



Before: Judge Solomon Areda Waktolla
Registry: Nairobi
Registrar: René M. Vargas M., Officer-in-Charge

NAJI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Saidou N'Dow, United Nations Human Settlements Programme, UN-Habitat
Nana Elsler, United Nations Human Settlements Programme, UN-Habitat

Introduction

1. On 8 August 2023, the Applicant, a Human Resources Assistant at the United Nations Interim Force in Lebanon (“UNIFIL”), filed an application contesting the decision deeming him ineligible for selection to the post of Human Resources Officer, P-3, with the United Nations Human Settlements Programme (“UN-Habitat”), Nairobi, advertised under Temporary Job Opening Number 196305 (“TJO196305”).
2. The Respondent filed a reply on 7 September 2023 in which he argues, *inter alia*, that the application is not receivable.
3. On 11 September 2023, the Tribunal invited the Applicant to file a response to the reply, which he did on 14 September 2023.

Facts

4. The Applicant joined the Organization on 1 January 1998 and has served in various capacities and missions. He is currently serving as a Field Service (“FS”) Human Resources Assistant in UNIFIL.¹
5. Between 28 November 2022 and 4 December 2022, UN-Habitat advertised TJO 196305. The Applicant and a female candidate were recommended for the position.²
6. On 7 September 2023, a Human Resources Partner at the United Nations Office at Nairobi (“UNON”) requested the Applicant to confirm whether he had sat and passed the General Service to Professional category examination (“G to P exam”). The Applicant responded stating that he had not since the exam was not applicable to him.³

¹ Reply, para. 14.

² *Ibid.*, annex 1.

³ *Ibid.*, annex 2.

7. On 9 February 2023, the Chief, Talent Acquisition Unit, Human Resources Management Unit, UNON, addressed an email to the Chief, Human Resources Liaison Unit, UN-Habitat, informing him that if the Applicant had not passed the G to P exam, then UN-Habitat needed to obtain exceptional approval from the Assistant Secretary-General, Office of Human Resources (“ASG/OHR”) as per the applicable rules.⁴

8. On 24 February 2023, UN-Habitat sent a request to the office of the ASG/OHR for exceptional approval to select the Applicant for TJO196305. On 30 March 2023, the office of the ASG/OHR responded that there was not sufficient justification to select the Applicant as the other recommended female candidate was in the professional category and met all the requirements of the advertised post as indicated by UN-Habitat.⁵

9. On 6 April 2023, the Applicant filed a request for management evaluation contesting the decision on his ineligibility for selection for TJO196305.⁶

10. On 26 May 2023, the Management Evaluation Unit, (“MEU”) responded to the Applicant and determined that there was no evidence to suggest that the Respondent erred in deeming him ineligible for TJO196305 and recommended that the decision be upheld.⁷

Parties’ submissions

11. The Applicant’s principal contentions are:

- a. There are no Staff Regulations or Rules or any other laws that require FS staff to sit the G to P exam;
- b. Instead, in taking the contested decision, UNON and the MEU relied on practice and internal policy;

⁴ *Ibid.*, annex 3.

⁵ *Ibid.*, annexes 8 and 9.

⁶ Application, annex 3.

⁷ *Ibid.* annex 4.

c. His application for TJO196305 in Inspira was screened and he was deemed eligible; and

d. The Respondent has incorrectly applied General Assembly resolution 66/234 (Human resources management), adopted on 24 December 2011, and staff rule 4.16.

12. The Respondent's principal contentions are:

a. Pursuant to art. 2.1(a) of the UNDT Statute, the application is not receivable as the Tribunal lacks the jurisdiction to conduct a judicial review of the propriety of United Nations Staff Regulations and Rules. In essence, the Applicant is arguing the legitimacy of General Assembly resolution 66/234 and staff rule 4.16;

b. Contrary to the Applicant's assertions, the relevant rules and established practice require that the Applicant must pass the G to P exam to be eligible for professional posts, unless exceptional approval is granted by the ASG/OHR;

c. The FS-5 category of staff and the G category of staff within the United Nations Secretariat have been held as having the same status on matters relating to their administration and categorization. Thus, the G to P exam requirement for FS-5 staff remains;

d. The International Civil Service Commission ("ICSC") Report on the Comprehensive review of the common system compensation package: overview of staff categories in the United Nations common system – (ICSC/82/R.4) (2016) provides that FS jobs are created either as FS Officers, (FS-6 and FS-7), or FS Assistants, (FS-1 to FS-5), corresponding to the level of responsibility of jobs in the Professional and General Service categories, respectively. The Report of the ICSC for the year 2017 stipulates that the functions and level of responsibilities in the FS category correspond to those in the GS category (FS-5 and below) and the Professional category (FS-6 and FS-7);

e. This is also in line with the conclusions of the Joint Inspection Unit (“JIU”) in its Report JIU/REP/2001/6 (Reforming the Field Service Category of Personnel in United Nations Peace Operations), which provides that FS Officers from FS-1 to FS-5 are equivalent to staff in the General Service category and receive base salaries equivalent to GS staff, and FS Officers at levels FS-6 and FS-7 receive salaries equivalent to P-3s and P-4s respectively. Paragraph 59 of the said Report provides that staff at the FS-5 levels can be promoted to the professional category through the competitive examination; and

f. Staff rules 3.8 and 5.1 support the argument that FS-5 staff and below are equated with GS staff for administrative purposes including eligibility for transitioning to professional positions within the United Nations Secretariat. As such, staff members at the FS-5 level and below are comparable to the GS category and, therefore, should also sit and pass the G to P exam before being considered for a professional post.

Consideration

13. Pursuant to arts. 16.1 and 19.1 of the UNDT Rules of Procedure, the Tribunal reviewed the parties’ submissions and took the view that the relevant facts in the present case are clear and there is no need to conduct a hearing on the merits as the matter can be determined based on the documents on record.

14. The Tribunal emphasizes that its role in reviewing the validity of the Secretary-General’s exercise of discretion in administrative matters is to assess whether the decision is legal, rational, and procedurally correct and whether the decision is absurd or perverse.⁸

⁸ *Kule Kongba* 2018-UNAT-849, para. 27 and *Kellie* 2018-UNAT-875, para. 4.

15. Having reviewed the parties' submissions and the evidence on record, the Tribunal defines the issues of the present case as follows:

- a. Whether the application is receivable in its entirety; and
- b. Whether the Applicant is eligible for a position in the professional category without taking a competitive examination or obtaining exceptional approval for a waiver.

Whether the application is receivable

16. The Respondent contends that the application is not receivable. The crux of the Respondent's argument is that the Applicant is essentially questioning the legitimacy of the applicable rules, regulations, and policies, specifically, General Assembly resolution 66/234 and staff rule 4.16. Therefore, as per art. 2.1(a) of the UNDT Statute, the application is not receivable as the Tribunal lacks the jurisdiction to conduct a judicial review of the propriety of United Nations Regulations and Rules.

17. In addressing the argument regarding the receivability of the application, the foremost issue to be tackled is the nature of the decision that the Applicant aims to contest. The Applicant is challenging the decision on his ineligibility for TJO196305.

18. The legal question that needs to be addressed at this point is whether the application challenges an administrative decision in the context of art. 2.1(a) of the UNDT Statute, which reads as follows:

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 non-compliance 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.

19. In *Al-Surkhi et al* 2013-UNAT-304,⁹ the United Nations Appeals Tribunal (“UNAT”) held that:

There is no dispute as to what an “administrative decision” is. 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.

20. The Tribunal considers that the Applicant is essentially contesting the administrative decision regarding his ineligibility for selection for TJO196305. The Applicant is not challenging the legitimacy of General Assembly resolution 66/234. Similarly, the Applicant is not challenging the legitimacy of staff rule 4.16. Rather, he contests the legality of the administrative decision made by the Respondent, which denied his selection for the aforementioned TJO based on the requirement to pass the G to P exam. The Applicant asserts that the law does not mandate passing the G to P exam for selection to this position.

21. His major contention is that the law has been wrongly interpreted, leading to an unlawful administrative decision, alleging that the decision directly impacts his rights causing significant legal consequences on his terms of employment.

22. The Tribunal finds that the Applicant is challenging an administrative decision that is alleged to be in non-compliance with his terms of appointment or his contract of employment and that the application is accordingly receivable.

⁹ At para. 26, citing United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

Whether the Applicant is eligible for a position in the professional category

23. When reviewing the Secretary-General's discretion in administrative matters, the Dispute Tribunal checks if the decision is legal, rational, procedurally correct and proportionate. It can also see if relevant or irrelevant matters are considered, and if the decision is unreasonable or illogical. But the Dispute Tribunal does not judge the Secretary-General's choice among different options. Nor does it replace the Administration's decision with its own.¹⁰

24. The Respondent submits that the relevant rules and established practice require that the Applicant must pass the G to P exam to be eligible for professional posts unless exceptional approval is granted by the ASG/OHR. The FS-5 category of staff and the GS category of staff within the United Nations Secretariat have been held as having the same status on matters relating to their administration and categorization. Thus, the G to P exam requirement for FS-5 staff remains.

25. The crux of the litigation in this case lies in the interpretation of the applicable legal rules. The legal claim and the parties' interpretations of the rules were carefully scrutinized by the Tribunal. The main issue is whether the law mandated Field Service staff with grade FS-5 to take the G to P exam to qualify for professional posts. The Tribunal examined the various interpretations of the rules put forth by the parties, along with the relevant rules, and conducted a legal analysis to arrive at a decision in the case.

26. General Assembly resolution 66/234, paragraph 8, provides that:

the Secretary-General should not recur to the practice of temporarily filling posts in the Professional and higher categories with General Service staff members who have not passed the General Service to Professional category examination other than on an exceptional basis, and requests the Secretary-General to ensure that temporary occupation of such posts by the General Service staff shall not exceed a period of one year, effective 1 January 2013, and to report thereon, including on the rationale for such practice, to the General Assembly every two years, starting at its sixty-seventh session.

¹⁰ *Arvizu Trevino* 2022-UNAT-1231, para. 50; *Sanwidi* 2010-UNAT-084, para. 40.

27. Staff rule 4.16(b)(ii), on Competitive Examinations, reads:

(b) Boards of examiners shall make recommendations to the Secretary-General in respect of the following:

...

(ii) Recruitment to the Professional category at the United Nations Secretariat of staff from the General Service and related categories having successfully passed the appropriate competitive examinations shall be made within the limits established by the General Assembly. Such recruitment shall be made exclusively through competitive examination.

28. Arts. 23 and 24 of the report of the ICSC on the Comprehensive review of the common system compensation package: overview of staff categories in the United Nations common system – (ICSC/82/R.4), states that jobs in the Field Service are classified either as FS Officers (FS-6 and FS-7) or FS Assistants (FS-1 to FS-5), corresponding to the level of responsibility of jobs in the Professional and GS categories, respectively. In this Report, the ICSC also provides a table of equivalencies, where FS-5 is equivalent to GS-7.

29. This was affirmed in the Report of the ICSC for the year 2017 (A/72/30) in which paragraph 45 provides:

The functions and level of responsibilities in the Field Service category corresponded to those in the General Service category (FS-5 and below) and the Professional category (FS-6 and FS-7). With regard to the question of converting the higher FS-6 and FS-7 levels to the international Professional category during a specified transitional period, the working group generally agreed that that might close the door for the promotion of lower-level Field Service staff to those levels. However, some participants welcomed the intention of the United Nations Secretariat to consider the conversion of functions in administration, human resources and finance from FS-6/FS-7 to P-3/P-4 positions over time.

30. JIU/REP/2001/6 provides that FS Officers from FS-1 to FS-5 are equivalent to staff in the GS category and receive base salaries equivalent to those GS staff. FS Officers at levels FS-6 and FS-7, on the other hand, receive salaries equivalent

to P-3 and P-4 respectively. The Report further clarifies that staff at the FS-5 level can be promoted to the professional category through a competitive examination.¹¹

31. Staff rule 3.8(a) stipulates in its relevant part that:

Staff members in the General Service, Security Service or Trades and Crafts category, or in the Field Service category up to and including the FS-5 level, holding a fixed-term or a continuing appointment may be entitled to a pensionable language allowance, under rates and conditions determined by the Secretary-General, provided that they have demonstrated proficiency in two or more United Nations official languages.

32. Staff rule 5.1(b) stipulates that:

A staff member in the General Service, Security Service or Trades and Crafts category, or in the Field Service category up to and including level FS-5, who is required to work in excess of the normal number of working hours per week shall be given compensatory time off or may receive payment for overtime, under conditions established by the Secretary-General.

33. Sections 2.4 and 2.5 of ST/AI/2012/2/Rev.1 (Young professionals programme) further stipulate that the Young Professionals Programme examinations are accessible to all staff members serving in the GS and related categories, as well as in the FS category, up to and including the FS-5 level. All staff members serving in these categories who meet the eligibility criteria under those sections are required to take the competitive examination for promotion to the professional category.

34. The Tribunal deems it necessary to provide insightful interpretations of these rules and principles. This includes the above set forth General Assembly resolution, Staff Rules, and general principles adopted by the ICSC, as well as the working documents and guidance provided by the ICSC and other entities of the Organization. These interpretations will be used to address the central issue of this case.

¹¹ Annex 15 to the reply. at paras. 38 and 59.

35. In *Avognon et al.* UNDT/2020/151 (para. 50), the Dispute Tribunal held that:

At the outset, the Tribunal finds it useful to recall an established principle that when the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. This follows general international practice, which refers to interpretation according to the ‘ordinary meaning’ of the terms ‘in their context and in the light of [their] object and purpose’ unless the parties intended to give the word a special meaning.

36. In interpreting the applicable legal provisions, the Tribunal will follow “current international practice, which is to interpret an instrument in accordance with the “ordinary meaning” to be given to the terms of the instrument”. The Tribunal’s first duty when interpreting and applying the law is to try to give its words their natural and ordinary meaning in their context.¹² Its role is to take the law as it is and explain its words according to their natural sense.

37. The technique of interpreting laws known as the “plain rule of interpretation” involves understanding the words of the statute in their literal or dictionary meaning. It is noted that when the words of the law are clear and unambiguous, they must be interpreted and should first be understood in their natural and ordinary sense. Above all, the grammatical meaning of the word must be respected in this rule of interpretation. There is no need to look for the legislative intent or purpose unless the law is ambiguous. If the law is plain and definite, the Tribunal must apply it and cannot change its scope to match the real or assumed intention of the lawmaker.

38. The Tribunal examined the rules stated above and determined if they were ambiguous or unclear. After reviewing them, the Tribunal concluded that their plain meaning was clear and did not create any confusion or doubt. The Tribunal did not find any reason to apply other rules of interpretation and decided that the literal and textual interpretations of these rules were sufficient to address the issue arising in this application.

¹² United Nations Administrative Tribunal Judgment No. 1225, (2005), para. VI.

39. Upon careful examination of this application, the Tribunal has determined that the General Assembly resolution, Staff Rules, and the ICSC principles and guidelines are clear and unambiguous. These rules stipulate that GS staff wishing to apply for a professional post must first pass the G to P exam unless an exceptional approval for the waiver is granted.

40. The rules also equate FS staff from levels FS-1 to FS-5 with GS staff, while FS staff at levels FS-6 and FS-7 are considered equivalent to professional staff. In other words, the functions, and responsibilities at the FS category from levels FS-1 to FS-5 correspond to those in the General Service category, while those at levels FS-6 and FS-7 correspond to the Professional category, as clearly specified in these rules.

41. Therefore, staff at level FS-5 and below must successfully pass the G to P exam to be eligible for a professional post.

42. The Applicant, who is an FS-5 staff member, submitted an application for TJO196305. To be eligible for this professional role, he was required to either pass the G to P exam or receive exceptional approval.

43. It is undisputed that the Applicant did not take the G to P exam. As such, UN-Habitat needed to secure exceptional approval from the ASG/OHR in accordance with the applicable law.

44. In line with General Assembly resolution 66/234 and staff rule 4.16, UN-Habitat sought exceptional approval from the ASG/OHR to appoint the applicant to the post. However, in a memorandum dated 30 March 2023, the ASG/OHR stated that there was insufficient justification to grant exceptional approval for the Applicant's selection to the post. Consequently, the request for exceptional approval for the Applicant was not approved.¹³

¹³ Reply, annexes 8 and 9.

45. Consequently, the Applicant's assertion that FS-5 staff are not GS staff and therefore do not need to take the G to P exam to apply for professional posts lacks legal support, when evaluated in light of the existing rules as outlined in the preceding paragraphs. Therefore, the Tribunal determined that the Applicant's claim of eligibility for the professional position without passing the competitive examination or obtaining exceptional approval for a waiver from the relevant authority is not legally valid.

46. In light of the foregoing, the Tribunal affirms that the administrative decision to not select the Applicant for TJO196305 was made in accordance with the relevant internal regulations and rules. The Respondent lawfully exercised his discretion in making this decision. The Tribunal found no evidence of unlawfulness, arbitrariness, or extraneous motives that would invalidate the decision.

Conclusion

47. The application is DISMISSED.

(Signed)

Judge Solomon Areda Waktolla

Dated this 29th day of November 2023

Entered in the Register on this 29th day of November 2023

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi