



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/110

Judgment No.: UNDT/2011/183

Date: 28 October 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

RAHMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bart Willemsen, OSLA

Counsel for Respondent:

Myriam Foucher, UNOG

Introduction

1. The Applicant contests the decision not to select him for the post of Director of the Division on Technology and Logistics (“DTL”), at the United Nations Conference on Trade and Development (“UNCTAD”).

2. He requests that the selection decision be rescinded and that he be compensated for harm suffered.

Facts

3. The Applicant joined UNCTAD, in Geneva, on 25 February 1991 as Special Adviser. After several promotions and changes of assignments, he was promoted to the D-1 level in 2005.

4. On 28 April 2008 a vacancy announcement for a D-2 level post as Director of DTL, UNCTAD, was advertised under No. 08-ECO-UNCTAD-417827-R-GENEVA. Five internal candidates, including the Applicant, and 63 external candidates applied for the post.

5. The five internal candidates and four of the external candidates were shortlisted for interviews, which were held on 21 and 22 October and on 4 November 2008. One internal candidate, who had initially declined to be interviewed, indicated on 3 March 2009 that she had changed her mind and was interviewed on 20 March 2009.

6. By a memorandum of 26 March 2009, the panel established for the selection procedure found that the Applicant fully met the requisite competencies for the post, that another candidate met most of them, and that the candidate interviewed in March 2009 met many of them. The panel therefore recommended those three candidates. On 30 March 2009, the Secretary-General of UNCTAD, as programme manager, proposed the three candidates to the Chairperson of the Senior Review Group. The Secretary-General of UNCTAD then recommended to the Secretary-General of the United Nations that the last-interviewed candidate, who was the sole woman candidate, be selected for the post.

7. By an email of 5 June 2009, the Secretary-General of UNCTAD sent a memorandum to all UNCTAD staff informing them that the Secretary-General of the United Nations had approved the appointment of the female candidate as Director of DTL and that she would take up her functions on 15 June 2009.

8. On 26 June 2009, the Applicant filed a complaint with the Ethics Office requesting protection against the retaliation to which he thought he had been subjected for having reported an instance of misconduct against one of his colleagues. The Ethics Office responded favourably to his complaint.

9. On 11 August 2010, the Applicant wrote to the Officer-in-Charge of the Human Resources Management Section (“HRMS”), UNCTAD, claiming that, as an interviewed candidate for the disputed post, he should have been informed in writing of the outcome of the selection procedure.

10. On 13 August 2010, the Officer-in-Charge of HRMS, UNCTAD, sent a reply expressing surprise at the lateness of the request and pointing out that the Applicant had been informed of the decision by the email of 5 June 2009 addressed to him and all other UNCTAD staff.

11. On 20 August 2010, the Applicant submitted a request for management evaluation of the decision not to select him for the disputed post.

12. On 6 October 2010, the Management Evaluation Unit at Headquarters informed the Applicant that his request for management evaluation was not receivable as time-barred.

13. On 26 November 2010, the Applicant filed his application with this Tribunal. The Respondent submitted his reply on 23 December 2010.

14. By a letter of 10 August 2011, the Tribunal informed the parties that an oral hearing was not considered necessary and invited them to submit their views on the question. The Respondent expressed his agreement on 22 August 2011, but requested to be given the opportunity to present additional comments should the Tribunal find the application receivable.

15. After two extensions of the time limit for the communication of views on the holding of a hearing, the Applicant submitted a memorandum on 8 September 2011 requesting the Tribunal to find the application receivable and stating his opinion that an oral hearing was necessary.

Parties' submissions

16. The Applicant's contentions are:

a. He received no notification of the decision not to select him. He did not contest the decision by the Secretary-General of UNCTAD—which he learned on 5 June 2009—because of exceptional circumstances connected with the fact that he was perturbed by the retaliation measures of which he was a victim;

b. Moreover, it was not until the second week of July 2010 that he received new information establishing the irregularity of the selection procedure, as contained in particular in the memorandum of 26 March 2009 from the selection panel. That new information on the panel's evaluations of the candidates caused him to realize that the contested decision violated his rights; moreover, it was necessary to submit his management evaluation request. The Respondent is wrong to maintain that the jurisprudence of this Tribunal in *Sefraoui* UNDT/2009/011 is not applicable to the Applicant's case;

c. His request for a management evaluation is not time-barred since it was not until 13 August 2010 that he received an official notification of the contested decision and he submitted his request for management evaluation on 20 August 2010;

d. The information given on 5 June 2009 was not a notification and therefore was not an administrative decision. The Administration did not comply with section 9.5 of administrative instruction ST/AI/2006/3 on the staff selection system, which requires the programme manager to inform the candidates in writing and personally of the results of a selection

procedure. Furthermore, whereas the above-mentioned section clearly specifies that this information should be conveyed by the programme manager, the memorandum of 5 June 2009 was sent by the head of department. In addition, the information posted on *Galaxy* contradicted that memorandum, since it indicated that the candidates were still under consideration;

e. The memorandum of the selection panel shows that the Applicant had all the requisite competencies for the post, whereas the selected candidate was considered as merely possessing many of the requisite competencies. Since the latter's competencies are inferior to the Applicant's, the fact that she is a woman could not justify her selection in preference to the Applicant;

f. As to the geographical distribution of staff, the Applicant's country is underrepresented, while this is not true of the selected candidate's country;

g. His career, in terms of mobility and posts filled, has been far more diverse;

h. He was discriminated against in so far as the selected candidate was chosen because she has the nationality of a State member of the United Nations Security Council whereas he does not.

17. The Respondent's contentions are:

a. The application is not receivable as the Applicant has not complied with the time limit set in staff rule 111.2(a) applicable at the date of the contested decision. Both the former Administrative Tribunal and the present Dispute Tribunal have consistently affirmed the necessity of complying with time limits;

b. This time limit begins to run from the date on which the Applicant learned of the contested decision. In *Schook* 2010-UNAT-013 the Appeals Tribunal ruled that former staff rule 111.2(a) does not require that the

notification of an administrative decision should be in any particular form, except that it should be in writing. Unlike in the case that gave rise to *Sefraoui* UNDT/2009/011, in the present case the Applicant, before having access to the memorandum of 26 March 2009, had already been in possession of information that could have caused him to challenge the decision which is currently in contention;

c. The question of receivability *ratione temporis* must not be confused with the question of full compliance with procedural requirements in respect of the notification of a decision;

d. Under the terms of article 8 of its Statute, the Tribunal is not authorized to suspend or waive the deadlines for management evaluation, even in exceptional circumstances;

e. The Applicant received notification of the decision not to select him by a memorandum of 5 June 2009 addressed to all UNCTAD staff. That memorandum fully satisfies the requirement that candidates who are interviewed but not selected must be notified of the decision not to select them. Moreover, the Applicant, who was performing the functions of the post as Officer-in-Charge, handed over the management of DTL to the selected candidate. The other information given to the Applicant in this regard was merely confirmative. Indications posted on *Galaxy* were irrelevant once he had received the memorandum of 5 June 2009.

Consideration

18. The Tribunal considers that it is in possession of sufficient information about the points of fact and of law raised by the parties. It therefore saw no point in holding an oral hearing or requesting the parties to submit further written material.

19. In requesting the Tribunal to reject the application, the Respondent contends that it is not receivable since the Applicant did not comply with the time

limit set in former staff rule 111.2 in force at the time the contested decision was taken, which provided that:

(a) A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing.

20. The Tribunal has therefore to determine on which date the Applicant received written notification of the decision not to select him for the post of Director of DTL, UNCTAD.

21. It can be seen from the facts as described above that on 5 June 2009 the Secretary-General of UNCTAD informed all UNCTAD staff by email, including the Applicant, that the Secretary-General of the United Nations had approved the appointment of the selected candidate as Director of DTL and that she would take up her functions on 15 June 2009. Hence, the Applicant cannot submit that such decision did not constitute the written notification prescribed by the above-mentioned provisions, since former staff rule 111.2(a) did not require the notification of an administrative decision to be in any particular form, except that it should be in writing, as confirmed by the Appeals Tribunal in *Schook* 2010-UNAT-013.

22. In conformity with the jurisprudence of the Appeals Tribunal, as set out in *Sethia* 2010-UNAT-079 of 29 October 2010, a staff member cannot contest a decision of the Administration whose sole object is to confirm a previous administrative decision. Hence, the Applicant cannot submit that the decision of 13 August 2010 by the Officer-in-Charge of HRMS, UNCTAD, which confirmed the decision of 5 June 2009, reopened the time limits for submission of a request for management evaluation.

23. Lastly, since the Applicant submits that exceptional circumstances prevented him from requesting a review within the two-month time limit prescribed by staff rule 111.2(a) then in force, the Tribunal must point out that, pursuant to the jurisprudence of the Appeals Tribunal as established by *Costa*

2010-UNAT-036, article 8.3 of the Dispute Tribunal's Statute prohibits it from extending the deadlines prescribed for the submission to the Secretary-General of a request for review of the contested decision.

Conclusion

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

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 28th day of October 2011

Entered in the Register on this 28th day of October 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry