



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/046/
R1
Judgment No.: UNDT/2023/001
Date: 11 January 2023
Original: English

Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

ULAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Irene Kashindi

Counsel for the Respondent:
Nicole Wynn, AS/ALD/OHR, UN Secretariat
Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant held a fixed-term appointment at the FS-4 level with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”). She served as an Administrative Assistant and was based in Kinshasa.

2. On 3 May 2019, she filed an application with the Dispute Tribunal. The Applicant described the decisions she challenges as: (a) continued harassment, unfair treatment and abuse of authority that cannot be classified as one single decision; (b) breach of several rules and regulations; (c) not being considered and bypassed for promotion on several occasions resting with a decision made on 22 January 2019; (d) not being compensated for work performed at a higher level; and (e) failure to address a claim for sexual harassment and abuse.

3. On 10 June 2019, the Respondent filed his reply.

4. On 9 January 2020, the Applicant filed a motion seeking an order for interim measures to reassign her to another duty station because of alleged ill-treatment by her colleagues and her Second Reporting Officer (“SRO”) following the filing of her application on 3 May 2019. The Tribunal issued Order No. 013 (NBI/2020) dismissing the motion for interim measures.

5. On 23 July 2020, the Tribunal issued Order No. 140 (NBI/2020) to manage the case. Among other things, the Tribunal asked the parties if they were amenable to the matter being resolved *inter partes*.

6. On 4 August 2020, the parties filed a joint motion for suspension of proceedings pending mediation and asked that the matter be referred to the United Nations Ombudsman and Mediation Services (“UNOMS”) to facilitate the process. This motion was granted on 6 August 2020 by Order No. 147 (NBI/2020) suspending proceedings to 31 August 2020.

7. On 31 August 2020, the Director of Mediation Services wrote to the Registry of the UNDT seeking more time for the parties to continue with their “good faith efforts” to resolve this matter without recourse to litigation.

8. On 2 September 2020, the Tribunal issued Order No. 168 (NBI/2020) granting the extension of time that was sought.

9. On 2 October 2020, the Director of Mediation Services informed the Tribunal that the parties were continuing their discussions in good faith towards a partial settlement of the dispute.

10. On 6 October 2020, the Tribunal issued Order No. 195 (NBI/2020) to allow more time for the partial settlement to be finalized.

11. On 15 October 2020, the Applicant informed the Tribunal that the dispute had been partially settled and withdrew that part of the claim which was no longer in dispute.

12. The Tribunal held a case management discussion (“CMD”) with the parties on the same day to discuss delineation of the issues that remained in dispute.

13. On 30 October 2020, the Applicant filed a motion seeking leave to file additional supporting documents/evidence and requesting for an oral hearing.

14. Following the parties’ respective submissions on receivability and the need for an oral hearing, the Tribunal scheduled another CMD on 16 November 2020.

15. On 10 December 2020, the Tribunal issued Order No. 236 (NBI/2020) refusing the Applicant’s motion for an oral hearing. The parties were directed to file their respective closing submissions.

16. In Judgment No. UNDT/2020/221, rendered on 31 December 2020, the Dispute Tribunal dismissed two of the Applicant’s claims but found that the Respondent had abused his authority in mishandling the sexual harassment complaint. The Dispute Tribunal ordered the Respondent to provide the Applicant

with a clear explanation for not pursuing her sexual harassment complaint and denied the other remedies sought.

17. The Applicant appealed the Dispute Tribunal's Judgment and moved the United Nations Appeals Tribunal ("UNAT/Appeals Tribunal") for an award in damages for mishandling her sexual harassment complaint as well as damages for harassment, unfair treatment and abuse of authority, and an immediate promotion to a post at the FS-5 level or *in lieu* compensation.

18. On 18 March 2022, the Appeals Tribunal rendered Judgment No. 2022-UNAT-1212. The Appeals Tribunal stated as follows:

Because the failure of the Dispute Tribunal to expressly rule on the motion was an error of procedure that affected the decision of the case as it related to Ms. Ular's claim for moral damages, we remand the issue of compensation for harm to the Dispute Tribunal. We provide no opinion on whether compensation should be granted. Rather, we remand the matter to remedy the procedural error committed by the Dispute Tribunal and to ensure the Dispute Tribunal considers the medical evidence included in the motion in its determination on compensation for harm.

19. On 10 August 2022, the Tribunal issued Order No. 110 (NBI/2022) directing the parties to file fresh submissions on the discrete issue of harm and compensation. The Applicant filed the said submissions on 20 October 2022. The Respondent filed a response to the Applicant's submissions on 2 December 2022.

Applicant's submissions

20. The Applicant reiterates and relies on the application for leave to file additional supporting documents/evidence dated 30 October 2020 and the documents annexed thereto. The Applicant further relies on the documents filed earlier with the Tribunal and fully adopts their contents in support of her claim for moral damages. Her 20 October 2022 submissions are summarized below.

a. She suffered harm from the refusal by the Respondent to promptly and efficiently address the complaints of sexual exploitation and other complaints of mistreatment and abuse of authority resulting in her ill health.

b. The Applicant filed medical reports which reflect that she had a medical condition in November 2019 while she worked in the Kinshasa office and that recommended that she was better off working in another office.

c. She made requests for removal from the Integrated Office to allow her time to heal but this was denied.

d. This matter was referred to mediation as a result of which she was transferred to Bunia. It was upon this transfer that she withdrew the claim for transfer to another station in her application on the merits. The mediated settlement was not sustained in the long term since her contract ended after a period of one year. She is no longer working for the Organization. Her position in Bunia was not extended. This demonstrates the substantial and irreversible harm she has been subjected to for a long period of time.

e. The Applicant urges the Tribunal to award damages for her continued mistreatment by the Respondent's officers over the years, failure to properly handle her complaints including that of sexual harassment, failure to properly conduct her performance evaluations, for mental anguish, trauma and harassment which over time negatively affected her health. The refusal to address the complaints resulted in her ill health which has been certified by a doctor.

f. Pursuant to art. 10(5)(b) of the UNDT Statute, the Applicant seeks the maximum allowable moral damages based on three years' net base salary.

Respondent's submissions

21. The Respondent makes the following submissions in response to the Applicant's submissions on compensation for harm.

a. The Applicant has not produced any evidence of moral harm that was caused by the delay in notifying her of the outcome of her complaint.

b. The two medical reports attached to the Applicant's 30 October 2020 motion state that the Applicant has a history of illness predating her 2017 complaint. They do not establish any causal link between the Applicant's condition and the delay in handling her complaint. The Applicant's self-report of issues in the workplace do not prove that her conditions were caused by the handling of her complaint. Neither of the reports reference the incident that was the subject of the Applicant's complaint or the handling of the complaint.

c. The Respondent requests that the Dispute Tribunal dismiss the Applicant's claim for damages. Should the Dispute Tribunal decide to award damages for delay, the Applicant's request for three years' net base salary far exceeds the bounds of an appropriate remedy in this case. In similar cases involving delays in handling harassment complaints, the Tribunals have awarded significantly less. While the Applicant was only formally notified of the outcome of her complaint in March 2021, she had been aware that it had been closed since May 2019.

Considerations

22. In its decision, UNAT remanded the Tribunal's decision of 31 December 2020 in Judgment No. UNDT/2020/221. The remand is limited to an award in damages for mishandling her sexual harassment complaint as well as damages for harassment, unfair treatment, and abuse of authority. This order was made based on the UNAT's finding that the Tribunal committed a procedural error in failing to consider the Applicant's motion for damages which was before it.

23. Among the allegations made by the Applicant which were referred to the Office of Internal Oversight Services ("OIOS") for investigation were sexual harassment by a female colleague on 8 July 2015; and verbal harassment and abuse from the same colleague. The report was made to the OIOS on 20 August 2017.

24. These complaints which were referred to the Management Evaluation Unit ("MEU") were deemed irreceivable.

25. The Applicant had also applied for an Administrative Assistant position on 27 November 2017. She failed to take a test which was required to complete the process of being short listed for possible selection. This application therefore failed and was dismissed.

26. On 22 August 2018, OIOS completed its investigation of the sexual harassment complaint and found that the complaint was substantiated. However, the United Nations Development Programme (“UNDP”) which was the Organization responsible for any further action on the complaint closed the case citing “insufficient evidence”.

27. To a large extent this action by the UNDP and the relatively slow pace of investigating the matter gave rise to a determination that the relevant agencies had abused their power.

28. Indeed, UNAT spoke to this issue in the following terms at paragraph 17 of the decision:

However as for the application challenging the handling of the sexual harassment complaint, the Dispute Tribunal noted the inordinate amount of time it took the Administration to respond to the Appellant. She first complained about the incident in July 2015 to her supervisor. She filed a complaint to OIOS two years later in August 2017 and although OIOS completed its investigation in August 2018 and transmitted its report to UNDP it was not until May 2019 that OIOS informed Ms. Ular of the UNDP decision to close the case against her colleague due to insufficient evidence.

29. The Tribunal’s procedural error then was its failure to rule on the Applicant’s motion dated 30 October 2020 seeking to admit additional documents relating to her medical condition.

30. UNAT found that the Dispute Tribunal’s error did not affect the outcome of the case but that the medical evidence and reports referred to in the motion were directly relevant to the issue of moral damages. Consequently, the Dispute Tribunal’s failure to rule on the motion to admit the additional evidence affected its decision on compensation for moral harm, particularly when it determined that the Applicant had not provided the “required evidence” to support that claim.

31. The Tribunal ordered the parties to file written submissions on the question whether moral damages should be awarded to the Applicant on 22 August 2022.

32. Both parties filed their respective submissions on the issue of an award of moral damages. The Respondent argued at paragraph 21 of his submission filed on 2 December 2022 that the Applicant has no claim for damages for general harassment allegations related to her performance evaluations and that the Dispute Tribunal found and the Appeals Tribunal affirmed were not receivable. Accordingly, the Applicant's claim for the Tribunal to award damages for "continued mistreatment of the Applicant, failure to properly acknowledge Applicant's performance evaluation, and for mental anguish, trauma and harassment" should be rejected.

33. The Respondent further submitted that the Applicant has not produced any evidence of moral harm caused by the delay in notifying her of the outcome of her complaint.

34. The Applicant based her claim for moral damages on the Tribunal's finding that the Organization's investigation was flawed. She also argued that the medical findings established that she was suffering from a medical condition because she did not like working at the post where she was sent. These facts coupled with the "e-Pas" results she argues, establish that there was harassment and that she suffered moral harm as a result of the combination of factors including the delay in the investigation of her harassment allegation.

35. *Kebede*¹ sets out the three elements contributing to compensation for harm. This harm must be established by convincing medical evidence. Secondly there must be a legal breach committed by the administration and thirdly there must be a link between the damage caused and the breach committed by the administration.

36. It is accepted that no award was made consequent to the Applicant's application that the delay in responding to the reports caused harm.

¹ 2018-UNAT-874.

37. The Respondent argues that the Tribunal should dismiss the Applicant's claim for damages. The Tribunal agrees. The Tribunal is satisfied as is argued at paragraphs 3 and 4 of the submissions of the Respondent of 2 December 2022.

38. The Applicant has not produced any evidence of moral harm that was caused by the delay in notifying her of the outcome of her complaint.

39. The two medical reports attached to the Applicant's 30 October 2020 motion state that the Applicant has a history of ill health predating her 2017 complaint. They do not establish any causal link between the Applicant's condition and the delay in handling her complaint. The Applicant's self-report of issues in the workplace do not prove that her conditions were caused by the handling of her complaint. Neither of the reports reference the incident that was the subject of the Applicant's complaint or the handling of the complaint. The first report of 30 November 2019 of the Centre Hospitalier prepared only after the Applicant filed her application states that the Applicant had complained of lack of sleep and headaches "for several years". These symptoms are consistent with the 20 January 2020 diagnosis of the Applicant's medical condition the onset of which typically occurs in a person's late teens or early twenties. In January 2020, the Applicant was 55 years old.

40. Also, by the date of the Doctor's report, there was arguably not any ongoing delay. Since OIOS had already informed the Applicant on 13 May 2019 that UNDP had decided to close her complaint. On 9 March 2021, UNDP formerly informed the Applicant in writing of the outcome of her complaint and gave her a summary of the findings and conclusions of the investigation.

41. The Tribunal recalls that an order was made in response to the Applicant's complaint of undue delay in processing the claim for harassment and failure to follow the correct procedure. However, the Tribunal holds that there is insufficient evidence to support the conclusion that any distress caused to the Applicant was a result of the failure to resolve the harassment complaint and therefore an essential link in the requirement to prove moral damages has not been established by the evidence.

42. In the circumstances, based on the submissions of the parties related to moral damages caused by the Secretary-General's undue delay in addressing the Applicant's harassment claim, the Tribunal finds there is no evidence upon which to make an award for moral damages.

43. The Tribunal also wishes to indicate that the finding that there was abuse of power was not based on an administrative act which was part of the Applicant's application. The Applicant claimed that the delay was part of the harassment meted out by the Administration. However, she never provided evidence to link the delay to the allegation of harassment. It is the Tribunal which raised the question of the abuse of power as an issue to which the administration should respond.

Judgment

44. The application for a consideration of moral damages is therefore dismissed.

(Signed)

Judge Francis Belle

Dated this 11 day of January 2023

Entered in the Register on this 11 day of January 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi