



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/062

Judgment No.: UNDT/2017/096

Date: 28 December 2017

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CHACON GOMEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Aleksandra Jurkiewicz, OSLA

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is an Associate

14. Throughout the period commencing September 2015 to the date of the filing of the application, the Applicant continued not to receive her full salary and related entitlements. Since October 2015 when she first raised this issue, she continued to engage with the Administration to resolve the outstanding payments and to regularize her salary. On each occasion, the Administration informed her that the matter was being resolved.⁵

15. On 19 January 2017, the Applicant was informed that all of the concerns she had raised, including retroactive salary, difference of post-adjustment during the months that 6()-n9 Tm[)JT16t

USD1,181.67 was to be paid by 3 November 2017. In a supplemental response to Order No. 156 on 12 October 2017

23.

purchase an apartment in Alicante, Spain. She made a down payment of EUR3,000 and requested two months to obtain the loan.⁸ However, this sale could not go through because she did not receive her salary in June and July. Her deposit was forfeited.

29. Finally, she received a salary in August 2017 along with the first correct payslip since August 2015. When she asked for payslips, she received an excel spreadsheet representing almost two years of payment slips. After reviewing the spreadsheet, she requested clarifications and has been going back and forth with HR since then because she did not know whether she was paid the correct amount or not.

30. Throughout the period of delay she had to contact at least 30 people officially and unofficially and visit HR departments in three different duty stations trying to resolve her payment issue. She sent around 60 emails on the subject. Every time she needed to make a service request in iNeed, she had to talk to a different HR person and explain the issue. She had to ask for personal favours from colleagues which was counterproductive in terms of her performance. It was a very stressful period; she did not feel like she was a staff member.

31. Overall, the absence of pay checks had a detrimental impact on her quality of life. For a period of two whole years, she faced extreme financial distress as she was not in a position to take any decisions regarding even the smallest or most basic financial transactions, without fear of the consequences. She was anxious daily about whether she would receive the next salary payment or not and continuously had to restrain herself from buying anything other than the strictly necessary to be able to

32. The haphazard salary payments prevented her from planning any substantial expenses. She was unable to provide payslips as evidence of income and therefore could not make use of even basic financial services available to people in regular employment, such as buying a house and securing an appropriate mortgage.

⁸ Annex A to the Application

33. She sustained additional harm and distress due to the humiliation of having to repeatedly beg the Administration for payments that were owed to her as of right.

34. The arguments articulated in the application and subsequent filing in response to Order No. 169 (NBI/2017) is summarized below:

35. The absence of pay checks, irregular and inadequate advance payments in lieu of salary, and denial to regularize her financial situation for two years insult the very nature of the contractual relationship between the Secretary-General and the staff member. It violates the basic principle that the employer is under an obligation to pay Administration a wide degree of latitude in delaying payment of salary whilst at the strikes at the very core of the concept of the dignity of an employee.

36.

42. Accordingly, the Applicant has not demonstrated a substantial factual basis proving that she has suffered moral harm because of the late payment of her salary and entitlements.

43. If the Tribunal decides to award moral damages, the award of three months' net base salary is not warranted. Such an award would exceed amounts awarded in other cases regarding delays in payment of salaries or entitlements.

44. The Applicant distinguishes her case from that of Kings, where moral damages of CHF1,000 (USD1,000) was awarded for the five month delay in payment of three weeks' net base salary. The Applicant is not owed a total sum of USD50,000 for a period of two years. The delay in the payment of her salary started in June 2016. Yet, the following month, she received a salary advance of USD10,000. The Applicant is not owed a total sum of USD50,000 for a period of two years. The delay in the payment of her salary started in June 2016. Yet, the following month, she received a salary advance of USD10,000. However, she was paid a salary advance of USD26,500 in August 2016 and USD10,000 in September 2016. When her salary was delayed, she received two salary advances in N0709005700B60056900032990036J 0 es

staff member in retribution for the work performed, which is the obvious primary duty of any employer towards its employees. This finding is supported by the fact that the salary rate is one of the very few elements of the conditions of service specified in the United Nations letters of appointment (see para. (a)(v) of Annex II to the Staff Regulation), and the determination of the salary scales and components is the subject of numerous staff regulations and rules (notably, but not limited to, Annex 1 to the Staff Regulations). Although there is no specific provision setting the interval of salary accrual and payment, there is a constant intention from the inception to pay salaries monthly. As such, it is an implied condition of contract resulting from the practices of the Organization.

47. While the eventual payment of arrears put an end to the ongoing breach by the Administration, it did not erase the failure to pay the salary when due, and in due amounts, nor the damage that would have been occasioned by the lack of timely payment during the period of two years. The Tribunal understands that the obligation to compensate such a damage is disputed not in principle but as an evidentiary matter.

48. The Tribunal recalls UNAT's holding in *Kallon* according to which proving moral injury requires showing beyond a balance of probabilities the existence of factors causing harm to others, the loss of a positive state of emotional gratification or emotional balance is harm deserving of compensation.¹³ For a breach or infringement to give rise to moral damages, especially in a contractual setting, where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances.¹⁴

49. This Tribunal considers that the following circumstances, which are neither exhaustive nor listed per significance, may be relevant for the finding of ~~SHFØLDU IHDWØHMØDMRIPRUDOGDPDJHØFODLPHGLQHODWLRØLWKODWHSØPHØV~~

- a. Duration of the breach;
- b. Cause for the breach, including a degree of negligence or improper motive behind it;
- c. Nature of the obligation breached;
- d. Magnitude of financial inconvenience as function of the sum owed in ~~UHODWLRØVRWKHDSSØLFDØVØLØØLDØWDØWØX~~
- e. Actual privations suffered;
- f. Time and effort spent by the applicant in pursuance of the claim; and
- g. Treatment of the applicant by the administration, including whether the administration responded to the applicant ~~ØODLPDØØHØLHØ~~, whether it mitigated the financial loss and inconvenience, whether explained the reasons and whether apologized for the delay.

50. In consideration of the foregoing, the Tribunal finds that in the present case the duration of the breach and its continuing character was, by UNDT experience, extreme. This was combined with the obscurity of its cause, ~~LHØWHFKØFDØSØREØHP ZLWKØØLØ~~ which remains unexplained. Reasonably, a problem with funding for the position should have prevented the deployment in the first place; above all, however, should have been solved earlier. No explanation has ever been given as to why it took two years and the proceedings before the UNDT to sort out the payments. Lack of apparent rational reason does not help coping with the delay and aggravates the sense of frustration and uncertainty and is only minimally

and thus that harm to personality deserving of compensation has been sufficiently proved and is supported by the evidence as required by art. 10(5)(b) of the UNDT Statute.¹⁵ On the totality of evidence the Tribunal, as the principal trier of fact, is satisfied that the Applicant suffered moral harm.

55. Turning to the question of appropriate compensation the Tribunal bears in mind that whereas the distress endured by the Applicant may not be undone, the role of financial compensation is to enable gratification, such as buying goods and services, proportionate to the harm suffered. The breach of the \$SOLFDQVWLJKWZDV of a limited duration and the harm has now been alleviated with the satisfaction of the main claim. In quantifying the compensation, the Tribunal considers that the Applicant's demand, a three-month worth of her salary, which would be equivalent of three-month vacation with pay, is excessive.

Case No.: UNDT/NBI/2017/062

Judgment No.: UNDT/2017/096