



UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.: UNDT/NY/2019/041
UNDT/NY/2019/042
UNDT/NY/2019/043
UNDT/NY/2019/044
UNDT/NY/2019/045
UNDT/NY/2019/046
Judgment No.: UNDT/2020/192
Date: 16 November 2020
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

MIKSCH *et al.*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Dorota Banaszewska, OSLA

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

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Introduction

1. On 20 June 2019, six staff members of the Department of Safety and Security (“DSS”) filed applications contesting their non-selection to the five posts of Security Sergeant that were advertised in Job Opening No. 97591 (“the Posts”), at DSS. At the Applicants’ request, the Tribunal joined all six cases.
2. The Respondent replies that the applications are without merit because the Applicants’ candidatures for the post were given full and fair consideration.
3. For the reasons state below, the Tribunal finds the contested decision to be unlawful, grants the Applicants’ claims for compensation for loss of chance in part and rejects all other claims.

Relevant facts

4. Prior to the advertisement of the Posts, the Applicants were all placed on the roster of pre-approved candidates for the position of Security Sergeant at the S-4 level.
5. On 25 May 2018, DSS advertised the Posts. All six Applicants applied but were unsuccessful.

Consideration

6. It is well established that the Secretary-General has broad discretion in matters of staff selection. When reviewing such decisions, the Tribunal shall examine “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration” (*Abbassi* 2011-UNAT-110, para. 23). The Appeals Tribunal has further held that the role of the

Tribunals is “to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals’ role is not to substitute their decision for that of the Administration” (*Ljungdell* 2012-UNAT-265, para. 30).

7. As the Appeals Tribunal reiterated in *Lemonnier* 2017-UNAT-762, citing *Rolland* 2011-UNAT-122, “the starting point for judicial review is a presumption that official acts have been regularly performed” (see para. 32). The Appeals Tribunal held in *Rolland* that if the management is able to minimally show that the applicant’s candidature was given a full and fair consideration, the burden of proof shifts to the applicant who then must show through clear and convincing evidence that he or she was denied a fair chance of selection (*Rolland*, para. 26).

8. The evidence shows that after they were shortlisted and invited to sit for a written test for the posts, the Applicants inquired whether their participation in the written test was a requirement. By email dated 17 August 2018, the Administrative Officer of the Security and Safety Section New York replied: “[i]n my previous response I stated the opposite i.e: you are not required to participate in the written assessment and other steps that follow”.

9. The matrix prepared by the Hiring Manager comparing all the shortlisted candidates included the following information: performance at a technical assessment in 2011, performance at a technical assessment in 2014, performance at a technical

assessment in 2018, performance appraisal for the cycle 2016-2017 and performance appraisal for the cycle 2017-2018.

10. As regards the Applicants, the matrix showed that none of them took the written test in 2018.

11. In *Anshasi* 2017-UNAT-790 (para. 40), the Appeals Tribunal recalled its well-settled jurisprudence stating that the Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee is implied in every contract of employment and both parties must act reasonably and in good faith.

12. The evidence described above shows that the Applicants were unequivocally informed by DSS that their participation in the written assessment was not a requirement for the purpose of the selection process under review. However, their non-participation was later taken into consideration in the assessment of their candidatures with respect to other candidates. The Tribunal finds that the Applicants were misled in that they were not clearly informed, despite their inquiry, that their non-participation in the written test would be taken into consideration in the evaluation of their candidacies. Thus, the Administration violated its duty to act transparently and in good faith with the Applicants.

13. The Tribunal further notes that the Applicants' performances at two prior recruitment exercises, in 2011 and 2014, were also taken into consideration in comparing them with the other candidates.

14. In *Sanwidi* 2010-UNAT-084 (para. 40), the Appeals Tribunal held that in examining the lawfulness of an administrative decision, the Dispute Tribunal can

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consider whether relevant matters were ignored and irrelevant matters considered and examine whether the contested decision was absurd or perverse.

15. The Tribunal finds that the Administration cannot reasonably take into consideration the performance of a staff member in separate recruitment exercises, even less so when such exercises took place several years prior. The performance in prior selection exercises is utterly irrelevant to the determination of whether a candidate is suitable for a vacant post. A candidate may very well fail in the written test or interview in one selection exercise and excel in the future after having accumulated years of experience in the relevant field and/or having better prepared for the test and/or interview. Considering past failures would negate the candidate's ability to improve and therefore denies the staff member's right to have his or her candidature fairly considered.

16. In light of the above, the Tribunal finds that the Administration failed to show that the Applicants were afforded fair and full consideration in the selection exercise for the post. The contested administrative decisions are therefore unlawful.

Remedies

17. The Applicants seek compensation *in lieu* of rescission, compensation for loss of opportunity, and moral damages.

18. Article 10.5 of the Tribunal's Statute states that the Tribunal may only order one or both of the following:

- (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 for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant.

19. The Respondent argues that under the Appeals Tribunal's jurisprudence, compensation for loss of opportunity is generally capped to 10%. The Respondent cites *Hastings* 2011-UNAT-109 (para. 2). The Tribunal observes however that in para. 18 of *Hastings*, the Appeals Tribunal did not set a 10% limit to a compensation for loss of opportunity but found that in that particular instance, the 10% compensation awarded by the Dispute Tribunal was excessive. The Appeals Tribunal set the compensation limit for loss of opportunity to two years' salary.

20. The Tribunal further recalls that in *Robinson* 2020-UNAT-1040 (para. 24), the Appeals Tribunal found that compensation *in lieu* can only be ordered when the unlawful decision has been rescinded. The Appeals Tribunal further upheld the Dispute Tribunal's finding that, in that case, the rescission was impossible because the post in question was no longer available.

21. In the present case, the five vacant posts have been filled. This, coupled with the amount of time elapsed since the date in which the decisions were made, renders the rescission of the decisions not to select the Applicants impossible.

22. Accordingly, the Tribunal is not in a position to consider awards under art. 10.5(a) of its Statute.

23. Under art. 10.5(b), the Tribunal is not only allowed to award compensation for non-pecuniary damages such as moral injury but also compensation for economic loss.

Both sorts of damages must be supported by the evidence and must be mitigated (*Robinson*, paras. 23 and 25).

24. In *Ross* 2019-UNAT-926, para. 48, the Appeals Tribunal held that “any irregularity (procedural or substantive) in promotion cases will only give rise to an entitlement to rescission or compensation if the staff member has a significant or foreseeable chance for promotion. The irregularity must be of such a nature that, had it not occurred, the staff member would have had a foreseeable and significant chance for promotion”.

25. To calculate the economic loss suffered by the Applicants as a result of the unlawful decision, the Tribunal will assess whether they would have had a significant chance of being selected absent the illegality. Given that the Applicants were all rostered for positions similar to those under review and none of them had negative performance reviews in the previous years, the Tribunal is satisfied that they all had a significant chance of selection.

26. The transmission memorandum to the Central Review Board shows that out of the 57 longlisted candidates, 49, including the Applicants, were shortlisted to participate further in the selection process. As there were five posts open for selection in this process, each shortlisted candidate had a 9.8% chance of selection.

27. The Respondent further points out that a promotion exercise for a post of Security Sergeant at the S-4 level was carried out on 24 May 2019. He states that two of the Applicants, Mr. George and Mr. Kennedy, did not participate in this selection exercise and the four other Applicants applied but were unsuccessful.

28. The Tribunal agrees with the Respondent that Mr. George and Mr. Kennedy’s compensation shall be limited to one year in light of their failure to participate in the

2019 promotion exercise as they have not fully mitigated their losses (see, for instance, *Dube* 2016-UNAT-674, para. 59).

29. As regards the other four Applicants who unsuccessfully participated in the 2019 promotion exercise, had they been successful in the selection process under review, given that they all hold permanent appointments, the compensation for their loss of chance shall be calculated for the period between the date of the unlawful decision and the prospective date of their retirement from the Organization, with a cap of two years' net salary.

30. The Applicants further claim compensation for moral damages but fail to provide any supporting evidence. Accordingly, under art. 10.5 (b) of its Statute, the Tribunal must reject this claim.

Conclusion

31. In light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;
- b. The Respondent shall pay Applicants George and Kennedy each an amount equivalent to 9.8% of the difference between their salaries and the salary they would have obtained at the S-4 level for one year;
- c. The Respondent shall pay Applicants Miksch, Miyashiro, Ramsaroop and Mazioui each an amount equivalent to 9.8% of the difference between their salaries and the salary they would have obtained at the S-4 level for the period between the unlawful decision and the prospective date of their retirement from the Organization, with a cap of two years' net base salary;
- d. The Applicants' claim for moral damages is rejected;

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e. If payment of the above amounts are not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 16th day of November 2020

Entered in the Register on this 16th day of November 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York