



Administrative Tribunal

Distr. Limited
30 September 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1473

Case No. 1550

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena
Wijewardane, Second Vice-President; Mr. Goh Joon Seng;

Whereas, on 29 September 2007, a former staff member of the United Nations, filed an
Application requesting the Tribunal, inter alia:

“II. PLEAS

7. ...[T]o find:

- (a) that the findings and recommendations of the Joint Appeals Board [JAB] should be affirmed;
- (b) that the decision of the Respondent [rejecting the JAB’s recommendation for compensation] insofar as the award of legal fees is arbitrary and without merit;
- (c) that the decision of the Respondent rejecting the recommendation for compensation in the amount of one year’s net base pay is arbitrary and without merit;
- (d) that the amount of compensation recommended by the [JAB] is insufficient

8. ...[T]o order:

- (a) that the Respondent pay an additional ten months’ net base pay;
- (b) that the Respondent pay additional compensation in the amount of one year’s net base pay as damages.....;

(c) that the Applicant be paid for costs, the sum of \$10,000.00 in legal fees

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 17 March 2008, and once thereafter until 17 April;

Whereas the Respondent filed his Answer on 2 April 2008;

Whereas the Applicant filed Written Observations on 18 December 2008;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

“Summary of the facts

... On 30 September 2003, the UN Administrative Tribunal issued Judgement No. 1128 ..., in which it ordered Respondent to ‘reinstatement the Applicant in a post suitable to his qualities and ability, as well as his seniority, with all salary and benefits’ and fixed ‘the compensation to be paid to the Applicant at two years’ net base at the rate in effect at the time of his separation from service, if the Secretary-General decides within 30 days of the notification of the Judgement, in the interest of the United Nations, not to reinstate the Applicant.’

... On 3 February 2004, [the Applicant] wrote to the Secretary-General, enclosing copies of similar letters he had written to him on 22 February, 9 April, 25 June and 3 October 2001. Calling his attention to UNAT Judgement No. 1128, [the Applicant] requested, as he had done so many times in the past, that he be reinstated. [The Applicant] referred also to his letter of 27 October 2003, addressed to the Chef de Cabinet ... in which he had reiterated that his preference had always been for reinstatement. He thus advised the Secretary-General that ‘if he did not hear from [him] by 16 February 2004, [he had] instructed [his] Counsel ... to revert on his behalf to the Tribunal for clarification and confirmation of their Judgement No. 1128...’

... On 25 February 2004, ... [the] Deputy-Director, Nordic Office and Chief, Staff Administrative Services, UNDP [United Nations Development Programme], emailed [the Applicant] informing him that he had ‘received an instruction to pay [him] \$191,622 in connection with the recent judgement of the UN Administrative Tribunal’. He noted that the calculation had been made based on two years of net base salary at the D-2, step VI, level and that the funds could be released ‘without delay’.

... On 27 February 2004, [the Applicant's Counsel wrote to the Respondent as regards the 25 February email]. [The Applicant's Counsel] observed that the parties had been notified of UNAT Judgement No. 1128 on 30 September 2003. Five months later, [the Applicant's Counsel stated that] in spite of [the Applicant's] letters to the Secretary-General and to his Chef de Cabinet, requesting consideration to be reinstated and to be allowed to honourably serve the United Nations through mandatory retirement in September 2004, there had been no communication either with [the Applicant] or himself. It was, therefore, their understanding that, since the Tribunal's judgements are binding on the parties, Respondent had by default clearly opted for the choice of reinstating [the Applicant] ‘in a post suitable to his qualities and ability, as well as his seniority, with all salary and benefits’. [The Applicant's] Counsel further informed Respondent that, pursuant to the foregoing and ‘in the interest of ensuring that the Tribunal's judgements [were] fully respected’, earlier that week they had formally sought ‘the Tribunal's confirmation of this interpretation’. [UNAT Case No. 1239 ...].

... On 5 March 2004, Respondent replied to [the Applicant's Counsel] letter, informing him that UNDP was prepared to release the funds to [the Applicant] as soon as he provided UNDP with his banking details, and apologizing for the delay in effecting payment.

... In a response, dated 25 March 2004, [the Applicant's Counsel's] supplied [the Applicant's] banking information, requested a breakdown of the calculation of the amount being paid and a formal confirmation when the deposit was effected, as well as 'an explanation from UNDP for the delay of six months in implementing the decision' and 'the basis on which the payment [was] being made, in light of the fact that as of 30 October 2003, [the Applicant] was deemed to have been reinstated, as per the binding judgement of the Tribunal'.

... On 30 March 2004, [the] Director, Office of Legal and Procurement Support, advised [the Applicant's Counsel] that the sum of \$191,622 had been deposited to [the Applicant's] bank account on 29 March 2004 and that it had been calculated as follows: 2 years x US\$95,831 corresponding to the annual salary at the D2 level, step VI, at the dependency rate, as of 30 June 2001. Regretting the delay in effecting payment, [the Director] noted [that] it had been due to the implementation of a new system computer software and asked that UNDP's apologies be conveyed to [the Applicant] ...

... On 30 September 2005, UNAT issued its Judgement No 1229 Noting in its conclusion that the 'question presented by the Applicant ... was not a question of interpretation;' the Tribunal suggested that 'the Applicant should follow the normal appeal procedure; that is, request a review of the administrative decision and, if the request [is] denied, appeal to the [JAB],...'

....

... On 14 December 2005, [the Applicant] wrote to the Secretary-General requesting a review of the administrative decision refusing to implement in a timely and correct manner Administrative Tribunal Judgement No. 1128, which had been issued on 30 September 2003.

... On 30 December 2005, [the Applicant's] Counsel wrote to the Administrator of UNDP, providing 'additional clarification on the basis for appealing the decision refusing to implement in a timely and correct manner' UNAT Judgement [No.] 1128.

... On 27 January 2006, [the] Officer-in-Charge, Bureau of Management, responded to [the Applicant's] Counsel, informing him that he could 'find no factual or legal basis for overturning the decision concerning the implementation of Administrative Tribunal Judgement No. 1128'."

On 28 February 2006, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 2 May 2007. Its considerations and recommendations read, in part, as follows:

“Considerations

21. The Panel first examined Respondent's contention that the appeal was time-barred. Recognizing the circumstances and timelines of the case, the Panel determined the appeal to be receivable.

22. The Panel then carefully examined the contentions of both Appellant and Respondent. In this connection the Panel recalled that judgments of the United Nations Administrative Tribunal are legally binding on both parties. The Panel agreed with Appellant that failure to implement the Tribunal's decisions 'occasions a failure of justice' and erodes the credibility of the system of recourse and internal justice.

23. The Panel observed that Respondent had not communicated a decision on the UNAT Judgement [No.] 1128 to Appellant within the stipulated 30 days.

24. The Panel noted that Appellant had received no correspondence from the Organization until 5 March 2004, some five months after the judgment had been handed down and, certainly, long after the 30-day period during which the Secretary-General was to have taken his decision and transmitted said decision to [the Applicant]. The Panel, furthermore, noted that Respondent's communication had been received by Appellant after his Counsel had stated his intention to pursue further recourse.

25. The Panel determined that the formulation of UNAT Judgement [No.] 1128 was clear and supported Appellant's argument that in the absence of any contrary indication within the stipulated 30-day timeframe Respondent had by default opted for the Tribunal's initial order of reinstatement.

26. The Panel took note of the fact that Respondent had provided no reason for the failure to implement the UNAT decision in the timeframe contained in the judgement. While the Panel did not see evidence of a willful act to ignore obligations, the Panel was perturbed by the fact that Respondent describes the five-month delay in effecting the payment as merely 'unfortunate', when his inaction in fact created a reasonable expectation by Appellant that he would be reinstated, a remedy Appellant had communicated to the Administration on numerous occasions. In this context, the Panel rejected Respondent's contention that it was obvious that it had been decided that Appellant would be compensated rather than reinstated. The facts are clear, Respondent failed to communicate such decision to Appellant in the timeframe stipulated in the UNAT judgement.

27. While Respondent drew the attention of the Panel to the fact that the UNAT Judgements Nos. 499, *Amoa* (1990) and 587, *Davidson* (1993), quoted by Appellant, dealt with delays of more than two and five years, respectively, it observed that under the given circumstances it was irrelevant whether that failure consisted of a 5-month delay or a two-year delay. UNAT's judgements are binding and there is an impetus for Respondent to comply fully.

Recommendations

28. Before making its recommendations to the Secretary-General, the Panel reviewed in some detail all aspects of the possible harm that had been done to Appellant by Respondent's failure to implement UNAT Judgement [No.] 1128 properly.

29. First of all, Appellant had lost the interest that would have accrued on the sum of \$191,622, which was ultimately paid to Appellant on 30 March 2004. In accordance with Tribunal jurisprudence, the Panel *unanimously recommends* that Appellant be paid interest at 8% per annum for five months (30 October 2003 to 29 March 2004).

30. The Panel noted that Appellant had hired Counsel to assist him in the pursuit of the implementation of Judgement [No.] 1128. The Panel thus *unanimously recommends* that Respondent should pay all legal fees incurred by Appellant, stemming from the delay in the implementation of the 30 September 2003 UNAT Judgement.

31. Since the Respondent had failed to implement UNAT Judgement [No.] 1128 within the prescribed 30 days, thus permitting an interpretation by Appellant that he had been reinstated, the Panel *unanimously recommends* that Appellant be compensated in the amount of one year's net base pay."

On 6 July 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General has examined your case in the light of the JAB’s report, as well as the entire record and the totality of the circumstances. He accepts the JAB’s findings and conclusions subject to the following comments. The Secretary-General accepts the JAB’s recommendation that you be paid interest at the rate of 8 per cent per annum for five months from 30 October 2003 to 29 March 2004. However, he does not accept the JAB’s recommendation that your legal costs stemming from the delay in implementing the 30 September 2003 UNAT Judgement be paid. In this connection, the Secretary-General notes that the UNAT has stated that it may grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount and if they exceed the normal expenses of litigation before the UNAT (UNAT Judgement No. 237, *Powell*). However, in this case, the Secretary-General considers that the existence of all three of these requirements has not been demonstrated to exist. Finally, the Secretary-General considers that the amount of one year’s net base pay as compensation for the failure to implement UNAT Judgement No. 1128 within 30 days is disproportionate and has agreed that you be paid compensation in the amount of two months’ net base salary at the rate in effect at the time of the failure to implement Judgement No. 1128 (i.e., 30 October 2003).”

On 29 September 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. He should be reinstated as the Respondent failed to implement the Tribunal’s decision within the prescribed timeframe.
2. He should be adequately compensated for the delay in the implementation of the Tribunal’s judgement.
3. He should be paid legal fees and costs.

Whereas the Respondent’s principal contentions are:

1. The delay in the implementation of the Tribunal’s decision does not entitle the Applicant to reinstatement.
2. The award of two months’ net base salary plus interest constitutes appropriate compensation for the delay in the implementation of the Tribunal’s decision.
3. The Applicant’s request for award of legal costs and fees is without merit.

The Tribunal, having deliberated from 9 July to 31 July 2009, now pronounces the following Judgement:

- I. On 30 September 2003, the Tribunal issued Judgement No. 1128, in which it ordered the Respondent to “reinstate the Applicant in a post suitable to his qualities and ability, as well as his seniority, with all salary and benefits” and fixed “the compensation to be paid to the Applicant at two years’ net base at the rate in effect at the time of his separation from service” should the Secretary-General decide, within

30 days of the notification of the Judgement, in the interest of the United Nations, not to reinstate the Applicant. On 25 February 2004, UNDP informed the Applicant that it had “received an instruction to pay [him] US\$ 191,622 in connection with the recent judgement of the UN Administrative Tribunal”. The calculation had been made based on two years’ net base salary at the D-2, step VI level and the funds could be released “without delay”. On 27 February 2004, the Applicant’s Counsel replied to UNDP, observing that for five months following the notification of Judgement No. 1128 on 30 September 2003, there had been no communication either with the Applicant or himself. It was, therefore, their understanding that, since the Tribunal’s judgements are binding on the parties, the Respondent had by default clearly opted for the choice of reinstating the Applicant “in a post suitable to his qualities and ability, as well as his seniority, with all salary and benefits”. He advised UNDP that the Applicant had submitted an application for interpretation of judgement in this regard. On 5 March 2004, the Applicant was requested to provide UNDP with his banking details, which he did on 25 March. On 30 March, UNDP advised Counsel for the Applicant that the sum of US\$ 191,622 had been deposited to the Applicant’s bank account on 29 March. On 30 September 2005, UNAT issued Judgement No. 1229. Noting in its conclusion that the “question presented by the Applicant ... was not a question of interpretation”, the Tribunal suggested that “the Applicant should follow the normal appeal procedure”.

II. On 14 December 2005, the Applicant wrote to the Secretary-General requesting a review of the administrative decision refusing to implement in a timely and correct manner Judgement No. 1128. On 28 February 2006, he lodged an appeal with the JAB. In its report of 2 May 2007, the JAB Panel recommended that the Applicant be paid interest at eight per cent per annum for five months (30 October 2003 to 29 March 2004); that Respondent should pay all legal fees incurred by the Applicant, stemming from the delay in the implementation of the UNAT Judgement No. 1128; and that, since the Respondent had failed to implement the Judgement within the prescribed 30 days, thus permitting an interpretation by the Applicant that he had been reinstated, the Applicant be compensated in the amount of one year’s net base salary. On 6 July 2007, the Applicant was informed that the Secretary-General had accepted the recommendation that he be paid interest; but he did not accept the JAB’s recommendation to pay his legal costs; and that he had decided to limit the amount of compensation to two months’ net base salary.

III. The Applicant’s contends that the Respondent’ failure to implement Judgement No. 1128, gave him the expectation of reinstatement. In Judgement No. 1128 the Tribunal ordered the Respondent “to reinstate the Applicant”; and fixed the compensation “at two years’ net base salary ... if the Secretary-General decide[d] within 30 days of the notification ... in the interest of the United Nations not to reinstate the [Applicant]”.

IV. Judgement No. 1128 clearly gave the Secretary-General the option to either reinstate the Applicant or, in lieu of reinstatement, to pay compensation of two years’ net base salary. The Secretary-General was

requested to decide within 30 days which course of action to follow. The Tribunal does not accept the interpretation advanced by the Applicant, i.e. that the Respondent's failure to implement the Judgement within 30 days gives rise to reinstatement pursuant to the Tribunal's order in Judgement No. 1128. However, as the Respondent failed to pay the Applicant the monies due to him pursuant to Judgement No. 1128, for over five months, the Applicant is entitled to be compensated for the delay.

V. In view of the foregoing, the Tribunal:

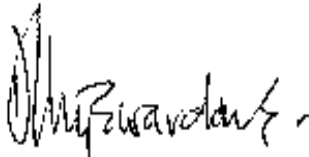
1. Recognizing that the Applicant has already received eight per cent interest for the delay of five months in effecting payment as ordered in Judgement No. 1228, awards the Applicant US\$5,000 for the delay in payment, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected.

2. Rejects all other pleas.

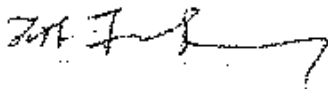
(Signatures)



Jacqueline R. **Scott**
First Vice-President



Dayendra Sena **Wijewardane**
Second Vice-President



Goh Joon Seng
Member

Geneva, 31 July 2009



Tamara Shockley
Executive Secretary