



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

SICAT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests three decisions made by the Economic and Social Commission for Asia and the Pacific (“ESCAP”):

a. The decision not to select her for a temporary P-3 level vacancy advertised in November 2010, which became available when the incumbent went on special leave without pay (“SLWOP post”);

b. The decision not to select her for a temporary P-3 level vacancy advertised in March 2011, which became available when the incumbent went on maternity leave (“maternity leave post”);

c. The decision to temporarily place an external candidate on the maternity leave post prior to advertising it.

2. The Applicant agreed at a case management discussion held on 15 January 2013 that, although she maintained her complaints in relation to all three decisions, her primary claims were in regard to the failure to advertise the maternity leave post prior to March 2011 and the propriety of the subsequent selection exercise. At the substantive hearing held on 25 January 2013, the Applicant reiterated this contention. The Applicant seeks financial compensation in the amount of 10 months’ net base salary.

3. The Respondent submits that the Applicant received full and fair consideration for both positions, adding that she was interviewed but did not demonstrate during the interviews the requisite competencies up to the standard expected and was therefore not recommended for either position. The Respondent further submits that both positions were advertised and considered in accordance with the established rules. With regard to the assignment of an external candidate to the maternity leave post without advertising it for two months, the Respondent submits that the Applicant’s claims are not receivable as the decision in question is

not an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute. The Respondent further submits that, in any event, the Applicant's claims with respect to this temporary assignment are without merit as ESCAP acted in accordance with the established rules.

Procedural matters

Hearing on the merits

4. At a hearing on the merits held on 25 January 2013, the Tribunal heard evidence from the Applicant as well as from Mr. Bradley, Chief of Human Resources, ESCAP, and Mr. Donald Clarke, former Chief, Gender Equality and Women's Empowerment Section ("GEWES"), Social Development Division ("SDD"), ESCAP. The Tribunal found the Applicant, as well as Mr. Bradley and Mr. Clarke, to be witnesses of truth.

5. At the conclusion of the hearing, the Applicant submitted to the Tribunal a copy of the written statement that she read out at the hearing on the merits.

Findings of facts

6. The following findings of fact are based on the oral testimony given by the Applicant and the Respondent's witnesses, the parties' submissions, and the case record.

7. The Applicant joined ESCAP in or around 2005 and, at the time of the events discussed in this judgment, worked as a P-2 level Associate Social Affairs Officer in GEWES, SDD.

8. In or around November 2010, one of the staff members of SDD went on special leave without pay, and on 17 November 2010 a temporary vacancy was issued to fill her post "until 31 October 2011, with possibility of extension". The Applicant applied in late November 2010 and was shortlisted and interviewed

on 7 December 2010, along with two other candidates, Ms. Jori Jorgensen and Ms. Rebecca Carter.

9. On 9 December 2011, while the selection process for the SLWOP post was still ongoing, the Administration received a memorandum from Ms. Sayiru Okada, Social Affairs Officer, GEWES, requesting it to authorize her absence for almost eight months, from 10 December to 31 July 2011. This included: (i) 16 weeks of maternity leave (from 10 December 2010 to 31 March 2011), (ii) approximately one month of annual leave (from 1 April to 29 April 2011), and (iii) three months of special leave without pay (30 April to 31 July 2011).

10. On 21 December 2010, Ms. Nanda Krairiksh, Chief of SDD, sent a memorandum to Mr. Bradley, stating that, “[i]n order to avoid disruption of the implementation of the mandated programme of work, SDD is requesting a temporary placement post for the period of Ms. Okada’s maternity leave”.

11. Both Mr. Bradley and Mr. Clarke testified that, at the time of the events, SDD needed a replacement for Ms. Okada not for the entire eight-month period of her absence, but only for the time she was on maternity leave (10 December 2010 to 31 March 2011). Mr. Clarke explained that SDD needed to focus on immediate needs of the office and wanted to have someone on board immediately, bearing in mind the three-month limitation on recruitment without an advertised vacancy.

12. Around the same time, in early January 2011, the selection exercise for the SLWOP post was completed. On 11 January 2011, the Applicant was informed that she was not successful (she received a formal notification on 1 February 2011). Ms. Jorgensen was selected for the SLWOP post, and Ms. Carter was identified as the runner-up who was thereafter placed by ESCAP on a list of candidates suitable for similar positions.

13. As the functions of the maternity leave post were similar to the functions of the SLWOP post, in mid-January 2011, SDD recommended that Ms. Carter be assigned to the maternity leave post.

14. However, after some discussions it became clear that Ms. Carter, whose appointment with her office was due to expire on 31 March 2011, would not be released to SDD. Mr. Clarke testified that, in large part due to the delays associated with Ms. Carter's unavailability, SDD felt the need to proceed with finding an alternative solution quickly. Accordingly, by memorandum dated 17 January 2011, Mr. Clarke proposed the recruitment of an external candidate, Ms. Rikke Pedersen, for the temporarily available maternity leave post "for a period of up to three months". Mr. Clarke explained in his memorandum to Mr. Bradley of 17 January 2011 that "Ms. Pedersen is fully qualified to undertake the duties of the post, and has had prior work experience at ESCAP". Mr. Clarke explained to the Tribunal that Ms. Pedersen was a well-qualified candidate with relevant experience and was available immediately.

15. The evidence adduced by the Respondent demonstrates that it was, in fact, the initial assessment of SDD that the replacement for the maternity leave post would be needed for three months only. Mr. Bradley explained that, pursuant to sec. 3.1 of ST/AI/2010/4 on the administration of temporary appointments (dated 27 April 2010 and reissued for technical reasons on 28 May 2010), when a need for service does not exceed three months, as was the case with the initial appointment of Ms. Pedersen, no temporary vacancy announcement is required.

16. Ms. Pedersen joined SDD on 1 February 2011. As ESCAP wanted to align the duration of her appointment with the duration of the maternity leave component of Ms. Okada's absence (i.e., until 31 March 2011), Ms. Pedersen's appointment was for two months only (i.e., until 31 March 2011).

17. Mr. Bradley and Mr. Clarke testified that, in early March 2011, the workload was such that SDD determined that it needed a further temporary replacement beyond March 2011.

18. The Respondent submits that, as such a temporary replacement would exceed the period of three months, under ST/AI/2010/4, ESCAP was required to issue

a temporary vacancy announcement. The announcement was issued on 11 March 2011, with the deadline for applications on 18 March 2011 (the parties are in dispute as to whether the advertised vacancy was circulated in accordance with the existing requirements).

19. In the meantime, while the selection process for the maternity leave post was ongoing, Ms. Pedersen's appointment was extended until 30 April 2011.

20. A total of 13 candidates applied for the maternity leave post. On 21 April 2011, three candidates, including the Applicant, were interviewed. On 11 May 2011, two candidates were recommended for recruitment, including Ms. Pedersen. The Applicant was interviewed but not recommended. As a result of the selection exercise, Ms. Pedersen's appointment was extended from 1 May to 30 July 2011. However, Ms. Pedersen resigned on 30 June 2011.

21. On 4 April 2011, the Applicant submitted a request for management evaluation in relation to her claims and, on 20 September 2011, she filed the present application with the Tribunal.

22. The case was assigned to the undersigned Judge on 9 October 2012.

Consideration

Judicial review of non-selection cases

23. The Secretary-General has broad discretion in matters of selection, promotion, and appointment and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General (*Abbassi* 2011-UNAT-110). However, the exercise of managerial prerogative is not absolute and the Tribunal may examine whether the selection procedures were properly followed or were carried out in an improper, irregular or otherwise flawed manner, as well as assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (*Abbassi, Charles* 2012-UNAT-242).

Non-selection of the Applicant for the SLWOP post

24. Although the Applicant's application primarily concerned the maternity leave post, the Applicant made a number of allegations in her request for management evaluation with regard to the selection process for the SLWOP post. They need not be repeated here. The Tribunal has considered the evidence including the written records of the selection process. The Tribunal is not satisfied that the Applicant's criticisms of the selection process, including the conduct of the interview panel, are justified.

25. The interview panel found that the Applicant did not demonstrate the competencies required for the SLWOP post. On the evidence before the Tribunal, the Applicant has failed to show to the Tribunal that she was not considered fully and fairly or that the exercise of the panel's discretion in reaching its conclusion was manifestly unreasonable.

Initial recruitment of an external candidate for the maternity leave post without an advertised vacancy

Receivability of the Applicant's claims

26. The Respondent submits that the non-advertisement of the two-month assignment was not an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute. The Respondent states that the assignment was an operational decision of general application to all ESCAP staff members and thus it did not violate the Applicant's terms of appointment or contract of employment and was not an administrative decision subject to appeal.

27. The Tribunal disagrees. The language of art. 2.1(a) of the Dispute Tribunal's Statute is clear: the Tribunal is competent to hear and pass judgment on an application appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

28. If a vacant position is not advertised, all staff members that would be otherwise eligible to apply for the said position are deprived of a full and fair opportunity of consideration for it since they would in effect be shut out. It is unarguable that the contractual rights of potentially eligible staff members who would have otherwise applied for the position were not capable of being breached when they were deprived of the opportunity to apply. If this were to be the case, the Administration would be allowed to make all manner of appointments in violation of applicable administrative issuances as no staff member would have standing to contest them.

29. When a staff member advances a claim, as the Applicant does in this case, that the contested decision is not in compliance with his or her contract of employment, the Tribunal is competent to examine the matter under art. 2.1(a) of its Statute (see also former United Nations Administrative Tribunal Judgment No. 99, *Mr. A* (1966), para. II). The Tribunal is therefore satisfied that this application is receivable. The Respondent's contention that there was no appealable administrative decision is misconceived.

30. The Tribunal observes that despite the growing jurisprudence and numerous cases of a similar nature having been found receivable, submissions on receivability which hold little or no merit, particularly with regard to what constitutes an appealable administrative decision, continue to be advanced in cases before the Tribunal. Parties must endeavour to make the necessary concessions and avoid arguments that require an uneconomic use of the Tribunal's time to adjudicate on issues that are well settled. In appropriate cases the Tribunal will consider making an order for costs against the party advancing what is in effect a frivolous contention that a claim or reply is not receivable either in full or in part.

Merits of the Applicant's claims

31. Section 3 of ST/AI/2010/4 (Administration of temporary appointments), applicable at the time, provided that temporary needs for up to three months could be filled without a temporary vacancy announcement. Specifically, it stated:

Section 3

Selection process for the granting of a temporary appointment

Temporary vacancy announcement

3.1 When a need for service for more than three months but less than one year is anticipated, a temporary vacancy announcement shall be issued by the programme manager.

3.2 While the decision to issue a temporary vacancy announcement for a temporary appointment of less than three months is made at the discretion of the programme manager, any extension of three months or more shall require the issuance of a temporary vacancy announcement.

32. ESCAP was aware that Ms. Okada would be absent for almost eight months. In the circumstances, the Respondent's decision not to issue a vacancy announcement and to appoint an external person without an interview required an explanation. It is entirely understandable that the Applicant found the circumstances to be suspicious. However, having examined the evidence, the Tribunal is satisfied that it was reasonable for SDD to take into account its operational needs and determine initially that it needed a replacement for a shorter period of time, i.e., until 31 March 2011. It adjusted its determination in early March 2011, and, upon determining that further replacement was required beyond three months, advertised the post.

33. The Tribunal accepts Mr. Bradley's evidence that no replacement was hired after Ms. Pedersen's departure on 30 June 2011 and until Ms. Okada's eventual return in October 2011. This point lends support to the Respondent's contention that the absence of a staff member does not necessarily translate into the need to find a replacement for the exact period of the staff member's absence.

34. The Applicant also submits that the Respondent misinterpreted sec. 3 of ST/AI/2010/4. The Applicant states that Ms. Pedersen's appointment prior to the completion of the formal selection process turned out to be for three months *exactly* (i.e., from 1 February to 31 March 2011 and then until 30 April 2011, pending completion of the selection process), as opposed to *less* than three months. Therefore, according to the Applicant, pursuant to sec. 3.2 of ST/AI/2010/4, the Organization was required to advertise it.

35. The Tribunal agrees that secs. 3.1 and 3.2 of ST/AI/2010/4 could have been more clearly drafted and defined to avoid an apparent ambiguity.¹ However, the Tribunal does not consider it necessary to address this issue in detail since Ms. Pedersen's initial appointment was for two months. Therefore, when initially hiring her in February 2011, ESCAP was not required to issue a vacancy announcement. Furthermore, with regard to the extension of her initial appointment up to 30 April 2011, pending the completion of the selection process, the Tribunal finds that the Respondent's application of sec. 3 of ST/AI/2010/4 in this instance, as it was explained by Mr. Bradley, was not unreasonable.

36. The Tribunal finds that the initial recruitment, without an advertised vacancy, of an external candidate (Ms. Pedersen) for the period of 1 February to 31 March 2011, with subsequent extension of one month, to 30 April 2011 while the selection exercise was ongoing, was lawful.

Advertisement of the maternity leave post

37. The Applicant claims that the vacancy for the maternity leave post was not properly advertised. The crux of her argument is that according to sec. 3.5 of ST/AI/2010/4 the post should have been advertised "for a minimum of one week on the Intranet or be circulated by other means, such as e-mail, in the event that

¹ It should be noted that the later redaction of ST/AI/2010/4 removed the contradiction between sec. 3.1 and sec. 3.2 by making it clear that the issuance of a temporary job opening for service of "three months [*exactly*] or less" was at the discretion of the programme manager (see sec. 3.2 of ST/AI/2010/4/Rev.1, dated 26 October 2011).

an Intranet is not available at the duty station concerned. A temporary vacancy announcement may also be advertised externally if deemed necessary and appropriate". The Applicant questions whether sec. 3.5 was complied with by ESCAP with regard to the maternity leave post.

38. Mr. Bradley testified that the vacancy announcement of 11 March 2011 was advertised on ESCAP's job website, which was both ESCAP's external job site (internet) and internal job site (intranet). The Applicant did not effectively challenge this evidence. In fact, she acknowledged that "temporary posts were clearly advertised on the ESCAP website". However, she asserted that "it does not appear that there was a formal advertisement of the temporary posts on the intranet" and stated that "what constitutes the intranet at ESCAP is ambiguous and unclear".

39. The Tribunal finds that the requirement of sec. 3.5 was complied with. Section 3.5 states that both Intranet and "other means ... in the event that an Intranet is not available" are acceptable forms of publication. Mr. Bradley's evidence that ESCAP's job website was used for both external (internet) and internal (intranet) announcements was not effectively rebutted by the Applicant. The Applicant also did not rebut Mr. Bradley's evidence that the particular vacancy in question was advertised on that website, so her becoming aware of the vacancy only one day before the deadline may have very well been due to her not checking the ESCAP job website at the relevant time.

40. In any event, the Applicant became aware of the vacancy on 17 March 2011 and applied for the position in question before the deadline of 18 March 2011. Therefore, even if the Applicant established that ESCAP should have taken additional steps to circulate the vacancy, the Applicant has not demonstrated that she would have suffered harm as a result of ESCAP's failure to do so. It may be arguable that she did not have sufficient time to draft her application. However, this was not to her detriment as she was invited for an interview and her lack of success was because of her unsuccessful performance at that interview.

Non-selection of the Applicant for the maternity leave post

41. The Applicant has failed to show to the satisfaction of the Tribunal that the exercise of the panel's discretion in reaching the conclusion that she was not suitably qualified was manifestly unreasonable. The Applicant has not been able to demonstrate that the interview panel took any improper considerations into account or failed to take proper factors into account or acted in breach of procedure.

42. At the hearing, Mr. Clarke agreed that, on the information available to the Applicant, it was reasonable for her to regard with suspicion the circumstances surrounding the temporary recruitment of an external candidate for the maternity leave post and the subsequent selection process. The Tribunal agrees that, for a staff member who was not aware of the full facts and relevant documents at the time, the Applicant's concerns were reasonable. However, the evidence provided to the Tribunal demonstrates that her concerns, whilst understandable, were not justified.

43. The Tribunal finds that the non-selection of the Applicant for the temporary vacancy for the maternity leave post, advertised in March 2011, was lawful.

44. The Applicant made a number of ancillary allegations, which the Tribunal has examined and found either not proven or not determinative as far the main issues in the case are concerned.

Conclusion

45. The Tribunal finds that the selection processes for the SLWOP post and the maternity leave post were conducted properly and that the Applicant was fully and fairly considered for both vacancies. With respect to both posts, the interview panels determined that the Applicant was not the most suitable candidate. The decisions reached were well within the discretion of the Respondent and, on the evidence before the Tribunal, were not vitiated by any improper considerations and were not manifestly unreasonable. The Applicant was entitled to be assessed

fairly and adequately, and this entitlement was satisfied. The two decisions not to select her were lawful.

46. The Tribunal further finds that the decision of ESCAP to employ Ms. Pedersen on the maternity leave post, prior to advertising the vacancy, for the initial period of 1 February to 31 March 2011 and for one more month subsequently, while the selection process for the maternity leave post was ongoing, was lawful.

47. The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 12th day of February 2013

Entered in the Register on this 12th day of February 2013

(Signed)

Hafida Lahiouel, Registrar, New York