



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-785

Smith
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before: Judge John Murphy, Presiding
Judge Richard Lussick
Judge Martha Halfeld

Case No.: 2017-1067

Date: 27 October 2017

Registrar: Weicheng Lin

Counsel for Mr. Smith: Mariam Munang, OSLA

Counsel for Secretary-General: Nathalie Defrasne

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal has before it an appeal against Judgment No. UNDT/2017/003, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 17 January 2017, in the case of *Smith v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 20 March 2017, Mr. Steven Robert Smith filed his answer and a cross-appeal on 19 May 2017, and the Secretary-General filed an answer to the cross-appeal on 13 July 2017.

Facts and Procedure

2. Mr. Smith, at the relevant time, was an Air Transport Officer with a continuing appointment at the P-4 level with the Air Transport Service, Logistics Support Division, Department of Field Support (DFS) at Headquarters in New York.

3. On 4 February 2015, the incumbent of the position of Chief Aviation Officer at the P-5 level with the United Nations Mission in the Republic of South Sudan (UNMISS) was selected for a temporary assignment with the United Nations Mission for Ebola Emergency Response (UNMEER).

4. On 24 February 2015, a six-month temporary job opening (TJO) for the P-5 Chief Aviation Officer, UNMISS, was broadcast internally within UNMISS via e-mails to UNMISS staff members and on the UNMISS board. The TJO specified that it was not open to external candidates. The term “external candidates” was not defined in the TJO. However, the TJO included a definition for “internal candidates” as “staff members who have been recruited after a competitive examination under staff rule 4.16 or after the advice of a central review body under staff rule 4.15”. The TJO also noted that “[s]ubject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station”. The deadline for submitting an application was set at 2 March 2015. The estimated starting date for the TJO was 10 March 2015.

5. On 2 March 2015, a colleague of Mr. Smith’s forwarded him the TJO and Mr. Smith applied the same day.

6. In an e-mail dated 3 March 2015, a Human Resources Officer, UNMISS, acknowledged receipt of Mr. Smith's application. However, she informed Mr. Smith that "this position is open to UNMISS staff only". It was not stated that the reason for this was related to the "funding source of the position".

7. In a memorandum dated 10 March 2015, the Chief Human Resources Officer, UNMISS, informed the selected candidate of his selection to the TJO position of Chief Aviation Officer, UNMISS, subject to the approval of the Special Post Allowance (SPA) panel for a temporary period effective from the date he assumed the functions at the P-5 level.

8. On 13 March 2015, Mr. Smith filed both a request for management evaluation and an application requesting suspension of the decision that he was not eligible to apply for the P-5 TJO position. In Order No. 46 (NY/2015) dated 13 March 2015, the Dispute Tribunal ordered that the impugned decision that Mr. Smith was not eligible to apply for the TJO be suspended, pending management evaluation. The UNDT was of the view that the restriction that the TJO was open only to UNMISS staff was *prima facie* unlawful and that its implementation would cause irreparable damage. It accordingly granted an order in terms of Article 2(2) of the UNDT Statute. Nonetheless, the UNMISS Administration continued and completed the recruitment process by placing the selected candidate in the post of Chief Aviation Officer on a temporary basis.

9. In the Judgment now under appeal, the Dispute Tribunal found that Mr. Smith's application was receivable *ratione materiae* as he was challenging "the decision to determine him ineligible for consideration for a temporary job opening ... and the related administrative decision to conduct the recruitment exercise without him in breach of Order No. 46 [(NY/2015)]". It held that since the TJO stated that it was open to internal candidates, it was open to all internal candidates, including Mr. Smith (even though he was working for a different department at a different duty station) because he was recruited after a competitive examination under Staff Rule 4.16. And, perhaps most significantly, since there was no evidence of any limitation on the funding source for the TJO, the UNDT was of the view that there was no basis for restricting the TJO to UNMISS staff members.

10. The UNDT thus concluded that the decision to consider Mr. Smith ineligible for the TJO was unlawful and breached his right to be fully and fairly considered for that particular position. However, it was not persuaded that Mr. Smith would have been selected and refused to award

him pecuniary damages in the amount of the difference in salary between the P-4 position he occupied and the P-5 temporary position for the six-month period. The UNDT instead opted to award Mr. Smith moral damages in the amount of USD 1,500 for loss of a career prospect, in that his prospects for career development and opportunities for professional growth were reduced by the restriction. In addition, the Dispute Tribunal found no evidence indicating the selection decision had been implemented on 10 March 2015 and concluded that the decision to continue with the recruitment exercise for the TJO, despite the UNDT Order No. 46 of 13 March 2015, was also unlawful.

Submissions

The Secretary-General's Appeal

11. The Secretary-General submits that the UNDT erred in both law and fact in finding that the Administration could not limit the eligibility for the TJO to UNMISS staff members. The decision to circulate the TJO only to staff based in UNMISS was an effective and expeditious way of satisfying the operational requirements of UNMISS, in the discretionary exercise of the Secretary-General's prerogative to determine the operational requirements of the Organization. The position needed to be filled for a six-month period urgently. But the procedure to obtain a visa for a non-UNMISS staff member was lengthy and uncertain, and the removal and installation costs of recruiting a candidate from outside UNMISS would have been costly. It was convenient and rational to recruit a staff member in place at UNMISS for the limited duration of the temporary vacancy.

12. Mr. Smith was aware of the limited eligibility stated in the TJO and he was fully and fairly considered within the limitations of the operational requirements of the Organization.

13. The Secretary-General further submits that the UNDT erred in both law and fact in awarding compensation for moral damages without receiving evidence of moral harm. There is no evidence that Mr. Smith would have been short-listed, recommended and selected for the TJO had he been found eligible to apply for it or that Mr. Smith's professional reputation had been affected by his exclusion from participating in the selection exercise for the TJO. The UNDT's decision was based on speculation and not evidence.

14. The Secretary-General requests that this Tribunal vacate the UNDT Judgment in its entirety.

Mr. Smith's Answer

15. Mr. Smith submits that the UNDT did not err in law or fact in finding that the Administration could not limit the eligibility for the TJO to UNMISS-based staff. He further questions whether the alleged urgency for a replacement is supported by the facts. The incumbent was selected for a temporary assignment to UNMEER on 4 February 2015. Yet, the TJO was not issued until 20 days later, on 24 February 2015. As only two candidates (Mr. Smith and the selected candidate already based at UNMISS) were eligible for the TJO, the manner in which the recruitment exercise was conducted suggests that the Administration already had a candidate in mind, contrary to its stated reasons of filling the TJO effectively and expeditiously.

16. Mr. Smith maintains further that by considering only UNMISS-based staff members for the TJO, the Administration immediately limited the pool of potential candidates. It was designed to skew the recruitment in favor of a few candidates, rather than to fulfil the legitimate aim of effectively and expeditiously filling the TJO, and rendered the recruitment process opaque and discriminatory, possibly resulting in a less qualified candidate being selected for the job.

17. Finally, Mr. Smith argues that the restriction is also unreasonable because the UNMISS Administration took into account irrelevant factors such as the application process for a visa to South Sudan.

18. Mr. Smith thus submits that the UNDT correctly concluded that the decision to exclude him from the recruitment exercise was unlawful and that there was evidence of moral harm in the form of reduced career development and professional growth. Moreover, the Administration's ignoring of the UNDT's order suspending the selection process for the TJO also entitles Mr. Smith to moral damages.

19. Mr. Smith requests that this Tribunal dismiss the Secretary-General's appeal in its entirety.

Mr. Smith's Cross-Appeal

20. Mr. Smith has filed a cross-appeal contending that the UNDT erred by failing to consider evidence of the likelihood that he would have been selected for the TJO because he met the minimum and technical requirements and competencies for the TJO and was on the P-5 roster

for the Chief Aviation Officer post. He had a significant chance to be selected for the TJO position. Mr. Smith requests that this Tribunal grant his claim for pecuniary compensation.

The Secretary-General's Answer to Cross-Appeal

21. The Secretary-General submits that the UNDT correctly held that Mr. Smith was not entitled to pecuniary compensation. It evaluated the evidence presented by Mr. Smith, but rejected his request for pecuniary compensation. The mere fact that there were only two Aviation Officers at the P-4 level who had applied for the TJO does not amount to evidence proving that Mr. Smith would have likely been recommended and selected for the TJO. The Secretary-General requests this Tribunal to dismiss Mr. Smith's cross-appeal.

Considerations

22. The essential question for consideration in this appeal is whether the UNMISS Administration acted lawfully and reasonably when restricting the eligibility for the temporary vacancy to internal candidates who were staff members at UNMISS. It is common cause that Mr. Smith was an internal candidate. His exclusion from consideration was based exclusively on the fact that he was not a staff member at UNMISS.

23. The enquiry then is whether the Administration had reasonable grounds not to recruit system-wide on the basis it advanced in its papers, namely: an urgent need for the replacement, extensive time needed for a visa and avoiding the associated relocation costs for a non-UNMISS staff member if selected. However, the preliminary question is whether the Administration has the lawful authority to impose such a restriction.

24. Various statutory instruments govern the question of temporary appointments in the Organization. Article 101(3) of the United Nations Charter provides:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

25. Paragraph 7 of Section II of General Assembly resolution 63/250 (24 December 2008) provides that temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but can be renewed for

up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates. Paragraph 8 of Section III of the same resolution provides that, in order to ensure the transparency of the recruitment process, all specific vacancy announcements shall continue to be advertised; while paragraph 14 of Section III acknowledges the necessity of ensuring transparency and accountability with respect to recruitment of general temporary assistance and consultants.¹

26. Staff Rule 4.12 deals specifically with temporary appointments. It reiterates that temporary appointments may be granted for a period of less than one year to meet seasonal or peak workloads and specific short-term requirements, having an expiration date specified in the letter of appointment. The appointment may be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates under circumstances and conditions established by the Secretary-General.

27. Section 3 of Administrative Instruction ST/AI/2010/4/Rev.1 (Administration of temporary appointments, 26 October 2011) requires that when a need for service for more than three months but less than one year is anticipated, a temporary job opening shall be issued by the programme manager.² While the decision to issue a temporary job opening for a need for service for three months or less is made at the discretion of the programme manager, any extension beyond three months shall require the issuance of a temporary job opening. The temporary job opening shall include a description of the qualifications, skills and competencies required and reflect the functions of the post, using to the greatest possible extent the database of generic job profiles maintained by the Office of Human Resources Management. Each temporary job opening shall indicate the date of posting and specify a deadline by which all applications must be received. Temporary job openings shall be posted

¹ Staff Regulation 4.5 provides that the appointment of Under-Secretaries-General and of Assistant Secretaries-General shall normally be for a period of up to five years, subject to prolongation or renewal. Other staff members shall be granted either a temporary, fixed-term or continuing appointment under such terms and conditions consistent with the Staff Regulations as the Secretary-General may prescribe. A temporary appointment does not carry any expectancy, legal or otherwise, of renewal and shall not be converted to any other type of appointment.

² ST/AI/2010/4/Rev.1 deals generally with the administration of temporary appointments. Section 1 provides that the purpose of a temporary appointment is to enable the Organization to effectively and expeditiously manage its short-term staffing needs. Section 2 provides that a temporary appointment may be granted for specific short-term requirements that are expected to last for less than one year at the time of the staff member's appointment, *inter alia*, to temporarily fill a position whose incumbent is on special leave, sick leave, maternity or paternity leave or on assignment.

for a minimum of one week on the Intranet or be circulated by other means, such as e-mail, in the event that an Intranet is not available at the duty station concerned. A temporary job opening may also be advertised externally if deemed necessary and appropriate.

28. Paragraph 5.1 of ST/AI/2010/4/Rev.1 provides that a current staff member who holds a fixed-term, permanent or continuing appointment may apply for temporary positions no more than one level above his or her current grade. Mr. Smith complied with this provision in that as a P-4 he was entitled to apply for a temporary P-5 post.

29. It is clear from these statutory provisions (particularly Staff Rule 4.12) that they confer upon the Secretary-General a wide inherent discretion to determine eligibility criteria for temporary appointments. No provision prohibits the Administration from imposing a restriction limiting recruitment to a temporary position to staff members at a particular duty station or mission. Such a restriction can be justified on various operational grounds such as cost, convenience, working environment, local conditions, etc.

30. It is well-established that tribunals should avoid substituting their own preferred appointment or eligibility criteria for those chosen by the Administration. Nonetheless, the discretion to introduce criteria in the interests of operational requirements or efficiency is not unfettered and must be exercised lawfully, reasonably and fairly.³ The choice of eligibility criteria and their application must be reasonable, or at least rationally based, in the sense, *inter alia*, of not being arbitrary, capricious, improperly motivated or based on irrelevant considerations.

31. The evidence does not disclose how the Administration arrived at the decision to impose the restriction to recruit only from UNMISS staff members. The reference to “the funding source” of the position is an indication that cost was intended to be a relevant consideration. Mr. Smith has suggested that the Administration was motivated by the improper purpose of favouring the only eligible staff member at UNMISS. The Secretary-General has justified the decision to restrict selection to staff members at UNMISS on the grounds of efficiency, cost and convenience. The restriction objectively furthered the operational purposes of efficiency

³ *Nikolarakis v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-652, para. 30; *Scheepers et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-556, para. 55; and *Dhanjee v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-527, paras. 29-31.

and short-term convenience and (given the limited duration of the appointment and the obvious need to fill it quickly) was proportional in its effects.

32. Although Mr. Smith's suspicion is not beyond the bounds of possibility, there is no cogent, reliable or credible evidence to support the existence of an improper or discriminatory motive other than the fact that the selected candidate was the only person who could have benefited from the restriction. An inference of improper purpose, ulterior motive or discrimination is not the only reasonable, legitimate or most probable inference to be drawn from the imposition of the restriction. A conclusion that cost and convenience were paramount cannot be discounted. In so far as there was a risk of favouritism to staff members *in situ*, the evidentiary burden is on the party alleging unfair discrimination to rebut the presumption of regularity arising from the relevant considerations of cost saving and convenience in relation to a short-term, temporary appointment. Mr. Smith has not presented sufficiently compelling evidence discharging that onus.⁴ The decision to include the restrictive criterion and its application, therefore, is reasonable in the circumstances.

33. The *ratio decidendi* of the impugned Judgment, however, is somewhat narrower and based on the principle of legality. The UNDT held that since there was no evidence regarding the funding source for the TJO, there was no basis for restricting the TJO to UNMISS staff members. The UNDT in effect concluded that the TJO had imposed a mandatory condition precedent to the application of the restrictive criterion, which had not been fulfilled. The funding source requirement, the UNDT implicitly reasoned, fettered the discretion of the Administration. The Administration was permitted to exclude staff members outside UNMISS from applying for the position only if the funding source condition applied.

34. It is not clear what the TJO intended precisely by the qualification "[s]ubject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station". It is obvious though that the limitation would apply only in the event of funding considerations. And, as stated, the UNDT found there was no evidence regarding the

⁴ The parties agreed for the application to be resolved exclusively on the papers - see paragraph 14 of the impugned Judgment. Where there are facts in dispute on the papers, the tribunal must determine the dispute with regard to the admitted facts of the applicant (the common cause facts) taken with the facts stated by the respondent. Should an applicant not be disposed to the resolution of factual issues on that basis, he or she must seek to refer the issue to oral evidence. The averments of the Secretary-General (as the Respondent in the application) regarding the reasons for imposing the restriction should therefore be accepted, unless they are wholly and self-evidently un-creditworthy or untenable - which is not the case.

funding source of the position. However, we are satisfied that in the peculiar circumstances of this case, where the post had to be filled urgently for a short duration, the phrase “[s]ubject to the funding source” may be interpreted generously or extensively to permit the imposition of the restriction on the basis of cost (fiscal prudence) and convenience in the interests of operational exigencies.

35. In the result, therefore, the decision by the UNMISS Administration to limit the appointment to UNMISS staff members was reasonable and the appointment was made in terms of that decision lawfully and reasonably. There is, moreover, insufficient evidence to support a finding of discrimination or improper motive.

36. There is accordingly no legal basis for an award of pecuniary or non-pecuniary damages and the UNDT erred in awarding compensation as it did. The cross-appeal is thus equally without merit and should be dismissed.

37. Finally, it is noted with regret that the Administration opted to disobey the order of the UNDT issued on 13 March 2015 suspending (pending management evaluation) the decision that Mr. Smith was not eligible. Even if the selection process was finalized by 10 March 2015, the proper course would have been to delay its further implementation. The Administration’s conduct was in all probability in contempt and is reprehensible. However, considering our position on the merits of the application, Mr. Smith suffered no actual prejudice as a result of the improper conduct of the Administration and there is no need to extend a sanction beyond this admonition.

Judgment

38. The appeal is upheld and Judgment No. UNDT/2017/003 is hereby vacated. The cross-appeal is dismissed.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Halfeld

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar