



Case No.: UNDT/NY/2010/041/
UNAT/1705

Judgment No.: UNDT/2010/194

Date: 29 October 2010

Introduction

1. On 25 June 2010 the United Nations Dispute Tribunal issued its first Judgment in this matter on the issues of liability and compensation (*Fayek* UNDT/2010/113), finding that the decision not to select the Applicant for the contested P-4 level post on a two-year contract was in violation of her right to full and fair consideration and that there was a causal connection between this violation and the Applicant's non-selection, for which she must be properly compensated. The parties were directed to attempt to reach an amicable agreement on compensation in light of the first Judgment by 12 July 2010, failing which they were directed to file further submissions on compensation.

2. In the Judgment of 25 June 2010, the Tribunal found, *inter alia*, that compensation for the actual economic loss caused to the Applicant should be based on the difference, for two years, between the actual salary, benefits and entitlements at the P-3 level and step held by the Applicant at the relevant time period and the salary, benefits, and entitlements she would have received at the P-4 level and appropriate step. The facts of this case and the Tribunal's findings on liability and compensation are articulated in detail in the previous Judgment and will not be repeated here unless necessary to address the parties' contentions.

Applicant's submission

3. The Applicant accepts the computation submitted by the Respondent for the actual economic loss for the period of 1 August 2007 to 31 July 2009. The Applicant submits, however, that the financial loss resulting from her non-selection must be computed as a lifetime loss. With respect to the future loss, the Applicant requests the Tribunal to make certain "assumptions about the future", including that she will remain with the Organisation until her retirement in 2026. The Applicant avers that she was given permanent status on 30 April 2010, with retroactive effect to 30 June 2009, and it can be expected that as a permanent staff member she will continue working for the UN until her retirement age. She alleged that whenever she will be promoted or receive step increases, she will remain below the grade level she would have otherwise been at, and

therefore she will be suffering continuing losses. The Applicant submits that depending on the method of calculation and the assumptions allowed, her future loss beyond 31 July 2011 will be between USD239,000 and USD487,000.

4. The Applicant further avers that although she would have been promoted to the P-4 level effective 1 August 2007, she would not have received a new two-year contract until 31 January 2008, when her P-3 contract expired, due to the Organisation's administrative practices. On 31 January 2008, her P-4 fixed-term contract would have been renewed for another two years, and on 31 January 2010 it would have been renewed until 31 January 2012.

5. Finally, the Applicant submits that the compensation in the amount of three months' net base salary (USD16,535), paid by the Secretary-General on the basis of the Joint Appeals Board ("JAB") report, was for her moral injury and did not include actual economic loss.

Respondent's submission

6. The Respondent submits that the Applicant would have received a two-year contract and it is unlikely that she would have been promoted to the P-5 level. The Respondent avers that had the Applicant been promoted and employed for two years, she would have been employed at the P-4 level, step VII, for the first year (1 August 2007-31 July 2008) and, due to a within-grade increment, her step level would have increased to VIII during the second year (1 August 2008-31 July 2009). For the first year, the difference between what the Applicant received and what she would have received at the P-4 level, step VII, is USD5,699, including the monetary equivalent of the entitlements and benefits (but excluding additional pension contributions by the Organisation). For the second year, this difference would have amounted to USD8,565. Thus, the total difference for two years would have been USD14,264, which roughly approximates the three months' net base salary paid to the Applicant by the Secretary-General. Thus, the Applicant has received adequate compensation for the actual loss suffered and no further award should be made.

7. Pursuant to the Tribunal's Order, the Respondent calculated the difference between the Organisation's pension contributions on behalf of the Applicant between 1 August 2007 and 31 July 2009 and the contributions the Organisation would have paid to the UN Joint Staff Pension Fund had the Applicant been employed at the higher level. The Respondent submitted that the difference amounted to USD3,287, and the Applicant did not dispute the accuracy of this calculation.

8. Finally, the Respondent submitted that the Applicant failed to articulate with sufficient specificity her claims concerning moral damages and failed to submit any evidence in support thereof.

Consideration and findings

Compensation for breach of procedural rights

9. The JAB recommended that the Applicant be paid compensation of three months' salary "for the lack of due process". The Secretary-General accepted the JAB's conclusion that the Applicant's rights had been violated and decided to grant her compensation. The Applicant was informed by letter that the Secretary-General had decided "to accept the JAB's recommendation that [the Applicant] be granted three months net base salary at the rate in effect as of the date of this decision letter as compensation *for the violation of [her] rights*" (emphasis added).

10. The Applicant submitted that the three months' net base salary awarded by the Secretary-General was for moral injury only and did not cover actual economic loss. The Respondent submitted, on the other hand, that this compensation was intended to cover all damages, including actual economic loss. Having given careful consideration to the nature of this award, the Tribunal finds that there is no basis for either of these assertions. Neither the JAB report nor the Secretary-Gene

Judgment, that, ordinarily, it will have little or no effect on any computation of damages. This claim is therefore rejected.

18. I have reviewed the parties' submissions with respect to the bases for compensation for the actual loss suffered and I find that there is nothing in these submissions that qualifies or adds anything to my previous findings. There is no need to repeat these findings other than to say that certain assumptions can be allowed but they must be reasonable. I find that the assumptions the Applicant requests the Tribunal to make lack sufficient bases in this case for the reasons stated in the previous Judgment.

19. Accordingly, the actual loss in salary, benefits and entitlements (not including pension rights, which are discussed below) suffered by the Applicant for which she should be recompensed is as follows: (i) for the first year (1 August 2007 to 31 July 2008), the amount of USD5,699 plus interest at the applicable US Prime Rate until the date of payment, and (ii) for the second year (1 August 2008 to 31 July 2009), the amount of USD8,565 plus interest at the applicable US Prime Rate until the date of payment (see *Warren 2010-UNAT-059*).

20. With respect to the Organisation's pension contributions on behalf of the Applicant, the parties agree that there was a shortfall of

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