



Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Bérengère Neyroud, ALS/OHRM

Introduction

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). He has filed seven substantive applications before the Tribunal challenging a number of administrative decisions taken between August 2008 and July 2011. He alleges that each of these administrative decisions is unlawful because they are not only in breach of specific regulations or rules but also are examples of a continuing pattern of abuse of authority against him by the Executive Secretary (ES) of ECA.

2. In this case he has challenged the 13 July 2011 decision not to select him for the ECA Post of Director, Regional Integration and Infrastructure and Trade Division (D/RIITD). He alleges that this case is another in the series of persistent retaliatory actions taken against him by the ES/ECA that began in 2009.

Procedural Matters

3. Since February 2010, the Applicant has represented himself in all of his cases. Before the hearing of the substantive Applications the Tribunal heard and decided a number of interlocutory matters.

4. Hearings were held in the seven cases over eight consecutive working days in September. This case was heard on 17 and 18 September 2013. In preparation for these hearings the Tribunal made several case management orders¹ which included the consolidation of three of the cases² (the Trio).

5. In accordance with these orders, the Tribunal received oral and documentary evidence in each case on the clear understanding of both parties that, to avoid duplication of documents and evidence, the Tribunal would make its determination in

¹ Order Nos. 098 (NBI/2013), 150 (NBI/2013), 159 (NBI/2013), 179 (NBI/2013), 180 (NBI/2013) and 194 (NBI/2013).

² Case Nos. UNDT/NBI/2009/044, UNDT/NBI/2010/045 and UNDT/NBI/2010/077.

the Trio first and refer to any relevant findings of fact and law made in the Trio in the subsequent judgments.

6. The Parties produced a bundle of documen

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Development (D/TFED). He refused to attend the interview. One of his reasons was that as a rostered candidate he should not be required to be interviewed.⁴

15. On 3 August and 3 December 2009 in its responses to two of the Applicant's

...for future vacancies for which [the Applicant] is a candidate, the ES of the ECA should be urged to ascertain that all ASPs are established in a manner that guarantees fairness and impartiality of all the Panel members.

20. The Applicant agreed under cross-examination that after those two MEU decisions he was interviewed by two ASPs for other posts at the D-1 level.⁷

21. On 4 December 2009 the ES announced the redeployment of staff members following the restructuring decisions.⁸ The ACGS Division, including the Applicant, was to be moved to the former Trade, Finance & Economic Development (TFED) Division now designated as Economic and Development and NEPAD Division (EDND). The Director of EDND was Mr. N against whom the Applicant had lodged complaints. The Applicant's objections to being relocated to what he perceived as a hostile working environment were eventually resolved in August 2010 following the intervention of a number of senior officials.

22. On 5 December 2009 the Applicant applied for the temporary post of OIC RIITD.

23. On 8 February 2010 the post of Director/RIITD was advertised and the Applicant applied for it.⁹ He was interviewed but not recommended for the post or placed on the roster. The ES informed all ECA staff on 9 September 2010 that Mr. A-M had been appointed to the post effective 1 September 2010.¹⁰

24. On 8 February 2010, an Office of Human Resources Management (OHRM) Support Mission to ECA, conducted between 29 October and 6 November 2009, finalized its Mission Report. It reported, *inter alia*, that vacancy management and recruitment at ECA was chronically deficient. The recruitment processes were

⁷ Nwuke UNDT/2013/158 and Nwuke UNDT/2013/159 (Case Nos. UNDT/NBI/2011/001 and UNDT/NBI/2011/008 respectively).

⁸ Nwuke UNDT/2013/157 (Case No. UNDT/NBI/2010/045).

⁹ The facts and decision relating to this recruitment process are in Nwuke UNDT/2013/159 (Case No. UNDT/NBI/2011/008).

¹⁰ *Ibid.*

29. On 1 October 2010, Mr. Rao was appointed Chief HRSS at ECA. He is the chief advisor to the ES on all human resources (HR) matters mostly through the Director of Administration. He is responsible for HR processes relating to promotion and selection. He gave evidence to the Tribunal about some of the HR procedures at the ECA.

30. He said that the responsibility for implementing the recommendations for the OHRM Support Mission was with the Director of Administration and the Chief of HRSS but no matrix was ever made. ECA addressed issues as they came up but not in a systematic way.

31. In response to questions about the selection of candidates from the roster, Mr. Rao said that A/RES/63/250 (Human resources management) referred to appointing pre-screened candidates from the rosters and paragraph 9.4 of ST/AI/2010/3 (Staff selection system) referred to specific job openings. At ECA the roster system is used normally when a job opening is advertised. The hiring manager makes a recommendation of candidates suitable for the position from the roster to HR. If no roster candidate is available the other candidates go through normal assessment. In the past two years just a handful of appointments were made from the roster.

32. In May 2011, ECA filled the D-1 post of Director, Office of Strategic and Programme Management (OPM) by laterally transferring Mr. A-M from Director/RIITD without advertising the post.¹²

Selection process for RIITD post

33. On 9 June 2011, the post of Director/RIITD was advertised with an application deadline of 8 August 2011. The Applicant applied for the post on 16 June 2011. Mr. Rao said that approximately 65 candidates applied and about 17 of them were screened in, including the one who was selected.

¹² The facts and decision relating to this matter are in Nwuke

34. On 4 July 2011, the ES requested the list of all candidates rostered against D-1 posts in substantive divisions. HRSS sent him a list of rostered candidates in the Economic Affairs Job family at the D-1 level on the same day. The Applicant was not on this list.

35. On 13 July 2011, the ES wrote to the Director of Administration advising her that he considered that it was appropriate and important given the urgent demands on ECA in the area of trade, to fill the position of Director/RIITD expeditiously. He said he had reviewed the roster and decided to make a selection from it as per paragraph 9.4 of ST/AI/2010/3. On the same day he selected Mr. K who had been rostered against the Director/RIITD post after it had been advertised in February 2010¹³ and had applied for the post again. The ES set out the qualities to justify Mr. K's appointment and asked the Director of Administration to take the necessary steps to appoint Mr. K effective immediately. On the same day Mr. K was notified of his selection from the roster of pre-approved candidates. He accepted the appointment immediately.

36. The appointment was effective 1 August 2011. On 27 July 2011 when it was announced by the ES to all staff, the Applicant requested management evaluation of the decision of the ES to fill the post of Director/RIITD from the roster and applied to the Tribunal for a suspension of action. This was rejected. The MEU decision dated 28 September 2011 upheld the decision to fill the post from the roster.

37. The Applicant told the Tribunal that he waited and thought carefully about his next step. He was considering not proceeding with his challenge but because matters at the ECA were not improving, he filed his application with the Tribunal on 12 December 2011.

¹³ NwukeUNDT/2013/161 (Case No. UNDT/NBI/2010/008).

Applicant's Submissions

38. The Applicant submitted that there are dynamic linkages between the events in this and the other cases he has brought to the Tribunal. He recognizes that he has no right to promotion but to full and fair consideration in a promotion exercise. He has brought the case in the interests of the Organization, the Administration and the staff members. He said he is not searching for lucrative awards but a contribution to the improvement of the administrative and management practices at the United Nations.

39. The Applicant alleges that the ES had antipathy towards him and had not

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done in secret. This is an egregious violation and contemptuous disregard of the General Assembly's mandate of transparency in the recruitment process.

44. The decision was motivated by the personal animus of the ES against the Applicant. It was retaliation for the complaint he made against the ES. The Applicant relies on evidence given in the Trio of cases¹⁴ to substantiate his allegations of harassment. The Applicant was not accorded due process as his candidature was not even considered.

45. In spite of the Ruling of the Tribunal in NwukeUNDT/2011/107 paragraph 59, the ES did not make even a minimal attempt to consider his application. His decision to ignore the ruling was contemptuous. The decision was improperly motivated because it was designed to block the Applicant from appearing before a selection panel to deliberately frustrate the recommendations of the Secretary-General in the 2 MEU decisions.

46. The use of the roster candidates was unlawful because although Mr. K was on the roster he was not rostered against this post. He was not marked with the symbol RM but was marked "screen". Even if Mr. K were rostered against this post, the decision is unlawful because the suitable roster candidates were not submitted by the recruiter within five working days as required by Chapter 15.5.2 of the INSPIRA Instructional Manual or linked by the recruiter to the job opening as required by Chapter 15.5.7 of the instructional manual.

47. Mr. K was rostered based on his performance in an interview as a candidate for the previously advertised post of Director/RIITD however MEU had found that the Applicant had not been given full and fair consideration for that post. It is unfair to use the outcome of a flawed process to deny him an opportunity of an interview.

¹⁴ NwukeUNDT/2013/157.

52. UNDT has consistently recognised that the Organization may establish criteria for selection even if it limits the pool of eligible applicants so long as the criteria serve an important interest of the Organization. The Tribunal notes that of the three cases cited by the Respondent in support of this proposition none does so expressly.

53. The Applicant did not receive disparate treatment as the facts relating to the appointment of Mr. K are different from those of the Applicant while on the roster. The selected candidate did not receive favourable treatment.

54. The decision was not a retaliatory act. The Applicant's complaint against the ES was fully addressed and completed in July 2010. There was no finding of discrimination against the ES. There is no evidence that the Applicant is a victim of harassment.

55. The Applicant's right to a full and fair process was not violated and there was no breach. The Applicant has not proven any damage or prejudice. Any loss of chance would be highly speculative. There is no basis on which to award compensation.

Considerations

56. ST/AI/2010/3 was promulgated in April 2010 to integrate the recruitment, placement, promotion and mobility of staff within the Secretariat. The issue is whether this administrative instruction enables the Administration lawfully to fill a vacancy by appointing a roster candidate without evaluating other candidates who have applied to the vacancy.

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conditions of service”. These words are reflected in General Assembly resolutions on Human Resources Management.

58. General Assembly resolution 65/247 (Human resources management), adopted on 24 December 2010, at section II, para 20, requested that the Secretary-General “ensure that all administrative instructions and any other internal instructions on human resources ...are in full compliance with the relevant resolutions of the General Assembly”. It follows that where there is a dispute about the interpretation of an administrative or other internal instruction, the Tribunal should take into account any relevant resolutions of the General Assembly. In the case of the use of rosters in the selection process, the following Resolutions are relevant.

59. General Assembly resolution 63/250 (Human resources management), adopted on 24 December 2008, noted the desirability of speeding up the recruitment and staffing process but at section III, paragraph 8 decided that in order to ensure the transparency of the recruitment process all specific vacancy announcements shall continue to be advertised. At section III, paragraph 16, the General Assembly requested that the Secretary-General ensure all anticipated and immediate vacancies are properly advertised and filled quickly, and to report on the success of this endeavour to the General Assembly at its sixty-fifth session.

60. A/RES/61/244 (Human resources management), adopted on 22 December 2006, stated at section I, paragraph 2, that the Secretary-General’s proposals on the new human resources framework shall be based on “clear ethical standards, simplicity, clarity and transparency,”... In that resolution the General Assembly recognized the importance of speeding up the recruitment and staffing process, in accordance with article 101, paragraph 3, of the Charter, and at section II, paragraph 9 recognised that pre-screened rosters can considerably expedite the recruitment process in the United Nations. To that end it requested the Secretary-General at paragraph 10:

64. The Tribunal's reasons in *Charles* which are respectfully adopted in the present case, included, *inter alia*,

68. The Tribunal expressly rejects the submission of the Respondent that the decision whether or not to select a roster candidate without further consideration of non-roster applicants is at the discretion of the manager. The manager's discretion is exercised once all suitable candidates have been considered. In making this submission the Respondent relied on the INSPIRA Manual section 15.6.2. In the

Although he was interviewed for the post in 2010 the Applicant was not included in this roster, which diminished his chance of appointment. The Applicant repeatedly acknowledged he had no expectation of being appointed. There is no evidence that the unlawful decision has caused him any monetary or professional harm such as loss of chance of appointment that would entitle him to compensation.

81. The Applicant is however entitled to moral damages. Throughout this case and all the other cases heard by the Tribunal, he exhibited a strong sense of injustice both to himself and to the institution of the United Nations and its ideals. These were compromised by the unlawful selection processes. His legitimate expectation that, having applied for a post, he would be fully and fairly considered for it was disappointed.

82. UNAT has held that it is within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case.¹⁹

83. The Tribunal acknowledges the stress caused to the Applicant by the circumstances of this case and awards one month of net base salary at the rate applicable to the Applicant at 13 July 2011.

(Signed)

Judge Coral Shaw

Dated this 4th day of December 2013

¹⁹ Cieniewicz2012-UNAT-232; Morsy2012-UNAT-330 and Wu2010-UNAT-042.

Entered in the Register on this 4th day of December 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi