



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/088

Judgment No.: UNDT/2011/101

Date: 16 June 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

NYAKOSSI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. By application filed on 9 June 2010 before the United Nations Dispute Tribunal, the Applicant, a staff member of the United Nations Office in Geneva (UNOG), contests the decision of the United Nations High Commissioner for Refugees not to retain him in the pool of candidates for P-3 and P-4 field security adviser posts.

2. He is requesting compensation for the material and moral damage suffered.

Facts

3. The Applicant has been a G-3 security and safety officer at UNOG since June 2004.

4. In 2009, the United Nations High Commissioner for Refugees (UNHCR) published a call for application for P-3 and P-4 field security adviser posts in various countries on the ReliefWeb website.

5. On 21 October 2009, the Applicant submitted an application for the advertised posts.

6. On 19 November 2009, the UNHCR Field Security Section forwarded the Applicant's candidacy to the United Nations Secretariat Department of Safety and Security (DSS) for clearance. That same day, DSS informed UNHCR that the Applicant had not been granted clearance.

7. UNHCR asked DSS to give the reasons for its refusal to grant the Applicant clearance. On 24 November 2009, DSS informed UNHCR that the Applicant lacked the relevant experience for field security adviser posts, especially at the managerial level. DSS also noted that the Applicant could not write easily in English and informed UNHCR that his candidacy had already been reviewed and rejected two times.

8. On 1 December 2009, UNHCR informed the Applicant that DSS had rejected his candidacy and that, for that reason, his name could not be retained as a candidate for field security officer posts. It also indicated that DSS had taken note of his time with the police in his country and of his university degree but had nevertheless decided to reject his candidacy owing to his lack of security experience. Lastly, UNHCR informed the Applicant that DSS had expressed concern over his language skills.

9. By e-mail dated 2 December 2009, the Applicant informed UNHCR that he contested the rejection of his candidacy, stressing that he had the necessary skills for a field security adviser post as listed in the call for applications criteria. He asked UNHCR to contact DSS and request a second review of his candidacy. That same day, UNHCR confirmed the decision of DSS and denied the Applicant's request.

10. By letter dated 27 January 2010, the Applicant submitted to the Deputy High Commissioner a request for a management evaluation of the UNHCR decision not to retain his candidacy.

11. By letter dated 12 March 2010, the Deputy High Commissioner sent the Applicant the results of the management evaluation. He indicated that the Applicant had not been granted clearance by DSS, mainly due to the lack of the required managerial and English communication skills. He also stated that the call for applications had not been a specific vacancy announcement; it had been aimed at developing a pool of cleared candidates for field security adviser job openings.

12. On 9 June 2010, the Applicant filed an application before the United Nations Dispute Tribunal. On 12 July 2010, the Respondent submitted its reply and on 4 August 2010, the Applicant submitted his observations on the Respondent's reply.

13. On 27 May 2011, a hearing was held in the presence of the Applicant, his Counsel and Counsel for the Respondent. The parties submitted additional documentation on 31 May 2011.

14. By Order No. 92 (GVA/2011) of 6 June 2011, the Tribunal ordered UNHCR to produce the text establishing that clearance from DSS was a mandatory step in the selection process and that it was compelled to follow the opinion of DSS.

15. On 9 June 2011, UNHCR replied to the aforementioned Order.

Parties' contentions

16. The Applicant's contentions are:

a. There were irregularities in the assessment of his candidacy. The call for applications announcement stipulated that the candidate was required to speak English or French, not both languages. Thus, the Respondent took an irrelevant consideration into account in rejecting the Applicant's candidacy because he did not speak English;

b. The announcement did not specify that it was a call for applications to create a pool of potential candidates from which vacant field security adviser posts would be filled. Having been excluded from that pool, he will be unable to obtain a post of field security adviser. The fact that he was not informed in advance of the selection procedure constitutes a breach of his due process rights;

c. UNHCR failed to give adequate consideration to his employment history. He has almost 21 years of experience in the security sector and has served in various managerial roles as a security officer with positive performance evaluations.

17. The Respondent's contentions are:

a. The application is inadmissible. The Applicant is a UNOG staff member, but he does not hold a contract with UNHCR. Furthermore, the call for applications announcement posted on the website did not mention a specific vacancy. Therefore, the decision not to retain the Applicant in the pool of cleared candidates for field security adviser posts was not an

administrative decision since it does not violate his contract with UNOG and has no direct impact on his contractual situation;

b. The Applicant's candidacy was considered according to the standard procedure and practice of the Organization. In screening the applications, UNHCR concluded that the Applicant's profile did not merit retention in the pool of candidates cleared for field security adviser posts owing to his insufficient English communication skills and his lack of experience in crisis management. However, since the Applicant was a United Nations staff member and had applied for positions with UNHCR on several occasions, his profile was sent to DSS for clearance. Clearance was not granted by DSS. As all candidates for field security adviser posts must be cleared by DSS, his candidacy was rejected;

c. The call for applications did not refer to a specific vacancy. If a vacant field security adviser post is advertised in the future, the Applicant will be able to submit his application for that vacancy as part of a specific selection process;

d. The Applicant's employment history was considered by UNHCR and DSS;

e. The wording of Annex IV to the Report of the Ad Hoc Inter-Agency Meeting on Security Matters suffices to compel UNHCR to obtain DSS clearance for the recruitment of security personnel.

Judgment

On the issue of receivability

18. The Applicant contests the decision of the United Nations High Commissioner for Refugees not to retain him in the pool of candidates for P-3 and P-4 field security adviser posts.

19. In asking the Tribunal to reject the application, the Respondent first maintains that the Tribunal is not competent to consider it since the Applicant's rights and terms of employment are not affected by the contested decision.

20. Article 2, paragraph 1, of the Statute of the United Nations Dispute Tribunal provides that:

The...Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance...

21. It is not disputed that on the date of the contested decision, the Applicant was a UNOG staff member. Thus, rejection of his candidacy breached his rights under his contract of employment. Therefore, by virtue of the foregoing provisions, the Tribunal is competent to rule on this dispute.

On the merits

22. The documents in the file indicate that in rejecting the Applicant's candidacy, UNHCR based its decision solely on that of DSS, which refused to grant him clearance. Thus, UNHCR considered that it was compelled to follow the opinion of DSS. In response to the Tribunal's request, in Order No. 92 (GVA/2011) of 6 June 2011, that the respondent produce the text establishing that it was compelled to follow the opinion of DSS, UNHCR stated that the only text on which it relied was Annex IV to the Report of the Ad Hoc Inter-Agency Meeting on Security Matters (ACC/1999/10), for which there is no official French translation. This Annex contains the report of the Working Group on Field Security Officers, prepared in connection with a meeting held on 28 and 29 May

1998, which includes, inter alia, the following conclusions and recommendations on the recruitment of security officers:

(b) UNSECOORD [the Office of the United Nations Security Coordinator which was replaced by UNDSS in 2005] should establish and maintain a database of potential security officers to be used by all organizations. UNSECOORD should routinely provide a copy of the database to all organizations on a semi-annual basis. Any organization which undertakes to interview candidates on the roster should provide a summary of the interview results to UNSECOORD for inclusion in the database;

(c) UNSECOORD should establish and maintain a database of all security officers currently in the system. Organizations should routinely provide required information regarding their respective security officers to UNSECOORD for updating of the database. UNSECOORD will provide a copy of the database to all involved organizations. Comments/evaluations of the security officers, as appropriate, should be available to interested organizations.

23. The Tribunal in no way purports to challenge the appropriateness of the conclusions and recommendations contained in this report. However, since no legal text has adopted the conclusions contained in this report, they are not, as yet, regulatory in nature and while UNHCR was entitled to consult DSS as to whether the Applicant should be recruited, it was in no way compelled to follow the opinion of DSS as it did.

24. Thus, the refusal of the United Nations High Commissioner for Refugees to retain the Applicant in the pool of candidates cleared for P-3 and P-4 field security officer posts is illegal and the Applicant is entitled to claim compensation for the damage arising out of this illegality.

25. In order to establish the amount of compensation to be paid to the Applicant, the Tribunal must assess the likelihood that he would have been retained in the pool of candidates if UNHCR had not felt compelled to follow the opinion of DSS - in other words, the likelihood that UNHCR would not have followed the negative opinion of DSS with respect to the Applicant's candidacy.

26. DSS refused to grant clearance to the candidacy for two reasons, which the Applicant contests.

27. One of these reasons, as seen from the e-mail sent to the Applicant by UNHCR on 1 December 2009, is that his language skills were insufficient, particularly as he was not fluent in English. The Applicant maintains that the call for applications required fluency in either English or French and that since he was fluent in French, DSS committed a substantive irregularity in rejecting his candidacy on the grounds that his knowledge of English was insufficient.

28. It should, however, be noted that with respect to languages, the call for applications announcement specified that fluency in English or French was required, fluency in a second United Nations language was an asset and fluency in Arabic, Russian or Spanish was highly desirable.

29. Thus, since French was the only official language of the Organization in which the Applicant was fluent, it is likely that UNHCR, like DSS, would have taken this factor into account.

30. The other reason for the refusal of DSS to grant clearance to the Applicant's candidacy is the fact that he had insufficient security experience and no management experience. The Tribunal considers that in light of the conclusions adopted by the Working Group on Field Security Officers, which purport to standardize the conditions for recruitment of staff in that area, it was highly likely that UNHCR would endorse the opinion of DSS.

31. However, the Tribunal must consider whether the opinion given by DSS contains a factual error or an obvious error of judgment.

32. The Tribunal must first note that the Applicant attached in support of his application a Personal History Profile (PHP) that is different from the one that he had submitted in support of his candidacy for the disputed posts. Thus, the Applicant did not provide the Tribunal with the document that would allow it to rule on the matter.

33. It is clear from the different versions of the Applicant's PHP, as sent to the Tribunal, and from his statement at the hearing that as a manager, he had acquired

good security skills during his years of service as an officer in Togo. However, it is also clear from the file that in light of the Applicant's many years of theoretical training, DSS did not commit a factual error or an obvious error of judgment in considering that his experience in the security field was insufficient.

34. The Tribunal therefore considers that even if UNHCR had not committed the aforementioned illegality, it is highly unlikely that the Applicant would have been selected. Under the circumstances, the Tribunal considers that compensation must be provided for all the damage suffered by awarding him the sum of CHF1,500 and that his other claims should be dismissed.

Conclusion

35. In view of the foregoing, the Tribunal DECIDES:

- a. UNHCR is ordered to pay the Applicant the sum of CHF1,500;
- b. The abovementioned compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of the said compensation. An uplift of five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;
- c. All the Applicant's other claims are dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 16th day of June 2011

Entered in the Register on this 16th day of June 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva