



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

GARCIA IGLESIAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Marisa MacLennan, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 18 May 2014, the Applicant, a Human Resources Assistant (G-5) with the United Nations Logistics Base/Global Service Centre (“UNLB/GSC”), contests the decision communicated to her verbally on 5 December 2013 to deem her ineligible for the position of Human Resources Assistant (G-6), Field Central Review Board Unit, Reference Verification Unit, UNLB/GSC (Vacancy Announcement (“VA”) No. VA/UNLB/GSC-13-14(011), hereinafter “the post”).

Facts

2. On 1 March 1995, the General Assembly approved the creation of the UNLB in Brindisi, Italy, as “the first permanent United Nations logistics base to support peace-keeping operations” (A/RES/49/233 on the Administration and budgetary aspects of the financing of the United Nations peacekeeping operations).

3. On 8 August 1996, Guidelines on Placement and Promotion of Locally Recruited General Service Staff Members in established field missions were promulgated (the “Guidelines”). They specified that to be eligible for promotion, local staff in the General Service category had to be at the same level of the post or one level below; additionally, if the latter, a minimum seniority in grade was required. For instance, a minimum seniority in grade of four years was required for promotion to the G-6 and G-7 levels.

4. From March 2004 to February 2011, the Applicant was employed with the International Criminal Court (“ICC”) in the Hague at the G-5, step 7 level.

5. From March 2011 to January 2012, she worked for the Office for the Harmonization of Internal Markets, a European Union agency in Alicante, Spain.

6. On 24 January 2012, the Applicant was recruited to work in the Education Grant Unit, UNLB/GSC, as a Human Resources Assistant (G-5) in Valencia, Spain. She was granted the same step she had when she left the ICC, namely step 7.

7. As stated by the Respondent, in its “Financial performance report for the period from 1 July 2010 to 30 June 2011 and proposed budget for the period from 1 July 2012 to 30 June 2013 of the [UNLB]”, dated 2 May 2012 (A/66/713/Add.15), the Advisory Committee on Administrative and Budgetary Questions questioned the reassignment of certain field human resources functions from Brindisi to Valencia and advised against the establishment of the Field Human Resources Section in Valencia. The Education Grant Unit, where the Applicant worked at the time, was one of the field Human Resources functions that required reassignment back to Brindisi. As stated by the Respondent, due to the fact that the positions of the concerned local General Service staff in Valencia, including that of the Applicant, were abolished, the Organization exceptionally allowed those affected staff to be recruited as local staff in Brindisi. The Applicant accepted her recruitment as a local staff member in Brindisi, bearing the costs of the relocation, and on 1 July 2013, she was appointed to the UNLB in Brindisi on a fixed-term appointment. Her entry on duty date with the UNLB in Brindisi was kept as the same date of her entry into service at the UNLB in Valencia, namely, 24 January 2012.

8. On 29 October 2012, the Director, UNLB/GSC, provided information to all staff on the “Eligibility requirements of minimum seniority in grade” (administrative instruction 12/26.01), which stated the following:

UNGSC has been directed by [Field Personnel Division] to implement the full application of the 1996 guidelines for the recruitment and promotion of local staff [...] which establishes the eligibility requirements of minimum seniority in grade.

The exceptional waiver granted by OHRM in its memorandum dated 3 June 2008 was specific and limited to the Finance Assistant G-5 position. This exceptional approval should not be considered as a blanket authorization to be applied for all other similar cases and any current practice is to be discontinued.

Candidates not meeting the eligibility requirement of minimum seniority in grade will NOT be placed against the higher level position.

The attached chart lists the requirements of seniority in grade for a post at the next level.

The Administrative Instruction 12/026 has been amended to rectify the example made. If you are a G-4 and you wish to apply to a G5 post, you are only eligible to apply after you have completed [three] years of service in your G-4 post.

Please be guided accordingly.

9. On 1 July 2013, the Applicant was offered a one year fixed-term appointment in her position as Human Resources Assistant in the Field Central Review Bodies Unit, at the G-5 level, step 8. Her current contract expires on 30 June 2015.

10. On 7 October 2013, the VA for the post at stake was issued. It included the following information highlighted in red: “[i]nternal candidates at the same level of the post are eligible to apply. Internal candidates at the GS-5 level are eligible to apply after completion of four years of service at the GS-5 level”.

11. On 21 October 2013, the Applicant applied for the post, and on 5 December 2013, her supervisor informed her that although he had initially placed her name on the shortlist, the Personnel Section, UNLB, deemed her ineligible for the position because she lacked the four-year time-in-grade service requirement indicated in the VA.

12. The next day, i.e., on 6 December 2013, the Applicant wrote to the Chief Civilian Personnel Officer (“CCPO”), UNLB, requesting a clarification of the decision not to place her on the shortlist. She received a reply on 9 December 2013, confirming the basis for the decision, and indicating that it was not possible to “transfer experience from another duty station for local staff as per the policy [...] this would then constitute International recruitment”, under staff rules 4.4 and 4.5.

13. As stated by the Respondent, a total of 81 applications were received for the post, and five candidates were invited to take a written assessment on 13 and 16 December 2013. On 8 January 2014, three candidates were invited to participate in competency-based interviews, which took place on 10 and 11 February 2014. The interview panel recommended one candidate for the position. On 17 March 2014, the CCPO, UNLB, submitted the Hiring Manager's recommendation to the Local Subsidiary Panel ("LSP") at UNLB, which met on 18 March 2014 but did not endorse the Hiring Manager's recommendation. Indeed, in an email of 21 March 2014 on file, the CCPO explains that after "a review of the cases and the report submitted by the interview panel, the [LSP] has unanimously declined the request due to lack of evidence in the interview report substantiating the selection", and that the LSP "recommend[ed] that the recruitment exercise be re-initiated as soon as possible".

14. In the meantime, namely on 12 December 2013, the Applicant had requested management evaluation of the contested decision.

15. On 19 February 2014, the Management Evaluation Unit emailed the Secretary-General's decision dated 6 February 2014, upholding the contested decision to the Applicant.

16. On 18 May 2014, the Applicant filed the present application, and on 17 June 2014, the Respondent filed his reply.

17. On 27 May 2014, a VA for the post of Human Resources Assistant (GS-6) was re-advertised, with the mention "GTA Funded post" (VA No. UNLB/GSC-13-14(046)), with a deadline for applications set at 26 June 2014. The "re-advertised VA", as described by the Respondent, indicated the same time-in-grade eligibility requirement as the initial VA for the post, namely a requirement of four years of service at the G-5 level. For the re-issued VA, 81 applications, including the Applicant's, were received. The Respondent, in his written submissions to the Tribunal, stated that "the Applicant was found ineligible for further consideration for the re-advertised post because she did not meet the time-in-grade eligibility requirement".

18. On 5 August 2014, the written assessment for the candidates retained for the selection process of the re-advertised VA was conducted.

19. On 9 December 2014, pursuant to the Tribunal's Order No. 184 (GVA/2014) of 25 November 2014, the Respondent provided additional evidence, on which the Applicant commented on 9 January 2015.

20. By Order No. 16 (GVA/2015) of 15 January 2015, the Tribunal convoked the parties to a hearing on 12 February 2015, during which legal issues relating to the receivability and the merits of the application were discussed, and the Respondent confirmed that the recruitment process for the VA No. UNLB/GSC-13-14(046) was still ongoing.

Parties' submissions

21. The Applicant's principal contentions are:

a. The Administration erred by only counting her time-in-grade service with the Organization in order to determine her eligibility for the position at stake; in fact her prior service at the ICC—an international organization which is also part of the UN common system—should have been taken into account when determining her seniority for the post, as was the case upon her recruitment for the UNLB/GSC position in Valencia in January 2012, for which her years of service at the ICC were given due consideration and for which she was offered the same step she had when she left the ICC, namely G-5, step 7;

b. Based on *Korotina* UNDT/2012/178, absent a specific exclusion in the VA of the post of previous work experience acquired in organizations outside the UN system, it was unlawful for the Administration to only consider service in the same duty station and exclude her previous work experience at the G-5 level at the ICC. Moreover, there is no requirement in the rules or Guidelines that grade-in-service at the G-level must be acquired at the same duty station, and any interpretation to the contrary should be considered unlawful; it is further worth noting that such a grade-in-service

requirement was abolished in the UN by ST/AI/2002/4 (Staff selection system), sec. 5.3;

c. In view of the above, the Administration's reliance on the Guidelines, which hierarchally are not of the same level as Staff Rules or even administrative instructions, cannot be the basis of an additional requirement that was not specifically provided for in the VA, such as a seniority in-grade requirement before promotion that must be gained at the same duty station. Such a situation, if admitted, would bring as a result that only staff who remain in a single duty station for a long time would be eligible for promotion, which is in contravention with the principle of staff mobility the UN wishes to implement. If the interpretation made by the Respondent of the applicable rules would be followed, external candidates would be advantaged to the expense of internal candidates; as such, had she been an external candidate, her years of experience would have counted towards the required seniority-in-grade; moreover, the Administration contradicts itself as it had counted her seniority-in-grade for her current post as from her entrance on duty in Valencia, and not in Brindisi; there is even more contradiction in the Administration's actions as the candidate who was selected to the Temporary Job Opening on 4 July 2014 did not meet the seniority-in-grade requirement at the G-5 level;

d. The above-mentioned argument is reinforced by the fact that regarding the waiver practice, the current practice at UNLB was to allow internal candidates who do not possess the seniority-in-grade requirement to participate in post selection processes, and, if selected, to give them the position with a Special Post Allowance until they achieve the seniority required;

e. In addition to these arguments, the Respondent's contention that staff in the GS category in peacekeeping operations and special political missions are excluded from the ST/AI/2010/3 on the Staff Selection System cannot stand as there is evidence showing that UNLB/UNGSC is not a "mission"; therefore, the Guidelines are not applicable to her case, contrary to the Respondent's statement;

f. In conclusion, in line with the staff mobility being strongly encouraged at the UN, she should be rewarded and not punished for her having been mobile, and she cannot understand how nine years of work, despite having been acquired within the UN Common System, can "suddenly disappear";

g. In view of the above, she requests the rescission of the contested decision, or that she be granted eligibility for consideration for an equivalent post. She also asks for compensation amounting to six months' salary for being subject to an unfair and unreasonable breach of due process.

22. The Respondent's principal contentions are:

a. For GS staff members, prior service outside the Organization and their overall work experience, although considered for the purposes of recruitment, is not considered for internal promotion purposes after their initial appointment. At the time of her application for the post, the Applicant's service with the Organization at the GS-5 level was 21 months, hence she did not meet the four years' time-in-grade eligibility requirement to be considered for the position and the decision was lawful;

b. Furthermore, the Administration is vested with a broad discretion in determining eligibility requirements for positions in the Organization, and the introduction of a four years' time-in-grade eligibility requirement was not unlawful; indeed, such a requirement was explicitly set out in the 1996 Guidelines for promotion of locally recruited GS staff at established missions that had been duly circulated to all staff in UNLB/GSC on 29 October 2012. While ST/AI/2010/3 on the Staff Selection System does

not foresee seniority-in-grade requirements, pursuant to its sec. 3.2(h), appointment and selection of staff in the GS category in peacekeeping operations and in special political missions fall outside of its scope; this applies to UNLB/GSC, since its functions are in support of peacekeeping operations so that it is staffed and managed by the Department for Field Support in the same manner as peacekeeping missions. It has to be noted, however, that it is the intention of the UN Secretariat “to revise ST/AI/2010/3 in the near future and to expand its scope to include locally-recruited staff in field missions”; in the meantime, however, “the former “established missions”, which includes UNTSO, UNMOGIP, UNFICYP, UNDOF and UNIFIL, as well as UNLB, continue to apply the 1996 Guidelines”;

c. A time-in-grade requirement benefits the Organization and GS staff members as well, by ensuring that staff possess well-rounded experience prior to promotion, and that “staff across a work unit have consistent expectations as to when they, and their colleagues, are eligible to apply for promotion”. The requirement is directed to ensure “steady and consistent progression of GS staff between grades”, and “stability within work units”; it is accordingly predicated on the basis of time served with the Organization, and not time served prior to joining the Organization;

d. In accordance with staff rule 4.17 regarding re-employment and sec. 3.14 of ST/AI/2013/1 on the administration of fixed-term appointments, even if the Applicant’s prior service had been with the Organization, it would not have counted toward her time-in-grade with UNLB for the reason that a new service resets a staff member’s entry duty date, and is not considered continuous from the previous service;

e. In view of the above, the application should be rejected in its entirety.

Consideration

23. Article 2.1 (a) of its Statute provides that the Dispute Tribunal “shall be competent to hear and pass judgment on an application filed by an individual ... against the Secretary-General”, to “appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. The Appeals Tribunal (see e.g., *Al Surkhi et al.* 2013-UNAT-304) has adopted the definition of an administrative decision based on the jurisprudence of the former Administrative Tribunal, which held in *Andronov* (Judgment No. 1157 (2003)) that:

It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

24. Pursuant to a well-established jurisprudence, preparatory decisions are not considered administrative decisions, as they merely constitute one of the steps and/or findings leading to an administrative decision, and do not in themselves adversely affect a staff member’s legal situation, since they modify neither the scope nor the extent of a staff member’s rights. As regards a selection process, the Appeals Tribunal has consistently held that it “involves a series of steps or findings which lead to the administrative decision”, and that “[t]hese steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT” (*Ishak* 2011-UNAT-152). In the same vein, the Appeals Tribunal held in *Elasoud* 2011-UNAT-173 that “Departmental Recommendations” within a selection process do not constitute administrative decisions. Also, in its most recent Judgment *Nguyen-Kropp & Postica* 2015-UNAT-509, the Appeals Tribunal recalls that it had “previously held that certain administrative processes, such as a

selection process ... are preparatory decisions or one of a series of steps which lead to an administrative decision”, and that “[s]uch steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences”.

25. The Appeals Tribunal has also highlighted that there is only one administrative decision that completes a selection process (see *Ivanov* 2013-UNAT-378). A selection procedure ends with the selection of the successful candidate, which results in the non-selection of other candidates; the latter being the consequence of the former, hence it is this decision that may be contested by unsuccessful candidates. Any prior decisions within the selection procedure are preparing the final selection and do not amount to contestable administrative decisions.

26. Against this background, the Tribunal emphasizes that in the present case, the Applicant is challenging the decision to find her ineligible for the position of Human Resources Assistant (G-6), Reference Verification Unit, UNLB/GSC, Field Central Review Board Unit, VA No. VA/UNLB/GSC-13-14(011), and, hence, excluding her from the next steps of the selection process.

27. Further, the Tribunal notes that the initial selection process, namely the selection procedure for post No. VA/UNLB/GSC-13-14(011), was not completed, without formal notice of its suspension or cancellation, and that the position was subsequently re-advertised by issuance of VA No. UNLB/GSC-13-14(046) on 27 May 2014, for which the Respondent confirmed that the selection process is still ongoing.

28. Having compared the two VAs, namely No. VA/UNLB/GSC-13-14(011) and No. UNLB/GSC-13-14(046), the Tribunal notes that the wording of the second VA was slightly changed when compared with the first one, for instance by the addition of supervisory tasks of minor nature, and the deletion of the “communication” competency. However, the changes made to the newly advertised VA were mostly of an editorial nature and did not change the essence of the initial VA No. VA/UNLB/GSC-13-14(011). The post that was re-advertised is still the same and concerns the position of Human Resources Assistant (GS-6)

in the Reference Verification Unit of the Field Central Review Board. It is hence a continuation of the same selection process, for which a final decision has still to be made. Like the Appeals Tribunal found in *Ngokeng* 2014-UNAT-460, “[t]he only logical inference that could be drawn from the facts was that the second job opening has replaced the first one and that there was only one recruitment process, which was still ongoing”, and that there were not two separate selection processes, but a single one. In *Ngokeng*, based on this observation, the Appeals Tribunal concluded that the Administration’s decision to suspend the recruitment process was not a final administrative decision and therefore had no direct legal consequences for the applicant.

29. In view of the foregoing, and based on the jurisprudence of the Appeals Tribunal, the Dispute Tribunal—which is expected to recognize, respect and abide by the Appeals Tribunal’s jurisprudence (see *Igbinedion* 2014-UNAT-410, *Hepworth* 2015-UNAT-503)—cannot but conclude that the contested decision was only a preparatory decision, and did not carry any direct legal consequences on the Applicant’s rights. The assessment of the eligibility of a candidate, similar to his or her exclusion from the interview stage following a written assessment exercise, is only one step in the recruitment procedure, and is not tantamount to a final and individual administrative decision directly affecting the Applicant’s rights that might be challenged before the Tribunal (see e.g., *Valentine*, Order on suspension of action No. 80 (GVA/2015)).

30. Further, the post at stake was re-advertised and the recruitment process is still ongoing as no candidate has been selected. The legality of the Applicant’s non-selection for the post could therefore only be disputed in light of a final decision on the selection procedure for the re-advertised post. Insofar, the application is premature, and should be rejected.

31. The Tribunal wishes to note that its conclusion would have been the same even if, under another approach to the case, the change made under the “Competencies” section of the second VA—when compared to the first VA—would have been assessed as being of a substantial nature. Indeed, under such a hypothesis, the publication of the second VA would be considered as the start of a

new selection process, and not as a continuation of the initial VA. However, since the Applicant's request for management evaluation—and present application—is restricted to her ineligibility under the first VA, the Tribunal would have considered the application irreceivable as having become moot, hence it would have rejected it as well.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 1st day of May 2015

Entered in the Register on this 1st day of May 2015

(Signed)

René M. Vargas M., Registrar, Geneva