



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/002
UNDT/GVA/2010/102
Judgment No.: UNDT/2011/201
Date: 25 November 2011
Original: English

Before: Judge Coral Shaw
Registry: Geneva
Registrar: Anne Coutin, Officer-in-Charge

REES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Chile Eboe-Osuji, OHCHR
Christine Graham, ALS/OHRM, UN Secretariat
Myriam Foucher, UNOG

Introduction

1. In the substantive Judgment in this matter *Rees* UNDT/2011/156, the Tribunal decided that the Respondent did not comply with its performance appraisal obligations to the Applicant; that the decision in June 2009 to reassign the Applicant from her position as Coordinator of the Women’s Rights and Gender Unit (“WRGU”), Office of the High Commissioner for Human Rights (“OHCHR”), in Geneva, to another post was an unlawful exercise of the discretion conferred by former staff regulation 1.2(c) and former staff rule 101.2(b) and should be rescinded; that the non-extension of the Applicant’s contract in March 2010 was not a valid exercise of the Administration’s discretionary powers and should be rescinded; and that the Applicant was not constructively dismissed.

2. Both parties requested the Tribunal to determine remedies as a separate consideration.

3. The parties were encouraged to seek mutual resolution of these issues. This proved unsuccessful.

Motion to file supplementary submissions

4. The Applicant filed submissions on relief, to which the Respondent replied on 14 October 2011. On 22 October the Respondent filed a motion for leave to file “Respondent’s Supplement to Response to Applicant’s Submission on Relief”. By Order No. 194 (GVA/2011) this motion was rejected.

Facts

5. The reasoning for the decision and the facts of the case were stated in the judgment on liability.

Remedies sought

6. The Applicant seeks:

a. Two years' gross salary at the P-5 level and appropriate step, from the date of the non-extension of the Applicant's appointment (31 March 2010), including post adjustment, dependency allowance, education grant, "home leave grant", "mobility/hardship/non-removal allowance", "pension remuneration (i.e. the Organi[z]ation's 15.8% pension contribution)", "difference in payment of health insurance", the foregoing reduced by the staff assessment and the Applicant's own pension contribution;

b. Interest at the US Prime Rate applicable at 31 March 2010 (date of the non-renewal decision) to the date of payment of any compensation awarded by the Tribunal, with an additional 5 per cent should the judgment on compensation not be executed within 60 days;

c. Damages for a combination of moral injury, loss of professional reputation and career prospects, and public humiliation in the sum of USD100,000;

d. Two months' net base salary for failure to comply with the performance review obligations as required by ST/AI/2002/3;

e. The Applicant's United Nations Official Status File ("OSF") to be cleared of any adverse material relating to this matter, including any notes for file or memos concerning her performance or reasons for non-renewal of her appointment, save for this judgment and subsequent action taken to implement it;

f. That all public statements by officials of the Organization concerning the Applicant's case be ordered to stop.

Parties' submissions on remedies

7. The submissions of the Respondent strayed into matters of substance which had already been decided in the liability judgment. In particular, the Respondent made further submissions on the responsibilities of staff members and management in the performance evaluation system ("PAS") procedure. In her submissions the Applicant raised allegations of actions and statements by the Respondent which allegedly occurred since the hearing. Neither of these will be considered as part of this decision on remedies as they are not relevant to the consideration of the harm caused to the Applicant by the administrative decisions, which is the subject of this decision.

8. The Applicant's principal contentions are:

a. The Applicant, who is currently aged 54, had expected to stay in the United Nations until her retirement. She would have been eligible for a permanent appointment;

b. The loss of her employment in the Organization in a specialized legal field the Applicant helped define and contribute to in the international arena, is a considerable deprivation of professional and personal opportunity;

c. The Applicant's professional reputation has been blemished and her prospects for future employment with the Organization are severely hindered;

d. Given her contractual record, it is wholly reasonable to expect that the Applicant would have been given a further two-year fixed-term contract;

e. The decision to reassign the Applicant was prejudicial to her career and professional reputation, as she was being assigned to a "yet-to-be created" or "non post". As adduced in evidence at the hearing, the tasks of that post (after its transfer to the New York office) are fulfilled by its current incumbent on a part-time basis. The reassignment decision was not a genuine administrative decision as there was no indication that her senior management intended to keep the Applicant on this post;

f. The Tribunal found that the Applicant was unnecessarily and publicly humiliated by top management of OHCHR. Public acts of humiliation were repeated, occurred in high-profile settings and were noticed by the attendants. This conduct caused the Applicant reputation harm. In addition, at that time the Applicant was already in a vulnerable position professionally and personally, and was not able to defend herself;

g. This case is exceptional and warrants compensation beyond the statutory limit of two years' net base salary. There was an accumulation of aggravating factors¹, including the "egregious public conduct" of OHCHR senior management, the Applicant's deprivation of due process rights through disregard of PAS obligations, and the decision to reassign her unlawfully without proper consultation. Furthermore, the fact that the Applicant needed support from a staff representative and stress counselling shows her exceptional emotional hardship;

h. The Applicant had a legitimate expectation that her fixed-term contract would be renewed until she reached at least the age for early retirement. Renewal of her appointment would have allowed her to seek employment outside the Organization without frustration of a decrease in salary and benefits and with an increase in the number of years of contribution for her pension;

i. Public comments to the media by spokespersons for the Secretary-General and the High Commissioner for Human Rights concerning this case have caused her unnecessary stress and anxiety.

9. The Respondent's principal contentions are:

a. The decisions in question did not cause any economic loss to the Applicant. She did not prove any causal link between the two contested decisions and the moral harm she claimed to have suffered. Moreover, "these damages could not have been caused, in the presence of a finding that the

¹ See *Mmata* 2010-UNAT-092.

Respondent had not engaged in any course of conduct that amounted to ‘marching the Applicant to the door’”. Loss of employment and flawed procedural decisions are not to be confused;

b. In the absence of proof of ill-will towards the Applicant, “distress additional to that arising from the mere fact of the wrongful decision ... cannot be a factor in the calculation of compensation”² in cases of procedurally flawed decisions. Cases cited by the Applicant concerned misconduct charges strategically employed to harass or march the staff member to the door. The Applicant’s separation “did not result from breach of contract” and the Respondent made good faith efforts to place her on a position of equal pay and encouraged her to apply for alternative positions, which she did not;

c. The Respondent’s attempts to keep the Applicant within the Organization in another role “effectively break the link between questions about the Applicant’s performance as Head of WRGU and her departure”. OHCHR management identified a post for the Applicant and made several attempts to get her to apply to alternative positions, and she refused;

d. The Applicant’s claims for compensation are based on speculative assumptions. Had the Applicant stayed at OHCHR, she “may have found the hierarchical atmosphere in Geneva too constraining to tolerate”. In this regard, the “general principle of vicissitudes of life” has been applied by the Dispute Tribunal;³

e. An applicant is obligated to mitigate loss of employment and must make reasonable efforts to find alternative employment and, in the event he or she is successful, the measure of the damages would be “no more than the differential between what was called for by way of salary in lieu of reasonable notice and the salary received in the new employment for the same period to be covered by the reasonable notice”. In the case at bar, the Applicant did not

² *Hastings* UNDT/2010/071.

³ *Garcia* UNDT/2011/068.

accept the proposed P-5 position and did not apply to any other position despite aid and reminders by the Administration;

f. The Applicant did not suffer any period of employment hiatus. She found a new job before the expiration of her appointment. The decision to depart from the Organization was the Applicant's choice; she should not be entitled to compensation for this choice;

g. Awarding compensation in this case would run against the principle that irregularities that do not create any economic loss do not give rise to compensation;⁴

h. The Applicant is requesting a much higher amount as compensation than the Tribunal has awarded even in cases when the applicant had in no manner contributed to the degradation of the situation;

i. The Applicant overstates her own stress and anxiety. She herself made "intemperate allegations"—as characterized by the Tribunal—which in fact poisoned the working relationship and may help to explain her refusal to accept the lateral transfer and to apply for other positions in the United Nations. This calls into question the Applicant's request for compensation based on the alleged permanently damaged prospects of reemployment with the Organization as a result of the non-renewal of her contract;

j. It is necessary for the Applicant to prove that any moral harm or loss of reputation suffered is the direct result of the unlawful decision impugned. In this regard, first, there is no evidence of loss of reputation suffered by the Applicant (her reputation seemingly was even enhanced among the OHCHR staff); second, it is a principle of employment law that damages, even for wrongful dismissal, do not permit a claim for loss of reputation merely as an incident of the loss of employment; third, there was no conduct on the part of the Administration amounting to compensable attack on the Applicant's reputation; and, fourthly, "it was the Applicant's own conduct that would have

⁴ See *Abboud* 2010-UNAT-100, *Bertucci* 2011-UNAT-114.

attracted to the decisions the attention she now complains about”, as she embarked upon a campaign in the Office aimed at winning sympathy and discredit senior management. Lastly, there is no evidence that the cancellation of the planned mission to Colombia “inexorably binds” the Applicant’s reputation. It is actually regular occurrence to cancel planned missions and nothing suggests that she was lowered in anyone’s estimation because of the cancellation of this mission.

10. On the above grounds, the Respondent requests that the Applicant’s prayers for damages be dismissed.

Consideration

11. Each of the Applicant’s claims is considered separately.

Two years’ gross salary at the P-5 level and appropriate step

12. Although not expressly stated by the Applicant it appears that this part of her claim is for the amount that the Secretary-General may elect to pay in lieu of rescission.

13. Pursuant to article 10.5 of the Statute, the Tribunal may order rescission of a contested decision and “where the contested 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”.

14. In this case two administrative decisions were found to have violated the Applicants rights: the reassignment and the non-renewal of her appointment. Both have been rescinded. These decisions were separate but closely linked. However, alternative compensation to rescission may only be set in the case of the non-renewal.

15. In assessing the appropriate amount of compensation to be awarded the Tribunal must assess the chances of the Applicant having her contract renewed but for

the procedural breaches identified in the substantive judgment and the period of that renewal.

16. The Applicant's previous appointments with OHCHR had been consistently renewed from 1998 to 2008. Her last two renewals as Head of WRGU were each for two years. The work of the WRGU continued upon the departure of the Applicant. While there is normally no expectancy of renewal of a fixed-term contract, the Tribunal finds that but for the events including the procedural breaches which led to the non-renewal of her contract, there is a strong probability that the Applicant would have received a further renewal for two years. Proper performance management would have given the parties the opportunity to solve their differences at an early stage and to maintain a sustainable working relationship. She therefore could have reasonably expected two years' further salary and entitlements.

17. In order to place the Applicant in the position that she would have been but for the breach of her terms of appointment, as far as it is reasonably possible, she is awarded two years' net base salary at the P-5 level and step which she had at the date of the non-extension of her appointment on 31 March 2010, plus the applicable post adjustment and the value of any quantifiable monetary entitlements and benefits to which she would have been entitled. In addition, she is entitled to the amount corresponding to the contributions that the Organization would have made to the United Nations Joint Staff Pension Fund ("UNJSPF") and to a sum which represents the difference between what she would have paid in medical insurance at the United Nations and the medical insurance she actually had to pay since 31 March 2010 during the two years following her separation. The resulting sum is to be reduced by the net take-home pay which the Applicant has received and will receive in the period of two years following her separation from OHCHR, that is, up to 31 March 2012. The Applicant is responsible for providing all documents necessary to justify her entitlements and full details of her earnings from 31 March to the Respondent by 31 March 2012.

Damages for a combination of moral injury, loss of professional reputation and career prospects, and public humiliation in the sum of USD100,000

18. The evidence showed that the Applicant suffered from stress caused by the failure of the performance evaluation procedure. Through the last part of her employment, negative judgments were being made about her performance with which she strongly disagreed but for which she had no official recourse. This, and the public nature of some of the negative treatment and criticism, caused her such stress during the period leading up to her reassignment that from March 2009 she consulted a stress counsellor.

19. There were a number of aggravating features in the case of the reassignment decision. First was the complete absence of consultation. The Applicant received no advance warning of the decision that had been made to reassign her. She was told in passing just before a public event started of the decision that would remove her existing responsibilities and place her in a position that was not defined or in place. This was very shocking to her.

20. As was stated in the substantive judgment,

The decision to reassign was made hastily and without proper planning. The circumstances of the reassignment, including the misconceived decision to cancel her mission to Colombia at the last minute, led to the impression that the action was being taken because of some serious wrongdoing by her. The decision was potentially prejudicial to the Applicant's reputation.

21. On the evidence given at the hearing the Tribunal is satisfied that the period around the reassignment decision caused most stress to the Applicant. Given the extent to which the non-renewal decision was an extension of the reassignment decision it is not possible to attribute any discrete moral harm to the Applicant arising from that decision. The Tribunal notes that, as the Applicant became increasingly insecure in her employment, she also made publicly critical remarks about her reporting officers.

22. Taking into account these circumstances the Tribunal finds that the Applicant is entitled to four months' net base salary for the emotional harm and distress caused to her by the failures of process.

Two months' net base salary for failure to comply with the performance review obligations as required by ST/AI/2002/3

23. Non-compliance with the requirements of ST/AI/2002/3 vitiated the two contested decisions. An award of damages against the Respondent for failure to comply with its lawful obligations could be seen as punitive. The harm caused to the Applicant by the procedural failures is acknowledged and compensated for under the previous heading. Hence, no award is made under this claim.

The Applicant's United Nations Official Status File to be cleared of any adverse material relating to this matter

24. The retrospective evaluation made by the former Chief of Research and Right to Development Branch at the request of the Respondent was carried out against the letter and the spirit of ST/AI/2002/3. It was unfair in that it did not grant the Applicant an opportunity to comment, challenge and rebut. This memorandum should not be included in the Applicant's OSF. *Rees* UNDT/2011/156 as well as the present judgment will be placed in her OSF.

That all public statements by officials of the Organizations concerning the Applicant's case be ordered to stop

25. This remedy does not fall within the ambit of the Tribunal's powers. The statements at issue, in any event, occurred well after both contested decisions had been taken, and not as a result of them. Any action in their regard would go beyond the Tribunal's authority to provide redress for unlawful administrative decisions.

Two years' net base salary limit

26. Although it is not possible at this juncture to calculate the exact amount of the compensation afforded, should it exceed the limit laid down in article 10.5(b) of its

Statute, the Tribunal finds that the aggravating features of this case include the period of time over which the Applicant was subjected to negative comments and behaviours, the unexpected reassignment and last minute removal from the mission to Colombia. These factors satisfy the Tribunal that there are exceptional circumstances to warrant a total award to the Applicant of more than two years' compensation.

Interest

27. The final calculation of the sums to be paid to the Applicant cannot be concluded until the expiry of the two-year period from her separation, in order to take into account her earnings to 1 April 2012. Therefore interest will not begin to be applied until 1 April 2012.

Conclusion

28. In view of the foregoing, the Tribunal DECIDES:

a. The Tribunal recalls its decision in *Rees* UNDT/2011/156 regarding the rescission of the contested decisions. If the Respondent elects to pay compensation as an alternative to the rescission of the non-renewal of her appointment, the Applicant is awarded two years' net base salary at the P-5 level and step which she had on 31 March 2010, plus the entitlements listed in paragraph 17 above, the foregoing reduced by the net take-home pay which the Applicant has received and will receive in the period of two years following her separation from OHCHR, that is, up to 31 March 2012;

b. The compensation set in sub-paragraph (a) shall bear interest at the United States Prime Rate from 1 April 2012;

c. By 31 March 2012, the Applicant will provide the Respondent with full details of the net take-home pay which she received between 31 March 2010 and 31 March 2012 and all necessary documentation to support her claims to the entitlements listed in paragraph 17;

d. The Applicant is awarded four months' net base salary for moral damages;

e. The compensation set in sub-paragraph (d) shall bear interest at the United States Prime Rate with effect from the date this judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the United States Prime Rate 60 days from the date this judgment becomes executable;

f. The retrospective performance evaluation memorandum made by the former Chief of Research and Right to Development Branch is not to be included in the Applicant's OSF and copies of the two judgments in this case are to be placed therein.

(Signed)

Judge Coral Shaw

Dated this 25th day of November 2011

Entered in the Register on this 25th day of November 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry