



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/028/  
UNAT/1664  
Judgment No.: UNDT/2012/062  
Date: 3 May 2012  
Original: English

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**Before:** Judge Coral Shaw

**Registry:** New York

**Registrar:** Hafida Lahiouel

SHANKS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RELIEF**

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**Counsel for Applicant:**  
Bart Willemsen, OSLA

**Counsel for Respondent:**  
Teresa López Posse, UNDP

## **Introduction**

1. In Judgment No. UNDT/2011/209, issued on 8 December 2011, the Tribunal found that the Office of Human Resources (“OHR”) of the United Nations Development Programme (“UNDP”) had violated the Applicant’s rights under her employment contract by (see para. 95 of the Judgment):

- a. Not advising in a timely manner the Applicant or her private attending physician, Dr. Alex Moroz, that the consequence of a disability finding by the United Nations Staff Pensions Committee (“UNSPC”) would be termination of her appointment. If she had had that information before 10 April 2006, it is unlikely that she would have given consent for her case to go to the UNSPC;
- b. Not informing the Applicant, or any of the relevant medical advisors, about the possible alternative of her gradually returning to work on part-time basis instead of her obtaining disability benefit or special leave with pay;
- c. Not telling the Applicant on 11 April 2006, when she had changed her mind, that the case had already been submitted to the UNSPC so that she could take steps to rectify the situation at an early stage;
- d. Not ensuring that the UNSPC knew that the Applicant had had a change of heart regarding her being declared disabled;
- e. Continuing with the referral to the UNSPC contrary to the Applicant’s explicit request;
- f. A systemic failure in the lack of any policy for a gradual return to work for the Applicant which meant that neither the OHR nor the Special Unit for South-South Cooperation (“SSC”), UNDP, ever gave this option proper consideration;

g. Terminating the Applicant's appointment when the medical evidence of her incapacity was inconclusive as her physician had already cleared her for resuming her duties albeit with some limitations.

2. In addition, the Tribunal found that whilst it was not competent to review the medical decisions of the Medical Services Division ("MSD"), other entities such as OHR must be able to count on the advice obtained from the MSD and that in this case the MSD failed to meet its responsibility to act in a consistent and coordinated manner and that its acts and omissions contributed to the Secretary-General's resultant failures.

3. The Tribunal adjourned the decision on remedies to enable the parties to attempt an agreed settlement given the complexity of the matter and range of options available. As this was not possible in spite of two extensions of time, the parties filed closing written submissions on the matter of remedies.

#### **The parties' principal submissions on remedies**

4. Pursuant to art. 10.5 of the Statute of the Dispute Tribunal, the Applicant requests compensation for damages caused by the wrongful termination of her contract. For pecuniary harm, she claims 75 percent of the net base salary she would have received for a period of 24 months, which is the equivalent of 18 months for the period of her latest appointment prior to the accident. In addition, the Applicant requests compensation for non-pecuniary harm in the amount of USD60.000.

5. The Applicant acknowledges that the total amount of compensation requested would exceed the limit set in art. 10.5 of the Statute, but submits that the exceptional circumstances of her case warrant the compensation requested.

6. The Respondent submits that the maximum level of compensation for material harm, if awarded, should be 12 months' net base salary, starting at 40 percent of the

Applicant's net base salary for the first six months and transitioning into 50 percent of the Applicant's net base salary for the subsequent six months.

7. In making this submission, the Respondent invites the Tribunal to also take into consideration the fact that the Applicant denied herself the right to receive the disability benefit awarded by the UNSPC, and therefore did not mitigate any potential economic loss suffered during the appeal process.

### **Consideration**

#### *Calculation of compensation*

8. In *Antaki* 2010-UNAT-095, the United Nations Appeals Tribunal determined that compensation may be awarded for "actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury".

9. The Tribunal will determine the amount of income the Applicant is likely to have earned but for the impugned decision (pecuniary damages) and the extent of the non-pecuniary harm caused to her by the decision to terminate her.

#### *Pecuniary damages*

10. To establish what pecuniary loss was suffered by the Applicant due to the wrongful termination of her employment, it is necessary to consider her fitness to return to work; the likely duration of the contract she could reasonably have expected to have been given; and the amount of work she would likely have been able to perform in view of her disability during the hypothetical contract period.

#### Fitness to return to work

11. The Respondent submits that the Applicant may not have been in a position to resume her duties even on a part-time basis because the UNSPC first needed to reverse its position and that this was subject to medical clearance by the MSD.

12. In the Judgment on liability, the Tribunal noted, based on an email dated 25 April 2006 from the (then) Medical Director, Dr. Sudershan Narula, that the MSD would have no objection to the Applicant returning to work part-time subject to Dr. Moroz's clearance, which he provided the following day. The Tribunal found that "by the date of the UNSPC hearing, MSD and OHR had received the medical clearance for the Applicant to return to work from Dr. Moroz, which Dr. Narula had in advance accepted as sufficient for not declaring [the Applicant] incapacitated" (see para. 77 of the Judgment). If this information had been provided to the UNSPC in an appropriate and timely manner, it would have had no basis for declaring the Applicant incapacitated for further service.

