



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/041/
UNAT/1705
Judgment No.: UNDT/2010/194
Date: 29 October 2010
Original: English

Before: Judge Ebrahim-Carstens
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

FAYEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for Applicant:
Joseph Grinblat, OSLA

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

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 25 June 2010 the United Nations Dispute Tribunal issued its first Judgment in this matter on the issues of liability and compensation (*Fayek* UNDT/2010/113), finding that the decision not to select the Applicant for the contested P-4 level post on a two-year contract was in violation of her right to full and fair consideration and that there was a causal connection between this violation and the Applicant's non-selection, for which she must be properly compensated. The parties were directed to attempt to reach an amicable agreement on compensation in light of the first Judgment by 12 July 2010, failing which they were directed to file further submissions on compensation.

2. In the Judgment of 25 June 2010, the Tribunal found, *inter alia*, that compensation for the actual economic loss caused to the Applicant should be based on the difference, for two years, between the actual salary, benefits and entitlements at the P-3 level and step held by the Applicant at the relevant time period and the salary, benefits, and entitlements she would have received at the P-4 level and appropriate step. The facts of this case and the Tribunal's findings on liability and compensation are articulated in detail in the previous Judgment and will not be repeated here unless necessary to address the parties' contentions.

Applicant's submission

3. The Applicant accepts the computation submitted by the Respondent for the actual economic loss for the period of 1 August 2007 to 31 July 2009. The Applicant submits, however, that the financial loss resulting from her non-selection must be computed as a lifetime loss. With respect to the future loss, the Applicant requests the Tribunal to make certain "assumptions about the future", including that she will remain with the Organisation until her retirement in 2026. The Applicant avers that she was given permanent status on 30 April 2010, with retroactive effect to 30 June 2009, and it can be expected that as a permanent staff member she will continue working for the UN until her retirement age. She alleged that whenever she will be promoted or receive step increases, she will remain below the grade level she would have otherwise been at, and

therefore she will be suffering continuing losses. The Applicant submits that depending on the method of calculation and the assumptions allowed, her future loss beyond 31 July 2011 will be between USD239,000 and USD487,000.

4. The Applicant further avers that although she would have been promoted to the P-4 level effective 1 August 2007, she would not have received a new two-year contract until 31 January 2008, when her P-3 contract expired, due to the Organisation's administrative practices. On 31 January 2008, her P-4 fixed-term contract would have been renewed for another two years, and on 31 January 2010 it would have been renewed until 31 January 2012.

5. Finally, the Applicant submits that the compensation in the amount of three months' net base salary (USD16,535), paid by the Secretary-General on the basis of the Joint Appeals Board ("JAB") report, was for her moral injury and did not include actual economic loss.

Respondent's submission

6. The Respondent submits that the Applicant would have received a two-year contract and it is unlikely that she would have been promoted to the P-5 level. The Respondent avers that had the Applicant been promoted and employed for two years, she would have been employed at the P-4 level, step VII, for the first year (1 August 2007–31 July 2008) and, due to a within-grade increment, her step level would have increased to VIII during the second year (1 August 2008–31 July 2009). For the first year, the difference between what the Applicant received and what she would have received at the P-4 level, step VII, is USD5,699, including the monetary equivalent of the entitlements and benefits (but excluding additional pension contributions by the Organisation). For the second year, this difference would have amounted to USD8,565. Thus, the total difference for two years would have been USD14,264, which roughly approximates the three months' net base salary paid to the Applicant by the Secretary-General. Thus, the Applicant has received adequate compensation for the actual loss suffered and no further award should be made.

7. Pursuant to the Tribunal's Order, the Respondent calculated the difference between the Organisation's pension contributions on behalf of the Applicant between 1 August 2007 and 31 July 2009 and the contributions the Organisation would have paid to the UN Joint Staff Pension Fund had the Applicant been employed at the higher level. The Respondent submitted that the difference amounted to USD3,287, and the Applicant did not dispute the accuracy of this calculation.

8. Finally, the Respondent submitted that the Applicant failed to articulate with sufficient specificity her claims concerning moral damages and failed to submit any evidence in support thereof.

Consideration and findings

Compensation for breach of procedural rights

9. The JAB recommended that the Applicant be paid compensation of three months' salary "for the lack of due process". The Secretary-General accepted the JAB's conclusion that the Applicant's rights had been violated and decided to grant her compensation. The Applicant was informed by letter that the Secretary-General had decided "to accept the JAB's recommendation that [the Applicant] be granted three months net base salary at the rate in effect as of the date of this decision letter as compensation *for the violation of [her] rights*" (emphasis added).

10. The Applicant submitted that the three months' net base salary awarded by the Secretary-General was for moral injury only and did not cover actual economic loss. The Respondent submitted, on the other hand, that this compensation was intended to cover all damages, including actual economic loss. Having given careful consideration to the nature of this award, the Tribunal finds that there is no basis for either of these assertions. Neither the JAB report nor the Secretary-General's decision referred to compensation for actual economic loss or emotional harm. The Tribunal finds that the compensation already paid to the Applicant was for the breach of her procedural rights during the selection process.

11. In the first Judgment, the Tribunal found that the Respondent had tainted the process by bias, prejudice, and lack of transparency. The Tribunal found that the conduct of the Applicant's supervisors was not simply a matter of "careless and untoward behaviour" bespeaking a lack of free and fair treatment, but that there was credible evidence of improper motivation such as to render the process fatally and fundamentally flawed.

12. Having considered the circumstances of this case and the nature of the irregularity, the Tribunal finds that the three months' net base salary paid to the Applicant on the recommendation of the JAB report was insufficient (see former UN Administrative Tribunal Judgment No. 1156, *Fedorchenko* (2003)). The Tribunal finds that greater compensation is more appropriate considering that the selection process was tainted by improper factors. The Tribunal finds that, in the present case, the procedural unfairness was so grave that it warrants compensation in excess of the three months' salary paid to the Applicant. Therefore, in addition to the three months' salary already paid to the Applicant, USD15,000 shall be paid to her for the breach of her procedural rights.

Compensation for actual economic loss

13. The Tribunal has already found that the Respondent shall compensate the Applicant for the actual economic loss incurred by her in this case. The parties were ordered to file submissions on compensation on the basis of the first Judgment as their initial submissions did not adequately address this issue. I must say, with regret, that lack of specificity with respect to compensation has been a common weakness of many applications and replies submitted to the Tribunal. Instead of providing submissions on the specific factors and amounts as ordered by the Tribunal, the Applicant sought to re-introduce many of the substantive arguments brought before the Tribunal previously. I have, nevertheless, carefully reviewed the Applicant's submissions.

14. The parties agree that had the Applicant been appointed to the post, she would have been promoted to the P-4 level, step VII. The Applicant submits, however, that her

contract would not have commenced until 31 January 2008 because she would have been allowed to finish her P-3 level contract expiring on 31 January 2008. The Respondent, on the other hand, submits that the new two-year contract would have commenced on 1 August 2007. The Respondent is correct. The Applicant's contract, expiring on 31 January 2008, was for a P-3 level position. Had the Applicant been selected and promoted to the P-4 level, she would have received a new contract and I do not see how, having been selected and appointed for a new position at a new grade level effective 1 August 2007, the Applicant would have retained her old contract at the P-3 level.

15. Despite the Applicant's initial objections to the Respondent's submission that, had she been selected, she would have been promoted to the P-4 level, step VII, the Applicant acknowledged in the later submissions that the Respondent's assessment of her prospective grade level and step between August 2007 and July 2009 was accurate. Therefore, as stated in *Fayek* UNDT/2010/113, the Applicant would have received a two-year contract at the P-4 level, step VII, commencing 1 August 2007.

16. In her final submissions, the Applicant asserted that the Tribunal ought to take into account that she became a permanent staff member effective 30 June 2009. The Tribunal is not persuaded that this has any significance in the present case. As the Applicant acknowledged in her submission dated 7 August 2010, she was not a permanent staff member at the time of the contested selection process—in fact, the decision on her permanent status was made only in April 2010 (although it was applied retroactively), *after* her two-year P-4 contract would have expired had she been selected.

17. The Applicant requests the Tribunal to consider her claim for financial loss resulting from her non-selection as a lifetime loss of future earnings up until her retirement in 2026. At para. 30 of the previous Judgment, I noted the Applicant's submission that she will continue to work with the UN until retirement age as highly speculative. A staff member cannot have an unqualified legitimate expectation to work in any organisation right up to her or his retirement age. At most, such an expectation must be so heavily qualified by the contingencies of life, some of which I alluded to in the first

Judgment, that, ordinarily, it will have little or no effect on any computation of damages. This claim is therefore rejected.

18. I have reviewed the parties' submissions with respect to the bases for compensation for the actual loss suffered and I find that there is nothing in these submissions that qualifies or adds anything to my previous findings. There is no need to repeat these findings other than to say that certain assumptions can be allowed but they must be reasonable. I find that the assumptions the Applicant requests the Tribunal to make lack sufficient bases in this case for the reasons stated in the previous Judgment.

19. Accordingly, the actual loss in salary, benefits and entitlements (not including pension rights, which are discussed below) suffered by the Applicant for which she should be recompensed is as follows: (i) for the first year (1 August 2007–31 July 2008), the amount of USD5,699 plus interest at the applicable US Prime Rate until the date of payment, and (ii) for the second year (1 August 2008–31 July 2009), the amount of USD8,565 plus interest at the applicable US Prime Rate until the date of payment (see *Warren 2010-UNAT-059*).

20. With respect to the Organisation's pension contributions on behalf of the Applicant, the parties agree that there was a shortfall of USD3,287. Therefore, this sum shall be paid by the Organisation to the UN Joint Staff Pension Fund on behalf of the Applicant in order to restore the Applicant's entitlement. In other words, the Organisation must pay the amount that would have been its contribution had the violation not occurred. This contribution of USD3,287 is to be made with appropriate adjustments to the Applicant's pension rights and benefits (i.e., as if separate additional monthly contributions totaling USD3,287 were made at the time they would have been made had the Applicant been promoted).

Emotional harm

21. As stated in para. 31 of the previous Judgment, to be compensated for emotional harm and anxiety, the Applicant must articulate her claims with sufficient specificity and provide evidence of injury. Despite the clear direction to particularise and establish her

claims with supporting material, the Applicant failed to do so in her submissions to the Tribunal. Accordingly, she has failed to prove to the Tribunal that she suffered emotional harm requiring compensation and no compensation is ordered under this head.

Applicable interest rates

22. In *Warren*, the United Nations Appeals Tribunal discussed how interest rates are to be calculated and applied for payments that are determined to be due. The compensation, with interest, was ordered to be paid within 60 days of the date the judgment was rendered and became executable. The judgments of the Dispute Tribunal do not become executable until the expiration of the 45-day period for appeal. Therefore, following the Appeals Tribunal's reasoning in *Warren*, interest rates should be calculated and applied as follows:

- a. For sums determined by the Dispute Tribunal to be due *prior* to the rendering of its judgment (for instance, lost salary), the applicable US Prime Rate shall apply from the date the payment was due to the date of payment. The Respondent shall have 60 days from the date the judgment becomes executable to pay the sum ordered, in default of which an additional five per cent shall be added to the applicable US Prime Rate.
- b. For sums determined by the Tribunal to be due from the date the judgment becomes executable (for instance, compensation for non-economic loss), no interest shall apply before the judgment becomes executable. The Respondent shall have 60 days from the date the judgment becomes executable to pay the sum ordered, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within this 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

Order

23. The Respondent is ordered to pay compensation for the actual economic loss suffered by the Applicant as follows: (i) for the first year (1 August 2007–31 July 2008),

the amount of USD5,699 plus interest at the applicable US Prime Rate until the date of payment, and (ii) for the second year (1 August 2008–31 July 2009), the amount of USD8,565 plus interest at the applicable US Prime Rate until the date of payment. If payment is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

24. The Respondent is ordered to pay compensation for the breach of the Applicant's procedural rights in the amount of USD15,000. This amount is in addition to the three months' salary already paid to the Applicant by the Secretary-General. This sum is to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

25. The Respondent is ordered to pay USD3,287 to the UN Joint Staff Pension Fund on behalf of the Applicant. This additional contribution is to be made with appropriate adjustments to the Applicant's pension rights and benefits. In the alternative, should this retroactive additional contribution not be permitted in this case under the regulations of the UN Joint Staff Pension Fund, the amount of USD3,287 is to be paid to her under the terms stipulated in para. 24 above.

26. All other pleas are rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of October 2010

Entered in the Register on this 29th day of October 2010

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry