



UNITED NATIONS APPEALS A

Case No. 2010-140



Counsel for Appellant: Self-represented

Counsel for Respondent: Melanie Shannon

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11. While on sick leave, on 2 April 2004, the Appellant wrote an e-mail to all NYO staff, with copies to the Chief of Staff and the Acting High Commissioner of the OHCHR in Geneva, indicating the Appellant's concerns, requesting that outside help from the

obligations to take appropriate actions before the Applicant's situation and complaints of discrimination harassment and abuse of authority, taking into account all of the circumstances of [this] case.

21. The Appellant's case was not considered by the former Administrative Tribunal before its abolition on 31 December 2009, and it was subsequently transferred to the UNDT.

22. On 20 August 2010, the UNDT rendered Judgment No. UNDT/2010/148. Regarding the scope of the case, Judge Ebrahim-Carstens determined that "the only legal issue before the Dispute Tribunal is whether compensation in the amount of one month's net base salary recommended by the JAB to be paid to the applicant for the Administration's failure to properly address [the applicant's] complaints was fair and adequate", but "the applicant's submissions concerning [the applicant's] sick leave entitlements and termination of [the applicant's] contract and alleged damages flowing from this termination are not properly before the Tribunal". While she thought the Appellant's claims for compensation were "excessive" and "unsustainable", Judge Ebrahim-Carstens nonetheless held that compensation in the amount of a month's salary was "wholly inadequate", as the Appellant was deprived of the opportunity to prove a breach of the Appellant's fundamental human right not to be discriminated against on the grounds of sexual orientation and HIV status and the Appellant's rights were further compromised by the passage of time which rendered any inquiry ineffective. While she did not think that compensation for actual economic loss was warranted, Judge Ebrahim-Carstens awarded the Appellant USD 40,000 for emotional distress, which sum included the equivalent of one month's net base salary that the Secretary-General had agreed to pay, but not yet paid. She clarified that it was more appropriate to express compensation for emotional distress and injury in lump sum figures and not in net base salary, because "[d]ignity, self-esteem and emotional well-being are equally valuable to all human beings regardless of their salary level or grade". Judge Ebrahim-Carstens dismissed the claims made by the Appellant concerning the deterioration of the Appellant's health and the Appellant's demand for an apology.

23. On 28 September 2010, the Appellant filed an appeal against the UNDT Judgment, which the Appellant amended to meet the filing requirement and re-filed on 3 October 2010. On 15 November 2010, the Secretary-General filed a request for a 15-day

extension of the time limit due to the sudden unavailability of the legal officer. The extension request was granted. On 3 December 2010, the Secretary-General filed an answer.

Submissions

The Appellant's Appeal

24. The UNDT erred when it decided to ignore the Appellant's request for other forms of relief including an investigation and an apology, and focused only on the issue of adequacy of the compensation. In the view of the Appellant, "dignity is not restored simply by giving someone a higher bank balance but rather, it is restored by the administration of justice, the application of due process, and the issuance of an apology for past transgressions".

25. The only way to rescind the decision is to order a full and complete investigation. Not to order such an investigation constituted a denial of the Appellant's fundamental right to due process. The Administration as the responsible party should not be allowed to use the passage of time and the deterioration of evidence to avoid an inquiry. The Appellant cites an Inter-American Court of Human Rights case in support of the Appellant's contentions.

26. By failing to explore the causes for the deterioration of the Appellant's health conditions, the UNDT in effect allowed the Administration to abuse an employee and then use the results of the abuse as grounds for dismissal.

27. The Appellant reiterates the claims for relief made before the UNDT, namely the Appellant's claim for: an investigation; an apology; compensation for financial loss in the amount of 32 years' net base salary; and compensation for injuries caused including emotional suffering and health deterioration in the amount of five years' gross salary at the P-5 level.

Secretary-General's Answer

28. The UNDT correctly concluded that it may only review decisions that have been the subject of a prior request for administrative review. The HCHR's failure to reply to

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failed to exercise the jurisdiction vested in it in failing to “properly address the root causes of the Appellant’s termination from OHCHR”.

35. In the course of its Judgment, under the heading “Scope of the application”, the Dispute Tribunal set out as follows:

In [the applicant’s] request for an administrative review, dated 14 February 2005, the applicant sought review of the administrative decision of the High Commissioner “not to reply to a formal complaint and request compensation for abuse of power, harassment and discrimination by staff of the [OHCHR]”. Thus, the Administration’s failure to properly and timeously (sic) address the applicant’s complaint is the only matter receivable by the Dispute Tribunal.

36. Addressing the Appellant’s claims for compensation for financial loss, including salary and benefits and entitlements, which the Appellant in the submissions to the Dispute Tribunal, maintained, arose on foot of the separation from service, and addressing the claim made for sick leave entitlements, the Dispute Tribunal stated

The applicant was separated for reasons of health and it is not contested that the reasons for [the applicant’s] separation were lawful and valid. The claim for sick leave entitlements was not part of the applicant’s request for administrative review and is, in any case, time-barred pursuant to former staff rule 111.2(a), as the applicant was required to submit [a] request within two months of the date [the applicant] received notification of the decision in writing. Therefore, the applicant’s submissions concerning [the] sick leave entitlements and termination of [the] contract and alleged damages flowing from this termination are not properly before the Tribunal.

37. From a review of the procedural steps taken in this case, from the time of the Appellant’s letter of 14 February 2005 requesting that the Secretary-General review the administrative decision of the OHCRC not to reply to the Appellant’s formal complaint to the date the proceedings came before the Dispute Tribunal, it is evident that the issue identified as the subject matter for administrative review was the decision of OHCRC not to reply to the Appellant’s complaint of discrimination, harassment and abuse of power.

38. In the course of its Report of 5 December 2008, the JAB stated:

In order to avoid any possible confusion, the Panel wished to delimit the subject matter of the present appeal. The Panel emphasized that the issue it was called on to consider was the lack of response by the HCHR to the Appellant’s complaints of discrimination, harassment, and abuse of authority by [the Appellant’s] former

superiors, and not the merits of the allegations. This appears clearly from the formulation of the contested decision as detailed in the Appellant's statement of appeal and subsequent submissions. It is also consistent with UNAT's findings relating to the admissibility of this specific appeal as stated in Judgment no. 1385.

39. We note that while issue is taken by the Appellant, in the course of the submissions made to this Tribunal, with the decision of the Dispute Tribunal to limit judicial review to the adequacy of compensation, the fundamental approach of the Dispute Tribunal to the scope of the issue before it was nevertheless described by the Appellant in the following terms: "[T]he UNDT, in the judgment underlying this appeal, correctly understood that the issue at hand was 'the Administration's failure to properly and timeously (sic) address the Appellant's complaint'".

40. The Appellant separated from service on 3 December 2004. This separation was not the subject matter of any request for administrative review by the Appellant. Indeed, in the course of the submissions to this Tribunal, the Appellant expressly states that the validity or the lawfulness of the grounds of the separation from service was not in dispute. The Appellant submits that the Dispute Tribunal erred in law and failed to exercise its jurisdiction by concluding that the Appellant was lawfully and validly separated from service for reasons of health, in the absence of the Dispute Tribunal having addressed the root cause of why the Appellant was in such a condition in the first place.

41. It is well established in the jurisprudence of the Appeals Tribunal, as expressed in *Crichlow and Planas*,¹ that in order to invoke the jurisdiction of the Dispute Tribunal, a specific administrative decision must be identified and that administrative review, as required under the former internal justice system, must be sought in relation to that decision.

42. We are satisfied, having regard to the principles established in the above quoted cases, as to the jurisdiction of the Dispute Tribunal to receive complaints, that there was no error of law or failure to exercise jurisdiction on the part of the Dispute Tribunal when

¹ *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035; *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049.

it determined as not receivable the Appellant's submissions, concerning sick leave entitlements, termination of contract, and the alleged damages flowing therefrom.

43. We are satisfied that the Dispute Tribunal properly determined that the issue before it for judicial review was the failure of the HCHR to address the Appellant's formal complaint, as made on 14 February 2005.

44. In the course of the submissions to this Tribunal, the Appellant contends that the Dispute Tribunal failed to consider the Appellant's request that it direct the Administration to conduct a full investigation into the matters which the Appellant

49. As the forum which is charged under the Statute to consider the facts of a particular case and as the forum which has before it the relevant information and/or evidence which will inform it as to what is the most appropriate remedy for an employee, should there be a finding that an infringement of legal rights has occurred, the Dispute Tribunal is in the best position to determine the nature of the remedy that should be granted in any particular case.

50. The Appeals Tribunal should be slow to interfere with the Dispute Tribunal's determinations in this regard, unless the exercise of the Dispute Tribunal's discretion is found to be manifestly unreasonable. This Tribunal is satisfied that in this case the Dispute Tribunal did not overstep the bounds of reasonableness or fairness in its assessment as to the benefits or otherwise of ordering an inquiry pursuant to ST/AI/371. It is the view of this Tribunal that the Appellant has not discharged the burden, which is on the Appellant, of showing how the Dispute Tribunal erred in its conclusion that directing that the procedure under ST/AI/371 be put in place would not be an effective remedy. Essentially, the same arguments have been made before us as were made to the Dispute Tribunal.

51. The Appellant submits that the Dispute Tribunal erred in refusing the claim for compensation for economic loss and sick leave benefit. The Appellant seeks compensation equivalent to 5 years gross salary at the P-5 level for the harm/emotional distress caused as a result of the HCHR's failure to respond to the formal complaint made in February 2005.

52. The Dispute Tribunal concluded that it was not competent to consider the Appellant's claims for actual economic loss, d to theJ03 646 0 Td-1.9(e ST27Ndn-1646unne02 Tc. i

Appellant's letter of complaint of 14 February 2005, a failure which, as stated by the Dispute Tribunal, was in breach of the requirement pursuant to Section 2 of ST/AI/371. As observed by the Dispute Tribunal, the nature of the complaints being made by the Appellant required the matter to have been taken seriously and enquired into properly, as required by Information Circular ST/IC/2003/17 which provides:

3. The Organization cannot tolerate discrimination and harassment in any form. Any infraction will be taken very seriously.

4. I expect all managers to take or initiate prompt and appropriate action in collaboration with the Office of Human Resources Management at Headquarters or the local Human Resources office at Offices away from Headquarters whenever an infraction occurs.

55. In measuring the compensatory award for the infringement which occurred in the case of the Appellant, the Dispute Tribunal took, as its starting point, the Respondent's acceptance of the findings in the JAB report and the Respondent's acceptance (albeit limited to the amount recommended by the JAB) that the Appellant was entitled to be compensated for the wrong perpetrated by the failure of the HCHR to deal with the Appellant's complaint.

56. The Dispute Tribunal opined that "the delay and failure to respond meant that the applicant was prejudiced in having [the] complaints investigated timeously (sic) or at all. The [Appellant] was deprived of the opportunity to prove a breach of [the] fundamental right not to be discriminated against...."

57. It concluded that in the particular case there was a "failure of the Administration to follow its own rules and regulations and to ensure protection for the values and principles concerning equal rights and protection against discrimination, enshrined in the [United Nations] Charter.... and several international instruments". Moreover, it took cognizance, from the documentation before it, including medical reports, of the adverse impact the events had on the Appellant's health, in so far as such documentation established causation. Furthermore, the Dispute Tribunal had regard to the "aggravating factor" that, by virtue of the number of years that had elapsed since the Appellant first made complaint, the Appellant's rights had been compromised.

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Judgment

68. We dismiss the appeal in its entirety.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.