UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2014/041
Judgment No.:	UNDT/2015/059
Date:	26 June 2015
Original:	English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUTISO

v.

andre TaviaediOn OS:LA:
SECRETARY-GENERAL O ThHnE U(NIT(D)5.3N(ATI(NS -32531.1L)]TJ412

ounse
S/OHRMo

Introduction

1. The Applicant is a former staff member of the United Nations Political Office for Somalia (UNPOS). He filed the current Application on 16 May 2014 to challenge the Administration's "failure to conclude an investigation implicating [him] in a UN vehicle theft".

Procedural history

2. The Application was served on the Respondent on 19 May 2014.

3. The Respondent submitted a Reply on 18 June 2014 in which he asserted that the Application was not receivable because the Applicant had been notified of the conclusion of the investigation and the decision to close the matter.

4. Pursuant to Order No. 185 (NBI/2014), the Applicant submitted his comments on the issue of receivability on 13 August 2014.

5. The Tribunal heg(r N)-23(s)9e ma -29(un)-5.2(e)2.4ghe meut discussioh on(28OA)-628(c)2.4tob(e

The Applicant -53(fited -531an AA)-628Application forale o ae mndn hl m 18NAmr. (The Resb)-5.7pondent was o fitd hisrResbnhe AAlicanl'f t28Novee mrt 2014.

18Nove mrt

imIe

85. The ndent sub mitted hl-1.2isrResolht

Hearing

9.

15. The Applicant was interviewed by UNON DSS on 3 and 8 March 2011.

16. According to the Applicant, UNON DSS handed him over to the Kenyan Diplomatic Police on 7 March who then fingerprinted and interrogated him. On 8 March, he returned to the Police station for further interrogation and an identity parade (a police line-up). On 29 March, 8 and 20 April 2011, he returned to the police station for more robust interrogations.

17. On 13 April 2011, UNON DSS completed its investigation into the theft of vehicle number 105 UN 240K and forwarded a copy of the investigation report to the then Director of UNPOS/the United Nations Support Office for the African Union Mission in Somalia (UNSOA). The investigation report recommended, inter alia, that "appropriate administrative and legal action" be taken against the Applicant and three others for "their roles in regard to the theft of 105UN240K".

18. On 14 May 2012, the Applicant wrote to the Chief Civilian Personnel Officer (CCPO) of UNSOA to request an update on the outcome of the investigation. The CCPO did not reply to the Applicant's email.

19. The UNSOA Conduct and Discipline Team Focal Point (CDT-FP) reviewed the preliminary investigation file on 16 May 2012 and noticed that the statements of the staff members implicated in the theft were not included in the file. UNON DSS provided the complete file in October 2012.

20. On 22 October 2012, the Director of UNSOA sent a fax to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) and the Under-Secretary-General for the Department of Field Support (USG/DFS) by which he forwarded the UNON DSS investigation report and recommended that appropriate action, including suspension, be taken against the Applicant and the other three staff members.

21. On 6 November 2012, a Disciplinary Officer (DO) working with the Conduct and Discipline Unit within DFS (CDU/DFS) at United Nations Headquarters in New York wrote to the UNSOA CDT-FP inquiring about the

whereabouts of the supporting documentation referred to in the fax. The UNSOA CDT-FP responded the same day that the documents would be sent by pouch.

22. On 7 February 2013, the Applicant wrote to the CCPO to obtain

30. On 30 July 2013, the UNSOA CDT-FP resent the investigation report and its supporting documentation to CDU/DFS. Once again, CDU/DFS indicated on 31 July 2013 that it never received the original set of documents.

31. On 5 August 2013, CDU/DFS informed the UNSOA CDT-FP that the investigation report was incomplete and that the mission's investigation review/analysis had not been provided and as such, it considered the matter to still

relation to: (i) the sloppy manner in which the investigation had been conducted[4]; (ii) the loss of his file by the Respondent[5]; (iii) violations of the principle of fairness resulting in loss of employment and considerable stress[6]; (iv) undue delay in taking a decision and failure to act diligently[7] and (v) no opportunity to comment on the preliminary findings of the investigation prior to its submission to OHRM[8].

54. All the above matters arise from the investigation and the path it followed. These matters did not exist in a vacuum but are connected to the investigation. The closure of the investigation notwithstanding, they are still live issues that must now be addressed by this Tribunal.

55. The Tribunal therefore concludes that all the above matters to the exclusion of the closure of the investigation are receivable.

Should the Applicant be granted leave to amend his Application of 16 May 2014?

56. In his original Application dated 16 May 2014, the Applicant prayed for the following remedy: (i) a closure letter in regard to the investigation that had started in March 2011 to confirm the end of the investigation; and (ii) in the absence of charges a compensation equivalent to 12 months' net base salary.

57. Following a case management hearing on 28 October 2014 the issue of the Applicant amending his Application was canvassed.

58. On 18 November 2014, the Applicant filed a Motion for Leave to Amend the Application (Motion).

59. On 4 December 2014, the Respondent filed his response after being allowed an extension of time to comply with this requirement.

---

[4] Ibid, paragraph 28.
[5] Ibid, paragraphs 28 and 4.
[6] Ibid, paragraph 29.
[7] Ibid, paragraphs 32 and 43.
[8] Ibid, paragraph 46.

69.

Respondent's submissions

73. The Respondent submits that ST/AI/371 as amended does not provide a

> être concilié avec les intérêts de la défense et le respect de la procédure contradictoire[13].

77. It is a fundamental principle in the criminal process that a person facing a criminal charge must be tried within a reasonable time. The issue of delay in the completion of criminal proceedings is very important and conviction may be quashed or damages awarded for undue delay in a trial. The Tribunal is of the view that delay is also a component to be considered in the determination of disciplinary proceedings and that includes the timely completion of an investigation.

78. In the matter of CH v International Bank for Reconstruction and Development[14], the World Bank Administrative Tribunal held that the Bank unreasonably delayed giving the Applicant notice of the allegations of misconduct and secondly the Vice President, Human Resources, without explanation took nine months to make his disciplinary decision. This in the view of the World Bank Administrative Tribunal was a violation of the due process rights of the Applicant and ordered the Bank to pay the attorney's fees of the Applicant.

79. In the matter of CG v International Bank for Reconstruction and Development[15] the World Bank Administrative Tribunal held:

> [T]he Tribunal is of the view that matters involving misconduct and disciplinary measures should always be dealt with expeditiously. The Tribunal finds, however, that the Bank has not provided a proper justification as to why the HRVP took almost one year to make a decision. Unjustifiable delay in making a disciplinary decision after an investigation can be considered inconsistent with a staff member's due process rights. In the circumstances of the case, taking almost one year for the HRVP to issue his decision on the disciplinary measures after receiving the INT [Bank's Integrity Vice Presidency] Report is excessive and for this reason the Tribunal determines that the Bank shall pay the Applicant's attorneys' fees and costs in the amount $8,213.03.

---

[13] "In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure".

lack of diligence it happened, this fact cannot exonerate the Administration or lessen its responsibility[16]. There was no information as to the progress of the investigation or the date on which the investigator would submit his report. The Administration chose not to answer the Applicant when he queried about the status of the investigation. In Lauritzen 2013-UNAT-282, UNAT held that "the Administration cannot legally refuse to state the reasons for a decision that creates adverse effects on the staff member […]".

86. In Obdeijn 2012-UNAT-201, UNAT reiterated that principle in the context of judicial review of administrative decisions:

> The obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

87. Consequently, the Tribunal finds that the delay in conducting the investigatory process caused the complainant moral injury which must be redressed.

Was it proper for the Applicant to be handed over to the Kenya police?

88. The Applicant submits that by handing him over to the Kenyan police the Respondent subjected him to humiliating and degrading treatment. The Respondent did not join issue on this aspect of the pleadings.

Considerations

89. The national investigation started on 7 March 2011 after UNON DSS officials handed the Applicant to the Kenya Police. The Applicant was interrogated on 8 and 29 March 2011 and on 8 and 20 April 2011 by the Kenya Police.

[16] See ILOAT Judgment No. 3064.

90. Article V of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (the Convention) provides in section 18(a) that officials of the United Nations shall "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

91. Under section 20 of art. V of the Convention:

concerned[17]. Further, ST/SGB/198 states that "[…] the Member States concerned should recognize the functional immunity of staff members asserted by the Secretary-General, in conformity with international law […]".

95. ST/AI/299 (Reporting of arrest and detention of staff members, other agents of the United Nations and members of their families) of 10 December

97. ST/SGB/198 and ST/AI/299 refer to cases of arrest or detention. There is no mention of a staff member being handed over to the police of the Host State for interview or questioning. The words arrest and detention in ST/SGB/198 have been used purposely because a distinction must be made between the situation where an individual is under arrest and the situation where he is in detention. An arrest would suppose that there is reasonable suspicion or probable cause that an offence has been committed. A detention would be in principle a restriction of liberty without necessarily leading to an arrest unless there is reasonable suspicion that an offence has been committed.

98. The Applicant, as a staff member of the Organization, was protected by the privileges and immunities afforded to officials of the Organization by virtue of Article 105.2 of the Charter and the Convention. The Tribunal is fully cognizant of the fact that the immunity afforded to staff members in the Applicant's position is solely functional. However, it is not within the authority of UNON DSS to decide whether or not immunity, functional or otherwise, applies in any case. ST/AI/299 clearly indicates that this is a matter that rests solely within the discretionary authority of the Secretary-General of the United Nations. Thus when UNON DSS handed over the Applicant to the Kenya police without resorting to the proper procedure for waiver of immunity, they were in breach of the rules

104. Compensation is regulated by Article 10.5(a) and (b) of the UNDT Statute which stipulate :

> As part of its judgment, 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 Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

105. Article 10.5(b) was amended by the General Assembly General Assembly in December 2014[19]. The new article reads:

> Compensation, **for harm, supported by evidence** 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 (emphasis added).

106. In the case of Abu Nada[20] the UNRWA Dispute Tribunal pointed out that "it took the Agency a total of 25 months from the date of communicating the alleged "findings of the investigation" to the Applicant to make a final decision. Indeed, the Applicant was given time to put his comments on the record, however,

to respond to his inquiries into the duration of his suspension. Essentially, the Agency suspended the Applicant and seemed to have forgotten about him. When the evidence gathered did not support a finding of misconduct the Agency did nothing. It almost appears as if the investigators were hoping for evidence to fall into

110. In *Eissa*, UNAT was following an earlier pronouncement made on the same issue in the case of *Hersh* 2014-UNAT-433-Corr.1. In *Hersh* it was submitted by the Secretary-General that the UNDT erred in awarding compensation purely for procedural and substantive irregularities, without making any determination as to whether the applicant had suffered any moral harm as a result of the administrative actions at issue in the case. It was also submitted that the applicant did not describe any moral harm suffered in her UNDT application, nor did she ask for moral damages or provide any evidence of moral harm. UNAT ruled as follows in addressing that submission:

> As a matter of fact, Ms. Hersh in her application before the UNDT referred to "significant moral damage as a result of the deliberate manipulation of the Organization's processes". In any event, the breach of Ms. Hersh's rights was so fundamental that she was entitled to both pecuniary and moral damages.

111. The Tribunal endorses what it said in *Dahan* UNDT/2015/053 that:

> 73. 'The term "moral damages" is nowhere to be found in the Statute or the Rules of Procedure of the UNDT. However the principle of awarding compensation by way of moral damages is well entrenched in the internal justice system. In a number of cases, moral damages have been awarded by the UNDT and this principle has been approved by UNAT. Should the word "compensation" used in articles 10.5(a) and (b) be understood to include moral damages or are moral damages a separate and distinct remedy that can be awarded in addition to compensation?
>
> 74. In *Kasyanov* UNDT/2010/026 Adams J. observed:
>
> > In my view, the word "compensation" should be given the meaning it has in ordinary parlance without introducing notions of damages developed in various domestic jurisdictions. It comprehends the duty to recompense a staff member as nearly as money can do so for the breach of the contract and the direct and foreseeable consequences of 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 N2(d)eNrNDd
iia68.1(r)98.1(r)34.8bsG sm
dikstion's
Ted mswevnggmnghs' ng
alaryut i.r

79. In *Eissa* 2014-UNAT-469, UNAT repeated what it had determined in *Gakumba* on the nature of the two heads of compensation that are provided in articles 10.5(a) and (b) of the UNDT Statute by holding:

> An award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages for the fundamental breaches of Mr. Eissa's rights not to be unlawfully terminated from service and to be automatically transitioned to the post of UNMISS Spokesperson. It is not the same remedy and does not serve the same purpose.

80. UNAT also held in *Eissa* that "[m]oral damages arise from a breach of a fundamental nature, whether the breach stems from substantive or procedural irregularities. Either type of irregularity may support an award of moral damages.

81. In *Hersh* 2014-UNAT-433-Corr.1, UNAT held that "[a]n award of moral damages for a breach of a staff member's rights, especially when the breach is of a fundamental nature as found by the UNDT, does not require evidence of harm or a finding of harm".

82. The amendment to art. 10.5(b) requires evidence of "harm" before compensation is granted. One issue that arises with the amendment is whether the amendment should be made to operate retroactively. Would it be applicable to cases filed before the amendment came into force and thus compel an applicant to adduce evidence even where there is breach of fundamental rights? The question assumes all its importance as UNAT has come out strongly against the retroactive application of rules or regulations even when they would have benefitted an applicant[23]. "

112. The Applicant in the present case filed his case in May 2014. The Tribunal considers that it would be unfair to apply the amendment to his case as indeed to

hanging on his head for a period of three years following the completion of the investigation in April 2011 until its closure in May 2014 was "inhumane and a flagrant abuse of power"[24]. It does not require expert evidence or otherwise to conclude that the delay of the Administration in handling the case of the Applicant went against the basic principles of natural justice and caused him to suffer stress and anxiety.

113. From these averments it can be reasonably be inferred that there were 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.

114. 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.

115. The Tribunal awards the Applicant compensation amounting to six ings12.4(00.6(in931.1(s)-.7(/).7(o