



NATIONS UNIES

Case No. 2011-229

Simmons

(Appellant/Respondent on Cross-Appeal)

v.

Secretary-General of the United Nations

(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Kamaljit Singh Garewal
Judge Jean Courtial

Judgment No.: 2012-UNAT-221

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellant/Respondent on cross appeal: [Redacted]

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assessment of the reasons for the Appellant's non-selection was manifestly unreasonable. Moreover, we accept the Respondent's contention that a completed e-PAS report for 2007-2008 could never have been available to the interview panel, given the timeframe of the interview process - October/November 2007.

6. The Appeals Tribunal is equally satisfied to uphold the Dispute Tribunal's finding that Ms. Simmons has not substantiated claims of bias or prejudice on the part of the interview panel.

7. Her appeal in this regard is dismissed.

The breach of Ms. Simmons' employment rights by virtue of the late completion of her e-PAS report for 2008-2009

8. Ms. Simmons appeals on the basis that the UNDT failed to award her reasonable compensation for the breach which occurred in this case and the stress caused to her as a result.

Secretary-General's cross- appeal

9. The Respondent has cross-appealed on the basis that the UNDT erred in law in determining that Ms. Simmons' application concerning her 2008-2009 e-PAS report was receivable. The Respondent submits that the delay in the finalizing of the e-PAS 2008-2009 report was never the subject of a request for administrative review on the part of the Appellant. It is therefore contended that in the absence of adherence to former Staff Rule 111.2(a), then in force, Ms. Simmons' application to the Dispute Tribunal should not have been received.

10. In urging the Appeals Tribunal to find that the UNDT erred on a question of law in receiving Ms. Simmons' complaint concerning her 2008-2009 e-PAS report, the Respondent cites the jurisprudence of this Tribunal in *Crichlow* that where a staff member "failed to request an administrative review on the matters the UNDT has no jurisdiction *ratione materiae*" to consider the request.¹ While this Tribunal unequivocally endorses this principle, the procedural sequences and developments in this case raise the question whether the Respondent is entitled to make the case in this appeal that the UNDT erred in law in determining the 2008-2009 e-PAS report issue.

¹ *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 31.

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actually harmed by the missing e-PAS reports, as she had made it to the interviews. As for Post 2, the UNDT found that Ms. Simmons had applied too late in time, and concluded that the appeal in that regard had no merits.

19. However, in the same Judgment, the UNDT found that the required procedures for completing Ms. Simmons' 2007-2008 and 2008-2 009 e-PAS reports were not followed, for which Ms. Simmons should be compensated. The UNDT awarded her a total of USD 3,500 as compensation: USD 500 for the delay in completing the 2007-2008 e-PAS report and the resulting stress caused to Ms. Simmons, and USD 3,000 for the delay in completing the

OPPBA had followed all the procedures on paper, but with a predetermination that she would not be the candidate. The results obtained from the Central Review Committee revealed that her competencies were not fairly considered and/or were unfairly assessed by a biased and prejudiced interview panel.

23. Ms. Simmons also maintains that the UNDT disregarded or minimized the weight and importance of her evidence while it appeared to be keen on accepting the biased and inadmissible evidence from the Respondent. In this regard, Ms. Simmons stresses that while the UNDT Judge, in Order No. 47 (NY/2011), decided not to allow any new facts and evidence introduced by the Respondent in his closing statement, she proceeded to do that by basing her Judgment on the inadmissible statements of the Respondent without exercising the UNDT's jurisdiction to award cost.

Secretary-General's Answer

24. The Secretary-General submits that Ms. Simmons has failed to establish any errors, in fact or in law. Ms. Simmons's arguments are unavailing. (See Ms. Simmons's comments on the Secretary-General's Answer, paras. 14-15.)

Considerations

28. The issues to be considered in this appeal and cross-appeal are as follows. Ms. Simmons contends that the UNDT erred in law and fact in the manner in which it determined that compensation of USD 500 was reasonable for the procedural breaches which occurred with regard to her e-PAS report for 2007-2008. She also contends that an award of USD 3,000 was not reasonable compensation for the procedural violation with regard to her 2008-2009 e-PAS report. Ms. Simmons further maintains that the Dispute Tribunal Judge erred in law and fact in determining that her candidature for Post 1 received full and fair consideration, and that the untimely preparation of Ms. Simmons' e-PAS reports did not impact on the decision not to recommend her for Post 1.

29. It is further pleaded that the UNDT erred in law in taking into account matters raised by the Respondent in his closing arguments despite the UNDT's own ruling in Order No. 47 (NY/2011) that it would not admit such matters.

30. The Respondent contends that the Appellant's pleas are without merit. The Respondent cross-appeals on the basis that the Dispute Tribunal Judge erred in law in finding Ms. Simmons's claim with regard to her 2008-2009 e-PAS report receivable. It is the Respondent's case that the delay in the completion of the 2008-2009 e-PAS report was never the subject of a request by Ms. Simmons for administrative review.

The award of USD 500 for the violation of Ms. Simmons' rights with regard to her 2007-2008 e-PAS report

31. On a perusal of the facts set out in the UNDT Judgment, it is not altogether clear whether in fact Ms. Simmons ever received her performance appraisal for 2007-2008. What is apparent is that the appraisal process stalled at the work plan stage. Indeed the Appellant's principal complaint was the delay in the completion of the work plan.

32. The Dispute Tribunal noted that once she received, on 11 June 2007, the general work unit plan for 1 April 2007 to 31 March 2008, Ms. Simmons submitted her first draft plan (as she was required to do under ST/AI/2002/3) on 16 July 2007, a response deemed by the Dispute Tribunal Judge to be "timely".

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consideration that the ultimate responsibility for the completion of the e-PAS report rests with the employer and noting, in particular, that some three months of the relevant timeframe had elapsed before Ms. Simmons was circulated with the general work unit plan.

39. Accordingly, we are of the view that the compensation awarded for the breach in question was manifestly insufficient and we thus substitute the UNDT's sum for an award of three months' net base pay to be computed on the basis of the salary the Appellant was drawing on 31 March 2008, with interest thereon at the US Prime Rate applicable on 31 March 2008 calculated from 31 March 2008 to the date of payment of the compensation. If payment of the compensation is not made within 60 days, an additional five per cent shall be added to the relevant US Prime Rate from the date of expiry of the 60-day period to the date of payment.

The UNDT's finding that the Appellant received full and fair consideration with regard to her candidacy for Post 1.

40. Having reviewed the Dispute Tribunal's findings on this issue and having regard to the submissions advanced by both parties, the Appeals Tribunal finds no reason to disagree with the Dispute Tribunal's assessment that, notwithstanding the fact that some of the Appellant's e-PAS reports were not available to the interview panel, ultimately that did not impact the decision not to recommend her for the post. The Dispute Tribunal is in the best position to assess matters of a factual nature and in the instant case we see nothing to suggest that the Dispute Tribunal's assessment of the reasons for the Appellant's non-selection was manifestly unreasonable. Moreover, we accept the Respondent's contention that a completed e-PAS report for 2007-2008 could never have been available to the interview panel, given the timeframe of the interview process - October/November 2007.

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make the case in this appeal that the UNDT erred in law in determining the 2008-2009 e-PAS report issue.

54. The Respondent submits that "...instead of treating the inclusion of the delay in the completion of [Ms. Simmons'] performance evaluation for the period 2008-2009 in the same manner", as the claim of harassment/intimidation, that is by excluding it, the Dispute Tribunal "erred by simply noting that [Ms. Simmons] had added this aspect to her 15 June 2009 Statement of Appeal, and on this basis alone considered the appeal receivable".

55. As already set out, the UNDT issued Order No. 325 on 10 December 2010, following a consideration of the submissions made by the Respondent (as the moving party) and the Appellant. The arguments advanced by the Respondent, as recited in Order No. 325, do not make any specific claim that the 2008-2009 e-PAS issue was not receivable *ratione materiae* although the Respondent-4 (ed [e70174ece/e155(t)164(hTuh)1550(4ining t)6([(a)1m[(a)10

57. Thus, while the Respondent set out a clear case (paragraph 42 above) as to why the Appellant's claim of harassment was not receivable *ratione materiae*, he did not under the heading "Contentions" highlight with any degree of particularity the claim that the 2008–2009 e-PAS issue was not receivable *ratione materiae*.

58. It is apparent that prior to formulating his submissions on receivability the Respondent had sight of the Appellant's complete statement of appeal of 15 June 2009, yet the specific argument the Respondent is now making does not appear to have been clearly canvassed before the UNDT. We are satisfied that had it been it would have been recited and addressed by the Dispute Tribunal Judge on 10 December 2010.

59. As part of his submissions to this Tribunal, the Respondent appended a "Request for Leave to Produce Evidence" as Annex 2, made to the UNDT on 3 March 2011, and maintains, at paragraph 41 of his submission, that in that Request the argument on the non-receivability of the 2008-2009 e-PAS issue had been "reiterated" before the UNDT.

60. The arguments advanced by the Respondent at paragraph 41 of his submissions, presumably in reference to the contents of paragraph 12 of Annex 2, do not find favour with this Tribunal on the basis that although the Respondent made passing reference to the issue of the receivability *ratione materiae* of the 2008-2009 e-PAS complaint at paragraph 12 of the Request, this reference was made subsequent to the time (which was prior to December 2010) when the Respondent specifically sought a ruling on whether the Appellant's claims were receivable.

61. It is our considered view that by virtue of the absence of any specific detailed argument as to whether the claim with regard to the 2008-2009 e-PAS report was receivable *ratione materiae* having been made prior to the UNDT Judge's ruling of 10 December 2010, the Respondent is now estopped from raising such issue on appeal before this Tribunal. Thus, given the particular circumstances of this case, the Appeals Tribunal is not satisfied to entertain the cross-appeal and it is accordingly dismissed.

62. The Appellant maintains that an award of USD 3,000 is not reasonable compensation for the breach which occurred in relation to her 2008-2009 e-PAS report.

63. In the course of her Judgment, the Dispute Tribunal Judge described the breach- a year's delay -as "clearly improper" and ruled that the Appellant had "swiftly and diligently under[taken] her duties in the process". On this basis and having regard to the history of violations of her

employment rights, we are of the view that manifestly the UNDT did not take sufficient cognizance of the seriousness of the breach, and the stress caused thereby. Accordingly, we substitute the award of USD 3,000 with compensation equivalent to three months' net base salary computed on the basis of the salary the Appellant was drawing on 31 March 2009, with interest on the award of compensation at the US Prime Rate applicable on 31 March 2009 calculated from 31 March 2009 to the date of payment of the compensation. If payment of the compensation is not made within 60 days, an additional five per cent shall be added to the US Prime Rate in effect on 31 March 2009 from the date of expiry of the 60-day period to the date of payment.

Judgment

64. The appeal is granted in part. The crossappeal is rejected. The UNDT's total award of USD 3,500 is substituted with an award of compensation equivalent to three months' net base salary in effect on 31 March 2008 and compensation equivalent to three months' net base salary in effect on 31 March 2009.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Courtial

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar