



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/054/
JAB/2008/103
Judgment No.: UNDT/2010/011
Date: 27 January 2010
Original: English

Before: Judge Adams
Registry: New York
Registrar: Hafida Lahiouel

CASTELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON INTEREST

Counsel for Applicant:

Nicholas Christonikos

Counsel for Respondent:

Susan Maddox, ALU

Introduction

1. On 13 November 2009 I gave judgment for the applicant and ordered the respondent to pay him the relocation grant applicable at the time of the applicant's relocation upon the basis that he was a staff member with a year or more continuous service. I considered that, *prima facie*, the respondent should pay interest from 7 days after the date on which the applicant sought payment until the date of payment at either the relevant standard 30 day bank bill rate or the rate provided by the New York Civil Procedure Rules but, as this question was not the subject of submissions, in the absence of agreement within seven days the parties were directed to provide written submissions to the Tribunal as to this issue.

Respondent's submissions

2. No interest should be payable. Although the draft statute of the Tribunal annexed to the Report of the Secretary-General on the Administration of Justice (A/62/782), provided specifically for a power to award both interest and costs, this specific power was omitted from the Statute as finally passed. It should be inferred that the General Assembly did not intend to confer jurisdiction to award interest. The UN Administrative Tribunal, which had no explicit power to award interest and did so only in certain exceptional cases, for example, when payment of a sum of money was unduly delayed, or because of the respondent's conduct, there was evidence of bad faith or the practice adopted by the respondent put the staff member at a serious financial disadvantage: *Kremer and Gourdon* (1996) Judgment 747; *Goddard* (2005) Judgment 1255; *Roy* (1971) Judgment 143; *Sabillo* (1972) Judgment 164; *Dupuy* (1973) Judgment 174; *Back* (1975) Judgment 196; *Corrado* (1976) Judgment 209; *Bombardella* (1983) Judgment 313; *Sletten* (1981) Judgment 274. However, interest was ordered where the staff member made excess contributions to the pension fund (*Bérubé* (1981) Judgment 280), where tax reimbursement had not been paid (*Mills* (1983) Judgment 320) or where portion of the sum payable under a separation agreement was withheld (*Al-Jassani* (2000) Judgment 955). This case does not fall precisely into any of these categories.

3. In its more recent jurisprudence, the Administrative Tribunal consistently ordered the payment of interest only when the administration failed to pay the specified award within 90 days of the Administrative Tribunal's judgment.

4. Since the respondent "acted in good faith" when it did not pay to the applicant the amount found by the Tribunal to be paid to him and the funds are "public funds", interest should not be not payable.

5. (Counsel for the respondent sought to rely on a note from the Controller expressing an opinion about the payment of interest on money withheld from a staff member, where there is no "bad faith". Since the question is a legal one, the opinion of the Controller is irrelevant and I have disregarded it.)

6. No submission was made as to the appropriate rate, if the Tribunal determined that interest should be paid.

Applicant's submissions

7. Interest is a part of the compensation necessary to be awarded to place the applicant in the same position as nearly as may be done had the money owed to him been paid in due course. The amount that was not paid to him should not be considered as being the Organisation's money but, rather, the applicant's money wrongly withheld from him. Not only has the applicant been denied the use of that money, but the Organization has had the benefit of it at his expense.

8. Although the Administrative Tribunal had no specific authority under its statute to award interest, it frequently did so in cases other than those where payments were made after 90 days from judgment.

Is there jurisdiction to award interest?

9. The mere fact that the General Assembly did not accept the Secretary-General's draft statute provisions in connection with costs and interest does not justify any inference that it considered that the Tribunal should not have jurisdiction

to award interest and costs. At its highest, this could only mean that specifying a particular power in these respects was rejected. If it was intended that the Tribunal could not award interest or costs, then it would have been very simple to include a provision to that effect.

10. In my opinion, the question is governed by the meaning of the word “compensation” in art 10.5 of the Statute. If the award of interest in any case is necessary for the purpose of appropriately compensating a staff member for a breach of contract, then such an award must be made, either specifically or by including an amount under this head as part of the overall compensation awarded, reflecting the cost to the staff member of being kept out of his or her money. The very purpose of compensation is to place the applicant, as far as money can do so, in the same position he would have been in had the respondent complied with its contractual obligations. This has long been an inherent part of the notion of compensation¹. In respect of non-pecuniary loss, of course, there is no debt (although there might be an obligation) until the award is made by the Tribunal and, on the face of it, interest should also be payable on a delay in payment of the sum awarded but, since an award of this kind does not arise in this case, it is unnecessary to resolve this issue.

11. It will be seen from the cited examples of the decisions of the Administrative Tribunal that interest has been awarded in respect of debts payable by the Organization to the staff member, most frequently where there had been some undue delay or in some other particular fashion the Organization had not acted with due care and diligence. There is thus a nuance of punishment in some cases and these judgments must therefore be approached with some caution.

12. In *Kremer and Gourdon* the Administrative Tribunal said –

IV. The Tribunal holds that adding interest to its awards is not an automatic right. It is for the Tribunal to decide, taking into account all the circumstances of the case, whether interest should be awarded.

¹ There is a useful and comprehensive discussion of the relationship of interest to compensation with reference to both liquidated and unliquidated damages and the modes of calculating the appropriate rate in Fischer, *Understanding Remedies*, 2nd ed, LexisNexis, S16, Prejudgment Interest at 165 ff.

Payment of interest must be specifically ordered and cannot be considered as implicit in the Tribunal judgments...

This statement suggests – as seems to be the fact – that the Administrative Tribunal did not consider that there was a useful principle that might be applied to the award of interest, except for the *ad hoc* appreciation of the justice of the case. The cases cited by the applicant do not yield any more precise principle, largely because there is no reference to the fact that the question of interest is to be considered in the context of the *obligation* of the Administrative Tribunal to compensate adequately a staff member who has not been paid his or her entitlements. Thus, it is not surprising that the various justifications or, at least, explanations, for awarding interest in particular cases are not consistent.

13. Coming then to the question of awarding interest where the sum owing by the Organization is payable under the applicant's contract of employment, as is the case here, the applicant's submission that the outstanding sum should be seen as a debt owed to the applicant and not money of the Organization is, in principle, correct. At all events, the only way in which the applicant can be placed in the same position in which he would have been had the Organization paid the debt that it owed him is by awarding him interest since the date upon which payment was due at a rate that is reflective of the amount that could have been earned had it been invested. Otherwise he must be out of pocket and the very point of compensation is that he should not be. This is not merely incidental to the applicant's right to compensation under the Statute but lies at its centre. On the other side of the coin, the Organization has had the advantage of investing the sum which it should have paid to the applicant and, accordingly, has made a profit at his expense.

14. This approach is similar to that adopted by the Administrative Tribunal of the International Labour Organization (ILOAT), which ruled (for example, in (2009) Judgment 2782) that –

(a) In the absence of any particular rule requiring the Organisation to pay interest on arrears to a staff member where a benefit due to that person is paid belatedly, such interest is not in principle due until the

creditor – ie, the staff member to whom the benefit is owed – has served notice on the Organisation to pay. This apparently harsh solution is justified because no particular formalities are required for the service of such notice, it being sufficient for the creditor to request payment of the amount due. At first sight, it would appear that the Tribunal should therefore find that the complainant, who did not request the adjustment due as at 1 July 2003, is not entitled to the payment of interest on arrears.

(b) However, this rule does not apply where the debt is one which falls due on a fixed date. In such a case the due date is equivalent to the service of notice (*dies interpellat pro homine*). The debtor owes interest on arrears as from that date, without any need for the creditor to establish that he or she has requested payment of the due sum. The same applies where the debt falls due periodically at a fixed date, as in the case of a salary.

The date for payment

15. The Organization's obligation to pay the relocation grant was triggered by the completion of a year's continuous service by the applicant on 4 April 2008. The applicant sought payment on 31 March 2008. Unfortunately, the parties' submissions did not advert to this issue. In particular, the respondent gave no information about the Organization's usual terms for payment of its debts. It seems to me that the terms for payment of accounts should apply, so that grant should have been paid within thirty days of its becoming due, namely 4 May 2008.

The appropriate rate

16. In many national jurisdictions the interest rate is calculated (directly or indirectly) by reference to the official bank bill or (in the US, the Treasury bill) rate. However, if the bank bill rate is the only parameter, an applicant might well still be out of pocket, since the money may well have been conservatively invested in a way that yielded a higher return. Accordingly, a figure to reflect the potential return achievable on conservative investment other than bank deposit is conventionally added. Another reasonable approach – which has the advantage of simplicity – is to allow the fixed rate which the applicant would have had to pay to borrow the amount owed from a bank or similar lending institution as an unsecured or personal loan. By

way of example, applications to the EU Civil Service Tribunal by staff members for compensation in respect of unpaid entitlements contain a reference to “default interest” which is referred to in judgments and orders of this Tribunal as two points above that set by the European Central Bank for its main refinancing operations². The parties did not tender any evidence on the rates at the relevant time and, accordingly, I have no particular figure with which to inform this discussion. Under the Civil Practice Rules of the State of New York, which was the duty station where the applicant served at the time the payments of the relevant entitlements in this case accrued, the current statutory default rate was 9 per cent per annum³.

17. In the cases of the UN Administrative Tribunal referred to by the respondent as cited above, the applicant was awarded 6 per cent in six cases from 1972 to 1981 and 10 per cent in a case from 1981. Since approximately 2006, the Administrative Tribunal has awarded interest at an apparently standard rate of 8 per cent. The basis for this rate is unfortunately not stated, but I note that the ILOAT has been using the same rate in recent years: see, for instance, (2009) Judgment 2762 and (2001) Judgment 2076; cf (1987) Judgment 874 (5 per cent), (1995) Judgment 1461 (10 per cent).

Conclusion

18. Interest shall be payable as part of the award of compensation under art 10.5 of the Statute. It seems likely that the issue of the applicable interest rate will be further discussed in other cases that come before the Tribunal. It is regrettable that I have received no submissions on this point from the respondent. Doing the best I can with the material before me, I determine the applicable interest rate to be 8 per cent per annum in this case. Accordingly, the respondent is to pay interest from the date the payment of the relocation grant became due, namely 4 May 2008, and until

² Cf the default interest payable on unpaid receivables specified by Art 80 of the Implementing Rules under the Financial Regulations, which in the absence of other provision are 3.5 points above the rate applied by the European Central Bank to its principal refinancing operations.

³ See New York Civil Practice, CPLR art 5004.

payment at the rate of 8 per cent per annum. The amount of the grant has not been specified but I assume that it can be readily calculated.

19. The parties are to jointly submit a draft order to the Tribunal awarding the appropriate sum plus interest calculated in accordance with this judgment within 14 days.

(Signed)

Judge Michael Adams

Dated this 27th day of January 2010

Entered in the Register on this 27th day of January 2010

(Signed)

Hafida Lahiouel, Registrar, New York