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Case No. 2000-148

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parties of its intention in order to allow them to discuss the issue when, owing to the passage of time, a rescission of the decision would serve no purpose, or the performance of an obligation would be impossible, or one of those options would affect the rights of a third party. As such, the UNDT did not give reasons for its decision, but the United Nations Appeals Tribunal (Appeals Tribunal) considers that owing to the passage of time, the rescission of the decision or performance of any obligation would have served no purpose, or at least no useful purpose. Furthermore, the parties have not contested that point. The Secretary-General's appeal is dismissed.

Facts and procedure

4. Mr. Verschuur started working for the United Nations Settlement Programme (UN-HABITAT) on 2 February 1991 at the L-3 level. Furthermore, at the time of the contested decision, he held a P-4 level post.

5. In 2001, Mr. Verschuur applied for a post at the P-5 level. He was shortlisted, interviewed, recommended for the post and placed on the roster for future vacancies of similar positions.

6. On 2 August 2007, a vacancy announcement was advertised on *Galaxy* for chief of section at UN-HABITAT, a P-5 post. Mr. Verschuur applied for the post. The vacancy announcement having been cancelled, and a new vacancy announcement for the same post was advertised on 17 December 2007. Mr. Verschuur applied on 14 January 2008. His application was eligible for consideration at the 30-day mark, but was examined along with the applications for consideration at the 60-day mark.

7. The Programme Manager c7.76nipcintervi9(thvac2(daontnt. The))TJ13.9115 -1.651 TD-0.06

candidates was what the panel had actually wanted to say. The panel reconvened and made a new recommendation of only the two candidates who had previously been strongly recommended. On 9 May, the Executive Director appointed one of the candidates who had thus been recommended; the second was included in the roster of approved candidates. On 15 May 2008, Mr. Verschuur was informed of the decision not to recommend him and hence not to include him on the roster of approved candidates.

8. Mr. Verschuur filed an appeal before the Joint Appeals Board. On 1 July 2009, the appeal was transferred to the UNDT.

9. On 26 August 2010, the Dispute Tribunal issued judgment No. UNDT/2010/153. It found that according to section 7.7 of administrative instruction ST/AI/2006/3, the duty of the head of department, who in this case was the Executive Director, is to transmit the proposal submitted to him or her by the Programme Manager to the Central Review Body. The UNDT took the view that a process conducted for the purpose of evaluating candidates for promotion or appointment had to be conducted independently. According to the UNDT, even when an interview panel has been set up by a programme manager, the panel is independent of the latter in doing its job as long as it acts within its mandate. It is equally independent of the head of department.

10. The UNDT found that the Executive Director had unlawfully intervened in the establishment of the interview panel's recommendation by substituting her own opinion with that of the panel, and that she had manipulated the selection process by influencing the interview panel to drop the names of Mr. Verschuur and of two other candidates from the list of recommended candidates. According to the UNDT, that interference and manipulation impinged on the integrity of the selection process. Mr. Verschuur having not been included on the roster of approved candidates, he consequently incurred a prejudice.

11. The Dispute Tribunal also found that the original vacancy announcement had been cancelled because of lack of compliance with the relevant administrative instructions.

12. It further found that the Programme Manager did not have the mandate to decide considering eligible 30-day candidates along with 60-day candidates. He had a duty to consider candidates who were eligible at the 30-day mark but failed to do so.

13. Finally, the UNDT found that the selection process had not been conducted in accordance with the provisions of administrative instruction ST/AI/2006/3, and that Mr. Verschuur's right to a fair and full consideration had not been respected. It ordered the Secretary-General to pay him compensation equivalent to six months' net base salary.

14. The Secretary-General filed an appeal against the judgment.

Submissions

The Secretary-General's appeal

15. The Secretary-General contends that the Dispute Tribunal erred on a question of law in finding that the actions of the Executive Director were *ultra vires* and had disregarded ST/AI/2006/3. He submits that the error stems from a narrow interpretation of section 7.7 of ST/AI/2006/3, without reference to the other provisions outlining the authority of the head of department in the staff selection system, in particular paragraph 3 of Annex I to administrative instruction ST/AI/2006/3, paragraphs 14 and 16 of the *Staff Selection Guidelines*, and step 3 of the *Guide to Workflow and Rules for Processing Vacancies in the Galaxy*. The Secretary-General holds it against the UNDT for not taking into account these texts that are an integral component of the legal framework governing the staff selection system.

16. The Secretary-General maintains that the Dispute Tribunal erred in considering that the actions taken by the Executive Director were not fully consistent with the provisions relevant to the role of a head of department in the staff selection system. He submits that the head of department has the right and the responsibility to confirm compliance with established procedures, as non-compliance with those procedures may subsequently expose the department to liability towards unsuccessful candidates. Since the head of department is responsible for the execution of mandated programmes and activities, he or she must ensure that the recommended candidates sent to the central review bodies are not simply "suited" for the functions of a vacant position, but that such

individuals are “ the best suited” to perform these functions, as set out in paragraph 3 (b) of Annex II to ST/AI/2006/3.

17. The actions taken by the Executive Director were in conformity with the applicable legal provisions governing the role of the head of department in the staff selection system. She had received a list containing two candidates who were strongly recommended and three who were only recommended. The list was at odds with ST/AI/2006/3 which expressly requires that the list of recommended candidates must be unranked. The Executive Director took action in order to ensure compliance with the applicable procedures. Furthermore, it was valid for her to question the evaluation report submitted by the interview panel that included a list of very good candidates when the others were only average, to request the interview panel to provide her with a list of candidates of appointable calibre or to confirm that the panel actually intended to recommend five candidates.

18. The Secretary-General further contends that the UNDT erred on a question of fact in concluding that the actions of the Executive Director constituted a manipulation of the selection process. Contrary to the judgment of the UNDT, there is no evidence that the Executive Director singled out Mr. Verschuur in order to exclude him from the list of recommended candidates. The Secretary-General maintains that the Executive Director did not force the panel to submit a new report. The panel was at liberty to affirm or amend its recommendations.

19. Ultimately, the Secretary-General submits that the UNDT erred on questions of law and fact, and exceeded its competence in ordering him to pay compensation to Mr. Verschuur. He submits that the UNDT erred on a question of law and fact in reaching the conclusion that the contested decision had been tainted by the Executive Director's interference in and manipulation of the process. Accordingly, any remedy ordered on the basis of those conclusions is unfounded. The Secretary-General requests that the Appeals Tribunal reverse or significantly reduce the order contained in the contested judgment.

Mr. Verschuur's answer

20. Mr. Verschuur begins by noting that the Secretary-General's arguments appear not to involve neither the cancellation of the original vacancy announcement, nor the pooling of Mr. Verschuur with the 60-day mark candidates, nor the quantum of the award. They dispute the judgment's determination that the Executive Director improperly interfered in the selection and its impact on the roster of approved candidates.

21. While, the Appellant attempts to base his argument on the role of the head of department in the annexes to the administrative instruction on the staff selection system, *Staff Selection Guidelines* and the *Galaxy Workflow Guide*, those texts are of no assistance to him.

22. The Appellant selectively emphasizes a portion of paragraph 3 (b) of Annex I of the administrative instruction on the staff selection system that requires the head of department to ensure that the candidates best suited for the functions are selected for vacancies. However, it would be contrary to the objective of section 7.7 of the administrative instruction, which provides that a list of qualified unranked candidates should be sent to the central review body rather than a proposal regarding one candidate, to infer that the head of department has a role to play in evaluating the suitability of the candidates whose names should be submitted to the central review body. Moreover, immediately following that passage, Annex I emphasizes that the head of department must only participate in staff selection in strict compliance with the requirements of the new system.

23. Mr. Verschuur also maintains that the role of the head of department to which Annex I refers is contained in section 9.1 of the administrative instruction. That section grants the head of department the ultimate responsibility for choosing a single candidate. The head of department does not have to exercise his duty prior to the interview panel having evaluated the candidates and the central review body having approved the evaluation process. It is not for the head of department to remove, or induce the removal of, candidates from the roster of approved candidates.

24. Mr. Verschuur then contends that if the head of department was free to veto at any time and on any basis, the recommended candidates, the pre-approved criteria for candidate evaluation would risk becoming meaningless, as would the convening of a panel and the role of the central review body. The head of department would not be able to fulfil his function of selecting the best suited candidate if he was not provided with the opportunity to chose from a list of independently evaluated candidates based on procedures validated by the central review body. With regards to the roster of approved candidates, whose importance is vital for the efficiency of the staff selection process and staff mobility, its utility would be undercut.

25. Mr. Verschuur maintains that neither the *Galaxy Workflow Guide* nor the *Staff Selection Guide* contemplates a different procedure. To the extent that the *Staff Selection Guidelines* contemplate a substantive evaluation of candidates by the head of department before the review of the central review body, such a procedure would be inconsistent with the system put in place by the administrative instruction. Such an interpretation, even if reflected in the *Guidelines*, should be regarded as incorrect.

26. Mr. Verschuur maintains that the fact that the jury submitted a list of ranked candidates did not mean that the head of department could require a shorter list of unranked candidates.

27. Mr. Verschuur further contends that the Dispute Tribunal did not make a factual error in finding that the Executive Director had improperly interfered with the selection process. The Executive Director had no reason for determining that the five candidates originally recommended were not of appointable calibre. The Secretary-General himself concedes that the Executive Director was not aware of the scores that the panel had

The Respondent adds that this concerns a determination of the facts made by the Dispute Tribunal that is not manifestly unreasonable.

29. Lastly, Mr. Verschuur submits that the Dispute Tribunal committed no error that would cause the judgment to be reversed or the quantum of compensation to be altered. He concludes that the appeal should be dismissed and submits a request for an oral hearing in order to be able to attend the deliberations of the Appeals Tribunal.

Considerations

30. At the outset, this Court believes that oral submissions do not appear to be necessary for a fair and expeditious disposal of the proceedings in a case where the facts are clearly established in the judgment of the Dispute Tribunal and are not contested by the parties. The Appeal Tribunal does not grant Mr. Verschuur's request for oral proceedings.

31. This Court notes that the Secretary-General does not contest the conclusions of the Dispute Tribunal judge regarding the irregularity in the selection process resulting from ST/AI/2008/12.

instruction ST/AI/2006/3, the *Staff Selection Guidelines* and the *Guide to Workflow and Rules for Processing Vacancies in Galaxy*.

35. The Appellant maintains that the judge disregarded paragraph 3 of Annex I to administrative instruction ST/AI/2006/3, en

UNITED NATIONS APPEALS T

UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2011-UNAT-149

approved candidates and thus prevented him from applying in that capacity for future vacancies with similar functions.

47. Mr. Verschuur contested the decision not to include him in the roster of approved candidates. The Dispute Tribunal granted him compensation without giving the Administration a choice between, on the one hand, either rescinding the invalid decision or performing an obligation or, on the other hand, paying compensation as an alternative to the rescission or performance of the obligation.

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first instance is the best placed to determine the level of compensation and that there is no reason to call that amount into question.

Judgment

51. The appeal is dismissed.

Original and Authoritative version: French

Dated this 8 July 2011 in Geneva, Switzerland.

(Signed)

Judge Courtial, President

(Signed)

Judge Garewal

(Signed)

Judge Faherty

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar