aly *et al.*'s request for costs, on the basis that the order of rescission of the contested decision together with the remanding of the case for reconsideration was reasonable and sufficient compensation for the delays in the procedure.

Submissions

Aly *et al.*'s Appeal

7. The Appellants submit that the UNDT was correct to rescind the contested decision, but erred in law and procedure when it remanded Aly *et al.*'s case to the NYGSCAC for reconsideration. At no point during the four-year proceedings did the Secretary-General raise or propose remanding the Appellants' 1

This implies that each instance of miscarriage of justice would be absolved by another remand of the same case, and without any compensation for the harm caused whereas, in

12. As with other decade-long reclassification cases, this appeal falls in the category of exceptional circumstances covered by Article

retroactive to the first of the month following receipt of the Appellant's classification request in October 2000;

c) award each of them compensation in the amount of one year's net base salary for non-pecuniary damages, including delay, loss of promotion and distress throughout 12 years of protracted negotiations;

d) order costs against the Secretary-General in the sum of USD 20,000 for abuse of process before the NYGSCAC and the UNDT; and

e) refer to the Secretary-General for accountability members of OHRM and the NYGSCAC, as well as the NYGSCAC Secretary, who were involved in the systematic violation of the Appellants' due process rights during the 2011 NYGSCAC proceedings.

The Secretary-General's Answer

16. The Appellants have not clearly articulated their grounds of appeal. Their appeals do not clearly identify the errors of fact, law, jurisdiction, procedure or competence which Aly et al. allege may justify overturning or modifying the UNDT Judgment on the basis of Article 2(1) of the Appeals Tribunal Statute. While the Appellants make several assertions of errors by the UNDT, none establishes that the UNDT made any error such as to warrant a reversal of its decision to order the rescission of the contested decision of 8 June 2011, and to remand it for reasoned consideration. Nor have the Appellants identified any new harm that they say results specifically from the UNDT's decision to remand the classification appeal, and thus they have not shown any prejudice as a result of the UNDT Judgment. Rather, Aly et al. seek to incorporate a long factual history and a petition to what they view as general unfairness, without regard to matters that have already been decided on in the course of these proceedings which the UNDT correctly found to be *res judicata* and compensation already awarded.

17. The Appeals Tribunal should reject the claim that the Judgment should be vacated. The UNDT properly exercised its authority

23. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

Preliminary matter – request for an oral hearing

24. The Appellants request an oral hearing in order that they may give evidence on financial harm and moral suffering, loss of salary increases since 2000, loss of promotion and the Respondent's disregard of official procedures. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute. Having regard to the submissions filed and the material on record we do not think it is necessary to receive further evidence on appeal. The application for an oral hearing is therefore denied.

Merits of the Appellants' claims

Applicable Law

25. Article 10 of the UNDT Statute provides, in part:

4. Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the

(b) Compensation for harm, supported by evidence, 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 for harm, supported by evidence, and shall provide the reasons for that decision.

6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

7. The Dispute Tribunal shall not award exemplary or punitive damages.

8. The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

26. In ascertaining the most efficient manner in which to adjudicate this appeal involving a protracted classification review process spanning over 20 years, as well as how to remedy the situation, this Tribunal has carefully weighed all the facts, the applicable law and the arguments urged upon us.

27. On 6 September 2011, Aly *et al.* filed an application with the Dispute Tribunal contesting the post reclassification decision made by the ASG/OHRM on 8 June 2011, based on the NYGSCAC recommendations of 7 June 2011, in which they challenged, in particular, the legality of the appointments to the NYGSCAC and its composition, as well as the resultant NYGSCAC report and its findings. By way of remedy, the Appellants sought pecuniary and non-pecuniary damages, as well as legal costs in the sum of USD 20,000 for abuse of proceedings. They did not expressly request either rescission of the contested decision or remand of the case to the NYGSCAC for reconsideration.

28. The Dispute Tribunal found the contested decision flawed and rescinded the ASG/OHRM decision of 8 June 2011, together with the NYGSCAC recommendations, and ordered a remand of Aly *et al.*

30. Generally, the Appeals Tribunal defers to the broad discretion of the Dispute Tribunal in the management of its cases.¹⁹ And the Appeals Tribunal has criticised the Dispute Tribunal for awarding damages when the Applicant has not requested it.²⁰ Similarly, the Appeals Tribunal defers to the discretion of the Dispute Tribunal to remand a case. While the Appeals Tribunal may reverse an award of damages in cases where a party has not made such a request, by parity of reasoning, it may likewise reverse the awards of damages of the Dispute Tribunal pursuant to its powers under Article 2(3) of our Statute.

31. The Appeals Tribunal has ruled that when a reclassification decision is found illegal and a remand is no longer available then compensation is owed by the Respondent:²¹

Generally, when the Administration's decision is unlawful because the Administration, in making the decision, failed to properly exercise its discretion and to consider all requisite factors or criteria, the appropriate remedy would be to remand the matter to the Administration to consider anew all factors or criteria; it is not for the Tribunals to exercise the discretion accorded to the Administration. However, in the present case, remand is not available because Mr. Egglefield has retired from service with the Organization.

32. In *Fuentes*, the Appeals Tribunal affirmed the Dispute Tribunal's order that the Secretary-General pay 24,500 Swiss Francs as compensation for the illegal decision not to reclassify her post.²² The Dispute Tribunal noted that Ms. Fuentes had received no response to her appeal of the non-classifi

36. From the circumstances of this case, we are of the view that the Dispute Tribunal erred in failing to consider all the requisite factors, fair play and equity on the side of the Appellants who had been involved in a protracted classification review process, by remanding the case instead of awarding compensation, which would be the most effective remedy.

37. It is not, in substance, disputed that there were massive procedural violations on the part of the Administration causing delays in dealing with the legitima

40. The Appellants, over the past twenty years, have consistently stated they performed functions exceeding their original job descriptions and the Administration has not disputed that statement. We hold that the Appellants

50. The cap on compensation which shall normally not exceed the equivalent of two years' net base salary of the appellant does not apply where the violation of a staff member's rights is as egregious as in this case.²⁸ The facts and circumstances of this case are truly exceptional. This appeal raises fundamental issues of human rights concerning equal pay for equal work and prohibition of discrimination, which reflects negatively on the operations of the Administration in the reclassification process.

51. Article 9(3) of our Statute prohibits exemplary or punitive damages. We will therefore not go too far beyond the cap ceiling.

52. Accordingly, we award compensation equivalent to three years' net base salary to each of the Appellants.

53. In respect of the Appellants who are still sta

58. The compensation is to be paid within 60 days of the publication of this Judgment, failure of which would attract interest at five per cent in addition to the US Prime Rate.

59.

Original and Authoritative Version: English

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

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Faherty