



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/044/
JAB/2008/087
Judgment No.: UNDT/2013/053
Date: 15 March 2013

Introduction

1. This Judgment concerns the relief to be awarded to the Applicant for the violation of his rights as these have been identified in UNDT/2012/092 issued on 21 June 2012 (reference is made to this judgment for a complete recitation of the facts and the Tribunal's findings on the Respondent's liability).

Scope of the case

2. In Order No. 202 (NY/2012) dated 8 October 2012, and reiterated in Order No. 227 (NY/2012) dated 13 November 2012, the Tribunal defined the issues on relief as follows:

- a. Is the Applicant entitled to compensation for any loss of earnings and, if so, to determine the amount?
- b. Is the Applicant entitled to any other compensatory relief, including loss of benefits that he would otherwise have enjoyed had he remained an employee of the United Nations? If so, to identify those heads of claim and to provide the legal and factual basis in support thereof?
- c. Is the Applicant entitled to compensation for "moral damages" and, if so, to assess the extent to which he has suffered such loss and damage and compensate him accordingly?
- d. Are each of the parties entitled to an award of costs bearing in mind the legal test under art. 10.6 of the Statute, which requiresn

Procedural history

3. In the Judgment on liability, the Tribunal invited the parties:

[...] to settle the issue of remedy failing which the Tribunal will hold a hearing on a date to be fixed, in October 2012, to determine the appropriate remedy to be afforded to the Applicant and to hear any other application that may be made, as indicated at the hearing on the merits. In this event, the parties are to inform the Tribunal on or before 1 August 2012 whether they intend calling any witnesses and producing any documents and, if so, identifying them and providing an estimate of the length of the hearing.

4. By email of 24 July 2012, the Applicant filed a submission requesting an extension of time to comply with UNDT/2012/092. The Applicant requested that the deadl mexterdedr

Union Rule of Law Mission, Kosovo; Dr. Stacy Lamon, a clinical psychologist; one or more of the Applicant's family members; and the Applicant.

8. By motion dated 17 August 2012, Counsel for the Respondent proposed to

13. By motion of 5 September 2012, Counsel for the Applicant stated as follows:

This motion is to compel the production of documents from Respondent that are relevant and necessary to Applicant's proof of damages. Though duly requested, easily and inexpensively available to Respondent, Respondent refuses to produce them, requiring this motion.

Further, Respondent has failed to identify any specific document upon which it intends to rely in the hearing to be held on damages.

Finally, Applicant requests an award of attorney's fees and costs as this motion should not have been required to make.

14. On 6 September 2012, Counsel for the Respondent filed a response to the Applicant's 5 September 2012 motion in which he stated that this motion is unnecessary as the Respondent had agreed to produce the information sought and the Applicant had failed to explain why he does not have his own financial records.

15. By email to the Registry of the same date, regarding the Applicant's motion for award of legal costs, the Respondent stated that:

[A]ny application for costs should be made at the hearing scheduled for 4 October 2012. As such, the Applicant['s] motion for costs appears to be contrary to the order of the Tribunal and, any argument the Applicant wishes to make, should be made at the hearing on 4 October 2012.

For these reasons, at this time, the Respondent does not intend to respond to the Applicant's motion, nor bring his own motion for costs. Instead, the Respondent will bring an application for costs at the hearing on 4 October 2012 and respond to any application brought by the Applicant.

Should the Respondent's understanding of the Judgement be mistaken, the Respondent respectfully observes that he stands ready to provide a response to the motion and file his own application for costs, should the Tribunal direct him to do so.

16. By Order No. 188 (NY/2012) dated 17 September 2012, the Tribunal cancelled the hearing on remedy scheduled for 4 October 2012 and replaced it by a

the Tribunal ordered the parties to file and serve their closing submissions, the latest to be submitted no later than 7 January 2013 and ruled that:

... Pursuant to art. 19 of the Rules of Procedure of the Dispute Tribunal, and the requirement of a fair and expeditious disposal of the case and to do justice to the parties, the Tribunal will not allow the parties to adduce any further evidence at this late stage of the proceedings. Instead, the Tribunal will provide the parties with an opportunity to submit their written closing submissions on remedy. The Tribunal will thereafter proceed to determine the question of compensation on the papers before it, unless it deems that further information and/or evidence is required in which case it will issue the necessary orders.

Applicant's submissions

21. Appended to the Applicant's closing statement and against the explicit orders of the Tribunal in Order No. 227 (NY/2012), his Counsel submitted an additional 32 pages of written documents as evidence to corroborate a factual account that had not been presented to the Tribunal before, nor was there an application for leave to do so explaining its relevance. At the closing stage of the proceedings, the Tribunal will not allow the submission of new facts and evidence without leave and, for future reference discourages any party from doing so.

22. The Applicant's submissions and contentions may be summarized as follows:

a. By tarnishing the Applicant's reputation through its contacts and communications, UNMIK prevented him from receiving the benefits of a successful return to his parent agency, UNDP;

b. When he returned, UNDP failed to comply with its duty to properly assist the Applicant in finding a new job, which eventually resulted in the Applicant being separated from his employment with the United Nations. This also meant that the Applicant was not able to retire with full benefits as

he only needed two more years of employment with United Nations to reach his retirement age, after 28 years of unblemished service with the Organization;

c. Had the OIOS investigation found that the Applicant had been retaliated against, his contract would not have ended and the Applicant has consistently held that his post with UNMIK was abolished as a result of this retaliation;

d. The Applicant should be awarded a total maximum amount of USD3,130,656.50 as compensation for loss and damage, including costs, but excluding interest;

e. His pecuniary losses are the following:

i. Loss of earnings: either USD217,311 or USD255,516 depending on whether the Tribunal finds that he would have received a promotion during his final years with the United Nations;

ii. Loss of educational allowance for his two children: USD237,100;

iii. Loss of full “after service medical coverage”: USD387,743;

iv. Loss of pension: either USD1,399,111 or 1,513,420 depending on whether the Tribunal finds that he would have received a promotion during his final years with the United Nations;

v. Interest on sums due.

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by the Applicant's pleadings; otherwise, the Respondent is denied due process. In the absence of any properly formulated claim, the Respondent has no real opportunity to respond. Accordingly, at law, there is no need for the Respondent to provide any further submissions. The Applicant's claim for compensation should be summarily denied;

c. The question in this case is: What loss and damage, if any, did the Applicant suffer as a result of the Ethics Office's failure to review

f. The “Merriam-Webster” dictionary defines “costs” as follows: 1(a): the amount or equivalent paid or charged for something; price; 1(b): the outlay or expenditure (as of effort or sacrifice) made to achieve an object; 2: loss or penalty incurred especially in gaining something; 3: plural: expenses incurred in litigation; especially: those given by the law or the court to the prevailing party against the losing party;

g. The essential meaning of the term is that a sum has been outlaid. Where no sum has been outlaid, or will be, there can be no costs incurred. There is no reason to depart from this meaning in interpreting art. 10.6 of the Dispute Tribunal’s Statute. To the contrary, an award of costs without any costs having been incurred would be punitive. Art. 10.7 provides that punitive awards are forbidden;

h. The Applicant must demonstrate a causal link between any claimed cost incurred and the conduct of the other party to justify any award of costs. Costs are not intended to provide more than an indemnity; the receiving party is not entitled to a bonus;

i. Absent proof of costs incurred pursuant to art. 10.6 of the Statute of the Dispute Tribunal, either paid or to be paid, the Applicant cannot recover costs. The Applicant has expressly refused to produce any proof of costs incurred. In the absence of proof of costs incurred, the Applicant is no longer seeking “costs”, instead, he is seeking that a penalty payment be imposed against the Respondent and the penalty be paid to him.

j. The Respondent did not manifestly abuse the proceedings under art. 10.6 of the Statute of the Dispute Tribunal, instead he exercised his right to present arguments and submissions in regard to legal issues of first impression during the initial stages of the new system of internal justice.

The purpose of an award of compensation is to place the applicant in the same position that he would have been had the Administration complied with its obligations (

inferences that it would have been legitimate to draw from the facts many of which

- b. The investigations into his alleged offence of signing an employment contract to work for the Managing Directors of PTK and Pristina International Airport were matters of an administrative nature, and did not justify his treatment as a potential criminal;
- c. He was stopped at the border in his car, coming from Greece;
- d. His passport was taken away;
- e. He was escorted back to his apartment under armed escort;
- f. His car and his home were searched without a proper warrant;
- g. His United Nations ground pass was taken away;
- h. His office at the United Nations was cordoned off with crime scene tape;
- i. Wanted posters with his name were put up at different places at the UNMIK facilities;
- j. He was not advised of his right to representation.

32. The Respondent denied that the closure of the OPOE and the ending of the Applicant's contract were acts of retaliation. The Respondent did not challenge the factual accuracy of the issues enumerated at para. 32(b) to (j) above. However, the Respondent contends that none of these actions were retaliatory in nature. This contention lacks merit. It begs the very question which was before the Ethics Office but that was never addressed. There was clear and uncontested evidence, supported by the findings in the report of ID/OIOS, that the Applicant's contractual rights were breached, which included clear evidence of severe human rights' abuses. However, these breaches were never addressed by the Ethics Office, as the Tribunal pointed out at paras. 46 and 48 of the Judgment on liability, neither were the reasons for subjecting the Applicant to such insensitive and degrading treatment considered. In the absence of a cogent and satisfactory explanation, the inescapable inference must be that the underlying motive was retaliatory.

33. Whilst the Applicant had always argued assiduously that the closure of OPOE and the ending of his assignment with UNMIK were acts of retaliation, there was not a sufficiency of evidence to support this assertion. The Tribunal did not find

required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.

37. By its failure to properly and diligently examine the ID/OIOS's investigation report and, as an absolute minimum, taking steps to investigate its evident flaws, as set out in detail in the Judgment on liability, the Ethics Office clearly violated the Applicant's right to a fair and competent consideration of the facts and thereby denied him a remedy and compelled him to institute proceedings before the Tribunal. The Tribunal finds that this failure on the part of the ethics Office further compounded and aggravated the harm, including severe distress and public

d. The Tribunal has to be satisfied that the damage as described was attributable to action taken by the Respondent;

e. Where the unlawful act was performed maliciously or was high-handed and without due regard for the legitimate concerns and feelings of the staff member it is bound to have aggravated the feelings of distress and will accordingly attract a higher award;

f. The Tribunal has to take into account that the assessment arrived at should be appropriate for the harm suffered. To award a paltry sum will discredit the policy underlying such awards as will an excessive award. Accordingly the Tribunal has to bear in mind the principle of proportionality;

g. Finally, the Tribunal will remind itself that it has no power to award exemplary or punitive damages and that the award must be truly compensatory.

39. The Tribunal had the opportunity to form its own assessment as to the degree to which the egregious conduct to which the Applicant was subjected to, compounded by the failure of the Ethics Office, as described in detail in the Judgment on liability, caused him anxiety, stress and loss of reputation. Accordingly, having regard to the foregoing principles the Tribunal assesses the degree of non-pecuniary damages at the extreme top of the end of the scale. The Tribunal awards the Applicant the sum of USD50,000 as compensation for non-pecuniary damage.

Costs

40. Art. 10.6 of the Dispute Tribunal's Statute provides, in relation to an award of costs, "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party".

41. The question for decision is whether, during the proceedings before the Tribunal, the conduct of the Respondent in the persistent refusal to respect and abide by the Tribunal's Orders, particularly Order No. 19 (NY/2010) in which the Respondent was ordered to grant access to ID/OIOS's investigation report, constituted a legitimate defense of proceedings or amounted to a manifest abuse of proceedings pursuant to art. 10.6 of the Dispute Tribunals Statute.

42. The authority of the Tribunal derived from its Statute and Rules of Procedure, confers upon it the exclusive power to manage the proceedings before it. Under art. 18.2 of the Rules of Procedure, the Tribunal has unquestionable power to "require any person to disclose any document or provide any information that appears to [it] to

Conclusion

44. Pursuant to arts. 10.5 and 10.6 of the Statute of the Dispute Tribunal, the Tribunal orders that the Respondent is to pay to the Applicant:

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