Case No.: UNDT/NY/2010/032/
UNAT/1670

Judgment No.: UNDT/2011/070

Date: 13 April 2011

Introduction

1. The Applicant appeals against her not being selected for two G-5 positions in the Asia-Pacific Division ("APD") in the Department of Political Affairs ("DPA") and, in result thereof, her return to her permanent post in the Electoral Assistance Division ("EAD"), DPA, from a temporary assignment with APD.

2. As will be more fully explained below, under Order No. 315 (NY/2010) of 2 December 2010, the Tribunal determined that the scope of the case would be limited to the following issue:

> [T]he adequacy of the Applicant's compensation of six months' net base salary at the rate in effect on 30 November 2005 for the Respondent's errors in connection with the selection processes for two G-5 positions (VA#403331 and VA#407297) for which the Applicant was not selected.

3. On 5 January 2011, a substantive hearing was held at the premises of the Tribunal in New York, at which the Applicant gave oral evidence.

4. The backdrop for some of the Applicant's contentions are that the Joint Appeals Board ("JAB") had recommended that the Applicant be compensated with six months' net base salary for some shortcomings in the selection processes for the two G-5 positions; a recommendation that was subsequently upheld by the Secretary-General. In the same report, the JAB made some additional recommendations concerning the Applicant's employment situation with the United Nations, which the Secretary-General rejected. However, these decisions are not before the Tribunal in the present case (see more below in paras. 21-40).

Facts

5. The Applicant made a general reservation regarding the outline of facts as produced in JAB Report No. 1958. However, when directed by the Tribunal under Order No. 262 (NY/2010) of 4 October 2010 to specify this reservation, her Counsel did not produce any comprehensible additions or objections to the account of facts in the JAB report. Therefore, these facts are adopted as agreed by the parties, but where the oral testimony at the substantive hearing has modified those facts, the Tribunal has clearly noted the alteration.

6. The Applicant joined the Organization in June 1979 at the G-2 level and has subsequently received consecutive promotions up to the G-4 level. The Applicant received a permanent appointment in 1991.

7.

most of the criteria for the post. Those eight candidates were interviewed, and three of them (not including the Applicant) were recommended for the post.

10. On 30 November 2005, the Applicant was informed that she had not been selected for either of the two G-5 vacancies and that she would be returning to her regular post in EAD.

11. According to the Applicant's oral testimony at the substantive hearing, she was on sick leave from 1 December 2005 to 1 January 2006, with the official reason for her leave stated as bronchitis. The Applicant also testified that she was under stress and that the request for sick leave was directly related to the two non-selection decisions for the G-5 posts.

12. According to her oral testimony, beginning on 1 January 2006, the Applicant resumed working at EAD.

13. Effective 1 April 2006, the Applicant requested and was placed on a one-year Special Leave Without Pay ("SLWOP"). The SLWOP was subsequently extended through 15 May 2008 (at the substantive hearing, the Applicant stated that her SLWOP lasted until September 2008).

14. On 8 April 2006, the Applicant requested an administrative review of her non-selection for the two G-5 posts and of the decision to return her to her former post in EAD.

15. On 20 June 2006, the Applicant filed an appeal with the JAB.

16. On 31 January 2008, the JAB panel issued its report regarding the Applicant's non-selection for the two G-5 posts and the decision to return her to her former post in EAD in which it, *inter alia*, made certain findings, which the Tribunal has labeled Recommendation A, Recommendation B and Recommendation C, respectively:

The Secretary-General has examined your case in light of the JAB's report and all the circumstances of the case. The Secretary-General agrees with the finding of the JAB that your right to a full and fair consideration for the two vacancies was violated. Accordingly, the Secretary-General has decided to accept the JAB's recommendation that you be compensated for the violation of your rights but such compensation should be six-months net base salary at the rate in effect on 30 November 2005. The Secretary-General, however, has decided not to accept the JAB's recommendation that [the Applicant] be placed on a roster at the G-5 level as in the circumstances, this would not be practical.

Additionally, the Secretary-General does not agree with the finding of the JAB with regard to your being returned to your former post in the Electoral Assistance Division in that there is no justification for the

vacancies for the two G-5 posts. With this admission, the issue of whether the Applicant's due process rights were violated in the selection processes becomes a moot question and is no longer before the Tribunal, since the Respondent has already conceded this factual determination.

25. Remaining to be determined in connection with Recommendation B, however, is the issue of whether the payment to the Applicant of six months' net base salary at the rate in effect on 30 November 2005 constitutes adequate compensation for violation of her procedural rights.

