



U

Case No.: UNDT/GVA/2010/062

Order No.: 1 (GVA/2011)

Date: 11 January 2011

## **Facts**

1. On 19 January 2010, the Applicant, a former UNMIK staff member, filed an application with the Tribunal to appeal the decision dated 21 October 2009 to impose on him the disciplinary measure of dismissal.
2. On 12 July 2010, the Tribunal rendered Judgment *Zerezghi* UNDT/2010/122 on the above-mentioned application, in which it concluded:

### ***Remedies***

49. Article 10.5 of the statute of the Tribunal outlines the remedies which the Tribunal may order, i.e. rescission of the contested decision, specific performance and compensation. While article 10.5 does not stipulate how compensation may be calculated, subparagraph (b) stipulates that compensation should not, but in exceptional cases, exceed the equivalent of two years' net base salary of the applicant, and article 10.7 prohibits the award of exemplary and punitive damages.

50. As previously indicated, the Tribunal concluded that the evidence in this case does not sufficiently support the charge that the applicant did not pay for three tickets issued to him by MCM. As regards the applicant's unauthorized absences from the mission area, the Tribunal concluded that a sanction of dismissal was disproportionate to the established offence and that a written censure would be an appropriate measure. Accordingly, the Tribunal orders the respondent to rescind the applicant's dismissal, to reinstate him in service with retroactive effect and to issue him a written censure to be placed in his personnel file.

51. Since the applicant's dismissal is a termination within the meaning of article 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the applicant's dismissal. The Tribunal considers an appropriate compensation to be the amount of salary the applicant would have received until the expiration of his last fixed-term appointment had he not been dismissed, i.e. eight months' net base salary.

52. Irrespective of whether the respondent elects to reinstate the applicant or to pay him the above amount as an alternative, the applicant also deserves compensation under article 10.5 (b) of the UNDT statute for the moral damage the wrongful decision has caused him. In view of the stigma of being imposed the most severe disciplinary measure and the resulting difficulties in finding further employment, the Tribunal sets the appropriate amount at

USD 60,000.00, which corresponds approximately to 12 months of the applicant's net base salary.

53. The applicant also requested that his personnel file be cleared of any adverse material relating to this matter. The Tribunal orders that all material relating to the applicant's dismissal be removed from his official status file, with the

5. On 6 December 2010, the Applicant filed his comments.

**Parties' Submissions**

6. The Respondent's arguments are as follows:
  - a. He elected to pay compensation pursuant to paragraph 54(2) of the Judgment and now seeks clarification as to the extent to which the decision to dismiss the Applicant remains effective and/or is rescinded;
  - b. He understands that paragraph 54(2) of the Judgment provided him with the option of either reinstating the Applicant or alternatively

had the choice to either reinstate the Applicant or pay compensation in the amount indicated in the Judgment as an alternative. He also agrees with the assumption that if the Respondent opts for the alternative compensation, the Applicant's separation from the Organization shall no longer be on the basis of a disciplinary measure of dismissal and that the Respondent remains bound to give effect to the other orders set out in paragraph 54 of the Judgment;

b. However, he adds that if the Respondent opts for the alternative of compensation and the Applicant must therefore be considered to have been separated, the Applicant would be entitled to receive all monies he would have received but which have been withheld as a consequence of the rescinded dismissal, including but not limited to termination indemnities, compensation in lieu of notice and relocation grant;

c. Furthermore, paragraph 54(2) of the Judgment does not in lieu of notice of termination indemnities, compensation in lieu of notice and relocation grant.



have received until the expiration of his last fixed-term appointment had he not been dismissed, i.e., eight months' net base salary.

13. In view of the foregoing, the Tribunal considers that the Respondent's interpretation of Judgment UNDT/2010/122 is entirely permissible and does no violence either to its language or to its purpose.

14. Such interpretation is also consistent with article 10.5(a) of the Tribunal's Statute, more specifically with the exception to the general rule set out in this article, namely that as part of its judgments, the Dispute Tribunal may order "[r]escission 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".

15. The *travaux préparatoires* of the Statute do not shed light on the true intention of the original drafters when they introduced this exception. It seems reasonable to assume that the intention was to shield the Organization from having to reinstate in service someone whose appointment it had chosen to terminate. However, there is no reason to believe that the intention went beyond this, nor that it was intended to give the word "termination" a meaning different from the one it has in the Staff Rules, i.e., a separation from service initiated by the Secretary-General.

16. Furthermore, exceptions to a general rule should normally be applied restrictively and construed *contra proferentem*. Accordingly, an exception such as the one contained in article 10.5(a), whic

orders insofar as they entail the rescission of the Applicant's termination and his reinstatement. The exception does not apply to the order rescinding the Applicant's dismissal, nor does it apply to the orders—which clearly do not “concern termination”—to issue a written censure and remove adverse material from the Applicant's file.

18. Regarding the Applicant's claim that if the Respondent opts to pay compensation as an alternative to rescission and/or specific performance, he should be entitled to receive all monies he would have received but which have been withheld as a consequence of the rescinded dismissal, including but not limited to termination indemnities, compensation in lieu of notice and relocation grant, this is not a question of interpretation. The Tribunal considers that the Applicant is actually attempting to enlarge the scope of Judgment UNDT/2010/122, which leaves no room for interpretation as to the financial remedies ordered, namely eight months' net base salary as an alternative to reinstatement and USD60,000.00 as compensation for moral injury. The Applicant is now claiming additional benefits outside the scope of the Tribunal's orders in Judgment UNDT/2010/122, which is *res judicata*.

### **Conclusion**

19. In view of the foregoing,

### **IT IS ORDERED THAT**

1) Paragraph 51, first sentence, of Judgment No. UNDT/2010/122 is to be read as follows (new text in bold):

Since the Applicant's dismissal **resulted in the termination of his appointment** within the meaning of article 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the Respondent may elect to pay as an alternative to **the reinstatement of the Applicant.**



2) Paragraph 54(2), first sentence, of Judgment No. UNDT/2010/122 is to be read as follows (new text in bold):

As an alternative to **the reinstatement of the Applicant**, the Respondent may elect to pay **him** ...

*(Signed)*

Judge Thomas Laker

Dated this 11<sup>th</sup> day of January 2011

Entered in the Register on this 11<sup>th</sup> day of January 2011

*(Signed)*

Víctor Rodríguez, Registrar, UNDT, Geneva