



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KISIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON AN APPLICATION FOR
EXECUTION AND INTERPRETATION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Security Officer with the Security and Safety Services (“SSS”) in the Department of Safety and Security (“DSS”) filed an application requesting the Tribunal to (a) provide an interpretation of paras. 51, 53, 55(a) and 55(b) of the Judgment *Kisia* UNDT/2016/040 in Case No. UNDT/NY/2014/061 (*Kisia*), (b) issue an order for the execution of *Kisia* UNDT/2016/040, and (c) grant the Applicant non-pecuniary damages for the alleged delay in executing *Kisia* UNDT/2016/040.

2. In his reply, the Respondent contends that *Kisia* UNDT/2016/040 has already been executed in that the Applicant’s claim is to be examined at the next meeting of the United Nations Claims Board (“UNCB”), which is scheduled for September 2016 and that the Controller will then make a decision on the claim. Furthermore, the Respondent submits that the meaning of the Judgment is clear and that the application for interpretation is therefore not admissible.

Procedural background

3. On 2 August 2016, the Applicant filed the present application which, on the same day, was transmitted to the Respondent, instructing him to file his reply by 1 September 2016.

4. On 2 August 2016, the case was assigned to the undersigned Judge.

5. On 1 September 2016, the Respondent filed his reply and, on the same day, the Applicant filed a motion for leave to file an observation to the Respondent’s reply, including his comments to the reply.

Parties’ submissions

6. The Applicant’s submissions, as set out in the application and in his 1 September 2016 motion, may be summarized as follows:

a. *Kisia* UNDT/2016/040, which was not appealed by the parties, leaves reasonable doubts about the will or the argument leading to the decision requiring interpretation;

b. It is unclear if the Tribunal entered into a final judgment disposing of the dispute on procedural irregularity or the case was remanded to the Secretary-General for the institution or correction of required procedure and whether it will be followed by a judgment on the merits. Such institution or correction of required procedure ought to have been carried out within three months or 90 days from the date of judgment, no later than 25 July 2016 in the present case;

c. *Kisia* UNDT/2016/040 did not clearly state the date by which the remanded claim was to be executed by the Respondent. Until the date of the filing of the present application, the institution or correction of the required procedure has not taken place and the Applicant has not been served with the implementation of required procedure or any other decision regarding the dispute;

d. *Kisia* UNDT/2016/040 was not executed within a reasonable time in accordance with *Bangoura* UNDT/2011/202. The Tribunal should therefore issue a final judgment on merits of the case and order (i) appropriate compensation and relief, resulting from the long delay to institute correct procedure, which lead the Applicant to feel anxious and emotional distress, and (ii) *Kisia* UNDT/2016/040 to be executed.

7. The Respondent's submissions may be summarized as follows:

a. The Tribunal did not remand the Applicant's claim under art. 10.4 of the Dispute Tribunal's Statute but granted the application, rescinded the contested decision, and remanded the claim to UNCB;

b. *Kisia* UNDT/2016/040 is clear and there is no need for interpretation;

c. Under art. 12.4 of the Dispute Tribunal's Statute, an order for execution can be issued only where a judgment requires time for execution. *Kisia* UNDT/2016/040 did not require execution within a period of time and, in any event, it has been executed because the Applicant's claim will be examined by the UNCB at its next meeting in September 2016, which is the first UNCB meeting after the issuance of *Kisia* UNDT/2016/040.

Consideration

The relevant parts of Kisia UNDT/2016/040

8. According to para. 1 of *Kisia* UNDT/2016/040, which is not challenged by the Applicant in the present case, the administrative decision contested by the Applicant in Case No. UNDT/NY/2014/061 was that of:

... the Assistant Secretary-General ["ASG"], Controller, Office of Programme Planning, Budget and Accounts, Department of Management ... to approve the recommendation of [the UNCB] to deny his claim for compensation of USD2,277.53 for damage to his car following an accident that occurred on 27 July 2013 at security post no. 103, United Nations Secretariat building, New York.

9. Based on its findings from para. 45-48 of *Kisia* UNDT/2016/040, the Tribunal concluded that:

49. Taking into account the above mentioned procedural irregularities of the contested decision, the Tribunal concludes that the mandatory procedure prescribed by ST/AI/149/Rev.4 was not followed and will not further analyze the grounds of appeal related to the merits of the present case.

...

51. Therefore, in the light of the Appeals Tribunal's binding jurisprudence, according to which the Tribunal cannot place itself in the position of the decision-maker, which in the present case is the ASG/Controller, the Tribunal will grant the application and will rescind the contested decision of 23 April 2014 together with the UNCB's recommendation of 4 April 2014.

52. The Tribunal notes that the Respondent submitted that:

... the Applicant has failed to take the reasonable step of claiming the cost of the repairs to his vehicle under his insurance, and has not met the conditions for presenting a claim for compensation established by [secs. 5 and 12 of ST/AI/149/Rev.4].

53. The Tribunal underlines that, according to secs. 14 and 16 of ST/AI/149/Rev.4, the UNCB is competent in the first instance to evaluate the receivability of a compensation claim in accordance with its Rules of Procedure, sec. 17. Consequently, the Applicant's compensation claim for property damage for his car is to be remanded for a new examination by UNCB, including on receivability.

54. Based on the UNCB's recommendation, the ASG/Controller is then to make the final decision on the Applicant's claim.

10. Accordingly, the Tribunal decided:

55. In the light of the foregoing, the Tribunal DECIDES:

- a. The application is granted;
- b. The contested decision of 23 April 2014 together with the UNCB's recommendation of 4 April 2014 are rescinded. The Applicant's claim is remanded for a new examination by the UNCB, including on receivability.

Interpretation of Kisia UNDT/2016/040

11. The Applicant contends that the meaning of *Kisia* UNDT/2016/040 is unclear and requests an interpretation of paras. 51, 53, 55(a) and 55(b).

12. The Appeals Tribunal set out the test for when a request for interpretation is admissible in *Abbasi* 2013-UNAT-315 in which it stated that:

18. Turning to the application for interpretation, the Appeals Tribunal notes that interpretation is only needed to clarify the meaning of a judgment when it leaves reasonable doubts about the will of the Tribunal or the arguments leading to a decision. But if the judgment is comprehensible, whatever the opinion the parties may have about it or its reasoning, an application for interpretation is not admissible, as it happens in the present case.

13. As results from *Kisia* UNDT/2016/040, the application was granted and the contested decision of 23 April 2014 together with the UNCB's recommendation of 4

April 2014 were rescinded. The Applicant's claim was remanded for a new examination by the UNCB, including on receivability. Therefore, the UNCB is now to issue a new recommendation based on which the Controller will take a new reasoned decision regarding the Applicant's claim for compensation of USD2,277.53 for damage to his car following an accident that occurred on 27 July 2013 at Security Post no. 103 at the United Nations Secretariat building, New York. *Kisia* UNDT/2016/040 is without prejudice to the proceedings, including an appeal, if any, related to the new decision.

14. Accordingly, the Tribunal finds that *Kisia* UNDT/2016/040 is clear and unambiguous in its meaning, including the findings and conclusions entailed in paras. 51, 53 and 55(a) and (b), and that it therefore leaves no reasonable doubts about the will of the Tribunal or the findings leading to its decision. There is therefore no need to interpret *Kisia* UNDT/2016/040 and the request for interpretation is to be rejected.

Execution of Kisia UNDT/2016/040

15. Articles 11.3 and 12.4 of the Statute of the Dispute Tribunal state:

[11.3] The judgements and orders of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal ...

[12.4] Once a judgement is executable under article 11, paragraph 3, of the present statute, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out.

16. In line herewith, art. 32 of the Dispute Tribunal's Rules of Procedure on execution of judgments states that:

1. Judgements of the Dispute Tribunal shall be binding on the parties, but are subject to appeal in accordance with the statute of the Appeals Tribunal. In the absence of such appeal, it shall be executable

following the expiry of the time provided for appeal in the statute of the Appeals Tribunal.

2. Once a judgement is executable under article 11.3 of the statute of the Dispute Tribunal, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out.

17. As clearly results from *Kisia* UNDT/2016/040, the Tribunal did not establish a certain deadline for execution, so the judgment was to be executed according with the general rule, namely following the expiry of the time provided for appeal.

18. The Tribunal considers that the parties have the obligation to execute a judgment within the deadline established by the Tribunal or, if such a period is not indicated, as soon as possible within a reasonable period of time.

19. In accordance with art. 7.1(c) of Statute of the Appeal's Tribunal, an appeal is to be filed within 60 calendar days of the receipt of the judgment of the Dispute Tribunal. *Kisia* UNDT/2016/040 was published on 25 April 2016 and the parties were notified on the same day. As *Kisia* UNDT/2016/040 was not appealed by the parties, it became executable on 25 June 2016. In his reply, the Respondent submitted that the Applicant's claim was forwarded by the Controller to the UNCB and is to be examined at its next meeting in September 2016 after which the Controller will decide on the matter. The Respondent also indicated that this meeting is the first meeting of the UNCB after the issuance of the *Kisia* UNDT/2016/040 and the Applicant's claim is included on the agenda.

20. The Tribunal considers that, in most cases, the execution of a judgment requires only one executorial act (*uno actu*). However, the execution of *Kisia* UNDT/2016/040 consists in several steps to be followed due to the specificity of the procedure, which involves different levels prior to the final decision-making. As stated by the Respondent, the Controller forwarded the Applicant's claim to the UNCB and it was included on the agenda of the first UNCB meeting after the issuance of *Kisia* UNDT/2016/040, which will be held in September 2016. The final

step of the execution of *Kisia* UNDT/2016/040 following the UNCB recommendation will be the Controller's decision.

21. Pursuant to *Kisia* UNDT/2016/040, paras. 51–55, and in accordance with arts. 11.3 and 12.4 of the Dispute Tribunal's Statute, and art. 32 of the Rules of Procedure, the Tribunal notes that execution of the judgment is currently ongoing and there is no evidence produced by the Applicant showing that the Respondent could have executed the judgment earlier and/or that he acted in bad faith. The Tribunal observes that the UNCB scheduled its first meeting two months after the date when *Kisia* UNDT/2016/040 became executable, respectively as soon as possible and considers that the Applicant has not been deprived of his right to have the judgment executed within a reasonable time.

22. The Tribunal concludes that execution of the judgment is currently being carried out. The Applicant's request for execution of *Kisia* UNDT/2016/040 is therefore to be rejected (see, similarly, the Appeals Tribunal in *Sutherland* 2014-UNAT-494, para. 38).

Compensation

23. The Tribunal notes that art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and that the text introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

24. In *Black's Law Dictionary*, 6th Ed. (1990), "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (p. 718).

25. The Tribunal notes that, in *Asariotis* 2013-UNAT-309, the Appeal Tribunal stated that (emphasis in the original as well as added and footnotes omitted):

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

26. In accordance with the new requirement of art. 10.5(b) of the Dispute Tribunal's Statute and para. 36(i) of *Asariotis*, this Tribunal is of the view that a breach of a fundamental nature can give rise to an award of moral damages only if the harm to the staff member is supported by evidence.

27. In *Dahan* UNDT/2015/053 and *Mutiso* UNDT/2015/059 (neither judgment is appealed), the Dispute Tribunal concluded that the evidence on moral damage can, for instance, be produced in pleadings and documents on record which demonstrate a clear showing of harm. The Tribunal notes that there is no evidence in the present case that the Applicant has suffered any anxiety and emotional distress caused by his claim being considered only in September 2016 during the first UNCB scheduled

meeting. The Applicant's request for three months' net base salary as compensation for damages is therefore to be rejected.

Conclusion

28. In the light of the foregoing, the Tribunal DECIDES that:

The application is dismissed in its entirety.

(Signed)

Judge Alessandra Greceanu

Dated this 26th day of September 2016

Entered in the Register on this 26th day of September 2016

(Signed)

Hafida Lahiouel, Registrar, New York