



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/087/
JAB/2009/052
Judgment No.: UNDT/2010/071
Date: 28 April 2010
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

HASTINGS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON REMEDIES

Counsel for applicant:

Bart Willemsen, OSLA

Counsel for respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The applicant's substantive case was decided in her favour in Judgment UNDT/2009/030. It was held that the administration did not properly consider the applicant's formal application for an exception to apply for a post two levels above her own. The administration acted as though such an exception was not possible and did not turn its mind as to whether the applicant had a case for exception.

2. The substantive hearing was limited to questions of liability. Following judgment the parties attempted unsuccessfully to reach agreement on remedies due to the applicant. The Tribunal is now asked to decide the question of remedies.

3. The applicant did not seek rescission of the decision nor specific performance. In her original application she sought an order that –

... the Secretary-General appropriately compensate Appellant for the violations of her terms of appointment and to ensure application of Section 5.2 of ST/AI/2006/3 in a manner which would allow for reasonable exception.

4. In the applicant's additional submissions on remedies that claim has been particularised to read –

- a. Moral damages resulting from a failure to consider the Applicant's request for an exception.
- b. Loss of chance to be selected for the contested post due to the rejection of her application for exception.

Applicant's submissions

5. In support of the claim for moral damages, the applicant submits that the question of the decision-maker's motive behind the decision is relevant. She also refers to her distress which, in her submission, was exacerbated by the fact that she

was within five years of retirement and this was conceivably her only chance to be promoted to a D-2 position after a long career with the UN.

6. In relation to the damages for loss of chance, the applicant invited the Tribunal to consider the positive value of the loss of chance of a benefit. She submits that she had a substantial chance of success to be selected for the post if her request for an exception had been granted, and it is only fair to assume that had the exception been granted the applicant would have been selected for an interview. In her submission, the Tribunal should proceed on the assumption that as three other candidates were short-listed she would have had a twenty-five percent chance to be selected (depending on the qualification of the other candidates), however, the Tribunal should proceed on a fifty percent basis for the calculation of compensation.

7. The applicant relies on the decision of the Tribunal in *Koh* UNDT/2010/040 where the Tribunal stated that if there is –

... a real or significant chance that the applicant might have been selected, the Tribunal has the duty to compensate him for the loss of that chance, doing the best it can to measure the probability, else the only remedy available to him to right the respondent's breach will be unjustly denied.

8. In addition to the submissions the applicant also annexed a statement by the Chairman of the Advisory Committee on Administrative & Budgetary Questions (ACABQ) which read –

As Chairman of the Advisory Committee on Administrative and Budgetary Questions, I was the person to whom selection committee for the post of Executive Secretary of the Advisory Committee reported. It should be noted that the short list consisted of three candidates who had been interviewed. The opportunity to review the candidacy of Ms. Hastings would have been welcomed.

9. The applicant's submissions in reply of the respondent's reply have been incorporated where appropriate into the discussion section below.

Respondent's submissions

10. The respondent contends that the applicant has not suffered any detriment, subject to any non-pecuniary loss she may have suffered. The respondent submits that if the unlawful decision had not been made the applicant would be in the same position as she is now—i.e., a P-5 staff member whose request for an exception was denied due to the fact that staff rule 112.2(b) does not allow for exceptions in circumstances such as this.

11. The unlawfulness of the administrative decision was the failure of the Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM) to turn her mind to the possibility of an exception and not to the applicant's ultimate disappointment that an exception was not granted. Even if the ASG/OHRM had turned her mind to the possibility of an exception, the exception would not have been granted as the applicant would not have been deemed eligible for the position. The applicant therefore did not lose the chance to be selected as a result of the unlawful decision.

12. The respondent acknowledges that the applicant was qualified for the position and that, had she been eligible, she would have been short-listed for further assessment but says that the question in issue is not the applicant's qualification for the post, but whether she was eligible to be considered for selection.

13. The respondent submits that pursuant to staff rule 112.2(b) and section 5.2 of ST/AI/2006/3 the ASG/OHRM could not have concluded that the applicant should be granted an exception, since this would have prejudiced the interests of other staff members or groups of staff members. These comprised: 1) The three candidates recommended for the position who were D-1 staff members. They would have been prejudiced in the sense that they would have lost the right to have their applications considered only with internal candidates of the same rank. 2) Other P-5 staff members at the P-5 level who may have applied for the position but did not do so

due to the mandatory language of section 5.2 may also have been prejudiced. This would have led to the negative consequences that the section was intended to avoid, namely the negative impact on staff morale and productivity caused by the selection of lower-graded candidates over higher-graded candidates.

14. In general terms, it is the case for the respondent that the granting of exceptions under staff rule 112.2(b) is extremely limited as it is intended to ensure that if injustice or patent maladministration would result from the application of the Rules an exception may be granted. The respondent did not identify the source of nor the basis for this submission but I accept that the wording of section 5.2 makes the circumstances under which an exception could be granted for that section extremely limited.

15. Next it was submitted that the applicant's expectations were contrary to her legal entitlement and it was this fact that caused her disappointment and not the decision of the ASG/OHRM. Even though made in error, the administrative decision was made in good faith.

16. Finally, the respondent submitted that if there is to be a calculation of compensation for loss of chance the loss would have been one out of eight and not twenty-five percent. Had the applicant been granted an exception she would have been short-listed along with seven other candidates for a written test and an interview.

17. In fact, six candidates passed the written test and continued to the interview. Of these three were recommended by the interview panel for meeting the qualifications for the post and were subsequently interviewed.

Discussion

Compensation (moral damages)

18. Article 10.5 of the Statute confers jurisdiction on the Tribunal to rescind a contested administrative decision, order specific performance and/or order

compensation. The Tribunal may not award punitive or exemplary damages. The term moral damages does not appear in the Statute.

19. The scheme of article 10.5 is to provide at least two remedies: the first in 10.5(a) is a remedy either in kind by way of rescission or specific performance or monetary compensation in lieu; the second is in 10.5(b). Although not expressly stated in the Statute it may reasonably be inferred from its context that compensation under this part of article 10 is for the purpose of compensating an applicant for losses other than the more easily quantifiable material losses available under article 10.5(a), that is to compensate for adverse but non-material consequences of a legal wrong. This type of compensation is universally referred to by a number of different names depending on the jurisdiction but the common characteristic of such compensation is that it is a means by which harm caused to a person by a legal wrong is assessed according to that person's characteristics.

20. While the calculation of the appropriate amount of such compensation in any particular case has been described as an inexact science, there are some basic principles which must exist before such damages can be contemplated:

- a. Compensation can be awarded when identifiable harm to an individual is caused by a legal wrong or unlawful act. This is a question of causation.
- b. Where causation is established, the amount of compensation should be proportionate to the degree of harm suffered. This is a question of evidence. A person seeking an award of non-material compensation must present some evidence of the adverse effects on him or her of the legal wrong.

21. In this case the alleged damage to the applicant is said to be caused by the failure of the administration to consider her request for an exception to allow her to apply for a position two levels above her own. However, there is no specific

evidence before the Tribunal of what if any specific damage was caused to or suffered by the applicant arising directly out of this failure other than a submission by counsel that she was distressed.

22. At the video hearing of the substantive case it was submitted on behalf of the applicant that she had brought the case not out of personal interest but in the interest of the Organization.

23. The extent of damages may be influenced by the motivation of the decision-maker. For example, if it is established that the decision-maker acted out of personal animosity towards the applicant this would undoubtedly cause her distress additional to that arising from the mere fact of the wrongful decision. However, in this case there was no such evidence. It appears that the decision not to consider the exception was made because of a mistaken belief at the time that such an exception could not be made. In the absence of evidence that the decision-maker in this case was motivated by ill will to the applicant this cannot be a factor in the calculation of compensation in this case.

24. I accept the applicant's submission and therefore conclude that she must have suffered some distress at the unlawful decision to reject without consideration and in a peremptory manner the case she had put for an exception. While the respondent initially told the applicant that such an exception could not be made and persisted in this stance it subsequently conceded at the hearing before the Tribunal that this was in fact possible. If that concession had been made earlier the applicant would possibly have been spared the time and effort of bringing this case and its attendant stresses.

25. I award the applicant the sum of USD5,000 for damages under this head.

Compensation (loss of chance)

26. This is a claim for compensation for monetary losses. Again, it must be established that the loss of chance claimed arose out of the legal wrong. Such losses must also be substantiated by evidence of potential loss.

27. This is a particularly difficult question. The chances of the applicant receiving a promotion depended on not one but potentially three stages. First, her application for an exception had to be properly decided in her favour. If she passed that step she would then have faced the short-list procedure although the respondent has conceded that due to her qualifications she would have been short-listed. She then would have had to undergo the formal selection process. It is difficult for the Tribunal to accurately evaluate the chances of the applicant's success at this stage as this would have depended on the quality of the competing candidates.

28. The question is whether there was a real or significant chance that the applicant would have been granted an exception because, as conceded by the respondent, once past that hurdle, she would have had a good chance of being short-listed and therefore had a prospect of selection for the position.

29. I accept the submission of the respondent that given the apparent mandatory wording of section 5.2 it would be unusual for such an exception to be made and should be given in limited circumstances. Staff rule 112.2(b) contains the criteria which should be applied. But the starting point is the UN Charter.

30. First is the requirement in article 101.3 of the UN Charter for the necessity to secure the highest standards of efficiency, competency and integrity. As was held in the substantive judgment these are paramount considerations in the employment of UN staff. So there should first be an inquiry into the requirements of the post and the capabilities of the applicant for that post. In this way exceptions would be limited in the first instance to those few cases where people who, in spite of their grade, are *prima facie* capable of performing the role efficiently, competently and with integrity. These are factors which are essentially personal to the applicant for exception.

31. The next factor limiting the power to grant an exception is the necessity to avoid prejudice to other persons or groups of persons as required by staff rule

112.2(b). As the respondent submitted, there are significant groups who could potentially be affected negatively.

(a) Personal characteristics

32. I find that for someone in her grade the applicant was unusually suited for the position she wanted to apply for. Apart from the factors of her experience and performance referred to in the substantive judgment I take into account the statement by the Chairman of the ACABQ, and infer from it that, at the very least, the applicant was seen as a person who had the potential to be seriously considered for the post of Executive Secretary. This endorsement from the head of the committee with whom the applicant could have been working directly is sufficient to make her case unusual and significantly increases the likelihood that she would have met the Charter criteria. For these reasons, even on the respondent's test as outlined in paragraph 14, I find that the applicant would have qualified for an exception.

(b) Prejudice to other groups

33. While the question of prejudice is a factor which the administration was bound to consider in a fair and rational manner it was somewhat overstated in the respondent's submissions, particularly if the need for personal qualities referred to above is also correctly taken into consideration.

34. The respondent's submission that prejudice may have occurred because other P-5 staff members who may have applied for the position did not do so due to the mandatory language of section 5.2 does not address the real point. It refers to the "prejudice" caused by the interpretation of the apparently mandatory wording of section 5.2. The prejudice referred to in staff rule 112.2(b) is the potential prejudice arising out of an exception being granted. In that regard, it is highly unlikely that there would be many, if any, other P-5 staff members who would have met the personal qualities test that would have been necessary for the D-2 post of Executive

Secretary of ABACQ and unless they did so they would not have suffered any prejudice.

35. The fact that D-1 candidates for the position would face competition from a non D-1 candidate is not necessarily prejudicial to them provided their applications were given full and fair consideration to which all staff members are entitled. Given that promotions are never guaranteed, any potential prejudice to the other candidates should be mitigated if not eliminated by the interview and evaluation process.

36. On balance I find that, if the process had been followed correctly, the applicant had a good although not certain chance of being granted an exception to apply for the post she wanted. I accept the applicant's submission in reply that if she had been granted the exception it may be assumed that she would have passed the written test as she had passed a similar test in 2006 in the selection process for the same position and was subsequently interviewed. Since 2006 her qualifications and experience have increased as she has spent a significant period acting in the role for which she had applied. The evidence of the ACABCQ Chairman indicates that she would certainly have been interviewed again.

37. I conclude that the applicant has suffered material loss as a result of the unlawful decision of the administration. I calculate her loss on the basis that realistically she had an eighty percent chance of having an exception granted in her favour. Next, given her qualifications and experience, she had a very high chance of being shortlisted and passing the written test. I assess that chance at one-hundred percent. Then she had a fifty percent chance of getting recommended for final interview. From that stage she would have been in competition with three other candidates which reduced her chance of selection by twenty percent. In summary, I find that she had a ten percent chance of being successful in her application for the D-2 post of Executive Secretary.

38. The Tribunal therefore orders that –

- a. The respondent is to pay the applicant USD5,000 for compensation for her distress.
- b. The respondent is to pay to the applicant ten percent of the difference between the salary she actually carries and that she would have received in the D-2 position on a continuous basis. The payments are to commence on the date the successful candidate started in the D-2 position and continue until the date of the applicant's mandatory retirement. The respondent is also to pay the applicant 10 percent of any additional allowances and benefits she would have received at the D-2 level including adjustment of her pension contributions and consequent retirement benefits.

(Signed)

Judge Coral Shaw

Dated this 28th day of April 2010

Entered in the Register on this 28th day of April 2010

(Signed)

Hafida Lahiouel, Registrar, New York