



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/072

Judgment No.: UNDT/2022/123

Date: 14 November 2022

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RONVED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Support office in Somalia (“UNSOS”), filed an application on 21 August 2022 contesting the decisions to: (i) grant the Applicant a special post allowance (“SPA”) instead of a temporary promotion; and (ii) find the Applicant ineligible to apply for Job Opening (“JO”) 178301 because applicants may only apply for vacancies one level above their current grade (“contested decisions”). JO 178301 is a position at the P-5 level.
2. The Respondent filed a reply to the application on 20 September 2022 arguing that the application was not receivable.
3. The Applicant filed a motion for interim measures¹ on 30 September 2022 seeking suspension of the recruitment process for JO 178301 pending the Tribunal’s judgment on the merits. The Tribunal rejected the motion *via* Order No. 145 (NBI/2022).
4. The Tribunal held a case management discussion (“CMD”) with the parties on 26 October 2022 where it was established that the parties did not require a hearing. Upon the Applicant’s request, in order to prove that there was a finding of non-eligibility of the Applicant for JO 178301, the Tribunal ordered disclosure of a document forwarding candidates for JO 178301 to the hiring manager, to which the Respondent objected. The Respondent eventually stipulated the disputed fact.

Facts

5. The Applicant serves as a Human Resources Officer with UNSOS. At the time the Applicant applied for JO 178301, their personal grade was at the P-3/13 level.² Effective 1 September 2022, the Applicant has been promoted to P-4 Human Resources Officer.³

¹ Articles 10.2 of the Statute and 14 of the Rules of Procedure of the United Nations Dispute Tribunal.

² Reply, annex R/1.

³ Response to motion for interim measures, annex R/9.

6. On 24 March 2020, the Applicant was selected for the temporary position of Human Resources Officer at the P-4 level against Temporary Job Opening (“TJO”) 131330. The Applicant assumed the functions of the post effective 1 April 2020 through 30 January 2021 and was informed of the conditions for eligibility for SPA. A request for SPA for their temporary assignment at the higher P-4 level was made on their behalf by the Chief of Human Resources (“CHRO”).⁴ The SPA was granted effective 1 July 2020 pursuant to section 6.3 of ST/AI/2003/3 (Special post allowance for field mission staff).⁵ The Applicant’s temporary assignment and SPA were subsequently extended until 31 May 2021.⁶ According to the Respondent, the Applicant had a short break at the P 4 post upon return of the incumbent to UNSOS, but resumed the functions on 28 June 2021.⁷

7. In March 2022, the UNSOS Human Resources Section recommended the extension of the Applicant’s SPA retroactively from 1 June 2021 through 30 June 2022.⁸ There is an email from one PG to the Applicant dated 26 April 2022 informing them of the extension of their SPA from 1 June 2021 to 30 June 2022 and that payment would be reflected in their May salary.⁹

8. Between 20 April to 19 May 2022, UNSOS advertised a P-5 Senior Logistics Officer position in *Inspira* under JO 178301.¹⁰ The Applicant applied for JO 178301 on 1 May 2022, and subsequently learned that their application was rejected, and that they would not be further considered.¹¹ According to the Respondent, recruitment for JO 178301 is still ongoing.¹²

⁴ Reply, annexes R/4 and R/5.

⁵ Application, annex 01 and annex 04, pages 4-5.

⁶ Application, annex 06 (response from the Management Evaluation Unit).

⁷ Reply para. 14

⁸ Application, annex 04.

⁹ Reply, annex R/7.

¹⁰ Reply, para. 16.

¹¹ Application, p. 4, para. 5; motion for interim measures, section II, para. 5; and motion for leave to respond to the Respondent’s response on interim measures, para. 8.

¹² Reply, para. 16.

9. On 12 May 2022, a Personnel Action (“PA”) form was issued retroactively extending the Applicant’s temporary assignment and SPA from 1 June 2021 to 30 June 2022.¹³

10. On 22 May 2022, the Applicant requested management evaluation contesting the decision of placement on SPA and the decision to find them ineligible for JO 178301.¹⁴

11. In a response dated 1 July 2022, the Management Evaluation Unit (“MEU”) found the Applicant’s management evaluation request to not be receivable because the challenge against the SPA decision was time-barred and there was no administrative decision with respect to the Applicant’s ineligibility for JO 178301.

Applicant’s submissions

Receivability

12. The Applicant concedes that the decisions to place them on SPA from 1 April 2020 to 31 January 2021 and to extend their SPA from 1 February 2021 to 31 May 2021 are time-barred. The decision to extend their SPA from 1 June 2021 to 30 June 2022 is receivable because the PA was raised on 12 May 2022 and they requested management evaluation on 22 May 2022, only 10 days following the notification, and well within the 60 days’ time limit. Additionally, even if they had been aware of the 31 March 2022 request from the UNSOS’ CHRO to the Director of Mission Support (“DMS”) their request for management evaluation dated 22 May 2022 is well within the 60-day limit.

13. The Applicant has not yet been notified of their ineligibility for JO 178301, but they are aware from several friends and colleagues that they have already participated in the written assessment. As the Applicant was not invited for this written assessment, it is evident that their application is not being further considered. The jurisprudence

¹³ Application, annex 02.

¹⁴ Application, annex 05, p. 2.

shows that such internal steps are appealable if they end the assessment process for a candidate. This decision is not time-barred since they applied for JO 178301 on 1 May 2022 and requested management evaluation on 22 May 2022.

Merits

14. Pursuant to staff rule 3.10(b), “promotion under staff rule 4.15 shall be the normal means of recognizing increased responsibilities and demonstrated ability” and that SPA should be granted only in exceptional cases when a staff member is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than their own for a temporary period exceeding three months. The selection of a staff member following a fully competitive process in accordance with ST/AI/2010/4 (Administration of temporary appointments) cannot be described as being “called upon”. It follows from staff rule 3.10(b), that the only alternative is promotion, in this case temporary, as the availability of the post was originally for less than one year, from 1 April 2020 up till 31 January 2021.

15. Since TJO 131330 was a temporary appointment, ST/AI/2010/4 is the applicable legal framework. Unlike ST/AI/2010/3 (Staff selection system), ST/AI/2010/4 is silent on whether an SPA or temporary promotion applies. Section 6.5 of ST/AI/2010/3 violates the legal maxim of equal pay for equal work because it creates an arbitrary distinction between a staff member from a headquarters location temporarily assigned to a peacekeeping or special political mission, and a staff member from a field location temporarily assigned to the same position. Additionally, an external applicant selected for the same position would be granted a temporary appointment at the higher level advertised.

16. Should the Tribunal grant the request to rescind the decision to grant them SPA in lieu of temporary promotion from 1 June 2021, then they are eligible to apply for JO 178301 at the P-5 level without anything further, as it would be one level above their current grade.

17. The Applicant seeks the following remedies: rescission of the decision to grant them SPA in lieu of temporary promotion from 1 June 2021; and rescission of the decision to find them ineligible for JO 178301.

Respondent's submissions

Receivability

18. The Applicant did not request management evaluation of the SPA decision within 60 days of notification, as required by staff rule 11.2(a) and art. 8.1(c) of the Statute. The date of a contested decision “is based on objective elements that both parties (Administration and staff member) can accurately determine”.¹⁵ This test is satisfied by determining when the “staff member knew or reasonably should have known of the [...] decision”.¹⁶ A staff member’s actual knowledge cannot be ignored for the purposes of calculating time limits.¹⁷ The 60-day deadline for requesting management evaluation began to run from 24 March 2020 when UNSOS first notified the Applicant of the SPA decision. The Applicant knew or should have known that their temporary assignment to TJO 131330 was not a temporary promotion thus the management evaluation deadline was 19 May 2020, making the 22 May 2022 management evaluation request more than two years late. Neither UNSOS’s subsequent decision of 26 April 2022 to retroactively continue the Applicant’s SPA nor the related 12 May 2022 PA constituted a new decision or reset the deadline. The Applicant continued to serve on the same assignment and continued to receive SPA as the SPA panel had approved in August 2020.

19. With respect to JO 178301, the Applicant does not contest a reviewable administrative decision within the meaning of art. 2.1(a) of the UNDT Statute. An administrative decision is a precise act distinguished from other administrative acts and which is notified to a staff member on a specific date hence the Applicant must clearly

¹⁵ *Rosana* 2012-UNAT-273, para. 25; *Terragnolo* 2015-UNAT-566, para. 36; *Awan* 2015-UNAT-588, para. 19.

¹⁶ *Chahrouh* 2014-UNAT-406, para. 31; *Rabee* 2013-UNAT-296, para. 19.

¹⁷ *Onana* 2011-UNAT-157, para. 25.

specify the exact date they first became aware of the contested act.¹⁸ There has been no decision that the Applicant was determined to be ineligible to apply for the P-5 position. The Applicant's allegation that they heard from their friends and colleagues on the progress of the recruitment is hearsay which cannot establish an administrative decision. Selection decisions are notified through formal *Inspira* correspondence.¹⁹ Ultimately, however, the Respondent stipulated that the Applicant was found ineligible to apply for the P-5 post against JO 178301.²⁰

Merits

20. The SPA decision was lawful because the Applicant was selected against a temporary job opening, not a regular job opening. ST/AI/2010/3 applies only to the selection and appointment of staff members recruited through regular job openings to whom the Organization has granted or proposes to grant an appointment of one year or longer under the staff rules. The recruitment process for job openings under ST/AI/2010/3 is a full competitive process reviewed by the Field Central Review Body ("FCRB") whereas the selection process for temporary job openings is not a full selection process subject to FCRB review. The Applicant's selection against the TJO was not reviewed by the FCRB, thus the Applicant was not promoted.

21. The Applicant's appointment to TJO 131330 is not governed by ST/AI/2010/3, but by the Administrative Instruction ("AI") on temporary appointments²¹, which does not provide for temporary promotions. In accordance with section 3.7(a) of the AI on temporary appointments and in line with the special notice in the TJO, the Applicant retained their P-3 status during the temporary assignment. UNSOS paid the Applicant SPA pursuant to staff rule 3.10(c) and section 3.7(a). Assuming *arguendo* that the AI on the staff selection system applies, section 6.5 is discretionary and does not provide

¹⁸ *Mokrova* 2021-UNAT-1092, para. 28; *Auda* 2017-UNAT-746, paras. 27-28; *Wasserstrom* 2014-UNAT-457; *Ngokeng* 2014-UNAT-460; *Gehr* 2014-UNAT-475; *Lee* 2014-UNAT-481; *Al Surkhi et al.* 2013-UNAT-304; *Hamad* 2012-UNAT-269.

¹⁹ See Hiring Manager's Manual, Chapter 16, pgs. 116-118 (selection decisions are automatically sent by *Inspira*, and signed by the staffing table manager, copying the primary hiring manager).

²⁰ Respondent's response to the Applicant's motion for production of documents (10 November 2022).

²¹ ST/AI/2010/4/Rev. 1.

for temporary promotions for assignments within the same peacekeeping mission, which is the case for the Applicant.

22. If the Dispute Tribunal finds that there has been an administrative decision to find the Applicant ineligible to apply for a P-5 position, that decision was lawful. Pursuant to section 6.5 of ST/AI/2010/3, staff members are ineligible to apply for positions more than one level higher than their personal grade. The Applicant's personal grade was P-3 when they applied for the P-5 Senior Logistics Officer position on 1 May 2022.

23. The Applicant is not entitled to any relief because they have failed to establish that the Organization breached any staff regulations and rules. Compensation cannot be awarded when no illegality has been established.²²

Considerations

24. The Tribunal agrees that the extension of the SPA is a new administrative decision, which, in principle, does activate afresh the deadlines to appeal it. The Applicant, however, would be lacking legitimacy to complain against being granted an SPA, which decision accords with their presumed interest (they applied for it through the Chief of Human Resources and accepted the payment). This situation is substantively different from a situation where the administration modifies the employment relation to a staff member's disadvantage, and does it through periodical extensions, such as Administrative Leave Without Pay ("ALWOP") or rolling recovery of money.

25. This said, it transpires from the application and was confirmed during the CMD, that the grievance is rather directed against the fact that the Applicant was not granted a temporary promotion in the place of the SPA. In this respect, the Tribunal considers that the Administration's position regarding non-applicability of a temporary promotion has been known to the Applicant since their application against TJO 131330,

²² *Wishah* 2015-UNAT-537, para. 40; *Harris* 2019-UNAT-897, para. 28.

which informs, at page 2 *in fine*²³, that, if the selected candidate is a staff member from the United Nations Secretariat, the selection will be administered as a temporary assignment, and not as an appointment. At the latest, the Applicant must have learnt this in March 2020, when they had been selected for the post and not issued a new appointment, a legal regime that continued through subsequent extensions of the assignment, the last one taking place in June 2021. The 2022 retroactive extension of the SPA is only a corollary to the extension of the assignment and does not create any new legal situation for the Applicant's appointment.

26. On the facts presented to the Tribunal, the question of a temporary promotion had never been contemplated for any contender among Secretariat staff members, neither had it been raised between the parties. As such, the application regarding this part is not receivable *ratione materiae* for the lack of administrative decision. In the alternative, accepting, *arguendo*, that the extension of the Applicant's assignment was an implied refusal of a temporary promotion, it is not receivable for the lack of a timely management evaluation.

27. As concerns eligibility for JO 178301, even though the Respondent may have not issued a specific decision rejecting the Applicant, the matter belongs in a broad category of non-selection decisions, which are, in principle, appealable. Given that the Respondent has not established a deadline for informing the candidates of their non-selection, and it is only at the level of a manual where it is foreseen for a non-selection to be notified at all, the Respondent may not rely on a principle that an administrative decision is an act which "is notified to a staff member on a specific date"²⁴. The Tribunal agrees that, indeed, this is how a professional administration should function: to have a legal obligation to issue a clearly identifiable and reasoned decision within a specific time, with a corresponding right on the part of a staff member to be rendered such a decision. In the present state of affairs, however, this Tribunal deals on a regular basis with applicants who must rely on informal channels of information, deduce

²³ Reply, annex R/2.

²⁴ Reply, para 22.

administrative decision from other facts, or engage in interpreting multiple email communications that often reveal only an aversion to taking any decision.

28. In the present case, in a single reply, the Respondent argues that “an administrative decision is an act which is *notified* to a staff member *on a specific date*”, notwithstanding that only a couple of paragraphs above he proffered that the receivability test “is satisfied by determining when the staff member knew or reasonably should have known of the [...] decision”. The Respondent did not, however, deny that other candidates had been invited to a written test and confirmed during the CMD that the Applicant was not going to be invited to take one. It is therefore clear that the Applicant had been eliminated from the selection exercise. In a situation like the present one, where an application has been lodged, it would have spared the time of the Tribunal and expense to the Organization had the Respondent confirmed this fact in the reply, instead of obscuring the process for months without any indication when he would be ready to inform the Applicant of their results concerning JO 178301 through *Inspira* or otherwise.

29. The Tribunal, in any event, finds that there has been a decision to eliminate the Applicant from the selection exercise and that it has been timely appealed. The precise date of the Applicant’s acquiring this knowledge is not relevant, given that the management evaluation request was filed within two months from the application for JO 178301.

30. As concerns the merits, for the question of eligibility for JO 178301 the controlling instrument at the time of the job opening was ST/AI/2010/3. Pursuant to section 6.1 (and not 6.5, as incorrectly referenced by the Respondent), staff members were ineligible to apply for positions more than one level higher than their personal

grade.²⁵ Undisputedly, the Applicant's personal grade was P-3 when they applied, rendering them formally non-eligible.²⁶

31. To establish whether there was irregularity in retaining the Applicant at the P-3 level, and thus precluding their competing for JO 178301, the Tribunal must examine incidentally the question of not granting a temporary promotion. The Tribunal notes that the parties seem to agree that the matter of the Applicant's engagement pursuant to TJO 131330 was regulated by an administrative instruction on administration of temporary appointments. They, however, seem to rely on different renditions of this instruction and derive different conclusions as to the Applicant's situation.

32. The Tribunal, at the outset, finds that the administrative issuance controlling the matter is ST/AI/2010/4/Rev.1, and not, as incorrectly referenced by the Applicant, ST/AI/2010/4. Section 3.7 of ST/AI/2010/4/Rev.1 provides:

The selected candidate shall be offered a temporary appointment unless he/she already holds another type of appointment, in which case the following rules apply: (a) Candidates holding a permanent or continuing appointment will retain their permanent or continuing appointment and will be assigned to the position to be temporarily encumbered; (b) Candidates holding a fixed-term appointment will retain their fixed-term appointment and will be assigned to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment.

33. It results that an option of a temporary appointment to the post is only open to external applicants. The Tribunal need not entertain the question of fairness of this provision, nor the fairness of section 6.5 of ST/AI/2010/3, which has since been abolished²⁷, because none of them were applied to the Applicant's case. As results from the notice in TJO 131330 (see para. 25 *supra*), the option of a temporary appointment was not open to any staff member from the United Nations Secretariat. The Applicant

²⁵ Section 6.1 "Staff members holding a permanent, continuing,12 probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade."

²⁶ This requirement was abolished in ST/AI/2010/3 Rev.1, which entered into force on 1 July 2022 and the Applicant may now apply even for an USG position.

²⁷ ST/AI/2010/3/Rev.1

voluntarily entered this regime when they accepted the assignment and the SPA. The Tribunal agrees with the Respondent that the mere extension of the Applicant's temporary assignment did not convert the TJO for which they had applied to a regular job opening, with a regular promotion regime.

34. Contrary to the Applicant's averment, the regime of a temporary assignment at a higher level does not contradict staff rule 3.10(b), even where the assignment is preceded by a selection exercise, because its finite duration and a simplified recruitment process justifies a different treatment and is not improperly discriminatory. Moreover, there is no violation of the principle of equal pay for equal work. The payment of SPA ensures that the principle is observed. As held by the United Nations Appeals Tribunal in *Elmi*:

It does not follow from the principle "equal pay for work of equal value" that a staff member who exercises higher level functions has a right to receive the same salary and pension benefits as a staff member at a higher level exercising the same or similar functions. If this were the case, Staff Rule 3.10(a) and (b) would be unlawful in itself as it states expressly that staff members, for a certain amount of time, must exercise higher functions as a normal part of their customary work and without any pecuniary reward in the form of higher salary or pension and, afterwards and if certain criteria are met, may receive only non-pensionable SPA.

As Staff Rule 3.10(a) and (b) regulates the interests of staff members of lower grades exercising higher level functions in a consistent and reasonable way, it lawfully embodies the principle of "equal pay for work of equal value" into the United Nations' system.²⁸

35. This Tribunal finds this holding dispositive of the issue at hand. As such, there was no irregularity in not granting the Applicant a temporary promotion, and, holding an appointment on a P-3 level, they were rightly considered non-eligible for JO 178301.

36. Absent irregularity of the impugned decision, the question of compensation does not arise.

²⁸ 2016-UNAT-704, para. 35.

Judgment

37. The application is dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart

Dated this 14th day of November 2022

Entered in the Register on this 14th day of November 2022

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi