



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/029/
UNAT/1666
Judgment No.: UNDT/2010/148
Date: 20 August 2010
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Self-represented

Counsel for respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The applicant, a former human rights officer in the Office of the United Nations High Commissioner for Human Rights (OHCHR), requested an administrative review of the failure of the High Commissioner for Human Rights to reply to his complaint of abuse of power, harassment and discrimination by his supervisors. The applicant subsequently filed an appeal with the Joint Appeals Board (JAB), which found the appeal not receivable. The former United Nations Administrative Tribunal found that the case was receivable and remanded it to the JAB for consideration on the merits. The JAB concluded that the Organisation had failed to properly address the applicant's complaint and recommended that he be compensated in the amount equivalent to one month's net base salary. The Secretary-General agreed. However, no payment has been made to the applicant as he filed another appeal with the Administrative Tribunal, contesting the amount of compensation and requesting that the respondent be ordered to investigate the applicant's complaint and issue an apology to him.

2. The case was transferred to the Dispute Tribunal on 1 January 2010. On 29 April 2010, the Dispute Tribunal held a directions hearing, at which both parties agreed that the matter should be dealt with on the papers, following final written submissions. Therefore, the application and the reply filed with the Administrative Tribunal, as well as the additional submissions filed pursuant to my orders, constitute the pleadings in this case.

3. The parties agreed at the directions hearing that the facts as set out in the JAB report constitute the agreed facts, which are summarised below.

Facts

4. The applicant entered the service of OHCHR in April 1998 as a human rights mobile monitor in Cambodia. Thereafter, he served on a series of contracts with the

Department of Peacekeeping Operations (DPKO), OHCHR and the United Nations Office for Project Services until 31 August 2003. On 4 November 2003, the applicant was appointed as a human rights officer with the New York Liaison Office of the OHCHR at the P-3 level, step VIII, on a two-year 100 series fixed-term appointment.

5. The applicant is HIV-positive and at the material time suffered from major depression. According to a report prepared by his attending physician, the applicant admitted to depressed mood, impaired memory and concentration, feelings of hopelessness and worthlessness and to passive suicidal ideation. The applicant claims that his health condition worsened as a result of the alleged mistreatment by his supervisors on account of his sexual orientation and HIV status.

6. As the applicant's health began to deteriorate, he was placed on sick leave with full pay on 29 March 2004 and, on 4 August 2004, on sick leave with half pay.

7. On 2 April 2004, the applicant wrote an email to all New York Office staff, with copies to the Chief of Staff and the Acting High Commissioner in Geneva, indicating his concerns and requesting that they consider asking for an outside expert's help from the Office of Human Resources Management (OHRM) in dealing with the issue of high tension in the office. Between April and August 2004, the applicant contacted numerous officials in New York and Geneva via email, requesting advice and assistance. In particular, he asked for a temporary transfer to the Civilian Training Unit of DPKO in New York or, alternatively, a transfer back to the Geneva Office or an office in any other country provided that a reasonable level of medical care was available there.

8. On 5 May 2004, the applicant sent a confidential note to the Acting High Commissioner for Human Rights, requesting his urgent assistance in finding a solution. The applicant never received an answer, despite sending a follow-up letter on 23 June 2004.

9. In a statement dated 21 May 2004, the applicant's attending physician indicated that stressors involving the applicant's work situation had exacerbated his condition, that in the interests of his health he should not return to the position he held at the time and that his ongoing treatment required that he remain in New York.

10. The applicant sought the advice of the Office of the UN Ombudsman in New York and the latter brokered an agreement in June 2004 for him to be temporarily released to DPKO. Members of the Civilian Training Unit, DPKO, interviewed the applicant and welcomed his joining the team whenever he returned from sick leave. On 24 June 2004, the Director of the New York Liaison Office of the OHCHR agreed with the Ombudsman's Office on the applicant's transfer. However, the Deputy Director of the New York Office later intervened and the compromise was called off. The Deputy Director subsequently explained to the applicant that he could not afford to relinquish the applicant's post but that he would assist him in finding another posting.

