



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-285

**Charles
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

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|------------|---------------------------------------------------------------------------------|
| Before: | Judge Mary Faherty, Presiding Judge Sophia Adinyira Judge Rosalyn Chapman |
| Case No.: | 2012-311 |
| Date: | 28 March 2013 |
| Registrar: | Weicheng Lin |

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|-------------------------|------------------|
| Counsel for Appellant: | Self-represented |
| Counsel for Respondent: | Wambui Mwangi |

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Lestrade Charles against Judgment No. UNDT/2012/023, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 14 February 2012 in the case of *Charles v. Secretary-General of the United Nations*.

Facts and Procedure

2. On 25 January 2011, Mr. Charles, a P-3 level staff member in the Procurement Division (PD), Office of Central Support Service, Department of Management, applied for a P-4 post of Procurement Officer, which was advertised on 8 December 2010 on Inspira (the United Nations jobsite).

3. In early 2011, after the 6 February 2011 deadline for applications, a list of 105 screened applicants, as well as a list of suitable rostered candidates, was sent to the hiring manager for further screening. An ad hoc panel identified and recommended a candidate from the roster for the post and, on 10 March 2011, the hiring manager requested the approval of the Officer-in-Charge, PD, of this recommendation.

4. The recommended candidate had been rostered at the time the post was advertised, but his position on the roster expired on 28 February 2011. Accordingly, in April 2011, the hiring manager sought, and received, confirmation from the Office of Human Resources Management (OHRM) that he was still eligible for recommendation. Thereafter, the recommendation was formally approved and, on 9 May 2011, the successful candidate was selected.

5. Having seen on Inspira that the position had been filled, Mr. Charles requested management evaluation of the selection process on 27 May 2011. Although the PD confirmed to Mr. Charles on 21 June 2011 that a rostered candidate had been selected, on 24 June 2011, the Management Evaluation Unit advised him that it had no jurisdiction in the case as no selection decision had been made.

6. The successful candidate accepted the position on 11 July 2011.

7. Mr. Charles appealed to the Dispute Tribunal on 21 July 2011, alleging that the selection process had been vitiated because the successful candidate was not on the roster at the time of selection and also contending that his rights had been breached when the Organization delayed in notifying him of the decision.

8. Insofar as the roster status of the selected candidate was concerned, whilst finding the relevant administrative instruction “silent about how the eligibility dates of roster candidates should be computed”, the UNDT took note of the advice provided by OHRM in April 2011 “that the consistent and accepted practice in respect of this issue is to recognize as eligible roster candidates those whose name is on the roster on, at least, the date of the opening of the vacancy announcement”.

9. With respect to Mr. Charles’ right to be informed of the outcome of the selection process, the UNDT found that, pursuant to Section 10.1 of ST/AI/2010/3, entitled “Staff selection system”, as a roster candidate, he should have been informed within 14 days after the selection decision was made.¹ The Dispute Tribunal disagreed with the Respondent that this period ran from the date the successful candidate accepted the position, finding that, “as the selection decision was made on 9 May 2011, [Mr. Charles] should have been notified by the hiring manager by 23 May 2011”. Moreover, the UNDT emphasised that an Inspira notification did not satisfy the obligation of the hiring manager in this regard, and “the notification should have been made ... directly and personally by the hiring manager”. The Dispute Tribunal concluded, however, that Mr. Charles had failed to substantiate his claim of harm because of the delay in notifying him, and held that there was no basis for an award of compensation.

10. Mr. Charles appealed this Judgment to the Appeals Tribunal on 27 March 2012, and the Secretary-General answered on 1 June 2012. On 11 September 2012, Mr. Charles filed a motion seeking leave to file additional pleadings in this matter. The Duty Judge granted the motion on 10 October 2012 in Order No. 109 (2012), and the additional pleadings submitted in the context of Mr. Charles’ motion were accepted.

¹ This finding of fact was, however, erroneous, as is further detailed in the Considerations below.

Submissions

Mr. Charles' Appeal

11. Mr. Charles requests reversal of the UNDT Judgment, and submits that the Dispute Tribunal made several errors of fact and of law.
12. As a matter of record, he argues that the UNDT erred in stating that he was a rostered candidate during the impugned selection process.
13. He contends that the Dispute Tribunal also erred in concluding that his candidature was fully and fairly considered and that the selection process was not legally flawed.
14. Mr. Charles further contends that the UNDT erred in not finding that the Respondent selected an ineligible candidate. He asserts that the successful candidate's roster status was governed by ST/AI/2006/3/Rev.1, "Staff selection system", and not ST/AI/2010/3.
15. He requests "reasonable compensation for the damage caused to his career advancement opportunity and for the moral and emotional harm caused as a consequence of the violation of his rights" which, *inter alia*, included delay in notifying him of the selection decision.
16. In his additional pleadings, Mr. Charles argues that ST/AI/2010/3/Amend.1 illegally retroactively alters ST/AI/2010/3 and, as such, should not be considered in the context of his case, which was brought under the original wording of ST/AI/2010/3. He argues that to do otherwise would violate the principles of good faith and non-retroactivity of law.

Secretary-General's Answer

17. The Secretary-General submits that Mr. Charles has failed to establish any error on the part of the Dispute Tribunal that would warrant reversal of its Judgment, in particular its decision not to grant compensation.
18. The Secretary-General objects to Mr. Charles' attempt to re-argue his case in the guise of an appeal to the Appeals Tribunal.

19. The Secretary-General further submits that the UNDT correctly concluded that the selection process was properly conducted in accordance with ST/AI/2010/3, the relevant administrative instruction.

20. The Secretary-General contends that the UNDT also correctly concluded that there was no undue delay in notifying Mr. Charles that he had not been selected for the post.

21. The Secretary-General acknowledges that the UNDT erred in stating that Mr. Charles was a rostered candidate, which statement was made on the basis of erroneous submissions from the Respondent, but asserts that this factual error, which can be corrected for the record by the Appeals Tribunal, did not materially affect the outcome of the Judgment.

22. The Secretary-General submits that Mr. Charles has provided no evidence that the selection process in question was arbitrary or prejudiced and, as such, has failed to meet his burden of proof in this matter.

23. The Secretary-General contends that Mr. Charles has alleged no basis to support his requested award of compensation.

24. The Secretary-General requests the Appeals Tribunal to affirm the Judgment of the UNDT, and to dismiss the appeal in its entirety.

Considerations

Preliminary Issue

25. On 11 September 2012, Mr. Charles filed a motion with the Appeals Tribunal seeking leave to file additional pleadings to the effect that the Appeals Tribunal consider his case in light of the provisions of administrative instruction ST/AI/2010/3 in force at the time of the contested selection process and that it should not retroactively apply the amendment made to ST/AI/2010/3 on 29 June 2012 (ST/AI/2010/3/Amend.1).

26. The Respondent acknowledges the inapplicability of ST/AI/2010/3/Amend.1 to the present case. Given that both parties are at *idem* (albeit for different reasons) on the issue, Mr. Charles' argument has become moot and the appeal will proceed without reference to ST/AI/2010/3/Amend.1.

Did the UNDT err in law in determining the successful candidate eligible to fill the vacant P-4 post in issue in these proceedings?

27. Mr. Charles contends that the Dispute Tribunal erred in law when it determined that the candidate selected to fill the P-4 post was eligible to be selected from the roster and that the decision to select him was proper. Specifically, Mr. Charles maintains that, pursuant to the provisions of former administrative instruction ST/AI/2006/3/Rev.1, the successful candidate's tenure on the roster ran from 1 March 2010 to 28 February 2011. It is contended that as his eligibility expired on 28 February 2011, the successful candidate was thus ineligible for consideration and/or selection for the P-4 vacancy in issue in this case.

28. In the absence of specific guidelines in ST/AI/2010/3 (which came into force in April 2010 and which was the operative administrative instruction at the time of the selection decision), the Dispute Tribunal took note of OHRM's practice of recognising as eligible all rostered candidates whose names were on the roster on the date of the opening of the vacancy announcement for the P-4 post. The existence of this practice was not only communicated by the Respondent to the Dispute Tribunal in the course of the proceedings, but was also confirmed by OHRM to the hiring manager in April 2011, following the ad hoc panel's recommendation of the successful candidate for the post.

29. It is clear that the hiring manager's query arose in circumstances whereby, pursuant to ST/AI/2006/3/Rev.1, the successful candidate's inclusion on the roster was for a period of one year. Notwithstanding the arguments advanced by Mr. Charles in the course of his submissions, we are satisfied that the Dispute Tribunal properly concluded, given the existence of the practice confirmed to the hiring manager by OHRM, that the successful candidate's eligibility was covered by the provisions of ST/AI/2010/3, the statutory instrument which was promulgated in April 2010 and which superseded ST/AI/2006/3/Rev.1. As the successful candidate's name was on the roster in April 2010 and, more specifically, remained on the roster in December 2010 when the vacancy for the P-4 post was announced, his eligibility was governed by the provisions of ST/AI/2010/3. Thus, in affirming the successful candidate's eligibility, the Dispute Tribunal committed no legal error and Mr. Charles' appeal on this issue is dismissed.

Was there delay on the part of the Administration in notifying Mr. Charles of his non-selection and, if so, was that delay and/or the consequences thereof such as to warrant an award of compensation by the Dispute Tribunal?

30. Section 10.1 and 10.2 (“Notification and implementation of the decision”) of ST/AI/2010/3 provide as follows:

10.1 The executive office at Headquarters, the local human resources offices or the Division of Field Personnel of the Department of Field Support shall inform the selected candidate of the selection decision within 14 days after the decision is made. Candidates endorsed by the central review body and placed on a roster shall be informed of such placement within 14 days after the decision is made by the hiring manager or occupational group manager and be advised that they may be selected from the roster for similar positions that may become available within the stipulated time frame as described in sections 9.3 and 9.4. Other candidates convoked for assessments but not selected or placed on a roster shall be so informed by the hiring manager or the occupational group manager within 14 days after the selection decision is made in writing. Applicants eliminated prior to the assessment exercises shall be informed.

10.2 The decision to select a candidate shall be implemented upon its official communication to the individual concerned. When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions. However, when an encumbered position has been included in the compendium after upward reclassification and an applicant other than the incumbent is selected, the decision shall be implemented only when a suitable position has been identified for the incumbent.

31. From a reading of its Judgment, it is clear that the Dispute Tribunal found that there was a delay on the part of the Administration in notifying Mr. Charles of the selection decision. The UNDT made this finding of fact in the erroneous belief (based on what the Respondent had pleaded in his reply) that Mr. Charles’ name was on the list of rostered candidates which was forwarded to the hiring manager, together with a list of 105 screened applicants, once the deadline for the vacancy had expired. Both the Appellant and the Respondent acknowledge that the UNDT’s finding that Mr. Charles was a rostered candidate was erroneous and that Mr. Charles’ name in fact only appeared on the list of screened applicants.

32. Having (erroneously) found Mr. Charles, as a rostered candidate, to be entitled to notification in writing within 14 days of the selection decision (9 May 2011), the UNDT nevertheless concluded that Mr. Charles who was notified on 21 June 2011, some 42 days after the selection decision, was not entitled to compensation for alleged stress and anxiety as he had

not adduced evidence of such harm or stress. Moreover, the Dispute Tribunal found that the delay complained of did not prevent him from applying for other positions, such as, having regard to the Appeals Tribunal's jurisprudence in *Rolland*,² might have warranted a compensatory award.

33. As a candidate for the post in question who was eliminated prior to the assessment exercise, Mr. Charles' entitlement to be notified of the outcome of his application fell to be considered under the fourth category of candidates referred to in Section 10.1 of ST/AI/2010/3 as follows: "Applicants eliminated prior to the assessment exercises shall be informed".

34. In the course of its Judgment, the Dispute Tribunal, in considering the applicable time frame for informing fourth category candidates of the selection decision, stated: "In any event, the separate reference to the fourth group of candidates may not necessarily be interpreted as meaning that there is no time frame at all for informing that group of the selection decision".³ The UNDT cited the jurisprudence of this Tribunal in *Wu*⁴ as requiring notification to unsuccessful candidates be provided "within a reasonable amount of time".⁵

35. Contrary to what is stated in the Respondent's submission to this Tribunal, the UNDT did not with any sufficient degree of clarity determine whether notification to Mr. Charles on 21 June 2011 fell within the ambit of "a reasonable amount of time". The Dispute Tribunal's lack of clarity on this issue is presumably accounted for on the basis that it had already (erroneously) viewed Mr. Charles' entitlement to notification in the context of him being a rostered candidate.

36. Mr. Charles submits that the Respondent's failure to inform him (as a fourth category candidate) of the outcome of the selection process in a timely manner breached Staff Rules and violated his due process rights, thereby causing him harm.

37. We are satisfied however, having regard to the circumstances of the present case, that the communication to Mr. Charles on 21 June 2011 did not constitute undue delay and we note, in particular, that he was notified while the selection process remained ongoing, as the selected candidate did not accept the offer of appointment until 11 July 2011.

² *Rolland v. Secretary-General of the United Nations*, Judgement No. 2011-UNAT-122.

³ Judgment No. UNDT/2012/023, para. 35.

⁴ *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

⁵ Judgment No. UNDT/2012/023, para. 36.

38. In any event, even if we were minded to consider a period of 42 days as beyond the realm of “a reasonable amount of time”, it remains the case that Mr. Charles did not satisfy the UNDT that he had suffered harm or damage as a result, a finding which we have upheld.

Alleged lack of evaluation of Mr. Charles' candidacy for the P-4 post

39. In the course of his submissions, Mr. Charles appears to take issue with the UNDT's handling of his claim that the Administration did not give full and fair consideration to his application. While this issue is not specifically addressed in the course of its Judgment, the Dispute Tribunal did consider the provisions of Sections 9.2 and 9.4 of ST/AI/2010/3, which govern the Administration's entitlement to select a rostered candidate for a vacancy, without recourse to a central review body. Thus, Mr. Charles was not considered for the P-4 post because a suitable rostered candidate was identified and duly selected. We accept the Respondent's contention that Mr. Charles had never been recommended for the post and we are, thus, satisfied that no procedural irregularity arose which prevented his candidacy from proceeding to the central review board. The Secretary-General has broad discretion in selection matters and it is not the function of the UNDT or indeed this Tribunal, in the absence of evidence of bias, discriminatory practices or *mala fides*, to substitute its judgment for that of the Secretary-General.⁶ Furthermore, we note Mr. Charles' own acknowledgment, at page 13 of his submission, of the discretionary authority of the Secretary-General in staff selection matters. Insofar, therefore, as Mr. Charles challenges the legal findings of the UNDT on his candidacy, his appeal is dismissed.

Judgment

40. Mr. Charles' appeal in its entirety is dismissed and the Judgment of the UNDT is affirmed.

⁶ See generally *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Chapman

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar