UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/061/ JAB/2009/009
Order No.:	101 (NY/2010)
Date:	20 April 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BEAUDRY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON COMPENSATION

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. The applicant's fixed-term contract appointment as an international staff member at the P-4 level with the United Nations Stabilization Mission in Haiti (MINUSTAH) was not renewed. The decision not to renew the contract, which expired on 31 October 2008, was made by the Chief of Mission Support (the CMS) on 23 July 2008. I have ruled in favour of the applicant on the question of liability, holding that the decision not to renew her contract was in breach of her contract of employment (*Beaudry* UNDT/2010/039). It is now necessary to consider what award of compensation should be made in respect of this breach.

Facts

2. These have been set out in detail in my previous reasons and it is unnecessary to refer to them again, except to point to those of particular relevance. This is an unusual case because the uncontradicted evidence of the Chief of Mission Support (CMS), who made the decision not to renew the applicant's contract, and the Chief of Mission Administrative Services (CAS), who recommended that course, was that it would have been renewed if they had appreciated that the applicant wished to renew it. Their evidence was that, because of certain conflicts and difficulties experienced by the applicant in management of her unit – in respect of which the CMS and CAS were critical of her – she had expressed informally on a number of occasions a wish to move to another mission and they inferred that she did not wish to renew her contract. They said that, had they appreciated that the applicant indeed wished to renew her contract, it would have been renewed. They both testified that the management issues were not a factor at all in the decision. I accepted this evidence.

3. The applicant testified that she wished to renew and was shocked by the decision not to do so. I accepted this evidence and concluded that, had she been asked, she would have informed both the CAS and CMS to this effect.

4. In my previous ruling I explained that the decision not to renew was affected by a significant error of fact, namely the decision-maker's supposition about the

applicant's intentions and a significant procedural error, namely the failure to inform the applicant of the relevance of her willingness or otherwise to renew, to give her a chance to be heard on this point. This error could be characterized in various ways: good faith and fair dealing required the applicant to be given an opportunity to inform the decision-maker directly as to the material fact; reasonableness required that the crucial fact should be ascertained by rational enquiry, here asking the person involved; the applicant had a legitimate expectation that, if the critical question were whether she would accept renewal, she would be asked about it; and, the most obvious, whether the applicant wished to *accept* renewal or not had nothing to do with whether she should or should not be *offered* renewal. It is unnecessary to deal with the many ways in which the error could be identified or to make a choice. The essential point is that, however, characterized, if the correct course had been taken, the applicant would have accepted renewal.

5. Upon this analysis, the applicant can only be placed in the same position that she would have occupied had the wrong decision not been made by awarding her the economic equivalent of the contract that was not renewed and the other economic losses, if any, that ensued.

6. The earlier judgment also dealt with the failure to properly deal with the applicant's request for administrative review. The decision not to renew was confirmed on the basis – expressly repudiated by the decision-maker – of alleged performance shortcomings. There were two problems with this approach by the Administration. The first was that it had nothing to do with the true cause for non-renewal; and the second was that it was contrary to the requirements of sec 10.2 of ST/AI/2002/3. Again, had the request for administrative review been properly considered, that must have led to the applicant's reinstatement or an award of its economic equivalent.

7. This is therefore one of those unusual cases in which, where a decision not to renew has been found to be incorrect, it is possible to infer as a matter of logic, what would have been the outcome had the decision-maker not erred. Thus, compensation should be awarded on the basis that the applicant's contract would have been

renewed if the decision had not been affected by error. The remaining uncertainty concerns the term of the potential contract.

8. There can be no doubt that the applicant's overall performance was entirely satisfactory. Indeed the CMS said that it was for this reason that his criticisms of the way in which the applicant managed her work colleagues in her unit did not lead him to qualify the overall appraisal rating of "fully successful performance" which he gave her. I infer that, though the applicant's management of her work colleagues was certainly not optimal and indeed inappropriate to a greater or lesser extent, the CMS was prepared to put up with these problems, in the hope no doubt of some improvement, because of the unit's successful productivity due to the applicant's evident skills. Moreover, more careful consideration of the facts by both him and the CAS should have led them to appreciate that the problems, or at least similar ones, had been experienced by the applicant's predecessor and, hence, she was not entirely to blame.

9. I infer from this that, more probably than not, the applicant's contract would have been renewed for at least a year: see also new staff rule 4.13. Further renewals are, for obvious reasons, more problematical. On the one hand, the position is still in place (and encumbered) and there is no reason to suppose the applicant's overall effectiveness would have been less. Moreover, I think I should take judicial notice of the fact that posts in Haiti must be regarded as less attractive under present conditions than they were when the applicant was recruited, so that competition for her post would be less and another recruitment process would be time demanding and expensive – and unnecessary if the applicant's productivity were unchanged. However, she did find it difficult to work with her colleagues and it may be that her relationship with the CAS and CMS has been damaged by this litigation, in which she made a number of unfortunate and exaggerated complaints about them. On the other hand, the respondent has not attempted to adduce any evidence, or made any submission, on the likelihood of renewal when the facts are very much within its knowledge, being content simply to rely on this issue on the submission that there is no expectation of renewal. Of course, this is a *non sequitur*. The question is not

whether the applicant has a right to renewal but whether there is a probability of renewal and, if so, its extent. I infer from the fact that the respondent does not point to any material that might suggest that renewal would not or was not likely to occur, that it is unable to do so, despite its being in a position to ascertain this (or relevant) information from the responsible managers. In my judgment, given the effluxion of time, continued productivity on behalf of the applicant, the natural development of a *modus vivendi* by professionals just wanting to get their work done, her learning to modify some of her behaviour vis-à-vis her subordinates (especially because of her desire to remain employed), more productive support for her management problems, would probably lead to a significant reduction in the internal problems of the applicant's unit. Taking these considerations together, I infer that the probability of further renewal to the applicant's date of retirement (a further sixteen months) is sufficiently high to regard it as very likely.

10. I have already discussed extensively the mode of compensating for the loss of a chance where future events form the basis for calculating economic loss (see *Koh* UNDT/2009/073) and I will not repeat it here. I wish to make an additional important point, however. It must always be remembered that one is dealing with incommensurables and resort to probabilities, whilst essential to enable rational analysis of the forensic question, should disguise the fundamental and inherent uncertainties involved. Accordingly, even though the occurrence of some future event will almost never be certain, the likelihood of its occurrence may be such that it should be regarded as practically so. At the other end of the scale, the likelihood may be so small that, practically speaking, it should be regarded as non existent. At the end of the calculation (and this word is used in a broad sense) it may be that an overall reduction should be made for the exigencies of life – though this will be appropriate only where the time scale is appreciable (a term deliberately chosen for its suggestiveness, rather than precision).

11. In my judgment, I consider that, practically speaking, it is certain that the applicant's term would be renewed to her retirement.

12. The appropriate sum to award under this head of economic loss is, therefore, the applicable salary, plus post adjustment, less assessment, less pension deduction. There must be added the amount that would have be payable by way of pension, on the assumption that the applicant remained employed until 10 February 2011. In this respect the mode of calculation (not sought to be controverted by the respondent) proposed on the applicant's behalf should be adopted. Accordingly, the Administration is ordered to calculate the contributions the applicant would have made had her contract been renewed to retirement on 10 February 2011, transfer this sum to the UNJSF together with the contribution which would have been made by the Administration and advise the UNJSF that, effective 10 February 2011, it should proceed on the basis that the Applicant had satisfied the prerequisites for payment of pension entitlements. The Administration is to deduct from the award made under this head the total sum paid to the applicant on separation in respect of her pension contributions plus interest at the average earned on deposits by the UNJSF from the date of payment to the date upon which it deposits those funds with the UNJSF.

13. There is no other evidence of economic loss and I pass to the question of non-economic loss. This encompasses compensation for significant and foreseeable changes in the applicant's life situation caused or substantially contributed to by the respondent's breach of contract and which is not remote in the sense of being within the constructive (as likely) contemplation of the parties in the event of such breach. The applicant has not tendered any evidence of this kind and there is therefore no evidentiary basis for any award under this head.

14. There was evidence during the hearing of the considerable personal distress caused to the applicant when she was informed of the refusal to extend her contract and I think that it is fair to infer this has continued to the present day, though no doubt over time it has moderated somewhat. I also consider that the need to undertake proceedings in which the criticisms in her e-PAS have been made public, together with her other shortcomings as a manager in the course of the evidence. This has been caused directly by the respondent's breach of contract and was plainly

a constructively contemplated consequence of forcing her to litigate to vindicate her contractual rights. Under this head I award the sum of USD4,000.

15. The applicant seeks compensation for the failure to give proper consideration to her request for an exception to permit rebuttal of her e-PAS appraisal. The right to rebut negative appraisals is extremely valuable. Here, the applicant indicated from the very beginning that she wished to dispute the negative comments made by her reporting managers. The refusal to give fair consideration to her request to be permitted to do so outside the relevant time limit and even to give her an answer as to whether it had been decided or not, was a breach of a significant and valuable right in her circumstances which has now continued for a substantial time. The appropriate compensation for this breach is USD6,000.

The limit on damages

16. Article 10.5(b) of the Tribunal's Statute provides –

> Compensation, 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 and shall provide the reasons for that decision.

It is clear that the total of damages awarded to exceeds the "equivalent of two years' net base salary of the applicant". It must be accepted also that such a sum should not be awarded except in "exceptional cases". Given the nature of the cases considered by the Tribunal, namely breaches of contract, substantial awards of compensation will almost invariably involve only economic loss. Since the calculation of economic loss is fundamentally an attempt to replace what has been taken unlawfully away by the respondent, it must follow that limiting the amount to be awarded must inevitably result in committing an injustice, the greater or lesser according to the extent to which there is a shortfall. Yet this is what the General Assembly has mandated unless the case is exceptional and the Tribunal is bound to conscientiously apply the law so propounded. The Tribunal has, in another context, discussed the meaning of the term "exceptional": see *Morsy* UNDT/2009/036, *Castelli* UNDT/2009/075. It seems to me

that these statements, working from first principles, apply to the interpretation of art 10.5(b).

17. What, then, are the considerations that are relevant to the determination of the existence of an exceptional case? It seems to me that, whilst some injustice must be accepted as inevitable, there may well be a stage where the injustice is so great, the amount of loss so significant, that this alone must be regarded as exceptional. This can only be assessed, as it seems to me, in light of the circumstances of the applicant as presented in evidence. To take an extreme case, where the limitation would cause him or her economic catastrophe, the inability to sustain or support his or her family, the loss of a home, or similar outcomes, I should think such a case would be exceptional within the ordinary meaning of the word. On the other hand, cases where the effect of the limitation is to reduce the compensation by a relatively small percentage of the total, so that the level of loss is not much greater than inconvenience, having regard to the situation in which the applicant finds him or herself, would not to my mind be relevantly exceptional. On the contrary, this would, I should think, be precisely the kind of case in which the General Assembly considered that the injustice caused was justified by whatever policy considerations underlay this provision (a matter about which I would not presume to comment). In brief, it is one thing to award something less but not substantially less than what justice requires, considered as a mere matter of contractual obligation, and quite another to cause actual hardship. Where, between these limits, a line will be drawn in a particular case is a matter of difficult judgment.

18. I do not, of course, intend by these observations to lay down any binding rule but merely to indicate my approach to the issue in this case. What I have said, however, is enough to indicate that no sensible decision can be made until the actual sum to be awarded before considering reduction is calculated. In fairness, I should also give the applicant an opportunity to present evidence, should she wish to do so, of her actual economic circumstances if it is intended to submit that it bears on the question. The respondent will need to have an opportunity to test that evidence if needs be.

19. I should mention, for completeness, that I do not think that the exceptional case is a cliff edge, so that the limit either applies or it does not. It may be that there will be an exceptional case requiring a larger sum than the limit to be awarded but it does not follow that the whole of the compensation assessed should be ordered to be paid. It would be, in my opinion, necessary for Tribunal to assess what additional sum (within the assessed award) would be sufficient to bring the amount within the circumference drawn around the unexceptional case. I do not imply that this can be done with precision, of course – it is very much a question of fact and degree, in short of judgment in every case and by no means arithmetic for all that I have used a geometric metaphor.

IT IS ORDERED THAT –

1. The parties are to agree on the amount required to be paid in accordance with this judgment and inform the Registry accordingly by COB 22 April 2010.
2. By COB 23 April 2010 the applicant is to provide any further evidence upon which she seeks to rely.
3. By 27 April 2010, the respondent is to indicate whether the matters sought to be relied is in dispute. If so, a hearing will be convened for Thursday, 29 April 2010 to determine the matter.

(*Signed*)

Judge Adams

Dated this 20th day of April 2010