UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. The Applicant is a staff member of the International Criminal Tribunal for Rwanda (ICTR). She filed the current Application on 28 June 2013 challenging the Administration's refusal to grant her the home leave she was entitled to take in 2012.

Facts

2. The Applicant began her career with the United Nations as a French Court Reporter for the International Criminal Tribunal for Rwanda (ICTR) in 2000. She presently holds a Field Service (FS) position at Level 5 step 10.

3. In January 2012 she was diagnosed with a serious ailment and underwent surgery following which she had to undergo intensive treatment in France.

4. On 2 July 2012, while under treatment in France, the Applicant received an email[1] from BT, an ICTR Human Resource Assistant, asking her to sign her employment contract[2] effective 1 July 2012 for the period ending 30 September instead of 31 December 2012.

5. The Applicant inquired about the reason behind the change of her renewal period[3] but she received no explanation. She subsequently found out that her appointment had only been renewed for three months because she had been placed on sick leave.

6. In an email[4] sent by Ms. Sarah Kilemi, the Chief of the ICTR Division of Administrative Support Services (Chief/DASS), to one EN on 21 June 2012 it is stated that should the Applicant return to work before 1 July 2012, the duration of her renewal would be reviewed accordingly.

[1] Exhibit E of Application.
[2] Exhibit F of Application.
[3] Exhibit L of Application paragraphs 63-66.
[4] Exhibit G of Application.

7. On 14 September 2012, Ms. Carmen De Los Rios, the Chief of the ICTR Human Resources & Planning Section (Chief/HRPS) wrote an email[5]

12. On 8 October 2012, the Applicant inquired again about taking her home leave in an email[9] she sent to Ms. De Los Rios. On the same day Ms. De Los Rios acknowledged receipt of the Applicant's email and indicated that she would get back to her shortly after evaluating her request[10].

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13. On 11 December 2012[11], the Applicant wrote a letter to Mr. Besnier, Ms. De Los Rios, and Ms. Kilemi complaining about ICTR's manner of handling her requests. In this letter she requested assistance with processing her home leave request.

14. On 20 and 21 December 2012, the Applicant was diagnosed with another ailment. Her doctors recommended that she be placed on sick leave[12].

15. In January 2013, the Applicant was placed on sick l

not be approved for home leave as she was currently on sick leave[14]. The Applicant was instead medically evacuated to Israel.

19. On 22 April 2013, the Applicant requested management evaluation of the ICTR Administration's refusal to grant her home leave in 2012[15].

20. On 7 June 2013, the Applicant received the decision from the Management Evaluation Unit (MEU). MEU determined that the Applicant's request was time-barred and therefore not receivable and that there were no exceptional circumstances that would justify an extension of the time limit[16].

Hearing

21. In *Bertucci* 2010-UNAT-062, the United Nations Appeals Tribunal (UNAT) recognized the Dispute Tribunal's broad discretion with respect to case management. UNAT stated in relevant part that:

> As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties. The Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases.

22. In *Carrabregu* 2014-UNAT-485, UNAT decided that an oral hearing was not necessary because the issues for decision were clearly defined in the parties' written submissions. This Tribunal holds the same view in this case.

23. Accordingly, the Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, has determined that an oral hearing is not required in determining this case and will rely on the Parties' pleadings, written submissions and the documentary evidence in the record.

[15]Exhibit R of Application.
[16] Exhibit S of Application.

Issues

24. The issues for determination are:

a. Whether the Application is receivable; and

b. If it is receivable, whether ICTR's decision to deny the Applicant's request to take home leave in November 2012 unconditionally was lawful?

Is the Application receivable?

Respondent's submissions

25. In August 2012, the ICTR Administration advised the Applicant that since her appointment was not expected to continue beyond three months, under staff rule 5.2 (l)(i)(a), she was not entitled to take home leave. Nevertheless the Administration offered to grant her home leave on the condition that she undertook to reimburse the Organization in the event that she did not serve beyond three months. By making this offer, the Administration granted the Applicant an opportunity to proceed on home leave beyond her entitlement under the Rules.

26. The Applicant had already been informed that she could not get an unconditional grant of home leave at the time of her official request dated 27 September 2012. The Applicant indicated that she could not agree to the Administration's offer to grant her conditional home leave and, instead, insisted on being granted home leave unconditionally as stated in her email dated 8 October 2012[17].

27. On 24 October 2012, the Applicant met with the ICTR Administration to discuss a variety of issues, including her request for home leave. At this meeting, and at no time before 2 November 2012, did the ICTR Administration reconsider its

[17] Exhibit K of Application, paragraph 9.

decision taken that the Applicant would only be granted conditional home leave for the 2-18 November period requested. The minutes of the meeting indicate that, at that time, the ICTR Administration was to confirm whether the Applicant could exercise home leave to an alternate place of home leave on an exceptional basis[18].

28. Accordingly, the initial decision not to

March 2013 after the Applicant had submitted a new request for home leave with new leave dates.

Applicant's submissions

33. MEU's determination that the Applicant's request for management evaluation was time-barred and therefore not receivable is patently unreasonable.

34. The Administration's failure to respond to the Applicant's numerous requests with regards to her home leave is considered an administrative decision in itself, as it produces legal consequences for the Applicant. The Administration's lack of response is subject to review by this Tribunal.

35. The conclusion of the management evaluation that the Applicant's right to request a review of her case expired on 1 March 2013 as the decision on her home leave was taken in December 2012 has no basis. Although the App

decision, express or implied, had been taken in respect of the home leave. Nor can that correspondence be backdated to August 2012 to support the view that a final decision not to approve the home leave had been taken in August 2012. The process of making a decision on the home leave was still an ongoing one as at October 2012.

42. Further in February 2013, the Applicant again requested home leave and was informed that her application could not be approved as she was on sick leave. The answer from the Administration was not one linked to the duration of the Applicant's contract but was subject to her sick leave. It can reasonably be inferred from that last reply that no final decision, either express or implied, had been taken in respect of the home leave as of that date or that the decision was left pending on account of the sick leave.

43. Whatever the case may be the Applicant cannot be faulted if she considered the decision of February 2013 as a refusal and proceeded to file a request for management evaluation in April 2013.

Decision

44. The Tribunal finds the Application receivable.

Was ICTR's decision to deny the Applicant's request to take home leave in November 2012, without conditions, lawful?

Applicant's submissions

45. The Applicant submits that her contract was erroneously renewed for a period of three months starting 1 July 2012 instead of six months to end on 31 December 2012.

46. No explanation was given for the shortening of the extension period save for the fact that the Applicant came to know that this was done because she was on sick

leave. This was confirmed by the email sent on 21 June 2012[20] by Ms. Kilemi where she stated that "[t]he staff member is on sick leave and therefore have the extension done for 3 months and if she comes back before then the duration will be reviewed accordingly".

47. On 14 September 2012, Ms. De Los Rios wrote an email to Ms. Kilemi and the Chief of the ICTR Health Services Unit saying that the Applicant had been one of the higher ranked staff members following the staff retention exercise and acknowledging that because of her high rank, her contract was to be extended until December 2012[21].

48. It is clear from these emails that in July 2012, the Applicant should have been renewed for a period of six months that is until December 2012 but the Administration chose to split the renewal period of six months into two renewal periods of three months each because the Applicant was on sick leave.

49. In August 2012, having accumulated 60 days of home leave, the Applicant inquired about taking her home leave upon the expiration of her sick leave. She was told that since her appointment was expiring September 2012, she was not eligible for home leave as she would not have the required three month working period upon return from leave.

50. The Administration verbally acknowledged that the unjustified change in the date of expiration of her appointment was an administrative mistake.

51. On 30 August 2012, the Applicant wrote[22] to Mr. Besnier informing him that her contract had been ended prematurely and that she was consequently unable to take her home leave. The Applicant informed Mr. Besnier of her numerous failed attempts to resolve this issue with the ICTR Administration.

[20] Exhibit G of Application.
[21] Exhibit H of Application.
[22] Exhibit I of Application.

52.

67. In *Sanwidi* 2010-UNAT-084, UNAT held that:

> When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.

68. When Ms. Kilemi wrote that because the Applicant was on sick leave she would be extended for only three months and that the decision would be reviewed if she resumed work, she wrongly applied staff rule 5.2. That was a procedurally incorrect approach that rendered the decision perverse.

Decision

69. The Tribunal concludes that the Respondent exercised his discretion wrongly and unlawfully deprived the Applicant of her home leave when she made the request in November 2012.

Remedies

70. Compensation is governed by articles 10.5(a) and (b) of the UNDT Statute, which stipulate:

> As part of its judgement, the Dispute Tribunal may order one or both of 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) of the present paragraph;
> >
> > (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The

> that breach, whether economic or not. Further refinement is neither necessary nor useful.

75. It is clear from the reasoning of the learned Judge that compensation should be interpreted to include both pecuniary and non-pecuniary loss.

76. However in the case of *Gakumba* 2013-UNAT-387, UNAT seems to be making a distinction between an award of compensation under articles 9.1(a) and (b) of the Statute of the Appeals Tribunal, articles that are mirrored verbatim in articles 10.5(a) and (b) of the UNDT Statute. UNAT determined that the circumstances of the Gakumba case supported the UNDT "finding of humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member, which led the UNDT to award the reasonable amount of seven months' net base salary as compensation".

77. UNAT then analysed the nature of the compensation permissible under articles 9.1(a) and (b).

> This compensation [for humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the Administration, and it is regulated in Article 9(1) (b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling.

78. What UNAT is saying is that compensation under art. 9.1(a) is awarded for a prejudice suffered as a result of an action taken by the administration on the contract of employment and should not be assimilated to moral damages. Compensation by way of moral damages under art. 9.1(b), which is known in the civil law system as "dommage moral" and in the common law system as "non-pecuniary loss" or non-

economic loss", is awarded at the discretion of the court. Moral damages are not punitive in nature but are meant to compensate a litigant for physical suffering,

its importance as UNAT has come out strongly against the retroactive application of rules or regulations even when they would have benefitted an applicant[27].

83. The Applicant filed her case on 28 June 2013. The Tribunal considers that it would be unfair to apply the amendment retroactively to the case of the Applicant as indeed to all cases filed before December 2014. However the issue of whether the amendment should be made to operate retroactively is of no major consequence. The Tribunal takes the view that even without that amendment the established jurisprudence of UNAT indicates that evidence of prejudice is required before an award of moral damages is made[28].

84. What UNAT seems to be saying in *Hersh* is that the breach of the fundamental rights of an individual must be established first. Then if the breach is so patent the evidence of the harm is contained in that patent breach. This is supported by the views expressed in *Asiarotis* 2013-UNAT-309 where UNAT held "[w]here the breach is of a fundamental nature, **the breach may of itself** give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee" (emphasis added). But there must be evidence from which this conclusion may be derived. *Hersh* cannot be interpreted to mean that no evidence is required for an award of moral damages when there is a breach of a fundamental right.

85. In *Assiarotis,* UNAT set out the principles that should guide the UNDT in the award of moral damages:

> To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What

[27] See *Robineau* 2014-UNAT-396 and *Hunt-Matthes* 2014-UNAT-483.
[28] See for example *Wu* 2010-UNAT-042; *Marsh* 2012-UNAT-205; *Kozlov and Romadanov* 2012-UNAT-228; *Wu* 2012-UNAT-042; *Kasyanov* 2012-UNAT-076; and *Diallo* 2014-UNAT-430; *Andreyev* 2015-UNAT-501.

can be stated, by way of general principle, is that damages for a moral injury may arise:

> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages,

> service by reason of illness that continues beyond the date of expiration of the appointment.

87. In the light of the principles laid down by UNAT, the Tribunal has to consider whether there was a breach of the Applicant's substantive entitlements arising from substantive and/or procedural irregularities and whether the breach was of a fundamental nature.

88. In the present matter the Tribunal relies on the pleadings and the averments of the Applicant. From the pleadings the following substantive irregularities are very apparent: the processing of the extension of her contract and her home leave entitlement was done in an amateurish manner and in total disregard of the rules governing home leave and sick leave; the mistake in the duration of the extension of her contract remained without explanation; the delay in responding to her requests on home leave; the failure of the administration to get back to the Applicant in spite of an undertaking to that effect and the complete disregard and silence in the face of her impassioned plea in the letter she sent to Mr. Besnier.

89. From these averments the reasonable inference is that there was a breach of the substantive entitlements arising from the Applicant's contract of employment resulting from a number of substantive and procedural irregularities. The Tribunal does not consider that evidence establishing the existence of moral injury must compulsorily be *viva voce* evidence. Such a fact can be gathered and/or inferred from the pleadings and documents produced by a party.

90. The Tribunal considers that if the pleadings contain a clear showing of "harm" as in the case of the Applicant that is evidence enough to grant an award for moral damages.

Judgment