



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/062

Judgment No.: UNDT/2017/096

Date: 28 December 2017

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CHACON GOMEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Aleksandra Jurkiewicz, OSLA

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM
Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant is an Associate Political Affairs Officer at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

2. In her application dated 19 July 2017, the Applicant contests the implied decision by “the Administration to refuse to pay [her] exact salary and associated entitlements for the period September 2015 to date”. She requested all the outstanding payments with interest and moral damages for the inconvenience and stress caused.

3. The Respondent filed a reply to the application on 21 August 2017 in which he conceded liability for unpaid salary and allowances with interest for the delay.

4. The Tribunal held a case management discussion on 20 September 2017 and a hearing on the merits on 14 November 2017. By Order Nos. 156, 169 and 196 (NBI/2017), the Tribunal directed the parties to file submissions on the state of financial accounting between them and submissions on the question of compensation for moral damages.

Facts and proceedings

5. Facts described below are undisputed.

6. The Applicant is currently a serving staff member in MONUSCO holding a fixed-term appointment as an Associate Political Affairs Officer.

7. She joined the United Nations on 15 September 2013 as an Associate Civil Affairs Officer (P-2, step 5) with the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). Her duty station was Bamako.

8. On 12 August 2015, the Applicant was offered a temporary assignment with the United Nations Assistance Mission in Somalia (UNSOM) office in Mogadishu,

initially for a three-month period.¹ She accepted this offer and was deployed from Bamako to Mogadishu. She took up the temporary post on 28 September 2015. In the meantime, she kept a lien on her post in Bamako.

9. Upon entry on duty in Mogadishu, the Applicant continued to be paid at her P-2 step 7 Bamako rate.² As a result, she failed to regularly receive the associated benefits on account of her assignment to an “E” duty station specifically: post adjustment; hardship; and danger pay.

10. On 28 December 2015 and on 28 June 2016, the Applicant’s temporary assignment in Mogadishu was extended.³

11. In June 2016, the Applicant did not receive any salary at all. In July 2016, she started to receive advance payments in lieu of a regular salary. These advance payments were of a non-descript nature and did not itemize what specific amounts were being paid to the Applicant and which entitlements were included. The Applicant served in Mogadishu for a period of 10 months and 20 days, during this time the matter of her outstanding pay and benefits were not resolved.

12. On 22 August 2016, she resumed her post in Bamako.⁴ She continued to receive salary advances as opposed to her regular salary and entitlements. In September 2016, November 2016 and January 2017, she did not receive any salary advance at all. As was the case in Mogadishu, no explanation was given as to what the sums received related to or the reasoning behind the random amounts that were received.

13. In February 2017, the Applicant was reassigned to MONUSCO. Her salary and related entitlements were not regularized and she continued to receive the sporadic advance payments, the last one in March 2017.

¹ Annex 1 – application.

² Annex 2 – application.

³ Annex 4 – application.

⁴ Annex 5 – application.

14. Throughout the period commencing September 2015 to the date of the filing of the application, the Applicant continued not to receive her full salary and related entitlements. Since October 2015 when she first raised this issue, she continued to engage with the Administration to resolve the outstanding payments and to regularize her salary. On each occasion, the Administration informed her that the matter was being resolved.⁵

15. On 19 January 2017, the Applicant was informed that all of the concerns she had raised, including retroactive salary, difference of post-adjustment during the months that she was deployed in Mogadishu but receiving MINUSMA salary, medical and life insurance coverages, rental deductions, telephone and accommodation recoveries and danger pay, would be addressed in the January 2017 payroll.⁶ However, the Applicant did not receive any regularized payment for January 2017 nor even an advance payment. On 9 February 2017, the Applicant received a draft payslip with the pay date indicated as 28 February 2017.⁷

16. On 6 March 2017, the Applicant filed a request for management evaluation challenging the non-payment of her salary and allowances and requesting the Administration to provide a full accounting of her earnings and deductions, and the payment of any amounts still due to her. This request remained unanswered.

17. On 20 September 2017, the Tribunal held a case management discussion following which it issued Order No. 156 (NBI/2017) requiring the Respondent: to calculate the interest due to the Applicant, both specific and the total amount; the proposed date of payment of said sum and to inform the Tribunal whether the parties had reached agreement on payment of compensation for moral damages. In response the Respondent submitted that the Applicant had been provided with a breakdown of the USD48,653.24 which was owed to her and which she received with her August 2017 salary. The Respondent further submitted that interest due to her in the sum of

⁵ Annex 6 – application.

⁶ Annex 7 – application.

⁷ Annex 8 – application.

USD1,181.67 was to be paid by 3 November 2017. In a supplemental response to Order No. 156 on 12 October 2017, the Respondent informed the Tribunal that an additional USD825.05 was owed to the Applicant in respect of her post-adjustment and hardship element of mobility payments for September and October 2015 and that the Applicant would receive this payment with her October 2017 salary. In light of that additional payment, overall interest due to the Applicant had been recalculated at USD1,249.41

18. On 9 October 2017, the Tribunal issued Order No. 169 (NBI/2017) requiring the parties to file submissions on the issue of moral damages and subsequently set down the matter for a hearing on that matter specifically on 14 November 2017.

19. By Order No. 196 (NBI/2017), the parties were required to inform the Tribunal whether they had reached a settlement on the main claim. On 1 December 2017, the parties informed the Tribunal that the only outstanding amount owed by the Administration in terms of the Applicant's pecuniary damages is the amount of USD1,300.34 which she is to receive with her December 2017 salary.

20. The parties did not reach agreement as to compensation for moral damages.

Applicant's case

21. The Applicant's case with respect to moral damages was presented in her testimony as follows:

22. The problems with her salary payments started when she moved to Somalia in October 2015. She raised the case several times with Human Resources (HR) in Somalia, UNSOM. They tried several times to discuss with colleagues in the Regional Service Centre Entebbe (RSCE). She then escalated the case to the Chief of Staff who put her in touch with the Director of Mission Support (DMS). They all tried to solve the issue unsuccessfully.

23. She lived in hardship conditions in Mogadishu. She had a four-week rest and recuperation (R and R) cycle but she was unable to decide freely on how to spend her vacation. When she received R and R, she would go home because she was not sure about her financial situation. She restricted her movements because her finances were unstable.

24. By February 2016, she had received over USD50,000 in advance payments but did not know what her salary was during her time in Mogadishu. She tried to keep track but she could not be sure; she did not know which expenses were deducted from her payslip. The last payslip she received was in May 2016.

25. When she moved back to Mali in May 2016, she thought that the issue would be finally solved. Instead, she stopped receiving any salary at all or even payslips. She discussed with HR colleagues, Finance colleagues, DMS office and Budget but all was in vain and the only information that she got was that there were problems with her post.

26. Till September 2016, she did not receive a salary but only random payments. She then contacted the Ombudsman's offices in Entebbe. The Ombudsman was very helpful in the beginning but two months later, the Ombudsman told her to escalate the case to the Management Evaluation Unit (MEU) and to seek legal advice. At that time at least the RSCE kept her in the loop. For over a year they had not done this before. She received notifications every month from January to August 2017 announcing that she would be paid regularly. This, however, never happened.

27. In February 2017, she moved to the Democratic Republic of Congo (DRC). She had troubles checking out of the Mission because no one in the Finance Section knew whether she owed money or was owed money. When she finally moved to MONUSCO, she requested HR colleagues there to assist her but they also could not do anything.

28. In May 2017, after she had received another reassurance that her financial situation would be regularized, she relied on that information and attempted to

purchase an apartment in Alicante, Spain. She made a down payment of EUR3,000 and requested two months to obtain the loan.⁸ However, this sale could not go through because she did not receive her salary in June and July. Her deposit was forfeited.

29. Finally, she received a salary in August 2017 along with the first correct payslip since August 2015. When she asked for payslips, she received an excel spreadsheet representing almost two years of payment slips. After reviewing the spreadsheet, she requested clarifications and has been going back and forth with HR since then because she did not know whether she was paid the correct amount or not.

30. Throughout the period of delay she had to contact at least 30 people officially and unofficially and visit HR departments in three different duty stations trying to resolve her payment issue. She sent around 60 emails on the subject. Every time she needed to make a service request in iNeed, she had to talk to a different HR person and explain the issue. She had to ask for personal favours from colleagues which was counterproductive in terms of her performance. It was a very stressful period; she did not feel like she was a staff member but “just like a number”.

31. Overall, the absence of pay checks had a detrimental impact on her quality of life. For a period of two whole years, she faced extreme financial distress as she was not in a position to take any decisions regarding even the smallest or most basic financial transactions, without fear of the consequences. She was anxious daily about whether she would receive the next salary payment or not and continuously had to restrain herself from buying anything other than the strictly necessary to be able to cope if the next month’s salary did not arrive.

32. The haphazard salary payments prevented her from planning any substantial expenses. She was unable to provide payslips as evidence of income and therefore could not make use of even basic financial services available to people in regular employment, such as buying a house and securing an appropriate mortgage.

⁸ Annex A to the Applicant’s submissions on moral damages.

33. She sustained additional harm and distress due to the humiliation of having to repeatedly beg the Administration for payments that were owed to her as of right.

34. The Applicant's legal argument as articulated in the application and subsequent filing in response to Order No. 169 (NBI/2017) is summarized below:

35. The absence of pay checks, irregular and inadequate advance payments in lieu of salary, and denial to regularize her financial situation for two years insult the very nature of the contractual relationship between the Secretary-General and the staff member. It violates the basic principle that the employer is under an obligation to pay salary as the counterpart to the employee's obligation to work. To allow the Administration a wide degree of latitude in delaying payment of salary whilst at the same time affording no flexibility in the staff member's obligation to work strikes at the very core of the concept of the dignity of an employee.

36. Regarding the Respondent's questioning the proof of moral damage, the Applicant submits that to view art. 10.5(b) of the UNDT Statute as requiring the staff member to provide some form of self-serving statement as evidence of harm merely adds an element of subjectivity and potentially trivializes the nature of the violation. In reliance on *Kallon*⁹, the Applicant argues that the presence of certain circumstances may lead to the presumption of moral injury.

37. The Applicant recognizes that the quantum of moral damages cannot be easily assessed based on the absence of any prescribed mode of calculation of moral damage. The Applicant, however, requests the Tribunal to distinguish her case from all which precede her, specifically from *Ho*¹⁰ and *Kings*¹¹. Unlike those, her case was not a one-off event of non-payment, in which the administrative action could easily be identified, quantified and remedied, but the cumulative failure to pay her salary and other dues over a period of two whole years. The large amount of money involved is beyond what any staff member could be expected to adjust to without

⁹ 2017-UNAT-742.

¹⁰ UNDT/2017/013.

¹¹ UNDT/2017/043.

suffering extreme financial insecurity. Regular salary payment is so fundamental to the everyday life of an employee that depriving her of this, whilst requiring that she keep working, is self-evidently much more detrimental than the harm associated with a one-off non-payment.

38. For the above-mentioned reasons, the Applicant requests moral damages for the inconvenience and stress caused in the amount of three months' net base salary.

Respondent's case

39. There is insufficient evidence of moral harm. Overdue payment of the Applicant's salary and entitlements does not of itself give rise to an award of moral damages. Any damages relating to such a delay require a substantial factual basis showing moral harm.

40. The Applicant claims that she suffered moral harm resulting from the non-payment of her contractual salary since September 2015, and the Administration's failure to remedy the situation. The claim is incorrect. The Applicant has not been without remuneration since September 2015. It is accepted that there were delays in the payment of her monthly salary from June 2016 onwards. However, the Administration did pay her USD77,500 in salary advances, responded to her queries promptly, and made all good faith efforts to rectify the situation. The Applicant has now received all salaries and entitlements that were owed to her. In addition, she has been paid interest on any outstanding amounts.

41. The Applicant's claim that she was unable to access certain financial services is unsupported by any evidence. The purchase agreement annexed to the Applicant's submissions does not prove that she lost the EUR3,000 down payment. The Applicant has produced no documents showing that she was unable to make, or keep up with, any payments because of the delay in receiving her monthly salary.

42. Accordingly, the Applicant has not demonstrated a substantial factual basis proving that she has suffered moral harm because of the late payment of her salary and entitlements.

43. If the Tribunal decides to award moral damages, the award of three months' net base salary is not warranted. Such an award would exceed amounts awarded in other cases regarding delays in payment of salaries or entitlements.

44. The Applicant distinguishes her case from that of *Kings*, where moral damages of CHF1,000 (USD1,000) was awarded for the five month delay in payment of three weeks' worth of salary. Contrary to the Applicant's claim, she was not owed a total sum of USD50,000 for a period of two years. The delay in the payment of her salary started in June 2016. Yet, the following month, she received a salary advance of USD10,000. Similarly, the Applicant's September 2016 salary was not paid timely. However, she was paid a salary advance of USD26,500 in August 2016 and USD9,000 in October 2016. When the payment of the Applicant's November 2016 salary was delayed, she received two salary advances in December 2016 totalling USD14,000 and additional advances in January and March 2016 totalling USD18,000.

45. Should the Tribunal decide to award moral damages, it should do so in line with the approach taken in the cases of *Kings* and *Ho*. The Administration paid salary advances to the Applicant to mitigate the delays in the payment of her salary and entitlements. It also paid the Applicant interest on any outstanding amounts. The Administration responded promptly to her queries, and throughout, has acted in good faith.

Considerations

46. The Tribunal understands that by admitting liability for payment of the entitlements with interests for the delay the Respondent recognizes that there was an ongoing breach of the Applicant's right to receive her salary and related emoluments. No doubt, the Organization has an obligation to pay the corresponding salary to each

staff member in retribution for the work performed, which is the obvious primary duty of any employer towards its employees. This finding is supported by the fact that the salary rate is one of the very few elements of the conditions of service specified in the United Nations letters of appointment (see para. (a)(v) of Annex II to the Staff Regulation), and the determination of the salary scales and components is the subject of numerous staff regulations and rules (notably, but not limited to, Annex 1 to the Staff Regulations). Although there is no specific provision setting the interval of salary accrual and payment, there is a constant practice since the Organization's inception to pay salaries monthly. As such, it is an implied condition of contract resulting from the practices of the Organization.

47. While the eventual payment of arrears put an end to the ongoing breach by the Administration, it did not erase the failure to pay the salary when due, and in due amounts, nor the damage that would have been occasioned by the lack of timely payment during the period of two years. The Tribunal understands that the obligation to compensate such a damage is disputed not in principle but as an evidentiary matter.

48. The Tribunal recalls UNAT's holding in *Kallon* according to which proving moral injury requires showing beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity.¹² Among others, the loss of a positive state of emotional gratification or emotional balance is harm deserving of compensation.¹³ For a breach or infringement to give rise to moral damages, especially in a contractual setting, where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances.¹⁴

¹² At para. 60.

¹³ *Ibid.*, at para. 61

¹⁴ *Kallon* 2017-UNAT-742 , at para. 62

49. This Tribunal considers that the following circumstances, which are neither exhaustive nor listed per significance, may be relevant for the finding of “peculiar features” in cases of moral damages claimed in relation with late payments:

- a. Duration of the breach;
- b. Cause for the breach, including a degree of negligence or improper motive behind it;
- c. Nature of the obligation breached;
- d. Magnitude of financial inconvenience as function of the sum owed in relation to the applicant’s financial status;
- e. Actual privations suffered;
- f. Time and effort spent by the applicant in pursuance of the claim; and
- g. Treatment of the applicant by the administration, including whether the administration responded to the applicant’s claim and queries, whether it mitigated the financial loss and inconvenience, whether explained the reasons and whether apologized for the delay.

50. In consideration of the foregoing, the Tribunal finds that in the present case the duration of the breach and its continuing character was, by UNDT experience, extreme. This was combined with the obscurity of its cause, i.e., “technical problem with funding” which remains unexplained. Reasonably, a problem with funding for the position should have prevented the deployment in the first place; above all, however, should have been solved earlier. No explanation has ever been given as to why it took two years *and* the proceedings before the UNDT to sort out the payments. Lack of apparent rational reason does not help coping with the delay and aggravates the sense of frustration and uncertainty and is only minimally mitigated by the fact that, admittedly, many staff in the administration acted in good faith and attempted to assist the Applicant.

51. The Tribunal further finds that, notwithstanding that the Applicant received certain payments during the period of the delay, a failure to pay the regular salary, a fundamental source of staff member's income, is particularly onerous. The Tribunal is persuaded that the Applicant could not be certain whether she would receive the next salary payment or not and continuously had to restrain herself from spending on anything other than strictly necessary to be able to cope if the next month's salary did not arrive, including the way of using her R and R.

52. The Tribunal moreover considers that the overall debt incurred, USD50,000, is a significant amount when compared to the Applicant's monthly salary (app. USD6,000 net) and the price of her purposed housing investment (EUR180,000). Without more, the Tribunal is not ready to accept that the Applicant's resignation of the purchase of the apartment in Alicante was exclusively attributable to the Respondent's failure to regularise her salary - given that the state of irregularity had been lasting for some time at the date of the preliminary contract, in entering such contract under these circumstances the Applicant must have been taking a financial risk. The Tribunal is nevertheless persuaded that haphazard salary payments prevented the Applicant from planning any substantial expenses. As such, the Tribunal is satisfied that the Applicant experienced stress, anxiety and diminished quality of life caused by the Organization's failure to process her payment in due time

53. Lastly, the Tribunal finds that having to repeatedly beg the administration for payments that were owed to her as of right and having been impeded even in mundane bureaucratic operations, the Applicant sustained distress, humiliation and a waste of her time.

54. These findings are premised on facts described as per the Applicant's *viva voce* evidence and written submissions, which are fully credible in light of the undisputed facts of the case. These facts, moreover, largely speak for themselves whereupon, as noted by UNAT, it would be permitted to infer logically and legitimately from the factual matrix that moral damages will normally follow as a consequence to an average person being placed in the same situation as the applicant

and thus that harm to personality deserving of compensation has been sufficiently proved and is supported by the evidence as required by art. 10(5)(b) of the UNDT Statute.¹⁵ On the totality of evidence the Tribunal, as the principal trier of fact, is satisfied that the Applicant suffered moral harm.

55. Turning to the question of appropriate compensation the Tribunal bears in mind that whereas the distress endured by the Applicant may not be undone, the role of financial compensation is to enable gratification, such as buying goods and services, proportionate to the harm suffered. The breach of the Applicant's rights was of a limited duration and the harm has now been alleviated with the satisfaction of the main claim. In quantifying the compensation, the Tribunal considers that the Applicant's demand, a three-month worth of her salary, which would be equivalent of three-month vacation with pay, is excessive. On the other hand, for the stress and privations endured over the two-year period it seems just that the Applicant be compensated on a level equivalent to a month vacation with pay. As such, the Tribunal finds that USD6,000 (roughly one-month of Applicant's net salary pay) is appropriate compensation. In view of the foregoing the Tribunal has decided that an adequate award for moral damages is USD6,000.

Conclusion

56. In view of the foregoing, the Tribunal DECIDES that:

- a. The Applicant shall be paid moral damages in the amount of USD6,000.
- b. This amount is to be paid within 60 days from the date the judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment.

¹⁵ *Kallon*, at para. 63 citing to *Massabni* 2012-UNAT-238, and at para 65.

c. All other pleas are dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 28th day of December 2017

Entered in the Register on this 28th day of December 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi