



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/053
(UNAT 1698)
Judgment No.: UNDT/2010/120
Date: 12 July 2010
Original: English

Before: Judge Thomas Laker
Registry: Geneva
Registrar: Víctor Rodríguez

OSTENSSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Bettina Gerber, UNOG

Introduction

1. The applicant submitted an application against the decision not to select him for the D-1 post of Head, Commodities Branch, Division on International Trade in Goods and Services, and Commodities (DITC), at the United Nations Conference on Trade and Development (UNCTAD), advertised under vacancy announcement No. 06-ECO-UNCTAD-411154-R-Geneva.

Facts

2. The applicant entered the service of the United Nations on 21 June 1981 under a two-year fixed-term appointment (FTA) at the P-3 level as an Economic Affairs Officer in the Commodities Division, UNCTAD, in Geneva, on secondment from the Government of the Kingdom of Sweden. His appointment was subsequently extended until 8 July 1983, date of his separation.

3. On 31 October 1985, the applicant was reappointed to his previous post, at the same level, again on secondment from the Government of the Kingdom of Sweden, under a two-year fixed-term contract which was subsequently extended for three months until 31 December 1987.

4. On 1 January 1988, the applicant was granted a probationary appointment, which was converted to a permanent one on 1 October 1988. The applicant was promoted to the P-4 level on 1 February 1992 (Economic Affairs Officer, Commodities Division, Minerals and Metals Branch, UNCTAD) and to the P-5 level on 1 October 2000. The applicant was appointed as Chief of the Diversification and Natural Resources Section on 1 June 2004.

5. On 1 November 2006, the D-1 post of Head, Commodities Branch, DITC, UNCTAD, became vacant following the retirement of its incumbent and the applicant was designated Officer-in-Charge (O-i-C) of that Branch by the Director, DITC. Later, he was granted a special post allowance (SPA) to the D-1 level, retroactively from 1 February 2007 to 31 July 2007, for the functions he was performing as O-i-C of the Commodities Branch.

6. The vacancy announcement for the post of Head, Commodities Branch, DITC, UNCTAD, was advertised on 4 December 2006 under VA No. 06-ECO-UNCTAD-411154-R-Geneva. It stated with respect to the competency of leadership:

“Proven track record of excellent management and technical leadership skills and ability to delegate appropriate responsibility, accountability and decision-making authority. Proven record of building and managing teams and creating an enabling work environment, including the ability to effectively lead, supervise, mentor, develop and evaluate staff and design training/skills enhancement initiatives to ensure effective transfer of knowledge/skills. Demonstrated flexibility in leadership by performing and/or overseeing change initiatives including the analyses of complex human resources, budgetary, financial or administrative management policy and programmatic issues.”

7. The applicant’s candidature, together with the candidature of three other 30-day mark candidates, was released to the Programme Case Officer (PCO), i.e. the Director, DITC.

8. On 19 January 2007, a complaint was filed against the applicant by one of his supervisees, with respect to an incident that had happened on 20 December 2006. UNCTAD set up a fact-finding panel to conduct an initial investigation into the alleged incident on 18 April 2007.

9. On 1 May 2007, the applicant submitted a formal complaint to the Director, Division of Management (DOM), UNCTAD, against the supervisee who had complained against him, “for assault on 20 December 2006” and false accusation.

10. The four 30-day mark candidates for the post of Head, Commodities Branch, DITC, UNCTAD, were interviewed, on 25 May 2007 and 7 June 2007, by an interview panel in which the Director, DITC, sat.

11. After the interviews, the applicant and the candidate who was subsequently selected for the post were included in the list of recommended candidates. After approving the recommended list, the Department Head (DH) submitted the list to the Central Review Body (CRB).

12. By email dated 11 July 2007, the Secretary of the CRB informed the DH, that the case had been reviewed by the CRB on 11 July 2007 and that:

“Having examined the information available in the Galaxy system, the Board was not in a position to approve the list of recommended candidates for the following reasons: The Board found that, according to the PCO’s evaluation as it is recorded in the Galaxy system, [the applicant], recommended candidate, does not fully meet the communication and leadership competencies. In addition to that his awareness of the inter-linkages between the trading system and commodities needs to be strengthened. Therefore he does not fully meet the work experience requirement as it was defined under the evaluation criteria. On the basis of the above considerations the Board requested that either the name of [the applicant] be removed from the recommended list or the PCO provides the clarifications as to why he is considered as meeting all established evaluation criteria.”

13. The case was returned to the PCO, who, after verbal consultation with the two other interview panel members, opted for removing the name of the applicant from the list of recommended candidates. The new list, which thus only contained the name of the candidate who was finally selected, was resubmitted to the CRB.

14. The CRB reviewed the case on 13 July 2007 and concluded that the recommended candidate, i.e. the candidate who was finally selected, had been evaluated on the basis of the pre-approved evaluation criteria and that the applicable procedures had been followed. The DH selected the only recommended candidate on 19 July 2007.

15. The applicant was informed orally and by memorandum dated 30 July 2007 from the Director, DITC, that another candidate had been selected for the post. One day later, UNCTAD staff was informed through an all-staff email of the appointment of the new Head of the Commodities Branch, DITC, effective 1 August 2007.

16. By email dated 2 August 2007, the applicant asked the O-i-C, Human Resources Management Service (HRMS), UNCTAD, to confirm that he had been recommended hence rostered for the post, as per information received from the PCO.

17. The O-i-C, HRMS, UNCTAD, sent an email to the applicant, dated 15 August 2007, stressing that the applicant's name had been removed from the recommended list, because the CRB "felt that [he] did not meet the experience requirement as it was defined under the evaluation criteria".

18. The applicant submitted a request for review of the decision not to select him for the post of Head of the Commodities Branch, DITC, to the Secretary-General on 25 September 2007.

19. By memorandum dated 14 November 2007, the Chief, Administrative Law Unit (ALU), Office of Human Resources Management (OHRM), in response to the applicant's request for review, informed the applicant that the decision not to select him for the post had been taken in accordance with the rules and did not violate the applicant's rights; she also informed him of his right to appeal against that decision.

20. On 26 November 2007, the applicant submitted an incomplete statement of appeal against the decision not to select him for the post to the Geneva Joint Appeals Board (JAB), and a complete statement of appeal on 15 January 2008. The JAB issued its report on 10 November 2008, concluding that the decision not to select the applicant for the post of Head, Commodities Branch, DITC, UNCTAD, was a valid exercise of administrative discretion and that the applicant's candidature had been given full and fair consideration. By letter dated 19 January 2009, the applicant was informed of the Secretary-General's decision to accept the JAB recommendation and to take no further action on his case and was notified of his right to appeal against that decision.

21. Following a request by the applicant, he was transferred within UNCTAD to become Special Adviser in the Division on International Trade in Goods and Services and Commodities, on 1 August 2008. The applicant resigned from the Organization on 31 March 2009.

22. The applicant submitted an application to the former United Nations Administrative Tribunal (UNAT) on 19 March 2009; since the application did not comply with the requirements of article 7 of the Rules of the UNAT, the Secretary of the former UNAT sent it back to the applicant, who submitted a corrected

version on 20 May 2009. The respondent submitted his answer thereto on 4 December 2009. The application was transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010 and the applicant submitted his observations on the respondent's answer on 25 March 2010.

23. A directions hearing on this and two other applications submitted by the applicant was held on 4 May 2010 and a full hearing on this and on one of the two other applications pending with the Tribunal was held on 23 June 2010.

Parties' contentions

24. The applicant's principal contentions are:

- a. The evaluation undertaken by the PCO in the framework of the selection process was factually incorrect: his experience was misrepresented and the record shows that he was "thoroughly familiar with the international trading system as it affects commodity trade";
- b. The interview panel's evaluation of his competencies, namely communication and leadership, is in direct contradiction with the rating "fully competent" he obtained for both these competencies in his last three performance evaluations. In addition, his performance evaluations were done since 2002 by the PCO for the post under review;
- c. In its evaluation of the applicant's leadership skills, the interview panel found, *inter alia*: "The means he uses to motivate his staff does not always reach the performance objectives sought. He can be impatient if staff performance is not up to his expectations." This evaluation is in direct contradiction with the ratings the applicant had received in his e-PAS, i.e. "outstanding" both for "Empowering others" and for "Management of Performance" in two of the last three e-PAS and "Fully competent" in the third; more specifically, in the 2004/2005 evaluation it was stated that "[the applicant] has been outstanding in managing a Section with

various problems in terms of staff resources. He has been extremely conscientious in empowering staff members by giving them clear responsibilities according to their levels of competence. This has resulted in a very useful understanding of the strengths and weaknesses of each staff member under his supervision”; the evaluation for 2005/2006 states: “The degree of empowerment and responsibility he has accorded to his staff, his concern with the manner that this empowerment is exercised as well as his doing so with a perfect respect for gender and diversity are also outstanding”;

- d. The respondent’s argument that these evaluations were not relevant since they were for the applicant’s performance at the P-5 level, whereas the post under review was at the D-1 level, cannot stand, since such a position would seriously compromise the objectives of the staff selection process;
- e. He had served as O-i-C of the Commodities Branch from 1 November 2006 to 31 July 2007 and as such had performed all the functions of the post; it is “very unlikely that [he] would have been left to exercise the functions of the post for such a long period if [he] had been unqualified”; in a communication from the PCO of 20 August 2007, with respect to the granting of an SPA to the applicant, the PCO certified “that [the applicant] carried out the duties as Officer-in-Charge in a fully satisfactory manner and [she] requested that [he] be granted a Special Post Allowance for the period from 1 February to 31 July 2007”; also, in the evaluation of his work for the period he was O-i-C, it was noted that: “The Branch has delivered a credible and reasonable level of results despite major shortfalls in staff size.” The fact that no e-PAS had been established for the period he served as O-i-C at the day of his application to the former UNAT was due to circumstances out of his control;

- f. The respondent's assertion that what is questioned is his "effective communication with staff" based on his performance as O-i-C, which also raises questions about his leadership skills" is not supported by any evidence and appears as "an attempt to come up with an explanation after the fact"; also, the argument that the evaluation was based on the applicant's Personal History Profile (PHP) and his interview is false, since he obviously did not provide such a negative evaluation of himself in his PHP and during the interview, these competencies were only touched upon once and the respondent did not provide any example of specific replies given by the applicant which would support such a negative evaluation, simply because there were none;
- g. The qualifications of the successful candidate were misrepresented by the PCO and the evaluation was based on mere assertions unsupported by any evidence; even more, the PCO had been cautious not to appoint the successful candidate as O-i-C of the Branch he had been working for since 2006 because several colleagues in that Branch had made objections thereto;
- h. Moreover, "the record states that [the successful candidate] left a D-1 post in FAO two and a half years before retirement in order to return to a non-supervisory P-5 post in UNCTAD", which speaks for itself; according to the former supervisor of the successful candidate at FAO, "the circumstances surrounding his leaving FAO were available to UNCTAD in the form of letters and other documentation"; the successful candidate's former supervisor also discussed informally with the PCO about the qualifications of the successful candidate and the applicant requests disclosure of the content of that conversation;
- i. Even though the record of the selected candidate's leadership qualities at FAO constitutes the only evidence in this respect, it was not taken into account and the PCO fabricated the evaluation

of the leadership qualities of the selected candidate “in direct contradiction with her own direct experience”;

- j. The difference between the available information and the actual evaluation communicated to the CRB proves that the evaluation constituted an abuse of discretion; he was not given the opportunity to rebut any of the negative comments made about him and notes that this is in contradiction with the jurisprudence of the former UNAT (judgement No. 1209, *El-Ansary*, (2005)).

25. The applicant requests the Tribunal to order:

- “a. That [he] be awarded compensation equivalent to the difference between [his] emoluments at the P-5 [step 13] and D-1 levels for the period between the appointment of the successful candidate and [his] scheduled retirement date, that is, two years and three months;
- b. That [he] be further awarded compensation for the loss of pension rights, resulting in lower future pension; and
- c. That, finally, [he] be awarded compensation for the damage to [his] professional standing and reputation and for psychological injury, in the amount of United States dollars 50,000.”

26. The respondent’s principal contentions are:

- a. Staff members do not have a legal right to be selected to a particular post and the Secretary-General has discretionary power with respect to the assessment and selection of candidates to a post;
- b. The Secretary-General’s discretionary power must not be abused and must be exercised fairly and without extraneous considerations or improper motivation; the former UNAT held that all candidates for a post must be given full and fair consideration and the respondent bears the burden of proof in this respect; in the case at hand, the Administration provided sufficient evidence to show that the applicant was fully and fairly considered for the post under review;

- c. The sequence of events shows that all candidates were fully and thoroughly considered: the applicant was short-listed, interviewed and put on the list of recommended candidates submitted to the CRB, which, in accordance with Section 5.5 of ST/SGB/2002/6 and in view of the information contained in Galaxy, requested clarifications from the PCO as to whether the applicant did indeed meet the established evaluation criteria; at the hearing, the respondent conceded that by requesting that in the absence of such clarification, the applicant should be removed from the list of recommended candidates, the CRB exceeded the mandate accorded to it in Section 5.5 of ST/SGB/2002/6;
- d. The PCO chose the latter option and resubmitted the list of recommended candidates, which then only contained the successful candidate, to the CRB, which approved the proposed candidate; the fact that the applicant was not given the opportunity to rebut the information provided to the CRB is consistent with the jurisprudence of the former UNAT which recognizes the need to preserve the confidentiality of appointment and promotion processes and, as the JAB held in its report of 10 November 2008, there is no requirement to submit evaluations by interview panels to the candidates for “rebuttal”;
- e. It was the lack of the applicant’s qualifications, rather than the respondent’s alleged abuse of discretion, that led to the applicant’s non-selection; the respondent discharged his burden of proof that the applicant was given full and fair consideration; the applicant was not deemed suitable for the post, nor apt for his inclusion on the roster for subsequent similar vacancies;
- f. Since the applicant’s candidature was given full and fair consideration and the applicant failed to prove that the decisions taken by the respondent were ill-motivated, the applicant suffered no damage which could be compensated; the applicant did not present any evidence establishing the mere existence of any

damages, nor the causal link between the alleged damages and any actions of the respondent;

- g. The applicant's requests for disclosure of additional documentation is irrelevant and lacks any probative nature and should be dismissed in their entirety; the same applies to the applicant's comments on the qualifications of the successful candidate;

27. The respondent requests the Tribunal to dismiss the application in its entirety.

Considerations

28. The former UNAT held that "it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled" (cf. judgement No. 828, *Shamapande* (1997)). This Tribunal decided that except in cases of patent errors, it falls not upon the judge to decide whether an applicant is suitable for a post (UNDT/2010/065, *Krioutchkov*). The former UNAT further decided that "[w]hile the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules" (cf. judgement No. 943, *Yung* (1999)). This Tribunal confirmed jurisprudence of the former UNAT, which stated that: "[F]ormal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence of which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process" (UNDT/2010/009, *Allen*, quoting judgement No. 1122, *Lopes Braga* (2003), which quotes judgement No. 1047, *Helke* (2002)). Additionally, the former UNAT stated that "the first and greatest safeguard against the operation of prejudice lies in the procedural requirements which every set of staff regulations contains and whose main objective is to exclude improper influence from an administrative decision. ... [P]roof of prejudice is rendered unnecessary when procedural requirements have not been observed." (cf. judgement No. 1060, *Baddad* (2002), quoting judgement No. 495, *Olivares Silva* (1982) of the International Labour Organization Administrative Tribunal).

29. In the case at hand, the record leaves no doubt that the applicant was suitable for the post of Head, Commodities Branch, DITC, UNCTAD, hence he should have been on the list of recommended candidates, as the interview panel had originally decided when it put the applicant's name on the first list of recommended candidates submitted to the CRB. There is, however, no need for the Tribunal to enter into a detailed analysis of the various arguments brought forward by the parties with respect to the applicant's qualifications for the post, since the selection process was tainted by a serious procedural irregularity, which impacted on the applicant's rights to have his candidature fully and fairly considered.

30. During the hearing, the respondent himself conceded that in the present case, the CRB exceeded the mandate vested into it by former staff rule 104.14 and Section 5.5 of ST/SGB/2002/6, which provides:

“When the central review body has questions or doubts regarding the proper application of the evaluation criteria and/or the applicable procedures, it shall request the necessary information from the head of department/office, the programme manager or the ex officio member representing the Office of Human Resources Management or the local personnel office, as appropriate. If the questions are answered and the doubts are resolved to the satisfaction of the central review body, that body shall proceed as provided in section 5.4.”

31. Section 5.6 of ST/SGB/2002/6 further provides:

“When, after obtaining additional information, the central review body has found that the evaluation criteria were improperly applied and/or that the applicable procedures were not followed, it shall transmit its findings and recommendation to the official having authority to make the decision on behalf of the Secretary-General...”

32. It results from the foregoing provisions that the CRB competence is restricted to request further information in cases when it has questions or doubts. These provisions do not include a right to request the removal of a candidate from a list of recommended candidates as an alternative to a request for clarification. The CRB exceeded its mandate under Section 5.5 of ST/SGB/2002/6 when it “requested that either the name of [the applicant] be removed from the recommended list or the PCO provides the clarifications as to why he is

considered as meeting all established evaluation criteria”. On that basis, the PCO chose the first option and removed the applicant from the list of recommended candidates. This constitutes a clear breach of the applicable procedures, which had an immediate impact on and violated the applicant’s right to full and fair consideration.

33. The foregoing notwithstanding, the Tribunal finds the applicant’s argument that the selected candidate was not qualified for the post under review without any merit. As already stated above, in the absence of patent errors, it is not the role of the Tribunal to substitute its judgement to that of the Secretary-General in the assessment of a candidate’s suitability for a given post. In the present case, there is nothing on file which would allow concluding that the successful candidate was not suitable and that the applicant was the only qualified candidate and that, had the procedural flaw not occurred, he would have been selected.

34. The Tribunal already held that non-compliance with legal provisions, specified in article 2.1 of the UNDT statute, leads to the illegality of the contested decision, regardless of the seriousness of the non-compliance (UNDT/2010/009, *Allen*). It further stated that under article 10.5 (a) of the statute and as a general rule, it is necessary to rescind the contested decision once the Tribunal has established its illegality (cf. UNDT/2010/009, *Allen*; UNDT/2010/070, *Farraj*). There is no reason in the present case to make an exception to that rule. Since the present application concerns a promotion, the Tribunal is obliged, under article 10.5 (a) of its statute, to set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision.

35. Without prejudice to the considerations under paragraph 33 above, the compensation under article 10.5 (a) of the Tribunal’s statute has to be calculated on the basis of the difference between the applicant’s net base salary at the P-5 level at the moment of the contested decision and the net base salary at the applicable D-1 level, for the period between the date the successful candidate was appointed and the applicant’s SPA to the D-1 level was terminated, i.e. 1 August 2007, and the applicant’s mandatory retirement, i.e. 31 October 2009. Upon the

Tribunal's request, the UNOG Payroll Unit provided the Tribunal with the relevant figure. Taking into account that the applicant was one out of two suitable candidates that difference in salary has to be divided by two, which amounts to approximately USD4,900.

36. Moreover, the applicant is entitled to compensation under article 10.5 (b). This Tribunal has stated in judgement UNDT/2009/028, *Crichlow*, that the quantification of compensatory damages is an inexact science and has established some guiding principles for the calculation of such damages. These principles include that damages may only be awarded to compensate for negative effects of a proven breach; and that an award should be proportionate to the established damage suffered by the applicant.

37. With respect to the determination of the level of financial compensation, the Tribunal already recalled the parameters developed by the jurisprudence of the former UNAT in appointment and promotion cases: in its judgement No. 1122 *Lopes Braga* (2003), which concerns a promotion case, the former UNAT considered that the applicant should be compensated with six months' net base salary for the respondent's failure to follow his own procedures and the violation of his due process rights stemming from these procedural irregularities.

38. The Tribunal finds that it is appropriate to apply the yardstick set by the former UNAT in the case of *Lopes Braga* to the present case. The applicant was excluded from further consideration by removing his name from the list of recommended candidates. This exclusion, based on the assumption that the applicant did not fully meet the evaluation criteria, affected his professional reputation in a serious way. The negative impact on his reputation must have been even stronger within the Branch the applicant led as O-i-C for several months. In view of all the circumstances, there may be no reason to doubt that the applicant suffered emotional distress, caused to him by the irregular selection procedure. Therefore, in view of the above-stated procedural flaw, the applicant should be compensated through payment of a lump sum of USD48,000, which takes into account his net base salary at the P-5, step XIII level, for the violation of his rights.

Conclusion

39. In view of the foregoing, the Tribunal DECIDES:
- a. That the selection decision for the post of Head, Commodities Branch, DITC, UNCTAD, be rescinded and, as an alternative, that the applicant be paid USD4,900 under article 10.5 (a) of the Tribunal's statute. Should the respondent opt for the payment of compensation under article 10.5 (a), this amount is to be paid to the applicant within 60 days from the date of the issuance of this judgment, with interest thereafter at eight percent per annum until payment;
 - b. Further, that the applicant be awarded a lump sum of USD48,000 under article 10.5 (b). This amount is also to be paid to the applicant within 60 days from the date of the issuance of this judgment, with interest thereafter at eight percent per annum until payment;
 - c. All other pleas are rejected.

(Signed)

Judge Thomas Laker

Dated this 12th day of July 2010

Entered in the Register on this 12th day of July 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva