UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/039/ JAB/2008/080
Judgment No.: UNDT/2010/117
Date: 30 June 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for applicant:
François Loriot

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. In Judgment UNDT/2010/080 in this matter liability was found against the respondent for breach of the applicant's contract of employment. This determination followed, among other things, a refusal by the respondent to produce relevant documents ordered by the Tribunal to be produced. As a consequence of that refusal I ordered that the respondent was excluded from participation in the proceedings. Previous rulings explain the basis of this order and it is unnecessary to say more about it here.

2. I decided that the decision of the Secretary-General concerning the appointment of the Assistant Secretary-General of the Department of Economic and Social Affairs (ASG/DESA) was unlawful and in breach of the contract of employment of the applicant and that therefore the applicant should be awarded compensation on the basis that he would have been appointed to the post of ASG/DESA, had his contractual entitlements been satisfied. The compensation resulting from the illegality of this decision was determined to be payable on the following basis:

a. Two years' emoluments at the ASG level, including post adjustment for New York, plus medical and dental insurance contribution, less assessment and pension contribution, for economic loss. I ordered the respondent to file a submission on the quantum of this head of damage.

b. USD200,000 for the capital value of the enhanced earning capacity the applicant would have otherwise derived from having retired at ASG rather than D-2 level, together with some allowance for loss of the non-economic but nonetheless real benefit that comes with the prestige and reputation of service in the UN at ASG level. (I stated that the extent to which this amount should be awarded, in light of the cap in art 10.5(b) of the Tribunal's Statute

must depend upon the calculations and evidence to which reference is made below.)

c. Payment of an amount into the pension fund as would have been payable had the applicant retired from the UN after serving two years at ASG level. (I determined this was not subject to the cap in art 10.5(b).)

d. USD10,000 for the respondent's failure to comply with the Statute of the Tribunal.

e. An amount for legal costs (which do not fall within the cap specified by art 10.5(b)), to be determined subject to the submissions of the parties.

3. I stated that the applicant was required to fully disclose the net sum (after tax) that he had earned from personal exertion since his retirement, which would be deducted from the amount of compensation ordered.

4. I noted that it would be necessary to make adjustments to the amount awarded because of the provisions of art 10.5(b) of the Tribunal's statute, that is, that aside from personal circumstances of financial hardship or other substantial disparity such as to engage the exception, the total I ordered to be paid would need to be reduced to the prescribed level. I gave the applicant the opportunity to tender any evidence (initially by way of a signed statement) of substantial hardship which would result from the application of the cap imposed by that provision.

5. For reasons already given, the respondent has likewise been excluded from participation in the proceedings concerning compensation. However, pursuant to directions in that respect, the respondent has provided information as to salaries and pension matters. The parties' submissions for the purpose of the calculations are dealt with below. Other outstanding issues concern the question of costs and the application of art 10.5(b).

Calculations

6. Since the applicant was due to retire at the time the selection would have been made, his economic loss was the value of the salary and emoluments of an ASG, without any adjustment for the receipt of entitlements as a D-2 Director. This admits, therefore, a simple calculation. Dealing with the loss of the increased pension entitlements is more difficult, although it is obvious that, as a matter of principle, this difference is real economic loss. Its calculation is not easy, although, as I have already explained, in principle the elements are readily identified.

Economic loss

7. Since the economic loss must deal with real money, in the sense of actual payments in the pocket of the applicant, all contributions made by the respondent and all deductions suffered by the staff member, including staff assessment, must be taken into account. Since, as will be explained below, the applicant cannot have his pension recalculated on the assumption that, as at the date of hypothetical retirement, he would have been an ASG, the pension contribution of the respondent must be disregarded but the pension contribution of the staff member must still be taken into account (this is explained more below.)

ASG emoluments 2008		
	Total gross annual earnings (to the nearest USD100)	258,400
	Deductions	84,300
	Subtotal	174,100
	Add respondent subsidy contributions (to the nearest USD10)	3,335
	Total loss 2008	177,435

ASG emoluments

2009		
	Total gross annual earnings (to the nearest USD100)	267,800
	Deductions	87,300
	Subtotal	180,500
	Add respondent subsidy contributions (to the nearest USD10)	3,335
	Total 2009	183,835
	Total loss of salary and entitlements 2008 and 2009	361,270

Pension

8. The Tribunal has been informed that the Pension Fund (which is independent of the Secretary-General and, as I understand it, not subject to orders of the Tribunal – though I hasten to add I have not personally considered the relevant instruments in any detail) will not recalculate and pay the applicant's pension as if he had retired at the ASG level. Accordingly, the loss of pension must be valued – in this case the difference between what would have been paid to the applicant had he retired as ASG and that actually paid to him as a D-2 retiree. Two methods of calculation are open: the first is simply to actuarially calculate the capital value of the increased income stream (although I say "simply", this is actually rather complicated and requires expert assessment); and the second is to ascertain the cost on the open market of acquiring an annuity that would the difference in the income streams.

9. The evidence tendered comprises the actual cost of an annuity. The respondent has submitted an actuarial calculation from the Pension Fund of about USD230,000. The applicant has obtained a quotation from an external company showing the cost to purchase an annuity as being about $180,000. As there is no justification for awarding a greater sum than the cost of purchasing an annuity of the

difference in income streams, the starting point is the figure tendered by the applicant. Although I am not altogether confident of the suitability of relying on the sole cost assessment tendered by the applicant, on the other hand (if I may say so without inappropriate self-confidence), I have been involved in calculating value of future income for over three decades, and the sum proposed by the assessment strikes me as well within the reasonable range. I would point out that the assessment of compensation is very much a discretionary finding of fact and, of its very nature, a matter of reasonable and commonsense judgment. Accordingly, I assess the cost of the lost income stream in respect of the difference in pension entitlements at USD180,000.

The effect of article 10.5(b) of the Statute of the Dispute Tribunal

10. In accordance with my decision UNDT/2010/080, the total compensation necessary to be paid to the applicant to place him in the position he would have been in but for the breach – that is to say, to do justice – is as follows:

Loss of earning capacity	200,000
Non-economic compensation for breach of entitlement	10,000
Loss of salary and entitlement	361,270
Loss of pension	180,000
Total Loss	751,270
Less sum earned by applicant	18,000
Balance Loss	USD733,270

11. Applying the cap of two years' net base salary – agreed at USD354,600 (rounded down) – this would lead to a shortfall of USD378,670. In *Beaudry* UNDT/2010/039 I explained why sums awarded for pension do not come within the

cap. If I am right about this, the shortfall is USD198,670 but, of course, USD180,000 would need to be paid for loss of the increased pension.

12. In *Beaudry*, I dealt with the meaning of "exceptional circumstances" within the meaning of art 10.5(b) of the Statute and adopt that reasoning here. There is a substantial difference between the sums which I have determined justice requires to be paid, and the sum arbitrarily selected in art 10.5(b) as the cap. This substantial difference amounts to an exceptional circumstance justifying an award more closely approximating just compensation than compliance with the cap would permit. However, as I explained in *Beaudry*, this does not necessarily mean that the whole sum should be awarded. In the result, ignoring the loss of pension element, I would award the sum of USD475,000, taking into account the cap sum, together with USD180,000 for loss of pension, thus a total of USD655,000.

13. If on the other hand, the pension loss is covered by the cap in art 10.5(b), a portion of the discrepancy between what justice requires and the limit is so great that to apply the limit would affect such a grave injustice on the applicant as to constitute exceptional circumstances. In this event, the cap cannot be applied and the resulting sum I award is USD655,000.

14. The sum of USD655,000 is assessed on the basis that any lesser sum would, in my judgment, represent such a significant departure from the amount of compensation actually required to be paid to place the applicant in the same position as he would have been in had the respondent not breached his contract as to impose an exceptional injustice. Of course, this is scarcely capable of precise calculation and necessarily reflects a discretionary judgment which takes into account the matters to which I have directed attention in the calculation of the actual sum required for appropriate and just compensation. The existence of the cap imposes the necessity of reducing this sum but there must be a limit to that reduction beyond which it is simply inappropriate to go. I have assessed that limit at USD655,000.

15. The sum is to be paid on or before 46 days after the date of this judgment.

Costs

Costs are to be assessed as previously ordered.

Interest

16. The question of interest for past economic loss and any future loss in the event of payment after 46 days after the date of this judgment is reserved for determination by another Judge.

(*Signed*)

Judge Adams

Dated this 30th day of June 2010

Entered in the Register on this 30th day of June 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York