



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

Judgment No. 2013-UNAT-360

McIlwraith

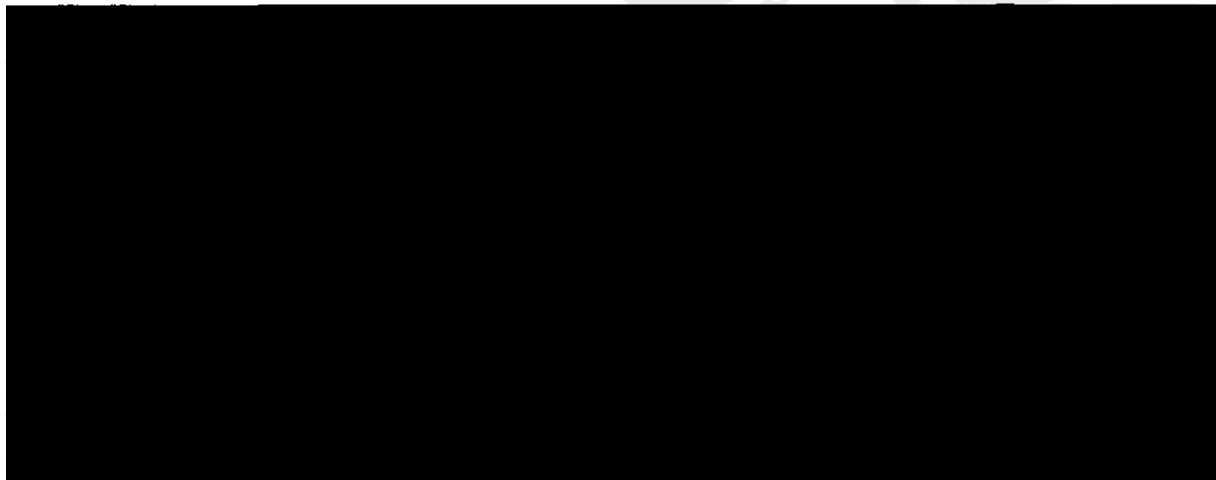
(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT



Registrar:

Weiheng Lin

Counsel for Mr. McIlwraith:

Self-represented/ Robbie Leighton

Counsel for Secretary-General:

Phyllis Hwang

Rupa Mitra

Simon Thomas

Submissions

Mr. McIlwraith's Appeal

6. Mr. McIlwraith contends that the UNDT erred on a question of law when it concluded that Article 10(5)(a) of the UNDT Statute was applicable to its decision and ordered compensation in lieu of specific performance or rescission of the contested decision. He also asserts that it was procedural error for the UNDT to apply an alternative compensatory remedy when it failed to reach the merits of his claims; such remedy does not address a threshold

10. In the alternative, the Secretary-General argues that if the Appeals Tribunal upholds the UNDT's decision to rescind, then the UNDT was correct in applying Article 10(5)(a) of the UNDT Statute and in ordering compensation in lieu of specific performance.

11. With respect to the quantum of the in lieu compensation, the Secretary-General contends that it was "overly generous" and the Appellant's claim that he deserved more is not sustainable.

12. In sum, the Secretary-General requests that the Appeals Tribunal dismiss the appeal.

Considerations

13. On appeal, Mr. McIlwraith raises claims substantially similar to, if not identical to, those raised by the other ICTY staff members who appealed Judgment No. UNDT/2012/131, as well as the staff members who appealed Judgment No. UNDT/2012/129 and Judgment No. UNDT/2012/130. Their appeals are disposed of in *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359; *Malmström et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357; and *Longone v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-358, respectively.

14. The Secretary-General appealed each of the UNDT Judgments cited above, and Mr. McIlwraith filed an individual answer in the Secretary-General's appeal of Judgment No. UNDT/2012/131. In *Malmström et al.*, which is quoted, in extenso, in *Longone* and *Ademagic et al.*, the Appeals Tribunal determines that the UNDT erred in concluding that the ICTY Registrar had the discretionary authority to grant permanent appointments to ICTY staff members. The Appeals Tribunal agrees with the Secretary-General's contention that such decision-making authority was vested in the Assistant Secretary-General for Human Resources Management (ASG/OHRM), but finds that, in adopting a blanket policy of refusing permanent appointments to ICTY staff members, her de

Appeals Tribunal's decision in this regard; thus, the Judgment herein does not address these aspects of our decision.⁴

15. Since the Appeals Tribunal rescinds the UNDT Judgment against which the staff members appealed, the majority of their claims are rendered moot. Our reasoning in *Malmström et al.* applies to Mr. McIlwraith's claims that the UNDT erred when it applied Article 10(5)(a) of its Statute or, alternatively,

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which

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Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar