UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/026/ UNAT/1657
Judgment No.: UNDT/2011/034
Date: 18 February 2011
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Santiago Villalpando

KAMAL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Background

1. The Applicant joined the Organization on 14 February 1988 as an Interpreter Trainee (P-1 level), with the Arabic Section of the Interpretation Service, Department of Conference Services, later to become the Department of General Assembly and Conference Management ("DGACM"). On 1 July 1988, she was granted a two-year fixed-term appointment as an Associate Interpreter, at the P-2 level. On 1 July 1990, she was granted a probationary appointment as an Interpreter, at the P-3 level. She was promoted to the P-4 level, with effect from October 1995. The record shows the Applicant to have an excellent performance record and that she is very highly regarded by her supervisors. She was promoted to the P-5 level as an Interpreter in the Arabic Section of DGACM, with effect from 14 April 2005.

2. On 14 November 2008, the Applicant filed an appeal before the former United Nations Administrative Tribunal complaining about the circumstances surrounding her promotion to the P-5 level.

3. On 7 January 2010, the parties were informed that the case had been transferred to the United Nations Dispute Tribunal in accordance with para. 45, of General Assembly resolution 63/253 (Administration of justice at the United Nations) of 24 December 2008 and sec. 4 of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice).

4. A hearing on the merits was held on 2 January 2011.

Issues

5. Both parties in this case have spent considerable energy in arguing over several minor matters which, in the final analysis, are of no assistance to this Tribunal in resolving the principal issues. Therefore they will not be referred to.

6. The starting point must be the issues that were the subject of the Applicant's appeal to the former United Nations Administrative Tribunal.

7. In the Applicant's appeal to the Administrative Tribunal, at para. 8, she requested it to find that:

> (a) Inordinate and inexplicable delays occurred in the announcement and filling of the two P5 vacancies in the Arabic Section;
>
> (b) The Respondent's decision to suspend the selection process on the basis of the Staff Council's request and to withdraw the recommendation to promote the Applicant from the agenda of the [central review board ("CRB")] was inappropriate and illegal and harmed the Applicant in addition to resulting in the breakdown of the promotion process;
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> (c) Deciding to cancel the vacancy and re-start the promotion process was unjustified and harmed the Applicant;
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> (d) [The] [l]ength of process until the vacancy was filled through the fourth and final selection exercise [and] the fight to have Applicant's candidacy properly considered over three selection exercises harmed [her] morale and professional reputation.

8. In addition, the Applicant requested the Administrative Tribunal, at para. 9 of her statement of appeal, to order by way of remedy:

> (a) Adequate financial compensation for delays, for failure to provide fair and due consideration during the first two selection exercises and for cancellation of vacancy for which staff member was recommended (third announcement) without justification;
>
> (b) Adequate financial compensation for adverse effects on morale and professional reputation. The compensation for damage incurred.

Facts

9. The events surrounding this long, drawn out saga began in April 2004 with a vacancy announcement for a P-5 post in the Arabic Section. This announcement was subsequently withdrawn and two vacancy announcements were issued in September

2004. There is a dispute between the parties as to whether the September 2004 vacancies were for one post or two, but nothing turns on this.

10. On 14 April 2005, these vacancies were cancelled and re-advertised when it was established, following a complaint by two staff members, that the evaluations were not consistent with ST/AI/2002/4 (Staff selection system) in that the performance records of the candidates were not taken into account. On 10 June 2005, the criteria for the P-5 promotions were posted on the website in the interests of transparency. This decision, taken by Ms. Brigitte Andreassier-Pearl, Chief, Interpretation Service, was the correct response in the circumstances.

11. Towards the latter part of 2005, the Applicant and another staff member were recommended for appointment. The recommendations were forwarded to the Central Review Board ("CRB") for consideration in October 2005.

12. On 17 October 2005, a group of four interpreters sent a written complaint to the President of the Staff Union, expressing their concern about the procedures and the recommendations and asking for a suspension of the process and the setting up of a joint staff management task force to investigate the selection exercise.

13. On 20 October 2005, the Staff Council adopted a resolution proposing that a task force be established to review whether the existing rules were complied with in relation to this case. On 6 December 2005, the Office of Human Resources Management ("OHRM") established a working group ("WG") to review the selection process and to interview interested staff members, including the Applicant.

14. At an earlier stage of the proceedings before the Tribunal, an issue arose regarding the composition of this WG and, in particular, the fact that it appeared to the Applicant that there was a conflict of interest in the membership. When the factual position was made clear, the Applicant withdrew her complaint in relation to this matter. It is therefore not necessary to address it. Another issue concerned the vacancy announcements in 2004. This claim had not been the subject of a request for

administrative review or an appeal to the Joint Appeals Board ("JAB"), and the Applicant quite properly withdrew this aspect of the claim. It should be observed that this had the effect of shortening the proceedings and enabled the parties and the Tribunal to focus on the real issues that remained.

15. The identities of the two candidates, including the Applicant, who were recommended to the CRB for appointment to the P-5 posts was known within the Interpretation Service.

16. The Applicant was concerned about two matters. She considered that it was wrong in principle for the Staff Council to be unduly influenced by unsuccessful candidates to take a course of action that was detrimental to herself. She was also extremely concerned that the Staff Council should have passed a resolution effectively asking for a suspension of the procedures that were before the CRB and the setting up of the WG. She complained that the allegations by the Staff Council regarding procedural failures in the promotion process had a direct, adverse impact on her professional reputation and that the inference that would have been drawn by others was that she and the other candidate were not being recommended on merit but were in fact the recipients of favouritism in breach of procedures.

17. In a letter to Ms. Jan Beagle, the Assistant Secretary-General for Human Resources Management ("ASG/HRM") dated 26 January 2006, the Staff Council proposed a WG to be formed, and offered to designate an individual from the Staff Council to participate.

18. On 21 April 2006, the Applicant wrote to the Under-Secretary-General ("USG") for the Department of Management and the USG for DGACM requesting information on the results of the WG and any action that was to be taken regarding the selection process. She did not receive a response.

19. The WG submitted its report in May 2006. One of its recommendations was that DGACM should ensure dissemination of evaluation criteria in advance of any

interview process. This would appear to have been an eminently sensible and obvious recommendation.

20. On 6 July 2006, the Applicant wrote to the USG for DGACM expressing her concern at the continuing delay in processing her promotion. The Applicant did not receive a reply.

21. On 2 June 2006, three staff members submitted a complaint regarding the composition of the WG and requested that there be a newly constituted panel to look at the selection process afresh. They asked for an assurance that the WG would be properly constituted and would address the procedural irregularities alleged. The WG was not reconstituted and the report and record of the previous WG stood. This also was an appropriate management response.

22. In November 2006, a joint decision was taken by OHRM and DGACM to cancel the two vacancy announcements of 2005 and to issue a new vacancy announcement, making it clear that all candidates would be assessed on the basis of the final version of the selection criteria established by DGACM and communicated to all concerned. It is important to note that the interview panel for the revised promotion process did not include persons who were involved in the 2004 or 2005 rounds of interviews.

23. The final selection exercise was completed. On 26 December 2007, it was decided to promote the Applicant to the P-5 level retroactive to the date of the posting of the vacancy on 14 April 2005. It should be noted that this date was six months prior to the date when the recommendation for promoting the Applicant was sent to the CRB during the second selection exercise.

Consideration

24. Whilst the Tribunal supports clarity and transparency in promotion exercises, particularly in relation to the application of selection criteria, and the adoption of

appropriate measures to avoid criticism and suspicions regarding the propriety of promotion decisions, it has to be observed that little thought seems to have been given to the effect of all these developments on the Applicant, who had been recommended for promotion in late 2005.

25. The Tribunal accepts the basic proposition put forward by the Applicant that gossip, rumours and the resolution of the Staff Union gave rise to an impression that was created in the minds of others that the recommendations that had been made to the CRB were not based on merit. It is understandable that the Applicant had been emotionally affected by these developments. It was not unreasonable for her to suppose that there was thereby a diminution in her standing and professional status and this in turn caused her anxiety and stress. The question for the Tribunal is whether senior management failed to institute proactive measures to reduce the delay in finalising the promotion exercise, and if so, whether this failure or omission added to the Applicant's distress. The Tribunal finds that there was both avoidable delay and failure to act expeditiously in the circumstances, thus adding to the stress experienced by the Applicant.

26. The Tribunal has no hesitation in stating that, where management receives strong representations from a Staff Union or its Staff Council, they have a duty to take note of any legitimate concerns. In the particular circumstances of this case it should not be a matter of surprise, as is evident from a number of cases before this Tribunal, that management had a duty to take positive action to ensure that the highest standards of integrity, probity and transparency were followed. In so far as the Applicant criticises the managers for setting up a WG, the Tribunal finds that this criticism lacks substance. The WG comprised independent persons whose recommendations made sense and the Respondent's managers, in introducing a transparent process, are to be applauded for their actions, save for the fact that they seemed to have dragged their heels for reasons which do not appear to carry much conviction. The Applicant's criticisms that staff members, with a vested interest,

because they were unsuccessful in the promotion exercise, procured the Staff Union resolution is not a criticism that should be directed towards the Respondent's managers. It is a matter for the Staff Union and for the Union membership. Whatever be the factual position or the merits relating to the Staff Union's actions, it cannot form the basis of a valid complaint against the Respondent's managers in this case except to the extent that it contributed to the inordinate delay in concluding the process.

27. The Respondent's managers have given no indication that they factored into their deliberations, and their decisions, the interests of the staff members who had been recommended for promotion. It is a matter of common sense that the surrounding circumstances were bound to be distressing to those recommended for promotion. Once the report of the WG had been submitted to management, the Respondent's managers failed to do what enlightened management would have done in circumstances such as those that have arisen in this case. They ought to have issued a short statement to all concerned summarising the gist of the WG report if for no other reason than to explain why they were to carry out a further review of the promotion exercise. The Tribunal considers this to be a requirement of the principle of good faith and fair dealing. The act of recommencing the promotion process in the circumstances where a dark cloud hung over the entire process from 2004 did affect the Applicant's standing and caused her further distress.

Inordinate and inexplicable delay

28. The Applicant's first complaint is of inordinate and inexplicable delay. She clarified at the hearing that whilst explanations were provided for the delay, she does not accept them as being reasonable or legitimate. The Applicant conceded that, faced with complaints that proper procedures were not followed, it was necessary for management to carry out an enquiry. It is her case that this took far longer than it ought to have and in the interim she was subjected to anxiety and stress. The

Tribunal agrees with both arguments. It took far too long to finalise the process. Such inordinate delay and failure to provide a timely response to her enquiries caused her much anxiety and distress. This complaint is well-founded.

Suspension of the selection process

29. The Staff Council resolution of 20 October 2005 makes a number of assertions and comments. The resolution states that the system has "created an institutionalised cronyism due to its lack of personal accountability measures'. The Staff Council's letter of 26 January 2006 addressed to the ASG/HRM, pointed out that there were problems with the same selection exercise in the previous year and the involvement of the same managers would result in a lack of confidence in the process.

30. The Applicant's principal complaint is that the recommendation before the CRB should not have been recalled on the basis of the complaint from the Staff Council. She considers that she was harmed as a result. The Tribunal finds that given the history of problems within the Arabic Section and given the complaints of a lack of due process, management acted within its rights to recall the reference to the CRB and to set up an independent investigation. The Applicant's criticisms regarding the role of the unsuccessful candidates is not a matter for which the Respondent can be held liable, nor can the Respondent be liable for the fact that a resolution was passed by the Staff Council and forwarded to management. This complaint is dismissed.

Cancellation and recommencement of the selection process

31. For reasons which have been explained in the Tribunal's findings, the cancellation of the vacancy exercise and recommencement was, in the circumstances, appropriate. This complaint is dismissed. However, the Tribunal upholds the

complaint in so far as it relates to inordinate delay in reaching finality and the consequential harm to the Applicant.

Damage to morale and professional reputation

32. The Tribunal agrees that the process took longer than was reasonable. It is noted that this was also the conclusion of the JAB panel, which stated, at para. 31 of its report:

> [T]he Panel observes that the inquiry process into the concerns here took roughly six months to complete. While the Panel does not consider this illegal, it does consider it unfair, particularly given the fact that Appellant ultimately was selected for the P-5 post in the third round of the process. Nevertheless, the Panel takes note that, according to the Respondent, a decision has been taken to make her promotion retroactive to April 2005 … . While there was no entitlement to a remedy, the Panel observes that this should go some ways towards curing the unfairness from the above-stated delays.

33. Counsel for the Respondent, Mr. Gutman, stated that by backdating the appointment to 14 April 2005, the Respondent had adequately compensated the Applicant for her lost earnings, and interest thereon, in recognition of the tortuous history of this promotion exercise. However, it was not in recognition of any distress which the Applicant experienced. At the hearing, Mr. Gutman submitted that the fact of retroactive promotion should not be taken as an acceptance by the Respondent that there was any wrongdoing, nor should it be construed as acceptance by the Respondent that the Applicant suffered damage to morale and/or loss of professional reputation.

34. It is the Applicant's case that the setting up of a WG to investigate allegations of impropriety and the recommencement of the selection exercise would have reinforced the view, or impression, that she was the beneficiary of an improper selection process. In the circumstances, management should have published the WG report or explained why the promotion exercise was being recommenced. The

Applicant gave convincing testimony on the stress caused by the delay and by the effect of the process on her reputation with her colleagues. This would have dispelled any rumours which reflected adversely on her. The Tribunal upholds this aspect of her complaint.

The CRB

35. Section 8 of ST/AI/2006/3 (Staff selection system) describes the role of the CRB as follows:

> The central review bodies shall review the proposal for filling a vacancy made by the department/office concerned to ensure that candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed, in accordance with sections 5.1 to 5.6 of ST/SGB/2002/6.

36. One of the matters that concerned the Tribunal was the decision to withdraw the recommendation that had already been forwarded to the CRB. Accordingly, the Tribunal ordered the Respondent to produce a witness, who would be in a position to explain the role of the CRB and the circumstances under which a manager may take a decision to withdraw a recommendation that had already been forwarded to the CRB. The Tribunal heard evidence from Mr. Suren Shahinyan, Chief, Professional and Above Staffing Services, OHRM. He has held his current position since spring 2009 and has been with United Nations for 15 years. Prior to his current position, he was Chief of the CRB Secretariat from 2006. The Tribunal was impressed with Mr. Shahinyan's evidence regarding the procedures and accepts his explanation.

37. Once a referral is made to the CRB, it takes a few weeks for the administrative arrangements to be made. At any time between the referral and the papers being formally put before a CRB panel, it was open to the recruiting manager to withdraw the application if he or she felt there was a reasonable basis to do so. The Tribunal found Mr. Shahinyan's evidence helpful in relation to the CRB's procedures and particularly dealing with the circumstances under which a formal

recommendation to the CRB may be withdrawn. He explained that the hiring manager was acting under delegated authority from the Head of Department.

38. It was not the function of the CRB to check the validity of any request to withdraw a recommendation. Sixty-seven per cent of recommendations to the CRB are approved without requesting additional clarification or information. About one-third of the recommendations will result in additional questions being asked by the CRB. Prior to the Galaxy system (the United Nation's employment portal), the average time taken from the publication of a vacancy notice to the final decision was approximately 275 days. Under Galaxy this average was reduced to 174 days. The target is to reduce it further to 120 days.

39. Given this explanation, the Tribunal accepts that the withdrawal of the recommendation in the particular circumstances of this case was not a procedural error. The error that did take place was the delay in finalising the selection exercise and that was not a matter for the CRB but for the appropriate managers within DGACM and OHRM. The delay in this case exceeds by far the time frames described by Mr. Shahinyan.

40. Ms. Janett Beswick, who appeared as a witness for the Respondent, has been the Deputy Executive Officer for DGACM since October 2008. She has 19 years experience in personnel matters. In October 2008, when she became Deputy Executive Officer, she assumed responsibility for the Section. DGACM is the largest department in the Secretariat. Ms. Beswick's evidence was of limited value to the Tribunal since she had no involvement in this case and the evidence she gave was as a result of reviewing the records. She confirmed that on average it now took 120 days to complete a selection exercise. In answer to a question from the Tribunal, she said that the circumstances of this case were unique in that she had not come across such a case with such a protracted exercise which included suspensions and restarting the processes, either before or since. Ms. Beswick stated that the Applicant was very highly regarded by the Chief of Section and her electronic performance appraisal

system ("e-PAS") reports rated her as having "frequently exceeded expectations or higher".

Compensation

41. On compensation, art. 10.5 of the Statute of the Dispute Tribunal provides:

> As part of its judgement, the Dispute Tribunal may order one or both of the following:
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> (*a*) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (*b*) of the present paragraph;
>
> (*b*) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

42. In *Wu* 2010-UNAT-042, the United Nations Appeals Tribunal upheld the Dispute Tribunal's award of compensation on the ground that the delay in notifying the Appellant of the outcome of a selection process caused him stress. Specifically, the United Nations Appeals Tribunal stated, at para. 33, that:

> The UNDT awarded compensation to Wu under Article 10(5)(b) of the UNDT statute for non-pecuniary damage arising from the violation of his due process rights during the selection process. It is not disputed that compensation may be awarded for non-pecuniary damage. While not every violation of due process rights will necessarily lead to an award of compensation, the UNDT found in this case that Wu suffered damage, in the form of neglect and emotional stress, for which he is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

43. Counsel for the Applicant, Mr. Danquah, submitted that the delay of three years and eight months was excessive and it induced a state of stress and anxiety in the Applicant. The Applicant's claim for compensation for distress is not simply in relation to the unfairness arising from such a protracted delay but also its psychological consequences.

44. Counsel for the Respondent, Mr. Gutman, conceded that, in hindsight, things could have been done better. However, he argued that unless the Respondent's actions were wrong in law, because a statutory provision was infringed, there would be no basis for providing compensation. He added that there was no statutory provision for a time frame for recruitment and that what was important was whether the integrity of the process was maintained, whether there was bad faith and whether the decision was arbitrary. He said that the decision was made in response to serious complaints by three-quarters of the Section and the Staff Council's resolution. Management had to look into it.

45. Mr. Gutman argued that the retroactive payment was not a recognition of error but the recognition of the need to recompense the Applicant notwithstanding the fact that the management actions and decisions were for genuine reasons. The payment was not recognition of illegality. He relied on *Andrysek* 2010-UNAT-070, at para. 17, in support of the proposition that there was absolutely no right to a promotion and that it would follow that there was no right to a timely promotion.

46. In relation to this matter, the Tribunal takes the view that Mr. Gutman's submission overlooked the simple point that a staff member who put herself forward for promotion and is then recommended for promotion had to face the ordeal of that recommendation being withdrawn and the selection exercise being repeated twice. Furthermore, notwithstanding that the Respondent may have had a genuine reason for suspending the promotion exercise in the face of such a significant number of complaints, he nevertheless had a duty to act expeditiously. The reality of the situation was that the Applicant, as well as colleagues in the section, knew that she

had been recommended for promotion. Mr. Shahinyan's evidence that 67 per cent of recommendations are approved with no additional requests for clarification and that a further one-third were approved after clarification had been obtained leads to a reasonable inference that a candidate, who has been recommended for promotion and who knows that to be the case, would expect that in all probability she would be promoted within a reasonable period. There was an obligation on the Respondent to take such steps as were necessary to ensure that delay was kept to an absolute minimum. The evidence before the Tribunal suggests a rather casual pace with no demonstrable sense of urgency. This is not a question of a staff member having no right to promotion and therefore no right to a timely decision. This is a case of a staff member who was recommended for promotion and who was entitled to a final decision in a timely manner.

47. The Tribunal finds as fact that the Applicant had reasonable grounds to be distressed by the manner in which the managers concerned conducted the selection exercise and the inordinate delay that occurred from the moment the Applicant was recommended for appointment to the final implementation of the decision that she be appointed. The Tribunal finds that there was no loss of earnings but that the Applicant is entitled to be compensated for psychological distress exacerbated by the lack of adequate communication to her as a staff member with a direct and legitimate interest in the outcome. It is noted that the Applicant has not suffered any long-lasting loss to her professional reputation, nor are her legitimate feelings of anxiety and distress persisting to date. It is to her credit and the resilience of her personality that she bounced back and has performed exceptionally well professionally. She has had the highest possible ratings in her performance appraisal reports and is very highly regarded by her managers. The award which the Tribunal makes is for the period from the moment of her knowledge that she was recommended to the date when she was appointed and for a short period thereafter on the basis that feelings of upset and distress cannot be turned on and off. It is a gradual process. In the Tribunal's view, the delay was unconscionable, and as such should be compensated,

following the principle as established by the former United Nations Administrative Tribunal. Specifically, on compensation for moral damage, the Administrative Tribunal consistently relied upon Judgment No. 353, *El-Bokany* (1985), which stated that an inordinate delay "not only adversely affects the administration of justice, but on occasion can inflict unnecessary anxiety and suffering to an applicant", and "because of the dilatory and casual way in which [the Applicant's] case was dealt with, [she] is entitled to some compensation". The delay in this case was unconscionable. There was no sense of urgency and no indications of concern or sensibility displayed in recognition of the Applicant's legitimate concerns. Furthermore, the management's failure to respond to her repeated and reasonable enquiries about progress and their dilatory handling of the selection process meant that the Applicant had to endure an extended period not only of uncertainty and distress but also a loss of esteem in the eyes of her colleagues.

48. The Tribunal can well imagine cases far more serious than this one where a compensatory award for distress and anxiety may well merit an award at the top end of the scale for such awards, particularly where loss of earnings and benefits may be involved. This is not such a case.

49. The Tribunal recognises the measured presentation by Mr. Gutman, as Counsel for the Respondent, and expresses its appreciation to Mr. Danquah, as Counsel for the Applicant, for assisting in narrowing down the issues to a few relevant and concise matters which have formed the subject of this judgment.

Conclusion

50. The Tribunal awards the sum of USD10,000 to compensate the Applicant for the emotional distress and anxiety suffered. This sum is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

51. All other pleas are rejected.

(*Signed*)

Judge Goolam Meeran

Dated this 18th day of February 2011

Entered in the Register on this 18th day of February 2011

(*Signed*)

Santiago Villalpando, Registrar, UNDT, New York