



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2009/044/  
JAB/2008/087  
Judgment No.: UNDT/2013/053  
Date: 15 March 2013  
Original: English

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**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Hafida Lahiouel

WASSERSTROM

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON RELIEF**

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**Counsel for Applicant:**

Mary Dorman

**Counsel for Respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. This Judgment concerns the relief to be awarded to the Applicant for the violation of his rights as these have been identified in UNDT/2012/092 issued on 21 June 2012 (reference is made to this judgment for a complete recitation of the facts and the Tribunal's findings on the Respondent's liability).

## **Scope of the case**

2. In Order No. 202 (NY/2012) dated 8 October 2012, and reiterated in Order No. 227 (NY/2012) dated 13 November 2012, the Tribunal defined the issues on relief as follows:

- a. Is the Applicant entitled to compensation for any loss of earnings and, if so, to determine the amount?
- b. Is the Applicant entitled to any other compensatory relief, including loss of benefits that he would otherwise have enjoyed had he remained an employee of the United Nations? If so, to identify those heads of claim and to provide the legal and factual basis in support thereof?
- c. Is the Applicant entitled to compensation for "moral damages" and, if so, to assess the extent to which he has suffered such loss and damage and compensate him accordingly?
- d. Are each of the parties entitled to an award of costs bearing in mind the legal test under art. 10.6 of the Statute, which requires the Tribunal to find that a party has "manifestly abused the proceedings"?

### **Procedural history**

3. In the Judgment on liability, the Tribunal invited the parties:

[...] to settle the issue of remedy failing which the Tribunal will hold a hearing on a date to be fixed, in October 2012, to determine the appropriate remedy to be afforded to the Applicant and to hear any other application that may be made, as indicated at the hearing on the merits. In this event, the parties are to inform the Tribunal on or before 1 August 2012 whether they intend calling any witnesses and producing any documents and, if so, identifying them and providing an estimate of the length of the hearing.

4. By email of 24 July 2012, the Applicant filed a submission requesting an extension of time to comply with UNDT/2012/092. The Applicant requested that the deadline for his submission be extended to 17 August 2012 due to “[...] a number of matters pending”. The Applicant submitted that the Respondent had no objections to his request.

5. By Order No. 155 (NY/2012) dated 2 August 2012, the Tribunal granted the Applicant’s request for a time extension and ordered the parties to inform the Tribunal on or before 17 August 2012 whether they intended to call any witnesses and to produce any additional documents and, if so, by identifying them and providing an estimate of the length of the hearing.

6. On 16 August, Counsel for the Applicant filed a letter to the Tribunal requesting the Respondent to produce the Applicant’s United Nations statements of taxable earning for 2005 and 2008 as well as his complete pay slips from 2005–2009, since the Respondent had refused to produce them.

7. On the same date, Counsel for the Applicant filed two motions: one for an award of legal costs and one regarding witnesses. In the latter motion, she proposed to call: Mr. Geoffrey Senogles, an accountant; Mr. John Ryan, Senior Adviser, European Union Human Rights Review Panel, Office of Head of Mission, European

Union Rule of Law Mission, Kosovo; Dr. Stacy Lamon, a clinical psychologist; one or more of the Applicant's family members; and the Applicant.

8. By motion dated 17 August 2012, Counsel for the Respondent proposed to call as witnesses: Mr. Vladimir Dzuro, an investigator with the Office of Internal Oversight Services; and Mr. Tarik Chung, Office of Human Resources, United Nations Development Programme ("UNDP"). He further observed that he would rely on the documentation already admitted into evidence as well as the documentation appended to the Respondent's submission in response to Order No. 254 (NY/2011) and to the Respondent's request for production of documents filed on 28 November 2011.

9. By Order No. 169 (NY/2012) dated 17 August 2012, the Tribunal ordered the parties to a hearing on compensation to be held on 4 October 2012, 10:00 a.m., unless the parties informed the Tribunal before then that they had reached an agreement to settle all outstanding matters arising from the Applicant's claims.

10. By letter dated 28 August 2012, Counsel for the Applicant resubmitted her request for the production of the Applicant's United Nations statements of taxable earning for 2005 and 2008 as well as his complete pay slips from 2005–2009.

11. By motion of 29 August 2012, Counsel for the Applicant submitted a response to the Respondent's 17 August 2012 submission on witnesses and documentation related to compensation.

12. By email of 30 August 2012, Counsel for the Respondent noted that the Applicant had not requested, nor been granted, leave to file a response to the Respondent's submissions for which reason he did not intend, at this time, to respond to the Applicant's filing. He further observed that should the Tribunal require a response, he stood ready to provide it.

13. By motion of 5 September 2012, Counsel for the Applicant stated as follows:

This motion is to compel the production of documents from Respondent that are relevant and necessary to Applicant's proof of damages. Though duly requested, easily and inexpensively available to Respondent, Respondent refuses to produce them, requiring this motion.

Further, Respondent has failed to identify any specific document upon which it intends to rely in the hearing to be held on damages.

Finally, Applicant requests an award of attorney's fees and costs as this motion should not have been required to make.

14. On 6 September 2012, Counsel for the Respondent filed a response to the Applicant's 5 September 2012 motion in which he stated that this motion is unnecessary as the Respondent had agreed to produce the information sought and the Applicant had failed to explain why he does not have his own financial records.

15. By email to the Registry of the same date, regarding the Applicant's motion for award of legal costs, the Respondent stated that:

[A]ny application for costs should be made at the hearing scheduled for 4 October 2012. As such, the Applicant['s] motion for costs appears to be contrary to the order of the Tribunal and, any argument the Applicant wishes to make, should be made at the hearing on 4 October 2012.

For these reasons, at this time, the Respondent does not intend to respond to the Applicant's motion, nor bring his own motion for costs. Instead, the Respondent will bring an application for costs at the hearing on 4 October 2012 and respond to any application brought by the Applicant.

Should the Respondent's understanding of the Judgement be mistaken, the Respondent respectfully observes that he stands ready to provide a response to the motion and file his own application for costs, should the Tribunal direct him to do so.

16. By Order No. 188 (NY/2012) dated 17 September 2012, the Tribunal cancelled the hearing on remedy scheduled for 4 October 2012 and replaced it by a case management discussion (“CMD”). The Tribunal stated as follows:

... The Tribunal is disappointed to note the number of requests and motions since the date of the last hearing. It seems that the parties have failed to heed the Tribunal’s advice that this case should not take on a new lease of life and that it was hoped that the parties would work constructively to resolve issues relating to compensation without bombarding the Tribunal with several motions the relevance of which are not always entirely clear.

...

... The Tribunal considers that it would be neither sensible nor profitable to hold the hearing on remedy as scheduled on 4 October 2012 without a final attempt to assist the parties to focus on issues relevant to this stage of the case and not to seek to relive or relitigate matters which have already been raised and/or been determined.

17. On 18 September 2012, Counsel for the Applicant submitted an “expert account report” report and requested that the accountant should testify as a witness before the Tribunal.

18. On 4 October 2012, at the CMD, Counsel appeared before the Tribunal to clarify the issues in contention relating to the compensation and/or other relief which the Applicant might be entitled to following UNDT/2012/092.

19. In the subsequent Order No. 202 (NY/2012) dated 8 October 2012, the Tribunal set out the issues to be decided (see above in para. 2) and, at the request of the parties, called them to attend another CMD on 2 November 2012. In the meantime, the Tribunal ordered the parties to submit written submissions to further clarify the issues. The parties complied with these orders.

20. At the request of the Applicant’s Counsel, the CMD was postponed to 4 November 2012. By Order No. 227 (NY/2012) dated 13 November 2012,

the Tribunal ordered the parties to file and serve their closing submissions, the latest to be submitted no later than 7 January 2013 and ruled that:

... Pursuant to art. 19 of the Rules of Procedure of the Dispute Tribunal, and the requirement of a fair and expeditious disposal of the case and to do justice to the parties, the Tribunal will not allow the parties to adduce any further evidence at this late stage of the proceedings. Instead, the Tribunal will provide the parties with an opportunity to submit their written closing submissions on remedy. The Tribunal will thereafter proceed to determine the question of compensation on the papers before it, unless it deems that further information and/or evidence is required in which case it will issue the necessary orders.

#### **Applicant's submissions**

21. Appended to the Applicant's closing statement and against the explicit orders of the Tribunal in Order No. 227 (NY/2012), his Counsel submitted an additional 32 pages of written documents as evidence to corroborate a factual account that had not been presented to the Tribunal before, nor was there an application for leave to do so explaining its relevance. At the closing stage of the proceedings, the Tribunal will not allow the submission of new facts and evidence without leave and, for future reference discourages any party from doing so.

22. The Applicant's submissions and contentions may be summarized as follows:

a. By tarnishing the Applicant's reputation through its contacts and communications, UNMIK prevented him from receiving the benefits of a successful return to his parent agency, UNDP;

b. When he returned, UNDP failed to comply with its duty to properly assist the Applicant in finding a new job, which eventually resulted in the Applicant being separated from his employment with the United Nations. This also meant that the Applicant was not able to retire with full benefits as

he only needed two more years of employment with United Nations to reach his retirement age, after 28 years of unblemished service with the Organization;

c. Had the OIOS investigation found that the Applicant had been retaliated against, his contract would not have ended and the Applicant has consistently held that his post with UNMIK was abolished as a result of this retaliation;

d. The Applicant should be awarded a total maximum amount of USD3,130,656.50 as compensation for loss and damage, including costs, but excluding interest;

e. His pecuniary losses are the following:

i. Loss of earnings: either USD217,311 or USD255,516 depending on whether the Tribunal finds that he would have received a promotion during his final years with the United Nations;

ii. Loss of educational allowance for his two children: USD237,100;

iii. Loss of full “after service medical coverage”: USD387,743;

iv. Loss of pension: either USD1,399,111 or 1,513,420 depending on whether the Tribunal finds that he would have received a promotion during his final years with the United Nations;

v. Interest on sums due.



f. In addition to his pecuniary losses, the Applicant should also be compensated for the violation of his procedural rights; the egregious conduct surrounding the investigation, the anguish of uncertainty regarding separation, humiliation, and stress.

g. The Applicant should be awarded: USD200,000 for the violations of his due process and procedural rights; USD200,000 for the injury to his reputation; and USD300,000 for his emotional distress;

h. The following events are examples of “unacceptable treatment” that merit a finding of “exceptional circumstances” for him to be awarded a compensation amount above the statutory limit of two years’ net base salary under art. 10.5 of the Dispute Tribunal’s Statute:

[T]he abolition of the Applicant’s post; his termination of employment; subjecting him to baseless criminal and administrative investigations; his arrest and detention at an international border; seizure of his passport; being taken in public by armed escort to his home; the search of his car and home without a warrant; taking away of his [United Nations] grounds pass; taking away his Laissez-Passer; cordoning off his office with crime scene tape and leaving it in place for over three months; placing “wanted posters” of the Applicant within UNMIK facilities with his private contact information on it; not advising him of his right to representation; making statements to the international and local media that the Applicant was still under investigation when he was not; not applying for or securing a waiver of immunity; the manipulation and late payment of salary and emoluments; necessitating his hiring of legal counsel; obfuscating his dealings with the United Nations Administration, Ethics Office, OIOS and UNDP; prejudicing UNDP against him by implying his UNMIK post was terminated because of his malfeasance and requiring him to find a new career with a tainted reputation.

- i. The Respondent has manifestly abused these proceedings by having continually refused to obey or implement the orders of Judge Adams to produce the unredacted investigation report of OIOS with supporting documents;
- j. The costs should include all expenses for legal representation from the time Judge Adams issued Order No. 19 (NY/2010) dated 3 February 2010, directing the production of the investigation report to the Applicant, to Judge Kaman's Order No. 271 (NY/2010) dated 11 October 2010, directing the supporting documents be released by the Registry to the Applicant's counsel;
- k. The time expended by the Applicant's counsel for said efforts is 81.95 hours at USD450 per hour, totaling USD36,877.50.

### **Respondent's submissions**

23. The Respondent's submissions and contentions may be summarized as follows:

- a. The Applicant makes no claim that he suffered any loss as a result of the Ethics Office's failure to seek clarification and/or further investigation from the OIOS concerning the search and seizure exercise. This is the only basis upon which he may make a claim for loss or damage. Instead, he claims compensation for the ending of his secondment at UNMIK and separation from UNDP. These claims have no place in this proceeding as UNDP is not a party to the proceedings;
- b. Having failed to present any submission justifying any award of compensation flowing from the findings in UNDT/2012/092, the Applicant cannot be awarded any compensation. The scope of the case must be defined

by the Applicant's pleadings; otherwise, the Respondent is denied due process. In the absence of any properly formulated claim, the Respondent has no real opportunity to respond. Accordingly, at law, there is no need for the Respondent to provide any further submissions. The Applicant's claim for compensation should be summarily denied;

c. The question in this case is: What loss and damage, if any, did the Applicant suffer as a result of the Ethics Office's failure to review the annexes to the OIOS investigation report? Therefore, the questions are:

i. If clarification and/or further investigation had been requested, would OIOS have changed its conclusions and/or the Ethics Office changed its decision?

ii. If the Ethics Office had changed its decision and found that the Applicant had been retaliated against when his vehicle and premises were searched, would the Ethics Office have recommended that the Applicant be compensated?

d. The evidence on record demonstrates that, had the Ethics Office sought further clarification or investigation, then OIOS would have been in a position to provide that clarification.

e. As demonstrated by the circumstances surrounding the conflict of evidence between that of Judge Peralta vis-à-vis that of Mr. Borg-Olivier, the Financial Investigation Unit's investigation, the role of the international prosecutor and the pre-trial judge and their Special Representative of the Secretary-General's supervisor authority and questions of the Applicant's immunity, such a clarification would not have changed the Ethics Office's initial decision that the Applicant had not been retaliated against;

f. The “Merriam-Webster” dictionary defines “costs” as follows: 1(a): the amount or equivalent paid or charged for something; price; 1(b): the outlay or expenditure (as of effort or sacrifice) made to achieve an object; 2: loss or penalty incurred especially in gaining something; 3: plural: expenses incurred in litigation; especially: those given by the law or the court to the prevailing party against the losing party;

g. The essential meaning of the term is that a sum has been outlaid. Where no sum has been outlaid, or will be, there can be no costs incurred. There is no reason to depart from this meaning in interpreting art. 10.6 of the Dispute Tribunal’s Statute. To the contrary, an award of costs without any costs having been incurred would be punitive. Art. 10.7 provides that punitive awards are forbidden;

h. The Applicant must demonstrate a causal link between any claimed cost incurred and the conduct of the other party to justify any award of costs. Costs are not intended to provide more than an indemnity; the receiving party is not entitled to a bonus;

i. Absent proof of costs incurred pursuant to art. 10.6 of the Statute of the Dispute Tribunal, either paid or to be paid, the Applicant cannot recover costs. The Applicant has expressly refused to produce any proof of costs incurred. In the absence of proof of costs incurred, the Applicant is no longer seeking “costs”, instead, he is seeking that a penalty payment be imposed against the Respondent and the penalty be paid to him.

j. The Respondent did not manifestly abuse the proceedings under art. 10.6 of the Statute of the Dispute Tribunal, instead he exercised his right to present arguments and submissions in regard to legal issues of first impression during the initial stages of the new system of internal justice.

Specifically, the Respondent presented legal submission in regard to the following issues: (i) the receivability of claims against decisions of the EO; (ii) the appealability of interlocutory orders; (iii) whether an appeal of an interlocutory order results in a stay of the proceedings; and (iv) whether a party may opt to accept an adverse inference instead of producing documentation.

## **Consideration**

### *Applicable law on compensation*

24. Art. 10.5 of the Statute of the Dispute Tribunal provides the legal basis for awarding an applicant compensation. It states that:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

25. To award monetary compensation, the United Nations Appeals Tribunal ("UNAT") has ruled that the applicant must substantiate the pecuniary and/or non-pecuniary damages that he claims that he has suffered in consequence of the Administration's violation(s) of his rights (see, for instance, *James* 2010-UNAT-009, *Sina* 2010-UNAT-094, *Antaki* 2010-UNAT-095 and *Abboud* 2010-UNAT-100).

The purpose of an award of compensation is to place the applicant in the same position that he would have been had the Administration complied with its obligations (*Warren* 2010-UNAT-059 and *Ianelli* 2010-UNAT-093). The quantification of the award therefore depends on the specific harm that the Tribunal assesses and determines that the individual applicant has suffered (*Solanki* 2010-UNAT-044). Article 10.7 of the Statute precludes an award of punitive damages.

*The Applicant's actual loss of earning and benefits*

26. This is not a case of termination of employment. Any suggestion to that effect is misconceived. Therefore, given the Tribunal's findings and the evidence adduced at the substantive hearing, no compensation is due to the Applicant under this head of damage. Whatever may have been the merits of the claim that UNDP, the Applicant's parent agency, were in error in the manner in which they failed to manage or to honour their obligations towards him as a staff member returning from an assignment, this was not the case that was brought in the application filed with the Tribunal. UNDP was not a party to these proceedings. It follows that UNDP had never had the opportunity to be heard on this aspect of the Applicant's allegations/claim. It is now too late to raise this matter.

27. As stated in Judgment No. UNDT/2012/092 on liability (see paras. 27 and 28), this case concerns the Ethics Office's finding that the Applicant was not retaliated against as a whistleblower under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations). The Tribunal found that the conclusion of the Ethics Office that the Applicant was not retaliated against was arrived at as a result of a misdirection in law and a failure to appreciate fully the significance of the documentary evidence before them. In the circumstances, the Ethics Office failed to draw the appropriate

inferences that it would have been legitimate to draw from the facts many of which were uncontested (see paras. 31, 32 and 33 below)

28. The Applicant's claims in respect of lost earnings and benefits are, in effect, all claims against UNDP because they relate to his separation from service as a staff member of the United Nations for which liability, if any, may have attached to UNDP, and not the Ethics Office.

29. Consequently, the Tribunal dismisses all the Applicant's claims regarding compensation for lost earnings and associated benefits.

*The claim for non-pecuniary damages*

30. In its investigation report, the Investigations Division, OIOS ("ID/OIOS") found that (see para. 8 of UNDT/2012/092) (emphasis added):

... Some of the actions (i.e. seizure [of the Applicant's] national passport at the Kosovo border with the aim to restrict his movement, searches of this private vehicle and residence, placement of a poster with his photograph at the entrances of UNMIK [headquarters] to prevent his entry as well as visibly sealing off his office for an extensive period of time) appeared to be excessive considering the administrative nature of his reported possible conflict of interests. However, ID/OIOS found no evidence that these activities would have been retaliatory within the meaning of [ST/SGB/2005/21].

31. In his submissions to the Tribunal, challenging the ID/OIOS's finding of non-retaliation, the Applicant has identified the retaliatory activities of the Administration and its breaches to his rights to due process to be the following (see para. 25. of UNDT/2012/092):

a. [The Office for the Coordination of Oversight of Publicly Owned Enterprises ("OPOE")] was closed and his contract with UNMIK was not renewed;

- b. The investigations into his alleged offence of signing an employment contract to work for the Managing Directors of PTK and Pristina International Airport were matters of an administrative nature, and did not justify his treatment as a potential criminal;
- c. He was stopped at the border in his car, coming from Greece;
- d. His passport was taken away;
- e. He was escorted back to his apartment under armed escort;
- f. His car and his home were searched without a proper warrant;
- g. His United Nations ground pass was taken away;
- h. His office at the United Nations was cordoned off with crime scene tape;
- i. Wanted posters with his name were put up at different places at the UNMIK facilities;
- j. He was not advised of his right to representation.

32. The Respondent denied that the closure of the OPOE and the ending of the Applicant's contract were acts of retaliation. The Respondent did not challenge the factual accuracy of the issues enumerated at para. 32(b) to (j) above. However, the Respondent contends that none of these actions were retaliatory in nature. This contention lacks merit. It begs the very question which was before the Ethics Office but that was never addressed. There was clear and uncontested evidence, supported by the findings in the report of ID/OIOS, that the Applicant's contractual rights were breached, which included clear evidence of severe human rights' abuses. However, these breaches were never addressed by the Ethics Office, as the Tribunal pointed out at paras. 46 and 48 of the Judgment on liability, neither were the reasons for subjecting the Applicant to such insensitive and degrading treatment considered. In the absence of a cogent and satisfactory explanation, the inescapable inference must be that the underlying motive was retaliatory.

33. Whilst the Applicant had always argued assiduously that the closure of OPOE and the ending of his assignment with UNMIK were acts of retaliation, there was not a sufficiency of evidence to support this assertion. The Tribunal did not find



the Applicant's answers under cross-examination sufficiently persuasive that there was a case to answer. In the circumstances, the Applicant's claim for any loss in relation to the closure of OPOE and the ending of the Applicant's assignment is refused.

34. The power given to the Ethics Office to remedy a wrong in circumstances such as those of the present case are extremely limited. Moreover, the record would appear to indicate that as an institution charged with the responsibility of uncovering acts of retaliation the effectiveness of the Ethics Office leaves much to be desired. The Tribunal does not accept that, as a matter of law, the Respondent is correct in suggesting that the appropriate course for the Tribunal to adopt is to refer the case back to the Ethics Office.

35. The appalling treatment to which the Applicant had been subjected led the Tribunal to state in UNDT/2012/092, at para. 44, that:

... This begs the question as to how or for what reason could a staff member with an otherwise impeccable record of service with the Organization have been subjected to wholly unacceptable treatment in breach of his right to due process. There would appear to have been a fundamental failure on the part of the Ethics Office to ask the simple question as to why the Applicant was treated in such a way.

36. The Tribunal finds it difficult to envisage a worse case of insensitive, high-handed and arbitrary treatment in breach of the fundamental principles of the Universal Declaration of Human Rights, including arts. 1, 3, 6, 7, 8 and 9. The failures of the Ethics Office to recognize such gross violations calls seriously into question its suitability and effectiveness as a body charged with the duty, as described in its mandate ST/SGB/2005/22 (Ethics Office—establishment and terms of reference), para. 1.2, to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity

required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.

37. By its failure to properly and diligently examine the ID/OIOS's investigation report and, as an absolute minimum, taking steps to investigate its evident flaws, as set out in detail in the Judgment on liability, the Ethics Office clearly violated the Applicant's right to a fair and competent consideration of the facts and thereby denied him a remedy and compelled him to institute proceedings before the Tribunal. The Tribunal finds that this failure on the part of the ethics Office further compounded and aggravated the harm, including severe distress and public humiliation already suffered by the Applicant.

38. A proper assessment of an award for non-pecuniary damages should follow the following steps:

- a. There should be a finding as to whether or not the Applicant did in fact suffer such damage;
- b. If he did not, there would be no basis for such an award;
- c. If he did, it will be important for the Tribunal to make a factual determination of the level of damage, bearing in mind that feelings of upset, stress, anxiety, psychological damage and all such components that either singly or cumulatively make up what has been referred to as "non-pecuniary damages" are at varying levels of severity. At one end of the continuum lies a minimal level and, at the other end, a level of extreme severity. Between these two extremes is the appropriate level and the task of determining this level is properly entrusted to the Tribunal which has seen or has heard the individual giving evidence and describing his feelings and emotional state;

d. The Tribunal has to be satisfied that the damage as described was attributable to action taken by the Respondent;

e. Where the unlawful act was performed maliciously or was high-handed and without due regard for the legitimate concerns and feelings of the staff member it is bound to have aggravated the feelings of distress and will accordingly attract a higher award;

f. The Tribunal has to take into account that the assessment arrived at should be appropriate for the harm suffered. To award a paltry sum will discredit the policy underlying such awards as will an excessive award. Accordingly the Tribunal has to bear in mind the principle of proportionality;

g. Finally, the Tribunal will remind itself that it has no power to award exemplary or punitive damages and that the award must be truly compensatory.

39. The Tribunal had the opportunity to form its own assessment as to the degree to which the egregious conduct to which the Applicant was subjected to, compounded by the failure of the Ethics Office, as described in detail in the Judgment on liability, caused him anxiety, stress and loss of reputation. Accordingly, having regard to the foregoing principles the Tribunal assesses the degree of non-pecuniary damages at the extreme top of the end of the scale. The Tribunal awards the Applicant the sum of USD50,000 as compensation for non-pecuniary damage.

#### *Costs*

40. Art. 10.6 of the Dispute Tribunal's Statute provides, in relation to an award of costs, "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party".

41. The question for decision is whether, during the proceedings before the Tribunal, the conduct of the Respondent in the persistent refusal to respect and abide by the Tribunal's Orders, particularly Order No. 19 (NY/2010) in which the Respondent was ordered to grant access to ID/OIOS's investigation report, constituted a legitimate defense of proceedings or amounted to a manifest abuse of proceedings pursuant to art. 10.6 of the Dispute Tribunals Statute.

42. The authority of the Tribunal derived from its Statute and Rules of Procedure, confers upon it the exclusive power to manage the proceedings before it. Under art. 18.2 of the Rules of Procedure, the Tribunal has unquestionable power to "require any person to disclose any document or provide any information that appears to [it] to be necessary for a fair and expeditious disposal of the proceedings".

43. The Tribunal finds that the Respondent's conduct of the proceedings in deliberately and persistently refusing, without good cause, to abide by the Orders of the Tribunal and not granting access to the full ID/OIOS's investigation report constituted a manifest abuse of proceedings. The Tribunal is satisfied that the Applicant has, in consequence thereof, incurred costs. Accordingly, the Respondent is to pay to the Applicant the sum of USD15,000 as a contribution towards the Applicant's costs since he was left with no alternative but to challenge these instances of abuse of process. Even if it were to be argued that the Respondent's conduct in relation to these matters was not an abuse of process, it is clearly the case that by the Respondent's persistence in defying the Tribunal's orders, he left the Applicant with no alternative but to challenge the Respondent's position on disclosure, thereby incurring costs, which were not of the Applicant's making.

## **Conclusion**

44. Pursuant to arts. 10.5 and 10.6 of the Statute of the Dispute Tribunal, the Tribunal orders that the Respondent is to pay to the Applicant:

- a. USD50,000 in compensation for non-pecuniary damage which he suffered; and
- b. USD15,000 in costs.

45. The total sum of compensation and costs as detailed above in para. 44 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 Meeran

Dated this 15<sup>th</sup> day of March 2013

Entered in the Register on this 15<sup>th</sup> day of March 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York