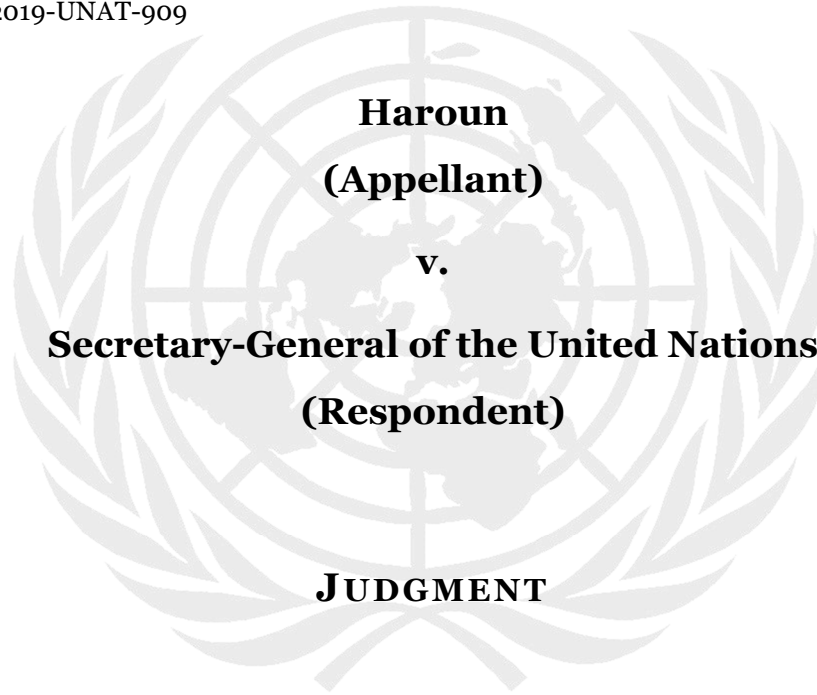




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-909



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| Before: | Judge John Raymond Murphy, Presiding Judge Sabine Knierim Judge Deborah Thomas-Felix |
| Case No.: | 2018-1203 |
| Date: | 29 March 2019 |
| Registrar: | Weicheng Lin |

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|-------------------------|---------------------------|
| Counsel for Appellant: | Mr. Robbie Leighton, OSLA |
| Counsel for Respondent: | Ms. Amy Wood |

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/083, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 28 August 2018, in the case of *Haroun v. Secretary-General of the United Nations*. Ms. Mariam Haroun filed the appeal on 24 October 2018, and the Secretary-General filed his answer on 7 January 2019.

Facts and Procedure

2. Prior to the termination of her employment in 2015, Ms. Haroun held a fixed-term appointment as an Administrative Assistant at the G-5/10 level in the United Nations Assistance Mission for Iraq (UNAMI). She was based in Kuwait City. She began working for the United Nations in 2005 as an Administrative Assistant in the office of the Chief of Administrative Services (CAS), Mr. Raja Arumugham, who later became the Chief of Mission Support (CMS). Ms. Padma Nandkumar then became the CAS.

3. While Ms. Haroun worked in the office of the CAS, she received excellent e-PAS evaluations. In July 2012, she was laterally assigned to the Supply Section of the Mission's warehouse where she worked as a Supply Assistant in the Supply and Services Section. She contended that the lateral transfer was imposed on her improperly following a conflict between her and her supervisors. In 2012, Ms. Haroun had been reprimanded by Mr. Arumugham for not properly performing tasks to assist national staff who had transferred from Jordan to Kuwait. Ms. Haroun disputed the legitimacy of the allegations against her and contended that it later led to the unfair decision to re-assign her.

4. In 2013, Ms. Haroun challenged the legality of her transfer (the first application) before the UNDT, which three years later in 2016 (after her separation from service) found that the decision to transfer her in 2012 had been arbitrary and tainted by irregularities. The UNDT held that the transfer was "ill-conceived, clumsily effected and made on the basis of extraneous factors".¹ Moreover, the conduct of Mr. Arumugham and Ms. Nandkumar betrayed a pervasive unfairness and abuse of authority in their treatment of Ms. Haroun. She was re-assigned to a post not commensurate with her training and qualifications as a punitive measure following her fall-out with Mr. Arumugham. Mr. Arumugham and Ms. Nandkumar had bullied her, "used their

¹ *Haroun v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/058.

superior positions to threaten and intimidate her” and had been dishonourable and dishonest in their testimony before the UNDT.

5. Ms. Haroun in the first application sought rescission of the decision to transfer her. However, while UNDT Judgment No. UNDT/2016/058 was pending, she was separated from service. The UNDT thus held there was no decision to rescind and awarded Ms. Haroun substantial compensation in the amount of 18 months’ salary plus USD 5,000. The award of compensation was partially set aside on appeal by this Tribunal and the amount of 18 months’ salary reduced to 15 months on the ground that the UNDT had erred in awarding Ms. Haroun three months compensation in relation to her subsequent separation from service, which cause of action had not formed part of the first application.²

6. As mentioned, the decision to separate Ms. Haroun from service, which is the subject of the present application, was taken in November 2014, while her complaint about her transfer was pending before the UNDT. Ms. Haroun received a memorandum on 20 November 2014 indicating that her contract would be terminated effective 1 January 2015 as her post had been relocated to Erbil, Iraq.

7. On 23 November 2014, Ms. Haroun learned that an Internal Review Panel (IRP) was conducting comparative reviews of cases of post abolishment or redeployment within the mission. She did not at that stage know which staff, sections, or groups were involved in the review – though it later transpired that the process was restricted to warehouse assistants. She later learned that all four colleagues who worked at her level in the warehouse were included in the internal review exercise to compete for two posts that would remain in Kuwait – (one colleague subsequently agreed to withdraw from the review process due to his approaching retirement). Ms. Haroun was not officially informed of the review and was excluded from it.

8. On 10 December 2014, Ms. Haroun sought a management evaluation of the decision to terminate her contract, requesting the decision be reversed and that she be included in the comparative review process. On 16 January 2015, she filed a supplementary submission to the

² *Haroun v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-720. The Secretary-General did not challenge the UNDT’s determination that the re-assignment decision was unlawful. Nor did he object to the award of compensation in lieu of rescission. He submitted though that the UNDT erred by awarding three-month compensation for loss of career prospects arising from her termination of employment. The fact of her separation from service was not in evidence and had occurred after closing submissions before the UNDT. Moreover, the separation decision (the subject of this appeal) had been challenged in the second application and was pending before the UNDT.

Management Evaluation Unit (MEU), in which she annexed a memorandum from Hassena Yasin, who was then CMS for UNAMI, dated 18 November 2014 showing that another colleague who also worked in the warehouse with the functional title of Administrative Assistant was included in the comparative review process.

9. On 20 January 2015, she received a response from the MEU upholding the administrative decision to terminate her contract and to not allow her to take part in the comparative review exercise.

10. On 26 January 2015, Ms. Haroun was separated from service.

11. On 13 April 2015, Ms. Haroun filed the present application with the UNDT challenging the termination of her employment and the decision to exclude her from the comparative review exercise involving warehouse assistants.

12. The evidence before the UNDT established that two Staff Association members, who sat on the IRP, had questioned Ms. Haroun's exclusion from the comparative review pool (CRP) pool during the comparative review. They were informed that Ms. Haroun had moved to the Supply Section with her post from the Office of the CAS and was working there as an Administrative Assistant and not as a Warehouse Assistant. However, in fact, she was not employed against the post she previously had occupied in the CAS.

13. Ms. Haroun alleged that her successful challenge of the decision to transfer her and her filing the first application motivated the later decision to exclude her from the CRP pool and to terminate her employment. She submitted that there was no basis for her exclusion from the CRP on the ground that she had moved to the Supply Section with her post of Administrative Assistant. The Supply Section in UNAMI is divided into two sub-sections, the Warehouse Unit and the Contracts Service Unit. These two units are physically located in different places and perform different tasks. After her lateral reassignment, she worked exclusively in the Warehouse Unit carrying out warehouse functions. However, in September 2013, without her knowledge, she was placed against a post as a Contract Management Assistant within the Contracts Service Unit. This placement did not in any way change the functions she performed. At no point did she work in the Contracts Service Unit.

The Judgment of the United Nations Dispute Tribunal

14. The UNDT accepted that despite having the functional title of Administrative Assistant while working in the Warehouse Unit, Ms. Haroun's day to day work was essentially the same as that of her other colleagues working at the GL-5 level in the Warehouse Unit, and that since she performed the functions of a Supply/Warehouse Assistant, she was eligible to be comparatively reviewed for retention against her peers. It appeared also to accept the submission that placing Ms. Haroun against a post as Contract Management Assistant without changing her actual functions as a Warehouse Assistant was in anticipation of the impending restructuring of the Supply Section and a calculated move to justify her exclusion from the CRP pool in order to achieve the termination of her appointment and was thus evidence of an improper motive.

15. The UNDT questioned the *bona fides* of the Secretary-General in persisting with the argument, despite cogent evidence to the contrary, that Ms. Haroun was excluded because she did not work as a Warehouse Assistant. The evidence supported a conclusion rather that Ms. Haroun's superior, the CAS, Ms. Padma Nandkumar, with whom she had been in conflict prior to her lateral reassignment, exhibited personal bias against Ms. Haroun and retaliated against her for making the first application by taking the decisions to exclude her from the comparative review and to terminate her employment.

16. After discussing the decision of the UNDT in the first application, the UNDT held:³

(...) This context is important because it is central to [Ms. Haroun's] present case that the decision to exclude her from the comparative review exercise which led to her separation, was made in bad faith, and that it stems from the conflict surrounding the decision to transfer her from the CAS Office to the Supply Section.

17. The UNDT accordingly held that the decision to exclude Ms. Haroun from the comparative review, which formed the basis of the decision to terminate her employment, was tainted with bad faith and improper motive. Thus, the decision to terminate Ms. Haroun's employment was unlawful.

³ Impugned Judgment, para. 88.

18. The UNDT ordered that Ms. Haroun be paid six months' net base salary (NBS) as compensation for the unlawful termination of her employment. In setting the amount of compensation, the UNDT gave weight to the "careless and cavalier behaviour" on the part of the responsible officials.

19. Furthermore, acting in terms of Article 10(8) of the UNDT Statute, the UNDT referred the conduct of Ms. Nandkumar to the Secretary-General for possible action to enforce accountability. It observed as follows:⁴

The [Dispute] Tribunal finds that it must comment on conduct of the Mission's Chief of Administrative Services, both as [a] manager within the Organization and a witness before this Tribunal. She has fallen short of her duties and responsibilities as a manager within the International Civil Service and made decisions that show little regard for the dignity and worth of the human person and respect for the equal rights of men and women of nations great and small. The witness' poor judgment in her managerial decisions reflects poorly on an Organization committed to upholding the highest standards of efficiency, competence and integrity of its staff members in the discharge of their functions as international civil servants.

Submissions

Ms. Haroun's Appeal

20. Ms. Haroun requests the Appeals Tribunal to revise the UNDT's compensation award of six months' NBS and instead award her three years' NBS with compensation equal to the contributions (staff and administration) that would have been paid to the United Nations Joint Staff Pension Fund for a three-year period. Ms. Haroun also requests moral damages.

21. Ms. Haroun submits that the UNDT erred in law by failing to indicate the basis for the calculation of compensation at only six months' NBS, which she maintains was not in proportion to the impact of the contested decision.

⁴ Impugned Judgment, para. 140.

22. In her submission, the UNDT also erred in law by not finding that exceptional circumstances justified an award of more than two years' NBS. Article 10(5)(b) of the UNDT Statute provides that compensation awards should normally not exceed the equivalent of two year's NBS except in "exceptional circumstances". She maintains that the circumstances of her termination are exceptional justifying an award of more than two years' NBS.

23. Ms. Haroun notes that the UNDT's Judgment was issued more than three and a half years after her separation rendering her chance of being reinstated effectively impossible. The impugned decision has resulted in the dire consequence of the loss of her livelihood.

24. Ms. Haroun referred to various awards of compensation of more than six months' NBS for abuses of authority by managerial staff.⁵ The fact that she was the victim of abuse of power for the second time at the hand of the responsible official, she submits, represents a significant aggravating factor and constitutes an exceptional circumstance. She further argues that her length of service is relevant to assessing the quantum of damages.⁶ In *Nakhlawi*,⁷ the UNDT considered the staff member's long service (14 years) as a relevant factor for finding exceptional circumstances to justify an award in excess of two years. She refers also to the award in *Fasanella*,⁸ wherein the Appeals Tribunal awarded two years' NBS for procedural errors that were devoid of aggravating factors such as malice. If a purely erroneous termination warrants two years' NBS then an award of only six months for a termination motivated by malice and abuse of authority is disproportionate and constitutes a reversible error.

25. Lastly, Ms. Haroun submits that the UNDT erred in its denial of her moral damages request. She submits that she gave evidence on the impact of the decision on her as she was a mother of four children, the main source of her family's income, and approximately five months pregnant when informed of her termination. She suffered stress, loss of appetite and depression. She was unable to take medication for depression due to her pregnancy.

⁵ *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092. *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433.

⁶ *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469.

⁷ *Nakhlawi v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/204.

⁸ *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765.

The Secretary-General's Answer

26. The Secretary-General has not filed a cross-appeal on the merits of the UNDT's findings in respect of malice, abuse of authority and the illegality of the termination of Ms. Haroun's employment. He, however, requests that the appeal regarding compensation be dismissed in its entirety.

27. He submits that the UNDT Judgment on its face reveals that the UNDT examined the facts and evidence in reaching its award. Specifically, the UNDT noted that it considered the circumstances surrounding the decision to separate Ms. Haroun including extraneous factors and expressly noted that the consequence of the impugned decision was the dire loss of her livelihood. Ms. Haroun merely disagrees with the UNDT's assessment, which is not a basis to overturn the award. The UNDT is in the best position to assess compensation and there is no demonstrable error of law or manifestly unreasonable factual findings to warrant interfering with the UNDT's remedy. Ms. Haroun's reference to other cases with higher compensation awards is not a showing of error but is merely an expression of her discontent with the award.

28. The Secretary-General also argues that the UNDT did not err by not awarding compensation in excess of two years' NBS as such an award is purely discretionary and not a statutory requirement. Ms. Haroun has failed to demonstrate that her case qualifies as exceptional under Article 10(5)(b) of the UNDT Statute. Ms. Haroun fails to satisfy her burden of showing defect in the Judgment and fails to establish a basis for which the Appeals Tribunal should increase the UNDT's award.

29. Lastly, the Secretary-General argues that the UNDT did not err in declining to award moral damages. The Appeals Tribunal has confirmed that evidence of moral injury consisting exclusively of testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise) affirming that moral harm indeed occurred. Ms. Haroun did not provide any evidence to support her claim other than her own assertions. Furthermore, she simply repeats the arguments she made before the UNDT and is merely expressing her disagreement. Ms. Haroun fails to identify any appealable error and her appeal must fail.

Considerations

30. This appeal implicates the nature of the Appeal Tribunal's power to interfere with an award of compensation by the UNDT. Article 2(1) of the Appeals Tribunal Statute provides that the

Appeals Tribunal shall be competent to hear and pass judgment on an appeal in which it is asserted that the Dispute Tribunal has: (a) exceeded its jurisdiction or competence; (b) failed to exercise jurisdiction vested in it; (c) erred on a question of law; (d) committed an error in procedure, such as to affect the decision of the case; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision. An appeal against a compensation award must thus be founded upon one such error.

31. Article 10(5)(b) of the UNDT Statute provides that where the UNDT opts to award compensation it may only do so for harm, supported by evidence, which shall normally not exceed the equivalent of two years' NBS of the applicant. It may, however, in exceptional cases, order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision. In terms of Article 10(7) of the UNDT Statute, it shall not award exemplary or punitive damages.

32. In *Sarrouh*,⁹ this Tribunal reiterated the principle that the UNDT is in the best position to decide on the level or quantum of compensation given its appreciation of the case. Compensation must be set by the UNDT following a principled approach on a case-by-case basis having regard to the nature of the irregularity in relation to the contested administrative decision, the staff member's length of service and any consequential prejudice. The Appeals Tribunal ordinarily will be reluctant to interfere with an award of compensation by the UNDT because the amount of compensation is necessarily a matter of estimation and discretion. However, the Appeals Tribunal is entitled and obliged to interfere where: i) there has been an irregularity or misdirection (such as considering irrelevant facts; ignoring relevant ones; or a material error of law); ii) no sound or reasonable basis exists for the award made by the UNDT; or iii) there is a substantial variation or a striking disparity between the award made by the UNDT and the award that the Appeals Tribunal considers ought to have been made.

33. In determining whether the award is excessive or inadequate, the Appeals Tribunal must make its own assessment of the harm. If, on comparison with the award made by the UNDT there appears to be a "substantial variation" or a "striking disparity", the Appeals Tribunal should interfere on the ground of a factual error, resulting in a manifestly unreasonable decision.

⁹ *Sarrouh v. Secretary-General of the United Nations*, Judgement No. 2017-UNAT-783.

34. Ms. Haroun makes two valid criticisms of the UNDT's award of compensation: firstly, the reasoning supporting it is cryptic and insubstantial; and secondly, it appears less generous than previous awards for similar irregularities.

35. As mentioned, the Secretary-General has not filed a cross-appeal against the finding of the UNDT that Ms. Haroun was the subject of retaliation for filing the first application challenging her transfer. Nor does he take issue with the findings that the transfer of Ms. Haroun and the termination of her appointment were punitive and actuated by malice, or that her superiors abused their authority to threaten and intimidate her. The evidence in this regard is cogent and compelling.

36. In its report to the General Assembly of 23 July 2018, A/73/150, the Internal Justice Council (IJC) registered its concern about retaliation against staff members who litigate against management under the internal justice system. This Tribunal is equally concerned. The UNDT and the Appeals Tribunal have a duty to protect witnesses and parties from harassment and bullying during Tribunal proceedings. At the same time, managers have an obligation to refrain from, and protect staff against, retaliation. Retaliation against litigants and witnesses amounts to an abuse of authority, which constitutes misconduct that must be addressed and sanctioned, in line with the relevant Staff Regulations and Rules. Where the retaliation against a staff member takes the form of termination of employment, and reinstatement is neither likely under Article 10(5)(a) of the UNDT Statute,¹⁰ nor practicable, then substantial awards of compensation will be appropriate.

37. Although Ms. Haroun was on a fixed-term contract, as opposed to a continuing appointment, her length of service (she was employed by UNAMI for almost a decade) is a relevant consideration in the assessment of the quantum of damages.¹¹ She clearly had prospects within the Organization which now she will not realize. An order of reinstatement would obviously have been the best way to vindicate Ms. Haroun, as well as the integrity of the internal justice system, in response to management's retaliation against her for invoking the statutory remedies. As things stand now, Ms. Haroun, the innocent party, has lost her employment, her career prospects within the Organization have been destroyed, and the offending managerial staff members who acted with impunity remain entrenched in their positions. Such an outcome brings the legitimacy and

¹⁰ This provision requires the UNDT to set an amount of in-lieu compensation as an alternative to reinstatement, which in practice is always preferred by the Secretary-General.

¹¹ *Nakhlawi v. Secretary-General of the United Nations*, Judgment No. UNDT/2016/204.

effectiveness of the internal justice system into question. The UNDT ignored these relevant considerations when making the award of compensation. There is undeniably a significant variation or disparity between the award made and past comparable awards.¹² Given that an order of reinstatement was unlikely to be implemented, a more generous award was justifiable in the circumstances.

38. There is, accordingly, a substantial variation or a striking disparity between the award made by the UNDT and the award that the Appeals Tribunal considers ought to have been made.

39. In determining under Article 10(5)(b) of the UNDT Statute whether exceptional circumstances exist justifying an enhanced award of more than 24 months, an accumulation of aggravating factors, including repeated blatant harassment, will support an increased award. However, considering that Ms. Haroun has already been awarded extensive compensation in respect of the abuse of authority in relation to her transfer, it would be excessive to go beyond the maximum in this instance. An award of the maximum of compensation equivalent of two years' NBS will be adequate vindication.

40. The UNDT did not err in law or fact in denying moral damages. Our jurisprudence requires corroborating evidence (expert or otherwise) in addition to the sole testimony of an appellant to sustain a claim for moral damages.¹³ The only proof of moral injury before the UNDT was Ms. Haroun's own testimony, and thus, the evidence did not meet the evidentiary standard.

¹² *Mmata v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-092; and *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433.

¹³ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742.

Judgment

41. The appeal is upheld and Judgment No. UNDT/2018/083 is modified to award Ms. Haroun 24 months' NBS as compensation for the unlawful termination of her appointment; together with interest at the US Prime Rate from the date of the UNDT Judgment to the date of payment, and an extra five per cent shall be added to the US Prime Rate if this Judgment is not executed within the deadline.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Thomas-Felix

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar