



UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2014-UNAT-425

Simmons
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before: Judge Sophia Adinyira, Presiding

Judge Inés Weinberg de Roca

Judge Rosalyn Chapman

Case No.: 2013-479

Date: 2 April 2014

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Ms. Stéphanie Cartier

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Sheryl Simmons against Judgment No. UNDT/2013/050, rendered by the United Nations Dispute Tribunal in New York in the case of *Simmons v. Secretary-General of the United Nations* on 13 March 2013. Ms. Simmons appealed on 3 June 2013, and the Secretary-General responded on 5 August 2013.

Facts and Procedure

2. Ms. Simmons was a successful candidate at the United Nations Competitive Recruitment Examination in the field of finance in 1993. She is currently a Programme Budget Officer at the P-3 level with the Office of Programme Planning, Budget and Account (OPPBA), Department of Management.

3. On 28 January 2010, Ms. Simmons was invited to take a written test for the post of Programme Budget Officer, OPPBA. The test was administered pursuant to section 7.5 of administrative instruction ST/AI/2006/3, entitled "Staff selection system". At first Ms. Simmons refused to participate in the test, claiming that the administration was biased against her. As a result, her supervisor initially suspended the selection process but then rescheduled the test to 26 April 2010, when Ms. Simmons agreed to take it. It was administered and assessed anonymously. The selection panel evaluated Ms. Simmons' performance on the written examination as "less than acceptable", and did not consider her candidacy at the subsequent stages of the selection process.

4. In 2009, the Office for Coordination of Humanitarian Affairs (OCHA) issued a generic vacancy announcement for the post of Administrative Officer for its emergency response roster. OCHA invited Ms. Simmons for an interview in December 2009 on the basis that she had been rostered for a similar position in the past. Together with 12 other candidates, Ms. Simmons' name was added to the list of recommended candidates for the emergency response roster.

5. On 26 April 2010, OCHA sent an e-mail to all rostered candidates, asking them whether they would be interested in possible posts of Administrative Officer at the P-4 level in Jerusalem and/or Pakistan. The e-mail expressly stated that it was "not an

official offer". In response, Ms. Simmons informed OCHA that she was interested in the Jerusalem post. Ms. Simmons was then requested to contact the universities she had attended, in addition to providing other employment documentation.

6. On 19 May 2010, the Office of Human Resources Management (OHRM) sent a letter to Ms. Simmons, noting that the Organization was "considering [her] application for a position with significant management functions which require[d] certification of suitability of the candidates for those functions". OHRM informed Ms. Simmons that she needed to advise whether she had ever been subject to a preliminary investigation or disciplinary proceedings. In an accompanying e-mail, which was entitled "Self-Certification for Designation Clearance: Ms. Sheryl Johnson-Simmons", OHRM stated that the Office was "conducting a designation clearance .., in connection with [her] application for a vacancy". Ms. Simmons responded in the negative to the question of whether she had ever been subject to a preliminary investigation or disciplinary proceedings, and signed the letter on the same day.

7. On 28 June 2010, the Under-Secretary-General for Management (USG/DM) informed the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator that the "designation of Ms. Simmons, Administrative Officer (P-4), with OCHA" had been approved. The USG/DM stated that such designation was made "on the understanding that the staff member is not expected to engage directly in procurement functions", and further indicated that "[s]hould the situation change, it is required that Ms. Johnson-Simmons undertakes UN Fundamentals of Procurement training prior to assuming such functions and provide relevant documentation for completion of the training". The following day, Ms. Simmons received an e-mail from OCHA stating: "you were cleared for P-4. Congratulations!"

8. By e-mail dated 7 October 2010, however, OCHA informed Ms. Simmons that the hiring process for the post in question "was stopped (due to budgeting questions)". In an interoffice memorandum dated 31 March 2011, the Officer-in-Charge of the Coordination and Response Division, OCHA, informed the Assistant Secretary-General, Deputy Emergency Relief Coordinator, OCHA, that the P-4 post had not been filled and requested that the funds be deployed to functions in New York on the basis

of organizational and budgetary reasons. The vacancy was thus cancelled without any candidate being chosen.

9. Ms. Simmons challenged the decisions in respect of both posts.
10. In Judgment No. UNDT/2013/050, the UNDT found that Ms. Simmons had not established any impropriety in the decision not to select her for the Programme Budget Officer post. Regarding the cancellation of the Administrative Officer post, the UNDT found that the Administration's organizational and budgetary justifications were credible. The UNDT concluded that Ms. Simmons had not substantiated her allegations of bias in relation to her non-selection for either post.

Submissions

Ms. Simmons' Appeal

11. Ms. Simmons submits that the UNDT erred on a question of fact and law by failing to recognize the Organization's unfair consideration of her rostered candidature. She claims that because she has previously had recourse to the internal justice system, the Respondent retaliated against her by withholding promotion.

12. With respect to the Programme Budget Officer post, Ms. Simmons argues that, pursuant to the Hiring Managers Manual, she should have been selected from the roster without further evaluation of her candidacy as she had already been rigorously vetted.

13. With respect to the Administrative Officer post, Ms. Simmons submits that the UNDT erred in failing to recognize that her promotion to that post was unlawfully withheld and that the Administration was in breach of contract, resulting in a loss of legitimate expectation and a loss of chance. She maintains that the cancellation of the post was abuse of authority and retaliation, and that there was no reason for her qualifications to require additional vetting. In particular, she objects to the reference to her need for procurement training.

14. In respect of both posts, Ms. Simmons argues that certain members of personnel ought to have been recused or disqualified from the recruitment process, as they were biased against her following earlier appeals.

15. Ms. Simmons further submits that the UNDT erred in failing to award compensation under Article 10.5 of its Statute for violation of her legal rights and consequential stress and moral suffering.

The Secretary-General's Answer

16. The Secretary-General submits that the UNDT correctly concluded that Ms. Simmons had not established any impropriety in the decision not to select her for the Programme Budget Officer post. The Hiring Managers Manual cannot trump the provisions of administrative instruction ST/AI/2010/3, entitled "Staff selection system", which provides that a full selection process may be undertaken instead of choosing candidates from the roster. Moreover, as the vacancy issued was for a Programme Budget Officer post at the P-4 level whereas Ms. Simmons had only previously been rostered for the P-4 level post of Administrative Officer, it was appropriate to require her to take an examination.

17. As the UNDT ruled, the Secretary-General contends that Ms. Simmons' non-selection for the post was credible; her written examination was evaluated anonymously, by an independent panel. She has failed to produce sufficient evidence to prove impropriety in the decision making. She has alleged bias but has failed to put forward any specific evidence substantiating her allegations.

18. The Secretary-General also submits that the UNDT correctly concluded that the decision to cancel the P-4 Administrative Officer post was lawful, having been made on the basis of organizational and budgetary constraints. In his view, there was no offer or acceptance of appointment resulting in legal rights and obligations for either party; Ms. Simmons' misunderstood the designation clearance process, which is part of OCHA's roster process. Pre-approval merely ensures that rostered candidates can be deployed rapidly if and when offered an appointment. Furthermore, he maintains that it is not unreasonable to require recent procurement training for persons required to perform procurement functions.

19. The Secretary-General argues that the UNDT correctly concluded that Ms. Simmons should not be compensated for moral injury, because she has not established any breach of her substantive or procedural rights and nor has she provided

any specific evidence, other than her own statements, to support her allegations that she suffered moral damages as a direct result of the alleged breaches of her rights.

Considerations

20. Ms. Simmons appeals against the decision of the UNDT on the grounds that:

- a) The UNDT erred on a question of fact and in law by failing to recognize the Respondent's unfair consideration of her rostered candidature to fill the posts of Programme Budget Officer and Administrative Officer; and,
- b) The UNDT erred on a question of fact and in law by concluding that the Administration's reason for cancelling the Administrative Officer Post in Jerusalem was credible.

Non-selection for Programme Budget Officer Post

21. Under Article 101(1) of the Charter of the United Nations and Staff Regulation 4.1, the Secretary-General has broad discretion in making decisions regarding appointments and promotions.

22. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.¹

23. Where a staff member complains that he or she was not given full and fair consideration,

If the management is able to even minimally show that [a] candidature was given a full and fair consideration, then the presumption of law [that official acts have been regularly performed] stands satisfied. Thereafter the burden of proof shifts to the [staff member] who must show through clear and convincing evidence that [he or] she was denied a fair chance of promotion.²

¹ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110.

² *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.

24. The UNDT ruled that the reason for Ms. Simmons' non-selection for the Programme Budget Officer post was credible, as she was graded anonymously and each of the three different individuals reached the conclusion that her performance was less than acceptable. We find that Ms. Simmons failed to produce sufficient evidence to prove impropriety in the decision making.

25. Ms. Simmons argues further that, pursuant to the Hiring Managers Manual, she should have been selected from the roster without further evaluation of her candidacy, as it had already been rigorously vetted by the central review committee.

26. Regarding the Appellant's claim that the Administration abused its discretion in choosing to re-evaluate her candidacy for the post, the Secretary-General correctly stated that the vacancy issued was for a Programme Budget Officer post at the P-4 level but Ms. Simmons had only been previously rostered for the post of Administrative Officer at the P-4 level; it was appropriate to require her to take part in an examination.

27. Ms. Simmons claims further that because she has previously had to bring complaints to the internal justice system, the management has retaliated against her employment rights by withholding her promotion. In addition, she argues that the UNDT erred in law when it failed to declare that Ms. Van Buerle should have been automatically disqualified from handling further recruitment involving Ms. Simmons' candidacy due to her bias against Ms. Simmons.

28. Ms. Simmons failed to put forward any specific evidence substantiating her claim of discrimination, bias and retaliation to warrant a reversal of the findings of the UNDT.

29. The appeal on this ground fails.

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Cancellation of the Administrative Officer Post

30. Regarding the cancellation of the Administrative Officer Post with OCHA in Jerusalem, Ms. Simmons submits this was also in retaliation for having had legal successes against the Administration's prior abuse of process. She submits that the Administration has deliberately obstructed her career advancement in contributing to a loss of chance and quashing a legitimate expectation.

31. We reject these submissions as the Administration provided evidence to show the cancellation of the post was based on organizational and budgetary reasons. The jurisprudence of the Appeals Tribunal in several cases has been that the Organization has the power to restructure some or all of its units which include cancellation or abolition of posts or reassignment due to organizational or budgetary reasons.³ Finally Ms. Simmons has failed to demonstrate any error in the UNDT findings; she has not been able to adduce sufficient evidence or arguments of substance to call into question the decisions and the way in which they have been reached by the Administration.

Judgment

32. The appeal fails and is hereby dismissed. The UNDT Judgment is affirmed.

³ See *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097; *Liverakos v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-206; and, *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236.

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Original and Authoritative Version: English

Dated this 2nd day of April 2014 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

Entered in the Register on this 15th day of May 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar