



UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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Judgment No. 2013-UNAT-381

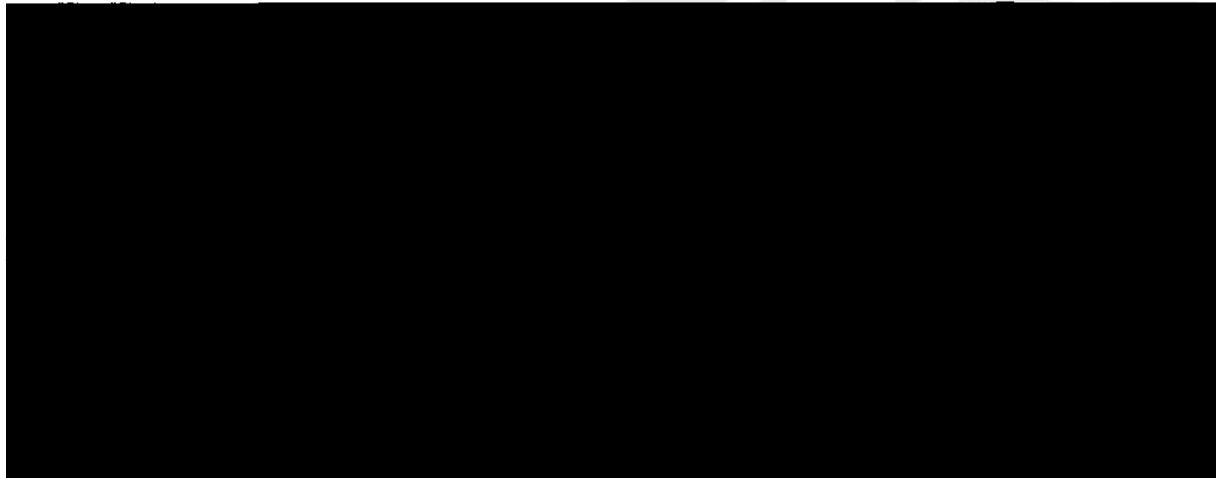
Applicant

(Respondent/Appellant/  
Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations

(Appellant/Respondent/  
Appellant on Cross-Appeal)



Date: 17 October 2013

Registrar: Weicheng Lin

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Counsel for Applicant: Self-represented

Counsel for Secretary-General: Zarqa Chohan



THE UNITED NATIONS APPEALS TRIBUNAL



Judgment on the Merits No. UNDT/2013/079

7. The following facts were established by the Dispute Tribunal concerning the merits of the case.<sup>5</sup>

... The Applicant is a medical doctor. On 6 July 2008, he joined the Malawi Country Office as Chief of Health and Nutrition with UNICEF on a fixed-term contract at the P-4 level expiring on 31 December 2011. In addition to his role as Chief of Health and Nutrition he was also the Office Ombudsperson.

... On 25 January 2010, the Applicant made a formal complaint to the Office of Internal Audit (OIA) that he was being sexually harassed by Ms. H ... He alleged that she made telephone calls and sent text messages to him about her work related stress, insomnia and a mental condition.

... The Applicant told OIA that these text messages and telephone calls progressed from expressions of gratitude for counselling and advice, to polite compliments before changing into messages of a sexual nature. He said that Ms. H began spreading rumours within the office about the two of them having an affair and only discovered what she was saying when he was approached by a colleague and asked if it were true.

... Ms. H was informed of these allegations and responded with a detailed account of events that she said she recorded in her diary, listing meetings between her and the Applicant between 25 August 2009 and 27 January 2010.

... She alleged that as a result of her relationship with the Applicant, she became pregnant. When she informed the Applicant of that fact he allegedly told her to get an abortion. Ms. H said that as a result of the Applicant threatening her career she had an abortion on 21 November 2009.

... On 16 December [2009],[<sup>6</sup>] OIA commenced an investigation into the actions of the Applicant. The OIA investigators put it to him that they believed he had been intimately involved with Ms. H. He agreed that he had and that it was a mutually agreed arrangement. He told OIA that she started to harass him with the emails and texts after he tried to end the affair.

... In February 2010, Ms. H informed OIA that she was again preg wh.8( an )J-20.2515 -1.49717TD-.0273



... OIA issued its investigation report into Ms. H's allegations against the Applicant in June 2011. It made the following findings and conclusions:

a. Both staff members have shown poor judgment in entering into an extramarital affair between colleagues in the same office. There are conflicting stories as to how and who started the relationship and this is a key element of the allegation of sexual exploitation. However, from the attached correspondence provided, Ms. H was an active participant in the relationship up until the point that the Applicant ended it.

b. It is clear that Ms. H made the complaint of sexual exploitation, only after the Applicant declined to submit to a paternity test, which was some months after the relationship ended.

c. Recommends that Department of Human Resource (DHR)/PALS [Policy and Administrative Law Section] consider the evidence and take whatever action that is deemed appropriate.

... On 11 August 2011 the Applicant was offered the post of Chief of Chil12(gus)6.9Tw7(n)rv0On.497 TD-.018

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the Country Office and was told it was neither desirable nor reasonable to reassign him nor redeploy him elsewhere.

... On 25 October 2011, the Recruitment and Staff section of DHR informed the Applicant that “due to evolving changes in our programme interventions in the Tanzania Country Office in Dar-es-Salam, the recruitment process” for the position of Chief of Health in Tanzania, for which he had applied and been interviewed, had been cancelled.

... In a decision dated 13 November 2011, the Deputy Executive Director (“DED”) ... delivered a decision on the Applicant’s request for management evaluation.

... The decision concluded, *inter alia* , that as there was an absence of sufficient evidence that the Applicant had made a previous commitment to take a paternity test the contested decision was reversed. The DHR was instructed to reissue the reprimand letter making no reference to the paternity test although highlighting the importance of all UNICEF Staff members to comply with their private obligations and particularly their parental obligations. ...

... The DHR altered the reprimand letter in line with the MEU directive and reissued it on 22 November 2011. It removed the requirement for the Applicant to proceed with the test before assuming his new duties in Uganda. [Second reprimand.]

... The Applicant remained in Malawi at the P-4 level between September and December 2011. On 21 December 2011, he was re-issued with another P[-]4 contract for his Malawi post from 1 January to 31 March 2012.

... In the meantime, the investigation into the assault proceeded.

...

... OIA issued its investigation report on the Applicant’s case in December 2011...

...

... On 10 January 2012 the Applicant received notice that he had been formally charged with:

- a. Engaging in a physical altercation with Ms H, grabbing and pushing her out of his office[;]
- b. Yelling at Ms H and using inappropriate and offensive language when demanding her to leave his office[; and]
- c. Breaching the standards of conduct expected of a civil servant.

... On 15 February 2012, the Applicant sent a comprehensive response to the allegations of misconduct.

... On the same day, he requested a comparative analysis of the candidates interviewed for the Tanzania post. In response, on 16 February 2012, the Human Resources Specialist informed him that as the interview exercise conducted

did not yield a successful candidate the vacancy was cancelled and due to the unique skill set of the position, would be filled from a direct placement of a candidate picked from the ‘talent group[.]’ The [Dispute] Tribunal notes that this reason was different from the one given to [the Applicant] on 25 October 2011 by the Recruitment and Staff section of the DHR.

... On 9 March 2012, the Applicant was informed by the DED that as a result of the charges of misconduct against him, it had been decided that the interests of the Organization would be served through an informal resolution approach and that on 30 January his case was referred to the Office of the Ombudsman. He agreed to engage with the Ombudsman’s office however no agreement was reached.

... Following consideration of the facts, the DED further informed the Applicant that it was concluded that there was clear and convincing evidence that he had engaged in misconduct but having considered mitigating facts decided that he should be demoted one level with deferment, during two years, of eligibility for consideration of promotion.

...

... In the same letter, the Applicant was then directed to take up his re-assignment to Uganda remaining at the P[-]4 level due to demotion. He did so from the beginning of April 2012.

8. In Judgment No. UNDT/2013/079, the Dispute Tribunal considered the following issues:

(i) Whether the failure to give the Applicant written notice of the abolition of his post was unlawful;

(ii) Whether the first reprimand and the refusal to sign th2 dir aTn oafd2dirtbrth2da8 Tw(he)3.wnal

(viii) remedies.

9. Concerning (i) and (vii), the Dispute Tribunal dismissed the Applicant's claims. In its view, although his rights were breached by the lack of written notification of the abolition of his post, the Applicant was verbally informed of the abolition and suffered no material harm. Consequently, compensation was not warranted. Concerning his non-selection to the Tanzania post, the Dispute Tribunal concluded that the claim was moot because he had been appointed to the Uganda post before he learned of the cancellation of the Tanzania post, and he consequently suffered no prejudice.

10. The UNDT also concluded that the Applicant had engaged in misconduct and the sanction of demotion was proportionate to the offence. However, the two-year demotion period should start on 19 September 2011, when the Applicant was effectively demoted as he was prevented from taking up his P-5 post in Uganda because of the paternity test.

11. While it found that the Applicant's rights were breached by the paternity test being made a condition for assuming the Uganda post, and that the first reprimand, the refusal to issue travel authorization, and the erroneous calculation of the two-year demotion period "were sources of humiliation and anxiety to him", the UNDT concluded that the Applicant "was, to a considerable extent, the author of his own misfortune", and he was therefore "not entitled to any moral damages". However, the Applicant was entitled to a refund of the expenses for hotel, storage and airline penalties in the amount of USD 15,823, which he incurred as a direct result of the unlawful delay to his departure based on the requirement to take a paternity test.

#### Submissions

Judgment on Receivability No. UNDT/2012/159

The Secretary-General's Appeal

12. The Secretary-General submits that his appeal of Judgment No. UNDT/2012/159 is receivable. The question of receivability is linked in the present case to the requirement of management evaluation and not to the merits of the case.

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17. The Applicant submits that the UNDT erred on a question of fact, when it concluded that he had failed to substantiate his allegations about the process and the motivation of the decision-makers concerning the Tanzania post. The Applicant maintains that he submitted substantive evidence, but the UNDT failed to assess it. He believes that he had a “100% chance” to be selected, as he was the “most suitable” and best qualified candidate.

18. The Applicant submits that, contrary to the UNDT’s findings, he did request management



27. Concerning the issue of compensation, the Applicant submits that this was rightly awarded. This compensation was, contrary to the Secretary-General's submission, not awarded for his day-to-day expenses, which were not claimed, but for warehouse charges, ticket penalty

32. We note that before the Applicant made his request for management evaluation, he had been advised by the OIC, Division of Human Resources, that: “In order for your request for Management Evaluation to be complete, kindly formally identify the decision you wish to be reviewed”.

33. The Applicant’s subsequent request for management evaluation was couched in these terms:

I would like to request for a management evaluation of the administrative decision made by the Division of Human Resources following the investigation of the sexual exploitation case leveled against me. ... In light of the countervailing evidence that I have provided, I believe that the decision to make paternity testing a condition for my re-assignment and promotion to Uganda is unlawful and in violation of the terms and conditions of my employment and appointment. I have never made a commitment to do a paternity test ... and I have been refuting this ever since the investigation began. I do not believe that I should be required to honour a commitment that I have never made. I am also requesting for evidence to be provided to support the claim that I agreed to do a paternity test that is now the basis the administrative decision [sic] .... I consider this request to be the ultimate insult and blow to my dignity and basic human rights.

34. The Applicant concluded by asking that all the communications he had made “on this case” together with the investigation file form part of his request for management evaluation.

35. There was no mention in the Applicant’s request for management evaluation of any of the non-disciplinary issues. Moreover, the documents attached to his request were clearly meant to support his request for management evaluation of the decision regarding paternity testing and none of those documents contains a request for management evaluation of any of the non-disciplinary issues.

36. We note that the Applicant did not dispute the outcome of the management evaluation, notwithstanding that such evaluation addressed only the issue of the paternity test. This is not consistent with the Applicant having also challenged the non-disciplinary issues in his request for management evaluation.



37. This Tribunal has held that the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary and that for this goal to be met it is essential to clearly identify the administrative decision the staff member disputes.<sup>10</sup>

38. The Applicant's request for management evaluation is clear and unambiguous. It clearly identifies the issue in dispute as the decision requiring him to submit to a paternity test. No reasonable and objective reading of it could lead to the conclusion that the Applicant was challenging any other issue.

39. We find that the UNDT, in deciding that the non-disciplinary issues had been submitted for management evaluation, erred in law and in fact, resulting in a manifestly unreasonable decision. It follows that the UNDT exceeded its jurisdiction in deciding on the merits of the Applicant's application when it was not receivable insofar as it relates to the non-disciplinary issues.

Judgment (on the Merits) No. UNDT/2013/079

40. The UNDT's award of USD 15,823 in respect of hotel, storage and airline penalties allegedly incurred by the Applicant, being a non-disciplinary issue which had not been submitted for management evaluation, cannot be allowed to stand.

41. The Applicant challenges the UNDT's finding that the facts on which his demotion was based were established by clear and convincing evidence. The Applicant submits that the UNDT's finding was not supported by either the available evidence or by its own jurisprudence.

42. The UNDT not only reviewed the evidence gathered by the OIA and considered by the decision maker, but also heard evidence from the Applicant, in which he accepted that there was a physical altercation in his office between himself and Ms. H and that he grabbed her in an attempt to push her out of the office. He also admitted using strong language as alleged by the complaint. The UNDT concluded that the facts on which the decision to demote him was based were established by clear and convincing evidence.

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<sup>10</sup> *Pina v. Secretary-General of the United Nations*

, Judgment No. 2013-UNAT-311, para. 42.

43. The UNDT also, in a reasoned decision, found that the established facts amounted to misconduct and that the sanction was proportionate to the offence. In the latter regard, although the UNDT was reluctant to interfere with a disciplinary sanction that had been imposed in accordance with proper procedure, it found that the calculation of the sanction of two years' demotion should commence from 19 September 2011 (the date on which the Applicant had been effectively demoted) ending on 19 September 2013, rather than from the time it was imposed on 9 March 2012.

44. The standard of the UNDT's review of the disciplinary sanction imposed on the Applicant was consistent with the jurisprudence of this Tribunal.<sup>11</sup>

45. The Applicant has not demonstrated that the UNDT committed any error of law or fact. We find his submissions in this regard to be devoid of merit.

#### Judgment

1. The Secretary-General's appeal and cross-appeal are allowed.
2. The UNDT Judgment on Receivability is set aside.
3. The award of compensation of USD 15,823 for hotel, storage and airline penalties is vacated.
4. The Applicant's appeal is dismissed in its entirety.

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Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2013 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Chapman

Entered in the Register on this 19<sup>th</sup> day of December 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar