



Judgment No. 2016-UNAT-637



Counsel for Ms. Maslei:

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JUDGE RICHARD LUSSICK, PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/041, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 27 May 2015 in the matter of Maslei v. Secretary-General of the United Nations. The Secretary-General filed his appeal on 27 July 2015, and Ms. Mariia Maslei filed her answer on 25 September 2015.

Facts and Procedure

2. Ms. Maslei was recruited in November 2010 as a Resettlement Officer at the P-3 level with the Country Office of the United Nations High Commissioner for Refugees (UNHCR) in Islamabad, Pakistan, on a one-year fixed-term appointment, which was subsequently renewed on an annual basis. In 2011 and 2012, Ms. Maslei received satisfactory performance ratings.

3. The UNHCR Policy on Procedures on Assignments and Promotions of 14 June 2010 governed the duration of Ms. Maslei's assignment with UNHCR in Pakistan. Paragraph 50 of that policy provided that the "period of time that an international professional staff member is normally expected to serve in a given duty station is based on its hardship classification, which is established by the International Civil Service Commission ("ICSC") according to prevailing living conditions". This period of time is referred to as the "Standard Assignment Length" or "SAL". At the material time, the SAL in Islamabad, Pakistan, was two years.

4. In March 2012, Ms. Maslei's initial SAL in Islamabad, Pakistan, was extended until December 2013. Consequently, in November 2012, her appointment was renewed for another year, running until 31 December 2013.

5. In December 2012, Ms. Maslei sought guidance from Human Resources about having her SAL extended until 31 December 2014 on personal grounds.

6. On 15 January 2013, the UNHCR Representative in Pakistan sent an inter-office memorandum to the Director of the Regional Bureau for Asia and the Pacific, UNHCR Headquarters, requesting an extension of Ms. Maslei's SAL in Islamabad, Pakistan,

until 31 December 2014. The request was approved on 22 March 2013, and Ms. Maslei was informed accordingly.

7. On 15 February 2013, a new Assistant Representative joined UNHCR, Pakistan and, effective 17 April 2013, became Ms. Maslei's supervisor.

8. In late September 2013, after having supervised Ms. Maslei for five months during which time a number of disagreements and interpersonal issues had arisen, which Ms. Maslei characterized as bullying, Ms. Maslei's supervisor gave Ms. Maslei a negative "mid-year development review" for the purpose of Ms. Maslei's electronic Performance Appraisal Document for the 2013 cycle.

9. On 28 November 2013, the UNHCR Representative in Pakistan informed Ms. Maslei that her supervisor had recommended not renewing her appointment beyond 31 December 2013 based on unsatisfactory performance and, on 4 December 2013, Ms. Maslei received a separation memorandum.

10. Ms. Maslei was subsequently placed on sick leave and her appointment was extended until 31 January 2014 for administrative purposes until the end of her sick leave.

11. On 27 January 2014, Ms. Maslei submitted a request for management evaluation of the reduction of her SAL, to which she received no reply.

12. On 1 February 2014, Ms. Maslei separated from service.

13. On 11 June 2014, Ms. Maslei filed an application with the UNDT contesting the decision to "unextend" her contract beyond 31 December 2013 on the grounds of unsatisfactory performance, although her SAL had been extended until 31 December 2014.

14. On 27 May 2015, the UNDT issued the Judgment, holding that the decision not to renew Ms. Maslei's appointment based on performance-related reasons was unlawful because the Administration had not followed UNHCR's policies on performance management. The UNDT also concluded that the extension of her SAL had given her a legitimate expectation that her one-year fixed-term appointment would be renewed until 31 December 2014. Accordingly, the UNDT ordered the rescission of the non-renewal decision and, as an alternative to rescission, the payment of compensation in the amount of

note from a staff member's psychotherapist, finding that that alone did not discharge the staff member's burden of proving moral damage.³ Ms. Maslei did not present any medical evidence of moral harm in respect of the period following February 2014, or any bills or expenses that she had incurred as a result of her non-renewal. Further, Ms. Maslei's

19. The Secretary-General's insinuation that any moral damage incurred by Ms. Maslei in relation to her mental health relates purely to the period of her sick leave should be rejected. The assertion that mental illness is like food poisoning, the symptoms of which appear overnight and disappear just as quickly, is unfounded and ignores the evidence that her symptoms first appeared in April 2013 and significantly deteriorated in September 2013, before culminating in her taking sick leave from 7 December 2013 to 31 January 2014. It was UNHCR's unlawful actions that resulted in a staff member, who had never previously experienced mental illness, being rendered sufficiently ill that she was unable to work for a period of nearly two months.

20. The UNDT's moral damages award does not relate exclusively to the period of Ms. Maslei's sick leave, but to the totality of the damage she incurred as a result of UNHCR's failure to follow its own rules. The calculation of moral damages is not merely based on a period of sick leave; it requires consideration of the nature of the breaches of rights, their intensity and impact. In the instant case, these breaches were numerous and occurred over a prolonged period of time as UNHCR failed to fulfil its obligations under performance evaluation rules. UNHCR's breaches resulted in Ms. Maslei's illness and ended her nascent career, leaving her with a performance evaluation that could not be subject to review, and professional reputation that could not be rehabilitated. The UNDT thus was also correct to find that this harm was aggravated in view of the fact that Ms. Maslei was left with no recourse forum to address the allegations of poor performance as her performance appraisal was never completed such that her supervisor's conclusions were insulated from review.

21. While the Secretary-General relies on *Kozlov and Romadanov* to suggest that Ms. Maslei's moral damage was not properly evidenced, he in fact contends that the quality of evidence used to demonstrate the harm should somehow affect the degree of damage found and therefore the quantum. Such proposition has no basis in law. While the quality of evidence might go to the question of whether moral damage has been proved, it cannot be relevant to the issue of the degree of such damage and thus to the quantum. The Secretary-General's argument also fails to address the reputational harm that Ms. Maslei suffered as a consequence of UNHCR's actions.

22. The Appeals Tribunal has repeatedly held that the UNDT is in the best position to decide on the level of compensation given its appreciation of the case.⁵ As the UNDT heard evidence over a two-day period, including evidence in person from Ms. Maslei, it was best placed to calculate the damage incurred by Ms. Maslei and the award cannot be disturbed on the basis of ill-founded comparisons to cases decided on distinguishable facts. The UNDT's award of moral damages in Ms. Maslei's case can also be distinguished on its facts from the cases relied upon by the Secretary-General.

23. Further, the Secretary-General's suggestion that a higher award of moral damages can only be made in cases where unlawful motive is found erroneously supposes that the award of moral damages relates not to the harm incurred, but to the cause of that harm. None of the cases relied upon indicate that improper motivation increased the award, and two of the cases do not even indicate that the decision challenged was improperly motivated. The seriousness of a breach of a staff member's rights is not dictated by the reason for that breach, nor is the damage that is incurred. Evidence of damage is required because it is the *extent* of that harm that is compensated. Further, the cases upon which the Secretary-General relies, such as *Rees*, in fact support the UNDT's award for the harm suffered by Ms. Maslei.

24. Ms. Maslei requests that the Appeals Tribunal affirm the UNDT Judgment and its moral damages award, and dismiss the appeal in its entirety.

Considerations

25. The Dispute Tribunal found that the non-renewal of Ms. Maslei's contract was unlawful. It ordered the rescission of that decision or compensation in lieu of the rescission. It also awarded Ms. Maslei six months' net base salary for moral damages.

26. The only part of the Dispute Tribunal Judgment challenged by the Secretary-General is the award of six months' net base salary for moral damages.

27. The Secretary-General does not contest that Ms. Maslei suffered moral damage, but claims that the award is excessive and disproportionate because it vastly exceeds the awards affirmed by the Appeals Tribunal in similar unlawful non-renewal cases and because the evidence does not justify such a substantial amount of compensation.

⁵ Citing *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 20.

28. The evidence on which the Dispute Tribunal based its award was the sworn testimony of Ms. Maslei, together with a summary of psychiatric evaluation from her physician. In addition, the Dispute Tribunal took into account that Ms. Maslei's condition had been accepted by the Administration to be a stress related illness from 7 December 2013 to 31 January 2014 sufficient to entitle her to sick leave and an exceptional extension of her contract to cover that period.⁶

29. We note that the summary of psychiatric evaluation recorded a history of "episodes of severe anxiety and panic lasting about half an hour in which she felt her heart was racing, she had trembling and shortness of breath and felt a discomfort in her chest". These episodes, which were said to have "started due to a stressful situation at work", were initially experienced in April 2013 but increased in intensity in September 2013. The psychiatrist, in his report of 20 February 2014, was of the opinion that she was "doing better" but was still showing symptoms of stress. The psychiatrist diagnosed Ms. Maslei as suffering from an "[a]djustment [d]isorder with mixed anxiety and depressed mood" and recommended that she continue with "[b]rief individy4.6(rs5.9(2 Tcj9(t.)-3.2ef c5.4(in .4(i)14.4(s)22.4(o

similar in each case. The assessment of an award of moral damages is made on a case-by-case basis according to the discretion of the Tribunal.⁹

33. As we held in *Appleton*

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Weinberg de Roca