



JUDGE MARY FAHERTY , Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals, one filed by the Secretary-General of the United Nations and the other by Mr. Abuobaida Abubakr, against Judgment No. UNDT/2011/219, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 29 December 2011 in the case of *Abubakr v. Secretary-General of the United Nations*. Mr. Abubakr and the Secretary-General filed their respective answers on 9 April 2012 and 30 April 2012.

### Synopsis

#### Secretary-General's Appeal

2. The Secretary-General asserts that the Dispute Tribunal erred in law and in fact by failing to recognize the significant actions taken by the Administration to address Mr. Abubakr's complaints of harassment and discrimination and by concluding that the facts of the present case were substantially similar to the facts in the UNDT Judgment *Applicant* (UNDT/2010/148), thereby warranting the same award of USD 40,000 to Mr. Abubakr as was awarded in the aforementioned case.

3. The Secretary-General seeks to distinguish between the facts in the *Applicant* case and the facts in Mr. Abubakr's case so as to persuade this Tribunal to find that the UNDT erred in law and in fact in determining that Mr. Abubakr's complaint merited USD 40,000 as compensation.

4. Notwithstanding the Secretary-General's pleas, the Appeals Tribunal does not find that the Dispute Tribunal erred in law and fact in choosing not to recognize, as in any way meaningful, the majority of the actions relied on by the Secretary-General. At the end of the day, by virtue of the "dysfunctional" work of the Panel on Discrimination and Other Grievances (PDOG), Mr. Abubakr was left bereft of any proper process through which his claims of harassment and discrimination could be addressed.

5. In all these circumstances, we reject the Secretary-General's pleas that the Dispute Tribunal's finding that Mr. Abubakr's predicament merited compensation was erroneous in law and fact.

6. On the issue of the level of compensation awarded, we find that the UNDT erred somewhat on the generous side in comparing the due process deprivations suffered by Mr. Abubakr to those in the *Applicant* case and, bearing in mind the Dispute Tribunal's finding that the PDOG process assisted Mr. Abubakr to some degree in that he got his budgeted post, we hereby vary the level of compensation to an award of USD 25,000.

7. The Secretary General's appeal is, thus upheld to the extent set out above.

#### Mr. Abubakr's Appeal

8. The Dispute Tribunal correctly determined that the scope of Mr. Abubakr's case was whether or not the Administration had adequately addressed his claims of harassment and discrimination. Furthermore, the UNDT did not err in law or fact when it found that the scope of the case, as had been determined following a joint submission by the parties, did not embrace any of the ten issues listed in Mr. Abubakr's closing submissions to the Dispute Tribunal. The UNDT correctly determined that these were matters which should have been contested by him by way of administrative review or management evaluation.

9. In its consideration of the foregoing, the UNDT did not err in law or fact.

10. With regard to Mr. Abubakr's appeal on the issue of economic loss, the Appeals Tribunal is satisfied to uphold the Dispute Tribunal's finding that he failed to establish that he sustained actual economic loss warranting compensation by reason of the Administration's failure to address his claims of harassment and discrimination. The UNDT made no error of law or fact in so finding.

11. The appeal is, thus, dismissed.

#### Facts and Procedure

12. Both the Secretary-General and Mr. Abubakr accept the facts as set out in paragraphs 12 to 40 of the impugned Judgment rendered by the Dispute Tribunal:

12. The pertinent facts below are based on the findings made by the Tribunal on the oral testimony given in court, the parties' joint submission of 18 October 2010, and the case record.

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Coordinator asked to see the interview notes and was informed some weeks later that the interview notes had been lost during Ms. W's office move. The Acting Coordinator testified that, as a result, she lost trust in Ms. W, since the PDOG was dealing with confidential matters. However, she conceded that she did not inform the Office of Human Resources Management ("OHRM"), or security personnel, or the Applicant of any lost file.

25. The Acting Coordinator also alluded in her testimony to her suspicion of bias on



I regret to inform you that I have absolutely no confidence in the current work of the panel which certainly not going to lead to any meaningful resolution. These delays have rendered the work of the panel mute and redundant to say the least. As an elected representative to the Staff Union Council, I will formally bring the dismal performance issue of [PDOG] before the full council attention.

32. The Acting Coordinator replied on the same day, 18 October 2007, inquiring whether the Applicant's email was to be considered a withdrawal of his complaint and stating that "[u]nless a complainant informs us in writing that s/he is withdrawing the case, PDOG continues to work on any case that is open until a final report on the case is written and submitted to the appropriate authorities". Notably, the email did not contain a request for additional documents.

33. The Acting Coordinator sent a follow-up email on 31 October 2007, requesting that the Applicant respond by 1 November 2007. Specifically, the Acting Coordinator stated:

The message below was sent to you on October 18. We have not heard from you since. Please respond by close of business tomorrow (1 November [2007]). Please note that work on your case has been paused until we hear from you.

34. The Applicant did not reply to this email. The Respondent submits that no further action was taken by the Administration with regard to the Applicant's complain of 22 September 2006 as the Applicant decided to pursue his grievances through the formal system.

35. The Acting Coordinator testified that, following the meeting of 17 October 2007, she was still awaiting further documents from the Applicant before she could finalise the Report. It is notable that there is no written record of a request for documents informing the Applicant that the report cannot be finalised in the absence thereof. It is also relevant that the Acting Coordinator's testimony is that the documents required to finalise the Report pertained to allegations of corruption made by the Applicant, yet several contemporaneous communications indicate that the Acting Coordinator clearly stated that the PDOG was not mandated to deal with allegations of corruption and would not do so. The witness was not able to furnish answers to the Tribunal's satisfaction during cross-examination regarding this apparent contradiction.

36. Although a draft report of the PDOG was prepared on or about 15 October 2007, the Respondent contends that this draft report was provided to OHRM only on or around 12 March 2008, when the disclosure of the draft was requested during the JAB proceedings. The draft report contained comments and questions inserted by the Acting Coordinator, supporting her contention that the document was incomplete. When the draft report was submitted to the JAB, the Respondent stated that it was a draft document, that it was the position of the PDOG that "it could not issue its draft



report due to lack of supporting evidence”, and that it was one of the questions before the JAB “whether it would have been appropriate for the PDOG to proceed in the circumstances” (see the memorandum of 7 August 2008 from the Representative of the Secretary-General to the Secretary of the Joint Appeals Board). According to the Respondent, it was also made clear in the Respondent’s answer to the Applicant’s appeal before the JAB that “[t]he work of the PDOG ha[d] been suspended pending further input from the [Applicant]” and that the draft report had not been finalised.

appointment in the context of this case and therefore unanimously decided to make no recommendation.

The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case. The Secretary-General agrees with the findings and conclusions of the JAB. In accordance with the JAB's unanimous decision to make no recommendation in favour of the present appeal, the Secretary-General has decided not to take any further action in this matter.

40. On 14 August 2009, the Applicant filed an application against the “[d]ecision of

Submissions

Secretary-General's Appeal

16. The Secretary-General challenges the UNDT's findings and award in respect of emotional damages.

17. The Secretary-General submits that the UNDT erred in law in concluding that the facts of the present case were substantially similar to those of the *Applicant* case, thereby warranting the same award of USD 40,000 as compensation for emotional distress, because the facts of Mr. Abubakr's case differ substantially from those of the *Applicant* case:

a) The Administration took meaningful action in response to Mr. Abubakr's complaint, which is reflected by the fact that, at least partly because of the assigned PDOG, Mr. Abubakr was granted the appointment against a regular budget post.

b) Contrary to the *Applicant* case, there were no unaddressed communications to the Administration.

c) The PDOG almost completed its draft report before its work was put on hold while the Acting Coordinator made efforts to reach a properly founded result. In the *Applicant* case, the Administration failed to take any action.

d) In the *Applicant* case, the Organization accepted that the Applicant should be compensated whereas here it did not.

18. The Secretary-General also submits that the UNDT erred in law and fact by determining that Mr. Abubakr had provided evidence that he suffered emotional distress warranting compensation. Mr. Abubakr did not establish, with either oral or documentary evidence, that the PDOG's failure to finalize its report caused him emotional distress. Instead, Mr. Abubakr claimed that his psychosomatic illness was caused by acts of harassment and discrimination in the workplace. The UNDT, however, never made any affirmative finding that Mr. Abubakr had been subjected to harassment.

19. The Secretary-General further submits that the UNDT erred in fact in finding that Mr. Abubakr's evidence in support of his damages was "unrebutted", as the Secretary-General made arguments to rebut Mr. Abubakr's evidence.

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29. Mr. Abubakr requests that the Appeals Tribunal remand the case to the UNDT for the unresolved matters to be adjudicated. He further requests that the Appeals Tribunal find that he has proven the existence of economic loss, so that the UNDT may order appropriate compensation.

Secretary-General's Answer

30. The Secretary-General submits that the UNDT properly defined the scope of the case. Mr. Abubakr failed to properly identify any additional administrative decisions that the UNDT should have addressed. The UNDT correctly relied on Mr. Abubakr's June 2007 request for administrative review and the joint submissions of the parties to determine the scope of the case, and correctly eliminated additional issues in Mr. Abubakr's closing submission based on receivability.

31. The Secretary-General submits that the UNDT correctly found that Mr. Abubakr did not establish any economic loss.

32. The Secretary-General requests that the Appeals Tribunal affirm the UNDT's conclusions as to the scope of the case and as to the finding that Mr. Abubakr did not establish economic loss.

Considerations

Secretary-General's Appeal

33. In the course of his written submissions, the Secretary-General maintains that the Administration "did all it could reasonably be expected to do to address [Mr. Abubakr's] complaints and that it succeeded in large part in their resolution".

34. Thus, the Secretary-General asserts that the Dispute Tribunal erred in law and in fact by failing to recognize the significant actions taken by the Administration to address Mr. Abubakr's complaints of harassment and discrimination and by concluding that the facts of the present case were substantially similar to the facts in the UNDT Judgment *Applicant* (UNDT/2010/148), thereby warranting the same award of USD 40,000 to Mr. Abubakr as was awarded in the aforementioned case.

35. The Appellant seeks to distinguish between the facts in the *Applicant* case and the facts in Mr. Abubakr's case so as to persuade the Tribunal to find that the UNDT erred in law and in fact in determining that Mr. Abubakr's complaint merited USD 40,000 as compensation.

36. It is noteworthy to the Tribunal that the Dispute Tribunal Judge did not premise her ultimate conclusion, that there had been a breach of Mr. Abubakr's contract of employment, on any comparison of the facts in the case with that of the *Applicant* case. Rather, the Dispute Tribunal documented, in paragraphs 12-40 of its Judgment, in painstaking detail the nature of Mr. Abubakr's complaint and what transpired between the time of the making of the complaint of 22 September 2006 and the ultimate response to that complaint on the part of Administration, namely, the letter of 13 May 2009 advising Mr. Abubakr of the decision not to take further action in the matter.

37. There is no doubt but that the facts in the present case differ to those in the *Applicant*

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54. On the issue of the level of compensation awarded, we find that the UNDT erred  
somewhat, and the degree of error is 24.32% (2012-UNAT-272, para. 23).

59. Four additional legal issues were identified by Mr. Abubakr as follows:

43. [...]

5. Can the Applicant be blamed for the non-finalization of the PDOG Report?

...

6. Did the Applicant cooperate fully with the PDOG panel?

...

7. Did the JAB and the Secretary-General renege on their duties to recommend and effectuate [any] meaningful measure to redress the wrongs done to the Applicant?

...

8. Whether or not the Applicant's claim for breach of his contract is receivable.

60. The additional issues raised by Mr. Abubakr, and, indeed, three additional issues raised by the Secretary-General, were considered relevant only to the extent that they assisted the Dispute Tribunal in determining the main legal issue.<sup>5</sup>

61. In his closing submission to the UNDT, Mr. Abubakr raised a number of other matters, all of which were effectively rejected as non-receivable as it was held that they constituted administrative decisions which should have been contested properly and timeously, either by a request for administrative review or management evaluation.

62. In his appeal to this Tribunal, Mr. Abubakr takes issue with the approach adopted by the UNDT and maintains that "a substantial part of his cause of action was improperly eviscerated by that ruling". Moreover, he submits that the issues raised by him in his closing submission had previously been subsumed under the additional issues which the UNDT had listed in Order No. 106 (NY/2011) as forming the scope of the case.

63. We find no merit in this argument as we consider the matters referred to in Mr. Abubakr's closing submission to be at a considerable remove from the seven subsidiary issues raised between him and the Secretary-General in their response to UNDT Order No. 241 (NY/2010).

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<sup>5</sup> See *Abubakr v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/219, para. 43.

64. The UNDT correctly determined that the ten issues Mr. Abubakr raised extended well beyond the scope of the case as previously argued by the parties and, notwithstanding the submissions made to this Tribunal, we are satisfied that none of the ten issues capable of being litigated as of June 2007 were subsumed in his 6 June 2007 letter to the extent hereby reader of that letter would reasonably or logically conclude that administrative review was being sought.

65. We agree entirely with the Dispute Tribunal Judge when she states:

47. Each of the matters listed in the Applicant's closing submission is a separate administrative decision (either explicit or implied) that should have been contested properly and timeously, starting with a request for administrative review (under the former system) or management evaluation (under the current system) (see, e.g., the United Nations Appeals Tribunal's ("UNAT") rulings in Syed 2010-UNAT-061, Appellant 2011-UNAT-143, Kapsou 2011-UNAT-170, O'Neill 2011-UNAT-182). Staff members must follow the established internal mechanisms to properly assert their claims (Barned 2011-UNAT-169, Jennings 2011-UNAT-184).

48. Although the Applicant may be dissatisfied with various matters that occurred during his career with the United Nations, the Tribunal is bound by the scope of the present case, which was correctly identified by the parties in their joint submission and which stems from the Applicant's request for administrative review. Any other interpretation of the scope of issues properly before the Tribunal would render the legal requirements of administrative review and management evaluation and the requirement of time limits meaningless, as the Applicant would be permitted to attach any past or future decision to his request for review filed on 6 June 2007.

66. Insofar as Mr. Abubakr makes the case that his request, on 25 September 2008, for administrative review of the decision not to accede to his request for a new Rebuttal Panel to consider his e-Pas rebuttals for the period 1 April 2006-31 March 2007 confers jurisdiction on the UNDT to consider "appurtenant" e-Pas matters, we reject this contention as stretching the bounds of logic.

67. Insofar as Mr. Abubakr contends that the Dispute Tribunal did not give consideration to the seven additional matters it duly identified as relevant to the main issue, we are satisfied that it did so. As apparent from its Judgment, the additional items (2-6) were the subject of analysis and, equally, in the context of the Dispute Tribunal's overall findings, the issue of the Administration's failure to address the claims of harassment and discrimination

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