



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/040/
UNAT/1703
Judgment No.: UNDT/2011/117
Date: 30 June 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

PANDEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Salim Shaikh

Counsel for Respondent:
Jorge A. Ballesterro, UNICEF

Introduction

1. The Applicant appealed to the former United Nations Administrative Tribunal against the Secretary-General's 2 December 2008 decision to compensate the Applicant in the amount of two years' net base salary following a determination by the Joint Appeals Board ("JAB") that the Applicant's due process rights had been violated in the non-renewal and non-extension of her fixed term contract with the United Nations Children's Fund ("UNICEF"). The Applicant has confirmed to the Dispute Tribunal that she has received payment of the two years' net base salary, but the Applicant now contends that the award made was insufficient.

2. The Applicant also filed a formal complaint of harassment, sexual harassment and abuse of authority against the Country Representative of UNICEF New Delhi Office, as well as against the Applicant's immediate supervisor in the office. The Applicant submits that these matters are linked to the non-renewal and non-extension of her fixed-term contract, as will be delineated herein.

3. The present case is adjudicated by the Dispute Tribunal after the case was transferred to it on 1 January 2010 from the former United Nations Administrative Tribunal as a result of the abolition of the latter Tribunal.

Facts

4. On 30 April 2007, the Applicant filed a statement of appeal with the JAB against the decisions not to renew her fixed-term contract beyond 31 December 2006, when she was on extended sick leave, and against the non-extension of her appointment to cover that sick leave.

5. On 2 December 2008, the JAB panel adopted its Report No. 2022 in relation to the Applicant's statement of appeal to the JAB.

Case No. UNDT/NY/2010/040/UNAT/1703

Judgment No. UNDT/2011/117

Case No. UNDT/NY/2010/040/UNAT/1703

Judgment No. UNDT/2011/117

14. By a letter dated 18 March 2009, the Deputy Secretary-General (“DSG”) transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General decided to accept the JAB panel’s findings for compensation to the Applicant in the amount of two years’ net base salary in effect on 31 December 2006.

15. On 15 June 2009, the Applicant filed an application with the former United Nations Administrative Tribunal, appealing the Secretary-General’s decision of 18 March 2009. In her application, the Applicant asked the Tribunal to:

- a. Rescind the decision of the Respondent not to renew her fixed-term appointment;
- b. Reinstatement her in her original position with all benefits effective on 1 January 2007;
- c. Initiate punitive action against “those accountable for causing irreparable loss to her career with the UN and her honour and reputation”;
- d. Award appropriate additional damages and financial relief of 36 months’ net base salary “over and above the compensation awarded by the JAB for the irreparable damage caused to the dignity, integrity, career of the Applicant especially with the [United Nations], mental and emotional torture to which the Applicant was subjected to during the last three years since she is running from post to pillar to seek justice from the Management”;
- e. Additionally, grant salary for the period January 2007 to 5 June 2007, the period for which the Applicant’s sick leave was “deemed to be approved by the [United Nations] Medical Director”;
- f. Hold her two supervisors responsible for “their nefarious acts of severely damaging the Applicant’s civil reputation, career prospects, etc. and to make them personally liable to pay damages of USD100,000 each to the Applicant”; and

g. Order the Secretary-General to waive the immunity enjoyed by her two supervisors in order to “facilitate the Applicant to pursue the criminal proceedings already instituted with the law enforcing authorities in India”.

Scope of the case

Article 10.5 of the Statute of the Dispute Tribunal

16. Pursuant to paragraph 28 of General Assembly resolution 63/253 of 24 December 2008 (“... the Tribunal ... shall not have any powers beyond those conferred under [the Statute]”) and art. 10.5 of the Statute of the Dispute Tribunal, the only permissible forms of relief that the Tribunal may order are 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)

contractual rights for which the Tribunal could possibly grant specific performance under art. 10.5(a) of the Statute (see, e.g., *Aly et al* UNDT/2010/195). These findings are without prejudice to the competence that the Tribunal holds under art. 10.8 of the Statute (“The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability”).

18. The Tribunal finds that it does not have authority to order any of the means of relief requested by the Applicant as described in para. 15 (c), (f) and (g) above.

Relief requested by the Applicant, as described in para. 15 (a), (b) and (e) above

19. As described in para. 15 (a), (b) and (e) above, in essence, the Applicant requests that she be re-instated in the position for which her appointment was not renewed with full pay, including also for the time when she allegedly was sick, from January 2007 to 5 June 2007.

20. In her 18 March 2009 letter to the Applicant, the DSG confirmed the JAB

been violated by ‘the failure of the UNICEF Administration to extend [your] contract while [you were] on certified sick leave’.

In light of the foregoing, the Secretary-General has decided to grant you compensation in the amount of two years net base salary at the rate in effect on 31 December 2006, as compensation for the violation of your rights.

21. Thus, the Applicant has already been compensated for loss of the income she would have obtained under a renewed contract for the entire period from the expiry of the previous contract on 31 December 2006 and two years ahead, i.e. until 31 December 2008. As for reinstating her in the position, the renewed (hypothetical) contract would have since expired, so it is not possible for the Dispute Tribunal to do so under art. 10.5 of its Statute.

22. The Tribunal finds that it does not have the authority to order any of Applicant’s claims mentioned under para. 15 (a), (b) and (e).

Relief requested by the Applicant, as described in para. 15 (d) above

23. In Order No. 276 (NY/2011) of 14 October 2010, this Tribunal found that:

... the only issue before it is the question of the sufficiency of the compensation to the Applicant for the violation of her due process rights in her non-renewal case, namely two years’ net base salary plus interest or USD76,800

24. With the remaining matter before the Tribunal being the sufficiency of the compensation paid to the Applicant for violation of her due process rights in the decisions not to renew her fixed-term contract beyond 31 December 2006 when she was on extended sick leave and the non-extension of her appointment to cover that sick leave, the question arises whether the Tribunal is also required to examine, once more, the underlying merits of the Applicant’s due process claims.

25. As to that point, the Applicant advances contradictory contentions. She seeks to keep the JAB decision intact (finding that she was entitled to compensation as a result of the violation of her due process rights, although the Applicant contends that

the compensation was inadequate), while at

Case No. UNDT/NY/2010/040/UNAT/1703

Judgment No. UNDT/2011/117

31. The Tribunal affirms its finding of Order No. 276 (NY/2010)21 uetax d(Fc)l0its fibO28f Or

35. In the following summary, the Tribunal reorganized and rephrased the Applicant's contentions, in an attempt to give relevance within the context of the present case. Insofar as Counsel's submissions were entirely irrelevant or simply inappropriate, the Tribunal has disregarded

contractual status on completion of four years' service as a national office and thereby approval by the Regional Director, etc.”.

Respondent's submissions

36. In essence, the Respondent contends that the Applicant has not substantiated why the present case is “exceptional” under art. 10.5(b) of the Statute of the Dispute Tribunal for the Tribunal to order the payment of compensation beyond two years' net base salary.

37. Furthermore, the Respondent requests that costs be awarded against the Applicant, in accordance with art. 10.6 of the Statute, for Counsel for the Applicant's “unsubstantiated and outrageous accusations”.

Consideration

38. With respect to the determination whether a case is “exceptional” under art. 10.5(b), the United Nations Appeals Tribunal stated that this provision “does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation” (*Mmata* 2010-UNAT-092, para. 33).

39. The “aggravating factors” to which the Applicant has pointed in the present case are the following:

a. Had UNICEF not unlawfully refused to renew and extend her contract, she would have worked with the Fund for a longer time than the two years for which she was compensated;

b. The circumstances of the alleged sexual harassment leading to her employment contract not being renewed or extended were so “aggravating” that they justified more than two years' net base salary plus interests in compensation to cover her injuries; and

c.

was not provided to the Applicant was that the investigation panel found against the Applicant, since “the facts reported in the investigation report appear[ed] to indicate that misconduct has not occurred” (see UNICEF’s Policy on Preventing Harassment, Sexual Harassment and abuse of authority, CF/AI/2005/017, 16 December 2005, para. 41).

43. Annexed to the Applicant’s statement of appeal is a “Note for the Record of Meeting” of a meeting that was held on 26 July 2006 between the Applicant, her supervisor and a Human Resources Officer, where her possible separation from UNICEF was discussed. From the Note, it follows that the Applicant’s separation from UNICEF seemed to be the result of the Applicant’s own failed promotion expectations, and possibly also of the fact that her supervisor wanted her to leave (for a reason that is not clear from the document):

The objective of the meeting was to discuss clearly and concretely [the Applicant’s] future plans having given a firm indication at an earlier meeting (before proceeding on extended sick leave) of her desire to issue notice of resignation from UNICEF on or around 1st July 2006 ... [The supervisor] went on to say that this was an opportune time to talk concretely about what [the Applicant] wanted to do, specifically if she was continuing with UNICEF or was going to resign. [The Applicant] said she didn’t know but thought that if there was a possibility of working at a higher level she would be interested in continuing; otherwise if there were no prospects of growth she would consider moving on ... [The Applicant] then said that she would appreciate knowing if her contract would be extended upon its expiry in December, 2006, to which [her supervisor] responded by telling her that UNICEF will not extend her contract. ...

44. Nothing in the above Note indicates or implies any connection to the harassment, sexual harassment and abuse of authority allegations made by the Applicant. The Tribunal observes that the Note was signed by all the participants after the meeting, who assumingly thereby all consented to its contents, and that the Applicant has not subsequently denied its veracity.

45. It further follows from the JAB Report No. 2022 that the JAB panel, after reviewing the investigation report, considered the possible nexus between the

Applicant's non-renewal/non-extension and her sexual harassment allegations. The JAB panel found that it did not want to "second guess the Investigative Team on the sexual harassment charges ... the Panel ... concentrated on whether due process was followed in the non-renewal of her contract". Thus, the JAB panel rejected even to consider the Applicant's allegations of harassment, sexual harassment, and abuse of authority in the context of her non-renewal and non-extension claims. Rather, the JAB panel chose to focus its attention on the Applicant not being provided with the appropriate procedural rights in the non-renewal and non-extension process.

46. The Tribunal in no way minimises the serious nature of the Applicant's claims of harassment, sexual harassment and abuse of authority, but the Applicant has not been able to demonstrate the existence of a causal link between these claims and the claims that are before the Tribunal. Further, nothing in the case record even implies that such a connection ever existed.

47. The third "extraordinary" circumstance to which the Applicant refers is constituted by the shortcomings identified in the JAB report and which led the JAB panel to award two years' net base salary plus interest in compensation (see paras. 11 and 13 above). However, the Applicant has not pointed to any particular evidence to support the conclusion that any of these circumstances is so "aggravating" as to render her case "exceptional" within the meaning of art. 10.5(b) of the Statute. Under *Mmata*, the Tribunal therefore cannot justify a higher compensation award on this basis.

48. Finally, according to the JAB report (para. 19), the Tribunal notes that the Applicant's initial request was for the JAB panel to recommend:

... compensation of [USD]76,800, which would be the equivalent of the last two years of Appellant's net salary, for the irreparable morale and career damage done to her professional reputation and for the financial loss incurred by her illness.

49. Having been compensated in the amount of two years' net base salary, the Applicant since has raised her compensation request to three years' net base salary,

but she has nowhere explained what prompted this increase. Although the Applicant is not bound by her original plea to the JAB in her later appeal to the former Administrative Tribunal (and now to the Dispute Tribunal), the Applicant's initial request in some manner is indicative of her own initial determination that two years' net base was sufficient to compensation for her losses.

Conclusion

50. The Tribunal finds that the Applicant has failed to provide sufficient evidence to corroborate the existence of "aggravating factors", in accordance with *Mmata*, and has failed to prove that the present case is "exceptional" as to warrant an order for payment of compensation beyond two years' net base salary under art. 10.5(b) of the Statute of the Dispute Tribunal.

51. For all of the foregoing reasons, the application is rejected in its entirety.

(Signed)

Judge Marilyn J. Kaman

Dated this 30th day of June 2011

Entered in the Register on this 30th day of June 2011

(Signed)

Santiago Villalpando, Registrar, New York