



## **1. Case background**

1.1 The Applicant joined the Organization in July 1989 as a Security Officer. He currently holds a permanent appointment as a Fire Lieutenant with the United Nations Office at Nairobi (UNON). Since April 2007, the Applicant had been on assignment with the United Nations Operations in Cote d'Ivoire (UNOCI) as a Fire Marshall at the G-6 level. He returned to UNON on 2 May 2009. The facts giving rise to the application before the Tribunal are contained in UNDT Judgment No. 052 (2010). In the said Judgment, having found in favor of the Applicant, the Tribunal directed the parties to provide written submissions as to the appropriate relief that should be ordered by or before close of business Friday, 9 April 2010, which date was subsequently extended to Friday 16 April 2010.

1.2 On 15 April 2010, the Applicant requested a further extension of time, which the Respondent did not oppose as the Applicant had been hospitalized due to his medical condition. On 16 April 2010, the Applicant filed his submissions on appropriate relief. As part of the said submissions, the Applicant requested the Tribunal to grant his request for an extension of time to allow him to submit further particulars. The Applicant's request was granted on 23 April 2010 and he filed further particulars on 26 April 2010. The Respondent filed his submissions on 16 April 2010.

## **2. Parties' Submissions**

### **2.1 The Applicant**

2.1.1 The Applicant's submissions on the appropriate relief that should be ordered are contained in his filings dated 16 April 2010 and 26 April 2010 and are summarized below.

2.1.2 As a result of the Administration's initiation of disciplinary proceedings against him, and in light of DPKO policies preventing candidates being considered for positions while disciplinary proceedings are pending against them, he was barred from applying for at least two positions for which he was qualified.

2.1.3 At the time of the accident in November 2007, he was temporarily encumbering the post of Fire Safety Assistant, FSL 4 level, and a colleague of his was temporarily encumbering a Security post at FSL 4 level. These posts were subsequently advertised (Applicant's post was advertised as VA FSL/4-412049), and he and his colleague each applied for his respective post, in order to become regularized in Abidjan. Both he and his colleague were internal candidates applying for lateral moves and they would have been considered at the 15-day mark. His colleague was selected for his post and became regularized in Abidjan.

2.1.4 His supervisors were very satisfied with his performance, as evidenced by his performance appraisals for 2008 and 2009 and he would have been eligible for consideration for this post at the 15-day mark. In light of this, the Applicant submits that in the absence of evidence that there were any other suitable 15-day candidates for this position, he would have been selected for the position of Fire Safety Assistant in Abidjan.

2.1.5 He also applied for a second post, that of Fire Safety Assistant at UNTSO, Jerusalem FSL/5, for which he would have been considered an internal candidate. However, shortly after applying for these posts, he met with a UNOCI official who informed him that he could not be considered for any posts while disciplinary proceedings were pending. The official advised him to meet with the Chief of Mission Support at ONOCI, who confirmed to him that he could not be considered for any posts while disciplinary proceedings were pending. Consequently, as a result of the disciplinary proceedings, he was denied a chance to be considered for these positions, one of which was at a higher level, and both of which would have rendered him eligible for the entitlements that attach to General Service staff on mission.

2.1.6 He should be compensated for the lost chances for career advancement and mobility that he was unlawfully denied. To support this contention, the Applicant cites the Tribunal's *ratio decidendi* in *Koh*<sup>1</sup>,

“In this case, once it can be seen that there is a real or significant chance that the applicant might have been selected, the Tribunal has the duty to compensate him for the loss of that

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<sup>1</sup> UNDT Judgment No. UNDT/2010/040.

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the official UNOCI rate at the time was US\$ 0.14 per kilometer. His average monthly mileage at UNOCI was 2000 kilometers. His monthly travel costs were approximately US\$ 280 (0.14 x 2000). Over 17 months, this amounted to US\$ 4760. The Tribunal is accordingly asked to order Respondent to pay him US\$ 4760 to compensate him for his travel costs.

2.1.10 As a result of the fact that he was barred from consideration for the posts mentioned above, he could not become regularized in Abidjan or Jerusalem, and he had to return to Nairobi at the end of his two year temporary assignment in Abidjan. Having returned to his home duty station in Nairobi, he was no longer a General Service staff member on mission, and was consequently unable to apply for Education grants for his children. As a result, he incurred costs relating to his children's education. The education grants amounted to US\$ 5,000.

2.1.11 The Applicant avers that the Respondent's decision to initiate disciplinary proceedings against him damaged his reputation, because his colleagues and juniors saw him as a drunk and as an irresponsible and even dishonest staff member. He was the topic of gossip and chatter in the mission and his standing at work deteriorated as a result. The Applicant submits that a survey of the jurisprudence of the former Administrative Tribunal shows cases in which the former UNAT found that staff members' reputations had suffered, it rarely distinguished that damage from other heads of damage claimed, in terms of the compensation ordered and that it is consequently difficult to determine the appropriate relief for damage to his reputation.

2.1.12 The Applicant submits that in AT/DEC/1049, the former UNAT rejected other pleas made by the Applicant in that case, and awarded him US\$ 12,000 mainly for damage to his reputation and that in AT/DEC/1404, the former UNAT, having found that disciplinary proceedings were unlawfully brought against the staff member and that this caused a serious intrusion into his private life, damage to his reputation, and a gross violation of his rights, awarded the staff member one year's net base salary as well as US\$ 5,000 for his costs. The Applicant requests the Tribunal to order the Respondent to

compensate him with a sum of US\$ 10,000 for the damage to his reputation caused by the Respondent, the investigation and the ensuing disciplinary proceedings.

2.1.13 The Applicant submits that the Respondent's decision to initiate disciplinary proceedings against him caused him significant anguish and anxiety. During the protracted disciplinary proceedings, his future at the Organization was uncertain. He went to bed every night and got up every morning with the knowledge that disciplinary proceedings charging him with drunkenness were pending against him and that they could lead to his dismissal. This anxiety took its toll on his health. His anxiety also affected his relationships with his family, friends and colleagues. His family also suffered, as they were afraid that the family's breadwinner might lose his job. The Applicant requests the Tr

2.2.3 The Respondent's submits that it is the internal law of the United Nations that governs the employment relationship between the Organization and its staff and that the UN Administrative Tribunal in *Moreira de Barros*<sup>2</sup> ruled that:

2.2.6 Accordingly, the Respondent submits that general principles of law, although demonstrative of a consistent State practice, should not be seen as demonstrative of a customary rule of international administrative law. The law of the Tribunal must be derived from the internal laws and practices of the Organization. These laws and practices are developed to serve the unique nature and circumstances of the Organization.

2.2.7 The Respondent submits that while general principles of law are not applied per se in international organizations, in circumstances where there is a lacuna in the internal law, they provide a legitimate source of international administrative law. The UNAT and the International Labour Organization Administrative Tribunal (“ILOAT”) have recognized that, in specific circumstances, general principles of law provide a source of international administrative law.

2.2.8 The Respondent submits that Article 10 (5) of the Statute of the United Nations Dispute Tribunal (“the Statute”), vests authority in the Tribunal to award compensation to a party, however the Statute is silent as to how that sum is to be calculated. Notably, in a significant departure from the Statute of the United Nations Administrative Tribunal, Article 10(7) of the Statute prohibits the award of exemplary and punitive damages.

2.2.9 In many instances, punitive or exemplary considerations were a part of the calculus of damages in UNAT judgments. The Respondent submits that the practice of UNAT may be divided into two distinct groups of cases: Judgments where UNAT applied an approach consistent with the principle of *restitutio in integrum* on the question of liability and quantification of loss, in large part limiting compensation to actual pecuniary loss; More recent judgments where UNAT awarded compensation on the basis of procedural error alone, even where such error either did not result in a pecuniary loss or did not change the outcome of the proceedings.

2.2.10 The Respondent submits that UNAT has traditionally awarded moral damages. It is recognized that claims of moral injury may be based on, inter alia,



injury to an

Applicant to prove the non-observance of his rights led to his suffering a loss within a recognized head of damage. The onus of proof lies on the Applicant.

2.2.13 The Respondent submits that in relation to the actions taken by SIU's conduct of the investigation into the accident involving the Applicant, the Respondent notes that there was no finding of actual bad faith or discriminatory treatment. Furthermore, good or bad faith is not relevant as awards of punitive and exemplary damages are not permissible under the Tribunal's Statute. The award in *Bonder*<sup>5</sup>, which included a finding of discriminatory behavior and bad faith and a substantial award as damages on the basis thereof, is in effect an award of punitive damages which is no longer permitted.

### **3. *Legal Issues***

3.1 The legal issues arising out of the parties submissions are the following:

- (i) How should an award of compensation be calculated under Article 10(5) of the Statute of the United Nations Dispute Tribunal?
- (ii) Is the Applicant entitled to compensation for the loss of chance for being barred from applying for the two posts mentioned above as a result of the initiation of disciplinary proceedings against him?
- (iii) Is the Applicant entitled to compensation for his travel costs for the period 20 November 2007 to 2 May 2009?
- (iv) Is the Applicant entitled to compensation for the cost of his children's education as a result of failing to become regularized in Abidjan and Jerusalem?
- (v) Is the Applicant entitled to compensation for moral damages to his reputation and for the mental anguish and anxiety he suffered as a result of the investigation and the ensuing disciplinary proceedings?

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<sup>5</sup> UNAT Judgment No. 1052, (2002).



damages for procedural error and moral damages. An additional head of damage is

have fallen back on equity to assess damages. The matter is explained as follows by the former UNAT Judge and Legal Scholar, Amerasinghe<sup>7</sup>:

“There are a few areas in which equity in a general sense has been freely referred to or decisions have been given *ex aequo et bono*. The first of these is the area of damages. Tribunals have in the award of damages sometimes stated that damages were being fixed or calculated *ex aequo et bono* or used language of this kind. Equity is not used as a basis for establishing the right to recover damages or for listing the heads of damages but merely for assessing the amount of damages once the right to damages and the heads of damages have been laid down. This technique is no more than an application of reasonable standards to the assessment of compensation. As the ICJ pointed out, tribunals in these circumstances fix a reasonable figure for compensation because of the actual amount to be awarded could no5.6(m)-0.3(o6ror1.1(w)4(n)-1.1(e)19 Tc0qces o(on)4)-1.1()-1.3(e )5.7ny()-1.3(e )5.sv)4.7.1(s)-hav

(iv) Rejects all other pleas.

*(Signed)*

Judge Vinod Boolell

Dated this 27<sup>th</sup> day of May 2010

Entered in the Register on this 27<sup>th</sup> day of May 2010

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi