



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

Judgment No. 2019-UNAT-958



**Dispert & Hoe
(Appellants)**
v.
**Secretary-General
of the International Maritime Organization
(Respondent)**

JUDGMENT

Before: Judge Jean-François Neven, Presiding
Judge Sabine Knierim
Judge Graeme Colgan

Case Nos: 2019-1256 & 2019-1257

Date: 25 October 2019

Registrar: Weicheng Lin

Counsel for Ms. Dispert & Ms. Hoe: Alex Philippe Haines

Counsel for Secretary-General of IMO: Dorota Lost-Sieminska

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. This matter arose out of Ms. Astrid Dispert and Ms. Ming Lee Hoe's (the Appellants) request for their posts to be up-graded to a higher level within the International Maritime Organization (IMO). The Secretary-General of the IMO rejected their request upon advice from the IMO's Classification Committee (CC) and the IMO's internal appeals process, the Staff Appeals Board (SAB), which both recommended that the posts stay at their current grades. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of the Appellants' appeals against this rejection. For reasons set forth below, we remand the matter to the SAB.

Facts and Procedure

2. On 25 September 2017, Ms. Dispert, assigned to the GloMEEP Project post of Technical Adviser at the P-2 level and Ms. Hoe, assigned to the post of Project Administrative Assistant at the G-6 level, filed applications to up-grade their posts to P-3 and G-7, respectively. The CC considered their applications when it met from 16 to 20 October 2017. On 14 January 2018, the CC communicated, through the Director of Administrative Division to the Secretary-General of the IMO, that it recommended both posts remain at their current grades.

3. On 31 January 2018, the Secretary-General of the IMO accepted the recommendation and communicated his decision to the Appellants by memorandum, dated 7 February 2018, which they received on 12 February 2018. The Appellants requested reconsideration of the decision on 7 and 16 March 2018.

4. On 3 April 2018 the IMO conducted a mapping comparative analysis between the Appellants' roles and the roles' of two "comparators", namely, their colleagues' roles in an adjacent project, called GloBallast. The IMO accepted that the Appellants' roles were equal to their comparators' roles but determined that their colleagues' roles should retroactively be downgraded to match the Appellants' grades. On 4 May 2018, the Appellants submitted an intention to appeal, pending the outcome of the mapping exercise, and while a mediation effort was underway.

5. On 2 August 2018, the Appellants e-mailed Human Resources Services and conveyed that the subsequent downgrade of their two colleagues on the GloBallast project did not rectify the discriminatory situation whereby their two colleagues worked at a higher grade and salary along side of them which meant they suffered discrimination and a violation of the principle of equal

work for equal pay. Also, the GloBallast project had ended and those two colleagues benefited from their higher grades by applying to posts at an even higher grade. The Appellants found it was convenient for the IMO to retroactively downgrade two posts that did not exist anymore instead of up-grading their two posts.

6. On 12 September 2018, after the SAB granted an extension, the Appellants filed internal appeals to the SAB contending the following: there were procedural irregularities with the classification process, specifically an attempt to remove them from the reclassification exercise; their manager was not available to provide information to the CC; the CC was not qualified to assess technical and project roles; the classification methods were unclear and discriminated against GloMEEP project staff; there was a breach of the equal pay for equal work principle as their respective roles were similar to the roles under the GloBallast project; the breach of this principle has led to their financial loss and inability to apply for higher grade positions like those incumbering posts in the GloBallast project; there was an unjustifiable delay through the mapping process; and there was *mala fides* from the Administrative Division throughout the process, with a subsequent downgrading of the GloBallast roles serving as an attempt to silence the Appellants. The Appellants also argued that their posts should have been classified at the same original level as the GloBallast posts, which is supported by the mapping exercise, the view of their manager, and the approval of the project donor.

7. The SAB provided the appeals to the Administrative Division for comments. The Administrative Division provided comments on 29 October 2018. Following consideration of the appeal and the Administrative Division's response, the SAB reached its conclusion and forwarded same to the Secretary-General of the IMO. On 21 November 2018, Ms. Dispert and Ms. Hoe requested a copy of the Administrative Division's response, which was provided to them and the process was put on hold. On 20 December 2018, the Appellants submitted comments on the Administrative Division's response.

8. On 29 January 2019, the SAB issued its report to the Secretary-General of the IMO. The report concluded that the classification process was followed appropriately in line with the Organization's procedures and that the subsequent actions taken by the Secretary-General of the IMO in response to the advice of the CC was consistent with established procedures. The SAB concluded there was no evidence to show that unclear classification methods had been applied. The SAB found the other contentions of the Appellants fell outside the scope of their mandate, which was to review the process for compliance with established procedures. Consequently, the

SAB recommended that the Secretary-General of the IMO confirm his decision to keep the posts at their current grades.

9. On 31 January 2019, the Secretary-General of the IMO, by way of two nearly identical memoranda, informed the Appellants that he confirmed the administrative decision to keep their posts at the current levels. He noted that he had received the SAB's report, which concluded that the CC recommendations were consistent with established procedures.

10. The Appellants filed two appeals with the Appeals Tribunal on 6 May 2019 against the Secretary-General of the IMO's decision dated 31 January 2019. On 5 June 2019, the Secretary-General of the IMO filed a motion for leave to file a consolidated answer to the two appeals. As both appeals were nearly identical and challenged nearly identical decisions, the Appeals Tribunal, by way of Order No. 347 (2019), dated 20 June 2019, consolidated the two appeals for all purposes. The Secretary-General of the IMO thereafter filed a consolidated answer on 5 July 2019.

Submissions

Ms. Dispert & Ms. Hoe's Appeals

11. The Appellants request this Tribunal to order their posts be up-graded, that they be paid in arrears the salary and entitlements they would have received had their posts been reclassified, and that they be awarded compensation for non-material and moral damages for lost opportunities and career progression. They request that this Tribunal find that they have been victims of unlawful discrimination and award them legal costs.

12. The Appellants argue that there is a discriminatory difference in grading between their posts and their comparators. The SAB and the Secretary-General of the IMO erred in law by failing to remedy this discrimination. The IMO admitted their two roles were similar to the two comparators' roles each operating at one higher grade. The IMO conducted a mapping exercise and confirmed that their roles were operating equally to the comparators' roles, which are one grade higher. However, the IMO's remedy to this disparity was to retroactively downgrade their comparators' roles. This does not provide remedy to the Appellants. The two comparators worked on the GloBallast project, which terminated in June 2017. But the two comparators remained on the same contract to support the development of another Project, GoFouling, and maintained their grades of P-3 and G-7. Despite the similar scope of the GoFouling project the

posts were classified as P-4, P-2, G-6 and G-5. Furthermore, the Appellants are both female and were doing equal work as the two comparators who are male but for less pay in violation of their human rights under Article 23(2) of the Universal Declaration of Human Rights and in violation of IMO Staff Rule 101.2(e) and the IMO policy and procedures on workplace harassment. Despite the downgrading, the Appellants were still paid less than their male comparators for work which the IMO admits was equal. The only way to remedy this retroactive discrepancy is to pay them the difference in salary in arrears. In turn, the Appellants argue that the SAB and the Secretary-General of the IMO erred in law when they failed to rectify the IMO's admitted breach of the equal pay principle.

13. The SAB and the Secretary-General of the IMO further erred in law and procedure as the reclassification decision breached IMO Staff Rule 102.1, which required that posts and their inter-relationships be analysed objectively and fairly. The IMO has admitted their roles were similar to the two comparators who concluded a project of equal work yet were paid at the higher grades.

The Secretary-General of the IMO's Consolidated Answer

14. The Secretary-General of the IMO requests the Appeals Tribunal to dismiss the appeals. The Secretary-General of the IMO argues that the Appellants fail to meet their burden of showing error in the decision. Firstly, the Appellants do not provide any evidence of discrimination against them in violating the principle of equal pay for equal work. The SAB also did not find any evidence was proffered. The Appellants for the first time on appeal argue they were discriminated against due to their gender. There is no evidence to support this claim. As new arguments are not permitted on appeal, they should be dismissed. Furthermore, the Appellants allege that this discriminatory and unequal payment by not aligning their posts with the posts in the GloBallast project constitutes prohibited conduct under Rule 1.5 of the IMO's Policy and Procedures for Investigation of Alleged Breaches of IMO Policy on the Right to Work in a Harassment Free Environment (The Non-Discrimination Policy). The Appellants claim that the Secretary-General of the IMO breached Rules 3.3 and 5.3 of the Non-Discrimination Policy. These policies set forth formal procedures requiring a formal complaint, investigation, report, etc. The Appellants never submitted a formal complaint on prohibited conduct in line with these policies and there was thus no administrative decision rendered as they did not utilize the first instance process. Any consideration regarding these claims should be deemed not receivable by this Tribunal.

15. The IMO complied with the procedures of IMO's Staff Rule 102.1 as a tripartite CC was established comprising of an independent job classification expert, a trained and qualified representative of the Human Resources Services, and a trained representative nominated by the Staff Committee. Three affidavits of the members set forth their qualifications in this regard. The CC reviewed the duties and responsibilities attached to each post; reviewed the relationship between posts as relates to various factors in the system; reviewed the levels as they fit within the overall structure; applied the post classification system established by the International Civil Service Commission (ICSC); analyzed component parts of the job and compared them to other jobs in similar disciplines; interviewed the supervisor; and assessed the occupational field. The CC determined independently and unanimously that their posts should remain at their current levels.

16. This Tribunal should dismiss the Appellants' claims for relief. There is no legal basis for their claim to be paid at the higher grade in arrears. The Appeals Tribunal is not competent to classify or re-classify posts and therefore cannot grant this request. The Appellants' claim for moral damages and for lost opportunities or career progression is without any supporting evidence and must fail. Their claim for legal costs must also fail as the Appeals Tribunal's power to award costs is restricted to cases where a party has manifestly abused the proceedings. There is no evidence that the Secretary-General of the IMO has abused the process.

Considerations

17. There are fundamental problems with the manner in which the IMO has dealt with Ms. Dispert and Ms. Hoe's requests for reclassification. This Tribunal is concerned that the "decisions" under appeal do not appear to conform to the Respondent's jurisdictional requirements under Article XI of IMO's Staff Regulations and Rules. IMO Staff Rule 111.1(a) ("Consideration of an Appeal by the Staff Appeals Board") provides that the SAB, as the "first instance neutral process", must provide a "written record" and a "written decision" providing reasons, facts, and law. IMO Staff Rule 111.1(b) provides that in cases, such as this, where the appeal is against an "administrative decision" taken in response to the advice received from a technical body such as the Classification Committee, the appeal is to be "limited to the decision taken in response to the advice".

18. Article XI of the IMO's Staff Regulations and Rules is based on the terms of the Agreement between the United Nations and the IMO, which took effect on 1 July 2009 extending the jurisdiction of the Appeals Tribunal to the IMO and, in turn, incorporating Article 2(10) of the Appeals Tribunal's Statute, which governs our jurisdiction and powers.

19. The Secretary-General of the IMO says (and the Staff Regulations and Rules specify) that the SAB is the neutral element in that first instance process. However, even if what was issued by the SAB was a "decision", it was nevertheless only advisory or recommendatory. It gave advice to the Secretary-General of the IMO who cannot himself be regarded as a neutral part of the process. That is because he is both the employer's representative and the original decision-maker appealed against by Ms. Dispert and Ms. Hoe.

20. We are not satisfied that the essential elements are present to enable the SAB to take a "decision" within the meaning of Article 2(10) of the Appeals Tribunal's Statute and therefore to allow us to consider and decide the Appellants' appeals. Although in this instance, the SAB seems to have dealt with all aspects of the appeals and has provided a written record with reasons, facts, and law, it remains that the SAB did not issue written decisions but only recommendations to the Secretary-General of the IMO, and that it was the Secretary-General of the IMO, who is not a neutral instance, who took the final decisions on 31 January 2019.

21. Therefore, to ensure compliance with the jurisdictional requirements of the IMO's Regulations and Rules, we remand this matter to the SAB under Article 2(10) of this Tribunal's Statute in order to issue a decision on Ms. Dispert and Ms. Hoe's appeals against the original administrative decisions issued on 7 February 2018.

Judgment

22. The case is remanded to the SAB.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Neven, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Colgan

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar