UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/033
Judgment No.: UNDT/2024/032
Date: 10 May 2024
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

AGUILAR VALLE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RELIEF

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Marcos Zunino, DAS/ALD/OHR, UN Secretariat

Introduction

1. On 26 February 2024, the Tribunal issued Judgment No. UNDT/2024/007 on liability in which the application was granted on liability and whereby the contested decision, namely the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, was found unlawful. It was also stated that a written Order on the parties' further submissions on remedies and costs would follow.

2. By Order No. 023 (NY/2024) dated 28 February 2024, the Tribunal ordered the parties to file their closing statements on remedies and costs, including certain additional documentation. The parties duly complied with Order No. 023 (NY/2024).

Consideration

The legal framework for relief before the Dispute Tribunal

3. The Statute of the Dispute Tribunal provides in its art. 10.5 an exhaustive list of remedies, which the Tribunal may award:

> 5. As part of its judgement, the Dispute Tribunal may only 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;
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> (b) Compensation for harm, supported by evidence, 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 for harm, supported by evidence, and shall provide the reasons for that decision.

Rescission under art. 10.5(a) of the Dispute Tribunal's Statute

4. In the application, the Applicant principally seeks the rescission of the contested decision dated 1 April 2022 to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity.

5. The Tribunal notes that the application against the contested decision was granted on liability in Judgment No. UNDT/2024/007, because the Respondent was not able to fully establish facts on which the contested decision was based with the requisite evidentiary burden. The alleged counts of misconduct were therefore held to be unfounded.

6. Considering these circumstances, the Tribunal finds that the most appropriate remedy would be to rescind the contested decision (in comparison, see the Appeals Tribunal in *Lucchini* 2021-UNAT-1121 and *Rolli* 2023-UNAT-1346).

In lieu *compensation under art. 10.5(a) of the Dispute Tribunal's Statute*

General principles and elements to consider when deciding the *in lieu* compensation amount

7. Under art. 10.5(a) of the Statute of the Dispute Tribunal, in cases concerning termination, like the present one, the Administration may elect to *in lieu* compensation pay as an alternative to the rescission.

8. In *Laasri* 2021-UNAT-1122 (para. 63), the Appeals Tribunal set out that "the very purpose of *in lieu* compensation is to place the staff member in the same position in which he or she would have been, had the Organization complied with its contractual obligations". It further held that the Tribunal "shall ordinarily give some justification and set an amount that the Tribunal considers to be an appropriate substitution for rescission or specific performance in a given and concrete situation".

9. In this regard, the Appeals Tribunal held that "the elements which can be considered are, among others",

a. "[T]he nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed-term)";

b. "[T]he remaining time on the contract"; and

c. "[C]hances of renewal".

The nature and the level of the post formerly occupied by the Applicant and the remaining time on the contract

10. If follows from the documentation submitted by the Applicant in response to Order No. 023 (NY/2024) that, at the time of his separation on 4 April 2022, he was employed on a two-year fixed-term appointment with an expiration date of 22 April 2022.

The Applicant's chances of renewal

11. The Applicant submits that while "the Applicant held a fixed term appointment, his continued service in a number of missions, and the high regard in which he was held by [the United Nations Department of Safety and Security, "UNDSS"] gave him every legitimate expectation of serving at least for two more years until he reached full retirement age, and likely beyond to age 65". The Respondent's "reference to managerial shortcomings is both inaccurate and unfair in that [the Applicant] had been serving with distinction in two other missions since Bolivia". The Administration had "extended the Applicant's contract every two years, in addition to the contract transfer from [the United Nations Development Programme] to the Secretariat, including for four years in South Sudan and in Panama with a regional responsibility encompassing five countries, for one year until the separation occurred". The Applicant was "a long-term staff member with 13 years of service, considered a top-tier UNDSS Security

Officer with evaluations exceeding expectations, and had the full confidence of his UNDSS superiors (Chief of Desk and UNDSS Security Coordination Officer)".

12. The Respondent contends that the "compensation in lieu of rescission should be restricted to the salary and other emoluments that the Applicant would have received until the expiration of his appointment". As an alternative to rescission or specific performance, "in-lieu compensation 'should be as equivalent as possible to what the person concerned would have received, had the illegality not occurred'" (referring to *Ashour* 2019-UNAT-899, para. 20), and under the "settled jurisprudence" of the Appeals Tribunal, a "fixed-term contract ends with the effluxion of time and a person so employed does not have a right or legitimate expectation of the renewal of same" (referring to *Andreyev* 2015-UNAT-501, para. 31). The Applicant's "assumption … that 'but for' the contested decision he would have remained in service with the Organization until his retirement is misplaced". At the time of the contested decision, the Applicant "held a fixed-term appointment expiring on 22 April 2022" and "had no expectation of an appointment after that date", which would be "incorrect and speculative". The Applicant has "not provided any evidence, or even argued, that his appointment would have been renewed if it would not have been for the contested decision". The Dispute Tribunal in *Saleh* UNDT/2022/064, para. 80, as upheld by the Appeals Tribunal in *Saleh* 2023-UNAT-1368, set as *in lieu* compensation "the full salary, including all related benefits and entitlements" the applicant would have obtained until the expiration of his appointment.

13. The Tribunal notes that the Applicant was separated from service on 4 April 2022 and that the expiration date of his two-year fixed-term appointment fell only 18 days later, namely on 22 April 2022.

14. In this regard, the Tribunal observes that it is standard practice and courtesy in the Organization that, albeit fixed-term appointments, per definition, do not carry any expectancy of renewal under staff rule 4.13(c), a staff member whose fixed-term

appointment is not to be renewed is to receive a pre-notification concerning the non-extension, at least 30 days before its expiry.

15. The Respondent has not argued or submitted any documentation demonstrating that the Applicant should have been advised that his fixed-term appointment was not to be extended. Considering that the Applicant was separated only 18 days before the expiry of this fixed-term appointment, the Tribunal therefore finds it likely that a non-renewal of the Applicant's fixed-term appointment had not been contemplated; rather, his appointment was planned to be extended. In this regard, it is further noted that nothing in the case file suggests that any possible reason existed for not renewing the Applicant's appointment, such as, for instance, the abolishment of his post or him having serious and documented performance issues.

16. Accordingly, the Tribunal finds that had it not been for the Applicant's separation on 4 April 2022, his fixed-term appointment would have been renewed for another two years on 23 April 2022. In this hypothetical scenario, he would then have been granted another two-year fixed-term appointment expiring on 22 April 2024. Thereafter, the Tribunal finds that it would too be speculative to assume that it would be extended any further.

Offsetting alternative income and mitigation of income loss

17. Any actual income, which an applicant has received during the compensation period for loss of income in accordance art. 10.5 of the Dispute Tribunal's Statute, shall be offset in the compensation amount as, in the hypothetical scenario that the applicant had not lost her/his appointment at stake, s/he would not have obtained this other income (see also the Appeals Tribunal in *Belkhabbaz* 2018-UNAT-895, para. 38). In line herewith, the Appeals Tribunal has also held that an applicant has a duty to mitigate her/his losses in terms of the compensation for loss of income under art. 10.5 of the Dispute Tribunal's Statute (see, for instance, *Dube* 2016-UNAT-674.). Typically, the

applicant therefore must show that s/he has been actively job searching during the relevant compensation period.

18. In the present case, the Applicant submits that he has had no alternative income and as evidence of his job searching efforts, appends 12 different emails from various private companies by which the Applicant was informed that his job application had been unsuccessful. The emails range from the period from June 2023 to February 2024.

19. The Respondent submits in response that the Applicant has "failed to mitigate his loss" as the "evidence he provided of unsuccessful employment applications in the private sector is insufficient to establish his mitigation of loss as it is not possible to assess from the evidence provided whether he was qualified for the positions he applied to".

20. The Tribunal notes that the jobs for which the Applicant, a security professional, had applied were all in his line of business. Also, as the Applicant's name was stated in the United Nations' Clear Check database, his employment opportunities within the United Nations system, where he had worked since 2009, were non-existent. The Tribunal takes judicial notice that according to the website of the United Nations System Chief Executives Board for Coordination, Clear Check is a "Screening Database [and] a critical system-wide tool to avoid the hiring and re-hiring of individuals whose working relationship with an organization of the system ended because of a determination that they perpetrated sexual harassment or sexual exploitation and abuse" (see, https://unsceb.org/screening-database-clearcheck).

21. Consequently, the Tribunal finds that the Applicant has demonstrated that he had no alternative income and appropriately fulfilled his duty to mitigate his income loss during the compensation period.

The *in lieu* compensation calculation

22. The Applicant submits that he should be compensated for his loss of net salary, pension, medical insurance subsidy, education grant, post adjustment, mobility incentive, and dependency allowances for spouse and child.

23. The Respondent contends that the Applicant's "in lieu compensation should not exceed the normal statutory limit of two years' net base salary" and that he has "not argued, let alone established, the existence of exceptional circumstances warranting exceeding the normal statutory limit for compensation".

24. The Tribunal notes that under the Appeals Tribunal's settled jurisprudence, the Applicant is to be placed in a situation as if the infringement of his rights had never occurred (see, for instance, the above quoted judgments in *Laasri* and *Ashour*). In the present case, this would mean that the Applicant should be placed in a position as if his fixed-term appointment had been extended until 22 April 2024, which the Tribunal will therefore order the Administration to do.

25. Accordingly, in cooperation with the Applicant, the Administration is to undertake the necessary calculations and adjustments in terms of the Applicant's benefits and entitlements, including net-base salary, post adjustment, pension, grants, subsidies, allowances, and all other payments relevant to the Applicant in the situation.

Compensation for harm under art. 10.5(b) of the Dispute Tribunal's Statute

26. The Applicant further requests to be awarded two-years of net base pay in "compensation for moral harm to his personal and professional reputation, well-being and 'dignitas'", referring to "his inability to secure employment as documented … as well as the need for psychological support for himself and his family over an extended period". In corroboration of his claim, the Applicant submits a medical report from a medical professional dated 28 February 2024 concerning 15 psychotherapy sessions,

and an invoice from another medical professional dated 29 April 2022 for four sessions of individual psychotherapy on 7, 14, 21 and 28 April 2022.

27. The Respondent contends that the Applicant has not provided "any evidence" to support his claim and refers to *Rehman* 2018-UNAT-882 and states that "[f]or this reason alone, the Applicant's claim for compensation for moral harm stands to be rejected". In addition, in the Applicant's closing statement, he "belatedly seeks to expand his request for moral harm 'to his personal and professional reputation, well-being and 'dignitas'", which should be "rejected as beyond the scope of the Application".

28. The Respondent also argues that the invoice "allegedly for four psychotherapy sessions in April 2022 and [the medical] report from a psychologist which mentions 15 sessions of psychotherapy for stress related to the unexpected termination of his employment" is "belated evidence" and "insufficient to substantiate the Applicant's claim for moral harm". Both documents "lack enough information concerning the Applicant's condition and its nexus with the contested decision to discharge his burden of establishing that the contested decision was the cause of his harm", and "they state that the stress is *related* (relacionados) to the termination of his employment, rather than *caused* by it as required". The medical report "is dated 28 February 2024 and was clearly issued to for the purpose of responding to the Tribunal's request for evidence", and "too far removed in time from the contested decision (issued on 1 April 2022) to be probative of the causal nexus between the Applicant's alleged symptoms and the contested decision". The invoice is "a financial document and not a medical certificate and lacks information to establish the harm and the nexus".

29. The Tribunal accepts the medical report and the invoice submitted by the Applicant as genuine and proper evidence of the stress and anxiety he felt after the second harshest disciplinary sanction under staff rule 10.2 imposed on him, namely separation from service with compensation *in lieu* of notice and without termination indemnity, for alleged sexual harassment. The Tribunal notes that the Respondent has

not objected to the informal translations of the medical report and invoice from Spanish into English, respectively, submitted by the Applicant.

30. Whereas the Tribunal agrees with the Respondent that the medical report is likely produced for the purpose of the judicial proceedings as it is dated 28 February 2024, this does not invalidate its content as it explicitly refers to "15 psychotherapy sessions" already undertaken by the medical professional with the Applicant in "follow-up on stress symptoms related to the unexpected termination of work contract". The Tribunal also takes note of the specific symptoms described in the medical report, as well as the recommended treatment (not stated here for privacy reasons). Whether the report describes the symptoms as "related to" or "caused by" the Applicant's termination is insignificant in this context as the general idea of the report is evident, namely that the Applicant would not have suffered these symptoms had it not been for the contested, and unlawful, decision.

31. Regarding the invoice, the Tribunal notes that it is explicitly stated therein that the four sessions were "due to physical and psychological symptoms of stress related to the unexpected termination of the employment contract". In addition, the first session was held on 7 April 2022, which is three days after the Applicant's separation became effective on 4 April 2022.

32. Considering the finding of sexual harassment and the severity of the disciplinary sanction, the Tribunal finds that the Applicant's non-pecuniary and moral damages fell in the middle spectrum of harm, also noting that the Appeals Tribunal has held that a "finding of sexual harassment against a staff member of the Organisation is a serious matter", which "will have grave implications for the staff member's reputation, standing and future employment prospects" (see, *Appellant* 2022-UNAT-1210, para. 37, as also quoted in Judgment No. UNDT/2024/007, para. 15). In this regard, it makes no difference how the Applicant specifically qualified the moral harm in the closing statement as compared to the application as, in this context, this is mostly a question of semantics.

33. At the same time, at least to some extent, the Applicant also contributed to the situation. In Judgment No. UNDT/2024/007, para. 53(d), the Tribunal found that the Applicant had "greeted some female colleagues in flattering and affectionate ways", which "were not always welcome", although "such behavior was considered socially acceptable and normal in the cultural context, and when asked to stop, the Applicant immediately did so".

34. As the Appeals Tribunal has held that compensation for harm under art. 10.5(b) should be set as a lumpsum in order not to differentiate between professional grades and salary scales, the Applicant is awarded USD5,000 for his non-pecuniary and moral damages (in line herewith, see *Dawoud* 2023-UNAT-1402, paras. 53-54 (on the issue of lumpsum), and *Belkhabbaz* UNAT-2018-873, para. 90 (on the compensation amount)).

The two-year net salary limitation in art. 10.5 of the Dispute Tribunal's Statute

35. Insofar as the entire compensation amount exceeds the two-year net salary limitation stated in art. 10.5 of the Dispute Tribunal's Statute, the Tribunal finds that the Appeals Tribunal's unequivocal case-law in, for instance, *Laasri* an *Ashour*, combined with the seriousness of the sexual harassment accusations, the severity of the disciplinary sanction, and the Applicant's proven moral harm, provides sufficient justification for paying him more than the stated two-year limit. The circumstances of the Applicant's case are, thus, indeed exceptional.

The Applicant's inclusion in Clear Check

36. In the application, under the heading, "Damages", the Applicant states that "his personal and professional reputation and any further employment prospects have been irreparably harmed, especially since the entry of his name on Clear Check will preclude any further [United Nations] employment". In the closing statement, the Applicant specifically requests that his name be removed from Clear Check database.

37. The Respondent submits that this request was not stated in the application and that "the Tribunal cannot grant the Applicant remedies he did not request in his Application (*ultra petita*)". In *Fosse* 2020-UNAT-1008, the Appeals Tribunal "held that the Dispute Tribunal was not competent to award compensation where no request for such compensation had been made in the application". Expanding "the scope of relief requested in the application, 'would prejudice due process of law, affecting the ability of the opposing party to effectively answer his petition that failed to explicitly refer to the specific kind of damage or request adequate compensation for it'", referring to *Harris* 2019-UNAT-896, para. 67. The remedies available to the Applicant "are restricted to rescission; in-lieu compensation; and compensation for moral damages in the amounts indicated".

38. Whereas the Tribunal, in principle, agrees with the Respondent that an applicant is to present all requested remedies in the application (otherwise, a motion requesting to amend the application should be submitted), it also notes that deleting the Applicant's name from Clear Check is a corrective measure that logically follows from the Tribunal rescinding the impugned disciplinary sanction. Subsequent to the Judgment, no reason any longer exists for maintaining his name therein. For the Applicant's name to be deleted from Clear Check, the Tribunal therefore does not need to order the Administration to do so—this should be done automatically. In any event, as stated above, the Applicant did explicitly mention the issue of his inclusion in Clear Check in the application as part of his list of damages, and the Tribunal has therefore not granted the Applicant more than what he has asked for with reference to the notion of *ultra petita*.

Costs

39. In the Applicant's final observations on liability dated 26 December 2023, he requests costs in the amount of USD5,000 for the Respondent's abuse of process, arguing that the Respondent had "once again" exceeded the page limit and he also refers to the issue of possible witness intimidation. In the Applicant's closing statement

on remedies and costs dated 14 March 2024, even if he was requested to file submissions thereon, he did not reiterate his request for costs.

40. Considering the outcome of Judgment No. UNDT/2024/007, and since the Tribunal also addressed the questions of the Respondent's page limit in the closing statement and the issue of possible witness intimidation therein, the Tribunal finds that all procedural matters of the proceedings on the merits have been appropriately addressed and resolved. The Applicant's 26 December 2023 request for costs is therefore to be rejected.

Conclusion

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

a. The contested decision is rescinded;

b. As *in lieu* compensation under art. 10.5(a) of the Dispute Tribunal's Statute, the Applicant shall financially be placed in a situation as if the contested decision had never been taken and his fixed-term appointment had been extended until 22 April 2024. The Administration is to undertake the necessary calculations and adjustments to effectuate the relevant payments in cooperation with the Applicant;

c. The Applicant is awarded USD5,000 in compensation under art. 10.5(b) of the Dispute Tribunal's Statute;

d. If the aggregated compensation amount exceeds two years' net base salary of the Applicant, the exceptional circumstances of the present case warrant that the Applicant shall be paid the full compensation amount despite the limitation stated thereon in art. 10.5 of the Dispute Tribunal's Statute;

e. The compensation amount shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Joelle Adda

Dated this 10th day of May 2024

Entered in the Register on this 10th day of May 2024

(Signed)

Isaac Endeley, Registrar, New York