



Judgme

JUDGE INÉS WEINBERG DE ROCA, P

... On 1 March 2012, the Applicant filed a request for management evaluation claiming SPA for the entire period of time during which he was performing duties at a higher level. On 16 April 2012, the [Management Evaluation Unit] recommended that the Applicant be granted two years' payment of SPA to compensate him for the work performed at the G-5 level. The Applicant subsequently received payment of SPA for the period 17 April 2010 to 16 April 2012. The Applicant considers this payment to be insufficient given that he had been performing the duties at the G-5 level for 12 years at the time of the request.

... [On 28 June 2012, Mr. Hosang filed an application with the UNDT seeking rescission of the decision not to grant him retroactive SPA for the full period that he had been performing duties which had been graded at the G-5 level. The Secretary-General filed his reply on 1 August 2012.]

...

... During a hearing on 23 July 2014 and 7 August 2014, the following witnesses gave evidence: Mr. Paul Orsini (a retired staff member who worked in the Personnel Record Unit); Mr. Alexander Sokol (the A

in particular considered the fact that, according to Ms. Maharramova, she was not requested to carry out a proper assessment in accordance with Administrative Instruction ST/AI/1998/9 (System for the classification of posts), but merely expressed her opinion on the basis of the limited information provided. It was clear to the UNDT that she did not intend her

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11. Finally, the UNDT erred in law by awarding duplicative compensation for the loss of opportunity and chance. In granting Mr. Hosang SPA from the G-4 to the G-5 level, the UNDT had placed him in the position he would have been in had he been successful in the selection exercise for the post. Given that Mr. Hosang had already been compensated as though he had been a G-5 for the entire period, there was no loss of opportunity and chance for promotion to that same post. The UNDT therefore erred in awarding USD 1,000 on that ground.

Mr. Hosang's Answer

12. The Secretary-General merely contests issues regarding the "continuing nature" of the compensation awarded as well as "other ancillary matters also not considered at the hearing". Mr. Hosang asks that the Appeals Tribunal reject the appeal as not receivable on that ground.

13. As to the Secretary-General's contention that the UNDT erred in awarding "prospective compensation for an uncertain duration", Mr. Hosang contends that the Secretary-General had repeatedly assured the UNDT in formal submissions that the selection process for the G-5 position was being finalized. The Secretary-General is therefore advancing an argument that is entirely due to his own fault by failing to make the selection decision. As the Judgment is not executable until the Appeals Tribunal disposes of the case, a selection decision before that time would render the issue moot. Mr. Hosang therefore requests that the Appeals Tribunal order the Secretary-General to make the selection decision, if he has not done so, as an interim measure under Article 9(4) of its Statute before considering the merits of the case.

14. Contrary to the Secretary-General's contention, the compensation for loss of opportunity and chance for placement and promotion awarded in paragraph 79(b) of the Judgment is not duplicative of the compensation awarded in paragraph 79(a) for loss of salary. The former compensation places Mr. Hosang in the same financial situation he would have been in had he received an SPA or promotion at the time. His career position however is not the same as what could have prevailed had the Secretary-General taken the correct administrative action when he should have taken it. Mr. Hosang not only lost the opportunity and chance for promotion in the GS-5 post he encumbered prior to its advertisement. During that time, he also lost the opportunity and chance to be considered for another GS-5 post in the interests of mobility, as well as the chance to gain seniority in grade required to have the opportunity to compete for a higher level post in advancement of his career.

15. As to the award of USD 1,000 for costs and expenses Mr. Hosang incurred in relation to the proceedings, subject to his providing necessary proof, Mr. Hosang asks that the Appeals Tribunal consider relying on his counsel's certification of expenses as an officer of the court. His counsel is a voluntary counsel and his costs entailed mainly dinner and transportation expenses. Since he did not request or expect to receive compensation for legal costs, he did not retain any record of these expenditures. As to the UNDT's reference to the fact that Mr. Hosang is a General Service staff member, such reference calls attention to the fact that he belongs to the least-paid category of staff.

16. Contrary to the Secretary-General's contention, the correctness of the classification of the post or of Mr. Hosang's level was not at issue. The issue was whether Mr. Hosang actually performed the functions required in the post. The Secretary-General, claiming that Mr. Hosang did not perform those functions, presented as a witness only one supervisor out of several during the period of time for which he claimed SPA, and that witness was unpersuasive. The classification result was called into question only when the Secretary-General presented a witness from the Classification Unit to give evidence against the G-5 classificationw [(A, aD .0275..38 7393E5..3

19. Article 10(6) of the UNDT Statute states: “Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party”. The UNDT’s power to award costs is thus restricted by the Statute to cases in which it determines that a party has manifestly abused the proceedings before it. In the absence of such a determination, the basic principle applicable in international courts on the question of costs is that each party shall bear its own costs.

20. According to the jurisprudence of this Tribunal in *Bi Bea*, “[i]n order to award costs against the Secretary-General, it was necessary for the UNDT to be satisfied on the evidence that ... the Secretary-General had ‘manifestly abused the proceedings’. The plain language of those words meant that before the UNDT could lawfully award costs against the Secretary-General, it was necessary to determine on the evidence that the [testimony] was clearly and unmistakably a wrong or improper use of the proceedings of the court.”⁵

21. In the instant case, the calling of a witness in good faith to bolster the views of the Administration ⁶ does not constitute an abuse of process warranting the award of legal costs of USD 1,000 and additional costs in the amount of USD 3,000. The Secretary-General’s appeal on this point is granted.

22. We dismiss the Secretary-General’s appeal of the award of prospective compensation of the monetary equivalent of SPA for an uncertain duration. The Judgment awards compensation in the amount of the difference in salary between earnings at the G-4 and G-5 level – retroactive from 25 January 2000 to the date the post is filled, deducting the payment of SPA for the period 17 April 2010 to 16 April 2012 already received by Mr. Hosang. It is for the Secretary-General to fill the vacancy.

23. Finally, we find no merit in the Secretary-General’s appeal against the award of compensation in the amount of USD 1,000 for loss of opportunity. It is not duplicative since the award of SPA from the G-4 to the G-5 level compensates for the lower salary he received during the period his post was already classified at the higher level. Mr. Hosang, however, at the G-4 level, consequently also lost the opportunity to thereafter apply for a promotion from the G-5 level to a higher grade.

⁵ *Bi Bea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-370, para. 30.

⁶ See impugned Judgment, para. 75.

Judgment

24. The appeal of the Secretary-General is granted, in part, and the award of costs of USD 3,000 and USD 1,000 for abuse of process is vacated. The remainder of the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Lussick

Entered in the Register on this 30th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar