



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/052/
UNAT/1660

Judgment No.: UNDT/2011/145

Date: 24 August 2011

Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Santiago Villalpando

BRIDGEMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

Introduction

1. In Judgment No. UNDT/2011/018 dated 25 January 2011, the Tribunal found that:

a. The Applicant's due process rights were violated when his computer hard drive was seized in violation of sec. 8.5(a) of ST/SGB/2004/15. However, by giving him notice and inviting him to be present when the ICT data were being accessed the Administration accorded him his due process rights in accordance with sec. 8.5(b)(i) of ST/SGB/2004/15;

b. The [Joint Appeals Board's ("JAB")] review of his case was unconscionably delayed and procedurally flawed. The Respondent bears responsibility for this;

c. The [Joint Disciplinary Committee ("JDC")] process was proper and fair. The consideration by the investigation panel and the Report of the JDC were soundly based on the available evidence, and the recommendation as to appropriate sanction was not disproportionate;

d. The disciplinary sanction imposed on the Applicant was disproportionate. The Tribunal rescinds the decision to impose a loss of two steps in grade and a two year deferment of within grade salary increments; and

e. A hearing on remedy is to take place on 10 February 2011.

2. Article 10.5 of the Statute of the Tribunal provides:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

3. In para. 10 of the Judgment of the United Nations Appeals Tribunal in *Warren* 2010-UNAT-059 the Appeals Tribunal stated that “[t]he very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations”.

4. The United Nations Appeals Tribunal in *Antaki* 2010-UNAT-095 stated that:

19. The Dispute Tribunal has an unquestioned discretion and authority to quantify and order compensation under Article 10(5) of its Statute for violation of the legal rights of a staff member as provided under the Staff Regulations, Rules, and administrative issuances.

20. Not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages.

21. A Tribunal may thus award compensation for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury. ...

...

5. Specifically regarding non-pecuniary damage for breaches of procedural rights, the Judgment of the United Nations Appeals Tribunal in *Wu* 2010-UNAT-042, at para. 33, enunciated the principle that:

... It is not disputed that compensation may be awarded for non-pecuniary damage. While not every violation of due process rights will necessarily lead to an award of compensation, the UNDT found in this case that Wu suffered damage, in the form of neglect and emotional stress, for which he is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

6. A hearing on remedy took place on 10 February 2011. The Tribunal heard evidence from the Applicant. No other witnesses were called.

7. It was clear, after a preliminary exchange of views with Counsel, that the parties were capable of agreeing certain heads of remedy, thereby reducing the length of the hearing and permitting the Tribunal and the parties to concentrate on those issues that were not agreed. The Tribunal granted the parties a short adjournment.

8. The Tribunal was informed that the parties had reached agreement on certain elements but not others. They were asked to record their agreement in a joint written statement which would be incorporated in the final Order. Counsel are to be congratulated for their endeavours and for reaching a substantial measure of agreement in the following terms:

a. The alternative sanction of a written censure for non-observance of ST/SGB/2004/15 (*Use of information and communication technology resources and data*) will be imposed by the Respondent;

b. The Respondent will increase the level of the Applicant's engagement by two steps within grade and by the steps he would have been eligible for but for the two-year deferment of eligibility for within-grade salary increment;

c. The Respondent will pay the Applicant the sum by which his net base salary and post adjustment was reduced by [the loss of two steps in grade and a two year deferment of within grade salary increments], less the additional sum he would have paid toward his pension contributions had the Sanction not been imposed;

d. The Respondent will pay to the United Nations Joint Staff Pension

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- a. USD 90,000 for breaches of his right to due process and for moral injury. The Tribunal understands the claim for “moral injury” to encompass compensation for mental or psychological injury to include anxiety and stress.
- b. Financial compensation for loss of salary consequent upon the disciplinary sanction of a loss of two steps in-grade;
- c. Loss of salary for nine months when the Applicant took Special Leave Without Pay (“SLWOP”);
- d. USD8,000 for legal fees; and
- e. Restitution of pension contributions.

10. Items (b) and (e) were subject to the joint agreement of the parties and will be incorporated as an order by consent.

11. The Tribunal decided that it was necessary to hear evidence from the Applicant in relation to his claim for compensation for “moral injury”, loss of salary during SLWOP and legal fees.

12. After further discussion, it was agreed that the hard drive which contained the images contrary to art. 4.1(a) of ST/SGB/2004/15 was the property of the United Nations. However, its contents comprised two elements:

- a. the Applicant had stored personal items and insofar as these are still available, they should be released to him with the exception of any material that was stored in breach of art. 4.1(a); and
- b. all material relating to the Field Staff Union, which should be returned to the President of the Union in accordance with arrangements to be mutually agreed between the Respondent and the Union President.

Consideration

Compensation for stress and anxiety

13. The Tribunal has to be acutely aware of the risk inherent in an uncritical acceptance of a claim based on the subjective assessment of an individual. This is not such a case. The Applicant produced the following medical evidence of stress and anxiety:

- a. a Sick leave Certificate from Dr

1 November 2008. The certificate identifies as limiting factors, “hypertension” and “anxiety attacks”.

14. The question for the Tribunal is whether the medical conditions described by the Applicant and supported by medical practitioners were caused or contributed to in any significant degree by the breach of his rights to due process (for which see para. 65 of the Judgment on liability and para. 1 above).

15. The Tribunal listened carefully to the Applicant describing the effect on his state of mind and body. His response to searching cross-examination did not strike the Tribunal as contrived. His explanations were coherent and consistent with an apparent absence of exaggeration. The Tribunal finds that this aspect of the claim is made out. The actions of Mr. Stephen Lieberman, Chief Administrative Officer, described in the Tribunal’s Judgment on liability, were high-handed and grossly disproportionate. Moreover, the subsequent attempt at misleading both the JAB and JDC panels, as well as Counsel for the Respondent and the Tribunal in the present proceedings, constitute aggravating factors which the Tribunal finds heightened the distress experienced by the Applicant. The Tribunal assesses the hurt suffered, or the “moral damages/injury” as it has been described by the appellate tribunals of the former and current systems of internal justice, merit an award that is not derisory but one which properly recognizes the hurt suffered by the Applicant. In arriving at a monetary assessment, the Tribunal has taken account of Counsel for the Respondent’s submission that the stress and anxiety suffered by the Applicant was due to his own misdeed of storing pornographic material on his United Nations office computer. Whilst applying an appropriate discount to the sum awarded, the Tribunal reminds all concerned that by far the most serious of the disciplinary charges was that of sexual harassment which was a potentially dismissible offence. This charge was dismissed, and it was this charge that was the substantial cause of the stress and anxiety suffered by the Applicant aggravated by the manner in which Mr. Lieberman misled the Applicant, the JAB and JDC Panels and the Respondent’s representative.

16. A further factor which added to the Applicant's sense of stress and anxiety arising from the sexual harassment charge, which was dismissed, was the protracted JAB process that he had to endure and which the Tribunal in its Judgment on liability found was unconscionably delayed. Since, under former staff regulation 11.1, it was the Respondent's responsibility to "establish administrative machinery with staff participation to advise him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment", which he did by creating the JAB (see Chapter XI of the former Staff Rules), he must also be liable for shortcomings of the JAB. That the Applicant is entitled to compensation for the JAB's faults was also recognised by the former United Nations Administrative Tribunal, which in its Judgment No. 1047, *Helke* (2002), stated that:

VI. In conclusion, the Tribunal holds that ... the Applicant ... should be compensated for the lack of compliance with the relevant provisions of the Rules of Procedure and Guidelines of the Geneva JAB.

17. Taking into account Counsel for the Respondent's submissions and having regard to the principle of contributory fault, the Tribunal considers that a fair and reasonable compensatory award for anxiety and stress is properly reflected in the sum of USD15,000.

SLWOP

18. By an inter-office memorandum of 26 March 2008, the Applicant requested that he be granted six months' of SLWOP commencing on 15 April 2008 "pending medical evaluation". As background for his request, he stated that:

During the past two years, I have been subject to undue mental pain and suffering that apparently resulted with a medical condition. As you may know, I have been undergoing medical treatment for the past three months and I am required to continue with medication in order to manage a cause for relapse.

Tribunal is also mindful that the Judge hearing the case has an appreciation of all the issues for determination and the evidence before the UNDT (*Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123).

22. In this case, the Tribunal finds that the medication administered to the Applicant did cause an adverse reaction. To this extent the requirement of causality is satisfied. In the circumstances, there are two heads of claim to be considered. First, whether the Tribunal should make an award for the distress caused by the adverse reaction to medication that was necessary for the Applicant to ameliorate the effect of anxiety and stress. The Tribunal has already reflected this

Legal costs

24. Article 10.6 of the Statute of the Dispute Tribunal provides as follows regarding legal costs, “Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party”.

25. With reference to art. 10.6, the Applicant requests the Tribunal to order that he be compensated in the amount of USD8,000 for legal fees and disbursements. In support of his claim, the Applicant contends that the Respondent bears “full responsibility for the actions of his agents” and therefore also for Mr. Lieberman’s “false justification for the sequestering of the Applicant’s hard drive”. The Applicant further submits that the scope of art. 10.6 extends to “any abuse of the proceedings before the former Administrative Tribunal”.

26. To corroborate his claim, the Applicant tendered a retainer agreement of 13 November 2008 between himself and Mr. George G. Irving, Esquire (“the retainer agreement”) for “legal services and general legal counsel in connection with an application to the United Nations Administrative Tribunal concerning an employment claim against the United Nations”. According to the retainer agreement, the Applicant agreed to pay a minimum fee of USD7,500 to Mr. Irving for preparing and submitting his application as well as his final observations on the Respondent’s answer. A handwritten note, dated 21 December 2009, at the bottom of the agreement confirmed that the sum of USD7,500 was paid in full.

27. The Respondent rejects the claim that the proceedings were “manifestly abused” under art. 10.6 of the Statute. He submits that his representatives acted properly on the basis of the available information in that they were not aware that the information provided by Mr. Lieberman was false. In the circumstances, the Respondent did not use the proceedings for any “elicit purpose or act in any unlawful or unethical manner”. Furthermore, the Respondent contends that the retainer agreement does not constitute proper evidence of the Applicant’s loss, since it does

not distinguish between fees incurred as a consequence of any alleged abuse of the proceedings and fees incurred for other services rendered, including those concerning the Applicant contesting the JDC proceedings, the disciplinary decision, and the finding of the JAB in regard to whether his due process rights were breached when his hard-drive was seized in his absence.

28. The question is whether the misleading information provided by Mr. Lieberman, during the course of various stages of these proceedings constituted a manifest abuse of proceedings on the part of the Respondent, under art. 10.6 of the Statute of the Dispute Tribunal. Itwhet

b. The Respondent will increase the level of the Applicant's engagement by two steps within grade and by the steps he would have been eligible for but for the two-year deferment of eligibility for within-grade salary increment;

c. The Respondent will pay the Applicant the sum by which his net base salary and post adjustment was reduced by the Sanction, less the additional sum he would have paid toward his pension contributions had the Sanction not been imposed;

d. The Respondent will pay to the United Nations Joint Staff Pension Fund the sum by which the Applicant's staff and employer pension contributions were reduced as a result of the Sanction.

31. It is further ordered that:

a. Insofar as the Applicant had stored personal items on his sequestered hard-drive, these items shall be released to him with the exception of any material that was stored in breach of art. 4.1(a) of ST/SGB/2004/15; and

b. All material relating to the Field Staff Union shall be returned to the President of the Union in accordance with arrangements to be mutually agreed between the Respondent and the Union President.

32. It is ordered that the Respondent shall pay to the Applicant the sum of USD15,000 as compensation for stress, anxiety and harm caused by the unlawful seizure of his computer hard drive, the manner in which he was treated in the course of the internal proceedings including the unconscionable delays in the JAB process and, finally, the actions of Mr. Lieberman which had the effect of aggravating the distress that the Applicant was already experiencing.

33. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed in paragraph 32 above is to be paid to the Applicant within

60 days of the date that this Judgment becomes executable, during which period the United States Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the United Statesu