



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BI BEA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Sandra Medel, UNHCR

Introduction

1. The Applicant's indefinite contract with the United Nations High Commission for Refugees (UNHCR) was terminated on 30 June 2004.
2. The Joint Appeals Board (JAB) found that there was a link between the decision not to renew his assignment and an investigation concerning him that was not closed until March 2005. This investigation eventually exonerated him from any allegations for misconduct.
3. On 13 May 2008, the JAB recommended that the Applicant be paid nine (9) month's net salary as compensation for the termination of his indefinite contract but after waiting several months and receiving no response from the Secretary-General, on 8 September 2008 he filed an appeal with the former United Nations Administrative Tribunal. In that Appeal he sought:
 - a. The implementation of the findings and recommendations of the JAB.
 - b. Payment of an additional compensation in the amount of six month's salary at the FS-5 level to take account of the successive delays (four years) in proceedings that the organization has caused throughout this matter.
 - c. Compensation in the amount of 5000 Swiss Francs for expenses incurred in preparing and submitting the case both to the JAB and to the former UN Administrative Tribunal.
4. Further to the recommendations of the JAB, on 29 December 2008 the Secretary General paid the Applicant USD 34,677.
5. On 3 January 2012 the Applicant responded to the Tribunal's case management order, outlining his claims as follows:
 - a. whether the Applicant was entitled to receive from UNHCR USD 70,200 instead of USD 34,677 for loss of income;

- b. whether the Applicant was also entitled to pension contributions for six (6) months and insurance premiums;
- c. whether the Applicant was entitled to the interests accrued on this amount since the date of separation.

Issues

- 6. The issues for determination by the Tribunal are:
 - a. What was the correct amount of compensation due to the Applicant?
 - b. Is the Applicant entitled to pension contributions and insurance premiums for six months?
 - c. Is the Applicant entitled to interest accrued on the compensation ordered since the date of his separation?
 - d. Is the Applicant entitled to an award of costs?

Facts

- 7. The Applicant joined the service of the UNHCR on 4 February 1991 as an Administrative/Finance Assistant at the GL-7 level, for the sub-office in Tabou (Côte d'Ivoire). On 1 August 2000 he was assigned for two years to the Emergency Preparedness and Response Section in Geneva on an FS-5 (Field Service) post where he was responsible for administration and finance.
- 8. On 15 October 2002 the Applicant was redeployed to Angola. This redeployment was initially intended for three months, but was extended for a further nine (9) months to 15 October 2003.
- 9. On 15 October 2003, the Applicant was appointed to the sub-office in M'banza Congo (Angola). His assignment was due to end on 31 March 2004, but was extended to 30 June 2004.

10. On 23 April 2004, upon returning from leave, the Applicant was informed that his services would not be required after 30 June 2004. The letter stated that:

due to the fact that [he] d[id] not have a post to go to and no comparative review can be undertaken as no posts at [his] level/functions are available at [his] old duty station, [his] appointment w[ould] cease effective 30 June 2004.

11. The Applicant was separated from service on 30 June 2004.

12. The Assistant High Commissioner from whom the Applicant sought help on 6 July 2004 asked the Applicant's former office in Angola whether he could return to his post, but this request was denied.

13. The Applicant then approached the Director of Human Resources on two occasions, following which he was given a two-month temporary assistance contract covering 8 November 2004 to 31 December 2004. Since that ended the Applicant has had no employment with the United Nations.

14. On 3 March 2005, the Applicant received a letter from the head of the investigation unit at UNHCR which informed him of an investigation which had been conducted against him, with no resulting evidence of misconduct or criminal activity. Until that time, he had not been notified of any investigation being carried out against him.

15. The Respondent contends that from 23 April 2004 until 1 October 2006 the Applicant was liaising with the Administration making various attempts to resolve the matter informally and be reinstated. These efforts did not result in the Applicant's reinstatement.

16. On 1 October 2006, the Applicant filed an appeal with the UNHCR secretariat in Geneva, which was received on 13 November 2006. The JAB was constituted on 22 May 2007. The JAB reported on his case on 13 May 2008.

17. The JAB found that the termination of the Applicant's contract shortly after the investigation commenced was a "troubling coincidence" and that the

investigation strongly influenced the decision not to renew the Applicant's assignment in M'banza Congo. The JAB stated that there was a set of disturbing and mutually corroborating clues that tipped the balance in favour of the Applicant's contention that there was indeed a link between the decision not to renew his assignment and the investigation concerning him that was not closed until March 2005.

18. The JAB held that it could not presume that had the misuse of procedure not been committed, the Applicant would still hold an indefinite contract. In light of the information in the Inspector-General's report, it was clear the Applicant would have remained in M'banza Congo for at least the last six months of 2004.

19. The JAB awarded the Applicant compensation equivalent to six month's net salary, and compensation of three month's net salary for the moral injury suffered. It stressed the lack of notice of the investigation concerning the "very serious allegations" made against him. The JAB noted that it took fourteen (14) months for the Inspector-General's Office to prepare the report and found that as the Applicant did not find out until March 2005 that very serious allegations had been made against him and finally cleared, gave rise to severe stress and to fears that his reputation had been tarnished for 14 months.

20. The Secretary of the JAB transmitted the Report of the panel to the Secretary-General on 19 May 2008. The Applicant received a copy of the report on 23 June 2008.

21. As the Secretary-General did not respond to the Report, the Applicant applied to the former Administrative Tribunal on 8 September 2008. He submitted that the lack of response constituted a denial of justice, and sought the orders listed above.

22. The Deputy Secretary-General informed the Applicant on 24 October 2008 that the Secretary-General accepted the findings of the JAB and decided to compensate the Applicant with "nine month's net base salary at the rate in

effect on 30 June 2004 in respect of the Field Service post [the Applicant] held at the time.”

23. The Respondent replied to the Applicant’s submission to the former UN Administrative Tribunal on 30 March 2009. It advised that the issue of nine month’s salary compensation was no longer disputed as the Respondent had taken a decision to accept the JAB recommendations. The Applicant submitted additional observations on the Respondent’s answer on 6 April 2009. He requested an additional six month’s salary in compensation, as the compensation paid to him was substantially less than the salary due to him based on the JAB report. The Applicant further claimed costs to compensate him for UNHCR’s deliberate actions to cause him to engage in lengthy and interminable proceedings to ‘wear him down’.

24. The case was transferred to the United Nations Dispute Tribunal (“the Tribunal”) Registry in Nairobi as of 1 January 2010 in accordance with ST/SGB/2009/11.

Applicant’s submissions

25. The Applicant’s submissions to the Tribunal were amended from those in his original application having received the response of the Secretary-General on 24 October 2008.

26. The JAB determined that had the Administration not breached his contractual rights, he would have held his position at least until the end of December 2004. As the Respondent accepted the JAB’s conclusions and recommendations he should have received 72,000 USD for ‘actual loss of income’ instead of UDS 34,677. The Respondent erroneously used the calculation of “net base pay” instead of “net pay”.

27. He was also entitled to the Administration’s pension contributions for an additional six months, as this fell under the heading of ‘actual loss of income.’

28. According to case law, provision of interest was necessary to place the Applicant in the same position that he would have been in but for the breach.¹

Respondent's submissions

29. In his reply to the original application, the Respondent argued that:

a. The Applicant's request that the JAB recommendations be implemented is no longer disputed, as the Respondent took a decision dated 24 October 2008 accepting the JAB recommendations.

b. The request for payment of additional compensation in the amount of six month's salary for delays in the proceedings is not justified, as the delay the Applicant alleges as regards the period from 23 April 2004 until 1 October 2006 cannot be attributed to the Administration. Ever since the Applicant was notified, on 23 April 2004, that he was being separated from the Organisation, the Applicant has sought to find an amicable solution. He engaged of his own free will, in formal and informal negotiations with the Administration until 1 October 2006 at which point he submitted an appeal to the JAB secretariat. The Respondent further submitted that the Applicant did not suffer unreasonable delay in the review of his case such as to warrant compensation, since he was compensated some two years after initiating proceedings in the JAB. The Respondent relied on case law to submit that the Applicant must prove injury as a result of delay.²

c. There was no exceptional circumstance which would justify reimbursement of the Applicant's costs.

¹ *Assoumi*, 2011-UNAT-162, at para. 23. Also *Warren*, 2010-UNAT-059.

² Judgment No. 327, *Ridle* (1984), paragraph IX; Judgment No. 541 *Ibarria* (1991), paragraph XI; Judgment No. 918 *Meron* (1999), paragraph V.

Considerations

Compensation due to the Applicant

30. The Applicant received the amount of compensation awarded by the JAB which, when quantified, amounted to USD 34,677. There is no practical difference between the terms 'net pay' and 'net base salary'. Both refer to a payment of an employee's salary entitlements after all deductions have been made. The JAB did not recommend payment of the gross amount as now claimed by the Applicant.

31. As the Applicant did not appeal the findings or the award made by the JAB, the Tribunal is unable to change the recommendation. In any event, the recommendation was accepted by the Secretary-General and belatedly paid to the Applicant who accepted the amount. The payment of the compensation by the Secretary-General renders the issue of the amount of compensation payable moot.

Pension Contributions

32. The Applicant claims for the contributions that UNHCR would have made to the Applicant's pension fund had he remained in employment for six (6) months on the basis that this constitutes an actual loss of income.

33. The Applicant is mistaken in making this claim. The award of compensation paid to the Applicant is to compensate him for the loss of his position. It does not amount to a continuation of his employment beyond his separation date. The Applicant is not entitled to any benefits beyond the separation date. The Organisation's contributions to the pension fund are nominal contributions which are only accounted for at the relevant time based on the actual service of a staff member. They are not a supplement to the staff member's income and cannot be claimed as such.

34. The Applicant's claim for the Organisation's pension contributions is refused.

Interest

35. The Tribunal may award a payment of interest pursuant to art. 10.5 of the Statute of the Dispute Tribunal.

36. The Respondent claims that the delays suffered by the Applicant are of his own making. However, the Tribunal finds that whatever the reason for delays in a case, including attempts to informally resolve a case, where an award of compensation is made it is open to the Tribunal to award interest from the date of the breach. The Applicant should not be penalised for his attempts to resolve his case by informal means, nor for the lethargy with which the Administration responded to his efforts. The Applicant's access to relief was protracted from June 2004 when his contract was terminated until the actual payment of compensation in December 2008, a total of four years.

37. The Tribunal notes that it was not until the Applicant filed a claim with the former UN Administrative Tribunal on 8 September 2008 that the Secretary-General finally addressed and accepted the JAB recommendations on 24 October 2008, and even then there was a further 3 month delay before the Secretary-General paid the accepted amount on 29 December 2008.

38. In the light of these delays, the Applicant is entitled to interest on the sum of USD 23,118 (six month's salary) from the date of wrongful separation, namely, 30 June 2004, until the payment by the Administration of compensation, that is, the 29 December 2008 at the US Prime Rate applicable on 30 June 2004.

39. Interest on the moral damages award of USD 11,559 (three month's salary) shall be calculated from when the JAB made its recommendation on 13 May 2008, until the payment by the Administration of compensation on 29 December 2008 at the US Prime Rate applicable on 13 May 2008.

40. 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.

Costs

41. Art. 10.6 of the Statute of the Dispute Tribunal provides that: '[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.'

42. The term "costs" in Article 10.6 refers to the reimbursement of part or all of the costs of litigation that have been actually expended by a party. Although costs may be awarded where the Tribunal finds that a party has manifestly abused the proceedings, it is not a means by which a party can be punished. That would offend against article 10(7) of the Statute which prohibits the award of exemplary or punitive damages.

43. In the Applicant's letter of 6 April 2009, he requested reimbursement of costs for the UNHCR's attempt to 'deliberately' cause him to 'engage in lengthy and interminable proceedings'. He thus requested the Tribunal to 'do whatever it can to help me obtain reparation that is fair and equitable.' The Applicant requested compensation in the amount of 5,000 (five thousand) Swiss Francs for expenses incurred in preparing and submitting the case both to JAB and to the Administrative Tribunal.

44. If the Respondent had reacted without delay to the JAB report, the Applicant would not have been put to the expense of filing a claim. In the absence of any reason given by the Respondent for the delay, the Tribunal finds that it was a manifest abuse of the proceedings which entitles the Applicant to an award of costs.

45. The Tribunal awards the Applicant the Sum of 5,000 Swiss Francs in reimbursement of his costs.

Conclusions

46. In light of the foregoing the Tribunal DECIDES:

- a. The amount of compensation awarded to the Applicant by the JAB was correctly paid by the Administration, therefore the request for additional compensation is denied;
- b. The Applicant's request for pension contributions is denied;
- c. The Applicant is awarded interest on the sum of USD 23,118 from 30 June 2004 until 29 December 2008 at the US Prime Rate applicable on 30 June 2004, and on the sum of USD 11,559 from 13 May 2008 until 29 December 2008 at the US Prime Rate applicable on 13 May 2008;
- d. The Applicant is awarded costs in the amount of CHF 5,000.

(Signed)

Judge Coral Shaw

Dated this 11th day of October 2012

Entered in the Register on this 11th day of October 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi