



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/013

Judgment No.: UNDT/2014/056

Date: 29 May 2014

Original: English

Introduction

1. On 16 March 2014, the Applicant, a P-5 ~~Chief~~ Chief, Transport Facilitation and Logistics Section, Transport Division, Economic and Social Commission for Asia and the Pacific (“ESCAP”) in Thailand, filed an application contesting the “unlawful job opening for [the D-1] position of Chief, Transport Division, ESCAP”.

2. The Applicant submits *inter alia*, that his application is receivable because the job opening in this case was an individual administrative decision that affected his rights. He states that this job opening deviated from the relevant generic job profile and did not adequately represent the functions and responsibilities of the advertised position, rendering the Applicant ineligible for it. The Applicant submits that the job opening was designed by the Chief of the Transport Division, Mr. H, to ensure promotion of one of the Section Chiefs in the Transport Division, Mr. O. According to the Applicant, Mr. H had admitted his offer to help [Mr. O] to get this position” and therefore the recruitment exercise was no longer performed on a competitive basis, in violation of the requirements of the United Nations Charter and of the Staff Regulations. The Applicant submits that this was an act of retaliation against him for having previously prevented an improper recruitment of a former colleague of Mr. H in 2011.

3. The Applicant seeks *inter alia*, cancellation and re-advertisement of the job opening (“JO”) after its revision, that the current incumbent of the position of Chief of the Transport Division, Mr. H, be precluded from participating in the recruitment process for his successor, and that there be made to the Management Evaluation Unit (“MEU”) to undertake a thorough management evaluation.

4. The Respondent submits *inter alia*, that the Applicant does not have standing pursuant to art. 3 of the Tribunal’s Statute. The Respondent submits that the issuance

of the job opening has no direct legal effect on his terms of appointment. As the Applicant chose not to apply for the post, the Organization could not assess his eligibility, and the Applicant therefore has no standing in this case. Further, the Respondent submits that the application is not receivable *ratione materiae* as the Applicant does not challenge an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute. A job opening is only a preliminary step in a selection process, which can only be challenged in the context of an application contesting the outcome of that process and cannot alone be the subject of an appeal before the Tribunal. The Respondent further states that the Applicant's claims are without merit as the job opening was adopted following extensive consultation process to ensure that it reflected the needs of the ESCAP and to attract a broad pool of candidates.

Relevant facts and procedural history

5. The Transport Division in ESCAP is headed by Mr. H and is divided into three sections, each supervised by a Chief level: the Transport Facilitation and Logistics Section, headed by the Applicant; the Transport Policy and Development Section, headed by Mr. O; and the

7. On 12 March 2014, the Applicant submitted his request for management evaluation requesting a management evaluation of the job opening in question and also asking the MEU to suspend the job opening.
8. The same day, the Applicant also filed an application before this Tribunal seeking the suspension of the job opening pending management evaluation. The Applicant contended that the job opening did not adequately follow the generic job profile, that it covered less than one-third of the actual functions of the post, and that it had been worded with a view to favoring a particular candidate and excluding the Applicant from participating in it. The application for suspension of action under Case No. UNDT/NY/2014/012 was dismissed by Order No. 43 (NY/2014), dated 18 March 2014, as the management evaluation was no longer pending, the Management Evaluation Unit having already completed its review.
9. By memorandum dated 13 March 2014, the MEU informed the Applicant of the outcome of management evaluation, stating *inter alia*, that since the Applicant did not apply for the advertised position, the job opening had no direct legal consequences for him and did not affect his rights as a staff member. The MEU also determined that, in any event, job openings were not considered as a final “administrative decision” for the purposes of staff rule 11.2(a) but were merely preparatory steps in the selection process.
10. On 16 March 2014, prior to receiving the decision on his request for suspension of action, the Applicant filed the present application on the merits.
11. On 18 March 2014, the application was duly served on the Respondent, who was directed to file his reply by 17 April 2014.
12. On 26 March 2014, the Respondent filed an application for leave to file a reply limited to relevancy, contending *inter alia*, that the Applicant did not contest any administrative decision in terms of art. 2.1(a) of the Tribunal’s Statute, and that he

lacked legal standing as he had not applied for the position advertised in the job opening.

13. On 26 March 2014, the Duty Judge (Judge Greceanu) directed the Applicant to file his response to the Respondent's motion by 2 April 2014. The Applicant filed his submission on 1 April 2014.

14. On 2 April 2014, by Order No. 55 (NY/2014), the Duty Judge (Judge Greceanu) dismissed the Respondent's motion to have receivability considered as a preliminary issue, and directed that the Respondent file his reply by 17 April 2014.

15. On 16 April 2014, the Respondent filed his reply, and, on 22 April 2014, the Applicant filed a motion requesting leave to submit a response to the Respondent's reply and to provide further evidence, appending thereto the Applicant's said response.

16. By Order No. 96 (NY/2014) of 2 April 2014, leave was granted to the Applicant to file a response to the Respondent's reply, and the response, attached to his motion, was considered duly filed.

17. The case was assigned to the undersigned Judge on 8 May 2014.

Consideration

18. In his 12-page response to the Respondent's reply, filed on 25 April 2014, the Applicant articulates *inter alia*, that he has standing as he would be eligible for the position if the job opening truly reflected the actual functions of the post. He further submits that his claims are receivable as the unlawful job opening creates a non-competitive basis for recruitment, which violates the Charter of the United Nations and the Staff Regulations, and has direct legal consequences for his terms of

appointment. He confirmed that he has applied for the position due to the “bias and discrimination of the [job opening]”.

19. However, in this response, the Applicant also makes the following request at para. 33:

The Applicant understands the financial and reputation cost of cancelling the [job opening] to the organization after the recent wide campaign for this position. The Applicant, therefore, withdraws the request to cancel the [job opening]. Instead, the Applicant requests the [Dispute Tribunal] to order the Respondent to (a) fully consider the requirements of actual functions of the position in the selection process; (b) exclude the current incumbent of the position from the recruitment process due to his failure of neutral role, integrity and impartiality in the preparation of the [job opening].

20. In essence, the Applicant is requesting that during the selection process the actual functions of the position, and not those that were advertised, should be taken into account in the selection of the candidate.

21. Before considering the substantive merits of the claim, the Tribunal will determine the scope of the contested decision and the curability of the matter.

Scope of the contested decision

22. In his application filed on 16 March 2014, the Applicant challenges the allegedly unlawful job opening for the D-1 position of Chief, Transport Division, ESCAP. At the management evaluation stage, the Applicant also challenged the legality of the job opening and requested its suspension. Although the Applicant has now withdrawn his request for cancellation or setting aside of the job opening, the Applicant still maintains his challenge to its legality, requests the removal of Mr. H from the ongoing selection process, and seeks revision of the job opening functions by the Respondent. The contested decision therefore remains the Applicant’s objection to the job opening.

Receivability

23. Article 8.1 of the Tribunal's Statute states:

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

24. The Respondent's challenge in respect of receivability is twofold. The Respondent submits that the Applicant does not have standing to make the application before the Tribunal and that his claim is not receivable *ratione materiae*.

25. Article 2.1 of the Tribunal's Statute states:

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the ti

25.

of the Division's work, which fall under his responsibility, and by creating a non-competitive basis for recruitment, the job opening violates art. 101.3 of the United Nations Charter, which states that "[t]he paramount consideration in the employment of staff ... shall be the necessity of securing the highest standards of efficiency, competency, and integrity, as well as staff regulation 4.3, which states that, "so far as practicable, selection shall be made on a competitive basis". Therefore, the job opening is unlawful. The Applicant contends that he will not condone the unlawfulness of the job opening by applying for it, and that the job opening has direct legal consequences in his terms of appointment.

27. For the purposes of art. 2.1(a) of the Statute, it is not sufficient for an applicant to merely establish that there was an administrative decision that she or he disagrees with, if indeed in this instance there is such a decision. To have standing before the Tribunal, a staff member must show that a contested administrative decision affects her or hi

application, and therefore absent his candidature, the Applicant cannot be considered at all, nor can he put forward allegations of unfairness on his behalf, and certainly not on behalf of other staff members (*See inter, supra*).

29. The Applicant was made fully aware, since the earliest stage of these proceedings, including at the MEU stage, of this conscious choice of not applying may have adverse consequences for his standing before the Tribunal and the receivability of his claim. The Applicant refused to apply for the position because he deemed himself ineligible due to the alleged unlawfulness, "bias and discrimination of the [job opening]".

30. The Applicant's justification with regard to his failure to apply for the position is based solely on his subjective assessment of his eligibility and his suspicion or allegation, unproven at this stage, that abuse of authority has taken place. The Tribunal finds that the Applicant's own assessment of his ineligibility is not the same as the independent assessment by the Administration. The Applicant decided not to apply solely on the basis of his interpretation and assessment that the job opening purported to exclude him. Thus, the Applicant declared himself ineligible, precluding the Administration from making any actual determination on his eligibility.

31. Therefore, the Tribunal cannot consider whether or not his eligibility has been compromised, as the Applicant has no standing under art. 2.1 of the Statute to bring a claim before it in the absence of his application for the post.

32. This does not mean that the Applicant's claims are not of a serious nature. Allegations of possible abuse of authority and discrimination in selection and promotion cases are prohibited conduct that ought not to be taken lightly, in order to ensure that all staff members' rights are fully respected. However, these ought to be raised in an appropriate manner and through the appropriate channels so that they

may be diligently and effectively addressed by the Administration once put on notice of such allegations (see, e.g., ST/S/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)).

33. Having determined that the Applicant lacks *locus standi* to institute the present application, the Tribunal finds that the application is not receivable. In light of this finding, the Tribunal need not address the remaining issue of receivability or the merits of the case.

Conclusion

34. The Applicant lacks legal standing and the application is therefore not receivable.

35. The present application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of May 2014

Entered in the Register on this 29th day of May 2014

(Signed)

Hafida Lahiouel, Registrar, New York