



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/018

Judgment No.: UNDT/2010/084

Date: 6 May 2010

Original: English

**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

TEFERRA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Bernard Adams, OSLA

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a staff member of the United Nations Economic Commission for Africa (ECA), contests the decision by ECA, to re-advertise the vacancy for the post of Mail Assistant (Registry Supervisor), G-7 (VA 07-ADM-ECA-414274-R-Addis Ababa).

## **Summary of relevant facts**

2. On 23 July 2007, an Advisory Selection Panel (ASP), which had been constituted to review applications for VA 07-ADM-ECA-414274-R-Addis Ababa, recommended, after holding interviews with four candidates, the Applicant as the most suitable candidate for the post. This recommendation was not accepted by ECA's Chief of Human Resources Services Section (HRSS) on the basis that there were irregularities in the selection process and instead re-circulated the vacancy for the post on 25 November 2008.

3. On 10 December 2008, ECA informed the Applicant that the new Programme Case Officer had requested that the vacancy announcement to be re-circulated. Subsequently, the Applicant submitted a request for review to the Secretary-General and then a Statement of Appeal to the former Joint Appeals Board (JAB) contesting the decision to re-circulate the vacancy announcement.

## **UNDT Proceedings**

4. In accordance with ST/SGB/2009/11 on *Transitional measures related to the introduction of the new system of administration of justice*, this case was transferred on 1 July 2009 from the JAB to the United Nations Dispute Tribunal (UNDT) for resolution.

5. At a preliminary hearing on 9 November 2009, the Respondent submitted that the contested decision was not receivable for a number of reasons, including, *inter*

*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:

- (i) That the re-advertised vacancy announcement for the subject post be terminated.
- (ii) That his nomination to the post of Registry Supervisor be confirmed forthwith.

### **Respondent's submissions**

10. The Respondent's principal contentions are:

- (i) That the contested decision was a legitimate exercise of the Administration's discretion.
- (ii) That the contested decision was in accordance with ST/AI/2006/3 on the *Staff Selection System*.
- (iii) That the ASP's recommendation was not a final selection decision and as such, the Applicant's contention that his due process rights were violated is without merit.
- (iv) That the Administration has a duty to intervene and correct a flawed selection process to ensure that the rights of all candidates are fully safeguarded.

11. In view of the foregoing, the Respondent requests the Tribunal to dismiss the Applicant's application.

### **Legal Issues**

12. The Tribunal considers the following to be the legal issues arising out of this application:

**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

memorandum in view of the provisions of ST/AI/2006/3. According to the Respondent, the PCO subsequently submitted to HRSS, a revised memorandum dated 23 July 2007, recommending only the Applicant and characterizing the other previously suitable candidate as not being a suitable candidate for the post.

18. A memorandum dated 22 August 2007 from the PCO to the Chief of HRSS, which was submitted into evidence by the Respondent, establishes that a document was submitted to HRSS by the ASP prior to their 23 July 2007 recommendation. In the Tribunal's view, however, this memorandum does not establish the contents of the earlier memorandum. To a large extent, it shakes the core of the Respondent's case in that it urges the Chief of HRSS to "listen to the tape-recorded interviews during which your Section was represented" and asserts that "this latter version is the one fully agreed and endorsed by the members of the ASP, which conducted the review and interviews". There is no indication that the Chief of HRSS followed the PCO's advice and listened to the tape recorded interviews, which would probably have resolved this issue in its infancy.

19. It is hard to believe that the PCO would urge the Chief of HRSS to listen to the recorded interviews if he knew that the discussions contained therein were contrary to the findings and recommendations contained in the 23 July 2007 memorandum. It is also notable that whilst the 22 August 2007 memorandum was copied to the HRO, there is no document in the record reflecting her disagreement with any of the PCO's assertions.

20. The Respondent asserts that the first document from the ASP recommended two candidates as suitable and yet, this particular document was not produced for the Tribunal's examination. Instead, the Respondent offered in evidence, as proof of the veracity of the matter asserted:

- (i) A memorandum from the Chief of HRSS, dated 18 February 2009 that reports on a conversation that allegedly took place between the HRO (i.e. the

Ex-Officio member of the ASP) and the PCO regarding the mixing of internal and external candidates in the ASP's first memorandum; and

(ii) An email from the Chief of HRSS, dated 20 August 2007, stating that it was her "understanding" that there was a first memorandum submitted to HRSS, which was subsequently replaced. She therefore requested that the PCO re-submit the original memorandum recommending "candidates" for the post and stating that the second memo (i.e. the one dated 23 July 2007) with the revised text was unacceptable.

21. In light of the fact that the documents from the Chief of HRSS were not relating information she knew personally or had first-hand knowledge of, the Tribunal was not inclined to accept or give any probative value to either of these documents as proof of the veracity of the matter being asserted by the Respondent. In the Tribunal's view, the Chief of HRSS was relating what the PCO had allegedly told her, which therefore made the veracity of her statement dependent on the credibility of the PCO. In this respect, the Tribunal notes that these purported statements should have been solicited from the PCO to whom they are attributed. However, the record does not contain any document (i.e. a Note to the File, an interoffice memorandum, an email, etc.,) from the HRO establishing/confirming that this conversation ever took place or that she ever saw this document that recommended, in addition to the Applicant, an internal 15-day candidate, as suitable for the subject post. The Tribunal also notes that while the Respondent had the opportunity to call the Chief of HRSS and the HRO to testify as witnesses, and thus have them subjected to cross examination during the hearing, he failed to avail himself of this opportunity.

22. Additionally, while Section 7.1 of ST/AI/2006/3 imposes the requirement that programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark, the Tribunal notes that the Respondent requested that the case be decided on the parties' submissions and yet he failed to submit any

documentation, such as the Galaxy<sup>1</sup> 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/2006/3<sup>2</sup> 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.

25. In the absence of this document that purportedly recommended two candidates as suitable, the Tribunal considers that the Respondent failed to establish a proper basis for the invalidation of the selection process for VA 07-ADM-ECA-414274-R-Addis Ababa. Consequently, HRSS' decision to discontinue the selection process without a proper determination that the recruitment procedures were not precisely followed was an abuse of the Administration's discretionary authority.

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<sup>1</sup> The compendium of vacancies formerly used by the United Nations as a staff recruitment tool.

<sup>2</sup> ST/AI/2006/3, Annex IV, section 1(l) provides that the Office of Human Resources Management is responsible and accountable for advising heads of departments/offices, programme managers, central review bodies (as ex officio members of those bodies) and staff members on the proper application of the new system.

26. While the Respondent emphasizes in his pleadings that management has broad discretion in appointing and promoting staff and in filling vacancies<sup>3</sup>, 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.”<sup>4</sup>

**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.

28. Section 7.6 of ST/AI/2006/3 provided that:

*For each vacancy, the programme manager shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and/or decision by the head of the department/office.*

29. Section 7.7 of ST/AI/2006/3 provided that:

*Programme managers shall transmit their proposal for one candidate or, preferably, a list of qualified, unranked candidates to the appropriate central review body through the head of department/office after the 15-, 30- or 60-*

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<sup>3</sup> UNAT Judgment No. 362, *Williamson*, (1986) and Judgment No. 1209, *El-Ansary* (2005)

<sup>4</sup> *Kasmani v. Secretary-General of the United Nations*, 11 September 2009, UNDT/2009/017.

*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.e. select) a particular candidate to fill a position is ultimately made by the head of department/office. The selection decision is therefore not made by the interview panel or by the Programme Manager.

36. In the present case, the Applicant was interviewed and subsequently recommended/proposed by the PCO (also the Programme Manager) as the most suitable candidate for the subject post. Based on the provisions of Section 8 of ST/AI/2006/3, the next step in the selection process should have been a review by a central review body. The central review body, however, never had the opportunity to review the PCO’s recommendation due to the fact that the selection process was stalled and eventually cancelled by HRSS, on the basis of what the Tribunal deems as inaccurate information,. Consequently, a selection decision was never made by the head of department/office in accordance with Section 9.1 nor was there any implementation pursuant to Section 10.2.

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 UNAT was of the view that the facts of the case raised the question of “whether proper procedures were followed, of whether extraneous matters were brought to bear

on the selection process, and of whether the decision was made on the basis of inaccurate information". The former UNAT subsequently found that:

*It cannot be said that the Applicant would have obtained the post even if the procedures relating to the selection for the post after the issuing of the second vacancy announcement, had not been defective. Nonetheless, the Applicant has established, to the satisfaction of the Tribunal, that the procedures were flawed due to the highly improper interference in the process by the Director, OHRM, with the objective of promoting the appointment of Ms. X, to the detriment of all other candidates and the selection process as a whole. This impropriety violated the Applicant's right to full and fair consideration for the post.*

41. In the present case, the Tribunal cannot help but agree with the decisions of the former UNAT in *Gordon and Pelanne* and *Maia-Sampaio*. While the Tribunal cannot conclude that, if proper procedures had been followed and if the Applicant's candidacy had been reviewed by the central review body, he would have been selected for the subject post, it considers that the Applicant's prospect for selection was very high due to the fact that he was the only candidate deemed suitable for the position by the ASP. Thus, the decision by HRSS to discontinue the selection process, without a properly established basis, effectively deprived him of the opportunity to be selected for the post and thereby violated his right to due process.

42. In Judgment No. 1052, *Bonder* (2002), the former United Nations Administrative Tribunal stated that:

*Depending on the extent to which proper procedures have been ignored and on the existence of solid prospects for renewal, the Tribunal may conclude that the procedural irregularities do not fundamentally vitiate the decision and that the Applicant is entitled only to a limited compensation for the inadequate treatment of his or her case; or it may conclude that, although the Applicant does not have a right of renewal, the procedural irregularities were*

*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.



Judge Vinod Boolell

Dated this 6<sup>th</sup> day of May 2010

Entered in the Register on this 6<sup>th</sup> day of May 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi