

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:

UNDT/NY/2009/006/

JAB/2007/050

Judgment No.: UNDT/2010/040

Date: Original: 5 March 2010 English

Before:

Judge Adams

Registry:

New York

Registrar:

Hafida Lahiouel

Introduction

- 1. On 20 November 2009 the Tribunal delivered judgment in relation to liability (UNDT/NY/2009/078), finding that the respondent had breached its contract of employment with the applicant and reserving the question of compensation, seeking further submissions on this aspect of the case. The facts are set out sufficiently in that judgment and do not need to be repeated except for some details. The applicant was a senior officer on an abolished post seeking other employment with the United Nations whilst on special leave without pay. He had entered into a separation agreement, one of the conditions of which was that United Nations Development Programme (UNDP) would assist him in specified ways to obtain another post. He had been a candidate for a large number of posts for which he was not selected. On the other hand, his evidence was (and I accept) that he was not suitable for many of these posts, because of the specialised nature of his qualifications as against the requirements of the positions. Two suitable vacancies were advertised, with the period for applications reduced from the two weeks minimum period specified in the relevant guidelines to seven days. In the circumstances (presently irrelevant) this precluded his making a timely application.
- 2. The applicant, in essence, lost the opportunity to compete for remunerative employment for which he was qualified. The question for determination is the value of this loss.

Applicant's submissions

3. The applicant submits that, had he been short-listed, there would have been three candidates for each of the two posts, and therefore he had a one in three chance of being selected for one of the posts. In all likelihood, the contract would have had been extended for an additional two years past its initial twelve month term, as has indeed happened.

- 4. So far as the likelihood of selection is concerned, under staff rule 109.1(c)(i) the applicant was entitled to have priority subject to "relative competence ... integrity and to length of service". The applicant had been separated at the P-5 level, step X level after more than eighteen years of unblemished service and relevant experience in communication posts with UN agencies. There was no issue with his integrity. Of the four candidates in fact short-listed, three had fewer total years of service than the applicant, none had as much supervisory experience, one was not an internal candidate and the other three held only fixed-term appointments, although one of them was a displaced staff member.
- 5. The applicant's total after-tax earned income for the 48 months from 1 January 2006 to 31 December 2009 was the equivalent of USD72,860. If compensation is to be valued as a percentage of the relevant emoluments, earned income should be considered as mitigating only on a correspondingly proportional basis and only to the extent that it coincides with the timing and is proportional to the duration of the period for which compensation is to be considered.
- 6. Compensation should be calculated upon the basis that the applicant lost both his base salary and the post-adjustment for New York. Since 2003, the applicant's wife had been enrolled in a doctoral program at Columbia University in New York and was therefore obliged to remain there to complete her studies. The applicant and his wife could not relocate in the timely and planned manner that a normal retirement upon completion of his UN career in due course would have permitted. He did not have the rig

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month that has lapsed since the separation date (cob). No return of received indemnities is required if you are employed after the same number of months (maximum 21) has lapsed. You are obligated to inform UNDP of any re-employment within the UN system.

11. If the Tribunal decides to proceed on the basis that the applicant would probably have been appointed to one of

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out here. He had earlier failed to obtain the post of Head, Communications Unit (P-4) for which, also, his qualifications seemed to make him eminently suitable, for reasons which were identified on interview.

The UNAT jurisprudence

- 15. It is not useful in this case to analyse the judgments of the UN Administrative Tribunal, cited by the respondent. They do not contain any substantive discussion of the nature or attributes of compensation, let alone state any relevant principles. The compensation awarded in those cases reflects an overall conclusion as to the appropriate sum, mixing together the nature of the process failures and the extent of fault that caused the wrong decision. There is no focus on the extent, if any, of the appellant's economic loss and the manner in which it should be calculated. A distinct element of these decisions appears to contradict the requirement that punitive compensation should not be awarded.
- 16. A system of justice requires a rational approach, not only to fact-finding but also the measurement of compensation and, to my mind, this Tribunal needs to approach both these questions by applying reasonable and common sense principles rooted in the real world and as transparent as the process sensibly allows. I find mylsoglf, therefore, insufficiently informed by the judgments of the Administrative

which a contracting party (here, the applicant staff member) has actually sustained by reason of a breach of contract for which compensation must be awarded. One such subsidiary rule is that the applicant bears the onus of establishing the extent of loss on the balance of probabilities. In many cases, proof of the full extent of the loss sustained will involve establishing an evidentiary foundation for positive and detailed ultimate findings upon the balance of probabilities. There are, however, cases where considerations of justice or the limitations of the curial method render ultimate findings, about what would have been or will be, impracticable or inappropriate. In such cases, compensation must be assessed on some basis other than findings about what would have ultimately happened if the breach had not occurred or about the precise ultimate implications of the situation which exists after the breach. In particular, it may be appropriate that damages be assessed by reference to the probabilities or the possibilities of what would have happened or will happen rather than on the basis of speculation that probabilities would have or will come to pass and that possibilities would not have or will not. If, for example, what the applicant has lost by reason of the respondent's breach of contract is a less than fifty percent but nonetheless real and hence valuable chance of being appointed in circumstances where the Tribunal can decide that a proportionate figure approximately reflects the chance of success but can do no more than speculate about whether, but for the respondent's breach, the applicant would have actually succeeded, it would affront justice to hold that the applicant was entitled to no compensation at all for the lost chance of attempting to obtain the appointment. In such a case, considerations of justice require that the applicant be entitled to recover the value of the lost chance itself and that the respondent not be allowed to take advantage of the effects of its own wrongful act to escape liability by pointing to the obvious, namely, that it is theoretically more probable than not that a less than fifty percent chance of success would have resulted in failure.

19. It is not only the positive value of a chance of a benefit which may, in appropriate circumstances, require to be taken into account in the assessment of damages for breach of contract. The loss involved in being subjected to a significant

Case No. UNDT/NY/2009/006/JAB/2007/050 Judgment No. UNDT/2010/040 award of compensation should reflect the degree of probability, whether more or less than fifty percent, that it will occur. In this case, 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.

23.

- 28. In my opinion, the applicant had a real and substantial chance of appointment within a range oscillating fairly closely around the even mark. Since it is necessary to select the probability, I find that his chance of success was fifty percent.
- 29. The other relevant issue, so far as the appointment itself is concerned, is its likely duration. The respondent points to a number of features which make it uncertain that the applicant, if he were appointed, would have stayed for the three years he envisaged. He may have had to retire for health reasons or because of suffering some accident and steps might have been taken, at all events, to terminate him. There is no evidence that there are any issues with the applicant's health. Of

evidence and should be supplied by the respondent within seven days and the agreed date notified to the Registry.

31. Accordingly, it seems to me, doing the best I can, that the applicant lost a fifty percent chance of obtaining employment paid at the P-5 level for the period from the date notified by the respondent in 2006 to 16 January 2010. The amount that he would have received was, of course, his full emoluments including post-adjustments, less the staff assessment. The applicant submitted an amount, but I am unsure that it reflects this sum. The parties have seven days to agree a figure and submit it to the Registry. In the absence of agreement each may submit a written submission with in the same period and I will determine the issue.

Deductions

- 32. The respondent's submissions in relation to the amounts paid on termination should be accepted. Essentially, this adjustment must be made to avoid double payment. However, the actual amounts which ought to be deducted for the period from commencement date to April 2007 are not disclosed in the evidence. The parties have seven days provide a figure. Failing agreement, written submissions must be filed within the same period, and I will determine the question.
- 33. There is no basis for supposing that the applicant had a greater capacity to earn an income than that which yielded the sum disclosed and, accordingly, no greater amount should be taken into account. I do not see any logical or just basis for reducing this adjustment simply because the applicant will not be compensated for the complete loss of the P-5 salary. The entire amount (net of taxes) earned by the applicant from commencement date to 16 January 2010 should be taken into account.
- 34. Article 10.5 of the Tribunal's statute limits the compensation normally to be awarded to two years' base salary, presumably of the applicant, or, where relevant, of the post wrongly denied. This amount is to be regarded as a quasi-jurisdictional limit and does not inform the assessment of compensation. If, at the end of the day, the

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same time, there is no substantial basis for distinguishing between the character and attributes of the employment he otherwise obtained or would be likely to obtain and the work envisaged with the UN.

Order

38. The parties are to submit the commencement date and figures as agreed within seven days of this judgment or, failing agreement, written submissions by the same date.

(Signed)

Judge Michael Adams

Dated this 5th day of March 2010

Entered in the Register on this 5th day of March 2010

(Signed)

Hafida Lahiouel, Registrar, New York