



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

MIRKOVIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), contests the decision whereby she was denied the right to appeal to the Central Examinations Board the decision that she was

6. On 19 October 2010, the Applicant was informed that she was ineligible to take the exam because she did not meet the minimum academic qualifications and/or experience required for the Human Rights occupational group.

7. By email dated 22 October 2010, the Applicant asked the Chief of the Examinations and Tests Section at the Office of Human Resources Management (“OHRM”), United Nations Secretariat, to provide her with the contact details of the Chair of the Central Examinations Board (“CEB”) so that she could submit an appeal against the above-mentioned decision in accordance with paragraph 3.8 of ST/AI/2010/7. On the same day, the Chief of the Examinations and Tests Section responded to the Applicant to send her appeal to OHRM-GtoP@un.org.

8. On 26 October 2010, the Applicant appealed to the CEB for review of the decision on her ineligibility pursuant to paragraph 3.8 of ST/AI/2010/7. The appeal was directed to the Chair of the CEB and copied to the Chief of the Examinations and Tests Section, OHRM.

9. By email dated 1 November 2010 addressed to the Chief of the Examinations and Tests Section, OHRM, the Applicant enquired as to when she could expect a decision on her appeal.

10. On 8 November 2010, the Applicant called the Chief of the Examinations and Tests Section, OHRM, who informed her orally that applications for the G to P exam from ICTY staff were not reviewed by the CEB and that ICTY staff members did not have the right to appeal a negative decision on their application, unlike other Secretariat staff.

11. By emails dated 9 and 25 November 2010, the Applicant requested the Chief of the Examinations and Tests Section, OHRM, to confirm in writing the decision notified orally on 8 November. He never responded.

12. The written component of the 2010 ICTY G to P exam was held on 1 December 2010.

13. By letter dated 5 January 2011, the Applicant requested management evaluation of the decision communicated orally to her on 8 November 2010 by the Chief of the Examinations and Tests Section, OHRM, whereby she was denied the right to appeal to the CEB the decision that she was ineligible to take the 2010 ICTY G to P exam.

14. By letter dated 18 February 2011, the Management Evaluation Unit (“MEU”) at the United Nations Secretariat Headquarters confirmed to the Applicant that with her agreement, the matter had been put in abeyance pending attempts at informal resolution.

15.

19. On 21 May 2011, the Applicant filed the present application with the Tribunal. The Respondent submitted his reply on 23 June, and the Applicant filed observations on 1 July.

20. By Order No. 36 (GVA/2012) of 13 February 2012, the Tribunal informed the parties that in its view the case could be dealt with on the papers, without any hearing, but that should a party object, a hearing would be held on 29 February 2012. Both parties responded that they did not have any objection to the matter being determined on the papers.

Parties' submissions

21. The Applicant's principal contentions are:

- a. As regards receivability, the contested decision was not a

ineligible to sit the examination. The denial of such a right is in breach of the principle of equal treatment;

d. Her right to appeal was not upheld until six months after she filed an appeal with the CEB and five months after the G to P exam was held. Even though the Administration ultimately concluded that it had violated her right to appeal and overturned its decision, it must still be held responsible for the violation of her procedural right to appeal and the undue delay in respecting such procedural right;

e. Between 22 October and 8 November 2010, as she believed that her eligibility might be recognized on appeal, she continued her intensive preparation for the exam on nights and week-ends. She even hired a baby-sitter for five hours per day on the week-ends of 22 October, 29 October and 5 November. Her studies required her to sacrifice time with her family, and especially with her two young children. Upon learning on 8 November 2010 that she had no right to appeal, she felt humiliated. Lastly, the process of vindicating her right has been a stressful, time-consuming and lengthy process. Accordingly, she is entitled to compensation for the unlawful discrimination she suffered, the excessive procedural delay, the breach of her moral and procedural rights and for the stress suffered and the time spent studying away from her family.

22. The Respondent's principal contentions are:

a. The application is not receivable *ratione materiae* on two grounds.

32. The last issue before the Tribunal is thus whether the Applicant suffered any damage as a result of the contested decision, which warrants the award of compensation.

33. The Applicant requested compensation in her request for management evaluation “for the breach of procedural rights, moral injury and emotional distress”. She explained *inter alia* that:

When my procedural right to appeal was denied, it put me through a difficult period which caused me significant emotional distress.

... [E]ven though my application to participate in the examination was denied, I nevertheless continued to study for the exam, hoping that eventually my procedural rights would be respected and I would be allowed to sit for the examination.

The time spent studying for the exam, combined with the uncertainty about whether indeed I would be allowed to sit for the exam, put me through considerable stress and took valuable time away from my family life.

34. In his decision reversing the contested decision, the Secretary-General rejected the Applicant’s claim for compensation on the grounds that she had not suffered an actual economic loss, nor submitted “any particulars or evidence” of emotional distress.

35. In her application to the Tribunal, the Applicant thus submitted additional information in support of her claim for compensation.

36. She requests compensation for the delay in respecting her procedural right to appeal, claiming that the *ex post facto* remedy ordered by the Secretary-General—i.e., recognizing her right of appeal after the exam had already taken place—did not repair any of the damage suffered. She explains that:

On 22 October 2010, when [the Chief of the Examinations and Tests Section, OHRM] told me that I had the right to appeal, I reasonably relied on his statements and the relevant administrative instruction, contacted my professors, prepared an appeal, hired a week-end babysitter for my children and continued to study intensively. When my procedural right to appeal was denied, it caused me uncertainty, humiliation and stress. It also took away

from my time with my family in the weeks when I continued to study – prior to learning that the Administration was unwilling to hear my appeal. Lastly, the process of vindicating my right ... has been a stressful, time-consuming and lengthy process ...

37. The Tribunal finds that the Applicant's due process rights were violated by the contested decision and that any reasonable person in the Applicant's situation of preparing for a competitive exam, especially one that could have such a significant impact on her career, would have suffered stress and emotional distress. The Tribunal further finds that the contradictory information received by the Applicant on 22 October 2010 and 8 November 2010 on her right of appeal, and the subsequent failure of the Chief of the Examinations and Tests Section, OHRM, to respond to her requests for a written confirmation added to the stress and injury suffered. In the circumstances of the case, reversal of the unlawful decision *after* the exam had already taken place was not sufficient to repair the damage suffered by the Applicant.

38. In *Wu* 2010-UNAT-042, the Appeals Tribunal held that:

While not every violation of due process rights will necessarily lead to an award of compensation, the UNDT found in this case that [the applicant] suffered damage, in the form of neglect and emotional stress, for which he is entitled to be compensated. The

Conclusion

41. In view of the foregoing, the Tribunal DECIDES:
- a. The Applicant is awarded compensation in the amount of EUR2,000;
 - b. The compensation set in sub-paragraph (a) shall bear interest at the US Prime Rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the US Prime Rate 60 days from the date this Judgment becomes executable;
 - c. All other pleas are rejected.

(Signed)

Judge Thomas Laker

Dated this 24th day of February 2012

Entered in the Register on this 24th day of February 2012

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry