



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/112

Judgment No.: UNDT/2011/068

Date: 8 April 2011

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

GARCIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RELIEF

Counsel for Applicant:
George Irving

Counsel for Respondent:
Natalie Boucly, UNDP

Introduction

1. On 25 October 2010 the Dispute Tribunal rendered its judgment on liability—*Garcia* UNDT/2010/191—in this case. The Tribunal found, in particular, that the offer of appointment accepted by the Applicant and the communications between the parties contained the terms necessary for the formation of a binding contract. The Tribunal found that on the particular facts of the case, including the agreement reached and the actions of the parties, there was a binding contract between the Applicant and the United Nations Development Programme (“UNDP”). The Tribunal concluded that the refusal of UNDP to execute the employment relationship on 1 October 2007 was in breach of this contract. The parties were ordered to file further submissions on appropriate relief, which is the subject matter of the present Judgment.

2. The Applicant seeks total compensation in excess of USD700,000, which includes seven years and one month’s net base salary for economic and non-economic loss, USD17,512 for relocation expenses, and USD115,463 for lost pension entitlements. The Applicant also requests that any adverse material be removed from his personnel file.

Applicant’s submissions

3. The Applicant’s principal contentions may be summarised as follows:

a. The Applicant should be compensated for the actual economic loss suffered, including his prospective UNDP earnings for the period of 1 October 2007 to 30 September 2008 (i.e., for the duration of the contract), as well as his prospective earnings for the following two years as it can be expected that his contract would have been renewed for at least two more years. This follows from his past performance rating as having “exceeded

expectations” and from the fact that he was never found guilty of any wrongdoing.

b. For the period of 1 October 2007 to 30 September 2008, the Applicant’s actual earnings were USD32,000. His earnings since September 2008 have amounted to approximately USD40,000 a year.

c. As the Applicant had less than five years of contributory service at the time of his separation, his pension had not vested and he was forced to accept a withdrawal settlement comprising his own pension contributions, but forfeiting the Organisation’s contributions for his prior period of service. Had he remained with the Organisation for another 18 months, his pension would have vested.

d. The Applicant is entitled to one month’s compensation pursuant to former staff rule 209.4, which states that “[i]n lieu of the notice period [of at least one month], the Secretary-General may authorize compensation equivalent to salary and applicable post adjustment and allowances corresponding to the relevant notice period, at the rate in effect on the last day of service”.

e. The Applicant should be compensated for USD17,512 in additional expenses incurred by him due to the abrupt cancellation of his appointment, including costs related to transportation and storage of personal belongings (USD12,486), hotel-related expenses (USD1,584), commission fee for an apartment in Cairo (USD3,200), and medical examination for his medical clearance (USD241).

f. The Applicant should also be compensated for the violation of his due process rights in the amount of two years’ net base pay in connection with the investigation that was commenced but never completed, leaving his reputation unfairly tarnished.

g. The Applicant requests further compensation in the amount of two years' net base pay for the resulting moral damages, including damage to his health and professional reputation. The Applicant was involved in a criminal investigation without the help and support of the Organisation. The stress and the lack of certainty over his future produced negative effects on his health resulting in a diagnosis of serious depression, evidenced by a note from his doctor dated 8 November 2010.

h. Any existing impediments to his re-employment and any adverse material should be removed from the Applicant's employment records.

Respondent's submissions

4. The Respondent's principal contentions may be summarised as follows:

a. Compensation in this case should be based on the Applicant's lost earnings and entitlements during the one-year term of his contract. It cannot be presumed with sufficient certainty that the Applicant's contract would have been extended beyond its one-year term. Any renewal of contract would have not only been subject to the availability of funds and the continuous need for the position, but also to factors which are of individual and specific relevance to the person encumbering the post in question. These individual factors include future performance and personal circumstances, such as health issues and family matters. Therefore, the Applicant did not suffer any loss of further employment and promotion warranting compensation beyond one year.

b. In light of the findings in *Garcia* UNDT/2010/191, the Respondent is willing to compensate the Applicant in the amount of USD121,128.48 (his lost earnings for the period of 1 October 2007 to 30 September 2008)—,less the relocation grant of USD19,822 paid to the Applicant and the amounts earned by him during the relevant period.

c. The sum of USD19,822 paid to the Applicant on 5 September 2007 represented both the relocation grant and compensation for travel expenses, including daily subsistence allowance. All these expenses, excluding the cost of the medical examination, are comprised within the said relocation grant and cannot be the subject of further compensation.

d. There is no basis to award one-month compensation in lieu of notice, as compensation in the amount of one-year salary would place the Applicant in the position he would have been in if not for the contractual breach.

e. The Applicant would not have had his pension rights vested by the end of his one-year contract as he still would not have had the required five years of service. Therefore, he would have been entitled to the return of his own pension contributions he would have made during the one-year term of the contract. As these payments would be paid to the Applicant as part of compensation in the amount of one-year gross salary, he should not receive any additional payments in relation to his pension entitlements.

f. No compensation should be awarded with respect to the investigation carried out by UNDP. No regulation, rule, or other administrative issuance was violated in connection with the initiation of the investigation. UNDP was required to initiate its investigation based on the information provided to it. The investigation was not completed thereafter because the Applicant was not a staff member and UNDP was requested by the United Kingdom (“UK”) authorities to suspend its investigation in order not to interfere with the ongoing criminal enquiry in that country. Although the Applicant was subsequently cleared in the course of this enquiry, audit reports prepared by UNDP found that the Applicant failed to comply with UNDP’s internal procurement procedures.

g. The Applicant's request for compensation for emotional distress should be rejected. Any emotional distress caused to the Applicant was in connection with the actions of the UK authorities, for which UNDP is not responsible. The fact that the Applicant has been working as a consultant since October 2007, earning between USD32,000 to USD40,000 a year, is indicative that the Applicant was able to undertake work of a sufficiently high quality. However, should the Tribunal reject the Respondent's submission regarding moral damages, the Respondent submits that an award of three months' net base salary would be appropriate.

h. The Respondent is not aware of any adverse material on the Applicant's official status file. However, as no investigation was completed against him, the Respondent undertakes to check and remove any such material that may feature on the said file. There are no impediments to the Applicant's ability to apply for posts for which he considers himself suitable.

Consideration

The probable duration of employment

5. As the United Nations Appeals Tribunal stated in *Warren* 2010-UNAT-059, para. 10, the purpose of compensation is to place the staff member in the same position he or she would have been in had the Organisation complied with its contractual obligations (see also *Castelli* UNDT/2010/011, para. 10).

6. The offer accepted by the Applicant was for a one-year fixed-term contract. The Tribunal is not persuaded by the Applicant's submission that there is near-certainty that he would have received further extensions beyond the one-year term of his contract. The Applicant's submission does not take into account the normal contingencies and uncertainties which may and frequently do intervene in the average working life (see, e.g., *Fayek* UNDT/2010/113, para. 30). The post in question was a

one-year fixed-term position as a Programme Advisor in Cairo. In the circumstances of this case, the Tribunal finds that it is impossible to state with a sufficient level of certainty how the Applicant would have performed in his new job, whether or not both parties would have decided to continue the employment relationship after the expiration of the one-year term, or whether any normal contingencies of life would have interfered. The Tribunal accepts that certain assumptions can be made, but they must be reasonable (see *Fayek* and *Tolstopiatov* UNDT/2011/012, paras. 24–29). The Applicant’s past performance in a different capacity and in a different office is not of much assistance in this task.

7. Therefore, relief for lost earnings shall be based on the Tribunal’s finding that the Applicant’s appointment would have been for one year, during which period the Applicant was deprived of his earnings and entitlements at the L-5 level, step 9.

8. At this juncture, it is necessary to make the following observation. In his submission on relief, the Respondent relied on some unidentified “audit reports” to support his position concerning the improbability of the Applicant’s contract being extended. This submission is misguided, inappropriate, and unsubstantiated. No audit reports have been tendered before the Tribunal at any point during the proceedings. There is also no indication that they were provided to the Applicant during or prior to this litigation or that his comments were sought in relation to them. There is simply no evidence before the Tribunal to conclude that the Applicant was involved in any kind of improper conduct or managerial failures, that he violated any internal procurement rules, or that these audit reports would have resulted in any adverse action against him had he remained in the Organisation’s employ. Accordingly, these audit reports and alleged breaches of procurement rules—which the Respondent did not even identify in his submission—have not been taken into consideration by the Tribunal in determining the probable duration of the Applicant’s contract.

Loss of salary and entitlements

9. It is common cause that, if not for the contractual breach, the Applicant's net base salary (i.e., his gross salary minus staff assessment) would have been USD91,605. He would have also been entitled to post adjustment in the amount of USD27,023.48 and one-time allowance of USD2,500. Therefore, his total earnings would have been USD121,128.48, as was unreservedly tendered by the Respondent.

10. The only deductions that would have been made totaled USD17,750.17, which would include the Applicant's pension contributions (USD14,039.17), life insurance (USD1,008), and medical insurance (USD2,703). However, the Applicant's pension contributions would have been returned to him upon his separation and his contributions towards his life insurance and medical insurance would have been deducted from his salary in exchange for certain benefits and entitlements. Because of the unlawful decision, he was deprived of these benefits and protections, and he is now legally entitled to receive the financial equivalent of their value. For these reasons, the amount of USD121,128.48 is the proper basis for compensation for lost salary and entitlements, as acknowledged in the Respondent's submission on compensation.

11. A party affected by a breach of contract has a duty to mitigate her or his losses. The doctrine of mitigation was referred to in *Mmata* 2010-UNAT-092, para. 27, in which the Appeals Tribunal stated that "[p]ost-judgment compensation may include loss of future earnings taking into account mitigation". (See also *Tolstopiatov* UNDT/2011/012.)

12. In the present case, the Tribunal finds that the Applicant took reasonable steps to mitigate his loss of income which resulted from the Respondent's breach of contract. Accordingly, the Tribunal will take into account the Applicant's earnings during the relevant period of time for the purpose of calculating compensation due to him (see *Tolstopiatov* UNDT/2011/012, paras. 64–85). The loss of earnings shall be

calculated based on the difference between the salary and entitlements that he would have received at the L-5 level, step 9, for one year, and the salary and entitlements earned by the Applicant during the relevant time period. It was submitted by the Applicant that, in the period of 1 October 2007 to 30 September 2008, he earned USD32,000. No objection was received from the Respondent regarding this submission on the Applicant's income.

13. With respect to the lost salary and entitlements, the Tribunal will deduct the Applicant's actual income from 1 October 2007 to 30 September 2008 (USD32,000) from the total earnings he would have received (USD121,128.48) if not for the breach of contract. Therefore, the total amount of compensation due to him for lost salary and entitlements is USD89,128.48.

14. As the Applicant would have been paid monthly, this amount shall be subject to interest on the basis that it would have been paid in twelve separate installments, with interest on each installment calculated in accordance with *Warren* 2010-UNAT-059, from the date it became due (see also *Iannelli* 2010-UNAT-093, para. 18, *Fayek* UNDT/2010/194, para. 22, and *Alauddin* UNDT/2010/200, para. 39).

15. Considering that the Applicant will be compensated on the basis that his employment would have continued until the expiration of his one-year contract, the Tribunal will not order any compensation in lieu of notice of termination. The Applicant is not entitled to this payment since he is being compensated as if his employment had continued for the full duration of his contract.

16. As a result of the Tribunal's finding concerning the probable duration of the Applicant's contract, he is not entitled to any additional compensation for future economic loss. In relation to pension-related payments, the parties agree—and the Tribunal accepts—that, had the Applicant completed his one-year contract, his pension rights would not have vested as he would have been short of the required

five-year mark, and he would have been entitled only to the return of his pension contributions (see para. 10 above).

Emotional harm and harm to reputation

17. The Applicant produced a note from his medical doctor, dated 8 November 2010, stating:

I[,] the undersigned, Dr. [D], affirm, having seen [the Applicant] as a patient from May 2008 to June 2010.

...

Diagnosed as light depression during our first interviews, the general health situation of [the Applicant] has deteriorated since mid-2009 and progressively evolved towards a breakdown that could be termed severe. Despite certain awareness of his situation, the stress—due to having been fired from the UN and more particularly the loss of his possibility to work normally—seems to be the principle cause. Beyond the sudden loss of his job, [the Applicant] feels a deep injustice against him that he considers as moral harassment, and that he is unable to overcome.

18. No objections were raised by the Respondent with regard to this note. The Tribunal accepts that the Applicant, indeed, suffered emotional distress, at least from May 2008, when he suffered from light depression. His emotional state has progressively and noticeably deteriorated, according to his doctor's note.

19. The Tribunal accepts that the circumstances under which the contested decision was taken and the reasons given to the Applicant contributed to his emotional anxiety. The Tribunal therefore finds that the Applicant has discharged his burden of proving emotional harm as a result of the Respondent's breach (see *Antaki* 2010-UNAT-095, stating, at para. 20, that “[c]ompensation may only be awarded if it has been established that the staff member actually suffered damages”). The emotional harm was accompanied by a certain degree of harm to the Applicant's professional reputation, considering the circumstances under which the breach took place. The Tribunal also finds it appropriate to take into account, in this regard, the

Respondent's unsubstantiated submissions in the course of the proceedings concerning the Applicant's reputation in light of the alleged audit reports.

20. As the Tribunal stated in *Applicant* UNDT/2010/148,

it is more appropriate to express compensation for emotional distress and injury in lump sum figures, not in net base salary. Such damages, unlike actual financial loss, are not dependent upon the applicant's salary and grade level. Dignity, self-esteem and emotional well-being are equally valuable to all human beings regardless of their salary level or grade.

For reasons stated in *Applicant* UNDT/2010/148, the Tribunal finds it appropriate to order compensation for emotional harm and harm to reputation in the form of a lump sum payment.

21. In assessing the appropriate amount of compensation under this head, the Tribunal has considered such factors as the Applicant's previous history with the Organisation, harm to his emotional well-being and consequential deterioration of health, and harm to his reputation. In light of the circumstances of this case and the context of the contractual breach, as well as the existing case law (see, e.g., *Zerezghi* UNDT/2010/122, *Ikpa* UNDT/2010/128, *Applicant* UNDT/2010/148), the Tribunal has determined that the amount of USD50,000 is appropriate compensation for the non-pecuniary harm suffered by the Applicant as a result of the breach of contract.

Compensation for alleged due process violations during the investigation

22. The Applicant requests compensation for the violation of his due process rights during the investigation carried out by UNDP. However, whether or not the investigators followed proper procedures when carrying out the investigation was plainly not the subject matter of this case. This case arose not because of alleged procedural violations during the investigation, but because of the unlawful decision made by UNDP in September 2007 regarding the Applicant's appointment.

23. Further, it must be noted that the scope of the Applicant's request for administrative review, dated 12 November 2007, did not include the conduct of the investigation and was limited to his request "that the action of rescinding [his] appointment be reviewed and withdrawn and that [he] be permitted to continue to perform [his] duties as Programme Advisor unless and until [he is] charged with wrongdoing". At the time of his request for administrative review the Applicant understood the investigation to be ongoing and formulated the subject matter of his case as pertaining to the decision not to effectuate the employment relationship, not the propriety and procedural correctness of the ongoing investigation. In fact, as stated in *Garcia* UNDT/2010/191, para. 21, it was part of the Applicant's case that "[a]t the time it was decided to cancel the Applicant's assignment there had been no investigation of the allegations, let alone a finding that he had done anything wrong" and that "[t]he mere initiation of an investigation is not a basis for taking action against a staff member such as to void a contract or to terminate his employment".

24. Moreover, the Tribunal observes that the propriety and procedural correctness of the investigation were not properly brought forward and challenged by the Applicant during the substantive proceedings before the Tribunal. As a result, the Respondent was not provided with a proper opportunity to argue, in due course, the receivability of the issue and to file substantive submissions and tender relevant evidence. The Applicant will not be permitted to re-open this litigation after the Tribunal has already rendered its judgment on liability.

Relocation and other expenses

25. The Applicant requested the Tribunal to order that he be reimbursed for various relocation expenses totaling USD17,512. As the Tribunal stated in *Garcia* UNDT/2010/191, the Applicant was permitted by UNDP to keep USD19,822 that had already been transferred to him as a relocation grant. It was clear to both parties, and it is clear to the Tribunal, that this money was provided to the Applicant

to recompense him for the costs of his “arrangements for the move to Cairo” (see *Garcia* UNDT/2010/191, para. 35). The Respondent’s decision to compensate the Applicant for the relocation expenses and the Applicant’s acceptance of the money were, in fact, among the circumstances relied on by the Tribunal in finding that there was a contractual relationship between the parties. The Applicant accepted the money and his request to be reimbursed again for the same expenses must be rejected, particularly as he has not proved that he suffered any additional loss in excess of the monies he accepted.

26. The Respondent submitted that “the only additional expense coverable that has not already been satisfied from the relocation grant is the invoice for the medical examination in the amount of [USD]241”. The Tribunal accepts this submission and finds that, as the cost of the medical examination for the purposes of medical clearance was separate from the relocation grant, the Applicant shall be compensated in the amount of USD241. For the purpose of calculating the retroactive interest rate on this sum, the Tribunal finds it appropriate to take 1 October 2007 as the date when the amount became due.

Adverse material

27. Counsel for the Respondent submitted that the Respondent was not aware of any adverse material on the Applicant’s personnel files and that there were no impediments to the Applicant’s ability to apply for posts for which he considered himself suitable. The Applicant did not seek to contradict these claims. However, in the interests of justice, the Tribunal will make appropriate orders with respect to any adverse material that may exist on the Applicant’s files with regard to the reasons for and the circumstances of the unlawful decision not to effectuate the Applicant’s employment with the Organisation effective 1 October 2007 (see *Miyazaki* UNDT/2009/076, paras. 10–16, *Applicant* UNDT/2010/069, paras. 18–21, and *Zerezghi* UNDT/2010/122, paras. 53–54).

Orders

28. The Respondent shall pay compensation for the Applicant's lost salary and entitlements in the amount of USD89,128.48. This sum is to be paid within 60 days of the date this Judgment becomes executable. The interest on this sum is to be calculated as if the sum was paid in twelve separate installments of equal value, with the applicable US Prime Rate from the date each of these installments was due and until date of payment. If this compensation is not paid 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 the date of payment.

29. The Respondent shall pay compensation for the medical examination in the amount of USD241. This sum is to be paid within 60 days of the date this Judgment becomes executable. The interest on this sum is to be calculated at the applicable US Prime Rate from 1 October 2007 and until date of payment. If this compensation is not paid 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 the date of payment.

30. The Respondent shall pay to the Applicant USD50,000 as compensation for non-pecuniary loss, including harm to his emotional well-being, consequential deterioration of health, and harm to his reputation. This sum is to be paid within 60 days of the date this Judgment becomes executable during which period 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.

31. Any adverse material pertaining to the reasons for and the circumstances of the unlawful decision not to effectuate the Applicant's employment on 1 October 2007 shall be removed from his personnel file.

32. All other pleas are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 8th day of April 2011

Entered in the Register on this 8th day of April 2011

(Signed)

Santiago Villalpando, Registrar, New York