



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

TERRAGNOLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Record Assistant on a fixed-term contract at the G-4 level receiving Special Post Allowance at the G-5 level since 18 June 2013, contests the decision of the Office of Human Resources Management (“OHRM”) refusing to grant him an exception to sec. 6.1 of ST/AI/2010/3 (Staff selection system) pursuant to staff rule 12.3(b), to enable him to apply for a post two grades higher than his, at the G-6 level with the United Nations Joint Staff Pension Fund (“UNJSPF”).

2. The Applicant seeks rescission of the contested decision so that he may be tested and interviewed for inclusion on the roster, and three months’ salary as compensation for procedural delay. Alternatively, he requests “compensation for the irreversible loss of employability and deskilling attributed to the retaliatory pattern embedded in the impugned decision, including for the cost of his higher education and professional certification allegedly gone to waste, namely €5,376 [for a Master’s degree in Business and Administration at the ESSEC business school] and €7,227 [for Chartered Financial Analyst, “CFA”] on the basis that the Respondent has a responsibility to “protect the intangible property of staff”. Should the Tribunal refuse the above remedies, the Applicant requests that the maximum permissible monetary compensation be awarded to him, namely two years of net salary for loss of income as “the Administration is irredeemably preventing the Applicant from acquiring the necessary professional experience to achieve the compensation of CFA Charterholders”.

3. The Applicant had initially, on 31 May 2014, filed an application with the Tribunal which exceeded the prescribed page limit of 10 pages, and included over 800 pages of supporting documents. In response to the Registry’s request to comply with the 10-page limit, the Applicant split his original application into two separate applications, neither of which met this page limit. Both applications were registered under different case numbers on 7 June 2014 on an exceptional basis.

4. On 25 July 2014, by Judgment No. UNDT/2014/107, the Tribunal dismissed the second application, Case No. UNDT/NY/2014/046, concerning the alleged “[f]ailure to investigate the administrative decision impugned in UNDT/NY/2014/045 under ST/SGB/2008/5 [(Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)]” on the grounds that it was not receivable and ordered costs against the Applicant for abuse of process (*Terragnolo* UNDT/2014/107).

5. The first matter, namely the present case, forms the subject matter of the application which was served on the Respondent on 9 June 2014. In the reply filed on 9 July 2014, the Respondent submits that the application should be dismissed as the conditions for granting an exception under staff rule 12.3(b) were not met, and further, that the decision was rational and reasonable.

6. Due to the considerable amount of documentation and extensive submissions by the parties, by Order No. 276 (NY/2014) dated 10 October 2014, the Tribunal invited the parties to confirm whether they consented to this case being determined on the papers before it, or to file and serve a reasoned submission not exceeding two pages, why such determination was not possible.

7. On 16 October 2014, the Respondent consented to the matter being determined on the papers, whilst the Applicant filed a three-page response with 52 pages of annexes, requesting a hearing.

8. The parties were thereafter invited to a case management discussion by Order No. 282 (NY/2014) dated 22 October 2014 to discuss the further conduct of the proceedings in this matter. At the case management discussion on 6 November 2014, the parties, the Applicant appearing in person, presented their final oral submissions, subsequent to which neither party objected to the matter being thereafter determined on the papers.

Facts

9. The background facts hereunder set out appear from the case record.
10. On 29 June 2009, the Applicant was recruited at a G-3 level post as Publishing and Desktop Editorial Assistant in the French Text Processing Unit with the Department for General Assembly and Conference Management (“DGACM”) and, in June 2010, he was promoted to the G-4 level.
11. In March 2013, the Applicant was selected for the extra-budgetary temporary position of Administrative Assistant at the G-5 level within the Department of Political Affairs (“DPA”).
12. On 28 June 2013, DGACM renewed the Applicant’s appointment for two years at G-4 level, and on 8 July 2013, DPA recommended him for a G-5 Special Post Allowance (SPA) effective 18 June 2013.
13. On 14 December 2013, the Applicant applied for the post of Investment Assistant, at the G-6 level, in the Investment Management Division (“IMD”), UNJSPF advertised on Inspira, the posting date of which closed on 15 December 2013.
14. On 30 December 2013, the Applicant submitted a reasoned four-and-a-half page request to OHRM for an exception to sec. 6.1 of ST/AI/2010/3 (Staff selection system) pursuant to staff rule 12.3(b). As he received no response, the Applicant reiterated his request on 15 January 2014.
15. OHRM responded to the Applicant under the subject-matter heading, “Request for exception from ST/AI/2010, para. 6.1 pursuant to staff rule 12.3”, by email dated 20 January 2014, which in its entirety, states that:

We received your email dated 30 December 2013. As a staff member holding a Secretariat fixed-term appointment at the G-4 level under the Staff Rules, you fall under the scope of ST/AI/2010/3 and therefore

you are eligible to apply for job openings up to the G-5 level in the Secretariat.

Please note that section 6.1 of the instruction on the staff selection system ST/AI/2010/3, regulating the eligibility of staff members to apply for promotion, applies to all staff members holding a permanent, continuing, probationary or fixed-term appointment with the Secretariat under the Staff Rules, who are applying for promotion within such contractual framework.

16. On the same day, the Applicant requested that the decision be reconsidered, also raising issue with the applicability of ST/AI/2010/3 to internal candidates and the separately funded entity concerned (UNJSPF).

17. On 6 February 2014, the Applicant requested a management evaluation of OHRM's decision denying him an exception sec. 6.1 from ST/AI/2010/3. He further requested that an investigation be carried out on the grounds that the decision was motivated by ill will (the subject matter of Case No. UNDT/NY/2014/046 and dealt with in *Terragnolo* UNDT/2014/107).

18. On 11 March 2014, the Under-Secretary-General for Management ("USG/DM") accepted the recommendation of the Management Evaluation Unit ("MEU") to uphold OHRM's decision not to grant the requested exception, explaining, *inter alia*, that:

OHRM states that, as a staff member with a fixed-term appointment at the G-4 level, you were ineligible to apply for a post at the G-6 level. OHRM states that your request for an exception was reviewed and that a decision was made not to grant an exception. According to OHRM, granting an exception would have been unfair and prejudicial to the interests of other similarly situated staff members found ineligible ...

OHRM states that ST/AI/2010/3 applies to job openings with the UNJSPF. Paragraph 14 of the "Memorandum of Understanding with Respect to United Nations Personnel Procedures applicable to the UN Joint Staff Pension Fund" (MoU) provides that the General Service staff of the UNJSPF secretariat shall be appointed and promoted through the normal United Nations appointment and promotion procedures.

OHRM states that the ASG/OHRM could not grant an exception to ST/AI/2010/3 without consultations with the UNJSPF whose needs are defined by the Board and implemented by the Chief Executive Officer. OHRM states further that, pursuant to Staff Rule 12.3 (b), any exception must not be prejudicial to the interests of other staff members. OHRM asserts that a formal exception would therefore require: (1) a formal agreement with the UNJSPF on the specific element for which an exception is to be made; (2) a vacancy announcement indicating that the UNJSPF determined a particular eligibility requirement would not apply, based on the operational needs of the UNJSPF; and (3) a proper screening of all candidates eligible under the revised conditions.

...

Obligation of the Administration to consider a request for exception

The MEU had regard to the holding of the UNDT in *Hastings*, UNDT/2009/030, affirmed by 2011-UNAT-109, that:

“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.”

...

Discretion of the Administration in granting a request for exception

The MEU noted that the decision to grant or deny a request for exception is within the discretion of the Administration.

...

The Administration considered your request for an exception

The MEU noted that the e-mail of [OHRM] of 20 January 2014 did not explicitly refer to having considered the possibility of an exception. The MEU noted, however, that this e-mail was in response to your explicit request for an exception. The MEU further noted that, in your follow-up e-mail of 20 January 2014 thanking [OHRM] for [its] response, you did not question whether your request had been considered but rather invited OHRM to reconsider its decision. The MEU considered that your case was therefore clearly distinguished from the case of *Hastings* wherein the staff member, upon receiving a similar response, “immediately enquired of the [Assistant Secretary-General] whether that letter constituted a response to her request for an exception”.

The MEU considered that, notwithstanding any ambiguity in the e-mail of [OHRM] of 20 January 2014, the comments provided by

OHRM indicated that OHRM considered your request for an exception. The MEU considered that these comments also indicated that OHRM considered that an exception was legally possible and the circumstances under which a legitimate exception could be made. The MEU concluded that OHRM had considered your request for an exception and had made a discretionary decision to deny your request.

19. Subsequently, in an inter-office memorandum dated 25 April 2014, after the management evaluation, and in response to the Applicant's request for an "investigation" of the impugned decision which he alleged constituted abuse of authority and retaliation, the Assistant Secretary-General of OHRM elaborated on and provided the Applicant with the substantive grounds for denying him an exception to para. 6.1 of ST/AI/2010/3 explaining that:

... It is in the interest of the Organization to maintain the eligibility requirements in Section 6.1 of ST/AI/2010/3. These eligibility requirements recognize the interest of the Organization and its staff members in an orderly career progression through the grades of each category of staff. They also benefit the Organization by ensuring that staff members who are selected to perform at higher grade levels have well-rounded experience within the Organization. Accordingly, staff members holding permanent, continuing, probationary, or fixed-term appointments are required to gain progressively responsible experience, and are only eligible to apply for positions that are one level higher than their personal grades. This restriction applies even if a staff member meets the requirements of a job opening two or more grades above his or her grade level.

... I also note the negative impact an exception may have on other staff members. Specifically, it would be prejudicial to other staff members who may meet the requirements of the job opening but would not have been afforded the same opportunity to apply and compete for the job opening. Similarly, granting an exception would not be fair to job applicants who have gained progressively responsible experience in compliance with the eligibility requirements.

Consideration

The contested decision

20. The Tribunal must first identify the contested decision before it. The Applicant was informed by OHRM on 20 January 2014 that his request for an exception was denied, whereupon he immediately requested a reconsideration of the decision on the same day. In his request for management evaluation of 6 February 2014, the Applicant also requested an “investigation” of this decision as constituting retaliation and an abuse of authority. It is only following the management evaluation decision of 11 March 2014 that OHRM, in its communication of 25 April 2014 relating to the Applicant’s request for an investigation, elaborated on the merits upon which the exception had been denied. The decision of 25 April 2014 regarding the “investigation” was the subject matter of Case No. UNDT/NY/2014/046. This latter decision therefore is not before the Tribunal, the only administrative decision properly before the Tribunal is the Administration’s decision pertaining to the communication of 20 January 2014.

Issues before the Tribunal

21. The Applicant has taken several points, some of which are irrelevant or tangential, others that are not within the purview of the Tribunal, and some of which have already been decided and settled in previous cases including, as acknowledged by the Applicant, in *Terragnolo* UNDT/2013/098 (recently affirmed by the United Nations Appeals Tribunal (“UNAT”) in *Terragnolo* 2014-UNAT-447). In particular, the UNAT found that ST/AI/2010/3 was properly promulgated and was applicable to the selection of staff in the UNJSPF.

22. However, the Applicant’s main contentions are, *inter alia*, that the request for an exception was summarily denied, and further that the Administration failed to exercise its discretion in a fair, legitimate, proper and reasonable manner, as required. The Tribunal has therefore identified the following matters to be adjudicated:

- a. Did the Administration consider the Applicant's request for an exception to sec. 6.1 of ST/AI/2010/3 pursuant to staff rule 12.3(b);
- b. Did the Administration exercise its discretion correctly when denying the request for an exception;
- c. Was the Administration's decision tainted by improper motives, arbitrary, capricious or otherwise unlawful?

Did the Respondent consider the request for an exception?

23. Pursuant to sec. 6.1 of ST/2010/3, the Applicant, as he is holding a fixed-term appointment, is not eligible to apply for positions more than one level higher than his personal grade in the Secretariat. However, under staff rule 12.3(b), the Secretary-General may make exceptions to the staff rules in the following circumstances:

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

24. The Applicant submits that his request for an exception was summarily dismissed without proper consideration of its merits or without even contemplating the possibility of an exception.

25. In *Hastings* UNDT/2009/030, affirmed by the Appeals Tribunal in *Hastings* 2011-UNAT-109, the Dispute Tribunal found that although an administrative instruction such as ST/AI/2010/3 is not of itself a staff rule, it is subject to staff rule 12.3(b) on exceptions. Further, sec. 6.1 of ST/AI/2010/3, notwithstanding the unconditional language of "shall not", is still susceptible to exception. If a staff member requests an exception to sec. 6.1, the decision-maker, in the words of the Dispute Tribunal in *Hastings*, "is obliged to turn his or her mind to the factors which are relevant to the decision to be made" (see para. 27 of UNDT/2009/030).

26. Moreover, an applicant has the right to be provided with the grounds for an administrative decision in a proper and timely manner. Every administrative decision entails a reasoned determination after consideration of relevant facts since there is a duty on institutions to act fairly, transparently and justly in their dealings with staff members (*Obdeijn* UNDT/2011/032). Without knowing the basis for the contested decision, the staff member may not be able to effectively challenge it, and the office responsible for carrying out the, in many cases mandatory, management evaluation will not be able to examine its propriety and lawfulness.

27. Reasons must generally be disclosed at the time of the notification of the decision, and most certainly must be disclosed when requested by the staff member. In this way, an applicant will be apprised whether he should request management evaluation. Further, the purpose of management evaluation is to give management a chance to correct an improper decision and to provide acceptable remedies in cases where the decision was flawed. In a case such as this, the decision-maker must, of necessity, “turn his or her mind to the factors which are relevant” at the time of considering the request for an exception, and provide a reasoned decision upon rejection of the request.

28. The Applicant’s four-and-a-half page request for an exception to enable him to apply for the G-6 post was made on 30 December 2013, and in the absence of a response, repeated on 15 January 2014. The email response he received on 20 January 2014 is tersely unambiguous in its meaning, and stipulates, simply, that the request is denied on the grounds that he is eligible to apply for a job opening only up to the G-5 level in the Secretariat pursuant to sec. 6.1 of ST/AI/2010/3. Nothing more, nothing less. Aside from this contemporaneous document of 20 January 2014, that much is evident also from the Respondent’s reply. It is only in the subsequent communication of 25 April 2014, after the management evaluation, and pursuant to the Applicant’s request for an investigation of the impugned decision, that OHRM fully elaborated on and informed him of the grounds upon which the exception had been denied. It must be recalled that this OHRM letter is not in response to

the request for an exception; rather it is in response to the Applicant's request for an investigation, a matter under the ambit of the previously decided Case No. UNDT/NY/2014/046.

29. Accordingly, the Tribunal finds that, in its decision of 20 January 2014, OHRM did not turn its mind to any factors other than the Applicant's legal ineligibility to apply for a post two grades higher than his in the Secretariat. Certainly, no other reasons were communicated to him prior to the management evaluation and OHRM's position was not fully elaborated until the memorandum of 25 April 2014. The Tribunal finds that the request for an exception allowing the Applicant to apply for a post two grades higher, was not properly considered by OHRM in its decision of 20 January 2014.

Did the Administration exercise its discretion correctly in denying the exception?

30. The Applicant contends that, according to the "Memorandum of Understanding with respect to United Nations Personnel Procedures applicable to [UNJSPF]" from 2000 ("the MoU"), which regulates the employment of UNJSPF staff members, ST/AI/2010/3 does not apply to him. He maintains that, whilst sec. 6.1 of ST/AI/2010/3 prevents a UN Secretariat staff member from applying for a position more than one level higher than his personal grade, this provision does not apply to him and, similar to staff from UN agencies, nothing therefore hinders him from applying for a post at the G-6 level with UNJSPF. It is noted that the Applicant only made this contention in his response to Order No. 276 (NY/2014) and at the case management discussion on 6 November 2014.

31. At the 6 November 2014 case management discussion, the Applicant made reference to several provisions of the MoU relating to the appointment and promotion of UNJSPF staff which illustrate that the UN administrative procedures and directives are not automatically applicable to the UNJSPF staff since the requirements of the Pension Fund Board take precedence, and that the Fund retains the final say on

promotion and appointment recommendations taking into account its fiduciary responsibility.

32. The Tribunal observes that the MoU explicitly distinguishes between the treatment of General Service staff and those employed at the Professional level. For General Service staff members such as the Applicant, the MoU, under the heading “General Service staff”, at para. 14, provides that:

The General Service staff of the Fund shall be appointed and promoted through the normal UN A & P [appointment and promotion] procedures, according to the policies applicable at the duty station in which the UNJSPF staff serve, presently New York and Geneva.

33. Furthermore, para. 17 of the MoU states that “the Staff Regulations and Rules of the United Nations shall apply to all UNJPSF staff.”

34. The Tribunal therefore finds that the Applicant’s contention that sec. 6.1 of ST/AI/2010/3 does not apply to him is unsustainable.

35. The Applicant further submits that, as an exception to sec. 6.1 of ST/AI/2010/3 was warranted, OHRM did not properly exercise its discretion pursuant to staff rule 12.3(b) to allow him to apply for the post at the G-6 level.

36. As indicated above, the Respondent’s response dated 20 January 2014 to the Applicant’s request for an exception to sec. 6.1 of ST/AI/2010/3 did not provide reasons for denying an exception other than his ineligibility to apply for a job opening two steps higher in the Secretariat. No reasons indicating a consideration of the merits were disclosed to the Applicant prior to the management evaluation stage.

37. However, the Applicant requested a reconsideration of the 20 January 2014 decision denying him an exception, following which he requested management evaluation of this decision, and provided further information to the MEU on 13 and 19 February 2014, which was apparently followed by comments provided by OHRM on 19 February 2014 as indicated in MEU’s response of 11 March 2014.

38. On 11 March 2014, the USG/DM explained the reasons which were, *inter alia*, that the exception could not be granted without consultation and agreement with the UNJSPF on the specific element for which an exception was to be made; nor without a vacancy announcement indicating that the UNJSPF had determined that a particular eligibility requirement would not apply based on operational needs; and further, without a proper screening of all candidates eligible under the revised conditions. The Tribunal finds that a decision based on these grounds, is not manifestly unreasonable.

39. The USG/DM also explained that any exception would be prejudicial to the interests of other staff members. The Applicant contends, amongst other things, that other staff members' rights would not have been prejudiced, and that other candidates were not precluded from receiving fullest regard of their individual skills since staff regulation 4.4 (regarding recruitment of staff) refers to the skills of candidates rather than to their grades. The Respondent, on the other hand, contends that allowing the Applicant to apply for the job would have prejudiced the rights of other staff members, who have gained progressively responsible experience, to an orderly career progression. .

40. In this regard, the Tribunal notes that, in view of sec. 6.1 of ST/AI/2010/3 categorically providing that staff members *shall not* be eligible to apply for positions more than two levels higher than their personal grade, the Administration's scope of discretion for granting an exception to this rule, and thereby allowing a staff member to nevertheless apply for such positions, must be extremely limited. The Tribunal further observes that, under similar circumstances, in *Terragnolo* 2014-UNAT-447, the Appeals Tribunal held that "the interests of other staff members applying for [the same post] would have been prejudiced if an exception had been made for the Applicant".

41. Consequently, although delayed, in denying the Applicant's request for an exception, the Administration's decision was not manifestly unreasonable.

Was the decision ill-motivated, arbitrary, capricious or otherwise unlawful?

42. The Applicant contends that the contested decision was tainted by improper motives, that the refusal to grant an exception was arbitrary, capricious or otherwise unlawful, and that the procedural delays have prejudiced him.

43. There is no doubt that the Applicant is well qualified and has been active in many staff association matters and suspects he is being retaliated against. The Tribunal notes that the onus is on the Applicant to prove improper motives, arbitrariness or capriciousness (*Parker* 2010-UNAT-012). Mere suspicion does not suffice and, in the present case, the Tribunal does not find that the Applicant has discharged this burden. In any event, this contention was the primary issue of the application which the Tribunal found not receivable in *Terragnolo* UNDT/2014/107.

44. Accordingly, the Tribunal dismisses the Applicant's contentions that the contested decision was tainted by improper motives, arbitrary, capricious or otherwise unlawful.

Compensation

45. In *Antaki* 2010-UNAT-095, para. 20, the Appeals Tribunal ruled that "[n]ot every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages".

46. The Applicant says that the procedural delays in the consideration of his exception request have prejudiced him. The only violation identified by the Tribunal is that the Administration failed to give due consideration to the Applicant's request for an exception in the decision of 20 January 2014 and to respond to the Applicant's request for an exception under staff rule 12.3(b) in a timely manner. The Applicant

could therefore argue that this delay inflicted pecuniary and/or non-pecuniary harm on him.

47. Whilst there appear to be no guidelines as to when a request for an exception should be submitted in these circumstances, it is reasonable to conclude that at the very best, if not made before, it should be made at the time the application for the post is made. Needless to say, a staff member can only apply for such an exception upon becoming aware of the vacancy announcement. The Applicant applied for the post on 14 December 2013 one day before the closing date of 15 December 2013, and only made his request for an exception on 30 December 2013; 15 days after the vacancy announcement for the post had closed. In this instance, the duration of the vacancy announcement being only 30 days, time was of the essence. The Applicant cannot complain about procedural delays, when his request for an exception was also delayed.

48. Furthermore, as otherwise required by *Antaki*, the Applicant has failed to substantiate how the delay in providing him with full reasons caused him any damages. Under *Antaki*, and in the particular circumstances of the present case, the Tribunal therefore finds that there are no grounds for awarding the Applicant any compensation.

Excessive filings

49. In fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing. However, with a view to efficiency and fast tracking of cases, new applications may be dealt with on a priority basis in appropriate circumstances (for example, cases that could be decided on the documents where the facts and legal issues are clear and the law settled, cases which may be susceptible to summary judgment, and cases which may be manifestly inadmissible, not receivable or frivolous). In light of the facts, full submissions and

copious documents, this case was identified by the Tribunal for fast tracking and determination on the papers.

50. The Tribunal observes that the Applicant filed a 29-page application and appended over 800 pages of documents as annexures, including research and editorial articles, many of which bear no direct or reasonable relevance to the case. The filing of cumbersome pleadings and irrelevant and immaterial documentation causes obfuscation of the real issues, and is antithetical to judicial economy. Filings that are overly burdensome are costly for all concerned, and also unfair and prejudicial to other applicants who are patiently awaiting resolution of their matters in a timely chronological manner. Parties must desist from overburdening the Tribunal with copious documents which are irrelevant to the issues at hand, and which, if there is any doubt as to their relevancy, can always be filed subsequently by agreement between the parties or upon application, or following case management.

Conclusion

51. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 30th day of January 2015

Entered in the Register on this 30th day of January 2015

(Signed)

Morten Albert Michelsen, Officer-in-Charge, Registrar, New York