



UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D 'APPEL DES NATIONS UNIES

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JUDGE KAMALJIT SINGH GAREWAL , Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by



have been in, had she not been separated from service. The UNDT awarded compensation based on the speculation that Ms. Mwamsaku would have been extended until the day of the issuance of the UNDT Judgment. Such speculation constitutes an error in law, since it is well established that fixed-term appointments carry no expectancy of renewal.

12. In the alternative, the Secretary-General submits that the UNDT erred in law in awarding compensation for loss of earnings beyond the two-year limit set out by the UNDT's Statute. Where compensation is calculated based on the loss of earnings, it should be limited to

16. Ms. Mwamsaku also states that the compensation awarded was not based on speculation and does not place her in a better position than in which she would have found herself had she not been separated. In fact, she could not get a job anywhere else because of the reason for her separation. If she had not been separated, she would have by now been in a more senior position. The unfair separation had consequences for her family, and her career and reputation were “seriously damaged”.

17. Ms. Mwamsaku maintains that the UNDT can order compensation exceeding two years’ net base salary and her case was exceptional. The damage suffered in the present case was greater than that experienced in the cases cited by the Secretary-General. In the view of Ms. Mwamsaku, the UNDT was correct in relying on the Borhom case as it had similar material facts and produced the same impact on the parties as in the present case.

#### Considerations

18. The Secretary-General has appealed against the Dispute Tribunal’s Judgment, setting alternative compensation for loss of earnings beyond the duration of Ms. Mwamsaku’s appointment. The Secretary-General’s alternative plea is that should this Tribunal decline to find in favour of the management on the above issue, then this Tribunal should hold that the Dispute Tribunal erred on a question of law in awarding compensation beyond the two-year limit set by its Statute.

19. Obviously, the Dispute Tribunal’s principal order that the contested administrative decision be rescinded as Ms. Mwamsaku was unfairly dismissed goes unchallenged. Therefore, we are not required to re-examine the factual background of the allegations against Ms. Mwamsaku and the disciplinary proceedings against her.

20. We are primarily concerned with the awards of compensation ordered by the UNDT as an alternative to rescission and reinstatement, which consist of (i) the lost earnings from the date of separation (1 October 2008) to the date of the UNDT’s Judgment (16 September 2011), a period of two years, 11 months and 15 days, and (ii) six-mo

was informed that her fixed-term appointment with the WFP would be terminated effective 1 October 2008.

21. The question before us is whether in the circumstances of the present case, these awards were fair and adequate or excessive.

22. Under Article 10 of the Statute of the Dispute Tribunal, where the UNDT rescinds the contested administrative decision of termination, as in the present case, the Dispute Tribunal must necessarily set an amount of compensation in lieu of rescission or specific performance. Article 10(5)(b) provides that in exceptional cases compensation may exceed two years' net base salary. In the present case, the Dispute Tribunal did not record any reasons for holding that this was indeed an exceptional case, warranting an award higher than two years' net base salary.

23. On the other hand, the Statute of the Dispute Tribunal provides no guidelines in the matter of determining the quantum of compensation. Is the Dispute Tribunal to fix an arbitrary or notional amount or award an amount equivalent to the real loss of salary for the period during which Ms. Mwamsaku remained out of her jobshmr1( )62.9(.4(r) e)67.39(.4(r) )591from sep compensation but without articulating any reasons. There is a drawback in this approach because it presumes that the staff member was going to remain in service during the entire period between separation and the date of the UNDT's Judgment, but it ignores the fact that the staff member may be separated from service on other non-disciplinary grounds like

witness. In *Harding*, the Disciplinary Committee and the Dispute Tribunal found that the dismissal decision was flawed by factual errors and violation of due process rights. It seems to us that the procedural irregularities were a determining factor in the award of compensation.

26. If we follow this approach, we should briefly examine the procedural irregularities which led to the impugned decision. There was a failure to take the testimony of certain relevant witnesses, failure to give the staff member the allegations of misconduct in writing before she was subject to a formal investigation, and the taking

Judgment

31. The appeal is accepted to the extent indicated above. We reduce the quantum of compensation in lieu of reinstatement to one year's net base salary in effect on 1 October 2008.



Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of June 2012 in Geneva, Switzerland.

*(Signed)*

*(Signed)*

Judge Garewal, Presiding