UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/089
Judgment No.: UNDT/2017/013
Date: 7 March 2017
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas

HO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bettina Gerber, UNOG

Introduction

1. By an incomplete application filed on 4 October 2016, completed on 7 October 2016, the Applicant, a former Programme Management Officer (P-3), Sustainable Development Mechanisms Programme ("SDM"), United Nations Framework Convention on Climate Change ("UNFCCC"), based in Bonn, challenged the decision of the Chief, Human Resources ("HR"), UNFCCC, dated 31 May 2016, to pay her the sum of 23,358 Malaysian ringgit (MYR) as repatriation grant alleging that the Organization still owes her 248 United States dollars (USD).

2. The Respondent submitted his reply on 14 November 2016.

Facts

3. The Applicant entered the Organization as a Programme Management Officer, UNFCCC, in Bonn on 8 November 2012, under a fixed-term appointment at the P-3 level.

4. In January 2015, the Applicant resigned effective 15 February 2015.

5. On 26 May 2015, she submitted proof to UNFCCC that she had relocated to Malaysia, her home country.

6. On 1 June 2015, UNFCCC finalized the Personnel Action related to the Applicant's separation from service ("Separation PA") effective 15 February 2015.

7. By email dated 2 June 2015, UNFCCC sent to the Applicant a copy of her Separation PA for her records.

8. On 6 July 2015, the Applicant emailed a Human Resources Assistant, HR, UNFCCC, requesting advice on the section "End of Service entitlements" on her separation PA

9. On 8 July 2015, she wrote another email to HR, UNFCCC, requesting *inter alia* information about whether her repatriation grant had been remitted and, if so, to where it had been sent. By email of the same day, HR, UNFCCC, advised the Applicant that her "repatriation grant [would go] to the bank account [she] indicated in [her] final salary payment form" and that it would be processed "via payroll". The Applicant replied, also on the same day, confirming that she had "not received her 5 weeks repatriation grant", and asking that UNFCC "check with payroll or provide the name/email to check with" while noting that the matter had "been long outstanding".

10. By email of 13 July 2015, the Applicant followed up with HR, UNFCCC, on the payment of her repatriation grant. By email of the same day, a Human Resources Assistant, HR, UNFCCC, confirmed that she was in contact with Payroll, and informed her that while it could take some months for the processing of the repatriation grant, she would keep the Applicant informed of any development.

11. By email of 4 December 2015 to HR, UNFCCC, the Applicant reiterated her request for information about when she would be paid the repatriation grant. The following day, a Human Resources Assistant, HR, UNFCCC, replied that she would follow up on the outstanding payment upon her return to the office the following week.

12. By email of 24 February 2016 the Applicant followed up yet again on the payment of her repatriation grant.

13. By email of 18 May 2016, Applicant's Counsel from the Office of Staff Legal Assistance ("OSLA") contacted the Chief, HR, UNFCCC, requesting his intervention in the processing of the repatriation grant.

14. By email of 26 May 2016, the Chief, HR, UNFCCC, responded that they had "resolved the issue and [that the Applicant] may expect payment over the next few weeks" and expressed his regret for "the delay in the processing of [the] payment".

15. By email dated 30 May 2016 to the Management Evaluation Unit ("MEU"), the Applicant requested management evaluation of "the long overdue payment [of her] repatriation grant".

16. Following clearance from UNFCCC, the Financial Resources Management Service, UNOG, released the payment of the repatriation grant with a payment date of 31 May 2016. As per the documents on file, the repatriation grant amount held in trust was USD5,994.07. It was wired, as per the Applicant's instructions, to her MYR account, and the conversion from USD to MYR was made using the prevailing United Nations Operational Rates of Exchange (UNORE) of May 2016, namely USD1 = MYR3.897, resulting in the crediting of MYR23,358.89 to the Applicant.

17. By letter dated 6 June 2016, the MEU acknowledged receipt of the Applicant's request for management evaluation.

18. By email of 8 June 2016, a Human Resources Officer, HR, UNFCCC, sent to the Applicant an "UMOJA clip regarding the disbursement of the repatriation grant". It showed that USD5,994.07 had been cleared for payment effective 31 May 2016. By email of the same day, the Applicant informed UNFCCC that the money had not yet reached her account and that, based on the information she had received, she was of the view that the Organization had underpaid her USD268.29.

19. By email of 9 June 2016, a Human Resources Assistant, HR, UNFCCC, replied to the Applicant that she had "contacted treasury again for further information".

20. By email of 10 June 2016, the Applicant reiterated that she had not received any monies in her account. On the same day, a Human Resources Assistant, UNFCCC, replied to the Applicant that UNFCC was "still awaiting feedback from treasury".

21. By email of 14 June 2016 to the Applicant, the MEU advised her that "the Administration presented a payslip whereby the repatriation grant [had been]

transferred to [her] account", and asked her to confirm if she had received the payment in question. By email of 15 June 2016, the Applicant *inter alia* advised the MEU that although she had not received any payslip, she had been underpaid USD268 for her repatriation grant and that she wished to "add this underpayment to [her] claim against UNFCCC".

22. By email dated 21 June 2016, a Human Resources Officer, HR, UNFCCC, inquired with the Applicant if she had received the repatriation grant.

23. By letter dated 14 July 2016, the MEU informed the Applicant that it would proceed to close her file. In support of this, the MEU advised the Applicant, *inter alia*, that payment of her repatriation grant, amounting to USD5,994.07, had been executed on 31 May 2016 and that she had confirmed receipt of the equivalent MYR amount, namely MYR23,358,89 by email of 24 June 2016. Her banking statement of Maybank shows that she received that amount in her bank account on 20 June 2016.

24. The Applicant filed the present application on 4 October 2016, and the Respondent filed his reply on 14 November 2016. By Order No. 26 (GVA/2017) of 1 February 2017, the Tribunal asked the Respondent to provide additional information on the normal workflows to process payment of a repatriation grant, and the Applicant to do so with respect to material and moral damages she suffered. Both parties provided information pursuant to said order on 15 February 2017, and the Applicant filed some documents on an *ex parte* basis.

Parties' submissions

25. The Applicant's principal contentions are:

a. There was an undue delay in paying her the repatriation grant despite several follow–ups;

b. It appears that the initial payment made on 31 May 2016 via Citibank failed and that a third-party, namely Intl FCStone, was used to reissue the payment on 20 June 2016. This, together with the time elapsed between the clearance of the payment by the Organization and its receipt by the

Applicant, i.e., 21 days, can only lead to conclude that the payment was made in June 2016 and that, thus, the (higher) UNORE rate for that month should have been applied;

c. She lost the opportunity to "add to [her] currently held risk free investment account with a yield of approximately 6.5% per annum";

d. If payment had been made in December 2015, she would have benefitted from a higher UNORE (USD1 = MYR4,29);

e. In her submission of 17 February 2017, the Applicant also states that when she joined UNFCCC, her salary was wrongly set at the P-3 , step 1, instead of step 5.

f. As remedies, the Applicant requests:

i. compensation for her financial loss by paying her "interest at 8% per annum, from the date the payment of the repatriation grant was due, namely 26 May 2015, until the payment was 'partially made' on 20 June 2016" pursuant to *Castelli* UNDT/2010/011; and

ii. the award of moral damages amounting to USD5,000 "as a result of emotional stress and time cost of sending/drafting emails";

iii. an explanation concerning why her payment was not released for almost 12 months, and on the "failure to take prompt corrective action"; and

iv. "documentation (from external sources, i.e., bank statement) of the payment amount, date and applicable exchange rate. And immediately remit the difference/shortfall of [USD268] in the repatriation grant due to [her]".

26. The Respondent's principal contentions are:

a. The Applicant's challenge concerning the "long overdue for payment of her repatriation grant (sic)" is moot because the repatriation grant has been paid to her;

b. The repatriation grant amount paid to the Applicant was USD5,994.07, equivalent to MYR23,358.89 at the time the payment was released, namely May 2016, using the applicable UNORE rate. The sum of USD5,725.78 is the amount debited by the bank against UNOG's USD account to purchase MYR23,358.89 on the date that the banking operation was being processed; it does not reflect the amount of the repatriation grant paid to the Applicant;

c. Payroll, UNOG, traced the payment made to the Applicant and did not find any return of funds or re-payment requests that could explain the time taken for the monies to reach the Applicant's account. Payroll records lead to conclude that funds were remitted from the Organization's account on 2 June 2016, and the Applicant may seek clarification from her bank on this matter;

d. The delay in paying the Applicant "was the result of a human oversight by UNFCCC", whereby no action was taken to process her repatriation grant at the time of receipt of her proof of relocation. It is not the result of ill-will or bias against the Applicant, and the Chief HR, UNFCCC, regretted it in writing. Furthermore, in his email of 26 May 2016, he committed to paying the applicant "over the next few weeks";

e. The Applicant is not entitled to any interest as compensation because the nature of the irregularity was human oversight, and not the result of "a practice of the Administration tainted with bad faith towards the Applicant". Furthermore, the Staff Rules and Regulations do not provide for payment of interest depending when an entitlement is paid and, also, the Applicant did not substantiate her claim concerning specific damages that she suffered and/or her holding of an account yielding 6.5% per annum; and

f. The Applicant is also not entitled to moral damages because she did not submit any evidence in support of it, as required by art. 10.5.b) of the UNDT Statute. Furthermore, "a delay cannot be considered as a fundamental breach of the Applicant's rights", and she did not "claim to be in financial distress … or to have suffered specific moral damages due to the delay".

Consideration

27. The Tribunal first has to decide upon some preliminary procedural matters.

Ex parte documents filed by the Applicant

28. The Tribunal decides that the *ex parte* documents filed by the Applicant on 17 February 2017 shall remain *ex parte*, since it did not find them relevant to adjudicate the present matter. There was thus no need to share them with the Respondent.

Hearing

29. Article 9 of the UNDT Rules of Procedure reads as follows:

> A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative that summary judgement is appropriate.

30. By Order No. 26 (GVA/2017) of 1 February 2017, the Tribunal asked the parties to provide it with additional information, and particularly had invited the Applicant to give or provide evidence with respect to any material or moral damages.

31. Since there is no contention about any facts relevant for the determination of the present matter, and since the main issue to be addressed is of a legal nature, the Tribunal does not find it necessary to hold a hearing to adjudicate the case, and will hereby decide on the application based on the written submissions and documentary and written evidence submitted by the parties.

Legal framework

32. Staff rule 3.19(a) (Repatriation grant) provides that:

> The purpose of the repatriation grant provided by staff regulation 9.4 is to facilitate the relocation of expatriate staff members to a country other than the country of the last duty station, provided that they meet the conditions contained in annex IV to the Staff Regulations and in this rule.

33. Staff Regulation 9.4 stipulates that:

> The Secretary-General shall establish a scheme for the payment of repatriation grants in accordance with the maximum rates and under the conditions specified in annex IV of these Regulations.

34. The above-mentioned annex IV (Repatriation grant) states the following:

> In principle, the repatriation grant shall be payable to staff members who have completed at least five years of qualifying service, whom the Organization is obligated to repatriate and who at the time of separation are residing, by virtue of their service with the United Nations, outside their country of nationality. The repatriation grant shall not, however, be paid to a staff member who is dismissed. Eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station. Detailed conditions and definitions relating to eligibility and requisite evidence of relocation shall be determined by the Secretary-General.

35. The Applicant's eligibility to the payment of a repatriation grant under the above provisions is undisputed. There is also no dispute as to the USD amount due to the Applicant, in application of the table contained in annex IV to the Staff Rules and Regulations, namely USD5,994.

36. What is in dispute is the actual amount paid to the Applicant in MYR, in light of the United Nations Operational Rates of Exchange ("UNORE") applied at the time of the payment. The Applicant sustains that the exchange rate that should have been applied is that of June 2016 (UNORE USD1 = MYR 4.078), rather than that of 31 May 2016 (USD 1 = MYR 3.89), and that, accordingly, she was underpaid USD268. Furthermore, the Applicant states that she was entitled to payment of 8% interest on the repatriation grant, calculated from the date that she

submitted her proof of relocation to the date of "partial" payment, arguing that the Administration made the payment with an undue delay. She also claims moral damages.

37. Therefore, the question the Tribunal has to examine is whether or not the payment made to the Applicant on 31 May 2016 (and which was credited to her Maybank account on 20 June 2016) fully compensates her for the amount due to her as repatriation grant under the above-referenced rules.

38. To make that assessment, the Tribunal has to consider when the Applicant's entitlement became due and whether the delay in payment, if any, was undue and attributable to a breach of the Organization's obligations. Finally, it has to assess whether the Applicant suffered any material or moral damages and is entitled to compensation, if applicable.

When did the repatriation grant become due?

39. The repatriation grant became due as of the moment the Applicant provided the Administration with her proof of relocation to Malaysia. Indeed, after her resignation and separation from the Organization on 15 February 2015, the Applicant submitted proof that she had relocated to Malaysia, her home country, to HR, UNFCCC, on 26 May 2015. It was received by HR, UNFCCC, on 1 June 2015.

Did the Organization comply with its duty of timely payment?

40. The Tribunal notes the existence of a general principle of due diligence and good faith towards staff members enshrined in the Charter of United Nations. It constitutes a structural principle of good management practice, which was not observed in the present case.

41. Indeed, the Tribunal is concerned that it took the Administration twelve months from the day the proof of relocation was received (1 June 2015) to pay the repatriation grant (31 May 2016), despite several follow-ups sent by the Applicant. Upon the Tribunal's request, the Respondent confirmed that if normal workflows are followed, the processing of a repatriation grant payment, once

proof of residence is received, takes four to six weeks, including time required by Finance/Payroll, UNOG, for approvals and disbursement. Had normal workflows been observed in the case at hand, the payment should, thus, have been processed at the end of June/mid of July 2015. De facto, however, the repatriation grant was paid to the Applicant only on 31 May 2016, on the basis of the UNORE applicable at that time.

42. As the Administration admitted, the delay from mid-July 2015 to 31 May 2016 was undue, and clearly was not attributable to the Applicant, who duly followed up on the matter through several emails, and even involved OSLA, as described in paras. 8 to 14 above. The evidence shows, and the Administration admits, that the delay in paying the repatriation grant to the Applicant was the fault of the Administration due to human oversight. Indeed, no action was taken to process the Applicant's repatriation grant at the time of receipt of her proof of relocation, nor following the various follow-ups sent by the Applicant. The Administration finally acted upon this matter only once the Applicant involved OSLA.

43. The Tribunal finds that by making the payment almost eleven months after it should have been effected had normal workflows been respected, despite the various follow-ups sent by the Applicant, the Administration failed to fulfil its obligation to make a timely payment of the Applicant's entitlement to repatriation grant under the above-referenced Staff Rules and Regulations.

Remedies

44. In light of the foregoing, the Tribunal now has to examine whether the Applicant is entitled to compensation for the undue delay in payment.

45. The Appeals Tribunal has held that the very purpose of compensation is to place the Applicant in the same position he/she would have been in had the Organization complied with its contractual obligations (*Warren* 2010-UNAT-059; *Iannelli* 2010-UNAT-093). The Tribunal therefore has to examine whether the Applicant suffered any damages as a result of the late payment.

Compensation for material damages

46. To assess whether the Applicant suffered any material damage, the Tribunal has to consider, on the one hand, the impact of the fluctuation of the UNORE between the USD and the MYR, and, on the other hand, whether the Applicant was entitled to payment of interest for the delay in payment.

Fluctuation of the UNOER between USD and MYR

47. To determine any material damage, the Tribunal first has to take into account the UNORE that applied at the time the payment became due (that is upon receipt of the proof of relocation, 1 June 2015) and/or the UNORE applicable at the time the payment should have been effected had normal workflows been respected and the payment been timely (i.e., 30 June 2015). That has to be compared to the UNORE that was applied when the payment was actually made (i.e., 31 May 2016).

48. The UNORE on 1 June 2015 was USD1 = MYR3,642, while that on 30 June 2015 was USD1 = MYR3,768 MYR/USD. Applying the more favourable of the two, that at 30 June 2015, the Applicant would have received MYR22,585.66. In contrast, on 31 May 2016, the UNORE was USD1 = MYR3,897. In applying this UNORE, the Applicant received MYR23,358.89.

49. It follows that the Applicant was not prejudiced by the UNORE applied in May 2016. Quite the contrary, she received MYR773.23 more than what she would have received had the UNORE of June 2015 been applied. In other words, the Applicant received more money than she would have had the Administration acted promptly once the payment became due.

50. The Applicant's argument that the UNORE of June 2016 (which was USD1 = MYR4,078) should have been applied does not stand scrutiny. The Administration's duty to process the payment was complied with once the money was transferred/wired from the United Nations bank account to the bank account indicated by the Applicant (31 May 2016). Any problems at the receiving bank

cannot be construed as falling within the responsibility of the United Nations, and cannot impact on the applicable UNORE. Furthermore, any damage of the Applicant has to be assessed by comparing the amount of MYR she would have received in case of "timely payment" as described above, as opposed to the amount actually received, by applying the UNORE at the date of the payment (31 May 2016). Any future fluctuations in the UNORE cannot be used to assess the material damage suffered by the Applicant.

Is the Applicant entitled to receive interest due to the delay in payment?

51. The Tribunal observes that the purpose of the repatriation grant under the Staff Rules and Regulations is to allow a staff member to pay for their actual repatriation to their country of nationality. The Applicant does not argue that in light of the late payment of the grant, she had to take a bank credit, including payment of interests, to be able to finance her repatriation. Had that been the case, and evidence been provided to support it, the Tribunal could have possibly found an economic damage suffered by the Applicant as a result of the undue delay in payment. However, and quite the contrary, the Applicant argues that she could have *invested* the money in a risk free investment account of approximately 6.5% per annum, and is asking for 8% of interest for the period from June 2015 to the date of payment.

52. The Tribunal recalls the jurisprudence of the Appeals Tribunal, which stressed in *Warren* 2010-UNAT-059 with respect to interests that:

> 10. Notwithstanding the absence of express power of the UNDT and the Appeals Tribunal in their respective statutes to award interest, the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. In many cases, interest will be by definition part of compensation. To say that the tribunals have no jurisdiction to order the payment of interest would in many cases mean that the staff member could not be placed in the same position, and that therefore proper "compensation" could not be awarded.

53. The Tribunal is aware of its jurisprudence in the case of *Castelli* UNDT/2010/011 (see para. 13), with respect to the interest rate to be paid as part of the award of compensation under art. 10.5, namely that:

> [a]t all events, the only way in which the applicant can be placed in the same position in which he would have been had the Organization paid the debt that it owed him is by awarding him interest since the date upon which payment was due at a rate that is reflective of the amount that could have been earned had it been invested.

54. Furthermore, the Tribunal recalls that in *Warren* 2010-UNAT-059, the Appeals Tribunal applied the prime rate of the United States of America ("US prime rate") as interest to the amounts due to the Applicant.

55. Having found that the payment would have been timely up to the end of June 2015/mid-July 2015, the Tribunal considers that any interest the Applicant could have earned has to be calculated from that point in time through 31 May 2016. The US prime rate applicable in June/July 2015 was 3.5 per cent. Calculated from 30 June 2015 to the date of payment (31 May 2016), that is, over a period of eleven months, the interest applied to MYR22,585.66 amounts to MYR724,62.

56. However, the Tribunal notes that the Applicant received a total amount of MYR23,358.89 in May 2016, instead of MYR22,585.66 that she would have received if payment had been made in June 2015. Therefore, since the difference in payment, i.e., MYR773.23, exceeds the amount of interest calculated above, the Tribunal cannot but find that even taking into account the potential interest she could have obtained through investment, the Applicant did not suffer any material damage.

57. The Tribunal is of the view that in calculating any material damages, it has to apply the US prime rate for the calculation of interest in light of the jurisprudence of the Appeals Tribunal in *Warren*. It follows that the Applicant's argument that she could have gained interest at the rate of 6.5%, is not only something uncertain and subject to changing market conditions but, more

importantly, not relevant for the determination of material damages by the Tribunal.

Compensation for moral damages

58. Under art. 10.5(b) of its Statue, the Tribunal may award compensation for moral damages provided that it is sufficiently corroborated by evidence.

59. The Applicant refers to "emotional stress and time cost for sending/drafting and sending emails to UNFCCC, OSLA, Maybank and the MEU, to chase for repatriation grant and to clarify for the foreign exchange disparity/shortfall in the payment".

60. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal noted the following:

> 36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.[7] (footnote text omitted)
>
> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and *where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award*. (emphasis added)

61. In *Asariotis*, the Appeals Tribunal also considered that compensation for a delay would fall under the principle set forth in para. 36(ii) of that judgment.

62. Additionally, this Tribunal recalls what it held in *Dahan* UNDT/2015/053, namely that:

> The Tribunal does not consider that evidence establishing the existence of moral injury must compulsorily be *viva voce* evidence. Such fact can be gathered and/or inferred from the pleadings and documents produced by a party.

63. The documentary evidence on file shows that the Applicant wrote several emails inquiring about the payment of her relocation grant, and that she even had to escalate the matter by involving OSLA to finally have her repatriation grant paid 11 months after providing proof of relocation.

64. The Tribunal finds that it can be reasonably concluded that, given the circumstances, the Applicant suffered stress, frustration and anxiety caused by the Organization's failure to process the payment in due time, and it is satisfied that there is merit for granting compensation. Therefore, the Tribunal finds adequate to award the Applicant compensation for moral damages in the amount of USD500.

65. Finally, the Tribunal notes that the matter of the step granted to the Applicant upon her recruitment is not properly before the Tribunal and that, therefore, it is not competent to examine it.

Conclusion

66. In view of the foregoing, the Tribunal DECIDES that:

a. The Applicant shall be paid moral damages in the amount of USD500;

b. All other pleas are dismissed.

(*Signed*)
Judge Teresa Bravo
Dated this 7th day of March 2017

Entered in the Register on this 7th day of March 2017
(*Signed*)
René M. Vargas M., Registrar, Geneva