



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NANTUMBWE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Emmanuel Gali

Counsel for the Respondent:

Alan Gutman, AS/ALD/OHR, UN Secretariat

Clémentine Foizel, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, who applied to a job opening for the position of an Administrative Assistant, on a fixed-term appointment (“FTA”), at the GS-5 level at the Regional Service Centre (“RSCE”) in Entebbe, Uganda, challenges the refusal by the Administration to grant her an exception pursuant to staff rule 4.7(a) on the appointment of immediate family members within the Secretariat of the United Nations.

Procedural background

2. The Applicant held a temporary appointment at the United Nations at the time of the application. She served at the RSCE.

3. On 9 April 2021, the Applicant moved the Tribunal to suspend the refusal of the Assistant Secretary-General for Human Resources (“ASG/OHR”) to grant her this exception. On 13 April 2021, the Tribunal issued Order No. 078 (NBI/2021) refusing the application for suspension of action.

4. On 26 July 2021, she filed an application to challenge the Respondent’s refusal to grant her an exception, pursuant to staff rule 4.7(a), on the appointment of immediate family members within the Secretariat of the United Nations.

5. The Respondent filed his reply on 27 August 2021.

6. On 3 August 2022, the Tribunal issued Order No. 102 (NBI/2022) to inform the parties of its decision to adjudicate this matter based on their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022.

7. The Respondent filed his closing submissions as directed. The Applicant did not.

Facts and Submissions

8. After her initial appointment on 28 February 2019, the Applicant’s contract was renewed several times until 25 February 2021, when she reached the maximum

729 days of service permitted under staff rule 4.12(b) and section 2.7 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments).

9. On 5 February 2020, the ASG/OHR approved an exception to staff rule 4.7, allowing the appointment of the Applicant's sister, PN, as a Gender Affairs Officer on a fixed-term appointment in the Department of Political and Peacebuilding Affairs ("DPPA"). In approving the exception, the Respondent submits that the ASG/OHR considered the fact that the Applicant's appointment cannot be extended beyond the statutory 729 days.

10. On 5 January 2021, prior to the expiry of her temporary appointment, the Applicant applied to a job opening for the position of an Administrative Assistant at the GS-5 level at the RSCE. This would have been a fixed-term appointment.

11. On 8 February 2021, the Director of the RSCE wrote to OHR to clarify that the exception that was granted on 5 February 2020 would apply to the re-appointment of the Applicant on a fixed-term appointment if she was competitively selected for the position. In the event that a new exception was required, the Director would have to make a case for it to be approved. The Director took the view that since the Applicant joined the Organization first, and should she succeed in the selection exercise, some flexibility should be exercised in the interpretation and application of the rule.

12. On 15 March 2021, the Human Resources Policy Section conveyed the decision of the ASG/OHR not to grant an exception to staff rule 4.7(a) to the Applicant. OHR advised RSCE, *inter alia*, that "[s]taff Rule 4.7 (a) is clear in not allowing two individuals with family relationships such as mother, father, sister, brother to work for the organization irrespective of reporting lines or location."

13. It is the Applicant's case that the ASG/OHR was "arbitrary and capricious" in her decision making and did not exercise her discretion properly, and the resultant decision was both unjust and unfair.

14. The Respondent submits that staff rule 4.7(a) categorically, and without exception, prohibits the appointment of the Applicant.

15. While staff rule 12.3(b) grants the Secretary-General discretion to make exceptions to the staff rules, the exception must not be “inconsistent with any Staff Regulation or other decision of the General Assembly.” In this case, discretion was not abused; indeed the request was properly considered and the eventual decision was legal, rational and procedurally correct.

Considerations

16. The application has no merit.

17. While the Applicant’s temporary appointment cannot be extended or converted to another type of appointment, and ended at its natural expiry date, the issuance of a new appointment to the Applicant is prohibited because her sister was already a staff member of the Organization at the relevant time.

18. Staff rule 4.7 provides,

- (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

19. In 2019, the Secretary-General proposed to the General Assembly an amendment to staff rule 4.7(a) that would have allowed certain flexibility in the appointment of immediate family members, reintroducing a previously established practice of allowing the recruitment of a close family member in the event that no other equally well qualified person could be recruited. At the 76th session of the General Assembly, however, the proposed amendment to staff rule 4.7(a) was not approved.

20. The Tribunal is therefore bound by the said provision (*Latimer*, 2019-UNAT-901).

21. As this Tribunal already has held in Order No. 078 (NBI/2021),

Staff rule 4.7 (a) is categorical in not allowing two individuals with family relationships such as mother, father, sister or brother to work for the Organization irrespective of reporting lines or location.

22. While the said rule contains no exceptions, staff rule 12.3(b) grants the Secretary-General discretion to make exceptions to the Staff Rules. The ASG/OHR reasonably concluded that the request for an exception presented no extraordinary circumstances, and it was not in the interest of the Organization to allow an exception to staff rule 4.7(a) in this case.

23. The question before the Dispute Tribunal in this case is whether or not the Administration abused its discretion by deciding not to grant the Applicant an exception to the general rule prohibiting the appointment of staff members' parents, children, and siblings, thereby barring the Applicant's appointment because her sister is a current staff member.

24. The Tribunal notes that the judicial review of exercise of discretion under staff rule 12.3(b) is limited. As explained by the Appeals Tribunal¹:

[I]t is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

25. In this case, the ASG/OHR considered all the relevant facts, and weighed the reasons provided by the Director of the RSCE. She considered the circumstances surrounding the Applicant's prior service on a temporary appointment, and the exception previously granted to the Applicant's sister.

26. The Respondent created no legitimate expectation that the exception previously granted to the Applicant's sister would automatically result in the Applicant being later granted an exception, too; indeed, the derogation in the past had a different factual basis in the type and length of the relationship (and the temporary nature) of the first appointed relative; the Applicant's sister was granted an exception because, among other things, the Applicant was on a temporary appointment at the time, meaning that the overlapping service of both sisters would only be for a limited time.

¹ *Sanwidi*, 2010-UNAT-084, 40; *Alquza*, 2020-UNAT-1065, 31; *Ernst*, 2012-UNAT-227, 4, 33; *El-Awar*, 2019-UNAT-931, 34-35; *Hastings*, 2011-UNAT-109, 17.

27. The Tribunal therefore reiterates what it already stated in Order No. 078 (NBI/2021), that

The approval granted exceptionally in the specific context did not create legitimate expectation that a parallel employment of the sisters will be maintained for as long as they wish to remain with the Organization.

Conclusion

28. In light of the foregoing, the application is dismissed.

(Signed)

Judge Francesco Buffa

Dated this 7th day of October 2022

Entered in the Register on this 7th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi