



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/018

Judgment No.: UNDT/2010/125

Date: 15 July 2010

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TEFERRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Case background

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA), who contested the decision by ECA to re-advertise the vacancy for the post of Mail Assistant (Registry Supervisor), G-7 (VA 07-ADM-ECA-414274-R-Addis Ababa).

2. The facts giving rise to the application before the Tribunal are contained in UNDT Judgment No. 084 (2010). In the said Judgment, the Tribunal, having found in favor of the Applicant, directed the parties to provide written submissions, on or before 14 May 2010, as to the appropriate relief that should be ordered.

Applicant's submissions

3. The Applicant, in his application, submitted that his due process rights were violated and his career prospects damaged as a result of the Administration's failure to follow its own procedures during the selection process.

4. Further, he submitted that the Administration should be estopped from not accepting the recommendation of the Advisory Selection Panel (ASP)¹ regarding his suitability for the post on the pretext that such action was necessary to ensure

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been observed. In this instance, it is for the Applicant to prove that the non-observance of his rights led to his suffering a loss within a recognized head of damage.

7. The Respondent submits that in *Crichlow*², the Tribunal reasoned that in respect of compensation for emotional suffering and distress, non-statutory principles for calculation of compensatory damages for emotional suffering and stress include non-punitive damages awarded to compensate proportionally for negative effects of a proven breach. The Respondent further submits that in *Wu*³, the Tribunal articulated that to determine the amount of compensation, the particular circumstances of a given case have to be taken into account, including the impact the established breaches have on the victim.

8. The Respondent's submits that it is the internal law of the United Nations that governs the employment relationship between the Organization and its staff and that the UN Administrative Tribunal in *Moreira de Barros*⁴ ruled that:

...[the] internal laws of the United Nations prevail and are the relevant legal basis upon which the Tribunal operates... Where, however, there is a gap, or lacuna, in the internal laws...the Tribunal is entitled, if not obliged, to consider general principles of law ... As such, it may take cognisance of foreign law, and grant it evidentiary value.

9. The Respondent submits that the former United Nations Administrative Tribunal (UNAT) Judge and legal scholar, Chittharanjan Felix Amerasinghe, expressed the relationship between International Tribunals and national jurisdictions as follows:

...international organisations have a characteristic that with respect to their internal organization and functioning they are outside the jurisdiction of national law. Their life is governed by a set of rules and principles which

² UNDT Judgment No. UNDT/2009/028.

³ UNDT Judgment No. UNDT/2009/084.

⁴ UNAT Judgment No. 1320 (2007).

*constitute their internal law. With this framework they are not subject to interference by states in regard to the legal system or the laws that apply.*⁵

13. The Respondent submits that Article 10(5) of the Statute of the United Nations Dispute Tribunal (UNDT Statute) vests authority in the Tribunal to award

circulation of the vacancies was not so extraordinary in nature that the Administration could avoid the procedures that all staff members are entitled to expect. The former UNAT found that the Applicants were “automatically excluded from any opportunity to compete for the posts” as a result of the improper procedure used by the Respondent. Further, the former UNAT found that “the Respondent’s disregard of proper procedures was detrimental to the Applicants’ career development, and caused the frustration and mental anguish of not being considered for posts for which they might have been qualified.” The UNAT awarded the Applicant’s compensation for the violation of their rights.

22. Additionally, in former UNAT Judgment No. 779, *Maia-Sampaio*, (1996), the Applicant applied twice for the post of Senior Research Officer. The first recruitment process was cancelled and at the end of the second recruitment process, another candidate was selected. She subsequently asserted that she was not given fair consideration for the post because the office of Human Resource Management (OHRM) was actively favouring the selection of another candidate. The former UNAT considered that the Secretary-General is vested with discretion in matters of promotion and appointment. However, the former UNAT was of the view that the facts of the case raised the question of “whether proper procedures were followed, of whether extraneous matters were brought to bear on the selection process, and of whether the decision was made on the basis of inaccurate information”. The former UNAT subsequently found that:

It cannot be said that the Applicant would have obtained the post even if the procedures relating to the selection for the post after the issuing of the second vacancy announcement, had not been defective. Nonetheless, the Applicant has established, to the satisfaction of the Tribunal, that the procedures were flawed due to the highly improper interference in the process by the Director, OHRM, with the objective of promoting the appointment of Ms. X, to the detriment of all other candidates and the selection process as a whole. This

impropriety violated the Applicant's right to full and fair consideration for the post.

23. The UNAT awarded the Applicant in *Maia-Sampaio* nominal compensation for the violation of her rights.

24. The Tribunal endorses the above legal principles for the purpose of deciding whether the Applicant is entitled to compensation in the present case. Once again, the Tribunal reiterates that it cannot conclude that, if proper procedures had been followed and if the Applicant's candidacy had been reviewed by the central review body, he would have been selected for the subject post. However, it considers that the Applicant's prospect for selection was very high due to the fact that he was the only candidate deemed suitable for the position by the ASP. Thus, the Tribunal is satisfied that the procedures were flawed due to the highly improper interference in the process by the Chief of Human Resources Services Section (HRSS) and that this interference effectively deprived the Applicant of the opportunity to be selected for the post and thereby violated his right to due process.

25. In *Kasyanov*¹¹, Adams J stated the general rule that a legal right to appointment is a valuable right, the loss of which requires compensation. Additionally, in *Koh*¹² he stated further that:

Once it can be seen that there is a real or significant chance that the applicant might have been selected, the Tribunal has the duty to compensate him for the loss of that chance, doing the best it can to measure the probability, else the only remedy available to him to right the respondent's breach will be unjustly denied.

26. The Tribunal notes that the contested decision impacts substantially on the Applicant's life in that he has lost the opportunity to move to the G-7 level even though he was deemed by the Interview Panel as being the most suitable candidate

¹¹ UNDT/2010/026 (2010).

¹² UNDT/2010/040 (2010).

