



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/061

Judgment No.: UNDT/2011/131

Date: 20 July 2011

Original: English

Before: Judge Shaw
Registry: Nairobi
Registrar: Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RELIEF

Counsel for Applicant:
Edward Patrick Flaherty

Counsel for Respondent:
Elizabeth Brown, UNHCR
Felix Ross, UNHCR

6. The Respondent objects to the admission of this certificate on the basis that it lacks probative value and should be excluded as evidence in accordance with Article 18(5) of the UNDT Rules of Procedure.

7. Specifically the Respondent alleges that the examining psychiatrist does not appear to properly assume the role of an independent expert as he draws improper and apparently prejudicial conclusions regarding matters not related to his medical expertise. For example, his reference to the Applicant's dismissal as an injustice, his comments on the appropriate means of indemnification and the current economic crisis which would impact on the Applicant's ability to find work.

8. Further, the Respondent submits that the medical certificate does not support the Applicant's submission regarding his incapacity to assume regular work during the period up to 2019.

9. Should the Tribunal find the Applicant's future state of health to be relevant, the Respondent requests that a medical board be established to provide independent evidence on the Applicant's present state of health.

10. The Tribunal finds that the medical certificate over-steps the bounds of a proper professional opinion by assuming that the Applicant should be objectively fit to perform matters within the professional capacity of the expert. It should be objective

termination he held an indefinite contract at the P4 level. He had planned and expected to finish his career upon his statutory retirement age of 62.

12. He submitted that damages due to him should be determined in two separate categories: “back pay” to compensate for losses arising from his dismissal to the date of judgment and “future pay” as an alternative to retroactive reinstatement. Although reinstatement is preferred by the Applicant, he doubts that this is likely. He submits that as a result of the severe illness and injuries he has suffered, and his record of having been summarily dismissed, it is unclear whether he will again be able to resume his professional duties.

“Back pay”

13. The Applicant seeks:

- i. His gross salary at P4 grade from the date of his summary dismissal on 11 January 2009 including post adjustment, dependency allowance, educational grant, home leave grant, mobility/hardship/non-removal allowance. He also seeks the Organisation’s 15.8% pension contribution, reduced by the staff assessment and the Applicant’s own pension contribution until 16 March 2011 when the Tribunal’s rendered its judgment. He asks that his and the Respondent’s contributions be paid directly to the United

and, in reliance on the medical certificate, the catastrophic effects on his physical and mental health, marriage and professional reputation.

iii. Legal fees of US\$75, 000.

Future pay

14. The Applicant seeks:

- i. Payment of his gross monthly salary at the P4 level, including post adjustment, dependency allowance, educational grant, home leave grant, mobility/hardship/non-removal allowance, but excluding the UNHCR's 15.8% monthly pension contribution reduced by the staff assessment as from 16 March 2001 until his statutory retirement date on 31 March 2019. The Applicant calculates these benefits at approximately US\$872,606.69 subject to detailed accounting of the sum by the Respondent.
- ii. In the event that the Tribunal orders that he is to be paid a lump sum payment to cover future pay and entitlements, the Applicant requests that the respondent be instructed to maintain the Applicant as an active participant within the UNJPF and for the Respondent to pay the 15.8% monthly contributions on the Applicant's calculated salary amount until the Applicant's statutory retirement age on 31 March 2019.
- iii. Payment of his repatriation grant equal to 28 weeks or US\$50,645.13 which was denied to him as a result of his summary dismissal.
- iv. Interest on the claimed amount at 8% or such other rate as determined by the Tribunal.

The Respondents Submissions

15. The UNAT case of *Mmata* (2010-UNAT-092) limits the total of all compensation ordered under Article 10(5) (a) and (b) to the equivalent of 2 years base salary.

16. In this case the Applicant seeks a tota

Considerations

19. Having rescinded the decision to summarily dismiss the Applicant, the Tribunal is required by article 10(5) of the UNDT Statute to set an amount of compensation *in lieu* of rescission of the impugned decision to summarily dismiss the Applicant.

20. Article 10(5) (a) refers to “compensation” and (b) refers to “compensation which shall normally not exceed the equivalent of two years net base salary”. It has been affirmed by UNAT in *Warren* (UNAT-2010-065), that the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organisation complied with its contractual obligations. However in *Mmata* (UNAT-2010-092), UNAT has held that Article 10(5) limits the total of all compensation under sub paragraphs (a) and (b) to the equivalent of two years base salary except in exceptional cases.

21. The tenor of Article 10(5) of the statute is that compensation should be calculated in terms of the net base salary. It does not specifically refer to entitlements over and above the salary.

22. In summary, in determining compensation, the Tribunal is to order such compensation as is necessary to place the staff member in the same position he would have been in but for the breach of contract. But unless it is an exceptional case the total compensation should not exceed two years net base salary.

23. There are three issues:

- i. What compensation is necessary to place the Applicant in the same position he would have been but for the unlawful investigation?
- ii. Should the Applicant be compensated for future losses and if so the amount to be awarded?
- iii. Whether and to what extent the Applicant may be compensated for moral injury?

i) Placing the Applicant in the same position

24. In this case, the Applicant was facing allegations of serious misconduct. He was denied a fair and lawful investigation process. The pre-breach position to which he should be restored is that immediately prior to the investigation. At that point in time he was holding a P-4 managerial position, some staff members had made complaints about his behaviour towards them and the Administration was obliged to investigate those allegations.

25. The investigation, having been found to have been irregular, has no effect. Although the decision to dismiss

ii) Compensation for future losses

29. The Applicant's future losses depend entirely on what the outcome of a properly conducted investigation would be. However this is impossible to predict and there is no certainty that the Applicant would have retained the position he was in at the time of the allegations.

30. The Applicant's claim for compensation is excessive. It equates to over 13 years of net base salary plus payment of a number of entitlements.

31. Apart from being well outside the scope of compensation that might properly be ordered by the Tribunal, the Applicant's claim is predicated on the mistaken belief that but for the unlawful dismissal he would have remained in his position until his retirement some 10 years into the future. That prediction is unsubstantiated by the Applicant. Indeed the medical evidence produced by him indicates that his medical condition may preclude this. The Respondent also makes the valid point that the period of time covered by the claim makes it too remote. The Tribunal is not in a position to predict the prospects of the Applicant continuing his employment with UNHCR for the next 10 years.

32. The Applicant's claim for future losses is rejected.

iii) Moral Damages

33. The Tribunal accepts that the Applicant was physically and emotionally affected by the investigation but he is entitled only to be compensated for the damages caused to him by the breaches which have been established. While the Tribunal accepts that the Applicant did suffer considerably as a result of the investigation, it is mindful that the Respondent was obliged to undertake the investigation and did not act in bad faith in doing so. Given the complexity and importance of the case, the investigation was conducted within a reasonable time

during which the Applicant received his full entitlements as a staff member in spite of not working.

34. The breaches identified in the substantive judgment in this case were:

date of judgment to payment of the compensation would be premature and should await the outcome of the appeal.

38. All other claims by the Applicant are rejected.

Conclusion

39. The Tribunal orders:

- i. Pursuant to Article 10(5) (a) the compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision is a lump sum equivalent to two year's and two month's net base salary.
- ii. The Respondent is to pay the Applicant moral damages pursuant to Article 10(5) in a lump sum equivalent to 3 months net base salary as at the date of his dismissal.
- iii. The Respondent is to pay the Applicant interest on the total judgment sum at the US Prime Rate from the date of the Applicant's dismissal on 17 January 2009 to the date of this judgment.

(Signed)

Judge Shaw

Dated this 20th day of July 2011

Entered in the Register on this 20th day of July 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi