



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

Judgment No. 2018-UNAT-895

**Belkhabbaz (formerly Oummih)
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge John Murphy, Presiding
Judge Dimitrios Raikos
Judge Deborah Thomas-Felix

Case No.: 2018-1193

Date: 26 October 2018

Registrar: Weicheng Lin

Counsel for Ms. Belkhabbaz: Craig Shagin & Jofred Grinblat (underlying case
UNDT/2013/057)

Self-represented (underlying case
UNDT/2013/039)

Counsel for Secretary-General: Amy Wood/Jiyoung Kwon

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. On 1 September 2009, Ms. Belkhabbaz was granted a two-year fixed-term appointment as a Legal Officer at the P-3 level in the Office of Staff Legal Assistance (OSLA). Assigned initially to Beirut, she was laterally transferred to a position in Geneva in June 2010.

3. On 29 July 2011, her first reporting officer (FRO) completed Ms. Belkhabbaz's first performance appraisal, covering the period from September 2009 until 1 April 2010, giving her an overall rating of "Does not meet performance expectations". He recommended that Ms. Belkhabbaz's contract, which was due to expire on 31 August 2011, not be renewed but this recommendation was not followed and it was rather decided on 24 August 2011 to extend Ms. Belkhabbaz's contract until completion of her second performance appraisal, for the 2010-2011 cycle. Ms. Belkhabbaz successfully rebutted this performance appraisal (September 2009 - April 2010) and her overall rating was upgraded to "Fully successful performance" on 2 April 2012.

4. On 18 November 2011, the FRO completed Ms. Belkhabbaz's second performance appraisal, for the 2010-2011 cycle, once again giving her an overall rating of "Does not meet performance expectations". Ms. Belkhabbaz successfully rebutted this second performance appraisal, for which her overall rating was upgraded to "Successfully meets performance expectations" on 28 March 2012.

5. From 27 March 2012, the FRO sought to put in place a performance improvement plan (PIP) but Ms. Belkhabbaz refused it. Despite several attempts by the FRO and eventually Ms. Belkhabbaz's successive second reporting officers (SRO) to reach an agreement on a PIP, it was never implemented.

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 unsuccessful and her rating was maintained by the rebuttal panel on 31 January 2013.

7. On 26 March 2013, Ms. Belkhabbaz was placed on certified sick leave (CSL) with full pay, and, from 22 July 2013, she was on CSL with half pay.

8. By letter dated 9 May 2013, sent to her on 10 May 2013, Ms. Belkhabbaz was informed that her SRO had decided not to renew her appointment beyond its expiration date of 11 June 2013.

9. On 10 May 2013, Ms. Belkhabbaz received her fourth performance appraisal, namely for the 2012-2013 cycle, with the rating of "Partially meets performance expectations".

10. By e-mail of 15 May 2013, the SRO informed Ms. Belkhabbaz of the reasons for the non-renewal of her contract, which were as follows: i) she was unable to maintain professional working relationships with colleagues; ii) she required an inordinate amount of supervisory attention; iii) her performance only partially met performance expectations for two consecutive years; iv) she had lost the confidence of the FRO and SRO; and v) the renewal of her appointment would be inconsistent with the operational requirements of OSLA and the Office of Administration of Justice (OAJ).

11. By e-mail of 30 May 2013, addressed to the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, copied, in particular, to the SRO, Ms. Belkhabbaz stated her intention to initiate a rebuttal of her fourth performance appraisal and, on 3 June 2013, she initiated such process. On the same day, by e-mail addressed to the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, she requested confirmation that she could expect her appointment to be renewed for the duration necessary to complete the rebuttal process, pursuant to Section 4.12 of Administrative Instruction ST/AI/2013/1 (Administration of fixed-term appointments).

12. By e-mail of 3 June 2013, Ms. Belkhabbaz was informed by the Director, Office of the Chef de Cabinet, Executive Office of the Secretary-General, that her contract would not be extended for the duration of the rebuttal procedure as the reasons for non-renewal went beyond performance, and that, thus, Section 4.12 of ST/AI/2013/1 did not apply in her case.

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 renew her contract upon its expiry, which was registered under Case No. UNDT/GVA/2013/057.

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 inextricably linked. As the Secretary-General has limited his appeal to this Tribunal to the question of compensation, it is not necessary to consider the reasoning of the UNDT in relation to the legality of the contested decisions in any detail.

22. With respect to the contested decision not to extend Ms. Belkhabbaz's fixed-term appointment pending the conclusion of the rebuttal of her fourth performance appraisal, the UNDT found that there were no good reasons to depart from the principle of renewal pending completion of the rebuttal process. As for the contested decision not to renew Ms. Belkhabbaz's fixed-term appointment upon its expiry on 11 June 2013, the UNDT considered that Ms. Belkhabbaz's performance was not adequately and properly evaluated during her third and fourth performance appraisal cycles as the FRO was biased against her and the SROs did not take sufficient measures to ensure an objective assessment of her performance. Thus, the UNDT considered that the third reason for the contested decision, namely that Ms. Belkhabbaz had only partially met performance expectations for two consecutive years, could not stand. Based on the foregoing, the UNDT concluded that both the decision not to renew Ms. Belkhabbaz's fixed-term appointment upon expiry and the decision not to extend her appointment pending the outcome of the rebuttal process were unlawful.

23. In respect of the decision not to renew Ms. Belkhabbaz's fixed-term appointment, the UNDT ordered the Secretary-General to pay Ms. Belkhabbaz compensation equivalent to 21 months' net base salary, as pecuniary damages. It reasoned that the non-renewal of her appointment based on poor performance and the difficulties to get references from OSLA made her job search particularly difficult. She was pregnant at the time and was the main breadwinner of her family. She was unemployed for a year and was only partly employed in the second year after the termination of her contract. The UNDT accordingly took the view

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.

Submissions

The Secretary-General's Appeal

28. The Secretary-General submits that the UNDT exceeded its competence and erred in law by ordering compensation of 21 months' net base salary for alleged pecuniary harm resulting from the non-renewal of Ms. Belkhabbaz's fixed-term appointment. Any award of compensation exceeding one year of net base salary would be impermissibly excessive, as it is not reasonable to assume that Ms. Belkhabbaz's fixed-term appointment would have been extended for longer than one year, at the most. Specifically, while Ms. Belkhabbaz was initially granted a two-year fixed-term appointment on 1 September 2009, thereafter, her appointment was extended for shorter durations, none of which exceeded one year and, indeed, for the last ten months of her employment with OSLA, Ms. Belkhabbaz's appointment was extended on a monthly basis. In sum, Ms. Belkhabbaz held a fixed-term appointment which does not give rise to an expectation of renewal. Moreover, while the UNDT noted that Ms. Belkhabbaz was partially employed the second year after her separation, it did not, however, take Ms. Belkhabbaz's earnings into consideration when setting its award of compensation for pecuniary harm.

29. 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. This award of compensation should be vacated as 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.

30. The UNDT erred on a question of law by awarding separate remedies in relation to the same decision. Specifically, the UNDT ordered a separate set of remedies in relation to Ms. Belkhabbaz's application concerning the decision not to extend her fixed-term appointment upon its expiry on 11 June 2013, i.e. the decision to maintain the non-renewal decision. The decision to maintain the non-renewal decision resulted in the same consequences for Ms. Belkhabbaz as the decision not to renew her appointment pending the conclusion of the rebuttal of her fourth performance appraisal. Consequently, the decision to maintain the non-renewal could not properly give rise to a separate basis for an award of additional compensation for pecuniary and non-pecuniary damages. Likewise, the award of USD 10,000 for 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 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 could have expected a career with the United Nations, not limited by a concerted effort of her supervisors to push her out of the Organization for improper reasons. Moreover, the UNDT did consider all mitigating and aggravating factors in assessing compensation. Ms. Belkhabbaz earned some income during a brief period in 2015, however it was not until the end of 2016 that she started her own legal practice. In addition, Ms. Belkhabbaz was separated from the Organization

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 to have her contract extended pending the outcome of the rebuttal process. The UNDT was careful to avoid duplication of award of pecuniary damages by specifically indicating that the amount awarded under paragraph 336(a) should not be awarded if compensation is received under paragraph 335(a).

36. As for the non-pecuniary award of USD 10,000 in connection with the decision not to extend Ms. Belkhabbaz's appointment pending the outcome of the rebuttal process, such award was not duplicative as the UNDT concluded, after a thoughtful analysis and credible corroborated evidence, that Ms. Belkhabbaz had in fact suffered additional and different harm, in the form of 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.

37. Ms. Belkhabbaz requests that the Appeals Tribunal uphold the Judgment in its entirety and take judicial notice of the UNDT's reasoning not to award compensation for harassment and abuse of authority as it was already awarded in Judgment No. UNDT/2018/016 which is currently under appeal. Ms. Belkhabbaz further requests that the Appeals Tribunal

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

harm. The circumstances of the termination of her contract, although drawn out over a period of time, should be regarded as a single incident of wrongdoing. An award of USD 50,000 for moral damages is excessive in the circumstances, particularly in light of the accommodation Ms. Belkhabbaz received prior to her ultimate termination and the award of compensation for her pecuniary damages. An amount of USD 20,000 will be adequate compensation for her moral harm.

42. In the premises, the appeal of the Secretary-General must partially succeed and Judgment No. UNDT/2018/071 must be modified accordingly.

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