13. The Tribunal finds that, if it had not been for the impugned decision, it is more likely than not that the Applicant would have been found fit to resume her duties, initially on a part-time basis.

The likely duration of a contract with UNDP had the Applicant not been improperly terminated

14. At the time of her accident (27 September 2004), the Applicant had been working for SCC for almost a year, after having worked for UNDP since 1995 in different positions and being gradually promoted from the G-3 to the G-6 level. Her contract at that time was for 18 months, starting 3 July 2003 and ending on 2 January 2005. After that, while not working due to her injuries, her contract was extended for several shorter periods (from one to six months) until 30 June 2006, the date of her termination.

15. The Respondent submits that it cannot be said with any level of certainty that the Applicant would have been able to continue her employment in the SCC at all and that her claim for compensation for a period of 24 month's net base salary is, at best, excessive. It suggests that a period of 12 months would have been more realistic.

16. The Applicant's most recent extension of her contract before her accident was for 18 months. In the light of this and the positive statements about her performance, the Tribunal concludes that it is more likely than not that she would have been offered an extension for, at least, the same time period had her employment not been improperly terminated, meaning that she would have been offered an 18-months contract from 1 July 2006 and until 31 December 2007. Without further evidence, it would be speculative to find that her contract would have been extended beyond this date.

17. The Respondent also submits that the Applicant failed to observe her duty to mitigate her actual losses as she "denied herself the right to receive the disability benefit awarded by UNSPC, thereby mitigating, during the appeal process, any potential economic loss suffered".

18. The duty for an aggrieved party to mitigate her/his losses by requiring the demonstration of reasonable efforts to obtain other employment to limit her/his income loss during the relevant time period has its foundation in internationally recognised legal principles and has been affirmed in the jurisprudence of the Dispute and Appeal Tribunals (see *Tolstopiatov* UNDT/2011/012 and *Mmata* 2010-UNAT-092).

19. In the present case, the Tribunal found that the Applicant sought work during the relevant period and managed to secure some limited employment (see para. 59 of the Judgment on liability). Had she claimed the disability benefits to which she was entitled she would have acquiesced to the finding of disability and thus obstructed her chances for obtaining any further employment with the United Nations. The Tribunal does not accept the Respondent's contention concerning mitigation.

20. Although the actual income which the Applicant obtained during the relevant 18 months' period should normally be offset in the award for damages for actual income, the Respondent did not rely on this point in its submission. Having

considered the limited nature of her actual paid employment, the Tribunal finds that any offset would be so minimal that it should not be taken into account.

The Applicant's working capacity from 1 July 2006 to 31 December 2007

21. On 27 April 2006, Dr. Moroz reaffirmed the Applicant's capacity to work part time as of 1 May 2006 for 16 hours a week, subject to seven limitations, including the need for her to take regular breaks. In oral evidence to the Tribunal, Dr. Moroz said that she would even have been capable of 20 hours of work a week and that he would have permitted this had she been required to do so by the Respondent.

22. The Respondent submits that based on the evidence available, if the Applicant's medical clearance had been obtained, she would likely have returned to work on a 40 percent part-time basis and transitioned into a 50 percent part-time basis upon showing improvement.

23. The Applicant accepts that the content of a letter from Dr. Moroz dated 11 January 2008 does not conclusively demonstrate that, at that point in time, she was able to perform her duties on a full-time basis. However, in that letter, Dr. Moroz states that there is "an apparent improvement in her ability to function since April 2006" and that he "suspect[ed] that were [the Applicant] to undergo a repeat situational work assessment she may no longer require accommodations in the work place".

24. In addition, the Applicant testified under oath that not long after the termination of her appointment she was able to assume a number of consecutive short-term positions in outside entities, some unpaid, from April 2006 (see para. 59 in the Judgment on liability).

25. On the other hand, as evidence of her continuing incapacity, the Respondent relies on the unquestioned assessment of the Advisory Board on Compensation Claims ("ABCC"), which, on 10 August 2006, found the Applicant's impairment to

be at 39 percent permanent loss of function of the whole person and recommended the award of USD100,435.14 to the Applicant.

26. However, based on the evidence before it, the Tribunal accepts the Applicant's explanation of this payment that ABCC's conclusion was based, in whole or in part, on the determination of the UNSPC, which was founded on inaccurate and incomplete information it had received from MSD (paras. 18, 36 and 92 of the Judgment on liability).

27. In light of the employment the Applicant actually undertook and Dr. Moroz's estimate about her capacity to work at least 20 hours a week as early as in April 2006, the Tribunal finds, on the balance of probabilities, that, while that Applicant could have started work at 16 hours a week in March 2006 on medical advice, at least by 1 July 2006, she was fit to return to more consistent employment. The Tribunal concludes that, in light of her recovery after that date, it is reasonable to assume that, within the given 18 months, she would have been able to gradually increase her working hours from 20 hours a week (50 percent) up to full-time employment (100 percent).

#### Conclusion on pecuniary harm

28. The Tribunal concludes that, as compensation for lost income caused by her improper termination, the Applicant is entitled to 75 percent of the full-time salary she would have obtained had she been extended for an additional 18 months from 1 July 2006 to 31 December 2007.

#### *Non-pecuniary harm*

29. A person seeking an award for non-pecuniary harm must present evidence of the adverse effects on him or her of the legal wrong. Such damages are awarded in light of the particular circumstances of the case and of the specific harm caused by the legal wrong to the aggrieved party (*Antaki*).



30. The Tribunal accepts the Respondent's submission that he cannot be held responsible for any humiliation that was caused by incapacity arising from the accident as this was not his responsibility. The Applicant can only be compensated for the effects of the breaches committed by the Respondent.

31. The Respondent submits that the Applicant has offered no concrete evidence of the adverse effects of the contested decision, which she claims had an "enormous impact" on her "well-being" and caused her "enormous moral damage". He further submits that his officials acted in good faith and any harm caused to the Applicant was not the result of ill will.

32. The Tribunal notes that pursuant to art. 10.7 of its Statute, exemplary or punitive damages may not be awarded; therefore, in principle, the subjective motives of the officials responsible for infringing an aggrieved individual's employment contract is not a factor in calculating the amount of compensation.

33. The harm suffered by the Applicant in this case arose from the failure of the Organization to give her a chance to resume her work after suffering serious injuries. On the evidence of the Applicant, the Tribunal finds that she suffered considerable frustration and anxiety when she realised that her wishes had been overlooked by UNSCP by declaring her incapacitated when she specifically asked for it not to do so. She also suffered immaterial damage from the shock of learning of the decision to terminate her employment.

34. She also suffered the stress and anxiety of pursuing the claim against the decision that she was incapacitated while at the same time demonstrating her increasing capacity for work. The Tribunal accepts that this was a humiliating experience for her and one that she would not have had to undergo had a proper decision been made at the relevant time.

35. In her oral evidence, the Applicant stated that her foremost career ambition was to be reemployed by UNDP. By being improperly terminated, she lost such

possibility, at least until she was finally cleared by MSD to return to work in 2009 or 2010. Furthermore, on 15 June 2009, UNIFEM withdrew its initial offer of 28 November 2008 for a fixed-term appointment for the Applicant because she did not have medical clearance (see the Judgment on liability paras. 51 and 54). Had her contract with UNDP not been terminated, the issue of such clearance would not have occurred.

36. The Tribunal finds that the Applicant's personal and professional life was seriously impaired by the negligence of the responsible officials resulting in her being wrongfully terminated.

37. Awards of compensation made by the Tribunal in comparable cases of emotional harm and violation of due process rights, where the Applicant has lost an employment opportunity, have variously been between three and six months' net base salary or by way of lump sum awards. Examples include *Alauddin* UNDT/2010/200 (USD30,000), *Lutta* UNDT/2010/097 and *Chen* UNDT/2010/068 (affirmed by the Appeal Tribunal in Judgments No. 2011-UNAT-181, 2011-UNAT-117 and 2011-UNAT-107, respectively) as well as *Ostensson* UNDT/2010/120 and *Gaskins* UNDT/2010/119.

38. Since the non-pecuniary injuries, which the Applicant endured as a result of her wrongful termination, do not relate to either her employment category or level, it is appropriate to calculate this as a lump sum rather than base it on the aggrieved individual's salary (see also *Applicant* UNDT/2010/148, para. 29).

39. The Tribunal finds that USD50,000 would be appropriate compensation to the Applicant for her non-pecuniary harm.

### **Conclusion**

40. In light of the above findings and pursuant to art. 10.5 of the Statute of the Dispute Tribunal, the Respondent is ordered to pay the Applicant as follows:

- a. *Pecuniary damages*: 75 percent of the full-time salary net base she would have obtained had her contract in SSC, UNDP, been extended for an additional 18 months' period, from 1 July 2006 to 31 December 2007; and
- b. *Non-pecuniary damages*: USD50,000.

41. Should the total amount of compensation awarded by the Tribunal exceed the cap of two years' net base salary cap as stipulated by art. 10.5 of the Statute of the Dispute Tribunal, the compensation is to be limited to two years' net base salary as the Applicant has failed to specify the exceptional circumstances to justify any higher award.

42. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed in para. 40-41 above is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total 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 Coral Shaw

Dated this 3<sup>rd</sup> day of May 2012

Entered in the Register on this 3<sup>rd</sup> day of May 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York