11. On 30 November 2004, the applicant sent an email titled "formal complaint" to the High Commissioner for Human Rights, asking her to initiate a proper investigation and ensure the accountability of the responsible staff members. The applicant presented several alleged incidents of harassment by his supervisors and claimed that his health condition worsened as a result. He also sought a formal apology from the Organisation and compensation for all the damages he had suffered. Having received no response from the High Commissioner for Human Rights, the applicant sent follow-up emails on 1 and 2 December 2004 and 5 January 2005, requesting that action be taken in his case.

12. The applicant was separated from service for health reasons on 3 December 2004. The validity and lawfulness of the grounds for his separation are not in dispute. Several days prior to the applicant's separation, on 30 November 2004, the UN Staff Pension Committee awarded the applicant disability benefits.

JAB appeal

13. By a letter dated 14 February 2005, the applicant requested the Secretary-General to review the administrative decision of the High Commissioner not to reply to his formal complaint and requested compensation for abuse of power, harassment and discrimination. He subsequently lodged an appeal with the JAB in Geneva. The JAB concluded that the appeal was not receivable, *ratione materiae*, on the basis that the High Commissioner's lack of response to the applicant's emails did not constitute an administrative decision, as it had no legal consequences for the applicant. The JAB noted, moreover, that he had separated from service by the time he sent the second email and that an email could not be considered "a formal complaint". While the JAB indicated it would not proceed on the merits of the case, it did state that the decision to launch an investigation fell within the discretionary authority of the respondent.

14. The applicant filed an appeal with the Administrative Tribunal which decided that the case was receivable since the High Commissioner's inaction amounted to an implied administrative decision directly affecting the applicant's rights and remanded the case to the JAB for consideration on the merits, also ordering compensation for the procedural delay on the receivability issue in the amount of three months' net base salary.

15. On 5 December 2008, the JAB issued a report, concluding that:

52. . . . [T]he circumstances of the case warranted that some form of preliminary action be taken by the Administration in response to the Appellant's allegations. The Panel recognized that it is for the Administration to determine what type of measures should be undertaken and how far they should reach. However, it considered that, in the present case, the Appellant had been denied any form of initial consideration of his complaint. By so doing, the Organization had failed to comply with the duty of due diligence vis-à-vis its staff members.

. . .

53. In light of the foregoing, the Panel concluded that by not taking appropriate action upon the Appellant's complaints of harassment, discrimination and abuse of authority by his former supervisors and request of action: thereon, the Administration failed to address his case with the required due diligence.

54. While the Panel took note that the Appellant asked for a complete and thorough investigation to be conducted on his original claims, it was of the opinion that no effective investigation could be opened at this point in time on the alleged facts.

55. The Panel therefore recommended that the Appellant be granted compensation as a means to provide reparation for the Administration's failure to properly address his complaints (and not on account of any possible harassment or discrimination suffered) since those allegations were not—and should not be—established within the framework of the appeals procedure. Bearing this in mind, the Panel recommended that the Appellant receive a compensation of one month net base salary.

56. Furthermore, the Panel considered that its declaration that the Administration failed to treat the Appellant's complaints with due diligence constituted an appropriate satisfaction for him.

16. By letter dated 27 January 2009, the applicant was informed that the Secretary-General had decided to accept the JAB's findings and conclusion. The letter stated:

The Secretary-General has examined your case in light of the JAB's report and all the circumstances of the case. The Secretary-General accepts the conclusion of the JAB that the Administration failed to address your allegations with the requisite due diligence. Accordingly, the Secretary-General has decided to accept the JAB's recommendation to award you compensation of one month net base salary as of 3 December 2004 and considers that the JAB's declaration that the Administration failed to treat your complaints with due diligence constitutes additional satisfaction for you.

17. The applicant subsequently filed an application with the former Administrative Tribunal, seeking, *inter alia*, a formal apology from the Organisation, an order requiring the Organisation to investigate his allegations and additional compensation, including 40 to 60 years' net salary for past, present and future

consequences and harm caused and 15 years' net salary for injuries caused, including emotional pain and health deterioration.

Applicant's submissions

18. The applicant's submissions may be summarised as follows:

a. The Administration failed to properly address the applicant's complaint of abuse of power, harassment and discrimination by his supervisors, more specifically, by the then Director and Deputy Director of the New York Office. By failing to address his complaint, the Organisation acted in breach of UN values and principles and, therefore, of its contract with the applicant. The way the Administration acted in this case, whether intentionally or negligently, resulted in the termination of the applicant's contract and caused serious emotional, health and financial consequences for him.

b. The lack of response amounted to an abuse of power and was in violation of his right to due process. Whilst the Administration has the discretion to decide whether to undertake disciplinary action or an investigation, when basic rights are at stake this discretionary authority is limited. The applicant's allegations ought to be addressed despite the lapse of time, especially since the Administration itself is responsible for the delay. The applicant refers to a number of international human rights instruments containing equality clauses prohibiting discrimination, including, among others, the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, which, in the applicant's view, form an integral part of the UN staff members' contractual rights and obligations.

c. In his final submissions on compensation the applicant stated that the amount of compensation should be determined upon consideration of various

factors, including whether he would be reinstated, whether an investigation would be conducted and whether an apology would be issued by the Organisation. The applicant requests compensation for pain and suffering he experienced since 2004 to date, including “anguish, depression, anger, frustration and fear for more than six years”. He says he suffers feelings of victimisation every time there is a response to his case and that the pain and suffering has a direct impact on his immune system. Specifically, in his amended pleadings, the applicant sought the following relief:

- i. a full investigation against the Director and Deputy Director of the New York Office, the High Commissioner and the Acting High Commissioner and all other relevant staff;
- ii. a formal and unconditional apology by the Administration;
- iii. compensation for financial loss, including salary and benefits and entitlements not received for the period of more than four years since the applicant’s separation;
- iv. the salary not received for the last three months of sick leave while in New York;
- v. an offer of a proper job commensurate with his experience, if and when his health so allows, or, alternatively, adequate financial compensation in the amount of USD3,205,488 (i.e., 26 years’ salary at the rate of USD10,274 a month);
- vi. compensation for the injuries caused, including emotional pain and health deterioration, equivalent to a minimum of five years’ gross salary at the P-5 level, which may be reduced if a proper apology is issued and a proper investigation is carried out; and

- vii. costs of trips to New York for medical follow-up and of the proceedings associated with the applicant's appeal.

Respondent's submissions

19. The respondent's submissions may be summarised as follows:
 - a. The only issue before the Dispute Tribunal is whether the applicant is entitled to any additional compensation in light of the JAB's finding that the Administration failed to properly address his complaint. The compensation in the amount of one month's net base salary, accepted by the Secretary-General, was reasonable and fair in light of similar awards in cases where the Organisation was found liable for breach of the duty of due diligence. The compensation offered to the applicant in addition to the previously paid three months' net base salary is well within the range of compensation that has been awarded by the Dispute Tribunal for distress and emotional injury.
 - b. The applicant's request to investigate his former supervisors and other personnel should be denied as the Administration's tacit or explicit decision not to initiate an investigation did not violate the applicant's rights. The Administration's accountability for the decision of whether to initiate an investigation was to the Organisation, not the applicant. No effective investigation could be opened at this point in time on the alleged facts.
 - c. While the respondent accepts that the applicant suffers from an illness that causes him emotional distress, the respondent denies that the Organisation was the source of or otherwise exacerbated the applicant's illness at the material time or subsequent thereto, and denies liability for economic or other damages.
 - d. The applicant has failed to establish exceptional circumstances warranting compensation in excess of the two-year limit established by the

Dispute Tribunal's Statute. The applicant's request for a formal apology should be denied since an apology is beyond the remedies which may be ordered by the Tribunal under sec. 10.5 of its Statute (*Gonzales-Ruiz and Buscaglia* UNDT/2009/029). No costs should be awarded as there was no manifest abuse of process before the Tribunal.

Scope of the application

20. In his request for an administrative review, dated 14 February 2005, the applicant sought review of the administrative decision of the High Commissioner "not to reply to a formal complaint and request compensation for abuse of power, harassment and discrimination by staff of the [OHCHR]". Thus, the Administration's failure to properly and timeously address the applicant's complaint is the only matter receivable by the Dispute Tribunal. This was accepted by both the JAB and the former Administrative Tribunal. Therefore, the only legal issue before the Dispute Tribunal is whether compensation in the amount of one month's net base salary recommended by the JAB to be paid to the applicant for the Administration's failure to properly address his complaints was fair and adequate. If such compensation is determined to be inadequate, the Tribunal will determine the appropriate relief to be awarded to the applicant.

21. The applicant was separated for reasons of health and it is not contested that the reasons for his separation were lawful and valid. The claim for sick leave entitlements was not part of the applicant's request for administrative review and is, in any case, time-barred pursuant to former staff rule 111.2(a), as the applicant was required to submit his request within two months of the date he received notification of the decision in writing. Therefore, the applicant's submissions concerning his sick leave entitlements and termination of his contract and alleged damages flowing from this termination are not properly before the Tribunal.

Compensation

22. With respect to the relief that would fully recompense the applicant, I must say from the outset that the applicant's claims for compensation, especially for actual economic loss, are in many respects excessive and, in the final analysis, unsustainable. I have already indicated that the Tribunal is not competent to consider the applicant's claims for actual economic loss, including loss of salary and sick leave pay, as these issues are not before the Tribunal. The subject matter of this appeal is the Administration's failure to consider the applicant's complaint against his supervisors, and not the merits of such allegations.

23. After the applicant submitted his formal complaint to the High Commissioner for Human Rights, the Commissioner was required under sec. 2 of ST/AI/371 (Revised disciplinary measures on procedures)—which at the time governed the procedure for dealing with allegations of possible misconduct—to undertake an initial inquiry to determine whether there was “reason to believe” that the staff members named in the applicant's complaint had “engaged in an unsatisfactory conduct for which a disciplinary measure may be imposed”. The nature of the allegations raised by the applicant required that an initial inquiry be undertaken in order to make preliminary findings and determine whether a formal investigation was required. Although ST/SGB/2005/20 of 28 November 2005 on harassment and abuse of authority was not in force at the material time, the seriousness with which this case should have been handled is underscored by information circular ST/IC/2003/17, which states that any infraction of the prohibition of discrimination and harassment “will be taken seriously” and “all managers” are expected to “take or initiate prompt and appropriate action” in collaboration with the human resources office “whenever an infraction occurs”. Although a staff member cannot compel the Administration to take disciplinary action against another staff member (see UN Administrative Tribunal Judgment No. 1086, *Fayache* (2002)), staff members have a right to have their request for an investigation fairly and competently considered (*Abboud* UNDT/2010/001). It is not contended that any, let alone a timely and adequate,

initial inquiry was carried out to ascertain whether there was reason to believe that unsatisfactory conduct had occurred. In fact, the respondent accepts that no action at all was taken with respect to the applicant's complaint, but submits that the compensation agreed to by the Secretary-General was sufficient.

24. Whilst this Tribunal is not bound by the findings or recommendations of the JAB, I find that the starting point for assessing the amount of compensation to be ordered in this case is the respondent's acceptance of the JAB findings that the Administration failed to address the applicant's complaint with required due diligence. The gravity of the allegations, the persistent unaddressed communications to the Administration, together with the fact that the Ombudsman considered the situation sufficiently grave to intervene, constituted sufficient reason for the allegations to be considered seriously and should have prompted an adequate initial inquiry, yet no action was taken either in compliance with the relevant administrative issuances, or whatsoever. The JAB recommended, and the respondent accepted, that the applicant ought to be granted compensation to provide reparation for this failure, and not on account of any possible harassment or discrimination suffered since those allegations were not established and could not be established within the framework of the appeals procedure. The delay and failure to respond meant that the applicant was prejudiced in having his complaint investigated timeously or at all. The applicant was deprived of the opportunity to prove a breach of his fundamental human right not to be discriminated against on the grounds of his sexual orientation and HIV status. In light of these circumstances, compensation in the amount of a month's salary is wholly inadequate.

25. This was not simply an issue of lack of due diligence but also of failure by the Administration to follow its own rules and regulations and to ensure protection of the values and principles concerning equal rights and protection against discrimination, enshrined in the Charter (see art. 1.3) and several international instruments. In the assessment of compensation or damages, much as there may be mitigating circumstances, there may be aggravating factors. When basic fundamental human

rights are at stake, a failure to afford adequate consideration and protection may be an aggravating, but not a punitive, factor. The applicant's rights have been further compromised because the events in question took place more than six years ago and, due to the passage of time, an inquiry as initially requested in 2004 would not be an effective remedy at this time. The harm done to the applicant thus justifies a commensurate award and not the one month's salary offered to him.

26. At the directions hearing, counsel for the respondent submitted that the applicant had already been awarded compensation equivalent to four months' salary, constituting one month's salary recommended by the JAB (and accepted by the Secretary-General) and three months' salary awarded by the former Administrative Tribunal. Although the former Administrative Tribunal awarded compensation for the injury suffered by the applicant "in view of the procedural delays", this submission is inaccurate. The former Administrative Tribunal found the case receivable but remanded the matter to the JAB for consideration on the merits. The three months' salary ordered by the former Administrative Tribunal was clearly with respect to the delay in reviewing the applicant's case at the JAB stage. The compensation ordered by the Administrative Tribunal was therefore not in relation to the substantive claims raised by the applicant. Thus far, the compensation awarded to the applicant in relation to his substantive claims has been one month's net base salary as agreed by the Secretary-General based on the JAB report. The applicant stated at the directions hearing that this compensation had not been paid because of his appeal.

27. Generally, the burden is on the applicant to substantiate his claim for compensation or damages. In assessing the quantum of compensation the Tribunal may consider the economic loss and emotional distress suffered by the applicant. As the reasons for termination of the applicant's contract are accepted as valid and lawful, and as this issue is not properly before the Dispute Tribunal, no compensation for actual economic loss is warranted. With respect to compensation for emotional distress, such compensation ordered by the Dispute Tribunal has ranged in the

vicinity of several months' net base salary (see, e.g., *Crichlow* UNDT/2009/028, *Allen* UNDT/2010/009, *Gomez* UNDT/2010/042, *Hastings* UNDT/2010/071, *Lutta* UNDT/2010/097, *Ostensson* UNDT/2010/121). The amount of compensation for emotional distress, of course, depends on the particular circumstances of each case. The applicant should be recompensed for the negative impact of the breach and the compensation should be proportionate to the established damage suffered by him, taking into account the particular circumstances of the case (*Crichlow* UNDT/2009/028).

28. The documents furnished by the applicant—including the medical report and contemporaneous emails—referred to in the agreed facts (and thus accepted by the respondent), demonstrate that he was clearly distressed by the work situation and the persistent failure to respond to his complaint. Having given due and careful consideration to both parties' submissions and the record, I find that the applicant must be compensated for the failure to timeously and adequately consider his complaint and for the emotional distress caused by this failure in the amount of USD40,000, which sum includes the equivalent of one month's net base salary to which the respondent had already agreed but not yet paid.

29. I consider that 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.

30. As regards the applicant's claims concerning continuing health deterioration, the applicant has failed to show that the deterioration of his health is the result of the Administration's failure to consider his complaint.

31. Upon the Dispute Tribunal's written enquiry of the applicant as to whether he required anonymity in this judgment, he stated that he had no objection to the Tribunal referring to any matter, personal or not, in its judgment. However, because

of the circumstances of this case I deemed it prudent to omit the name of the applicant from this judgment. In light of the compensation ordered by the Tribunal in this case and the respondent's admissions reflected in this judgment, the applicant has been sufficiently vindicated and I do not find that the Tribunal need consider whether an order for an apology is permitted by art. 10.5 of the Dispute Tribunal's Statute.

32. No award of costs will be made as neither party abused the proceedings.

Conclusion

33. Having given due and careful consideration to both parties' submissions and the record, I find that the appropriate compensation for the failure to consider the applicant's complaint and for the emotional distress suffered by him in all the above circumstances, is the amount of USD40,000, which sum includes the one month's net base salary already agreed to but not yet paid by the respondent.

(Signed)

Judge Ebrahim-Carstens

Dated this 20th day of August 2010

Entered in the Register on this 20th day of August 2010

(Signed)

Hafida Lahiouel, Registrar, New York