



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LUTTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for Applicant:

Esther Shamash, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat.

1. Case background

1.1 The Applicant joined the Organization in July 1989 as a Security Officer. He currently holds a permanent appointment as a Fire Lieutenant with the United Nations Office at Nairobi (UNON). Since April 2007, the Applicant had been on assignment with the United Nations Operations in Cote d'Ivoire (UNOCI) as a Fire Marshall at the G-6 level. He returned to UNON on 2 May 2009. The facts giving rise to the application before the Tribunal are contained in UNDT Judgment No. 052 (2010). In the said Judgment, having found in favor of the Applicant, the Tribunal directed the parties to provide written submissions as to the appropriate relief that should be ordered by or before close of business Friday, 9 April 2010, which date was subsequently extended to Friday 16 April 2010.

1.2 On 15 April 2010, the Applicant requested a further extension of time, which the Respondent did not oppose as the Applicant had been hospitalized due to his medical condition. On 16 April 2010, the Applicant filed his submissions on appropriate relief. As part of the said submissions, the Applicant requested the Tribunal to grant his request for an extension of time to allow him to submit further particulars. The Applicant's request was granted on 23 April 2010 and he filed further particulars on 26 April 2010. The Respondent filed his submissions on 16 April 2010.

2. Parties' Submissions

2.1 The Applicant

2.1.1 The Applicant's submissions on the appropriate relief that should be ordered are contained in his filings dated 16 April 2010 and 26 April 2010 and are summarized below.

2.1.2 As a result of the Administration's initiation of disciplinary proceedings against him, and in light of DPKO policies preventing candidates being considered for positions while disciplinary proceedings are pending against them, he was barred from applying for at least two positions for which he was qualified.

2.1.3 At the time of the accident in November 2007, he was temporarily encumbering the post of Fire Safety Assistant, FSL 4 level, and a colleague of his was temporarily encumbering a Security post at FSL 4 level. These posts were subsequently advertised (Applicant's post was advertised as VA FSL/4-412049), and he and his colleague each applied for his respective post, in order to become regularized in Abidjan. Both he and his colleague were internal candidates applying for lateral moves and they would have been considered at the 15-day mark. His colleague was selected for his post and became regularized in Abidjan.

2.1.4 His supervisors were very satisfied with his performance, as evidenced by his performance appraisals for 2008 and 2009 and he would have been eligible for consideration for this post at the 15-day mark. In light of this, the Applicant submits that in the absence of evidence that there were any other suitable 15-day candidates for this position, he would have been selected for the position of Fire Safety Assistant in Abidjan.

2.1.5 He also applied for a second post, that of Fire Safety Assistant at UNTSO, Jerusalem FSL/5, for which he would have been considered an internal candidate. However, shortly after applying for these posts, he met with a UNOCI official who informed him that he could not be considered for any posts while disciplinary proceedings were pending. The official advised him to meet with the Chief of Mission Support at ONOCI, who confirmed to him that he could not be considered for any posts while disciplinary proceedings were pending. Consequently, as a result of the disciplinary proceedings, he was denied a chance to be considered for these positions, one of which was at a higher level, and both of which would have rendered him eligible for the entitlements that attach to General Service staff on mission.

2.1.6 He should be compensated for the lost chances for career advancement and mobility that he was unlawfully denied. To support this contention, the Applicant cites the Tribunal's *ratio decidendi* in *Koh*¹,

“In this case, once it can be seen that there is a real or significant chance that the applicant might have been selected, the Tribunal has the duty to compensate him for the loss of that

¹ UNDT Judgment No. UNDT/2010/040.

chance, doing the best it can to measure the probability, else the only remedy available to him to right the respondent's breach will be unjustly denied."

2.1.7 Had he been selected for either of the positions of Fire Safety Assistant, he would have stayed in that position until his retirement at 31 October 2014. In this respect, the Applicant refers again to the Tribunal's *ratio decidendi* in *Koh*:

"The other relevant issue, so far as the appointment itself is concerned, is its likely duration. Of course, accidents happen, and, if one were looking at a decade or more an allowance for this and other vicissitudes of life would need to be made and, in common law jurisdictions, conventionally is. However, over such a short period, I do not think that the chances of an accident which might have required the applicant to retire prematurely should be regarded as significant enough to enter the calculus of loss. So far as the possibility of termination under staff regulation 9.1 (a) is concerned, the stipulated possibilities are the necessities of the service requiring abolition of the post, unsatisfactory service, incapacity, misconduct and vitiating anterior facts. The post has not been abolished and there is no reason to think that this is likely, the applicant's performance was consistently assessed as more than adequate and, *ex hypothesi*, it was assessed as within his capacity, there is no reason to question his health and no hint of the possibility of vitiating anterior facts. The possibility of termination can be dismissed as inconsequential."

2.1.8 In light of the above, the Applicant submits that the appropriate calculation would be the difference between his current salary as a G-6 / step 10, which amounts to US\$ 38,052.34 (2,939,543 Kenyan Shillings) and either his salary in the UNTSO post on an FSL contract, level 5, step 10, which would have been US\$ 81,575, or on the Abidjan post on an FSL contract level 4, step 10, which would have amounted to US\$ 70,519. He also would have been entitled to yearly increments, and that these too should be taken into account in calculating his loss.

2.1.9 On 29 November 2007, the Chief Transport Officer informed him via memorandum that his UNOCI Driving Permit and Privileges were suspended pending the outcome of the official security investigation. For the 17 months and 13 days between 20 November 2007 and 2 May 2009, he was forced to pay for taxis in order to carry out his duties. He consequently requests that the Tribunal order the Respondent to compensate him for his transportation costs for that period. The Applicant submits that

the official UNOCI rate at the time was US\$ 0.14 per kilometer. His average monthly mileage at UNOCI was 2000 kilometers. His monthly travel costs were approximately US\$ 280 (0.14 x 2000). Over 17 months, this amounted to US\$ 4760. The Tribunal is accordingly asked to order Respondent to pay him US\$ 4760 to compensate him for his travel costs.

2.1.10 As a result of the fact that he was barred from consideration for the posts mentioned above, he could not become regularized in Abidjan or Jerusalem, and he had to return to Nairobi at the end of his two year temporary assignment in Abidjan. Having returned to his home duty station in Nairobi, he was no longer a General Service staff member on mission, and was consequently unable to apply for Education grants for his children. As a result, he incurred costs relating to his children's education. The education grants amounted to US\$ 5,000.

2.1.11 The Applicant avers that the Respondent's decision to initiate disciplinary proceedings against him damaged his reputation, because his colleagues and juniors saw him as a drunk and as an irresponsible and even dishonest staff member. He was the topic of gossip and chatter in the mission and his standing at work deteriorated as a result. The Applicant submits that a survey of the jurisprudence of the former Administrative Tribunal shows cases in which the former UNAT found that staff members' reputations had suffered, it rarely distinguished that damage from other heads of damage claimed, in terms of the compensation ordered and that it is consequently difficult to determine the appropriate relief for damage to his reputation.

2.1.12 The Applicant submits that in AT/DEC/1049, the former UNAT rejected other pleas made by the Applicant in that case, and awarded him US\$ 12,000 mainly for damage to his reputation and that in AT/DEC/1404, the former UNAT, having found that disciplinary proceedings were unlawfully brought against the staff member and that this caused a serious intrusion into his private life, damage to his reputation, and a gross violation of his rights, awarded the staff member one year's net base salary as well as US\$ 5,000 for his costs. The Applicant requests the Tribunal to order the Respondent to

compensate him with a sum of US\$ 10,000 for the damage to his reputation caused by the Respondent, the investigation and the ensuing disciplinary proceedings.

2.1.13 The Applicant submits that the Respondent's decision to initiate disciplinary proceedings against him caused him significant anguish and anxiety. During the protracted disciplinary proceedings, his future at the Organization was uncertain. He went to bed every night and got up every morning with the knowledge that disciplinary proceedings charging him with drunkenness were pending against him and that they could lead to his dismissal. This anxiety took its toll on his health. His anxiety also affected his relationships with his family, friends and colleagues. His family also suffered, as they were afraid that the family's breadwinner might lose his job. The Applicant requests the Tribunal to order the Respondent to compensate him with a sum of US\$ 20,000 for the protracted mental anguish and anxiety he suffered during these disciplinary proceedings.

2.1.14 The Applicant submits that the Respondent failed to abide by his own rules in investigating the accident and in initiating the disciplinary proceedings against him and failed to treat him with the required good faith owed to him contractually causing him moral damage. The Applicant requests the Tribunal to order the Respondent to compensate him with a sum of US\$ 30,000 for this moral damage.

2.2 *The Respondent*

2.2.1 The Respondent's contentions are contained in his submissions dated 16 April 2010 and are summarized below.

2.2.2 Article 10(5) of the Statute of the Tribunal outlines the remedies which the Tribunal may order. The Respondent submits that the reasoning in *Koh* cannot serve as an appropriate guidance to the Tribunal in its determination of the amount of compensation in this case.

2.2.3 The Respondent's submits that it is the internal law of the United Nations that governs the employment relationship between the Organization and its staff and that the UN Administrative Tribunal in *Moreira de Barros*² ruled that:

“...[the] internal laws of the United Nations prevail and are the relevant legal basis upon which the Tribunal operates... Where, however, there is a gap, or lacuna, in the internal laws...the Tribunal is entitled, if not obliged, to consider general principles of law ... As such, it may take cognisance of foreign law, and grant it evidentiary value.”

2.2.4 The Respondent submits that according to a former Judge of the UNAT who is also a Legal Scholar, the relationship between International Tribunals and national jurisdictions has been expressed as follows:

“...international organisations have a characteristic that with respect to their internal organization and functioning they are outside the jurisdiction of national law. Their life is governed by a set of rules and principles which constitute their internal law. With this framework they are not subject to interference by states in regard to the legal system or the laws that apply.”³

2.2.5 The Respondent submits that the sources of international administrative law are not the same as the sources of public international law, although international administrative law may be a branch of public international law. Article 38(1) of the Statute of the International Court of Justice, which is regarded as reflecting the sources of public international law, does not directly apply to international administrative law and these sources may only be seen “by analogy” to be a source of international administrative law.

“At best, some analogies may be drawn from the sources mentioned in Article 38(1) of the Statute of the ICJ - for example, that staff regulations and other such written legal sources correspond to treaties or that the practice of an organization corresponds to custom - but there the similarity ends.”⁴

² UNAT Judgment No. 1320 (2007).

³ Amerasinghe C.F. (2003). *Principles of the Institutional Law of International Organizations*. 2nd Ed. Cambridge University Press, p. 272.

⁴ *Ibid*, p. 283.

2.2.6 Accordingly, the Respondent submits that general principles of law, although demonstrative of a consistent State practice, should not be seen as demonstrative of a customary rule of international administrative law. The law of the Tribunal must be derived from the internal laws and practices of the Organization. These laws and practices are developed to serve the unique nature and circumstances of the Organization.

2.2.7 The Respondent submits that while general principles of law are not applied per se in international organizations, in circumstances where there is a lacuna in the internal law, they provide a legitimate source of international administrative law. The UNAT and the International Labour Organization Administrative Tribunal (“ILOAT”) have recognized that, in specific circumstances, general principles of law provide a source of international administrative law.

2.2.8 The Respondent submits that Article 10 (5) of the Statute of the United Nations Dispute Tribunal (“the Statute”), vests authority in the Tribunal to award compensation to a party, however the Statute is silent as to how that sum is to be calculated. Notably, in a significant departure from the Statute of the United Nations Administrative Tribunal, Article 10(7) of the Statute prohibits the award of exemplary and punitive damages.

2.2.9 In many instances, punitive or exemplary considerations were a part of the calculus of damages in UNAT judgments. The Respondent submits that the practice of UNAT may be divided into two distinct groups of cases: Judgments where UNAT applied an approach consistent with the principle of *restitutio in integrum* on the question of liability and quantification of loss, in large part limiting compensation to actual pecuniary loss; More recent judgments where UNAT awarded compensation on the basis of procedural error alone, even where such error either did not result in a pecuniary loss or did not change the outcome of the proceedings.

2.2.10 The Respondent submits that UNAT has traditionally awarded moral damages. It is recognized that claims of moral injury may be based on, inter alia,

injury to an individual's physical or psychological well-being, dignity, reputation or privacy. While it is not possible to identify precisely and exhaustively the types of evidence that would be required to establish a claim of moral injury, Applicants claiming damages for moral injury should be required to describe with specificity the circumstances upon which they base their claim and to provide evidence of such circumstances. In the ILOAT case of *In re Wasef*, the Applicant claimed that the Organization's failure to draw up a panel of counsel, that is, a panel of staff who could advise staff on their rights, had impaired his right to due process. The Tribunal found that the Applicant had failed to make out his claim for compensation, having failed to support his claim with any evidence of injury. ILOAT stated that:

“The complainant does not support his claim with any evidence of injury. Injury is not to be presumed: mere mention of “worries”, “psychological stress” and “deprivation of rights” will not do.”

2.2.11 The Respondent submits that in the present case, the Applicant, as a holder of a fixed-term appointment, could have no expectation that he would have been selected for either one of the two posts mentioned in his response. Furthermore, as enunciated by the Tribunal, the failures of the Administration in relation to the Applicant's case were: (a) that the SIU investigation was conducted poorly and did not meet any of the well recognized international norms of fairness in investigations; (b) the Administration failed to comply with the international standards for determining sobriety status; (c) it was wrong for the responsible officer to have recommended further action and it was unfortunate that OHRM went along with that recommendation without ascertaining the evidence available (“the Failings”). The Respondent submits that these Failings did not lead to the imposition of disciplinary measures on the Applicant as the Secretary-General accepted the findings of the Joint Disciplinary Committee to drop the charges against him. The Respondent submits that any compensation should be limited to an award for moral injury only.

2.2.12 The principle of restitution requires that the Applicant be placed in the position he would have been in had his procedural rights been observed. In this instance, it is for the

Applicant to prove the non-observance of his rights led to his suffering a loss within a recognized head of damage. The onus of proof lies on the Applicant.

2.2.13 The Respondent submits that in relation to the actions taken by SIU's conduct of the investigation into the accident involving the Applicant, the Respondent notes that there was no finding of actual bad faith or discriminatory treatment. Furthermore, good or bad faith is not relevant as awards of punitive and exemplary damages are not permissible under the Tribunal's Statute. The award in *Bonder*⁵, which included a finding of discriminatory behavior and bad faith and a substantial award as damages on the basis thereof, is in effect an award of punitive damages which is no longer permitted.

3. *Legal Issues*

3.1 The legal issues arising out of the parties submissions are the following:

- (i) How should an award of compensation be calculated under Article 10(5) of the Statute of the United Nations Dispute Tribunal?
- (ii) Is the Applicant entitled to compensation for the loss of chance for being barred from applying for the two posts mentioned above as a result of the initiation of disciplinary proceedings against him?
- (iii) Is the Applicant entitled to compensation for his travel costs for the period 20 November 2007 to 2 May 2009?
- (iv) Is the Applicant entitled to compensation for the cost of his children's education as a result of failing to become regularized in Abidjan and Jerusalem?
- (v) Is the Applicant entitled to compensation for moral damages to his reputation and for the mental anguish and anxiety he suffered as a result of the investigation and the ensuing disciplinary proceedings?

⁵ UNAT Judgment No. 1052, (2002).

4. *Applicable law*

4.1 Articles 10 (5)-(7) of the Statute of the UNDT provide as follows:

“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.

6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

7. The Dispute Tribunal shall not award exemplary or punitive damages.”

5. *Considerations*

5.1 Article 10 (5) of the Statute of the UNDT is silent as to how compensation to be awarded to a party is to be calculated. The Respondent submits that in such circumstances where there is a lacuna in the internal law of the organization, general principles of law provide a source of internal administrative law and should be applied. The Tribunal agrees with this reasoning and further notes that how this Article will be applied will depend on the particular circumstances of each case.

5.2 The Respondent submits that the principle of restitution requires that the Applicant be placed in the position he would have been in had his procedural rights been observed and that in this instance, it is for the Applicant to prove that the non-observance of his rights led to his suffering a loss within a recognized head of damage. As per the Respondent’s submissions, the recognized heads of damage are: actual pecuniary loss;

damages for procedural error and moral damages. An additional head of damage is contained in Article 10 (6) of the UNDT Statute, that is, an award of costs where a party has manifestly abused the proceedings before the Tribunal. The Tribunal does not consider this list to be exhaustive.

5.3 Having considered the parties' submissions on the question of appropriate relief, the Tribunal has arrived at the following conclusions:

(i) The Applicant is entitled to compensation for the loss of chance for being barred from applying for the two posts as a result of the failures by the Respondent in relation to his case. The evidence of the Applicant that he would have stood a "real chance or significant chance" of being selected had he not been subjected to the proceedings arising from his alleged drunken driving stands unrebutted. The Tribunal will not speculate as to whether or not the Applicant would have been selected for the said posts.

(ii) On the basis of the evidence before it, the Tribunal finds that the Applicant has proved that had his procedural rights been observed, he would not have incurred the additional transport costs for the period 20 November 2007 to 2 May 2009. The Tribunal finds, therefore, that the Applicant is entitled to compensation for his transportation costs for that period.

(iii) As stated at point (i) above, the Tribunal will not speculate as to whether or not the Applicant would have been selected as opposed to having a chance of being selected for the posts in Abidjan and Jerusalem and finds that the Applicant is not entitled to compensation for the cost of his children's education as a result of failing to become regularized. That head of compensation is in the nature of "a problematical chance rather than anything approaching a firm expectancy"⁶.

(iv) The Tribunal finds, and the Respondent has concurred, that the Applicant is entitled to compensation for moral damages. Moral damages are assessed in a rather arbitrary manner in many national jurisdictions. The international Tribunals

⁶ UNAT Judgment No. 11, *Howrani* (1951).

have fallen back on equity to assess damages. The matter is explained as follows by the former UNAT Judge and Legal Scholar, Amerasinghe⁷:

“There are a few areas in which equity in a general sense has been freely referred to or decisions have been given *ex aequo et bono*. The first of these is the area of damages. Tribunals have in the award of damages sometimes stated that damages were being fixed or calculated *ex aequo et bono* or used language of this kind. Equity is not used as a basis for establishing the right to recover damages or for listing the heads of damages but merely for assessing the amount of damages once the right to damages and the heads of damages have been laid down. This technique is no more than an application of reasonable standards to the assessment of compensation. As the ICJ pointed out, tribunals in these circumstances fix a reasonable figure for compensation because of the actual amount to be awarded could not be based on any specific rule of law.”

6. Judgment

6.1 Having considered the parties' submissions on the matter of the appropriate relief for the Applicant, the Tribunal,

(i) Orders the Respondent to pay the Applicant three months' (of his current) net base salary as compensation for the loss of chance for being barred for consideration for the two posts with interest at 8% beginning 90 days from the date of issuance of this Judgment until payment is effected;

(ii) Orders the Respondent to pay the Applicant US\$ 4,760 as compensation for his travel costs for the period 20 November 2007 to 2 May 2009 with interest at 8% beginning 90 days from the date of issuance of this Judgment until payment is effected;

(iii) Orders the Respondent to pay the Applicant six months' (of his current) net base salary as compensation for moral damages with interest at 8% beginning 90 days from the date of issuance of this Judgment until payment is effected; and

⁷ Op. cit., p. 292.

(iv) Rejects all other pleas.

(Signed)

Judge Vinod Boolell

Dated this 27th day of May 2010

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

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi