



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/068

Judgment No.: UNDT/2012/067

Date: 9 May 2012

Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

MOKBEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RELIEF

Counsel for Applicant:

Edwin Nhliziyo

Counsel for Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. This is a Judgment on relief following a hearing that took place on 7 May 2012. On 1 May 2012, the Tribunal issued its Judgment on liability, UNDT/2012/061, which concerned allegations by the Applicant about the manner in which he was treated, including the lengthy delay before the disciplinary charges against him were dismissed. He asked the Tribunal to award compensation for the anxiety and distress which he says he suffered.

2. The purpose of the hearing on 7 May 2012 was to give the Applicant the opportunity of explaining and justifying the basis upon which he claims compensation for what he referred to as mental anguish and distress. The Tribunal understands this to refer to emotional harm.

3. After the hearing and closing submissions, the Tribunal adjourned to consider the matter. Later that day, the Tribunal delivered an *ex tempore* judgment. The parties were informed that this judgment would be sent in written form with minor editing and drafting, but the substance will remain. This is the written Judgment.

4. The background and the Tribunal's factual findings are to be found in the Judgment on liability. This Judgment deals solely with the issue of relief.

5. As the Tribunal indicated, at para. 23 of its Judgment on liability, there cannot be an immutable principle of law conferring an automatic entitlement to compensation to staff members who may have been acquitted of disciplinary charges. The Tribunal went on to state that, where the disciplinary charges were unnecessary, baseless, devoid of merits or brought negligently, it could amount to an abuse of power or the arbitrary exercise of power that is inconsistent with the highest standards of conduct required of staff members as international civil servants. It is not suggested that the charges were brought for improper motives.

6. At the hearing on relief, Ms. Maddox appeared for the Respondent and Mr. Nhliziyo for the Applicant. The Applicant gave evidence by video link from Haiti.

Findings on fact

7. The representatives submitted the following documents at the hearing on relief:

- a. For the Applicant, the Tribunal received a copy of what has been described as a medical abstract from the medical officer who saw him in June 2007. He also produced an e-mail from the staff counsellor at the United Nations Stabilization Mission in Haiti (“MINUSTAH”) confirming that the Applicant was facing a lot of stress and needed medication and a period of sick leave, initially for five days and subsequently for three additional days;
- b. For the Respondent, the Tribunal was provided with the Applicant’s electronic performance appraisal (“e-PAS”) reports for the periods 2006-2007, 2007-2008 (this performance was split in two: the first report covered the period from 1 April to 19 August 2007 and the second report the remaining period until 31 March 2008), 2009-2010 and 2010-2011. These e-PAS reports clearly indicate that the Applicant was performing extremely well throughout the relevant period.

8. The Applicant gave evidence that he suffered distress and mental anguish as a result of the threat of him not only losing his job but also facing the prospect of a criminal prosecution. The latter concern has to be seen in the context of the Applicant’s knowledge of a criminal prosecution having been brought against two procurement staff members in New York.

9. The Applicant accepted a transfer from procurement to personnel under protest. However, he did not make a formal complaint about this transfer. Any concerns he had relating to that lateral move is not a matter that concerned the Tribunal at this hearing on remedy.

10. The Tribunal accepts the Applicant's evidence as credible regarding the caution with which his colleagues dealt with him and may on occasion have avoided him. The Tribunal takes judicial notice of the fact that such conduct is likely to occur in the workplace in circumstances such as those in this case. However, having heard the Applicant give evidence on this point, the Tribunal concludes that the degree of ostracism which the Applicant is claiming, though it could possibly have occurred, has been exaggerated.

11. The Tribunal takes note of the very positive commendations in the successive e-PAS reports. It follows from these reports that the Applicant did not have a reasonable basis for fearing that he had lost the confidence of management and that this, in itself, would hamper his future within the United Nations.

12. The Tribunal accepts that the Applicant's wife and children, knowing what he was going through, would also have been distressed. That is a matter of common sense and requires no evidence from them, but it is not a matter which would attract any or any additional compensation from the Tribunal. The Tribunal's remit is confined to an assessment of any loss or damage to the individual staff member as a result of the treatment accorded to him.

13. It is highly commendable that, despite the anxiety that the Applicant was experiencing regarding the ongoing investigation and disciplinary proceedings, he nevertheless focused on the demands and duties of his new appointment in personnel and subsequently on his return to working on administrative matters in procurement. The Applicant is clearly a resilient person who put in a creditable work performance. The favorable e-PAS reports do not in themselves disprove the Applicant's

contentions that he was suffering from stress, though they could have a bearing on the level and severity of the experience.

14. The Tribunal finds as a fact, supported by medical evidence, that he did suffer emotional harm for the period around June 2007 during which he was in receipt of treatment and counseling. On receipt of the letter dated 2 February 2010 informing him that all charges against him were dismissed, the Applicant felt a tremendous sense of relief and has continued to produce high-quality work for the United Nations.

The law

15. Under art. 10.5(b) of the Statute of the Dispute Tribunal, the Tribunal may order compensation to an aggrieved party. That the Applicant may receive compensation for emotional harm, such as distress and anxiety, follows from the jurisprudence of the Appeals Tribunal (see, for instance, *Wu* 2010-UNAT-042 and *Antaki* 2010-UNAT-095). However, it is clear from a number of authorities that, before the Tribunal awards such compensation, there must be evidence of injury or damage; as stated by the Appeals Tribunal in *Antaki*: “[c]ompensation may only be awarded if it has been established that the staff member actually suffered damages”. Furthermore, such compensation may not amount to “an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing” (see *Wu* and *Kasyanov* 2010-UNAT-76 as well as art. 10.7 of the Statute).

Considerations

16. The Applicant has not suffered any loss of earnings. His claim is solely for compensation in respect of the emotional harm he suffered as a result of the manner in which he was treated, including the delay of three years before the charges were finally dismissed.

17. The Tribunal takes into account its findings in the Judgment on liability, including paras. 27 and, 28, that there were certain shortcomings in the Applicant's conduct and that he had some explaining to do. In these circumstances, it was not surprising that some investigation was necessary. The relevance of this observation is no more than to point out that an element of blameworthy conduct exists.

18. Whilst it is the case that the manner in which the investigation and the disciplinary proceedings were conducted did cause the Applicant distress and anxiety, it is the degree to which such emotional harm could be attributed to the conduct of the Respondent that has to be considered.

19. It is difficult to arrive at a precise sum to reflect the extent of damage suffered by a particular staff member in a given set of circumstances. This is not an issue which lends itself to scientific quantification or certainty. The Tribunal has to use its judgment to arrive at an assessment, which is fair and proper and does not diminish confidence in the ability of the system to provide, in appropriate cases, compensation that is neither paltry nor excessive. Above all, the award has to be truly compensatory.

20. The approach that the Tribunal has adopted is to try and categorise the harm suffered by the Applicant in terms of a scale of severity. The Tribunal has first to assess whether the Applicant was minimally, moderately, or extremely distressed by the manner in which he was treated. It is only after such a finding that the Tribunal may arrive at a sensible and reasoned assessment. In this case, the Tribunal has no hesitation in stating that the Applicant's distress and anxiety cannot be placed at the top end of the scale nor could it legitimately be placed at the extreme bottom end of the scale as contended by the Respondent. It falls somewhere between the two extremes, but below the midpoint.

21. In all the circumstances, the Tribunal finds that the Applicant is entitled to an award of compensation for emotional harm in the sum of USD10,000.

Conclusion

22. The Respondent is ordered to pay to the Applicant the sum of USD10,000 in compensation.

23. Under art. 10.5 of the Statute of the Dispute Tribunal, the sum of compensation as detailed in para. 22 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.

24. There being no other applications, this matter is now closed.

(Signed)

Judge Goolam Meeran

Dated this 9th day of May 2012

Entered in the Register on this 9th day of May 2012

(Signed)

Hafida Lahiouel, Registrar, New York