Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

SEYIDOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Alexandre Tavadian, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision not to select her for the post of Administration/Programme Assistant, at the GL-6 level, in the UNHCR Office in Baku, Azerbaijan, and requests its rescission.

2. The Applicant further seeks the Tribunal to order that she be given priority consideration for the litigious post. Additionally, she requests compensation for moral damage.

Facts

3. The Applicant joined UNHCR in Baku in November 2000 as a Senior Programme Clerk at the GL-5 level. In January 2002, she was promoted to the GL-6 level as a Programme Assistant following the reclassification of her post.

4. By a memorandum dated 31 March 2010, the Applicant was informed that, following the review of the workforce requirements to address the 2011 operational imperatives in the UNHCR Office in Azerbaijan, the post of Programme Assistant she encumbered would be submitted for reclassification to Administration/Programme Assistant, at level GL-6, with effect from 1 January 2011. The memorandum clarified that the reclassification was triggered by the need for a different set of skills and competencies to perform the functions of the new post and could therefore have direct impact on the Applicant as the current incumbent. The Applicant was encouraged to apply for the reclassified post and informed that, should her application be successful, she would be recruited against this new position. Otherwise, the comparative review process provided for in the UNHCR Staff Administration and Management Manual would apply.

5. In a further memorandum dated 23 August 2010, the Applicant was informed that UNHCR headquarters had confirmed the reclassification of her post.

6. The reclassified post was advertised on 19 November 2010. Two internal staff members applied, including the Applicant. Both were shortlisted, took a written test, and were interviewed by a three-member panel.

7. On 16 December 2010, the UNHCR Representative in Baku recommended the other internal candidate for the reclassified post as his first choice, and the Applicant as his second choice.

8. On 17 December 2010, the local Appointments, Promotions and Postings Committee endorsed the recommendation of the UNHCR Representative in Baku.

9. By memorandum dated 22 December 2010, the Applicant was informed that, following the recommendation of the local Appointments, Promotions and Postings Committee, another internal candidate had been appointed to the reclassified post.

10. On 11 February 2011, the Applicant requested management evaluation of the decision not to select her for the post of Administration/Programme Assistant.

11. By memorandum dated 27 April 2011, the Deputy High Commissioner informed the Applicant of the outcome of the management evaluation whereby the contested decision would stand as it was in compliance with the applicable rules and procedures. In her application, the Applicant confirmed receipt of this memorandum on that same date.

12. On 2 May 2011, the Applicant was informed of the decision to separate her from service effective 4 August 2011.

13. On 27 July 2011, the Applicant filed the application which forms the subject of the present Judgment.

14. On 4 August 2011, the Applicant was separated from service.

15. By Order No. 115 (GVA/2012) dated 14 June 2012, the Tribunal invited the parties to a substantive hearing to be held on 5 July 2012.

16. On 26 June 2012, Counsel for the Applicant filed a motion to postpone the hearing until late August and the Tribunal granted it.

17. On 12 September 2012, the Tribunal conveyed to the parties its view that the case could be dealt with on the papers. The Tribunal gave the parties one week to file comments, if any. The Applicant agreed with the Tribunal's proposal to not hold an oral hearing and the Respondent did not file any objections.

Parties' submissions

18. The Applicant's principal contentions are:

a. The decision not to select her for the reclassified post was in breach of paragraph 12 of the inter-office memorandum IOM/FOM No. 27/2009 (Procedural Guidelines for Changes in Status of Positions), which stipulates that "[p]rovided that all criteria of the reclassified position are met by the incumbent, he/she will be given priority consideration" in the selection. If the Administration's sole obligation in the selection process was to choose the most suitable candidate out of a pool of suitable candidates, paragraph 12 of IOM/FOM No. 27/2009 would be emptied of its plain meaning and intention;

b. In this case, there is no evidence that the Applicant was given priority over other candidates. To the contrary, the unequivocal statement in the decision of 27 April 2011 that "any priority consideration under paragraph 12 of IOM/FOM No. 27/2009 did not prevent the selection of a more suitable candidate" demonstrates that in fact no such priority consideration was given;

c. The circumstances preceding the decision not to select the Applicant for the reclassified post suggest a failure to give her full and fair consideration. The GL-6 post of the staff member who was eventually selected for the litigious post was reclassified to the GL-4 level in 2010. This reclassification coincided with the decision to assign the Applicant to

different and new functions upon her return from mission, and to assign the selected staff member to the Applicant's functions before her departure on mission. These operational decisions suggest an intent to allow the selected candidate to familiarize herself with the core functions and responsibilities of the reclassified post;

d. The entire process appears to have been engineered so as to allow the selected candidate to remain in a G-6 post;

e. In the memorandum dated 31 March 2010 informing the Applicant of the anticipated submission of the request for reclassification, the terms used suggest that the reclassification was a *fait accompli* while the decision from UNHCR headquarters did not come until 6 August 2010.

19. The Respondent's principal contentions are:

a. The Respondent has a broad discretion in making selection decisions and such decisions are subject to a limited review by the Tribunal;

b. Paragraph 12 of IOM/FOM No. 27/2009 does not entitle the incumbent of a reclassified position to be appointed thereto, even if he/she meets the criteria. It gives him/her priority over other candidates only if it is established that he/she is substantially equally suitable. In other words, the appointment of a more suitable candidate is possible. This is in line with the case law of the Appeals Tribunal as reflected in *Megerditchian* 2010-UNAT-088 and with article 101.3 of the Charter of the United Nations;

c. In the instant case, the Administration evaluated the Applicant as significantly less suitable than the competing internal candidate, both during the written test and the interview. The Representative nevertheless recommended her as his second choice, but this recommendation highlights the strengths of the other candidate as compared to the Applicant, and points out concerns regarding the Applicant's performance.

Accordingly, the Applicant and the selected candidate were not substantially equally suitable for the reclassified post;

d. The Applicant's allegations of bias and improper motives are unsubstantiated. The reclassification decision was not contested by the Applicant at the time and was taken to address the operational imperatives of the UNHCR Office in Azerbaijan UNHCR. The change of functions criticized by the Applicant was not arbitrarily imposed on her but agreed upon by her in January 2010.

Consideration

Receivability

20. Although the Respondent states in his reply that he does not contest the admissibility of the application, the Tribunal has a duty to raise this question on its own motion.

21. In *Comerford-Verzuu* UNDT/2011/005, as confirmed by the Appeals Tribunal in *Comerford-Verzuu* 2012-UNAT-203, the Tribunal held that, before ruling on the lawfulness of a decision, it is bound to verify whether its Statute grants it jurisdiction to do so, irrespective of the fact that the parties may have raised the issue.

22. With specific regard to time limits for administrative review this Tribunal further stated in *Comerford-Verzuu*:

> 75. [W]here the Administration fails to raise the lateness of a staff member's request for review of the decision, the Tribunal must do so on its own motion, because neither it nor the Administration has any right to waive an instrument setting time limits for appeals, unless in exceptional circumstances or in cases where the staff member has, before the expiration of the time limit, expressly requested an extension.

23. Pursuant to article 8.1(d)(i)a of the Statute of the Dispute Tribunal, an application shall only be receivable if the application is filed within 90 calendar

days of the Applicant's receipt of the response by management to his or her submission.

24. On 27 April 2011, the Deputy High Commissioner notified the Applicant of the response to the request for management evaluation she had submitted on 11 February 2011. It follows that an application had to be filed on 26 July 2011 at the latest. However, the Applicant filed it on 27 July 2011 and the application is therefore time-barred.

25. Both the Dispute Tribunal and the Appeals Tribunal have repeatedly emphasized the need to observe the time limits (see for example *Mezoui* 2010-UNAT-043, *Ibrahim* 2010-UNAT-069, *Christensen* 2012-UNAT-218 as well as *Odio-Benito* UNDT/2011/019 and *Czaran* UNDT/2012/133).

26. Time limits for contesting administrative decisions are well known. Even though the present application is only one day late it remains time-barred. The Appeals Tribunal held in *Christensen* 2012-UNAT-218 that "it is the staff member's responsibility to ensure that [he/]she is aware of the applicable procedure in the context of the administration of justice at the United Nations. Ignorance cannot be invoked as an excuse." Hence, the application is not receivable *ratione temporis*.

Merits

27. While the application fails on receivability, it also has no merits.

28. The Applicant erred in equating the term "priority consideration" used in IOM/FOM No. 27/2009 with a guarantee for appointment.

29. The Appeals Tribunal stated in *Megerditchian* 2010-UNAT-088, as reiterated in *Charles* 2012-UNAT-242:

> It should be emphasised that "priority consideration" cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for. To hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.

30. This Tribunal considers this principle applicable in this case. A promise to give priority consideration must not be understood as preventing the Administration to select a more suitable candidate. It has to be understood as giving preference to the Applicant over other candidates only if she has the same qualifications as the other candidate

31. The Applicant's written test and interview scores were lower than those of the selected candidate. She was thus not deemed equally qualified. Therefore, in accordance with Article 101.3 of the UN Charter and the case law of the Appeals Tribunal, the Administration did not fail to give her priority consideration, within the meaning of IOM/FOM No. 27/2009, when selecting the other internal candidate.

32. The Applicant further claimed that she was not given full and fair consideration. In support of her claim, the Applicant submitted that the operational decisions, prior to the reclassification of her post, suggest an intent to allow the selected candidate to familiarize herself with the core functions and responsibilities of the reclassified post. The Applicant thus asserts that the entire process of reclassification was engineered so as to allow the other candidate to remain in a G-6 position.

33. As the Appeals Tribunal stated in *Charles* 2012-UNAT-242, "in reviewing the Secretary-General's exercise of his discretionary authority in matters of staff selection and promotion, the UNDT is to consider, whether the staff member's candidacy was given full and fair consideration and whether the procedure set forth in the Staff Regulations and Rules was followed".

34. The Tribunal further recalls that the Secretary-General enjoys broad discretion in making decisions regarding the selection process (see *Abbassi* 2011-UNAT-110), and that a staff member alleging that a given decision was based on improper motivation bears the burden of proof (see *Rolland* 2011-UNAT-122, *Bye* UNDT/2009/083).

35. The Tribunal accents that the Applicant contested neither her change of functions in January 2010, upon her return from mission, nor the reclassification

decision. The Applicant did not provide documentary evidence showing that the established procedure to change her functions or to request/conduct the reclassification of her post was not followed. Additionally, the Applicant did not substantiate her claim with respect to the Respondent's alleged intentions to retain the selected candidate on a G-6 post. Therefore, the Applicant has not met the burden of proving that the Administration acted arbitrarily and improperly in selecting a candidate other than her.

Conclusion

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

The Application is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 7th day of November 2012

Entered in the Register on this 7th day of November 2012

(*Signed*)

René M. Vargas M., Registrar, Geneva