



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/007
UNAT/1578
Judgment No.: UNDT/2012/019
Date: 10 February 2012
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

DEBEBE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is appealing against the decision of the Secretary-General not to promote him from G-7 level to L-1 level in implementation of the recommendations of the Joint Appeals Board (JAB) in its Report No. 1886.

2. On 1 January 2010, this case was transferred to the Nairobi Registry of the United Nations Dispute Tribunal (UNDT) in accordance with ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice).

Facts

3. The Applicant joined the United Nations Economic Commission for Africa (ECA) in 1981, as a General Service Finance Assistant at the GS-7 level. He held a number of financial assistance or administrative positions until, in December 2002, he became GS-7 Finance Assistant at the UN Health Care Centre (UNHCC) at ECA Headquarters in Addis Ababa.

4. Between 1991 and 1998, the Applicant sat the “G to P examination” on eight occasions, but did not pass.

5. In July 2003 the Clinic Advisory Committee and the Executive Committee of UNHCC approved the creation of an L-1 post of Administrative/Finance Officer and in August of that year a request was made by UNHCC to reclassify the Applicant’s post to this end. The Human Resources Services Section (HRSS) wrote to Dr. Azeb Tamrat, Officer in Charge of UNHCC on 11 May 2004, advising him that the post had indeed been reclassified to L-1 level, as requested.

6. “L” level posts were governed by the 200-Series of Staff Rules, now abolished. The 200-Series of Staff Rules were said to be applicable to technical assistance project personnel, and project personnel were specifically defined under rule 200.2(b) to exclude individuals recruited to serve in the General Service category.

7. On 31 May 2004, Dr. Tamrat wrote to HRSS asking the effective dates of staff promotions as a result of the reclassification. He did not receive a reply, and so on 10 July 2004 he again wrote, this time requesting Special Post Allowance (SPA) for the Applicant pending finalisation of his promotion to L1 level. He did not receive a response to this request either.

8. Almost a year later, in April 2005, Dr. Tamrat wrote again, requesting a response to his earlier memos. Receiving no response to this, on 3 June 2005, he wrote to another Human Resources Officer, Ms. Rosa Convers, to follow up.

9. On 16 September 2005 Ms. Convers wrote to Dr. Tamrat rejecting the request and advising that SPA could only be granted against a “P”, not an “L” post, under the 100-series of Staff Rules. She further advised that the “L” post in question had not yet been approved or created under UNHCC accounts, but if such a post were to be created, it would have to be circulated in *Galaxy* and if the Applicant wished to apply, he would first have to resign from his current position at the GS-7 level. She added that selection was the sole prerogative of the Central Review Bodies, hence there would be no guarantee of the Applicant’s selection for the L post.

10. In October 2005 the Applicant wrote to the Executive Secretary of ECA asking for his intervention. On 17 January 2006 the Applicant sent a request for review of the decision not to promote him to the L-1 level to the Secretary-General, and on 21 April 2006 he submitted an appeal to the JAB. The JAB produced a report dated 17 May 2007.

11. In its report, the JAB concluded that the Applicant had had a reasonable expectation of promotion to the L-1 level. The panel further concluded that the L-1 post had been created and the G-7 post eliminated, resulting in the Applicant performing the higher level functions of an L-1 from the time of the reclassification. In view of these findings, the JAB recommended that the Applicant be promoted to the L-1 level against the post on which he was serving, and compensated for the difference between his G-7 salary and the L-1 salary from May 2004 when the post was first classified, until such time as he was duly promoted to L-1 level.

12. By letter dated 29 August 2007, the Under-Secretary-General for Management advised the Applicant that:

The Secretary-General agrees with the finding that you had a reasonable expectation of promotion as well as with the finding that you should be remunerated at the level of the work you perform. The Secretary-General does not agree, however, that the failing of the Administration to act in a timely manner regarding the improper practice of ECA, justifies a promotion in violation of existing rules and policies.

The letter went on to state that the Applicant would be paid the equivalent to what he would have received as SPA from the G-7 level to the L-1 from May 2004 “and for the duration of the time in which you perform work at that level”.

13. On 30 January 2008, the Applicant appealed against this decision to the former UN Administrative Tribunal. The case was transferred to the UNDT on 1 January 2010.

The Parties’ submissions

14. The Respondent has accepted that errors were committed by ECA in connection with reclassification of posts from the General Service to Professional categories, and that Headquarters should have clarified the situation sooner. The Respondent further accepts that the Applicant in this case did have a reasonable expectation of promotion and that he is entitled to remuneration at the level of the work he performed. Indeed, the Applicant has been paid the equivalent of SPA to date.

15. The only issue, then, for adjudication, is whether or not the Applicant is entitled to automatic promotion from G to P category, without having either to pass the G to P examination or to resign and successfully apply for a Professional post.

16. The Respondent contends that automatic promotion from G to P category, as recommended by the JAB, is not legally possible because the General Assembly Resolution 33/143 of 20 December 1978 and subsequent administrative issuances do not allow for any other route from the G to P category than via the examination.

17. The Respondent further contends that any right the Applicant may have had to consideration for promotion to the L-1 post at issue, has to be balanced against his failure to pass the exam on eight separate occasions.

18. The Applicant asserts that the ECA has promoted numerous General Service staff to the Professional category without requiring them to resign and apply for Professional posts through competitive selection. Even if this policy was in breach of the applicable rules, it is unfair on the Applicant that he should be treated differently because of a policy change which occurred whilst he was in the process of negotiating his own promotion. The Applicant refers to the former UN Administrative Tribunal Judgment No. 1169 *Abebe* (2004) and avers that he is in the same position as the applicant in that case and should therefore be treated similarly.

Consideration

Promotion to the Professional category

19. In *Abebe*, the applicant, a General Service staff member of ECA was appointed to an L position and served in that capacity for a number of years. The ECA was said to have been acting outside its delegated authority in granting a General Service staff member a Professional appointment, without her having passed the G to P examination. When funding ran out and she was to be separated, the question arose as to whether this was fair since she had been encouraged to give up her indefinite appointment in the General Service category in order to obtain the L position in the first place. Ultimately the Administration gave her back her indefinite appointment in the General Service category, but the applicant appealed to the former UN Administrative Tribunal, asserting that she should be granted a Professional appointment, not a General Service appointment. She had never sat the G to P examination but had served in an L position for many years. The former UN Administrative Tribunal agreed with the Applicant that she should not be required to take the examination in order to encumber a Professional post, stating that:

...the Respondent...allowed the Applicant to remain in that Professional capacity beyond one year, without requiring her to take the competitive examination. In fact, the Respondent allowed the Applicant to encumber a Professional post for more than six years. During that entire time, the Respondent allowed the Applicant to perform Professional duties, and the Respondent benefited from the performance of those services. Clearly, the Respondent believed the Applicant possessed skills sufficient to carry out the responsibilities of her Professional post, without requiring an examination to confirm that. If the Respondent believed otherwise, he undoubtedly would have required the Applicant to take the examination before she was allowed to continue in her post beyond the one year period. The Respondent cannot now assert that the Applicant must take the qualifying examination in order to qualify as a Professional.¹

20. Thus the former UN Administrative Tribunal found in the applicant's favour in respect of her eligibility for Professional posts despite not having taken the examination.

21. The Applicant relies on *Abebe* in asserting that he should be formally placed against the L-1 post he is presently encumbering. The Tribunal, however, sees a distinction between the Applicant's case and that in *Abebe*. The applicant in *Abebe* had applied, and been selected for, an L-1 post. Ultimately it was said that the ECA was wrong to have granted a General Service staff member an L position, but the fact remains that the applicant in *Abebe* was competitively selected for the position. Further, the applicant in *Abebe* was continuously employed in that position for six years. The Applicant in the present case has not undergone any form of competitive selection for any L post, and his many attempts to pass the G to P examination have been unsuccessful. It cannot, therefore, be said that he "qualifies" as a Professional in the way that the applicant in *Abebe* did.

22. Furthermore, the former UN Administrative Tribunal did not award the applicant in *Abebe* that which the Applicant in the present case is seeking: placement directly into a Professional position. Such an outcome would, in the view of this Tribunal, be beyond its jurisdiction. There is a clear difference between eligibility for a Professional post, and

¹ *Abebe*, paragraph XX.

entitlement to one, and the former UN Administrative Tribunal drew that distinction in *Abebe*.

23. Former staff rule 104.15, applicable in May 2004, reads:

Recruitment to the Professional category of staff from the General Service and related categories having successfully passed the appropriate competitive examinations shall be made within the limits established by the General Assembly. Such recruitment shall be made exclusively through competitive examination.

This is now reflected in the current Staff Rule 4.16(b)(ii).

24. General Assembly resolution 33/143, entitled “Personnel questions”, provides that:

Movement of staff from the General Service category to the Professional category should be limited to the P-1 and P-2 levels and be permitted up to 30 per cent of the total posts available for appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years’ experience and post-secondary educational qualifications.²

These provisions have been reaffirmed in a number of subsequent resolutions, including for example resolution 55/258, entitled “Human resources management”, of 27 June 2001.

25. General Assembly resolution 35/210, entitled “Personnel questions”, and dated 17 December 1980, provides that “movement of staff from the General Service category...is to be regulated exclusively through competitive examination...No exception shall be authorised.”

26. As stated in the former UN Administrative Tribunal Judgment no. 1303 (2006), the “language of the relevant General Assembly resolutions is clear and unambiguous in

² A/Res/33/143, section I, paragraph 1(g)

its intention to restrict movement of staff from the General Service category to the Professional category”³, and this Tribunal has no power to gainsay it.

Fair and equal treatment

27. In its report, the JAB found “no evidence that Appellant had suffered consequential damage while his case had been pending” and therefore rejected his claim for two years net base salary at the L-1 level as compensation “for damages suffered as a result of the improper, or lack of, action by ECA”. This seems an odd conclusion.

28. It is the obligation of both the staff member and the Organisation to act in good faith towards each other. Good faith includes honesty, reasonableness, courtesy and consideration. In this case, the Respondent has acknowledged his failures in this regard, accepting that “errors were committed by ECA in connection with reclassification of Professional posts” and that “Headquarters should have clarified any resultant misconceptions sooner...” but simply accepting that mistakes were made does not seem to this Tribunal to go far enough. It is extremely unfair to the Applicant that other staff around him in ECA should appear to have benefited by the aforementioned “errors”, creating an atmosphere of unhappiness and a sense of unequal treatment which is apparent from the pleadings in this case.

29. Further, as the JAB found, the Applicant was given a legitimate expectation of promotion to L-1 level, which was never satisfied. The award of the equivalent of SPA to L-1 level does not compensate him for this—it is not compensation at all, in fact. It is, rather, appropriate remuneration given that the Applicant is performing the functions of an L-1 position and bearing in mind the fundamental principle of equal pay for equal work.

30. In the circumstances, it seems to this Tribunal that the Applicant should receive some level of damages pursuant to article 10.5(b) of the Statute of the Tribunal, for the

³ Paragraph V.

distress caused to him by the Respondent's admitted incompetence which created a legitimate expectation of promotion in the Applicant's mind.

Conclusion

31. The Application is granted in part.

32. The Respondent is to pay the Applicant damages for distress in the sum of four months' net base salary at the L-1 level.

33. Under article 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total 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.

(Signed)

Judge Vinod Boolell

Dated this 10th day of February 2012

Entered in the Register on this 10th day of February 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi