



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

LIARSKI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**

Rose Dennis, OSLA

**Counsel for respondent:**

Susan Maddox, ALS/OHRM, UN Secretariat

## **Introduction**

1. The applicant, a Programme Budget Officer in the Office of Programme Planning, Budget and Accounts (OPPBA), appeals the decision not to select him for a P-5 level Senior Programme Budget Officer post advertised on 28 February 2007. The applicant alleges that he was not given full and fair consideration for the post.

2. The applicant filed an application with the Dispute Tribunal on 3 September 2009. A directions hearing was held on 19 January 2010. Following the hearing, the parties filed additional submissions in response to my orders dated 2 February, 17 March and 7 June 2010. The application, the respondent's reply and the additional submissions of the parties filed pursuant to my orders stand as the pleadings in this case. The parties consented to this matter being determined on the papers.

## **Facts**

3. The applicant joined the United Nations in May 1985 as an accountant at the P-3 level. In 1988, he was transferred to the Programme Planning and Budget Division (PPBD), OPPBA, as a Programme Budget Officer, and in June 1995 he was promoted to the P-4 level. He holds a permanent appointment.

4. Between January 2001 and April 2007, the applicant applied for several P-5 posts, including the post of a Senior Programme Budget Officer advertised on 28 February 2007. The applicant was not successful, but was placed on the roster of candidates approved for similar functions.

5. The vacancy advertised on 28 February 2007 did not require any particular number of years of experience. Instead, it identified the required work experience as “[p]rogressively responsible experience in budgeting, administration, financial management or related area including budgetary policies and practices”. The applicant was considered for this vacancy at the 30-day mark and was one of thirteen candidates short-listed for interviews. The interviews were conducted in April 2007.

Four candidates, including the applicant, were deemed to have met all the requirements for the post, and were placed on the list of recommended candidates. The Central Review Board endorsed the evaluation process. On 13 August 2007, the applicant was informed that he was not selected for the post, but was again placed on the roster of candidates approved for similar functions.

6. The applicant requested an administrative review of the decision and, subsequently, filed an appeal with the Joint Appeals Board. The JAB found that the applicant was given full and fair consideration and that the Organisation did not violate the terms of his appointment. By a letter dated 6 May 2009, the Deputy Secretary-General informed the applicant of the Secretary-General's decision to adopt the JAB's recommendations and not to take any further action in his case.

#### **Applicant's submissions**

7. The applicant's principal contentions are:

- a. The vacancy announcement improperly deviated from the applicable generic job profile and from the standards set by the International Civil Service Commission (ICSC). Specifically, it should have identified the length and type of the practical experience required for the post. Under the standard job classification for financial and budget management specialists, developed by the ICSC (Job Classification: Tier II Standard for Financial Management Specialists, ICSC/22/R.17 of 5 June 1985), as well as the UN Secretariat's Guidelines for Determination of Level and Step on Recruitment to the Professional Category and Above (30 July 2004), a minimum of ten years of experience was required. The changes to the vacancy announcement were to the applicant's detriment in that they, *inter alia*, allowed other candidates who may not have had the required number of years of experience to be considered.

- b. The evaluation criteria were arbitrary, incorrect and not in accordance with the existing requirements. The panel's evaluation of the applicant contained errors of fact and wrong findings, including with respect to the applicant's skills, competencies and experience. Furthermore, it is unclear how the successful candidate, who in the past had been evaluated at a lower score than the applicant, became more eligible than him for the current post.
- c. The failure to give full and fair consideration to his candidature in several selection exercises demonstrated a pattern of discrimination against him in comparison with other candidates who possessed less competence and a shorter length of service than the applicant.
- d. The JAB denied him due process because it failed to consider his request to review all pertinent documents and information relevant to his appeal.
- e. The respondent did not produce the information regarding the designation of the successful candidate to perform significant functions in financial management, personnel management and general services administration, as required by ST/AI/2006/3 and ST/SGB/2005/7. No evidence has been produced as to whether the applicant was considered for designation to perform significant functions.

8. The applicant requests compensation calculated on the basis of the difference between a P-5 salary with corresponding steps that would have accrued and his present P-4 salary, beginning from the date when his promotion to P-5 would have become effective in 2007. He also requests compensation in the amount of one year's net base salary for denial of due process and discrimination against him.

## **Respondent's submissions**

9. The respondent's principal contentions are:
- a. The applicant received full and fair consideration for the post. Experience and qualifications listed in the vacancy announcement were in line with the requirements set out in the generic job profile for the post of a Senior Finance and Budget Officer/Section Chief at the P-5 level. The number of years of experience was not required to be specified in the vacancy announcement. In any case, the length of experience is only one of the requirements and all the recommended candidates had more than ten years of experience. Both the applicant and the successful candidate were found to be eligible for the post. The final selection decision was made in compliance with sec. 9.2 of ST/AI/2006/3, which provides that:

The head of department/office shall select the candidate he or she considers to be best suited for the functions, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and shall give the fullest regard to candidates already in the service of the Organization.
  - b. The applicant did not substantiate his claims of procedural irregularity, improper motivation or discrimination. The non-selection of the applicant for positions he had applied for previously is insufficient in and of itself to prove discrimination or ill motivation.
  - c. The applicant misconstrued the authority of the ICSC in relation to the recruitment process of the Organisation and conflated the requirements for classification of posts and the recruitment process. Document ICSC/22/R.17 concerns only the standards of classification of posts, and the Guidelines for Determination of Level and Step on

Recruitment to the Professional Category and Above are used to determine the level and step of a staff member once they are recruited. These documents do not require that vacancy announcements at the P-5 level must specify at least ten years of work experience.

- d. The respondent initially submitted that no designation to perform significant functions in the management of financial, human and physical resources pursuant to ST/SGB/2005/7 was required for the contested post. In support of this submission, the respondent submitted a memorandum from the Controller (Assistant Secretary-General, OPPBA), dated 17 February 2010, stating that “[t]he designation process under ST/SGB/2005/7 is not applicable to the post in PPBD to which the Applicant applied”. In response to further orders from the Tribunal, the respondent amended his position and submitted that, although the contested post did not involve significant functions in personnel and general services management, it did involve the performance of significant financial functions, but no formal designation process was required as it was performed in the context of the evaluation and selection of candidates for such vacancies. The Controller considered during the selection exercise whether the successful candidate was suitable to perform significant financial functions and determined that he had the requisite experience and qualifications to carry out the functions of the post. As a rostered candidate for the contested vacancy, the applicant was also cleared for performance of the significant financial management functions entailed by that post.

### **Preliminary matters**

10. There are several preliminary matters that need to be discussed at the outset. The scope of the present application must be limited to the contested decision, which

is the decision not to select the applicant for the P-5 post advertised on 28 February 2007. Submissions regarding the non-selection of the applicant for other vacancies are only relevant insofar as they may inform the motive behind the impugned decision.

11. It is the applicant's submission that the JAB denied him due process by failing to consider all relevant documents and information. The Dispute Tribunal is empowered to hear appeals of contested administrative decisions, and not of the JAB's findings, recommendations or reports. Therefore, the submission of the applicant regarding the proceedings before the JAB is not a matter for consideration by this Tribunal. In any event, the Tribunal has considered the relevant documents and information.

12. On 7 June 2010, I ordered the respondent to provide the applicant with redacted copies of the selection records, including interview evaluations, for the contested selection exercise. The documents were subsequently provided to the applicant and, on 22 June 2010, the applicant filed a submission with his comments, including with respect to the evaluations of other candidates, which I have carefully considered.

13. In his submission dated 22 June 2010, the applicant requested that "all official copies of the previously approved versions [of the generic job profile for the contested post] together with their respective job classification forms . . . should also be made available to the Tribunal for its information and input in the review of this case". Having carefully considered the documents before me, I find that the records requested by the applicant will not be of assistance to the Tribunal in this case. I therefore decided not to order their production.

## Considerations

### *Vacancy announcement*

14. The applicant has submitted that the vacancy announcement improperly deviated from the general job profile for the relevant P-5 level posts. A generic job profile is a standard job description that encompasses a large group of related jobs for which major characteristics of the job are similar in duties and responsibilities, education, work experience, technical skill, and essential core competencies (see sec. 1 of ST/AI/2006/3). According to Annex II of ST/AI/2006/3, the programme manager is responsible for determining whether a generic job profile is available from the database of profiles maintained by the Office of Human Resources Management (OHRM) and for preparing a vacancy announcement for review by OHRM. Section 4.3 of ST/AI/2006/3 requires the vacancy announcement to include the qualifications, skills and competencies required and to reflect the classified functions of the post, “using to *the greatest possible extent* the database of generic job profiles maintained by OHRM” (italics added). Therefore, as the Dispute Tribunal held in *Krioutchkov* UNDT/2010/065, requirements differing from those expressed in a generic job profile which are seen as necessary or desirable for the particular post are permitted, provided that the drafters of the vacancy announcement are not influenced by extraneous or ulterior motives when drafting the job requirement.

15. Pursuant to the Tribunal’s orders, the respondent produced the generic job profile for a Senior Finance and Budget Officer/Section Chief at the P-5 level, approved by the Assistant Secretary-General (ASG) for Human Resources Management on 31 July 2006 and applicable at the time relevant to this case. This generic job profile does not require any minimum number of years of experience. In the section regarding experience, this requirement is stated as follows:

Progressively responsible experience in financial management and budgeting systems. Successful completion of work in two sections of the programme budget or peacekeeping budgets or demonstrated leadership of group of staff working on a group of budgets. Extensive



relevant experience in financial management. Hands on experience in UN financial environments. Work experience in peacekeeping or other field operation is highly desirable.

16. Therefore, the experience criterion in the vacancy announcement was in line with the relevant generic job profile. Having found this, I now turn to whether the generic job profile used to create the vacancy announcement was contrary to any established rules.

17. I find that the applicant's reliance on the Guidelines for Determination of Level and Step on Recruitment to the Professional Category and Above is misguided. The Guidelines provide the minimum experience requirements for placement at certain levels and state that the required experience for holders of a PhD or Masters degree for P-5 level is ten years. However, the Guidelines provide that "[f]or candidates appointed under the 100 series after selection for a vacancy advertised under ST/AI/2006/3, effective 1 January 2007, the grading guidelines are to be used **only for determination of step** on recruitment. These candidates have, by definition, been found to meet the requirements of the post and are appointed at the level of the post in all cases" (emphasis in original). The Guidelines further envisage that vacancy announcements may not necessarily require a certain number of years of experience—they state that "[w]here a [vacancy announcement] does not specify number of years of experience, [human resources officers should] go to step I of the salary scale and use candidate's experience and academic qualifications to determine additional steps". Therefore, even if I were to accept the Guidelines as anything more than a mere internal procedure of an advisory—rather than binding—nature, their language plainly demonstrates that they do not create a requirement that a certain number of years of experience is to be included in every generic job profile or vacancy announcement.

18. Whether or not the generic job profile in question was in violation of ICSC/22/R.17, referred to by the applicant, is a more difficult question and, in the end, one that the Tribunal does not need to consider. ICSC/22/R.17 states that the proposed standard for financial management specialists (described as "Tier II

standard”) is a *draft* proposed by the Sub-Committee on Job Classification and that the Sub-Committee recommended the ICSC to “[d]ecide to promulgate the Tier II standard for Financial Management Specialists contained in annex II for immediate application by the organizations”. Annex II of the document contained two alternative “Summary narrative rating rationales” for P-5 level posts, both of which required “[p]rofessional financial experience at the national level of over 10 years or at international level of over 5 years”. Although ICSC/22/R.17 appears to contain *draft* standards, the applicant relies on them as if they were binding on the Organisation. This was not objected to by the respondent and I am therefore prepared to accept that the standards set out in ICSC/22/R.17 are at least of some relevance (for reasons stated below, their actual legal status need not be examined in detail). Although the requirements for classification of posts and the recruitment process are distinct, the respondent conceded—correctly, in my view—that they overlap because the duties and functions specified in a vacancy announcement should not diverge in such a way as to misrepresent the duties and functions of the position in question. Therefore, I think that if certain requirements in a generic vacancy announcement were contrary to the standards set out in ICSC/22/R.17—provided they were adopted by the Organisation—and were thus improperly relied on in a selection process, this reliance may result in a violation of the established procedures and, possibly, violation of the applicant’s rights. However, I do not think this was the case here and, in any event, it is clear from the selection documents produced pursuant to my order that all recommended candidates for the post, including the successful candidate, had at least ten years of relevant experience. The experience of each candidate was noted and discussed under the heading of “experience” in the selection panel’s evaluation sheets and I have no reason to find that these assessments were incorrect. I therefore find that the reliance on the requirement of progressively responsible experience as opposed to the requirement of the minimum of ten years of experience had no prejudicial effect on the applicant.

*Full and fair consideration*

19. Although the applicant is, without a doubt, a very experienced and highly qualified staff member, he does not have a *right* to be promoted. However, he does have a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper factors. Generally, the Tribunal will not substitute its decision for that of the Administration in the discretionary matters of appointment and promotion, but the Tribunal may examine whether the selection process was carried out in an improper, irregular or otherwise flawed manner and assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable. (See *Solanki* UNDT/2009/045, *Joshi* UNDT/2009/047, *Tsoneva* UNDT/2009/048, *Krioutchkov* UNDT/2010/065, *Rolland* UNDT/2010/095.)

20. In his submission, the applicant disputed the correctness of the interview panel's evaluation of the applicant's competencies and experience, particularly compared with the other candidates, and the weight afforded to the applicant's language certificates. I have considered the applicant's submission and have reviewed the selection records and I am not satisfied that the applicant's criticisms of the panel's evaluation are sufficient to demonstrate that the panel failed to consider the applicant fully and fairly and that its findings were manifestly unreasonable.

21. I find that the applicant failed to clarify the grounds for the alleged discrimination, nor introduced any evidence supporting his contention. The fact that the applicant applied for several P-5 posts over a number of years and has not yet been promoted is not in itself sufficient evidence to found a pattern of discrimination. I find that the applicant has failed to provide sufficient evidence to support his contention that the selection process was tainted by prejudice, discrimination or improper motive.

22. The applicant contended that the selection panel did not have access to one of his performance evaluation (e-PAS) reports when considering his candidacy as the report was not yet available at the time of the selection process. This argument was

not actively pursued by the applicant in his submissions before the Tribunal, however, I have considered it and find that it lacks merit—even if the e-PAS report was by that point completed but not made available to the selection panel (which, in any case, I am not prepared to conclude would have been due to any ill will), the applicant's prior evaluations were available and there is no reason to conclude that the selection panel did not act upon the assumption that the applicant's performance was fully satisfactory.

*Designation of staff members performing significant functions*

23. The applicant submits that the respondent did not produce information regarding the designation of the successful candidate to perform significant functions in the management of financial, human and physical resources. Further, according to the applicant, if he was denied clearance to carry out these functions, the Administration was required to provide him with a written explanation. The respondent avers that the successful candidate's suitability to perform significant functions was considered by the Controller during the selection exercise. In his final submissions, the respondent contended that the only significant functions were those in the area of financial management, and the applicant did not present evidence that the post involved any significant functions other than in the area of finance.

24. Pursuant to sec. 9.1 of ST/AI/2006/3,

When the post to be filled involves significant functions in financial management, personnel management and general services administration, the executive or local personnel office shall inform OHRM of the proposed selection so that the approvals required by Secretary-General's bulletin ST/SGB/2005/7 may be obtained prior to selection.

25. Section 2 of ST/SGB/2005/7 entrusts the Under-Secretary-General for Management with the authority to designate staff members to perform significant functions in the management of financial, human and physical resources, wherever they may be assigned in the UN. It further provides that the Under-Secretary-General

for Management shall rely upon the Controller, the ASG for Human Resources Management and the ASG for Central Support Services for the designation of staff members performing significant functions in their respective areas of responsibility. Pursuant to sec. 5 of ST/SGB/2005/7, proposals for the designation of all professional officers, irrespective of level, whose functions involve financial duties, whether in whole or in part, shall be addressed for final approval to the Controller.

26. Paragraph 10 of the Guidelines on Designation of Staff Members Performing Significant Functions in the Management of Financial, Human and Physical Resources (Guidelines), approved by the Under-Secretary-General for Management on 14 November 2006, provides that:

For appointments of one year or longer under the staff selection system ST/AI/2006/3 (effective 1 January 2007), proposals for designation of staff members performing significant functions in the management of financial, human and physical resources must be submitted to [the Department of Management] after the review by the central review bodies of the proposals for filling a vacancy and before the selection of the candidate by the department head.

27. It is not in dispute that the post in question involved significant financial functions and that para. 10 of the Guidelines applied to the selection exercise for the contested post. Pursuant to this provision of the Guidelines, prior to the selection of the successful candidate a proposal must have been submitted to the Department of Management designating the successful candidate to perform significant functions. The respondent submitted that since the contested post involved significant functions in the management of financial resources (and not in the areas of personnel and general services administration), the designation issue was dealt with as part of the selection decision made by the Controller since he was also the Head of Office for the selection exercise as the post was located in his Office.

28. The respondent's submissions with respect to the designation process lacked clarity and were self-contradictory and the Tribunal had to issue several orders to obtain further information and records from the respondent. Although the respondent asserted in his final submission that the successful candidate was considered for

designation to perform significant functions in financial management prior to his selection, the respondent has failed to provide a documented record of such consideration, merely asserting that since the post was in the OPPBA, the Controller considered the issue of designation when he decided to select the applicant. On the submissions before me, I can see no good reason for accepting this statement at face value, without supporting documents, particularly considering the respondent's earlier submissions that the post in question did not involve any significant functions and required no designation and that no designation was undertaken. In fact, the respondent himself submitted on 6 July 2010 that the designation process was "not part of the selection process", adding, however, that this distinction was true only for "posts involving significant management functions *outside OPPBA*" (emphasis added). The respondent has failed to explain the basis for his assertion that the posts in OPPBA are to be treated differently. There is no provision in ST/AI/2006/3 or ST/SGB/2005/7 exempting OPPBA from carrying out the designation process pursuant to the procedures established in accordance with these administrative issuances. The designation process either took place or it did not. If it did, a documented record of the designation process must exist. However, no such record was provided to the Tribunal and I therefore conclude that no proper designation process took place with respect to the successful candidate as prescribed by ST/AI/2006/3 and ST/SGB/2005/7.

29. I shall now deal with the consequences of the respondent's failure to properly follow the process of designation of the successful candidate to perform significant functions in the area of financial management. I do not find that this procedural lapse violated the applicant's right to full and fair consideration for the post. The applicant has failed to show that, had the designation process for the successful candidate been properly followed, it would have led to the applicant's selection and appointment. As the applicant correctly stated in his submission dated 22 June 2010, the evaluation and selection of applicants under ST/AI/2006/3 and the provision of clearance under ST/SGB/2005/7 are distinct and separate processes. There is simply no evidence to demonstrate that, if not for the procedural failure concerning the designation of the

successful candidate, the applicant would have been appointed. Therefore, I find that the applicant is not entitled to any compensation as his rights had not been breached.

### **Conclusion**

30. I find that the requirement of progressively responsible experience in the vacancy announcement in question corresponded to the relevant generic job profile and was not prejudicial to the applicant. Further, although the Organisation failed to properly carry out and document its consideration of the designation of the successful candidate to perform significant functions in financial management, this did not result in a violation of the applicant's rights.

31. I find that there is no evidence of discrimination against the applicant and that the selection did not suffer from procedural errors such as to vitiate the outcome of the process. The fact of the matter is that another candidate was found better suited for the job and I find that this determination was well within the discretion of the respondent and was not vitiated by any improper considerations and was not manifestly unreasonable.

32. The application is therefore dismissed.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 26<sup>th</sup> day of July 2010

Entered in the Register on this 26<sup>th</sup> day of July 2010

*(Signed)*

Hafida Lahiouel, Registrar, New York