



UNITED NATIONS DISPUTE
TRIBUNAL

Case No.: UNDT/NY/2010/066

Judgment No.: UNDT/2011/023

Date: 28 January 2011

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

SAHEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Alan Gutman, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant contests the decision not to appoint him to the position of Operations Assistant at the G-6 level in the Department of Safety and Security (“DSS”) at United Nations Headquarters, following his successful application and selection for the post. He also challenges the decision to unilaterally reassign him within DSS, and the harassment of which he was allegedly the victim arising from a restriction placed on his carrying of a weapon in his official capacity, resulting in his medical evaluation.

2. The Tribunal issued three case management orders in this matter, being Orders Nos. 146, 210 and 318 (NY/2010). A case management hearing was held on 30 November 2010. With the agreement of the Parties, the Tribunal determined that the receivability of the Applicant’s claims regarding the contested decisions would be dealt with first, with a consideration of the merits of each claim to follow in the event they were found receivable. The application, the Respondent’s reply, and subsequent documentation and submissions constitute the pleadings and the record in this case.

Scope of the application

3. The primary administrative decision challenged by the Applicant, referred to in the pleadings as “the First Decision”, is that conveyed to him by email dated 30 April 2009 not to appoint him to the post of Operations Assistant at the G-6 level (“the Post”) in DSS, advertised by Vacancy Announcement No. 08-SEC-DSS-419173-R-NEW YORK (“the Vacancy Announcement”), on the grounds that he had not successfully passed the United Nations Administrative Support Assessment Test (“the ASAT”).

4. The “Second Decision” the Applicant challenges in his application is that of 1 December 2009 to end his temporary assignment with the Department of Regional Operations (“DRO”) and to return him to the Division of Headquarters Security and

Safety Services (“SSS”). At the case management hearing, in clarifying the scope of his application and the decisions he was challenging, the Applicant stated words to the effect that “after receiving the ... letter, I automatically went back to the other duties—they needed me back [in DRO]. So, I don’t contest that”. Therefore, the Applicant having effectively withdrawn his claims regarding the Second Decision, the Tribunal needs not consider them further.

5. At the case management hearing, the Applicant confirmed that, as per his pleadings, he also sought recourse for what he said was conduct constituting harassment and retaliation, relating to a restriction placed on his authorisation to carry a weapon for approximately two months in February–March 2010, and his having to undergo a subsequent medical assessment prior to this restriction being lifted (collectively called, “the Alleged Harassment”).

6. The Applicant also raised objections in relation to the process used to select the person currently occupying the Post on a temporary basis, maintaining that that person was unsuitable for the Post, had not even applied for the Post and had not gone through any selection process, yet stood a better chance of securing the permanent position than the Applicant. He alleged that the Executive Office facilitated the transfer of this colleague to join an assignment as Operations Assistant with DSS and expressed his disappointment that the Executive Office had avoided its rules and policy to make exceptional transfers for certain individuals and not others. He further contended that the same Operations Assistant Post was advertised twice in the past (in April and July 2007) and that the ASAT had not been specified as a requirement. These issues were raised apparently in support of his case regarding the First Decision and the Applicant did not suggest that he challenged this decision separately.

7. The Applicant also contended that ST/AI/2006/3 does not make the ASAT mandatory for any position, and that the ASAT written language test is not a useful test for DSS, as distinct from a written technical test. The Applicant’s contentions regarding the alleged conduct of the Office of Staff Legal Assistance (“OSLA”) in his

interactions with it are outside the scope of this application and, save to mention them, I will not deal with them further.

8. The Applicant sought specific performance as a sole remedy in his application. Being unrepresented, he was given the opportunity to clarify that he sought financial compensation in the alternative, if the matter were to be decided in his favour, which he did. The Respondent did not raise any objection to this clarification and amendment to the relief sought.

9. At the case management hearing, the Tribunal suggested to the Parties that mediation might be an appropriate way to reach a mutually beneficial outcome in this case, particularly as the Parties' relationship was an ongoing one and in view of the peculiar circumstances of the case—notably, that the Applicant had applied, was short listed, interviewed and selected despite his failure to satisfy the ASAT criteria stipulated in the Vacancy Announcement. While Counsel for the Respondent indicated a willingness to seek instructions to have the case referred to mediation, the Applicant stated that he was not willing to proceed to formal mediation. Therefore, there appearing to be no material dispute of fact relating to the receivability aspects of the First Decision or the Alleged Harassment, the Tribunal indicated that it may be appropriate to determine firstly the issue of receivability as a preliminary point. The Parties were provided with an opportunity to make further submissions on receivability, which were received in due course and have been fully considered by the Tribunal.

Facts

10. In August 2005 the Applicant commenced employment with SSS in New York as an S-2 level Security Officer.

11. In September 2008 the Applicant applied and was selected for a six-month Temporary Vacancy with DRO, DSS, as an Operations Assistant. He commenced in this position in October 2008.

12. In November 2008 the Vacancy Announcement was issued for the Post. The Applicant stated that the responsibilities of the Post were the same as those that he was then undertaking—that of Operations Assistant with DRO—with the difference being that the said Vacancy Announcement was for a budgeted post, rather than a mere temporary vacancy.

13. It is common cause that under the heading “Qualifications”, sub-heading “Education”, the Vacancy Announcement required that the candidate “[m]ust have passed the United Nations Administrative Support Assessment Test in English at New York Headquarters”.

14. The Applicant was short-listed, interviewed, and recommended for the Post. On 23 April 2009 he received a notice of his selection for the Post from the Executive Officer, DSS, stating that his promotion would be effective 1 May 2009. The Applicant says he informed his colleagues, family and friends immediately.

15. On 30 April 2009 the Office of Human Resources Management (“OHRM”) advised the Executive Office, DSS, that the Applicant had to pass the ASAT exam prior to his appointment. This email stated:

[The Applicant] has been selected for a G position. Before he can be officially selected for this position, he must pass the ASAT. Could you please contact him tomorrow and advise him of a day when he can come and take the test. He may be put on priority stand-by if we do not have any availability.

16. On the same date, 30 April 2009, the Applicant received a further letter from the Executive Officer, DSS, informing him that it superseded the letter of 23 April 2009, and advising him that his appointment to the Post was “contingent upon [his] successful passing of the UN’s ASAT”. The Applicant was contacted by the Respondent in relation to the scheduling of this exam. He had previously attempted the exam on 2 January 2008 before occupying the Temporary Vacancy but had been unsuccessful.

17. On 26 June 2009 the Applicant sat the ASAT, but did not pass the exam on this occasion either.

18. On 1 August 2009 the Applicant's assignment on the Temporary Vacancy was extended until 31 January 2010. The Applicant alleges that this was because he was still undergoing informal discussions with a view to resolving the dispute.

19. On 1 December 2009 the Applicant was informed in writing that he would be reassigned to the Conference Platoon, SSS, and his reassignment was effected on 4 January 2010. The Applicant submits that his supervisor at the 24/7 Communication Centre, DSS, informed SSS that the Applicant's presence was required in DSS for operational reasons, yet his supervisor's view was not considered.

20. On 24 January 2010 the Applicant sought management evaluation of the First Decision.

21. On 19 February 2010 the Applicant called a staff member of the Management Evaluation Unit ("MEU") enquiring about the status of his request for a management evaluation of the decision to reassign him within DSS, which was pending at that time. The Respondent alleges that, on that occasion, the Applicant stated that he thought the decision to allow him to carry a weapon was irresponsible in the prevailing circumstances. In the conversation, he also allegedly told the MEU staff member not to convey the content of the telephone conversation to the Administration. This is said by the Respondent to have alarmed the MEU staff member who called the Executive Officer, DSS, to relay her concerns, upon which the Executive Officer, DSS, informed the Officer-in-Charge, DSS, who issued the instruction for the Applicant to be placed on weapons restriction, in accordance with standard practice.

22. On 24 February 2010 the Applicant was informed by the MEU that his request was not receivable in relation to the First Decision as the contested decision was notified to him by letter of 30 April 2009 and he did not request management evaluation until January 2010, well outside of the 60-day time limit prescribed by provisional staff rule 11.2(c). On the same day, 24 February 2010, he received a phone call from SSS informing him that his weapon would be restricted, and he was

subjected to a medical evaluation and assessment process, on the basis that he was alleged to have said that he was not comfortable carrying a weapon in the circumstances. The Applicant alleges that the timing of the weapons restriction to coincide with the rejection by the MEU of his case indicates harassment.

23. On 25 February 2010 the Applicant sought the assistance of OSLA. He explains that he met OSLA staff “a few times” but was ultimately told on 20 April 2010 that OSLA declined to represent him before the Dispute Tribunal.

24. On 21 April 2010, after medical assessment, the Applicant’s restriction on carrying a weapon was lifted.

25. On 22 April 2010 the Applicant submitted his application in respect of the instant case.

Applicant’s submissions

26. The Applicant’s main submissions may be summarised as follows.

First Decision

a. The Applicant did not delay unduly and submitted his application to MEU on 24 January 2010, only 24 days after he officially concluded his assignment as an Operations Assistant with DSS.

b. The Applicant sought all available alternatives for an informal solution of his case. In respect of the First Decision, the Applicant understood from the information contained on the MEU website, that “this deadline [for management evaluation] may be suspended pending efforts for informal resolution conducted by the Office of the Ombudsman”. He says he attempted to use informal resolution processes first as he was advised by a staff representative that they were faster and often successful. His implication is that, effectively, this suspends the deadlines during which management evaluation must be requested.

c. The Applicant submitted at the case management hearing that, two weeks after receiving the notification, he contacted the Staff Representative with a view to having him advocate on his behalf for an informal resolution of the matter. The Applicant says that thereafter, through the latter part of May 2010, the Staff Representative attempted to resolve the matter informally with the Executive Office. The Applicant also stated that either he or the Staff Representative had spoken with the Ombudsman's Office via telephone at certain points (the precise dates, occasions and content of which he did not identify).

d. Paragraph 7.5 of ST/AI/2006/3 does not make the ASAT mandatory for any position, since the ASAT is not even mentioned. The ASAT test is a very poor method for identification of skilled and professional Security Operations Assistants for DSS and irrelevant to security operations assignments. Furthermore ASAT test proficiency requirements can tie up the best Security Operations Assistants in less effective roles, creating a critical shortfall of skilled and dedicated Operations Assistants in the Department. Only supervisors with strong knowledge of security operations can successfully assess and determine the most qualified candidate for a Security Operations Assistant post.

Alleged Harassment

e. The Applicant says he did not request management evaluation of the Alleged Harassment since it originated only a few hours after he received the MEU decision dated 24 February 2010. He maintains that the Alleged Harassment was clearly a retaliation and character assassination which greatly inflicted moral and reputation damage and should be compensated financially.

Respondent's submissions

27. The Respondent's main submissions may be summarised as follows.

First Decision

a. The Applicant is time-barred from challenging the First Decision. The First Decision was notified to the Applicant on 30 April 2009 and he did not request management evaluation of that decision until 25 January 2010, i.e. almost seven months after the 60-day period prescribed under staff rule 11.2(c) had expired. As a consequence, the MEU, in its letter of 24 February 2010, correctly considered the Applicant's request for management evaluation of the First Decision time-barred and not receivable under staff rule 11.2(c).

b. In the case of *Costa* UNDT/2009/051, the Dispute Tribunal held that “[t]here is no express power in either the Statute or the Staff Rules for the Tribunal to extend or waive any deadlines or other time constraints set by the Staff Rules. To the contrary, Article 8.3 contains an express prohibition in relation to management evaluation deadlines”. The Dispute Tribunal concluded that, pursuant to this provision, it had “no jurisdiction to extend the deadlines for the filing of requests for either administrative review or management evaluation”. This was confirmed by the Appeals Tribunal in *Costa* UNAT-2010-036.

c. The Applicant in his submissions attempts to cast responsibility for missed deadlines on OSLA; however, in the email of 20 January 2010 which the Applicant tendered, OSLA specifically warned the Applicant of the importance of deadlines, and that he alone was responsible for ensuring those time limits were met. The Applicant claims that he sought assistance of the Staff Representative and that this suspended the deadline for management evaluation. However, the Parties never agreed to resolve the issue that gave rise to the First Decision informally. The Staff Representative and the

Executive Office (“EO/DSS”) spoke on two occasions, but the EO/DSS declined to negotiate this matter.

Alleged Harassment

d. The Applicant does not provide any evidence that he requested management evaluation of the alleged harassment claim, including the weapons restriction and the subsequent evaluation by the Medical Services Division. Furthermore, he fails to justify why these claims are receivable. Accordingly, there are no grounds to find the matter receivable before the Tribunal (see *O’Neill* UNDT/2010/203).

e. The Applicant was advised of the decision relating to the Alleged Harassment on 24 February 2010 and should have submitted a request for management evaluation by 26 April 2010, at the latest. He did not do so, and therefore this claim is not receivable by the Tribunal (see *Andati-Amwayi* UNDT/2010/193).

f. In any event, in making generalised and unsubstantiated claims, the Applicant fails to discharge his burden of showing sufficient evidence of harassment, prejudice or other such kinds of improper motives. The decision to place the Applicant on temporary weapons restriction was properly made by the Officer-in-Charge of the SSS, in accordance with the standard practice of the DSS, and in response to comments made by the Applicant to a legal officer within the MEU.

Consideration

First Decision

28. It is common cause that the Applicant received notification of his selection for the Post on 23 April 2009, followed by a notification a week later on 30 April 2009 that his appointment was subject to his passing the ASAT. Some two months later, the Applicant unsuccessfully sat the ASAT.

29. The Applicant's position is essentially that the application regarding the First Decision is receivable despite the fact that the request for management evaluation was outside the 60-day period. He says this is because he first attempted to resolve the matter informally, proceeding to the Tribunal immediately upon becoming aware that no resolution was possible and only 24 days after he officially concluded his assignment as an Operations Assistant with DSS. Other than stating that the MEU website led him to believe that the deadlines were suspended pending informal resolution, he did not offer any other justification for the delay. Further, there was no reason offered by the Applicant as to why he had to wait until concluding his assignment at DSS before requesting management evaluation.

30. The Applicant has argued that the application must be receivable as the informal negotiations suspended the deadline for management evaluation. There is no provision in the Staff Rules or the relevant instruments that time limits will automatically be suspended if informal resolution of a dispute is sought. Exhausting internal remedies or conducting informal *inter partes* negotiations does not normally suspend or interrupt time limits or a prescription period.

31. The Secretary-General has the power to extend the 60-day period which a staff member has to seek management evaluation "pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General" (as specified by staff rule 11.2(c)). In this case there was no request for, or grant of such extension, by the Secretary General. The Appeals Tribunal has held that the Dispute Tribunal does *not* have the same power to waive or suspend the deadlines for management evaluation that the Secretary-General has—see *Costa* 2010-UNAT-036. Therefore, regardless of whether there were attempts at informal resolution (or indeed any other circumstance or factor), the Applicant's challenge to the First Decision is out of time as it was filed more than 60 days after the notification of this decision. The Tribunal must find the application regarding the First Decision not receivable as the Applicant did not seek management evaluation within the time limits imposed by the Statute of the Tribunal and the Staff Rules.

32. In light of the fact that the Applicant is self-represented, I wish to note two further matters in order to fully explain the Applicant's position to him. Firstly, even if the Tribunal were not bound by *Costa* to apply the strict 60-day proscription, the Applicant has not proffered any explanation that would satisfy the "exceptional circumstances" test justifying a waiver of these time limits. Secondly, although the Applicant fails on receivability, his chances of success on the merits would not, in any event, appear to be very good. This is because the Applicant was well aware of the requirements of the Post when he applied and must have known that he did not meet these requirements. Furthermore, he was, in any event, subsequently given a chance to re-sit the ASAT, which he did unsuccessfully. Even if his challenge had been timeous, by his conduct, i.e. by acquiescence and submission to the ASAT, the Applicant waived his right to challenge and would have been estopped from challenging the ASAT as a prerequisite criterion.

Alleged Harassment and other challenges

33. In terms of art. 8.1(c) of the Statute of the Dispute Tribunal, an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation. Management evaluation of the Alleged Harassment is also required pursuant to staff rule 11.2(a), but it clearly has not been sought in this case.

34. There is nothing to suggest that the Applicant queried the decision restricting the carrying of his weapon or the requirement that he undertake medical evaluation informally, but it is clear that he did not request management evaluation. The Applicant's contention that he could not request management evaluation of the Alleged Harassment as the conduct originated only a few hours after he received the MEU decision dated 24 February 2010 is immaterial, as there would have been nothing to stop him from subsequently requesting a management evaluation of this decision as a distinct and separate administrative decision.

35. Accordingly, the Tribunal cannot review the Alleged Harassment complaint as management evaluation is a prerequisite to an application before the Tribunal (see *Planas* 2010-UNAT-049, *Syed* 2010-UNAT-061). The Applicant having failed to submit to management evaluation, this challenge is also not receivable.

36. Since the Tribunal did not enter the merits of the case I need not address the Applicant's allegations regarding the alleged favourable treatment of other staff members and the failure to apply selection procedures uniformly. Nonetheless the Tribunal is perplexed that as a recommended and selected candidate, having gone through a full selection process, the Applicant was not advised that he did not satisfy the essential criteria in the first place.

Conclusion

37. The Applicant's claims in respect of the decision not to appoint him to the position of Operations Assistant at the G-6 Level, DSS, and the Alleged Harassment, are not receivable. The application is therefore dismissed in its entirety.

(Signed)

Judge Ebrahim-Carstens

Dated this 28th day of January 2011

Entered in the Register on this 28th day of January 2011

(Signed)

Santiago Villalpando, Registrar, UNDT, New York