



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/041/
UNAT/1705
Judgment No.: UNDT/2010/113
Date: 25 June 2010
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

FAYEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Joseph Grinblat, OSLA

Counsel for respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The applicant, a P-3 level Radio Producer in the French Language Unit of the Department of Public Information (DPI), applied for the P-4 post of the Chief of her Unit. She was not selected. It later transpired that the applicant had initially received the highest score at the interview, but her supervisors, who participated in the selection panel, increased the successful candidate's score, and ranked the successful candidate higher than the applicant. Upon review, the Joint Appeals Board (JAB) recommended that the applicant receive compensation in the amount of three months' salary for the violation of her rights during the selection process and the Secretary-General accepted the recommendation. The applicant, however, was not satisfied with the amount of compensation and, on 29 June 2009, filed an appeal with the former United Nations Administrative Tribunal, requesting it to order that she be selected for the next available P-4 post in her field of competence and that she be compensated in the amount of USD148,000 for the loss of salary and pension benefits resulting from her improper non-selection.

2. The case was transferred to the Dispute Tribunal on 1 January 2010. Following my orders for further submissions from the parties, both parties consented to this case being decided on the papers. Therefore, the application and the reply filed with the UN Administrative Tribunal, as well as the additional submissions filed pursuant to my orders, constitute the pleadings in this case.

Facts

3. The applicant joined the Organisation on 1 August 2000 as a Radio Producer at the P-3 level in the French Language Unit, Radio Section, Radio and Television Service, News and Media Division, DPI.

4. On 23 March 2007, she applied for the post of the Chief of her Unit. Six candidates were invited for interviews. The interview panel consisted of three

members: the Chief of the Radio Section, who at the time was the applicant's immediate supervisor; the Chief of the Radio and Television Service, who at the time was the applicant's second supervisor; and the Chief of the Meetings Coverage Section. The applicant was interviewed on 30 May 2007. Initially, the scores assigned to the six candidates by the interview panel were as follows:

Candidate A (the applicant)—95 points

Candidate B (the successful candidate)—93 points

Candidate C—90

Candidate D—90

Candidate E—90

Candidate F—85

5. The top five candidates, including the applicant, were found to be qualified for the post. The applicant was the only recommended female candidate and one of only two candidates (along with the successful candidate) with experience of serving as Officer-in-Charge of the Unit.

6. On 25 and 26 June 2007, prior to the transmission of the records of the selection process to the Central Review Body (CRB), two members of the selection panel—the applicant's first and second supervisors—exchanged emails (the authenticity of which was accepted by the respondent), without including the third member of the panel, in which they discussed the applicant's candidature for the post as follows:

[Email from the first supervisor to the second supervisor, dated 25 June 2007:] I don't know how else to tweak this. Please see [X's] comments. [X being the first name of an unidentified third person.]

[Email from the second supervisor to the first supervisor, dated 25 June 2007:] How does this look? How does her score compare with others?

[Email from the first supervisor to the second supervisor, dated 25 June 2007:] This looks very good. I suggest we reduce her score to

43 in the area of “years of experience”. This would give her a total of 93. The scores of the other candidates are as follows: [Candidate F] total 85: 45 for years of experience; [Candidate B—the successful candidate] total 93: 46 for years of experience; [Candidate C] total 90:43 for years of experience; [Candidate D] total 90: 45 for years for experience; [Candidate E] total 90: 45 for years of experience. [The applicant] ends up with the same score as [the successful candidate]. What do we do?

[Email from the second supervisor to the first supervisor, dated 26 June 2007:] Let’s give [the successful candidate] 2 extra points for his supervisory experience.

7. In the end, the applicant’s supervisors did not change the applicant’s score, but added two points to the score of the successful candidate (which prior to that was 93) to match that of the applicant (which was 95). After the score was manipulated by the applicant’s supervisors, the records of the selection process were transmitted to the CRB (which was unaware of the supervisors’ actions), and following its approval the final list of recommended candidates, along with the panel’s final evaluations, was transmitted for consideration and approval to the Under-Secretary-General of the DPI. The recommendation note stated (emphasis in the original note):

[The successful candidate] (interviewed on 7 May 2007): In his work in the French Radio Unit, the staff member has demonstrated sound political awareness and judgment. [The successful candidate] has the ability to develop goals as well as identify priority activities. He has practical experience in radio broadcast journalism with written and on-air presentation skills. The staff member also has hands-on experience in digital desk-top editing. Having served as Officer-in-Charge of the Unit on a number of occasions, [the successful candidate] has proved that he has acquired the strong supervisory skills needed to be managing the unit. **He is recommended.**

[The applicant] (interviewed on 30 May 2007): The staff member has demonstrated political awareness and judgment and keeps abreast of international current affairs. [The applicant] has become conversant with available digital editing technology and has developed an understanding of their applicability and limitations. She has hands-on practical experience using Radioman technology. [The applicant] has demonstrated her leadership abilities as Officer-in-Charge of the Unit. The staff member has had strained interpersonal relations with colleagues from time to time. However, she has made some improvements recently and in the interview demonstrated that she has

given a lot of thought to improving her relationships with her colleagues and creating harmony in the Unit. **She is recommended.**

...

The Panel recommends five candidates for this post, in the following order:

- 1) [Candidate B—the successful candidate]
- 2) [Candidate A—the applicant]
- 3) Candidate D
- 4) Candidate E
- 5) Candidate C

And requests approval of the USG/DPI [Under-Secretary-General for DPI]

8. Prior to preparing the evaluation narrative above, however, the panel prepared individual and more detailed narratives for each of the applicants which were used to prepare the recommendation note. The individual evaluation narrative for the successful candidate also contained a comment on his interpersonal skills, which was as follows: “Teamwork: The staff member has improved his interpersonal skills in a significant way and is now able to maintain collegial relationship with his colleagues”. I find that this comment suggests that the successful candidate also had prior interpersonal communication problems, and as can be seen from the quoted text above, this statement was omitted from the evaluation narrative included in the recommendation note.

9. On 19 July 2007, candidate B was selected for the position and his selection was announced on 24 July 2007. The applicant was placed on a roster of candidates pre-approved for similar functions.

10. In its report adopted on 10 March 2009, the JAB found that the exchange of emails between the first and second supervisors, which was done outside of the interview room and subsequent to the grading of the candidates, showed “that the Respondent intended, after the fact, to ‘tweak’ the scores to reflect their desired result”. It concluded that the respondent “had tainted the process by this careless and

untoward behaviour” and, whilst recognising that management ultimately had the right to select the candidate of its choice, stated that “[a] selection process . . . should be handled responsibly and transparently, and . . . this selection process and these actions bespoke of a lack of free and fair treatment”. The JAB recommended that the applicant “be fully and fairly considered . . . for all available positions in the future, and . . . [be awarded compensation in the amount] of three (3) months’ salary for the lack of due process of which, indeed, she was the obvious victim”.

11. On 29 April 2009, by a letter signed by the Deputy Secretary-General, the applicant was informed that the Secretary-General accepted the JAB’s conclusion that her rights were violated, and decided to grant her the compensation recommended by the JAB. The letter stated:

With respect to the admissibility of the emails that you submitted as proof that your Managers had sought to tamper with the results of the evaluation, the JAB noted that the Respondent never challenged their admissibility or denied their accuracy. The JAB also considered the Respondent’s decision to seek the guidance of the Ethics Office on how to address “this breach of ethical behaviour” and noted that the response of the Ethics Office had not been forwarded to the Joint Appeals Board. The JAB concluded that a promise to seek “guidance” did not rise to the level of a challenge of admissibility of the emails.

The JAB recognized that Managers have a right to consult during promotion exercises but found that this exchange of emails outside of the boundaries of the process was suspect and “troubling, to say the least”. The JAB, noting the Respondent’s contentions that the email exchange was illustrative of the consultation process, considered that such deliberations [s]hould have been contemporaneous with the other discussions during the course of the process in the interview room and not subsequent to the grading of the candidates. Based on the contents of the email exchange, the JAB agreed that the Respondent intended, after the fact, to “tweak” the scores to reflect their desired result. In light of the foregoing, the JAB concluded that the selection process had been tainted. It therefore unanimously recommended that you should be fully and fairly considered for all available positions in the future and granted compensation in the amount of three months salary for the lack of due process.

The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case. The Secretary-

General accepts the conclusion of the JAB that your rights were violated. Accordingly, the Secretary-General has decided to accept the JAB's recommendation that you be granted three months net base salary at the rate in effect as of the date of this decision letter as compensation for the violation of your rights. Further, the Secretary-General has taken note of the JAB's recommendation that you should be fully and fairly considered for all available positions in the future and would like to point out that any applications you submit in the future for positions with the Organization will be considered in accordance with the provisions of ST/AI/2006/3, which relates to the staff selection process.

Applicant's submissions

12. The applicant submits that, if not for the improper actions of the supervisors which violated her rights, she would have been selected for the post. The applicant's supervisors manipulated the scores in order to avoid recommending her as the best qualified candidate instead of their favoured candidate, who came second in the actual evaluation.

13. The applicant avers that the compensation of three months' salary may have been adequate to compensate her for moral damages (ie emotional distress and anxiety), but it did not address the financial loss to her for the rest of her active life due to the non-promotion. Even if the applicant were to be promoted soon, for the rest of her career with the United Nations and in her retirement she would receive a salary and a pension at two steps lower than if she had been promoted on 24 July 2007. The applicant calculated this economic loss to be USD148,000. In response to the Tribunal's further orders, the applicant provided alternative assessments of her economic loss, estimating it between USD150,363 and USD570,000, depending on the method of calculation and different factors being taken into account.

14. Since August 2007, the applicant has applied for seven P-4 posts in her field, but has not been selected for any of them. She requests the Tribunal to order that she be selected for the next available P-4 post in her field as part of her relief.

Respondent's submissions

15. The respondent accepts that the applicant was not treated fairly and that her rights were violated in the selection process, contending that the only issue before the Tribunal is the adequacy of the compensation granted and paid to the applicant. The respondent submits that compensation in the amount of three months' salary paid to the applicant constitutes adequate compensation for the violation of her due process rights, and since there is no causal nexus between the violation of her rights and her non-selection for the post, the applicant is not entitled to any additional damages.

16. The respondent argues that the applicant does not have the right to be automatically selected for the next available P-4 post for which she is eligible and qualified. The applicant's future applications for vacancies in the Organisation (including at the P-4 level) will be fully and fairly considered in accordance with the applicable rules and procedures.

Consideration and findings

17. Liability in this case is not in dispute. Nor are the facts. Two out of the three members of the selection panel modified the score given to the successful candidate prior to the transmission of the recommendations for review and approval. Although the applicant's score was not reduced, two points were added to the successful candidate's score for "his supervisory experience". As a result, both the applicant and the successful candidate were awarded with the same total score, with the successful candidate having an inflated score for supervisory experience.

18. The email exchange between the two members of the panel modifying the scores was done outside of the meetings of the interview panel and without any consultation with the third member of the panel. The JAB found that the exchange of emails outside the boundaries of the process was "suspect and troubling, to say the least". The respondent does not submit otherwise and does not deny that the applicant's rights were violated. The parties are in agreement that the actions of the

supervisors were improper and contrary to the applicant's rights. Therefore, in view of the admission on the part of the respondent that the applicant's rights were violated, the issue in this case remains that of adequate compensation.

19. In order to assess the appropriate measure of compensation for the violation of the applicant's rights, I will examine whether in the absence of violation of her rights, the applicant would have been selected for the P-4 post. According to sec 9 of ST/AI/2006/3, which governed the selection process at the time, the head of the department/office (in this case, Under-Secretary-General for DPI) shall exercise his or her authority to select a candidate for the post after receiving from the programme manager a documented record recommending the selection of a candidate.

20. Although sec 7.7 of ST/AI/2006/3 requires that, after evaluating candidates, "programme managers shall transmit their proposal for one candidate or, preferably, a list of qualified, *unranked* candidates" to the appropriate CRB through the head of department/office (my emphasis), there is no similar requirement under sec 9.2 for recommendations transmitted to the final decision-maker. Indeed, the recommendation note which was transmitted to the USG for DPI stated that the selection panel recommended "five candidates . . . , *in the following order*" (my emphasis), thus ranking the selected candidate first and the applicant second. The recommended candidates were not listed in alphabetical order; they were listed in accordance with the scores assigned to them by the panel, with the highest-scoring candidates first, although the scores were not reflected. If not for the manipulation of the scores by the applicant's supervisors, the applicant would have had the highest score, and, in the absence of any evidence from the respondent as to any other factors that influenced the panel's ranking of the candidates, she would have been ranked as the top candidate.

21. Once the applicant raised sufficient doubt as to the propriety of her non-selection, it was for the respondent to counter the applicant's claims and to show that the staff member's statutory right to full and fair consideration was satisfied (*Sefraoui* UNDT/2009/095, *Kasmani* UNDT/2009/063, *Nogueira* UNDT/2009/088, *Parmar*

UNDT/2010/006, UN Administrative Tribunal Judgment No. 362, *Williamson* (1986)). The respondent has not proffered or sought to proffer any evidence as to what factors could have led to the non-selection of the applicant had she remained the highest scoring and ranking candidate, and I therefore conclude that the only relevant factors were the evaluation narrative, scoring, ranking and the order of recommendation.

22. With respect to the final evaluation narrative, although I accept that sec 9.2 of ST/AI/2006/3 vests a certain discretion in the head of department/office to select the candidate he or she considers to be best suited for the functions, it is clear from sec 9.2 that the proposed selection of the recommended candidate must be supported by a documented record. In this case, the documented record constituted a list of the candidates recommended and ranked by the selection panel preceded by a short evaluation of each candidate. The final evaluation narratives for both the applicant and the successful candidate, attached to the list of recommended candidates, were generally favourable. However, although the evaluation of the applicant in this document is similar to the individual evaluation sheet prepared by the panel, the final evaluation of the successful candidate was different from what was stated in the individual evaluation sheet. Specifically, both the individual evaluation sheet and the final evaluation attached to the list of recommended candidates stated that the applicant had “strained interpersonal relations with colleagues from time to time”. However, the selected candidate’s weakness identified in his individual evaluation sheet was not mentioned in the document transmitted to the USG for DPI. Namely, the identified weakness was that “the staff member has improved his interpersonal skills in a significant way and is now able to maintain collegial relationships with his colleagues”, which indicated that he, too, at some stage had problems with interpersonal skills.

23. To my mind, the importance of the scoring and ranking of the candidates in the ultimate selection decision is further demonstrated by the fact that the applicant’s supervisors concentrated their efforts on manipulating the scores and the resultant

ranking, to achieve their desired result. Had the scoring not been so significant, and had there been other, more important factors capable of influencing the selection process in the manner desired by the supervisors, why would they alter the scores? I conclude, in the absence of any contrary explanation by the respondent, that the panel's evaluation narrative, scoring, and ranking order determined the final selection decision. Indeed, candidate B, who was at the top of the list, was selected.

24. The respondent accepts the JAB's conclusion that the applicant's rights were violated. The JAB found that the respondent had tainted the process by the "careless and untoward behaviour" of the supervisors, noting that management had the right to select the candidate of its choice but that the selection process should be handled responsibly and transparently and that in its view "[the] selection process and [the] actions bespoke of a lack of free and fair treatment". This Tribunal is not bound by the findings of the JAB (although the respondent's admissions are, of course, instructive). I find that the acts of the supervisors cannot be described simply as mere procedural carelessness as they evinced the necessary animus such as to taint the process by bias, prejudice, lack of transparency and irregularity from the outset.

25. The JAB also found, and the respondent has accepted, the exchange of the emails to be "suspect and troubling", and the intentions of the supervisors "obvious" and "crystal clear" in that they intended, "after the fact, to 'tweak' the scores to reflect their desired result". I find that the words "How does her score compare with others?" show that the supervisors were concerned with how the applicant compared with the other candidates, not just the selected candidate, demonstrating bias and prejudice against the applicant. I find that the conduct of the supervisors indicates overt favouritism for the successful candidate and *mala fides* against the applicant, thus constituting unfair treatment.

26. I disagree with the respondents' contention that there is no causal connection between the violation of the applicant's rights and her non-selection for the post. The applicant was, in fact, the top candidate (ie the one with the highest score), one of only two recommended candidates with experience of serving as the Officer-in-

Charge of the Unit, and the only female. Although it is not absolutely certain that the applicant would have been selected had the scores not been manipulated, in the absence of any other explanation, I find that the probability of her selection as the top candidate on the panel's list would have been so high as to fully warrant the conclusion that she would have been selected and appointed. (See *Koh* UNDT/2010/040, *Hastings* UNDT/2010/071 and *Beaudry*, Order No. 101 (NY/2010).). I therefore find that the applicant would have been selected and, as a consequence of her non-selection, suffered actual damage for which she must be adequately compensated.

27. In any case, if I am at all mistaken in the above view, from the tone of the emails and the surrounding circumstances, there is credible evidence of improper motivation, and I find that the process was so fatally and fundamentally flawed, (particularly in the absence of any explanation from the respondent), such as to seriously question the propriety of the appointment of the selected candidate. The decision to appoint the selected candidate could *ipso facto* be declared null and void but in this instance the rights of the selected candidate, who was not a party to the proceedings, would be affected, and, in any event, this is not the relief claimed by the applicant. Therefore, the Tribunal will only consider the appropriate award of compensation.

Remedies

28. The respondent submits that the Secretary-General has taken note of the JAB's recommendation that the applicant should be fully and fairly considered for all available positions in the future. This recommendation and its adoption give the impression that the applicant has obtained some extraordinary relief. However, I find that it confers no priority upon the applicant, but simply places her in the queue with all other candidates for any other future positions; since, like any other staff member, she already has a right to be considered fully and fairly. As a remedy, the JAB's recommendation and its endorsement by the Secretary-General are therefore

meaningless. Therefore, the only relief received by the applicant thus far is the compensation in the amount of three months' net base salary. The applicant contends this is insufficient.

29. Each case must be adjudicated on the basis of its own facts and surrounding circumstances. In my view, the correct starting point for the award of compensation in the current case is the type and length of contract that would have been offered to the applicant had she been selected for the post.

30. I find that the applicant's submission that there is near-certainty that she will continue to work for the UN until her retirement age verges on the highly speculative. It does not take into account the normal contingencies and uncertainties which may and frequently do intervene in the average working life such as early retirement, career change, death or disability, lawful termination and so on. It may also be the case that at some point the applicant will be promoted to a P-4 post, but it is uncertain if (and when) this will happen. I am willing to accept that certain assumptions can be made, but they must be reasonable. The respondent submitted, and I accept, that had the applicant been selected, she would have been given a two-year fixed-term contract at the P-4 level, step VII. Thus, I find that the proper basis for the determination of the appropriate compensation is that the applicant was deprived of her earnings and relevant entitlements and benefits at the P-4 level for two years. Therefore, the actual damage should be calculated based on the difference between the actual salary, benefits and entitlements at the P-3 level and step held by the applicant at the relevant time period and those that the applicant would have received at the P-4 level and step she would have received, for two years.

31. Although in her initial application to the former Administrative Tribunal the applicant did not mention any emotional distress suffered as a result of her supervisors' actions, in her later submissions to the Tribunal she stated that the compensation in the amount of three months' salary given to her by the Secretary-General may be sufficient to recompense her only for "moral damages", which I understand to mean emotional distress. Although I find that it is possible that, as a

result of the actions of her supervisors, the applicant did suffer some emotional distress, the applicant's submission lacks specificity in this respect and in regard to any further damages she may be claiming and requires further particulars. As the UN Appeals Tribunal stated in *James* 2010-UNAT-009 and *Tabari* 2010-UNAT-030, to be recompensed for emotional distress and anxiety (moral damages), the applicant must articulate her submission in this respect and provide evidence of injury (see also *Hastings* UNDT/2010/071). Further, there can be no one-size-fits-all in the award of compensation. Each case must be seen on the basis of its own facts and surrounding circumstances and the mitigating and aggravating circumstances of the case (including the nature and the circumstances of the wrongdoing).

32. Finally, with respect to the applicant's request that she be selected for the next available P-4 post in her field, I do not find it appropriate to order the Organisation to select a particular candidate to some future post (see *Parker* UNDT/2009/013). Such an order would go against the competitive nature of the selection process established by the Organisation and would prejudice the rights of other candidates to receive full and fair consideration.

33. The parties are directed by the Tribunal to attempt to resolve the issue of compensation between themselves in the light of this judgment and case law of the Dispute Tribunal and the Appeals Tribunal. The three months' net base salary already paid to the applicant is to be taken into account when calculating compensation for the loss suffered by the applicant. If the parties are unable to reach a resolution, I will order further submissions, including with respect to actual damages and emotional distress suffered by the applicant, with a view to assessing the appropriate remedies in this case.

Conclusion

34. For all the reasons stated above, the decision not to select the applicant was in violation of her right to a full and fair consideration for the contested post and I find

that there was a causal connection between this violation and the applicant's non-selection, for which she must be properly compensated.

35. By Monday, 12 July 2010, the parties are ordered to file a joint submission stating whether they have reached an agreement on compensation in light of this judgment. If the parties are unable to reach an agreement, they will be ordered to file further submissions.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 25th day of June 2010

Entered in the Register on this 25th day of June 2010

(Signed)

Hafida Lahiouel, Registrar, New York