



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-605

Hosang
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Deborah Thomas-Felix Judge Richard Lussick
Case No.:	2015-704
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Mr. Hosang:

Nicholas C. Christonikos

Counsel for Secretary-General:

Simon Thomas

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/012, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 4 February 2015 in the case of *Hosang v. Secretary-General of the United Nations*. On 6 April 2015, the Secretary-General filed an appeal, and on 7 June 2015, Mr. Vernal Hosang filed his answer.

Facts and Procedure

2. The following facts are uncontested:¹

... In June 1997, the Applicant took up his duties as a G-3 level Clerk in the Department of Peacekeeping Operations (“DPKO”). On 25 August 1999, he was promoted to the G-4 level on the same post, to take effect formally on 1 June 2000.

... On 11 January 2000, the Applicant made a request for the classification of his post.

... On 25 January 2000, the post was classified at the G-5 level. [The Administration did not provide the Applicant with a copy of the notice of the classification results.]

... When the Applicant discovered, upon examination of his personnel file referred to within the Organization as the Official Status file (“OS file”), that the duties he had been performing since 1997 had been assessed at the G-5 level since 25 January 2000 and not at the G-4 level as he had been led to believe, he raised the issue informally with management. The matter was not resolved.

... On 8 September 2011, the Applicant made two separate requests, first to the Chief, Section II, of the Office for Human Resources Management (“OHRM”) and second, to the Executive Office, DPKO, for compensation in the form of a retroactive payment of [special post allowance (SPA)] for having performed duties at the G-5 level since 16 June 1997.

... On 16 January 2012, the Executive Office, DPKO, notified the Applicant that his request for SPA was refused on the ground that it had not been endorsed by Mr. Craig Hanoch, the Applicant’s supervisor at the time, as required under ST/AI/1999/17 (Special post allowance). The decision was based on Mr. Hanoch’s view that the Applicant had never been selected to perform, nor had performed, higher level functions from 16 June 1997 to 8 September 2011, the period indicated in his request for retroactive SPA.

¹ Impugned Judgment, paras. 2-8 and 11.

... On 1 March 2012, the Applicant filed a request for management evaluation claiming SPA for the entire period of time during which he was performing duties at a higher level. On 16 April 2012, the [Management Evaluation Unit] recommended that the Applicant be granted two years' payment of SPA to compensate him for the work performed at the G-5 level. The Applicant subsequently received payment of SPA for the period 17 April 2010 to 16 April 2012. The Applicant considers this payment to be insufficient given that he had been performing the duties at the G-5 level for 12 years at the time of the request.

... [On 28 June 2012, Mr. Hosang filed an application with the UNDT seeking rescission of the decision not to grant him retroactive SPA for the full period that he had been performing duties which had been graded at the G-5 level. The Secretary-General filed his reply on 1 August 2012.]

...

... During a hearing on 23 July 2014 and 7 August 2014, the following witnesses gave evidence: Mr. Paul Orsini (a retired staff member who worked in the Personnel Record Unit); Mr. Alexander Sokol (the Applicant's First Reporting Officer from 1999 to 2002); Mr. Craig Hanoch (the Applicant's Second Reporting Officer from 2009 onwards); and Ms. Elza Maharramova (Compensation Officer, Compensation and Classification Section, OHRM).

3. On 4 February 2015, the UNDT issued Judgment No. UNDT/2015/012. The UNDT found that the Administration had breached its obligation to provide Mr. Hosang with a copy of the classification result in 2000, which "prevented him from exercising: (a) the rights that would flow from a formal, official, written notification; and (b) the right to request payment at the proper rate for the job he was performing".² The UNDT therefore found that Mr. Hosang had been denied proper remuneration, amounting to a violation of the principle of equal pay for equal work, for which it awarded him "[c]ompensation in the form of a monetary equivalent of SPA from the G-4 level to the G-5 level, retroactive from 25 January 2000 until such time as [Mr. Hosang] may cease to perform these duties at the G-4 level, plus interest at the US Prime Rate from the date that the sum of money would have been properly due, subject to a deduction of the two-year SPA already paid to him".³

4. The UNDT further found that the presentation of Ms. Maharramova as a witness was based on fundamental procedural and factual flaws and was aimed at discrediting the properly and lawfully conducted classification exercise conducted over a decade before. The UNDT

² *Ibid.*, para. 43.

³ *Ibid.*, para. 79(a).

in particular considered the fact that, according to Ms. Maharramova, she was not requested to carry out a proper assessment in accordance with Administrative Instruction ST/AI/1998/9 (System for the classification of posts), but merely expressed her opinion on the basis of the limited information provided. It was clear to the UNDT that she did not intend her evidence to displace the lawfully conducted assessment made in January 2000. She was called as a witness for the sole purpose of bolstering the views expressed by her second reporting officer Mr. Hanoch, which formed the primary basis upon which the impugned decision was based. The UNDT found that this amounted to an abuse of process and awarded costs in the amount of USD 3,000 against the Secretary-General.

5. The UNDT further awarded USD 1,000 for loss of chance of being considered for promotion to the post at the G-5 level within a reasonable period after the post had been reclassified on 25 January 2000, as well as compensation for legal costs/expenses incurred up to a maximum amount of USD 1,000, subject to Mr. Hosang providing proof.

Submissions

The Secretary-General's Appeal

6. The UNDT erred in fact and law in awarding costs against the Secretary-General in the amount of USD 3,000 for abuse of process. During the case management stages of the proceedings, the UNDT ordered the Secretary-General to provide, *inter alia*, “[t]he name of any witness who will be called to testify, particularly on the issue of [Mr. Hosang’s] level of duties during the [relevant] period of time”.⁴ The Secretary-General informed the UNDT that he proposed to call, *inter alia*, Ms. Maharramova to give evidence in this regard and provided the UNDT with a summary of the proposed evidence. The UNDT was therefore aware that the Secretary-General would proffer the evidence subsequently impugned in the Judgment. If the UNDT considered the impugned evidence in question to be manifestly inappropriate, it could have declined the request to adduce the evidence or exercised its case management authority by stopping the examination. It also remained open to the UNDT to disregard it for lack of probative value.

⁴ UNDT Order No. 140 (NY/2014), para. 8(b).

7. The witness was called in good faith and with the reasonable aim of showing Mr. Hosang's level of functions. The Administration was required to establish as a matter of fact the actual duties performed by Mr. Hosang, and the classification of the level of the duties performed. With regard to these issues, the Secretary-General adduced evidence to prove that Mr. Hosang had never undertaken G-5 level functions. Moreover, contrary to the UNDT's conclusion, the witness' evidence did not discredit the 2000 classification exercise; rather, it explicitly confirmed it. Her evidence showed that, in principle, the functions connected to the post were classifiable at a GS-5 level, whereas the functions actually performed by Mr. Hosang were only at a GS-4 level.

8. The UNDT erred in law and fact in making a finding of abuse of process in circumstances where the Secretary-General was arguing the case without bad faith. The UNDT erred in law by awarding costs in the amount of USD 3,000 without specifying how the Secretary-General had manifestly abused the process. In the alternative, the Secretary-General submits that the alleged breach failed to meet the threshold of manifest abuse. The conduct in the present case was not remotely akin to previous scenarios where awards of costs had been upheld. The Secretary-General requests the Appeals Tribunal to vacate the finding of an abuse of process and the award of costs of USD 3,000 resulting therefrom.

9. The UNDT also erred in law and fact by making separate awards of USD 3,000 and USD 1,000, thereby essentially compensating Mr. Hosang for a single set of legal expenses. Either the first or the second award of costs was a punitive measure, which is expressly prohibited by Article 10(7) of the UNDT Statute. Furthermore, the UNDT erred in taking into account irrelevant matters in making the secondary award of costs, such as the fact that Mr. Hosang was a General Service staff member who needed to pay for outside counsel. The Secretary-General requests that the Appeals Tribunal also vacate the secondary award of USD 1,000.

10. The Secretary-General further contends that the UNDT erred in law and exceeded its jurisdiction by awarding compensation in an amount equivalent to SPA from the G-4 to the G-5 level, retroactive from 25 January 2000 "until such time as [he] may cease to perform these duties at the G-4 level". By doing so, the UNDT purported to award prospective compensation for an uncertain duration, which precludes a proper closure of proceedings. The compensation should, instead, be calculated on an ascertainable basis from the date of the breach to the date of the UNDT Judgment.

11. Finally, the UNDT erred in law by awarding duplicative compensation for the loss of opportunity and chance. In granting Mr. Hosang SPA from the G-4 to the G-5 level, the UNDT had placed him in the position he would have been in had he been successful in the selection exercise for the post. Given that Mr. Hosang had already been compensated as though he had been a G-5 for the entire period, there was no loss of opportunity and chance for promotion to that same post. The UNDT therefore erred in awarding USD 1,000 on that ground.

Mr. Hosang's Answer

12. The Secretary-General merely contests issues regarding the “continuing nature” of the compensation awarded as well as “other ancillary matters also not considered at the hearing”. Mr. Hosang asks that the Appeals Tribunal reject the appeal as not receivable on that ground.

13. As to the Secretary-General's contention that the UNDT erred in awarding “prospective compensation for an uncertain duration”, Mr. Hosang contends that the Secretary-General had repeatedly assured the UNDT in formal submissions that the selection process for the G-5 position was being finalized. The Secretary-General is therefore advancing an argument that is entirely due to his own fault by failing to make the selection decision. As the Judgment is not executable until the Appeals Tribunal disposes of the case, a selection decision before that time would render the issue moot. Mr. Hosang therefore requests that the Appeals Tribunal order the Secretary-General to make the selection decision, if he has not done so, as an interim measure under Article 9(4) of its Statute before considering the merits of the case.

14. Contrary to the Secretary-General's contention, the compensation for loss of opportunity and chance for placement and promotion awarded in paragraph 79(b) of the Judgment is not duplicative of the compensation awarded in paragraph 79(a) for loss of salary. The former compensation places Mr. Hosang in the same financial situation he would have been in had he received an SPA or promotion at the time. His career position however is not the same as what could have prevailed had the Secretary-General taken the correct administrative action when he should have taken it. Mr. Hosang not only lost the opportunity and chance for promotion in the GS-5 post he encumbered prior to its advertisement. During that time, he also lost the opportunity and chance to be considered for another GS-5 post in the interests of mobility, as well as the chance to gain seniority in grade required to have the opportunity to compete for a higher level post in advancement of his career.

15. As to the award of USD 1,000 for costs and expenses Mr. Hosang incurred in relation to the proceedings, subject to his providing necessary proof, Mr. Hosang asks that the Appeals Tribunal consider relying on his counsel's certification of expenses as an officer of the court. His counsel is a voluntary counsel and his costs entailed mainly dinner and transportation expenses. Since he did not request or expect to receive compensation for legal costs, he did not retain any record of these expenditures. As to the UNDT's reference to the fact that Mr. Hosang is a General Service staff member, such reference calls attention to the fact that he belongs to the least-paid category of staff.

16. Contrary to the Secretary-General's contention, the correctness of the classification of the post or of Mr. Hosang's level was not at issue. The issue was whether Mr. Hosang actually performed the functions required in the post. The Secretary-General, claiming that Mr. Hosang did not perform those functions, presented as a witness only one supervisor out of several during the period of time for which he claimed SPA, and that witness was unpersuasive. The classification result was called into question only when the Secretary-General presented a witness from the Classification Unit to give evidence against the G-5 classification. The witness was not Mr. Hosang's supervisor and, therefore, was not in a position to testify on his performance and the functions he actually performed. Mr. Hosang therefore asks that the Appeals Tribunal uphold the UNDT's finding of an abuse of process and uphold the award of compensation in the amount of USD 3,000.

17. Mr. Hosang requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

Considerations

18. The Secretary-General appeals the UNDT Judgment on the following grounds: (a) the UNDT erred in law and fact by awarding costs against the Secretary-General in the amount of USD 3,000 for abuse of process; (b) the UNDT erred in law and fact by awarding legal costs to Mr. Hosang in the amount of USD 1,000; (c) the UNDT erred in law and fact by awarding prospective compensation for an uncertain duration for the payment of the monetary equivalent of SPA; and (d) the UNDT erred in law by awarding duplicative compensation for the loss of opportunity and chance. We will address these grounds of appeal in turn.

19. Article 10(6) of the UNDT Statute states: “Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party”. The UNDT’s power to award costs is thus restricted by the Statute to cases in which it determines that a party has manifestly abused the proceedings before it. In the absence of such a determination, the basic principle applicable in international courts on the question of costs is that each party shall bear its own costs.

20. According to the jurisprudence of this Tribunal in *Bi Bea*, “[i]n order to award costs against the Secretary-General, it was necessary for the UNDT to be satisfied on the evidence that ... the Secretary-General had ‘manifestly abused the proceedings’. The plain language of those words meant that before the UNDT could lawfully award costs against the Secretary-General, it was necessary to determine on the evidence that the [testimony] was clearly and unmistakably a wrong or improper use of the proceedings of the court.”⁵

21. In the instant case, the calling of a witness in good faith to bolster the views of the Administration⁶ does not constitute an abuse of process warranting the award of legal costs of USD 1,000 and additional costs in the amount of USD 3,000. The Secretary-General’s appeal on this point is granted.

22. We dismiss the Secretary-General’s appeal of the award of prospective compensation of the monetary equivalent of SPA for an uncertain duration. The Judgment awards compensation in the amount of the difference in salary between earnings at the G-4 and G-5 level – retroactive from 25 January 2000 to the date the post is filled, deducting the payment of SPA for the period 17 April 2010 to 16 April 2012 already received by Mr. Hosang. It is for the Secretary-General to fill the vacancy.

23. Finally, we find no merit in the Secretary-General’s appeal against the award of compensation in the amount of USD 1,000 for loss of opportunity. It is not duplicative since the award of SPA from the G-4 to the G-5 level compensates for the lower salary he received during the period his post was already classified at the higher level. Mr. Hosang, however, at the G-4 level, consequently also lost the opportunity to thereafter apply for a promotion from the G-5 level to a higher grade.

⁵ *Bi Bea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-370, para. 30.

⁶ See impugned Judgment, para. 75.

Judgment

24. The appeal of the Secretary-General is granted, in part, and the award of costs of USD 3,000 and USD 1,000 for abuse of process is vacated. The remainder of the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Lussick

Entered in the Register on this 30th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar