



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/083

Judgment No.: UNDT/2012/066

Date: 9 May 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

ASARIOTIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Bettina Gerber, UNOG

Introduction

1. By application registered on 17 November 2011 by the Geneva Registry of the United Nations Dispute Tribunal, the Applicant, a staff member of the United Nations Conference on Trade and Development (“UNCTAD”), contests the decision to cancel, three and a half years after it was published, vacancy announcement No. 07-ECO-UNCTAD-416118-R-GENEVA (G) for the D-1 post of Head of the Trade Logistics Branch within UNCTAD.

2. She requests the following:

- a. That the staff member now serving as Officer-in-Charge of the Trade Logistics Branch be relieved of his temporary duties;
- b. That she be temporarily assigned as Officer-in-Charge of the Branch pending completion of the new selection process;
- c. That her name be placed on a roster of pre-approved candidates for similar functions;
- d. That the Tribunal order the Respondent to complete the selection procedure for the re-advertised post within the shortest possible time;
- e. That she receive compensation commensurate with the material and moral damage caused by mistakes and irregularities on the part of the Administration.

Facts

3. The Applicant entered the service of UNCTAD at the P-4 level on 9 December 2001. On 1 September 2005, she was promoted to the P-5 level and became Chief of the Policy and Legislation Section of the Trade Logistics Branch, Division for Services Infrastructure for Development and Trade Efficiency (renamed the Division on Technology and Logistics (“DTL”) in early 2008).

4. Vacancy announcement 07-ECO-UNCTAD-416118-R-GENEVA (G) for the D-1 post of Head of the Trade Logistics Branch was published on 26 November 2007. It had an application deadline of 25 January 2008.

5. The Applicant applied for the post as a 30-day candidate on 24 December 2007.

6. The Trade Logistics Branch consists of three sections, including the Policy and Legislation Section, headed by the Applicant, and the Transport Section, headed by another P-5 level staff member.

7. Upon the retirement of the Head of the Trade Logistics Branch on 31 January 2008, the Chief of the Transport Section was appointed Officer-in-Charge of the Branch on 1 February 2008, pending the selection of a new Head.

The first round of interviews and the recommendation for the disputed post

8. On 10 March 2008, the Applicant was interviewed for the disputed post. Four other eligible internal 30-day candidates were also interviewed, including the Officer-in-Charge of the Branch. The interview panel consisted of three people, including the Director (D-2) of DTL, in her capacity as the hiring manager.

9. By internal memorandum dated 14 May 2008, the Director of DTL recommended to the Secretary-General of UNCTAD that he select for the disputed post the Chief of the Transport Section, who was also serving as the Officer-in-Charge of the Branch. However, no action was taken on this recommendation.

10. On 30 June 2008, the Director of DTL, who was the hiring manager, retired. A staff member was appointed to serve as Officer-in-Charge of the Division on 1 July 2008.

11. The Applicant received no information on the selection procedure for the disputed post until May 2009, when she was informally advised that the selection procedure had been “put on hold.” According to the Respondent, the budget line item had been required for a priority placement of a staff member holding a permanent appointment until that individual’s retirement in June 2009. During

this period, Galaxy, the online recruitment system, continued to indicate that the applications were under consideration.

12. On 15 June 2009, a new Director of DTL was appointed.

13. On 15 July 2009, the Director of DTL advised the Applicant that the disputed post would be re-advertised. However, as the information below indicates, she subsequently changed her mind with regard to that matter.

14. On 28 July 2009, a temporary vacancy announcement for a period of from three to six months was issued for the disputed post, and the Applicant applied on 6 August 2009. She was interviewed, but the candidate who had served as Officer-in-Charge of the Branch since 1 February 2008 was selected. The Applicant was notified of this on 19 January 2010.

The second round of interviews and the recommendation for the disputed post

15. From February to April 2010, there was a second round of interviews for the disputed post as advertised in November 2007, apparently further to the decision of the Director of DTL not to re-advertise the post as initially announced. The Applicant was interviewed once again on 30 March 2010, as were three of the four other candidates who had been interviewed in March 2008. Four 30-day candidates and eight 60-day candidates were interviewed in all. The interview panel was composed of three members, including the new Director of DTL, as the hiring manager.

16. In June and July 2010, as she had received no information about the selection procedure, the Applicant wrote to the Officer-in-Charge of the Human Resources Management Section of UNCTAD to enquire about the progress of the selection procedure. The Officer-in-Charge replied on 5 July 2010 that the Director of DTL was finalizing the evaluations.

17. On 12 October 2010, the Applicant, who was still without news, wrote once again to the Officer-in-Charge of the Human Resources Management Section of UNCTAD, who answered the same day that the interview panel's recommendations had "recently" been submitted to the Secretary-General of

UNCTAD for transmission to the Central Review Board, and that a decision would be taken by mid-November.

18. The interview panel's evaluations indicate that it concluded that the Applicant did not fully meet the requirements for the post and had therefore not been recommended. The panel was of the opinion that only two candidates met the post criteria, the candidate who had been serving as Officer-in-Charge of the Service since February 2008 and one 60-day candidate.

19. On 3 November 2010, the panel's recommendations were presented to the Geneva Central Review Board. The Board twice requested additional information with regard to: (i) the performance evaluations of the interviewed candidates, (ii) the reasons why it had taken more than three years to produce the recommendations, (iii) the reasons why one of the candidates had not been recommended despite her experience, (iv) some apparent inconsistencies between the panel's evaluation of the recommended candidate and his experience as described in his personal history profile, and, finally, (v) the reasons why UNCTAD had not taken any measures to avoid having the Officer-in-Charge of the Branch serve as the Applicant's first reporting officer in 2008-2009 and 2009-2010 while they were both in competition for the disputed post. At its meetings of 15 December 2010 and 16 February 2011, the Board considered the information provided by UNCTAD.

20. On 4 April 2011, the Applicant wrote once again to the Human Resources Management Section of UNCTAD, as she still had received no news. On 15 April 2011, she was informed that the selection procedure was still ongoing and that once it was completed she would be informed.

21. By memorandum dated 7 April 2011, the Geneva Central Review Board informed the Under-Secretary-General for Management that despite additional information provided by the Director of DTL, it was not in a position to endorse the recommendations made by UNCTAD, as the selection procedure had been flawed. It recommended that the post be re-advertised.

The contested decision: Cancellation of the litigious vacancy announcement

22. By memorandum of 14 April 2011, the Under-Secretary-General for Management requested the Secretary-General of UNCTAD to re-advertise the post.

23. By email of 3 May 2011, the Director of DTL informed the Applicant that “in response to a request from the Senior Review Group” [*sic*], vacancy announcement No. 07-ECO-UNCTAD-416118-R-GENEVA (G), issued on 26 November 2007 in Galaxy, would be cancelled and re-issued in Inspira, the new online recruitment system, and she invited the Applicant to reapply.

24. On 9 May 2011, in response to the Applicant’s request for clarifications, the Human Resources Management Section of UNCTAD informed the Applicant that the decision to re-advertise the post had been taken by the Under-Secretary-General for Management in accordance with section 5.6 of ST/SGB/2002/6, the Secretary-General’s bulletin on central review bodies.

25. On 25 May 2011, the Applicant wrote to the Under-Secretary-General for Management and to the Secretary of the Geneva Central Review Board to request clarifications regarding the decision to cancel the vacancy announcement and to find out whether her name had been on the list of recommended candidates.

26. On 26 May 2011, the Office of the Under-Secretary-General for Management replied to the Applicant that the Central Review Board had expressed concerns about delays in the selection procedure and the impact on other potential candidates, as well as on other issues that could not be revealed to the Applicant. It stated in addition that the Under-Secretary-General for Management had decided to re-advertise the position in view of the protracted nature of the evaluation and recommendation of candidates and that it could not reveal to the Applicant whether or not she had been recommended.

27. On 22 June 2011, the Secretary of the Central Review Board replied to the Applicant that the Board had decided to refer the case to the Under-Secretary-General for Management under section 5.6(a) of bulletin ST/SGB/2002/6, having concluded that the procedures in effect had not been adhered to and that the

evaluation criteria had not been consistently applied to all the candidates. Moreover, she stated that the Under-Secretary-General for Management had communicated to the Secretary-General of UNCTAD his decision to re-advertise the disputed post on 14 April 2011.

28. On 1 July 2011, the Applicant submitted a request for management evaluation of the decision to cancel vacancy announcement 07-ECO-UNCTAD-416118-R-GENEVA (G) for the post of Head of the Trade Logistics Branch, after a selection procedure lasting nearly three and a half years.

29. On 26 August 2011, the disputed post was re-advertised. The Applicant applied for this position.

30. By letter dated 16 September 2011, received by the Applicant on 19 September, the Deputy Secretary-General informed the Applicant that the Secretary-General had decided to uphold the contested decision.

Appeal

31. On 17 November 2011, the Applicant submitted her application.

32. The Respondent submitted his reply on 20 December. In it, he submitted, on his own motion, part of the selection documents, in particular, the unredacted evaluations of the 12 candidates who had been interviewed in 2010, the memorandum of 7 April 2011 from the Geneva Central Review Board to the Under-Secretary-General for Management and the decision of the latter of 14 April 2011 to re-advertise the post. However, the evaluations of the candidates interviewed in 2008 were not provided, nor were the requests of the Central Review Board for supplementary information and the responses provided by UNCTAD between November 2010 and February 2011.

33. On 6 January 2012, the Applicant submitted observations on the Respondent's reply.

34. By Order No. 49 (GVA/2012) of 7 March 2012, the Tribunal asked the Respondent to produce the selection documents related to the interviews conducted in March 2008 and to the reasons why the selection procedure was

“interrupted” after those interviews. It also asked the Respondent to provide explanations and supporting documents as to why the Director of DTL decided, some time between June 2009 and February 2010, to resume the interrupted selection procedure rather than cancel the vacancy announcement and to interview additional candidates, including 60-day candidates.

35. On 21 March 2012, the Respondent filed a submission in response to Order No. 49 (GVA/2012) and requested the Tribunal not to release to the Applicant all of the documents related to the selection interviews conducted in March 2008.

36. By Order No. 59 (GVA/2012) of 23 March 2012, the Tribunal transmitted to the Applicant a redacted version of the documents mentioned above and set a deadline for her to file her observations.

37. The Applicant filed her observations on 10 April 2012.

38. On 17 April 2012, the Tribunal held a hearing, attended by the Applicant and Counsel for Respondent.

Parties’ submissions

39. The Applicant’s contentions are:

a. The selection procedure for the disputed post was hindered by an unconscionable delay, from the publication of the vacancy announcement in November 2007 until it was cancelled nearly three and a half years later (1,234 days). This delay is excessive compared to the average duration of such a procedure in Galaxy (174 days) and the target of 120 days established by the General Assembly. The decision to cancel the vacancy announcement and re-advertise the post served only to increase this delay, which has had a detrimental effect on the Applicant’s emotional state, as well as on the working climate in her service and her career progression;

b. The selection procedure was tainted by a series of irregularities which led the Central Review Board to refer the matter to the Under-

Secretary-General and to a decision by the Under-Secretary-General to cancel the vacancy announcement. Of particular interest are the following points:

i. A selection decision should have been taken following the interviews of the 30-day candidates in March 2008, and she should have been either selected or placed on the roster of pre-approved candidates;

ii. Moreover, as a woman and a candidate particularly qualified for the post who meets the conditions set forth in paragraph 1.8(a) of administrative instruction ST/AI/1999/9 (Special measures for the achievement of gender equality), she should have been selected following the interviews of March 2008;

iii. Instead, the selection procedure was suspended from April 2008 to June 2009 to allow for the placement of a staff member without assignment; it was at that point that the vacancy announcement should have been cancelled. Moreover, during that period, no steps were taken to appoint an Officer-in-Charge of the Branch in accordance with the rules in effect with regard to temporary assignments (ST/AI/1999/9, ST/AI/1999/17, ST/AI/2006/3 and ST/AI/2010/4), which inflicted material damage on her as well as damage on her career progression and gave an unfair competitive advantage to the Officer-in-Charge of the Branch;

iv. Throughout the entire selection procedure, which lasted nearly three and a half years, she was either not kept informed or else received contradictory information, which was a significant source of stress;

v. During the second round of interviews in March 2010, the 30-day and 60-day candidates were considered together, in violation of administrative instruction ST/AI/2006/3/Rev.1 on the staff selection system;

vi. Moreover, the evaluation criteria were not consistently applied to all candidates, as noted by the Central Review Board. As a result, the evaluation of her candidacy by the interview panel cannot be considered reliable, nor can it be cited by the Respondent to claim that her chances of being selected were weak. Moreover, it is apparent from her evaluation that her candidacy did not receive the full and fair consideration to which she was entitled, as demonstrated by the inconsistencies between the scores assigned for her university studies and her knowledge of United Nations policies, procedures and operations, and the scores assigned to other candidates. These scores were arbitrarily assigned;

vii. As the Central Review Board noted, her candidacy suffered, moreover, owing to the fact that the Officer-in-Charge of the Branch was the Applicant's first reporting officer in 2008-2009 and 2009-2010, even though they were both applying for the disputed post;

viii. The Respondent cannot, on the one hand, decide to cancel the selection procedure after 42 months owing to its being tainted by irregularities, and on the other hand, argue, as he has, that her candidacy during this same procedure received the full and fair consideration to which she was entitled;

c. The decision of the Under-Secretary-General for Management to cancel the vacancy announcement amounts to a decision not to select the Applicant and not to place her on the roster of pre-approved candidates. Under section 5.6 of ST/SGB/2002/6, the Under-Secretary-General had the authority and the obligation to select a candidate and, in this case, to select the Applicant. There is no provision that covers the possibility of cancelling a vacancy announcement;

d. The decision to re-advertise the post is prejudicial to her for several reasons. Under the new selection rules, she will no longer benefit from the preferences granted to internal candidates and women. Furthermore, given the budgetary situation, it may well be that the post will never be filled.

40. The Respondent's contentions are:
- a. The decision to re-advertise the post is not prejudicial to the Applicant, as she can apply and has in fact done so;
 - b. The decision to re-advertise the post is lawful. It was taken in response to the recommendation of the Central Review Board and is consistent with the provisions of ST/SGB/2002/6, in particular, sections 5.6 and 8. While there is no provision covering the possibility of re-advertising a post, the United Nations Dispute Tribunal concluded in *Kamal* UNDT/2011/034 that such a practice was lawful. In that case, the selection procedure was tainted in several ways that prevented full and fair consideration of the applications; it therefore fell to the Under-Secretary-General to have the vacancy announcement cancelled rather than to take a selection decision which would have been unlawful owing to its being based on a tainted procedure;
 - c. While it is true that the decision to re-advertise the post will necessarily delay the selection of a candidate still further, in this case, the candidates' right to full and fair consideration should prevail over the Organization's interest in filling the disputed post as soon as possible;
 - d. During the selection procedure, the Applicant received all necessary information and was informed without delay of the decision to re-advertise the post;
 - e. The Applicant's argument that the decision to re-advertise reduces her chances of being selected is groundless;
 - f. While it is regrettable that the selection procedure could not be completed within a reasonable time frame, it must be pointed out that this is one of the reasons why the vacancy announcement was cancelled and that re-advertising the post in fact prevents the delay from having a negative impact on the selection decision. Moreover, the delay caused no material damage to the Applicant, who could not know for sure that she

would be selected; as for the moral damage she claims to have suffered, she has provided no evidence of that, such as a medical certificate;

g. The interview panel concluded that the Applicant did not fully meet the criteria for the post, and it was not the Applicant's evaluation but that of another candidate that caused the Central Review Board to recommend re-advertising the post;

h. To the extent to which the application concerns the decision to select another candidate to serve as Officer-in-Charge of the Branch during the regular selection procedure, it is time-barred and therefore not receivable.

Consideration

41. From the facts as recounted above, it emerges that the Applicant submitted an application for the disputed D-1 post of Head of The Trade Logistics Branch on 24 December 2007 as a 30-day internal candidate and that she was invited to a selection interview that took place on 10 March 2008. Although she was informed by the Director of the Division on 15 July 2009, 16 months later, that the selection procedure would be interrupted and the vacancy re-advertised, the vacancy was not re-advertised, and between February and April 2010 a second round of interviews was conducted for the disputed post as advertised in November 2007. The Applicant was therefore interviewed for a second time on 30 March 2010, albeit with a differently composed selection panel. Other candidates not selected for interviews in 2008 were also interviewed during that round.

42. Finally, on 3 November 2010, the second selection panel's recommendations were submitted to the Geneva Central Review Board. By memorandum dated 7 April 2011, the Board declined to approve them owing to procedural flaws in the selection procedure. On 14 April 2011, the Under-Secretary-General for Management asked the Secretary-General of UNCTAD to re-advertise the post. This decision officially brought selection activities to an end.

43. It is the task of the Tribunal to note the primary irregularities tainting the selection procedure up until it was officially terminated.

44. First, after the Applicant was invited to the first selection interview on 10 March 2008, the procedure was suspended, and the Administration maintains that this was done in order to use the vacancy for the priority placement until retirement in June 2009 of a staff member with a permanent appointment but without assignment. While the Tribunal recognizes that, given the broad discretionary powers of the Secretary-General in the organization of services, he may suspend or interrupt a selection procedure for a post at any time, as long as a staff member has not been officially advised of his or her selection, he can nonetheless do this only when there are legitimate grounds to do so. In this case, although the Tribunal asked the Respondent to produce the documents that would serve as grounds for doing so, the only documents produced date from before the posting of the vacancy announcement for the disputed post on 26 November 2007, and as such, they do not provide support for the alleged grounds. Thus, the Administration has not provided any legitimate grounds for suspending the selection procedure while the interviews had already been conducted, and in May 2008 the Director of DTL, who was the hiring manager for the vacant post, had transmitted her selection recommendation to the Secretary-General of UNCTAD.

45. Second, it is not disputed that after five internal 30-day candidates, including the Applicant, were interviewed in 2008, the selection procedure for the same vacancy announcement was resumed between February and April 2010, with a second round of interviews. The 30-day candidates who had already been interviewed in 2008, including the Applicant, and eight 60-day candidates were all invited to interviews. Thus, not only was a second round of interviews for the same post organized before the results of the first round had been announced, but, in addition, the Administration did not comply with the requirement under administrative instruction ST/AI/2006/3 to consider 30-day candidates before considering 60-day candidates (see the Judgment of the United Nations Appeals Tribunal *Verschuur* 2011-UNAT-149).

46. Lastly, in addition to the irregularities already mentioned, the Tribunal cannot but note that the Central Review Board refused to approve the

recommendations of UNCTAD based on the second round of interviews, concluding that the procedures in force had not been followed and that the evaluation criteria had not been consistently applied to all the candidates.

47. Thus, given the numerous irregularities in the selection procedure that began after vacancy announcement No. 07-ECO-UNCTAD-416118-R-Geneva (G) was published on 26 November 2007, the Under-Secretary-General for Management had to terminate the procedure, and the Applicant has no basis for complaint regarding the cancellation of the vacancy announcement of the disputed post. Accordingly, the contested decision is lawful.

48. The Applicant is nonetheless entitled to maintain that if the selection procedure had been completed and if it had been free of procedural violations, there was a chance that she would have been selected for the vacant post. She is also entitled to request compensation for the damage suffered.

49. Given their irregularities, the Tribunal cannot use the second panel's evaluations conducted in 2010 to assess the Applicant's chances of being selected had the procedure been complied with. Nor can it use the first interview panel's evaluations from 2008, which, unlike those of 2010, were not submitted to the Central Review Board, but which also appear to be flawed; the evaluation of the Applicant, in particular, was negatively influenced by considerations of which she was not apprised during her interview.

50. Given that five internal 30-day candidates were interviewed during the first round of interviews in 2008 and that four of them were interviewed during the second round in 2010, the Tribunal is of the view that the Applicant had approximately a 25 per cent chance of being selected, as the Respondent's counsel acknowledged during the hearing. Moreover, with regard to the Appeals Tribunal case law as evidenced in *Hastings* 2011-UNAT-109, the Tribunal holds that a lump sum of CHF10,000 would represent fair compensation for the material damage the Applicant suffered in losing an opportunity for promotion.

51. Finally, from what has been said above, it follows that, owing to the irregularities on the part of the Administration which were noted by the Tribunal,

the Applicant, who applied for the disputed post on 24 December 2007, was not officially advised that the vacancy would be re-advertised until 3 May 2011, three and a half years after it was first advertised and more than three years after the Applicant was first interviewed.

52. Therefore, the Administration's delays in informing the Applicant of the outcome of her application and the irregularities in the selection procedure conducted by the Administration of UNCTAD caused the Applicant great anxiety and resulted in significant moral damage, even though she has never claimed to have an illness resulting from the Administration's actions. It would therefore be fair to order the Secretary-General to pay her a lump sum of CHF15,000 as compensation.

Conclusion

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

- a. The Respondent is ordered to pay the Applicant the amount of CHF25,000;
- b. The compensation set above shall bear interest at the US prime rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent interest shall be added to the US prime rate 60 days from the date this Judgment becomes executable;
- c. The Applicant's other requests are rejected.

(Signed)

Judge Jean-François Cousin

Dated this 9th day of May 2012

Entered in the Register on this 9th day of May 2012

(Signed)

René M. Vargas M., Registrar, Geneva