UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/087/ JAB/2009/052
Judgment No.: UNDT/2009/030
Date: 7 October 2009
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

HASTINGS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Stephen Margetts, ALU

Introduction

1. The Applicant applied to the Secretary-General for an exception to be made to administrative instruction ST/AI/2006/3 to allow her to apply for a D-2 position that was more than one level higher than her P-5 personal grade. At the time of the application she was receiving a D-1 special post allowance (SPA) as she was working in the acting position for which she wished to apply. The application for an exception was refused by the Assistant Secretary-General for Human Resource Management (ASG). The Applicant sought an administrative review which upheld the original decision. She then appealed to the Joint Appeals Board (JAB).

2. On 1 July 2009 the case was transferred from the JAB to the United Nations Dispute Tribunal for hearing and decision. Counsel for both parties advised the Tribunal that they did not wish to call any evidence other than that submitted in writing to the JAB but asked for an opportunity to make submissions to the Tribunal. These submissions were made by way of a video link hearing. At that hearing it was decided that the hearing would be limited to the question of liability and that question of remedies would be reserved for further submissions should that become necessary.

The issues

3. The issues in the cases are the following:

   a. Does section 5.2 of ST/AI/2006/3 permit exceptions? This is a question of law.

   b. Was the decision of the ASG not to allow an exception lawful? In order for the decision to be lawful the ASG must have turned her mind to the possibility of an exception being made, the criteria for such an exception and then considered whether the Applicant's situation amounted to such an exception. This is a question of fact.

The facts

4. The parties agreed on a statement of facts which forms the basis of the following outline of the material facts:

5. The Applicant has been a staff member of the UN since 1978 and has been working in the Advisory Committee on Administrative and Budgetary Questions (ACABQ) Secretariat since 1999. In 2000 she was promoted to the P-5 level as senior administrative management officer. In July 2006 the Applicant applied for the vacant position of executive secretary, a post at the D-2 level. At that time ST/AI/2002/4 was in force. This administrative instruction did not impose eligibility restrictions on staff members applying two levels above their own. The Applicant participated in a competency-based interview but was not selected.

6. On 1 January 2007, ST/AI/2006/3 came into force replacing ST/AI/2002/4. Section 5.2 of ST/AI/2006/3 provides that staff members shall not be eligible to be considered for a position more than one level higher than their personal grade. It was introduced following a consultative process between staff and management which culminated in a recommendation from the Staff Management Coordination Committee. The Respondent contends, and it was not seriously disputed by the Applicant, that the change was made to reflect a legitimate management concern about the gravity of concerns and frustrations of staff who had been bypassed for promotion by staff junior to them in grade and experience.

7. On 1 September 2008 when the then Executive Secretary separated from employment pursuant to an agreed termination the Applicant was named acting Executive Secretary and was granted a SPA to the D-1 level as she was and continues to be employed on the P-5 level. A new incumbent has been selected and is soon to take up the new position.

8. On 13 January 2009 the vacant D-2 post of Executive Secretary was announced and a month later the Applicant wrote to the Secretary-General requesting that an exception be made to section 5.2 of ST/AI/2006/3 to enable her to apply for

the D-2 post. In this letter she set out the full reasons why she should be considered for the position notwithstanding that it would be a promotion to a post more than one grade higher than her personal grade. These reasons included:

a. Her long experience and increasing responsibility in the ACABQ Secretariat.

b. She had been receiving a SPA at the D-1 level since September 2008 when she was named acting Executive Secretary.

c. Her achievements and performance as acting Executive Secretary.

d. Article 101.3 of the Charter of the United Nations which provides that the paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity as well as gender balance.

9. On 16 March 2009 the Staffing Service, SPSD/OHRM/DM replied to her request:

> "Dear [first name of the Applicant],
>
> As per our phone conversation, I am confirming here that your case falls under Section 5.2 of the ST/AI/2006/3 that states:
>
> 5.2 staff members shall not be eligible to be considered for promotion to posts more than one level higher than their personal grade.
>
> Kind regards,"

10. The Applicant immediately enquired of the ASG whether that letter constituted a response to her request for an exception. The ASG responded:

> "I regret to inform you that we are unable to grant an exception to the eligibility requirements laid out in ST/AI/2006/3 in order for you to apply for the post of Executive Secretary. I will also provide you with a formal response in writing."

11. The subsequent formal response included the following paragraph:

> "While recognizing that personnel may perform functions at a higher levels on the basis of a temporary assignment and given special post allowance (SPA), such an assignment is governed by paragraph 5.3 (c) of ST/AI/2006/3. Notwithstanding paragraph 5.3 (c) of the administrative instruction, paragraph 5.1 of ST/AI/2006/3, stipulates that the requirement of eligibility for selection must be met. Consequently, under the current staff regulations and rules including ST/AI/2006/3, we are not permitted to grant exceptions to the prohibitions set out in paragraph 5.2 and, to date, no such exception has been made. Accordingly, we are not able to comply with your request to grant an exception of 5.2 for your application."

12. The Applicant has challenged this decision

Issue a. Can there be an exception to section 5.2 of ST/AI/2006/3?

13. It is the case for the Applicant that when reaching its decision the Administration closed down the possibility of any exception to the rule that staff members shall not be eligible to be considered for promotion to posts more than one level higher than their personal grade.

14. For the Respondent it was submitted that no exception is contemplated under the terms of the administrative instruction or other staff regulations or rules relating to appointments. Although section 5.2 mandates that persons applying more than one level higher than their personal grade are not eligible for consideration, the Respondent accepted that an exception to the application of section 5.2 may be granted, in the most limited circumstances, under staff rule 112.2(b).

15. Was this concession by the Respondent justified given the apparently mandatory nature of the wording of section 5.2?

16. The meaning of any legislative provision is ascertained by the meaning of its words in the light of the intention of the rules as a whole. This intention is generally ascertained by reference to the context of the provision in the rules.

17. Where the wording of an instruction suggests that no exception is permitted, the question of whether a provision is mandatory or directory has historically been

another aid to interpretation. However in a number of common law jurisdictions reliance on that dichotomy to establish the meaning has been found to be inappropriate. In R v Soneji and Anor, the House of Lords conducted a detailed review of how the distinction had been dealt with in a number of jurisdictions, including Canada, Australia and New Zealand.[1] It summed up the position in this way:

> "Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

18. To establish the meaning and intention of a UN provision the relevant context is the hierarchy of the UN's internal legislation. This is headed by the Charter of the UN followed by resolutions of the General Assembly, staff regulation and rules, Secretary-General bulletins and then administrative instructions.

19. Article 101.3 of the Charter provides:

> "The paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

20. The Secretary-General is required by the preamble of the staff rules to provide and enforce staff rules which are consistent with the fundamental conditions of service and the rights, duties and obligations of the UN Secretariat as embodied in the staff regulations.

21. The Applicant noted that staff regulation 1.1(d) also refers to "the necessity of securing staff of the highest standards of efficiency, competence and integrity". The incorporation of the wording of article 101.3 into the regulations reinforces the paramountcy of the provision.

[1] [2005] UKHL 49 at [23]

22. Staff rule 112.2(b) is relevant when interpreting staff rules and their operational counterparts in the administrative instructions. It reads:

> "Exceptions to the staff rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members."

23. Such exceptions may be made by persons properly delegated by the Secretary General.

24. An administrative instruction is not of itself a staff rule but is the means by which such rules are put into operation. Given the hierarchy of UN legislation it cannot be the case that exceptions may be made to staff rules but not to administrative instructions which are essentially subordinate legislation. If this were the case an administrative instruction could trump a staff rule. Administrative instructions must therefore be subject to staff rule 112.2(b) in the same way as staff rules are.

25. The imperative of the paramount considerations for the employment of staff in article 101.3 of the Charter and staff regulation 1.1(d) means that it is conceivable that in certain circumstances an exception would have to be made to meet those paramount considerations. For example, where an otherwise ideal candidate with the highest standards of efficiency, competency and integrity does not meet the pre-requisites for the position in the staff rules, rule 112.2(b) could be invoked for the paramount considerations to prevail in order to enable an exception to be made to the otherwise strict rule.

26. In the light of this analysis I conclude that Respondent's concession on this point was properly and responsibly made. The wording of section 5.2 is susceptible to exceptions under staff rule 112.2(b).

Issue b. Was the decision not to allow an exception unlawful in this case?

27. A decision maker exercising powers conferred by rules and regulations is obliged to turn his or her mind to the factors which are relevant to the decision to be made. In the present case the relevant factors were threefold:

a. Can an exception such as that sought by the Applicant be made?

b. If so, what are the circumstances under which a legitimate exception may be made?

c. Does the Applicant's case meet those circumstances?

28. The question of whether the AGS made a lawful decision is one of fact. Did she properly turn her mind to these matters?

29. In the Applicant's initial application of 11 February 2009 for the Respondent to make an exception in her case, she explicitly requested such exception to be considered by stating:

> "Dear Mr Secretary-General,
>
> This is to request that, in respect of my application for the position of Executive Secretary of ACABQ, an exception be made to the provision of paragraph 5.2 of the administrative instruction on the staff selection system (ST/AI/2066/3)…"

30. In responding to this request, the Respondent submitted that the ASG followed a two step process. First she considered whether any exceptions to section 5.2 were contemplated in ST/AI/2006/3 or in any other staff regulations and rules and concluded that no exception was contemplated in the Administrative Instruction. She then turned to consider whether an exception was justified under staff rule 112.2(b) and decided that such an exception could not be justified.

31. In advocating for that position the Respondent relied on the ASG's brief response of 25 March 2009. He submitted that the ASG's statement "under the

current staff regulations and rules including ST/AI/2006/3 we are not permitted to grant exceptions to the prohibition set out in paragraph 5.2" indicates that she addressed the first step. The second step, in his submission, was addressed in the words "to date no such exception has been made."

32. The Applicant argued that the words used show that the ASG did not consider the second step. It is the Applicant's case that once the ASG decided that section 5.2 did not permit her to make an exception she stopped at that point and did not consider whether the Applicant had made out a case for an exception or not.

33. If the only evidence of the decision were the ASG's letter of 25 March 2009 the question of whether she had in mind that an exception could be possible under staff rule 112.2(b) would be finely balanced. She does not refer to rule 112.2(b) but the reference to no exceptions having been made in the past could possibly be construed as an oblique reference to the possibility of an exception being granted. However I find that the correspondence which preceded that letter shows that without a doubt the decision made and adhered to throughout the process leading to the ASG's formal reply was that the wording of section 5.2 did not allow any exceptions and therefore the Applicant's case for an exception could not and would not be considered.

34. The first response of 16 March 2009 said her case could not be considered because of the wording of section 5.2. The next response of 17 March 2009 cited only ST/AI/2006/3. It made no reference to staff rule 112.2(b) or any possibility of an exception.

35. Read together with these two answers I find that the formal response of 25 March 2009 is a reiteration and reinforcement of the unequivocal decision that had been made earlier. This decision was that section 5.2 did not permit exceptions and therefore no exception would be made. In that light, the words "to date no exception has been made" read as a further justification for the decision that no exception could be made.

36. I find that the ASG considered that there could never be an exception to the prohibition in section 5.2 and therefore did not move to the next step of deciding what circumstances might constitute reasons for an exception to be granted.

37. Apart from the valid submission by the Respondent that given the wording of the section any exceptions should be very limited, there is nothing to show what guidelines (if any) the ASG used to evaluate the Applicant's eligibility to be considered for an exception even if it had got to that stage. There was certainly a basis for such a consideration to be made because she had the necessary qualifications to be considered for an interview before 2006 and the change to the Administrative Instructions. I find that it is more likely than not that the Applicant's case for an exception was not properly considered and accordingly the decision of the ASG to reject her application on the basis that no exceptions were possible to section 5.2 was not lawful.

Remedies

38. The question of what remedies should follow this decision is reserved. The parties are encouraged to seek a joint resolution of this issue. If they are unable to reach a resolution I propose to the parties that the case be referred to mediation. Counsel are to advise the Registrar of the Tribunal within 30 days of the date of this judgment whether a hearing and decision about appropriate remedies will be required.

(*Signed*)

Judge Coral Shaw

Dated this 7th day of October 2009

Entered in the Register on this 7th day of October 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York