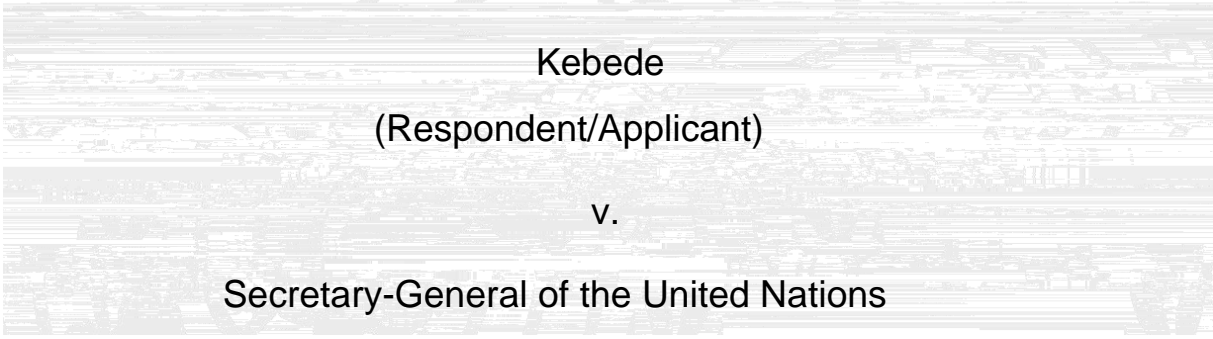

APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES



Kebede
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge John Murphy Judge Sabine Knierim
Case No.:	2018-1166
Date:	26 October 2018
Registrar:	Weicheng Lin

JUDGE M

Management (“ASG/OHRM”) pursuant to [Secretary-General’s Bulletin] ST/SGB/2008/5 [(Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)] alleging discrimination against him on the basis of his physical disability and the failure of senior ECA managers to address his concerns.

d. The Applicant emailed the [Executive Secretary of ECA (ES/ECA)] on 4 January 2014 regarding the poor working conditions for ECA staff members with disabilities, including himself.

e. By email dated 16 January 2014[,] the ASG/OHRM informed the Applicant that his ST/SGB/2008/5 complaint should be sent to the ES/ECA.

f. The Applicant forwarded the 12 September 2013 email to Mr. Lopez, the then ES/ECA, on 5 February 2014 and on 17 February 2014, the ECA legal adviser informed him that more specific information would be required for the ES/ECA to act on his complaint.

g. On 1 April 2014, the Applicant provided the ECA legal adviser with the information requested on his ST/SGB/2008/5 complaint.

3. The UNDT summarized Mr. Kebede’s complaint as follows:²

a. [H]e has remained as a library clerk at the G-3 level for 14 years despite a good record of performance and ... recommendations for promotion to senior library assistant were blocked by the then head of library services.

b. [H]e was moved to what he considered to be a dead-end job.

c. He was informed that he had not been given responsibilities because all positions in the Inventory Store and Services Management Unit (“ISSMU”) require a high degree of physical movement Accordingly, he has remained “idle” for the past three years.

d. His supervisors failed to finalise his performance assessments thereby jeopardising his advancement within the Organization.

e. Despite being moved to his current post to address his grievances and supposedly to advance his career[,] his request for reclassification of his post was refused on the ground that the post was funded from General Assistance Funds. To address this problem the PDOG Report recommended that “serious consideration” be given to vacant regular budget posts yet appropriate steps were not taken to implement this recommendation.

f. His requests to transfer to another duty station were refused.

² Ibid. , para. 13.

g. He had been subjected to insulting and demeaning comments relating to his disability.

h. His original workplan began with the words “Since our colleague is handicapped...”. This made him feel “unneeded and perhaps unwanted in the unit”.

i. [I]n a number of specific areas, which he identified, there was a failure to make reasonable adjustments to accommodate the needs of disabled staff including himself. One of his specific concerns was, “Staff members’ inability to safely access their workplace or basic facilities, such as bathrooms, serves as a source of humiliation and generates physical safety risks”. He mentioned the fact that he had fallen at the ECA compound and injured himself.

4. The UNDT established the events succeeding the filing of Mr. Kebede’s claim as follows:

h. The Applicant wrote to Mr. Lopes, ES/ECA, on 16 April 2014 to complain about the inadequacy of the parking lot assigned to staff with disabilities and on 17 April about the clamping of his car by ECA Security, thereby subjecting him to a detriment as a person with a physical disability.

i. He wrote to Mr. Lopes, ES/ECA, again on 12 May 2014 requesting that arrangements be made for him to attend a conference on the rights of persons with disabilities. In response, the ECA legal adviser informed him on

“since our staff is disabled no need of assigning him a team leader function” and “no room for disabled staff at the unit”.

m. On 25 April 2016, the Applicant received the Inter[-]Office Memorandum (“IOM”) recording Mr. Lopes’ the ES/ECA’s, decision dated 23 April 2016 regarding his complaint, submitted on 1 April 2014 under ST/SGB/2008/5. The ES/ECA informed the Applicant that after reviewing his allegations and the supporting evidence, he concluded that the complaint did not warrant the formation of a fact[-]finding investigation panel because: two of the complaints were not receivable; the complaint of inaction by the [A]dministration on the PDOG report had been settled informally by [the] MEU with compensation; and that the complaints against AG, for sending an email to a number of people stating that he had acted violently towards another staff member, and RA, for referring to him as being incapacitated due to his disability, did not amount to harassment under ST/SGB/2008/5.[4]

n. On 19 and 26 May 2016, the Applicant wrote to [the] MEU requesting an explanation as to why he had not received from [the] MEU a response to his request for management evaluation that he submitted on 12 September 2013. It would appear from the documents that [the] MEU did not respond to this request thereby reinforcing the Applicant’s belief that he was being marginalised.

o. On 20 June 2016, the Applicant submitted a management evaluation request against Mr. Lopes’ decision of 23 April 2016 not to form a fact-finding investigation panel into his ST/SGB/2008/5 complaint of 1 April 2014. On the same day, [the] MEU informed the Applicant that it had received his management evaluation request and would respond to him no later than 4 August 2016.

p. [The] MEU responded to the Applicant’s management evaluation request on 29 July 2016 upholding the ES/ECAly tD 08J 17.8383 0 Tc 0 Tw ()Tj /a

THE

ST/SGB/2008/5 and cannot support his claim that the handling of his complaint caused him distress.

9. The UNDT's award therefore failed to comply with the requirements of Article 10(5) (b) of the UNDT Statute and the jurisprudence of the Appeals Tribunal.

Mr. Kebede's Answer

10. The UNDT did not err in fact or law in awarding Mr. Kebede USD 3,000 in moral damages. It correctly applied Article 10(5)(b) of the UNDT Statute, as amended by General Assembly resolution 69/203, to award Mr. Kebede moral damages for the harm that had been caused by the ES/ECA's administrative decision not to initiate a formal fact-finding investigation into his complaint.

11. The Appeals Tribunal ruled in Kallon that proving moral injury requires showing, beyond a balance of probabilities, the existence of factors causing harm to the victim's personal rights and dignity. Among others, the loss of a positive state of emotional gratification or emotional balance is harm deserving compensation. The Appeals Tribunal also determined that the harm to dignity or to reputation and career potential may be established on the totality of the evidence, which may consist of an applicant's own testimony. The UNDT therefore correctly applied the Appeals Tribunal judgment in Kallon to award Mr. Kebede compensation for moral damages.

12. The Secretary-General mischaracterizes the opinion of the majority of the Appeals Tribunal Judges in Kallon in arguing that the evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence affirming that moral harm in deed occurred. In their joint partial dissent, Judges Chapman, Lussick and Thomas-Felix stated that "generally speaking" the testimony of an applicant alone is not satisfactory proof to support an award of damages. They, however, also conceded that there may be some exceptions where testimony of an applicant alone would be sufficient to prove harm to receive an award of compensation for moral damages. This general notion was also reiterated by the Appeals Tribunal in Auda.

13. Moreover, while Judge Knierim, in her concurring opinion, opined that evidence of moral

from the Administration that the discrimination would stop following the June 2012 settlement agreement.

17. The Appeals Tribunal held in Appellant that it should “be slow to interfere with the Dispute Tribunal’s determinations in this regard [the calculation of damages], unless the exercise of the Dispute Tribunal’s discretion is found to be manifestly unreasonable”.¹⁰ The Secretary-General has presented no evidence to show that the UNDT exercised its discretion in a manifestly unreasonable manner. Therefore, pursuant to precedent and deference typically afforded to the UNDT, the UNDT’s award of compensation should not be disturbed. Mr. Kebede requests that the Appeals Tribunal dismiss the appeal.

Considerations

18. As noted above, following Mr. Kebede’s initial complaint in 2007, the PDOG issued its report in 2008 and the parties reached an agreement during the mediation process in 2012. Mr. Kebede filed a new complaint of discrimination in 2013, which, in 2016, the Administration found did not warrant the formation of a fact-finding panel. The UNDT rescinded the Administration’s decision, referred the case back to the ES/ECA for proper consideration under Section 5.14 of ST/SGB/2008/5 and awarded compensation for moral damages in the amount of USD 3,000.

19. The only issue in contention in this appeal is whether the UNDT erred on a question of law or fact when it found that the harm to Mr. Kebede was sufficiently evidenced so as to justify an award of compensation for moral damages in the amount of USD 3,000 plus interest.

20. It is universally accepted that compensation for harm shall be supported by three

compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question.¹²

21. As regards the award of compensation for harm, our jurisprudence has evolved following the 2014 General Assembly resolution 69/203, which amended our Statute and

... At section IX of the application, the Applicant seeks an award of moral damages as one of his remedies. Following the ruling in Kallon, the Tribunal heard oral evidence from the Applicant on 26 January 2018 in relation to his claim to be compensated for psychological and moral injury.

... The Applicant seeks compensation for psychological and moral damage. It was apparent from his application that the Applicant has for several years been complaining about the manner in which he had been treated because of his disability. It is also clear that his complaints were not totally ignored and that certain measures had been put in place to accommodate some of his needs. These measures were insufficient. What was difficult to discern from the documents was the extent and severity of any psychological harm he suffered as a direct consequence of Mr. Lopes's decision not to investigate his complaints of prohibited conduct. Ms. Baffoe-Bonnie, Counsel for the Respondent, was correct in submitting that the Applicant had to show a causal link between any distress he said he suffered and the decision not to carry out an investigation.

... The Applicant gave evidence that he experienced what he described as psychological consequences. When asked to elaborate on this he mentioned loss of sleep, increased pressure, a feeling of hopelessness and deterioration in his overall medical condition. He also mentioned "moral consequences" of a lack of career progression and bad treatment by senior managers due to his disability. The Tribunal takes into account the pre-existing distress that the Applicant was already suffering from and finds that his distress was exacerbated by the unlawful decision to refuse his request, made in good faith, that he was being subjected to continuing detrimental treatment in the workplace for reasons relating to his disability. The fact that the Applicant was already distressed does not preclude him from an award of compensation so long as the Tribunal finds on the evidence that the conduct that was found to be unlawful contributed to the distress that he suffered and is continuing to suffer. The Tribunal assesses this in the sum of USD 3000.

25. A review of these paragraphs reveals that the UNDT based the award of compensation for

suffered before the 2012 settlement agreement to support its award of moral damages for harm suffered after the 2016 decision.

26. For the foregoing reasons, the UNDT erred in law in awarding moral damages without evidence corroborating Mr. Kebede's testimony.

Judgment

27. The Secretary-General's appeal is granted and the UNDT's award of compensation for moral damages is vacated. The UNDT's rescission of the ES/ECA's decision not to initiate a formal fact-finding investigation into Mr. Kebede's complaint and the referral of Mr. Kebede's complaint back to the ES/ECA for proper consideration pursuant to Section 5.14 of ST/SGB/2008/5 have not been appealed and consequently stand.

Original and Authoritative Version: English

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

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Knierim

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

(Signed)

Weicheng Lin, Registrar