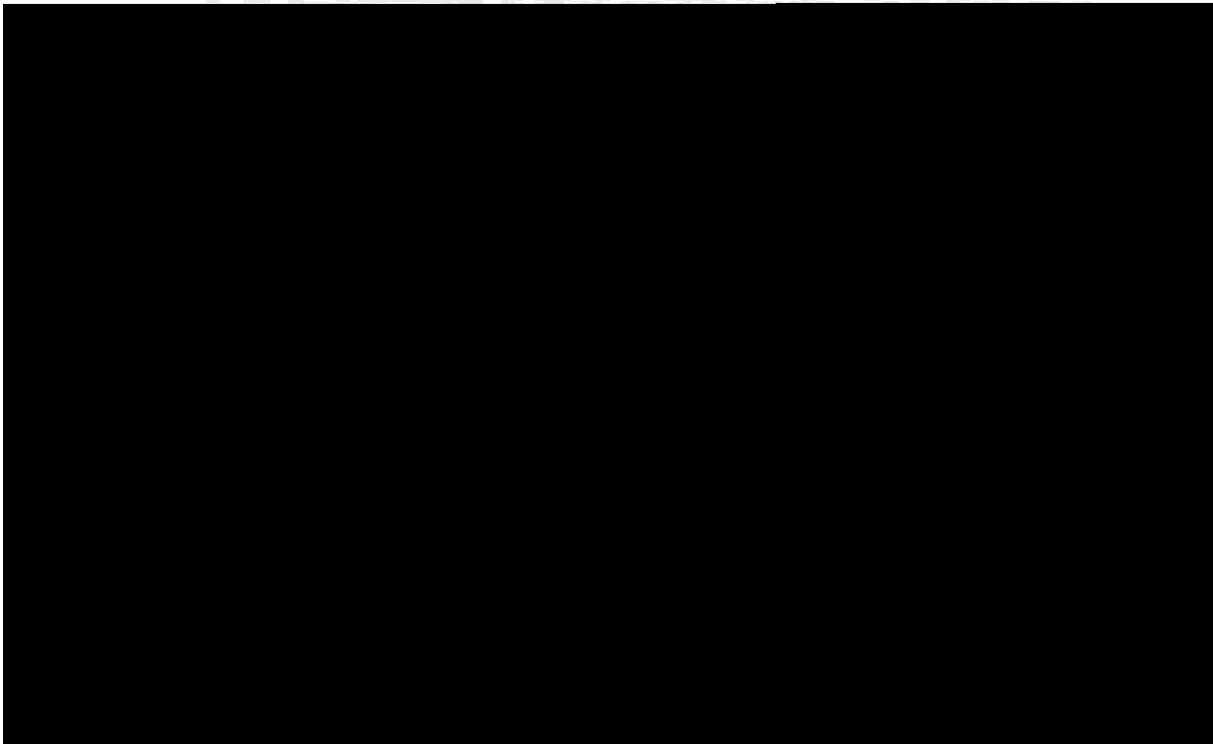




Judgment No. 2016-UNAT-676



JUDGE MARY FAHERTY , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has befo

9. By e-mail dated 17 November 2014, the Assistant Secretary-General (ASG) of OHRM denied Mr. Wilson's request. The ASG/OHRM reasoned, *inter alia*, that "[t]he exception would be considered as prejudicial to the interests of any other similarly situated staff member or group of staff members for other positions in the same and other categories advertised across the Secretariat that have not applied to the same [or] similar positions following ... paragraph 6.1 of ... ST/AI/2010/3".

10. Mr. Wilson unsuccessfully sought management evaluation of that decision.

11. On 27 January 2015, Mr. Wilson filed an application to the UNDT.

12. In Judgment No. UNDT/2015/125, now under appeal, the UNDT held that Mr. Wilson's request for an exception was not given proper consideration by the ASG/OHRM.

15. The UNDT erred in fact and law in finding that the ASG/OHRM had considered Section 6.5 of ST/AI/2010/3 to be the only possible exception. The evidence supports the conclusion that the ASG/OHRM had a correct understanding of the law and there is no evidence to support the UNDT finding to the contrary. Moreover, the UNDT's inference that the failure to cite the Appeals Tribunal precedent in the decision meant that the

Mr. Wilson's Answer

20. The UNDT was correct in its findings. The ASG/OHRM's consideration of Mr. Wilson's request for an exception was based on improper or inadequate considerations.

21.

Marsh,⁹ *Mezoui*¹⁰ and *Asariotis*,¹¹ while it cast aside the only two cases most relevant to his case, *Hastings* and *Lutta*,¹² specifically in relation to the percentage analysis.

27. The award of six months' salary requested by Mr. Wilson was both justified and substantiated in the context of his lost salary, pension emoluments, and the jurisprudence established by the Appeals Tribunal.

28. Mr. Wilson's experience or qualifications is not an issue of speculation as the UNDT asserted in paragraph 62 of its Judgment. Mr. Wilson maintains that he had sufficient experience and qualifications for the post and it was not a function of the UNDT to question that fact, nor speculate on the ASG/OHRM's implied endorsement of his experience and qualifications.

29. The UNDT failed to exercise its jurisdiction by not requesting information from the Secretary-General which was necessary to establish the probability of Mr. Wilson being recommended for the promotion. Such information may have been intentionally withheld by the Secretary-General.

30. Mr. Wilson requests that the Appeals Tribunal exercise its power to order the Secretary-General to provide information regarding the number of applicants, the number of the eligible applicants, and the number of the applicants that advanced to the next stage of the selection process for the Director of Ethics Office position. He also requests that the Appeals Tribunal order the United Nations Joint Staff Pension Fund to provide information needed for a determination of his lost pension emoluments and appropriate financial relief in accordance with *Solanki*.

31. Additionally, Mr. Wilson requests that the Appeals Tribunal award him three months' salary as this sum would be "the most fair and appropriate relief".

⁹ *Marsh v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/035.

¹⁰ *Mezoui v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/098.

¹¹ *Asariotis v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/144.

¹² *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117.

The Secretary-General's Answer

32. Mr. Wilson has failed to show that the UNDT committed an “error of procedure” and rendered an “inherently unfair and prejudicial” award. His reliance on *Hastings* and *Lutta* is misplaced as those cases are distinguishable from the present one. Moreover, contrary to Mr. Wilson's argument, the UNDT did consider the compensation awarded in the cases cited in its Judgment.

33. Mr. Wilson has failed to show that the award of damages is unjustified and unsubstantiated. His argument that the UNDT should have included calculations on lost salary and pension contributions through his age of retirement lacks merit. He did not provide the UNDT with any evidence to support his contention that he would have been selected for the post.

34. Mr. Wilson has failed to demonstrate that the UNDT erred or failed to exercise due diligence by not requesting additional information from the Secretary-General. His claim that the Secretary-General “intentionally” withheld information has no merit. Information on the number of candidates who applied for the post of Director of the Ethics Office and advanced to later stages in the selection process for the post was irrelevant to the dispositive issue in the case. Additionally, it was Mr. Wilson's burden to substantiate his claim for compensation. At no time during the proceedings did he produce, or request the UNDT to order the production of, the information he considered withheld.

35. Mr. Wilson has not shown any exceptional circumstances under Article 2(5) of the Statute of the Appeals Tribunal warranting the production of any new evidence. He has also failed to show any error by the UNDT that would warrant the modification of the award of compensation.

36. Lastly, the Secretary-General challenges the admission of documents annexed to Mr. Wilson's appeal.

37. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

38. The Secretary-General contends that rather than finding as it did, the Dispute Tribunal should have affirmed the contested decision as a proper exercise of the Secretary-General's discretion. Specifically, the Secretary-General contends that the Dispute Tribunal:

Erred in law and in fact in finding that the ASG/OHRM had considered Section 6.5 of ST/AI/2010/3 as the only possible exception to Section 6.1 of the said statutory instrument;

Erred in fact and in law in finding that the ASG/OHRM had not properly exercised her discretion;

Erred in fact and in law by substituting its own decision for that of the Secretary-General; and

Erred in law and in fact when it awarded damages to Mr. Wilson.

39.

affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

As provided for in Staff Rule 12.3(b), Mr. Wilson requested that an exception be made to Section 6.1 on the grounds, *inter alia*, that he met the required competencies as well as the required educational and work experience requirements; that he had been placed on the D-1 roster since July 2013; that he was performing duties at the D-1 level since May 2014; and that this was perhaps one of his last opportunities to be promoted in light of his due retirement in approximately five years' time.

42. The response of the ASG/OHRM to the request was as follows:

This refers to your interoffi

determine whether they meet the minimum requirements as stated in the job opening including their current personal grade.

Exceptions to the above mentioned eligibility requirements on current personal grade (paragraph 6.1) are allowed for and communicated in paragraph 6.5 of the same ST/AI, which sets out that a staff member holding a permanent, continuing, probationary or fixed-term appointment (with no appointment limitation) assigned from a headquarters location, including regional commissions, to a position one level higher than his/her current grade in a peacekeeping operation or special political mission, where a lien is maintained against a position at the parent duty station, may temporarily be promoted to the level of the position in the peacekeeping operation or special political mission for the duration of the assignment. A staff member temporarily promoted may apply during his/her assignment in a peacekeeping operation or special political mission to job openings one level higher than his/her temporary grade level, provided that he/she has spent more than 12 months continuously in the peacekeeping operation or special political mission. This is the exception to the rule and the determination made in the best interest of the Organisation to ensure transparency, and opportunity for those serving in locations of [peacekeeping operations (PKOs)] or [special political missions (SPMs)].

I would also like to highlight that every effort is made to ensure equity and fairness in recruitment and ensure equitable treatment of staff[.]

Having analysed your request and the ruling in this matter, I regret to inform you that I am unable to grant an exception to the eligibility requirements as set out in ST/AI/2010/3 in order for you to apply for the post of Director Ethics, D-2; JO 14-ETH-Ethics Office-37595-D-New York (G)[.] The exception would be considered as prejudicial to the interests of any other similarly situated staff member or group of staff members for other positions in the same and other categories advertised across the Secretariat that have not applied to the same [or] similar positions following [...] paragraph 6.1 of the ST/AI/2010/3.

I hope this helps to clarify your eligibility for higher level positions.

43. The Dispute Tribunal impugned the contested decision on the basis, *inter alia*, that the ASG/OHRM's e-mail "strongly suggests that the ASG considered that the only exceptions that could be granted to [S]ec[tion] 6.1 were under the provisions of [S]ec[tion] 6.5, which would in turn suggest that no other exceptions outside of [S]ec[tion] 6.5 of ST/AI/2010/3 were possible".¹³

¹³ Impugned Judgment, para. 40.

44. The Secretary-General takes issue with the Dispute Tribunal's interpretation of the ASG/OHRM's response to Mr. Wilson and contends that the evidence clearly supports the conclusion that the ASG/OHRM had a correct understanding of the law and that there is no evidence that the ASG/OHRM considered that Section 6.5 was the only exception to Section 6.1.

45. There is no doubt that the ASG/OHRM embarked upon a totally unnecessary discourse on the provisions of Section 6.5 of ST/AI/2010/3 when it was perfectly clear that Mr. Wilson's particular circumstances would not invoke the provisions of that section, given that he was not employed in a peacekeeping operation or special political mission. The question is whether this is sufficient to vitiate the decision. We do not believe that it is.

46. We agree with the Secretary-General

48. The ASG/OHRM invoked the third element as the basis upon which to refuse her discretion to grant the exception sought by Mr. Wilson, namely that it would be “prejudicial to the interests of any other similarly situated staff member or group of staff members ... that have not applied to the same [or] similar positions following ... paragraph 6.1 of ... ST/AI/2010/3”. The Dispute Tribunal interpreted this as a reference by the ASG/OHRM to staff members “who have *not* applied for [the] *‘same [or] similar positions’*, in the *past*”.¹⁴

49. We agree with the Secretary-General that it was open to the ASG/OHRM to take into consideration that the granting of an exception would be prejudicial to staff members who, in deference to Section 6.1 of ST/AI/2010/3, had not applied for the post applied for by Mr. Wilson. Furthermore, we find no basis for the UNDT having concluded that the ASG/OHRM’s rationale in this regard related to the past. The clear impression from the ASG/OHRM’s e-mail is that she was referring to staff members who may have refrained from applying for the post in question because of Section 6.1. However, the Secretary-General’s submission that the ASG/OHRM’s rationale can be read as encompassing prejudice to applicants for the advertised position is not sustained by the language used in the e-mail.

50. Insofar as the ASG/OHRM relied on the interests of other staff in declining to exercise her discretion, we do not find any reversible error in the failure to specify any “identifiable” or “sufficiently comparable” staff interests as we find that the reason actually provided by the ASG/OHRM was both reasonable and sufficient in all the circumstances.

51. We find that there was no basis for the UNDT to conclude that “no proper consideration

52. Staff Rule 12.3(b) accords the Secretary-General discretion to grant an exception to the Staff Rules.

53. As to how this discretion must be exercised, in *Benchebbak*, the Appeals Tribunal stated:¹⁶

When judging the validity of the Secretary-General's exercise of discretion it is not the role of the UNDT to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the

56. The present case was not one where the ASG/OHRM improperly precluded the exercise of discretion. Discretion was exercised in regard to Mr. Wilson's request. It was not however exercised in his favour. While the Dispute Tribunal has held that the discretion was improperly exercised, for the reasons we have set out herein we do not agree and find that the Dispute Tribunal erred in law.

57. Accordingly, the Secretary-General's appeal succeeds. The UNDT Judgment is reversed.

58. As the Dispute Tribunal Judgment is reversed, it follows that Mr. Wilson's appeal on the quantum of damages is rendered moot and dismissed accordingly.

Judgment

59. The Dispute Tribunal Judgment is reversed.

Original and Authoritative Version: English

Dated this 30th