



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

Judgment No. 2014-UNAT-416

Charles
**(Respondent/Applicant and Appellant on
Cross-Appeal)**
v.
Secretary-General of the United Nations
**(Appellant/Respondent and Respondent on
Cross-Appeal)**

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Inés Weinberg de Roca
Judge Luis María Simón

Case Nos.: 2013-467 & 2013-468

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Mr. Charles: Self-represented

Counsel for Secretary-General: Amy Wood

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/040 (Case No. 2013-467) and Judgment No. UNDT/2013/041 (Case No. 2013-468), respectively, both of which were rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 28 February 2013 in the cases of *Charles v. Secretary-General of the United Nations*. The Secretary-General filed his appeals on 30 April 2013, and Mr. Lestrade Charles filed his answers on 13 June 2013. Also on 13 June 2013, Mr. Charles filed cross-appeals in both cases which the Secretary-General answered on 23 August 2013. The Appeals Tribunal decided to join the cases as they are based on similar legal and factual issues.

Facts and Procedure

Case No. 2013-467

2. The following facts are uncontested:¹

... [Mr. Charles], a staff member in the Procurement Division of the Department of Management of the United Nations Secretariat in New York, contests the decision not to select him for the post of Procurement Officer (Team Leader), Field Supply Team, at the P-4 level (Job Opening No. 12-PRO-DMOCSS-24389-R-New York).

...

... The contested job opening was advertised from 10 July to 8 September 2012. In or about October 2012, [the Office of Human Resources Management (OHRM)] released to the hiring manager in the Procurement Division a list of candidates for the job opening. The list contained 153 candidates, of whom five were on the roster of pre-approved candidates. The hiring manager did not review any non-roster candidates and instead recommended to the Director of the Procurement Division by memorandum of 25 October 2012 the selection of one of the candidates from the pre-approved roster. On 2 November 2012, the Director of the Procurement Division selected the recommended candidate. On 12 November 2012, [OHRM] notified the Applicant of the decision to select a candidate from a roster of candidates pre-approved for similar functions at the level of the job opening.

¹ *Charles v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/040, paras. 1 and 5.

3. On 28 February 2013, the UNDT issued Judgment No. UNDT/2013/040, granting Mr. Charles' application in part and awarding him USD 1,000 as compensation for the breach of his rights and resultant harm. The UNDT held that the automatic appointment of a rostered candidate without a selection process that affords other candidates full and fair consideration is contrary to the requirements of Article 101.3 of the United Nations Charter (Charter) and Staff Regulation 4.2 and allows rostered candidates to be treated as a privileged class above other candidates. ST/AI/2010/3, which is consistent with the Charter and Staff Regulation 4.2, does not provide for a priority consideration of rostered candidates; the only difference is that, if selected, rostered candidates do not have to be referred to the central review bodies for approval.

4. The UNDT found that, by not giving proper consideration to Mr. Charles' candidacy as a result of considering only rostered candidates, Mr. Charles had been deprived of his rights to full and fair consideration and suffered some harm. However, since Mr. Charles was only one of the 153 candidates whose names were released to the hiring manager, it would be speculative to attempt an estimate of his chances of success. The UNDT dismissed allegations of bias and discrimination and rejected Mr. Charles' claim that the late response to his request for management evaluation caused him harm.

5. The Secretary-General appeals the UNDT Judgment and Mr. Charles cross-appeals.

Case No. 2013-468

6. The following facts are uncontested:²

... [Mr. Charles] contests the decision not to select him for the post of Procurement Officer (Operations) at the P-4 level (Job Opening No. 12-PRO-DMOCSS-24920-R-New York).

...

... The contested job opening was advertised on 24 August 2012. In or about September 2012, OHRM released to the hiring manager in the Procurement Division a list of candidates for the job opening. The list contained 128 candidates, of which, it appears, three were on the roster of pre-approved candidates. The Director of the Procurement Division did not review any non-roster candidates and instead recommended to the Assistant Secretary-General, Office of Central Support Services, by memorandum of 28 September 2012 the selection of one of the three candidates from the pre-approved roster. The recommended candidate was subsequently

² *Charles v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/041, paras. 1 and 5.

selected. [OHRM] subsequently notified the Applicant of the decision to select a candidate from a roster of candidates pre-approved for similar functions at the level of the job opening.

7. On 28 February 2013, the UNDT issued Judgment No. UNDT/2013/041, granting Mr. Charles' application in part and awarding him USD 1,000 as compensation for the breach of his rights and resultant harm. The UNDT noted that "[t]he parties' submissions in this case in large part repeat their submissions in Case No. UNDT/NY/2013/005, which was disposed of by the Tribunal by Judgment No. UNDT/2013/040" and that "[t]he two cases are also similar with respect to the legal and factual issues".³ The UNDT found that for the reasons stated in Judgment No. UNDT/2013/040, the Secretary-General's interpretation of ST/AI/2010/3 was mistaken and that by not giving any consideration to Mr. Charles' candidacy for the job opening, he had violated Mr. Charles' rights. The UNDT dismissed Mr. Charles' claims with regard to the delayed response to his management evaluation request.

8. The Secretary-General appeals the UNDT Judgment and Mr. Charles cross-appeals.

Submissions

Case No. 2013-467

The Secretary-General's Appeal

9. The Secretary-General submits that the UNDT erred in finding that the decision to select a rostered candidate in the present case was unlawful. Contrary to the UNDT finding, ST/AI/2010/3 does not require that the hiring manager/head of office first review all new candidates before properly exercising his or her discretion to select a rostered candidate for a particular post. While in Section 9.4 of former ST/AI/2006/3 it was expressly provided that a rostered candidate could be selected for a post only "after the programme manager has reviewed the applications of new candidates ... together with the pre-approved roster candidates", this requirement was explicitly excluded in its revised 2010 version (ST/AI/2010/3).

10. The Secretary-General further contends that the UNDT exceeded its competence by substituting its own judgment for that of the Secretary-General in deciding how candidates for a post should be considered. The UNDT does not have the authority to introduce different

³ *Ibid.*, para. 7.

procedures for the evaluation of candidates in a selection or promotion exercise, as the authority to promulgate the rules regarding the administration of staff members lies solely with the Secretary-General as the Chief Administrator of the Organization. The UNDT erred in drawing a distinction between the policy of selecting rostered candidates reflected in ST/AI/2010/3 and the practice of selecting rostered candidates based on the Administration's interpretation of ST/AI/2010/3. A comparison of the 2006 and 2010 administrative instructions reveals that the primary purpose of the amendments made to Section 9.4 was to remove the requirement for programme managers to consider all non-rostered candidates.

11. The UNDT erred in law and exceeded its competence in awarding compensation. The Organization complied with its contractual obligations vis-à-vis Mr. Charles and his rights were not violated since the decision to select a rostered candidate was properly and lawfully taken. Furthermore, if the Appeals Tribunal were to find that Mr. Charles' rights were violated by the decision to select a rostered candidate, his chances of selection were so slight that he did not suffer any compensable harm.

12. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment.

Mr. Charles's Answer

13. Mr. Charles claims that contrary to the Secretary-General's contention, the UNDT did not find that the selection of a rostered candidate for a post is unlawful without first reviewing all new candidates. Rather, the UNDT found that the Administration failed to give Mr. Charles full and fair consideration. The Secretary-General's argument is a misrepresentation of the UNDT Judgment and should be rejected.

14. Mr. Charles contends that the UNDT correctly found that the provisions of ST/AI/2010/3 must be considered as a whole and Sections 4 to 8 of ST/AI/2010/3 which precede Section 9, require that each eligible candidate must be considered fully and fairly. The roster system allows the Organization to save time and funds by avoiding a stage of referral to the Central Review Body, if a rostered candidate is considered the best candidate after the conduct of a fair and full competitive selection exercise.

15. The UNDT did not exceed its jurisdiction, but acted squarely in the parameters of its authority under Article 2 of its Statute by seeking to ensure that the policies promulgated by the Secretary-General comply with higher legal norms and providing proper guidance to the Administration on the interpretation and application of the rules it promulgated.

16. Mr. Charles requests that the Appeals Tribunal dismiss the appeal in its entirety and increase the quantum of compensation.

Mr. Charles' Cross-Appeal

17. Mr. Charles contends that the UNDT erred in procedure in failing to afford him the opportunity to file additional submissions and in failing to hold an oral hearing.

18. The UNDT improperly “trivialized” his case by finding that his non-selection was the result of a “mere procedural error” and erred by failing to recognize “the pattern of abuse of authority, bias, intimidation and retaliatory conduct” against Mr. Charles’ candidature and by failing to hold the Administration accountable.

19. Mr. Charles asserts that the UNDT erred with respect to his claims of undue delay in receiving a response to his request for management evaluation. He did not claim any harm as a result of a delayed response; rather, he claimed that he was harmed because the alleged delay in informing unsuccessful candidates prevented him from filing a timely suspension of action request of the selection decision.

20. Mr. Charles contends that the UNDT erred in failing to award him compensation for moral harm and adequate compensation for loss of chance. He requests that the Appeals Tribunal increase the amount of compensation from USD 1,000 to a combined total equal to twelve months’ net base salary as follows:

- (a) The sum of three months net base salary for the failure to give full and fair consideration to his candidature and breach of his employment rights;
- (b) The sum of three months net base salary as non-pecuniary compensation for the lost “opportunity/chance of selection and for the consequent damage to [his] career development”; and
- (c) The sum of six months net base salary for moral damages.

The Secretary-General's Answer to Mr. Charles' Cross-Appeal

21. The Secretary-General contends that Mr. Charles has failed to establish that the UNDT erred by dismissing his allegations of abuse of authority and bias. Mr. Charles has also failed to demonstrate that the UNDT committed procedural errors such as to affect the decision of the case. He has not shown that the UNDT erred in the exercise of its discretion in declining to hold an oral hearing and in declining Mr. Charles' request to file additional submissions.

22. The Secretary-General asserts that Mr. Charles' claim regarding the delayed response to his management evaluation request does not demonstrate any error by the UNDT. Article 10(2) of the UNDT Statute does not allow for the suspension of an administrative decision during the proceedings of the UNDT in cases of promotion. Since the UNDT could not have suspended the implementation of the selection decision pending the proceedings before it, any request for a suspension of action would have been without legal effect. The UNDT found in favour of Mr. Charles who was therefore barred from appealing on legal or academic grounds.

23. The Secretary-General contends that Mr. Charles has failed to establish any basis for the Appeals Tribunal to conclude that an increase in the compensation awarded is warranted. Mr. Charles has not provided any evidence to support his claim of moral harm. Furthermore, he has not established any basis for an increased award of compensation for loss of chance. Mr. Charles has failed to demonstrate that, even if there had been a procedural irregularity in the decision to select another candidate it would have had an impact on his status. There is no legal basis for an award of compensation for loss of chance.

24. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Charles' cross-appeal in its entirety.

Case No. 2013-467

25. The legal and factual issues in this case are similar to those of Case No. 2013-468 and the parties rely on their submissions in that case.

Considerations

26. ST/AI/2010/3 establishes the staff selection system. Section 9.4 of that instruction, the interpretation of which is the central issue in the instant cases, provides in part:

Section 9**Selection decision**

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time the present administrative instruction is amended. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body. ...

27. The UNDT rejected the Secretary-General's contention that this provision allows selection of rostered candidates without consideration of those candidates who actually applied for the job opening. The UNDT held that:

The [Secretary-General's] interpretation of ST/AI/2010/3, in effect, allows rostered candidates to be treated as a privileged class above other candidates for position-specific job openings. No such priority consideration exists for roster candidates under ST/AI/2010/3. Simply put, they are not a separate privileged class of candidates for position-specific job openings and cannot be treated as such. This was not the purpose of the roster, which was mainly to speed up the recruitment process by avoiding the stage of a referral to the central review bodies if a roster candidate is considered the best candidate when compared to all other candidates.⁴

28. This is not a case where the written law is silent or has to be interpreted because it is not explicit. The plain wording of Section 9.4 makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position. There is no requirement in Section 9.4 for the head of department to first review all non-rostered candidates. If the head of department's discretion is subject to such a requirement, then it would be essential for the instruction to provide as much. On the contrary, as pointed out by the Secretary-General, Section 9.4 has been amended specifically to remove such a requirement.

⁴ *Charles v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/040, para. 18. In Judgment No. UNDT/2013/041, the UNDT adopts by reference its reasoning in Judgment No. UNDT/2013/040.

29. It was thus not open to the UNDT to come to the conclusion that Section 9.4 requires the head of department/office to first review all non-rostered candidates before selecting a rostered candidate.

30. We find that the UNDT erred in law in deciding that the appointment of the rostered candidates was contrary to ST/AI/2010/3. The decision to do so was entirely within the Director's discretion, and no abuse of that discretion has been demonstrated.

31. Accordingly, we find that there was no violation of Mr. Charles' due process rights. It follows that the award of damages in his favour cannot be allowed to stand.

Judgment

32. The appeals are allowed and the Judgments of the UNDT are vacated. Mr. Charles' applications and cross-appeals are dismissed in their entirety.

Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 13th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar