



JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal has before it an appeal against Judgment No. UNDT/2017/003, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 17 January 2017, in the case of Smith v. Secretary-General of the United Nations. The Secretary-General filed the appeal on 20 March 2017, Mr. Steven Robert Smith filed his answer and a cross-appeal on 19 May 2017, and the Secretary-General filed an answer to the cross-appeal on 13 July 2017.

Facts and Procedure

2. Mr. Smith, at the relevant time, was an Air Transport Officer with a continuing appointment at the P-4 level with the Air Transport Service, Logistics Support Division, Department of Field Support (DFS) at Headquarters in New York.

3. On 4 February 2015, the incumbent of the position of Chief Aviation Officer at the P-5 level with the United Nations Mission in the Republic of South Sudan (UNMISS) was selected for a temporary assignment with the United Nations Mission for Ebola Emergency Response (UNMEER).

4. On 24 February 2015, a six-month temporary job opening (TJO) for the P-5 Chief Aviation Officer, UNMISS, was broadcast internally within UNMISS via e-mails to UNMISS staff members and on the UNMISS board. The TJO specified that it was not open to external candidates. The term “external candidates” was not defined in the TJO. However, the TJO included a definition for “internal candidates” as “staff members who have been recruited after a competitive examination under staff rule 4.16 or after the advice of a central review body under staff rule 4.15”. The TJO also noted that “[s]ubject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station”. The deadline for submitting an application was set at 2 March 2015. The estimated starting date for the TJO was 10 March 2015.

5. On 2 March 2015, a colleague of Mr. Smith’s forwarded him the TJO and Mr. Smith applied the same day.

6. In an e-mail dated 3 March 2015, a Human Resources Officer, UNMISS, acknowledged

him pecuniary damages in the amount of the difference in salary between the P-4 position he occupied and the P-5 temporary position for the six-month period. The UNDT instead opted to award Mr. Smith moral damages in the amount of USD 1,500 for loss of a career prospect, in that his prospects for career development and opportunities for professional growth were reduced by the restriction. In addition, the Dispute Tribunal found no evidence indicating the selection decision had been implemented on 10 March 2015 and concluded that the decision to continue with the recruitment exercise for the TJO, despite the UNDT Order No. 46 of 13 March 2015, was also unlawful.

Submissions

The Secretary-General's Appeal

11. The Secretary-General submits that the UNDT erred in both law and fact in finding that the Administration could not limit the eligibility for the TJO0 10.s

Mr. Smith's Answer

15. Mr. Smith submits that the UNDT did not err in law or fact in finding that the Administration could not limit the eligibility for the TJO to UNMISS-based staff. He further questions whether the alleged urgency for a replacement is supported by the facts. The incumbent was selected for a temporary assignment to UNMEER on 4 February 2015. Yet, the TJO was not issued until 20 days later, on 24 February 2015. As only two candidates (Mr. Smith and the selected candidate already based at UNMISS) were eligible for the TJO, the manner in which the recruitment exercise was conducted suggests that the Administration already had a candidate in mind, contrary to its stated reasons of filling the TJO effectively and expeditiously.

16. Mr. Smith maintains further that by considering only UNMISS-based staff members for the TJO, the Administration immediately limited the pool of potential candidates. It was designed to skew the recruitment in favor of a few candidates, rather than to fulfil the legitimate aim of effectively and expeditiously filling the TJO, and rendered the recruitment process opaque and discriminatory, possibly resulting in a less qualified candidate being selected for the job.

17. Finally, Mr. Smith argues that the restriction is also unreasonable because the UNMISS Administration took into account irrelevant factors such as the application process for a visa to South Sudan.

18. Mr. Smith thus submits that the UNDT correctly concluded that the decision to exclude him from the recruitment exercise was unlawful and that there was evidence of moral harm in the form of reduced career development and professional growth. Moreover, the Administration's ignoring of the UNDT's order suspending the selection process for the TJO also entitles Mr. Smith to moral damages.

19. Mr. Smith requests that this Tribunal dismiss the Secretary-General's appeal in its entirety.

Mr. Smith's Cross-Appeal

20. Mr. Smith has filed a cross-appeal contending that the UNDT erred by failing to consider evidence of the likelihood that he would have been selected for the TJO because he met the minimum and technical requirements and competencies for the TJO and was on the P-5 roster

for the Chief Aviation Officer post. He had a significant chance to be selected for the TJO position. Mr. Smith requests that this Tribunal grant his claim for pecuniary compensation.

The Secretary-General's Answer to Cross-Appeal

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up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates. Paragraph 8 of Section III of the same resolution provides that, in order to ensure the transparency of the recruitment process, all specific vacancy anno

for a minimum of one week on the Intranet or be circulated by other means, such as e-mail, in the event that an Intranet is not available at the duty station concerned. A temporary job opening may also be advertised externally if deemed necessary and appropriate.

28. Paragraph 5.1 of ST/AI/2010/4/Rev.1 provides that a current staff member who holds a fixed-term, permanent or continuing appointment may apply for temporary positions no more than one level above his or her current grade. Mr. Smith complied with this provision in that as a P-4 he was entitled to apply for a temporary P-5 post.

29. It is clear from these statutory provisions (particularly Staff Rule 4.12) that they confer upon the Secretary-General a wide inherent discretion to determine eligibility criteria for temporary appointments. No provision prohibits the Administration from imposing a restriction limiting recruitment to a temporary position to staff members at a particular duty

and short-term convenience and (given the limited duration of the appointment and the obvious need to fill it quickly) was proportional in its effects.

32. Although Mr. Smith's suspicion is not beyond the bounds of possibility, there is no cogent, reliable or credible evidence to support the existence of an improper or discriminatory motive other than the fact that the selected candidate was the only person who could have benefited from the restriction. An inference of improper purpose, ulterior motive or discrimination is not the only reasonable, legitimate or most probable inference to be drawn from the imposition of the restriction. A conclusion that cost and convenience were paramount cannot be discounted. In so far as there was a risk of favouritism to staff members in situ, the evidentiary burden is on the party alleging unfair discrimination to rebut the presumption of regularity arising from the relevant considerations of cost saving and convenience in relation to a short-term, temporary appointment. Mr. Smith has not presented sufficiently compelling evidence discharging that onus.⁴ The decision to include the restrictive criterion and its application, therefore, is reasonable in the circumstances.

33. The ratio decidendi of the impugned Judgment, however, is somewhat narrower and based on the principle of legality. The UNDT held that since there was no evidence regarding the funding source for the TJO, there was no basis for restricting the TJO to UNMISS staff members. The UNDT in effect concluded that the TJO had imposed a mandatory condition precedent to the application of the restrictive criterion, which had not been fulfilled. The funding source requirement, the UNDT implicitly reasoned, fettered the discretion of the Administration. The Administration was permitted to exclude st

funding source of the position. However, we are satisfied that in the peculiar circumstances of this case, where the post had to be filled urgently for a short duration, the phrase “[s]ubject to the funding source” may be interpreted generously or extensively to permit the imposition of the restriction on the basis of cost (fiscal prudence) and convenience in the interests of operational exigencies.

35. In the result, therefore, the decision by the UNMISS Administration to limit the appointment to UNMISS staff members was reasonable and the appointment was made in terms of that decision lawfully and reasonably. There is, moreover, insufficient evidence to support a finding of discrimination or improper motive.

36. There is accordingly no legal basis for an award of pecuniary or non-pecuniary damages and the UNDT erred in awarding compensation as it did. The cross-appeal is thus equally without merit and should be dismissed.

37. Finally, it is noted with regret that the Administration opted to disobey the order of the UNDT issued on 13 March 2015 suspending (pending management evaluation) the decision that Mr. Smith was not eligible. Even if the selection process was finalized by 10 March 2015, the proper course would have been to delay its further implementation. The Administration’s conduct was in all probability in contempt and is reprehensible. However, considering our position on the merits of the application, Mr. Smith suffered no actual prejudice as a result of the improper conduct of the Administration and there is no need to extend a sanction beyond this admonition.

