



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/056
(UNAT 1707)
Judgment No.: UNDT/2011/036
Date: 23 February 2011
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

EDELENBOS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stéphanie Cochard, UNOG

Introduction

1. On 29 June 2009, the Applicant filed an application with the former United Nations Administrative Tribunal contesting the decision not to promote her to a P-5 post of Senior Human Rights Officer in the Office of the High Commissioner of Human Rights (“OHCHR”). She requested the Tribunal:

- a. To rescind the Secretary-General’s decision not to follow the recommendation of the Joint Appeals Board (“JAB”);
- b. To order the Respondent to pay her, in accordance with the recommendation of the JAB, an amount equal to three months’ net base salary;
- c. To order the Respondent to pay her adequate monetary compensation and order any additional relief that the Tribunal may consider appropriate;
- d. To take appropriate measures to ensure that similar irregularities do not recur.

2. The case, which was pending before the former Administrative Tribunal, was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

3. By a further written submission on 7 February 2011, the Applicant provided, at the request of this Tribunal, additional information to justify the damage allegedly sustained and the financial compensation sought. Estimating that, were it not for the procedural irregularities complained of, she would have been promoted with effect from 1 July 2008, she seeks compensation equal to the difference between her gross earnings at level P-4 and the amount she would have earned at level P-5 from July 2008 until her actual promotion in August 2010, which she estimates as approximately USD50 000. In addition, she seeks one month’s salary as compensation for moral damage.

Facts

4. The Applicant entered the service of the United Nations on 1 October 1991 as Associate Human Rights Officer at level P-2 at the Centre for Human Rights. She was given a permanent appointment in 1995, then promoted to P-3 in 1998, and P-4 in 2004.

5. On 26 July 2007, the P-5 post of Senior Human Rights Officer in the Treaties and Council Branch of OHCHR was advertised under Vacancy Announcement 07-HRI-OHCHR-414120-R-Geneva, with a closing date for applications of 24 September 2007.

6. The Galaxy recruitment system recorded a total of 48 applications for the post in question, 14 of them supposedly from 30-day mark candidates, including the Applicant and the candidate finally selected, and 34 of them from 60-day mark candidates. All the applications were reviewed at the same time.

7. In February 2008, a selection panel conducted interviews for the above-mentioned post, and for a similar P-5 post that was also vacant, with a total of 11 candidates, including the Applicant and the candidate who was finally selected.

8. On 26 March 2008, following the interviews, the programme manager suggested that the High Commissioner send the Central Review Board a list of four qualified candidates, including the Applicant, for the two posts in question. The candidates were ranked, with a recommendation that the candidate finally selected and one other candidate be appointed to the two vacant posts, with the Applicant in third place and another candidate in fourth.

9. On 11 April 2008, the Central Review Board approved the selection process followed, and proposed that the High Commissioner for Human Rights proceed with her final selection.

10. By email of 28 April 2008, the Chief of Human Resources of OHCHR, on behalf of the High Commissioner, asked the Office of Human Resources Management (“OHRM”) at the United Nations Secretariat, New York, to approve the selection of a male candidate for the post to which the present appeal refers.

He pointed out, among other things, that the said candidate was an internal candidate, an OHCHR staff member, who could have been appointed without passing through the entire selection process because, technically, it was a lateral transfer and also “[t]he reason why [the candidate] was considered as a 60 day candidate for this particular vacancy is because he was previously selected against an [extra-budgetary] position and thus did not have ‘Geographic’ status which is a requirement for consideration as a 15 day candidate for [regular budget] positions such as this one”.

11. By email of 10 May 2008, OHRM replied to the Chief of Human Resources at OHCHR that the candidate recommended was Dutch, and that since, pursuant to administrative instruction ST/AI/2006/3, he must be considered as an external candidate, his selection would have a negative impact on the geographical balance of OHCHR staff members. OHCHR was therefore asked to review the proposed selection.

12. On 13 June 2008, the Chief of Human Resources of OHCHR replied that since the Netherlands was not over-represented in OHCHR, the High Commissioner was not bound to obtain OHRM approval to select the chosen candidate. On 26 June 2008 OHRM approved his selection, and on the same day the High Commissioner confirmed his appointment.

13. On 21 July 2008, the Applicant submitted to the Secretary-General a request for review of the decision to appoint an external 60-day mark candidate to the post.

14. On 25 August 2008, the Chief of the Human Resources Management Service of the United Nations Office at Geneva sent a memorandum to the Administrative Law Unit, United Nations Secretariat, pointing out that the selected candidate was, like the other three candidates interviewed, a 30-day mark candidate who was, moreover, on the roster of pre-approved candidates for similar functions.

15. By letter of 10 September 2008, the Administrative Law Unit, on behalf of the Secretary-General, rejected the Applicant's request for review, and on 26 September 2008 the Applicant lodged her appeal with the JAB.

16. The JAB submitted its report to the Secretary-General on 26 March 2009. It found that the candidate selected, a 60-day mark candidate, had been reviewed at the same time as the Applicant, a 30-day mark candidate. It recommended that the Secretary-General pay the Applicant three months' net base salary.

17. By letter of 1 June 2009, the Deputy Secretary-General notified the Applicant of the Secretary-General's decision not to follow the recommendation of the JAB, and to reject her appeal.

18. On 29 June 2009, the Applicant filed the present Application before the former United Nations Administrative Tribunal. On 23 December 2009, having requested and been granted two extensions of time by that Tribunal, the Respondent filed his answer to the application.

19. The case, which could not be decided by the UN Administrative Tribunal before its abolition on 31 December 2009, was transferred to the United Nations Dispute Tribunal on 1 January 2010.

20. The Applicant filed observations on the Respondent's answer on 19 March 2010.

21. The Applicant was promoted to level P-5 with effect from 1 August 2010.

22. By Order No. 7 (GVA/2011) of 28 January 2011, the Tribunal informed the parties that a hearing would be held but that, in view of the documented record available, no witnesses would be called. It further granted the Applicant one week in which to provide justification of the damage allegedly sustained and the financial compensation sought, and granted the Respondent a further week in which to file comments, if any.

23. By Order No. 12 (GVA/2011) of 3 February 2011, the Tribunal decided to share with the Applicant copies of the documented records of the selection

process that it considered necessary to pass judgment, namely the interview reports and the interview panel's recommendations, the related Galaxy reports, the Central Review Board's recommendation, an email exchange between the OHCHR and OHRM (April-June 2008), and the final selection decision as recorded in Galaxy. Those documents had been obtained by the JAB, which had used them to reach its conclusions, but had not shared them with the Applicant. The Tribunal also ordered the Applicant to keep the said documents confidential.

24. On 7 February 2011, the Applicant provided additional information to substantiate her damage. She also submitted observations on the documents relating to the selection process. On 14 February 2011, the Respondent replied to the Applicant's latest written submissions.

25. On 18 February 2011, a hearing was held in which the Applicant and Counsel for the Respondent took part in person.

Parties' contentions

26. The Applicant's contentions are:

- a. The selection process was irregular. The successful candidate was wrongly treated as a 30-day mark candidate when in fact he was a 60-day mark candidate, which amounts to a violation of section 7.1 of administrative instruction ST/AI/2006/3. The fact that the selected candidate fully met the requirements for the post has no bearing on the irregularity pointed out above;
- b. The Secretary-General may not argue that, as long as the programme manager had not selected a qualified candidate and had not submitted his proposal to the Central Review Board, he was entitled to review the applications from 30-day mark staff members at the same time as those of all the other 60-day mark candidates;
- c. The fact that the candidate selected is a man with the same nationality as the Applicant reinforces the impression that the selection

was arbitrary. In that context, in a memorandum of 3 April 2008, the Secretary-General reminded all Heads of Department that special efforts must be made to achieve gender balance in the Secretariat, particularly in positions of responsibility.

27. The Respondent's contentions are:

a. The Secretary-General has broad discretionary powers in the selection and promotion of staff members. The Tribunal's role is to review whether the staff member's candidature was duly examined, and it may not substitute its judgment of candidates for that of the Secretary-General;

b. In the present case, the Applicant's candidature received full and fair consideration because she was given the opportunity to demonstrate her competencies at an interview and was recommended. The interview panel however ranked the selected candidate ahead of the Applicant;

c. Furthermore, in appointing a staff member to the post in dispute, the High Commissioner was under no obligation to use that selection process since section 2.4 of administrative instruction ST/AI/2006/3 allowed her to award the post to that candidate by a process of lateral transfer, as he was already at level P-5;

d. Following the selection process, the Applicant was placed, for three years, on the roster of pre-approved candidates for similar functions, pursuant to section 9.3 the above-mentioned administrative instruction. She therefore benefited from the contested selection process;

e. While there was confusion over whether the selected candidate was a 30-day or 60-day mark candidate, this had no influence in any event, since the head of service responsible for the vacant post reviewed all the candidates at the same time, whether they were 30-day or 60-day mark candidates, as administrative instruction ST/AI/2006/3 authorised him to do;

f. The fact that the candidate selected is a man of the same nationality as the Applicant is not sufficient to establish that the Administration exceeded its powers;

g. The Applicant's rights have not been violated and she therefore is not entitled to any compensation. However, if the Tribunal were to take the view that the Applicant's rights were violated during the selection process, it should be emphasised that the only loss to the Applicant was that of a chance of promotion, and the Tribunal should set any compensation on that basis. On the other hand, there is no certainty that the Applicant would have been promoted if the selected candidate had not been chosen and she is not, therefore, entitled to compensation for financial loss.

Judgment

Lawfulness of the contested decision

28. In support of her contention that the selection process for the P-5 post of Senior Human Rights Officer, Treaties and Council Branch, OHCHR, was irregular, the Applicant maintains that the candidate finally selected was wrongly considered as a 30-day mark candidate, when in fact he was a 60-day mark candidate.

29. The Tribunal must straight away reject one of the Respondent's arguments, namely that, even assuming that there were irregularities in the selection process, they had no bearing on the final outcome of the selection as the status of the candidate chosen was such that the High Commissioner could lawfully have dispensed with the selection process used—the comparison of several candidates as contemplated by administrative instruction ST/AI/2006/3—and appointed him directly to the disputed post by lateral transfer.

30. First, contrary to the Respondent's contention, the candidate selected was not, by virtue of sections 5.4(a) and 5.6 of administrative instruction ST/AI/2006/3, eligible for a simple lateral transfer to the disputed post. Secondly,

the Tribunal recalls that, when the Administration chooses to follow a procedure laid down in an instrument, it is bound to comply with it in full. In the present case, it is common ground that OHCHR intended to conduct the selection for the disputed post according to the procedure laid down in administrative instruction ST/AI/2006/3, and it was therefore bound to comply with the following provisions:

Eligibility to be considered at the 30-day mark

5.5 The following staff members shall be eligible to be considered at the 30-day mark:

(a) For promotion against a post one level higher than the level of the staff member:

(i) Internal candidates whose appointment is not limited to service with a particular office may be considered for any post in the Secretariat;

(ii) Staff whose appointment is limited to service with a particular office may be considered for a higher-level post in that office only;

(iii) Staff in the Professional category and above who do not have geographic status may be considered for higher-level posts that are not subject to geographical distribution;

...

(b) For promotion against a post one level higher than the level of the staff member, or appointment at the same level of staff who are not internal candidates but fall in the following categories:

(i) Staff appointed at the P-3 level under the 100 series of the Staff Rules to serve against peacekeeping support account posts at Headquarters or under the 100 or 300 series in peacekeeping or other field missions may be considered for vacancies at the P-4 level; staff appointed at the P-4 level under the same conditions may be considered for vacancies at the P-4 or P-5 levels, provided in each case that they have a continuous period of 12 months of service;

(ii) Women staff members who hold a current appointment of any type at the P-3/L-3 level may be considered for vacancies at the P-4 level; women staff members holding a current appointment of any type at the P-4/L-4 level may be considered for vacancies at the P-4 or P-5 level, provided in each case that they have been in the service of the Organization for a cumulative period of at least one year prior to application and meet the requirements of section 5.3, where applicable ...

Consideration at the 60-day mark or other specified deadline

5.6 All candidates, including external candidates and staff whose appointment is limited to service with a particular office or staff who do not have geographic status, may be considered for any vacancy by the deadline indicated in the vacancy announcement ...

31. While the Administration argued in some of its written submissions that the candidate selected fulfilled the requirements for a 30-day mark candidate, it abandoned that argument in its pleadings before the Tribunal, so that it is no longer disputed that the candidate finally selected, who did not have geographic status while the post in dispute was subject to geographical distribution, should have been treated as a 60-day mark candidate, in accordance with section 5.6 cited above.

32. On the other hand, it was argued before the Tribunal that it was proper for 30- and 60-day mark candidates to be reviewed together, without contravening the provisions of administrative instruction ST/AI/2006/3.

33. However, the said administrative instruction stipulates:

4.5 ... Staff members are encouraged to submit their applications as early as possible, because staff fulfilling the eligibility requirements set out in section 5.4 shall be considered 15 calendar days after posting, and those fulfilling the eligibility requirements set out in section 5.5 shall be considered 30 calendar days after posting.

...

6.2 Applications of candidates eligible to be considered at the 15-day mark but received before the 30-day mark shall nevertheless be transmitted for consideration to the department/office, provided that the head of department/office has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15-day mark. Applications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline.

...

6.7 Applications shall be submitted to OHRM or the local personnel office, as indicated in the vacancy announcement. OHRM or the local personnel office shall transmit electronically to the department/office concerned at the 15-, 30- and 60-day marks the applications of candidates eligible to be considered at each of those dates. At the same time, OHRM or the local personnel office shall transmit the roster of pre-approved candidates eligible to be considered at the 15-, 30- or 60-day mark, as set out in section 9.3.13 ...

Consideration and selection

7.1 In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be

considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.

...

9.2 ... The head of department/office shall select the candidate he or she considers to be best suited for the functions ... and shall give the fullest regard to candidates already in the service of the Organization.

34. Annex I (Responsibilities of the head of department/office) to the above-cited administrative instruction also provides:

3. In the discharge of his or her responsibility to deliver mandated programmes and activities, the head of department/office works in close cooperation with the programme managers and other responsible officials in the department/office concerned to ensure that:

...

(b) The candidates best suited for the functions are selected for vacancies in strict compliance with the requirements of the new system, ... after giving the fullest regard to candidates already in the service of the Organization; ...

35. Lastly, Annex III (Responsibilities of the staff member/applicant) of that instruction provides:

4. Staff members may apply for a vacancy any time before the deadline for applications expires, but are encouraged to submit their applications as early as possible so that they may be considered at the 15- or 30-day mark, depending on their eligibility as defined in sections 5.4 and 5.5 of this instruction.

36. It is therefore clear from the provisions cited above, and more particularly sections 4.5, 7.1 and 9.2, as well as Annex I, paragraph 3, and Annex III, paragraph 4, that where there were 30-day mark candidates, their applications should have been examined first, and only if none of them proved to be suitable could 60-day candidates, including the candidate selected, be considered. The Tribunal has, moreover, already ruled to that effect in its Judgments *Verschuur* UNDT/2010/153 and *Contreras* UNDT/2010/154 of 26 August 2010.

37. The documents on the file show that, in the present case, all the applications were examined together, irrespective of their conditions of eligibility,

and that after the interviews four candidates, three of whom were 30-day mark candidates, and the candidate finally selected, who was a 60-day mark candidate, were placed on the list of candidates forwarded to the Central Review Board.

38. The Applicant is right, therefore, to argue that the candidate appointed was selected as the result of an irregular process, and to seek compensation for the damage suffered.

Compensation

39. The Appeals Tribunal has ruled in *Solanki* 2010-UNAT-044 and *Ardisson* 2010-UNAT-052:

We believe that in determining compensation, 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.

40. The Tribunal must therefore assess the Applicant's chances of obtaining the disputed post if the proper procedure had been followed.

41. After the interviews, the Applicant and three other candidates were recognised as qualified for the two posts available. A ranking of the candidates was also drawn up, recommending the appointment of the candidate finally selected and one other candidate to the two vacant posts, with the Applicant placed third and another candidate fourth. Thus, though administrative instruction ST/AI/2006/3 prohibited the ranking of candidates in order of merit, that ranking clearly shows that the Applicant had a very real chance of being appointed to the disputed post.

42. The only material damage the Applicant suffered by not being chosen for the post was the difference between her actual net earnings as a P-4 and what she would have earned as a P-5 from May 2008, the date when her promotion would have taken effect, to her actual promotion in August 2010, in other words approximately CHF10,950. Since the Applicant in the present case will not reach

retirement age until 2020, her pension rights will not be adversely affected by the unlawful act committed and no account need be taken of this factor.

43. The Tribunal therefore considers that, in view of the foregoing, an award of CHF9,000 will fully and fairly compensate the Applicant for her material damage, namely the loss of a very real chance of earning the amount mentioned above, together with an additional amount of CHF3,000 for moral damage.

Decision

44. In view of the foregoing, the Tribunal DECIDES:

- 1) The Respondent is ordered to pay the Applicant the amount of CHF12,000;
- 2) The above-mentioned compensation shall bear interest at the US Prime Rate from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the US Prime Rate 60 days following the date this Judgment becomes executable.
- 3) All other claims are dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 23rd day of February 2011

Entered in the Register on this 23rd day of February 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva