UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before:

Introduction

1. In Klein UNDT/2010/207, the Dispute Tribunal found, inter alia, that the release to Member States of a summary of a flawed investigation report regarding the Applicant was in breach of his terms of appointment, and the Respondent failed to reasonably exercise the discretion to withhold or modify it. The parties subsequently filed further submissions on appropriate relief. The present Judgement addresses the matter of relief to be ordered in view of the Tribunal's findings on liability in Klein UNDT/2010/207.

2. The Applicant seeks retraction or revision of the investigation report, a public statement from the Respondent "apologizing for the misinformation and affirming his unblemished record of service", removal of any adverse material that may be in the Organization's files, and financial compensation for pecuniary and non-pecuniary loss resulting from the violation of his due process rights, damage to his reputation, and emotional distress.

Facts

3. The relevant facts are set out in full in Klein UNDT/2010/207. The summary of facts, below, is provided for ease of reference.

4. Between February 1996 and April 2005, the Applicant led three United

Applicant of all allegations. In April 2005, OIOS received a separate complaint alleging that the Applicant had an "improper relationship" with "a Liberian woman who [allegedly] had links with Charles Taylor" and that he had misused United Nations assets by facilitating the provision of air transport to women who did not work for the United Nations. OIOS commenced a separate investigation into these allegations (OIOS Investigations Division Case No. 0176/05).

6. On 24 October 2005, OIOS issued its report in the second case ("the Second Report"), concluding that the Applicant had failed to uphold the standards required by former staff regulations 1.2(b) and 1.2(q) and that he had misused United Nations property and used his office for the private gain of a third

his reputation through the release of a privileged and confidential investigative report, resulting in its wide public dissemination". The JAB recommended that the Applicant be paid one year's net base salary as compensation, with interest, and that he be issued a letter of apology. By letter from the Deputy Secretary-General, dated 30 June 2009, the Respondent accepted that the Applicant's due process rights had been violated because he was not made aware of the scope of the alleged misconduct and he was not given the opportunity to further rebut the allegations prior to the finalisation of the Second Report. The Secretary-General, on this basis, paid the Applicant one year's net base salary as compensation, which the Applicant accepted without prejudice to his right of appeal.

Applicant's submissions

12. The Applicant's main contentions on relief may be summarised as follows:

a. There is at present no public record of the Applicant's refutation of the charges, of the Respondent's retraction of them, and of the Applicant's exoneration, which causes him ongoing harm. The Applicant seeks the Tribunal to order "rescission of the document in question as well as a public statement acknowledging and correcting the error". Further, any adverse material improperly maintained in the Organization's files must be removed pursuant to ST/AI/292 (Filing of adverse material in personnel records);

b. The circumstances of his abrupt departure and the misinformation contained in the Second Report have affected the Applicant's professional reputation and his prospects for further employment. Despite his efforts, he has had no steady employment since 2005 apart from occasional teaching and speaking engagements and pro bono consultancies;

c. The one year's net base salary already paid to the Applicant is inadequate to fully compensate him for the breach of his rights. The high publicity and continuing harm entailed by the refusal of the Respondent to

18. As the examples of corrective action ordered above demonstrate—and as confirmed by the Appeals Tribunal in Fröhler 2011-UNAT-141, Appellant 2011-UNAT-143 and Kaddoura 2011-UNAT-151—the Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached.

19. As found in Klein UNDT/2010/207, the Respondent has certain obligations towards staff members in relation to investigation processes, including, pursuant to General Assembly resolution 59/272 (Review of the implementation of General Assembly resolutions 48/218B and 54/244), the obligation to reasonably exercise the discretion to withhold or modify investigation reports requested by the Member States of the Organization, in appropriate circumstances. This specific obligation in relation to investigation processes and reports, as well as the general obligation of good faith and fair dealing (see Asaad 2010-UNAT-021, Bertucci 2011-UNAT-121, James UNDT/2009/025, D'Hooge UNDT/2010/044, Gaskins UNDT/2010/119 and Goddard UNDT/2010/196), require the Organization to only produce, maintain and disseminate investigation reports that have been created in accordance with the requirements of fairness and due process. Inherent in this obligation is a corollary obligation not to produce, maintain or disseminate improperly created material. While sometimes improper dissemination of such material cannot be undone, there are steps that can be taken towards undoing its effects.

20. Having carefully considered the parties' submissions, the Tribunal finds that, in the circumstances of the present case, rescission of the decision to disclose the Executive Summary would not restore the status quo ante and would not provide adequate relief to the Applicant. Similarly, the Tribunal finds that monetary compensation alone would not provide the Applicant with appropriate relief because of the nature of the non-pecuniary harm in this case.

21. The Tribunal finds it appropriate, in the particular circumstances of this case, to order corrective action, in addition to monetary compensation discussed and

ordered below. Such action can be made at little cost to the Respondent, with a significant benefit to the Applicant. The Tribunal finds it appropriate to require the Respondent to send a statement to the same Member States that received the Executive Summary, attaching a copy of the present Judgment and Judgment UNDT/2010/207 together with an appropriate statement, as ordered below. Further, in the interests of justice, and in view of ST/AI/292, the Tribunal will make appropriate orders to ensure the removal of any adverse material—including the Second Report and the Executive Summary—that may exist in the Applicant's personnel records and in the working files of organizational units of the Organization with regard to the matters raised in the Second Report (see Miyazaki UNDT/2009/076, Applicant UNDT/2010/069, Zerezghi UNDT/2010/122, Garcia UNDT/2011/068).

22. The Tribunal further finds that the relief ordered in the present Judgment is sufficient to fully compensate the Applicant for the harm suffered. Therefore, the Tribunal does not need to consider whether the order for an apology is permitted by art. 10.5 of its Statute (see Appellant 2011-UNAT-143 and Applicant UNDT/2010/148).

Actual economic loss

23. The Applicant submits that he has had no steady employment, apart from occasional teaching and speaking engagements, pro bono consultancies, since his separation from service in 2005. He says he applied for a position in Cyprus as Special Representative in 2007, which he did not get, and filed 15 applications with personnel and employment agencies, to no avail.

24. In respect of his application for the position in Cyprus as Special Representative, the Applicant tendered correspondence which he had sent to various high-level parties seeking the support of his candidature, as well as several separate communications in response thereto. The Applicant relies, in particular, on an email sent to him in February 2010 by a Director at a commercial consulting firm, stating

that "a friend of [the Director] was told by someone there that [the Applicant was] under a cloud from Liberia, so the Mission would not support [his] nomination" in relation to the position in Cyprus. The Tribunal finds that that this email borders on speculation based on hearsay. This email and other communications provided by the Applicant are not sufficient to persuade the Tribunal that, if not for the improper release of the Executive Report, the Applicant would have been selected for the position of Special Representative in Cyprus.

25. The Applicant also submitted documents indicating his interest in working in other high-level positions. Although they demonstrate the Applicant's interest, these documents do not constitute sufficient evidence that the Applicant was not selected for any of these positions as a result of the established breach of his rights. The evidence tendered in support of the Applicant's claims of actual economic loss is vague, and mostly consists of correspondence from the Applicant himself. As the Tribunal stated in *Fayek* UNDT/2010/113 and *Fayek* UNDT/2010/194, in assessing compensation, certain assumptions can be made, but they must be reasonable. In this instance, the Tribunal is requested to draw speculative assumptions and conclusions about the Applicant's actual economic loss.

26. Accordingly, the Tribunal finds that the Applicant has failed to persuade it that his failure to be permanently employed since 2005 was a direct result of the breach identified in *Klein* UNDT/2010/207. Therefore, the Tribunal is unable to conclude that the Applicant suffered actual economic loss, based on his submissions and the documentation tendered, and no compensation shall be awarded under this head of damage.

Non-economic loss

27. The amount of one year's net base salary previously paid to the Applicant was awarded only in relation to the procedural violations in the finalisation of the Second Report, and not in relation to the improper disclosure of the Executive Summary to Member States. This follows from the Deputy Secretary-General's letter of

regard, the JAB Report, which referred to the Applicant's "shocked" reaction to the disclosure of the Executive Summary. Additionally, it is apparent to the Tribunal that any reasonable person would inevitably suffer serious anxiety and emotional distress if put through the same ordeal. Furthermore, as the Tribunal stated in *Klein* UNDT/2010/207, the Respondent's failure to reasonably exercise the discretion to withhold or modify the procedurally flawed document resulted in "a serious personal and professional blight on the Applicant's character". In light of the aforesaid, and considering the publicity and continuous harm caused to the Applicant, the Tribunal is therefore satisfied that the Applicant's submissions regarding the negative effects of this proven breach are not merely speculative (see *Chen* 2011-UNAT-107).

31. Having given due and careful consideration to both parties' submissions and the record, the Tribunal finds that the Applicant should be compensated by an award of USD60,000 for the emotional distress and anxiety suffered by him as a result of the Respondent's actions, as well as for the damage caused to his reputation (see *Shkurtaj* 2011-UNAT-148, *Shkurtaj* UNDT/2010/156, and former United Nations Administrative Tribunal Judgment No. 1028, *Bangoura* (2001)). This sum is in addition to the one year's net base salary already paid to the Applicant in connection with the separate issue of procedural violations committed during the preparation of the Second Report.

Orders

32. The Second Report, the Executive Summary, and any other adverse material pertaining to the matters raised in the Second Report shall be removed from the Applicant's personnel file and any working files maintained by organizational units of the Organization.

33. Within 60 days of the date this Judgment becomes executable, the Respondent shall send a statement to the Member States that received the Executive Summary, attaching a copy of the present Judgment and *Klein* UNDT/2010/207 and an accompanying statement that: (i) the Tribunal found the Second Report and the