



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/062

Order No.: 1 (GVA/2011)

Date: 11 January 2011

Original: English

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**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

ZEREZGHI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
INTERPRETATION**

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**Counsel for Applicant:**  
Amal Oummih, OSLA

**Counsel for Respondent:**  
Susan Maddox, ALS/OHRM, UN Secretariat

## **Facts**

1. On 19 January 2010, the Applicant, a former UNMIK staff member, filed an application with the Tribunal to appeal the decision dated 21 October 2009 to impose on him the disciplinary measure of dismissal.
2. On 12 July 2010, the Tribunal rendered Judgment *Zerezghi* UNDT/2010/122 on the above-mentioned application, in which it concluded:

### ***Remedies***

49. Article 10.5 of the statute of the Tribunal outlines the remedies which the Tribunal may order, i.e. rescission of the contested decision, specific performance and compensation. While article 10.5 does not stipulate how compensation may be calculated, subparagraph (b) stipulates that compensation should not, but in exceptional cases, exceed the equivalent of two years' net base salary of the applicant, and article 10.7 prohibits the award of exemplary and punitive damages.

50. As previously indicated, the Tribunal concluded that the evidence in this case does not sufficiently support the charge that the applicant did not pay for three tickets issued to him by MCM. As regards the applicant's unauthorized absences from the mission area, the Tribunal concluded that a sanction of dismissal was disproportionate to the established offence and that a written censure would be an appropriate measure. Accordingly, the Tribunal orders the respondent to rescind the applicant's dismissal, to reinstate him in service with retroactive effect and to issue him a written censure to be placed in his personnel file.

51. Since the applicant's dismissal is a termination within the meaning of article 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the applicant's dismissal. The Tribunal considers an appropriate compensation to be the amount of salary the applicant would have received until the expiration of his last fixed-term appointment had he not been dismissed, i.e. eight months' net base salary.

52. Irrespective of whether the respondent elects to reinstate the applicant or to pay him the above amount as an alternative, the applicant also deserves compensation under article 10.5 (b) of the UNDT statute for the moral damage the wrongful decision has caused him. In view of the stigma of being imposed the most severe disciplinary measure and the resulting difficulties in finding further employment, the Tribunal sets the appropriate amount at

USD 60,000.00, which corresponds approximately to 12 months of the applicant's net base salary.

53. The applicant also requested that his personnel file be cleared of any adverse material relating to this matter. The Tribunal orders that all material relating to the applicant's dismissal be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

### **Conclusion**

54. In view of the foregoing, the Tribunal DECIDES:

1) The applicant's dismissal is rescinded and the respondent is ordered to reinstate him in service with retroactive effect and to issue him a written censure to be placed in his personnel file;

2) As an alternative to the rescission of the contested decision and specific performance, the respondent may elect to pay to the applicant eight months of his net base salary at the time of his separation. This amount is to be paid within 60 days from the date of issuance of this judgment, with interest thereafter at eight percent per annum until payment;

3) The respondent is to pay to the applicant USD 60,000.00 as compensation for moral injury. This amount is to be paid within 60 days from the date of issuance of this judgment, with interest thereafter at eight percent per annum until payment;

4) The Tribunal orders that all material relating to the applicant's dismissal be removed from his official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.

3. On 18 November 2010, the Respondent filed a "request for clarification of Judgment No. UNDT/2010/122", more specifically "in regard to the effect of paragraphs 54(1) and 54(2) of the Judgment".

4. By letter dated 19 November 2010, the Tribunal informed the parties that it had decided to treat the above-mentioned request as an application for interpretation within the meaning of article 12.3 of the Tribunal's Statute. Accordingly, pursuant to article 30 of the Tribunal's Rules of Procedure, the Applicant was given 30 days to submit comments on the application of interpretation, that is, until 20 December 2010.

5. On 6 December 2010, the Applicant filed his comments.

### **Parties' Submissions**

6. The Respondent's arguments are as follows:
  - a. He elected to pay compensation pursuant to paragraph 54(2) of the Judgment and now seeks clarification as to the extent to which the decision to dismiss the Applicant remains effective and/or is rescinded;
  - b. He understands that paragraph 54(2) of the Judgment provided him with the option of either reinstating the Applicant or alternatively compensating him in the sum specified. Accordingly, having elected to compensate the Applicant, he understands that the Applicant will remain separated from the Organization in accordance with the initial decision to dismiss him, however, his separation will no longer be regarded as a dismissal from service for disciplinary reasons;
  - c. Further, having elected not to reinstate the Applicant, the Respondent remains obliged to give effect to the other orders set out in paragraph 54, namely: to place a letter of censure on the Applicant's personnel file; to pay compensation for moral injury; and to remove all material relating to the Applicant's dismissal from his official status file;
  - d. Accordingly, although article 10.5(a) of the Tribunal's Statute and paragraph 54(2) of the Judgment provide for an alternative to the rescission of the contested decision, the order rescinding the decision remains effective in part. Specifically, the decision to dismiss the Applicant remains effective insofar as the Applicant was separated from service on the basis of this decision; however, it is to be "rescinded" insofar as the Applicant's personnel record is to be modified to ensure that the disciplinary measure of dismissal is not reflected in his personnel record.
7. The Applicant's arguments are as follows:
  - a. He agrees with the Respondent's interpretation insofar as it relates to the assumption that in accordance with paragraph 54(2) the Respondent

had the choice to either reinstate the Applicant or pay compensation in the amount indicated in the Judgment as an alternative. He also agrees with the assumption that if the Respondent opts for the alternative compensation, the Applicant's separation from the Organization shall no longer be on the basis of a disciplinary measure of dismissal and that the Respondent remains bound to give effect to the other orders set out in paragraph 54 of the Judgment;

b. However, he adds that if the Respondent opts for the alternative of compensation and the Applicant must therefore be considered to have been separated, the Applicant would be entitled to receive all monies he would have received but which have been withheld as a consequence of the rescinded dismissal, including but not limited to termination indemnities, compensation in lieu of notice and relocation grant;

c. Furthermore, paragraph 54(2) of the Judgment does not invalidate paragraph 54(1); rather it offers an alternative way or option of implementation of the Tribunal's order. The Tribunal is requested to stipulate this obligation in its decision.

### **Considerations**

8. Article 12.3 of the UNDT Statute provides that a party may apply to the Tribunal "for an interpretation of the meaning or the scope of the final judgment".

9. The question raised by the Respondent is whether the Tribunal—when it set an amount that the Respondent could elect to pay "as an alternative to the rescission of the contested decision or specific performance ordered" pursuant to article 10.5(a)—intended to exempt the Respondent both from rescinding the Applicant's dismissal and from executing the three specific performance orders—namely reinstatement, issuance of a written censure, and removal from the Applicant's official status file of all material relating to his dismissal—or whether the Tribunal intended to exonerate him exclusively from reinstating the Applicant. The latter option, which is more favourable to the Applicant, is also the one the Respondent considers more appropriate to give effect to the Judgment.

10. The Tribunal acknowledges that the structure and wording of the Tribunal's orders in paragraphs 51 to 54 of Judgment UNDT/2010/122 are ambiguous and lend themselves to different interpretations. For example, paragraph 51 of the Judgment refers to "an alternative to the rescission of the [A]pplicant's dismissal", whereas paragraph 54(2) refers to "an alternative to the rescission of the contested decision and specific performance" and paragraph 52 reads: "Irrespective of whether the respondent elects to reinstate the applicant or to pay him the above amount as an alternative ...". The Respondent's application for interpretation is therefore receivable.

11. What is at stake here, however, is not only the proper interpretation of the meaning and scope of the above-mentioned paragraphs, but also that of article 10.5(a), since the Tribunal would exceed its competence if it were to render a judgment or issue an interpretation of a judgment inconsistent with article 10.5(a).

12. Concerning the meaning and scope of paragraphs 51 to 54, it may be recalled that the Applicant had been charged with misconduct on two counts: not paying for three tickets issued to him by a UN travel agent and failing to report absences from the mission area. It is clear from the case records that the Respondent considered the second charge as a minor offence and that the decision to dismiss the Applicant was taken mainly on the basis of the first charge. The Tribunal concluded, however, that the evidence available did not sufficiently support the first charge, and that as far as the second charge was concerned, a sanction of dismissal was disproportionate to the established offence. Such findings were the basis for ordering the rescission of the dismissal, the reinstatement of the Applicant with retroactive effect and the removal of adverse material from his file. Furthermore, the finding regarding the second charge justified an order to issue the Applicant a written censure, consistent with the practice adopted by the UN Appeals Tribunal in cases where it concluded that a less severe disciplinary measure should have been imposed on an appellant. The Tribunal wished to restore, to the extent possible, the situation of the Applicant to what it would have been if the disciplinary procedure had resulted in the proper disciplinary measure being imposed on him. As an alternative compensation, the Tribunal ordered the Respondent to pay to the Applicant the salaries he would

have received until the expiration of his last fixed-term appointment had he not been dismissed, i.e., eight months' net base salary.

13. In view of the foregoing, the Tribunal considers that the Respondent's interpretation of Judgment UNDT/2010/122 is entirely permissible and does no violence either to its language or to its purpose.

14. Such interpretation is also consistent with article 10.5(a) of the Tribunal's Statute, more specifically with the exception to the general rule set out in this article, namely that as part of its judgments, the Dispute Tribunal may order "[r]escission 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".

15. The *travaux préparatoires* of the Statute do not shed light on the true intention of the original drafters when they introduced this exception. It seems reasonable to assume that the intention was to shield the Organization from having to reinstate in service someone whose appointment it had chosen to terminate. However, there is no reason to believe that the intention went beyond this, nor that it was intended to give the word "termination" a meaning different from the one it has in the Staff Rules, i.e., a separation from service initiated by the Secretary-General.

16. Furthermore, exceptions to a general rule should normally be applied restrictively and construed *contra proferentem*. Accordingly, an exception such as the one contained in article 10.5(a), which restricts the power of the Tribunal and the rights of applicants, should be narrowly construed and interpreted in favour of applicants.

17. Consistent with the above remarks and with staff rule 9.6(c), a distinction may be drawn between the termination of the Applicant's appointment, on the one hand, and the ground for such termination, i.e., his dismissal, on the other hand. The exception contained in article 10.5(a) should only apply to the Tribunal's

orders insofar as they entail the rescission of the Applicant's termination and his reinstatement. The exception does not apply to the order rescinding the Applicant's dismissal, nor does it apply to the orders—which clearly do not “concern termination”—to issue a written censure and remove adverse material from the Applicant's file.

18. Regarding the Applicant's claim that if the Respondent opts to pay compensation as an alternative to rescission and/or specific performance, he should be entitled to receive all monies he would have received but which have been withheld as a consequence of the rescinded dismissal, including but not limited to termination indemnities, compensation in lieu of notice and relocation grant, this is not a question of interpretation. The Tribunal considers that the Applicant is actually attempting to enlarge the scope of Judgment UNDT/2010/122, which leaves no room for interpretation as to the financial remedies ordered, namely eight months' net base salary as an alternative to reinstatement and USD60,000.00 as compensation for moral injury. The Applicant is now claiming additional benefits outside the scope of the Tribunal's orders in Judgment UNDT/2010/122, which is *res judicata*.

### **Conclusion**

19. In view of the foregoing,

#### **IT IS ORDERED THAT**

1) Paragraph 51, first sentence, of Judgment No. UNDT/2010/122 is to be read as follows (new text in bold):

Since the Applicant's dismissal **resulted in the termination of his appointment** within the meaning of article 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the Respondent may elect to pay as an alternative to **the reinstatement of the Applicant.**



2) Paragraph 54(2), first sentence, of Judgment No. UNDT/2010/122  
is to be read as follows (new text in bold):

As an alternative to **the reinstatement of the Applicant**, the  
Respondent may elect to pay **him** ...

*(Signed)*

Judge Thomas Laker

Dated this 11<sup>th</sup> day of January 2011

Entered in the Register on this 11<sup>th</sup> day of January 2011

*(Signed)*

Víctor Rodríguez, Registrar, UNDT, Geneva