



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/009

Order No.: 086 (NBI/2014)

Date: 24 April 2014

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

JANNOUN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON CASE MANAGEMENT

Counsel for the Applicant:

Alexandre Tavadian, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cummin, ALS/OHRM

Introduction

1. The Applicant is a staff member of the United Nations Economic and Social Commission for Western Asia (ESCWA). He filed the current application on 21 March 2013 challenging the decision by the Executive Secretary of ESCWA not to select him for the post of Chief of Security at the P-4 level.
2. The Respondent submitted his Reply on 22 April 2013.
3. Pursuant to Order No. 186 (NBI/2013) dated 21 August 2013, the Parties submitted a joint statement of facts and issues on 26 September 2013. The Respondent also submitted a list of his witnesses on the same day.
4. By Order No. 017 (NBI/2014) dated 29 January 2014, the Parties were directed to provide further submissions on the disputed issues outlined in their joint submission of 26 September. The Applicant filed his submissions on 5 February and a Motion for production of evidence pursuant to article 18.3 of the UNDT Rules of Procedure on 6 February 2014. The Respondent filed his submissions on the disputed issues and the Applicant's Motion on 10 February 2014.

Disputed issues

5. The Tribunal instructed the Parties to file submissions on the following issues that were identified as disputed in their joint submission:
 - a) Whether the Administration has a duty to disclose to the Applicant the opinion issued by the Department of Safety and Security (DSS);
 - b) Whether the Tribunal is competent to rule on security issues in the context of this case; and

- c) Whether the principle of *functus officio* applies to the actions of an administrative department/office such as DSS.

Parties' submissions

6. On the issue of whether the Administration has a duty to disclose the DSS opinion to the Applicant, the Applicant submits as follows:

- a) A selection process is necessarily irregular if it does not comply with the procedural requirements set out in the governing administrative issuances.

- b) Pursuant to ST/AI/2010/3 (Staff selection system), the 2012 Manual for the Recruiter on the Staff Selection System and a document entitled “Lines of Reporting, Responsibilities and Administrative Arrangements for Security and Safety Services at Offices away from Headquarters and Regional Commissions”, the Under-Secretary-General for the Department of Safety and Security (USG/DSS) has to endorse the candidacy of the Chief/Deputy Chief of Security. Thus, the decision to select a candidate not approved by DSS could not have been lawful.

- c) If DSS reversed its decision regarding the suitability of the selected candidate, then it is critical for the reasons of the reversal to be examined and for the Applicant to have access to such information as it relates to non-compliance with a procedural requirement in a selection exercise.

7. The Respondent submits that the Applicant has no standing to challenge the designation process or the designation decision for the selected candidate because he is not the subject of the designation. The conduct of the designation process related to the selected candidate does not carry any direct legal effects on the Applicant’s contract of employment and as such, his challenge to the designation is not receivable.

8. On the issue of whether the Tribunal is competent to rule on security issues in the context of this case, the Applicant accepts that the Tribunal is not competent to rule on security issues but he submits that the Tribunal has the statutory power to hold officials whose actions jeopardize the safety and security of approximately 400 United Nations staff members fully accountable. The Respondent submits that the Dispute Tribunal does not have jurisdiction to review the legality of an administrative decision challenged by a staff member in a representative capacity and that each staff member has the capacity to litigate on their own behalf. Thus, the Applicant's allegation that the Administration's decision to select Mr. C.L. despite DSS' adverse opinion jeopardizes the security and safety of ESCWA staff members is not receivable.

9. On the issue of whether the principle of *functus officio* applies to the actions of an administrative department/office such as DSS, the Applicant submits that:

a) The principle of *functus officio* applies to all administrative agencies, bodies, boards and entities that have a mandate to make determinations. DSS has a statutory duty to assess the suitability of candidates for a senior security post and determine whether approval of their candidacy is justified. Consequently, once DSS determines that a candidate is not suitable it becomes *functus officio* and cannot change its assessment unless it intends to correct clerical or other technical errors.

b) Where an office wants to radically alter its overall assessment and decision, it minimally has to provide objective reasons in support of such a reversal. In the present case, DSS initially refused to clear the selected candidate on the basis of cogent and convincing evidence. The Administration's reluctance to disclose the reasons for DSS clearance strongly suggests that DSS either never cleared the selected candidate or provided no reasons for reversing its initial assessment, in which case its decision is arbitrary and capricious.

c) The reversal of DSS' initial assessment relates directly to the lawfulness of the selection decision and the Applicant's case.

10. The Respondent submits that the doctrine of *functus officio* applies to judicial or quasi-judicial decisions. The doctrine has been applied by the Dispute Tribunal to its decisions, decisions of management evaluation or to decisions relating to disciplinary matters. There is no authority for the proposition that the doctrine applies to internal recruitment processes. Consequently, this issue is also not receivable.

Considerations

Disclosure of the DSS opinion to the Applicant

11. What the Applicant is challenging is his non selection for the post of Chief of Security at the P-4 level. He can only succeed if he establishes, the burden of proof being on him, that there were such procedural flaws in the selection process as to make the whole process unlawful and unsustainable. An aggrieved individual who is not selected should establish on a balance of probabilities that the decision to select a candidate was taken "without authority or in breach of a rule or form or procedure, or if it was based on a mistake of fact or law, or if some material fact is overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence"¹.

12. Should the Applicant then have access to the reasons why DSS reversed its decision in regard to a candidate who though recommended was not initially but subsequently selected?

13. The Tribunal is not convinced that the reasons for evaluating the risk potential of the selected candidate are material for the determination of the case on its merits. All that the Applicant would be limited to establishing is whether the selection process was flawed according to the criteria set out above. It is the selection process and not the evaluation of the security issue surrounding the selected candidate that

¹ Administrative Tribunal of the International Labour Organization Judgment No. 2163.

should concern the Applicant. The Tribunal concludes that there is no justification to provide the reasons why DSS reversed its initial decision in regard to the candidate who was ultimately selected.

The Tribunal's competence to rule on security issues

14. This issue is closely linked to the issue of whether the reasons why DSS changed its decision should be disclosed. It is not within the jurisdiction or prerogative of the Dispute Tribunal to adjudicate on matters relating to security, except in so far as these matters impact directly on the contract or terms of employment of a staff member. Matters of security are within the sole province of the Under-Secretary-General for DSS who is accountable to the Secretary-General.

*Applicability of the principle of *functus officio* to DSS*

15. By the expression *functus officio* what is commonly to be understood is the end of an office. Though it is said that *functus officio* is related to the doctrine of *res judicata*, the two doctrines are not similar as *res judicata* is applicable to the final determination of a case. The term *functus officio* is not restricted to a judicial activity or function as it relates to an office and not to a judicial decision. A person taking an administrative decision cannot be said to be *functus officio* until there is a final overt act connected to the initial decision. In the present case, the initial administrative decision was the selection of a candidate for the contested post. Until the process of security clearance had ended it cannot be said that there was an overt act that brought finality to the selection process.

16. Admittedly, security clearance was not obtained in regard to the selected candidate initially. But that did not put an end to the selection process which was still ongoing. The outcome of the ongoing process could have been either a finding that the selected candidate was unsuitable or that he was suitable, security wise. At the end he was found to be suitable as part of the ongoing process. The decision makers were not *functus officio* until that final decision had been taken. The Tribunal would rest the above premise on:

In general the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.²

Production of evidence

17. The Applicant initially requested in his Application disclosure of the recommendations made by the Assessment Panel in relation to the selection process and disclosure of the communications between ESCWA and DSS in relation to the clearance of the selected candidate.

18. The Applicant submitted that the communications between ESCWA and DSS should be disclosed because the DSS assessment of the selected client concerns the safety and security of 400 United Nations staff members and that DSS officials and the Executive Secretary of ESCWA can be held personally liable in case of safety and security breaches resulting from their decision.

19. On 6 February 2014, the Applicant filed a motion pursuant to article 18.3 of the UNDT Rules of Procedure requesting disclosure of the following evidence:

- a) All emails pertaining to him from ESCWA Human Resources Officer, Ms. Zorana Maltar, to UNICEF Operations Officer, Mr. Oumarou (Omar) Dia and vice versa between February and June 2013; and
- b) All emails pertaining to him from Ms. Maltar to UNICEF Programme Assistant, Mr. Abdelgader Ahmed and vice versa between February and June 2013.

20. The Applicant submits that the emails between Ms. Maltar and the UNICEF staff members are relevant because they may corroborate his contention that the decision not to select him was made on extraneous grounds. The Applicant submits

² Administrative law in South Africa (2nd ed.), 2012, p. 278.

that these emails will prove, at least on a balance of probabilities that ESCWA was looking for “incriminating evidence” against him for no apparent reason.

21. The Respondent submitted in his response to Order No. 017 that since the designation process did not apply to the Applicant his request for the disclosure of the communication between ESCWA and DSS regarding the designation of the selected candidate should be rejected.

Considerations

22. Pursuant to article 18.2 of the UNDT Rules of Procedure, the Tribunal may order the production of evidence at any time and may require the disclosure of documents that it deems relevant.

Recommendations of the Assessment Panel

23. In a joint submission, the Parties have presented the following as live issues relating to the Assessment Panel:

- a) Whether the Assessment Panel was properly constituted; and
- b) Whether the Assessment Panel acted in accordance with applicable statutory and jurisprudential rules. In particular, whether the assessment panel exceeded its mandate and power by ranking the recommended candidates and by recommending the selection of candidates.

24. In view of the fact that the Tribunal is being moved by the Parties to make determinations on procedural matters relating to the Assessment Panel, it is critical that all documents relating to or created by this Panel be placed before the Tribunal for informed decision making.

Communications between ESCWA and DSS

25. The Tribunal has held previously that this case relates to the selection process and not the evaluation of the security issue surrounding the selected candidate, and as such there is no justification to provide the reasons why DSS reversed its initial decision in regard to the candidate who was ultimately selected. Consequently, the communications between ESCWA and DSS are not relevant to the current application.

Emails

26. While the emails the Applicant is seeking disclosure of may corroborate his contention that the non-selection decision was made on extraneous grounds, the Tribunal considers that the breadth of the request has now turned it into a fishing expedition. It is for the Applicant to limit the scope of a discovery request by means of evidence in his possession and/or cross examination of witnesses that he would summon. The Tribunal cannot *ab initio* order a wholesale production of documents in order to enable the Applicant to establish extraneous factors.

27. To limit the scope of this request, it will be more helpful for the authors of these emails to appear before the Tribunal to give evidence on their correspondence. The Tribunal notes that Ms. Maltar is being called as a witness by the Respondent. Thus, the Applicant will have ample opportunity to cross-examine her.

28. Should the Applicant deem it necessary, the Tribunal is also willing to call Messrs. Dia and Ahmed to appear as witnesses to testify as to the contents of these emails.

ORDERS

29. The only issues for determination by the Tribunal are the Agreed Issues set out at paragraph 11 of the Parties' Joint Submission of 26 September 2013. The

Tribunal will not hear evidence or make determinations on the Disputed Issues outlined at paragraph 12 of the Joint Submission.

30. The Applicant's requests for disclosure of the communications between ESCWA and DSS and Ms. Maltar and Messrs. Dia and Ahmed are rejected.

31. In accordance with article 18.2 of the UNDT Rules of Procedure, the Tribunal orders the Respondent to submit all documents relating to or created by the Assessment Panel during the recruitment process for the Contested Post. The documents are to be submitted to the Registry, on an *ex parte* and confidential basis, **no later than 19 May 2014**. After reviewing the documents, the Tribunal will make a determination as to whether any of the documents should be disclosed to the Applicant. If the Tribunal decides that disclosure is necessary, the Respondent will be provided with an opportunity to comment.

32. The Parties are to inform the Registry, no later than **19 May 2014**, of their availability, and the availability of any witnesses they wish to call, for a hearing **between 8 and 10 July 2014**.

(Signed)

Judge Vinod Boolell

Dated this 24th day of April 2014

Entered in the Register on this 24th day of April 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi