
APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2019-UNAT-9



Haq and Kane



JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/099, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 5 October 2018, in the case of Haq and Kane v. Secretary-General of the United Nations . The Secretary-General filed the appeal on 4 December 2018 and Ms. Ameerah Haq and Ms. Angela Kane filed a joint answer on 29 January 2019.

Facts and Procedure

2. Ms. Haq joined the United Nations as a Junior Professional Officer with the United Nations Development Programme (UNDP) in 1976. She served continuously thereafter for UNDP through 2004, when she was appointed Deputy Assistant Administrator and Deputy Director of the UNDP Bureau for Crisis Prevention and Recovery at the D-2 level. Throughout those years, she was a participant of the United Nations Joint Staff Pension Fund (Fund or UNJSPF). Effective 8 June 2004, Ms. Haq was appointed Deputy Special Representative of the Secretary-General for the United Nations Assistance Mission to Afghanistan (UNAMA) at the Assistant Secretary-General (ASG) level, under a fixed-term appointment initially for six months. The letter of appointment (LoA) dated 7 June 2004 included the following paragraph under the title “Information”: “Your particular attention is drawn to Staff Regulation 3.3 relating to the Staff Assessment Plan and to the Regulations and Rules relating to the United Nations Joint Staff Pension Fund and to the Annex to this letter explaining various United Nations allowances, entitlements and conditions of employment.”¹

3. Ms. Haq signed the LoA on 21 July 2004. She was then 54 years old. In 2007, she was appointed Deputy Special Representative of the Secretary-General for the United Nations Mission in Sudan (UNMIS) also at the ASG level. In 2010, she was appointed Special Representative of the Secretary-General for the United Nations Integrated Mission in Timor-Leste (UNMIT) at the Under-Secretary-General (USG) level. From 2012 to 2015, she served as the USG for the United Nations Department of Field Support at Headquarters. For more than 10 years at the ASG or USG level, Ms. Haq remained a participant of the

¹ Staff Regulation 3.3, effective 1 January 2003, showed how the staff assessment was computed and how the staff assessment rates were applied to the salaries and other emoluments of the staff members with, or without, dependents.

UNJSPF, paying a fixed percentage of her pensionable remuneration

60 per cent of the participant's pensionable remuneration on the date of separation, or the maximum benefit payable to a participant at the D-2 level (top step for the preceding five years separating on the same date as the participant), with 35 years of contributory service. In 1996, the General Assembly further amended Article 28(d) by removing the reference to "35 years of contributory service".²

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10. Ms. Haq and Ms. Kane approached the Fund, but they were told that the Fund's Regulations had been correctly applied and that the Pension Board was not empowered to make any adjustments. Ms. Haq requested a review of that determination by the Standing Committee of the Pension Board, but the Standing Committee upheld the UNJSPF's determination.

11. On 26 May 2016, Ms. Haq and Ms. Kane sent a joint letter to the Secretary-General, -4.501 TS

14. Ms. Haq and Ms. Kane contacted the United Nations Office of the Ombudsman and Mediation Services (UNOMS) for an informal resolution. On 8 August 2016, the Management Evaluation Unit (MEU) agreed to extend the 60-day deadline for management evaluation pending the result of the mediation efforts.

15. On 31 October 2016, following an unsuccessful mediation of the case, Ms. Haq and Ms. Kane submitted a joint request to the MEU for management evaluation of the decision embodied in the letter of 7 July 2016 from the USG/DM. They clarified that they were not challenging the Fund's Regulations, but the "decision to disclose some factors governing [their] employment, but not those critical factors affecting [their] future pension benefits". More specifically, they were contesting the "failure of the Organization to carry out its obligations as a good employer" and the "failure to disclose fully all options open to [them] to safeguard [their] legitimate entitlements result[ing] in an unfair administrative arrangement which negatively affect[ed their] conditions of service", and "unfairly disempowered [them] from making career and financial choices in [their] best

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Submissions

The Secretary-General's Appeal

21. The UNDT erred in fact and in law and exceeded its jurisdiction in finding that Ms. Haq's and Ms. Kane's joint application was receivable. Its finding that the USG/DM's letter of 7 July 2016 was a new and separate decision that constituted a reviewable administrative decision was erroneous, because the said letter was a response to Ms. Haq's and Ms. Kane's request for equitable, and not legal, compensation; as such, it produced no direct and legal consequences or impact on their terms of appointment, nor did it address any legal obligation owed to them. Ms. Haq and Ms. Kane cannot create a new contestable decision by expressing disagreement with a previously communicated decision and challenging a subsequent confirmation of the decision.

22. It should be emphasized that the subject matter of Ms. Haq's and Ms. Kane's letter related to decisions that occurred as early as 2003. They did not initiate an administrative review or management evaluation until 1 November 2016, more than 12 years later. Even assuming that Ms. Haq and Ms. Kane were not aware of the Administration's failure to fulfil its duty of care towards them until January 2015 for Ms. Kane and March 2015 for Ms. Haq when the Fund notified them separately of the details regarding their respective pension entitlements, their request for management evaluation filed on 1 November 2016 was still out of time by more than a year.

23. The Dispute Tribunal erred in fact, law, and procedure in finding that staff members had a fundamental right to be fully and timely informed of how conditions of service apply to their individual circumstances and that Ms. Haq and Ms. Kane had not been provided with sufficient guidance about their pension entitlements when they accepted their appointments at the ASG and USG levels. Contrary to this finding, the Staff Regulations do not require the Administration to include detailed contractual clauses related to all terms of appointment in an LoA, because an LoA contains all the terms and conditions of employment expressly or by reference. The UNDT effectively created requirements that are not foreseen in the legal framework and imposed on the Administration the responsibility to explain the implications of the Fund's Regulations to senior staff members such as Ms. Haq and Ms. Kane, and a new duty of care to ensure that each and every staff member was aware of how the legal framework would be applied or could affect his or her individual circumstances. Contrary to

the UNDT findings, staff members, especially those in senior positions with significant responsibilities in relation to the Organization's human resources framework, such as Ms. Haq and Ms. Kane (the latter serving, *inter alia*, as the Representative of the Secretary-General on the Pension Board), are expected to know what policies, rules and regulations apply to them.

24. The UNDT made a fundamental error in procedure by prohibiting the Secretary-General's Counsel from eliciting evidence from Ms. Haq and Ms. Kane about the extent of their knowledge of the Fund's Regulations. That error led the Dispute Tribunal to conclude erroneously that there was no evidence that Ms. Haq and Ms. Kane had been aware of the content of the Fund's Regulations.

25. The UNDT erred in finding that there was a possibility for Ms. Haq and Ms. Kane to be exempted from their participation in the Fund. There is no provision in the Staff Regulations or the Fund's Regulations for any staff member to opt out of the participation in the Fund, with the exception of ungraded officials. Staff Rule 6.1 and Article 21(a) of the Fund's Regulations have not been interpreted to allow staff members on a full-time appointment longer than six months to opt out of participation and it has not been the practice of the Organization to agree to a staff member's opting out of such a participation.

26. The Dispute Tribunal erred in law in its orders of rescission, in-lieu compensation, and material damages. The provision of the full texts of the Staff Regulations and the Fund's Regulations and Rules as well as additional explanations would have made no difference, because Ms. Haq and Ms. Kane would have found themselves in the same position as they are today. Their pension benefits would still be capped at the D-2 level, and it would not have been possible for them to opt out of participation in the Fund.

27. The Dispute Tribunal also erred in law in its award of moral damages, because the award of moral damages was based on Ms. Haq's and Ms. Kane's testimony, without independent evidence, contrary to Article 10(5) of the UNDT Statut position ape

directly linked to Ms. Haq's and Ms. Kane's respective promotions to the ASG level. They never had then, nor have now, the intention to challenge the legality of those administrative decisions. Their aim was to keep the advantages of their promotions (especially the higher remunerations) and at the same time avoid the capping of their pension benefits at the D-2 level as provided in Article 28(d) of the UNJSPF Regulations. Finally, Ms. Haq and Ms. Kane accepted the calculation of their pension benefits by the Fund, and the administrative decisions in this regard were not challenged and thus went into legal force. Their 26 May 2016 request was an attempt to obtain, by way of compensation, pension entitlements which they are not entitled to under the legal provisions of the UNJSPF due to the capping in Article 28(d) of the Fund's Regulations.

37. On the other hand, the USG/DM expressly stated, in his 7 July 2016 letter, that the Secretary-General had "reviewed" the matter before he gave a lengthy explanation as to why the calculation of Ms. Haq's and Ms. Kane's pension benefits by the UNJSPF was in accordance with the Fund's Regulations, and that each and every staff member had the responsibility to look into his or her respective situation, thus implicitly stating that he, the Secretary-General, did not breach any duty of information towards Ms. Haq and Ms. Kane. As he did not refer at all to the legal force of the earlier promotions and the pension decisions, but rendered a series of legal arguments as to why Ms. Haq's and Ms. Kane's request for compensation must fail, the 7 July 2016 letter could also be regarded as a new administrative decision producing a direct legal effect that Ms. Haq's and Ms. Kane's request for compensation was denied.

38. Due to these uncertainties and because the matter is of general interest, the Appeals Tribunal will decide the case on the merits.

Merits

Whether the Secretary-General breached his duty of information towards Ms. Haq and Ms. Kane at the time of their appointments at the ASG level

39. The UNDT erred in law in finding that Ms. Haq and Ms. Kane had a fundamental right to be fully and accurately informed about their pension entitlements at the time of their appointments at the ASG level in 2002 and 2004, respectively, and that the Secretary-General breached this duty of information.

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(b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules;

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42. The Dispute Tribunal erred in law in failing to consider that Staff Regulation 4.1 does not oblige the Secretary-General to transmit the UNJSPF Regulations to a staff member with the letter of appointment, upon appointment. The UNJSPF is an autonomous body apart from the Secretariat of the Organization and has its own rules and regulations. Conseqey

Compensation for material and moral harm

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