
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/008

Judgment No.: UNDT/2013/159

Date: 4 December 2013

Original: English

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 seven substantive applications before the Tribunal in which he contests administrative decisions taken between August 2008 and July 2011. He alleges that each of the challenged administrative decisions are unlawful because they are in breach of specific regulations or rules and, in addition, are examples of a continuing pattern of abuse of authority against him by the Executive Secretary (ES) of the Economic Commission for Africa.

2. In this case he challenged two decisions. Of these, the decision not to advertise the temporary vacancy for the position of Officer-in-Charge (OIC), Regional Integration, Infrastructure and Trade Division (RIITD), ECA was held to not be receivable.¹

3. The sole decision under challenge is therefore the non-selection of the Applicant for the post of Director of RIITD which was advised to him in a letter dated 30 August 2010.

Procedural Matters

4. The Applicant has represented himself in all of his cases since February 2010. Before the hearing of the substantive applications the Tribunal heard and decided a number of interlocutory matters.

5. The seven cases were heard over eight consecutive working days in September 2013. This case was heard on 12 and 13 September 2013. In preparation for these hearings the Tribunal made several case management orders², which included the consolidation of three of the cases (the Trio).³

¹ Order No. 106 (NBI/2013) dated 20 May 2013.

² Order Nos. 096 (N os0.02 0 3(6)-5.7.d Tc.0T0T9uae(20)-50 TD-AN

6. 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 evidence and documents, the Tribunal would make its determination in the Trio first and refer to any relevant findings of fact and law made in the Trio in the subsequent judgments.

7. The Parties produced a bundle of documents for the hearing which contained all documents to be referred to by the witnesses or in submissions. The Applicant's evidence comprised his sworn confirmation of the facts alleged by him in his application supplemented by his oral testimony. The Respondent did not call any witnesses.

8. At the commencement of the hearing, the Respondent sougg38.3(a)-.7(ke5ei7(e)-.5(hearing whic

18. On 24 June 2009, the Applicant filed a complaint with the Secretary-General about several matters related to his employment at ECA. It included his protest at the decision requiring him to submit to a competency-based interview for the post of Director of Trade, Finance & Economic Development (TFED). The whole complaint was referred to MEU for review.

19. Following another restructuring of ECA announced at the end of 2009⁴ a number of posts became vacant at ECA. A temporary vacancy announcement for the post of OIC, RIITD was issued on 1 December 2009.

20. On 3 August and 3 December 2009 in its responses to two of the Applicant's requests for management evaluation of selection decisions and other matters⁵, MEU and the Secretary-General urged ECA to take appropriate action to ensure the integrity of the selection process, including the selection panels, and to ensure that for future vacancies for which the Applicant was a candidate, the ES of ECA should be urged to ascertain that all ASPs were established in a manner that guaranteed fairness and impartiality of all Panel members.

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

The RIITD vacancy and Selection process

22. On 8 February 2010 the post of Director of RIITD was advertised and the Applicant applied for it. As he had not heard about the outcome of his application for the OIC post, on 6 March he wrote to the Chief of Staff, ECA, copied to the ES and a number of other senior ECA officials. He did not receive a reply.

23. On 8 February 2010, a Mission Report by an Office of Human Resources Management (OHRM) Support Mission to ECA, held between 29 October and 6 November 2009, was finalized. It reported, *inter alia*, that vacancy management and

⁴ Nwuke UNDT/2013/157.

⁵ Ibid.

should accept an offer of an L6 post earlier made to him by the ES or he would regret it.

c) Other ASP members including Mr. HH had been involved in ASPs for positions for which he had applied and which were currently under investigation.

27. In this email the Applicant stated that he did not believe th

Applicant's interview for the RIITD post, which was conducted at 4.00 p.m. on 4 May 2010.

31. The Applicant described the atmosphere at his interview as very tense. He later reported to HRSS in writing that a member of the panel created a discomforting environment. He told the Tribunal that she was wincing and making guttural noises in disapproval as he was answering the questions. Another member remained placid and showed no enthusiasm. He simply asked the questions.

32. On 5 May Mr. P wrote to the ES and the other members of the ASP. He said he had been copied on the email exchanges between the Applicant and HRSS on the issue of the composition of the ASP for the post of Director of RIITD, He quoted from the Applicant's letter and said:

In my 29 year professional career this is the first time ever that my professionalism and integrity and moral values have been questioned... I consider... the references made by [the Applicant] unwarranted, distasteful, abusive and unethical. I trust in your judgment you will take the necessary actions to address this matter.

33. On 10 May 2010, the ES sent comments to the Investigation Panel about the Applicant's allegations of prohibited conduct by the ES. He referred to the Applicant's "continuous resort to various dispute resolution processes" and his "track record of behaviour that is antithetical to the norms and values of the UN" He said "[t]he staff member is notorious in ECA for sending abusive and harassing emails to colleagues and making all manner of accusations against them for unfathomable reasons".

34. The ES referred to Mr. P's letter in which he criticized the Applicant for the allegations made about the members of the ASP for the RIITD post. The ES said that the Applicant had written to impugn the integrity of several ECA directors who had been appointed to an ASP for the post; he had accused them of bias against him. He described the Applicant's letter as "...this false and worrying allegation which was no doubt aimed at intimidating the panel". The ES concluded his response to the

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40. The OIC HRSS wrote to CRB to say that the PCO had made adjustments to both questioned evaluations. In the case of the Applicant, the adjustment was to the “overall competencies field”.

41. On 30 July 2010, the ASG/OHRM advised the Applicant that the Investigation Panel Report, dated 1 July 2010, into his complaints of prohibited conduct by the ES had found that no prohibited conduct took place. It had found that the allegations of harassment against the ES by the Applicant had no merit and lacked credibility. They could not be substantiated. In relation to his allegation that the ASPs were biased the Investigation Panel was satisfied that he had been fairly and impartially evaluated. The ASG/OHRM said the findings were sound and supported by the evidence.

42. The ES was sent the names of the 2 recommended candidates for the RIITD post on 27 August. On 30 August 2010, the Applicant was advised that he was “not amongst the most suited applicants”.

43. On 9 September 2010, the ES announced that Mr. A.M. had been promoted and appointed to the RIITD post.

44. On 11 October 2010, the Applicant requested management evaluation of the decision to fill the RIITD post. He alleged that the decision was procedurally flawed and tainted with ill motive and prejudice.

45. In his response to the Applicant’s request for management review, the ES told MEU that the ASP decided that the recommended candidate should obtain more than half of the requirements of a competency rating for at least five competencies as a minimum benchmark for recommendation given the importance of the post in terms of its relationship to ECA’s strategic pillar and the need to ensure continued close partnership with the African Union, the African Development Bank and other agencies. He continued:

...Each candidate was assessed against eight competencies, as advertised in the VA. Based on his performance during the interview, the Applicant was found to have met more than half of the competency requirements in only 4 competencies... He did not get a rating of more than half of the competency requirement in at least a minimum of 5 competencies... the minimum requirement to recommend a candidate. Therefore he was not recommended.

46. On 3 February 2011 MEU released its findings. It concluded that the decision not to select the Applicant was not an act of retaliation by the ES. It found no error in the selection. It rejected the allegations that two of the panel members had a conflict of interest due to their involvement in other ASPs. The fact that an ASP member was a former incumbent of the Post did not disqualify him. However MEU found that the impact of the circulation of the Applicant's 29 April email to the members of the panel and Mr. P's reaction to it raised a serious doubt as to whether the Administration could demonstrate that it gave him full and fair consideration for the post.

47. Following an unsuccessful and confidential attempt to resolve the issue by agreement, MEU made a public proposal for the Applicant to accept compensation for this breach on the condition that he did not appeal the matter to the UNDT or bring any other claim in relation to the selection process of the Post in any other forum.

48. The Applicant rejected that proposal and filed his application with the UNDT on 19 February 2011.

49. Mr. Amareswara Rao, Chief, ECA Human Resources Services Section (HRSS) who gave some evidence in Case Nos. UNDT/NBI/2011/060 and UNDT/NBI/2011/082 also provided the Tribunal with evidence about the practice adopted by interview panels at ECA. He said that the ES nominates the ASPs for D-1 posts from a small pool of no more than 15 when the Directors of the Sub Regional Offices (SROs) are included. Once the interview panel is selected it has a preliminary meeting to: finalise questions to be asked based on the competencies for the Post

serve on the panel was baseless. The Investigation Panel found there was no prohibited conduct on the part of any ECA official.

62. There is no evidence that the contested decision was an act of retaliation or discrimination.

63. The circulation of the 29 April email was an error. There was no evidence of *mala fides*.

64. There is no basis upon which to award compensation to the Applicant.

Considerations

65. Although the Applicant alleged there were several aspects of the selection decisions that were unlawful, his principal claims challenged the composition of the panel including allegations of bias and the method of competency assessment. He also repeated the allegations made in each of his other cases that he was the victim of harassment, discrimination and abuse of authority. In the light of the ultimate decision in this case the Tribunal will not traverse the other issues other than in passing as they relate to the main issues.

Composition of the Panel

66. In the case of *Majbri* 2012-UNAT-200, UNAT stated at para 30 that:

All the candidates that appear before an interview panel have the right to full and fair consideration. A candidate challenging the denial of a promotion must prove through a preponderance of the evidence any of these grounds: that the interview and selection procedures were al of a

67. The Applicant referred to the “Terms of Reference, Interview Process under the Staff Selection System” revised in January 2006 as a guide to the procedures which he says should have been followed. These terms of reference relate to UNOV/UNODC and had not been adopted by OHRM and are therefore not applicable to this case.

68. In the absence of OHRM guidelines on selection panels or on how the competency standards are set, the Tribunal relies on the principles of fairness and natural justice to assess the lawfulness of the procedures adopted in the interview and non-selection of the Applicant in this case. The following matters are relevant to these principles:

- a) The small size of the pool from which suitable persons could be

those views were justified but the fact remains that the ES held a very negative opinion of the Applicant at a time when he was responsible for the appointment of each ASP and the ultimate selection decision for all of the posts for which the Applicant had applied, including the D-1 RIITD post.

71. Mr. P's reaction to the Applicant's 29 April 2010 letter was extreme and disproportionate. He described the Applicant's letter as unwarranted, distasteful, abusive and unethical.

72. In *Finniss*

Competency Evaluation

75. The evaluation formula applied by the ASP and sent to the CRB was that the candidates should demonstrate that they reached the standard of more than half the requirements in at least five out of the eight competencies in the Vacancy Announcement. The CRB's questions about the way the ASP expressed the Applicant's results appeared to indicate an inconsistency in the method of evaluation, however, the Tribunal is satisfied that the change in wording sent to the CRB simply clarified that he had attained the standard of more than half the requirements in four of the competencies. That did not alter the fact that according to the records of the ASP he did not achieve the standard in five or more competencies.

76. The Applicant suggested that there was a possibility that the ASP formulated the evaluation standards at the end of the process in order to ensure that he was not recommended for selection. Mr. Rao's evidence revealed that the ASPs set the method of assessment before the interviews. In light of the finding of apparent bias by the ASP members and Mr. Rao's concerns about the lack of compliance with the relevant administrative instruction in this part of the process there is an inevitable suspicion about the integrity of the process applied to this selection process. However a suspicion does not amount to a preponderance of evidence that it did occur. There is insufficient evidence to substantiate the Applicant's allegations.

Harassment, Discrimination and Abuse of Authority

77. The Tribunal found in the Trio of cases that the once strong relationship between the ES and the Applicant deteriorated from at least early 2009. Their last meaningful discussion was in June 2009. The Applicant ceased to trust any decisions made by the ES or by the Administration and challenged those decisions with increasing frequency. This led to a state of siege between the Applicant and the Administration.

78. The Applicant's allegations in the present case reflect this situation. In spite of the adverse finding that the Applicant did not receive fair consideration in his application for the RIITD post, the Tribunal cannot find on the preponderance of evidence that the reason for that failure was an act of harassment, discrimination or abuse of process. It is rather an example of the systemic failures of the HR system in place at time in the ECA as reported by the Mission Report of the OHRM Support Mission to ECA which was finalised on 8 February 2010. **(Footnote the Trio)**

Did the Applicant suffer any compensable damage as a result of the decision?

79. Article 10.5 of the UNDT Statute materially provides that in cases of appointment, the Tribunal may as part of its judgment order rescission of the contested administrative decision and/or compensation that shall not normally exceed the equivalent of two year's net base salary of the Applicant.

80. Although the Applicant requested the rescission of the selection decision for the post of Director RIITD, the decision is three years old. Too much time has passed for the Applicant to request the rescission of the selection decision.

82. The Applicant's case is that he has a legitimate expectation of a full and fair selection process. He gave evidence of the moral damage he has suffered. He spoke of his loss of morale and low self-worth. The Tribunal find.06cun

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

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi