



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

ROIG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Joseph Grinblat, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the selection of a staff member other than her on the grounds that the successful candidate did not meet the post eligibility requirements in connection with the P-4 level vacancy announcement 09-421575-R-New York (“the Post”), Migration Section, Population Division, Department of Economic and Social Affairs (“DESA”).

Facts

2. On 1 July 2009, the Applicant submitted an application for the Post. As part of the selection process, the Applicant was interviewed for the Post between 11 February 2010 and 10 March 2010.

3. On 29 October 2010, the Applicant received a letter from the Executive Officer of DESA informing her that the Under-Secretary-General of DESA had completed the selection for the Post and that she had not been selected. This letter also informed the Applicant that, as a result of the Central Review Board’s (“CRB”) endorsement of her application as a recommended candidate for this position and her ensuing non-selection, she was being placed on a roster of candidates that may be considered for future vacancies at the same level and with similar functions.

4. On 17 December 2010, the Applicant became aware of the identity of the candidate that had been selected for the Post.

5. On 11 February 2011, the Applicant requested management evaluation of the selection of the successful candidate on the grounds that the selected candidate did not meet the post eligibility requirements listed in the post vacancy announcement and that the selection process had therefore not respected the applicable selection rules and procedures resulting in a breach of her rights.

6. On 23 March 2011, the Under-Secretary-General for Management (“USG”) informed the Applicant that, following the Management Evaluation Unit’s (“MEU”) review of her request for management evaluation of the decision regarding her non-selection for the Post, the Secretary-General had decided to uphold the contested decision. The USG’s letter informed the Applicant that her candidature for the Post had been fully and fairly evaluated and noted that “the selected candidate possesse[d] the required ... experience”.

7. On 8 April 2011, the Applicant filed an application with the Dispute Tribunal contesting the selection of a candidate other than her which resulted in a breach of her rights.

8. On 13 May 2011, the Respondent submitted his reply in which he contested, *inter alia*, the receivability of the Applicant’s request for management evaluation. The Respondent submitted that it was filed 52 days after the 28 December 2010 deadline to request a review of the 29 October 2010 administrative decision informing the Applicant of her non-selection for the Post, thereby rendering her management evaluation time-barred.

9. On 17 May 2011, the Applicant submitted comments on the Respondent’s reply stating that her management evaluation request was timely as she had only found out who the selected candidate was on 17 December 2010. The Applicant further stated that she “was not contesting her non-selection ... [but] that her right for due process was violated by the selection of a candidate who ... did not even meet the minimum qualification required”.

10. On 1 July 2011, the Respondent filed comments on the Applicant’s 17 May 2011 submission in which he stated that the Applicant’s comments were akin to her “conced[ing] that she does not contest the decision not to select her for the post” and that she was therefore abandoning her claims before the Tribunal.

11. On 2 July 2011, the Applicant filed comments on the Respondent’s 1 July 2011 reply and stated that she did not renounce any of her claims with regard

to her non-selection as the violation of her due process rights were a direct result of the selection of an unqualified candidate.

12. On 27 July 2012 and 29 July 2012, the Applicant and the Respondent, in response to Order No. 145 (NY/2012) dated 19 July 2012, provided the Tribunal with separate submissions in which they stated that they did not object to the Tribunal disposing of this case on the papers.

Applicant's submissions

13. The Applicant's principal contentions may be summarized as follows:

a. The decision being contested is the selection of a candidate other than her who did not meet the minimum qualifications required by the vacancy announcement. The non-selection of the Applicant is not being contested as it was originally assumed to have been the result of the legitimate selection of a more qualified candidate;

b. There was no public announcement of who the selected candidate was, resulting in the Applicant only becoming aware of the identity of the selected candidate on 17 December 2010. Prior to becoming aware of who the selected candidate was, there was no ground for the Applicant to contest the selection decision. The selection of a candidate who turned out to be unqualified resulted in a breach of her due process rights because, but for this selection, she would have probably been selected for the Post;

c. Most staff members in the Population Division were aware that the successful candidate did not have the required experience. Therefore, the selection decision was based on favoritism and constituted a clear violation of the United Nations staff rules as well as the Applicant's rights to due process in the consideration of her own application;

d. By stating that the selected candidate's "combined experience" in the applicable field was satisfactory, the MEU disregarded the terminology of the vacancy announcement which required the selected candidate to have experience that "focused on" the applicable subject matter;

e. The MEU accepted the Administration's arguments regarding the suitability of the successful candidate without providing the Applicant, or a neutral party, the opportunity to counter their line of reasoning. The Tribunal may therefore want to consult with a neutral specialist that will be able to establish that the selected candidate did not possess the required qualifications as well as the fact that the selection was the result of favoritism;

f. The Administration failed to meet its burden of proof, as required by the jurisprudence of the Tribunal, to clearly show that the successful candidate met the minimum requirements for the Post;

g. The Tribunal should find that the Applicant's due process rights were violated as a result of the selection of an unqualified candidate and award her one year's net base salary in damages.

Respondent's submissions

14. The Respondent's principal contentions may be summarized as follows:

a. The application should be dismissed as it was not submitted to the MEU within the statutory time limit of 60 days from when the staff member received notification of the contested decision, which was on 29 October 2010, thereby rendering any request for management evaluation due by 28 December 2010;

b. In addition to the fact that the Applicant fails to provide any valid reasons for the delay incurred in filing her application, the Tribunal does not

have the authority to waive the applicable time limits to request management evaluation;

c. The application is not receivable under art. 2.1 of the Statute of the Dispute Tribunal and should also be dismissed pursuant to art 2.6 of the Statute of the Dispute Tribunal and arts. 19 and 36 of the Rules of Procedure of the Dispute Tribunal as the Applicant concedes in her filings that she is not contesting the decision not to select her but rather the selection of the successful candidate;

d. When reviewing a staff member's claim that his or her rights have been breached during a post selection exercise, the Tribunal limits its review to questions of whether the non-selected candidate was fairly and adequately considered (*Abbassi* 2011-UNAT-110). The Applicant does not identify how the selection of a candidate other than her breached her terms of appointment which, under art 2.1 of the Statute of the Tribunal, results in the Applicant abandoning her only claim with regard to her candidacy and, more importantly, her application being not receivable;

e. The Tribunal in *Liarski* UNDT/2010/134 held that it may review whether a post selection process was carried out in a proper manner and whether the selection decision was tainted by undue considerations or was manifestly unreasonable. However, the Tribunal limited its authority in *Krioutchkov* UNDT/2010/065 by stating that the Secretary-General enjoys broad discretionary authority when it comes to making selection decisions and the Tribunal may not substitute its judgment for that of the Secretary-General or attempt to replicate the work conducted by the interview panel;

f. The Applicant was fully and fairly considered for the Post in accordance with ST/AI/2006/3 (Staff selection system). All the rules and regulations of the Organization were respected and the Applicant was subsequently recommended for the Post with the selected candidate who met

all of the applicable requirements. A review of the successful candidate's qualifications shows that she had the required experience in the relevant fields and met the criteria from the vacancy announcement;

g. The Applicant fails to show how this selection process was tainted by any favoritism nor does she show through clear and convincing evidence that she was denied a fair chance of promotion. Consequently, considering that the decision under review enjoys the presumption of regularity (*Rolland 2011-UNAT-122*), this application should be dismissed;

h. With regard to the specific allegations regarding the successful candidate's qualifications, they are illogical and have no basis in fact. The internet searches conducted by the Applicant, as well as her own personal knowledge, are not "an exhaustive or reliable source of information, particularly on matters of professional qualifications".

Consideration

Receivability as a preliminary issue

15. The first issue the Tribunal has to consider is the Respondent's argument that the Applicant's application is not receivable due to the fact that she did not submit her request for management evaluation within the statutory time limit.

Applicable law

16. Staff rule 11.2(c) (Management Evaluation) states that:

A request for management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

17. ST/AI/2010/3 (Staff selection system) states, in relevant parts:

Selection Decision

9.4 Candidates for position-specific job openings ... other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories. ...

Notification and implementation of the decision

10.1 The executive office at Headquarters, the local human resources offices or the Division of Field Personnel of the Department of Field Support shall inform the selected candidate of the selection decision within 14 days after the decision is made. Candidates endorsed by the central review body and placed on a roster shall be informed of such placement within 14 days after the decision is made by the hiring manager or occupational group manager and be advised that they may be selected from the roster for similar positions that may become available within the stipulated time frame as described in sections 9.3 and 9.4. Other candidates convoked for assessments but not selected or placed on a roster shall be so informed by the hiring manager or the occupational group manager within 14 days after the selection decision is made in writing. Applicants eliminated prior to the assessment exercises shall be informed.

Administrative decision

18. The parties both contend that the Applicant was informed of her non-selection on 29 October 2010 upon receiving the letter from the Executive Officer, DESA, which advised her that the:

Under-Secretary-General for Economic and Social Affairs, made the selection decision for the above-mentioned vacancy, and placed you on a roster of candidates.

The roster includes candidates who have been endorsed by a central review body for a particular vacancy but not selected for it, and who have indicated an interest in being considered for a future vacancy with similar functions at the same level.

19. In her application, and in her subsequent submissions, the Applicant stated that she had no basis for contesting her non-selection prior to discovering the identity

of the selected candidate who “not only was clearly less qualified than she is, but did not even meet the minimum qualification required by the vacancy announcement” thereby resulting in a breach of her due process rights. Furthermore, the Applicant submits that had the successful candidate not been selected, “she would have been probably selected herself”.

20. When identifying the administrative decision that she is contesting, namely the selection of an unqualified candidate, the Applicant stated that she only became aware of the identity of the selected candidate on 17 December 2010. The Applicant submits that seeing that she “had no basis for disputing her non-selection until she knew who was selected”, the time limit identified in staff rule 11.2(c) had not yet started to run. Consequently, her request for management evaluation, which was filed on 11 February 2011, was filed with the MEU prior to the expiry of the 60-day time limit prescribed in the Staff Rules.

21. The question the Tribunal has to resolve for the purpose of determining the applicable time limits in this case is when was the contested administrative decision taken, namely on either 29 October 2010 or 17 December 2010.

Non-selection

22. While the Applicant does not contest the date of her non-selection, it serves this Tribunal to identify when and how the Applicant was informed of this decision for the purpose of these considerations.

23. As previously stated, the 29 October 2010 letter from DESA informed the Applicant that (a) a selection had been made for the Post; (b) she had been placed on the roster; and (c) the roster included candidates that had been endorsed but not selected for the Post. Such language clearly conforms with the criteria set out in ST/AI/2010/3 for informing an Applicant of a unilateral administrative decision taken by the Administration which is of individual application, and which carried direct legal consequences, namely the Applicant’s non-selection.

24. In *Thiam* UNDT/2010/131 and in *Schook* 2010-UNAT-013, both the Dispute Tribunal and the Appeals Tribunal held that the time limit within which a management evaluation has to be requested starts to run upon receiving the written notification of the contested decision. In this matter, the Applicant was clearly informed that a selection decision had been made and she had not been selected on 29 October 2010 resulting in the 60-day time limit for submitting a request for management evaluation of that decision to expire on 28 December 2010.

25. However, in this case the Applicant contends that she is not contesting her non-selection but rather the selection of another candidate which affected her rights. Furthermore, the Applicant submits that she only became aware of the said decision on 17 December 2010 which is the date on which the applicable time limits should start to run.

Selection of a candidate other than the Applicant

26. The 29 October 2010 letter, in addition to informing the Applicant of the administrative decision not to select her, identified that the administrative decision regarding the selection for the Post had been completed. However, no further information is provided in the letter regarding who the selected candidate is.

27. Section 10 of ST/AI/2010/3 covers the process by which an applicant should be notified of the selection, and the non-selection, of a candidate for a specific post. While this section clearly states that a candidate should be informed of their non-selection, no reference is made in the administrative instruction, or in other United Nations bodies of law, regarding the need to inform the unsuccessful candidate of the identity of the successful candidate whether by written notice or in the form of a public announcement. Rather, the administrative instruction specifies that the Administration “shall inform the selected candidate of the selection decision within 14 days after the decision is made” and the non-successful candidate who are placed on the roster only need be informed, “within 14 days after the selection decision is made”.

28. Phrased differently, sec. 10 of ST/AI/2010/3 states that the successful candidate needs to be informed in writing of the administrative decision to select him or her within 14 days of that decision being made and the non-successful candidate also needs to be informed within 14 days after the completion of the selection decision is made in writing.

29. The 29 October 2010 letter identified not only the latter of the two administrative decisions but also informed the Applicant of the former, namely by stating that the selection for the Post had been completed and that she had not been selected, yet placed on the roster, she was informed that the administrative decision to select a candidate other than her had been taken.

30. While the Applicant submits that she only became aware of the identity of the selected candidate on 17 December 2010, she does not contest the fact that she is challenging the administrative decision to select a candidate other than her. However, per the above, the Tribunal has determined that she could only have been informed of her non-selection following the completion of the selection of a candidate other than her and that she was informed of the said other administrative decision to select someone else on 29 October 2010.

31. Consequently, aside from the question as to whether or not an applicant has standing to contest an administrative decision that concerns someone else and which may therefore not affect their contractual rights or may not, per *Andronov*, carry direct legal consequences or not be of individual application to the Applicant, the Tribunal can only conclude that the Applicant was informed of the administrative decision to select someone other than her on 29 October 2010, at which point the 60-day time limit to potentially request management evaluation of that other administrative decision would have started to run.

32. The Applicant does not identify any legal measure that would require the Administration to inform her of the identity of the successful candidate which

may have tolled the running of the time limits or that an additional and separate administrative decision regarding the Post was taken on 17 December 2010.

33. Seeing that the Applicant only has the right to be informed of her non-selection rather than any inherent right to be informed of the identity of the successful candidate, it cannot be said that her becoming aware on 17 December 2010 of the identity of the successful candidate could have potentially served as the notification of the administrative decision to select the successful candidate that was initially referred to in the 29 October 2010 letter from DESA.

34. Another way that this question can be analyzed is whether any administrative decision was taken regarding the Post after 29 October 2010. The facts of the case clearly show that the only event that occurred after that date was that of the Applicant learning of the identity of the selected candidate. The Applicant does not identify an actual administrative decision as having been taken on that day but rather states that she only became actively notified of who was selected for the Post on 17 December 2010.

35. The Appeals Tribunal clearly stated in *Schook* 2010-UNAT-013 that, for the purpose of enabling the parties and the Tribunals to identify and correctly calculate from when the applicable time limits are to start to run, an administrative decision, in this case the Applicant's non-selection as well as the selection of another candidate, has to be in writing.

36. In addition to not identifying a right to be informed of the identity of the selected candidate, the Applicant does not identify a written decision, other than that of 29 October 2010, that the Tribunal could or should consider as a potential firm date from which time is to start to run.

Time limits applicable to management evaluation requests

37. Staff rule 11.2(c) states that the Secretary-General may, pending efforts for informal resolution conducted by the Office of the Ombudsman, extend the 60-day filing deadline by which an Applicant would need to request management evaluation.

38. Even if one was to try and construct a legal argument in which the learning of a separate administrative decision that concerned someone else may have affected the contractual rights of someone other than the one concerned by the administrative decision, the Tribunal, as for any administrative decision, needs to be able to determine when that decision was taken and when the non-selected candidate was informed of that decision.

39. In the present case, the Tribunal has determined that the non-selected candidate was informed of the administrative decision to select someone other than her on 29 October 2010 and that, more importantly, there is no legal basis under which it can consider that the time limit to request management review of that decision would have started at a later date.

40. The jurisprudence of the Tribunal, as affirmed by *Costa* UNDT/2009/051, *Zewdu* UNDT/2011/043, *Costa* 2010-UNAT-036 and *Sethia* 2010-UNAT-07, clearly states that the Tribunal does not have jurisdiction to waive the deadline for the filing of requests for management evaluation with the MEU.

41. Consequently, considering that the Tribunal does not have the authority to waive the 60-day time limit in staff rule 11.2(c), any request for management evaluation of either of the 29 October 2010 administrative decisions would have had to have been filed by 28 December 2010.

Extension of time for management evaluation

42. The request for management evaluation was formulated by the Applicant on 11 February 2011 which was more than 60 calendar days from the date on which

the Applicant received the 29 October 2010 notification of the selection of a candidate other than her, as well as her non-selection, for the Post. On 23 March 2011, the MEU informed the Applicant that they had completed their review of the selection process which included a determination of the facts of the case in accordance with art. 4.2 of the Staff Regulations.

43. For cases in which formulating a request for management evaluation is required, a mandatory criteria that has to be met by the initial request is that it be receivable. If the request for management evaluation is not receivable due to being time-barred, it will have no legal effect on the original administrative decision which will be considered as not having been contested.

44. Upon receiving an application from a case that was previously before the MEU, the Tribunal must always verify if the request for management evaluation was made within the applicable time limit and is not time-barred. Similarly, in cases where the MEU granted an extension of time to submit the request for management evaluation, the Tribunal must verify the legality of the extension also in order to ensure that all staff members benefit from the same procedural transparency, equity and fairness when they are before MEU. The deadline to file a request for management evaluation is mandatory and has important consequences upon the receivability of the application before the Tribunal.

45. Under staff rule 11.2(c), the deadline for management evaluation may be extended by the Secretary-General pending efforts for achieving an informal resolution via the office of the Ombudsman under conditions specified by Secretary-General. The granting of an extension of the deadline by which a party is required to file a management evaluation request must be clearly mentioned, with supporting reasoning, in the MEU's reply to the request for management evaluation. Indeed, one of the initial steps that the MEU should be undertaking as part of its review of a request is whether it is receivable

46. In the present case, there is no evidence that prior to submitting her request for management evaluation the Applicant approached without delay the Office of the Ombudsman in order to resolve the matter informally or that the Secretary-General granted her an extension of the applicable time limit.

Receivability before the UNDT

47. Art 11.2 (Management Evaluation) and 11.4 (United Nations Dispute Tribunal) of the former Staff Rules (ST/SGB/2010/6) describe the two level formal system by which a staff member can contest an administrative decision.

48. Firstly, there is the administrative level whereby art. 11.2(a) states that:

“[a] staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment ... shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision”.

This request will only be receivable if it formulated within 60 calendar days from the date on which the staff member received the notification of the administrative decision.

49. Secondly, there is the judicial level whereby art. 11.4(a) states that:

“[a] staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2(d) whichever is earlier”.

50. Art.8 UNDT Statute states that an application shall be receivable by the Tribunal if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

(ii) In cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision;

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

Consequently, if one of the above conditions is not met, the application will not be receivable.

51. The Respondent stated in his 13 May 2011 submission that the Applicant's request for management evaluation was time-barred because the Applicant had not submitted her request within the statutory limit.

52. The MEU does not appear to have taken note of the issue of receivability. Instead, it appears that the MEU proceeded to review the case on the merits of the facts resulting in the contested decision being upheld. The MEU determined that

the selection process was conducted in accordance with the applicable rules and the selected candidate met the post-selection criteria.

53. It is a general principle of law that no one can be heard to invoke his own turpitude (*nemo auditur propriam turpitudinem*). However, as long as the Tribunal verifies whether the request is receivable, an error made by the MEU regarding a question of receivability cannot be interpreted in favor of the applicant.

54. An application before the Tribunal will only be receivable if an applicant has, where applicable, previously submitted a receivable request for management evaluation of the contested administrative decision, namely within 60 days from the date on which the administrative decision was notified to the staff member.

55. In this case, the Applicant is a permanent staff member who contested the selection decision of a candidate other than her, as well as her non-selection, for the Post. The application before the Tribunal was filed on 8 April 2012 which is within 90 days following her receipt of the MEU's 23 March 2012 decision. However, seeing that the initial request for management evaluation was time-barred it has no legal effect and the application before the Tribunal is therefore not receivable.

Conclusion

56. The application is not receivable and the case is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 4th day of October 2012

Entered in the Register on this 4th day of October 2012

(Signed)

Hafida Lahiouel, Registrar, New York