

Judgment No. 2015-UNAT-553

JUDGE DEBORAH THOMAS -FELIX , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/066, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 18 June 2014, in the matter of *Dia v. Secretary-General of the United Nations*. Mr. Ousmane Sambia Dia filed his appeal on 16 August 2014, and the Secretary-General filed his answer on 31 October 2014.

Facts and Procedure

2. On 6 January 2003, Mr. Dia took up a temporary assignment with the United Nations Children's Fund Country Office in Senegal (UNICEF Senegal CO) as a Finance Assistant at the GS-5 level. On 12 March 2007, he was appointed to the post on a fixed-term basis.

3. In March 2011, Mr. Dia's post was abolished as a result of the Program and Budget Review. After reviewing the functions of the post, the Job Classification Panel substantially changed the job description and a new position of finance assistant was classified at the GS-5 level.

4. On 6 July 2011 and again on 29 September 2011, Mr. Dia was formally informed of the abolition of his post effective 31 December 2011.

5. In October 2011, UNICEF advertised the newly created GS-5 Finance Assistant post within the Senegal CO and Mr. Dia applied.

6. On 20 December 2011, the UNICEF Senegal CO Representative and the Human Resources Specialist informed Mr. Dia that his application had been removed from the short list for the newly created Finance Assistant post because of his prior performance and an incident in 2009 whereby he had compromised the integrity of a procurement process.

7. On 29 December 2011, Mr. Dia received a letter of separation indicating his entitlements and the conditions of his separation. In return for payment of an additional termination indemnity, he signed a waiver agreeing not to contest his separation from UNICEF.

8. On 17 January 2012, Mr. Dia submitted a request for management evaluation to UNICEF's Deputy Executive Director (DED) challenging the withdrawal of his name from the

THE UNITED NATIONS APPEALS TRIBUNAL

Finance Assistant post, while the UNDT found that there was no evidence of actual bias, it nonetheless held that the process was marred by the *perception* of bias insofar as the same members who first decided that Mr. Dia's application should not be put forward for consideration, were subsequently part of the interview panel that concluded he was not suitable for the position. As such, a reasonable observer would be bound to conclude that the possibility of bias existed in the recruitment process. Noting that rescission was not feasible, the UNDT set an award of alternative compensation in the amount of three months' net base salary, on the basis that Mr. Dia, as a staff member on an abolished post, would have been given preference for selection for the new Finance Assistant position had he been one of the recommended candidates. In the circumstances, he lost this important advantage as he was not one of the recommended candidates.

Submissions

Mr. Dia's Appeal

17. Mr. Dia challenges the amount of compensation which the UNDT awarded him, claiming that the UNDT's award of three months' net base salary does not adequately compensate him for the prejudice he suffered as a result of the breach of his right to due process in the recruitment procedure. As his contract was to run until 31 March 2012 instead of being abolished as of 31 December 2011, the UNDT's award simply corresponds to the money due to him until the end of his contract. As such, it does not compensate him for the violation of his right to a fair recruitment process and a missed opportunity, which give rise to separate damages. Nor does the award sanction UNICEF for the dual injustice it caused him. Instead, Mr. Dia requests this Tribunal to grant him compensation amounting to two years' net base salary, or to remand the Judgment to the UNDT which should award him two years' net base salary.

The Secretary-General's Answer

18. The award of compensation is a matter for the discretion of the UNDT which is in the best position to decide on the level of compensation to award given its appreciation of the case. Further, according to the Appeals Tribunal's *juri sprudence*, compensation should be set by the UNDT on a case-by-case basis, taking into consideration the nature of the irregularity and the chance that the staff member would have been recommended for the position had the breach not occurred. The role of the Appeals Tribunal is only to ensure that the UNDT was correctly guided

by the nature of the irregularity and the chance the staff member would have had to be selected had the correct procedure been followed.

19. Mr. Dia's claim for two years' net base salary is premised on the assertion that he had a certain chance of being selected had the composition of the panel been different and therefore he should be compensated for the salary he lost as a result of not being appointed. However, the UNDT made no finding that the panel's assessment of Mr. Dia was flawed or that Mr. Dia had a certain chance of being selected. While Mr. Dia relies on the fact of being accorded priority consideration by virtue of the abolishment of his post, "priority consideration" cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for.¹

20. Insofar as Mr. Dia claims that the award does not address the termination of his appointment before its date of expiry, the UNDT found this part of his challenge was not receivable, and thus properly declined to take this factor into account in determining the award of compensation. Further, Mr. Dia is precluded from claiming additional compensation on the ground of his early separation given that upon his separation, Mr. Dia accepted an enhanced termination indemnity and expressly agreed not to contest his separation from UNICEF. Last, as Article 10(7) of the UNDT Statute precludes the award of punitive damages, it would have been improper for the UNDT to award damages for the purpose of sanctioning UNICEF for any

23. This is not a matter where the Appellant did not request moral damages.² In his application to the UNDT, the Appellant requested, inter alia, payment of damages and interest

resulting from the abolition of his post, and which may have been the subject of an agreement with the Administration. Consequently, the Secretary-General's submission is rejected.

26. Pursuant to Article 9(1)(b) of the Appeals Tribunal Statute, this Tribunal may award:

Compensation for harm, supported by evidence, which shall normally not exceed the

Judgment

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Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge ThSett(006 Tc -.s-FSigned)IP(Signed)