



ATN
TRIBUNAL D 'APPEL DES NATIONS UNIES

Case No. 2010-046

Solanki
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Jean Courtial
Judge Rose Boyko

Judgment No. 2010-UNAT-044

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The United Nations Dispute Tribunal (UNDT or the Dispute Tribunal) ordered the rescission of the decision taken by the United Nations High Commissioner for Refugees not to promote Ravi Solanki (Solanki) to the P-5 level during the promotion session undertaken in 2007 (2007 Promotion Session). The UNDT also set an amount of compensation that the Secretary-General may elect to pay as an alternative to rescission, in accordance with Article 10(5) of the statute of the UNDT (UNDT statute). Solanki requests that his case be remitted to the Appointments, Postings and Promotions Board (APPB) with a recommendation for promotion at the next session, and challenges the amount of compensation set by the UNDT. The appeal is dismissed.

Facts and Procedure

2.

4. The UNDT ordered the rescission of the High Commissioner's decision not to promote Solanki to the P-5 level during the 2007 Promotion Session. It also set an amount of compensation that the Secretary-General may elect to pay as an alternative to rescission, in accordance with Article 10(5) of the statute of the UNDT. Judge Cousin found that the amount set must be considered compensation for the material harm that Solanki suffered over a one-year period, starting on 1 November 2007, "since he was able to exercise his right to seek a promotion during the 2008 promotion session". The UNDT set the amount of compensation at 8,000 Swiss Francs, plus interest.

5. After receiving a translation of the Judgment on 23 December 2009, Solanki filed an appeal on 4 February 2010. The Secretary-General received the appeal on 12 February 2010 and filed an answer on 26 March 2010. On 12 May 2010, Solanki filed observations in reply to the Secretary-General's answer.

Submissions

Solanki's Appeal

6. Solanki submits that he would have been promoted had the promotion process been correctly followed during the 2007 Promotion Session. He argues that the UNDT did not take this into account and, therefore, the decision of the UNDT regarding the remedy was manifestly unreasonable. Solanki seeks a remedy "requesting the Secretary-General to review the decision on [his] promotion accordingly and/or to remit the case to APPB with a recommendation for promotion at [the] next session".

7. Solanki challenges the amount of compensation set by the UNDT and submits that "to fashion an effective remedy within the constraints of article 10, paragraph 5 of its statute, the [UNDT] should have at least set the compensation at a level which puts the [Secretary-General] before a real choice between specific performance and payment of compensation". Solanki also refers to a general principle of law to the effect that "a finding of a violation should be followed by the order of an effective remedy, which attempts to repair as far as feasible the harm done". Solanki submits that, by failing to order an adequate remedy, the UNDT failed to exercise jurisdiction vested in it or erred on a question of law, within the meaning of Article 2 (1) of the Appeals Tribunal's Statute.

8. Solanki requests that “the compensation payment in lieu of specific performance be set at a level which forces the [Secretary-General] to at least take the possibility of specific performance into account”.

Secretary-General’s Answer

9. The Secretary-General submits that the UNDT properly limited itself to finding that there were irregularities in the application of the Methodological Approach during the 2007 Promotion Process. The Secretary-General refers to the jurisprudence of the former Administrative Tribunal on his discretionary authority in the promotion of staff and the duty to give each candidate full and fair consideration in the promotion process. The Secretary-General notes that, even had the APPB recommended the promotion of Solanki, the High Commissioner made the final decision and had the discretion not to promote him. Further, the Secretary-General disputes the UNDT’s observations that Solanki ranked 40th among 314 eligible candidates for 46 promotion slots, and refers to the elements to be taken into account by the APPB in recommending promotions under the Procedural Guidelines. The Secretary-General therefore contends that the UNDT correctly declined to make a determination that Solanki should have been promoted, as such a determination involves the subjective determination of Solanki’s record and falls within the sole discretionary authority of the Secretary-General.

10. With regard to the compensation ordered by the UNDT, the Secretary-General submits that Solanki has not identified any error of law that would require an increase in the compensation ordered by the UNDT. The Secretary-General contends that the determination of compensation in accordance with the principles put forward by Solanki would amount to an order for exemplary or punitive damages, which is expressly prohibited by Article 10(7) of the UNDT statute. The Secretary-General contends that the level of compensation set by the UNDT should be commensurate with the extent of the injury that the staff member would suffer if the Organization opted not to rescind the decision. The Secretary-General submits that if Solanki’s loss is to correspond to the difference between the P-4 and P-5 salary for the period from 2007 to 2008, which amounts to US\$5,052, the award of compensation of 8,000 Swiss Francs was appropriate.

11. The Secretary-General requests the Appeals Tribunal to dismiss the appeal in its entirety.

Considerations

12. As a preliminary matter, the Appeals Tribunal notes that Articles 8 and 9 of its Rules of Procedure (Rules) provide for an appellant to submit an appeal form, accompanied by a brief, and for a respondent to submit an answer form, accompanied by a brief. There is no provision under the Rules for additional pleadings to be submitted by the parties after the answer.

13. In accordance with Article 6 of the Statute of the Appeals Tribunal and Article 31(1) of the Rules, the Appeals Tribunal may allow additional pleadings in exceptional circumstances. Solanki has not identified any exceptional circumstances justifying the need to file observations in reply to the Secretary-General's answer. Accordingly, the observations are struck out and not taken in consideration by the Appeals Tribunal.

14. The Appeals Tribunal turns to the issues raised in this appeal regarding the level of compensation set by the UNDT under Article 10(5)(a) of the UNDT statute. Article 10(5) of the UNDT statute provides as follows:

As part of its judgement, the Dispute Tribunal may 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,...

15. The UNDT found that the High Commissioner's decisions with regards to the P-5 promotions during the 2007 Promotion Session were the result of an irregular procedure and vitiated the entire promotion process in respect of that grade. As a consequence of this finding, the UNDT ordered the rescission of the decision of the High Commissioner not to promote Solanki. As required under Article 10(5)(a) of its statute, the UNDT set an amount of compensation to be paid by the Administration as an alternative to rescission. The amount set was 8,000 Swiss Francs, plus interest.

16. Solanki challenges the compensation set by the UNDT and requests that it be increased to a level which forces the Administration to take the possibility of specific

performance into account. There was no order for specific performance by the UNDT. As Judge Cousin correctly observed, he was not able to substitute himself for the Administration or to declare that Solanki should have been promoted to the P-5 level.

17. The UNDT addressed the issue of compensation in detail in paragraph 25 of the Judgment. Should the Administration rescind the decision not to promote Solanki, this would entail conducting the selection process for the 2007 promotions de novo. However, should the Administration elect to pay compensation instead of rescinding the decision, Solanki would lose the possibility of being promoted in 2007 following a new selection process or the opportunity to challenge a new decision not to promote him.

18. The UNDT considered that Solanki must be compensated for the material harm he would suffer should the Administration choose not to rescind the decision not to promote him. As Solanki was able to apply for promotion to the P-5 level during the 2008 promotion session, he must be compensa

Judgment

22. For the foregoing reasons, the appeal is dismissed.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Courtial

(Signed)

Judge Boyko

Entered in the Register on this 17th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal