



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/59

Judgment No.: UNDT/2010/066

Date: 19 April 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

SAFWAT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Lynette Cunningham, OSLA

Counsel for respondent:
Stephen Margetts, ALS, UN Secretariat

Introduction

1. On 16 June 2005 the applicant filed an appeal with the New York Joint Appeals Board (JAB) against the decision by the Executive Secretary of the Economic and Social Commission for Western Asia (ESCWA) not to select him for the D-1 post of Chief, Information and Communication Technology Division, to which another candidate was appointed in January 2005.

2. Having been pending before JAB when that body was dissolved on 1 July 2009, the case was, pursuant to the transitional measures set out in General Assembly resolution 63/253, transferred to the United Nations Dispute Tribunal (UNDT).

Facts

3. The applicant entered the service of the Organization with ESCWA in Beirut, Lebanon, on 2 January 1998 at the P-5 level as the Chief, Transport Section, on a two-year fixed-term contract that was subsequently regularly renewed. He was still in that post when the appeal was filed.

4. In an e-mail dated 12 January 2004 the Secretary of the Commission complained to the Executive Secretary of ESCWA about the way the applicant had spoken to her during a telephone conversation. In an e-mail dated 15 January 2004 addressed to the Executive Secretary the applicant denied that his conduct towards the Secretary of the Commission had been unprofessional and accused her of having behaved insultingly during the conversation in question.

5. By interoffice memorandum dated 4 February 2004 copied to staff members including the Secretary of the Commission the Executive Secretary reminded the applicant that communication between colleagues should be respectful.

6. On 11 May 2004 the D-1 post of Chief, Information and Communication Technology Division, was advertised on the Galaxy

e-staffing system, with a deadline for applications of 9 July 2004.

Regarding education, the vacancy announcement called for:

“Advanced university degree (Master’s degree or equivalent) preferably in ... computer engineering, computer science, communications with the necessary technological and analytical knowledge and skills in ICT or knowledge management or any related field. A first level university degree, with a relevant combination of academic qualifications and experience in ICT or related area may be accepted in lieu of the advanced university degree.”

Regarding work experience, it called for, inter alia:

“... a thorough knowledge of the ICT and/or knowledge management in the regional and in the international context of strategic policy and planning. Progressively responsible relevant postgraduate experience is required, in the application of principles and concepts of ICT and/or knowledge management in the development in various contexts, or analytical and research techniques in support of an organizational, national or regional programme.”

7. In May 2004 the applicant and one of his colleagues travelled to Saudi Arabia to represent ESCWA at a conference. A dispute arose in public between the two staff members and the applicant’s colleague subsequently filed a complaint against him. On 8 June 2004 an investigation panel concluded, without interviewing either of the two staff members, that both of them had been at fault.

8. By interoffice memorandum dated 18 November 2004 addressed to the Executive Secretary the colleague who had complained about the applicant after the above-mentioned incident again filed a complaint against him.

9. By interoffice memorandum dated 8 December 2004 copied to staff members including the applicant the Executive Secretary informed the above-mentioned investigation panel of her decision to reopen the investigation and to entrust it to a new panel because the first one had not followed standard procedure by interviewing the two staff members involved and not recommending action as a consequence of their behaviour.

10. The vacancy announcement for the post of Chief (D-1), Information and Communication Technology Division, elicited no candidates eligible for consideration at the 15-day mark. There were four internal candidates eligible pursuant to paragraph 5.5 of administrative instruction ST/AI 2002/4, Staff Selection System, for consideration at the 30-day mark.

11. On an unspecified date the programme manager, i.e. the Executive Secretary of ESCWA, evaluated those four candidates using a grid with four headings: experience (maximum 35 points); skills (maximum 30 points); education (maximum 20 points); language (maximum 15 points). Out of a possible 100 points the candidate ultimately selected obtained 95, another candidate 45, the applicant 40 and the fourth candidate 25.

12. On the basis of those evaluations, the Executive Secretary found that only the candidate who obtained 95 points met all or most of the post requirements. The three other candidates, including the applicant, were therefore not selected for interview.

13. On 15 December 2004 a panel interviewed the candidate preselected by the Executive Secretary for the post and recommended his appointment.

14. On 26 January 2005 the Central Review Body endorsed that recommendation and the selection decision became effective on 1 February 2005.

15. On 22 February 2005 the applicant wrote to the Secretary-General requesting an administrative review of the decision by the Executive Secretary to appoint a less qualified, less senior candidate than himself to the post of Chief (D-1), Information and Communication Technology Division.

16. By letter dated 19 May 2005 the Administrative Law Unit of the United Nations Secretariat in New York transmitted to the applicant a copy of the reply by ESCWA to his request for an administrative review and implicitly rejected that request. ESCWA's reply contains extracts from the Executive Secretary's evaluations of the applicant's and the selected candidate's experience and education and full details of the point scores obtained by each of the four candidates for the post in question.

17. On 16 June 2005 the applicant filed an appeal with the New York JAB.

18. On 21 February 2006 the respondent submitted his reply to that appeal. The documents annexed to the reply included the unredacted evaluations of the applicant and the candidate selected for promotion.

19. On 27 February 2006 the whole of the respondent's reply was e-mailed to the applicant.

20. On 29 and 30 May 2006 the applicant transmitted his observations on the respondent's reply to the Secretary of JAB. The document in question, which apparently comprised five pages, was either not placed in the JAB case file or was lost and the Tribunal has been unable to obtain a copy of it.

21. On 1 July 2009 the appeal was transferred to the United Nations Dispute Tribunal.

22. On 2 July 2009 the applicant was promoted to the D-1 level against the post of Chief, Economic Development and Globalization Division, ESCWA.

23. By Order dated 28 August 2009 and transmitted to the parties on that date, the Tribunal ordered the transfer of the applicant's case from the New York Registry to the Geneva Registry.

24. By letter dated 23 September 2009 the Tribunal informed the applicant that his observations on the respondent's reply were not in the file transmitted to it and gave him until 26 October 2009 to submit them.

25. By e-mail dated 30 September 2009 the applicant requested two additional weeks to submit his observations and asked for a copy of the respondent's reply. On 1 October 2009 the Geneva Registry sent the applicant a copy of the respondent's reply of 21 February 2006 and extended the deadline for the submission of his observations on it.

26. By e-mail dated 10 November 2009 the applicant submitted his observations on the respondent's reply of 21 February 2006.

27. On 1 March 2010 the Tribunal ordered the respondent to produce all the documents pertaining to the selection process for the post of Chief (D-1), Information and Communication Technology Division, ESCWA.

28. On 19 March 2010 the respondent submitted the documents in question, namely the evaluations and the personal history profiles of the four candidates. While these documents were submitted in their entirety to the Tribunal, the respondent did not provide the applicant with the other three candidates' personal history profiles and gave him only redacted versions of their evaluations. In his communication to the Tribunal the respondent gave as his reason for not sharing all the documents submitted to the Tribunal with the applicant the need to protect the confidentiality of the other candidates' personal information and the integrity of the selection process.

29. By letter dated 26 March 2010 the Tribunal informed the parties that it considered an oral hearing unnecessary and invited them to take a position on that matter within 10 days. It also notified them that, as the most relevant document, viz. the evaluation of the selected candidate, had already been disclosed in full to the applicant by the respondent, including in the latter's reply to JAB of 21 February 2006, and the other documents contained no information of relevance to the applicant's allegations, it had decided not to share with the applicant the personal history profiles and unredacted evaluations of the other candidates.

30. By letters dated 6 April 2010 counsel for the applicant and counsel for the respondent stated that they agreed with the Tribunal that there was no need for an oral hearing.

31. By letter dated 9 April 2010 addressed to the applicant's counsel the Tribunal observed that the annexes had been missing from the copy of the respondent's reply sent to the applicant on 1 October 2009. It accordingly gave the applicant another week to submit observations on those annexes. It also stated, however, that he would not be granted any further extension since he had already been sent the respondent's reply and its annexes on 27 February 2006. As of the time limit set by the Tribunal the applicant had not submitted any observations.

Parties' contentions

32. The applicant's principal contentions are:
- a. In the selection process for the post of Chief (D-1), Information and Communication Technology Division, the Executive Secretary incorrectly evaluated his experience, skills and education and his United Nations core values were disregarded;
 - b. The Executive Secretary promised the post to the only candidate who was interviewed and the one who was ultimately selected long before it was advertised;
 - c. He was better qualified, more competent and more senior than the selected candidate, who was due to retire less than a year after his appointment;
 - d. The decision not to select him was a further example and proof of the discrimination, harassment and injustice to which the Executive Secretary subjected him from 2002 onwards. The Executive Secretary was in addition guilty of mismanagement and misconduct for having: (i) refused to interview the applicant for the four D-1 posts for which he applied between 2002 and 2005; (ii) unfairly evaluated his experience, skills and education for three of those posts; (iii) extended his fixed-term contract for one year instead of two in 2004 and 2005; (iv) written in 2004-2005 a series of unjust adverse memorandums about him without giving him the chance to defend himself properly..
33. The respondent's principal contentions are:
- a. The applicant was fully and fairly considered for the post in question. Pursuant to section 7.5 of administrative instruction ST/AI/2002/4, only candidates identified by the programme manager as meeting all or most of the requirements for a post are interviewed or otherwise evaluated. The Executive Secretary considered that the applicant's degrees in engineering and transportation systems and his working experience in transport and

transportation systems did not meet the evaluation criteria, which were that candidates should preferably have a degree in computer engineering, computer science or communication and professional experience in those fields;

- b. The contention that the selected candidate was due to retire less than a year after being appointed is irrelevant because regulation 4.2 of the then Staff Regulations required that the paramount consideration in the appointment and promotion of staff be to secure the highest standards of efficiency, competence and integrity;
- c. The applicant provides no proof that the decision not to select him for the post stemmed from prejudice or some other unlawful motive such as discrimination. The fact that he was not selected for other D-1 posts for which he applied is not proof of discrimination any more than was the Executive Secretary's decision to extend his contract for one year instead of two.

Judgment

34. The applicant's request to the Secretary-General for administrative review under rule 111.2 (a) of the then Staff Rules relates only to the fact that another candidate than himself was selected for the post of Chief (D-1), Information and Communication Technology Division, in ESCWA.

35. In the appeal he subsequently filed with JAB the applicant seeks to contest, in addition to the above-mentioned decision, a number of administrative decisions concerning which there were no prior requests to the Secretary-General for review. They are, inter alia: (i) decisions not to select him for three other D-1 posts in 2002 and 2003; (ii) multiple instances of discrimination and harassment of which he was allegedly a victim from 2001 onwards; (iii) adverse comments made by the Executive Secretary in his performance appraisal system (PAS) report for the period 2004/2005, a report of which he asks for his filing of an appeal with JAB to be considered

a rebuttal, and (iv) decisions by the Executive Secretary to renew his contract for one year instead of two in December 2003 and December 2004.

36. Notwithstanding, the only decision that this Tribunal is competent to examine, and thus the only decision that it will consider in the present judgment, is the decision that was the subject of a request to the Secretary-General for administrative review, namely the decision not to select the applicant for the D-1 post of Chief, Information and Communication Technology Division.

37. The applicant disputes the Executive Secretary's evaluation during the selection process of his experience, skills and education, regarding which she gave him 5 out of 35, 15 out of 30 and 5 out of 20 points respectively and commented that (i) his experience was mainly limited to the transport field, (ii) he was insufficiently familiar with information and communication technology issues in the region, and (iii) his degrees in civil engineering and transportation systems analysis were not related to the requirement of the post for university-level training in information and communication technology. He claims that these assessments are erroneous and biased and that the Executive Secretary should have given him full marks in each instance.

38. The Tribunal considers that the evaluation of candidates for a post is within the discretion of the Secretary-General and does not intend to substitute its assessment for his. However, as the United Nations Administrative Tribunal has often asserted, the Administration's discretionary power is not absolute and can be reviewed in the event of allegations of its abuse.

39. In the case in question, it was within the discretionary power of the Executive Secretary of ESCWA to evaluate the applicant's qualifications for the post and the evidence before the Tribunal, namely the evaluation of the applicant and his personal history profile, gives no grounds for concluding that she abused that power.

40. The procedure followed in choosing between the candidates for the post was governed by administrative instruction ST/AI/2002/4, which

provides, *inter alia*, that: “Interviews and/or other appropriate evaluation mechanisms ... are required for appointment and promotion at the 30- and 60-day marks of the candidates identified by the programme manager as meeting all or most of the requirements of the post.” Having found that only one candidate met most of the requirements, the Executive Secretary had no obligation to interview the other three.

41. The applicant claims that the Executive Secretary had promised the post to the candidate ultimately selected long before it was advertised. He provides no evidence to support this allegation, which must therefore be dismissed.

42. He also contends that he was better qualified, more competent and more senior than the selected candidate, and that the latter was, moreover, due to retire less than a year after his appointment.

43. While the applicant contends that the selected candidate should not have been appointed because he was nearing the compulsory retirement age, he does not quote any documents in support of that contention. Seniority cannot be an exclusive criterion for selection. The fact that the candidate selected for promotion had less seniority at the P-5 level than the applicant is not enough to prove that he was less qualified overall than the applicant.

44. Furthermore, the applicant had available to him from May 2005 part, and from February 2006 an unredacted copy of the whole of the evaluation of the selected candidate, who was, in addition, a colleague who had worked in the same division as him for several years. He therefore had access to essential information concerning the selected candidate’s qualifications and experience and the opportunity to make a comparative analysis of them and the qualifications he claims to have had himself. Despite that, he provides no details in support of his allegations that the candidate selected for promotion was less qualified than he.

45. Lastly, the applicant contends that the decision not to select him for the post of Chief (D-1), Information and Communication Technology Division, was merely one more example and proof of the discrimination and harassment to which he claims to have been subjected by the Executive

Secretary of ESCWA. Most of the examples of harassment and discrimination that he mentions are appealable administrative decisions, but the applicant did not appeal them. In the absence of evidence, the contested decisions cannot in themselves be considered signs of harassment. At most they show that the applicant's professional conduct was not entirely satisfactory and that the relations between him and the Executive Secretary on the one hand and between him and some of his colleagues on the other were not of the smoothest.

46. It follows that the applicant fails to prove that the Administration committed an error of law or judgment by not selecting him for the post of Chief (D-1), Information and Communication Technology Division, ESCWA.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 19th day of April 2010

Entered in the Register on this 19th day of April 2010

(signed)

A. Coutin
p.p. Victor Rodríguez, Registrar, UNDT, Geneva