
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/092

Judgment No.: UNDT/2019/016

Date: 31 January 2019

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

NIKOLARAKIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON REVISION

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

SSO post for some time to come and that he is unable to be considered for conversion for continuing appointment as this consideration requires staff members who are at least at the S-3 level. The Applicant fulfils all the required eligibility requirements for a continuous appointment except this element, see SGB/2011/9 (Continuing appointments). Having recruited so many S-3 level SSOs through an unlawful process, it follows that opportunities at that level will not arise for a significant period of time.

70. The Applicant cannot be considered for conversion to continuing appointment unless he is at S-3 level. The Applicant has been recommended for promotion by both his reporting officers whenever the earliest opportunity arises. The infraction of 12 unlawful recruitments has compounded the improbability of another recruitment for S-

Although he currently satisfies the age and performance criteria, his exclusion from the recruitment exercise has prevented him from fulfilling the other continuing appointment criteria and set him back several years. The Tribunal finds that the contested decision has i

security, and awards the sum of USD5,000 to the Applicant.

Conclusion

75. The Tribunal has found that the Applicant has suffered damages for loss of chance of the right to be fairly considered in the promotion exercise and that the contested decision has impacted his opportunity for career advancement and job security.

In view of the foregoing, the Tribunal DECIDES:

- a. Liability having being admitted, the application succeeds and the decision to exclude the Applicant from the recruitment exercise is rescinded;
- b. As an alternative to rescission, the Respondent may elect to pay the Applicant compensation in the amount of USD20,000;
- c. The Respondent is to pay the Applicant the amount of USD5,000 for loss of opportunity for career advancement and for loss of job security;
- d. The total amount of USD24,166.55, being the sums above, less USD833.45 already paid, shall bear interest at the

11. At the 15 November 2017 CMD,

York courtroom. The assigned Judge explained that due to her impending home leave, she had called the CMD to inform the parties that it would not be possible for her to determine the matter before her return in January 2018. Counsel for the Respondent confirmed that, in addition to the Administrative Law Division (D, previously named, Administrative Law Section) having filed the application for revision in the present case, the Office of Legal Affairs had also filed an appeal of the original case with the Appeals Tribunal. Counsel for the Applicant further explained that the selection process involving Applicant was still ongoing. Noting that the next Appeals Tribunal session would be in March 2018, and due to the particular circumstances of the matter, the Tribunal encouraged the parties, without prejudice to the final determination of the revision application, to seek further instructions from their respective clients to explore the possibility of an amicable solution and to inform the Tribunal of the progress by the end of December 2017.

Co

Mr. Nikolarakis was invited to interview.

25. The present appeal was filed on 24 October 2017, which was the deadline for filing the appeal, since the UNDT Judgment was issued on 25 August 2017. The filing of the appeal has prevented the UNDT from proceeding with the hearing of the application for revision. This is because, pursuant to Article 12(1) of the UNDT Statute, an application for revision must relate to an executable judgment, whereas, under Article 7(5) of the Appeals Tribunal Statute, the filing of the appeal has the effect of suspending the execution of the judgment. Consequently, the application for revision of judgment is still pending before the UNDT.

26. Article 12(1) of the UNDT Statute provides: Either party may apply to the Dispute Tribunal for a revision of an executable judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

27.

of appeals shall have the effect of suspending the execution of the

28. In our view, the application for revision that is currently pending before the Dispute Tribunal concerns a new consideration which could be relevant to the issue of the quantum of compensation. The outcome of the application for revision, whatever it may be, is likely to impact on the appeal before us. Therefore, we are of the view that to proceed with the appeal without giving the UNDT an opportunity to hear and pass judgment on the application for revision would neither be appropriate for the fair and expeditious disposal of the case nor to do justice to the parties.

29. In the circumstances, it is appropriate to remand the case.

20. By Order No. 119 (NY/2018) dated 5 June 2018, with reference to Judgment No. 2018-UNAT-832, and in view of the information that the Applicant had now been selected for and accepted an S-3 level position on 29 March 2018 and considering the particular circumstances of the present case, including the continuing employment relationship, the Tribunal entreated the parties to make all attempts to

Case No. UNDT/NY/2017/092

Judgment

judgment, with its attendant costs, and the issuance of a reasoned judgment thereafter. The Tribunal highlighted that such course of action would save valuable resources all round and also contribute to inculcating a harmonious working environment and culture within

28. The parties filed their respective closing statements on 19 October 2018 (the Respondent) and on 20 October 2018 (the Applicant).

Consideration

29. It is recalled that *Nikolarakis* UNDT/2017/068 concerned only the issue of relief, liability having been conceded by the Respondent, whereupon the Tribunal rescinded the contested decision, and set a sum of compensation as an alternative, together with loss of opportunity damages. The issues

primarily doomed to fail since art

Rules of Procedure require lack of knowledge on the part of the Respondent, and not his Counsel.

31. As for the factual background, the Tribunal notes that the parties appear to agree that the applying party, namely the Respondent (who, in this context, is to be understood as the Administration of the United Nations at large as the United Nations Charter, art. 97, designates the Secretary-

the chief administrative officer
must have known about the

ongoing recruitment exercise and the

in question before *Nikolarakis* UNDT/2017/068 was issued. Indeed, following the

relevant job opening on 21 April 2017. In those closing submissions, the Applicant referred to his loss of opportunity for career progression in light of so many posts having been admittedly unlawfully filled, and the remoteness of any future opportunities based on what is described as

regarding future recruitment exercises, including in the first quarter of 2017. The Tribunal notes that the Respondent did not rebut this submission, nor provide support for these assertions, including at the hearing on damages on 4 April 2017, despite the ongoing plans for the new recruitment drive for which the Job Opening was advertised on 21 April 2017, and to which the Applicant applied on 12 May 2017.

32. It follows from the facts before the Tribunal that the recruitment exercise in question commenced after the hearing on 4 April 2017. However, it appears that the parties agree that

Counsel, although also working as a lawyer of the Administration, had not been fully instructed or informed of recent developments regarding the recruitment exercise in question. For this reason, Counsel did not apprise the Tribunal about this fact, just as the

therefore not present in this case and, on a strictly technical basis, on this ground alone, a revision of the judgment is not possible. In line herewith, in a leading judgment on revision,

the parties the possibility to settle the matter informally. If the parties fail to resolve the matter within a specified time, then the Tribunal will thereafter make a final determination on the matter on the papers before it, but after allowing the parties to Judgment.

IT IS ORDERED THAT:

46. The application for revision of the judgment *Nikolarakis* UNDT/2017/068 is rejected on the grounds stated above.

47. By **4:00 p.m. on Thursday, 21 February 2019**, the parties are to file a joint motion in which they state whether they have agreed to settle the matter amicably or, if not, present their respective submissions on liability in light of findings contained in the present judgment after which the Tribunal will proceed to determine the matter on the papers before it unless otherwise ordered.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of January 2019

Entered in the Register on this 31st day of January 2019

(Signed)

Nerea Suero Fontecha, Registrar