



United Nations Dispute Tribunal

Case No.: UNDT/NBI/2017/012

Judgment No.: UNDT/2017/024

Date: 6 April 2017

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PORTER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON INTERPRETATION
OF JUDGMENT**

Counsel for the Applicant:

Monica Ona Bileris, Esq.

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 21 February 2012 the Applicant filed an application challenging three issues that arose from the circumstances of a prolonged medical leave that spanned a period of more than two years. These issues were:

a. A decision taken by UNAMI administration to keep him on medical leave for more than two years after his doctors had recommended that he was fit to return to work.

b. During the period of his forced medical leave, the Administration ignored his pleas for information and misled him thereby causing him untold stress and hardship.

c. Failure by the Administration to reimburse financial claims that accrued to him as a result of the forced medical leave.

2. The Respondent filed a reply to the application on 26 March 2012 contending that the Application was not receivable *rationae temporis* as the Applicant had not requested management evaluation of the contested decisions within the requisite time limit.

3. After considering the submissions on both sides with regard to receivability, the Tribunal ruled on 4 December 2013 that it was indeed receivable.¹

4. Thereafter, the Respondent appealed unsuccessfully to the Appeals Tribunal.²

5. On 1 July 2016, the Tribunal issued Judgment No. UNDT/2016/096 in favour of the Applicant as follows:

104. The facts of this case show that the Applicant should have returned to work upon receiving medical clearance on 30 November 2009. The Tribunal therefore orders the Respondent to

¹ *Porter* UNDT/2013/156.

² *Porter* 2015-UNAT-507.

pay the Applicant his full salary from 30 November 2009 to 1 August 2011 (less any payments that had been made to him such as full salary and half salary during the said period.) In calculating payments due to the Applicant, the hazard pay component of his salary is not to be included since he was in fact outside of the mission area during the period.

105. The Tribunal is also convinced by the submissions made by the Applicant [...] that the prolonged sick leave caused him anxiety and had a devastating effect on his personal and financial affairs including his failure to meet his mortgage obligations. The Applicant is accordingly entitled to moral damages which the Tribunal awards at USD 5,000.

106. The Respondent is ordered to grant the Applicant access to his personnel files in accordance with the relevant administrative practice.

107. All other pleas are refused.

6. On 15 February 2017, the Applicant filed an application titled “Application for interpretation of Judgment”.

7. The Respondent filed a reply to the said application on 21 March 2017. The Applicant filed a rejoinder to the Respondent’s reply on 30 March 2017.

Applicant’s case

8. The Applicant’s case is that the judgment be reviewed or interpreted on the following grounds:

a. The judgment ordering that he be awarded his back salary and damages was entered on 1 July 2016. On or about 9 December 2016, he received a lump sum payment of USD106, 108.43 from the Organization. After inquiring about the nature of the payment and requesting a breakdown thereof, on or about 20 January 2017, his Counsel was informed that the payment was intended to satisfy the UNDT Judgment.

b. His request for interpretation was filed within 30 calendar days of the discovery of the fact and within one year of the date of judgment as prescribed by art. 12 of the Statute of the Dispute Tribunal and his application for “*Revision* is therefore receivable” (emphasis added).

c. At the time that Judgment No. UNDT/2016/096 was issued, he was unaware that the Respondent would use a mistaken calculation in satisfying the financial award as ordered by the Tribunal, the discovery of which he was unable to rely upon in the original proceeding or else he would have spelled out the reliefs he sought more clearly. The discovery of the fact would necessarily have led the Tribunal to specify in its Judgment the dates upon which it relied in ordering relief.

d. The new fact that he is pleading is the fact that the Respondent paid him according to the pay scale in place at the time of his separation from the Organization not the salary scale in effect at the time of the Tribunal's judgment. Such fact was not known to him at the time of Judgment and his ignorance was not due to negligence on his part.

e. Before receiving the lump sum payment on 9 December 2016, he promptly inquired with the Respondent about the nature and breakdown of the payment on 7 December 2016 and 17 January 2017 only to find out that the Administration based the calculation on his old salary scale in effect at the time of his separation and not on the salary scale in effect on the date of judgment.

f. Had he known that the Respondent planned to use the said salary scale, he would have requested that he be granted payment of salary using the salary scale in effect at the time of judgment.

g. Allowing the Respondent to use the net base salary scale in effect at the time of his separation obstructs justice as Judgment No. UNDT/2016/096 called for him to be made whole or in other words to be put in the position he would have been in but for his separation, that is, at the salary scale in place in 2016 and not 2009 and he would have retired with a higher pension.

h. He seeks the revision of paragraphs 104 and 105 of Judgment No. UNDT/2016/096. The date on which his salary was to be paid ought to have been calculated as from 1 July 2016 and he accordingly prays the

Tribunal to interpret its Judgment No. UNDT/2016/096 to reflect that the said date be used. He also requests the Tribunal to clarify whether or not the Organization should retroactively credit him for the purposes of his pension and any other emoluments for which he was qualified for were it not for the Respondent's wrongdoing, he would have been in a higher earning bracket.

i. Alternatively, should the Tribunal clarify its Judgment and fix his date of separation as the date to be used when calculating the 21 months' net base salary, he requests the Tribunal to interpret its Judgment to provide that he be paid interest on the base salary at the rate of eight percent per annum from the date of separation through to the date of the Respondent's satisfaction of the said Judgment.

Respondent's case

9. The Respondent's submissions are summarized below.

a. An application for interpretation of judgment is receivable only if the operative part of the judgment gives rise to uncertainty or ambiguity about its meaning. Paragraphs 104 and 105 are the operative parts of the Judgment. They do not give rise to uncertainty or ambiguity about its meaning.

b. Paragraph 104 of the Judgment specifically orders that the Applicant be paid his full salary from 30 November 2009 to 1 August 2011 (less any payments that had been made to him such as full salary and half salary during the said period).

c. Logic dictates that the full salary for the period 30 November 2009 to 1 August 2011 must be calculated in accordance with the salary scale in place for that period. Accordingly, this is how paragraph 104 of the Judgment was executed on 8 December 2016. The Applicant has been placed in the same position as if he had returned to work effective 30 November 2009.

d. Paragraph 105 of the Judgment is equally clear in stating that the Applicant is entitled to moral damages in the amount of USD5,000. Accordingly, the Judgment was executed to give effect to the paragraph's plain meaning.

e. In terms of the request for revision, the Applicant has not identified any decisive fact, which at the time of the rendering of the Judgment, was unknown to him and the Dispute Tribunal and was not due to negligence on his part. An application for interpretation or revision is not a tool to remedy failings in the litigation of the case on the merits. To allow for this to happen would be in violation of the principle of finality. It was open to the Applicant argue in his merits application how any damages should be calculated and whether an order for prejudgment interest was warranted. He did not.

f. In response to the Applicant's claims relating to his current pension benefits, the Applicant has produced no evidence that his pension benefits have been adversely impacted. The Respondent does not have access to the Applicant's pension statements.

Applicant's rejoinder to the reply

10. In his rejoinder to the reply, the Applicant makes the following submissions,

a. He does not seek to remedy any failings in the litigation of the case on the merits, as the Respondent contends. He merely seeks clarification of the relief as ordered in Judgment UNDT/2016/096. Such request in no way violates the principle of finality of the litigation as he is not seeking to reopen any issues or arguments on their merits.

b. Contrary to Respondent's assertion, the subject Judgment did not specify the date upon which the Applicant's salary was to be calculated, nor the payment of interest—the discovery of which fact only became clear at the time of the Judgment.

c. Logic dictates that his full salary should have been paid in accordance with the salary range in place at the time of the Judgment, or alternatively, that he should be paid interest from the date of his improper separation because logically, if the case were, for instance, thirty years old, thirty year-old rates of pay would not suffice to make the Applicant whole.

d. In *Azzouni*, 2011-UNAT-162, the court recognized that the very purpose of compensation is to place a staff member in the same position he or she would have been in had the Organization complied with its contractual obligations.

e. With regard to his pension, the Applicant submits that, due to the discontinuity of his service caused by the Organization's breach by putting him on forced medical leave for over two years, he was not able to complete a full ten years of service, which would have put him in a higher paying pension bracket. For that reason, he seeks to clarify whether the award of salary was meant to credit him his pensionable remuneration.

Considerations

11. The legal issues arising for consideration in this case are:

a. Is the application for interpretation/revision receivable?

b. Is the Applicant entitled to the payment of his salaries for the period 30 November 2009 until 1 August 2011, as ordered by the Tribunal, at a rate different to when the said salaries were adjudged due, denied and unpaid?

12. Either party may apply to the Dispute Tribunal for an interpretation of the meaning or the scope of a final judgment, provided that it is not under consideration by the Appeals Tribunal.³

13. Either party may apply to the Dispute Tribunal for a revision of an executable judgment on the basis of the discovery of a decisive fact which was, at

³ Article 12.3 of the UNDT Statute and art. 30 of the UNDT Rules of Procedure.

the time the judgment was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgment.⁴

14. An exercise by the Tribunal designed to give effect to the provisions for interpretation of judgment under art. 30 of the UNDT Rules of Procedure is not an avenue for review nor is it a basis for a new judgment. Any dissatisfaction with an interpretation by the UNDT where the need arises, shall only be part of an appeal against the substantive judgment.⁵

15. The purpose of interpretation as set out in the Statute and Rules of the Appeals Tribunal is not to determine the disagreement of an applicant with a judgment who wishes to reargue an appeal.⁶ Interpretation is only needed to clarify the meaning of a judgment where there are reasonable doubts about the will of the Tribunal or the arguments leading to a decision. But if the judgment is comprehensible, whatever the opinion the parties may have about it or its reasoning, an application for interpretation is not admissible.⁷

Is the application receivable?

16. The Respondent has challenged the receivability of this application on the grounds that the operative parts of Judgment No. UNDT/2016/096, that is, paragraphs 104 and 105, do not give rise to uncertainty or ambiguity about its meaning. The Respondent further submits that in terms of the request for revision, the Applicant has not identified any decisive fact, which at the time of the rendering of the Judgment was unknown to him and the Dispute Tribunal and was not due to negligence on his part.

17. The present application prays for both interpretation and the revision of Judgment No. UNDT/2016/096. The Tribunal, having perused the Applicant's submissions, finds that what is properly before it is an application for

⁴ Article 12.1 of the UNDT Statute.

⁵ *Tadonki v SG* 2010-UNAT-010.

⁶ *Sidell* 2014-UNAT-489.

⁷ *Abbasi v SG* 2013-UNAT-315.

interpretation of paragraphs 104 and 105 of the said Judgment. This application was properly filed in accordance with the requirements set out at art. 12.3 of the UNDT Statute and art. 30 of the Tribunal's Rules of Procedure.

18. Further, the Tribunal sees that there is a need to clarify the meaning of paragraphs 104 and 105 of Judgment No. UNDT/2016/096. To that extent, the application is therefore receivable.

Is the Applicant entitled to the payment of his salaries for the period 30 November 2011, as ordered by the Tribunal, at a rate different to when the said salaries were adjudged due, denied and unpaid?

19. In *Azzouni*, it was held, that

The very purpose of compensation is to place a staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. Accordingly when calculating the quantum of compensation, it must be set as of the date of the breach of the staff member's contractual rights and not the date of judgment. In many cases, in order for the staff member to be placed in the same position he or she would have been in, but for the breach, the award of interest is to be part of the compensation.⁸

20. The salary scale to be applied to the Judgment should be calculated as of the time of separation, that is, 30 November 2009. The Secretary-General correctly calculated the compensation from the date of separation but failed to add the accrued interest to which the Applicant is entitled.

Judgment

21. It is hereby ordered that the Secretary-General add a pre-judgment interest on the compensation already paid; calculated at the US Prime Rate applicable on 30 November 2009 (date of separation) to 9 December 2016 (date of payment).

22. All other pleas are refused.

⁸ Op. cit., at para. 23 citing *Warren* 2010-UNAT-059.

(Signed)

Judge Nkemdilim Izuako

Dated this 6th day of April 2017

Entered in the Register on this 6th day of April 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi