UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2010/032/ UNAT/1670
Order No.:	315 (NY/2010)
Date:	2 December 2010
Original:	English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

SQUASSONI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

Counsel for applicant:
François Loriot

Counsel for respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. In Order No. 262 (NY/2010) of 4 October 2010, the UN Dispute Tribunal ("UNDT"), *inter alia*, directed the Parties as follows:

> 2. By 15 October 2010, the applicant is to file and serve a written submission containing the following:
>
> a. A listing of <u>all</u> specific administrative decision(s) the applicant is appealing under art. 2.1 of the Statute. The applicant is to make a precise identification of each of these decisions by date, decision-maker, and document in which the decision was recorded; the applicant is not to state or repeat any contentions made in connection with the administrative decision(s) being contested.
>
> b. Based on the Joint Appeals Board report, note which facts are disputed or those which are additionally sought to be established.
>
> c. A list of witnesses the applicant would seek to call at the hearing of the matter (including herself), if any, along with a brief statement of the evidence intended to be adduced from each.
>
> 3. By 22 October 2010, the respondent is to file and serve a written submission containing the following:
>
> a. A response to the applicant's answer to Order 2(a) above, including, if any, questions on receivability.
>
> b. A response to the applicant's list of facts.
>
> c. A list of witnesses it would seek to call at the hearing of the matter, if any, along with a brief statement of the evidence intended to be adduced from each.
>
> 4. By 29 October 2010, the applicant is to file and serve a written submission responding to any receivability arguments the respondent may have made.

2. In response to Order No. 262, para. 2(a), Counsel for the Applicant has filed a 15 October 2010 submission (revised on 19 October 2010), in which Counsel lists the

following as "all specific administrative decision(s) the applicant is appealing under art. 2.1 of the Statute":

a. "non-selection decisions on two G-5 vacancies decided by DPA ["Department of Political Affairs"] authorities, under influence and recommendation of the [Name] inner-circle";

b. the "forced return to her lien post at EOD/DPA [sic. the abbreviation is incorrect and should correctly be "EAD", i.e., Electoral Assistance Division] decided by its Director, [Name]";

c. the "implicit/continuous decision by the [Name] inner circle at EAD/DPA to maintain Squassoni in her lien post at EAD/DPA…";

d. the "4 June 2008 final administrative decision by the Deputy-Secretary-General limiting the compensation to 6-month net base salary, and ignoring the larger nefarious context of this case described by the Joint Appeal Board".

3. In response to Order No. 262, para. 2(b), which asks the Applicant to list the facts that the Applicant wishes to establish, Counsel instead poses three questions, as follows (emphasis in original):

2. Facts in dispute. The main in dispute in this case are the following:

- Was the 6-month compensation an adequate and sufficient indemnity for Squassoni, taking into account her loss of promotion opportunities and of pension benefits, in the absence of full and fair consideration of her candidature for two G-5 posts?
- Did the forced return of Squassoni, from December 2006 to March 2007, to her post at EAD/DPA, constitute a proper exercise of discretionary authority by the Respondent, or "a lack of management skill and sensitivity" (dixit JAB [Joint Appeals Board] report para 38 and 41), properly

> compensated by the DGA [sic. the abbreviation is incorrect and should correctly be "DSG", i.e., Deputy Secretary-General] decision of 4 June 2008 ?
>
> - Did the Respondent properly shield Squassoni from retaliation by the [Name] inner-circle, after her December 2006 return to EAS [sic. the abbreviation is incorrect and should correctly be EAD] /DPA ? including in PAS [Performance Appraisal System], reassignments and promotion matters?

4. In response to Order No. 262, para. 2(c), regarding witnesses that the Applicant wishes to call, Counsel stated the following (emphasis in original):

> **3. List of witnesses and synopsis of their depositions.** The Applicant, besides her own deposition, requests the following witnesses to testify:
>
> - Her physicians on the PTS and depression suffered after being reinstated in her lien post at EAD/DPA in December 2005, including the UN Medical Service physicians who certified her sick leaves
> - [Name], former DPA senior official who will confirm that Squassoni should not have been compelled to return to her lien post at EAD, in view of the [Name] inner-circle presence, and of the larger disciplinary investigation context

5. In his 22 October 2010 submission, the Respondent, *inter alia*, contends that the Applicant's "contentions" in respect to her return to her liened post are not receivable since there is no appealable decision taken by the Organization which directly impacted the Applicant's legal rights or produced "direct legal consequences to legal order" [reference to former UN Administrative Tribunal Judgment No. 1157, *Andronov* made in the Respondent's reply of 24 November 2009]. Further, the Respondent states that he accepts the account of facts in JAB report No. 1958 and that does not intend to call any witnesses.

6. The Applicant did not file and serve a written submission in accordance with Order No. 262, para. 4, under which she was to respond to any receivability arguments of the Respondent from his submission of 22 October 2010.

Considerations

General deficiencies in the Applicant's submissions to the Tribunal

7. Regrettably, the Tribunal is compelled to observe that the Applicant, through her Counsel, has failed to comply with Order No. 262 in several respects. Without proper information provided by parties to a proceeding, the UNDT is unable to properly and fairly assess the claims and contentions in a case before it. The Tribunal also notes that these deficiencies have imposed an extra burden on the Tribunal, namely that of trying to decipher the positions advanced by the Applicant. Without a code of ethical conduct governing counsel who appears before the UNDT, the Tribunal lacks the proper mechanism for addressing shortcomings of Counsel.

Receivability of Applicant's listed administrative decisions

8. Although Order No. 262, para. 4, imposed an order upon Counsel to file a response to Respondent's contentions regarding receivability, Counsel also did not comply with this specific order of the Tribunal. By default, the Tribunal therefore finds that the Applicant agrees with the Respondent's 22 October 2010 submission on this point. Accordingly, the Applicant's appeal is not receivable regarding the administrative decisions recited above under paras. 2(a) and (b) concerning the Applicant's "forced return" to her liened post at EAD/DPA and the "implicit/continuous decision by the [Name] inner circle at EAD/DPA to maintain Squassoni in her lien post at EAD/DPA".

9. Additionally, upon examining *ex officio* the receivability of the Applicant's contested administrative decisions, as recited under para. 2(a)-(d), the Tribunal

concludes that the only remaining issue before it is the adequacy of the compensation for irregularities in relation to the Applicant's candidature for the two G-5 posts in accordance with art. 2.1 of the UNDT Statute.

Inadequate identification of administrative decisions, particularly those listed in para. 2(b) and (c)

10. In its jurisprudence, the UNDT has required applicants to clearly identify the administrative decision(s) which is/are being appealed, otherwise the application is not receivable. The UNDT in *Planas* UNDT/2009/086 (affirmed by the UN Appeals Tribunal in 2010-UNAT-049) at para. 17 stated, as also recited in *O'Neill* UNDT/2010/203, that:

> In this regard, the Tribunal recalls the long-standing jurisprudence of the UNAT [the former Administrative Tribunal] which states that: 'It is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one's interest is predicated upon the condition that the impugned decision is stated in precise terms' (Judgement No. 1329 (2007)).

11. In response to Order No. 262, para. 2(a), Counsel for the Applicant was asked to list "all specific administrative decision(s) the applicant is appealing under art. 2.1 of the Statute", giving the date of the decisions, the name of the decision-maker, and the document in which the decision is recorded. The Applicant's listing is deficient in the following respects:

a. all the contested administrative decisions are defined extremely imprecisely, e.g.:

i. the Applicant fails to mention which exact positions she was not selected for (based on JAB report No. 1958, paras. 3, 4 and 20, these are assumedly the positions as Social Sciences Assistant in the Asia-Pacific Division ("APD") of DPA and in "DOPA" [the Tribunal

supposes JAB intended to refer to DPA] with the vacancy announcements: "VA#403331" and "VA#407297", and

ii. the reference to "… and ignoring the larger nefarious context of this case described by the Joint Appeals Board" is simply incomprehensible;

b. the exact date is only indicated regarding one decision;

c. no documents are mentioned regarding any of the decisions; and

d. two of decision-makers are not specifically identified ("the DPA authorities" and "the [Name] inner-circle").

12. The application and the Applicant's 15 October 2010 submission do not identify a specific decision taken by the Organization that has directly impacted the Applicant's legal rights or which has produced direct legal consequences to the legal order.

13. Concerning the Applicant's reference to the alleged administrative decisions on her return to her liened post in EAD/DPA (i.e., the decisions recited above in paras. 2(b) and (c)), the Applicant's return to her regular position in EAD merely seems to be the logical, direct consequence of her not being selected for the two G-5 positions (i.e., the decision recited in para. 2(a)) and the end of her temporary assignment with the APD in DPA—and not the result of any other administrative decision(s). This finding is based on the Applicant's application to the former Administrative Tribunal (particularly para. 8), the account of facts of JAB report No. 1958 (paras. 3-5) and the Interoffice Memorandum of 25 August 2006 from Administrative Officer (DPA) to Legal Officer (Administrative Law Unit, Office of Human Resources Management) (para. 2).

14. Furthermore, the applicable Administrative Instructions provided the Applicant with the option of returning to her former post and in exercising this option, the Applicant was merely exercising rights accorded to her, which did not involve an appealable administrative decision.

No remedy available for the administrative decision listed in para. 2(a) other than financial compensation

15. As to the Applicant's original appeal to JAB, the Respondent subsequently *affirmed* the JAB finding that "[the Applicant's] right to full and fair consideration for the two vacancies was violated":

> The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case. The Secretary-General agrees with the finding of the JAB that your right to full and fair consideration for the two vacancies was violated. Accordingly, the Secretary-General has decided to accept the JAB's recommendation that you be compensated for the violation of your rights but such compensation should be six months net base salary at the rate in effect on 30 November 2005.

16. The Tribunal notes that the Respondent has thereby recognised that the Applicant's right to a full and fair consideration for the two G-5 posts was violated. The Tribunal also notes that the Respondent accepted the recommendation that the Applicant was entitled to compensation. The Respondent made its own conclusion that the total amount of compensation owing to the Applicant for all violations was six months net base salary only.

17. However, the Respondent did not follow the JAB's recommendation for the Applicant to:

> (a) be placed on the roster at the G-5 level and be considered for a G-5 level post at the earliest opportunity; and absent a suitable vacant post, that priority be given to assigning her to a higher level function in the context of temporary vacancies on an interim basis;
> …

> (c) be compensated for the aggravation to Appellant's emotional state caused by the Administration in returning her to her former post without considering the implications and consequences for Appellant and the workplace environment (…) in the amount of six months net salary in effect on 1 December 2004.

18. The relief of placing the Applicant on a G-5 level roster is not available to the Applicant under the UNDT Statute, art. 10.5, with the result that the only remaining remedy available to the Applicant is that of financial compensation.

<u>The scope of the administrative decision listed in para. 2(d)</u>

19. The outstanding administrative decision, therefore, is the "4 June 2008 final administrative decision by the Deputy-Secretary-General limiting the compensation to 6-month net base salary, and ignoring the larger nefarious context of this case described by the Joint Appeals Board".

20. The question is whether, in addition to the question of the adequacy of the financial compensation for the flaws of the selection process for the two G-5 posts, this legal issue also includes the question of the Respondent not following the JAB's recommendation that the Applicant:

> (c) be compensated for the aggravation to Appellant's emotional state caused by the Administration in returning her to her former post without considering the implications and consequences for Appellant and the workplace environment (…) in the amount of six months net salary in effect on 1 December 2004.

21. The Tribunal notes that due to the imprecision with which Counsel for the Applicant's identifies the administrative decision as recited in para. 2(d), the Tribunal finds that the Applicant cannot be said to contest the decision not to follow this JAB recommendation: while direct mention is made to her not being selected for the two G-5 positions in the decision recited in para. 2(a), no direct reference is made any specific administrative decision(s) regarding "the aggravation to Appellant's emotional state" anywhere in the Applicant's listing of such decisions.

Facts

22. The Applicant, through her Counsel, did not produce any sensible additions or comprehensible objections to the account of facts in the JAB report, which therefore are to be adopted as agreed upon by both Parties.

Witnesses

23. Regarding witnesses to be called at a merits hearing, the witnesses identified by the Applicant would yield testimony on issues that the Tribunal has found within this Order to be irreceivable. The only remaining witness to testify will therefore be the Applicant, since the remaining witnesses referred to in the Applicant's submissions are not properly identified.

IT IS ORDERED THAT—

1. The legal issue in this case is determined as:

    a. the adequacy of the Applicant's compensation of six months net base salary at the rate in effect on 30 November 2005 for the Respondent's errors in connection with the selection processes for two G-5 positions (assumed to be the positions as Social Sciences Assistant in APD/DPA and DPA with the vacancy announcements: VA#403331 and VA#407297) for which the Applicant was not selected.

2. By 20 December 2010, the Respondent is to file and serve all documents relevant to the two selection processes, including: the vacancy announcements; the evaluation criteria; the written records of the interview panel and the Central Review Board; and the decision of the Head of the Department.

3. By 20 December 2010, each of the Parties is to file and serve any additional documents on which they wish to rely.

4. A hearing on the merits is set for 5 January 2010 at which the Applicant is to give testimony.

5. Subsequent to the hearing, the Parties will be required to file and serve a closing statement containing *all* their relevant contentions.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 2nd of December 2010