



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/020
(UNAT 1607)
UNDT/GVA/2010/024
(UNAT 1616)
Judgment No.: UNDT/2011/129
Date: 14 July 2011
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

MURATORE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Myriam Foucher, UNOG

Notice: This judgment has been modified in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. By applications filed with the former United Nations Administrative Tribunal on 16 June and 28 July 2008, the Applicant contests the decisions not to select him for the posts advertised in Vacancy Announcements Nos. 05-HRI-OHCHR-405865-R-Yaoundé (P-4), 05-HRI-OHCHR-406881-R-Geneva (P-4), 05-HRI-OHCHR-407031-R-Geneva (P-3) and 05-HRI-OHCHR-407257-R-Yaoundé (P-3).

2. He requests:

- a. Compensation for the material and moral damage suffered in an amount greater than that granted to him by the Secretary-General;
- b. That all his applications for United Nations posts at the P-3, P-4 and P-5 levels be given priority consideration during the 24 months following the Tribunal's decision;
- c. That the Respondent assess his performance under the Performance Appraisal System ("PAS").

3. The cases, which were pending before the former United Nations Administrative Tribunal, were transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

Facts

4. The Applicant joined the Organization on 19 July 2004 as a P-3 Human Rights Officer in the Office of the United Nations High Commissioner for Human Rights ("OHCHR") Africa Unit, Capacity Building and Field Operations Branch ("CBB"), on a three-month short-term appointment. His contract was extended several times until June 2006.

5. On 29 November 2004, the Officer-in-Charge of CBB asked the Applicant, who was the Africa Unit desk officer for the Democratic Republic of the Congo, to prepare a note on the situation of the OHCHR Office in the Democratic Republic of the Congo. The Applicant's supervisor, the Africa Team Coordinator, who was in turn under the supervision of the Officer-in-Charge of CBB, was copied on the request. The Applicant replied to that request, sending a copy of his email to his immediate supervisor.

6. That same day, the Africa Team Coordinator wrote to the Applicant, drawing his attention to the fact that the content of the message sent to the Officer-in-Charge should have been the subject of discussion at the team level.

7. On 30 November 2004, the Applicant sent the Africa Team Coordinator an email informing her that he had not taken any personal initiative in the matter; he had simply replied to a request from the Officer-in-Charge of CBB and had had no intention to bypass her.

8. On 1 December 2004, the Applicant wrote to the Officer-in-Charge of CBB to complain that, earlier that day, the African Team Coordinator had made insulting remarks about his nationality.

9. The Africa Team Coordinator sent the Deputy High Commissioner for Human Rights a note dated 1 December 2004 regarding the Applicant's complaint. She claimed that on several occasions, she had had to remind the Applicant to respect hierarchy in transmitting requests. With regard to the incident of 1 December 2004, she expressed her dissatisfaction at the fact that the normal procedure had been bypassed and admitted that she had told the Applicant that the whole procedure was not right. She stressed that it was not the first time that the Officer-in-Charge of CBB had put her in such a situation and that she did not have a "mafious culture". She also noted that the Applicant had copied his email of complaint to all the senior Italians in OHCHR. She maintained that she had not screamed at the Applicant but had simply spoken in a loud voice.

10. In 2005, OHCHR conducted a regularization exercise in order to facilitate the recruitment of staff who had held short-term contracts since 30 November 2003 for posts advertised through Galaxy.

11. In early February 2005, the Applicant was interviewed for the post of Desk Officer for Angola (Post No. 04-OHCHR-063-Geneva (L-3)). The Africa Team Coordinator was a member of the panel.

12. On 15 May 2005, the Applicant was transferred to the Europe, North America and Central Asia Region (“ENACA”) Unit on a short-term contract as Desk Officer for Russia, Belarus and Ukraine.

13. On 18 May 2005, a P-4 post of Human Rights Officer was advertised in Vacancy Announcement No. 05-HRI-OHCHR-405865-R-Yaoundé. There were 249 candidates, including the Applicant, who was not selected to be interviewed for the post.

14. On 23 June 2005, a P-4 Human Rights Officer post in ENACA, CCB, was advertised as Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva. The Applicant applied and was invited to an interview.

15. On 28 June 2005, six P-3 Human Rights Officer posts were advertised in Vacancy Announcement No. 05-HRI-OHCHR-407031-R-Geneva. The Applicant applied and was short-listed for an interview.

16. On 19 August 2005, a P-3 Human Rights Officer post was advertised as Vacancy Announcement No. 05-HRI-OHCHR-407257-R-Yaoundé. There were 328 candidates, including the Applicant, who was not selected for an interview.

17. In October 2005, the Applicant informed the OHCHR Staff Council of his belief that the Africa Team Coordinator had deliberately eliminated him from the recruitment procedure for the post of Desk Officer for Angola because he had complained of the harassment to which, in his view, he had been subjected.

18. In November 2005, the Applicant complained to the Special Assistant to the High Commissioner that he had been harassed by the Africa Team Coordinator; the Special Assistant referred the matter to the Chief of CBB.

19. In December 2005, the Applicant met with the Chief of CBB to discuss the problem.

20. On 6 April 2006, having been invited to an interview for the P-3 Human Rights Officer post advertised in Vacancy Announcement No. 05-HRI-OHCHR-407031-R-Geneva, the Applicant asked the OHCHR Human Resources Service not to include the Africa Team Coordinator in the interview panel. The following day, the Africa Team Coordinator agreed to withdraw from the panel and recommended that her deputy on the Team should replace her.

21. On 10 February 2006, the Coordinator of ENACA—who was, at that time, the Applicant's supervisor—sent a memorandum to his own supervisor, the Chief of CBB, recommending that the Applicant's short-term contract be extended beyond 31 March 2006.

22. On 31 March 2006, the Applicant sent the Chief of CBB an email informing her that the Coordinator of ENACA had told him that there was a general negative opinion about him in CBB. He explained that after his interview for the post advertised in Vacancy Announcement No. 05-HRI-OHCHR-406881-Geneva, the Coordinator of ENACA and chair of the interview panel had told him that although he had had a very good interview, he would not move to the next round of interviews because he did not speak Russian.

23. On 2 April 2006, the Applicant sent the Deputy High Commissioner an email informing him of the statements made by the Coordinator of ENACA and of his concerns about respect for his rights since he had reported irregularities in CBB.

24. By email dated 3 April 2006, the Coordinator of ENACA denied having said that he had a poor opinion of the Applicant. That same day, the Applicant replied to the Coordinator, reiterating that the latter had made such a statement.

25. By email of 10 April 2006, the Applicant asked the Chief of CBB to inform him of the measures that the latter planned to take concerning the conduct of the Coordinator of ENACA. He also requested that the selection procedure for the post of P-4 Human Rights Officer (Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva) be cancelled and reopened with a new panel and guarantees of fairness.

26. On 18 April 2006, the Chief of CBB replied that, having met with the Coordinator of ENACA, he could not accede to the Applicant's request that he take measures concerning the Coordinator's conduct.

27. On 21 April 2006, the Applicant wrote to the Chief of CBB, informing him that he interpreted the latter's failure to reply to the request that the disputed selection procedure should be cancelled as an administrative decision to grant that request.

28. By email of 4 May 2006, the Applicant complained to the Deputy High Commissioner about the conduct of the Chief of CBB. That same day, the Deputy High Commissioner replied that she considered his message completely unwarranted and asked him not to send any more messages on the matter.

29. On 9 May 2006, the Applicant wrote to the Ombudsman in New York.

30. On 11 May 2006, the Chief of CBB requested a final extension of the Applicant's contract from 19 to 30 June 2006.

31. Furthermore, between March and May 2006, the Applicant and the Africa Team Coordinator exchanged correspondence concerning preparation of the Applicant's PAS for the period during which he had worked under her supervision.

32. By letter dated 24 May 2006, the Applicant sent the Secretary-General a request for review of the decisions not to select him for the posts advertised in Vacancy Announcements Nos. 05-HRI-OHCHR-405865-R-Yaoundé (P-4), 05-HRI-OHCHR-407257-R-Yaoundé (P-3) and No. 05-HRI-OHCHR-407031-R-Geneva (P-3).

33. On 29 May 2006, the Applicant sent the Secretary-General a request for review of the decision not to select him for the post advertised in Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva (P-4). The Administrative Law Unit in the United Nations Secretariat acknowledged receipt of the request on 6 June 2006.

34. On 30 June 2006, upon expiration of his final contract, the Applicant was separated.

35. After submitting an incomplete statement of appeal to the Joint Appeals Board (“JAB”) in Geneva on 12 October 2006, the Applicant submitted an appeal claiming that he had not been fairly considered for Posts Nos. 05-HRI-OHCHR-405865-R-Yaoundé, 05-HRI-OHCHR-407031-R-Geneva and 05-HRI-OHCHR-407257-R-Yaoundé.

36. The JAB submitted its report on 8 January 2008, concluding that the appeal was not admissible with respect to Posts Nos. 05-HRI-OHCHR-405865-R-Yaoundé and 05-HRI-OHCHR-407257-R-Yaoundé because some of the contested decisions had not been administrative decisions subject to appeal, but merely preparatory steps. With respect to Post No. 05-HRI-OHCHR-407031-R-Geneva, the JAB recommended that the Applicant should be placed on the roster of candidates for similar posts for one year because the selection procedure had been flawed in so far as the evaluation criteria had not been applied objectively. By letter dated 11 April 2008, the Deputy Secretary-General endorsed the findings of the JAB but decided to grant the Applicant only financial compensation in the amount of one month’s net base salary at the rate in effect on the date of his separation.

37. The Applicant submitted an incomplete statement of appeal concerning the failure to select him for the post advertised in Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva on 24 August 2006 and a complete one on 29 September 2006.

38. The JAB submitted its report on 4 February 2008. It found that the selection procedure had been flawed in so far as the language used in the Applicant's evaluation was "selective" and contained a substantive error. The JAB therefore recommended that the Applicant should be placed on the roster of candidates for similar posts for one year as from the date of the Secretary-General's final decision, even though he was no longer an OHCHR staff member. By letter dated 11 April 2008, the Deputy Secretary-General rejected the findings and recommendations of the JAB.

39. On 16 June and 28 July 2008, the Applicant submitted the present applications to the former United Nations Administrative Tribunal. They were transferred to the United Nations Dispute Tribunal on 1 January 2010.

40. By Order No. 42 (GVA/2011) of 8 April 2011, the Tribunal requested the Respondent to transmit, by means of an *ex parte* filing, all documents pertaining to the selection procedures contested in application No. UNDT/GVA/2010/020, as well as clarifications of the procedures followed; the Respondent did so on 21 April 2011.

41. By Order No. 77 (GVA/2011) of 18 May 2011, the Tribunal transmitted to the Applicant the documents and comments provided by the Respondent; some of the information contained in the documents had been blacked out in order to conceal the identity of the other candidates. The Applicant submitted observations on 23 May. By Order No. 83 (GVA/2011) of 24 May 2011, the Tribunal then gave the Respondent an opportunity to submit comments on the Applicant's observations.

42. By Order No. 78 (GVA/2011) of 18 May 2011, the Tribunal ordered the Respondent to transmit to it all documents pertaining to the selection procedure contested in application No. UNDT/GVA/2010/024; the Respondent did so on 23 May 2011. By Order No. 84 (GVA/2011) of 24 May, the Tribunal invited the Applicant to submit observations.

43. On 1 June, a hearing was held. The Applicant participated by telephone and the Respondent's counsel attended in person. During the hearing, the Applicant raised the issue of the flawed nature of the entire regularization exercise that had been conducted by OHCHR.

44. By Order No. 98 (GVA/2011) of 10 June 2011, the Tribunal requested the Respondent to submit observations on the aforementioned argument and to indicate to the Tribunal, for each of the so-called "30-day candidates", whether he or she had been a 30-day candidate under the general selection system or by virtue of the exception to that system. The Respondent replied on 20 June 2011.

45. By Order No. 106 (GVA/2011) of 21 June 2011, the Tribunal communicated to the Applicant the documents that the Respondent had transmitted after blacking out some of the information. The Applicant submitted observations on 27 June 2011.

Parties' contentions

46. The Applicant's contentions with respect to application No. UNDT/GVA/2010/20, on the failure to select him for the posts advertised in Vacancy Announcements Nos. 05-HRI-OHCHR-405865-R-Yaoundé (P-4), 05-HRI-OHCHR-407257-R-Yaoundé (P-3) and 05-HRI-OHCHR-407031-R-Geneva (P-3), are:

- a. The present application is receivable in so far as it concerns the two Yaoundé posts since, although on 24 May 2006, the date on which the Applicant submitted his request for review by the Secretary-General, no

final selection decision concerning those two posts had been taken, the decision not to invite him to an interview had already been taken, and the latter constituted an administrative decision;

b. The post regularization exercise conducted by OHCHR in 2005 is illegal since the Administration based its actions on an agreement negotiated with the United Nations Secretariat Office of Human Resources Management (“OHRM”). OHRM authorized a derogation from the regime set out in administrative instruction ST/AI/2002/4 in order to benefit staff working on short-term contracts since 30 November 2003 by considering them as 30-day candidates, whereas they were in fact 60-day candidates. This agreement has no legal force and the document which, according to the Respondent, constitutes the agreement is simply an internal OHRM document with no legal value. Thus, there was no legal basis for the regularization exercise. In an attempt to give a semblance of legality to the process, the Administration subsequently fabricated a document containing false statements, namely the memorandum dated 3 June 2005 from the Assistant Secretary-General for Human Resources Management. In any event, a decision by the Assistant Secretary-General for Human Resources Management could by no means overrule administrative instruction ST/AI/2002/4, which was adopted at a higher level. Since the regularization exercise was conducted with no legal basis, the selection of those who allegedly benefited from the aforementioned derogation is flawed;

c. Contrary to the false statement made in Galaxy, he was not invited to an interview for the post advertised in Vacancy Announcement No. 05-HRI-OHCHR-407257-R-Yaoundé. The Respondent did not provide a copy of the email allegedly sent to him for that purpose;

d. The conduct of the Africa Team Coordinator amounts to professional misconduct as defined in rule 110.1 of the former Staff Rules.

It constitutes abuse of authority and harassment in the workplace, prohibited by administrative instruction ST/AI/371 (Revised Disciplinary measures and procedures). He was subjected to retaliation within the meaning of Secretary-General's bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations);

e. One month's net base salary is not adequate compensation for the harm suffered. The amount of the compensation is not consistent with the relevant jurisprudence. The intention to deprive him of a PAS should also be considered when calculating the amount of the compensation; the High Commissioner had personally urged all supervisors to finalize the PAS for each of the staff members concerned prior to the post regularization exercise conducted by OHCHR in 2006.

47. The Respondent's contentions with respect to application No. UNDT/GVA/2010/20 are:

a. The application is not receivable because, at the time when the Applicant submitted his request for review, no final selection decision had been taken;

b. The posts advertised in Vacancy Announcements Nos. 05-HRI-OHCHR-405865-R-Yaoundé and 05-HRI-OHCHR-407257-R-Yaoundé were not part of the regularization exercise;

c. The principles applicable to the post regularization exercise conducted by OHCHR are set out in a document entitled "OHCHR Post Regularization Exercise – Guidelines", paragraph 6 of which provides that temporary staff members continuously employed since 30 November 2003 were to be treated as 30-day candidates. The regularization exercise was conducted in conformity with the guidelines agreed upon by OHRM;

d. In the case of the posts advertised in Vacancy Announcement 05-HRI-OHCHR-407031-Geneva, unsuccessful efforts to contact the Applicant by telephone and email were made in order to invite him to an interview;

e. The only question before the Tribunal is whether the Applicant is entitled to additional compensation for the irregularities which have already been accepted by the Secretary-General. The Respondent maintains that in light of the irregularities in the Applicant's case, one month's net base salary is appropriate compensation;

f. The only harm that resulted from the errors recognized was that the Applicant was not properly considered for the posts in question. The Applicant has provided no details of the professional, moral and material damages that he allegedly suffered;

g. The Applicant's request that his PAS be completed is unjustified and not receivable. Since the Applicant was employed under the 300 series of the former Staff Rules, he was not entitled to be evaluated in accordance with administrative instruction ST/AI/2002/3 (Performance Appraisal System). Section 1 of that instruction is not mandatory; it simply envisages the possibility that the PAS may be used for the appraisal of staff employed under the 200 or 300 series of the former Staff Rules. In any event, the Applicant failed to request review of the decision not to assess his performance under the PAS method within two months from the date of that decision as required under former staff rule 111.2(a).

48. The Applicant's contentions with respect to application No. UNDT/GVA/2010/24, which concerns the post advertised in Vacancy Announcement No. 05-HRI-OHCHR-406881-R-Geneva (P-4), are:

a. The Respondent claims, but does not demonstrate, that the post in question was not part of the post regularization exercise conducted by

OHCHR, which, for the reasons mentioned above, was entirely flawed. Neither has he provided details as to why each of the candidates met the criteria for consideration as a 30-day candidate;

b. The selected candidate did not meet the eligibility criteria as he had neither the degree nor the experience required in the vacancy announcement;

c. If the interviewed candidates were 30-day candidates within the meaning of administrative instruction ST/AI/2002/4, it was illogical for the Administration to interview eight other 60-day candidates who had no chance of being selected. Furthermore, the Respondent claims that the post was not part of the regularization exercise, yet he expresses an opinion as to whether the 60-day candidates met the criteria set out in the regularization agreement;

d. The choice of candidate for the post in question was made in advance. The Administration bears the burden of proving the fairness of the contested decision since the relevant information and evidence are solely in its hands (see former UN Administrative Tribunal Judgment No. 1302, *Hammond* (2006)). The fact that the Applicant knew in advance the names of the future appointees to several posts before the selection procedures were finished proves that the selection procedure was flawed;

e. The conduct of the ENACA Coordinator during the Applicant's interview constitutes a procedural flaw. The Coordinator could not, as he did, take a decision without consulting the other members of the interview panel since the very reason for the existence of such a panel is that the decision should be made collegially. The fact that the Coordinator did not feel the need to consult the other members of the panel and that they did not object demonstrates that the decision on the Applicant's candidacy had been taken before the interview and that there was bias against him;

f. The decision not to select him was taken for illegal reasons, namely, the intention to retaliate against him for having made accusations of misconduct within CBB. The Administration consistently refused to deal with the content of his allegations; none of the bodies contacted by the Applicant—the Ethics Office, the Office of the Ombudsman, the Chief of CBB and the Deputy High Commissioner—took action to investigate the facts described in his reports. Instead, the Chief of CBB decided to get rid of him. In the past, the former United Nations Administrative Tribunal concluded that the Administration was at fault for failing to deal with the real substance of a staff member’s various complaints, denying his due process rights (Judgment No. 1178, *Shao* (2004)).

g. The Administration did not correctly exercise discretion in the selection process and committed a substantive error. While appointments and promotions are within the broad discretion of the Secretary-General, this power is neither absolute nor unfettered. Specifically, allegations of abuse of authority or of procedural or substantive errors must be considered;

h. According to article 101 of the Charter of the United Nations and staff regulation 4.2, “the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity”. As the JAB demonstrated in a reasoned manner, such was not the case in this instance;

i. A comparative analysis of his personal history profile (“PHP”) and that of the candidate selected in the contested decision demonstrates that the latter was less qualified. Therefore, the decision involved an abuse of authority;

j. The Secretary-General could not overrule the decision of the JAB without giving his reasons for doing so.

49. The Respondent's contentions with respect to application No. UNDT/GVA/2010/24 are:

- a. The post advertised in Vacancy Announcement 05-HRI-OHCHR-406881-R-Geneva was not part of the regularization exercise conducted by OHCHR;
- b. The Tribunal has consistently recognized that the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General. This power must be exercised fairly and without extraneous considerations or improper motivation. However, the assessment of candidates for posts lies within this discretionary power and it is not for the Tribunal to substitute its view for that of the Administration. Such decisions will be reviewed only on the grounds of abuse of authority, procedural or substantive errors, extraneous factors or improper motivation;
- c. While the Applicant asserts that he is more qualified than the selected candidate, the assessment of candidates is the responsibility of the Administration. Furthermore, the Applicant has failed to demonstrate how the selection of another candidate did not meet the criteria of efficiency, competency and integrity set out in former staff regulation 4.2 and article 101, paragraph 3, of the Charter;
- d. According to former staff regulation 11.1, the reports of the JAB are advisory and not mandatory in nature. Therefore, the Secretary-General has the liberty to deviate from the findings of the JAB and was simply acting within his authority when he took his final decision on 11 April 2008;
- e. The Secretary-General's decision to uphold the contested initial decision was based on a reasoned review of the case, including the report of the JAB;

f. Vacancy Announcement 05-HRI-OHCHR-406881-R-Geneva required, *inter alia*, competencies in the areas of teamwork, leadership and managerial skills and the ability to plan, organize and motivate staff. Having reviewed the Applicant's candidature against those competencies, it was decided that he did not fully meet the requirements of the post. Specifically, he had only limited exposure to leadership roles and had not demonstrated a record of building and managing teams or creating an enabling work environment;

g. The Applicant, who was responsible for proving his allegations, did not do so in this case. He failed to provide evidence that the candidate appointed to the post in question was pre-selected. The conduct of the ENACA Coordinator, who allegedly failed to consult the other members of the interview panel, does not prove that the Administration had already decided not to hire the Applicant. The Applicant failed to prove that he was not selected for any OHCHR post because of retaliation;

h. The Applicant suffered no material or moral damage since his qualifications received full and fair consideration, and his request to be given priority in future applications is unwarranted.

Consideration

50. The above applications were submitted by the same staff member; they concern non-selection decisions and have a number of contentions in common. It is therefore important to rule on them in a single judgment.

51. The Tribunal must first dismiss the Applicant's request that it order the Administration to assess his performance under the PAS system. It is clear from the documents in the case file that in his appeals to the Secretary-General, the Applicant failed to contest his supervisors' decision not to conduct such an assessment. Therefore, this request of the Tribunal is not receivable.

52. The Tribunal must now consider, in turn, the legality of each of the decisions not to select the Applicant for various posts for which he applied.

1. Post advertised on 18 May 2005 in Vacancy Announcement 05-HRI-OHCHR-405865-Yaoundé (P-4)

53. The Respondent maintains that the request is not receivable with respect to this post because the Applicant allegedly submitted his request for review to the Secretary-General before an administrative decision had been taken. However, it has been established that the Applicant submitted that request after learning that he would not be invited to interview for the post. Thus, while the candidate who was ultimately appointed had not yet been selected, it cannot be said that no administrative decision to reject the Applicant's candidature had been taken. Therefore, the application is receivable in this regard.

54. The Applicant maintains that the post regularization exercise conducted by OHCHR in 2005, which allegedly included the selection procedure in question, was illegal because it was based on a negotiated agreement between OHCHR and OHRM, through which OHRM authorized a derogation from the regime set out in administrative instruction ST/AI/2002/4 in order to benefit staff working on short-term contracts since 30 November 2003 by considering them as 30-day candidates whereas they were, in fact, 60-day candidates.

55. The Applicant contests the existence and the legality of such an agreement. While the Administration maintains that the agreement was based on "Guidelines", this internal OHCHR document can in no way derogate from the rules established in administrative instruction ST/AI/2002/4 (see *Villamoran* UNDT/2011/126). Section 7.1 of the instruction reads:

In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark

under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.

56. In any event, even if the Assistant Secretary-General for Human Resources Management had authorised the aforementioned derogation, a decision by the Assistant Secretary-general cannot derogate from the provisions of an administrative instruction issued by the Under-Secretary-General for Management (see *Villamorán* UNDT/2011/126). Therefore, the Applicant is entitled to claim that the regularization procedure through which some staff working on short-term contracts since 30 November 2003 received more favourable treatment than he did is flawed.

57. The Administration nevertheless submits in its defence that the post advertised in Vacancy Announcement 05-HRI-OHCHR-405865-Yaoundé was not part of the contested regularization procedure.

58. It is clear from the documents in the case file that in this instance, only 30-day candidates within the meaning of administrative instruction ST/AI/2002/4 were selected for an interview and that the candidate who was ultimately selected was chosen from among them. Therefore, in making that selection, the Administration complied with the provisions of the administrative instruction.

59. Thus, the illegality issue raised by the Applicant does not concern this selection procedure.

60. The Applicant maintains that his candidature was rejected owing to bias and retaliation on the part of the Administration. However, as noted above, only 30-day candidates within the meaning of administrative instruction ST/AI/2002/4 were invited to interview and the candidate who was ultimately selected was chosen from among them, whereas the Applicant, as a 60-day candidate, could not be considered unless none of the 30-day candidates was selected (see *Kasyanov* UNDT/2009/022); this did not happen in the case at hand.

61. Thus, the Applicant has not established that the aforementioned selection procedure was flawed.

2. *Post advertised on 23 June 2005 in Vacancy Announcement 05-HRI-OHCHR-406881-Geneva (P-4)*

62. With respect to this post, the Applicant also maintains that the procedure was illegal since it was part of a post regularization exercise conducted by OHCHR, under which some staff were considered, for the purposes of the selection procedure, as 30-day candidates within the meaning of administrative instruction ST/AI/2002/4 whereas they should legally have been considered as 60-day candidates.

63. For the reasons given above, the Tribunal has considered that the regularization exercise was illegal. However, the Respondent maintains that this selection procedure was not part of the regularization exercise.

64. It is clear from the documents in the case file that in this instance, eight candidates, including the Applicant and the candidate who was ultimately selected, were invited to an interview even though they had been considered as 60-day candidates. Thus, even if the 30-day candidates within the meaning of administrative instruction ST/AI/2002/4 had been wrongly considered at the same time as the aforementioned 60-day candidates in violation of the provisions of administrative instruction ST/AI/2002/4, this flaw could not, in any event, cause the Applicant harm since he fell into the 60-day category.

65. The Tribunal must bear in mind that in light of the discretionary power of the Administration, it can consider only allegations of abuse of authority, procedural irregularity, substantive error or manifest error of judgment in selection procedures.

66. The Applicant maintains that the candidate who was ultimately selected did not have the qualifications, in terms of education and experience, that were

required by the vacancy announcement. With respect to education, the vacancy announcement stated that the candidate must have an advanced university degree, preferably in law, political science, international relations or other discipline related to human rights and that a combination of relevant academic qualifications and extensive experience were acceptable in lieu of the advanced university degree. The Tribunal notes that according to the vacancy announcement, it was only “preferable”, not necessary, for this degree to be in a discipline closely related to human rights and that the candidate who was ultimately selected did have an advanced university degree. Furthermore, as the interview panel stated in its evaluation of that candidate, he had a degree in social sciences that could properly be considered suited to the responsibilities of the post; the Tribunal considers that this degree, combined with several years’ experience in the field of human rights, was sufficient to meet the education requirements set out in the vacancy announcement. With respect to experience, the Applicant claims that the evaluation of the candidate selected by the interview panel had only six years of experience, not the seven years called for in the vacancy announcement. That evaluation mentions six years of experience with OHCHR. However, prior experience must also be taken into account and it is clear from the documents in the case file that the selected candidate already had several years of experience prior to his work at OHCHR.

67. Thus, the argument that the selected candidate did not have the minimum qualifications appears unfounded.

68. Lastly, the Applicant maintains, on the one hand, that at the end of the interview the chair of the interview panel told him, without consulting the other members of the panel, that he would not be recommended because he did not speak Russian and, on the other hand, that the chair told him after the interview that his chances of getting a post within the service were very low because he was perceived as speaking too much. Since the Respondent does not seriously contest the Applicant’s contentions, the Tribunal considers that they are true and is of the view not only that this was a grave breach of the principle of collegiality of a

panel's decisions, but that the chair's statements reveal a clear bias on the part of one of the members of the panel; this leads the Tribunal to rule that the selection procedure contested above was flawed.

3. Post advertised on 28 June 2005 in Vacancy Announcement 05-HRI-OHCHR-407031-Geneva (P-3)

69. Although the Secretary-General, on the basis of the JAB report, granted the Applicant compensation in the amount of one month's net base salary owing to errors in the selection procedure for this post, the Applicant requests the Tribunal to increase that compensation and maintains that flaws other than the one acknowledged by the JAB and the Secretary-General were committed.

70. The Applicant first reiterates the aforementioned claim concerning the regularization exercise conducted by OHCHR, which has already been ruled illegal. The Respondent admits that this post was part of the exercise. Here again, the question is whether this flaw harmed the Applicant in any way. It is clear from the documents in the case file that in this instance, the Applicant was considered as a 60-day candidate and that other candidates were considered as 30-day candidates even though they, too, should have been considered as 60-day candidates within the meaning of administrative instruction ST/AI/2002/4.

71. Vacancy Announcement 05-HRI-OHCHR-407031-Geneva concerned six posts. Some of the candidates hired at the end of the procedure were 60-day candidates within the meaning of administrative instruction ST/AI/2002/4 and were treated as 30-day candidates on the basis of the aforementioned regularization agreement. Therefore, the procedure followed was flawed and this flaw may have diminished the Applicant's chances of being selected.

72. The Applicant also maintains that he was a victim of discrimination on the part of the Africa Unit Coordinator, who had been appointed as a member of the interview panel. However, it is clear from the documents in the case file that as a result of a complaint by the Applicant, she decided not to sit on the panel. While

the Applicant objects to her replacement by her deputy, this alone does not constitute proof of an attempt to discriminate against him.

73. Nonetheless, as the Secretary-General acknowledged, it is clear from the documents in the case file that the interview panel committed substantive errors by not awarding the Applicant any points for the “other skills” called for in the vacancy announcement while other candidates were awarded points for skills that he, too, clearly possessed. In particular, no fewer than three candidates were awarded points for their knowledge of the human rights situation in African countries whereas the Applicant, who had worked in Africa on human-rights-related matters for several years and had subsequently been recruited to the OHCHR Africa Unit, received no points.

74. The Applicant is therefore correct in maintaining that the selection procedure for the aforementioned post contained a substantive error.

4. Post advertised on 19 August 2005 in Vacancy Announcement 05-HRI-OHCHR-407257-Yaoundé (P-3)

75. For the reasons discussed in connection with the first of the posts considered above, the Respondent maintains that the request is not receivable because the Applicant allegedly submitted his request for review to the Secretary-General before an administrative decision had been taken. The same response is therefore called for: it cannot be said that no administrative decision to reject the Applicant’s candidature had been taken since he had been informed that he had not been selected for an interview. Therefore, the application is receivable in this regard.

76. The Respondent maintains that the only reason why the Applicant was unable to be interviewed for the post in question was the fact that the Administration was unable to contact him by telephone or email. The Applicant categorically denies having been absent from work on the date on which the Administration claims to have attempted to invite him, and the Respondent has

not provided the Tribunal with any evidence demonstrating that the Administration did, in fact, attempt to contact the Applicant. This proves that the selection procedure in his case was flawed.

Damage

77. Since the Applicant no longer requests that the contested recruitment procedures be cancelled, the damage that he suffered must now be assessed.

78. It is clear from the foregoing that the Applicant has established that three of the four contested selection procedures were flawed, including one case of bias and one of flagrant substantive error. Furthermore, the Tribunal's belief that there was a bias against the Applicant is strengthened by the fact that during the nine months prior to leaving OHCHR, he applied unsuccessfully for over 20 posts, including both P-3s and P-4s. The Tribunal therefore considers that the errors committed deprived the Applicant of a very real chance of obtaining continuing employment as either a P-3 or a P-4. Obtaining such employment might have increased his chances of having his contract renewed; instead, his employment with OHCHR was ended on 30 June 2006 at the expiration of his final contract.

79. Thus, the Applicant suffered significant material damage, as well as a high degree of moral damage since it has been established that he was a victim of bias.

80. In this instance, the Tribunal considers that in light of all the harm suffered, the Organization should be ordered to pay, in addition to the financial compensation in the amount of one month's net base salary already authorized by the Secretary-General, financial compensation in the amount of seven months' net base salary at the rate in effect on the date of his separation from OHCHR.

81. However, it is not for the Tribunal to order the Secretary-General to give him priority consideration for future OHCHR posts since the effect of such an order would be to place the candidates for those posts on an unequal footing.

Conclusion

82. In view of the foregoing, the Tribunal DECIDES:
- a. The Respondent is ordered to pay the Applicant financial compensation in the amount of seven months' net base salary at the rate in effect on the date of his separation from OHCHR;
 - b. The aforementioned compensation shall bear interest at the United States Prime Rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be added to the United States Prime Rate 60 days from the date this Judgment becomes executable;
 - c. All other claims are rejected.

(Signed)

Judge Jean-François Cousin

Dated this 14th day of July 2011

Entered in the Register on this 14th day of July 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva