



**UNITED NATIONS APPEALS TRIBUNAL
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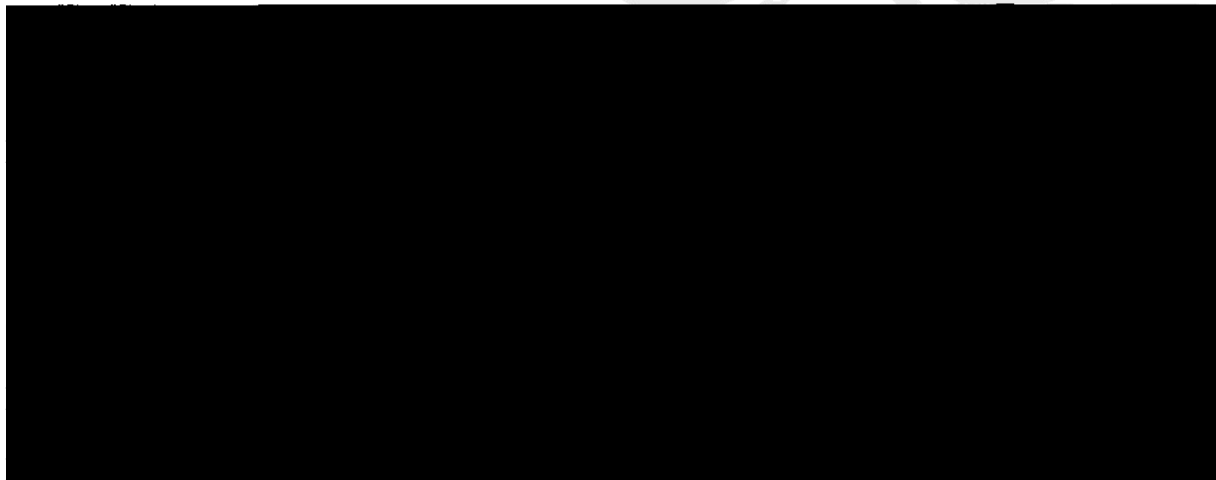
Judgment No. 2015-UNAT-525

**Flores
(Appellant)**

v.

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

JUDGMENT



Counsel for Appellant: George G. Irving

Counsel for Respondent: Zarqaa Chohan

THE U

A. [The] failure to intervene and correct [the Logistics Unit supervisor's] offensive conduct in violation of the WFP HSHAP [Harassment, Sexual Harassment and Abuse of Authority] Policy.

B. [The] deviation from Financial Regulations, Rules and Procedures of the Organization.

C. Directing the distribution of damaged beans and oil and permitting the removal of expiration dates from boxes and bottles containing expired vegetable oil.

D. Directing the removal of expiration dates from bottles containing vegetable oil and ordering the repacking of the expired oil in new boxes to conceal the expiration date.

... On 29 December 2009, the Director, HRD, WFP, informed [Ms. Flores] that the OSDI investigation had found that she had “breached various WFP Staff Rules and Regulations and related issuance and ha[d] displayed a standard of conduct which is below that required in international civil service”. [...]

... On 26 March 2010, [Ms. Flores] provided WFP with her responses to the charges filed against her. As part of her response, [Ms. Flores] raised a number of concerns regarding the investigation and disciplinary process, including that she was interviewed on the final day of the investigation; that prior to her interview she had no idea that she was being investigated; that she was not advised of her right to have a lawyer present during the interview; that a number of witnesses who were favorable to her case were not interviewed (e.g., regional and international logistics officers and food monitors).

... On 24 June 2010, following a review of her responses to the findings of the investigation report, the Director, HRD, WFP, informed [Ms. Flores] that (emphasis in original)

[t]he confirmed findings against you are of such serious nature that they entail the irretrievable breach of the trust on which your employment with the Programme is based.

Your actions are found to amount to fraud in that they aimed at misrepresenting the conditions of the commodities to food monitors and WFP beneficiaries. [Your] actions had the potential to negatively impact the Organization's reputation ... [and] had a very serious risk to the health and/or lives of WFP beneficiaries ... [T]he findings against you highlight a pattern of

serious misconduct and a series of grave incidents protracted over a significant period of time, from 2007 to 2009. The gravity of your confirmed misconduct is compounded by your significant seniority and experience with the Programme ...

In light of the foregoing ... this is to inform you of the decision to impose the proposed disciplinary measure of “***Separation from Service***” with no termination indemnities in accordance with UN Staff Rule 10.2(viii).

... On 22 September 2010, [Ms. Flores] filed an application with the Dispute Tribunal contesting the decision to separate her from service.

3. On 28 February 2014, the Dispute Tribunal issued its Judgment. It found that there were procedural irregularities in the handling of the investigation against Ms. Flores. Specifically, the Dispute Tribunal found that Ms. Flores was not informed at the beginning of the interview of the specific allegations held against her and did not get the opportunity to respond to them in full. Ms. Flores was also not re-interviewed in relation to any of the allegations against her before they were included as evidence in the investigation report sent to the Director, HRD.

4. Based on the interview transcript, the Dispute Tribunal considered that Ms. Flores was not informed of her rights: (i) to be treated fairly, including the right to defend herself; (ii) to be offered reasonable and appropriate support to deal with the impact of any harassment or abuse of authority

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11. While Ms. Flores has requested consideration of her loss of earnings of three and a half years between her separation and the issuance of the Judgment, this Appeals Tribunal has held that the award of full salary between separation and the date of a judgment is “fraught with ambiguity and uncertainty” as any number of change of circumstances could result in separation of a staff member on other non-disciplinary grounds.² The Dispute Tribunal took into account all the circumstances of the case, including Ms. Flores’ request for loss of earnings, but did not find any exceptional or compelling reasons to grant such request. Ms. Flores failed to provide evidence that she had a reasonable expectation of her appointment being renewed. Further, Ms. Flores’ additional documentation does not provide any evidence that she was not able to be re-employed due to the dismissal.

12. With respect to moral damages claimed by Ms. Flores regarding emotional distress and damage to her professional reputation, the Secretary-General notes that there is no entitlement to moral damages for each alleged violation and furthermore, as noted by the Appeals Tribunal, “not every breach will give rise to an award of moral damages” and any award will depend on the evidence before the Dispute Tribunal.³

The Secretary-General’s Cross-Appeal

13. The Dispute Tribunal erred in concluding that Ms. Flores was not given an opportunity to respond to the allegations in full. The record of the OSDI interview of Ms. Flores indicates that she was questioned about her knowledge of the inappropriate behaviour of her supervisee and her responsibilities to intervene as well as the distribution of the expired food products. These questions gave Ms. Flores a full opportunity to understand the subject matters of the investigation and to explain her role and conduct in such matters. For instance, she was asked to describe the process that was followed when food reached their expiration dates and to explain why expi

applied only when the disciplinary proceedings have been initiated.⁴ In other words, the staff member has to be informed of the charges in writing when s/he is charged with misconduct, but not during the preliminary investigation.

15. The Secretary-General highlights that, after the interview, Ms. Flores was given a letter on 29 December 2009 outlining the specific charges of misconduct to which she responded on 20 May 2010.⁵ The Administration took into consideration Ms. Flores' comments as noted in its dismissal letter of 24 June 2010, but found them unsatisfactory in light of the evidence against her.

16. The Dispute Tribunal also erred in determining that Ms. Flores was not asked by investigators if she wished to identify additional witnesses. The interview transcript indicates that she was asked whether the investigators should speak with anyone regarding the issues discussed and Ms. Flores had not suggested any names. Further, Ms. Flores could have specified the names of witnesses who were "favorable" to her case instead of making a general reference to such individuals not being interviewed in her written response to charges of misconduct.⁶

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Rules but all WFP policies and issuances applicable to locally recruited field staff, including OSDI's Quality Assurance Manual.

24. Furthermore, the records indicate that Ms. Flores provided the names of witnesses in her response to the charges and that there was no action taken by the Administration to interview such individuals. The Appeals Tribunal finds that the failure of the Administration in this regard was an undeniable breach of Ms. Flores' due process rights.

25. Regarding the UNDT decision not to order reinstatement in light of the fact that Ms. Flores' appointment expired shortly after the dismissal letter, we are mindful of the established jurisprudence, that unless the Administration has made an "express promise ... that gives a staff member an expectancy that his or her appointment will be extended', or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful".⁸

26. As for the quantum of compensation set by the UNDT, the Appeals Tribunal has previously stated that it will not interfere with the UNDT's decision absent a finding of error of law or fact on the part of the UNDT, in accordance with Article 2(1)(c) and (e) of its Statute. Specifically, the Appeals Tribunal has held that "[t]he trial judge is best placed to assess the nature and evidential value of the information being provided by an applicant to the UNDT to justify an award of damages, including pecuniary damages. In the absence of a compelling argument that the UNDT erred on a question of law, or on a question of fact resulting in a manifestly unreasonable decision, we will not lightly interfere with the findings of the Dispute Tribunal."⁹ We find that Ms. Flores has not provided a compelling argument.

27. We therefore uphold the UNDT Judgment.

Judgment

28. The appeal and cross-appeal are dismissed.

⁸ *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153, para. 47.

⁹ *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-346, para. 23.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Thomas-Felix

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar