



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/105

Judgment No.: UNDT/2011/208

Date: 8 December 2011

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

LJUNGDELL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Shelly Pitterman, UNHCR

Introduction

1. The Applicant contests the decision of the High Commissioner for Refugees dated 26 April 2010 not to select her for the post of Senior Resettlement Coordinator at the P-5 level in Geneva.

Facts

2. Having served in the Office of the United Nations High Commissioner for Refugees (“UNHCR”) since December 1991, the Applicant is a staff member at the P-5 level holding an indefinite appointment. Since July 2006, she has been a staff member in between assignments (“SIBA”) and she undertook several temporary assignments in Geneva.

3. On 29 July 2009, the Applicant was appointed to the post of Deputy Representative in Malaysia. However, before she could take up her functions, she was informed by email dated 9 September 2009 that this post would be discontinued and her appointment to the post would be rescinded.

4. The Applicant submitted five applications for posts advertised in the September 2009 Compendium of vacant posts. Two of these posts were subsequently reclassified at a higher level and the Applicant was thus considered for three P-5 posts, namely Deputy Chief of Mission in India, Deputy Representative in Sri Lanka, and Senior Resettlement Coordinator in the Division of International Protection (“DIP”) in Geneva.

5. The summary of decisions of the High Commissioner on Appointments and Postings No. 08/2009 was issued on 23 December 2009. The Applicant was not appointed to the posts of Deputy Chief of Mission in India or Deputy Representative in Sri Lanka. The summary of decisions of the High Commissioner on Appointments and Postings No. 02/2010 was issued on 26 April 2010. The Applicant was not appointed to the post of Senior Resettlement Coordinator in Geneva.

6. By letter dated 21 June 2010, the Applicant requested management evaluation of the decision not to select her for the post of Senior Resettlement Coordinator in Geneva. She also claimed that “the Organization ha[d] acted inappropriately and taken a series of negligent management decisions” during the period between her appointment as Deputy Representative in Malaysia and the decision not to select her for the post of Senior Resettlement Coordinator. In particular, she argued that as a result of the abolition of the post in Malaysia, she had suffered emotional stress and considerable financial losses (e.g., educational expenses of her daughter) for which she requested compensation.

7. On 11 August 2010, the Applicant received a response to her request for management evaluation. She was informed that procedural irregularities were present in the selection process for the post of Senior Resettlement Coordinator and that, as a consequence, she had not received full and fair consideration. The Applicant was also informed that in view of the procedural irregularities and her personal circumstances, she would be paid compensation in the amount of “three months’ salary”. With regard to her claim for compensation as a result of the abolition of the post of Deputy Representative in Malaysia, the Applicant was informed that this claim had not been subject to a timely request for management evaluation, which should have been filed within 60 calendar days from the date on which she received notification of that decision.

8. On 13 September 2010, the Applicant wrote to the Deputy High Commissioner requesting to receive the reasons why she was not one of the recommended candidates for the Senior Resettlement Coordinator post despite having an excellent profile for the post. She also requested him to consider the substance of her financial claim contained in her request for management evaluation.

9. On 15 September 2010, the Applicant was informed that the Deputy High Commissioner would review her case and revert to her at a later stage.

10. On 8 October 2010, the Applicant asked the Deputy High Commissioner that the entire selection dossier for the post of Senior Resettlement Coordinator be shared with her.

11. On 15 October 2010, the Applicant made a formal request for mediation.
12. At the Applicant's request, on 21 October 2010, the Dispute Tribunal granted her an extension of time to submit a full application until 10 January 2011.
13. Since the Applicant did not receive a response to her request for mediation, she filed an application with the Tribunal on 20 December 2010. On 24 January 2011, the Respondent submitted his reply. On 7 February 2011, the Applicant submitted observations on the Respondent's reply. On 15 February 2011, a directions hearing took place in which the Applicant and Counsel for the Respondent participated.
14. On 13 October 2011, an oral hearing took place in the presence of the Applicant and Counsel for the Respondent. The Director of DIP testified in person at the hearing.

Parties' submissions

15. The Applicant's principal contentions are:
 - a. The selection process for the post of Senior Resettlement Coordinator in DIP was not conducted in accordance with the established rules and procedures:
 - (i) The Director of DIP violated paragraph 96 of the APPB Guidelines. He recommended less than the required three candidates for the post and the recommended candidates were at the P-4 level. Furthermore, one of the recommended candidates did not comply with the requirements in terms of qualifications and professional experience, i.e., legal background and resettlement or protection related experience;
 - (ii) Five months after the deadline to apply for the post, the selected candidate (a male candidate) was included in the selection process by the Director of DIP, following instructions of the High

Commissioner. The selected candidate neither submitted an application, nor completed the written test that all *bona fide* candidates were required to complete. In addition, he does not have experience in resettlement and he was not an eligible candidate under paragraph 56 of the APPB Guidelines, according to which staff members may apply for an advertised post one year before the expiry of their current Standard Assignment Length;

(iii) The reasons for not recommending her as a suitable candidate for the post were discriminatory and improper in nature. The Applicant was subjected to discrimination because of her gender and family situation;

(iv) There were inconsistencies in the pretexts used for excluding her candidacy. The Applicant's managerial skills and experience in resettlement were misrepresented;

(v) The Director and the Deputy Director of DIP assured the Applicant that she would be a recommended candidate for the post of Senior Resettlement Coordinator;

b. Regarding her application for a post in India, it was decided to select a male candidate instead of her because all international staff members there were female. Concerning the post in Sri Lanka, for which the selection process was irregular, she did not request a management evaluation of the decision not to select her for this post as she believed that she would be selected for another post advertised in the September 2009 Compendium;

c. As a result of a series of inappropriate decisions during the period from 29 July 2009 to 26 April 2010, particularly in relation to the rescission of her appointment to the post of Deputy Representative in Malaysia, the Applicant suffered damage to her career aspirations, undue emotional stress and considerable financial losses relating to her daughter's educational expenses. If she had been appointed to a post

advertised in the September 2009 Compendium, she would not have suffered such damages.

16. The Applicant requests the following: 1) financial compensation and moral damages in the amount of USD30,000 for “egregious and cumulative breach of [her] procedural rights”, in addition to the three months’ salary already paid by the Respondent, 2) financial compensation in the amount of at least USD100,000 for “the suffered discrimination, the hampered career development, anxiety, stress and hurt feelings”, and 3) financial compensation in the amount of SEK255,714 (equivalent to CHF36,500) for incurred educational expenses.

17. The Respondent’s principal contentions are:

a. The application against the decision not to select the Applicant for the post of Senior Resettlement Coordinator is receivable. However, the application against the decisions not to select her for the posts in Sri Lanka and India and to rescind the Applicant’s appointment to the post of Deputy Representative in Malaysia, including her request for compensation for educational expenses of her daughter, is not receivable since these decisions were not subject to requests for management evaluation;

b. It was acknowledged in the reply to the Applicant’s request for management evaluation that procedural irregularities existed in the selection process for the post of Senior Resettlement Coordinator, and that as a result, she did not receive full and fair consideration. The Applicant was thus granted compensation in the amount of three months’ salary;

c. The Respondent acknowledges that the selection of a late and ineligible candidate who did not compete in the full selection process constituted the procedural irregularity referred to in the reply to the request for management evaluation;

d. The Applicant did not discharge the burden of proof regarding her allegations that she was subject to discrimination on the grounds of her gender and family situation. In fact, the Director of DIP recommended two

female staff members with children for the post and he rejected a male candidate endorsed by the APPB in favour of a female candidate. The documents show that the principal reason for the non-selection of the Applicant was her lack of sufficient experience in resettlement;

e. Contrary to the Applicant's allegations, both the Director and the Deputy Director of DIP denied having given her verbal assurances that she would be one of the recommended candidates.

18. The Respondent requests the Tribunal to reject the application in its entirety.

Consideration

19. At the outset, it is important to clarify that the Tribunal can only deal with the decision not to select the Applicant for the post of Senior Resettlement Coordinator at the P-5 level in Geneva, as she did not submit to management evaluation the decisions to rescind her appointment to the post of Deputy Representative in Malaysia and not to select her for the posts in Sri Lanka and India. Concerning the financial compensation claimed for educational expenses, the Tribunal considers that these expenses are linked to the rescission of the Applicant's appointment to the post of Deputy Representative in Malaysia, and that it therefore cannot examine this issue as part of the present case. The Tribunal will thus limit its review to the above-mentioned decision and its effects on the Applicant.

20. As a matter of principle, it is for the Administration to determine the suitability of each candidate and the Tribunal should not substitute its judgment to that of the Secretary-General in the assessment of a candidate's suitability for a given post (see for example *Abbassi* 2011-UNAT-110). Only in rare circumstances, such as failure to give fair consideration to a candidate, discrimination or bias, departure from proper procedures and failure to consider relevant material, may the Tribunal rescind a selection decision (*Rolland* 2011-UNAT-122).

21. In the case at hand, the Respondent has acknowledged that procedural irregularities occurred in the selection process for the post of Senior Resettlement Coordinator, and that as a result, the Applicant did not receive full and fair consideration. There is, thus, no need for the Tribunal to enter into a detailed analysis of the various arguments brought forward by the Applicant with respect to the selection process and the qualifications of some candidates, including the selected candidate.

22. The Applicant has already received compensation in the amount of three months' salary because of the procedural irregularities committed in the selection process and her personal circumstances. The role of the Tribunal is thus to examine whether the amount of compensation granted to the Applicant is enough to provide reparation for the damage she suffered as a result of the irregularities committed in the assessment of her candidacy.

23. First, based on the examination of the facts of the case during the oral hearing, the Applicant agreed that there was no basis for her allegation of gender discrimination. It is a fact that the Director of DIP recommended two female staff members with children for the post and that he rejected a male candidate endorsed by the APPB in favour of a female candidate.

24. Second, the Applicant's allegations that her managerial skills and experience in resettlement have been misrepresented could not be proven.

25. During the hearing, the Director of DIP clarified that resettlement activities have significantly changed during the last six or seven years, that the number of resettlement cases has increased and that the position of Senior Resettlement Coordinator has become more visible. He pointed out that resettlement has become a strategic tool in defining solutions for refugees. He explained that the person to be selected for the post was required to have excellent external diplomatic skills, as well as managerial skills and very good and recent knowledge on resettlement processes as he or she was to negotiate with national authorities and supervise professional staff at the P-4 and P-3 levels, all highly technical specialists in the area of resettlement.

26. Based on the evidence on file and the parties' statements at the hearing, the Tribunal finds reasonable that, considering the deep changes that occurred in the recent years in the area of resettlement, the Applicant's experience in this area was considered insufficient. It is undisputed that her experience in resettlement is not recent but that it dates back to the 1990s when she worked in Hong Kong and Turkey.

27. Furthermore, the Tribunal can only note that while the Applicant may have managerial skills, they were not considered appropriate for this specific post. As already stated above, it is for the Administration to determine the suitability of each candidate and the Tribunal should not substitute its assessment of candidates to that of the Secretary-General.

28. Third, turning to the Applicant's allegation that the Director and the Deputy Director of DIP assured her that she would be a recommended candidate for the post, this allegation could not be established as both staff members have denied giving her such assurances. It is a well-known principle followed by the United Nations Appeals Tribunal that the party who alleges a fact bears in principle the burden of proving its veracity (see for example *Azzouni* 2010-UNAT-081 and *Hepworth* 2011-UNAT-178).

29. In the present case, the Applicant has not discharged this burden as she has not adduced convincing evidence establishing that the Director or the Deputy Director of DIP assured her that she would be a recommended candidate for the post.

30. In view of the foregoing, with respect to the determination of financial compensation to be granted to the Applicant for the damage she suffered as a result of the irregularities committed in the selection process, the Tribunal finds that the amount of three months' salary already granted by the Respondent is adequate.

31. In this respect, the Tribunal considers that the Applicant has not suffered any material damage as a result of the contested decision. As a matter of fact, her personal level is P-5 and the level of the post is also P-5; furthermore, she is a

SIBA holding an indefinite appointment. She therefore continues to receive her full salary and is not threatened by the expiration of her appointment.

32. The Appeals Tribunal determined in *Wu* 2010-UNAT-042 and *Kasyanov* 2010-UNAT-076 that the relief of two months' net base salary was adequate to compensate the Appellants for the non-pecuniary damage arising from the violation of their due process rights during the selection process. In the case at hand, the moral damage suffered by the Applicant, if any, is very difficult to determine. However, in view of the Applicant's particular circumstances, the compensation given to her by the Respondent is deemed sufficient to repair any damage.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 8th day of December 2011

Entered in the Register on this 8th day of December 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry