



Before: Judge Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TEFERRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for applicant:
Bernard Williams, OSLA

Counsel for respondent:
Steven Dietrich, ALU/OHRM

INTRODUCTION

1. On 23 July 2007, an Advisory Selection Panel constituted to review applications for the post of Mail Assistant (Registry Supervisor), G7 (“the post”) in the Division of Administration at the Economic Commission for Africa (ECA), recommended the Applicant as the most suitable candidate for the post. This recommendation was not accepted and instead ECA recirculated the vacancy for the post on 25 November 2008.

2. On 10 December 2008, ECA informed the applicant that the Programme Case Officer had requested for the vacancy announcement to be recirculated. The Applicant wishes to appeal this decision to recirculate the vacancy announcement.

3. The sole question for this preliminary hearing is whether the applicant’s application is receivable.

4. Counsel for respondent made a verbal motion on the issue of receivability during a status conference held on 9 November 2009 and referred the Tribunal to paragraphs 9 to 14 of the respondent’s reply dated 17 August 2009. Counsel for the applicant filed written submissions on the issue of receivability on 10 November 2009.

RESPONDENT’S PRELIMINARY OBJECTION ON RECEIVABILITY

5. On 2 November 2009, the Registrar of the Nairobi UNDT invited the parties to a status conference on 9 November 2009. The general objectives of the status conference were, inter alia, to look into and attend to all issues having a bearing on the readiness of the case for consideration and determination by the Tribunal and to come up with a timeline for the processing of the case.

6. The parties participated in the status conference on 9 November 2009 via audio conference from New York. During the status conference, Counsel for the respondent raised the issue of the receivability of this application and referred to paragraphs 9 to 14 of the respondent's reply dated 17 August 2009. In the latter paragraphs, the respondent submits that:

(i) The contested decision is not open to appeal and that it is not enough for the applicant to say that the case is receivable pursuant to Staff Rule 111.2 and refer to a Request for Review that he had previously filed.

(ii) In order for an administrative decision to be open for appeal under Chapter XI of the Staff Rules, the United Nations Administrative Tribunal has stated that¹,

“(i) it must have been unilaterally taken by the Administration;

(ii) it must be of an individual application; and

(iii) it must have created direct legal consequences for the terms of employment of a particular individual.”

(iii) In this case, while the contested decision was unilaterally taken by the Administration, it is not of an individual application and it does not create direct legal consequences for the terms of the applicant's employment.

(iv) The contested decision did not affect the applicant's ability to re-apply for the subject post; it merely re-started a process that was deemed inconsistent with the applicable rules governing the recruitment and selection procedures.

(v) The contested decision was an effort made by the Administration to ensure transparency, to fully comply with the rules in force and is not an

¹ UNAT Judgment No. 1157, *Andronov* (2003).

administrative decision that may be appealed against under the Staff Rules and the Statute of the UNDT.

(vi) In the absence of a final decision, there is no legal basis upon which the applicant may challenge the decision taken by the respondent to discontinue and recommence an ongoing recruitment exercise where evidence of procedural irregularities has been detected.

APPLICANT'S SUBMISSIONS ON RECEIVABILITY

7. In response to the respondent's preliminary objection on the issue of receivability, the applicant filed additional submissions on 10 November 2009. The submissions were transmitted to the respondent's counsel on 11 November 2009. The applicant submits that:

(i) The respondent's objection on the issue of receivability rests upon a judgment rendered in the previous legal system.

(ii) The UNDT is part of a new legal system and may decide that it is not always bound by restrictive judgments made in the old system, a system which the General Assembly decided it was necessary to replace.

(iii) It is clear that the Administration has the authority to remedy an irregular process or a flawed decision but an Administrative official cannot claim authority to remedy an irregular process when that official had made the process irregular by trying to interfere in a selection that is supposed to be unbiased and fair.

APPLICABLE LAW

8. The jurisdiction *ratione materiae* conferred on the Tribunal is set out in Article 2.1 (a) of the Statute of the United Nations Dispute Tribunal:

“1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance...”

9. Given the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken. Izuako J in *Luvai*², opined,

“[m]uch as I agree that an administrative decision is one done unilaterally by the Administration, I am not compelled by the reasoning that for a decision or an act to be defined as an administrative decision, it must be of individual application. Where the act of the Administration complained of affects an individual even though not exclusively, it is my view that the individual has locus standi and can bring an action. In other words, an administrative decision must not necessarily be of individual application for an Applicant to have a cause of action.”

10. The jurisdiction in Article 2.1 (a) is in relation to an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract

² UNDT Judgment No. 2009/074 at paragraph 36.

of employment. A staff member occupying a certain position in the Organization is entitled to apply for other positions when they are advertised. This is related to the contract of employment. In this case, the applicant had applied for a position, he was interviewed and was recommended as the most suitable candidate for the post but the recommendation was not implemented. Although the administrative decision to recirculate the vacancy announcement is of general application and would no doubt affect other staff members, this does not and cannot mean that the applicant would not be affected by it.

11. In light of the foregoing, the Tribunal finds that this is an administrative decision related to the applicant's contract of employment and is therefore receivable.

(Signed)

Judge Vinod Boolell

Dated this 17th day of December 2009

Entered in the Register on this 17th day of December 2009

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi