

Background

1. The Applicant joined the Organization on 14 February 1988 as an Interpreter Trainee (P-1 level), with the Arabic Section of the Interpretation Service, Department of Conference Services, later to become the Department of General Assembly and Conference Management (“DGACM”). On 1 July 1988, she was granted a two-year fixed-term appointment as an Associate Interpreter, at the P-2 level. On 1 July 1990, she was granted a probationary appointment as an Interpreter, at the P-3 level. She was promoted to the P-4 level, with effect from October 1995. The record shows the Applicant to have an excellent performance record and that she is very highly regarded by her supervisors. She was promoted to the P-5 level as an Interpreter in the Arabic Section of DGACM, with effect from 14 April 2005.

2. On 14 November 2008, the Applicant filed an appeal before the former

6. The starting point must be the issues that were the subject of the Applicant's appeal to the former United Nations Administrative Tribunal.

7. In the Applicant's appeal to the Administrative Tribunal, at para. 8, she requested it to find that:

(a) Inordinate and inexplicable delays occurred in the announcement and filling of the two P5 vacancies in the Arabic Section;

(b) The Respondent's decision to suspend the selection process on the basis of the Staff Council's request and to withdraw the recommendation to promote the Applicant from the agenda of the [central review board ("CRB")] was inappropriate and illegal and harmed the Applicant in addition to resulting in the breakdown of the promotion process;

(c) Deciding to cancel the vacancy and re-start the promotion process was unjustified and harmed the Applicant;

(d) [The] [l]ength of process until the vacancy was filled through the fourth and final selection ex

2004. There is a dispute between the parties as to whether the September 2004 vacancies were for one post or two, but nothing turns on this.

10. On 14 April 2005, these vacancies were cancelled and re-advertised when it was established, following a complaint by two staff members, that the evaluations were not consistent with ST/AI/2002/4 (Staff selection system) in that the performance records of the candidates were not taken into account. On 10 June 2005, the criteria for the P-5 promotions were posted on the website in the interests of transparency. This decision, taken by Ms. Brigitte Andreassier-Pearl, Chief, Interpretation Service, was the correct response in the circumstances.

11. Towards the latter part of 2005, the Applicant and another staff member were recommended for appointment. The recommendations were forwarded to the Central

administrative review or an appeal to the Joint Appeals Board (“JAB”), and the Applicant quite properly withdrew this aspect of the claim. It should be observed that this had the effect of shortening the proceedings and enabled the parties and the Tribunal to focus on the real issues that remained.

15. The identities of the two candidates, including the Applicant, who were recommended to the CRB for appointment to the P-5 posts was known within the Interpretation Service.

16. The Applicant was concerned about two matters. She considered that it was wrong in principle for the Staff Council to be unduly influenced by unsuccessful candidates to take a course of action that was detrimental to herself. She was also extremely concerned that the Staff Council should have passed a resolution effectively asking for a suspension of the procedures that were before the CRB and the setting up of the WG. She complained that the allegations by the Staff Council regarding procedural failures in the promotion process had a direct, adverse impact on her professional reputation and that the inference that would have been drawn by others was that she and the other candidate were not being recommended on merit but were in fact the recipients of favouritism in breach of procedures.

17. In a letter to Ms. Jan Beagle, the Assistant Secretary-General for Human Resources Management (“ASG/HRM”) dated 26 January 2006, the Staff Council proposed a WG to be formed, and offered to designate an individual from the Staff Council to participate.

18. On 21 April 2006, the Applicant wrote to the Under-Secretary-General (“USG”) for the Department of Manage

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because they were unsuccessful in the promotion exercise, procured the Staff Union resolution is not a criticism that should be directed towards the Respondent's managers. It is a matter for the Staff Union and for the Union membership. Whatever be the factual position or the merits relating to the Staff Union's actions, it cannot form the basis of a valid complaint against the Respondent's managers in this case except to the extent that it contributed to the inordinate delay in concluding the process.

27. The Respondent's managers have given no indication that they factored into their deliberations, and their decisions, the interests of the staff members who had been recommended for promotion. It is a matter of common sense that the surrounding circumstances were bound to be distressing to those recommended for promotion. Once the report of the WG had been submitted to management, the Respondent's managers failed to do what enlightened management would have done in circumstances such as those that have arisen in this case. They ought to have issued a short statement to all concerned summarising the gist of the WG report if for no other reason than to explain why they were to carry out a further review of the promotion exercise. The Tribunal considers this to be a requirement of the principle of good faith and fair dealing. The act of recommencing the promotion process in the circumstances where a dark cloud hung over the entire process from 2004 did affect the Applicant's standing and caused her further distress.

