



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/015/
JAB/2008/018
Judgment No.: UNDT/2010/200
Date: 19 November 2010
Original: English

Before: Judge Marilyn J. Kaman
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

ALAUDDIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Peri Johnson, UNDP

Introduction

1. In *Alauddin* UNDT/2010/114, his Honour Judge Adams found for the Applicant, concluding:

11. The respondent was in breach of its contractual obligations to the applicant in refusing to renew his contract as agreed whilst his performance was satisfactory. He would have been entitled to successive renewals in accordance with the general policy of UNDP in respect of contracts of the type involved with the applicant.

2. On the matter of compensation, his Honour stated:

12. Primarily, the proper order to make is for the applicant's reinstatement upon the same basis that applied to his original contract of employment, namely, secondment or leave from his government or else resignation from service with that government. If the respondent chooses not to reemploy him, the measure of damages – as he has now been separated – is principally the value of the loss of salary and emoluments for the balance of the probable period of appointment, providing the applicant establishes on the balance of probability that he would have been in a position to accept renewal for that period. Since he has been employed by his own government for much of the time up until now, his income from that source must be brought into account and his future income in respect of the future period of entitlement, if any. He is also entitled to the economic loss, if any, that flows from the cutting short of his employment with UNDP which, practically speaking, might well be economically advantageous in Pakistan and elsewhere.

13. However, the impending end of my own term of serve as Judge of the Tribunal means that the task of dealing with this issue of compensation must, if the parties are unable to agree be determined by another Judge.

3. Following submissions from both parties, the instant Judgment considers the question of compensation.

Background

4. The Applicant was appointed as Assistant Resident Representative/Chief, Environment Unit (National Officer), in the United Nations Development Programme (“UNDP”) Pakistan Country Office on 21 November 2003 for an initial period of three months. His contract thereafter was extended each year until 31 December 2007.

5. The Applicant appealed the decision of 17 September 2007 advising him that his contract would not be extended beyond its expiry on 31 December 2007, alleging it to be a retaliatory measure taken against him for having raised the issue of wrongdoing in the Respondent’s Country Office in Pakistan.

6. The Applicant’s contractual status from January 2008 until he was placed on special leave without pay (“SLWOP”) has not been clarified although according to the Applicant, he did not receive any income from UNDP until June 2008.

7. On 16 June 2008, the Applicant was placed on special leave without pay, enabling him to assume a position with the Pakistani Government.

8. On 27 January 2009, the UNDP Ethics Office, concurring with the investigation report of the UNDP Office of Audit and Investigations (“OAI”), concluded that the Applicant had engaged in protected activities, that UNDP failed to provide clear and convincing evidence that it would have taken the same action in the absence of the protected activity, and that the decision not to renew the Applicant’s contract was arbitrary and capricious. The Ethics Office stated that, considering the totality of the circumstances, it is possible that the Applicant’s numerous allegations of wrongdoing caused the Country Office to retaliate against him by not renewing his contract. The Ethics Office recommended that the Applicant should be reintegrated into UNDP’s Country Office following his return from SLWOP. The findings and recommendations were accepted by the Respondent.

9. On 12 June 2009, UNDP sought clarification from the Government of Pakistan regarding the deputation rules for civil servants who wished to work outside the Government on deputation, stating, *inter alia*, that “UNDP is looking into the possibility of rehiring [the Applicant]. In that regard, we would much appreciate your formal advice on the Government’s position with the granting of deputation to [the Applicant] for a second time”. On 16 June 2009, UNDP was informed that “an officer cannot be sent on deputation [a] second time unless he has completed three years of service in his parent department after return from an earlier deputation, as per their deputation policy”.

10. On 5 August 2009, the Applicant was informed by the UNDP Office of Human Resources (“OHR”) that in order to return to UNDP, they needed him to resign from his Government.

11. On 1 September 2009, Counsel for the Applicant informed UNDP that the Applicant had started the process of securing his resignation from the service of his Government with a view to being reintegrated into UNDP.

12. On 3 December 2009, OHR extended the deadline for the Applicant’s resignation from his government and return to UNDP to 31 January 2010, a deadline which the Applicant did not meet.

13. On 7 January 2010, the Applicant was informed by OHR that he was required to return to his office on 1 February 2010 with the required governmental acceptance of his resignation or he would be separated effective 31 January 2010.

Applicant’s submissions

14. The Applicant requested the Tribunal to enforce the terms of his original contract and order reinstatement or reintegration by UNDP under the terms of which he went on SLWOP, as he was entitled to remain in his post as long as the condition of satisfactory performance has been met, as recognised by the Respondent.

15. As an alternative, if he were not restored to his former or comparable post, the Applicant requested the Tribunal:

a. to award financial compensation (“forward pay”) for the remaining years of his contract which he has been denied as a direct consequence of the breach;

b. to find that staff rule 4.13(b) which provides that “[a] fixed-term appointment may be renewed for any period up to five years at a time” means that the contract could be extended or renewed repeatedly until retirement but that the extension period at any one time could not be more than five years and therefore to find that under a fixed-term contract, the Applicant could have continued to work for UNDP until his retirement,

...just like all the other Assistant Resident Representative’s (ARR’s) on the fixed term contracts; e.g., ARR poverty ([name] (ARR Governance) has been working on fixed-term contract since the early 1991’s. Likewise, [name] (ARR Gender and Poverty) has been working since 2004. The Applicant can cite dozens of other examples; and

c. to award, in addition to the loss of salary and emoluments (including pension, medical and hardship assessments, as well as dependant allowance) for the balance of the probable period of appointment, compensation for “pain and suffering, as well as for insult and injury caused by the acts of UNDP”, and the “separation indemnity” as per the UNDP rules.

16. With the leave of the Tribunal, the Applicant presented a further document prepared by the Government of Pakistan to illuminate its policy on secondment/deputation. The document, signed on 9 January 2007, is a memorandum related to the deputation of an individual to the Food and Agriculture Organization (“FAO”) of the UN as Country Representative. The document considers the deputation of the individual and states that “[i]n view of the guidelines as quoted above, the Special Selection Board may (through circulation), consider recommendation the deputation of [name] ... with FAO for a period of 2 years from

the date of joining, subject to ... clearance.” The individual in question is said to have availed four years of deputation from FAO from 1995 to 1999.

Respondent’s submissions

17. The Respondent submitted that the Applicant was separated from service effective 1 February 2010 and that it did not consider reinstatement an option and recalled that it had been prepared to reinstate the Applicant on a one-year fixed-term appointment, from the date of his return from SLWOP, which never happened.

18. As the Applicant was seconded from his national government, the particularities of his secondment arrangement must be considered in assessing the probable period of appointment. The applicable UNDP policy (UNDP Personnel Manual (Locally Recruited Staff), Revised Edition of November 1991) provides that secondment arrangements with governments for National Officers do not exceed five years (subsection 4.0, para. 7).

19. In the case of the Applicant, his appointment with UNDP, on secondment from his Government, began on 21 November 2003. By 21 November 2008, the Applicant would have reached the five-year limit. At the Applicant’s request and as an interim measure of protection recommended by the UNDP Ethics Office under the UNDP Policy for Protection Against Retaliation, the Applicant was on SLWOP from 16 June 2008. Although based on the UNDP policy for secondment in respect of National Officers, the secondment arrangement should not have extended beyond a further five months, i.e. until November 2008, on the recommendation of the UNDP Ethics Office, the Respondent was prepared to offer the Applicant a one-year fixed-term appointment, at the National Officer C (“NOC”) level, step VIII (plus the normal increment to step IX).

20. The Respondent notes restrictions that were in place on the side of the Applicant’s government for release of government officials on secondment:

In particular, based on information provided by the Government, such “deputations”, as referred to by the Government are normally limited to three years and exceptionally extended another two years. Further, before a second deputation, the official must serve again in the Government for another period of three years (see letter from [the Section Officer], Cabinet Secretariat, Establishment Division, dated 16 June 2009 at tab 14, on page 202, as well as tab 12, pages 194-200 of the bundle). In addition to what [the Section Officer] represented to UNDP, the fact is that from June 2009 through January 2010, UNDP had several exchanges with the Applicant with a view to his returning to UNDP, as recommended by the UNDP Ethics Office. However, during that seven-month period, the Applicant was not able to obtain his release from the Government. The Respondent has, thus, little confidence that the Government would have released the Applicant for a one-year appointment with UNDP.

21. The probable period of the Applicant’s appointment could not exceed one-year at the NOC level, subject to evidence that his Government would have released him for such period.

22. Overpayment of salary to the Applicant from the Respondent for the period 16–30 June 2008, as the period which corresponded to the period of SLWOP, should be recovered.

23. The salary and emoluments that the Applicant has received from the Government for a period of one year must be deducted from any compensation that UNDP may be ordered to pay.

24. The terms of the SLWOP arrangement are not properly before the Dispute Tribunal and were not challenged at any prior state of the proceedings. If the Applicant had lucrative job offers, it was incumbent upon him to choose whether resigning from UNDP was in his best interest instead of pursuing reintegration following the SLWOP. This was conveyed to the Applicant by OHR.

25. The Applicant has sought compensation for “pain and suffering” and “insult and injury”. It is not entirely clear to what specific pain, suffering, insult or injury the Applicant refers or how these elements are different from one another. As recently reiterated by the Tribunal in *Applicant* UNDT/2010/148, “the burden is on the

Applicant to substantiate his claim for compensation or damages”, in which case the Tribunal also references *Crichlow* UNDT/2009/028 where it was established that “the award of compensation to the Applicant must be limited to the effects on her of the breach of duty towards her by the Organization”.

26. The Applicant was not engaged in five years of active service with the Respondent to warrant pension or to be considered for an agreed separation, therefore the Applicant is not eligible for the benefits as outlined in the policy entitled UNDP Agreed Separation Arrangements as of 1 July 2009.

27. The Respondent also notes that FAO is a separate international organization known as a specialised agency which has its own regulations, rules, policies and procedures which have no bearing on UNDP’s policies relating to the secondment of Government nationals.

Issues

28. The Tribunal has considered the following issues:

- a. whether it would be appropriate to order the reinstatement of the Applicant;
- b. the probable period of appointment if the Applicant had been renewed;
- c. the loss of salary and emoluments for probable period of appointment; and
- d. whether the Applicant has proven, on a balance of probabilities, that he would have been in a position to take up the appointment, including obtaining release from his government; and
- e. whether non-economic loss should be compensated.

Considerations

The option of reinstatement

29. Without prejudice to the Tribunal's power to reinstate, it is apparent that had the Applicant been renewed beyond 31 December 2007 (setting aside for a moment the issue of the period of renewal), under the UNDP rules and indeed, the policy of the Pakistani Government, there is a general restriction of five years which applies to such appointments. The facsimile of 16 June 2009, from the Section Officer, Cabinet Secretariat, Establishment Division of the Government of Pakistan to the Resident Representative of UNDP, Islamabad, provides:

1. I am directed to refer to your letter dated 12.06.2009 on the above subject and to say that the normal period of deputation is three years, extendable for another two years service in his parent department after return from an earlier deputation.

...

2. As UNDP intends to rehire the services of the officer and is also desirous of not contravening government deputation rules, it is brought to your notice that a second deputation is allowed as per our deputation policy only after completion of 3 years service in the parent Government Department.

30. As the Respondent correctly notes, if this five-year restriction is applied, the Applicant's appointment would have reached its five-year limit in November 2008. Given that this date has already passed, the Tribunal will not order the Applicant's reinstatement: were the original harm repaired, the Applicant's appointment would have already ended. This finding may have been different if the Tribunal was convinced, on a balance of probabilities, that the Applicant would have been renewed beyond November 2008, but as discussed below, this is not the case.

The probable period of appointment if the Applicant had been renewed

31. The Tribunal has considered the evidence as provided by the Applicant pertaining to some of his colleagues, whom he claims have worked for the UN on

secondment for more than five years. The Applicant also provided a letter concerning an arrangement with FAO for another individual on secondment where the five-year limit was not strictly applied. The Tribunal is of the opinion that this is evidence that extensions beyond the five years are *possible*, but it is far from evidence that such extensions are not exceptional. Furthermore, as the Respondent has pointed out, FAO is a separate organization from UNDP, with its own rules on the issue which are perhaps informative as to how the issue is dealt with within international organizations, but are, by no means, applicable to the instant case.

32. The Tribunal notes that UNDP, in the special circumstances of the Ethics Office's recommendations, was willing to offer the Applicant a one-year contract. Nevertheless, this contract never materialised and the Tribunal is not persuaded that this contract is indicative that an extension actually would have been granted for the same period at the time when the harm occurred, i.e., when the original decision was made. The Tribunal therefore holds that the Applicant's contract would have been renewed for the period outstanding up to the five year limit, i.e. until November 2008 and compensation will be awarded for this period.

Loss of salary and emoluments for the balance of the probable period of appointment

33. The Tribunal was provided with the information from the parties with regard to the Applicant's income for the period of 1 January until 21 November 2008 and the salary for which he would have been eligible, were it not for the contractual breach. No objections were received to the evidence of income received from the Applicant. The Tribunal will therefore order the Respondent to pay compensation of the sum of the Applicant's net base pay (including entitlements) as if he were renewed for the period of 1 January to 21 November 2008, less his income from the Government (July–September 2008) and his income from UNDP (June 2008). No details of income were provided from the period of January–May 2008.

Alleged overpayment of salary in June 2008

34. The Respondent claims that there is an outstanding overpayment of salary which was paid to the Applicant in June 2008, even though he was retroactively put on SLWOP from 15 June 2008 and that therefore this amount needs to be recovered. In the Applicant's final submission to the Tribunal, he provides evidence that the Applicant's SLWOP was later changed to begin on 1 July 2008. While the evidence appears to be convincing and was not countered by the Respondent, the Tribunal considers it is not necessary to adjudicate on this issue, as the amount in question has been rendered irrelevant by the calculation as set out herein: the payment has been taken into account as part of the Applicant's actual income.

Compensation for non-economic loss

35. However, turning to the issue of non-economic compensation, the Tribunal considers that the Applicant has been through an extremely difficult period and that this has caused him significant emotional distress. The Tribunal is satisfied with the account before it that the Applicant has suffered emotional harm as a result of the breach in his contract and does not agree with the Respondent that the Applicant's description of this non-economic loss is too general in this regard. The Applicant, a whistleblower, after having taken steps to report wrongdoing in his office and the Organization having itself acknowledged that the Applicant may have been retaliated against, then had his contractual rights violated. Any reasonable assessment of the accepted facts is indicative of significant emotional harm, and the Applicant discharges his burden of proving this harm by the descriptions in his submissions. But for the breach of his contractual rights for which the Respondent has already been found responsible, he would have been spared a great deal of stress and anxiety. The Tribunal has taken into account the context of the contractual breach, i.e. that it occurred after the Organization had recognised that the Applicant should be afforded whistleblower protection. The Tribunal notes that the present case can be distinguished from *Sina* 2010-UNAT-094, in which the Appeals Tribunal overturned

an award of compensation because *no harm* had been suffered. The Tribunal therefore awards USD30,000 as compensation for emotional harm.

Compensation for loss of future earnings

36. The Applicant has stated that the non-renewal has been detrimental to his career, but has not provided specific evidence of this, e.g., specific jobs for which he was unable to apply. The Tribunal is confident that the Applicant has been afforded every opportunity to provide detailed information of which he has not availed himself. For that reason, the Tribunal declines to make an award under this head.

Conclusion

37. The Tribunal holds that the Applicant's contract would have been renewed for the period from 1 January 2008 to November 2008 but for the contractual breach and therefore awards compensation for that period.

38. The Tribunal awards compensation for moral harm of USD30,000

Orders

39. The Respondent shall make payment to the Applicant of the Applicant's net base pay (including entitlements) as if he had been renewed for the period of 1 January to 21 November 2008, less his income for the same period. The payment shall be made within 60 days of this Judgment becoming executable. The applicable US Prime Rate shall apply from the date each monthly payment was due and until date of payment. If the Respondent fails to pay this sum within 60 days from the date the Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate from that date until payment.

40. The Respondent shall make payment of USD30,000 for emotional harm. The Respondent shall have 60 days from the date this Judgment become executable to pay the ordered sum, during which period interest at the US Prime Rate applicable as at

that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Marilyn J. Kaman

Dated this 19th day of November 2010

Entered in the Register on this 19th day of November 2010

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry