



Case No.: UNDT/NY/2010/028/
UNAT/1664

Judgment No.: UNDT/2012/062

Date: 3 May 2012

g. Terminating the Applicant's appointment when the medical evidence of her incapacity was inconclusive her physician had already cleared her for resuming her duties albeit with some limitations.

2. In addition, the Tribunal found that ~~it~~ it was not competent to review the medical decisions of the Medical Services Division ("MSD"), other entities such as OHR must be able to count on the advice obtained from the MSD and that in this case the MSD failed to meet its responsibility to act in a consistent and coordinated manner and that its acts and omissions contributed to the Secretary-General's resultant failures.

3. The Tribunal adjourned the decision ~~on~~ remedies to enable the parties to attempt an agreed settlement given the ~~density~~ density of the matter and range of options available. As this was not possible in spite of two extensions of time, the parties filed closing written submissions on the matter of remedies.

The parties' principal submissions on remedies

4. Pursuant to art. 10.5 of the Statute ~~of the~~ Dispute Tribunal, the Applicant requests compensation for damages ~~cause~~ cause the wrongful termination of her contract. For pecuniary harm, she claims ~~75~~ 75 percent of the net base salary she would have received for a period of 24 months, ~~which~~ which is the equivalent of 18 months for the period of her latest appointment prior ~~to~~ the accident. In addition, the Applicant requests compensation for non-pecuniary ~~harm~~ harm in the amount of USD60.000.

5. The Applicant acknowledges that the ~~total~~ amount of compensation requested would exceed the limit set in art. 10.5 of the Statute, but submits that the exceptional circumstances of her case warrant the compensation requested.

6. The Respondent submits that the ~~maximum~~ level of compensation for material harm, if awarded, should be 12 months' ~~base~~ base salary, starting at 40 percent of the

Applicant's net base salary for the first six months and transitioning into 50 percent of the Applicant's net base salary for the subsequent six months.

7. In making this submission, the Respondent invites the Tribunal to also take into consideration the fact that the Applicant denied herself the right to receive the disability benefit awarded by the UNSPC, and therefore did not mitigate any potential economic loss suffered during the appeal process.

Consideration

Calculation of compensation

8. In Antaki 2010-UNAT-05, the United Nations Appeals Tribunal determined that compensation may be awarded for "at pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury".

9. The Tribunal will determine the amount of income the Applicant is likely to have earned but for the impugned decision (pecuniary damage) and the extent of the non-pecuniary harm caused to her by the decision to terminate her.

Pecuniary damages

10. To establish what pecuniary loss was suffered by the Applicant due to the

12. In the Judgment on liability, the Tribunal noted, based on an email dated 25 April 2006 from the (then) Medical Director, Dr. Sudershan Narula, that the MSD would have no objection to the Applicant returning to work part-time subject to Dr. Moroz's clearance, which he provided the following day. The Tribunal found that "by the date of the UNSPC hearing, MSD and OHR had received the medical clearance for the Applicant to return to work from Dr. Moroz, which Dr. Narula had in advance accepted as sufficient for not declaring [the Applicant] incapacitated" (see para. 77 of the Judgment). If this information had been provided to the UNSPC in an appropriate and timely manner, it would have had no basis for declaring the Applicant incapacitated for further service.

13. The Tribunal finds that, if it had not been for the impugned decision, it is more likely than not that the Applicant would have been found fit to resume her duties, initially on a part-time basis.

The likely duration of a contract with UNDP had the Applicant not been properly terminated

14. At the time of her accident (27 September 2004), the Applicant had been

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considered the limited nature of her actual employment, the Tribunal finds that any offset would be so minimal that it should not be taken into account.

The Applicant's working capacity from 1 July 2006 to 31 December 2007

21. On 27 April 2006, Dr. Moroz reaffirmed the Applicant's capacity to work part time as of 1 May 2006 for 16 hours a week, subject to seven limitations, including the need for her to take regular breaks. In evidence to the Tribunal, Dr. Moroz said that she would even have been capable of 20 hours of work a week and that he would have permitted this had she been required to do so by the Respondent.

22. The Respondent submits that based on the evidence available, if the Applicant's medical clearance had been obtained, she would likely have returned to work on a 40 percent part-time basis and transitioned into a 50 percent part-time basis upon showing improvement.

23. The Applicant accepts that the content of a letter from Dr. Moroz dated 11 January 2008 does not conclusively demonstrate that, at that point in time, she was able to perform her duties on a full-time basis. However, in that letter, Dr. Moroz states that there is "an apparent improvement in her ability to function since April 2006" and that he "suspect[ed] that we [the Applicant] to undergo a repeat situational work assessment she may or may not require accommodations in the work place".

24. In addition, the Applicant testified under oath that not long after the

be at 39 percent permanent loss of function of the whole person and recommended the award of USD100,435.14 to the Applicant.

26. However, based on the evidence before it, the Tribunal accepts the Applicant's explanation of this payment that ABCC's conclusion was based, in whole or in part, on the determination of the UNSPC, which was founded on inaccurate and incomplete information it had received from MSD (paras. 18, 36 and 92 of the Judgment on liability).

27. In light of the employment the Applicant actually undertook and Dr. Moroz's estimate about her capacity to work at least 20 hours a week as early as in April 2006, the Tribunal finds, on the balance of probabilities, that, while that Applicant could have started work at 16 hours a week in March 2006 on medical advice, at least by 1 July 2006, she was fit to return to more consistent employment. The Tribunal concludes that, in light of her recovery after that date, it is reasonable to assume that, within the given 18 months, she would have been able to gradually increase her working hours from 20 hours a week (50 percent) up to full-time employment (100 percent).

Conclusion on pecuniary harm

28. The Tribunal concludes that, as compensation for lost income caused by her improper termination, the Applicant is entitled to 75 percent of the full-time salary she would have obtained had she been extended for an additional 18 months from 1 July 2006 to 31 December 2007.

Non-pecuniary harm

29. A person seeking an award for non-pecuniary harm must present evidence of the adverse effects on him or her of the legal wrong. Such damages are awarded in light of the particular circumstances of the case and of the specific harm caused by the legal wrong to the aggrieved party (aki).

30. The Tribunal accepts the Respondent's submission that he cannot be held responsible for any humiliation that was caused by incapacity arising from the

- a. Pecuniary damages 75 percent of the full-time salary net base she