



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/017
(UNAT 1593)
Judgment No.: UNDT/2010/139
Date: 30 July 2010
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

MURATORE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Stéphanie Cochard, UNOG

Introduction

1. By application filed on 25 April 2008 before the former UN Administrative Tribunal, the applicant contests the recruitment procedures relating to 21 posts for which he was a candidate during a post regularization exercise in 2006 at the Office of the United Nations High Commissioner for Human Rights (“OHCHR”).

2. He requests that:

- a. All the irregular recruitment procedures for the 21 posts be cancelled, the posts be readvertised, new procedures take place in full compliance with the applicable rules, and the staff members involved in management of the initial procedures be excluded from management of the new procedures;
- b. Given the public interest dimension of the case and its financial implications, since all the posts in the 2006 OHCHR post regularization process were improperly attributed, an inquiry into the regularity of the entire process be conducted by external auditors;
- c. He be paid, as compensation for the professional and material damage suffered as a result of the Administration's unlawful attitudes and arbitrary decisions, the equivalent of the salary and emoluments he would have received from the date of his separation, plus accrued interest;
- d. All his future applications for regular United Nations posts at the P-3, P-4 and P-5 levels be given priority consideration for the 24 months following the Tribunal's decision.

3. Pursuant to the transitional measures set out in General Assembly resolution 63/253, the application was transferred to the United Nations Dispute Tribunal (“UNDT”) on 1 January 2010.

Facts

4. The applicant joined OHCHR at Geneva on 19 July 2004 as a Human Rights Officer in the Africa Unit, Capacity Building and Field Operations Branch, at the P-3 level on a three-month short-term appointment. His contract was extended numerous times. In May 2005, he was assigned to the Europe, North Africa and Central Asia Unit. On 30 June 2006, his contract expired and he left the Organization.

5. In 2005, OHCHR launched a post regularization exercise and advertised a number of positions within the Office to fill all the posts involving core functions through the established competitive procedure. The objective of the exercise was to harmonize the contractual status of OHCHR staff and avoid the use of temporary appointments for the performance of core functions of a continuing nature.

6. Specially established guidelines entitled the OHCHR Post Regularization Exercise—Guidelines (“Guidelines”) were applied in conjunction with administrative instruction ST/AI/2002/4. The Guidelines reflected the outcome of consultations between OHCHR and Office of Human Resources Management (“OHRM”), as indicated in the memorandum of 3 June 2005 from the Assistant Secretary-General, OHRM, to the Officer-in-Charge, Division of Administration, United Nations Office at Geneva (“UNOG”). They provided, *inter alia*, that OHRM had agreed that the applications of all OHCHR temporary staff members with two years of service at OHCHR would be treated in a similar manner to those of internal candidates. That measure was therefore applicable to temporary staff members who had been continuously employed by OHCHR since 30 November 2003.

7. Between 22 June 2005 and 5 August 2005, the applicant applied for the following 21 posts covered by the regularization exercise:

- 05-HRI-OHCHR-407019-R-GENEVA, P-3
- 05-HRI-OHCHR-407012-R-GENEVA, P-3
- 05-HRI-OHCHR-406989-R-GENEVA, P-3
- 05-HRI-OHCHR-406975-R-GENEVA, P-3

- 05-HRI-OHCHR-406978-R-GENEVA, P-3
- 05-HRI-OHCHR-406979-R-GENEVA, P-3
- 05-HRI-OHCHR-407048-R-GENEVA, P-3
- 05-HRI-OHCHR-406982-R-GENEVA, P-3
- 05-HRI-OHCHR-407003-R-GENEVA, P-3
- 05-HRI-OHCHR-407042-R-PRETORIA, P-3
- 05-HRI-OHCHR-407039-R-ADDIS ABABA, P-3
- 05-HRI-OHCHR-407264-R-LUANDA, P-3
- 05-HRI-OHCHR-407263-R-LUANDA, P-4
- 05-HRI-OHCI-IR-407170-R-GENEVA, P-3
- 05-HRI-OHCHR-407192-R-BANGKOK, P-3
- 05-HRI-OHCHR-406991-R-GENEVA, P-4
- 05-HRI-OHCHR-406973-R-GENEVA, P-3
- 05-HRI-OHCHR-407021-R-GENEVA, P-4
- 05-HRI-OHCHR-407171-R-GENEVA, P-4
- 05-HRI-OHCHR-407032-R-GENEVA, P-4
- 05-HRI-OHCHR-407014-R-GENEVA, P-4.

8. He was not interviewed for any of them.

9. On 9 December 2005, he wrote to the chairperson of the Steering Committee on Post Regularization, asking her to clarify the distinction for the purposes of the regularization exercise between 30-day candidates and 60-day candidates. She replied the same day, explaining the difference and sending him the Guidelines and the staff selection system rules.

10. By e-mail dated 6 February 2006, the Senior Adviser to the Deputy High Commissioner informed him that the post regularization process had concluded and that the High Commissioner had made final selection decisions. She added that it had not been possible to accommodate his candidatures.

11. On 10 April 2006, the applicant asked the chairperson of the above-mentioned Steering Committee to send him a copy of the agreement between OHRM and OHCHR. She replied the same day that there was no document called the "OHCHR-OHRM agreement" and that the applicable rules and parameters were the result of prolonged discussions between OHRM and OHCHR and were reflected in the Guidelines.

12. After further exchanges with the chairperson of the Steering Committee, the applicant sent the Human Resources Management Section, OHCHR, a list of the posts for which he had applied and asked to be told

whether they had been filled. The answer he received the same day was that only selected and rostered candidates received direct notification and that he had to check the status of each of the posts in question by means of the United Nations e-staffing system, Galaxy. He replied the same day that he would do so.

13. On 24 May 2006, he requested administrative review of the contested decisions. He subsequently filed an appeal with the Geneva Joint Appeals Board (“JAB”) on 29 September 2006. In its report dated 8 January 2008, JAB recommended that the appeal be rejected as inadmissible. As the applicant was informed by letter dated 11 April 2008, the Secretary General accepted that recommendation.

14. On 25 April 2008, the applicant filed an application before the former UN Administrative Tribunal against that decision. The application was transferred to the present Tribunal on 1 January 2010.

15. By letter dated 22 March 2010, the Tribunal informed the parties that it intended to decide the case by summary judgment and invited them to submit their comments on that matter. No objections were raised.

Parties’ contentions

16. The applicant’s principal contentions are:

- a. Regarding the receivability of the application, it is a general principle of law that an administrative decision can be appealed even after the time limit if the facts that motivate the appeal were previously unknown to the applicant. This is confirmed by the former UN Administrative Tribunal Judgments No. 796, *Xu et al.* (1996), No. 1157, *Andronov* (2003) and No. 1046, *Diaz de Wessely* (2002). In his case, he only became aware of the possibility of appeal on 10 April 2006. He therefore initiated the application process within the time limit;
- b. Regarding the invocation by the respondent of the memorandum of 3 June 2005 from the Assistant Secretary-General, OHRM, the

date of which is not proven, while the principle is that each party bears the burden of proving its allegations, that rule must be modified when the relevant evidence is solely in the hands of the Administration (see former UN Administrative Tribunal Judgment No. 1302, *Hammond* (2006));

- c. In the present case, there are sufficient facts to permit a reasonable inference that a violation of the law occurred. Therefore, in accordance with the former UN Administrative Tribunal Judgments No. 1023, *Sergienko* (2001) and No. 897, *Jhuthi* (1998), he should not have to prove his allegations of irregularities beyond reasonable doubt;
- d. The chairperson of the Steering Committee on Post Regularization was unaware of the above-mentioned memorandum of 3 June 2005. The respondent produced that document, which does not bear the recipient's stamp, during the proceedings before JAB. It is for the respondent to clarify on what date it was sent;
- e. A decision by the Assistant Secretary-General, OHRM, cannot justify derogation from the provisions of administrative instruction ST/AI/2002/4 as the latter document was promulgated by a higher authority, the Under-Secretary-General for Management.

17. The respondent's principal contentions are:

- a. Former staff rule 111.2 (a) set a two-month time limit for asking the Secretary-General for administrative review with a view to appealing an administrative decision. Staff rule 111.2 (f) provided that, other than in exceptional circumstances, the subsequent appeals were not receivable unless that time limit had been met. The former UN Administrative Tribunal had consistently stressed the importance of complying with those mandatory time limits;
- b. While the contested decision dated from 6 February 2006, the applicant did not take his first formal action against it until 24 May 2006;

- c. While the statutory time limits may be waived in exceptional circumstances, it is established jurisprudence that only circumstances beyond the applicant's control may be considered exceptional circumstances within the meaning of the former staff rule 111.2 (f). The fact that the applicant believed that there was a legal basis for the Guidelines in the OHCHR-OHRM agreement was not a circumstance that justified a waiver.

18. The respondent requested the Tribunal to reject the application as time-barred.

Judgment

19. Staff rule 111.2 (a) in force at the time of the facts provided that:

A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

20. In addition, staff rule 111.2 (f) provided that:

An appeal shall not be receivable unless the time limits specified ... above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.

21. The applicant does not dispute that he did not request administrative review of the contested decision within the two-month time limit set by the above provisions. While he was informed of the decision on 9 February 2006, he did not request administrative review of it until 24 May 2006, more than a month after the expiry of the time limit.

22. He does argue, however, that there were exceptional circumstances that justify waiver of the time limit in his case. He claims that the time limit should only have run from the date of 10 April 2006, on which he received by e-mail the response by the chairperson of the Steering Committee on Post Regularization to his questions concerning the eligibility criteria for external

candidates. Until that date he believed in good faith that there was a valid legal basis for the application of the Guidelines.

23. The United Nations Appeals Tribunal has followed the jurisprudence of the former United Nations Administrative Tribunal according to which only circumstances “beyond his or her control that prevented the applicant from timely exercising the right to appeal” may be considered “exceptional circumstances” justifying a waiver of the statutory time limit (see 2010-UNAT-029, *El Khatib*). The fact that the applicant initially thought that the decisions he is now contesting were lawful cannot be deemed to constitute such a circumstance, especially as he had every means of obtaining information from the Administration. Furthermore, while the applicant claims that he mistakenly thought there was a legal basis for the rules applied in the regularization exercise, there remains the principle that “candidates for public employment are presumed to know the rules applicable to the employing public corporation” (see 2010-UNAT-029, *El Khatib*).

24. In addition, the Tribunal notes that, even after receiving the message of 10 April 2006, the applicant took a further one month and 14 days to transmit his request for administrative review to the Secretary-General.

25. In the light of the foregoing, the Tribunal finds that the applicant has failed to establish the existence of any exceptional circumstance justifying the waiver of the two-month time limit set in the former staff rule 111.2 (a). Consequently, it cannot but declare the present application time-barred and, therefore, irreceivable.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 30th day of July 2010

Entered in the Register on this 30th day of July 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva