



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/061

Judgment No.: UNDT/2011/131

Date: 20 July 2011

Original: English

**Before:** Judge Shaw  
**Registry:** Nairobi  
**Registrar:** Jean-Pelé Fomété

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RELIEF**

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**Counsel for Applicant:**  
Edward Patrick Flaherty

**Counsel for Respondent:**  
Elizabeth Brown, UNHCR  
Felix Ross, UNHCR

## **Introduction**

1. In its decision dated 16 March 2011, the United Nations Dispute Tribunal (UNDT/the Tribunal) found that the Applicant's dismissal on grounds of sexual harassment was unlawful because it breached legislative rules and procedures of disciplinary investigations within the United Nations, as well as the general requirements of fair process. As a result, the facts relied on by the Respondent were not sufficiently well established to justify summary dismissal. The decision to summarily dismiss the Applicant was rescinded.

2. The Parties were given the opportunity to resolve the claim for compensation but were not able to do so. In response to Orders by the Tribunal, the Parties filed written submissions on the issue of compensation and agreed the outstanding matters could be decided by the Tribunal without the need for a further hearing.

3. In his substantive application, the Applicant had sought a number of remedies. These have been modified in the most recent submissions.

## **Additional Evidence**

4. In written and oral evidence presented at the substantive hearing, the Applicant told the Tribunal of the effect of the investigation on his health. He said that the allegations and conditions in which his interview was conducted caused him severe psychological shock and moral devastation. He was not able to consult his telephone or e-mails and had to immediately resort to medical assistance. He was placed by his physician on certified sick leave initially until 18 August 2008. This was extended twice until 30 September 2008. He produced copies of the medical certificates.

5. With his written submission on compensation, the Applicant tendered another medical certificate dated 12 April 2011.

6. The Respondent objects to the admission of this certificate on the basis that it lacks probative value and should be excluded as evidence in accordance with Article 18(5) of the UNDT Rules of Procedure.

7. Specifically the Respondent alleges that the examining psychiatrist does not appear to properly assume the role of an independent expert as he draws improper and apparently prejudicial conclusions regarding matters not related to his medical expertise. For example, his reference to the Applicant's dismissal as an injustice, his comments on the appropriate means of indemnification and the current economic crisis which would impact on the Applicant's ability to find work.

8. Further, the Respondent submits that the medical certificate does not support the Applicant's submission regarding his incapacity to assume regular work during the period up to 2019.

9. Should the Tribunal find the Applicant's future state of health to be relevant, the Respondent requests that a medical board be established to provide independent evidence on the Applicant's present state of health.

10. The Tribunal finds that the medical certificate over-steps the bounds of a proper professional opinion to a court. Opinion evidence should be strictly limited to matters within the professional capacity of the expert. It should be objective and, even if the expert is the advisor to a party, should retain professional objectivity. The Tribunal will take into account only those matters referred to in the medical certificate which properly fall into the area of expertise of the doctor and in particular those parts which are consistent with the evidence given at the substantive hearing.

### **Applicant's submissions**

11. The Applicant is now 54 years old. He referred in detail to the history of his employment with the United Nations High Commissioner for Refugees (UNHCR) from February 1995 to his dismissal on 19 January 2009. At the time of his

termination he held an indefinite contract at the P4 level. He had planned and expected to finish his career upon his statutory retirement age of 62.

12. He submitted that damages due to him should be determined in two separate categories: “back pay” to compensate for losses arising from his dismissal to the date of judgment and “future pay” as an alternative to retroactive reinstatement. Although reinstatement is preferred by the Applicant, he doubts that this is likely. He submits that as a result of the severe illness and injuries he has suffered, and his record of having been summarily dismissed, it is unclear whether he will again be able to resume his professional duties.

***“Back pay”***

13. The Applicant seeks:

- i. His gross salary at P4 grade from the date of his summary dismissal on 11 January 2009 including post adjustment, dependency allowance, educational grant, home leave grant, mobility/hardship/non-removal allowance. He also seeks the Organisation’s 15.8% pension contribution, reduced by the staff assessment and the Applicant’s own pension contribution until 16 March 2011 when the Tribunal’s rendered its judgment. He asks that his and the Respondent’s contributions be paid directly to the United Nations Joint Staff Pension Fund (UNJSPF) for the benefit of the Applicant’s pension account plus any interest or annuity amounts demanded by UNJSPF to restore the Applicant’s pension account to its current status as at 16 March 2011. He estimates this sum to equal approximately US\$350,204.10.
- ii. Moral Damages at the equivalent of three years net-base salary. To support this claim he referred to the denial of his fundamental due process rights as found by the Tribunal, and the  
reckless and illegal imposition of the most serious and severe disciplinary sanction of summary dismissal upon a long serving and loyal staff member,

and, in reliance on the medical certificate, the catastrophic effects on his physical and mental health, marriage and professional reputation.

iii. Legal fees of US\$75, 000.

***Future pay***

14. The Applicant seeks:

- i. Payment of his gross monthly salary at the P4 level, including post adjustment, dependency allowance, educational grant, home leave grant, mobility/hardship/non-removal allowance, but excluding the UNHCR's 15.8% monthly pension contribution reduced by the staff assessment as from 16 March 2001 until his statutory retirement date on 31 March 2019. The Applicant calculates these benefits at approximately US\$872,606.69 subject to detailed accounting of the sum by the Respondent.
- ii. In the event that the Tribunal orders that he is to be paid a lump sum payment to cover future pay and entitlements, the Applicant requests that the respondent be instructed to maintain the Applicant as an active participant within the UNJPF and for the Respondent to pay the 15.8% monthly contributions on the Applicant's calculated salary amount until the Applicant's statutory retirement age on 31 March 2019.
- iii. Payment of his repatriation grant equal to 28 weeks or US\$50,645.13 which was denied to him as a result of his summary dismissal.
- iv. Interest on the claimed amount at 8% or such other rate as determined by the Tribunal.

**The Respondents Submissions**

15. The UNAT case of *Mmata* (2010-UNAT-092) limits the total of all compensation ordered under Article 10(5) (a) and (b) to the equivalent of 2 years base salary.

16. In this case the Applicant seeks a total amount of compensation equivalent to approximately ten years of his gross salary and allowances reduced by staff assessment as well as a further three years in moral damages. This vastly exceeds the cap established in Article 10(5) of the UNDT statute and would constitute exemplary or punitive damages which are specifically prohibited by Article 10(7) of the UNDT statute.

17. There was no egregious conduct to justify the lifting of the statutory cap. The Respondent acted in good faith throughout. The Respondent referred the Tribunal to its findings on the credibility of the complainants.

18. In relation to each of the Applicant's specific claims the Respondent submits:

- a) The Tribunal is required to set an amount of compensation *in lieu* of rescission of the impugned decision to summarily dismiss the Applicant;
- b) There are no exceptional circumstances that justify the lifting of the limit on compensation of two years' net base salary. Such limit applies to the total of all compensation to be awarded under Article 10(5) of the UNDT Statute;
- c) The Applicant's claim for compensation of approximately 10 years gross salary, less staff assessment, plus allowances, together with 3 years net base salary is excessive and if granted would amount to exemplary or punitive damages which are prohibited by Article 10(7) of the UNDT Statute;
- d) There are no grounds to award legal costs against the Respondent; interest should be awarded in accordance with the UNAT judgments in *Warren* and *Mmata*;
- e) The Applicant's claim for future damages is too remote, does not take into account the Applicant's duty to mitigate his losses and is not sufficiently supported by the medical evidence.

## Considerations

19. Having rescinded the decision to summarily dismiss the Applicant, the Tribunal is required by article 10(5) of the UNDT Statute to set an amount of compensation *in lieu* of rescission of the impugned decision to summarily dismiss the Applicant.

20. Article 10(5) (a) refers to “compensation” and (b) refers to “compensation which shall normally not exceed the equivalent of two years net base salary”. It has been affirmed by UNAT in *Warren* (UNAT-2010-065), that the very 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. However in *Mmata* (UNAT-2010-092), UNAT has held that Article 10(5) limits the total of all compensation under sub paragraphs (a) and (b) to the equivalent of two years base salary except in exceptional cases.

21. The tenor of Article 10(5) of the statute is that compensation should be calculated in terms of the net base salary. It does not specifically refer to entitlements over and above the salary.

22. In summary, in determining compensation, the Tribunal is to order such compensation as is necessary to place the staff member in the same position he would have been in but for the breach of contract. But unless it is an exceptional case the total compensation should not exceed two years net base salary.

23. There are three issues:

- i. What compensation is necessary to place the Applicant in the same position he would have been but for the unlawful investigation?
- ii. Should the Applicant be compensated for future losses and if so the amount to be awarded?
- iii. Whether and to what extent the Applicant may be compensated for moral injury?

*i) Placing the Applicant in the same position*

24. In this case, the Applicant was facing allegations of serious misconduct. He was denied a fair and lawful investigation process. The pre-breach position to which he should be restored is that immediately prior to the investigation. At that point in time he was holding a P-4 managerial position, some staff members had made complaints about his behaviour towards them and the Administration was obliged to investigate those allegations.

25. The investigation, having been found to have been irregular, has no effect. Although the decision to dismiss him was tainted by the investigation process and is rescinded, the Applicant was neither exonerated by the Tribunal's decision nor was he found to have been guilty of the alleged misconduct. That still remains a live question and the allegations remain unresolved.

26. The Applicant was and is entitled to a proper and fairly conducted investigation. If, as an alternative to rescission, the Respondent elects not to reinstate the Applicant the Applicant is due compensation.

27. The method of assessing compensation *in lieu* of rescission has, to date, not been definitively defined. One method of calculating that amount is to award the amount of the base salary that the Applicant would have received between the impugned decision and the date of the judgment which rescinded the decision.

28. In the Applicant's case that period of time is 2 years and 2 months. In *Mmata*, UNAT held that there may be cases that take longer to be heard by the UNDT and that this may provide a reason justifying compensation beyond the two-year limit. This is such a case. Compensation *in lieu* of rescission is set at two years and 2 months net-base salary.



*ii) Compensation for future losses*

29. The Applicant's future losses depend entirely on what the outcome of a properly conducted investigation would be. However this is impossible to predict and there is no certainty that the Applicant would have retained the position he was in at the time of the allegations.

30. The Applicant's claim for compensation is excessive. It equates to over 13 years of net base salary plus payment of a number of entitlements.

31. Apart from being well outside the scope of compensation that might properly be ordered by the Tribunal, the Applicant's claim is predicated on the mistaken belief that but for the unlawful dismissal he would have remained in his position until his retirement some 10 years into the future. That prediction is unsubstantiated by the Applicant. Indeed the medical evidence produced by him indicates that his medical condition may preclude this. The Respondent also makes the valid point that the period of time covered by the claim makes it too remote. The Tribunal is not in a position to predict the prospects of the Applicant continuing his employment with UNHCR for the next 10 years.

32. The Applicant's claim for future losses is rejected.

*iii) Moral Damages*

33. The Tribunal accepts that the Applicant was physically and emotionally affected by the investigation but he is entitled only to be compensated for the damages caused to him by the breaches which have been established. While the Tribunal accepts that the Applicant did suffer considerably as a result of the investigation, it is mindful that the Respondent was obliged to undertake the investigation and did not act in bad faith in doing so. Given the complexity and importance of the case, the investigation was conducted within a reasonable time

during which the Applicant received his full entitlements as a staff member in spite of not working.

34. The breaches identified in the substantive judgment in this case were:

- i. Being interviewed by an investigator about serious allegations of which he had no notice;
- ii. The failure to provide him with all relevant information to enable him fully to assess the case against him; and
- iii. The failure properly to consider the Applicant's request for witnesses specified by him to be interviewed.

35. The evidence of the Applicant, including those parts of the medical evidence that can be relied on, made it abundantly clear that directly after the investigation he was severely affected to the extent that he suffered psychological harm which has had lasting effects. It is a common principle of the law of damages that the fact that a person is found to be more vulnerable to injury than another, that should not preclude the Tribunal from taking the injuries into account.

36. The breaches of natural justice and the effects of these breaches on the Applicant were evident. He was deeply shocked by being told only at the interview what the allegations were and he suffered enormous frustration at the failure of the Respondent to provide the information and consideration he was entitled to but did not receive. These cumulative effects warrant an award of compensation for moral damages even though that award will mean that the total amount of compensation will exceed the 2 year limit for compensation set by Article 10(5). They were sufficiently serious to be regarded as an exceptional case. Compensation for moral damages is set at 3 months net base salary.

37. Interest is awarded on the judgment sum from the date of dismissal to the date of judgment however because this case is under appeal any order for interest from the

date of judgment to payment of the compensation would be premature and should await the outcome of the appeal.

38. All other claims by the Applicant are rejected.

### **Conclusion**

39. The Tribunal orders:

- i. Pursuant to Article 10(5) (a) the compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision is a lump sum equivalent to two year's and two month's net base salary.
- ii. The Respondent is to pay the Applicant moral damages pursuant to Article 10(5) in a lump sum equivalent to 3 months net base salary as at the date of his dismissal.
- iii. The Respondent is to pay the Applicant interest on the total judgment sum at the US Prime Rate from the date of the Applicant's dismissal on 17 January 2009 to the date of this judgment.

*(Signed)*

Judge Shaw

Dated this 20<sup>th</sup> day of July 2011

Entered in the Register on this 20<sup>th</sup> day of July 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi