



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/009/
UNAT/1594
Judgment No.: UNDT/2010/144
Date: 13 August 2010
Original: English

Before: Judge Meeran
Registry: New York
Registrar: Hafida Lahiouel

PEROSA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
François Lorient

Counsel for respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The applicant contested the decision taken on 30 November 2005 to appoint her at the G-3 level, after having applied for and been selected for a temporary G-4 vacancy with the Office for Coordination of Humanitarian Affairs (OCHA). The applicant originally requested administrative review on 27 January 2006. On 31 May 2006, she filed a Statement of Appeal. The Joint Appeals Board (JAB) considered the matter in August 2007 and submitted its report to the Secretary-General on 27 August 2007.

2. After granting three requests for extensions to file and appeal, on 12 May 2008, the United Nations Administrative Tribunal (UNAT) received an appeal from the applicant against the decision of the Secretary-General of 29 August 2007 to take no further action in respect of the applicant's appeal.

3. UNAT was unable to consider this appeal and when it ceased to function on 31 December 2009, the appeal was transferred to the Dispute Tribunal.

Background

4. The applicant is well-qualified, with a Bachelor of Arts in International and Diplomatic Sciences and a Masters' degree in the Theory and Practice of Human Rights. She is fluent in English, French and Spanish and is proficient in German and Portuguese. At the time of applying for the vacancy in question she was studying Chinese and she had employment experience with Amnesty International for six months and as an intern with the UN Staff Union for three months in 2003. She was employed as an independent contractor at the UN in February 2004 as a Public Information Assistant. She resigned from this position in May 2005 and worked on two short-term contracts with the UN Website Section during the 2005 World Summit and the High Level Segment Debate.

5. On 30 November 2005, the applicant was appointed as a Clerk at the G-3 level for the duration of six months as a replacement for another staff member on special leave without pay. She was appointed by the Humanitarian Emergency Branch (HEB), Coordination and Response Division (CRD), Americas and the Caribbean, Europe, Central Asia and Middle East (ACAEME) Section, OCHA.

6. The following sequence of events prior to her appointment at OCHA is important because it has a direct relevance to the applicant's contention that she had a reasonable and legitimate legal expectancy regarding the appropriate grade of the appointment.

7. On 23 September 2005, OCHA circulated an advertisement for a vacancy of a "Temporary Vacancy Secretary" at the G-4 level.

8. At the interview on 29 September 2005, the Chief of the ACAEME Section (Chief of Section) informed the applicant that the appointment would be for an initial period of six months at the G-4 level. The applicant said that she was aware of the fact that the holding of a Masters' degree would not grant her a higher qualification in the General Service staff category but that she was prepared to accept an appointment at the G-4 level because it would give her an opportunity to familiarise herself with OCHA's work.

9. On 1 November 2005, the Chief of Section asked the Executive Office of OCHA to proceed with recruiting the applicant as a temporary replacement for a staff member during her absence.

10. On 3 November 2005, the Executive Officer, OCHA, wrote to the Chief, General Services and Related Categories Staffing Unit (GSRCSU), Office of Human Resources Management (OHRM), requesting that the applicant be recruited for a period of six months on a fixed-term appointment at the G-4 level.

11. On 8 November 2005, the applicant received an email from OHRM informing her that she was offered a fixed-term appointment, subject to medical clearance. The grade of the appointment was not indicated.

12. Having passed the medical examination, on 14 November 2005, the applicant received an email from OHRM requesting information in connection with a visa application in which no mention was made of the grade of the appointment.

13. On 21 November 2005, the applicant attended a meeting at OHRM for the purpose of signing a contract. She noticed that the level of the grade was indicated as G-3 and not G-4. She states that when she queried this, OHRM informed her that it was for them to decide upon the appropriate entry level and that this exercise was independent of the selection panel's work. The applicant asked to see any document describing the policy. The applicant states that this request was refused, apparently on the basis that it was an internal document. The applicant decided to defer the signing of the contract to consider the changed circumstances.

14. On the same day the applicant said she sought a meeting with the Chief of Section who had interviewed her and he expressed surprise at what the applicant described as the "downgrading" of the post and said that he would seek an explanation from the OCHA Executive Officer.

15. On 22 November 2005, the Executive Officer, OCHA, contacted the applicant and gave her reasons why she could not be appointed at the G-4 level in this post or elsewhere within the UN. According to the applicant, she was informed that if she did not accept the position, they would have to offer it to another candidate. The applicant was granted more time to consider the matter.

16. On 25 November 2005, the applicant wrote to the Executive Officer, OCHA, expressing concern at the level of the appointment offered. She said that she had been given to understand that the post was at the G-4 level and repeated her request for the staff regulations and rules. She was informed by the Executive Officer that the matter would be referred formally to OHRM.

17. On 28 November 2005, Ms. Mindlin, Human Resources Officer, OHRM, emailed the applicant, expressing concern at the applicant's allegation that explanations had not been offered for the appointment being at the G-3 level rather than at the G-4 level that was advertised. She referred to a discussion with the applicant on 21 November 2005 and added that "many programme managers from various departments, do not understand the recruitment guidelines and erroneously advise candidates on these matters, despite the fact that our office has consistently asked them not to do so". It is clear that OHRM was stating its formal position in relation to recruitment matters and asserting their primacy over the individual program managers. This email is significant in that the applicant is being given written confirmation that the current guidelines on recruitment are very specific and that in order to be recruited at the G-4 level, a candidate must have either five years of prior experience in the UN system or 15 years of relevant experience. If a candidate did not meet either of these criteria, then he or she must be recruited at the G-3 level. Given the applicant's assertion regarding the downgrading of the post, OHRM informed her that the grading system for entry-level to a G-3 post is based on the candidate's experience and not on the level of the post. Ms. Mindlin added that, as a result of this episode, she was instructing all departments to indicate in future vacancy notices the appropriate grade and rules governing the grading. This would seem to the Dispute Tribunal to be a sensible instruction. OHRM placed the options very clearly before the applicant: she could accept the appointment at the G-3 level or another candidate would be offered the post. The applicant was left in no doubt as to the reasons why she could not be offered a G-4 appointment and it was her decision whether to accept the appointment at the grade offered. There was, in this respect, no misrepresentation of the position before the applicant made her decision to except the appointment at the G-3 grade.

18. On 30 November 2005, the applicant met Ms. O'Connor, Human Resources Officer, OHRM and signed the contract accepting the appointment at the G-3 level together with a document which records her understanding that her educational background did not of itself give rise to any special entitlements. A Note for the File

by Ms. O'Connor, which is at Annex 6 of the respondent's answer to the applicant's Statement of Appeal, is in the following terms:

During the pre-recruitment formalities, [the applicant] queried the level of G-3/II that was being offered to her. She discussed the level with OCHA/Executive Office, the programme manager and OHRM/GSRCSU. After deliberating over the entry-level, she decided to accept the offer and reported today 30 November 2005.

This issue was discussed again at length during the induction procedures. The candidate was informed that this was the highest entry-level that could be offered to her under the current recruitment guidelines and that if the level was not acceptable to her, she should not continue with the induction.

19. The applicant states that she signed the letter accepting the appointment under protest, thereby reserving her position to further argue after her appointment that she should have been appointed at the G-4 level. Whatever may have been the applicant's intentions, the Tribunal has to consider the quality of the evidence that is before it, particularly if that evidence is in documentary form. There is nothing in the letter of appointment to indicate that the applicant's acceptance was conditional. Furthermore, at the time of signing the letter of appointment she signed a separate document accepting the offer at the G-3 level notwithstanding the fact that she had a post-graduate degree. By signing this document, the applicant accepted that it would be incorporated as part of her terms of employment by the respondent. The document is Annex 10.2 to the applicant's Statement of Appeal (Annex 7 of the respondent's reply of 12 November 2008).

The claim before the Dispute Tribunal

20. It is not the function of the Tribunal to review and examine the accuracy of the Joint Appeals Board (JAB) report, but to consider whether the respondent acted properly and with due regard to the applicant's due process rights in deciding, in the particular circumstances of this case, that she should be appointed at the G-3 level rather than the G-4 level at which the position was advertised and for which she was interviewed and recommended.

21. In considering this claim it is necessary to address the following questions:
- a. What are the relevant rules and procedures governing these appointments?
 - b. Did the applicant receive fair consideration in accordance with the rules and were her due process rights respected?
 - c. Was the conduct of various managers in positions of responsibility such that they gave rise to a reasonable and legitimate legal expectancy that she would be appointed at the G-4 level? Are there facts and circumstances to be taken into account to contradict and challenge the applicant's assertion that such an expectancy had arisen?
 - d. Is there substance in the applicant's contention that Personnel Directive PD/1/94 was abolished by ST/SGB/1997/1 (Procedures for the Promulgation of Administrative Issuances) and was resurrected by the respondent to justify the decision not to appoint the applicant at the G-4 level? Did PD/1/94 lapse on 31 December 1999? If it did lapse, was it relied upon in order to achieve an outcome detrimental to the applicant? If so, did it amount to an abuse of authority?
 - e. Is the applicant correct in asserting that the insertion of the Note for the File of 30 November 2006 into her file was in breach of ST/AI/292 (Filing of Adverse Material in Personnel Records) because it was not copied to her for comment before being placed on her file?
 - f. Is the applicant correct in alleging that she was denied a right to request a reclassification of her grading? Did she, in fact, request a reclassification in accordance with ST/AI/1998/9 (System for the classification of posts)?

Legal provisions

22. The relevant provisions of the Annex to Personnel Directive PD/1/94 of 6 July 1994 (Recruitment of external candidates to posts in the General Service and related categories at Headquarters) provide as follows:

3. Recruitment of new staff at the G-1 to the G-3 level will normally be at the classified level of the post, subject to their meeting the recruitment criteria as set forth in Appendix A. At the G-4 level and above, staff will normally be recruited at one level below the classified level of the post. The purpose of this entry level is to provide time for induction into the procedures of the Organization and complete familiarization with the job to be performed. Staff will be required to perform satisfactorily at the entry level for a minimum period before they can be considered for promotion to the classified level of the job . . .

...

6. As indicated in paragraph 3, for posts at the G-4 level and above, candidates who meet the relevant recruitment criteria in Appendix A will normally be recruited one level below the classified level of the post. However, candidates for posts at the G-4 level who not only meet the recruitment criteria but also have substantial relevant experience (a minimum of five years at the appropriate level within the United Nations system, or fifteen years outside the system), may be recruited at the classified level of the post, with the approval of the Director, Recruitment and Placement Division, OHRM.

23. ST/AI/1998/9 sets out the policies and procedures for the maintenance of the post-classification system and, in so far as they are relevant to this case, the provisions of which are set out below:

1.1 Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of administration at offices away from Headquarters, or other appropriate official in the following cases:

- (a) When a post is newly established or has not previously been classified;

(b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution;

(c) Prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification;

(d) When required by a classification review or audit of a post or related posts, as determined by the classification or human resources officer concerned.

1.2 The Office of Human Resources Management, or the local human resources office in those cases where authority for classification has been delegated, shall provide classification advice when departments submit, with their budget requests, job descriptions for new posts and for the reclassification of existing posts.

1.3 Incumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within the office and/or a General Assembly resolution may request the Office of Human Resources Management or the local human resources office to review the matter for appropriate action under section 1.1 (d).

24. Section 6 describes the appeal procedure. Paragraph 6.1 provides that appeals for posts in the General Service categories at Headquarters shall be submitted in writing to the Assistant Secretary-General for Human Resources Management.

25. Appeals are dealt with by the Classification Appeals Committees, including the New York General Service Classification Appeals and Review Committee (the Committee), as established in accordance with section 7, which states that its purpose is “to examine classification appeals and advise the Assistant Secretary-General for Human Resources Management thereon or the respective head of office, as appropriate”.

Considerations

26. It would appear that the applicant’s primary attack on the way she has been treated is based on the belief that given her excellent academic qualifications she ought to have been placed at a higher level. The respondent disagrees and states that it is precisely for that reason that she was asked to sign a document making it clear

that educational background did not give rise to any special entitlements. The rule regarding grading had to apply. Whilst the respondent can be criticised for failing to provide the applicant with a copy of the relevant regulation or rule when she first raised the matter, it is clear on the evidence that before she signed the letter of appointment she knew that the strict application of the relevant rule meant that she could not be assigned at the G-4 level.

27. The next question to consider is whether, in spite of the rules implemented by OHRM, the applicant entertained a reasonable and legitimate legal expectation that she would be appointed at the G-4 level. There is no doubt that she applied for and was interviewed for a post at that grade. Furthermore the panel recommended that she be appointed at the G-4 level. The first intimation she had that the appointment would be at the G-3 level was when she went to sign her contract. Whilst the respondent's conduct did initially give rise to an expectation on her part, particularly in view of the fact that the person who chaired the panel was the Chief of Section and the panel had recommended that she be appointed at the G-4 level, it is also the case that OHRM who is responsible for implementing the UN's recruitment policy and procedures had made it clear to the applicant that she could not be appointed as a G-4. The applicant takes issue with the fact that during the initial procedural steps leading up to the preparation of her contract no mention was made of the grade, thereby confirming her assumption that it would be at the G-4 level. Against that, there is clear documentary evidence which indicates that the applicant was told that she could not be offered the appointment at the G-4 level and if she was not minded to accept it, she should so indicate and the post would have been offered to someone else.

28. It has not been alleged by the applicant that a binding contract appointing her at the G-3 grade had not been entered into. Nor for that matter is it being alleged that the contract should be set aside because of any misrepresentation. However, there is a clear allegation that the applicant, who was very keen on obtaining employment with the UN consistent with her qualifications, experience and commitment, felt

pressurised to sign the letter of appointment and what has been described as a waiver. It is said that the inequality of bargaining power at the point at which the contract was signed placed the applicant in an impossible dilemma. If she did not sign the waiver she was at risk of losing the opportunity of the appointment. On the other hand she expresses the view that her ability to challenge the decision could best be exercised once she had accepted the appointment and was within the system. An assessment in relation to this allegation is not dependent solely on the subjective feelings of the applicant. The evidence is more consistent with the applicant having taken a conscious decision to maximise her chances of challenge from within. Accordingly, whilst I accept, in principle, the inequality of bargaining power, I have no hesitation in concluding that that was not the motivating force or factor leading to the signing of the letter of appointment.

29. The question which arises in this case is whether an expectation created in the mind of the staff member as a result of actions by the selection panel should be displaced by contrary statements made by those discharging functions in the human resources management team. OHRM has primary responsibility for ensuring that proper procedures are followed by departmental managers and team leaders. They are, in that sense, guardians of the recruitment policies and procedures of the UN. Ms. Mindlin, in her email set out above, has placed her finger fairly and properly on a significant source of confusion and problems in personnel-related matters when she pointed out to the applicant that managers sometimes give incorrect information because of their lack of familiarity or understanding of the relevant regulations or procedure.

30. The applicant is mistaken in her allegation that the Note for the File dated 30 November 2006 being placed in her personnel file was in breach of ST/AI/292. Paragraph 2 of ST/AI/292 provides:

Adverse material shall mean any correspondence, memorandum report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member.

The Note for the File is a factual record and does not, in my view, meet the definition of adverse material as contained in paragraph 2. Moreover, even if the Tribunal had found for the applicant in this regard, this issue does not, of itself, have any direct bearing on the fundamental question of whether placing the applicant in a G-3 grade for a vacancy advertised at G-4 was a proper exercise of discretion under authority delegated by the Secretary-General to OHRM.

31. The conduct of the various individuals involved on the management side have been subjected to detailed criticism in many other respects which it is unnecessary to deal with it since they have no direct relevance to the issue that has to be decided

32. The applicant's request for a review of the decision to grade her at the G-3 level was denied by the Administrative Law Unit on 7 March 2006. There is no evidence that she had made an application for a reclassification under ST/AI/1998/9 as set out above.

33. The applicant's complaint that she was not afforded her due process rights is not supported by the evidence. Furthermore there is nothing to support allegations of undue pressure, harassment or abuse of authority. It is incumbent upon any party making such serious allegations to produce the evidential backing to support them.

34. The applicant further contended in paragraph 13 of her application that PD/1/94 was abolished by ST/SGB/1997/1 and was "resuscitated" by the respondent to justify the decision not to appoint the applicant at the G-4 level. This is another very serious accusation which is not supported by the evidence.

35. In accordance with ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules), the Assistant Secretary-General for Human Resources Management has delegated authority to recruit staff members in the general service and related categories at headquarters. The then Assistant Secretary-General issued a Decision for the Record on 27 December 1999 that OHRM will continue to follow the practice recorded in PD/1/94 pending the finalisation and issuing of an administrative instruction on recruitment, replacement and promotion of staff in the general service

and related categories in New York. The respondent submits that the Guidelines on External Recruitment for General Service Posts issued on 6 March 2006 confirm the Personnel Directive.

36. In the circumstances, the applicant cannot reasonably say that those in OHRM had in some way deliberately manipulated the relevant provisions in order to deny the applicant a legitimate right to be appointed at the grade for which she had applied. Armed with the knowledge that OHRM considered that the rules precluded them from offering her the appointment at the G-4 level and the reasons why they took this view, it was for the applicant, as a freely contracting person, to decide whether or not to accept the appointment. She did so accept on the basis of the clear oral and written conditions governing her appointment.

Conclusion

37. Considering the above factual findings and the application of the relevant administrative instructions and Personnel Directive and in the absence of any evidence of a denial of due process rights, the application fails and is dismissed in its entirety.

(Signed)

Judge Meeran

Dated this 13th day of August 2010

Entered in the Register on this 13th day of August 2010

(Signed)

Hafida Lahiouel, Registrar, New York