



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/019

Judgment No.: UNDT/2013/098

Date: 10 July 2013

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

TERRAGNOLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision taken by the Office of Human Resources Management (“OHRM”), Department of Management in New York, that he was not eligible to be considered for a post at the G-7 grade.

Facts

2. On 15 September 2010, the Applicant, a Desktop Editorial and Publishing Assistant at the G-4 level, grade 6, submitted an application in response to vacancy announcement VA10-ADM-UNJSPF-ECEO-15697r-New York(O) for the post of Investment Assistant (the “Post”) at the G-7 level, located in the United Nations Joint Staff Pension Fund (“UNJSPF” or the “Fund”).

3. On 23 November 2010, the Applicant contacted OHRM to express why he considered that he was the most suitable candidate for the Post. Three days later OHRM informed the Applicant that he did not match the requirements for the Post.

4. On 6 December 2010, the Applicant requested management evaluation of the decision not to give his application due consideration by concluding that he was ineligible for the Post.

5. On 31 January 2011, the Management Evaluation Unit (“MEU”) informed the Applicant that they had “found no basis to conclude that the Administration abused its discretion in its determination that [he was] ineligible for consideration for the Post”.

6. On 10 March 2011, the Applicant filed the present application stating that OHRM had “failed to give the fullest regard to [his] application” for the Post. The supporting documents to the application were contained within 64 annexes totaling close to 1,000 pages.

7. On 10 April 2011, the Applicant filed a motion for leave to file additional supporting documentation and claimed that this material was not available on the date the application was filed. The following day, the Respondent opposed the Applicant's request. The Respondent submitted in the alternative that, if the Tribunal were to grant the Applicant's request, the Respondent would need additional time to review the new documentation. On 12 April 2011, the Applicant informed the Tribunal that he did not object to the Respondent's request for additional time.

8. On 14 April 2011, the Respondent filed his reply.

9. By motion dated 6 May 2011, the Applicant requested leave to comment on "the Respondent's reply, the errors of law raised in the supporting documentation, and leave to address new facts indicated in the Respondent's Reply". On 17 May 2011, the Applicant requested leave to file "the certified translation annexed to the Response of the Respondent". On 20 May 2011, the Respondent opposed the Applicant's request.

10. On 23 May 2011, the Tribunal (Judge Ebrahim-Carstens) issued Order No. 140 (NY/2011) in which it ordered the parties not to submit any further motions "until such a time as the matter is set down for a case management hearing, unless [either] party is so requested by the Tribunal".

11. On 4 June 2012, the undersigned Judge was assigned to the present case.

12. On 20 December 2012, the Tribunal, via Order No. 268 (NY/2012), directed the parties to submit a joint statement identifying the agreed, and if need be, the disputed, legal issues and facts in the present case, as well as whether there was any reason for having an oral hearing.

13. On 1 February 2011, the Applicant submitted a motion for leave to notify the Tribunal of the Respondent's obstructionism to comply with Order No. 268

(NY/2012). That same day, the parties submitted their joint statement. As part of their submission the Respondent stated that he considered that the issues before the Tribunal could be settled on the papers before it whereas the Applicant stated that an oral hearing “would allow [it] to consider a few *peripheral* but *useful* facts to assess the credibility and the trustworthiness of the Respondent in light of its demeanor after [O]rder No. 140 (NY/2011) was issued, namely retaliatory action taken against the Applicant” (emphasis in original).

14. On 7 February 2011, the Respondent submitted his motion in response to the Applicant’s 1 February 2011 motion.

15. By Order No. 144 (NY/2013), dated 18 June 2013, these two motions and the Applicant’s request for a hearing were rejected and the Tribunal ordered the parties to file closing submissions by 28 June 2013.

16. On 19 June 2013, the Respondent filed a request for an extension of time to comply with Order No. 144 and, on the same day, the Applicant filed a motion for leave to notify the Tribunal of the Applicant’s reservation regarding the Respondent’s request.

17. By Order No. 155 (NY/2013), dated 21 June 2013, the Applicant’s motion was rejected and the Respondent’s request for an extension of time until 2 July 2013 was granted (with a similar extension granted to the Applicant). On 2 July 2013, the parties filed their closing submissions.

Applicant’s submissions

18. The Applicant’s principal contentions may be summarized as follows:

- a. He was the most capable candidate for the Post;

b. The eligibility restrictions in rule 6.1 of ST/AI/2010/3 (Staff selection system) invoked by the Administration do not apply to the Pension Fund as it is not bound by administrative instructions issued by the Secretariat. Seeing that the Secretary-General of the United Nations does not have any authority over staff rules at the UNJSPF, the Pension Fund is not precluded from employing a candidate that was rejected by OHRM;

c. Should these policies apply to the Pension Fund, they still violate the UN Charter, Staff Rules and Regulations, General Assembly resolutions and requirements of the International Civil Service Commission as the “United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs”;

d. The Applicant requests that he be appointed to the Post. Alternatively, he requests that he be awarded two years of salary in compensation for the harm suffered.

Respondent’s submissions

19. The Respondent’s principal contentions may be summarized as follows:

a. The Pension Fund recruits and selects its staff in accordance with the United Nations Staff Regulations and Rules. Furthermore, the authority to take actions related to selection, appointment, promotion, and determinations of terms and conditions of service for staff of the Pension Fund has been delegated to OHRM via a Memorandum of Understanding (“MOU”);

b. Paragraph 6.1 of ST/AI/2010/3 specifically states that staff members on fixed-term appointments are not eligible to apply to positions which are more than one level above their current grade. Further, a review of

the Applicant's Personal History Profile indicated that "as a G-4 staff member [he] did not meet the level requirement and that he did not possess a minimum of 10 years work experience in financial markets";

c. The Applicant's right to full and fair consideration was respected. The application should be fully dismissed and no compensation should be awarded.

Consideration

Receivability

20. The application meets all of the receivability criteria from art. 8 of the Dispute Tribunal's Statute.

Applicable law

21. ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) states:

Section 2

Entry into force and effect of administrative issuances

2.1 Administrative issuances shall enter into force upon the date specified therein and shall remain in force until superseded or amended by another administrative issuance of the same or higher level and promulgated in accordance with the provisions of the present bulletin.

2.2 Staff members at all levels shall be responsible for observing the provisions of administrative issuances promulgated in accordance with the present bulletin.

2.3 Administrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability.

Section 3

Secretary-General's bulletins

3.1 The following matters shall require the issuance of a Secretary-General's bulletin:

(a) Promulgation of rules for the implementation of regulations, resolutions and decisions adopted by the General Assembly, including:

(i) The Financial Regulations and Rules of the United Nations and the publication of consolidated texts thereof;

(ii) The Staff Regulations and Rules of the United Nations and the publication of consolidated texts thereof;

(iii) Regulations and rules governing programme planning, the programme aspects of the budget, the monitoring of implementation and the methods of evaluation, and publication of consolidated texts thereof;

(b) Promulgation of regulations and rules, as required, for the implementation of resolutions and decisions adopted by the Security Council;

(c) Organization of the Secretariat;

(d) Establishment of specially funded programmes.

22. ST/AI/2010/3 (Staff selection system) states:

Section 6

Eligibility requirements

6.1 Staff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade. Staff members in the General Service and related categories holding a permanent, continuing or fixed-term appointment may apply for positions in the Field Service category at any level, irrespective of the grade held in the General Service and related categories, provided they meet the requirements of the Post.

23. ST/SGB/2010/6 (Staff Rules), dated 2 September 2010, states:

Staff Regulations of the United Nations

Scope and Purpose

The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat.

Rule 12.3

Amendments of and exceptions to the Staff Rules

...

(b) 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. Memorandum of Understanding With Respect to United Nations Personnel Procedures Applicable to the UN Joint Staff Pension Fund states:

Appointment and Promotion of staff

Professional and higher categories

9 In view of the decisions taken by the United Nations General Assembly, which is also the legislative organ for the Fund, posts at the P-2 and P-3 levels in the Fund Secretariat shall be filled through (a) the selection of successful candidates in the United Nations National Competitive Examinations, (b) from UN General Service Staff who were successful in the General Service to Professional competitive examinations, and (c) from candidates applying from other member organizations of the Fund (who will be considered as internal candidates, provided that they had been selected for their positions in accordance with the normal appointment and promotion procedures applicable to their member organizations). The UNJSPF will have its own “Departmental” Panels, for purposes of submissions to the UN [Appointment and Promotion (“A&P”)] bodies.

...

11 Staff of the Fund recruited or promoted to the P-4, P-5 and D-1 levels (other than the post of Deputy CEO – see paragraph 7) shall be selected through normal appointment and promotion procedures applicable to the UN Secretariat

...

13 The formal contractual arrangements will be the same as those offered by the UN, i.e. short term, fixed term and eventually permanent appointments. No [appointments of limited duration] contracts are anticipated. The UN's measures for the achievement of gender equality, as set out in ST/AI/1999/9 would be followed to the extent possible.

General Service Staff

14 The General Service staff of the Fund secretariat shall be appointed and promoted through the normal UN A&P procedures, according to the policies applicable at the duty stations in which the UNJSPF staff serve, presently New York and Geneva. The same conditions as those outlined above shall apply with regard to applicants for posts from member organizations serving at the same duty station, i.e. such applicants shall be considered as internal candidates provided that they have been appointed through the normal appointment and promotion procedures of their member organizations, as applicable in the duty station. The UNJSPF shall have its own "Departmental" Panels, for purposes of submissions to the UN A&P bodies.

15 The recommendations of the A&P body would be sent to the ASG/OHRM (or the Director of Administration in UNOG), the CEO of the UNISPF (or the Chief of the Fund's Geneva Office). As in paragraph 10 above, the officials concerned would consult as necessary on the recommendations of the A&P bodies. Should there be any differences on the selections, the persons selected by the Fund would be appointed, under a contract limited to service in the UNJSPF. However, every effort would be made not to have a General Service staff appointed under contracts limited to service in the Fund, as this would limit the right for the staff to apply for other vacancies throughout the UN Secretariat or to be considered for mission service.

16 The formal contractual arrangements will be the same as those offered by UN, i.e. short term, fixed term and eventually permanent appointments.

...

25 OHRM would provide the Fund Staff with services corresponding to those provided for offices and departments in the UN Secretariat, in respect of recruitment, placement, promotion, classification, training and the administration of justice.

Applicability of the selection rules of the United Nations to UNJSPF

25. The main issue for the Tribunal to consider is whether the legal provisions from ST/AI/2010/3 apply to post selection exercises within UNJSPF.

26. Under the Charter of the United Nations, the General Assembly provides Staff Rules and Regulations which set out the broad principles of human resources policy for the staffing and administration of the United Nations Secretariat and the separately administered funds and programmes. Furthermore, sec. 3 of ST/SGB/2009/4 establishes the matters with respect to which the Secretary-General may issue bulletins.

27. OHRM is the “central authority for the monitoring and approval of the recruitment and placement of staff and for the interpretation of the regulations and rules of the Organization and their enforcement” (see General Assembly resolution 53/221, adopted on 7 April 1999).

28. The Staff Rules and Regulations identified above are designed to ensure that selection decisions are based on objective job-related criteria in order to promote the greater mobility of staff members among functions, departments, occupations, duty stations, field missions and organizations within the United Nations common system, as well as to provide them with increased career and development opportunities. The Rules and Regulations are issued in accordance with the provisions of art. 8 of the Charter of the United Nations, which states that “[t]he United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs”.

29. Article 15 of the MOU between the Fund and the United Nations highlights the fact that the persons selected by the Fund would be appointed under a contract limited to service in the Fund and that this would also limit the right for these staff members to apply to other vacancies throughout the United Nations Secretariat or to be considered for mission service.

30. OHRM is part of the Department of Management, which is part of the United Nations Secretariat. Consequently, activities conducted by OHRM are guided by the Staff Rules and Regulations of the United Nations.

31. In accordance with art. 25 of the MOU, OHRM is to administer the services related to the Fund with respect to the recruitment, placement, promotion, classification and training of current and potential new staff members. OHRM is to provide the Fund with the same services as those offered to offices and departments in the United Nations Secretariat. That means that OHRM must apply the same criteria with respect to the recruitment, placement, promotion and classification of staff members and posts in the Fund as it does with those in the United Nations Secretariat. Furthermore, the Fund has expressly accepted the applicability and the effects of administrative issuances as they apply to OHRM.

32. While sec. 2.3 of ST/SGB/2009/4 states that administrative issuances shall not apply to the separately administrated funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administrated funds, organs and programmes have expressly accepted their applicability, the UNJSPF has, as previously discussed, expressly accepted the applicability of the administrative issuances that relate to the eligibility requirements in sec. 6 of ST/AI/2010/3.

33. As stated in para. 14 of the MOU, the eligibility requirements of ST/AI/2010/3 are also applicable to posts within the UNJSPF. Consequently, no staff member, including the ones from the General Service and related categories, holding

a permanent, continuing, temporary or fixed-term appointment shall be eligible to apply to posts that are more than one level higher than their current grade. Per *a contrario*, all staff members will only be eligible to apply for positions which are at the same or one level higher than their current grade. This is a mandatory eligibility requirement and it is cumulative to the specific eligibility requirements for each individual post.

34. In conclusion, to be eligible to be considered for a post, a staff member can only apply to a post that is no more than one grade higher than their current grade.

35. The only exception to this rule is when staff members apply for positions in the Field Service category. In such cases the staff members in the General Service and related categories holding a permanent, continuing or fixed-term appointment may apply for positions in the Field Service category at any level, irrespective of the grade held in the General Service and related categories, provided they meet the requirements of the post.

Applicant's eligibility for the Post

36. On 27 June 2009, the Applicant joined the French Text Processing Unit, Department of General Assembly and Conference Management, on a two-year fixed-term appointment, as an editorial and Desktop Publishing Assistant at the G-3 grade, level 6.

37. On 27 June 2010, the Applicant, who remained on the same post, was promoted to a G-4 grade, level 6.

38. On 26 August 2010, the vacancy announcement for the Post, which was at the G-7 grade, was advertised on the United Nations electronic employment website. The vacancy announcement required, *inter alia*, that prospective applicants meet the following criteria:

Education: high school diploma or equivalent. Supplementary courses/training in finance or equivalent, preferably in economics, business administration, or related subjects are highly desirable.

Work experience: Ten years experience in the financial markets. Exposure to capital markets and international work experience is desirable. Prior experience in investment management also desirable. Prior experience in investment management also desirable.

39. On the date of his application for the Post, the Applicant was serving at a G-4 grade. He therefore applied for a post that was three grades higher than his grade. Unlike in *Hastings* UNDT/2010/071, at the time of his application for the Post, the Applicant did not formally request that, in accordance with staff rule 12.3, an exception be made to sec. 6.1 of ST/AI/2010/3, which states that “[s]taff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade”.

40. As stated by the Tribunal in *Al-Mulla* UNDT/2013/046, “since a P-5 position is obviously more than one level higher than P-3, it follows ... that a staff member at the grade of P-3, holding any of the listed types of contract, shall not be eligible to apply for a P-5 post”.

41. The Tribunal finds that OHRM correctly applied the legal provisions by considering that the Applicant was not eligible for the Post due to the fact that he held a post at a G-4 grade whereas the Post to which he had applied was at the G-7 grade, three grades above his own.

42. Since, in the present case, one of the cumulative requirements that the Applicant was required to fulfill was not met, namely that a staff member can only apply for a post that is no more than one grade higher than his or her current post, or the fact that his post was not in the Field Service category thereby being an exception to this criteria, the specific eligibility requirements for the Post will not be analyzed further by the Tribunal.

43. The Applicant has failed to prove the illegality of the contested decision.

Conclusion

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

45. The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 10th day of July 2013

Entered in the Register on this 10th day of July 2013

(Signed)

Hafida Lahiouel, Registrar, New York