



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/012

Judgment No.: UNDT/2011/192

Date: 10 November 2011

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pele Fomété

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for Applicant:

George Irving

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Alan Gutman, ALS/OHRM

Introduction

1. The Applicant first entered into the employment of the United Nations in February 2000 at the United Nations Mission in Bosnia and Herzegovina. He went on to serve also at the United Nations Transitional Administration in East Timor before joining the United Nations Operation in Burundi (ONUB) as Chief of Joint Logistics Operations Centre (JLOC) in October 2004 as a P4 officer.

2. Towards the end of May 2005, a complaint was filed against him by a subordinate staff member prompting an investigation by the Office of Internal Oversight Services (OIOS). He was subsequently charged with misconduct and summarily dismissed from the service of the Organization in January 2008.

3. The Applicant's appeal against his summary dismissal was transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010 in the framework of the transitional measures related to the new system of administration of justice.

4. On 23 June 2011, this Tribunal issued judgment in the Applicant's case and decided that the actions for which he was charged and dismissed by the Organisation did not amount to serious misconduct as found by the Secretary-General. The Tribunal also decided that the imposition of the sanction of summary dismissal on the Applicant was wrongful.

5. In the said judgment, the Tribunal ordered that the Parties were to agree on remedies failing which it would hear and decide on the matter. Due to a failure to reach agreement on the matter of remedies by the Parties, the Tribunal heard submissions of both Parties on the matter on 27 October 2011.

6. In view of the foregoing considerations, the Tribunal makes the following **ORDERS**:

Rescission

7. Article 10.5 of the UNDT Statute provides for remedies. Under the said provision, remedies may include rescission, specific performance and monetary award of compensation. A judgment in which it is decided that the summary dismissal of the Applicant was wrongful calls for a rescission of the said sanction. Accordingly, the summary dismissal of the Applicant which became effective on 17 January 2008 is hereby RESCINDED.

8. At the time of his wrongful dismissal, the Applicant's 100 series contract had lapsed on 31 December 2007. He continued to serve on a *de facto* contract before being notified of his summary dismissal on 9 January 2008. Indeed with regards to the subject of the recovery of a lump sum payment made to the Applicant for family visit, the Administrative Law Unit in an email of 25 January 2008 to Chief Civilian Personnel Officer of the United Nations Integrated Office in Burundi (BINUB) and a facsimile message of 29 January 2008 made the point that the Applicant had a reasonable expectation that he would remain in service beyond the date of his wrongful summary dismissal.

9. Accordingly, the Applicant is deemed to still remain in the employment of the United Nations Organization from 17 January 2008 up and until the date of the judgment of the Tribunal which is 23 June 2011.

10. He shall be paid his net base salary for the said period from 17 January 2008 till 23 June 2011 at the P4, step 9 level including the restoration of his pension benefits. Since the object of this order is to make good the Applicant's position and place him in the position in which he would have been had the wrongful sanction not been imposed, his net base salary for this period shall be paid less his net base earnings for the periods during which he was in other employment. Information placed before the Tribunal in this regard which is not challenged by the Respondent is that the Applicant was employed from 18 September 2008 until January 2009 on a net base salary of \$4,500 per month and again from 30 October 2010 till March 2011 on a monthly net base salary of \$5,300.

11. The Tribunal refuses the request that the Applicant ought to be compensated on a P5 scale and agrees with the Respondent's argument that such an award would be merely speculative.

Reinstatement

12. An order for the reinstatement of the Applicant is hereby made as provided for under article 10.5.

13. In the event that he cannot be reinstated, the said Applicant shall receive the equivalent of two years net base salary at the P4, step 9 level *in lieu* of reinstatement and at the rate in effect on the date of the Applicant's separation from service.

Due process violations

14. For the violations of the Applicant's due process rights, he shall receive compensation of four months net base salary at the P4, step 9 level.

Moral damages

15. A summary dismissal is the most severe sanction that the Respondent may impose on a staff member for serious misconduct. Judicial notice is taken of the fact that this sanction when wrongfully imposed will necessarily bring about damage to professional and social reputation, harm to career prospects, stigma and

16. The Applicant has submitted that he additionally suffered stress that brought on the medical condition of hypertension. He has placed before the Tribunal a medical report evidencing that he developed the said medical condition. The said report is unchallenged although the Respondent argued that it is not shown that the said medical condition can be traced to the wrongful summary dismissal. The Tribunal is satisfied that the medical condition bears sufficient relevance to stress brought about by the summary dismissal.

17. It must be borne in mind that the alleged misconduct, for which the Applicant was investigated, charged and subsequently dismissed included sexual harassment which

constitutes criminal conduct in most legal jurisdictions of the world. The investigation and disciplinary process against him within the Organisation lasted about two and a half years.

18. The Tribunal finds that the Applicant has also suffered harm to his career prospects, damage to his professional and social reputation as a result of his summary dismissal. An award of nine months net base salary is made in favour of the Applicant for the totality of the moral damages suffered.

Repatriation grant

19. A staff member who is summarily dismissed loses his entitlement to be repatriated to his home or country of permanent residence. The Applicant had to leave the ONUB in Burundi on account of his wrongful dismissal at his own expense. The order for his reinstatement or compensation *in lieu* thereof does not affect that reality.

20. The Tribunal rejects the Respondent's argument that such an award is antithetical to an order rescinding the Applicant's summary dismissal and his reinstatement.

21. The Applicant shall be paid a repatriation allowance in the amount normally made by the Organisation in January 2008 when the Applicant was forced to leave Burundi.

Education grant

22. The Applicant also asks for the payment of a balance of the equivalent of £2000 for the completion of his son's education grant for the academic year 2007/2008. The Respondent has submitted that the said education grant was fully paid up in August 2008.

23. IMIS records submitted by the Respondent show that a disbursement in the sum of \$4259.84 representing the sum of £2146.96 was made to the Applicant for his son's education grant for the school year of 2007/2008.

24. Based on this clarification, the claim for education grant is refused.

Placement on roster

25. The Applicant had requested that he be reinstated on the roster of internal candidates for suitable P5 positions within the UN. The Respondent has argued that while the Applicant was selected for the roster for a P5 post in January 2008 and the rostering period having since elapsed, there is no basis for restoring him to the roster.

26. It is evident that following the Applicant's summary dismissal in January 2008 and throughout the period before the judgment of 23 June 2011, the Applicant could not be selected on the basis of any roster within the Organisation.

27. In order to make good the position of the Applicant and restore him to the position he ought properly to have been in if the wrongful sanction was not imposed; the Applicant shall be restored to the roster for relevant P5 positions within the Organisation effective from today, 9 November 2011.

28. All other prayers for compensation are refused.

Accountability of Managers

29. The new internal justice system that came into operation on 1 July 2009 marked the beginning of a new approach to justice delivery within the United Nations. While the General Assembly that birthed this new system hopes and expects that many of the disputes that arise between staff members and the Organisation can be informally and amicably mediated and settled, it recognises that the Dispute and Appeals Tribunals would have to deal with conflicts that defy amicable resolution.

30. In order to see that justice is done in the settlement of disputes, the General Assembly in the relevant statutes made provision for monetary compensation. In discharging its duties, especially with regard to awarding compensation, the formal system made up of the Dispute and Appeals Tribunals have on occasions been portrayed as recklessly giving away the resources of the Organisation. This is far from the truth.

31. The Tribunal wishes to call attention to the conduct of some managers who have through recklessness and their lack of the required managerial skills, engaged in actions in their official capacity that not only embarrass the Organisation but bring about heavy cost-implications in the award of monetary compensation.

32. It is necessary that the Secretary-General calls such managers to account in a way that there are real or tangible consequences for the individual manager. Accountability in the new system of internal justice on the part of managers means that not only are their wrong decisions reversed but that they commit also to respecting the relevant rules and issuances and at all times acting in good faith in the interest of the Organisation. Such commitment on their part will minimise disputes, ensure better work environment and save the resources of the Organisation for the achievement of its substantive mandates.

(Signed)

Judge Nkemdilim Izuako

Dated this 10th day of November 2011

Entered in the Register on this 10th day of November

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi