UNITED NATIONS DISPUTE TRIBUNAL

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| Case No.: | UNDT/NY/2010/057/ UNAT/1576 |
| Judgment No.: | UNDT/2011/182 |
| Date: | 26 October 2011 |
| Original: | English |

**Before:** Judge Coral Shaw

**Registry:** New York

**Registrar:** Hafida Lahiouel

SEDDIK BEN OMAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
François Loriot

**Counsel for Respondent:**
Stephen Margetts, ALS/OHRM, UN Secretariat

Notice: This Judgement has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

**Introduction**

1. The Applicant appealed to the former United Nations Administrative Tribunal ("UNAT") on 28 January 2008 against three administrative decisions: the non-renewal of his fixed-term contract beyond its expiry date of 12 March 2005; the denial of payment of his salary and increments for the last two months of his employment when he was on sick leave; and the placement of an adverse note ("Note") on his Official Status File ("OSF") on 13 July 2006.

2. The case was transferred to the United Nations Dispute Tribunal on 17 March 2010. The case has been through a case management process during which each party had the opportunity to make submissions in addition to those in the original application and reply.

3. The Applicant seeks the following relief:

a. To find and rule that the Respondent's decisions violated the requirements of the Staff Regulations and Rules and pertinent administrative instructions by not addressing the Respondent's obligation to comply with due process, objectivity and professionalism in investigation matters and in placing adverse material in the Applicant's OSF without any due process;

b. To rescind the decision of the Secretary-General placing the Office of Human Resources Management ("OHRM") Note of 13 July 2006 in the Applicant's Official Status File ("OSF") and its related decisions of 31 August 2007 on the Joint Appeals Board ("JAB") report of 10 January 2008;

c. To reinstate the Applicant retroactively in his post to 12 March 2003, in view that the non-renewal of his fixed-term contract was ill-motivated, null and void;

d. To compensate the Applicant in the amount of 3 years' net base salary for the abusive decisions placing the adverse Note in his OSF, for the 12 March 2003 wrongful termination and non-renewal of the Applicant's contract, and for the subsequent loss of employment resulting from adverse work references by his former employer, the Respondent;

e. To reinstate the Applicant's medical coverage for the January/February 2005 sick leave, in order for him to claim that period's medical expenses;

f. To order the Respondent to pay the salary arrears for the Applicant's last two months of service, including the authorised sick leave between 5 January 2005 and 18 February 2005, as well as Hazard Pay and Daily Subsistence Allowance ("DSA") for the period 15 October 2004 to 22 December 2004;

g. To award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof, and for the harm to his career and reputation;

h. To fix the amount of compensation to be paid in lieu of specific performance by the Secretary-General within three months of the judgment, at three years' net base salary in view of the special circumstances of the case.

i. To award legal costs of USD10,000 against the Respondent.

**Issues**

4. The issues are as follows:

a. Is the claim regarding the decision not to renew the Applicant's contract receivable and, if so, was that decision lawful?

b. Was the placement of the adverse Note in the Applicant's OSF lawful and/or in compliance with ST/AI/292 of 15 July 1982 entitled "Filing of adverse material in personnel records"?

c. Is the Applicant entitled to any reimbursement of salary or other entitlements due to him at the time of separation?

d. Is the Applicant entitled to relief including reinstatement and/or compensation?

**Request for additional evidence**

5. In a joint submission to the Tribunal, the parties stated that they agree to the facts in paragraphs 3 to 13 of the JAB report. The Respondent considered that the submissions placed before the former UN Administrative Tribunal are sufficient for the Tribunal to dispose of the matter on the papers, except for two emails concerning the reasons and circumstances of the Applicant's separation, which it submitted following case management. Those emails are relevant and will be taken into account.

6. The Applicant sought a hearing of the case as he wished to call additional evidence from human resources officials from international agencies to which he had submitted job applications following his separation who were given adverse references on the Applicant by OHRM/UN officials.

7. If this additional evidence is relevant to and necessary for the proper disposal of the issues before the Tribunal then an oral hearing would be required.

8. As this evidence concerns the job applications made by the Applicant since his separation, it is not relevant to the Applicant's substantive claims. Although it may have some relevance to the Applicant's claims for remedies, the Tribunal is satisfied that there is sufficient evidence before it to enable a decision on remedies to be made without any further evidence

9. The Applicant also alleges that evidence should be called to rebut some findings by the Office of Internal Oversight Services ("OIOS"). He refers to a hotel manager who he says would confirm that the Applicant was a guest at a particular hotel despite OIOS' statement to the contrary, and to diplomats in Jordan who were witnesses to the Applicant's supervisor's state of "ebriety (sic.)". These last three items of evidence would be relevant to a review of the OIOS investigation but it is beyond the scope of the issues before the Tribunal. That evidence is not relevant to the three substantive issues of the case.

10. Having considered the Applicant's request to call evidence additional to that referred to in the JAB report, the Tribunal holds that this case can be determined on the extensive papers filed and that a hearing is not required to do justice in this case.

**Facts**

11. The Applicant was a former P-4 level Political Affairs Officer with the United Nations Assistance Mission for Iraq ("UNAMI"). He held fixed-term contracts from October 2003 which were renewed for three or six months. The last renewal was for two months until 13 March 2005. The reasons given for non-renewal were given to the Applicant at the time. There is no evidence that the non-renewal related to performance issues.

12. The Applicant was absent from duty from 24 December 2004. On 5 January 2005, the Applicant took a holiday in Morocco. He says he became sick and was hospitalised. Once he was advised by doctors that he could travel, the Applicant contacted the Special Representative of the Secretary-General for Iraq

("SRSG") to inform him that he had recovered and would be returning to his post in Iraq. He was told instead to travel to New York and wait for further instructions. He provided a medical certificate from his doctor in Morocco for the period from 4 January to 4 February 2006. He later provided another certificate for the period from 11 January 2005 through 18 February 2005. On or about 26 February 2005, the Applicant was verbally informed in New York by the SRSG that it had been decided that his contract would not be renewed.

13. On 13 March 2005, he was given formal written advice of the end of his contract.

14. The Applicant states that, after his separation, he took steps to have his complaint conciliated and reviewed by the Under-Secretary-General of the Department of Political Affairs ("USG/DPA"). He also took advice from the Office of the Ombudsman.

15. In August 2005, approximately five months after the expiration of his contract and while awaiting the outcome of these processes, the Applicant made a series of serious allegations concerning the conduct of the SRSG. In a letter to the Chief of Staff at the United Nations headquarters he sought "redress for the hardship he had experienced as a result of his senior officers' mismanagement and corruption". He said he had been advised to seek redress through legal action but decided to write his letter instead.

16. An investigation into the Applicant's allegations against the SRSG was commenced by OIOS in December 2005.

17. The OIOS undertook a comprehensive investigation into each of the 13 allegations made by the Applicant as well as into three complaints from other sources. Two of the latter complaints were found to have substance and the SRSG subsequently reimbursed the Organization the sum of USD2,148.40 for personal telephone bills and USD6,000 as repayment of claims for food and beverage by him

that could not be substantiated. The rest of the allegations were either refuted in their entirety or were found to have insufficient evidence to support them.

18. In addition to these findings, the OIOS report made observations about the Applicant who had been interviewed on 5 occasions. It said that it had found him to be imprecise, vague and careless when providing information and that his inability—and some refusals—to provide information or supporting evidence raised questions about the bases for his complaints.

19. In its conclusions, OIOS observed that the Applicant's contract had not been renewed and that he had been sufficiently upset to raise the allegations at the highest level against the person he saw as responsible for his predicament. It then stated:

> 161. …That fact alone is not sufficient to call his/her motives into question; however, the evidence acquired by the Investigators reveals the complainant's failure to have due regard for the accuracy of the allegations and for the need to ensure that the information he/she used to support them had merit. In each instance the complainant was given every possible opportunity to provide additional information/evidence to clarify his/her claims or to retract them. In a few instances, he/she presented some additional information, but as the report reveals none supported his/her allegations.
>
> 162. No investigating body insists on full proof of allegations of wrongdoing from the complaining party, especially when the crucial evidence might be outside of the complainant's control and/or is under the control of the subject. However, the repeating of rumours, gossip or even press reports cannot be a basis for a claim of good faith without more.
>
> 163. [Investigation Division ("ID")]/OIOS did not find evidence that the complainant transmitted the information regarding the allegations with "knowledge of their falsity or with willful disregard of their truth or falsity" as required in ST/SGB/273, paragraph 18(e). However, the complainant's failure to accurately report information to ID/OIOS throughout the course of this investigation, his/her refusals to provide supporting information and his/her failure to reasonably clarify the information before providing it to ID/OIOS, evidence a disregard for the truth, which reflects poorly on his/her integrity and credibility. Such conduct does not reflect the standards of behaviour required of international civil servants as described in the United Nations Charter, Article 101, which requires staff to

> demonstrate "the highest standards of efficiency, competence and integrity". It should be noted that the complainant is not currently employed by the UN and therefore no further action can be taken.

20. OIOS made no recommendations about the Applicant. It made three recommendations about strengthening control mechanisms in relation to the use of UN communications assets and staff recruitment.

21. In a letter dated 13 July 2006, the Officer-in-Charge of OHRM notified the Applicant of the OIOS conclusions. The covering letter stated:

> A Note will be placed in your Official Status File, which will refer to the findings made by ID/OIOS concerning your conduct in this case, and which will state that you should not be employed by the Organization in the future.

22. A copy of the Note was attached to the letter. It said that the investigation had found evidence of two administrative shortcomings by the SRSG, but otherwise concluded that none of the allegations of misconduct made by the Applicant against the SRSG had been substantiated. It said that ID/OIOS had concluded that the Applicant had refused to accurately report information during the course of the investigation, refused to provide supporting information and failed to reasonably clarify information before providing it to the investigators. The Note also observed that because the Applicant had not properly participated in the investigation, OIOS concluded that he had demonstrated a disregard for the truth. OIOS went further, finding that this conduct did not meet the standards of behaviour required of international civil servants under Article 101 of the Charter of the UN.

23. The Applicant acknowledges that he was not sent the Note, but neither the letter from OHRM nor the Note attached to it referred to the Applicant's right to comment on or rebut the contents of the Note. He did not send a rebuttal of the contents which could be placed on the file but the next day, on 14 July 2006, submitted a request for suspension of the action (i.e. the placement of the Note) to the JAB. He was informed that, as the Note was already placed in his OSF, his request was rejected.

24. On 18 October 2006, following an unsuccessful administrative review of the decisions not to renew his fixed-term appointment beyond 12 March 2005, to deny him payment of his salary and entitlements and to place a Note on his OSF in connection with the findings of OIOS, the Applicant filed a statement of appeal with the JAB.

25. The JAB rejected the Applicant's claim that the non-renewal violated his rights and his claim for compensation, but found that the retention of the Note on his file without an opportunity to review and respond to the allegations against him would be a violation of his rights.

26. On 31 August 2007, the Secretary-General subsequently agreed with the unanimous conclusions of the JAB Panel and decided to take no further action with respect to the Applicant's appeal concerning the non-extension of his contract or his appeal concerning the payment of salary and entitlements for the period of 4 January 2005 to 18 February 2005.

27. In relation to the JAB finding on the Note, the Secretary-General decided that if the Applicant provided a written undertaking to observe confidentiality, the OIOS report, redacted as necessary, would be released to the Applicant to allow him to comment on the merits of the conclusion. His comments would be placed on his OSF.

28. A redacted version of the OIOS report was provided to the Applicant. He did not provide comments for his OSF file but, in response, appealed to the former United Nations Administrative Tribunal. In his application, the Applicant maintains that the report supplied to him was redacted and incomplete. For example, it does not refer to the Applicant's corroborating witnesses being interviewed by OIOS and gave no explanation for its failure to contact them.

29. The Applicant says that, since his separation, he unsuccessfully applied for positions within the UN system. He provided a list of Political Officers positions in the United Nations Interim Force in Lebanon, the United Nations Missions in Sudan,

Haiti and Congo, a Human Rights Officer post in Jordan with the UN Office for Project Services and unspecified positions with the United Nations Development Programme in Jordan and Lebanon. The list suggests that he made at least ten applications for employment with the Organization between 30 April 2005 and 18 August 2006. He says that since the termination of his contract he has been left without work and revenue. He has been compelled to sell his house. He produced a mortgage default document and a notice of foreclosure sale of a property which are not in his name, but their authenticity has not been challenged by the Respondent.

30. In 2007, the Applicant and the Respondent corresponded about his entitlements upon separation. By letter dated 22 May 2007, the Applicant was informed that, upon processing his final pay upon separation, it was determined that he had been overpaid USD9,687.02. This was because he had been placed on leave without pay from 2 to 23 February 2005. Taking into account the sick leave and annual leave he would have accrued until 12 March 2006, his leave entitlements ended on 1 February 2005.

31. The Respondent provided the Tribunal with a memorandum on behalf of the Medical Director of the Medical Services Division, dated 7 May 2007, confirming that the Applicant was on certified sick leave for 46 days (from 4 January 2005 through 10 January 2005, and from 11 January 2005 through 18 February 2005).

32. The Respondent also provided a Time and Attendance Review record dated 18 April 2007, which shows that, at the beginning of 2005, the Applicant had accrued a total of 20.5 leave days with UNAMI comprising 10 days sick leave and 10.5 annual leave days. These leave entitlements were applied to the period 1 January 2005 to 17 January 2005 when the Applicant was on certified sick leave. Following that, although he was still certified as sick, he had exhausted his leave entitlements and was placed on Special Leave Without Pay. He was reinstated on full pay on 24 February 2005, the date he reported to the UN headquarters in New York, until the end of his fixed-term appointment.

33. The Respondent also produced work sheets showing the calculation of overpayment as well as his final statement of payment and earnings. The Applicant signed an agreement to have the overpayment deducted from his pension settlement.

34. The Applicant produced a single page setting out the amount of his claims for extra payments without explanation of the basis of these claims in spite of being ordered by the Tribunal to provide a calculation on 28 September 2010 and having been granted an extension to do the same on 6 December 2010. This calculation reads as follows:

> Calculation of DSA and hazard pay for the indicated periods of [the Applicant's] contract ending March 2005.
>
> DSA for Iraq from 12 October 2004 till 22 December 2005 = [USD]11,200
>
> Plus 2 and half months hazard pay = [USD]2,000
>
> Total: [USD]13,400 […]
>
> In addition the last 2 weeks of work for March 2005 totaling [USD]4,550 […], were never paid.

**Applicant's submissions**

35. The Applicant's closing written submissions summarised his previous pleas and submissions to the Tribunal. The Applicant submitted that he has discharged the burden of proof in his three main claims.

*Non-renewal of contract*

36. The Applicant did not address the Respondent's submission that this claim was out of time and, therefore, not receivable. He maintained that the evidence submitted showed that his performance was satisfactory and that he was a talented staff member. The Applicant alleges that the Respondent has not rebutted the allegation of discrimination against him and other Arabic staff, nor explained its reasons for non-renewal. By inference, in his submission, the Tribunal should find that the decision had no valid rationale.

*Adverse Note on file*

37. The Applicant maintains that it is common knowledge that OIOS has been discredited for the way it conducted earlier investigations. He cooperated with the OIOS investigation but it was not conducted objectively or in accordance with General Assembly resolutions. The report's contents were not communicated to him at the time of its release and he had no opportunity to comment on it.

38. OHRM did not give him advance notice before inserting the adverse comments in his OSF.

39. The OIOS investigation and the OHRM follow-up were in direct relation to the Applicant's terms of appointment, his non-renewal of contract and work relations at UNAMI.

*Entitlements claimed by the Applicant*

40. The Applicant alleges that he had not received a number of payments which were due to him. In the view of the Applicant, he has received no valid rebuttal of these claims from the Respondent

**Respondent's submissions**

*Non-renewal of contract*

41. The Respondent submits the application is time-barred, as it was made outside the 2-month time limit specified in former Staff Rule 111.2(a).

42. The time for the Applicant to request an administrative review of the end of his appointment ran, at the latest, from 13 March 2005. The Applicant's request for administrative review was dated 18 August 2006 and received on 8 September 2006.

*Adverse Note on file*

43. It is the case for the Respondent that the decision to place the Note on the Applicant's file was fair and reasonable. The Applicant was not a staff member at the time. The Respondent submits that, despite the Tribunal's decision in *Klein* UNDT/2010/207, ST/AI/292 does not apply to former staff members. The Respondent invites the Tribunal to infer from the relationship of employer/employee that the Administration has an ongoing obligation to maintain the integrity and completeness of the Applicant's OSF and that the Administration has a duty to update the file where relevant information is identified.

44. Whether or not ST/AI/292 applies, however, the Respondent accepts that the rights and duties of the Administration and the Applicant are effectively the same as those in the Administrative Instruction and its duty should be exercised rationally and within permissible grounds.

45. The Respondent submits that by the letter informing the Applicant that the Note would be placed on his file was sent to him on 13 July 2006, the Applicant was given an opportunity to comment on it. He did not provide comments, but instead requested an administrative review of the decision to place the Note in his file.

46. The Respondent disputes the evidence submitted by the Applicant relating to his failure to obtain employment since his separation and notes that he was provided with a reference by the former Special Envoy of the Secretary-General of the United Nations to Iraq reflecting his positive view of the Applicant's competence during the first half of 2004.

*Entitlements claimed by the Applicant*

47. The Respondent denies that the Applicant is entitled to any unpaid sick leave, DSA or Hazard Pay as the Applicant has provided no rationale for his calculations of these alleged entitlements and no evidence to support his assertion to which the Respondent can meaningfully respond.

48. In addition, the Respondent submits that these amounts have been "paid in full".

**Consideration**

*Non-renewal of contract*

49. The deadline for the Applicant to have sought an administrative review of the decision not to renew his fixed-term contract expired on 12 May 2005. His request for administrative review was therefore 15 months out of time.

50. Under Article 8 of its Statute, the Dispute Tribunal is competent to hear and pass judgment on an application if the applicant has previously submitted the contested administrative decision for management evaluation within the appropriate deadlines. This article has been interpreted by UNAT to include requests for administrative review under the former system of internal justice (see *Costa* 2010-UNAT-036). The Tribunal has no power to extend the time limits by which a request for administrative review can be sought.

51. For these reasons the Tribunal has no jurisdiction to consider the Applicant's claim against the non-renewal of his fixed-term contract.

*Adverse Note on file*

52. It is important to note that the OIOS investigation was not of the Applicant's behaviour but of the SRSG he had complained about. To that extent there was no obligation on the Organization to disclose the results of the investigation to the Applicant. It was the placement of the Note on his OSF arising from the interpretation of the Respondent of the OIOS comments on the Applicant's behaviour, as the complainant during the investigation, which gave rise to the obligation.

53. The power to file adverse material in the personnel records of a staff member is conferred by ST/AI/292. This Administrative Instruction was promulgated in 1982

for the express purpose of implementing the then Secretary-General's statement that anything that is adverse to a staff member should not go on a confidential file unless it has been shown to the person concerned. The purpose of ST/AI/292 is to ensure fairness to the staff member whilst retaining the Administration's control over its records.

54. ST/AI/292 does not refer to former staff members, but it is a logical, fair and reasonable implication that, in the interests of maintaining the integrity and completeness of files, the Organization should not be precluded from placing adverse material on the file of a former staff member for future reference, should that become necessary. With that right and duty, however, comes the responsibility of ensuring that the affected former staff member is afforded the fundamental rights set out in ST/AI/292. This is because the prejudicial effect of the adverse material continues as long as it remains on the former staff member's file and will have a bearing on the future prospects of that former staff member should they wish to be reemployed by the Organization or even by outside employers if they become aware of the adverse Note.

55. ST/AI/292 recognises three potential sources of adverse information: from outside the Organization; from Member States; and, as in this case, material that relates to an appraisal of the staff member's performance and conduct. ST/AI/292 acknowledges that all performance reports, special reports and other communications pertaining to a staff member's performance are a matter of record and are open to rebuttal by the staff member. Both the report and the rebuttal are to be placed in the OSF. This file constitutes the sole repository of the documents relating to the contractual status and career of the staff member.

56. In order to ensure fairness, there are some fundamental principles of fair-dealing which must be met:

a. The Note should be accurate. This requirement is unwritten but was recognised in *Applicant* UNDT/2010/069. This is to ensure that the

staff member is able to understand fully the adverse material so that a proper response can be made and placed on the file.

b. Before placement on the file of the Note, the staff member should be given a proper opportunity to comment on it. ST/AI/292 states: "As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon". To give effect to this statement the opportunity to make comments must be fair and genuine.

57. In the present case these two fundamental principles of fair-dealing were not observed: the Note was not demonstrably accurate. Second, the Applicant was not given a fair and genuine opportunity to comment before the Note was placed on his file. These two aspects are closely linked.

58. The Note purported to be a summary of the OIOS investigation. It neither contained nor attached the full OIOS report and failed to mention the finding by OIOS that the Applicant did not transmit the information regarding the allegations with knowledge of their falsity or with wilful disregard of their truth or falsity. This is a serious omission. Culpability is usually measured by the extent to which a person has acted deliberately. A person who acts carelessly is generally not as culpable as one who acts willfully and with full knowledge. In employment law, the difference is important in evaluating the seriousness of misconduct or to gauge the extent of the employer's response to the actions of an employee.

59. In addition, had he still been a staff member, the Applicant would have had the right under ST/AI/371 to see the OIOS report (suitably redacted) and to make comments on it before a decision to discipline him for his behaviour towards the investigation was made. As he was no longer a staff member, the Applicant was not subject to the disciplinary process, nevertheless the grave finality of the statement that he should not be employed by the Organization amounted to a life-long ban on

his employment, an outcome at least as damning—if not more so—than a summary dismissal.

60. This decision was made without him seeing the OIOS report. This is a breach of his fundamental right to be fully informed of the allegations made against him and the facts and reasoning which led to the conclusions about his conduct.

61. Second, as ST/AI/292 notes, in the case of an allegation of misconduct, a staff member has the right of rebuttal. The Note was sent to him on 13 July 2006 and placed on his file on the same day. This was in clear breach of the Administrative Instruction. He was neither shown the Note nor given a fair opportunity to comment on it before its placement.

62. In spite of OIOS' finding about the Applicant's lack of willfulness, the Organization then imposed what was effectively a severe disciplinary measure without the criteria for such action having been met.

63. ST/SGB/273 (Establishment of the Office of International Oversight Services) established OIOS. In paragraph 18 of the section entitled "Investigation" it states that:

> These procedures and related arrangements are designed to protect individual rights, the anonymity of staff and others, due process for all parties concerned and fairness during any investigation, as well as to protect against reprisals.

64. Paragraph 18(e) of ST/SGB/273 provides for a case in which a false complaint is made. It reads:

> The transmittal of suggestions or reports to the office with knowledge of their falsity or with willful disregard of their truth or falsity shall constitute misconduct, for which disciplinary measures may be imposed.

This paragraph sets out the type of conduct that would attract disciplinary action. Although critical of the Applicant, OIOS expressly disavowed any such behaviour by him.

65. Paragraph 18(f) of ST/SGB/273 states:

> No action may be taken against staff or others as a reprisal for making a report or disclosing information to, or otherwise cooperating with, the Office.

66. In spite of the OIOS disavowal which was not disclosed to the Applicant and without hearing from him, the Organization imposed what was effectively a disciplinary outcome: a punitive ban on his whole UN career because he made a report which was subsequently found to be without sufficient foundation. If this type of response is permitted this would act as a disincentive to people coming forward with complaints. A situation that the paragraphs in ST/SGB/273 was designed to prevent.

67. In addition, the Respondent's actions towards the Applicant were in stark contrast to the treatment accorded the SRSG about whom he complained. Although the SRSG was found wanting in two respects he did not receive any disciplinary action apart from the repayment of monies wrongfully claimed. The treatment of the Applicant was disproportionate, unfair and not in accord with the standard of seriousness set by ST/AI/371 nor with the protective policy of ST/SGB/273 towards persons making complaints.

68. At two stages through the process which followed the placing of the Note in his OSF, the Applicant was given the opportunity to provide a response to the summary in the Note and much later, following the JAB recommendations, to see a redacted version of the OIOS report and make comments on it. He did not take up these opportunities but chose, instead, to take action through the internal justice system. Although that was his right, and noting that he was limited in his ability to respond until he could see the report, he was unwise in the meantime not to take advantage of the opportunity to mitigate the effects of the Note placement, while still pursuing his remedies.

69. The Tribunal holds that the actions of the Respondent in placing the inaccurate, adverse Note in the OSF of the Applicant before the Applicant had had a

chance to comment on it, and the failure to provide him with the full details relating to the adverse comments in the Note were in breach of the requirements of ST/AI/292 and of the duty of the Respondent to protect the rights of the Applicant to due process.

**Claim for reimbursement of salary and entitlements**

70. The Respondent has provided full records of the calculation of the entitlements due to the Applicant upon separation as well as documented evidence of his leave entitlements and the way in which these were used.

71. The Applicant disputes these records but has provided no evidence, except his own opinion, to refute the Respondents submissions on this issue. The Applicant's claims for reimbursement are not substantiated and therefore must fail.

**Conclusions**

72. The Applicant's claim relating to the non-renewal of his contract is not receivable.

73. The placement of the adverse Note on the Applicant's OSF was in breach of ST/AI/292 and the Applicant's rights to due process.

74. The Applicant's claim for salary and other entitlements is rejected.

75. All other pleas are rejected.

**Remedies**

76. Of the remedies claimed by the Applicant, two relate to the placement of the Note. He seeks rescission of the decision to place the Note and three years' net base salary as compensation for the abusive decisions placing it in his OSF.

77. The adequacy of a remedy may be measured by the extent to which it places the successful party in the same position as he or she would have been but for the breach (*Mmata* 2010-UNAT-092). In this case, the breach was non-compliance with ST/AI/292 following the non-renewal of the Applicant's contract. Until the Note was placed on his file some 17 months after his contract ended he was in a position to apply for and be considered for other positions.

78. The placement of the adverse Note stating that the Applicant should not be employed by the Organization in the future meant that whatever steps he took to obtain a new position from that time were likely to be unsuccessful, even if he was able to provide a reference. The Note clearly states that he should not be employed.

79. To place the Applicant in the position he would have been in but for the breach, the adverse Note should be removed from the Applicant's OSF.

80. The amount of compensation awarded should also be referable to the breach. Only in exceptional cases should the compensation exceed the equivalent of two years' net base salary.

81. It is also necessary to take into account the actions of the Applicant to ascertain whether he contributed to the harm he has suffered or failed to mitigate his losses.

82. As noted above, the Applicant twice did not take up the offer of the Respondent to place a rebuttal note on his OSF, once after it had already been placed there and again, in August 2007, when the Secretary-General decided to release to him a redacted version of the OIOS report. Only the second opportunity was realistic as only then was the Applicant in possession of all the facts needed to make a proper rebuttal. It is also the case, however, that the Applicant was actively pursuing his remedies at that time so cannot be accused of sitting on his hands.

83. The final factor to be taken into account is the length of time it has taken for the case to be concluded. This is because it was commenced under the old system of

internal justice and had to be transferred to the Dispute Tribunal to await a decision. It is not the fault of either party.

84. In the period up to the placing of the adverse Note, the Applicant attempted to find work by applying for numerous positions. The Tribunal accepts that, between 30 April 2005 and 18 August 2006, the Applicant made a number of attempts to obtain another position within the Organization, but that these were unsuccessful. There is no evidence that the Applicant attempted to gain employment in any outside field.

85. In the absence of evidence that the Applicant's attempts to find employment continued after 18 August 2006, it is not at all clear that his failure to obtain employment after the placement of the Note on 13 July 2006 was caused entirely by that Note, although the Tribunal recognises that its existence would have been a serious discouragement to the Applicant even applying at that stage.

86. The Applicant is entitled to have the Note removed from his file and to be compensated for the prolonged period of prejudice to him caused by the placement of the Note. The prejudice to him lay in the loss of any opportunity to successfully apply for a position with the United Nations. There was no guarantee he would have been selected for any positions for which he may have otherwise applied, but the existence of the Note deprived him of any chance.

87. Beyond this prejudice, the Applicant has not produced sufficient evidence of distress linked specifically to the placement of the Note to warrant compensation for emotional distress. The Applicant has been granted sufficient time, including being granted extensions to comply with orders, to have provided statements and/or evidence of such distress. The only references made by the Applicant to his distress related to the non-renewal decision and harassment claims. As the non-renewal decision was found not to be receivable, there can be no compensation for distress caused by that decision.

IT IS ORDERED THAT:

88. Pursuant to Article 10.5(a) of the Statute of the Dispute Tribunal, the Respondent shall, without delay, remove the adverse Note from the OSF of the Applicant and provide written confirmation to the Tribunal and the Applicant that this has been done.

89. Pursuant to Article 10.5(b), the Respondent shall pay the Applicant the equivalent of six months' net base salary calculated as at the date of the placement of the adverse Note on his file. This payment should be made within sixty calendar days of the date this Judgment becomes executable, failing which interest is to accrue to the date of payment at the US Prime Rate applicable as at the date of expiry of this period. 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 date of payment.

(*Signed*)

Judge Coral Shaw

Dated this 26th day of October 2011

Entered in the Register on this 26th day of October 2011

(*Signed*)

Hafida Lahiouel, Registrar, New York