



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/018

Judgment No.: UNDT/2010/125

Date: 15 July 2010

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TEFERRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for applicant:

Bernard Adams, OSLA

Counsel for respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Case background

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA), who contested the decision by ECA to re-advertise the vacancy for the post of Mail Assistant (Registry Supervisor), G-7 (VA 07-ADM-ECA-414274-R-Addis Ababa).

2. The facts giving rise to the application before the Tribunal are contained in UNDT Judgment No. 084 (2010). In the said Judgment, the Tribunal, having found in favor of the Applicant, directed the parties to provide written submissions, on or before 14 May 2010, as to the appropriate relief that should be ordered.

Applicant's submissions

3. The Applicant, in his application, submitted that his due process rights were violated and his career prospects damaged as a result of the Administration's failure to follow its own procedures during the selection process.

4. Further, he submitted that the Administration should be estopped from not accepting the recommendation of the Advisory Selection Panel (ASP)¹ regarding his suitability for the post on the pretext that such action was necessary to ensure "transparency and maintaining the integrity of the recruitment process".

5. In light of the above, the Applicant submits that he should be appointed to the post of Mail Assistant (Registry Supervisor) at the G-7 level for which he was nominated and that he should also awarded 3 months net base salary for denial of due process.

Respondent's submissions

6. The Respondent submits that the principle of restitution requires that the Applicant be placed in the position he would have been in had his procedural rights

¹ An interview panel comprised of three members, including the programme case officer.

been observed. In this instance, it is for the Applicant to prove that the non-observance of his rights led to his suffering a loss within a recognized head of damage.

7. The Respondent submits that in *Crichlow*², the Tribunal reasoned that in respect of compensation for emotional suffering and distress, non-statutory principles for calculation of compensatory damages for emotional suffering and stress include non-punitive damages awarded to compensate proportionally for negative effects of a proven breach. The Respondent further submits that in *Wu*³, the Tribunal articulated that to determine the amount of compensation, the particular circumstances of a given case have to be taken into account, including the impact the established breaches have on the victim.

8. The Respondent's submits that it is the internal law of the United Nations that governs the employment relationship between the Organization and its staff and that the UN Administrative Tribunal in *Moreira de Barros*⁴ ruled that:

...[the] internal laws of the United Nations prevail and are the relevant legal basis upon which the Tribunal operates... Where, however, there is a gap, or lacuna, in the internal laws...the Tribunal is entitled, if not obliged, to consider general principles of law ... As such, it may take cognisance of foreign law, and grant it evidentiary value.

9. The Respondent submits that the former United Nations Administrative Tribunal (UNAT) Judge and legal scholar, Chittharanjan Felix Amerasinghe, expressed the relationship between International Tribunals and national jurisdictions as follows:

...international organisations have a characteristic that with respect to their internal organization and functioning they are outside the jurisdiction of national law. Their life is governed by a set of rules and principles which

² UNDT Judgment No. UNDT/2009/028.

³ UNDT Judgment No. UNDT/2009/084.

⁴ UNAT Judgment No. 1320 (2007).

*constitute their internal law. With this framework they are not subject to interference by states in regard to the legal system or the laws that apply.*⁵

10. The Respondent submits that the sources of international administrative law are not the same as the sources of public international law, although international administrative law may be a branch of public international law. Article 38(1) of the Statute of the International Court of Justice, which is regarded as reflecting the sources of public international law, does not directly apply to international administrative law and these sources may only be seen “by analogy” to be a source of international administrative law.

*At best, some analogies may be drawn from the sources mentioned in Article 38(1) of the Statute of the ICJ - for example, that staff regulations and other such written legal sources correspond to treaties or that the practice of an organization corresponds to custom - but there the similarity ends*⁶.

11. Accordingly, the Respondent submits that general principles of law, although demonstrative of a consistent State practice, should not be seen as demonstrative of a customary rule of international administrative law. The law of the Tribunal must be derived from the internal laws and practices of the Organization. These laws and practices are developed to serve the unique nature and circumstances of the Organization.

12. The Respondent further submits that while general principles of law are not applied *per se* in international organizations, in circumstances where there is a lacuna in the internal law, they provide a legitimate source of international administrative law. The UNAT and the International Labour Organization Administrative Tribunal (ILOAT) have recognized that, in specific circumstances, general principles of law provide a source of international administrative law.

⁵ Amerasinghe C.F. (2003). Principles of the Institutional Law of International Organizations. 2nd Ed. Cambridge University Press, p. 272.

⁶ Ibid, p. 283.

13. The Respondent submits that Article 10(5) of the Statute of the United Nations Dispute Tribunal (UNDT Statute) vests authority in the Tribunal to award compensation to a party but the Statute is silent as to how that sum is to be calculated. Notably, in a significant departure from the Statute of the UNAT, Article 10(7) of the UNDT Statute prohibits the award of exemplary and punitive damages.

14. The Respondent submits that the practice of the UNAT may be divided into two distinct groups of cases: judgments where UNAT applied an approach consistent with the principle of *restitution in integrum* on the question of liability and quantification of loss, in large part limiting compensation to actual pecuniary loss; and more recent judgments where UNAT awarded compensation on the basis of procedural error alone, even where such error either did not result in a pecuniary loss or did not change the outcome of the proceedings.

15. The Respondent submits that *Higgins*⁷, *Furst*⁸ and *Moser*⁹ are UNAT judgments where compensation was limited to actual pecuniary loss resulting from a violation of staff rights, as specifically provided under Staff Regulations, Rules and administrative issuances.

16. The Respondent submits that UNAT traditionally awarded moral damages and in recent decisions of the UNDT awards for moral injury have been made. It is recognized that claims of moral injury may be based on, inter alia, injury to an individual's physical or psychological well-being, dignity, reputation or privacy. While it is not possible to identify precisely and exhaustively the types of evidence that would be required to establish a claim of moral injury, Applicants claiming damages for moral injury should be required to describe with specificity the circumstances upon which they base their claim and to provide evidence of such circumstances.

⁷ UNAT Judgment No. 93 (1964).

⁸ UNAT Judgment No. 241 (1979).

⁹ UNAT Judgment No. 299 (1982).

17. The Respondent submits that in the case of *In re Wasef*¹⁰, the Applicant claimed that the Organization's failure to draw up a panel of counsel, that is, a panel of staff who could advise staff on their rights, had impaired his right to due process. ILOAT found that the Applicant had failed to make out his claim for compensation, having failed to support his claim with any evidence of injury. ILOAT stated that:

The complainant does not support his claim with any evidence of injury. Injury is not to be presumed: mere mention of "worries", "psychological stress" and "deprivation of rights" will not do.

18. In the present case, the Respondent submits that the Applicant's request is inconsistent with the Tribunal's jurisprudence on compensation in that he has not asserted that he suffered any financial damage or emotional suffering as a result of the administrative decision. Furthermore, there was no finding of any bad faith or discriminatory treatment on the part of the Administration.

Considerations:

19. The Tribunal considers that the legal issue arising out of the parties submissions is whether the Applicant is entitled to compensation for the lost opportunity to be selected for the post of Mail Assistant (Registry Supervisor) at the G-7 level and if so, what is the value of this lost opportunity?

20. Pursuant to the Respondent's submissions, the recognized heads of damage are: actual pecuniary loss; damages for procedural error and moral damages. The Tribunal, however, does not consider this list to be exhaustive.

21. In former United Nations Administrative Tribunal (UNAT) Judgment No. 914, *Gordon and Pelanne*, (1999), the Applicants maintained that the Administration's failure to circulate vacancy announcements "violated their right to be considered fairly and objectively" for two D-1 posts. In this case, the former UNAT was of the view that the urgency alleged by the Respondent to justify the non-

¹⁰ ILOAT Judgment No. 1534.

circulation of the vacancies was not so extraordinary in nature that the Administration could avoid the procedures that all staff members are entitled to expect. The former UNAT found that the Applicants were “automatically excluded from any opportunity to compete for the posts” as a result of the improper procedure used by the Respondent. Further, the former UNAT found that “the Respondent’s disregard of proper procedures was detrimental to the Applicants’ career development, and caused the frustration and mental anguish of not being considered for posts for which they might have been qualified.” The UNAT awarded the Applicant’s compensation for the violation of their rights.

22. Additionally, in former UNAT Judgment No. 779, *Maia-Sampaio*, (1996), the Applicant applied twice for the post of Senior Research Officer. The first recruitment process was cancelled and at the end of the second recruitment process, another candidate was selected. She subsequently asserted that she was not given fair consideration for the post because the office of Human Resource Management (OHRM) was actively favouring the selection of another candidate. The former UNAT considered that the Secretary-General is vested with discretion in matters of promotion and appointment. However, the former UNAT was of the view that the facts of the case raised the question of “whether proper procedures were followed, of whether extraneous matters were brought to bear on the selection process, and of whether the decision was made on the basis of inaccurate information”. The former UNAT subsequently found that:

It cannot be said that the Applicant would have obtained the post even if the procedures relating to the selection for the post after the issuing of the second vacancy announcement, had not been defective. Nonetheless, the Applicant has established, to the satisfaction of the Tribunal, that the procedures were flawed due to the highly improper interference in the process by the Director, OHRM, with the objective of promoting the appointment of Ms. X, to the detriment of all other candidates and the selection process as a whole. This

impropriety violated the Applicant's right to full and fair consideration for the post.

23. The UNAT awarded the Applicant in *Maia-Sampaio* nominal compensation for the violation of her rights.

24. The Tribunal endorses the above legal principles for the purpose of deciding whether the Applicant is entitled to compensation in the present case. Once again, the Tribunal reiterates that it cannot conclude that, if proper procedures had been followed and if the Applicant's candidacy had been reviewed by the central review body, he would have been selected for the subject post. However, it considers that the Applicant's prospect for selection was very high due to the fact that he was the only candidate deemed suitable for the position by the ASP. Thus, the Tribunal is satisfied that the procedures were flawed due to the highly improper interference in the process by the Chief of Human Resources Services Section (HRSS) and that this interference effectively deprived the Applicant of the opportunity to be selected for the post and thereby violated his right to due process.

25. In *Kasyanov*¹¹, Adams J stated the general rule that a legal right to appointment is a valuable right, the loss of which requires compensation. Additionally, in *Koh*¹² he stated further that:

Once it can be seen that 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.

26. The Tribunal notes that the contested decision impacts substantially on the Applicant's life in that he has lost the opportunity to move to the G-7 level even though he was deemed by the Interview Panel as being the most suitable candidate

¹¹ UNDT/2010/026 (2010).

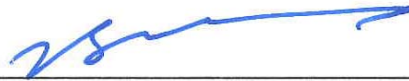
¹² UNDT/2010/040 (2010).

for the post based on his “educational qualifications, relevant experience, technical knowledge and performance during the competency interview [...]”

27. Having considered the parties’ submissions on the question of appropriate relief, the Tribunal has concluded that the Applicant is entitled to compensation for the loss of the opportunity to be appointed to the post of Mail Assistant (Registry Supervisor) at the G-7 level.

Judgment

28. Having considered the parties’ submissions on the matter of the appropriate relief for the Applicant, the Tribunal orders the Respondent to pay the Applicant three months of his current net base salary as compensation for the violation of his rights with interest at 8% beginning 90 days from the date of issuance of this Judgment until payment is effected.



Judge Vinod Boolell

Dated this 15th day of July 2010

Entered in the Register on this 15th day of July 2010



For
Jean-Pelé Fomété, Registrar, UNDT, Nairobi