



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-874

**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

Counsel for Respondent/Applicant: Julia Kyung Min Lee, OSLA

Counsel for Appellant/Respondent: John Stompor

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/018, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 8 February 2018, in the case of *Kebede v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 9 April 2018, and Mr. Fekadu Woldeyohannes Kebede filed his answer on 6 June 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... [The Applicant is an Inventory Control and Supply Assistant at the Economic Commission for Africa (ECA)'s Property Management Unit at the G-4 level. He joined the ECA in 1994 as a Library Clerk at the G-3 level and was moved to his current role in 2007 following the receipt of discrimination complaints.]

a. In February 2007, the Applicant submitted a formal complaint of discrimination and harassment to the Panel on Discrimination and Other Grievances ("PDOG") alleging that: (i) he had been working on a Temporary Assistance Fund post for 14 years without a promotion as a result of discrimination due to his disability; (ii) his supervisor, Mr. AA, had insulted him by telling him his "brain is as disabled as [his] leg"; (iii) [h]e had been the subject of a smear campaign based on an erroneous assumption that he was Eritrean instead of Ethiopian; (iv) [h]is life was in danger and ... he was being harassed but ... no action had been taken to correct the situation.

b. In a report dated 21 November 2008, the PDOG concluded that there were "discriminatory overtones" in the treatment of the Applicant and that the way his supervisor treated him created a hostile work environment. The PDOG also concluded that the Applicant had a genuine fear for his safety and that the ECA Library's appointment and promotion process appeared to be irregular. The PDOG recommended, *inter alia*, that: (i) ECA Security further investigate the threats made to the Applicant; (ii) OHRM review ECA's recruitment and promotion processes, especially in relation to the Library; and (iii) the Applicant be considered for a regular budget post rather than continuing to be assigned to a series of temporary assistance fund contracts after more than 14 years of service.

c. On 12 September 2013, the Applicant submitted a request for management evaluation to the Management Evaluation Unit ("MEU") and a complaint of discrimination to the Assistant Secretary-General for Human Resources

¹ Impugned Judgment, para. 12 (internal footnotes omitted).

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:³

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 15 and 16 May 2014 to direct his request to his supervisor for consideration.

j. Between 16 May 2014 and 21 July 2015, the Applicant was emailing various people within ECA about his e-PAS for 2013/2014 and an ongoing mediation process.

k. On 21 July 2015, the Applicant emailed the Secretary-General, copying [the Office of Internal Oversight Services (OIOS)] and other offices, alleging that he was being subjected to discrimination at ECA for a reason relating to his disability and ethnic origins. He reported that: he was forced to sit idle with no work; his medical records had been “illegally circulated”; and that he had been told that “your brain is as disabled as your leg” and “no room for disabled staff at the unit”. He requested that remedial action be taken. OIOS sent him a questionnaire which he completed and returned on 21 July 2015. He provided OIOS with additional information on 24 July 2015.

l. The Applicant emailed the ES/ECA on 1 August 2015 regarding the mistreatment of ECA staff members, including himself, with disabilities. He alleged that: he had not been given a work assignment since 2007; when he was given work, it was in an inaccessible area such as the basement; his medical records had been circulated to other staff members; and his supervisor had stated

³ *Ibid.*, para. 12.

“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/ECA’s decision of 23 April 2016.

5. On 19 October 2016, Mr. Kebede filed an application before the UNDT challenging the decision made on 23 April 2016 by the then ES/ECA not to set up a fact-finding investigation panel to investigate his complaints about workplace discrimination and harassment.

6. On 8 February 2018, the UNDT issued its Judgment. The UNDT found that the ES/ECA misapplied the definition of what constitutes workplace harassment pursuant to ST/SGB/2008/5. In addition, the UNDT found that the ES/ECA conflated ST/SGB/2008/5 on prohibited conduct with the receivability of claims under the formal internal justice system thereby excluding material he ought to have considered and failing to address the simple

[4] AG and RA are the initials of two staff members of the Human Resources Services Section.

question of whether it appeared that Mr. Kebede may have been subjected to prohibited conduct which merited an investigation. Finally, the ES/ECA erred in law and procedure by disregarding allegations of prohibited conduct on the basis that they had been subject of a settlement agreement between Mr. Kebede and the Organization, thereby failing to appreciate that Mr. Kebede was complaining of a continuing state of prohibited conduct. The UNDT concluded that the ES/ECA had misdirected himself as to the applicable law and procedures in deciding not to initiate a formal fact-finding investigation into Mr. Kebede's complaint. The UNDT rescinded the ES/ECA's decision and referred Mr. Kebede's complaint back to the ES/ECA for proper consideration pursuant to ST/SGB/2008/5. Relying on the Appeals Tribunal's jurisprudence in *Kallon*,⁵ the UNDT also awarded compensation for moral damages in the amount of USD 3,000.

Submissions

The Secretary-General's Appeal

7. The Secretary-General contends that the UNDT erred in fact and in law in awarding compensation for moral damages. Article 10(5)(b) of the UNDT Statute requires evidence of harm before an award of compensation can be justified. The Appeals Tribunal has held in *Kallon*,⁶ *Zachariah*⁷ and *Auda*⁸ that evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient to establish that he or she suffered compensable harm.

8. In the present case, the UNDT's award of compensation for moral damages relied on the testimony of Mr. Kebede without independent evidence. The UNDT's finding that Mr. Kebede had suffered distress constituting compensable moral harm as a result of the contested decision was based only on Mr. Kebede's oral testimony without independent evidence. Specifically, while the UNDT's finding was based on Mr. Kebede's oral evidence that he had experienced what he described as psychological and moral consequences, the medical reports he submitted in support of his claim for moral damages were dated 5 October 2007, 17 June 2010, 24 September 2010 and 18 September 2012. These medical reports therefore all predated Mr. Kebede's 5 February 2014 complaint of prohibited conduct pursuant to

⁵ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

⁶ *Ibid.*

⁷ *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764.

⁸ *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787.

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 indeed 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 injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence, she also held that the UNDT did not err in accepting

Mr. Kallon's loss of reputation as non-pecuniary harm allowing for compensation under Article 10(5) (b) of the UNDT Statute. In reaching this conclusion, Judge Knierim relied on the totality of the evidence presented before the UNDT and drew a "reasonable inference" to conclude that Mr. Kallon had actually incurred this harm as a result of the impugned administrative decisions in that case.

14. Furthermore, the Appeals Tribunal recently confirmed in *Al Hallaj*⁹ that the UNDT has the power and the duty to legitimately infer harm to the dignity of a staff member from the unlawful action of the Administration and that proof of moral damages could be established by making a direct link between facts and harm, by means of evidentiary presumption, corroborated by the context in which the situation occurred and the expected impact the acts would have on an average person.

15. The Secretary-General's assertion that the UNDT's award of compensation for moral damages solely relies on Mr. Kebede's testimony without independent evidence is misguided. The UNDT took into consideration the totality of the evidence before it, including that Mr. Kebede had been complaining for several years about the manner in which he had been treated because of his disability; that his complaints were only partially addressed despite the PDOG's recommendations based on findings that Mr. Kebede's supervisor created a hostile working environment and that there were "discriminatory overtones" in his treatment; that the discrimination against Mr. Kebede continued despite the assurance from the settlement agreement of June 2012; and Mr. Kebede's medical records confirming that he had already been suffering from distress due to the continuing detrimental treatment in the workplace for reasons related to his disability.

16. The UNDT drew the reasonable inference from this additional evidence that Mr. Kebede had incurred this harm as a result of the ES/ECA's administrative decision not to initiate a formal fact-finding investigation by dismissing his complaints. Any reasonable person in Mr. Kebede's position would have suffered harm to dignity after receiving the ES/ECA's decision not to investigate his complaints. Mr. Kebede's feeling of hopelessness and despair was exasperated by the ES/ECA's decision to dismiss his complaints, especially given the particular circumstances in which the discrimination against him perpetuated for several years, despite the assurance

⁹ *Al Hallaj v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-810.

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 elements: the harm itself; an illegality; and a *nexus* between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien.¹¹ If one of these three elements is not established,

¹⁰ *Appellant v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-143.

¹¹ *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277, para. 2.

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 that of the UNDT, introducing the expression “supported by evidence” after “compensation for harm” in Article 10(5) (b) of the UNDT Statute and Article 9(1) (b) of the Appeals Tribunal Statute. A breach of staff member’s rights, despite its fundamental nature, is thus not sufficient to justify such an entitlement. There must indeed be proven harm stemming directly from the Administration’s illegal act or omission for compensation to be awarded.

22. Our jurisprudence holds that, generally speaking, a staff member’s testimony alone is not sufficient as evidence of harm warranting compensation under Article 10(5) (b) of the UNDT Statute.¹³ The testimony of an applicant in such circumstances needs the corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred.¹⁴ Much will depend on the circumstances of the situation at hand, as the existence of moral damages shall be assessed on a case-by-case basis.

23. While the Secretary-General argues that the UNDT’s finding of harm justifying compensation for moral damages relied solely on Mr. Kebede’s evidence, which is contrary to our jurisprudence, Mr. Kebede claims that the UNDT based its award on the totality of the evidence, which included *inter alia* the continuous discriminatory manner in which he had been treated for many years, the distress he had been suffering as evidenced by his medical records and the Administration’s failure to fully comply with the PDOG’s recommendations.

24. With respect to its award of moral damages, the UNDT set out its considerations in paragraphs 45 to 47 of its Judgment as follows:¹⁵

¹² *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21, citing *Diatta v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-640; *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277.

¹³ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, joint partial dissent by Judges Thomas-Felix, Lussick and Chapman, para. 12; *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 64.

¹⁴ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, concurring Opinion of Judge Knierim, para. 4; *Langué v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, paras. 17 and 18.

¹⁵ Emphasis added.

... 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 harm both on the evidence produced by Mr. Kebede and what it described as "pre-existing distress that the Applicant was already suffering from" which "was exacerbated by the unlawful decision to refuse his request" to investigate the allegations of discrimination. There is no dispute as to the existence of distress originating from the discrimination Mr. Kebede had been suffering *before* the 2012 settlement agreement. The medical reports and the PDOG's report date from that time. The issue here, however, is to determine whether Mr. Kebede suffered moral harm *as a consequence* of the 2016 decision refusing his 2013/2014 complaint of discrimination. The UNDT therefore effectively relied on evidence of harm that Mr. Kebede

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