



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

GOODWIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON COMPENSATION

Counsel for Applicant:

George Irving

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. In his substantive application before the Tribunal, the Applicant contested the Respondent's decision to impose, remove and again reinstate an administrative reprimand issued to him upon the recommendation of the Joint Disciplinary Committee ("JDC"), following its review of allegations of misconduct made against him. The Applicant also challenged his removal from his former post and reassignment. On 21 June 2011, the Tribunal issued *Goodwin* UNDT/2011/104 on liability, finding that the decision to withdraw the reprimand and refer the matter to the JDC for advice and further action breached the Applicant's terms of appointment. The Tribunal found that the decision of the Secretary General to close the case and impose administrative action was final and conclusive, and in subsequently withdrawing the reprimand and referring the matter to the JDC, the Respondent was in breach of the Organization's rules, as well as general principles of law. This finding was made *inter alia*, on the principle that the office of the Secretary-General was *functus officio*, that the Respondent had offended the rule against double jeopardy, and breached the rule against finality.

2. However, the Tribunal found that the initial imposition of the reprimand was not improper, although the wording of the reprimand was inappropriate. It also held that the decision to transfer the Applicant from his functions at the United Nations Advance Mission in Sudan ("UNMIS") was a disguised disciplinary measure which was in breach of the Applicant's terms of appointment.

3. The instant Judgment addresses the outstanding matter of compensation in view of the Tribunal's finding on liability in *Goodwin* UNDT/2011/104.

Procedural background

4. *Goodwin* UNDT/2011/104 contained the following orders:

66. The Respondent is to replace the letter of 16 January 2007 with an appropriately worded reprimand ...

67. By 22 July 2011 the parties shall confer on the appropriate sum of monetary compensation to be awarded to the Applicant, which may include compensation for the decisions to transfer him from his functions at UNMIS, and to withdraw the reprimand and refer the matter to the JDC, and the resulting delay.

68. By 29 July 2011 the Applicant shall file and serve a statement confirming whether the issue of compensation has been settled, failing which settlement the Tribunal shall give further directions as necessary.

5. On 15 September 2011, following the granting of extensions of time to comply with the above orders, the Applicant informed the Tribunal that the parties had been unable to reach a settlement.

6. On 8 December 2011, the Tribunal held a case management hearing on the question of remedies. The Applicant participated by telephone. As a result of that hearing, the Applicant was ordered to “file a submission as to the compensation sought and the evidence he wishes to submit on the issue of compensation, including a summary of the Applicant’s testimony” if he was going to be called to give evidence. The Respondent was given the opportunity to file a response (Order No. 293 (NY/2011) dated 9 September 2011).

7. A substantive hearing on the issue of compensation was held on 16 December 2011. The Applicant participated by video-conference.

Facts

8. Essentially, between January 2006 and June 2009, the Applicant was: recalled from Mission in Sudan; charged with misconduct following investigations (which charges were revised, responded to by the Applicant and subsequently withdrawn); issued a reprimand which was subsequently withdrawn, after which his case was referred to the JDC ten months later to ascertain if any misconduct had been committed. Some thirteen months thereafter the JDC recommended that the administrative reprimand be reinstated, which recommendation the administration adopted some four months later. The facts and findings in this case are fully set out in *Goodwin* UNDT/2011/104, need not be repeated here in any detail and are adopted herein.

Applicant's submissions

9. The Applicant's principal contentions may be summarised as follows:

Imposition of a disguised disciplinary measure

a. The decision to transfer the Applicant from his functions at UNMIS was a disguised disciplinary measure which directly affected his career and professional reputation. The Applicant would either have been promoted to a P-5 level position earlier or would have received a Special Post Allowance for performing functions at a higher level. His promotion was delayed by the reprimand which also "officially excluded" the Applicant's possible return to his formal post;

b. The resulting damage is quantifiable as economic loss of approximately USD85,000 or can be treated as non-monetary loss of opportunity and moral damages of approximately the same amount. The award should take into account "the need for the Applicant to make a career

shift from aviation to operations as well as the corresponding loss of opportunity produced by his unfair exclusion from his former field of expertise”;

Due process violations

c. While the Appeals Tribunal has indicated six months’ net base salary as a reasonable amount of compensation for procedural violations, this case amounts to an abuse of process by subjecting the Applicant to an “unwarranted and prolonged disciplinary process and a substantive violation of his right against double jeopardy. This is a far more grievous breach of his rights than mere procedural irregularity or oversight”. An appropriate comparison can be made with the case of *Klein* UNDT/2011/169, which awarded the Applicant USD60,000, plus one year’s net base salary;

d. Compensation under this non-monetary heading can generally be categorised as moral damages. The improper bringing of disciplinary proceedings exposed the Applicant to an “extended period of uncertainty” and the “stigma” of claims of official misconduct, particularly in the Applicant’s field of work, warrants meaningful compensation, which the Applicant suggest should be six months’ net base salary at a minimum;

e. The Applicant is no longer claiming specific compensation for emotional distress to avoid duplication of remedies in connection with another pending case;

Delay

f. There was undue delay in handling this case. As noted in *Goodwin* UNDT/2011/104, it took two and a half additional years to finally achieve a measure of closure. In *Frechon* UNDT/2010/089, the Tribunal

awarded three months' net base salary and, in *Aly et al.* UNDT/2010/195, the Tribunal preferred to quantify the compensation for procedural delay in terms of USD20,000. Either is reasonable in the view of the Applicant;

Costs

g. The Applicant is due compensation for his legal expenses in having to engage in litigation over actions that were found to be an abuse of the Respondent's authority. The Applicant argues that the entire disciplinary proceeding was the result of an abuse of process and therefore an award of costs is warranted.

Respondent's submissions

10. The Respondent's principal contentions may be summarised as follows:

a. While the decision not to return the Applicant to UNMIS was found to be unlawful, it did not disadvantage the Applicant who was promoted from a P-4 level post to a P-5 level post, despite the legitimate negative impact of the reprimand on his career prospects: "Having been reprimanded for managerial shortcomings, he could not have reasonably expected to be favourably considered for promotion to the P-5 level earlier than June 2009";

b. The Applicant did not appeal the decision not to promote him and therefore cannot claim compensation for this decision;

c. The Applicant cannot claim loss consequent upon decisions taken prior to the reprimand;

d. The Applicant cannot claim compensation for the lawful finding that he failed in his managerial duties;

e. The Tribunal should not be asked to draw speculative assumptions and conclusions about the Applicant's possible economic loss. In the absence of evidence establishing economic loss, no compensation should be awarded (*Klein* UNDT/2011/169, paras. 25-26);

f. The Applicant is not entitled to compensation for a breach that did not cause him any loss or injury (the United Nations Appeals Tribunal ("UNAT") in *Sina* 2010-UNAT-094, *Abboud* 2010-UNAT-100);

g. The Applicant is not entitled to compensation for delays related to the processing of his case as he did not suffer emotional distress as a result of the delay and he has not proved that he suffered damages to his reputation or career prospects as a result of the delay.

Consideration

The scope of the present Judgment

11. In *Goodwin* UNDT/2011/104 on liability, the Tribunal dealt with the issue of the initial reprimand being reinstated after referral to the JDC, and with the Applicant's transfer from UNMIS. Accordingly, in the present Judgment, the Tribunal will only determine the amount of the compensation, which the Applicant is to be awarded for the breach of his rights, as defined in UNDT/2011/104.

12. It is clear from the submissions before the Tribunal that the Applicant is not claiming compensation for the imposition of a lawful reprimand, but rather he is claiming compensation for the harm caused by the decision to transfer him from his functions and to withdraw the reprimand whilst referring the matter back to the JDC, for disciplinary action.

Applicable legal principles guiding the award of compensation

13. The fundamental purpose of compensation is to place an aggrieved party in the position he or she would have been in but for the breach in contractual obligations (see, for instance, the judgments of the United Nations Appeals Tribunal (“UNAT”) in *Mmata* 2010-UNAT-092, *Iannelli* 2010-UNAT-093).

14. The Dispute Tribunal may award compensation “for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury” (*Antaki* 2010-UNAT-095). Such compensation may only be awarded if the harm has actually been established (*James* 2010-UNAT-009, *Sina* 2010-UNAT-094 *Antaki*). Pursuant to art. 10.7 of the Statute of the Dispute Tribunal, the Tribunal may not award exemplary or punitive damages, and, in fact, a compensation award may not include such damages (*Wu* 2010-UNAT-042).

Pecuniary damages—the Applicant’s actual economic loss

15. For the Applicant to claim pecuniary damages arising from his being transferred, or the reprimand being withdrawn whilst he was subjected to the JDC process, he must establish that he suffered actual economic harm. The Applicant could, for instance, have done so by identifying a specific promotion which he missed out on.

16. The Tribunal finds that the Applicant has provided limited evidence of his exclusion from consideration for other posts. There was no oral testimony from the Applicant, or documentary evidence of his having applied for positions during the period he alleges he was not selected. There has been limited explanation given as to why, as the Applicant contended, he suffered more damages in his specific field of aviation than a staff member in any other field would have suffered in the same circumstances, or how the shift from aviation to a role in programs caused damages.

Indeed, at the hearing, Counsel for the Applicant conceded that the professional salary scale was the same for both fields. The Tribunal also notes that there is no right to promotion and in any case, the Applicant was eventually promoted.

Non-pecuniary damages

17. In order to avoid duplication of remedies in connection with another pending case, the Applicant is no longer claiming specific compensation for emotional distress. Rather, he limits his claim for non-pecuniary damages to the harm suffered to his general reputation, the delays incurred, and the due process violations.

18. The Tribunal finds that being investigated for misconduct and having been issued with an administrative reprimand is more than likely to have negatively impacted the Applicant's general reputation and wellbeing. However, the fact that the Applicant acknowledged and was found responsible for some lack of managerial oversight is a factor which must be taken into account in the assessment of compensation.

19. However, the Tribunal is convinced from the submissions of the Applicant and in light of all the circumstances of the case, including the inappropriate content of the initial reprimand and the protracted period of time which it took to resolve the matter, that the Respondent's breaches did attach some "stigma" to the Applicant which negatively affected his general reputation and wellbeing, and therefore also his career and life in the broader sense. The Tribunal considers that this damage went beyond that which would have been caused had an appropriate reprimand been issued within a reasonable period of time, and the Applicant should be compensated for this. Considering the Applicant's circumstances, including his career path and the many years he has been in service, the Tribunal recognises that the breaches committed by the Respondent have had a negative impact on his general reputation and wellbeing.

20. Whilst it is recognised that it is for the Applicant to substantiate the harm suffered as a result of delays and due process violations, and that damages may not be exemplary or punitive, the Applicant was subjected to an extended period of uncertainty and, as it turned out, an unnecessary disciplinary process. In dealing with the Applicant, the Respondent breached the rule against double jeopardy (see para. 37 in *Goodwin* UNDT/2011/104 on liability), and subjected the Applicant to a disguised disciplinary measure. In cases where disciplinary measures have been found to be disproportionate or unlawful, the Tribunal has awarded damages at a high scale. The Tribunal finds that it is reasonable to conclude that all this has caused the Applicant harm, including in respect of the delays in resolving the matter.

21. The Tribunal, having taken all of the above factors into consideration, assesses the appropriate award of compensation for harm to his reputation, exacerbated by delay and due process violations, to be USD30,000. In reaching this amount, since this harm has also affected his general possibilities for career advancement and promotions, the Tribunal has found some guidance in the principles for damages set out in *Solanki* 2010-UNAT-044, *Lutta* 2011-UNAT-117, *Sprauten* 2012-UNAT-219 and *Mezoui* 2012-UNAT-220.

Costs

22. The Tribunal considers that an award for costs is not appropriate in these circumstances. The Tribunal is limited to awarding costs in narrow circumstances as defined by art. 10.6 of its Statute. The Tribunal must determine that a party has “manifestly abused the proceedings before it”. Neither the statutory provision nor the jurisprudence as relied upon by the Applicant supports an award for “an abuse of process” for conduct prior to the proceedings before the Tribunal. The Tribunal does not consider the Respondent to have manifestly abused the proceedings before it and therefore an award under this heading will not be made.

Conclusion

23. The Respondent shall pay the Applicant USD30,000 as compensation for the harm caused to the Applicant's career prospects and reputation as exacerbated by delay. 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 the date of payment.

(Signed)

Judge Memooda Ebrahim-Carsten

Dated this 17th day of August 2012

Entered in the Register on this 17th day of August 2012

(Signed)

Hafida Lahiouel, Registrar, New York