



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/023
(UNAT 1612)
Judgment No.: UNDT/2010/135
Date: 27 July 2010
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

FRÖHLER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

None

Counsel for respondent:

Stéphanie Cochard, UNOG

Introduction

1. The applicant contests the decision of 17 June 2008 whereby the Secretary-General awarded him only compensation in the amount of six months' net base pay for the injury resulting from the irregularity of the appointment made on 31 October 2006 to the post of Director, Services Infrastructure for Development and Trade Efficiency Division (hereinafter SITE), United Nations Conference on Trade and Development (UNCTAD), for which he was a candidate.
2. He seeks compensation in the amount of two years' net base salary at level D-2, step 6, for the moral and material injury he suffered.

Facts

3. The applicant joined the Organization on 31 August 1977 as an Associate Programmer with UNCTAD at the P-2 level. After several promotions, he was appointed Chief of Branch and promoted to the D-1 level on 1 June 2000.
4. On 28 October 2002, he was appointed Deputy Director of SITE.
5. On 29 December 2003, a vacancy announcement was issued for the D-2 post of Director, SITE. The vacancy announcement was later cancelled.
6. On 2 August 2004, the applicant was designated Officer-in-Charge, SITE, with a special post allowance at the D-2 level effective November 2004. On 7 July 2005, a vacancy announcement was reissued for the post of Director, SITE, at the D-2 level.
7. In November 2005, a selection panel was constituted. On 2 December 2005, it examined all the applications and drew up a shortlist of five candidates, including the applicant. After interviewing the candidates, the panel found that four, including the applicant, met the requirements of the post. The panel transmitted its report to the Secretary-General of UNCTAD, who did not recommend the applicant, but another shortlisted candidate.

8. On 25 October 2006, the Senior Review Group recommended that a candidate other than the applicant be selected for the post. The Deputy Secretary-General approved the recommendation.

9. The appointment in question was announced on 9 November 2006, after which the applicant was reassigned to his former post and payment of his special post allowance at the D-2 level ceased.

10. On 27 November 2006, the applicant petitioned the Secretary-General for administrative review of the decision to appoint the selected candidate to the post in question.

11. By letter dated 5 February 2007, the Officer-in-Charge, Administrative Law Unit, United Nations Secretariat, answered the applicant's request for administrative review of the contested decision. She transmitted to him the comments of the Director, Division of Management, UNCTAD, on the appointment made to the post.

12. On 16 February 2007, the applicant filed an appeal with the Geneva Joint Appeals Board (JAB). On 22 February 2008, JAB adopted its report, with a majority opinion to the effect that the appeal should be rejected and a minority opinion to the effect that the selected candidate did not meet the requirements of the post and that the applicant should receive compensation in the amount of two months' net base salary.

13. On 30 September 2007, the applicant retired.

14. By the decision of 17 June 2008 contested here, the Secretary-General decided to accept the minority opinion expressed in the JAB report and to award the applicant compensation in the amount of six months' net base salary.

15. The applicant submitted an application, dated 8 July 2008, to the former United Nations Administrative Tribunal (UNAT), which received it on 14 July 2008.

16. Pursuant to General Assembly resolution 63/253, the application was transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010.

Parties' contentions

17. The applicant's principal contentions are:

- a. His candidacy was not properly considered, since the selected candidate did not meet the requirements of the post;
- b. In view of his experience, he should have been selected for the post;
- c. The sum awarded him is insufficient compensation for his moral and material injury, in particular the negative effect on his pension of the decision not to select him for the post.

18. The respondent's principal contentions are:

- a. The only issue to be considered in the case is that of the compensation awarded to the applicant. The Secretary-General has already recognized that the applicant's right to full and fair consideration for promotion was violated;
- b. The compensation awarded by the Secretary-General is sufficient, since the applicant did not lose his employment and had only one year of service left before retiring; the sum is consistent with the jurisprudence of the former UNAT.

Judgment

19. Pursuant to article 16 of the UNDT rules of procedure, the judge handling the case decided that there was no need for an oral hearing, the only issue to be resolved being that of the amount of compensation the applicant should receive. For the same reason, there is no need for the Tribunal to ask the Administration to produce other documents than those already on file.

20. The applicant, who retired on 30 September 2007, contests the Secretary-General's decision to award him compensation in the amount of six months' net base pay for the injury resulting from the irregularity of the appointment made on 31 October 2006 to the post of Director, SITE, UNCTAD, for which he was a candidate.

21. He considers that compensation insufficient because, had the established selection procedure been properly followed, he would have been chosen for the post, and because the amount awarded does not take into account the adverse effect on his pension of his non-selection for a D-2 post.

22. It must be remembered that it is not enough for an applicant to prove unlawful conduct by the Administration for him/her to be automatically granted compensation. The applicant must also prove that the unlawful act caused him/her direct and certain injury.

23. The applicant must therefore prove that, if the selected candidate had not been chosen, he had a very good chance of being chosen himself. However, he merely asserts that he was the best candidate because he had been Officer-in-Charge, SITE, for the previous two years and Chief of Branch, Acting Chief or Deputy Director of various services of SITE before that.

24. To assess the applicant's chances of being selected for the post in question, the Tribunal must take into account the fact that, after an initial review of the applications, five candidates were shortlisted for interview. As a result of the interviews, the interview panel determined that only four candidates, including the applicant, fully met the requirements of the post. Calculating the probability of the applicant's being selected therefore entails recognizing that only the four candidates who were considered fully qualified had a chance of being chosen and, the Secretary-General having acknowledged that she was unlawfully chosen, removing from their number the candidate who was selected. That leaves three candidates, including the applicant, who had a good chance of being selected. Contrary to what the applicant claims, the documents in the case, particularly the interview

panel's post-interview comments, show that he had one chance in three of being selected and that the fact that he had previously held the above-mentioned posts did not increase his chances. The chance of being selected for the post must therefore be put at one in three.

25. Regarding the injury to the applicant, account must be taken of the financial harm corresponding, on the one hand, to the additional salary he would have received for approximately a year before his retirement and, on the other, to the reduction in his pension. The moral injury can only be considered minimal, since the damage to the reputation of a candidate shortlisted with five others from among 86 initial candidacies is necessarily very small.

26. Accordingly, the Tribunal considers that, by awarding him the equivalent of six months' net base salary as compensation for the loss of chance of being appointed, the Secretary-General fairly evaluated the injury to the applicant and that the application must therefore be rejected.

Decision

27. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 27th day of July 2010

Entered in the Register on this 27th day of July 2010

(signed)

V́ctor Rodŕguez, Registrar, UNDT, Geneva