



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TEFERRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bernard Adams, OSLA

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

alia, that the contested decision was not of an individual application and did not create direct legal consequences for the terms of the Applicant's employment.

6. By a Judgment dated 17 December 2009, the Tribunal ruled that the contested decision was an administrative decision within the meaning of Article 2.1 (a) of the Statute of the UNDT and therefore found the matter to be receivable.

7. The Tribunal held a hearing on 20 January 2010 in Nairobi. Representatives of the Applicant and the Respondent participated via audio conference. The Applicant did not participate in the hearing. Both representatives declined to call any witnesses and requested that the Tribunal decide the case based on the existing record.

Applicant's submissions

8. The Applicant's principal contentions are:

(i) That his due process rights were violated and his career prospects damaged as a result of the Administration's failure to follow its own procedures during the selection process.

(ii) That the decision to re-advertise the subject post violated his rights.

(iii) That pursuant to ST/AI/2006/3, he was entitled to a selection process that was free from interference.

(iv) That the Administration should be estopped from not accepting the ASP's recommendation on the pretext that such action was necessary to ensure "transparency and maintaining the integrity of the recruitment process".

9. In view of the foregoing, the Applicant requests the Tribunal to order the following remedial action:

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No.

Issue 1:

13. Whether the Administration abused its discretionary authority when it decided to discontinue the selection process with respect to VA 07-ADM-ECA-414274-R-Addis Ababa and recommence the process.

14. Former administrative instruction, ST/AI/2006/3, dated 15 November 2006, sets out the applicable procedures governing the staff selection process. Section 7.1 of this administrative instruction provided that:

In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.

15. Further, section 7.3 of ST/AI/2006/3 provided that:

For positions in the General Service and related categories that are filled locally under staff rule 104.6, the recruitment of external candidates for posts at the G-5, S-3 and TC-4 levels and above shall be possible only after it has been established to the satisfaction of OHRM or the local personnel office concerned that there are no suitable internal candidates at the duty station.

16. According to the Respondent, the ASP, through the Programme Case Officer (PCO), originally submitted to HRSS a recommendation that considered two possible candidates as suitable for the post. One of the candidates was a female UN staff member who applied for a lateral move and who was a 15-day mark applicant. The other one was the Applicant, who was an external 60-day mark applicant.

17. The Respondent asserts that the Ex-Officio member of the ASP, a Human Resources Officer (HRO) from HRSS, informed the PCO that the recommendation mixed internal and external candidates, and advised the PCO to consider revising the

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Ex-Officio member of the ASP) and the PCO regarding the mixing of internal

documentation, such as the Galaxy¹ Applicant List that shows the eligibility status of each applicant, to establish that there actually was a 15-day candidate. Here, the onus is on the Respondent to show that the provisions of Section 7.1 of ST/AI/2006/3 are applicable. In the Tribunal's view, this onus has not been discharged. If, as the Respondent is asserting, this other candidate was a 15-day candidate, why was she being considered with a 60-day candidate in contravention of Section 7.1 of ST/AI/2006/3?

23. In view of the foregoing, the Tribunal does not accept the Respondent's assertion that the Chief of HRSS acted in full accordance with Annex IV, section 1(l) of ST/AI/2006/3² when she deemed the selection process invalid. Regrettably, this procedural irregularity tainted the outcome of the selection process to the point of making it legally questionable.

24. The Tribunal is of the view that it was incumbent upon the Chief of HRSS to exercise due diligence in ascertaining the circumstances of this case prior to the invalidation of the selection process. This due diligence could have been as simple as listening to the tape recorded interviews and/or insisting upon proper documentation to the file from the PCO.

26. While the Respondent emphasizes in his pleadings that management has broad discretion in appointing and promoting staff and in filling vacancies³, the Tribunal wishes to remind him that this discretion must be exercised judiciously and in good faith. In *Kasmani*, the Tribunal noted that “discretion cannot be considered to be an unfettered one in the sense that it would always dispense the decision maker with the need to carefully weigh in the balance the consequences of the decision. The myth of unfettered discretion is inimical to the rule of law principles.”⁴

Issue 2:

27. Despite the fact that the Tribunal finds that the Administration abused its discretionary authority in deciding to discontinue the selection process with respect to VA 07-ADM-ECA-414274-R-Addis Ababa, the analysis in this case cannot stop there. The Tribunal must also consider whether the Applicant’s rights were violated by the Administration’s decision to discontinue the selection process. In making a determination on this issue in this particular case, the Tribunal must first examine whether there should be a distinction between being “recommended” for a post and being “selected” for a post.

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day mark. The head of department/office shall ensure that, in making the proposal, he or she has taken into account the Organization's human resources planning objectives and targets, especially with regard to geography and gender, and provide a certification to that effect to the central review body. There shall be no joint advisory body at the department or office level prior to the transmission of the proposal to the central review body.

30. Section 8 of ST/AI/2006/3 provided that:

The central review bodies shall review the proposal for filling a vacancy made by the department/office concerned to ensure that candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed, in accordance with sections 5.1 to 5.6 of ST/SGB/2002/6.

31. The relevant part of Section 9.1 of ST/AI/2006/3 provided that:

The selection decision shall be made by the head of department/office when the central review body finds that the evaluation criteria have been properly applied and/or that the applicable procedures have been followed. The selection shall be made by the official having authority to make the decision on behalf of the Secretary-General when the central review body finds that the evaluation criteria were improperly applied and/or that the applicable procedures were not followed, in accordance with the provisions of section 5.6 of ST/SGB/2002/6.

32. The relevant part of Section 10.2 of ST/AI/2006/3 provided that:

The decision to select a candidate shall be implemented upon its official communication to the individual concerned.

33. The Applicant avers that after having submitted himself to the interview process, and having been duly recommended for selection by the ASP, it is a denial of his due process rights for the Administration to simply ignore the results of its own procedures that resulted in his being “appointed” to the subject post.

34. The Respondent submits that the Applicant’s due process rights were not violated as the ASP’s recommendation was not a final selection decision. The Respondent avers that the role of an ASP is to provide a proposal regarding a selection decision, and not to make that decision, which is reserved to the official identified in section 9 of ST/AI/2006/3 with the authority to act on behalf of the Secretary-General.

35. Based on the relevant provisions of ST/AI/2006/3, subsequent to an interview or other appropriate evaluation mechanism, the Programme Manager makes a proposal (i.e. recommendation) that identifies a suitable candidate(s) for a specific post. After a review by a central review body, the decision to choose (i

37. Thus, even though the Applicant avers that he was “appointed” to the post, pursuant to the applicable rules, he had not been selected or appointed to the subject post. He had only been recommended by the PCO.

38. Nonetheless, the Tribunal is of the view that even though the Applicant had only been recommended, and not selected for the subject post, the procedural irregularity that prevented his candidacy from proceeding to the central review body was serious and therefore amounted to a violation of his rights.

39. In former United Nations Administrative Tribunal (UNAT) Judgment No. 914, *Gordon and Pelanne*, (1999), the Applicants maintained that the Administration’s failure to circulate vacancy announcements “violated their right to be considered fairly and objectively” for two D-1 posts. In this case, the former United Nations Administrative Tribunal (UNAT) was of the view that the urgency alleged by the Respondent to justify the non-circulation of the vacancies was not so extraordinary in nature that the Administration could avoid the procedures that all staff members are entitled to expect. The former UNAT found that the Applicants were “automatically excluded from any opportunity to compete for the posts” as a result of the improper procedure used by the Respondent. Further, the former UNAT found that “the Respondent’s disregard of proper procedures was detrimental to the Applicant’s career development, and caused the frustration and mental anguish of not being considered for posts for which they might have been qualified.”

40. Additionally, in former UNAT Judgment No. 779, *Maia-Sampaio*, (1996), the Applicant applied twice for the post of Senior Research Officer. The first recruitment process was cancelled and at the end of the second recruitment process, another candidate was selected. She subsequently asserted that she was not given fair consideration for the post because OHRM was actively favouring the selection of another candidate. The former UNAT considered that the Secretary-General is vested with discretion in matters of promotion and appointment. However, the former

so serious or so relevant to the decision not to renew that the non-renewal decision should be considered illegal and the staff member entitled either to renewal of his or her contract or to compensation in lieu thereof if the Administration refuses to comply. The latter conclusion applies in principle only in cases where there have been serious and manifest violations of the rights of the staff member and also where the likelihood that the staff member's contract would be renewed was particularly strong for general and/or specific reasons.

Conclusion

43. In view of the foregoing, the Tribunal concludes that the due process rights of the Applicant were violated.

Remedy

44. In view of the conclusion above, the Parties are directed to provide written submissions to the Tribunal, on or before 14 May 2010, as to the appropriate relief that should be ordered.

