UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/119
Judgment No.: UNDT/2011/169
Date: 28 September 2011
Original: English

**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Santiago Villalpando

KLEIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

# ON RELIEF

**Counsel for Applicant:**
George Irving

**Counsel for Respondent:**
Marcus Joyce, ALS/OHRM, UN Secretariat

## Introduction

1. In *Klein* UNDT/2010/207, the Dispute Tribunal found, *inter alia*, that the release to Member States of a summary of a flawed investigation report regarding the Applicant was in breach of his terms of appointment, as the Respondent failed to reasonably exercise the discretion to withhold or modify it. The parties subsequently filed further submissions on appropriate relief. The present Judgement addresses the matter of relief to be ordered in view of the Tribunal's findings on liability in *Klein* UNDT/2010/207.

2. The Applicant seeks retraction or revision of the investigation report, a public statement from the Respondent "apologizing for the misinformation and affirming his unblemished record of service", removal of any adverse material that may be in the Organization's files, and financial compensation for pecuniary and non-pecuniary loss resulting from the violation of his due process rights, damage to his reputation, and emotional distress.

## Facts

3. The relevant facts are set out in full in *Klein* UNDT/2010/207. The summary of facts, below, is provided for ease of reference.

4. Between February 1996 and April 2005, the Applicant led three United Nations missions. In July 2003, he was appointed to the position of Special Representative of the Secretary-General and Coordinator for the United Nations Mission in Liberia ("UNMIL") and served in this position until his separation from the United Nations in April 2005.

5. Following allegations in 2004 that the Applicant was involved in mining activities connected with the Charles Taylor regime in Liberia, the Office of Internal Oversight Services ("OIOS") of the United Nations Secretariat launched an investigation and issued a report on 7 July 2005 ("the First Report") clearing the

Applicant of all allegations. In April 2005, OIOS received a separate complaint alleging that the Applicant had an "improper relationship" with "a Liberian woman who [allegedly] had links with Charles Taylor" and that he had misused United Nations assets by facilitating the provision of air transport to women who did not work for the United Nations. OIOS commenced a separate investigation into these allegations (OIOS Investigations Division Case No. 0176/05).

6. On 24 October 2005, OIOS issued its report in the second case ("the Second Report"), concluding that the Applicant had failed to uphold the standards required by former staff regulations 1.2(b) and 1.2(e), and that he had misused United Nations property and used his office for the private gain of a third party. The Applicant having already been separated from service, OIOS recommended that the Department of Peacekeeping Operations ("DPKO") take note of the Applicant's failings for future reference, and consider reviewing the use of air assets in all missions.

7. Around the same time, OIOS also prepared a redacted summary of the Second Report ("the Executive Summary"), which stated that:

> 1. … [OIOS] received information that a former Senior Official of [UNMIL] was involved in a relationship with a Local Woman who holds dual American-Liberian citizenship. This Local Woman has close links with the former [Charles] Taylor regime in Liberia, both personally and through her family. Her family has large logging interests in Liberia and well-documented close connections with the Taylor regime. Additionally, the Nobel Peace Prize nominated NGO "Global Witness" has alleged that her uncle has been involved in arms smuggling in the region.
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> 2. Senior Official has invited Local Woman to functions both with UNMIL staff and persons outside the UN, some of which have been of an official nature. A number of staff interviewed by OIOS expressed concern that the Local Woman was passing information which she had gathered from Senior Official and UNMIL to Mr. Taylor and other interested parties.
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> 3. In addition, the Local Woman had travelled on UNMIL air assets on occasion, although she was not authorized to travel on UN air assets, being neither a UN staff member nor a person with an official reason to use them. Senior Official made the request that she

> be permitted use of the UN shuttle, and UNMIL's senior management authorized it.
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> 4. The [OIOS] investigation found evidence that the Senior Official:
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> a. By maintaining a relationship with the Local Woman, failed to uphold the standards of conduct expected by the United Nations; and
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> b. By authorizing the use of United Nations aviation assets by the Local Woman, a person not authorized to use such assets, failed to carry out, with the best interests of the Organization in mind, his management responsibilities.

8. The Executive Summary was provided to Member States on 16 January 2007 by the Office of the Under-Secretary-General, OIOS. The Applicant was provided with neither the Second Report nor the Executive Summary; in fact, he was unaware of their existence.

9. On 17 February 2008, the *Washington Post*, a newspaper in wide circulation in the United States of America, published an article about the release and posting on a United States government website of redacted versions of confidential United Nations audit reports ("the Article"). The Article identified the Applicant by his name as the subject of a redacted OIOS report (that is, the Executive Summary), stating that, while the names of posted OIOS reports' subjects were mostly redacted, they were easily decipherable.

10. In response to a letter that he sent to the Under-Secretary-General, OIOS, the Applicant was informed, by letter of 13 March 2008, that "OIOS is obligated under General Assembly resolution [59]/272 to make all reports available, upon request, to any Member State … [and that] in doing so OIOS takes sufficient care to redact certain reports … [and that t]his redaction was undertaken in the case of the [Executive Summary]".

11. The Applicant sought review before the Joint Appeals Board ("JAB") of "the decision not to request appropriate remedial action in light of the damage caused to

his reputation through the release of a privileged and confidential investigative report, resulting in its wide public dissemination". The JAB recommended that the Applicant be paid one year's net base salary as compensation, with interest, and that he be issued a letter of apology. By letter from the Deputy Secretary-General, dated 30 June 2009, the Respondent accepted that the Applicant's due process rights had been violated because he was not made aware of the scope of the alleged misconduct and he was not given the opportunity to further rebut the allegations prior to the finalisation of the Second Report. The Secretary-General, on this basis, paid the Applicant one year's net base salary as compensation, which the Applicant accepted without prejudice to his right of appeal.

**Applicant's submissions**

12. The Applicant's main contentions on relief may be summarised as follows:

a. There is at present no public record of the Applicant's refutation of the charges, of the Respondent's retraction of them, and of the Applicant's exoneration, which causes him ongoing harm. The Applicant seeks the Tribunal to order "rescission of the document in question as well as a public statement acknowledging and correcting the error". Further, any adverse material improperly maintained in the Organization's files must be removed pursuant to ST/AI/292 (Filing of adverse material in personnel records);

b. The circumstances of his abrupt departure and the misinformation contained in the Second Report have affected the Applicant's professional reputation and his prospects for further employment. Despite his efforts, he has had no steady employment since 2005 apart from occasional teaching and speaking engagements and *pro bono* consultancies;

c. The one year's net base salary already paid to the Applicant is inadequate to fully compensate him for the breach of his rights. The high publicity and continuing harm entailed by the refusal of the Respondent to

rectify the errors constitutes exceptional circumstances warranting compensation in excess of the statutory limitation of two years' net base salary;

d. With respect to his actual economic loss, the Applicant submits that, if not for the circulation of the Executive Summary in February 2008, he would have continued to be employed at a level comparable to the level he had prior to his departure from the Organization. Based on the Applicant's salary at the time he left the Organization in 2005, he should be compensated for the loss of earnings by an award of USD511,880, less the one year's net base salary previously paid, or USD383,910;

e. With regard to non-pecuniary harm, the negative effects on the Applicant were aggravated by the release of the report to third parties despite the knowledge "that it was established practice [of these parties] to publish such reports on the [I]nternet". Further, the Applicant has suffered emotional distress and extreme personal embarrassment. The Applicant's personal integrity has been questioned in a manner calculated to cause extreme embarrassment to him and his family. An award of moral damages in the amount of USD100,000 is appropriate.

**Respondent's submissions**

13. The Respondent's main contentions on relief may be summarised as follows:

a. It would appear in light of *Farraj* UNDT/2010/070 that the power to order specific performance does not extend to requiring revision or retraction of a document which is not part of the Applicant's personnel file or working file of organizational units of the Organization. Further, the proposal to retract or revise the document is not a practical solution as the document is in the public domain on the Internet. Such an order could not be executed in light of the impossibility of controlling the actions of third parties. The only practical

solution is the publication of the Tribunal's judgment, which will have the effect of supplanting the Second Report and provide a factual account correcting previous assertions relating to the Applicant's acts and conduct. Article 10.5 of the Dispute Tribunal's Statute does not include the power to order the issuing of a public acknowledgement or apology. Further, the published judgment of the Tribunal serves to acknowledge and correct the errors in the Applicant's case. It is therefore unnecessary for the Respondent to issue a public apology regarding the errors in the report which have already been acknowledged and corrected in a published judgment of the Tribunal;

b. Having thoroughly reviewed the Applicant's personnel records, the Respondent confirms that they do not contain the Second Report or any other adverse material. The inclusion of the Second Report in the OIOS files is not covered by ST/AI/292 which refers solely to official status files and working files of organizational units of the Organization;

c. The Applicant has been adequately compensated for the breach of his due process rights arising from the dissemination of the Second Report. An award of one year's net base salary is consistent with previous awards by the Tribunal for similar breaches;

d. Given that the Tribunal has found that the Applicant's claim for non-renewal is not receivable, he cannot claim loss of earnings as a pecuniary loss arising from his non-renewal. Therefore, any compensation due to the Applicant for the difficulty that he claims to have had in seeking further employment is a matter which must fall under the heading of moral injury. There is no evidence before the Tribunal that there was any ill will toward the Applicant and that he suffered any emotional injury as a result of the contested decision. The Applicant's claim for damages for moral injury must therefore be assessed without including any figure for emotional stress, of which there is no evidence. The one year's net base salary already paid to the

Applicant is sufficient to include compensation for any moral damages suffered by the Applicant;

e. The reasons as provided by the Applicant do not support his contention that his is an "exceptional case" which requires compensation in excess of the limit prescribed by art. 10.5 of the Statute.

**Consideration**

*Scope of judicial review*

14. As the Tribunal found in *Klein* UNDT/2010/207, the Applicant's claims regarding the non-renewal of his contract are not receivable as he failed to seek administrative review of the decision not to renew his appointment. The Tribunal also found that there is no nexus between the non-renewal of the Applicant's contract and the investigations. The Tribunal, therefore, will not consider the Applicant's submissions on relief in relation to the non-renewal of his contract.

*Corrective action*

15. The fundamental purpose of a judicial remedy is to attempt, to the extent possible, to place the aggrieved party in the position she or he would have been in but for the breach (*Warren* 2010-UNAT-059, *Castelli* 2010-UNAT-082 and *Iannelli* 2010-UNAT-093). To this end, the Tribunal's Statute recognises its capacity to grant both equitable and monetary relief. Article 10.5 of the Statute provides that the 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;
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> (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.

16. The remedy of rescission of an administrative decision generally entails the undoing of the decision. However, in some situations rescission as a remedy may be unavailable, for example, where third party rights are affected, or where a restoration of the *status quo ante* is impossible. Further, in some instances, the Tribunal may find that, although rescission is available, other types of relief, such as specific performance or compensation, may be more appropriate.

17. While the power to rescind relates to "the contested administrative decision", the power relating to specific performance is put in general terms as various types of specific performance may be ordered depending on the circumstances of each case. The Dispute Tribunal has ordered the following types of corrective action: access to a full performance rebuttal process for staff on contracts with duration of less than one year (*Miyazaki* UNDT/2010/078); quashing of a contested investigation report and conditional referral of the matter for a fresh investigation (*Messinger* UNDT/2010/116, affirmed in *Messinger* 2011-UNAT-123 (note that the referral was made *not* under arts. 10.4 or 10.8 of the Dispute Tribunal's Statute, but as specific performance under art. 10.5(a)); removal of improper or adverse material from personnel records (*Zerezghi* UNDT/2010/122, *Grigoryan* UNDT/2011/057, *Garcia* UNDT/2011/068); imposition of an alternative disciplinary measure (see *Zerezghi* UNDT/2010/122 and *Bridgeman* UNDT/2011/145, and, also, the United Nations Appeals Tribunal's judgments in *Abu Hamda* 2010-UNAT-022 and *Doleh* 2010-UNAT-025); referral of the matter to a classification appeals committee (*Aly et al.* UNDT/2010/195) (note that the referral was made *not* under arts. 10.4 or 10.8 of the Dispute Tribunal's Statute, but as specific performance under art. 10.5(a)); convening of a medical board for consideration of outstanding medical claims (*Meron* UNDT/2011/004); and return of personal material improperly seized from the concerned staff member (*Bridgeman* UNDT/2011/145).

18. As the examples of corrective action ordered above demonstrate—and as confirmed by the Appeals Tribunal in *Fröhler* 2011-UNAT-141, *Appellant* 2011-UNAT-143 and *Kaddoura* 2011-UNAT-151—the Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached.

19. As found in *Klein* UNDT/2010/207, the Respondent has certain obligations towards staff members in relation to investigation processes, including, pursuant to General Assembly resolution 59/272 (Review of the implementation of General Assembly resolutions 48/218B and 54/244), the obligation to reasonably exercise the discretion to withhold or modify investigation reports requested by the Member States of the Organization, in appropriate circumstances. This specific obligation in relation to investigation processes and reports, as well as the general obligation of good faith and fair dealing (see *Asaad* 2010-UNAT-021, *Bertucci* 2011-UNAT-121, *James* UNDT/2009/025, *D'Hooge* UNDT/2010/044, *Gaskins* UNDT/2010/119 and *Goddard* UNDT/2010/196), require the Organization to only produce, maintain and disseminate investigation reports that have been created in accordance with the requirements of fairness and due process. Inherent in this obligation is a corollary obligation *not* to produce, maintain or disseminate improperly created material. While sometimes improper dissemination of such material cannot be undone, there are steps that can be taken towards undoing its effects.

20. Having carefully considered the parties' submissions, the Tribunal finds that, in the circumstances of the present case, rescission of the decision to disclose the Executive Summary would not restore the *status quo ante* and would not provide adequate relief to the Applicant. Similarly, the Tribunal finds that monetary compensation alone would not provide the Applicant with appropriate relief because of the nature of the non-pecuniary harm in this case.

21. The Tribunal finds it appropriate, in the particular circumstances of this case, to order corrective action, in addition to monetary compensation discussed and

ordered below. Such action can be made at little cost to the Respondent, with a significant benefit to the Applicant. The Tribunal finds it appropriate to require the Respondent to send a statement to the same Member States that received the Executive Summary, attaching a copy of the present Judgment and *Klein* UNDT/2010/207 together with an appropriate statement, as ordered below. Further, in the interests of justice, and in view of ST/AI/292, the Tribunal will make appropriate orders to ensure the removal of any adverse material—including the Second Report and the Executive Summary—that may exist in the Applicant's personnel records and in the working files of organizational units of the Organization with regard to the matters raised in the Second Report (see *Miyazaki* UNDT/2009/076, *Applicant* UNDT/2010/069, *Zerezghi* UNDT/2010/122, *Garcia* UNDT/2011/068).

22. The Tribunal further finds that the relief ordered in the present Judgment is sufficient to fully compensate the Applicant for the harm suffered. Therefore, the Tribunal does not need to consider whether an order for an apology is permitted by art. 10.5 of its Statute (see *Appellant* 2011-UNAT-143 and *Applicant* UNDT/2010/148).

*Actual economic loss*

23. The Applicant submits that he has had no steady employment, apart from occasional teaching and speaking engagements, and *pro bono* consultancies, since his separation from service in 2005. He says he applied for a position in Cyprus as Special Representative in 2007, which he did not get, and filed 15 applications with personnel and employment agencies, to no avail.

24. In respect of his application for the position in Cyprus as Special Representative, the Applicant tendered correspondence which he had sent to various high-level parties seeking the support of his candidature, as well as several separate communications in response thereto. The Applicant relies, in particular, on an email sent to him in February 2010 by a Director at a commercial consulting firm, stating

that "a friend of [the Director] was told by someone there that [the Applicant was] under a cloud from Liberia, so the Mission would not support [his] nomination" in relation to the position in Cyprus. The Tribunal finds that that this email borders on speculation based on hearsay. This email and other communications provided by the Applicant are not sufficient to persuade the Tribunal that, if not for the improper release of the Executive Report, the Applicant would have been selected for the position of Special Representative in Cyprus.

25. The Applicant also submitted documents indicating his interest in working in other high-level positions. Although they demonstrate the Applicant's interest, these documents do not constitute sufficient evidence that the Applicant was not selected for any of these positions as a result of the established breach of his rights. The evidence tendered in support of the Applicant's claims of actual economic loss is vague, and mostly consists of correspondence from the Applicant himself. As the Tribunal stated in *Fayek* UNDT/2010/113 and *Fayek* UNDT/2010/194, in assessing compensation, certain assumptions can be made, but they must be reasonable. In this instance, the Tribunal is requested to draw speculative assumptions and conclusions about the Applicant's actual economic loss.

26. Accordingly, the Tribunal finds that the Applicant has failed to persuade it that his failure to be permanently employed since 2005 was a direct result of the breach identified in *Klein* UNDT/2010/207. Therefore, the Tribunal is unable to conclude that the Applicant suffered actual economic loss, based on his submissions and the documentation tendered, and no compensation shall be awarded under this head of damage.

*Non-economic loss*

27. The amount of one year's net base salary previously paid to the Applicant was awarded only in relation to the procedural violations in the finalisation of the Second Report, and not in relation to the improper disclosure of the Executive Summary to Member States. This follows from the Deputy Secretary-General's letter of

30 June 2009, which specifically declined to award any further compensation in relation to the disclosure of the report and any related damage, and which specified that the awarded compensation was only in relation to the violations in the preparation of the Second Report. The letter stated, specifically:

> [T]he Secretary-General considers that your due process rights were violated because you were not made aware of the scope of the possible misconduct contained in [the Second Report], and you were not given the opportunity to provide further evidence or responses to the allegation(s) contained in this report prior to its finalization. …
>
> The Secretary-General, however, does not accept the JAB's recommendation that you "be issued a letter of apology from OIOS for having allowed your name to be tarnished and your reputation sullied by unproven accusations". The Secretary-General notes that there is no evidence in the record to show that OIOS disclosed its reports to the *Washington Post*. In light of the foregoing, the Secretary-General considers that your due process rights were not violated in this respect and has decided to take no further action.

28. The Tribunal finds that the amount of one year's net base salary, as agreed by the Respondent, is sufficient to compensate the Applicant only for the failure of due process in the course of the preparation of the Second Report. However, the subsequent improper disclosure of the Report and the harm it caused are separate issues.

29. In assessing the quantum of compensation the Tribunal may consider, among other things, non-pecuniary harm, including emotional distress and harm to reputation (which is distinct from actual economic loss). Non-pecuniary harm is sometimes referred to as "moral damage" or "moral damages", particularly in jurisdictions with civil law tradition. Generally, the burden is on the injured party to substantiate her or his claims for such damages. The amount of compensation depends on the particular circumstances of each case and should be proportionate to the established harm.

30. The Tribunal is persuaded from the factual circumstances in this case and from the parties' submissions that the Applicant suffered non-pecuniary harm, including emotional distress and harm to reputation. The Tribunal notes, in this

regard, the JAB Report, which referred to the Applicant's "shocked" reaction to the disclosure of the Executive Summary. Additionally, it is apparent to the Tribunal that any reasonable person would inevitably suffer serious anxiety and emotional distress if put through the same ordeal. Furthermore, as the Tribunal stated in *Klein* UNDT/2010/207, the Respondent's failure to reasonably exercise the discretion to withhold or modify the procedurally flawed document resulted in "a serious personal and professional blight on the Applicant's character". In light of the aforesaid, and considering the publicity and continuous harm caused to the Applicant, the Tribunal is therefore satisfied that the Applicant's submissions regarding the negative effects of this proven breach are not merely speculative (see *Chen* 2011-UNAT-107).

31. Having given due and careful consideration to both parties' submissions and the record, the Tribunal finds that the Applicant should be compensated by an award of USD60,000 for the emotional distress and anxiety suffered by him as a result of the Respondent's actions, as well as for the damage caused to his reputation (see *Shkurtaj* 2011-UNAT-148, *Shkurtaj* UNDT/2010/156, and former United Nations Administrative Tribunal Judgment No. 1029, *Bangoura* (2001)). This sum is in addition to the one year's net base salary already paid to the Applicant in connection with the separate issue of procedural violations committed during the preparation of the Second Report.

**Orders**

32. The Second Report, the Executive Summary, and any other adverse material pertaining to the matters raised in the Second Report shall be removed from the Applicant's personnel file and any working files maintained by organizational units of the Organization.

33. Within 60 days of the date this Judgment becomes executable, the Respondent shall send a statement to the Member States that received the Executive Summary, attaching a copy of the present Judgment and *Klein* UNDT/2010/207 and an accompanying statement that: (i) the Tribunal found the Second Report and the

Executive Summary to be procedurally flawed and in breach of the Applicant's terms of appointment; (ii) the Tribunal found that the disclosure of the Executive Summary to Member States was improper; and (iii) the Second Report and the Executive Summary have been removed from the Applicant's personnel file and any working files maintained by organizational units of the Organization.

34. Further, to compensate the Applicant for the Respondent's failure to reasonably exercise the discretion to withhold or modify the Executive Summary of the Second Report and for the resultant non-pecuniary harm, the Respondent shall pay him USD60,000. This sum is to be paid within 60 days from the date the Judgment becomes executable, 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 Ebrahim-Carstens

Dated this 28th day of September 2011

Entered in the Register on this 28th day of September 2011

(*Signed*)

Santiago Villalpando, Registrar, New York