



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

YOUNIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RELIEF

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Nicole Wynn, ALD/OHR, UN Secretariat

Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. On 25 January 2018, the Applicant, a Chief at the P-5 level in the Transport Section with the African Union–United Nations Hybrid Operation in Darfur (“UNAMID”) in El Fasher, Sudan, filed an application contesting a decision finding him ineligible for attendance and participation at the United Nations Leaders Programme (“UN Leaders Programme”) training in Cape Town, South Africa. The Applicant alleged that he was discriminated against as two other staff members in like situation were nevertheless allowed to attend. As relief, he seeks an apology from the Office of Human Resources Management (“OHRM”) and the Management Evaluation Unit (“MEU”), an official investigation to determine accountability, a reinstatement of his nomination to the UN Leaders Programme, and financial remedy for stress, including that caused by the Administration’s delay in processing the case.

2. On 14 January 2019, the Dispute Tribunal rendered its judgment on liability *Younis* UNDT/2019/004, in which the Dispute Tribunal found the application receivable and the contested decision unlawful for reasons set out therein and summarised further below. The Tribunal thereafter directed the parties to attempt to resolve the issue of appropriate relief, but the parties reported to the Tribunal that their attempt to resolve the issue of appropriate relief has been unsuccessful. The instant judgment therefore concerns issue of relief only.

Facts and findings in the liability judgment

3. The relevant facts are set out in full in *Younis* UNDT/2019/004 and need not be repeated in any detail herein. Essentially, in July 2017 the Applicant was nominated by the Officer-in-Charge (“OIC”) of the Integrated Mission Training Center (“IMTC”), UNAMID, for attendance and participation in the training program in Cape Town. His nomination was accepted by United Nations System Staff College (“UNSSC”), subsequently confirmed by OHRM and approved by the Director of Mission Support UNAMID. The Applicant completed various forms and booked his hotel in Cape Town.

4. Subsequently in August 2017, UNAMID, following an enquiry by the OiC of IMTC, received a response from OHRM that the Applicant was no longer eligible to attend the course as, according to the standard operating procedures, the end of the temporary D-1 level assignment “should be beyond the selected course date,” and his temporary D-1 assignment had ended by then. This email was forwarded to the Applicant. The Applicant argued that he was subjected to disparate treatment as two other ineligible staff members were allowed to attend, to his wrongful exclusion.

5. In assessing whether the contested decision was lawful, the Tribunal, in the judgment on liability, found as follows:

Was the contested decision lawful?

32. The Tribunal observes that aside from their questionable binding nature, and whatever the legal status of [the Standard Operating Procedures, “SOP”], there is a clear proviso by way of footnote on page 4 of the SOP, which reads as follows (emphasis added):

Nominations by peacekeeping missions are not approved by OHRM as the departmental internal nomination and approval procedures may vary. However, approvals on mission level are strongly encouraged to follow the approval process as outlined in III.1 and III.2 for organizational consistency and quality assurance.

33. The facts of this case are that the Applicant was nominated, confirmed, and endorsed by UNSCC, as follows from an email from OHRM of 31 July 2017 regarding the training. It follows also from the above proviso that the OiC of IMTC who nominated the Applicant and the Director of Mission Support who approved the Applicant’s attendance, having considered the organizational needs of the Mission, were “strongly encouraged” to follow the approval process, but not obligated to do so. Furthermore, it being common cause that UNAMID is a peacekeeping mission, OHRM’s approval was not required in this instance. This is evident from OHRM’s casual acceptance of the nomination of the staff member from Abyei, without much ado.

34. If OHRM retained any right to refuse the Applicant’s participation, the Tribunal finds that at the very least OHRM had a discretion to reconsider the Applicant’s situation in light of the

particular circumstances, and had to exercise such discretion reasonably, fairly and flexibly. The particular circumstances in this case being, *inter alia*, that the Applicant had satisfied every other nomination criteria, that the SOP was only provisional and not set in stone, that another ineligible staff member had been accorded the benefit to participate, that the Applicant had already been nominated, approved and endorsed even beyond the date of expiry of his temporary D-1 assignment, and in light of the last minute and late notification of refusal, the Tribunal finds that a strong expectation of the training benefit was created for the Applicant. Therefore, the Tribunal finds that the discretion, if indeed OHRM had any power thereof, was not exercised properly. Even if a staff member has no contractual right to receive an entitlement, or for that matter a benefit, he does have an expectation that the discretion will be exercised properly in all the circumstances.

35. In addition, the Tribunal also finds that as the SOP was not mandatory nor obligatory, and possibly only directory, that an exception could have been made in the Applicant's favour in all the particular circumstances of this case (see *Hastings* UNDT/2009/030, paras. 22-26).

36. The Tribunal notes that the Respondent also contends that he relied on UNAMID's nomination of the Applicant which was later found to be in error, but does not argue that he committed an error by accepting the Applicant to the training program in Cape Town, which it was entitled to rectify. Considering the non-binding nature of the SOP and the specific proviso of the SOP which clearly states that OHRM's approval was not required in this case, the Tribunal finds that this is not the case where the Respondent committed an error and later rectified it. However, for the sake of completeness, the Tribunal will deal with this issue as well.

Consideration

6. The fundamental purpose of a judicial remedy is to attempt, to the extent possible, to place the aggrieved party in the position she or he would have been in, but for the breach (*Warren* 2010-UNAT-059, *Castelli* 2010-UNAT-082 and *Iannelli* 2010-UNAT-093). To this end, the Dispute Tribunal's Statute recognizes its capacity to grant both equitable and monetary relief. Article 10.5 of the Statute provides that the Tribunal may order one or both of the following:

... As part of its judgement, the Dispute 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. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

7. The remedy of rescission of an administrative decision generally entails the undoing of the decision. However, in some situations rescission as a remedy may be unavailable, for example, where third party rights are affected, or where a restoration of the *status quo ante* is impossible. Further, in some instances, the Tribunal may find that, although rescission is available, other types of relief, such as specific performance or compensation, may be more appropriate.

8. While the power to rescind relates to “the contested administrative decision”, the power relating to specific performance is put in general terms as various types of specific performance may be ordered depending on the circumstances of each case. For the various types of corrective action the Tribunal has ordered in previous cases, see the case of *Klein* UNDT/2011/169, particularly at para. 17. As confirmed by the Appeals Tribunal in *Fröhler* 2011-UNAT-141, *Appellant* 2011-UNAT-143 and *Kaddoura* 2011-UNAT-151, the Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached.

9. In this case, as relief, the Applicant seeks an apology from OHRM and MEU, an official investigation to determine accountability, a reinstatement of his approved nomination to the UN Leaders Programme, and financial remedy for stress, including that caused by the Administration's deliberate delay in processing the case, each of which the Tribunal will address in turn.

10. Primarily, the Applicant seeks a reinstatement of his approved nomination to the UN Leaders Programme. Under art. 10.5(a) of the Dispute Tribunal's Statute, the Tribunal can order rescission of the contested administrative decision or specific performance. In the circumstances of the present case, the Tribunal finds that the rescission of the contested decision would not fully restore the *status quo ante* and would not provide adequate relief to the Applicant as the UN Leaders Programme in Cape Town, South Africa, which the Applicant was registered for participation at, was presumably already held in September 2017. Similarly, the Tribunal finds that monetary compensation alone would not provide the Applicant with appropriate relief because of the nature of the non-pecuniary harm in this case, as well as harm not having been established or proved.

11. The Tribunal reiterates its finding in *Younis* UNDT/2019/044 that learning and development opportunities are for the benefit of staff members, that the Applicant received disparate treatment, and that the discretion to reconsider his situation was not exercised properly in light of the particular circumstances set out at para 34 therein (see also above). Considering that the Director of Mission Support approved the Applicant's attendance at the time, having considered the organizational needs of the mission, that the Applicant was nominated, confirmed, and endorsed by UNSCC, with OHRM confirming his nomination on 2 August 2017 (when he was no longer at D-1 level in any event, and the approval of OHRM not being required), the Tribunal orders that his approved nomination to the UN Leaders Programme be reinstated so that he can participate in an upcoming UN Leaders Programme course.

12. Regarding the Applicant's request for an apology, the Tribunal notes that the types of relief that the Dispute Tribunal may award is limited by art. 10.5 of the Statute. An apology is not listed in the Statute and thus there is no legal basis upon which to grant it. Nevertheless, in light of the findings in *Younis* UNDT/2019/004 and this judgment, the Tribunal finds that the Applicant has been sufficiently vindicated in this respect (see *Applicant* UNDT/2010/148 upheld by the Appeals Tribunal in *Appellant* 2011-UNAT-143). The Applicant's claim for an apology is therefore denied.

13. The Applicant also requests that the Tribunal order an investigation to determine accountability. Considering that the Applicant contested the administrative decision finding him ineligible for the UN Leaders Programme on the grounds of alleged discrimination, any administrative decision or lack thereof to investigate this matter is a separate claim with its own separate procedures and is not part of the Applicant's application in the present case. Thus, this request is denied.

14. To the extent that the Applicant requests the Dispute Tribunal's exercise of its authority to refer a case to the Secretary-General for possible action to enforce accountability under art. 10.8 of the Statute, the Tribunal does not find referral for accountability appropriate in this case. The Appeals Tribunal stated in *Cohen* 2017-UNAT-716, at para. 46, that "[t]he exercise of the power of referral for accountability ... must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws". While OHRM erroneously reconsidered UNAMID's decision in the Applicant's case such that he received disparate treatment, there has been no evidence provided such as to justify a finding of discrimination by any individual or group in this case. Regarding the Applicant's claim that he was discriminated against as two other ineligible staff members in like situation were nevertheless allowed to attend, the Tribunal found that the fact that OHRM casually accepted the nomination of a staff member from Abyei, Sudan, even though that staff member did not meet the SOP's eligibility criteria, simply proves that OHRM's approval was not required in this instance (see para. 33 of *Younis* UNDT/2019/044).

15. The Applicant further seeks financial remedies for stress, including that caused by the Administration's delay in processing the case. The Tribunal notes that upon enquiry by the OiC of IMTC of the Applicant's eligibility on 10 August 2017, OHRM responded within 11 days, which the Tribunal does not find wholly unreasonable, although not optimal, particularly as there had to be a follow-up by the OiC on 14 August 2017, and in light of the impending course date in September 2017. Furthermore, even if one were to reasonably perceive that this would be stressful for an individual, under art. 10.5(b) of the Statute, compensation for harm should be supported by evidence, and as the Appeals Tribunal held, "the testimony of

the complainant is not sufficient without corroboration by independent evidence (expert or otherwise)” (*Langue* 2018-UNAT-858, para. 18, citing *Kallon* 2017-UNAT-742). In this case, the Applicant has failed to provide any evidence documentary or otherwise to support his claim for compensation. Therefore, the request for compensation is denied.

Conclusion

16. In view of the foregoing, the Tribunal orders:
 - a. The Applicant’s approved nomination to the UN Leaders Programme be reinstated;
 - b. All other claims for relief are denied.

(Signed)

Judge Ebrahim-Carstens

Dated this 16th day of April 2019

Entered in the Register on this 16th day of April 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York