Inordinate and inexplicable delay

28. The Applicant's first complaint is of inordinate and inexplicable delay. She clarified at the hearing that whilst explanations were provided for the delay, she does not accept them as being reasonable or legitimate. The Applicant conceded that, faced

Tribunal agrees with both arguments. It took far too long to finalise the process. Such inordinate delay and failure to provide a timely response to her enquiries caused her much anxiety and distress. This complaint is well-founded.

Suspension of the selection process

29. The Staff Council resolution of 20 October 2005 makes a number of assertions and comments. The resolution states that the system has “created an institutionalised cronyism due to its lack of personal accountability measures’. The Staff Council’s letter of 26 January 2006 addressed to the ASG/HRM, pointed out that there were problems with the same selection exercise in the previous year and the involvement of the same managers would result in a lack of confidence in the process.

30. The Applicant’s principal complaint is that the recommendation before the CRB should not have been recalled on the basis of the complaint from the Staff Council. She considers that she was harmed as a result. The Tribunal finds that given the history of problems within the Arabic Section and given the abishe was hl3pwareresultv

complaint in so far as it relates to inordinate delay in reaching finality and the consequential harm to the Applicant.

Damage to morale and professional reputation

32. The Tribunal agrees that the process took longer than was reasonable. It is noted that this was also the conclusion of the JAB panel, which stated, at para. 31 of its report:

[T]he Panel observes that the inquiry process into the concerns here took roughly six months to complete. While the Panel does not consider this illegal, it does consider it unfair, particularly given the fact that Appellant ultimately was selected for the P-5 post in the third round of the process. Nevertheless, the Panel takes note that, according to the Respondent, a decision has been taken to make her promotion retroactive to April 2005 While there was no entitlement to a remedy, the Panel observes that this should go some ways towards curing the unfairness from the above-stated delays.

33. Counsel for the Respondent, Mr. Gutman, stated that by backdating the appointment to 14 April 2005, the Respondent had adequately compensated the Applicant for her lost earnings, and interest thereon, in recognition of the tortuous history of this promotion exercise. However, it was not in recognition of any distress which the Applicant experienced. At the hearing, Mr. Gutman submitted that the fact of retroactive promotion should not be taken as an acceptance by the Respondent that there was any wrongdoing, nor should it be construed as acceptance by the Respondent that the Applicant suffered damage to morale and/or loss of professional reputation.

34. It is the Applicant's case that the setting up of a WG to investigate allegations of impropriety and the recommencement of the selection exercise would have reinforced the view, or impression, that she was the beneficiary of an improper selection process. In the circumstances, management should have published the WG report or explained why the promotion exercise was being recommenced. The

Applicant gave convincing testimony on th

recommendation to the CRB may be withdrawn. He explained that the hiring manager was acting under delegated authority from the Head of Department.

38. It was not the function of the CRB to check the validity of any request to withdraw a recommendation. Sixty-seven per cent of recommendations to the CRB are approved without requesting additional clarification or information. About one-third of the recommendations will result in additional questions being asked by the CRB. Prior to the Galaxy system (the United Nation's employment portal), the average time taken from the publication of a vacancy notice to the final decision was approximately 275 days. Under Galaxy this average was reduced to 174 days. The target is to reduce it further to 120 days.

39. Given this explanation, the Tribunal accepts that the withdrawal of the recommendation in the particular circumstances of this case was not a procedural error. The error that did take place was the delay in finalising the selection exercise and that was not a matter for the CRB but for the appropriate managers within DGACM and OHRM. The delay in this case exceeds by far the time frames described by Mr. Shahinyan.

40. Ms. Janett Beswick, who appeared as a witness for the Respondent, has been the Deputy Executive Officer for DGACM since October 2008. She has 19 years experience in personnel matters. In October 2008, when she became Deputy Executive Officer, she assumed responsibility for the Section. DGACM is the largest department in the Secretariat. Ms. Beswick's evidence was of limited value to the Tribunal since she had no involvement in this case and the evidence she gave was as a result of reviewing the records. She confirmed that on average it now took 120 days to complete a selection exercise. In answer to a question from the Tribunal, she said that the circumstances of this case were unique in that she had not come across such a case with such a protracted exercise which included suspensions and restarting the processes, either before or since. Ms. Beswick stated that the Applicant was very highly regarded by the Chief of Section and her electronic performance appraisal

system (“e-PAS”) reports rated her as having “frequently exceeded expectations or higher”.

Compensation

41. On compensation, art. 10.5 of the Statute of the Dispute Tribunal provides:

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, subject to subparagraph (b) of the present paragraph;

(b) Compensation, 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 and shall provide the reasons for that decision.

42. In *Wu* 2010-UNAT-042, the United Nations Appeals Tribunal upheld the Dispute Tribunal’s award of compensation on the ground that the delay in notifying the Appellant of the outcome of a selection process caused him stress. Specifically, the United Nations Appeals Tribunal stated, at para. 33, that:

The UNDT awarded compensation to Wu under Article 10(5)(b) of the UNDT statute for non-pecuniary damage arising from the violation of his due process rights during the selection process. It is not disputed that compensation may be awarded for non-pecuniary damage. While not every violation of due process rights will necessarily lead to an award of compensation, the UNDT found in this case that Wu suffered damage, in the form of neglect and emotional stress, for which he is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

43. Counsel for the Applicant, Mr. Danquah, submitted that the delay of three years and eight months was excessive and it induced a state of stress and anxiety in the Applicant. The Applicant's claim for compensation for distress is not simply in relation to the unfairness arising from such a protracted delay but also its psychological consequences.

44. Counsel for the Respondent, Mr. Gutman, conceded that, in hindsight, things could have been done better. However, he argued that unless the Respondent's actions were wrong in law, because a statutory provision was infringed, there would be no basis for providing compensation. He added that there was no statutory provision for a time frame for recruitment and that what was important was whether the integrity of the process was maintained, whether there was bad faith and whether the decision was arbitrary. He said that the decision was made in response to serious complaints by three-quarters of the Section and the Staff Council's resolution. Management had to look into it.

45. Mr. Gutman argued that the retroactive payment was not a recognition of error but the recognition of the need to recompense the Applicant notwithstanding the fact that the management actions and decisions were for genuine reasons. The payment was not recognition of illegality. He relied on *Andrysek* 2010-UNAT-070, at para. 17, in support of the proposition that there was absolutely no right to a promotion and that it would follow that there was no right to a timely promotion.

46. In relation to this matter, the Tribunal takes the view that Mr. Gutman's submission overlooked the simple point that a staff member who put herself forward for promotion and is then recommended for promotion had to face the ordeal of that recommendation being withdrawn and the selection exercise being repeated twice. Furthermore, notwithstanding that the Respondent may have had a genuine reason for suspending the promotion exercise in the face of such a significant number of complaints, he nevertheless had a duty to act expeditiously. The reality of the situation was that the Applicant, as well as colleagues in the section, knew that she

had been recommended for promotion. Mr. Shahinyan's evidence that 67 per cent of recommendations are approved with no additional requests for clarification and that a further one-third were approved after clarification had been obtained leads to a reasonable inference that a candidate, who has been recommended for promotion and who knows that to be the case, would expect that in all probability she would be promoted within a reasonable period. There was an obligation on the Respondent to take such steps as were necessary to ensure that delay was kept to an absolute minimum. The evidence before the Tribunal suggests a rather casual pace with no demonstrable sense of urgency. This is not a question of a staff member having no right to promotion and therefore no right to a timely decision. This is a case of a staff member who was recommended for promotion and who was entitled to a final decision in a timely manner.

47. The Tribunal finds as fact that the Applicant had reasonable grounds to be distressed by the manner in which the managers concerned conducted the selection exercise and the inordinate delay that occurred from the moment the Applicant was recommended for appointment to the final implementation of the decision that she be appointed. The Tribunal finds that there was no loss of earnings but that the Applicant is entitled to be compensated for psychological distress exacerbated by the lack of adequate communication to her as a staff member with a direct and legitimate interest in the outcome. It is noted that the Applicant has not suffered any long-lasting loss to her professional reputation, nor are her legitimate feelings of anxiety and distress persisting to date. It is to her credit and the resilience of her personality that she bounced back and has performed exceptionally well professionally. She has had the highest possible ratings in her performance appraisal reports and is very highly regarded by her managers. The award which the Tribunal makes is for the period from the moment of her knowledge that she was recommended to the date when she was appointed and for a short period thereafter on the basis that feelings of upset and distress cannot be turned on and off. It is a gradual process. In the Tribunal's view, the delay was unconscionable, and as such should be compensated,

Conclusion

50. The Tribunal awards the sum of USD10,000 to compensate the Applicant for the emotional distress and anxiety suffered. This sum is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

51. All other pleas are rejected.

(Signed)

Judge Goolam Meeran

Dated this 18th day of February 2011

Entered in the Register on this 18th day of February 2011

(Signed)

Santiago Villalpando, Registrar, UNDT, New York