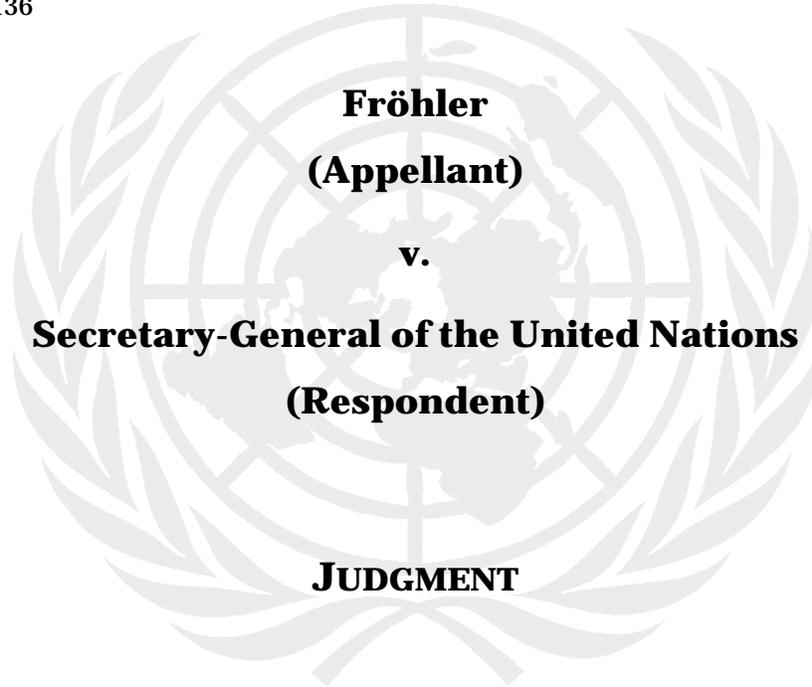




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-136



Before: Judge Mary Faherty, Presiding
Judge Kamaljit Singh Garewal
Judge Inés Weinberg de Roca

Judgment No.: 2011-UNAT-141

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Stephanie Cartier

JUDGE MARY FAHERTY, Presiding.

Synopsis

1. Peter Fröhler (Fröhler) was an unsuccessful candidate for the position of Director of the Services Infrastructure for Development and Trade Efficiency Division (SITE) of the United Nations Conference on Trade and Development (UNCTAD). Following Fröhler's request for administrative review of the decision to appoint the selected candidate, the Secretary-General acknowledged that a flawed selection procedure had occurred, determined that Fröhler was entitled to be compensated, and measured the compensation at six months' net base salary.

2. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Fröhler challenged the decision of the Secretary-General on a number of grounds. The Dispute Tribunal in its consideration of the matter determined that the issue before it was the adequacy of compensation, and held that by the award of six months' net base salary, the Secretary-General had fairly evaluated the injury done to Fröhler.

3. Before this Tribunal, Fröhler challenged inter alia the basis on which the Dispute Tribunal arrived at its determination on the question of compensation, in particular its assessment that Fröhler had one chance in three of being selected for the post in question.

4. Upon review, the United Nations Appeals Tribunal (Appeals Tribunal) finds that Fröhler did not establish any grounds meriting a reversal of the Dispute Tribunal's findings. Accordingly, the appeal is dismissed.

Facts and Procedure

5. Fröhler joined the Organization in 1977. In June 2000, Fröhler was appointed as Chief of Branch in the SITE/UNCTAD at the D-1 level.

6. In October 2002, Fröhler was appointed as Deputy Director of SITE and from August 2004, he served as Officer-in-Charge of SITE.

7. In July 2005, the post of Director of SITE at the D-2 level was re-advertised. Fröhler applied for the post and was interviewed by the selection panel. The selection

panel considered that four candidates, including Fröhler, met the requirements of the post. The Senior Review Group recommended that a candidate other than Fröhler be selected for the post, and the Deputy Secretary-General approved the recommendation. After the appointment of the Director of SITE was announced in November 2006, Fröhler was reassigned to his former post.

8. Fröhler requested administrative review of the decision to appoint the selected candidate to the post. After receiving the reply to his request, Fröhler filed an appeal with the Geneva Joint Appeals Board (JAB) in February 2007. Fröhler retired from the Organization in September 2007.

9. In its report of 22 February 2008, the majority of the JAB Panel recommended that the appeal be rejected. The minority of the panel, however, concluded that the candidate appointed to the post did not have the required experience as specified in the vacancy announcement; that Fröhler's candidature was not given full and fair consideration; and recommended that the Secretary-General pay Fröhler compensation of two months' net base salary.

10. In the contested decision of 17 June 2008, the Secretary-General agreed with the finding of the minority of the JAB panel that Fröhler's right to be fully and fairly considered was violated, and decided to award him six months' net base salary.

11. In July 2008, Fröhler filed an application contesting the decision with the former United Nations Administrative Tribunal. The application was subsequently transferred to the Dispute Tribunal.

12. On 27 July 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/135 which rejected Fröhler's application. The Dispute Tribunal considered that Fröhler was required to prove that he had a very good chance of being chosen for the post in order to establish that the unlawful conduct of the Administration caused him direct and certain injury. In assessing his chances of being selected for the post, the Dispute Tribunal noted that there were three candidates, including Fröhler, who had a good chance of being selected. The evidence showed that Fröhler had a one in three chance of being selected and the fact that he had previously held the post did not increase his chances. The financial harm suffered by Fröhler included the additional salary he would have received

for approximately one year before his retirement and the reduction in his pension. Fröhler's moral injury could only be considered as minimal, as the damage to the reputation of a candidate short listed with five others from among 86 candidates was necessarily small. The Dispute Tribunal found that the Secretary-General fairly evaluated the injury to Fröhler.

13. Fröhler filed an appeal against the UNDT Judgment on 10 September 2010. After receiving the completed appeal on 15 October 2010, the Secretary-General filed an answer to the appeal on 29 November 2010.

Submissions

Fröhler's Appeal

14. The Dispute Tribunal erred in fact in failing to accurately summarize his employment history and the important arguments that he made in his application. A fuller presentation of facts would help show that Fröhler was the only candidate who fully met the work experience requirements.

15. The Dispute Tribunal erred in fact and in law in mischaracterizing Fröhler's application as only concerning the issue of compensation. The amount of compensation was merely one of his concerns. The core issue of his application was to put a stop to unacceptable and damaging administrative practices.

Secretary-General's Answer

16. The Dispute Tribunal properly assessed the injury suffered by Fröhler as a result of the irregular selection process, by taking into account his likelihood of being selected.

17. The reasoning of the Dispute Tribunal for calculating the appropriate level of compensation is consistent with the jurisprudence of the Appeals Tribunal.

18. The Dispute Tribunal correctly concluded that Fröhler had only a one in three chance of being selected. It expressly took into consideration his past experience in assessing his chance of being selected for the post. Fröhler's claim that the Dispute Tribunal erred by not including all his arguments on the irregularity of the selection process was moot, since the Secretary-General recognized that errors had been made in

handling the selection procedure and that Fröhler's candidacy had not been given full and fair consideration.

Considerations

19. The function of the Appeals Tribunal is to determine whether the Dispute Tribunal has erred in fact or in law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction as prescribed by Statute. The burden of satisfying the Appeals Tribunal that the Judgment of the Dispute Tribunal is defective rests with the Appellant.

20. In this appeal, Fröhler asserts that the Dispute Tribunal erred in failing to address the issue of the validity of the selection process, in respect of which he had made complaint, and that the Dispute Tribunal erred in failing to recite in its Judgment the arguments he made in relation to this issue.

21. The recital of the "Facts" and "Parties' Contentions" clearly establishes that the Dispute Tribunal was cognizant of the arguments made by Fröhler in this regard and it is apparent that the Dispute Tribunal, from the outset, was aware, as recorded in its Judgment, of "the irregularity of the appointment made on 31 October 2006 to the post of Director, SITE, UNCTAD, for which he was a candidate".

22. On 17 June 2008, Fröhler was advised as follows:

The Secretary-General has examined your case in the light of the JAB's report and agrees with the finding of the minority that your right to be fully and fairly considered [for the post of Director, SITE] was violated.

23. This Tribunal considers it not unreasonable or erroneous on the part of the Dispute Tribunal, having before it the Secretary-General's acceptance of the minority JAB report, to have taken as already established that a wrong had been done to Fröhler.

24. In all of the circumstances, this Tribunal finds the submissions made by Fröhler that the Dispute Tribunal failed to consider his selection process arguments as unwarranted.

25. The Appeals Tribunal is further satisfied that the Dispute Tribunal did not err in law or in fact in its assessment that the issue before it for determination was the amount of compensation to be awarded to Fröhler.

26. While the Appeals Tribunal notes Fröhler's contention that in the course of the submissions he made to the Dispute Tribunal, he sought to explain that, over and above the question of compensation, his objective was "to put a stop to unacceptable and damaging administrative practices that have been the cause over many years for a long series of disputes", it does not regard the failure of the Dispute Tribunal to revisit the substance of Fröhler's claims of an invalid or unfair selection process as in any way unreasonable, irrespective of Fröhler's purpose in seeking that the Dispute Tribunal address this issue.

27. Fröhler takes issue with the Dispute Tribunal's findings on the issue of compensation in a number of respects, including its finding that by awarding him six months' net base salary as compensation, the Secretary-General fairly evaluated the injury he had suffered. In particular, Fröhler challenges the basis on which the Dispute Tribunal came to the conclusion that the compensation already paid to him was sufficient redress for the wrong done to him.

28. Fröhler maintains that the Dispute Tribunal erred in calculating the probability of his chances of being selected for the post of Director of SITE on the basis that there were three candidates, including Fröhler [but excluding the candidate who was the subject of the initial complaint], who had a good chance of being selected.

29. Fröhler submits that, based on the interview panel notes (which were available to the Dispute Tribunal), the Dispute Tribunal ought to have found that he was the only properly qualified candidate for the position in question. In the course of his submissions to this Tribunal, Fröhler makes the case for why he should have been selected for the position. He does so by taking it upon himself to assess the contents of the interview panel notes referable to the two candidates who, together with himself, constituted the backdrop against which the Dispute Tribunal assessed his chances of selection for the post as being one in three.

30. Essentially, what Fröhler contends for is that the Dispute Tribunal, and indeed this Tribunal, should take on the role of the interview panel and make an assessment in his favor, based on his contention that having regard to the content of the interview panel notes concerning the other two candidates, he was the only qualified person for the position.

31. The question to be answered here is whether the Dispute Tribunal, in the exercise of its jurisdiction in determining the amount of compensation to be awarded to Fröhler, and in the course of its consideration of his chances of success, was entitled to conclude that there were three candidates (including Fröhler) who had the prospect of promotion. On the facts of this particular case we consider as entirely reasonable the approach adopted by the Dispute Tribunal.

32. Fröhler contends that the UNDT ought to have found him to be the only qualified candidate. Irrespective of the question as to whether Fröhler raises this issue for the first time on appeal, it is not the function of the Dispute Tribunal, or indeed of this Tribunal, to take on the substantive role with which the interview panel was charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in the Dispute Tribunal is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy it deems appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found.

33. This Tribunal in *Ardisson* held, with regard to measuring the amount of compensation to be awarded, that

the Dispute Tribunal should bear in mind two considerations. The first is the nature of the irregularity that led to the rescission of the contested administrative decision. The second is an assessment of the staff member's genuine prospects for promotion if the procedure had been regular.¹

34. Although the question of rescission does not arise here, it is nevertheless entirely appropriate that the Dispute Tribunal would approach the issue of compensation under Article 10(5)(b), on the facts of the present case, by engaging in a consideration of the Appellant's likely prospects of success.

35. Did the Dispute Tribunal therefore assess the amount of the compensatory award in a fair and reasonable manner? In the course of its Judgment, the Dispute Tribunal stated:

Regarding the injury to the applicant, account must be taken of the financial harm corresponding, on the one hand, to the additional salary he would have received for

¹ *Ardisson v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-052, para. 24.

approximately a year before his retirement and, on the other, to the reduction in his pension. The moral injury can only be considered minimal, since the damage to the reputation of a candidate shortlisted with five others from among 86 initial candidacies is necessarily very small.

The Dispute Tribunal determined that, by his award of six months' net base salary as compensation, the Secretary-General fairly evaluated the wrong done to Fröhler.

36. Having regard to all the matters of which the Dispute Tribunal was apprised, this Tribunal finds no error in the approach adopted by the Dispute Tribunal in its determination on the issue of compensation.

37. Accordingly, the appeal is dismissed.

Judgment

38. We find no reversible error in the approach adopted by the Dispute Tribunal in its determination of facts and issue of compensation. The present appeal is dismissed.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar