



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/023/
UNAT/1643
Judgment No.: UNDT/2011/159
Date: 8 September 2011
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Santiago Villalpando

CHARLES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. At the material time the Applicant was a Financial Management Officer, Grade P-3/VI, on a permanent contract.

2. By a statement of appeal dated 31 October 2008, the Applicant filed his appeal to the former United Nations Administrative Tribunal against the decision of the Respondent, who accepted Report No. 587, dated 6 June 2008, of the Joint Appeals Board (“JAB”) in Geneva. The report concluded that the Applicant’s rights were not violated by the management decision, which was based on the recommendation of the selection panel, not to select him for a post of legal officer. The post was at the now abolished Secretariat for the JAB and the Joint Disciplinary Committee (“JDC”) New York, in the Office of the Under-Secretary-General, Department of Management.

3. It should be made clear at the outset that it is not contended by the Applicant that he ought to have been selected for the position. It is his primary contention that there was a failure to give him full and fair consideration in the selection process and that, had he been given full and fair consideration and been subject to a competency-based interview, he would have had a fair and equal chance of satisfying the selection panel of his ability to perform the duties in question.

4. By a letter dated 13 November 2009, the Applicant was informed that the former United Nations Administrative Tribunal was unable to consider his appeal before it was abolished on 31 December 2009. In the circumstances his appeal would be transferred to the Dispute Tribunal as of January 2010. This was in accordance with paragraph 45 of General Assembly resolution 63/253 (Administration of justice at the United Nations) of 24 December 2008, and section 4 of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice)

5. In their joint submission both parties agreed that no additional documents were required as the facts and evidence on record were adequate for a consideration of the

matter. They also agreed that an oral hearing was not required, and they consented to the application being determined on the papers.

The issues

6. The parties agree that the legal issues in this case are:
 - a. Whether the applicant received full, fair and timely consideration in the recruitment for post No. 06-LEG-DM OUSG-408675-R-New York (“the Post”); and
 - b. Whether the process of evaluation undertaken by the Respondent and the decision not to select the Applicant was tainted by lack of due process, extraneous factors or any improper motive.
7. As formulated, it could be perceived that the second issue is simply a variant of the first. However, the present case deals with two distinctively separate matters, namely: (1) whether the initial selection process was conducted correctly, including the appropriateness of the selection criteria; and (2) whether the subsequent management decision not to select the Applicant was proper and, in particular, whether the JAB, when reviewing this decision, accorded the Applicant his due process rights. The differentiation is important since each process is regulated by its own legal regime and involves different decision-makers.

Facts

The vacancy announcement

8. The vacancy announcement was issued on 31 January 2006 with the deadline for applications of 1 April 2006. The Post was at the P-3 level and the main responsibilities were described as providing legal support to the panels of the JAB and JDC in the processing of cases affecting the administrative treatment of staff members. The principal functions were: reviewing parties’ submissions, identifying factual and

legal issues; advising on substantive legal questions and on technical procedural matters on a full range of topics related to appeal and disciplinary proceedings; performing legal research; and preparing summaries of facts and contentions of the parties.

9. The competencies set out in the vacancy announcement for the Post included that of “Professionalism”, which was defined as:

In-depth knowledge of administrative and employment law; strong analytical skills and ability to conduct comprehensive legal research on a range of issues proficiency in legal writing and expression and ability to prepare legal briefs, opinions and reports; discretion and sound judgement in applying legal expertise to sensitive, complex legal issues; strong negotiating skills; coherence in approach to all cases; and the ability to effectively guide the panels in their deliberations.

10. One of the mandatory qualifications for the post was that the candidate should possess a minimum of five years of legal professional experience, with emphasis on administrative law and/or employment (labour) law, including international experience and experience in the public or private sector.

The JAB report

11. In their joint statement in response to Order No. 88 (NY/2010) of 23 April 2010, the parties agreed with the facts outlined in the JAB Report No. 587 but disagreed fundamentally with the conclusions reached. It is not necessary to repeat those facts in detail in the present Judgment except to emphasize that the Applicant challenged the conclusion that he had received full, fair and timely consideration in the selection procedures for filling the vacancy in question. He submitted that the decision was tainted by a lack of due process, extraneous factors, and improper motive on the part of those directly concerned. He also highlighted what he considered to be a conflict of interest in the Secretary-General’s consideration of the JAB Report No. 587 and its findings.

Consideration

The selection process

12. The procedural steps leading up to a decision can, in principle, and in some cases should, be separated from the actual decision on whom to appoint. It would be possible in an appropriate case for a tribunal to find that an applicant was unfairly treated in the process for determining who should be appointed even if the adoption of a fair procedure would not have resulted in the applicant being appointed in any event. Procedural fairness is an important principle in employment relations designed to ensure transparency in the decision-making process. It is also intended to guard against the manipulation of selection criteria and or, alternatively, the imposition of criteria that are not truly job-related in order to confer an unfair advantage on a favoured candidate. A classic example of such unfair practices, enshrined in the legal systems and jurisprudence of many national jurisdictions, is the concept of indirect discrimination, where selection criteria that are not job-related may be imposed either consciously or unconsciously. They may appear fair in form but are unfair or discriminatory in effect. This Tribunal has this, internationally respected, principle in mind in considering the merits of this application, without finding it necessary to deal with the minutiae of several issues peripheral to the fundamental question that has to be determined, namely whether the selection process was conducted properly.

13. At the time of the relevant selection exercise, the principle of indirect discrimination as relating to selection criteria was found in ST/AI/2002/4 (Staff selection system), secs. 4.3 and 4.4, outlining the requirements for preparing the vacancy announcement and the evaluation criteria, respectively. In relation to vacancy announcements, sec. 4.3 stipulated that such announcements “shall include the qualification, skills and competencies required and reflect the classified function of the post”. As for evaluation criteria, sec. 4.4 stated that these criteria “must be objective and related to the functions of the post and must reflect the relevant competencies”.

14. The Tribunal therefore examined the question whether the selection criteria

were job-related and whether it would be reasonable to suppose that a candidate who did not meet those criteria could, nevertheless, have performed those duties and responsibilities and therefore merited an interview to give him the opportunity of satisfying the selection panel as to his eligibility for appointment. It is not the function of the Tribunal to prescribe to management what their selection criteria should be for a particular post. In a given case, the task of the Tribunal is to see whether the stipulated criteria were or were not job-related or whether they were deliberately manipulated in order to disadvantage the applicant in the particular case, or alternatively, to favour a preferred candidate. It is clear from a reading of JAB Report No. 587 that the successful candidate met the essential requirements for the post, and the JAB panel concluded that the allegations of manipulation of the selection criteria were not well-founded.

15. The Tribunal finds that the requirement of relevant experience was appropriate and necessary for this particular vacancy. It is difficult to understand the basis upon which it could reasonably be argued, given the roles and responsibilities of the legal officer in this post, that the Respondent was not entitled to insist on such experience as a mandatory requirement. Nor could it be legitimately argued in this case that the Applicant possessed the requisite minimum of five years legal professional experience.

16. Accordingly, the Tribunal finds that the selection process was conducted in a proper manner.

The JAB process

17. The duty of the Tribunal is to consider whether the JAB panel acted in accordance with proper procedures and respect for the Applicant's due process rights in reviewing the evidence before it, and in arriving at the conclusion it did. It is not for the Tribunal to carry out a fundamental review and reconsideration of all the evidence before the JAB but to examine whether the JAB panel asked the correct questions, whether it directed itself properly in accordance with the law and the rules of

procedure and evidence and whether its conclusions were just and fair in the circumstances.

18. It is clear from Report No. 587 that the JAB panel addressed the appropriate legal principles (see paras. 18 to 120 of the Report) and that, in applying those principles to the facts of the case, it asked the correct questions and considered the appropriate authorities (see paras. 121 to 137 of the Report). In particular, the panel:

- a. Noted that the human resources policy of the Organization had the purpose of securing the highest standards of efficiency, competence and integrity as required under article 101.3 of the Charter of the United Nations and staff regulation 4.2;
- b. Took into account the importance of giving special consideration to “internal career movement” (see para. 124 of the Report); and
- c. Reminded itself that the jurisprudence of the former United Nations Administrative Tribunal had consistently held that no staff member possesses an automatic right to promotion. The panel, nevertheless (see para. 125 of the Report), stressed that the Respondent’s discretionary power with respect to promotion or appointment is “neither absolute nor unfettered”. If the decision was “tainted by any procedural flaw or any extraneous factors or improper motive”, then such a decision could not stand. It seems to the Tribunal that this was a proper direction in law.

19. On the question whether the Applicant received full and fair consideration the JAB panel took note of the Respondent’s contention that the Applicant did not have the required minimum of five years legal professional experience as stipulated in the vacancy announcement (see para. 10 above), which also required an advanced university degree in law or its equivalent and fluency in written and spoken English. The JAB panel stated in its Report as follows (see para. 133 of the Report):

The Panel then turned to the question whether the [Applicant's] candidature was fully and fairly considered or if it was due to a procedural flaw not to propose him to the Central Review Committee and following that not to select him. The Panel took note of [the Applicant's] allegation according to which he met the requirements as set out in the vacancy announcement, the Panel deemed that it was not within its purview to make such an assessment as the Rules and Regulations have put into place a system to that effect ([former United Nations Administrative Tribunal] Judgment No. 1193, *Chow*, (2004)). However, the Panel took note of the Respondent's contention that the Appellant did not have the required "minimum of 5 years of legal professional experience" set by the [vacancy announcement].

20. At paragraph 134 of the Report, the JAB panel recorded that the candidate selected for the position had the qualifications and experience prescribed by the vacancy announcement. The panel noted that the selection panel had taken into account the Applicant's experience of working for the JAB/JDC but that he did not possess significant legal professional experience as required by the vacancy announcement. The panel expressed its agreement that since the Applicant's volunteer experience at the JAB and JDC was not a full-time position it was insufficient to satisfy the requirement of a minimum of five years of legal professional experience

21. Given the nature of the duties and responsibilities to be performed by the legal officer at the JAB/JDC Secretariat in accordance with the vacancy announcement for the Post, the JAB panel concluded that the decision not to select the Applicant was not tainted by extraneous factors or improper motives. Having regard to the appointment and promotion procedures and the relevant jurisprudence of the former United Nations Administrative Tribunal, the panel did not agree that there was any failure on the part of the Administration to respect the Applicant's due process rights. It concluded that he was given full and fair consideration, that the Secretary-General had properly exercised his discretion and that the decision not to select the Applicant for the post in question was not tainted by any procedural flaw.

22. It was not part of the Applicant's case that the description of the roles and responsibilities of the legal officer at the JAB/JDC Secretariat was incorrect or that the requisite qualifications and experience were not relevant. Whilst the Applicant raises a

very large number of allegations, issues and comments in his appeal, he has failed to satisfy this Tribunal that there was any material irregularity in the proceedings before the JAB, such as to call into question its conclusions.

23. The Applicant's allegation of an actual or perceived conflict of interest is based on the fact that two of the three legal officers in the administration of justice unit were involved in the selection process. Since that unit had amongst its remit reviewing the JAB report and advising the Respondent thereon, the Applicant contended that this was a breach of the rule against conflicts of interest. The Respondent concedes that one of these legal officers was involved in the selection process, but argues that the other was not. However, neither of these officers was involved in reviewing the JAB Report no. 587 because of the deliberate decision to assign the case to the third legal officer who had no previous involvement in the selection process. The Applicant's suspicions were aroused by the fact that the two legal officers whom he had identified as having an actual or potential conflict of interest were copied into certain correspondence. The Tribunal accepts that this was no more than following standard practice within the unit in copying the Respondent's decisions to all the legal officers. It is understandable that the Applicant should have entertained a suspicion of conflict of interest, but in light of the explanation given by the Respondent for the names of the officers appearing in correspondence, the Tribunal finds that there is no substance in this allegation.

24. The Tribunal therefore finds that the decision not to select the Applicant was appropriately reviewed by the JAB panel and therefore proper.

Conclusion

25. The application fails and is dismissed in its entirety.

General guidance

26. At paragraph 137 of JAB Report No. 587, the JAB panel states that it carried out a careful and thorough examination of what they described as, "the voluminous

submissions of the appellant with a statement of appeal of some 167 pages, observations of some 450 pages, and 18 pages of final observations and ultimate communication." The Tribunal agrees with the observations in the former United Nations Administrative Tribunal's Judgment No.1338, *Niang* (2007), that:

... The cogency of a case is served by the quality and relevance of the evidence, rather than by the quantity of material attached to an application. The tribunal wishes to underscore the obligation of all applicants to clearly and concisely formulate the claims in respect of perceived rights under the staff regulations and rules which have been allegedly violated. This obligation is not served by a wide spectrum of allegedly evidentiary, or quasi-evidentiary, material ... which help to create impressions but do not, in fact, advance the applicant's case. In fact, it may serve to damage an applicant's case to the extent that he or she then may not focus on the precise burden which must be satisfied.

(Signed)

Judge Goolam Meeran

Dated this 8th day of September 2011

Entered in the Register on this 8th day of September 2011

(Signed)

Santiago Villalpando, Registrar, New York