



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/025

Judgment No.: UNDT/2012/030

Date: 24 February 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

MIRKOVIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), contests the decision whereby she was denied the right to appeal to the Central Examinations Board the decision that she was ineligible to take the 2010 ICTY competitive examination for promotion from the General Service category to the Professional category.

2. She requests three months’ net base salary in compensation for the damage suffered.

Facts

3. The Applicant joined ICTY in October 1998. At the material time, she was employed as a Trial Support Assistant at level G-5.

4. By email dated 11 August 2010, General Service staff at ICTY were invited to take the 2010 ICTY competitive examination for promotion from the General Service category to the Professional category (the “G to P exam”), in various occupational groups. The written component of the exam was to take place on 1 December 2010. Staff members were informed of the eligibility criteria, they were provided with the relevant administrative issuances, namely ST/AI/2010/7 (Competitive examination for recruitment to the Professional category of staff members from other categories) and ST/IC/2010/22 (2010 competitive examination for recruitment to the Professional category of staff members from other categories), and they were reminded that those successful in the exam would be limited to apply to vacancies at the Professional level at ICTY.

5. On 1 September 2010, the Applicant submitted an application to take the G to P exam in the Human Rights occupational group.

6. On 19 October 2010, the Applicant was informed that she was ineligible to take the exam because she did not meet the minimum academic qualifications and/or experience required for the Human Rights occupational group.

7. By email dated 22 October 2010, the Applicant asked the Chief of the Examinations and Tests Section at the Office of Human Resources Management (“OHRM”), United Nations Secretariat, to provide her with the contact details of the Chair of the Central Examinations Board (“CEB”) so that she could submit an appeal against the above-mentioned decision in accordance with paragraph 3.8 of ST/AI/2010/7. On the same day, the Chief of the Examinations and Tests Section responded to the Applicant to send her appeal to OHRM-GtoP@un.org.

8. On 26 October 2010, the Applicant appealed to the CEB for review of the decision on her ineligibility pursuant to paragraph 3.8 of ST/AI/2010/7. The appeal was directed to the Chair of the CEB and copied to the Chief of the Examinations and Tests Section, OHRM.

9. By email dated 1 November 2010 addressed to the Chief of the Examinations and Tests Section, OHRM, the Applicant enquired as to when she could expect a decision on her appeal.

10. On 8 November 2010, the Applicant called the Chief of the Examinations and Tests Section, OHRM, who informed her orally that applications for the G to P exam from ICTY staff were not reviewed by the CEB and that ICTY staff members did not have the right to appeal a negative decision on their application, unlike other Secretariat staff.

11. By emails dated 9 and 25 November 2010, the Applicant requested the Chief of the Examinations and Tests Section, OHRM, to confirm in writing the decision notified orally on 8 November. He never responded.

12. The written component of the 2010 ICTY G to P exam was held on 1 December 2010.

13. By letter dated 5 January 2011, the Applicant requested management evaluation of the decision communicated orally to her on 8 November 2010 by the Chief of the Examinations and Tests Section, OHRM, whereby she was denied the right to appeal to the CEB the decision that she was ineligible to take the 2010 ICTY G to P exam.

14. By letter dated 18 February 2011, the Management Evaluation Unit (“MEU”) at the United Nations Secretariat Headquarters confirmed to the Applicant that with her agreement, the matter had been put in abeyance pending attempts at informal resolution.

15. On 25 February 2011, the Applicant withdrew from the informal resolution process as the proposed solution, i.e., a potential policy change for future exams at ICTY, did not provide a substantive remedy in her case.

16. On 24 March 2011, the Under-Secretary-General for Management informed the Applicant of the Secretary-General’s decision “that the contested administrative decision contravenes [her] rights to be accorded the same or similar procedural safeguards that are accorded to similarly-situated staff members, and that it should be reversed”. She further advised the Applicant that “[s]hould [she] wish to appeal the decision ... respecting [her] ineligibility to write the G to P exam, [she] may advise the CEB of the same in writing within 10 (ten) calendar days” from the date of receipt of the letter. However, the Applicant’s request for compensation was rejected on the grounds, *inter alia*, that she had not submitted any evidence of emotional distress.

17. On 31 March 2011, the Applicant filed an appeal with the CEB against the decision that she was not eligible to take the G to P exam.

18. By letter dated 19 April 2011, the CEB informed the Applicant of its decision to uphold the initial decision that she did not meet the eligibility requirements to sit for the 2010 ICTY G to P exam in the Human Rights occupational group.

19. On 21 May 2011, the Applicant filed the present application with the Tribunal. The Respondent submitted his reply on 23 June, and the Applicant filed observations on 1 July.

20. By Order No. 36 (GVA/2012) of 13 February 2012, the Tribunal informed the parties that in its view the case could be dealt with on the papers, without any hearing, but that should a party object, a hearing would be held on 29 February 2012. Both parties responded that they did not have any objection to the matter being determined on the papers.

Parties' submissions

21. The Applicant's principal contentions are:

a. As regards receivability, the contested decision was not a preliminary decision but a final one since she was unable to file an appeal before the written component of the 2010 ICTY G to P exam was held on 1 December 2010 and she was not allowed to sit for it. In addition, the Respondent's delay in allowing her to file an appeal became undue the moment the exam was held without her having been granted that right;

b. According to the Secretary-General's report A/65/350 (Composition of the Secretariat: staff demographics) dated 8 September 2010, ICTY staff members form part of the Secretariat. Accordingly, the CEB discriminates against ICTY G-level staff by not allowing them to sit for the Secretariat G to P exam on the ground that they are not staff members of the Secretariat;

c. Even assuming that ICTY is not technically part of the Secretariat and even though the G to P exams conducted at ICTY limit successful candidates to appointments within ICTY, an ICTY staff member's eligibility to take the exam is governed by the same rules applying to Secretariat staff, i.e., ST/AI/2010/7 and ST/IC/2010/22. Accordingly, they have the right to appeal to the CEB for review if they have been found

ineligible to sit the examination. The denial of such a right is in breach of the principle of equal treatment;

d. Her right to appeal was not upheld until six months after she filed an appeal with the CEB and five months after the G to P exam was held. Even though the Administration ultimately concluded that it had violated her right to appeal and overturned its decision, it must still be held responsible for the violation of her procedural right to appeal and the undue delay in respecting such procedural right;

e. Between 22 October and 8 November 2010, as she believed that her eligibility might be recognized on appeal, she continued her intensive preparation for the exam on nights and week-ends. She even hired a baby-sitter for five hours per day on the week-ends of 22 October, 29 October and 5 November. Her studies required her to sacrifice time with her family, and especially with her two young children. Upon learning on 8 November 2010 that she had no right to appeal, she felt humiliated. Lastly, the process of vindicating her right has been a stressful, time-consuming and lengthy process. Accordingly, she is entitled to compensation for the unlawful discrimination she suffered, the excessive procedural delay, the breach of her moral and procedural rights and for the stress suffered and the time spent studying away from her family.

22. The Respondent's principal contentions are:

a. The application is not receivable *ratione materiae* on two grounds. Firstly, the Applicant contests a preliminary decision—not to grant her a right of appeal—and not the final decision in this matter—the CEB decision of 19 April 2011. Secondly, the contested decision was revised by MEU. The application is therefore moot;

b. On the merits, the Applicant alleges discrimination and unequal treatment in not granting her a right of appeal. This argument is moot since

she was eventually granted a right of appeal which she exercised with the CEB;

c. The Applicant further submits that she was not provided an adequate remedy because she was not able to file an appeal to the CEB in time to enable her to take the examination. There are four reasons why this argument must fail. First this contention amounts to a *de facto* attempt to contest the merits of the final decision not to permit her to sit the examination, which was never the subject of a management evaluation. Second, if the Applicant had wished to have a decision in time to enable her to sit the exam, she could have filed an application for suspension of action. Third, even if the Applicant had been granted a right of appeal prior to the examination date, she would still have been found ineligible to sit the exam. Fourth, there was no actual delay in the process of determining her eligibility since she filed a request for management evaluation on 5 January 2011 and was notified of the final decision on her appeal to the CEB on 19 April 2011.

Consideration

23. With the consent of the parties, this case was decided on the papers before the Tribunal, without a hearing.

24. One issue in this case is whether the application is irreceivable due to the alleged preliminary nature of the contested decision; another is whether reversal of the contested decision by the Administration necessarily excludes compensation. To both questions, the Tribunal responds in the negative.

25. Before the Tribunal, the Respondent contends first that the contested decision is a preliminary one, whereas the final decision in this matter would be the CEB decision of 19 April 2011 rejecting the Applicant's appeal. This argument confuses two distinguishable decisions. The decision not to grant the Applicant a right of appeal was undoubtedly a final one since it had the effect of

precluding her from taking the 2010 G to P exam. Further, the CEB decision of 19 April 2011—which could only be taken after the Secretary-General, at the management evaluation stage, reversed the contested decision—is an entirely different decision as it does not concern the Applicant’s right of appeal but her eligibility to take the exam.

26. Accordingly, in the present case, the Tribunal is satisfied that the Applicant contests an appealable administrative decision and for that matter, one that is unlawful.

27. Second, the Respondent submits that the application is moot because the contested decision was revised by MEU.

28. The Tribunal concurs with the Respondent in this respect inasmuch as the decision not to grant the Applicant an appeal to the CEB was indeed reversed by the Secretary-General based on the advice of MEU.

29. However, because the contested decision was reversed does not mean that the Applicant is not entitled to claim compensation for the damage she may have suffered as a result of the unlawful decision.

30. In *Gehr* UNDT/2011/211, the Tribunal held:

In cases where the Administration rescinds the contested decision during the proceedings before the Tribunal, the applicant’s allegations may become moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.

31. The same reasoning may apply *mutatis mutandis* to cases where the Administration reversed the contested decision at the management evaluation stage. If an applicant can prove that he or she still sustains or sustained an injury resulting from the unlawful decision despite the rescission of the same, he or she has grounds for claiming compensation.

32. The last issue before the Tribunal is thus whether the Applicant suffered any damage as a result of the contested decision, which warrants the award of compensation.

33. The Applicant requested compensation in her request for management evaluation “for the breach of procedural rights, moral injury and emotional distress”. She explained *inter alia* that:

When my procedural right to appeal was denied, it put me through a difficult period which caused me significant emotional distress.

... [E]ven though my application to participate in the examination was denied, I nevertheless continued to study for the exam, hoping that eventually my procedural rights would be respected and I would be allowed to sit for the examination.

The time spent studying for the exam, combined with the uncertainty about whether indeed I would be allowed to sit for the exam, put me through considerable stress and took valuable time away from my family life.

34. In his decision reversing the contested decision, the Secretary-General rejected the Applicant’s claim for compensation on the grounds that she had not suffered an actual economic loss, nor submitted “any particulars or evidence” of emotional distress.

35. In her application to the Tribunal, the Applicant thus submitted additional information in support of her claim for compensation.

36. She requests compensation for the delay in respecting her procedural right to appeal, claiming that the *ex post facto* remedy ordered by the Secretary-General—i.e., recognizing her right of appeal after the exam had already taken place—did not repair any of the damage suffered. She explains that:

On 22 October 2010, when [the Chief of the Examinations and Tests Section, OHRM] told me that I had the right to appeal, I reasonably relied on his statements and the relevant administrative instruction, contacted my professors, prepared an appeal, hired a week-end babysitter for my children and continued to study intensively. When my procedural right to appeal was denied, it caused me uncertainty, humiliation and stress. It also took away

from my time with my family in the weeks when I continued to study – prior to learning that the Administration was unwilling to hear my appeal. Lastly, the process of vindicating my right ... has been a stressful, time-consuming and lengthy process ...

37. The Tribunal finds that the Applicant's due process rights were violated by the contested decision and that any reasonable person in the Applicant's situation of preparing for a competitive exam, especially one that could have such a significant impact on her career, would have suffered stress and emotional distress. The Tribunal further finds that the contradictory information received by the Applicant on 22 October 2010 and 8 November 2010 on her right of appeal, and the subsequent failure of the Chief of the Examinations and Tests Section, OHRM, to respond to her requests for a written confirmation added to the stress and injury suffered. In the circumstances of the case, reversal of the unlawful decision *after* the exam had already taken place was not sufficient to repair the damage suffered by the Applicant.

38. In *Wu* 2010-UNAT-042, the Appeals Tribunal held that:

While not every violation of due process rights will necessarily lead to an award of compensation, the UNDT found in this case that [the applicant] 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.

39. In *Antaki* 2010-UNAT-095, the Appeals Tribunal also stated that “[a] Tribunal may ... award compensation for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury”.

40. The Tribunal finds consequently that the Applicant is entitled to be compensated for the violation of her due process rights and the moral injury resulting thereof. In light of the circumstances of the case, the Tribunal sets the appropriate amount of compensation at EUR2,000.

Conclusion

41. In view of the foregoing, the Tribunal DECIDES:
- a. The Applicant is awarded compensation in the amount of EUR2,000;
 - b. The compensation set in sub-paragraph (a) shall bear interest at the US Prime Rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the US Prime Rate 60 days from the date this Judgment becomes executable;
 - c. All other pleas are rejected.

(Signed)

Judge Thomas Laker

Dated this 24th day of February 2012

Entered in the Register on this 24th day of February 2012

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry