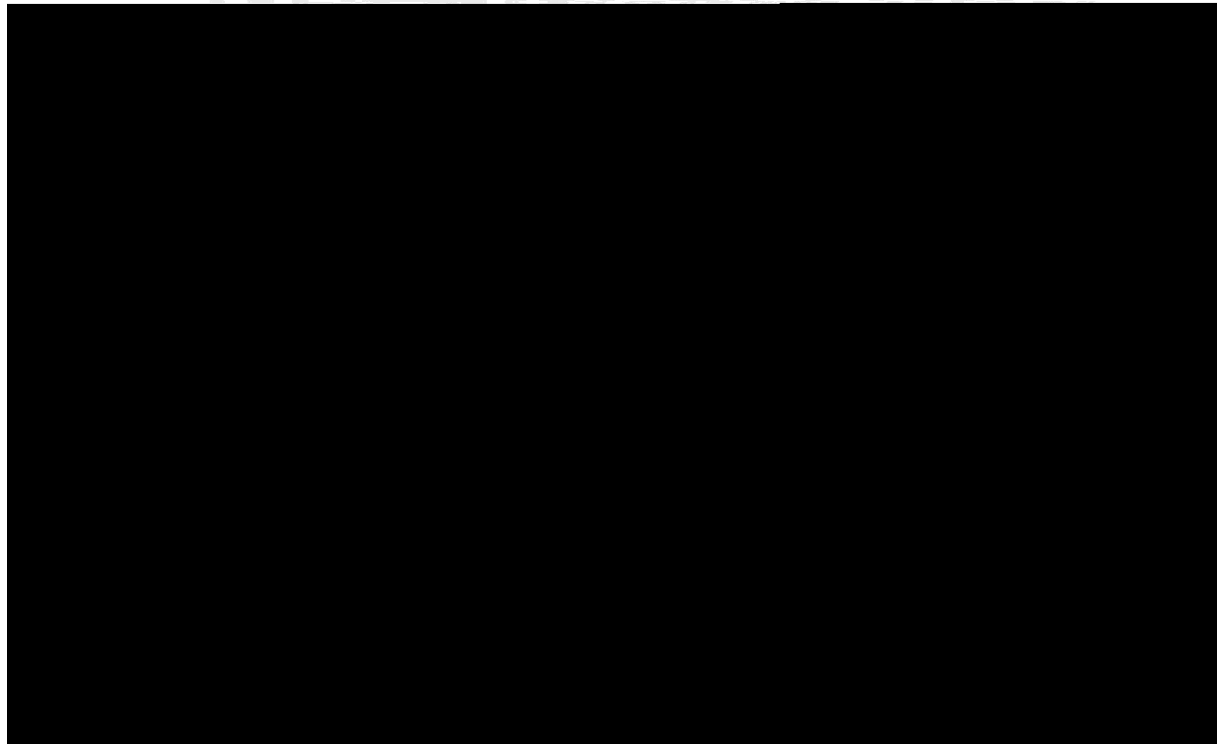


APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS U

Judgment No. 2018-UNAT-895



Counsel for Ms. Belkhabbaz:

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/071, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 27 June 2018, in the case of *Belkhabbaz v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 27 August 2018, and Ms. Amal Belkhabbaz filed her answer on 1 October 2018.

Facts and Procedure

2.

6. On 12 September 2012, Ms. Belkhabbaz's third performance appraisal, for the period 2011-2012, was completed and she received an overall rating of "Partially meets performance expectations". Ms. Belkhabbaz initiated a rebuttal process on 12 October 2012. She was

On 4 June 2013, Ms. Belkhabbaz requested management evaluation of that decision, followed on 5 June 2013 by an application for suspension of action to the UNDT, which was granted by Order No. 78 (GVA/2013) of 10 June 2013.

13. Upon the expiration of Ms. Belkhabbaz's contract on 11 June 2013, it was extended to 19 July 2013, and then until 22 July 2013 in accordance with Order No. 78 (GVA/2013). From 23 July 2013, Ms. Belkhabbaz's contract was extended for "administrative reasons" in order to allow her to avail herself of her right to sick leave.

14. On 10 July 2013, Ms. Belkhabbaz requested management evaluation of the decision not to extend her contract beyond 11 June 2013.

15. On 22 July 2013, the Under-Secretary-General for Management addressed a letter to Ms. Belkhabbaz, in reply to her requests for management evaluation of 4 June 2013 and 10 July 2013 against the decision not to extend her appointment pending the rebuttal process and the decision not to renew her contract upon its expiry, respectively. In his letter, he indicated the Management Evaluation Unit (MEU) had considered that both requests concerned the same decision, namely the decision not to extend Ms. Belkhabbaz's appointment beyond 11 June 2013 and, therefore, they had been examined at the same time. He further informed Ms. Belkhabbaz that after a review of the case, the Secretary-General had decided to endorse the findings and recommendations of the MEU and to uphold the decision not to renew her fixed-term appointment.

16. On 22 July 2013, Ms. Belkhabbaz filed an application to the UNDT contesting the decision not to extend her contract pending the conclusion of the rebuttal of her fourth performance appraisal, which was registered under Case No. UNDT/GVA/2013/039. On the same day, Ms. Belkhabbaz filed an application for interim measures seeking to suspend the execution of the contested decision, which was rejected by Order No. 108 (GVA/2013) of 25 July 2013. Also on 22 July 2013, the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, reiterated to Ms. Belkhabbaz that her contract would be extended solely to allow her to avail herself of her entitlement to sick leave.

17. On 15 August 2013, Ms. Belkhabbaz relocated to her home country for medical reasons.

18. On 14 October 2013, Ms. Belkhabbaz filed an application challenging the decision not to

19. On 27 February 2014, the rebuttal panel issued its report concerning Ms. Belkhabbaz's fourth performance appraisal, which upheld the performance rating of "Partially meets performance expectations".

20. Ms. Belkhabbaz was separated from service on 4 April 2014, after exhaustion of her sick leave entitlements.

21. On 27 June 2018, the UNDT issued Judgment No. UNDT/2018/071. In its Judgment, the UNDT addressed Ms. Belkhabbaz's two separately filed applications as they were

that she should be compensated for loss of income from her separation on 5 April 2014 until the end of 2016. The UNDT further ordered compensation equivalent to half Ms. Belkhabbaz's net base salary, plus post adjustment, for eight months and 13 days, as pecuniary damages for the loss of income resulting from her placement on sick leave with half pay from 22 July 2013 to 4 April 2014.

24. The UNDT also ordered payment of USD 40,000 as compensation for non-pecuniary damages arising from the significant stress she experienced as a result of the non-renewal of her contract, which resulted in her having to leave Geneva to return to difficult circumstances in the United States while she was pregnant with twins. She lost her medical insurance and her husband had to leave his employment in Morocco to assist her in the United States. Medical reports corroborated that Ms. Belkhabbaz suffered significant psychological harm caused by the non-renewal of her contract.

25. With regard to the decision not to extend Ms. Belkhabbaz's appointment pending the outcome of the rebuttal process, the UNDT awarded Ms. Belkhabbaz compensation equivalent to half her net base salary, plus post adjustment, for seven months and five days, as pecuniary damages. This award was intended to compensate Ms. Belkhabbaz for being placed on half-pay from 21 July 2013 until the issuance of the rebuttal report on 27 February 2014. However, somewhat puzzlingly, the UNDT ordered that this amount should be set off against the award for pecuniary damages made in relation to the non-renewal of her contract.

26. The UNDT also ordered payment of USD 10,000 for the non-pecuniary harm Ms. Belkhabbaz suffered as a direct result of the decision not to extend her appointment pending completion of the rebuttal process. In this regard, the UNDT found that she had suffered infringement of *dignitas* as a result of being treated differently from other staff members whose appointments are normally extended pending the completion of a rebuttal process and that this caused additional stress.

27. By Order No. 332 dated 10 September 2018, the Appeals Tribunal ordered that the Registry place the Secretary-General's appeal against the UNDT Judgment on the docket for consideration at the 2018 Fall Session and further ordered that Ms. Belkhabbaz's answer to the Secretary-General's appeal be submitted no later than 1 October 2018.

UNDT's award of USD 40,000 for non-pecuniary damages for non-renewal as Ms. Belkhabbaz did not suffer any additional compensable harm.

31. The Secretary-General requests the Appeals Tribunal to find that the UNDT exceeded its competence and erred in law by setting an impermissibly excessive award of damages in the present case. Accordingly, the Secretary-General requests the Appeals Tribunal to a) reduce the pecuniary damages awarded in paragraph 335(a) of the Judgment, b) vacate the pecuniary damages awarded in paragraph 335(b) of the Judgment and c) vacate the award of damages and interest in paragraph 336 of the Judgment.

Ms. Belkhabbaz's Answer

32. Ms. Belkhabbaz submits that the Secretary-General's appeal should be rejected for failure to state a valid ground for reversal of the UNDT Judgment on the quantum of damages. In fact, the Secretary-General merely repeats arguments already rejected by the UNDT.

33. The UNDT is best placed to assess compensation in a given case; it correctly calculated the financial harm to Ms. Belkhabbaz and the award ordered was not excessive. The UNDT Statute specifically allows the UNDT to award more than two years of net base salary in "exceptional circumstances". In the present case, the non-renewal decision was found to be unlawful because of extraneous improper motives, not as a matter of expectation of renewal. Thus, there is no merit in the Secretary-General's assertion that any award of compensation exceeding one year of net base salary is impermissibly excessive on the basis that it is not reasonable to assume that Ms. Belkhabbaz's appointment would have been extended for longer than one year. The fact that Ms. Belkhabbaz held a fixed-term appointment and her last renewal was for a period of one year is not a relevant factor in the circumstances of the case. Even if it had been a matter of expectation of renewal, the proper measure is the expectation that a reasonable person would have assuming a fair evaluation and review by her supervisors. Here, had Ms. Belkhabbaz been treated fairly, she he(u)h75-35.1()TJJ20.687

months shy of reaching the five-year threshold to be entitled to a pension from the United Nations Joint Staff Pension Fund.

34. The Secretary-General is mistaken in claiming that the UNDT erred by awarding pecuniary damages relating to Ms. Belkhabbaz's placement on sick leave with half pay. This was not a separate compensation for having been on sick leave. Rather, this award was part of the overall compensation for the non-renewal decision, calculated separately for pecuniary harm suffered during a different period, i.e., from 22 July 2013 until 4 April 2014, which had not been compensated under paragraph 335(a). The UNDT considered the fact that Ms. Belkhabbaz had not yet relocated to her home country for administrative purposes and determined that she was also entitled to post adjustment during the period she was on sick leave. In any event, the Appeals Tribunal has held that sick leave is an entitlement unrelated to compensation awarded pursuant to Article 10(5) (b) of the UNDT Statute.

35. Contrary to the Secretary-General's assertion that the UNDT erred by awarding separate remedies in relation to the same decision, these were two separate decisions in two separate cases. The first case concerned the violation of Ms. Belkhabbaz's right to have her contract renewed and the second case concerned the violation of Ms. Belkhabbaz's right

take judicial notice of other pertinent paragraphs in the present Judgment which make specific reference to Judgment No. UNDT/2018/016 and order any other relief deemed just and appropriate.

Considerations

38. The Secretary-General submissions are valid in most respects. The award of 21 months' compensation is excessive as it is not reasonable to assume that Ms. Belkhabbaz's fixed-term appointment would have been extended for longer than one year. While her initial appointment was a two-year fixed-term appointment, her subsequent appointments were for shorter durations and she had no legitimate expectation of renewal. Moreover, the UNDT erred in not taking into account the income Ms. Belkhabbaz earned during the second year after her separation. In the circumstances, an award of 12 months' remuneration will be adequate compensation.

39. Likewise, we agree that the UNDT exceeded its competence and erred in law by awarding pecuniary damages relating to Ms. Belkhabbaz's placement on sick leave with half pay. Ms. Belkhabbaz did not seek management evaluation of any administrative decision relating to her placement on sick leave with half pay from 22 July 2013 to 4 April 2014. Pursuant to Article 8(1) (c) of the UNDT Statute, applications to the UNDT are only receivable if the applicant has first submitted the contested administrative decision for management evaluation. As such, the UNDT could not properly award Ms. Belkhabbaz compensation on this basis.

40. Furthermore, the UNDT erred by awarding separate compensation for the alleged non-extension of Ms. Belkhabbaz's contract pending the completion of the rebuttal process. There was no basis for a separate set of remedies in relation to Ms. Belkhabbaz's application concerning the decision not to extend her contract pending rebuttal. Ms. Belkhabbaz remained in employment, albeit on CSL, until two months after the rebuttal process was finalized. She suffered no pecuniary harm as a consequence of being informed of the intention not to extend her contract pending the rebuttal process.

41. Likewise, the award of USD 10,000 for non-pecuniary damages for non-extension pending rebuttal is duplicative of the UNDT's award of USD 40,000 for non-pecuniary damages for non-renewal as Ms. Belkhabbaz did not suffer any additional compensable

Judgment

43. The appeal is partially upheld and Judgment No. UNDT/2018/071 is modified and substituted as follows:

- a) The Secretary-General is directed to pay Ms. Belkhabbaz compensation equivalent to 12 months' net base salary, as compensation for the unlawful non-renewal of her appointment.
- b) The Secretary-General is directed to pay Ms. Belkhabbaz compensation in the amount of USD 20,000 as non-pecuniary damages.
- c) The awards of compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said award. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.
- d) The Secretary-General shall place a copy of this Judgment in Ms. Belkhabbaz's official status file.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar