



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/108

Judgment No.: UNDT/2011/165

Date: 16 September 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

KISSELEV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. By application registered on 12 November 2010, the Applicant contests the decision, of which he was informed on 31 May 2010, not to promote him to the post of Chief (D-1), Human Resources Management Service (“HRMS”) of the United Nations Office at Geneva (“UNOG”).
2. He requests that the Tribunal:
 - a. Refer the case to the Secretary-General so that the latter may take appropriate measures to prevent the Director-General of UNOG from abusing his authority in selection decisions;
 - b. Award him compensation equivalent to one year’s salary for material and moral damages.

Facts

3. The Applicant entered into service at UNOG on 24 September 1990 at the P-3 level as a human resources officer. He was promoted within the same service to the P-4 level in 2000 and to the P-5 level in 2003. From January 2004 through September 2006, he performed the duties of officer-in-charge, HRMS, until the new Chief assumed his duties. He then continued to carry out the duties of Deputy Chief, HRMS, and Chief, Human Resources Operations Section.
4. On 28 January 2010, following the transfer of the Chief of HRMS to Headquarters, the post was advertised under vacancy announcement 10-HRE-UNOG-423723-R-GENEVA, with an application deadline of 29 March 2010. The Applicant submitted his application on 22 February 2010.
5. On 2 March 2010, an interview and selection panel was appointed. It was supposed to consist of three members, as follows:
 - a. The Director of the Administration Division (“Director of Administration”) at UNOG in her capacity as programme manager, i.e., the supervisor responsible for the post to be filled;

b. The Director of the Strategic Planning and Staffing Division, Office of Human Resources Management (“OHRM”), at Headquarters, appointed by the Assistant Secretary-General for Human Resources Management; and,

c. The Chief of the Central Planning and Coordination Service, Division of Conference Management, UNOG, appointed in coordination with the Director-General of UNOG.

6. By note dated 3 March 2010, the Director of Administration, whose retirement was set for 31 March of the same year, stated that she felt obliged to withdraw from the selection process for the post of Chief, HRMS, owing to a disagreement with the Director-General of UNOG. That same day, the latter had asked her to include two additional members in the interview and selection panel, which she had declined to do. According to the note, the Director-General wished thereby to comply with the practice followed by the Department for General Assembly and Conference Management, while the Director of Administration wanted to adhere to the Department of Management practice of having a three-member panel, including the programme manager and a representative of OHRM at Headquarters. A copy of the note was transmitted to the Director-General of UNOG, the Under-Secretary-General for Management, the Assistant Secretary-General for Human Resources Management and the two other members of the interview and selection panel.

7. On 8 March 2010, the Director-General appointed the Director of the Conference on Disarmament Secretariat as an alternate for the Director of Administration and Chair of the interview and selection panel. He also appointed two additional panel members: his Chef de Cabinet and the Chief of the Financial Resources Management Service at UNOG.

8. The Director of Administration retired on 31 March 2010.

9. There were no candidates eligible to be considered at the 15-day mark for the contested post. There were six candidates eligible at the 30-day mark, of whom four, including the Applicant and the candidate who was ultimately

selected, were invited to sit for a written examination on 22 March 2010. The interviews were conducted on 23 and 24 March.

10. The interview and selection panel determined that two candidates, the Applicant and the candidate who was ultimately selected, had the required qualifications and sent its proposal to the Central Review Board on 14 April 2010.

11. On 17 May 2010, the Central Review Board informed the Director-General of UNOG that the evaluation criteria had been properly applied and that the procedures in effect had been followed. It also informed the Director-General that the Assistant Secretary-General for Human Resources Management had approved the classification of the Applicant and the candidate who was ultimately selected as staff members designated to perform significant human resources management functions.

12. That same day, the Director-General of UNOG selected the other candidate for the contested post.

13. By an email dated 31 May 2010, an HRMS staff member sent the Applicant a memorandum dated 17 May 2010, informing him of the decision of the Director-General of UNOG not to select him for the contested post but to place him on the roster of candidates for similar functions.

14. By email dated 29 July 2010, the Applicant requested a management evaluation of that decision.

15. By letter dated 13 September 2010, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the contested decision since, in her view, this decision was legal.

16. On 12 November 2010, the Applicant filed an application to this Tribunal, and on 20 December the Respondent submitted his reply.

17. On 12 September 2011, the Tribunal held a hearing with the Applicant present and the Respondent's Counsel participating by videoconference.

Parties' submissions

18. The Applicant's contentions are:
- a. The contested decision is tainted by an abuse of authority by the Director-General of UNOG. Administrative instruction ST/AI/2006/3/Rev.1 on the staff selection system distinguishes clearly between the respective responsibilities of the head of department and the programme manager. It is the latter, not the head of department, who is responsible for interviews. As a result, for the head of department to appoint members of the interview and selection panel constitutes a violation of the relevant rules and an abuse of authority;
 - b. In accordance with section 7.5 and annex II, paragraph 1(f), to the administrative instruction mentioned above, it is the programme manager who is responsible for evaluating the candidates and preparing a reasoned and documented record of the evaluation of those candidates against the requirements and competencies. However, in this case, the Director-General of UNOG appointed as an alternate to the programme manager someone who was an expert in disarmament rather than in human resources and who, moreover, is not a UNOG staff member. This constitutes another instance of abuse of authority, which deprived the Applicant of a fair and equitable assessment of his skills;
 - c. In *Contreras* UNDT/2010/154, paragraphs 45 and 46, the Dispute Tribunal confirmed that in the context of the applicable rules governing selection, the sole power of a head of department is to have the final say in the making of a selection decision;
 - d. Even though the Applicant's name was included on the list of candidates recommended for the post, the interference by the Director-General of UNOG in the interview process and the illegal substitution of the programme manager indicate that he deliberately manipulated the selection process in order to achieve the desired result.

19. The Respondent's contentions are:
- a. The Applicant's candidacy was fully and fairly considered. The Secretary-General has broad discretionary powers in matters pertaining to staff appointments and promotions. The Tribunal's role is to examine whether staff members' applications were properly considered; it cannot substitute its evaluation of candidates for that of the Secretary-General;
 - b. There was no rule in effect at the time of the events prohibiting the head of department from appointing the members of the interview and selection panel;
 - c. There was no rule in effect at the time of the events prescribing the number of members which the panel must have or the required qualifications for the members. While, in practice, such panels usually have three members, there is nothing to prevent the establishment of a panel with more than three members. The appointment by the Director-General of UNOG of an alternate programme manager was warranted in light of the decision by the Director of Administration to withdraw from the process;
 - d. The Applicant's contention that his technical qualifications could not be properly assessed by the interview and selection panel is unfounded. The panel consisted of seasoned senior staff members, including a human resources management expert. What is more, the Applicant's qualifications were also assessed by means of a written examination prepared by OHRM. Lastly, the panel was called upon to assess other competencies that are not unique to human resources management;
 - e. The facts in *Contreras* UNDT/2010/154 are different from those of this case in that the former dealt with a candidate who had initially been recommended by the programme manager and had later been removed from the list of recommended candidates at the request of the head of department;

f. The Applicant's contention that the Director-General of UNOG abused his authority and manipulated the selection process is vague and unfounded. He provides no evidence to support that contention.

Consideration

20. In order to contest the decision not to promote him to the post of Chief (D-1), HRMS at UNOG, the Applicant maintains only that the Director-General of UNOG was not authorized to appoint the members of the interview and selection panel.

21. It is not disputed that, following the refusal of the Director of Administration to alter the make-up of the panel that she had formed to select candidates for the contested post and to participate in the selection process, the Director-General of UNOG, in a decision of 8 March 2010, designated the Director of the Conference on Disarmament Secretariat as an alternate to the Director of Administration and Chair of the interview and selection panel and also designated two additional panel members.

22. The law applicable on the date when the contested selection took place is administrative instruction ST/AI/2006/3/Rev.1 on the staff selection system.

23. The administrative instruction states:

Section 1, Definitions

...

Head of department/office: official appointed to head a department, office, regional commission or other major organizational unit of the Secretariat who is directly accountable to the Secretary-General in the exercise of the functions set out in section 5 of ST/SGB/1997/5 (as amended by ST/SGB/2002/11).

...

Programme manager: official within a department/office who is responsible for assisting the head of the department/office in ensuring the delivery of mandated activities ...

Section 2, General provisions

...

2.3 Selection decisions are made by the head of department/office when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed ...

24. Thus, for the purposes of the provisions cited above, the Director-General of UNOG should be thought of as the department head and the Director of the Conference on Disarmament Secretariat, in his capacity as alternate for the Director of Administration, as programme manager.

25. The provisions of the administrative instruction and the annexes thereto cited below set forth the respective responsibilities of the programme manager and the head of department in the candidate selection process:

Section 4, Compendium of vacancies — preparation of evaluation criteria

...

4.3 The programme manager shall be responsible for promptly requesting the inclusion of immediate or anticipated vacancies in the compendium ...

4.4 At the same time as he or she prepares the vacancy announcement, the programme manager shall prepare for subsequent review by the appropriate central review body the criteria to be used in evaluating candidates ...

Section 7, Consideration and selection

...

7.4 The programme manager shall evaluate new candidates and roster candidates transmitted by OHRM or the personnel office ... on the basis of criteria pre-approved by the central review body.

7.5 For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency-based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement.

7.6 For each vacancy, the programme manager shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and/or decision by the head of the department/office.

7.7 For posts up to and including at the D-1 level, programme managers shall transmit their proposal for one candidate or, preferably, a list of qualified, unranked candidates to the appropriate central review body through the head of department/office ... The head of department/office shall ensure that, in making the proposal, he or she has taken into account the Organization's human resources planning objectives and targets ...

Section 9, Decision

9.1 The selection decision for posts up to and including at the D-1 level shall be made by the head of department/office when the central review body finds that the evaluation criteria have been properly applied and/or that the applicable procedures have been followed ...

9.2 When recommending the selection of candidates for posts up to and including at the D-1 level to the head of department/office, the programme manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan ...

Annex I, Responsibilities of the head of department/office

1. The head of department/office has the authority:

...

(c) To make decisions on the selection of staff when the central review bodies are satisfied that the evaluation criteria were properly applied and/or the applicable procedures followed ...

...

In exercising his or her authority to select staff, the head of department/office shall select the candidate he or she considers to be best suited for the functions, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan ...

2. The head of department/office is accountable to the Secretary-General for the manner in which the selection process is conducted in his or her department/office ...

3. In the discharge of his or her responsibility to deliver mandated programmes and activities, the head of department/office works in close cooperation with the programme managers ... to ensure that ... [t]he candidates best suited for the functions are selected for vacancies in strict compliance with the requirements of the new system ...

Annex II, Responsibilities of the programme manager

1. For vacancies that are not filled laterally from within the department/office and that are expected to last for at least one year, the programme manager, as promptly as possible, and with the assistance of the executive or local personnel office:

...

(e) Ensures that interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment exercises, are conducted for appointment and promotion at the 15-, 30- and 60-day marks;

(f) Evaluates, in accordance with section 7 of this instruction, the candidates ...

(h) If there is no suitable roster candidate, submits to the central review bodies, through the head of department/office, a selection proposal that is reasoned and supported by a documented record of evaluation of the proposed candidates against the applicable evaluation criteria.

...

3. For posts up to and including at the D-1 level, programme managers propose, through the head of department/office, one candidate or, preferably, a list of qualified, unranked candidates found suitable for the functions. If a central review body finds that the proposed candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed, the programme manager recommends to the head of department/office selection of one of these candidates, supporting such recommendation by a documented record ...

4. Programme managers may delegate the performance of their functions under this instruction ..., in which case programme managers will remain fully accountable to the head of department/office for the manner in which these functions have been discharged.

26. Although the provisions cited above do not specify who is authorized to appoint a selection panel since no such panel is mentioned, it was their author's intention to make a clear distinction between the functions of, on the one hand, the head of department responsible for choosing the candidate who seems to him or her most qualified from among the candidates proposed and, on the other, those of the programme manager responsible for organizing the candidate selection process. The Tribunal thus considers that the author of the instruction intended to separate these functions so that, on the one hand, the head of department could only appoint a candidate proposed by the programme manager and, on the other, the programme manager would have no guarantee that a particular candidate from among those proposed would be appointed.

27. The Tribunal considers the separation between the functions of head of department and those of programme manager to be an essential element of the selection system that prevents the same person from both assessing and appointing candidates. Thus, the head of department could not legally intervene in the choice of members of the selection panel, once such a panel had been created, without violating the principle of separation of the two functions as indicated in the instruction referred to above.

28. Therefore, the Applicant is correct in maintaining that the selection process for the post of Chief (D-1), HRMS, at UNOG was tainted with irregularity.

29. However, since the Applicant is not requesting rescission of the entire selection process, but is requesting only compensation for the damage suffered, the Tribunal must consider whether the unlawful action caused him any damage.

30. The facts as described above indicate that after undergoing a written examination and an interview, the Applicant and another candidate were recognized by the panel as having the necessary qualifications for the post and were then proposed for appointment. Thus, the irregularity committed during the selection of the panel caused no damage to the Applicant, and the fact that he was not awarded the desired post was in no way the result of this irregularity but stemmed solely from the decision of the head of department, who, as he was entitled to do, chose the other candidate who was proposed.

31. At the hearing, the Applicant maintained that if the panel had been set up by the competent authority, he might have been considered the only qualified candidate and might thus have been the only one proposed for appointment by the Director-General. However, these assumptions are not supported by any document or other type of evidence and the Tribunal considers that this is sheer speculation on the Applicant's part.

32. Thus, although the Tribunal recognizes that there was a procedural flaw, the Applicant establishes no direct causal link between this irregularity and the decision not to appoint him to the contested post. The Applicant's request for compensation must therefore be rejected.

33. The Tribunal must also reject his request to refer the case to the Secretary-General so that he can take all appropriate measures to avoid such irregularities in the future since, as of the date of this Judgment, not only have the rules pertaining to selection procedures changed, but the Director-General who took the contested decision is no longer employed at the United Nations.

34. Lastly, at the hearing, the Respondent requested that costs be awarded against the Applicant for making allegations against the former Director-General, during the hearing, which he had not mentioned in his written submissions. Article 10.6 of the Statute stipulates that where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party. The Tribunal finds that in this case, there was no manifest abuse of the proceedings and it therefore rejects the Respondent's request.

Conclusion

26. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 16th day of September 2011

Entered in the Register on this 16th day of September 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry