



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/130

Judgment No.: UNDT/2010/095

Date: 18 May 2010

Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ROLLAND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Gritakumar Chitty

Counsel for respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The applicant complains that she was denied full and fair consideration for promotion in relation to one of three P-5 positions of Senior Human Resources Officer for which she applied and was eligible. She says that the promotion review process was carried out in breach of the rules and regulations of the Organization. Having unsatisfactorily sought redress via the Assistant-Secretary-General for the Advancement of Women (ASG) on 12 December 2007 and the Office of the Ombudsman on 13 December 2007, on 20 August 2008 the applicant sought administrative review “in connection with [her] reverting to [her] permanent post in OHRM and [her] promotion from P-4 to P-5 level”. A negative response was received from the Administration on 6 October 2008. The applicant then commenced proceedings in the internal justice system which came to the Tribunal pursuant to the transitional provisions. Following interlocutory orders the application was heard on its merits on 30 March 2010.

Procedural note

2. The respondent’s right to appear whilst in disobedience of the Tribunal’s orders was withdrawn (see *Bertucci* Order No. 40 (NY/201010) and related Orders). Counsel on his behalf sought leave to appear and was permitted to present his case at the hearing of 30 March 2010 with his evidence being tendered on the *voir dire*. Since the earlier orders were under appeal (although this did not in my view justify continuing disobedience) I granted a stay of my order refusing appearance. In the interests of finally determining this matter which is in substance unrelated to those in which the disobedience remained current and noting the pending appeals of those Orders, I have reluctantly decided to allow the matter to proceed in full on its merits. Accordingly, the evidence received on the *voir dire* has been admitted into the trial and the respondent has been permitted to make full submissions.

Facts

3. The applicant has had a long and distinguished record of service with the Organization. She commenced approximately thirty-three years ago at the General Service level and has worked progressively upwards to the P-4 level position of Chief, Recruitment and Outreach Unit, Field Personnel Division, Department of Peace Keeping Operations (DPKO), which she held when she retired from her permanent appointment in December 2008.

4. In 1999, at the request of DPKO, the applicant accepted a field mission placement as Chief Civilian Personnel Officer (CCPO) at the United Nations Stabilization Mission in Haiti (MINUSTAH). The permanent post she had held prior to accepting this position of P-4 Human Resources Officer with the Office of Human Resources Management (OHRM) was blocked pending her return. Following her service at MINUSTAH, the applicant was requested by DPKO to take a similar role at the P-4 level in the United Nations Mission in the Democratic Republic of Congo (MONUC). She accepted this request and occupied this position from August 2000 until January 2005, during which time she was granted a special post allowance (SPA) to the P-5 level.

5. In 2004, the applicant commenced applying for positions at Headquarters. She applied but was not selected for positions at a P-5 level, and as a result accepted the P-4 level position of Team Leader within the Personnel Management Support Service of DPKO. In 2006, as a result of restructurings, the applicant was asked to take the positions of Chief of the Recruitment and Outreach Unit of DPKO, still at a P-4 level, to which she agreed.

6. Vacancy Announcement 07-HRE-DFS-415239-R-NEW YORK (the VA) was issued on 22 September 2007 for three posts of Senior Human Resources Officer (Chief, Integrated Human Resources Management Regional Section) at the P-5 level. The VA had a deadline of 9 November 2007 and the applicant applied for each of the three posts within this time. The respondent conceded that, in preparing for the

selection of candidates for these posts, no separate evaluation criteria were provided to the Central Review Body (CRB) to be approved for use by the selection panel during the interviews. In his evidence, however, the Assistant Programme Manager stated that the VA contained all of these criteria itself, that they were accordingly approved by the CRB, and that it was these criteria which were used in the interview process. The competencies listed in the VA were: Professionalism, Planning & Organization, Communication, Client Orientation, Teamwork, Leadership and Managing Performance.

7. The applicant was interviewed for the posts on 25 October 2007. She stated that the Assistant Programme Manager did not inform the selection panel that there were three posts being considered, that accordingly the panel was unaware of this and this prejudiced her candidature. The applicant did not state a basis for this evidence and, at all events, said that she brought up the matter with the panel. The Assistant Programme Manager gave evidence that, in his role as Assistant Programme Manager and as a participant on the selection panel, he had informed the members of the selection panel that they were considering applicants against three posts and interviews and assessments were conducted with this in mind. I conclude that the panel was indeed aware of the number of posts for which recommendations were sought.

8. After the interview process, evaluation worksheets and an accompanying memorandum 16 November 2007 from the Officer-in-Charge, Field Personnel Division, Department of Field Support (DFS/FPD) to the Assistant Secretary-General, DFS, which sought approval of the selections for the three posts, were prepared reflecting the panel's consensus assessments of the candidates. (Evaluation Documents). The Evaluation Documents showed that eleven candidates were considered and interviewed (one 15-day and ten 30-day candidates, of which latter group the applicant was one). Six candidates were assessed as suitable for the posts and three were selected, but the applicant was not in either of these categories; neither, therefore, was she rostered. The Evaluation Documents showed that gender

and geographical considerations had been taken into account in recommending the three successful candidates.

9. As it happened, one of the selected candidates had been acting as Officer-in-Charge of the Division almost two months before the advertisement of the position.

10. The Evaluation Documents showed that the applicant had been considered “good” in respect of the competencies of “Communication” and “Client Orientation”, “acceptable” in respect of “Professionalism”, “Managing Performance”, “Planning & Organization”, “marginal” in respect of “Team Work” and “Below Standard” in respect of “Leadership”. In his testimony, the Assistant Programme Manager stated that, in respect of the competencies where she did not rank well, the applicant had failed to provide a convincing elaboration on her ability to deal with complex issues. Two of the three ultimately recommended candidates had rankings of at least “good” in respect of each competency, with the third also being ranked “good” except for “Communication”, for which a ranking of “acceptable” was given. Two of the three other candidates also considered suitable, but not ultimately recommended, had rankings of at least “good” for each competency, the other candidate having been ranked “marginal” for “Leadership”. Accordingly, the Evaluation Documents showed the applicant to have been ranked lower than the top half of the candidates interviewed on the basis of assessment against the competencies contained in the VA. Not surprisingly, the Assistant Programme Manager testified that the recommended six candidates were the only six “capable of being recommended”.

11. The VA stipulated that service of at least one year in a UN peacekeeping or other field operation was highly desirable. One of the three selected candidates had UN field experience in Asia and Africa, one had experience with the UN Independent Investigative Commission, based in Lebanon (but apparently only for six months) and the other served with the UN Peace Forces in the Former Yugoslavia, but only for approximately four months. So far as languages were concerned, English was a required language and knowledge of another official UN language, preferably French, was highly desirable. One of the three selected candidates had knowledge of French,

but she later withdrew (see below). Neither of the other selected candidates had knowledge of French; one had knowledge of another official UN language and one of another language that was not an official UN language.

12. The VA also stipulated that, as part of the competency of “Professionalism”, “in-depth technical knowledge of all aspects of human resources management” was required. One of the selected candidates was noted by the panel as having “direct experience [and] ... the competence to manage and supervise human resources ... [and gave] examples of her relevant experience ... and [a] technical knowledge of HR management”. Another was noted as “able to demonstrate his in-depth knowledge of HR management”, and the third “was able to demonstrate his ability to analyze issues related to HR management and financial rules”. The next three top ranked candidates who were rostered also satisfied the competency. The applicant, however, “did not demonstrate her ability to analyse issues related to HR policies, rules and regulations”. Given her extensive experience, this was a surprising assessment but it must be borne in mind that the adequacy of the ability in question was at a higher level than that occupied by the applicant.

13. The applicant’s prior performance evaluations (PAS reports) also appeared to be inconsistent with the assessment of her suitability by the selection panel as expressed in the Evaluation Documents. In her most recent PAS reports, she obtained the following rankings: 2006-07, “fully successful performance”; 2005-06, “fully successful performance”; 2004-05, “consistently exceeds performance expectations”. The applicant gave evidence that she was not asked to produce the PAS reports, nor questioned on them or their apparent inconsistency with the evaluation she received at the interview stage. The Assistant Programme Manager conceded that the PAS reports were not provided to or considered by the selection panel but said that the panel acted on the assumption that all candidates chosen for interview had been evaluated as fully successful performance or better or they would not have been short-listed. The Assistant Programme Manager testified, in effect, that since these evaluations were of the applicant’s performance as a P-4, it was not

appropriate to regard them as entirely referable to, or reflective of, the level of responsibility required to fulfil the requirements imposed by the P-5 posts to which she was seeking appointment. The difference in comparable responsibility was not entirely neutralized by the fact that she had received special post allowance at the P-5 level.

14. The respondent conceded that the applicant did not receive notification of acceptance or rejection in relation to any of the three posts. The applicant stated that she only became aware on or about 26 June 2008 via obtaining a copy of an internal staff list that she had been unsuccessful in respect of each. She gave evidence that this failure to notify resulted in her losing her chance to appeal the selection process prior to its implementation and that she may otherwise have applied for other positions. However, the positions she otherwise would have applied for were not identified, despite her being given the opportunity to do so, and she noted that her imminent retirement which was scheduled to occur in November 2008 was a factor in this as well. The applicant also gave evidence that she was disappointed and suffered anxiety as a result of the failure to properly notify her, particularly in light of her impending retirement.

15. In the result, the recommended and selected candidates comprised two males and one female. The latter declined appointment. A Temporary Vacancy Announcement (TVA) was posted on 6 February 2008 with functions identical to those of the VA to fill the resulting vacancy. The applicant did not apply for this position. A male was appointed, with the consequence that the three positions of Senior Human Resources Officer are encumbered by males.

Applicant's submissions

16. The applicant's main contentions may be summarised as follows:

- a) She was fully qualified, meeting all the requirements of the VA and had "legitimate claims to be promoted and appointed at the P-5 level". The

Organization had a responsibility to secure and provide her with continuity in her career development and to assign her to a suitable vacant post with the prospect of promotion to a level commensurate with her qualifications, experience and performance. Notwithstanding her extensive service as CCPO for over six years (over three at an SPA to the P-5 level) at two different missions, she was also not considered for the re-advertised TVA post, whereas she should have been.

b) She did not receive official communication that she was not short-listed or selected for a post as required by para 5 of Annex II, ST/AI/2006/3. This denied her the opportunity to challenge or take corrective measures (including to seek a stay of the process before the Joint Appeals Board) in relation to the short-list and prevented her from applying for other posts at a late stage in her service. She was thus denied the satisfaction of ending her career with the dignity that would flow from the recognition of her abilities as it relates to the quality and level of her performance in the two departments and two field missions.

c) The invalidity of the selection process for the three positions is evidenced by the following –

- i) The appointment of one of the selected candidates to act as Officer-in-Charge before the advertisement of the position, amounted a prejudgment of suitability for one at least of the posts.
- ii) The VA required in-depth technical knowledge of all aspects of human resources management and the selected candidates were less qualified than the applicant in this respect.
- iii) The discrepancy between her excellent PAS reports and her interview evaluation should have been taken into account by the selection panel.

- iv) Service of at least one year in a UN peacekeeping or other field operation was stated as highly desirable. Only two of the selected candidates met this requirement;
 - v) The linguistic requirement was for knowledge of a second UN language, preferably French. None of the three selected candidates have knowledge of French;
 - vi) Three male candidates now encumber the three positions of Senior Human Resources Officer, which does not comply with gender policy as stated in ST/SGB/237.
 - vii) The Programme Manager established evaluation criteria that were inconsistent with the vacancy announcement, while failing to take account of extended exercise by the applicant of competencies at the senior level in mission service. Further, the evaluation criteria were not specified in a separate document as required by ST/AI/2006/3, section 4.4.
 - viii) Eligibility requirements that were not applicable, *inter alia*, time in grade or time in post, were also inappropriately taken into account, contrary to ST/AI/2006/3, section 5.1, which states that eligibility requirements regarding time in grade or time in post are no longer applicable.
- d) When the applicant did not receive notification about the posts, she decided to seek the advice of the ASG. She did so on 12 December 2007. The ASG expressed serious concerns and told her she would approach the relevant Director, and would revert to the applicant. This did not occur. Likewise, on approaching the Ombudsman's office on 13 December 2007, a representative of the office met with her, but discouraged her from pursuing the matter, instead patronising her "to be satisfied to retire at [her] level after a

long successful career”. Both of these failures denied the applicant the opportunity to adequately challenge the selection process.

17. Compensation is sought to put the applicant in the position she would have been had she been promoted to the P-5 level from 1 February 2008 until her retirement on 31 December 2008, including pension benefits, and compensation for anguish resulting from a denial of her dignity, career development and loss of job satisfaction and achievement of a senior level after thirty-three years of dedicated service.

Respondent’s submissions

18. The respondent’s submissions may be summarised as follows:

a) The applicant did not have a right to be selected for any post; she had the right to apply for each post and to have her candidacy appropriately considered along with the other candidates. The selection record indicates that this was done. The candidacy of other candidates was considered to better fulfil the selection criteria than hers. The burden of proof should be on the applicant to prove otherwise.

b) The applicant should have been individually notified of the decision not to select her, but this is a courtesy and not a due process right. This notification was not done, but a general notification was posted on the Galaxy system immediately upon the completion of the selection process that the “vacancy has been filled”. The applicant had access to this information and it was sufficient to inform her of the status of her application. Furthermore, the failure to inform the applicant did not prejudice her in the enjoyment of any of her rights as a staff member, other than the right itself to be informed. Notwithstanding, the Tribunal should adopt an approach as in *Krioutchkov*, where it was found that only nominal damages applied.

- c) The appointment of one of the candidates to act as Officer-in-Charge two months before the selection process is a decision made independently of any selection process and cannot properly be withheld for the reason that there is an ongoing selection process for a position.
- d) The Evaluation Documents show that the applicant did not satisfy all of the criteria. The applicant's assessment of her qualifications and competencies relative to the other candidates is irrelevant.
- e) All of the candidates who were interviewed had fully satisfactory PAS reports and accordingly it was not necessary for the interview panel to assess the PAS reports of the candidates; rather, it was for each candidate to highlight their strengths in the application process (including their PHP). The interview panel was aware of the candidates' experience and expertise and had sufficient information before them to assess the candidates fully and fairly, which it did.
- f) As to the applicant's status as a woman, pursuant to section 1.8(a) of ST/AI/1999/19 there is a right to preferential treatment for women whose qualifications "are substantially equal to the qualifications of competing male candidates", which the applicant's qualifications were not. Accordingly the issue of preferential treatment did not arise.
- g) As regards the failure to prepare a separate document regarding the evaluation criteria, sec 4.4 of ST/AI/2006/3 was satisfied in substance, as the VA contained the evaluation criteria, it was reviewed and approved by the Central Review Body (CRB), and these approved criteria were used by the interview panel in assessing candidates. Evidence was given by the Assistant Programme Manager to this effect which was corroborated by the candidate evaluations. While the instruction requires that the appropriate CRB-approved evaluation criteria, are used, it does not require that they be provided in a separate document.

Consideration

19. Sec 4.4 of ST/AI/2006/3 does not require a sequence of documents to be created; it simply prescribes a process of preparation of the vacancy announcement and the criteria for evaluating candidates involving the programme manager initially and then, in respect of the criteria, the central review body.

20. In respect of the applicant's PAS evaluations, there is no evidence that the interview panel did not act upon the assumption, described by the programme manager, that the applicant's performance was not fully successful. The responsibilities of the positions to which she was seeking appointment, however, were greater than those of the position which she held. This is scarcely surprising since she was seeking promotion to a higher level. The criteria were apparently fair and appropriate – certainly, the applicant did not suggest otherwise – and the narrative of the evaluation process concerning her interview establishes, to my mind, that the panel fully considered the extent to which she demonstrated the necessary competencies at the requisite level.

21. Such an assessment must involve a high degree of judgment and experience which will not be replicated by a judge in my position. In the nature of things, therefore, unless there is some obvious anomaly or evidence that irrelevant material was taken into account, relevant material ignored, or of a mistake of fact or law, the Tribunal will not be able to conclude that the process was significantly flawed or a value judgment mistaken. It is, after all, not the Tribunal's role to determine the outcome of a promotion or appointment process. It is necessary, of course, that accurate and fair records of what transpired be maintained so that a critical examination is possible. The assertion by an applicant that, in fact, he or she satisfied the relevant criteria at an adequate level justifying selection does not suffice to prove that the interview panel was mistaken. This is a matter upon which reasonable minds could reasonably differ and such a difference does not lead to the conclusion that one or other is an error. Even if (for the sake of argument) an applicant could establish to the satisfaction of the Tribunal that he or she were suitable for appointment, this

would not of itself indicate that a different opinion by the interview was wrong. But, as I have said, the Tribunal is not qualified to make any such judgment. This is not to say that there will not be cases – though they must necessarily be very rare – where the outcome of a selection process is so manifestly unjust or unreasonable that it will be inferred that something went seriously wrong, even if it is not apparent what the error is and, in such a case, the Tribunal will infer a departure from the proper course sufficient to vitiate the process. Otherwise, the applicant must establish some patent error and, as I have said, the mere fact that the Tribunal might have come to a different conclusion to the interview panel (even if it were possible to persuade the Tribunal to such a view) would not mean that the process was legally flawed or the evaluation mistaken.

22. Accordingly, the mere fact that the applicant's PAS would have led to the reasonable expectation that the panel would have evaluated her competencies more favourably does not justify the conclusion that its evaluation was mistaken or unreasonable. At all events, it would be necessary for me to be confident that I appreciated the differing responsibilities (accepting that they existed) between what the applicant was doing as a P-4 and what would be required of her as a P-5 in the relevant posts before I could draw the conclusion pressed on the applicant's behalf. This information, of course, was well within the knowledge and understanding of the panel but it is almost completely absent from mine. The applicant's contention, therefore, relying on her favourable PAS evaluations, must be rejected.

23. So far as the desirable attributes of field experience and knowledge of a second official UN language are concerned, certainly the interview panel was obliged to consider these aspects of a candidate's suitability. But the extent to which their presence or absence was significant plainly needed to be evaluated the context of the other attributes of the particular candidate. There is nothing to suggest – and the applicant has not pointed to any particular matter indicating – that the panel did not give appropriate weight to this issue. At all events, two of the successful candidates

did have two languages and field experience and the third had field experience and significant language skill. The applicant's argument as to this matter fails.

24. I accept the argument of the respondent that the appointment of one of the candidates to act in a senior position was not a prejudgment of suitability in any relevant respect. It is obvious that administrative requirements cannot be placed on hold simply because one or more of the persons available and competent to undertake duties at a higher level happens also to be a candidate for promotion. One can imagine cases where such an appointment could be inappropriate but there is no evidence whatever in this case justifying such a suggestion, let alone conclusion.

25. So far as gender balance is concerned, it is not possible to assess this question by considering only the three positions to which the applicant refers. At all events, preference of an applicant on this basis depends upon her being otherwise suitable for appointment. The panel was of the view that the applicant was not suitable and hence, from her point of view, the issue did not arise.

26. I should state, more generally, that I have examined the Evaluation Documents. They appear to reflect a careful and comprehensive examination of the claims of the various applicants. I could detect no problematical analysis or conclusion that suggested to me that the process had gone awry or was anything other than proper.

27. In respect of notification, sec 9.5 of ST/AI/2006/3 provides that the applicant, as an interviewed candidate who was neither selected nor placed on the roster, should have been "so informed by the programme [manager]" (see also para 5 of Annex II). In my view, this requirement is not satisfied by a general announcement on Galaxy that the position had been filled which, by implication of course, means that all unselected candidates were unsuccessful. The programme manager is given a duty to inform the particular identified staff members directly. This was not done. A candidate who was not recommended for appointment must, as a practical matter, be categorized as not available for selection but, taking the section literally, the time for

notification does not arise until the successful candidate is actually selected for appointment. It is not clear from the evidence what that date was and how long afterwards the notice was placed in Galaxy. However, the complaint of the applicant that the delay prejudiced her rights to access in a timely way the internal justice system cannot be accepted. The circumstances here (even assuming some legal error) could not have justified, unless the circumstances were very exceptional, an order preventing the appointment in question, assuming that the applicant was informed that she was not recommended for appointment some time before the actual appointments took place. Such an order must have prejudiced the rights of the successful candidate and it is difficult – though not perhaps impossible – to think of circumstances in which such an order could properly be made. In such cases, the applicant who succeeds must almost invariably have to be satisfied with financial compensation together with, in some cases, other incidental remedial orders. However, there is here – as I have found – no legal error in the process and, accordingly, this argument does not need to be further considered.

28. The applicant suffered no loss or additional anxiety arising out of the inappropriate and discourteous way in which she became aware of her non-selection, but compliance with the specific obligations towards staff members in the appointment selection process is important and is one of a congeries of valuable rights of which it is a breach of contract to deprive a staff member. Accordingly, I award nominal damages USD500 in respect of this breach. This sum is to be paid on or before the expiration of 46 days from this date, with interest thereafter at eight percent per annum until payment.

Additional matter

29. The applicant gave evidence that she was scheduled to retire in November 2008, but her appointment was extended until December 2008. The VA by which a candidate was selected to replace her was advertised in March 2008, but no candidate had been selected. She testified that, due to this fact and that her Unit had a heavy

workload and a high staff turnover, she felt a responsibility to work on an unpaid basis in essentially the same role as she had worked pre-retirement for an additional three months after her retirement until March 2009, when a replacement was available to fill her position.

30. It strikes me as extraordinary that the loyalty of a staff member such as the applicant should be exploited by the Organization in this way, without any practical acknowledgment of her generosity. It is wrong in principle to take advantage of services for which the Organization is unwilling to pay yet whose work is thought to be necessary because of a lack of appropriate foresight of inevitable circumstances, (which need not be set out here). I am regrettably unable to make any orders in respect of this matter but, having now brought the issue to the attention (I hope) of senior officials, I can only trust that Organization will find it possible to do the decent thing and pay the applicant a gratuity for the work so generously provided and so ungratefully accepted.

Conclusion

31. Except for the nominal compensation ordered to be paid, the application is dismissed.

(Signed)

Judge Michael Adams

Dated this 18th day of May 2010

Entered in the Register on this 18th day of May 2010

(Signed)

Hafida Lahiouel, Registrar, New York