



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

GARCIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RELIEF

Counsel for Applicant:
George Irving

Counsel for Respondent:
Natalie Boucly, UNDP

Introduction

1. On 25 October 2010 the Dispute Tribunal rendered its judgment on liability—*Garcia* UNDT/2010/191—in this case. The Tribunal found, in particular, that the offer of appointment accepted by the Applicant and the communications between the parties contained the terms necessary for the formation of a binding contract. The Tribunal found that on the particular facts of the case, including the agreement reached and the actions of the parties, there was a binding contract between the Applicant and the United Nations Development Programme (“UNDP”). The Tribunal concluded that the refusal of UNDP to execute the employment relationship on 1 October 2007 was in breach of this contract. The parties were ordered to file further submissions on appropriate relief, which is the subject matter of the present Judgment.

2. The Applicant seeks total compensation in excess of USD700,000, which includes seven years and one month’s net base salary for economic and non-economic loss, USD17,512 for relocation expenses, and USD115,463 for lost pension entitlements. The Applicant also requests that any adverse material be removed from his personnel file.

Applicant’s submissions

3. The Applicant’s principal contentions may be summarised as follows:

a. The Applicant should be compensated for the actual economic loss suffered, including his prospective UNDP earnings for the period of 1 October 2007 to 30 September 2008 (i.e., for the duration of the contract), as well as his prospective earnings for the following two years as it can be expected that his contract would have been renewed for at least two more years. This follows from his past performance rating as having “exceeded

expectations” and from the fact that he was never found guilty of any wrongdoing.

b. For the period of 1 October 2007 to 30 September 2008, the Applicant’s actual earnings were USD32,000. His earnings since September 2008 have amounted to approximately USD40,000 a year.

c. As the Applicant had less than five years of contributory service at the time of his separation, his pension had not

g. The Applicant requests further compensation in the amount of two years' net base pay for the resulting moral damages, including damage to his health and professional reputation. The Applicant was involved in a criminal investigation without the help and support of the Organisation. The stress and the lack of certainty over his future produced negative effects on his health resulting in a diagnosis of serious depression, evidenced by a note from his doctor dated 8 November 2010.

h. Any existing impediments to his re-employment and any adverse material should be removed from the Applicant's employment records.

Respondent's submissions

4. The Respondent's principal contentions may be summarised as follows:

a. Compensation in this case should be based on the Applicant's lost earnings and entitlements during the one-year term of his contract. It cannot be presumed with sufficient certainty that the Applicant's contract would have been extended beyond its one-year term. Any renewal of contract would have not only been subject to the availability of funds and the continuous need for the position, but also to factors which are of individual and specific relevance to the person encumbering the post in question. These individual factors include future performance and personal circumstances, such as health issues and family matters. Therefore, the Applicant did not suffer any loss of further employment and promotion warranting compensation beyond one year.

b. In light of the findings in *Garcia* UNDT/2010/191, the Respondent is willing to compensate the Applicant in the amount of USD121,128.48 (his lost earnings for the period of 1 October 2007 to 30 September 2008)—,less the relocation grant of USD19,822 paid to the Applicant and the amounts earned by him during the relevant period.

c. The sum of USD19,822 paid to the Applicant on 5 September 2007 represented both the relocation grant and compensation for travel expenses, including daily subsistence allowance. All these expenses, excluding the cost of the medical examination, are comprised within the said relocation grant and cannot be the subject of further compensation.

d. There is no basis to award one-month compensation in lieu of notice, as compensation in the amount of one-year salary would place the Applicant in the position he would have been in if not for the contractual breach.

e. The Applicant would not have had his pension rights vested by the end of his one-year contract as he still would not have had the required five years of service. Therefore, he would have been entitled to the return of his own pension contributions he would have made during the one-year term of the contract. As these payments would be paid to the Applicant as part of compensation in the amount of one-year gross salary, he should not receive any additional payments in relation to his pension entitlements.

f. No compensation should be awarded with respect to the investigation carried out by UNDP. No regulation, rule, or other administrative issuance was violated in connection with the initiation of the investigation. UNDP was required to initiate its investigation based on the information provided to it. The investigation was not completed thereafter because the Applicant was not a staff member and UNDP was requested by the United Kingdom (“UK”) authorities to suspend its investigation in order not to interfere with the ongoing criminal enquiry in that country. Although the Applicant was subsequently cleared in the course of this enquiry, audit reports prepared by UNDP found that the Applicant failed to comply with UNDP’s internal procurement procedures.

g. The Applicant's request for compensation for emotional distress should be rejected. Any emotional distress caused to the Applicant was in connection with the actions of the UK authorities, for which UNDP is not responsible. The fact that the Applicant has been working as a consultant since October 2007, earning between USD32,000 to USD40,000 a year, is indicative that the Applicant was able to undertake work of a sufficiently work

one-year fixed-term position as a Programme Advisor in Cairo. In the circumstances of this case, the Tribunal finds that it is impossible to state with a sufficient level of certainty how the Applicant would have performed in his new job, whether or not both parties would have decided to continue the employment relationship after the expiration of the one-year term, or whether any normal contingencies of life would have interfered. The Tribunal accepts that cer

Loss of salary and entitlements

9. It is common cause that, if not for the contractual breach, the Applicant's net base salary (i.e., his gross salary minus staff assessment) would have been USD91,605. He would have also been entitled to post adjustment in the amount of USD27,023.48 and one-time allowance of USD2,500. Therefore, his total earnings would have been USD121,128.48, as was unreservedly tendered by the Respondent.

10. The only deductions that would have been made totaled USD17,750.17, which would include the Applicant's pension contributions (USD14,039.17), life insurance (USD1,008), and medical insurance (USD2,703). However, the Applicant's pension contributions would have been returned to him upon his separation and his contributions towards his life insurance and medical insurance would have been deducted from his salary in exchange for certain benefits and entitlements. Because of the unlawful decision, he was deprived of these benefits and protections, and he is now legally entitled to receive the financial equivalent of their value. For these reasons, the amount of USD121,128.48 is the proper basis for compensation for lost salary and entitlements, as acknowledged in the Respondent's submission on compensation.

11. A party affected by a breach of contract has a duty to mitigate her or his losses. The doctrine of mitigation was referred to in *Mmata* 2010-UNAT-092, para. 27, in which the Appeals Tribunal stated that "[p]ost-judgment compensation may include loss of future earnings taking into account mitigation". (See also *Tolstopiatov* UNDT/2011/012.)

12. In the present case, the Tribunal finds that the Applicant took reasonable steps to mitigate his loss of income which resulted from the Respondent's breach of contract. Accordingly, the Tribunal will take into account the Applicant's earnings during the relevant period of time for the purpose of calculating compensation due to him (see *Tolstopiatov* UNDT/2011/012, paras. 64–85). The loss of earnings shall be

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five-year mark, and he would have been entitled only to the return of his pension contributions (see para. 10 above).

Emotional harm and harm to reputation

17. The Applicant produced a note from his medical doctor, dated 8 November 2010, stating:

I[,] the undersigned, Dr. [D], affirm, having seen [the Applicant] as a patient from May 2008 to June 2010.

...

Diagnosed as light depression during our first interviews, the general health situation of [the Applicant] has deteriorated since mid-2009 and progressively evolved towards a breakdown that could be termed severe. Despite certain awareness of his situation, the stress—due to having been fired from the UN and more particularly the loss of his possibility to work normally—seems

Respondent's unsubstantiated submissions in the course of the proceedings concerning the Applicant's reputation in light of the alleged audit reports.

20. As the Tribunal stated in *Applicant* UNDT/2010/148,

it is more appropriate to express compensation for emotional distress and injury in lump sum figures, not in net base salary. Such damages, unlike actual financial loss, are not dependent upon the applicant's salary and grade level. Dignity, self-esteem and emotional well-being are equally valuable to all human beings regardless of their salary level or grade.

For reasons stated in *Applicant* UNDT/2010/148, the Tribunal finds it appropriate to order compensation for emotional harm and harm to reputation in the form of a lump sum payment.

21. In assessing the appropriate amount of compensation under this head, the Tribunal has considered such factors as the Applicant's previous history with the Organisation, harm to his emotional well-being and consequential deterioration of health, and harm to his reputation. In light of the circumstances of this case and the context of the contractual breach, as well as the existing case law (see, e.g., *Zerezghi* UNDT/2010/122, *Ikpa* UNDT/2010/128, *Applicant* UNDT/2010/148), the Tribunal has determined that the amount of USD50,000 is appropriate compensation for the non-pecuniary harm suffered by the Applicant as a result of the breach of contract.

Compensation for alleged due process violations during the investigation

22. The Applicant requests compensation for the violation of his due process rights during the investigation carried out by UNDP. However, whether or not the investigators followed proper procedures when carrying out the investigation was plainly not the subject matter of this case. This case arose not because of alleged procedural violations during the investigation, but because of the unlawful decision made by UNDP in September 2007 regarding the Applicant's appointment.

to recompense him for the costs of his “arrangements for the move to Cairo” (see *Garcia* UNDT/2010/191, para. 35). The Respondent’s decision to compensate the Applicant for the relocation expenses and the Applicant’s acceptance of the money were, in fact, among the circumstances relied on by the Tribunal in finding that there was a contractual relationship between the parties. The Applicant accepted the money NoonTw]TJs57 -1

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Orders

28. The Respondent shall pay compensation for the Applicant's lost salary and entitlements in the amount of USD89,128.48. This sum is to be paid within 60 days of the date this Judgment becomes executable. The interest on this sum is to be calculated as if the sum was paid in twelve separate installments of equal value, with the applicable US Prime Rate from the date each of these installments was due and until date of payment. If this compensation is not paid within 60 days from the date the Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate from that date until the date of payment.

29. The Respondent shall pay compensation for the medical examination in the amount of USD241. This sum is to be paid within 60 days of the date this Judgment becomes executable. The interest on this sum is to be calculated at the applicable US Prime Rate from 1 October 2007 and until date of payment. If this compensation is not paid within 60 days from the date the Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate from that date until the date of payment.

30. The Respondent shall pay to the Applicant USD50,000 as compensation for non-pecuniary loss, including harm to his emotional well-being, consequential deterioration of health, and harm to his reputation. This sum is to be paid within 60 days of the date this Judgment becomes executable during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

31. Any adverse material pertaining to the reasons for and the circumstances of the unlawful decision not to effectuate the Applicant's employment on 1 October 2007 shall be removed from his personnel file.

32. All other pleas are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 8th day of April 2011

Entered in the Register on this 8th day of April 2011

(Signed)

Santiago Villalpando, Registrar, New York