



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/002

Judgment No.: UNDT/2012/123

Date: 10 August 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

NEAULT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Rick Cottam

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 6 May 2011, the Applicant challenges the decision not to select her for a post of Judges' Assistant, at level G-5, in the Chambers of the International Criminal Tribunal for the former Yugoslavia ("ICTY").

2. She claims compensation in the amount of two years' salary and benefits at the G-5 level for the material and moral injury she suffered, the violation of her due process rights, and the Administration's bad faith.

Facts

3. In August 2007, the Applicant joined the ICTY, as a Computer Information Systems Clerk, at level G-4, in the Information Support Unit ("ISU") of the Office of the Prosecutor ("OTP"). She then worked in the Information Dissemination and Electronic Disclosure Unit ("IDED") of the OTP from April 2009 until June 2010, when she started working part-time for the ISU and part-time for the IDED.

4. On 1 March 2010, job opening No. VA 2010/REG/CHA/012-GS ("job opening No. 012") was issued to fill two G-5 posts of Judges' Assistant. The closing date for applications was set at 30 March 2010. Seven candidates, including the Applicant, were interviewed by a panel.

5. Under cover of a memorandum dated 8 June 2010, the Chair of the interview panel transmitted to the Head of Recruitment and Training Unit the panel's reports, finding that none of the seven interviewed candidates was suitable for the posts. Concerning specifically the Applicant, the panel noted that, while working in the OTP, she had been "to some degree substantively involved in several cases ... that are still before the tribunal, making the panel believe there is a likelihood of an actual or apparent conflict of interest due to impartiality and confidentiality factors were she to work supporting Judges in Chambers".

6. On 17 June 2010, the Central Review Panel ("CRP") which had been appointed to review the process for compliance with the selection criteria found

that “many of the candidates in fact met the criteria set out in [job opening No. 012]” and it accordingly decided not to endorse the findings of the interview panel.

7. A newly-constituted CRP later reviewed the matter and concluded, in a memorandum dated 12 August 2010, that “[a] perceived conflict of interests [wa]s not part of the pre-approved evaluation criteria” and that the reasons provided in the reports of the interview panel were insufficient to explain the rejection of all seven candidates. Consequently, it requested the panel to reconsider its reports of 8 June 2010.

8. In its revised reports transmitted to the Head of Recruitment and Training Unit under cover of a memorandum dated 23 September 2010, the interview panel found that five candidates, including the Applicant, were qualified for the advertised posts.

9. On 28 September 2010, the CRP endorsed the revised reports of the interview panel.

10. By a memorandum dated 7 October 2010, the Acting Head of the ICTY Chambers wrote to the Human Resources Section (“HRS”) in her capacity as hiring manager, explaining that, in her view, none of the five qualified candidates were suitable for the posts of Judges’ Assistant and she requested that HRS re-advertise them.

11. By subsequent memorandum of 11 October 2010, the Applicant was informed that she had not been selected although she had been included in the list of qualified candidates. She had thus been placed on the roster of pre-approved candidates for future job openings at the same level with similar functions.

12. On 13 October 2010, five G-5 posts of Judges’ Assistant were advertised through job opening No. VA 2010/REG/CHA/046-GS (“job opening No. 046”). The Applicant applied on the same day.

13. Also on 13 October 2010, she sought clarifications regarding the decision not to select her for the posts advertised in job opening No. 012. The Chief of

HRS responded on 21 October, explaining that, although she had been found to be qualified for the posts, she had been perceived as having a conflict of interest because she worked in OTP and she had been involved on behalf of one of the parties in cases which were currently pending before the ICTY Judges.

14. The Applicant was informed on 26 November 2010 that her application to the posts advertised in job opening No. 046 had been unsuccessful.

15. On 29 November 2010, the Applicant requested management evaluation of the decision of 11 October 2010 not to select her for the posts of Judges' Assistant advertised through job opening No. 012.

16. She separated from service on 31 December 2010, upon the expiry of her contract.

17. On 18 January 2011, she requested the Tribunal to order suspension of action on the decision not to select her with respect to job opening No. 012 and, on 25 January 2011, the Tribunal issued Order No. 6 (GVA/2011), whereby it noted that the selection decision had already been implemented and it accordingly rejected the Applicant's application for suspension of action.

18. By letter of 17 February 2011 which the Applicant received on the same day, she was informed that the Secretary-General had decided to uphold the decision not to select her for the posts advertised through job opening No. 012.

19. On 6 May 2011, the Applicant filed with the Tribunal an application challenging the decision of 11 October 2010. Also on 6 May, she filed a motion seeking disclosure of additional information and requesting an oral hearing. The Respondent filed his reply on 13 June 2011.

20. On 6 July 2011, Counsel for the Applicant notified the Tribunal that, as from 22 June 2011, the Applicant had been reemployed by the ICTY on a temporary basis as a Recruitment Clerk, at level G-4.

21. On 7 August 2012, an oral hearing was held which the Applicant, her Counsel and Counsel for the Respondent attended by videoconference.

Parties' submissions

22. The Applicant's principal contentions are:

- a. According to the case law of the Tribunal, particularly *Abu-Hawaila* UNDT/2010/102, the application must be considered as receivable. Although the deadline for the outcome of the management evaluation lapsed on 15 January 2011, the Management Evaluation Unit ultimately issued its response on 17 February 2011 and the application was filed within 90 days of this date;
- b. The decision not to select the Applicant and the decision to re-advertise the posts of Judges' Assistant are tainted by procedural and substantive irregularities, misuse of power and improper motives, and they constitute an abuse of discretion;
- c. The Applicant's candidature was not given full and fair consideration. The ICTY Judge who was sitting on the interview panel in an observer's capacity exercised improper control over and actively participated in the selection process. He had a personal interest in the outcome of that process as he wanted to retain his then Assistant beyond retirement age. During the interview, the Judge asked questions and asserted that the Applicant had a conflict of interest due to her work with OTP. He also tried to interfere with the review undertaken by the CRP as shown by his email exchange with the Chairperson of the CRP;
- d. The criterion of appearance of a conflict of interest was not indicated in job opening No. 012 and it was therefore irregular to assess the Applicant's candidature on the basis of this criterion;
- e. The Administration did not provide the reasons why it asserted that the Applicant had a conflict of interest; she was therefore not permitted to rebut or address this assertion. Further, while the Administration asserted that her functions with OTP could raise damaging perceptions about the

impartiality of the ICTY Judges, she was placed on the roster for future Judges' Assistant posts;

f. Before the first selection process was finalized, the Acting Head of the ICTY Chambers forwarded additional applications from external candidates to the Head of Recruitment and Training Unit. The fact that the home address of the Acting Head of the ICTY Chambers appeared on these new applications indicates that the Administration had prejudged the outcome of the first selection process and that the Acting Head intended to favour those external candidates by circumventing the applicable selection procedures;

g. During the Applicant's interview, the panel asserted that a mere association with OTP rendered a candidate not suitable for selection;

h. In order to justify its decision, the Administration argued that the rules for the disqualification of the ICTY Judges applied *mutatis mutandis* to the Applicant's candidature. However, in so doing, it applied a vague, ill-defined and subjective standard, which is higher than that applied to the Judges and Professional staff working in the ICTY Chambers. This suggests that General Service staff are not capable of being impartial and incorruptible, two basic qualities of the concept of integrity enshrined in the Charter of the United Nations. Moreover, this standard is not applied consistently and several staff members who had previously worked in the OTP subsequently worked in Chambers, including as Judges' Assistants;

i. While working in the OTP, the Applicant did not conduct substantive legal work; her duties were of a purely technical nature and did not involve making decisions. Neither was she assigned to a trial team, nor had she any interest in the outcome of the trials. Further, the duties related to the advertised posts have nothing to do with the core legal work of the ICTY Chambers; they are of a secretarial and clerical nature;

j. Right after the Applicant provided the Administration with a courtesy copy of her application for suspension of action on 19 January

2011, the Administration sent offers of appointment to the candidates who were ultimately selected for the posts of Judges' Assistant advertised through job opening No. 46. Two days thereafter, it objected that the application for suspension of action was moot since the posts had already been filled. These actions show the Administration's bad faith.

23. The Respondent's principal contentions are:

a. The Applicant acknowledges that she did not file her application within the 90 days of the expiry of the time limit for the response to her request for management evaluation. In *Abu-Hawaila* UNDT/2010/102, the Tribunal noted an apparent inconsistency between staff rule 11.4(a) and article 8.1(d) of the Tribunal's Statute but it also made it clear that its remarks were to be understood as observations and not as a determination of the matter. These two provisions are not inconsistent and it may be inferred from article 8.1(d) that the time limit to file an application starts to run from the expiry of the time limit for the Administration's response to the request for management evaluation, regardless of whether a response is later received. The Application is therefore time-barred;

b. In her application, the Applicant challenges the basis for the second selection process. However, she never raised that issue in her request for management evaluation. Her claim in this respect must accordingly be dismissed;

c. The Tribunal has recognized that the Secretary-General enjoys broad discretion in selection decisions and that those alleging a fact bear the burden of proving that fact;

d. Administrative instruction ST/AI/2006/3/Rev.1 (Staff selection system) does not exclude that negative criteria be taken into consideration when a selection decision is made. The appearance of a conflict of interest is a relevant consideration when determining the suitability of a candidate for a post in any legal environment and particularly at the ICTY; it is thus an inherent selection criterion which is well-known to all ICTY staff;

e. The ICTY Judge did not overstep his position in the interview process; his questions intended to clarify responses from the Applicant and other candidates. That Judge's subsequent exchange with the Administration is irrelevant to the issue of whether there were any procedural irregularities in the selection process;

f. There was no requirement to seek comments from the Applicant prior to determining whether or not there was a potential or actual conflict of interest and, in any event, the interview panel asked her about the potential for a conflict of interest and she provided her comments on this issue during the interview. Her claim that she was not consulted is therefore incorrect;

g. The interview panel did not assert that a mere association with the OTP rendered a candidate not suitable for selection and its reports demonstrate that it considered the specific circumstances of each candidate;

h. The finding that the Applicant was not suitable for the advertised posts because of a perceived or actual conflict of interest was a proper and lawful decision. In reaching its decision, the Administration took into consideration the fact that the Applicant had worked on cases that were pending before the ICTY Chambers, that she had been involved in the disclosure of documents and that she had informed the interview panel of her close working relationship with OTP staff. It also took into consideration the role of a Judge's Assistant and the fact that a Judge's Assistant has access to the Judge's email and files, personal notes, thoughts and observations on legal issues. It also took account of the importance and perception of impartiality in the controversial and publicized work of the ICTY. Article 4.9 of the ICTY Statute and article 27 of its Rules of Procedure define a conflict of interest as "any factor that may impair or reasonably give the appearance of impairing the ability of a Judge to independently and impartially adjudicate a case assigned to him or her". It was reasonable to conclude that there was a potential for an

actual conflict of interest in the Applicant's case. For instance, there was a real potential that a Judge to whom the Applicant was assigned would be involved in assessing the disclosure process that she had been involved in while working in the OTP. Further, the non-existence of a conflict of interest in relation to one candidate is irrelevant to the determination of whether such a conflict exists in the case of another candidate;

i. The Applicant has not provided evidence to support her allegations concerning the Acting Head of the ICTY Chambers;

j. There is no evidence of bad faith. The decision to send offers of appointment to the selected candidates was not connected to the Applicant's application for suspension for action.

Consideration

On the admissibility of the application

24. The first issue to be determined in this case is whether the application is receivable *ratione temporis*.

25. Article 8.1 of the Tribunal's Statute relevantly provides:

An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar

days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

26. Further, staff rule 11.2(d) states:

The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member ... within forty-five calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

27. It is not disputed by the parties that management evaluation was required in this case. The Applicant filed her request for management evaluation on 29 November 2010. Therefore, the Administration had until 13 January 2011 to issue its response. However, the Management Evaluation Unit only responded to the Applicant's request on 17 February 2011.

28. In *Granfar* Order No. 80 (NY/2012), the Tribunal considered that the fact that the applicant had received a belated response to her request for management evaluation could not justify the granting of a motion for extension of time to file an application. However, in *Abu-Hawaila* UNDT/2010/102 (as affirmed in *Abu-Hawaila* 2011-UNAT-118), the Tribunal incidentally considered that "the time limit to file an application would start to run anew if the Administration were to respond to a request for a management evaluation *after* the expiry of the relevant response period for the management evaluation" (emphasis in the original). Further, in *Vangelova* UNDT/2010/179 (as affirmed in *Vangelova* 2011-UNAT-172) and *O Hanlon* UNDT/2012/031, the Tribunal held:

Although [article 8.1 of the Tribunal's Statute] require staff members to file their application with the Tribunal within 90 days of the expiry of the response period of 45 days for the management evaluation if no response to the request was provided, when the management evaluation is received after the deadline of 45 days but before the expiry of the next deadline of 90 days, the receipt of the management evaluation in this case will result in setting a new deadline of 90 days for challenging it before the Tribunal.

29. According to article 8.1(d)(i)a of the Tribunal's Statute, applications have to be filed within 90 calendar days of "the applicant's receipt of the response by management". The Applicant received on 17 February 2011 the response to her request for management evaluation. While this response was not given within the 45-day limit, it was nonetheless provided. Therefore, article 8.1(d)(i)b of the Statute, which deals only with the situation where "no response to the request was provided", cannot be used as a basis for rejecting the application as untimely.

30. It follows that the 90-day deadline to file an application started to count on 18 February 2011 (see article 34(a) of the Tribunal's Rules of Procedure). The application was filed on 6 May 2011, that is, 78 days from the receipt of the late response to the request for management evaluation, and it is therefore receivable with regard to deadlines.

31. The second issue to be determined in this case, with respect to the admissibility of the application, concerns its scope.

32. Though, in the application form, the Applicant identifies the contested decision as the decision not to select her for the posts of Judges' Assistant, she submits that both this decision and the decision to re-advertise the posts are tainted by procedural and substantive irregularities and improper motives.

33. Article 8.1(c) of the Tribunal's Statute provides that applicants must have previously submitted the contested administrative decision for management evaluation. It follows that the scope of an application is defined by the request for management evaluation (see *Ibekwe* UNDT/2010/159 as affirmed in *Ibekwe* 2011-UNAT-179). In her request for management evaluation, the Applicant only and explicitly sought review of the decision of 11 October 2010 not to select her for the posts of Judges' Assistant advertised through job opening No. 012. Thus, the Tribunal will limit its review to examining the decision of 11 October 2010.

On the merits

34. Administrative instruction ST/AI/2006/3/Rev.1 (Staff selection system) is applicable to the present case, for it was the administrative issuance governing the matter at the time job opening No. 012 was issued, that is, on 1 March 2010. Section 12.1 of administrative instruction ST/AI/2010/3 (Staff selection system) provides in this respect:

The provisions of ST/AI/2006/3/Rev.1 shall continue to govern recruitment, placement and promotion in respect of applications for job openings advertised before 22 April 2010 through the “Galaxy” system.

35. Section 1 of ST/AI/2006/3/Rev.1 defines the central review bodies and evaluation criteria respectively as follows:

[J]oint bodies established under staff rule 4.15 to approve evaluation criteria and to ensure that candidates have been evaluated on the basis of such pre-approved evaluation criteria and/or that the applicable procedures have been followed.

...

[C]riteria used for the evaluation of candidates for a particular position after approval by a central review body. Evaluation criteria must be objective and related to the functions of the post and must reflect the relevant competencies.

36. ST/AI/2006/3/Rev.1 further provides:

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. If a list of qualified candidates has been approved, the head of department/office may select any one of those candidates for the advertised vacancy, subject to the provisions contained in section 9.2 below ...

...

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 unless a central review body has previously approved the evaluation criteria for a position with similar functions at the same level. The evaluation criteria

must be objective and related to the functions of the post and must reflect the relevant competencies.

...

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 ... 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.

...

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 ... 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, especially with regard to geography and gender, and shall give the fullest regard to candidates already in the service of the Organization.

37. In addition, the Guidelines for programme case officers on building vacancy announcements and evaluation criteria under ST/AI/2006/3/Rev.1, which were approved on 11 June 2003, state:

The Evaluation Criteria should be substantively similar to the published VA. In the interest of transparency, both the VA and EC should include the principal elements of the criteria against which the applicants will be evaluated. In other words, the VA should clearly explain to potential applicants the requirements of the post.

...

All optional phrases, reflecting special conditions or limitations, such as the policy regarding P-3 posts, limitations of appointment, source of funding, recirculation of the vacancy or others, should be placed by the Executive Office or the Local Personnel Office, as appropriate, as a "text box" on the VA, as applicable.

38. It follows from the above that the criteria to be used in evaluating candidates must be clearly stated in the vacancy announcement. It is a matter of fairness and transparency that the vacancy announcement should inform clearly and fully potential candidates of the requirements of an advertised post. This is all the more imperative with respect to evaluation criteria which will be decisive in the assessment of the candidates' suitability for the post.

39. In this case, the reports of 8 June 2010 show that the interview panel initially considered that, out of the seven candidates, six candidates—including the Applicant—were deemed not qualified because of their previous association with the OTP and an apparent lack of impartiality and/or conflict of interest resulting from that association. The panel thus regarded the candidates' apparent lack of impartiality and/or conflict of interest as a decisive negative criterion in the selection process. However, the CRP rightly rejected this finding and concluded that the candidates had been wrongly considered as not meeting the criteria set out in job opening No. 012 since "[a] perceived conflict of interests [wa]s not part of the pre-approved evaluation criteria". Based on the review of the CRP, the interview panel revised its finding and considered that five candidates, including the Applicant, were qualified for the posts.

40. However, in her memorandum dated 7 October 2010, the Acting Head of the ICTY Chambers, that is the head of office within the meaning of ST/AI/2006/3/Rev.1, stated that, in her view, none of the five qualified candidates were suitable for the advertised posts. She further explained:

2. [T]he position of Judge's Assistant is especially sensitive. The Judges' Assistants work more closely with the Judges than any other staff member in Chambers ... It is therefore of critical importance that Judges' Assistants not only do not have a conflict of interest, but are also perceived not to have a conflict of interest.

...

9. The five qualified candidates could well be perceived as having a conflict of interest because they are [working] or have worked for the OTP ... There is a further basis for a perception of a conflict of interest: as is clear from the description of their work for the OTP, each of the five would have had an involvement or be seen to have an involvement on behalf of one of the parties in cases

which are currently before the Judges of the ICTY ... For these reasons I find none of the five qualified candidates to be suitable for the position.

10. I should add that my conclusion should not be regarded as in any way reflecting negatively on the professionalism, integrity or any of the competencies of the candidates. I would agree fully that they have the qualifications to be appointed to a position at the G-5 level in the Tribunal.

41. The wording and content of the memorandum leaves no doubt that the Acting Head of the ICTY Chambers based her decision not to find any candidate suitable for the advertised posts solely on the appearance of a conflict of interest arising from the candidates' past or current association with the OTP, a criterion which had not been included in the vacancy announcement and which—for this very reason—had previously been censured by the CRP.

42. During the hearing, the Respondent argued, first, that ST/AI/2006/3/Rev.1 did not exclude that negative criteria be taken into consideration when a selection decision is made and, second, that the appearance of a conflict of interest is an “inherent” selection criterion. Aside from the fact that, in the view of the Tribunal, the definition of evaluation criteria as per ST/AI/2006/3/Rev.1 contradicts the Respondent's first contention, the Guidelines for programme case officers on building vacancy announcements and evaluation criteria under ST/AI/2006/3/Rev.1 clearly state that “special conditions or limitations” should be mentioned in the vacancy announcement. Additionally, the Respondent conceded that, at some earlier point in time, several staff members who had previously worked with the OTP had been subsequently employed in Chambers, including as Judges' Assistants. Accordingly, internal candidates for the advertised posts could not be expected to know of such an “inherent” criterion.

43. At this juncture, it should be recalled that “[i]t is not the function of the Tribunal to prescribe to management what their selection criteria should be for a particular post” (*Charles* UNDT/2011/159). However, where the Administration decides to use specific criteria to evaluate candidates, these criteria should be pre-approved by a central review body and specified in the vacancy announcement. In the instant case, the Administration failed to mention that the appearance of a

conflict of interest would be among the evaluation criteria. The selection process and resulting non-selection decision are accordingly flawed, without it being necessary to examine the Applicant's other pleas.

Compensation

44. The Applicant did not seek rescission of the contested decision and it is therefore unnecessary for the Tribunal to order rescission or set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission, as provided for in article 10.5(a) of the Tribunal's Statute.

45. As for the Applicant's claims for compensation, the Tribunal recalls at the outset that article 10.7 of its Statute specifically prohibits the award of exemplary or punitive damages. The Applicant is nonetheless entitled to claim material and moral damages. In this respect, the Appeals Tribunal has repeatedly held that not every violation will necessarily lead to an award of compensation and that compensation may only be awarded if it has been established that the staff member actually suffered damages (see in particular *Wu* 2010-UNAT-042; *Antaki* 2010-UNAT-095; *Obdeijn* 2012-UNAT-201).

46. Turning to the Applicant's claim for compensation for material damage, the Tribunal considers that the chance that the Applicant would have been selected had the selection process been properly conducted, that is, had the criterion of appearance of a conflict of interest been mentioned in job opening No. 012, is highly speculative. Therefore, no compensation for material damage can be granted.

47. As for the Applicant's moral damage, the irregularities in the selection process caused her distress. The Tribunal therefore considers that, in view of the circumstances, an award of EUR2,000 will fully and fairly compensate her (see *Mirkovic* UNDT/2012/030).

Conclusion

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

- a. The Respondent is ordered to pay the Applicant the amount of EUR2,000;
- 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 Thomas Laker

Dated this 10th day of August 2012

Entered in the Register on this 10th day of August 2012

(Signed)

René M. Vargas M., Registrar, Geneva