



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/020
(UNAT 1607)
UNDT/GVA/2010/024
(UNAT 1616)
Judgment No.: UNDT/2011/129
Date: 14 July 2011
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

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Unit

Introduction

1. By applications filed with the former United Nations Administrative Tribunal on 16 June and 28 July 2008, the Applicant contests the decisions not to select him for the posts advertised in Vacancy Announcements Nos. 05-HRI-OHCHR-405865-R-Yaoundé (P-4), 05-HRI-OHCHR-406881-R-Geneva (P-4), 05-HRI-OHCHR-407031-R-Geneva (P-3) and 05-HRI-OHCHR-407257-R-Yaoundé (P-3).

2. He requests:

- a. Compensation for the material and moral damage suffered in an amount greater than that granted to him by the Secretary-General;
- b. That all his applications for United Nations posts at the P-3, P-4 and P-5 levels be given priority consideration during the 24 months following the Tribunal's decision;
- c. That the Respondent assess his performance under the Performance Appraisal System ("PAS").

3. The cases, which were pending before the former United Nations Administrative Tribunal, were transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

Facts

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5. On 29 November 2004, the Officer-in-Charge of CBB asked the Applicant, who was the Africa Unit desk officer for the Democratic Republic of the Congo, to prepare a note on the situation of the OHCHR Office in the Democratic Republic of the Congo. The Applicant's supervisor, the Africa Team Coordinator, who was in turn under the supervision of the Officer-in-Charge of CBB, was copied on the request. The Applicant replied to that request, sending a copy of his email to his immediate supervisor.

6. That same day, the Africa Team Coordinator wrote to the Applicant,

10. In 2005, OHCHR conducted a regularization exercise in order to facilitate the recruitment of staff who had held short-term contracts since 30 November 2003 for posts advertised through Galaxy.

11. In early February 2005, the Applicant was interviewed for the post of Desk Officer for Angola (Post No. 04-OHCHR-063-Geneva (L-3)). The Africa Team Coordinator was a member of the panel.

12. On 15 May 2005, the Applicant was transferred to the Europe, North America and Central Asia Region (“ENACA”) Unit on a short-term contract as Desk Officer for Russia, Belarus and Ukraine.

13. On 18 May 2005, a P-4 post of Human Rights Officer was advertised in Vacancy Announcement No. 05-HRI-OHCHR-405865-R-Yaoundé. There were 249 candidates, including the Applicant, who was not selected to be interviewed for the post.

14. On 23 June 2005, a P-4 Human Rights Officer post in ENACA, CCB, was advertised as Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva. The Applicant applied and was invited to an interview.

15. On 28 June 2005, six P-3 Human Rights Officer posts were advertised in Vacancy Announcement No. 05-HRI-OHCHR-407031-R-Geneva. The Applicant applied and was short-listed for an interview.

16. On 19 August 2005, a P-3 Human Rights Officer post was advertised as Vacancy Announcement No. 05-HRI-OHCHR-407257-R-Yaoundé. There were 328 candidates, including the Applicant, who was not selected for an interview.

17. In October 2005, the Applicant informed the OHCHR Staff Council of his belief that the Africa Team Coordinator had deliberately eliminated him from the recruitment procedure for the post of Desk Officer for Angola because he had complained of the harassment to which, in his view, he had been subjected.

18. In November 2005, the Applicant complained to the Special Assistant to the High Commissioner that he had been harassed by the Africa Team Coordinator; the Special Assistant referred the matter to the Chief of CBB.

19. In December 2005, the Applicant met with the Chief of CBB to discuss the problem.

20. On 6 April 2006, having been invited to an interview for the P-3 Human Rights Officer post advertised in Vacancy Announcement No. 05-HRI-OHCHR-407031-R-Geneva, the Applicant asked the OHCHR Human Resources Service not to include the Africa Team Coordinator in the interview panel. The following day, the Africa Team Coordinator agreed to withdraw from the panel and recommended that her deputy on the Team should replace her.

21. On 10 February 2006, the Coordinator of ENACA—who was, at that time, the Applicant's supervisor—sent a memorandum to his own supervisor, the Chief of CBB, recommending that the Applicant's short-term contract be extended beyond 31 March 2006.

22. On 31 March 2006, the Applicant sent the Chief of CBB an email informing her that the Coordinator of ENACA had told him that there was a

24. By email dated 3 April 2006, the Coordinator of ENACA denied having said that he had a poor opinion of the Applicant. That same day, the Applicant replied to the Coordinator, reiterating that the latter had made such a statement.

25. By email of 10 April 2006, the Applicant asked the Chief of CBB to inform him of the measures that the latter planned to take concerning the conduct of the Coordinator of ENACA. He also requested that the selection procedure for the post of P-4 Human Rights Officer (Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva) be cancelled and reopened with a new panel and guarantees of fairness.

26. On 18 April 2006, the Chief of CBB replied that, having met with the Coordinator of ENACA, he could not accede to the Applicant's request that he take measures concerning the Coordinator's conduct.

27. On 21 April 2006, the Applicant wrote to the Chief of CBB, informing him that he interpreted the latter's failure to reply to the request that the disputed selection procedure should be cancelled as an administrative decision to grant that request.

28. By email of 4 May 2006, the Applicant complained to the Deputy High Commissioner about the conduct of the Chief of CBB. That same day, the Deputy High Commissioner replied that she considered his message completely unwarranted and asked him not to send any more messages on the matter.

29. On 9 May 2006, the Applicant wrote to the Ombudsman in New York.

30. On 11 May 2006, the Chief of CBB requested a final extension of the Applicant's contract from 19 to 30 June 2006.

31. Furthermore, between March and May 2006, the Applicant and the Africa Team Coordinator exchanged correspondence concerning preparation of the Applicant's PAS for the period during which he had worked under her supervision.

32. By letter dated 24 May 2006, the Applicant sent the Secretary-General a request for review of the decisions not to select him for the posts advertised in Vacancy Announcements Nos. 05-HRI-OHCHR-405865-R-Yaoundé (P-4), 05-HRI-OHCHR-407257-R-Yaoundé (P-3) and No. 05-HRI-OHCHR-407031-R-Geneva (P-3).

33. On 29 May 2006, the Applicant sent the Secretary-General a request for review of the decision not to select him for the post advertised in Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva (P-4). The Administrative Law Unit in the United Nations Secretariat acknowledged receipt of the request on 6 June 2006.

34. On 30 June 2006, upon expiration of his final contract, the Applicant was separated.

35. After submitting an incomplete statement of appeal to the Joint Appeals Board (“JAB”) in Geneva on 12 October 2006, the Applicant submitted an appeal claiming that he had not been fairly considered for Posts Nos. 05-HRI-OHCHR-405865-R-Yaoundé, 05-HRI-OHCHR-407031-R-Geneva and 05-HRI-OHCHR-407257-R-Yaoundé.

36. The JAB submitted its report on 8 January 2008, concluding that the

37. The Applicant submitted an incomplete statement of appeal concerning the failure to select him for the post advertised in Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva on 24 August 2006 and a complete one on 29 September 2006.

38. The JAB submitted its report on 4 February 2008. It found that the selection procedure had been flawed in so far as the language used in the Applicant's evaluation was "selective" and contained a substantive error. The

42. By Order No. 78 (GVA/2011) of 18 May 2011, the Tribunal ordered the Respondent to transmit to it all documents pertaining to the selection procedure contested in application No. UNDT/GVA/2010/024; the Respondent did so on 23 May 2011. By Order No. 84 (GVA/2011) of 24 May, the Tribunal invited the Applicant to submit observations.

43. On 1 June, a hearing was held. The A

It constitutes abuse of authority and harassment in the workplace, prohibited by administrative instruction ST/AI/371 (Revised Disciplinary measures and procedures). He was subjected to retaliation within the meaning of Secretary-General's bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations);

e. One month's net base salary is not adequate compensation for the harm suffered. The amount of the compensation is not consistent with the relevant jurisprudence. The intention to deprive him of a PAS should also be considered when calculating the amount of the compensation; the High Commissioner had personally urged all supervisors to finalize the PAS for each of the staff members concerned prior to the post regularization exercise conducted by OHCHR in 2006.

47. The Respondent's contentions with respect to application No. UNDT/GVA/2010/20 are:

a. The application is not receivable because, at the time when the Applicant submitted his request for review, no final selection decision had been taken;

b. The posts advertised in Vacancy Announcements Nos. 05-HRI-OHCHR-405865-R-Yaoundé and 05-HRI-OHCHR-407257-R-Yaoundé were not part of the regularization exercise;

c. The principles applicable to the post regularization exercise conducted by OHCHR are set out in a document entitled "OHCHR Post Regularization Exercise – Guidelines",

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OHCHR, which, for the reasons mentioned above, was entirely flawed. Neither has he provided details as to why each of the candidates met the criteria for consideration as a 30-day candidate;

b. The selected candidate did not meet the eligibility criteria as he had neither the degree nor the experience required in the vacancy announcement;

c. If the interviewed candidates were 30-day candidates within the meaning of administrative instruction ST/AI/2002/4, it was illogical for the Administration to interview eight other 60-day candidates who had no chance of being selected. Furthermore, the Respondent claims that the post was not part of the regularization exercise, yet he expresses an opinion as to whether the 60-day candidates met the criteria set out in the regularization agreement;

d. The choice of candidate for the post in question was made in advance. The Administration bears the burden of proving the fairness of the contested decision since the relevant information and evidence are solely in its hands (see former UN Administrative Tribunal Judgment No. 1302, *Hammond* (2006)). The fact that the Applicant knew in advance the names of the future appointees to several posts before the selection procedures were finished proves that the selection procedure was flawed;

e. The conduct of the ENACA Coordinator during the Applicant's interview constitutes a procedural flaw. The Coordinator could not, as he did, take a decision without consulting the other members of the interview panel since the very reason for the existence of such a panel is that the decision should be made collegially. The fact that the Coordinator did not feel the need to consult the other members of the panel and that they did not object demonstrates that the decision on the Applicant's candidacy had been taken before the interview and that there was bias against him;

f. The decision not to select him was taken for illegal reasons, namely, the intention to retaliate against him for having made accusations of misconduct within CBB. The Administration consistently refused to deal with the content of his allegations; none of the bodies contacted by the Applicant—the Ethics Office, the Office of the Ombudsman, the Chief of CBB and the Deputy High Commissioner—took action to investigate the facts described in his reports. Instead, the Chief of CBB decided to get rid of him. In the past, the former United Nations Administrative Tribunal concluded that the Administration was at fault for failing to deal with the real substance of a staff member’s various complaints, denying his due process rights (Judgment No. 1178, *Shao* (2004)).

g. The Administration did not correctly exercise discretion in the selection process and committed a substantive error. While appointments and promotions are within the broad discretion of the Secretary-General, this power is neither absolute nor unfettered. Specifically, allegations of abuse of authority or of procedural or substantive errors must be considered;

h. According to article 101 of the Charter of the United Nations and staff regulation 4.2, “the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity”. As the JAB demonstrated in a reasoned manner, such was not the case in this instance;

i. A comparative analysis of his personal history profile (“PHP”) and that of the candidate selected in the contested decision demonstrates that the latter was less qualified. Therefore, the decision involved an abuse of authority;

j. The Secretary-General could not overrule the decision of the JAB without giving his reasons for doing so.

49. The Respondent's contentions with respect to application No. UNDT/GVA/2010/24 are:

- a. The post advertised in Vacancy Announcement 05-HRI-OHCHR-406881-R-Geneva was not part of the regularization exercise conducted by OHCHR;
- b. The Tribunal has consistently recognized that the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General. This power must be exercised fairly and without extraneous considerations or improper

f. Vacancy Announcement 05-HRI-OHCHR-406881-R-Geneva required, *inter alia*, competencies in the areas of teamwork, leadership and managerial skills and the ability to plan, organize and motivate staff. Having reviewed the Applicant's candidature against those competencies, it was decided that he did not fully meet the requirements of the post.

Specifically, he had only limited exposure to leadership rol1(e req3(against)-4.r203 Tc10.1(d)-4(GV

52. The Tribunal must now consider, in turn, the legality of each of the decisions not to select the Applicant for various posts for which he applied.

61. Thus, the Applicant has not established that the aforementioned selection procedure was flawed.

2. *Post advertised on 23 June 2005 in Vacancy Announcement 05-HRI-OHCHR-406881-Geneva (P-4)*

62. With respect to this post, the Applicant also maintains that the procedure was illegal since it was part of a post regularization exercise conducted by OHCHR, under which some staff were considered, for the purposes of the selection procedure, as 30-day candidates within the meaning of administrative instruction ST/AI/2002/4 whereas they should legally have been considered as 60-day candidates.

63. For the reasons given above, the Tribunal has considered that the regularization exercise was illegal. However, the Respondent maintains that this selection procedure was not part of the regularization exercise.

64. It is clear from the documents in the case file that in this instance, eight candidates, including the Applicant and the candidate who was ultimately selected, were invited to an interview even though they had been considered as 60-day candidates. Thus, even if the 30-day candidates within the meaning of administrative instruction ST/AI/2002/4 had been wrongly considered at the same time as the aforementioned 60-day candidates in violation of the provisions of administrative instruction ST/AI/2002/4, this flaw could not, in any event, cause the Applicant harm since he fell into the 60-day category.

65. The Tribunal must bear in mind that in light of the discretionary power of

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required by the vacancy announcement. With respect to education, the vacancy

panel's decisions, but that the chair's statements reveal a clear bias on the part of one of the members of the panel; this leads the Tribunal to rule that the selection procedure contested above was flawed.

3. *Post advertised on 28 June 2005 in Vacancy Announcement 05-HRI-OHCHR-407031-Geneva (P-3)*

69. Although the Secretary-General, on the basis of the JAB report, granted the Applicant compensation in the amount of one month's net base salary owing to errors in the selection procedure for this post, the Applicant requests the Tribunal to increase that compensation and maintains that flaws other than the one acknowledged by the JAB and the Secretary-General were committed.

70. The Applicant first reiterates the aforementioned claim concerning the regularization exercise conducted by OHCHR, which has already been ruled illegal. The Respondent admits that this post was part of the exercise. Here again, the question is whether this flaw harmed the Applicant in any way. It is clear from the documents in the case file that in this instance, the Applicant was considered as a 60-day candidate and that other candidates were considered as 30-day candidates even though they, too, should have been considered as 60-day candidates within the meaning of administrative instruction ST/AI/2002/4.

71. Vacancy Announcement 05-HRI-OHCHR-407031-Geneva concerned six posts. Some of the candidates hired at the end of the procedure were 60-day candidates within the meaning of administrative instruction ST/AI/2002/4 and were treated as 30-day candidates on the basis of the aforementioned regularization agreement. Therefore, the procedure followed was flawed and this flaw may have diminished the Applicant's chances of being selected.

72. The Applicant also maintains that he was a victim of discrimination on the part of the Africa Unit Coordinator, who had been appointed as a member of the interview panel. However, it is clear from the documents in the case file that as a result of a complaint by the Applicant, she decided not to sit on the panel. While

the Applicant objects to her replacement by her deputy, this alone does not constitute proof of an attempt to discriminate against him.

73. Nonetheless, as the Secretary-General acknowledged, it is clear from the documents in the case file that the interview panel committed substantive errors by not awarding the Applicant any points for the “other skills” called for in the vacancy announcement while other candidates were awarded points for skills that he, too, clearly possessed. In particular, no fewer than three candidates were awarded points for their knowledge of the human rights situation in African countries whereas the Applicant, who had worked in Africa on human-rights-related matters for several years and had subsequently been recruited to the OHCHR Africa Unit, received no points.

74. The Applicant is therefore correct in maintaining that the selection procedure for the aforementioned post contained a substantive error.

4. Post advertised on 19 August 2005 in Vacancy Announcement 05-HRI-OHCHR-407257-Yaoundé (P-3)

75. For the reasons discussed in connection with the first of the posts considered above, the Respondent maintains that the request is not receivable because the Applicant allegedly submitted his request for review to the Secretary-General before an administrative decision had been taken. The same response is therefore called for: it cannot be said that no administrative decision to reject the Applicant’s candidature had been taken since he had been informed that he had not been selected for an interview. Therefore, the application is receivable in this regard.

76. The Respondent maintains that the only reason why the Applicant was unable to be interviewed for the post in question was the fact that the Administration was unable to contact him by telephone or email. The Applicant categorically denies having been absent from work on the date on which the Administration claims to have

Conclusion

82. In view of the foregoing, the Tribunal DECIDES:

a. The Respondent is ordered to pay the Applicant financial compensation in the amount of seven months' net base salary at the rate in effect on the date of his separation from OHCHR;

b. The aforementioned compensation shall bear interest at the United

States ~~The Respondent~~ effect from the date this Ju6(a)1(hi7tn4(Un)-6.7(itd)-6.7()TJ-2.9974