UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/061/ JAB/2009/009
Order No.: 116 (NY/2010)
Date: 6 May 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BEAUDRY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

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 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/2010/39). On 4 March 2010 I issued a ruling dealing with the legal issues concerning the award of compensation that should be made in favour of the applicant. In that ruling I made the following findings –

(i) The applicant is entitled to be awarded damages upon the basis that she had been unlawfully deprived of her employment by the respondent since, had the respondent acted lawfully, in the particular circumstances here, her contract would have been renewed from 1 November 2008 to the date upon which she was due to retire on 10 February 2010 (mistakenly stated in the ruling as 10 February 2011, derived from counsel of the applicant's submissions). This sum is to be calculated at the equivalent of her salary at the time, plus post adjustment, less assessment, less pension deduction.

(ii) In respect of the pension the Administration is to calculate the contributions the applicant would have made had her contract been renewed to retirement on 10 February 2010, transfer this sum to the United Nations Joint Staff Pension Fund (UNJSPF) together with the contribution which would have been made by the Administration and advise UNJSPF that, effective 10 February 2010, it should proceed on the basis that the Applicant had satisfied the prerequisites for payment of pension entitlements.

(iii) The Administration is to deduct from the award the total sum paid to the applicant on separation in respect of her pension contributions plus

interest at the average earned on deposits by UNJSPF from the date of payment to the date upon which it deposits those funds with UNJSPF.

(iv) Non-economic loss, covering personal distress, was USD4,000.

(v) In respect of the breach of the applicant's right to a proper consideration of her request for an exception to permit her to rebut her performance appraisal I awarded USD6,000.

2. Largely because of the mistake as to the applicant's retirement date, I apprehended that it could well be that the cap on compensation imposed by art 10.5 of the Tribunal's statute might be engaged. Before the significance of this provision could be evaluated, it was necessary, of course, to ascertain the amount of compensation that was payable absent the cap and consider whether any exceptional circumstances justified departure and, if so, to what extent. Accordingly, I ordered –

(i) the parties to agree on the amount required to be paid in accordance with this judgment and inform the Registry accordingly by COB 20 April 2010 (on the, perhaps mistaken, assumption that this was merely a matter of arithmetic);

(ii) by COB 23 April 2010 the applicant to provide any further evidence upon which she seeks to rely; and

(iii) by 27 April 2010, the respondent to indicate whether the matters sought to be relied is in dispute, in which event

(iv) a hearing would be convened for Thursday, 29 April 2010 to determine the matter.

3. On 20 April 2010 I was informed by the applicant's counsel of the error in the applicant's retirement date. As a consequence, on 21 April 2010 I amended the previous orders since the changed date had an impact on the total to be awarded and may have brought it below the cap, avoiding the necessity to consider the possible existence of exceptional circumstances. I extended the time for the provision of

evidence, and specified a hearing date of 6 May in the event that it would be necessary to hear evidence.

4. On 22 April 2010 I was informed by counsel for the respondent that an appeal had been filed in respect of my decision on liability. The respondent indicated that information was being sought from the Controller and the Accounts Division for the calculation of the compensation ordered to be awarded. It was submitted that the Accounts Division needed 30 days to obtain the pension-related information from the Pension Fund and sought an extension for this purpose. On 23 April 2010 the applicant objected to this extension.

5. On 23 April 2010 I directed the Registry to inform the parties that my assumption about the pension as an award to be taken into account in applying the cap may have been mistaken and that, if this were so, it was no useful purpose was served by the adjournment, since the order was self executing and did not need to be revisited so far as any calculation was concerned. Whether the award concerning the pension was governed by the cap (either by itself or in combination with the other sums awarded) was, however, still an open question. On 30 April 2010 the applicant filed a submission to the effect that, by virtue of the orders, the pension could not be a sum within art 10.5(b). My tentative view, without at this point deciding the matter, is that the pension itself is not a payment within art 10.5 at all. However, the sum that the Administration is required to pay as its contribution to the Fund to entitle the applicant to be treated as an employee as at 10 February 2010 may well be an amount of this character and, hence, may have to be accumulated with the other sums ordered to be paid in order to consider the application of art 10.5(b).

6. On 30 April 2010 the respondent filed a written submission repeating the need for allowing time for the Pension Fund to calculate the amount to be paid and making a number of other submissions, which may be summarized as follows –

> (i) The Tribunal's statement that the uncontradicted evidence of the CAS and the CMS was that, had they known that the applicant wished to have her contract renewed as at 23 July 2008, they would have renewed it, was correct

but that, when the applicant had sought administrative review of the decision not to renew, the CAS indicated that she would have given a negative recommendation at that stage and CMS indicated that he would not reconsider his decision not to renew because the applicant "lacked the requisite management skills" to undertake her function. The respondent therefore submitted that the evidence contradicted the finding that the applicant would have been renewed for to the time of her retirement.

(ii) The limitation to two years net base salary applies equally to awards under art 10.5(a) and art 10.5(b) unless there are exceptional circumstances. The award must take into account the obligation of the applicant to mitigate her damages. It is not appropriate to award compensation on the basis that the applicant would have continued in the employ of the Organization since her contract came to an end by effluxion of time in accordance with its terms.

(iii) The Tribunal found the failures of the respondent to be (a) not giving her reasons for deciding not to renew her appointment, (b) acting on the mistaken belief that she was willing not to have her contract renewed and (c) not responding to her request for a waiver of the time limit for filing a rebuttal. These were merely procedural and factual errors and compensation should be limited to an award for moral injury.

(iv) The order of the Tribunal that, in effect, the applicant is to be treated as if she were a staff member for pension purposes is, in effect, a rescission of the decision not to appoint her, which is expressly prohibited from ordering by art 10.5(a).

7. As to (i). The crucial date at which to determine whether there was a breach is the date at which it was decided not to renew the applicant's contract. It is this decision which the applicant claims to have been unlawful. In my decision dealing with liability I explained that the decision not to renew was indeed a breach of contract since it had been affected by two improprieties. In substance, these were the failure to act in good faith or fairly by not informing the applicant that renewal was

dependent on her willingness to accept extension of the contract and by acting on the basis of a mistake of significant fact, namely the belief, inadequately based, that the applicant did not wish to extend her contract. The decision not to renew the contract was fatally flawed for these reasons. As I recorded in my decision, both the CAS and the CMS stated that the decision not to renew the contract had nothing whatever to do with any perceived management shortcomings on the part of the applicant. Had there been no breach, the contract would have been renewed, as the CAS and the CMS testified and there would have been no occasion for the applicant to have sought administrative review. The possible reconsideration of the renewal as a result of the applicant's request for administrative review was, in substance, an opportunity to correct what was already a breach of contract. I discuss the evidence as to the asserted management shortcomings referred to by the CMS in connection with the refusal to reconsider renewal when the applicant had sought administrative review in para [19] of the decision on liability and it is not necessary to repeat that discussion here. This was essentially part of the history of the case: it was not this material that constituted the breach of contract for which compensation must be awarded.

8. As to (ii). The respondent's submission as to mitigation is correct and it is for the applicant to show what, if anything, she has done in order to mitigate her damage (such as disclosing her efforts to obtain alternative employment and disclosing her earnings). The correct approach to compensation is to ascertain the amount necessary to place the successful party in the same position he or she would have been in had the breach not occurred. In this case, this necessarily means that the contract would have been renewed and, as I have found, probably renewed to the date of the applicant's retirement. It follows that the applicant has lost the income this employment would have generated, less deductions (such as assessment and so on) and, as the respondent rightly points out, any sums earned or able to be earned by her during the relevant period. As to the question whether the contract would have been likely to have been extended beyond the term of the contract that would have been renewed absent the breach, I found it does not depend upon the respondent having a

legal liability to extend it but upon the probability *as a matter of fact* that it would have been extended.

9. As to (iii). The legal improprieties are set out clearly in the decision on liability. It is enough to say that the respondent's statement of them does not adequately or accurately summarise them. I simply repeat the point that the decision not to renew was made in breach of the applicant's contractual rights and compensation must be calculated upon the basis of the loss that directly and predictably flowed from that wrongful decision.

10. As to (iv). The issue of the pension is not a simple one. I accept the submission of counsel for the applicant that the Pension Fund is a separate and independent entity and is not subject to the orders of the Tribunal. Nor can the payment of a pension be compensation: it is payable by virtue of the legal charter that governs the operations of UNJSPF on the occurring of certain events. The compensation amount is that sum that must be paid by the Organization in order to restore the applicant's entitlement to be paid the pension that she lost as a result of the breach of her contract by the respondent, in short to restore her to membership of the Fund or eligibility for the pension. As a part of the salary arrangements, both the applicant and the respondent paid certain sums to UNJSPF. Those amounts have been, I assume, repaid – certainly the applicant's contribution. To be restored, I have assumed (as I think the applicant contends) that she would need to repay to UNJSPF the amount refunded to her plus the additional amount that would have been her contribution had she remained in the employ of the Organization until retirement. For its part, the Organization will need to repay that part which (I assume) it received because of the applicant's early departure from UNJSPF and, in addition, pay the additional amount that would have been its contribution had the contract been renewed to the applicant's date of retirement. Thus the amount of compensation necessary to be paid (though to UNJSPF and not directly to the applicant) is that contribution which the Organization would have paid had the applicant's contract been renewed in accordance with her rights.

11. I am unable to see how requiring the Organization to reinstate the applicant's pension is to order rescission of the illegal administrative decision. I have not ordered rescission at all: I have ordered the Organization to place the applicant in the same position, as nearly as money can do so, as she would have been in had the wrongful decision not been made. There is no order requiring the Organization to employ the applicant, indeed, as I have already said, I doubt that such an order could properly be made. But that is not to say that the Organization is not obliged to make recompense for its breach of contract for the losses that that breach entailed.

12. I accept that the calculation of the compensation attributable to the pension is, perhaps, complicated although I would have thought that it simply amounts to adding up what would have been the Organization's contribution in the event that the contract would have been renewed to retirement, the applicant's contribution in that time, and the contributions returned to the Organization and the applicant. The applicant's contribution would be paid by deduction from the other amounts payable as compensation, so that the Organization would pay the total sum to UNJSPF.

13. If it is not possible to restore the applicant's membership of UNJSPF, then her loss of her pension rights becomes a compensable loss which must be valued and awarded. Here again there must be an accounting for the amount that the applicant would otherwise have been required to pay to obtain the pension.

Conclusion

14. Until the relevant calculations are made it is not possible to deal with the question of the application of the gap. Accepting that the pension calculations are somewhat complicated, the extension sought by the respondent in that regard is granted. However, the other calculations of applicable emoluments are relatively simple and can be done more quickly. It maybe that this information is already to hand. Since the respondent's submission as to mitigation is correct, the applicant will need to adduce evidence on this question and, possibly on the question of exceptional circumstances.

15. In all the circumstances, I consider that the parties should be required to appear to enable directions to be given on the future conduct of this matter in the hope of enabling a speedy resolution. Accordingly, the parties are ordered to attend a directions hearing on 7 May 2010, 11:30am at the premises of the UNDT.

(*Signed*)

Judge Adams

Dated this 6th day of May 2010