UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/087/ JAB/2009/052
Judgment No.: UNDT/2009/030
Date: 7 October 2009
Original: English

Introduction

1. The Applicant applied to the Secretary-General for an exception to be made to administrative instruction ST/AI/2006/3 to allow her to apply for a D-2 position that was more than one level higher than her P-5 personal grade. At the time of the application she was receiving a D-1 special post allowance (SPA) as she was working in the acting position for which she wished to apply. The application for an exception was refused by the Assistant Secretary-General for Human Resource Management (ASG). The Applicant sought an administrative review which upheld the original decision. She then appealed to the Joint Appeals Board (JAB).

2. On 1 July 2009 the case was transferred from the JAB to the United Nations Dispute Tribunal for hearing and decision. Counsel for both parties advised the Tribunal that they did not wish to call any evidence other than that submitted in writing to the JAB but asked for an opportunity to make submissions to the Tribunal. These submissions were made by way of a vi

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The facts

4. The parties agreed on a statement of facts which forms the basis of the following outline of the material facts:

5. The Applicant has been a staff member of the UN since 1978 and has been working in the Advisory Committee on Administrative and Budgetary Questions (ACABQ) Secretariat since 1999. In 2000 she was promoted to the P-5 level as senior administrative management officer. In July 2006 the Applicant applied for the vacant position of executive secretary, a post at the D-2 level. At that time ST/AI/2002/4 was in force. This administrative instruction did not impose eligibility restrictions on staff members applying two levels above their own. The Applicant participated in a competency-based interview but was not selected.

6. On 1 January 2007, ST/AI/2006/3 came into force replacing ST/AI/2002/4. Section 5.2 of ST/AI/2006/3 provides that staff members shall not be eligible to be considered for a position more than one level higher than their personal grade. It was introduced following a consultative process between staff and management which culminated in a recommendation from the Staff Management Coordination Committee. The Respondent contends, and was not seriously disputed by the Applicant, that the change was made to reflect a legitimate management concern about the gravity of concerns and frustrations of staff who had been bypassed for promotion by staff junior to them in grade and experience.

7. On 1 September 2008 when the then Executive Secretary separated from employment pursuant to an agreed termination the Applicant was named acting Executive Secretary and was granted a SPA to D-1 level as she was and continues to be employed on the P-5 level. A new incumbent has been selected and is soon to take up the new position.

8. On 13 January 2009 the vacant D-2 post of Executive Secretary was announced and a month later the Applicant wrote to the Secretary-General requesting that an exception be made to section 5.2 of ST/AI/2006/3 to enable her to apply for

the D-2 post. In this letter she set out the full reasons why she should be considered for the position notwithstanding that it would be a promotion to a post more than one grade higher than her personal grade. These reasons included:

a. Her long experience and increasing responsibility in the ACABQ Secretariat.

b. She had been receiving a SPA at the D-1 level since September 2008 when she was named acting Executive Secretary.

c.

another aid to interpretation. However in a number of common law jurisdictions reliance on that dichotomy to establish the meaning has been found to be inappropriate. In R v Soneji and Another[1], the House of Lords conducted a detailed review of how the distinction had been dealt with in a number of jurisdictions, including Canada, Australia and New Zealand. It summed up the position in this way:

> "Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

18. To establish the meaning and intention of a UN provision the relevant context is the hierarchy of the UN's internal legislation. This is headed by the Charter of the UN followed by resolutions of the General Assembly, staff regulation and rules, Secretary-General bulletins and then administrative instructions.

19. Article 101.3 of the Charter provides:

> "The paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

20. The Secretary-General is required by the preamble of the staff rules to provide and enforce staff rules which are consist

Issue b. Was the decision not to allow an exception unlawful in this case?

27. A decision maker exercising powers conferred by rules and regulations is obliged to turn his or her mind to the factors which are relevant to the decision to be made. In the present case the relevant factors were threefold:

a. Can an exception such as that sought by the Applicant be made?

b. If so, what are the circumstances under which a legitimate exception may be made?

c. Does the Applicant's case meet those circumstances?

28. The question of whether the AGS made a lawful decision is one of fact. Did she properly turn her mind to these matters?

29. In the Applicant's initial application of 11 February 2009 for the Respondent to make an exception in her case, she explicitly requested such exception to be considered by stating:

> "Dear Mr Secretary-General,
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> This is to request that, in respect of my application for the position of Executive Secretary of ACABQ, an exception be made to the provision of paragraph 5.2 of the administrative inst

current staff regulations and rules including ST/AI/2006/3 we are not permitted to grant exceptions to the prohibition set out in paragraph 5.2" indicates that she addressed the first step. The second step, in his submission, was addressed in the words "to date no such exception has been made."

32. The Applicant argued that the words used show that the ASG did not consider the second step. It is the Applicant's case that once the ASG decided that section 5.2 did not permit her to make an exception she stopped at that point and did not consider whether the Applicant had made out a case for an exception or not.

33. If the only evidence of the decision were the ASG's letter of 25 March 2009 the question of whether she had in mind that an exception could be possible under staff rule 112.2(b) would be finely balanced. She does not refer to rule 112.2(b) but the reference to no exceptions having been made in the past could possibly be construed as an oblique reference to the possibility of an exception being granted. However I find that the correspondence which preceded that letter shows that without a doubt the decision made and adhered to throughout the process leading to the ASG's formal reply was that the wording of section 5.2 did not allow any exceptions and therefore the Applicant's case for an exception could not and would not be considered.

34. The first response of 16 March 2009 said her case could not be considered because of the wording of section 5.2. The next response of 17 March 2009 cited only ST/AI/2006/3. It made no reference to staff rule 112.2(b) or any possibility of an exception.

35. Read together with these two answers I find that the formal response of 25 March 2009 is a reiteration and reinforcement of the unequivocal decision that had been made earlier. This decision was that section 5.2 did not permit exceptions and therefore no exception would be made. In that light, the words "to date no exception has been made" read as a further justification for the decision that no exception could be made.

36. I find that the ASG considered that the could never be an exception to the prohibition in section 5.2 and therefore did not