UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/015
Judgment No.: UNDT/2017/058
Date: 17 July 2017
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SYRJA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is serving as a Security Officer at the FS-4 level with the United Nations Operation in Côte d'Ivoire (ONUCI). He filed an application on 6 March 2017 with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting the Administration's decision not to honour its commitment to pay him USD10,790 as compensation for the loss of his personal effects at his residence following post-election violence in Côte d'Ivoire in 2011 (Contested Decision).

2. The Respondent filed his reply to the application on 6 April 2017.

Procedural history

3. The Applicant initially filed an application on 19 March 2014 to UNDT challenging a decision of the United Nations Claims Board (UNCB) to deny his claim for compensation for personal effects looted and/or destroyed at his residence in Daloa following post-election violence in Côte d'Ivoire in 2011. This application was registered as UNDT/NBI/2014/021.

4. In its Judgment No. UNDT/2016/001 (*Syrja)*, the Tribunal concluded that the impugned decision was unlawful for the following reasons:

> a. The decision-maker did not consider a material fact, namely that the Applicant had submitted an inventory of personal items that pre-dated the incident; and
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> b. The UNCB recommended an award of compensation based on a test that did not conform to that required by the Staff Rules and ST/AI/149/Rev.4.

5. The Tribunal decided that since the UNCB is a technical body under staff rule 11.2(b), it was appropriate to remand the matter to it for reconsideration of the Applicant's claim and to also give the parties an opportunity to discuss and attempt to reach agreement on the remedies sought by the Applicant.

6. On 31 March 2016, the Tribunal struck the matter off its docket due to the parties' joint submission that they had determined the amount of compensation to be paid to the Applicant.

7. On 6 March 2017, the Applicant filed the current application contesting the Administration's decision not to honour its commitment to pay him USD10, 790 as compensation for the loss of his personal effects following post-election violence in Côte d'Ivoire in 2011.

Background facts from Judgment No. UNDT/2016/001

8. The following background facts have been taken from the Tribunal's judgment on liability in *Syrja* UNDT/2016/001.

> On 25 February 2011, during a series of violent post-election demonstrations, armed vandals broke into and looted the Applicant's residence in Daloa. They destroyed anything they could not carry away. The Applicant lost everything except the clothes he was wearing. The Applicant reported this incident. His claim was investigated by the ONUCI Special Investigations Unit (SIU). On 28 March 2011, the SIU concluded its investigation into the Applicant's claim. It recommended that he be compensated for the items looted per United Nations Rules and Regulations. The SIU report included a copy of the Applicant's inventory list dated 7 December 2010 as well as the two inventories completed after the violence.[1]
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> On 1 April 2011, the Applicant submitted claims for reimbursement of expenses for the loss and/or damage to personal effects at his residence at Daloa to the value of USD12, 120. To this claim he attached two inventory lists. The first was the list he had submitted to the RAO on 7 December 2010 to the value of $8,120. The second was a list the Applicant prepared after the looting and provided to SIU on 26 March 2011. This was headed "Inventory of Other Private Items" and listed items to the value of USD4, 000 that had not been included in his first list.[2]
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> In the report of the ONUCI Local Claims Review Board (LCRB), dated 28 November 2012, the Secretary of the LCRB determined that the loss of his entire inventory of personal effects was directly attributable to the performance of official duties and the events were beyond his control and could not have been prevented by him. The Secretary of the LCRB proposed that the items be reviewed based on reasonableness and requirement for mission

[1] See *Syrja* UNDT/2016/001, paragraphs 16, 18 and 20.
[2] *Id*, paragraphs 21 and 22.

> life. She suggested that the ONUCI compensation matrix be used to complement ST/AI/149/Rev.4 (Compensation for loss of or damage to personal effects attributable to service) and recommended applying a 10% depreciation rate to all items except those purchased in 2010. The recommendation of the Secretary of the LCRB, which was accompanied by the analysis of the claim list per the matrix, recommended that the Applicant be compensated in the full and final amount of USD6, 525. As the recommended amount exceeded the Mission's local delegation of authority granted by the Controller to settle staff member claims, the Secretary of the LCRB recommended that the claim be forwarded to UNCB for final review and approval by the Controller.[3]
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> In about February 2013, the Applicant was asked to complete additional forms for UNCB. He submitted a claim form which deleted some items he had earlier claimed for but had subsequently found. The revised total of his claim was USD11,710.[4]
>
> The Secretary of the UNCB stated that the UNCB found the claim was compensable. It considered that the ONUCI claims officer stated that all inventory lists for the claims submitted by ONUCI members were dated and stamped after the loss. Accordingly, due to the lack of adequate corroboration and proof of items, the UNCB recommended approval of the minimum necessary for mission life such as a few changes of clothes, one cell phone, one lap top, minimal appliances, minimal cash and no recreational equipment.[5]
>
> On 19 December 2013, the Applicant received the decision of the UNCB. It stated: According to the information provided by ONUCI, all inventory lists were dated and stamped after the incident and hence, due to lack of adequate corroboration and proof of ownership, the UNCB recommended approval of only the minimum necessary for mission life, such as few changes of clothes, one cell phone, one laptop, minimal appliances, minimal cash and no recreational equipment. The Controller therefore approved on 10 December 2013, that you be compensated in the final amount of US$2,654.67.[6]

Facts relevant to the current application

9. Following the issuance of Judgment No. UNDT/2016/001 on 6 January 2016, the parties commenced discussions on remedies since the Tribunal had ruled on the liability of the Respondent.

[3] *Id*, paragraphs 34, 37-39.
[4] *Id*, paragraph 40.
[5] *Id*, paragraph 41.
[6] *Id*, paragraph 46.

10. On 29 March 2016, the parties filed a joint submission informing the Tribunal that "a mutually determined amount of compensation to be paid to the Applicant has been reached" and that, accordingly, "the parties have now concluded their discussions on remedies." In view of this joint submission, the Tribunal struck the matter off its docket on 31 March 2016.

11. On 9 September 2016, following reconsideration of his claim by the UNCB, the Applicant received an undertaking and assignment form requesting that he affirm his acceptance of payment in the sum of USD6,919 as compensation for the loss of and/or damage to his personal effects. The Applicant did not sign the undertaking.

12. On 8 November 2016, the Applicant sought management evaluation of the Administration's decision not to honour its commitment to pay him USD10, 790 as compensation for the loss of his personal effects at his residence following the post-election violence in in Côte d'Ivoire in 2011. On 6 December 2016, the Applicant received a response from the Management Evaluation Unit (MEU) in which it upheld the decision of the Administration to pay the Applicant USD6, 919.

Hearing

13. Pursuant to art. 16.1 of the UNDT Rules of Procedure, the Dispute Tribunal has discretionary authority as to whether to hold an oral hearing. Additionally, art. 19 of the Rules of Procedure provides that the Tribunal may at any time issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

14. In *Lee* 2015-UNAT-583, the Appeals Tribunal held that:

> 17. It is clear that the UNDT has broad discretion in managing its cases and rightly so, since the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties. This discretion, though broad, is not unfettered and the exercise of it ought not to be arbitrary and/or improper.

> 18. In the absence of an error in the procedure adopted by the UNDT which may render the hearing of the case unfair, the Appeals Tribunal will not interfere with the discretion of the UNDT to manage its cases. In the instant case, the UNDT was in possession of the respective applications and documentations which it considered to be sufficient to make the relevant decisions to facilitate the fair and expeditious disposal of the case.

15. It is clear from the UNDT Rules of Procedure and the Appeals Tribunal's jurisprudence that a hearing is not mandatory for every case. Whilst the Tribunal may take the parties' views into consideration, the decision to hold an oral hearing lies squarely within the authority of the Tribunal.

16. In the present matter, the Tribunal has concluded that the issue before it is purely one of law and interpretation. Hence, an oral hearing is not necessary. A determination will therefore be made based on the parties' pleadings and supporting documentation.

Considerations

17. The crux of this application is whether there was an agreement between the parties that created an obligation on the part of the Respondent to pay the Applicant the sum of USD10, 790.

18. It is a basic principle of contract law that for there to be a contract or an agreement that is enforceable at law, there must be *consensus ad idem* (a meeting of the minds). This simply means that the parties agree on the same terms, conditions and subject matter.[7]

19. In *Fagundes* UNDT/2012/056, the Tribunal held that[8]:

> An offer is an expression of willingness to enter into a contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. An acceptance is a final and unqualified expression of assent to the terms of an offer. An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete.

[7] Black's Law Dictionary, Eighth Edition.
[8] This judgment was not appealed.

> Whether a binding contract has been concluded is established by making an objective assessment of what the parties said and did at the time of the transaction. What the parties later say they intended to do is secondary to the evidence of their contemporaneous acts.

20. Did Respondent's counsel in the present matter express a willingness/intention to enter into an agreement with the Applicant on his claim for compensation for the loss of his personal effects? Was there *consensus ad idem*?

21. The Tribunal is faced with a situation where the Applicant is essentially asserting that there was a formal agreement between the parties that specified the amount of compensation to be paid by the Respondent to him. However, he has not submitted a written agreement or any other signed document that clearly shows the Respondent's undertaking to pay him USD10, 790.

22. Even so, the absence of a signed document is not, on its own, conclusive evidence that there was no agreement. A contract or agreement may or may not be in writing. More specifically, the Tribunal will determine if there was an implied-in-fact contract by examining the parties' intentions based on their conduct and other circumstances to establish if there was mutual assent and consideration.[9]

23. In view of the foregoing, the Tribunal will look at the parties' conduct from the time Judgment No. UNDT/2016/001 was issued on 6 January 2016 to 29 March 2016, when the Applicant withdrew his application, to determine if the parties reached an agreement for the payment of USD10,790.

24. The Applicant wants the Tribunal to infer that there was an unequivocal agreement because:

> a. After the issuance of Judgment No. UNDT/2016/001, the parties started discussing "an agreed amount" to be paid to him by the Respondent. On 29 February 2016, they submitted a joint motion for extension of time because their discussions on an agreement were

[9] Bryan A. Garner, *Black's Law Dictionary* (Thomson West, 2007), p. 345.

ongoing. The Tribunal granted the motion and gave the parties until 16 March 2016 to reach an agreement on remedies.[10]

b. On 16 March 2016, Respondent's counsel sent an email to the Applicant's counsel that stated: "We still need to go back to New York to finalize a few matters regarding a possible agreement in this case. Would you be agreeable to a further extension of one week?"

c. Counsel for the Applicant agreed and on the same day, the parties filed another joint motion for extension of time. The Tribunal granted the motion and gave the parties until 29 March 2016 to reach an agreement.

d. On 29 March 2016, the parties filed a joint submission informing the Tribunal that "a mutually determined amount of compensation to be paid to the Applicant has been reached" and that, accordingly, "the parties have now concluded their discussions on remedies." This evidently ended the parties' discussions as to what was to be paid to the Applicant and clearly indicated that the amount to be paid to him is the amount referenced in the Administration's communications with his counsel, that is USD10, 790.

e. The Applicant withdrew his application in Case No. UNDT/NBI/2014/021 because of the apparent agreement with the Administration that his claim was to be valued at USD10, 790.

25. The Respondent's position may be summed up as follows:

a. There is no evidence of an agreement, signed by the parties, that the Applicant would be paid USD10, 790 to withdraw his case before the UNDT.

b. Relying on *Munuve* UNDT/2013/060, the Respondent asserts that to establish that there was a previous agreement between the parties, a written and signed agreement must be produced and that mere correspondence between the parties will not suffice.

[10] See Order No. 038 (NBI/2016).

c. Since the Tribunal had remanded the matter to UNCB for reconsideration, it was necessary for the parties to agree on the final amount sought. Consequently, he contacted the Applicant's counsel on 17 March 2016 to understand the value of the Applicant's claim, which the Applicant had modified on 7 October 2015. Given the uncertainty over the valuation of the claim and to assist the UNCB with its determination, an agreement was reached on the actual sum sought. His communications did not include an agreement to pay the Applicant USD10, 790.

d. The joint submission of 29 March 2016 was intended to reflect the parties' agreement on the value of the Applicant's claim.

e. The UNCB and the Controller reconsidered the Applicant's claim as ordered by the Tribunal in its Judgment No. UNDT/2016/001 and determined that the value of his claim was USD6, 919.

26. To resolve this issue, one must go to Judgment No. UNDT/2016/001 to understand the reason why the parties entered discussions in the first place. In the light of its findings on the erroneous procedure used by the UNCB in Judgment No. UNDT/2016/001, the Tribunal decided that it was "appropriate for the case to be remanded to [the UNCB] to reconsider the Applicant's claim for compensation". With respect to the parties, the Tribunal indicated that the remand would give them an opportunity to discuss and attempt to reach agreement on **other remedies** sought by the Applicant.

27. The parties were not instructed or expected to reach an agreement on the Applicant's claim for the loss of his property because the Tribunal recognized that the UNCB, as the technical body that makes recommendations on such claims, was the most competent entity to deal with the issue. Hence, the Tribunal limited the parties' discussions to a specific area, that is the "other remedies" that the Applicant had asked the Tribunal for.

28. Considering the precise directives in Judgment No. UNDT/2016/001, the Tribunal finds it strange that the Respondent's counsel engaged in a discussion with the Applicant on his claim for the loss of his property as opposed to the other

remedies that the Applicant was seeking. The Tribunal did not order any valuation exercise or other assistance to be given to the UNCB so it is no surprise that the Applicant deemed the discussions around the USD10, 790 to be an agreement and not just a mere valuation.

29. Additionally, the Tribunal finds the three joint motions filed by the parties and Respondent's counsel's email of 16 March 2016 to be quite indicative of the parties' intentions. On 29 February 2016 and 16 March 2016, the parties submitted joint motions that prayed for extensions of time because discussions on "an agreement" were ongoing. The Respondent's counsel's email of 16 March 2016 states in relevant part that he had to go back to New York to "finalize" a few matters regarding "a possible agreement" in this case. There is no mention of a "valuation" or an "agreement on a valuation" in the joint motions or the email. These three documents refer unambiguously to an agreement.

30. In view of the promising tone of the 16 March 2016 email, the Applicant agreed to the filing of the 16 March 2016 joint motion for extension of time, which, in the considered view of the Tribunal, was to allow the Respondent to wrap up loose ends vis-à-vis the agreement they had been discussing since January 2016.

31. The parties then submitted their last joint motion on 29 March 2016, which stated that they had reached "a **mutually determined amount** of compensation **to be paid** to the Applicant (emphasis added)" and that they had "concluded" their discussions on remedies. The Respondent has not pled that the mutually determined compensation was in relation to other remedies. Thus, the Tribunal can only surmise that the mutually determined compensation was in relation to the Applicant's claim for the loss of his personal belongings.

32. Based on the evidence before it, the Tribunal concludes that all the elements of not only a binding agreement but of a valid and enforceable contract existed between the parties because: (i) there was mutual assent leading both parties to jointly inform the Tribunal that they had established the amount of compensation to be paid to the Applicant; and (ii) there was consideration because the Applicant withdrew his application as a result of their "mutual determination"

on the payment. Accordingly, the Tribunal concludes that there was an implied-in-fact contract for the Respondent to pay the Applicant USD10, 790 as compensation for the loss of his personal belongings.

33. It must be emphasized that the Respondent's counsel as a legal representative is fully competent to enter into a binding agreement on behalf of his principal the Respondent with the Applicant. Such an agreement was entered into here and it is irresponsible to argue otherwise.

Judgment

34. This application succeeds.

35. The Respondent's decision not to honour his commitment to pay the Applicant USD10, 790 as compensation for the loss of his personal effects is rescinded.

36. The Respondent shall pay the Applicant the agreed-on sum of USD10, 790.

37. The total sum of compensation shall 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 Nkemdilim Izuako

Dated this 17th day of July 2017

Entered in the Register on this 17th day of July 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi