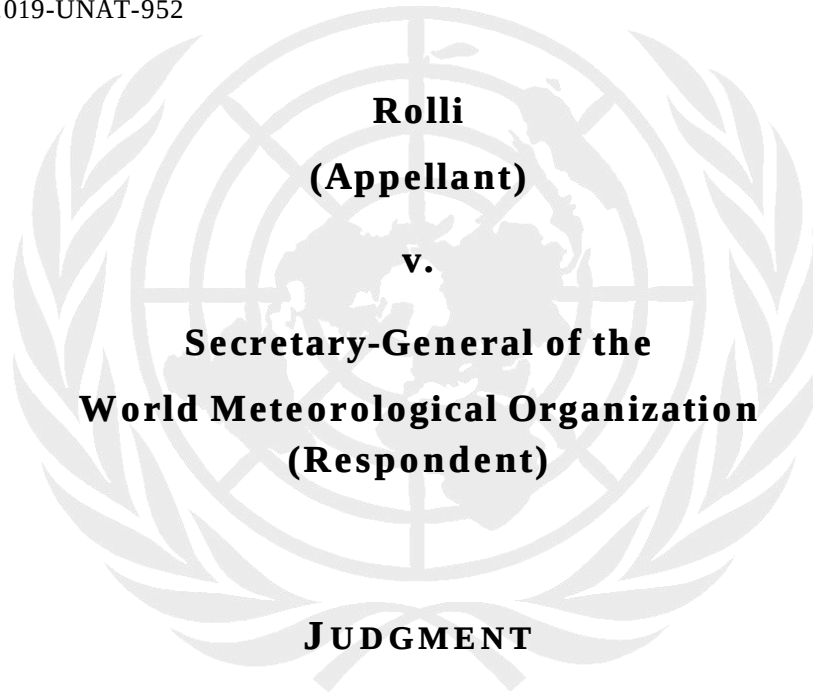




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-952



**Rolli
(Appellant)**

v.

**Secretary-General of the
World Meteorological Organization
(Respondent)**

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Martha Halfeld Judge Kanwaldeep Sandhu
Case No.:	2019-1249
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Ms. Rolli:

Edward Patrick Flaherty

Counsel for Secretary-General of the WMO:

Brigitta Exterkate

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Mr. Angiolo Rolli has appealed against the decision of the Secretary-General of the World Meteorological Organization (WMO) to summarily dismiss him for serious misconduct, which was taken following the recommendation of the Joint Appeals Board (JAB). For the reasons set forth herein, this Tribunal remands the matter to the JAB.

Facts and Procedure

2. Mr. Rolli is a former Director, Resource Management Department (D/RMD) of the WMO, who reported directly to the Secretary-General of the WMO. On 9 May 2018, the Secretary-General of the WMO sent a letter to Mr. Rolli terminating his employment on the grounds that Mr. Rolli had committed various acts of serious misconduct.

3. Firstly, it was alleged that Mr. Rolli had e-mailed the WMO's Audit Committee (AC), without informing the Secretary-General of the WMO and the Executive Management, and without their permission, requesting a private audience with the AC to ventilate his disagreement with the Executive Management concerning issues related to the WMO's Early Retirement and Voluntary Separation Programs (ERP/VSP). The e-mail to the AC enclosed a prior internal memorandum sent by Mr. Rolli to the Secretary-General of the WMO setting forth his views on the internal audit report regarding the ERP/VSP. The Secretary-General of the WMO was of the view that by not copying the Executive Management, Mr. Rolli had intended to hide the e-mail from them and, further, the request for an *in camera* meeting with the AC was intended to discuss internal differences of opinion. The Secretary-General of the WMO maintained that the AC's terms of reference provided that he is responsible for furnishing the AC with ongoing briefings and therefore Mr. Rolli's actions undermined his authority and damaged his trust in Mr. Rolli and the image of the WMO.

4. Secondly, the Secretary-General of the WMO maintained that fourteen staff members who had left the WMO under the ERP/VSP had received benefits exceeding the allowances provided for in the Staff Rules. Of the CHF 2.2 million paid out under the ERP/VSP, CHF 734,000 should have been considered *ex gratia* payments that ought to have been approved by the President and Executive Management, but were not. In addition, CHF 446,000 of the CHF 734,000 amount was allegedly paid irregularly as compensation *in lieu* of notice to staff members who had remained in employment for their notice periods. The Secretary-General

of the WMO found that Mr. Rolli had breached WMO's Financial Regulations in relation to these payments firstly by approving them without the requisite prior approval of the Executive Management and the President of the WMO, and secondly by providing incorrect and incomplete information to the President.

5. Thirdly, the Secretary-General of the WMO held that there was evidence of significant unexplained discrepancies in the cash accounts for which Mr. Rolli was responsible.

6. The Secretary-General of the WMO concluded that Mr. Rolli's conduct had breached the Staff Regulations and violated the standards of integrity stipulated in the WMO's Code of Ethics and thus decided to terminate Mr. Rolli's employment with immediate effect on grounds of serious misconduct.

7. On 8 June 2018, Mr. Rolli appealed to the JAB contending that he was summarily dismissed without a proper opportunity to be heard and requested the JAB to recommend that the Secretary-General of the WMO pursuant to Staff Rule 1111.3(h) immediately suspend the decision and reinstate him pending the JAB's review or alternatively place him on special leave with full pay. Mr. Rolli denied the alleged misconduct, maintained that he had acted in the interests of the WMO by contacting the AC, and asserted that he was not responsible for the alleged irregular payments or any discrepancies in the cash accounts.

8. On 12 February 2019, the JAB issued a report of less than two pages. It described the scope of its enquiry, its process, and methodology as follows:

The JAB examined the written statements and rebuttals and decided in its meeting on 18 January 2019 not to consider oral statements ... as it deemed them not necessary. It further decided that the appeal should only be analysed in line with WMO Staff Rule 1111.3(k) which states: 'In the case of termination or other action on grounds relative to efficiency, the Board shall not consider the substantive question of efficiency, but only evidence that the decision has been motivated by prejudice or some other extraneous factor.'

Based on the above, the JAB has reviewed and considered all statements submitted and the written evidence before it on the following three points:

- A) Is there any evidence that the Appellant's termination was motivated by prejudice or by any other extraneous factor with regard to the fact that the Appellant contacted the Audit Committee?

- B) Is there any evidence that the Appellant's termination was motivated by prejudice or by any other extraneous factor with regard to the implemented and executed [ERP/VSP]?
- C) Is there any evidence that the Appellant's termination was motivated by prejudice or by any other extraneous factor with regard to the fact that the Appellant provided information to the WMO President in February 2018?

9. After deliberations, the JAB came to the unanimous decision that the available documentation had not provided evidence, on any of the above-mentioned three points, which would allow a finding that the termination of the appointment of Mr. Rolli was motivated by prejudice or extraneous factors.

10. The JAB however found that: (i) Mr. Rolli approached the AC to discuss his disagreement with the Secretary-General of the WMO and thereby violated the WMO Code of Ethics; (ii) the implementation of the ERP/VSP entailed *ex gratia* payments without prior approvals which violated the WMO Financial Rules and Regulations; and (iii) Mr. Rolli had provided the President with inaccurate information on the ERP/VSP implementation.

11. The JAB unanimously recommended the Secretary-General of the WMO to maintain his initial decision.

12. On 14 February 2019, the Secretary-General of the WMO accepted the recommendation of the JAB and issued his final decision upholding his earlier decision to summarily dismiss Mr. Rolli.

13. On 15 April 2019, Mr. Rolli filed an appeal before the Appeals Tribunal in terms of the agreement between the United Nations and the WMO concluded on 18 July 2017 (WMO agreement). The WMO agreement is one contemplated in Article 2(10) of the Statute of this Tribunal which confers jurisdiction on the Appeals Tribunal to hear and pass judgment on an application filed against a specialized agency in terms of a special agreement concluded by the specialized agency with the United Nations accepting the terms of the jurisdiction of the Appeals Tribunal.

14. The Secretary-General of the WMO filed his answer to the appeal on 8 July 2019.

15. On 6 August 2019, Mr. Rolli filed a motion for additional pleadings to which the Secretary-General of the WMO filed his response on 2 September 2019. Mr. Rolli submitted a second motion for additional pleadings on 15 October 2019. For the reasons that follow, the determination of these motions will be deferred to a later date.

Submissions

Mr. Rolli's Appeal

16. Mr. Rolli has made various submissions in support of his appeal. For reasons that follow it is unnecessary to refer to them all at this stage.

17. Mr. Rolli requests the Appeals Tribunal to rescind the decision to summarily dismiss him and order his reinstatement. He also requests three years' net base salary for material damages, and two years' net base salary for moral damages, and seeks costs, a reference letter, and withdrawal from his personnel file of all adverse material related to his termination.

18. Most importantly for present purposes, Mr. Rolli argues that the decision and the JAB report lack any reasons or analysis of evidence leading to doubt that the evidence and arguments he submitted to the JAB were weighed, evaluated, and fully considered. There is no indication in the report of the JAB as to whether the relevant facts supporting the disciplinary measure have been established by clear and convincing evidence. He presented evidence to the JAB that his contacting the AC was not misconduct but was in accordance with his duties and responsibilities. He also contended that the allegations of serious misconduct regarding the payments under the ERP/VSP program were erroneous as he had no authority to approve *ex gratia* payments and did not do so as this fell under the authority of the Legal Counsel, who gave the necessary approval.

19. As for the allegation that he had provided erroneous calculations to the President, Mr. Rolli provided cogent evidence that this was a mistake, which he corrected promptly and brought to the President's attention. There is no analysis or apparent consideration of this evidence in the JAB report.

20. Mr. Rolli reiterates that he did not commit serious misconduct and maintains that the sanction was not proportionate.

The Secretary-General of the WMO's Answer

21. The Secretary-General of the WMO urges the appeal to be dismissed. The Secretary-General of the WMO did not respond to Mr. Rolli's contentions that the JAB did not make appropriate factual findings.

22. The Secretary-General of the WMO makes various submissions that need not be examined now. Most importantly, he maintains that the contested decision was taken within his discretion with the interests of the WMO in mind. Mr. Rolli's disclosure to the AC was not in line with the regulatory and normative environment within the WMO in that he lacked express permission to do so. In addition, the Secretary-General of the WMO persists in his claim that Mr. Rolli authorized irregular expenditures within the ERP/VSP not in accordance with the applicable rules and regulations.

23. The Secretary-General of the WMO maintains further that he has wide discretion to determine whether conduct amounts to serious misconduct and to determine a disciplinary measure. In this matter, he determined that the established facts constituted serious misconduct for which termination was a proportionate measure.

Considerations

24. The ultimate issue in this case, which this Tribunal must decide in terms of Article 2 of the WMO agreement, is whether the decision of the Secretary-General of the WMO to summarily terminate Mr. Rolli's employment was in non-compliance with the terms of his appointment, including the relevant rules, regulations, and issuances of the WMO and if so, whether his termination was a disproportionate disciplinary measure.

25. The findings of the JAB in relation to this critical issue are not adequately reflected or articulated in the written record. Moreover, the JAB did not furnish a written decision dealing fully with the factual and legal issues. It merely found in terms of WMO Staff Rule 1111.3(k) that Mr. Rolli's termination was not motivated by prejudice or extraneous factors.

26. This case is an application in terms of Article 2(10) of the Statute of the Appeals Tribunal which reads:

The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions *vis-a-vis* the agency, organization or entity. Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

27. The intention of Article 2(10) is to allow specialized agencies by agreement to accept and submit to the terms of the jurisdiction of the Appeals Tribunal consonant with the Statute of the Appeals Tribunal. As the ordinary jurisdiction of the Appeals Tribunal is to hear and pass judgement on appeals against a judgement rendered by the United Nations Dispute Tribunal, Article 2(10) requires the special agreement to include provisions establishing a neutral first instance process that includes a written record and a written decision providing reasons, based on factual and legal findings. It is intended that the neutral first instance process will result in a decision based on a record that can be the subject of a possible appeal. Appeals before the Appeals Tribunal are appeals on the record.

28. The first instance process utilized by the WMO is that before the JAB. In terms of WMO Staff Rule 1111.3(n) after consideration of an appeal, the JAB shall adopt and submit a report to the Secretary-General of the WMO. The report is considered as constituting a record of the proceedings in the appeal and must include a recommendation. In terms of

WMO Staff Rule 1111.3(o) the final decision on the appeal shall be taken by the Secretary-General of the WMO.

29. Article 2 of the WMO agreement confers competence on the Appeals Tribunal to determine an appeal by a staff member alleging that an administrative decision is not in compliance with the terms of employment or the rules and regulations of the WMO or if a disciplinary measure is proportional. The factual basis for the JAB's determination that Mr. Rolli's summary dismissal was justified is not clear and does not appear from the JAB report. It is accordingly not possible to establish whether the JAB made the alleged errors on the relevant questions of fact, resulting in a manifestly unreasonable decision. Additionally, the JAB limited its enquiry to determining whether the decision to dismiss Mr. Rolli was motivated by prejudice or extraneous factors. Hence, no decision was taken by the JAB determining the legal question of whether the summary dismissal of Mr. Rolli was lawful, reasonable, and procedurally fair in terms of his contract and rules and regulations of the WMO. The submission of Mr. Rolli that the JAB failed to make the necessary factual and legal findings in relation to the evidence he produced before it is therefore correct. Moreover, the final decision was taken by the Secretary-General of the WMO, who as employer, was not a neutral body.

30. Article 2(3) of the Statute of the Appeals Tribunal empowers the Appeals Tribunal to affirm, reverse, modify or remand a decision of a first instance body and to issue all orders necessary or appropriate in aid of its jurisdiction. In terms of Article 2(4)(b) of the Statute of the Appeals Tribunal, where the evidence of the first instance process is deficient and the Appeals Tribunal determines that further findings of fact are necessary, the Appeals Tribunal shall be competent to remand the case to the first instance body for additional findings of fact, subject to Article 2(5) of the Statute.

31. Article 2(5) envisages two possibilities. The first permits the Appeals Tribunal to receive additional documentary evidence, including written testimony, where the Appeals Tribunal determines that the facts are likely to be established by means of such documentary evidence. However, the admission of additional documentary evidence will only be permissible in exceptional circumstances and if it is in the interest of justice and the efficient and expeditious resolution of the proceedings to do so. Additionally, the evidence will not be admissible if it was known at the time and should have been presented at the first instance level.

32. The second possibility envisaged under Article 2(5) of the Statute is for the case to be remanded to the first instance body. This shall occur firstly where the resolution of the factual issues by additional documentary evidence is not appropriate or possible, or, secondly, where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written testimony. Article 2(5) of the Statute, therefore, in keeping with the Appeals Tribunal's appellate nature and function, does not envisage or permit the Appeals Tribunal to hold hearings for the purpose of receiving oral or other forms of non-written testimony. An appeal to the Appeals Tribunal is primarily an appeal on the record of the first instance body. The oral proceedings contemplated in Article 8 of the Statute of the Appeals Tribunal are for the purpose of hearing oral argument and submissions in relation to the factual record and not for fact-finding. The process of fact-finding is reserved by the statutory scheme to the first instance body. This arrangement is applied to specialized agencies subject to the Appeals Tribunal's jurisdiction by Article 2(10), which explicitly provides that remands should be to the first instance process of the agency.

33. The Appeals Tribunal holds that this appeal cannot be determined without additional fact-finding that may require oral testimony in relation to several material issues. Mr. Rolli's appeal to the JAB must be reconsidered and re-determined by a neutral process that produces a record of decision and a written decision including a statement of the relevant facts, the relevant law and reasons for the decision. We propose therefore to remand the case to the JAB to reconsider the appeal and to make various essential factual and legal determinations. The findings must be substantiated on proper evidence (including where necessary oral testimony) and be set out in a written decision determining the ultimate issue, as contemplated in Article 2(10) of the Statute of the Appeals Tribunal read with Article 2 of the agreement.

34. The JAB is directed to make findings on the following issues and questions:

34.1 Were the critical comments about the ERP/VSP in the Internal Audit Report (IOO Report) issued without any input from Mr. Rolli in his capacity as Director RMD?

34.2 Are the criticisms and comments of the Internal Audit Report contained in Mr. Rolli's memorandum of 5 March 2018 addressed to the Secretary-General of the WMO well-founded and necessary for a full and fair understanding of the matters investigated?

34.3 What response, if any, did the Secretary-General of the WMO provide to Mr. Rolli's memorandum of 5 March 2018?

34.4 Was the request by Mr. Rolli to the AC in his e-mail of 30 April 2018 for an *in camera* meeting an inappropriate attempt to have a private audience to ventilate his disagreement with the Secretary-General of the WMO and Executive Management; or did the request fall within Mr. Rolli's responsibilities to provide timely, high quality information to the AC?

34.5 Were Mr. Rolli's concerns expressed to the AC in a reasoned and acceptable manner?

34.6 Was the failure of Mr. Rolli to copy the e-mail of 30 April 2018 to the AC a deliberate attempt to hide his actions?

34.7 Did Mr. Rolli contact the AC out of concern for the interests of the WMO as well as his own reputation?

34.8 Did Mr. Rolli inform the Secretary-General of the WMO at a meeting on 20 April 2018 that he would provide the AC with his comments on the IOO Report about the ERP/VSP?

34.9 Did the Secretary-General of the WMO ever assure Mr. Rolli that he did not object to his contacting the AC?

34.10 Why did the Secretary-General of the WMO not reply to the e-mail addressed to him by Mr. Rolli on 20 April 2018 at 10h50 informing him that he would provide the AC members with his comments on the IOO Report on the ERP/VSP?

34.11 Did Mr. Rolli's actions in sending the e-mail of 30 April 2018 undermine the authority of the Secretary-General of the WMO?

34.12 Did 14 staff members of the WMO receive benefits under the ERP/VSP exceeding the allowances provided for in the Staff Rules?

34.13 Was the ERP/VSP carried out under the guidance and responsibility of Mr. Rolli?

34.14 On what basis should CHF 734,000 of the CHF 2.2 million paid out under the ERP/VSP be considered *ex gratia* payments?

34.15 If the payments were *ex gratia* payments, in terms of what provisions was it necessary for the President and the Executive Management to have approved them prior to them being made?

34.16 Were the *ex gratia* payments made in violation of the regulations? If so, in what respects?

34.17 Did the President and the Executive Management at any point approve the *ex gratia* payments?

34.18 Do the relevant regulations permit retroactive ratification of *ex gratia* payments? If so, why was retroactive ratification of the payments not sought?

34.19 Whose responsibility was it in terms of the relevant regulations to ensure that the President and the Executive Management gave prior approval for the *ex gratia* payments?

34.20 Did Mr. Rolli approve payment of CHF 446,000 as compensation in lieu of notice to staff members without the approval of the President and the Executive Management? If so, when and in terms of what decision or action?

34.21 In terms of what rule or regulation was Mr. Rolli obliged to obtain approval for the payment of CHF 446,000 as compensation in lieu of notice?

34.22 Were all the *ex gratia* payments approved in the form of a service note following a visa clearance from the Legal Counsel and all the executive managers?

34.23 Is Mr. Rolli's allegation that he played no role at the final stages of making payments under the ERP/VSP, or the final authorization, true?

34.24 Were all the payments under the ERP/VSP certified by the Chief Budget Officer as the certifying officer and finally approved by the Deputy-Secretary-General of the WMO?

34.25 Did all members of the Executive Management prior to the internal audit believe that no payments under the ERP/VSP were in fact *ex gratia* payments?

34.26 Did the Legal Counsel provide advice that the payments in question were not *ex gratia* payments?

34.27 Did the Senior Legal Adviser form an opinion in relation to the *ex gratia* payments that there was no clear legal liability on the part of the WMO to make the payments but that the payments were in the interests of the WMO?

34.28 Did the Secretary-General of the WMO ever seek the approval of the President for the *ex gratia* payments in terms of Staff Regulation 13.4? If not, why not?

34.29 Did Mr. Rolli provide inaccurate, incomplete or misleading information to the President in February 2018 and in which respects was the information inaccurate, incomplete or misleading?

34.30 Were there significant, unexplained discrepancies in the cash accounts as alleged by the Secretary-General of the WMO in his letter of 9 May 2018?

34.31 What was the precise nature of the alleged discrepancies in the cash accounts?

34.32 Who was responsible for the alleged discrepancies in the cash accounts?

34.33 Which specific provisions of WMO's Financial Regulations and Code of Ethics is Mr. Rolli alleged to have breached and in which respects?

34.34 The JAB is required to make a finding, and to set out its basis in respect of whether the Secretary-General of the WMO's characterization of Mr. Rolli as untrustworthy and of doubtful integrity was correct and justified?

34.35 Did the relationship between the Secretary-General of the WMO and Mr. Rolli deteriorate because of Mr. Rolli's efforts to introduce more rigorous practices in the management of field practices and the hiring of consultants?

34.36 The JAB should make a substantiated finding regarding Mr. Rolli's allegation that his termination was imposed by the Secretary-General of the WMO for improper reasons and as an act of retaliation for his efforts to ensure transparency and better practice.

34.37 The JAB must take a decision, as required by Article 2(10) of the Statute of the Appeals Tribunal and as contemplated in Article 2(1)(a) and (b) of the WMO agreement, on whether the termination of Mr. Rolli's appointment was in compliance with the terms of appointment, including the provisions of the WMO's Staff Regulations and Rules, and whether it was a proportional disciplinary measure.

Judgment

35. The case is remanded to the JAB of the WMO in terms of Article 2(3) and Article 2(4)(b) of the Statute of the Appeals Tribunal for reconsideration in accordance with the directions in paragraphs 33 and 34 of this Judgment.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Sandhu

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar