UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/026
Judgment No.: UNDT/2012/044
Date: 2 April 2012
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

WILLIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Myriam Foucher, UNOG

Introduction

1. In an application filed on 26 May 2011, the Applicant contests the decision by the Officer-in-Charge ("O-i-C") of the Human Resources Management Section ("HRMS"), United Nations Conference on Trade and Development ("UNCTAD"), finding him ineligible for consideration for promotion to the P-5 level.

2. As remedy, the Applicant requests the rescission of the decision, as well as compensation for violation of his rights to full and fair consideration and to due process and for harm to his professional career and aspirations for promotion.

Facts

3. The Applicant joined the United Nations in 1993 at the L-2 level. He worked on the basis of successive 200-series contracts until 1 July 2009, when his appointment was converted to a fixed-term contract at the P-4 level limited to that grade and to UNCTAD. Under this appointment he continued serving as Project Manager in the Debt Management and Financial Analysis Systems ("DMFAS") Programme, Division on Globalization and Development Strategies.

4. On 21 April 2010, a post of Project Coordinator, at the P-5 level, within the DMFAS Programme, UNCTAD, was published in Galaxy under vacancy announcement ("VA") No. 10-PGM-UNCTAD-424297-R-GENEVA, with 20 June 2010 as closing date. The Applicant applied for this post on 20 May 2010.

5. On 12 November 2010, the responsible Human Resources Officer at the United Nations Office at Geneva sought guidance from the Office of Human Resources Management ("OHRM") as to how sections 5.2 and 5.3 of administrative instruction ST/AI/2006/3/Rev.1 (Staff selection system) applied to candidates who were UNCTAD staff members but not deemed internal "for Galaxy purposes". The Chief of the Human Resources Policy Service, OHRM replied on 17 November 2010 that non-internal staff members at the P-4 level

were not eligible to apply to positions at the P-5 level if they did not meet the lateral moves requirement stipulated in section 5.3.

6. By email dated 3 December 2010, the O-i-C of HRMS/UNCTAD, informed the Applicant that he was ineligible for consideration for positions at the P-5 level, including that advertised under VA No. 10-PGM-UNCTAD-424297-R-GENEVA.

7. On 31 December 2010, the Chief, DMFAS/UNCTAD, who was the programme manager for the post in question, requested the O-i-C, HRMS/UNCTAD to cancel the VA and re-advertise the post under the Inspira system, given that none of the candidates had been found suitable for the post.

8. On 20 January 2011, the Applicant asked the (by then former) O-i-C, HRMS/UNCTAD whether he had been considered as an internal or external candidate for the litigious post. On the following day, he was advised that he had been considered as an external candidate.

9. On 1 February 2011, the Applicant requested a management evaluation of the decision "to consider [him] ineligible for consideration for the P-5 Vacancy (10-PGM-UNCTAD-424297-R-GENEVA)". The Management Evaluation Unit informed him, on 4 March 2011, that the contested decision was upheld.

10. The application at hand was filed with the Tribunal on 26 May 2011. The Respondent submitted his reply on 30 June 2011.

11. By Order No. 38 (GVA/2012) of 16 February 2012, the parties were convened to an oral hearing, which took place on 1 March 2012, with the participation of both parties.

Parties' submissions

12. The Applicant's principal contentions are:

a. The Applicant was unlawfully excluded from the selection process as a 30-day candidate, in violation of section 5.5(a)(ii) of

ST/AI/2006/3/Rev.1. In the alternative, his candidacy should have been given due consideration as an external candidate, pursuant to section 5.6. In either case, he was not required to have two prior lateral moves, as section 5.3 of the above-referenced instruction requires of internal candidates;

b. The Administration's interpretation of the relevant provisions is not supported by a plain reading of the text. In fact, such reading of sections 5.3, 5.5(a)(ii) and 5.6, in conjunction with the definition of "internal candidate" contained in ST/AI/2006/3/Rev.1, leads to the following conclusions: (1) the Applicant cannot be considered under any of the administrative instruction provisions reserved for internal candidates; (2) the Applicant should have been considered at the 30-day mark, since section 5.5(a)(ii) provides that staff whose appointment is limited to service with a particular office may be considered for a higher-level post in that office only. Inasmuch as section 5.5(a)(ii) is reserved for staff members with appointments limited to a particular office, any other provision regarding promotion of this category of staff should not have been taken into account; had the drafters of ST/AI/2006/3/Rev.1 intended that staff members with appointments so limited be also subject to section 5.3, this would have been clearly indicated;

c. The Administration's interpretation is not supported by a "statutory reading" of the pertinent provisions in their entirety and in context;

d. If it was the intent to subject staff members holding project posts to the same lateral moves requirement as internal candidates, this should have been indicated, especially considering that these two categories of staff have always been subjected to distinct contractual rules of employment and promotion;

e. The Applicant's exclusion contravenes article 101 of the Charter, which requires that 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 well as staff regulation 4.4, according to which "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations". In fact, the VA was cancelled as no suitable candidate was identified, whereas the Applicant had been performing the functions of the post for years to the full satisfaction of his hierarchy, a result which seems contrary to the Organization's interest;

f. The contested decision violates the Applicant's right to be treated fairly, equally and without discrimination, for his lack of lateral moves while on 200-series appointments was beyond his control. His contractual status prevented him from benefiting from geographical exchange initiatives sponsored by UNCTAD. The DMFAS Programme did not have posts out of Geneva and this fact, together with the specialized functions of the Applicant, made it virtually impossible for him to meet the lateral moves requirement;

g. Notification of his alleged ineligibility over five months after the closing of the VA is a significant delay, which amounts to a violation of his due process rights and resulted in professional and moral prejudice.

13. The Respondent's principal contentions are:

a. The VA advertising the post of Senior Project Coordinator (P-5) in the DMFAS Programme was cancelled due to lack of suitable eligible candidates and no post corresponding to these functions has been re-advertised since then. No candidate has ever been selected to fulfill the functions and the non-regular post in question does not exist anymore. Hence, the present application is moot, to the extent it relates to the allegedly erroneous interpretation of the rules governing the previous staff selection system applicable for this precise post;

b. On the merits, section 5 of ST/AI/2006/3/Rev.1 provided for the eligibility requirements applicable in the selection process. Sections 5.1 to 5.3 set out the general provisions governing eligibility for all staff

members regardless of their contractual status. These provisions should be considered as framing how the remaining sections on eligibility of internal or external candidates should be implemented. Therefore, staff members not eligible under sections 5.2 or 5.3 cannot be considered as eligible candidates under any other section. A different interpretation would create discrepancies among the different categories of staff members envisaged by sections 5.4, 5.5, and 5.6. Had the drafters of ST/AI/2006/3/Rev.1 wished to exclude certain categories of staff members from the scope of section 5.3, these categories would have been clearly stated. As a staff member, section 5.3 applies to the Applicant regardless of the category he belongs to;

c. Although the O-i-C, HRMS/UNCTAD advised the Applicant that he was regarded as an external candidate (60-day mark candidate under section 5.6), it appears that, since his project personnel appointment was converted to a limited fixed-term appointment on 1 July 2009, he could also be considered as a 30-day mark candidate under section 5.5. This apparent contradiction, resulting from a "maladjustment of the former staff selection rules to the newly created status of staff member under the ['Interim guidelines for implementation of transitional measures for the United Nations contractual reform for currently serving staff members other than those serving in the United Nations peacekeeping missions']", shows that a different interpretation of the administrative instruction would create an absurd situation, where, depending on whether the Applicant was considered under section 5.5 or 5.6, the mobility requirement would apply or not;

d. Similarly, if sections 5.1 to 5.3 did not apply to all categories of staff, this would bring about situations where candidates with the same contractual status could fall either under section 5.6, with no requirement for lateral moves, or under section 5.5, with a mobility requirement, for no justified reason;

e. In practice, considering the Applicant as an external candidate, not bound by the lateral moves requirement, would give an unfair advantage to a staff member who was appointed under more restrictive conditions for a project position, and who was never recruited through the staff selection system or had his appointment endorsed by a central review body;

f. Section 2.2 of ST/AI/200673/Rev.1 stresses the necessity for staff to move periodically to new functions, by providing that: "All staff, up to and including those at the D-2 level, are expected to move periodically to new functions throughout their careers." Regardless of the nature of their contracts, staff always has the possibility to apply for posts within or outside their department. Nothing prevented the Applicant from applying for other project personnel positions within UNCTAD;

g. The interpretation explained above, and consistently implemented by OHRM, allows coherent and fair treatment of staff members under ST/AI/2006/3/Rev.1; any other reading would be legally unsustainable.

Consideration

14. At the outset, it has to be stated that the fact that no other candidate was selected for the post at stake does not render the case moot. It must be emphasized, in this regard, that the contested decision is not the Applicant's non-selection to the post of Senior Project Coordinator, DMFAS Programme, but the determination that he is ineligible for P-5 positions in general. Although the contested decision was reached in the context of the selection procedure for a given post, it has effects with respect to any other position at the P-5 level to which the Applicant may apply, thus clearly beyond this specific procedure.

15. Turning to the merits, there is no contention as regards the relevant facts. In particular, it is undisputed that the Applicant did not have any lateral move within the meaning of section 1 of ST/AI/2006/3/Rev.1 (Staff selection system). It is not controversial either that ST/AI/2006/3/Rev.1 contains the rules applicable to the present case, for it was the administrative issuance governing the matter at the time VA No. 10-PGM-UNCTAD-424297-R-GENEVA was published.

16. The key question put to the Tribunal is whether section 5.3 of the said instruction was applicable to the Applicant, given his specific employment status, and whether, as a result, he was subject to the requirement of having had two prior lateral moves in order to be eligible for consideration for promotion to the P-5 level. The Applicant argues that the mobility requirement laid down in section 5.3 applied only to internal candidates, whereas the Respondent holds that this provision had a broader scope.

17. Section 5 of ST/AI/2006/3/Rev.1 dealt with the "Eligibility requirements". It started (section 5.1 to 5.3) by spelling out a series of conditions drafted in general terms; notably, section 5.3 prescribed:

> Staff members in the Professional category shall have at least two prior lateral moves, which may take place at any level in that category, before being eligible to be considered for promotion to the P-5 level …

18. Immediately after, it established three categories of candidates, i.e., 15-day, 30-day and 60-day mark candidates, respectively defined in sections 5.4, 5.5 and 5.6, and set up a system of priorities among the three groups. By virtue of it, no 30-day candidate could be considered before it had been assessed that there was no suitable 15-day candidate for a given post, and likewise, no 60-day candidate could be taken into consideration until it had been determined that there was no suitable 30-day candidate (see *Kasyanov* UNDT/2009/022, *Wu* UNDT/2009/084, *Krioutchkov* UNDT/2010/065, *Abbassi* UNDT/2010/086, *Xu* UNDT/2011/171).

19. In this connection, the parties have engaged in extensive discussions on what is the category—30-day or 60-day mark—under which the Applicant's candidacy should have been classified.

20. On this point, the Tribunal concludes that, for a post in UNCTAD at the P-5 level, the Applicant was to be considered at the 30-day mark. Indeed, section 5.5, which listed those qualifying as 30-day candidates, reads, in sub-section (a)(ii):

> Staff whose appointment is limited to service with a particular office may be considered for a higher-level post in that office only.

21. Since his 200-series appointment had been converted in July 2009 to a fixed-term contract limited to UNCTAD, the Applicant clearly fell under section 5.5(a)(ii). To this extent, he must be considered under this category, and not under a less favourable one. Interpreting ST/AI/2006/3/Rev.1 otherwise would run contrary to the logic underpinning the former staff selection system. The latter was based on a rigid hierarchy of three categories of candidates in terms of priority consideration. If a candidate belonged to a priority category—which was to his or her advantage—he or she was excluded from the less priority ones. Moreover, allowing one same candidate to be considered under either one category or another alike would have opened the door to arbitrariness, as it would permit applying to one candidate a more or less favourable regime depending on the Administration's choice to consider him or her under one or the other category.

22. Having said this, had the Applicant belonged to the 60-day rather than to the 30-day group, this would not necessarily have made a difference for the purpose of applying or not section 5.3 of the instruction to him. The Applicant's position is that only internal candidates are subject to the mobility requirement. At this point, it must be clarified that the classification as 15, 30 and 60-day candidates does not correspond to the distinction made in the instruction between internal candidates and the rest. It is true that, in defining the three different categories—15, 30 and 60-day candidates—ST/AI/2006/3/Rev.1 relies to a large extent on the distinction between internal and external or non-internal candidates. Yet, these two categorizations should not be confused.

23. As per section 1 (Definitions) of the instruction, "internal candidates" are:

> [S]taff members currently serving under a fixed-term, probationary or permanent appointment who have been recruited after a competitive examination under staff rule 4.16 or upon the advice of a Secretariat joint body under staff rule 4.15. Staff whose appointment is limited to service in a particular department or office are not considered internal candidates.

24. No express definition of external or non-internal candidates was provided. Nevertheless, section 5.6 of the instruction gave important indications as it delimited the category of the 60-day candidates. This section referred to (emphasis added):

> All candidates, including *external candidates and staff who are not considered internal staff members as defined in section 1 above*, may be considered for any vacancy by the deadline indicated in the vacancy announcement …

25. It flows from the above wording that the drafters of the administrative instruction intended to distinguish between: (1) internal candidates, strictly defined in section 1; (2) non-internal candidates, comprising staff members who do not fall within this definition; and (3) external candidates, by reference to those completely exterior to the Organization, i.e., non-staff members. Against this categorization, it results that the Applicant should be regarded as a non-internal candidate, inasmuch as he was a staff member but, given his contractual status, was excluded from the category of internal candidates by the last proviso of the definition in the above-cited section 1: "Staff whose appointment is limited to service in a particular department or office are not considered internal candidates."

26. Classifying the Applicant as a non-internal candidate is by no means incompatible with his consideration as a 30-day candidate under section 5.5 of the administrative instruction. On the contrary, it is clear from the language of section 5.5 that this category encompasses both internal and non-internal candidates. Sub-section 5.5(a)(i) included specifically "*[i]nternal candidates* whose appointment is not limited to service within a particular office", whereas sub-section 5.5(a)(ii)—under which the Applicant fell—referred to "*[s]taff* whose appointment is limited to service with a particular office" (emphasis added).

27. In any event, the contention that the application of section 5.3 of administrative instruction ST/AI/2006/3/Rev.1 is limited to internal candidates is unfounded. In fact, it is defeated by the plain meaning of this provision, as it imposed the mobility requirement upon "staff members in the Professional category", with no further restrictions. Nothing in section 5.3 or elsewhere

suggests that its applicability was limited to a certain category of candidates. Additionally, a systemic reading of section 5 as a whole suggests that the first three paragraphs (5.1 to 5.3) constituted a *chapeau* setting a common framework of general application, as opposed to the following provisions (5.4 to 5.6), which regulated each specific category of candidates. Lastly, section 5.3 itself contains a number of softening provisos regarding the mobility requirement. The Tribunal is of the view that had the drafters intended to exclude the application of the mobility requirement for all non-internal candidates, such an important exception would have been stated expressly.

28. In light of the foregoing, the Tribunal concludes that the mobility requirement, as established in section 5.3 of ST/AI/2006/3/Rev.1, applied to the Applicant and therefore the decision finding him ineligible for P-5 positions was lawful.

29. In addition, as a matter of policy, it is not unfair or unreasonable to require those who aspire to reach a senior level within the Organization's hierarchy—as the P-5 level is—to have moved twice in their careers to a different position at the same level for at least a year. A P-5 position generally requires skills which—it is sensible to assume—are developed, improved or tested by changing functions. For similar reasons, the Organization promotes a policy of mobility for its entire staff, recalled in section 2.2 of the same administrative instruction ST/AI/2006/3/Rev.1; it is legitimate to encourage adherence to such a policy in this manner, and normal that the exigency of compliance with it be reinforced vis-à-vis its high-ranking staff.

30. The Tribunal is mindful of the difficulties that some staff members may encounter in trying to have the required lateral moves. It has given due consideration to the Applicant's submission that his restrictive contractual status during most of his lengthy service with the United Nations, together with his professional specialization, made it hard for him to find suitable opportunities to fulfill the two lateral moves condition. Yet, this is not a sufficient reason to waive a requirement that, as explained above, is justified and reasonable. Difficult as it might be, it remained possible for the Applicant to make two lateral moves and

the Organization cannot be blamed for setting demanding standards to accede to senior positions.

31. The Applicant also claims that over five months for the Administration to communicate the contested decision is an excessive delay, in violation of his due process rights. The Tribunal wishes to stress that, while section 9.5 of ST/AI/2006/3/Rev.1 imposed a duty on the programme managers to inform "[a]ll interviewed candidates who are not selected or placed on the roster", the Applicant was not interviewed for the post of Senior Project Coordinator, and accordingly, there was no obligation under the said provision to advise him that his candidacy had been unsuccessful. This does not mean that the Administration is not bound to act in good faith and transparency with the Applicant, as part of its staff, and to respect his rights to due process and fair dealing. It does imply, however, that the time standards against which compliance with this obligation is measured cannot be the same as those used to declare a breach of section 9.5.

32. The Tribunal acknowledges that five months awaiting the outcome of a selection procedure which turned out to deceive his expectancies may well have been a source of frustration. Nonetheless, it is unavoidable that administrative procedures take time and in the present case the Administration cannot be seen as having lacked reasonable diligence in treating the Applicant's application and subsequent queries. While the Applicant avers that the time elapsed since he submitted his candidacy until he was notified of his ineligibility resulted in moral prejudice and damage for his career and aspirations for promotion, this period was not such as to cause him harm that calls for reparation (see *McKay* UNDT/2012/018).

Conclusion

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

The application is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 2nd day of April 2012

Entered in the Register on this 2nd day of April 2012

(*Signed*)

René M. Vargas M., Registrar, Geneva