26. In the Applicant's 15 October 2010 submission to the Dispute Tribunal (as revised on 19 October 2010), her Counsel identified the contested administrative decisions under review by the Tribunal as the following, which the Tribunal has labeled as Contested Decision A, Contested Decision B, Contested Decision C, and Contested Decision D, respectively:

> a. [Two] non-selection decisions on G-5 vacancies decided by DPA authorities, under influence and recommendation of [a former head of the EAD, who is named in the submission and will hereinafter be referred to as this] inner-circle ["Contested Decision A"];
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> b. [The] forced return to her lien post at EOD [sic, the abbreviation is incorrect and should be EAD] … decided by [the former head of EAD] ["Contested Decision B"];
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> c. [The] implicit/continuous decision by the [the former head of EAD's] inner circle at EAD … to maintain [the Applicant] in her lien [sic, should be 'lien'] post at EAD … ["Contested Decision C"];
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> d. [The] 4 June 2008 final administrative decision by the Deputy-Secretary-General limiting the compensation to 6-month net base salary, and ignoring the large nefarious context of this case described by the Joint Appeal Board ["Contested Decision D"].

27. The Tribunal has already determined that the Applicant's appeal regarding the two non-selection decisions, i.e., Contested Decision A, has been rendered moot and is no longer before the Tribunal.

28. Regarding the Applicant's appeal of her so-called forced return to her liened post at EAD, i.e., Contested Decision B, the Respondent has contended that this appeal is not receivable, since there was no

liened post (i.e., that the Applicant's claims thereon were not receivable) (Contested Decisions B and C).

32. In a submission of 20 December 2010, i.e., almost two months following issuance of Order No. 315 (NY/2010), Counsel for the Applicant only then filed a response on the receivability issue and did so agreeing with the Respondent's non-receivability contentions. He explained that his failure to respond to Order No. 262 (NY/2010) was due to his misunderstanding of the Tribunal's directions ("By 29 October 2010, the Applicant is to file and serve a written submission responding to any receivability arguments the respondent may have made") and that his previous submissions to the former Administrative Tribunal had, in any case, set out the Applicant's objections to the Respondent's non-receivability contentions.

33. The Tribunal sees no reason to change its Order No. 315 (NY/2010) regarding non-receivability in respect of the Applicant's return to her liened post. Compliance with orders of the Tribunal is required. Where such orders are not followed, the Tribunal is permitted to draw adverse inferences therefrom. In cases of failure by an applicant to comply with orders, the Tribunal has, in several instances, decided to reject the application or strike it from the docket (*Metanokhin* UNDT/2009/006, *Kouka* UNDT/2009/009, *Hijaz* UNDT/2009/056, *Bimo & Bimo* UNDT/2009/061, *Hastopalli & Stiplasek* UNDT/2009/062, *Mwachullah* UNDT/2010/003, *Moussa* UNDT/2010/029, *Attandi* UNDT/2010/038 (upheld on appeal), *Saab-Mekkour* UNDT/2010/047 and *Atogo* UNDT/2010/048).

34. Additionally and independently, the Tribunal has completed its own *ex officio* receivability review of the Applicant's case, as specifically permitted by the Appeals Tribunal in *Pellet* UNAT-2010-073: "… it was open to the Dispute Tribunal to consider the preliminary issue of whether he had legal standing to even challenge the administrative decision not to advertise the vacancies in question" (see also *O'Neill* UNDT/2010/203).

not properly before the Tribunal. This means that any evidence offered on this point is irrelevant.

39. Regarding the JAB's Recommendation (c) Compensation for the aggravation for the Applicant's emotional state caused by the Administration in returning her to

exceptional circumstances of this case". This included "harassment in the workplace, discrimination in the selection process and hostility towards her which began in 2000 when an anonymous letter against [the former head of EAD] was circulated at DPA. Since 2000, [the Applicant] [has been] targeted as the author of that anonymous letter by the inner-circle [of the former head of EAD] at EAD";

b. The JAB panel ignored "the evidence of harassment and discrimination which prevailed against the Applicant since 2000 at EAD, and limited its review only to the extensive selection process irregularities", contrary to the judgment of the Appeals Tribunal in *Azzouni* 2010-UNAT-081 (paras. 35-36). The JAB report was therefore incomplete, since it did not take into account "the larger career losses resulting from the harassment and discrimination against [the Applicant]";

c. The evidence before the JAB and the Dispute Tribunal shows that the Applicant was discriminated against and that the interview panels intended to undermine her two candidacies;

d. "Neither at the JAB nor at the Tribunal, did the Respondent justify how and why so many errors and omissions could have been committed by the interview panels against the Applicant's candidature, not only on one but on the two vacancies. The Applicant's computer skills were minimized for the most flimsy pretexts (para. 21 of [the] JAB report), her PAS ratings were contradicted by the interview panel (para. 30 of JAB report), her previous experience in the vacant post was disregarded (para. 31, 34 of [the] JAB report), the Applicant's superior linguistic skills were rated the same as those of the selected candidate who did not even meet any such requirements (para. 21b of

[the] JAB report), a candidate was recommended without meeting with the interview panel (para. 24 of the JAB report), the Applicant was not formally and timely notified of the results of interviews which took place many months before, etc";

e. The former United Nations Administrative Tribunal "always required that selection decisions be based on true and genuine information which, in this case, was instead wilfully distorted concerning the Applicant's qualifications" (Counsel appears to refer to Judgment No. 1390 (2008) with the name *Teal-Singh*; however, by that time the former United Nations Administrative Tribunal had stopped mentioning the name of applicants in their judgments and it is therefore not clear to which judgment Counsel refers). This practice has since been adopted by the Dispute Tribunal in *Sefraoui* UNDT/2009/95 (see para. 36), *Fayek* UNDT/2010/113 (see para. 23-24), *Koh* UNDT/2010/040, *Hastings* UNDT/2010/071 and *Beaudry* Order No. 101 (NY/2010);

f. "Likewise, recognition of a candidate's prior experience in a vacant post as an OIC [Officer-in-Charge] or on SPA [special post allowance] has been enshrined in the jurisprudence for decades, but ignored in this case by the Respondent". In this regard, Counsel refers to the former Administrative Tribunal's Judgment No. 1008, *Koh* (2001), as well as the Dispute Tribunal in *Fayek* UNDT/2010/113 (para. 26), and *Ostenson* UNDT/2010/120;

g. "Timely notification of the interview results on the [two] vacancies were never given to the Applicant, adding to her anxiety, stress and distress" (referring to *Abbassi* UNDT/2010/086, para. 30, and *Krioutchkov*

h. "The sum of so many errors and mistakes can only point to a pattern of discrimination and ill-intent towards the Applicant";

i. In 2005, the Applicant was compelled to testify before [some investigation teams concerning a disciplinary case of the former head of EAD], and she trusted "that her cooperation would not be used against her and against her career prospects. Not only was her cooperation with these investigation teams damaging to her two pending candidatures, but the whistle-blowing protection promised by [ST/SGB/2005/20 (Prevention of workplace harassment, sexual harassment and abuse of authority) and ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations)] was not even in place when, in January 2005, she was compelled to return to work at EAD where [the former head of EAD's] inner circle was still in place. The JAB panel unanimously concluded that, in the context of such investigations, 'the Administration had shown a remarkable lack of both management skills and sensitivity by requesting that the Appellant be returned to her former post' [para. 41 of the JAB report]. The impact of such decisions by the Respondent exceeds the $24,000 awarded, and resonates in the Applicant's whole career prospects and workplace safety. In similar cases, where circumstances and career losses were exceptional, the Administrative Tribunal awarded over 2 years of salary compensation" (referring to the Administrative Tribunal Judgments, No. 914 *Gordon Pelanne* (1999) and No. 1008 *Loh* (2001));

j. The Tribunal is not to substitute its decision for that of the Administration in the discretionary matters of appointment and promotion, but may examine whether the selection process was carried

out in a improper, irregular or

decision to delay her promotion to the G-5 level that was offered to her in November 2009. Even though the Applicant claimed that her sick leave was a result of her not being selected, her medical note stated bronchitis and not stress as the reason.

g. In accordance with *Azzouni*, the Applicant was permitted to testify on the alleged discrimination and harassment she had suffered. *Azzouni* held that an applicant bears the burden of proof when alleging discrimination. In the instant case, the Applicant would have to prove

52. In the present case, the Applicant had already been awarded six months' net base salary (approximately USD24,000) and the question to be determined is whether this was sufficient in light of the Respondent's breach of her employment contract, namely "the Administration's failure to afford her due process rights by failing to consider her fully and fairly for the two vacancies" (see Recommendation B, which was later upheld by the Secretary-General).

53. Regarding compensation, the Appeal Tribunal in *Sanwidi* 2010-UNAT-044 stated that "compensation must be set by [the Dispute Tribunal] following a principled approach and on a case-by-case basis".

54. As already explained in paragraphs 24-25 above, the focus of the present Judgment is on what damages the Applicant, in fact, suffered as a consequence of her not being fully and fairly considered for the two G-5 posts, and it is not on what may have motivated the relevant decision-makers to take the decisions which they did and how they then implemented these decisions, even if they deliberately attempted to harass or discriminate the Applicant as contended by the Applicant. In other words, the question is not why these people treated the Applicant the way they did and what they, in fact, did to her, but rather how she was harmed by the errors they committed, since, as per Antaki, this would be the indicator of the damages that she actually

supposed to cover all harm suffered by the Applicant, whether this may have been of pecuniary or non-pecuniary character.

Loss of salary

56. The due process violation that the Applicant was compensated for in reference to Recommendation B, which was later upheld by the Respondent, was not that she was not selected for the two G-5 positions, but that the selection processes were flawed. Had the breach not occurred, the Tribunal cannot conclude with certainty that she would actually have been selected for any of the positions. For the sake of argument, however, the Tribunal will assume so in the following analysis.

57. Had she been selected, the Applicant would at maximum have received the difference between the salary she actually received at the G-4 level and the salary

selected for either of the two G-5 positions; in fact, the Applicant does not at all link her not being selected for the two G-5 positions to her subsequently requesting the SLWOP. The Tribunal therefore makes the assumption that the Applicant, in all events, would have requested the SLWOP, and the Tribunal cannot compensate the Applicant for any income loss she may have suffered during the period of the SLWOP, since this was clearly the result of a decision the Applicant herself made.

60. From the Applicant's oral testimony, it appears that she was already chosen for her promotion to the G-5 level around November 2009, which would therefore likely have been effectuated by 31 December 2009, but that she deferred it until June 2010 because of her work commitments at the United Nations mission in the Sudan. Since this, according to her own statement, was her own choice, the Tribunal finds that the end date of the period for which she would have been entitled to receive compensation at the G-5 level must be 31 December 2009.

61. In sum, under the above hypothesis, the Applicant was deprived of the salary difference for a G-5 position for four years (from 1 January 2006 to 31 December 2009), of which she was on SLWOP for two years and four months, and the compensation period is therefore limited to one year and eight months, i.e., 20 months (equivalent to 1.67 years or 20/12 months). Accordingly, her pecuniary loss can be calculated to be, at maximum, approximately USD9,635.90 (1,67 x USD5,770) under the assumption that she would have been chosen for one of the G-5 posts, which, as explained above, is not a given fact.

Loss of pension entitlements

62. In her 20 December 2010 submission, the Applicant claims that she has lost USD85,800 worth in her pension entitlements, calculated on the basis that she would retire aged 60 and live until the age of 85. Although this is not mentioned in her closing statement, it logically would appear that her contention is that since the

67. In the present case, the Applicant does not directly contend that she suffered any non-pecuniary harm. Her submissions regarding harassment nevertheless indicate that she avers that she suffered some stress or moral injury from her not being fully and fairly considered for the two G-5 positions. In reply to this, the Respondent submits that the Applicant's oral testimony showed that she did not suffer any such damages.

68. Concerning stress, it is not clear from the Applicant's submissions exactly how the flawed selections processes for the two G-5 positions actually affected her. The Tribunal observes that it would only be natural if she felt some disappointment from her candidatures not being considered properly, but that she has failed to substantiate how any such frustration manifested itself in her being, aside from alleging, but not proving, that this caused her a month of sick leave. The Applicant did not provide any indication in terms of a monetary figure as to how this should be compensated by the Tribunal. In result, the Applicant failed to establish that she suffered any harm, as required under *Antaki*.

69. With regard to moral injury, the Applicant appears to submit that her reputation was harmed, since she was not fully and fairly considered for the two G-5 posts by referring to her "larger career losses" (see para. 45(a) above). From her oral testimony, however, it follows that, at least while she was working in APD, her skills were in demand and that she had many employment possibilities, including five job offers from different United Nations field missions. Her main reason for not accepting any of these offers was that she wanted to secure a position outside EAD in New York first. In December 2009, she was selected and accepted an offer to work for the United Nations mission in the Sudan, and around at the same time she was promoted to the G-5 level. In conclusion, it would appear that her career with the United Nations has not stagnated in result of the flawed selection processes and that the Tribunal would be mistaken to conclude that she suffered any "larger career losses" without any further evidence hereon. Referring also to *Antaki*, the Tribunal

therefore finds that the Applicant has not established that she has incurred any moral injury.

70. Concerning the "procedural violations" which the JAB report states were committed, the Appeals Tribunal in *Antaki* found that a violation of an applicant's rights is insufficient, of itself, to warrant an award of compensation; s/he must, in fact, also have incurred some damage. Accordingly, the Tribunal cannot compensate an applicant for any breaches of her/his procedural rights if s/he is unable to demonstrate that s/he has suffered any related damage in result hereof. In the present case, the harm suffered by the Applicant from the procedural breaches attributable to the Respondent have already been dealt with in the above, and there is therefore no legal basis for any separate compensation award for this.

Conclusion

71. Considering the limited pecuniary and non-pecuniary losses that the Applicant has been able to establish as a result of the Respondent's errors in connection with the selection processes for two G-5 posts, the Applicant has not demonstrated that the compensation of six months' net base salary, which she was awarded by the Secretary-General, was inadequate.

72. The Applicant informed the Tribunal that she was awarded around USD24,000, but the Tribunal has found that at a maximum the Applicant's pecuniary losses would have amounted to USD9,635.90. The Applicant has entirely failed to provide any figure or useful guidance for determining her non-pecuniary losses, such as stress and moral injury that might increase a damage award above USD9,635.90.

73. Moreover the Applicant appears to concede that USD24,000 did cover all her losses in this case by submitting that "[t]he $24,000 compensation received by [the

Applicant] barely covers more than the violations of her contractual and procedural rights to full and fair consideration" (see para. 45(m) above).

74. In general, the Dispute Tribunal determines non-pecuniary damages on the basis of the specific circumstances of the particular case (see *Applicant* UNDT/2010/148, para. 27) and it is therefore not possible to apply compensation awards from other cases directly to the present case. However, in *Goddard* UNDT/2010/196, when finding that not renewing the Applicant's contract was wrong and that the respondent had not "established and follow[ed] proper procedure and [had] denied [the applicant] of due process", the Dispute Tribunal awarded the applicant three months' net base salary for what appears to be both his pecuniary and non-pecuniary damages in total. In the present case, three months' net base salary would be comparable to around USD12,000. The Tribunal notes that since the applicant and his wife in *Goddard* were forced to move duty station as a result of the respondent's unlawful actions, it would appear as the impact on his life was potentially more severe than that the Applicant experienced in the present case, which, at least, remained in New York. Although the Tribunal observes that it could be argued that pecuniary damage should be determined as a lump sum and not be calculated based on an applicant's salary, since her/his grade level and duty station is not a reflection of non-pecuniary damages that s/he has suffered (see also *Applicant* UNDT/2010/148, para. 29), the three months' net base salary in *Goddard* could, for the sake of comparison, be used as indicative of the upper limit for the non-pecuniary damages of the Applicant in the present case.

75. In conclusion, even though the Applicant failed to establish that she actually suffered any non-pecuniary harm, it would appear as the six months' net base salary which the Applicant was awarded for the harm caused by the flawed selection processes was sufficient to cover all her losses, both pecuniary as well as non-pecuniary following *Goddard*.

76. Accordingly, the application is dismissed in its entirety.

Conduct of Counsel

77. The Tribunal reluctantly feels compelled to comment on the conduct of counsel who appear before the Dispute Tribunal. For proceedings before the UNDT, it is required that all counsel meet the standard of reasonable diligence in every respect when representing their clients' matters. Such an obligation includes, *inter alia*: (a) meeting deadlines imposed for making submissions to the Tribunal; (b) presenting the required factual and legal foundations for all arguments made to the Tribunal; and (c) organizing arguments in a logical and cogent manner. The manner in which the Applicant's case was presented to the Tribunal in this case has caused additional work for the Tribunal (presumably also to Counsel for the Respondent), has frustrated the efficient handling of the case, has resulted in unnecessary delay, and may also have harmed consideration of the merits of the Applicant's matter. All counsel would be well-advised to take appropriate measures to ensure that standards of diligence in representing clients are met.

(Signed)

Judge Marilyn J. Kaman

Dated this 13th day of April 2011

Entered in the Register on this 13th day of April 2011

(Signed)

Santiago Villalpando, Registrar, New York