



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

IVANOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Joseph Grinblat, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is contesting the selection of a staff member other than him on the grounds that the successful candidate did not meet the post eligibility requirements in connection with post vacancy announcement 09-POP-DESA-419116-R-New York (“the Post”) for the P-5 level post of Chief, Population Policy Section (“PPS”), Population Division (“PD”), Department of Economic and Social Affairs (“DESA”).

Facts

2. On 6 June 2009, the Post was listed on the United Nations job vacancy website. Seven candidates, including the Applicant, were interviewed for it between 27 May 2009 and 6 June 2009, with an additional candidate being interviewed on 17 July 2009. Upon the completion of the selection process, candidates AB and VM were recommended for the post by the Central Review Board (“CRB”).

3. On 15 September 2009, AB was selected by the Under-Secretary-General for Economic and Social Affairs (“USG/DESA”) for the Post and VM was added to the roster of candidates pre-approved for similar functions.

4. On 7 December 2009, AB entered into service as Chief, PPS/PD, but was soon thereafter, on 18 December 2009, laterally reassigned to the post of Chief, Fertility and Family Planning Section, due to critical operational needs arising from the dismissal of the former Chief of that Section.

5. On 22 December 2009, VM, who had been rostered, was selected to replace the now departed Chief, PPS/PD. VM was offered the appointment on 15 January 2010, which he accepted on 22 January 2010.

6. On 1 March 2010, VM entered into service as Chief, PPS/PD, and, on 4 March 2010, the Applicant became aware that VM had been selected as the new Chief, PPS/PD in place of AB.

7. On 11 March 2010, the Applicant submitted a request for management evaluation of the decision to select VM on the grounds that he had “the required experience and applied for the [P]ost, but was not selected, and therefore [his] rights for due process were violated because the selected person did not have the minimum required experience for the post”.

8. On 18 March 2010, the Applicant responded to an email from the Management Evaluation Unit (“MEU”) acknowledging receipt of his management evaluation request by stating that he sought to clarify that the purpose of his request for management evaluation was not to contest the decision not to select him but rather that of the breach of his due process rights that resulted from the selection of an unqualified candidate.

9. On 22 April 2010, the Applicant received a 19 April 2010 letter informing him that “the Secretary-General has decided to endorse the findings and recommendations of the MEU and uphold the decision taken by the Administration to select another candidate for the post of Chief, PPS”.

10. On 27 June 2010, the Applicant filed the present application with the Tribunal and, on 28 July 2010, the Respondent filed and served his reply in which he submits, as a preliminary matter, that the Applicant’s application is not receivable *ratione materiae* as “the Applicant has clarified that he is not challenging the decision not to select him”.

11. On 19 July 2012, the Tribunal issued Order No. 146 (NY/2012) in which it requested that each of the parties address questions of receivability both *ratione materiae* and *ratione temporis*.

12. On 30 July 2010, the Applicant filed comments on the Respondent’s reply.

13. On 27 July 2012, 2 August 2012 and 16 August 2012, the Applicant and the Respondent each filed their submission in response to Order No. 146 (NY/2012). As part of their responses, both parties submitted that they had no objection to the present case being disposed of on the papers.

14. On 25 August 2012, the Applicant filed a motion requesting leave to file a submission for the purpose of addressing errors of fact in the Respondent's submission.

15. On 27 August 2012, the Tribunal issued Order No. 170 (NY/2012) in which the parties were requested to clarify the dates on which the applicable administrative decisions were taken, notified and received.

16. On 28 August 2012 and 7 September 2012, the Applicant and the Respondent each filed their submission in response to Order No. 170 (NY/2012).

Applicant's submissions

17. The Applicant's principal contentions may be summarized as follows:

a. This application is receivable *ratione temporis* seeing that no announcement was made regarding the selection of VM resulting in the Applicant only becoming aware of VM's selection on 4 March 2010, three days after VM had taken his post. The request for management evaluation was timely filed as it was filed on 11 March 2010, which is within a week of the Applicant becoming aware of who had been selected for the Post. The MEU completed its review of the request on 22 April 2010 and the Applicant submitted his appeal to the Tribunal within the require time limits;

b. This application is receivable *ratione materiae* seeing that if VM had been found not to meet the qualification requirements for the Post, a vacancy announcement would have been re-advertized for the post resulting in him

having “a serious chance of getting it, especially if it is recognized meanwhile that he has been the victim of harassment [and discrimination] on the part of [the Director]”;

c. A review of VM’s curriculum vitae indicates that he did not have “the minimum five years experience of research on population policy required in the vacancy announcement, and thus was not eligible for selection on the post” while he himself met all the necessary requirements;

d. While the Secretary-General benefits from discretionary powers with regards to the selection of a given candidate for a post, these powers are not unfettered. When the selection of a candidate is being contested, it is for the Administration to show that no abuse occurred as part of the selection process;

e. The MEU did not describe how it had determined that VM met the qualification requirements for the Post other than by saying that this information was “confidential in nature”. If VM met the qualification requirements then the Administration should share that information barring which it is fair to state that the selection of VM resulted in a breach of the Applicant’s due process rights;

f. The MEU relied on the information provided by the Director, PD (“Director”), who is also the person who had previously, and arbitrarily, decided that the Applicant was not qualified for the post. The Director has victimized and harassed the Applicant since 2004 resulting in him filing a complaint for harassment and discrimination with the USG/DESA on 6 January 2010. The Applicant further notes that these actions fit a pattern whereby the Director has constantly denigrated her staff by, for example, selecting eight external candidates to fill ten of the recent senior staff posts;

g. Prior to selecting VM, the Director had selected AB for the post of Chief, PPS/PD, even though she, per her own curriculum vitae, also did not meet the applicable criteria for this post;

h. The Tribunal should find that the Applicant's due process rights were violated and award him two years' salary in compensation for that violation of his rights as well as for the loss in salary and pension benefits that resulted from his non-selection for the post.

Respondent's submissions

18. The Respondent's principal contentions may be summarized as follows:

a. The Applicant, in response to a request from the MEU, "clarified that he is not challenging the decision not to select him for the subject post *per se*, but is challenging the second decision to select [VM following the reassignment of AB]". Therefore, the Applicant is not challenging a unilateral decision that had any direct consequences on, or affected his, rights and obligations;

b. The Applicant never, and still does not, challenge the selection of AB for the post of Chief, PPS/PD, which was completed on 15 September 2009. Consequently, as stated in *Planas* 2010-UNAT-049, by only challenging VM's qualifications rather than "the outcome of the selection process for a specific post", the Applicant has not identified how the selection process directly violated his due process rights and obligations, thereby rendering his application not receivable *ratione materiae*;

c. The records of the selection exercise, including those pertaining to VM, clearly show that VM met all of the qualification criteria for the Post;

d. The Dispute Tribunal has consistently held that it will not substitute itself for the Administration concerning the application of the Secretary-

General's discretionary powers with regard to the appointment and promotion of staff members. More importantly, the Dispute Tribunal has held that it would not engage in a process of analyzing and comparing the qualifications of a successful staff member with those of a staff member that was not successful in being appointed to the contested post;

e. This selection is in full accordance with sec. 10.4 of ST/AI/2006/3/Rev.1 that specifically addresses a situation such as the present one, namely when "the selected candidate fails to take up the functions within two months for personal reasons of vacates the post within one year". Seeing that VM had been rostered and endorsed by the CRB, he was eligible for selection by the USG;

f. The Applicant does not provide any information, and does not meet the onus required, regarding his allegations of harassment and discrimination. Consequently, the Applicant "fail[s] to provide evidence that the contested decision was based on any other extraneous factors";

g. The Applicant has incurred no demonstrable losses or damages and the Tribunal should dismiss the application.

Consideration

Applicable law

19. Article 2 of the United Nations Dispute Tribunal's Statute states, in part, that:

1. The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all

relevant administrative issuances in force at the time of alleged non-compliance;

20. Staff rule 11.2(c) (Management Evaluation) states that:

A request for management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

21. ST/AI/2006/3 (Staff selection system) dated 15 November 2006 states, in part, that:

...

Decision

9.3 Candidates included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions, which shall be drawn from all duty stations for vacancies in the Professional category and above ... The roster shall be valid for one year after the first day of the month following the selection decision. ...

...

9.5 All interviewed candidates who are not selected or placed on the roster shall be so informed by the programme managers.

Notification and implementation of the decision

10.1 The executive office at Headquarters and the local personnel office at offices away from Headquarters shall inform the selected candidate of the selection decision. The executive office shall inform OHRM of the decision at the same time. OHRM or the local personnel office shall place other candidates endorsed by the central review body on the roster, inform them of such placement and advise them that they may be selected from the roster for similar posts that may become available within the following year. Other candidates shall be advised of the outcome of the process through posting of the results on an electronic bulletin board.

10.2 The decision to select a candidate shall be implemented upon its official communication to the individual concerned.

10.4 If the selected candidate fails to take up the functions within two months for personal reasons or vacates the post within one year, the head of department/office may select another candidate from the list endorsed by the central review body with respect to the particular vacancy. If no such candidate is available, the head of department/office may select another candidate from the roster or decide to advertise the post in the compendium if no roster candidate is found to be suitable.

22. ST/AI/2006/3/Rev.1 (Staff selection system) dated 11 January 2010 states, in part, that:

Notification and implementation of the decision

10.4 If the selected candidate fails to take up the functions within the specified time frames for personal reasons or vacates the post within one year, the head of department/office may select another candidate from the list endorsed by the central review body with respect to the particular vacancy. If no such candidate is available, the head of department/office may select another candidate from the roster or decide to advertise the post in the compendium if no roster candidate is found to be suitable.

Receivability as a preliminary issue

23. Pursuant to art. 19 of the Rules of Procedure of the Dispute Tribunal, and as affirmed by the Appeals Tribunal in *Pellet* 2010-UNAT-072, the Tribunal may initially “consider the preliminary issue of whether [the Applicant] had legal standing to even challenge the administrative decision” prior to entering into a review of the merits.

24. In this case there is no contest as to whether a certain decision was an administrative decision but rather the initial question is whether the Applicant has standing to contest the administrative decision for the Post. In this regard there are several administrative decisions that the Tribunal needs to consider with regard to the question of receivability which are (a) the 15 September 2009 decision to select AB; (b) the 15 September 2009 decision not to select the Applicant; and (c) the 15 January 2010 decision to select VM.

Selection for the Post

25. The Applicant applied and interviewed for the Post following which, on 15 September 2009, the Secretary-General took the administrative decision to select AB who then entered into service on the Post on 7 December 2009. As part of its selection process VM was rostered whereas the Applicant was neither selected nor rostered. While the Applicant mentions that AB's qualifications did not appear to meet the qualifications requirement for this position this question is not the subject of this Application.

26. Indeed, the sole focus of the Applicant's application is that, following the transfer of the initially appointed candidate, the second choice candidate that had previously been rostered and was subsequently appointed did not have the required "five years experience of research on population policy" for the Post. The Applicant further states that proving or disproving whether VM had the required experience is what would determine whether his due process rights were violated.

27. Nevertheless, it serves this Tribunal to review whether the Applicant has standing to contest any of the 15 September 2009 administrative decisions.

28. In *Roig* UNDT/2012/146, the Tribunal held that the time limits to contest the completion of, in this case, the 15 September 2009 selection process, whether it be with regard to his non-selection, the selection of a candidate other than him or the rostering of a candidate as a result of the selection process would have started to run upon his notification of his non-selection.

29. Neither party can specifically identify when an actual notification of the completion of the selection process for the Post occurred, including whether in accordance to para. 10.1 of ST/AI/2006/3 an automatic notification of the "outcome of the process through posting of the results on an electronic bulletin board" was sent following the completion of the 15 September 2009 selection of AB. Nevertheless, the Applicant submits that he became aware of the selection of AB at the time she entered into service on 7 December 2009.

30. Consequently, the Tribunal can only conclude that the Applicant, as stated in *Roig*, was informed of the administrative decision to select someone other than him by 7 December 2009 at the latest, at which point the 60-day time limit to potentially request management evaluation of any of the related administrative decisions would have started to run.

31. The Applicant submitted his request for management evaluation on 11 March 2010, which, even if the Tribunal was to consider 7 December 2009 as the date of the notification of the completion of the selection process for the Post, is more than a month after the 5 February 2010 expiry of the time limit to submit any request for management evaluation regarding the selection process for the Post.

32. Thus, the Tribunal can only conclude that any appeal of the initial administrative decisions is not receivable due to being out of time.

Selection from the roster

33. Following the 18 December 2009 lateral reassignment of AB, the P-5 level position of Chief, PPS/PD, was once again available to be filled by the Administration.

34. Under sec. 10.4 of ST/AI/2006/3 and ST/AI/2006/3/Rev.1, following the vacating of the Post by AB, the Administration could choose to (a) “select another candidate from the list endorsed by the central review body with respect to the particular vacancy” or (b) “[i]f no such candidate is available, the head of department/office may select another candidate from the roster or decide to advertise the post in the compendium if no roster candidate is found to be suitable”.

35. Should the Administration have decided to re-advertise the Post, it would have resulted in a new selection process with its own set of administrative decisions. Similarly, taking the decision to “select another candidate from the list endorsed by the central review body with respect to the particular vacancy” also consists of its own set of separate administrative decisions.

36. The Tribunal has already stated above that the Applicant was out of time to contest the findings of the initial selection process for the Post, which included the rostering of VM. However, the selection of VM, which was conducted according to sec. 10.4 of ST/AI/2006/3 and ST/AI/2006/3/Rev.1, became effective at the earliest upon his acceptance of the appointment which occurred on 22 January 2010. Therefore, by contesting that decision by 11 March 2010, the Applicant submitted his request for management evaluation within the 60-day time limit, irrespective of the fact that he only became aware of the decision when VM entered into service on 4 March 2010, and the application is therefore not time-barred.

37. The question for the Tribunal therefore becomes whether the selection of VM from the roster is an administrative decision which is contestable by the Applicant. More specifically, was the selection of VM, as the only candidate that had been rostered for this post, in non-compliance with the Applicant's terms of appointment. Namely, were any of his rights breached?

38. As expressed in the facts of the case, the Applicant was one of eight candidates interviewed as part of the initial post selection process. Two of the candidates, though not the Applicant, were recommended for the post resulting in the selection of AB and the adding of VM to a list of candidates pre-approved for similar functions. Neither the Applicant, nor any of the other five candidates for the Post, were added to the roster following the completion of the selection process.

39. As previously stated, the selection of VM was a new separate selection decision taken pursuant to sec. 10.4 of ST/AI/2006/3 and ST/AI/2006/3/Rev.1. Consequently, seeing that there was no actual direct link between VM's selection and the Applicant's candidacy for the Post, it cannot be said that any of his rights were breached by the new administrative decision that resulted in the selection of VM.

40. The Tribunal can only therefore conclude that the Applicant lacks standing to contest the second separate and individual administrative decision with regard to the Post.

Conclusion

41. In view of the foregoing the application is not receivable and the case is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 13th day of November 2012

Entered in the Register on this 13th day of November 2012

(Signed)

Hafida Lahiouel, Registrar, New York