UNDT/2010/080, Bertucci

UNAT Held or UNDT Pronouncements

The applicant, then a staff member, applied and was short-listed for the Galaxy-advertised post of ASG/DESA. The notice stated that the candidacies of all UN staff members were to be “considered first”, that is to say, in priority to external candidates, and via a procedure akin to that of ST/AI/2006/3. The person appointed was not a UN staff member and the applicant challenged the decision to appoint them. At around the time of the applicant’s application for the post, he was the subject of various widely publicized investigations. The respondent initially claimed that the decision not to appoint the applicant was that of the Secretary-General but changed its position to later allege that he was not short-listed and, accordingly, was not considered by the Secretary-General. During the course of proceedings the respondent disobeyed several of the Tribunal’s interlocutory orders relating to production of records of the selection process, for which he was excluded from appearing before the Tribunal in the matter. This disobedience was not expunged at the time of this judgment. There was also an issue with the respondent misleading the Tribunal by filing one-page communications to the Appeals Tribunal Registry which it stated were “Notices of Appeal”, upon which it sought a stay of proceedings. This matter will be dealt with at a further directions hearing. The fact that the respondent did not seek to establish that the (external) appointee was interviewed by the panel justifies the inference that he was not. This was a substantial departure from the process that the Secretary-General represented he would undertake. Although the discretion of the Secretary-General is necessarily wide when considering senior appointments at this level, it must nevertheless be lawful. Rights to good faith and fair dealing are not displaced because the appointment was that of a senior official or the Secretary-General had a wide discretion. If the Secretary-General had intended to maintain his freedom to appoint someone who was not an applicant for the position, despite the identification of a suitable internal or even external candidate, this would have been fundamentally inconsistent with the clear implication of the notice and a concealment which was inconsistent with good faith and fair dealing. Not subjecting the appointee to

interview and thus enabling him to avoid the scrutiny of the selection panel constituted a substantial departure from the representations expressed and implied in the vacancy notice. The respondent not only refused to permit the applicant to prove facts by refusing to supply documents, he did not intend to adduce any facts about the process on his own behalf. He therefore declined to prove that any, let alone, full and fair consideration, was given to the applicant’s candidacy. On this basis alone, the decision of the Tribunal must be that the respondent breached the contract with the applicant.The manner provided by the law to resolve the issue of confidentiality, where that is the claimed basis for withholding material, is that it must be produced to the court or in this case the Tribunal. If the claim is upheld, the material will not be disclosed to the applicant but, if justice requires that it be taken into account because it assists his or her case, then it must be given due weight although, of course, in such a way as to retain its confidential character. If the claim is rejected, then the material should be provided to the applicant if it is capable of assisting his or her case. Sometimes part of the material is confidential and part is not, in which case the applicant will be given access to that part which is not confidential. It is for the Tribunal to make these judgments, not the respondent. If this procedure had been followed in this case, no question of judgment by default would arise. The respondent cannot put an applicant to proof when material that is or may reasonably be thought to be a part of that proof is withheld from disclosure by the respondent despite an order for it to be produced. The only just outcome is that the applicant must have judgment by default against the respondent. If the applicant’s qualifications for appointment made him the outstanding candidate, then apart from some attribute unrelated to professional accomplishment or integrity, his chances of appointment were obviously very high. The investigations were known to the selection committee and did not prevent his being recommended. The respondent did not indicate that it was wished to make the case that, if the Secretary-General took into account the significance of adverse publicity, he would have been entitled to do so: he took the line that there would be no disclosure of what he did or did not take into account, indeed, whether he actually considered the recommendation of the selection committee or the applicant’s candidacy at all. This supports the two conclusions that, in effect, the respondent did not wish to litigate the question of the likelihood of the applicant’s selection and would not provide the information that would enable a comparison of the applicant’s claims with those of the other candidates.The only fair inference which can in justice be drawn is that which is most favourable to the applicant, thus that he was indeed the outstanding candidate and, had all necessary and proper things been done, would have been so

likely to have been appointed that his compensation should be awarded on the basis that he would have been appointed. Where, as in this case, the favourable inference concerns a crucial fact, this will result almost invariably in a favourable judgment. Outcome: The decision of the Secretary-General concerning the appointment of the ASG/DESA is unlawful and in breach of the contract of employment of the applicant. The applicant is to be awarded the following compensation, the sum of which will require further submissions from the parties: the two-years' net equivalent total of the benefits which he would have received if he had have been appointed ASG/DESA, minus his actual earnings; USD200,000 for the loss of the economic value in the open market of retiring as ASG/DESA; USD10,000 for the respondent's failure to comply with the Tribunal's orders; and USD22,000 legal costs.

Decision Contested or Judgment/Order Appealed

Non-selection

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

The decision of the Secretary-General concerning the appointment of the ASG/DESA is unlawful and in breach of the contract of employment of the applicant. The applicant is to be awarded the following compensation, the sum of which will require further submissions from the parties the two-years' net equivalent total of the benefits which he would have received if he had have been appointed ASG/DESA, minus his actual earnings; USD200,000 for the loss of the economic value in the open market of retiring as ASG/DESA; USD10,000 for the respondent's failure to comply with the Tribunal's orders; and USD22,000 legal costs.

Full judgment

Full judgment

Applicants/Appellants

Bertucci

Entity

UN Secretariat

Case Number(s)

UNDT/NY/2009/039/JAB/2008/080

Tribunal

UNDT

Registry

New York

Date of Judgement

4 May 2010

Duty Judge

Judge Adams

Language of Judgment

English
French

Issuance Type

Judgment

Categories/Subcategories

Compensation
Procedure (first instance and UNAT)
Confidentiality
Staff selection (non-selection/non-promotion)
Selection decision

Applicable Law

Administrative Instructions

- ST/AI/2006/3

Staff Regulations

- Regulation 4.1

UN Charter

- Article 101.3

UNAT Statute

- Article 7.5

UNDT RoP
UNDT Statute

- Article 10.5
- Article 10.6
- Article 11.3