UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/085
Order No.: 289 (NY/2010)
Date: 29 October 2010
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLETON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON RECEIVABILITY

Counsel for Applicant:
George Irving

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. On 30 July 2010 the Applicant filed an application with the UN Dispute Tribunal, challenging "the decision of the Secretary-General to reject [the Applicant's] nomination for the post of Director, Investigations Division, Officer of Internal Oversight Services … ".

2. On 30 August 2010 the Respondent filed a reply asking the Tribunal to find the application not receivable, on three main grounds:

a. it is time-barred (ratione temporis);

b. the Applicant has no standing as he was not a staff member at the time of the contested decision (ratione personae); and

c. no administrative decision has been taken (ratione materiae).

The Respondent's reply sought to reserve his right to respond to the merits of the case in the event the Tribunal considered the application receivable.

3. In accordance with the Tribunal's further orders, the Applicant filed a response on 24 September 2010, with the Respondent being granted leave to file a response to this submission by 11 October 2010, which he did.

Facts

4. The post of Director ("the Post"), Investigations Division, Officer of Internal Oversight Services ("ID/OIOS"), has been vacant since the former incumbent separated from service on 31 July 2006.

5. On 3 October 2006 the Applicant joined the Organization as the Deputy Director of the Procurement Task Force in OIOS ("PTF/OIOS") at the D-l level and was appointed Director of PTF/OIOS at the D-2 level on 6 April 2007.

6. On 17 December 2007 a vacancy announcement ("VA") for the Post was posted in Galaxy with a closing date of 15 February 2008 ("the First VA"). The Applicant and 77 other candidates applied.

7. On 3 April 2008 the Secretary-General sent a memo to all Heads of Departments and Offices on "achieving gender balance in the United Nations Secretariat", stating, *inter alia*:

> To enable me to exercise my discretion on senior level appointments in a positive manner, I request that you provide my office with a list of at least three qualified candidates that includes qualified women for posts at the D-2 level and above. In those exceptional cases in which you are unable to include at least one qualified woman in the slate; please submit a written explanation highlighting the efforts made to do so.

8. An interview panel was established by the then Under-Secretary-General, OIOS ("USG/OIOS") comprising of herself as the Chair, and three other members. In October 2008, the panel interviewed four candidates and considered the Applicant as the best candidate for the Post. The Respondent submitted that the candidates interviewed were all male and of the same nationality, although at the time of this Order the Tribunal has not been provided evidence in support of this fact.

9. On 18 November 2008 the USG/OIOS submitted a recommendation to the Senior Review Group ("SRG") that the Applicant be appointed to the Post. The USG/OIOS stated that none of the female candidates had met the criteria required for the post.

10. The Respondent submitted that on 26 November 2008 the Secretary of the SRG informed the USG/OIOS that the SRG:

> a. had noted that the recommendation of a sole male candidate was not in line with the Secretary-General's policy on achieving gender balance in the UN Secretariat (as communicated in a 3 April 2008 memo to Heads of Departments and Offices);

b. had noted that the four candidates were of the same nationality; and

c. had requested the re-advertisement of the subject post, and recommended wide circulation in order to attract a wider pool of candidates, including suitably qualified female candidates.

Again, the evidence supporting this contention has not yet been submitted to the Tribunal, but the Tribunal accepts the above statement made by the Respondent's counsel as true for the purposes of the present Order.

11. Following a series of extensions of his appointment as Director of PTF/OIOS, the Applicant's appointment expired on 31 December 2008 and he was separated from service.

12. On 1 January 2009 the Secretary-General promulgated ST/SGB/2009/2 (Senior Review Group), which, *inter alia*, incorporated the policy on the recruitment of D-2 level staff as previously articulated in the 3 April 2008 memorandum to all heads of departments and offices. Before this time, other issuances relating to the SRG (for example, ST/SGB/2005/4, ST/SGB/2001/9) had not specified the procedures of the SRG.

13. On 27 February 2009 the USG/OIOS requested that the Post be re-advertised for 30 days (an abbreviated period approved on an exceptional basis by the Office of Human Resources Management ("OHRM") in order to expedite filling of the Post, which had been vacant since July 2006). The First VA (with a closing date of 15 February 2009) ostensibly was cancelled and on 2 March 2009 a new VA was issued with a closing date of 1 April 2009 ("the Second VA"). The Second VA stated that candidates who had previously applied for the Post, which included the Applicant, would not need to re-apply. The Applicant reapplied anyway, along with 68 other candidates.

14. An interview panel was established by the USG/OIOS comprising of herself as Chair and two members from the First VA's interview panel. The Respondent

submits that the panel interviewed four candidates, including two female candidates. On 19 June 2009, the USG/OIOS provided a record of evaluation of eight candidates, including the four candidates who had been previously interviewed and requested approval to appoint the Applicant as her only recommended candidate for the subject Post. This evaluation was forwarded to the SRG for its review in accordance with ST/SGB/2009/2.

15. On 18 February 2010, the SRG allegedly informed the Secretary-General that it was not in a position to make a recommendation on the case on the basis that "the USG/OIOS continued to recommend only one candidate", which was not "in line with the policy and practice for the filling of D-2 positions".

16. By letter dated 18 March 2010, the Applicant requested that he be informed of the outcome of the selection process. On 29 March 2010, the Applicant sought management evaluation of the decision not to select him for the Post. By letter dated 13 April 2010, OHRM informed the Applicant that the selection process remained ongoing, and that he would be informed once a decision had been made.

17. On 14 July 2010, the USG/OIOS' term of appointment expired and she separated from the Organization. At present the selection process under the Second VA has not been completed and the Post remains unfilled.

Applicant's submissions

18. The Applicant's principal contentions may be summarised as outlined below.

19. The Respondent makes a number of factual assertions without any proof, including relating to the gender of candidates in the First VA and conversations had by or with the USG/OIOS. There is no evidence the First VA was cancelled.

20. The Administration viewed the selection exercises under the First and Second VAs as one exercise; the terms "first/second selection exercises" (used by the Respondent) are an intentional misrepresentation. The Applicant was repeatedly

advised that the process was continuous and ongoing and that he need not re-apply for the readvertisement. The purpose of the re-circulation was, ostensibly, to obtain a wider pool of candidates, not to cancel the previous process. The initial application that was accepted was from a serving staff member. His re-submission was merely to reaffirm his interest and to avoid any clerical error.

21. What constitutes an administrative decision "will depend on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision" (stated in UN Appeals Tribunal Judgment *Andati-Amwayi* 2010-UNAT-058). The refusal to endorse his candidacy is a decision within the plain meaning of that term and directly and adversely affected the Applicant's career, leading to his separation from service. Further, a non-decision is an administrative decision subject to legal challenge: former UN Administrative Tribunal Judgment No. 818: *Paukert* (1997). The Respondent may not hide behind his own refusal to act. The Respondent believes that by withholding information, ignoring requests and refusing to take action, he can insulate himself from accountability. This becomes even more egregious when the Respondent later attempts to put a different spin on his actions to imply that no decision has been taken while keeping the Applicant and the programme manager waiting for over two years until the passage of time removes the obstacles to a predetermined outcome. This represents a violation of the basic duty of care of the Respondent to act fairly and in accordance with the rules he himself has established.

22. In relation to the time bar issue, the Applicant was never advised that there was any final outcome from the initial circulation of the First VA. The Applicant logically could not have contested the results of the First VA because that process and what followed subsequently were part of the same selection process. The Applicant was advised by the Administration (the OIOS Selection Panel) that the two rounds were connected, and that it was one recruitment exercise that was ongoing. He again participated and was again selected. He is not contesting the initial process; he is contesting the failure to act on the final selection made by the USG/OIOS.

23. The Respondent also tries to evade responsibility by suggesting, with no proof, that the programme manager, the USG/OIOS, informed the Applicant of his status and that the Galaxy listing indicated that "the vacancy had been cancelled". A vacancy cannot be cancelled; only a VA can be cancelled. But even that has little meaning in itself since the process continued.

24. This situation is quite different from the cases cited by the Respondent. In *De Porres* UNDT/2010/021 a former staff member applied for a post after she had been separated and clearly had no contractual ties with the Organization at that time. The other cases cited deal with applicants who never had appointments. In the present case, the Applicant's personal jurisdiction derives from his status as a staff member at the time he applied for the post in question.

Respondent's submissions

25. The Respondent's principal contentions may be summarised as outlined below.

26. The cancellation and re-advertisement of the Post in the First VA are not receivable ratione materiae as there are no administrative decisions within the meaning of article 2.l(a) of the Dispute Tribunal's Statute. These decisions were not of individual application to the Applicant, which is part of the test outlined by the former UN Administrative Tribunal, which has also been adopted by cases of the Dispute Tribunal (see e.g. *Hocking, Jarvis, McIntyre* UNDT/2009/077; *Planas* UNDT/2009/086; and *Ishak* UNDT/2010/085). Further, the SRG had not made a recommendation to the Secretary-General and, as such, the Secretary-General could not, and did not, make a decision.

27. The Applicant's own actions, including his submission of a fresh application for the Second VA, indicate that he was aware of the cancellation of the first selection exercise, and the start of a new selection process.

28. The Secretary-General did not take any administrative decision regarding the First VA – the SRG determined that the interview panel did not follow applicable procedures governing the appointments of staff at the D-2 level, and therefore made no recommendation. Even if there is an administrative decision it is time-barred under former staff rule 111.2(a) which requires that the decision be challenged within two months of written notification. At the very latest, the Applicant was on notice as of 2 March 2009 (when the Second VA was published) that the First VA had been cancelled and re-advertised. The Applicant did not challenge the cancellation of the First VA when he first learned that it had been cancelled and his attempt to challenge it now is time-barred.

29. The Applicant's contentions with respect to the Second VA are not receivable ratione personae pursuant to articles 2.l, 3.1 and 8.1 of the Dispute Tribunal's Statute, as he was not a staff member at the time. He lost his status as a staff member when his contract expired on 31 December 2008 and he separated from the Organization. The access of former staff members to the Tribunal is against decisions alleged to be in non-compliance with the terms of their (previous) appointment; the Applicant did not hold an employment contract with the Organization when the post was re-advertised, and when he applied for the Second VA. Accordingly, there are no grounds upon which he can claim that his contractual rights have been breached, consistent with the reasoning of the Tribunal in cases such as *Basenko* UNDT/2010/145, *Roberts* UNDT/2010/086 and *Gabaldon* UNDT/2010/098.

30. Further, with respect to the Second VA, no administrative decision has been taken within the meaning of Article 2.1(a) of the Dispute Tribunal's Statute as neither the SRG nor the Secretary-General has commented on or taken a decision on the Applicant's suitability for the Post. The USG/OIOS, in her capacity as Chair of the interview panel, had only submitted a recommendation to the SRG that the Applicant be appointed to the post. The SRG informed the Secretary-General that it was not in a position to make a recommendation on the matter given that the USG/OIOS' recommendation was not in line with the relevant policy. The SRG's inability to

make a recommendation to the Secretary-General is not an administrative decision within the meaning of Article 2 of the Statute. The fact that no decision had been taken was conveyed to the Applicant on 13 April 2010 when OHRM informed him that no decision had been made. As articulated by the Dispute Tribunal in the case of *Planas* UNDT/2009/086 (affirmed in *Planas* 2010-UNAT-049), "[o]nly if the Applicant contested the outcome of the selection process for a specific post (the administrative decision), would the Tribunal be competent to hear and pass judgment on [his] application as per article 2 of its Statute".

31. An administrative decision in a selection exercise cannot be artificially created by a letter from a candidate in which he demands to know the status of his recruitment. The selection exercise remains ongoing with no formal decision despite the arbitrary deadline of 29 March 2010 contained in the Applicant's letter of 18 March 2010.

Consideration

Preliminary matter

32. As a preliminary matter, it should be noted that the Respondent has followed an incorrect procedural course in this matter. He filed a reply, dealing only with receivabililty, stating at para. 5 of the introductory paragraphs (and reiterated in the conclusion) "[s]hould the Dispute Tribunal find that the application is receivable, the Respondent will request leave to make additional submissions on the merits of the case". The Respondent, therefore, assumes that he may respond only to the issues in the case that he deems appropriate (in this case, receivability), and if these are found against him, to then seek leave to file what is essentially an amended reply. It is clear that he also assumes such leave will be granted; he could not otherwise, acting reasonably, gamble on being successful in his receivability arguments at the risk of losing the entire case. The correct course of conduct is rather to first seek the leave of the Tribunal to respond only to certain aspects of the case before the time the reply is due. No right to partially respond is granted by the Statute or Rules of Procedure.

Failing to follow the specified rules of procedure could, in some circumstances, prohibit the Respondent from a further reply. In this instance, the Tribunal will allow the Respondent to make further submissions after this finding of receivability, but the parties should note this Order as confirmation of the proper procedure, and the potential consequences of failing to adhere to it.

Administrative decision challenged

33. The Respondent raises different issues of receivability in relation to what he says are two separate selection exercises in respect of a single post. He says that the selection process under the First VA cannot be challenged as it is time-barred and does not relate to an "administrative decision", as it is not of individual application. He says that the selection process under the Second VA cannot be challenged, as the Applicant was not a staff member at the time of it.

34. It is firstly necessary to identify and characterise what the Applicant challenges. In his request for management evaluation of 29 March 2010, the Applicant says he challenges the decision "not to endorse my nomination for the [Post]". In his application to the Tribunal, he refers to it as the "failure to appoint [him] to [the Post]" and alternately the "[rejection of his] nomination for the [P]ost … on two occasions". The Respondent adopts a similar description, but says there are two separate decisions the Applicant challenges, being the cancellation of the First VA (which he calls the "first selection exercise"), and the failure to complete the selection exercise under the Second VA. The Respondent infers that each was a discrete process, and should be treated as such for assessing what the administrative decision challenged is.

35. The Tribunal finds that the administrative decision challenged is the Secretary-General's failure to exercise his discretion to select the Applicant for the Post; alternately described as the implied administrative decision to reject the Applicant's candidacy. This decision may reasonably be inferred, given that the

Applicant was not selected following the second interview process and given the time lapse since the conclusion of that process.

Objection to receivability ratione personae

36. While it is true that there was a cancellation of the First VA and then the issuance of the Second VA, it is not accurate to consider these exercises as entirely separate or distinct events in the current context. The Post and its functions as advertised under each VA were the same. It is not suggested that the content or wording of the VAs was substantively different; rather, the Respondent says that the Second VA was issued merely to attempt to obtain a wider pool which included more female and geographically underrepresented candidates. Most tellingly, however, is the fact that the Second VA described itself as a "recirculation" of the First VA rather than a new exercise, and moreover, informed candidates who had already applied that they did not need to apply again. That is, the Second VA confirmed expressly that, for candidates who had applied to the First VA, the right to be considered for the Post was continuing and was not lost as a result of the cancellation of the First VA.

37. The Respondent has not argued or adduced any evidence to suggest that the consideration of the Applicant's candidacy under to the Second VA was a consideration *de novo*. Having already been interviewed and recommended pursuant to the First VA, it is reasonable to conclude that the Applicant would have been automatically included in the list of candidates short listed for interview with the other candidates under the Second VA. It is fair, then, to conclude that, particularly in respect of the Applicant's candidacy, the exercise was treated as a single ongoing exercise. Any consequential rights, including the right to challenge the process, should naturally continue, as well. From a due process standpoint it would be unfair to allow a party to avoid liability by merely cancelling a selection exercise until (using the current example) the other party is no longer able to challenge the process as a result of their separation from the Organization.

38. The Respondent's argument that there was a separate VA number in the Second VA is indicative only of the fact that the Respondent chose to provide it another number for administrative purposes; in substance, it was the same VA, in his own words, "recirculated". Neither is it determinative that the Applicant "reapplied" to the second VA when he was not required to; his diligence in seeking to protect his rights should not be cast as his waiver of them.

39. Even if the Tribunal were to accept the Respondent's argument that the Applicant was time-barred from challenging the cancellation of the First VA as a discrete administrative decision (which, as discussed below, it does not), the Applicant's present challenge would still be accepted as receivable. This is because, on the basis of the reasoning outlined in the preceding paragraphs, the Tribunal finds that in respect of the Applicant's individual candidacy for the Post, the selection process was a singular ongoing one and his right to be considered as a candidate under the First VA – i.e. while he was a staff member – accrued at the time he was advised that he did not need to reapply for the new VA. On this basis, the case is different to those cited by the Respondent (above: *Basenko, Roberts* and *Gabaldon*) and the Respondent's argument that the ongoing selection (as he refers to it – the Second Selection Process) was unrelated to the Applicant's terms of employment at the time he was a staff member, is incorrect. On the contrary, there is a direct nexus between the Applicant's application for the Post at the time he was a staff member and the ongoing consideration of his candidacy, even once he had separated.

Objection to receivability ratione temporis

40. The Tribunal notes that the Respondent has not raised *ratione temporis* objections in relation to the request for a review of the ongoing selection process, but only the challenging of the cancellation of the First VA. Although it is difficult to ascribe a date to the decision, the Applicant enquired on 18 March 2010 as to the selection process' outcome, noting that he would treat it as an implied decision not to select him, had he not been advised of the outcome by 29 March 2010. He was not advised by this date, and accordingly sought management evaluation on the same

day. As stated by the UN Appeals Tribunal in *Schook* 2010-UNAT-013, time limits can only be enforced against a written decision. The Applicant's request for management evaluation of the decision not to select him could only be made in response to the written communication of such a decision, which was not provided until he sought confirmation by way of his letter of 18 March 2010. His seeking of management evaluation in relation to the response to this letter (whether considered as the actual response, or the failure to respond) was within time. For completeness, the Tribunal notes that even if the Tribunal had held the Applicant was not able to challenge the selection process under the Second VA as he was not a staff member at the time, his challenge of the cancellation of the First VA would be found to have been within time, as the Respondent did not ever notify him in writing of the cancellation of the First VA. The fact that there was an edit to the internet version of the First VA showing the word "cancelled" does not satisfy the requirement for written notice.

Objection to receivability ratione materiae

41. Having identified the decision challenged, finding it within time for challenge, and that the required nexus exists with the Applicant's contract of employment, it is necessary to turn to the Respondent's other *ratione materiae* objection: that the challenged decision does not fit the definition of what constitutes an administrative decision. The Tribunal notes the Appeals Tribunal's statement in *Andati-Amwayi* 2010-UNAT-058, as cited by the Applicant, that what constitutes an administrative decision "will depend on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision". In *Andati-Amwayi*, the Respondent raised the objection on grounds of receivability on the basis that the decision was not an administrative decision within the meaning of UNDT's Statute, as it was of "general application" and "did not produce a direct legal consequence" – similar to the objections he raises in the instant case. The Appeals Tribunal in its judgment stated that "administrative decisions might be of general application", rendering the Respondent's contentions that an administrative decision must be of

individual application incorrect, but in any event, the Tribunal in this case has noted how the decision at issue specifically affects the Applicant and his appointment. The Tribunal also reiterates that if the Organization's action causes a breach of a staff member's terms of appointment, it should not matter whether the breach affected one or several staff members, as the Statute of the Tribunal does not draw such a distinction (discussed by this Tribunal in *Jaen* UNDT/2010/165 (para. 22 – 23)).

42. Finally, the Respondent argues that neither the Secretary-General nor the SRG have taken a decision on the Post, as the SRG has been unable to make a recommendation due to the relevant procedures not being followed. Pursuant to sec. 3.1 of ST/AI/2006/3 (in force at the time of the commencement of the selection process):

> The process leading to appointment or promotion to the D-2 level shall be governed by the provisions of the present instruction, except that the functions normally discharged by a central review body shall be discharged by the Senior Review Group, prior to selection by the Secretary-General.

Pursuant to sec. 9.1 of the same instruction:

> The selection shall be made by the official having authority to make the decision on behalf of the Secretary-General when the central review body finds that the evaluation criteria were improperly applied and/or that the applicable procedures were not followed.

43. By analogy, the Secretary-General is able to make a decision (or for one to be made on his behalf), absent the SRG's recommendation. He has not, and this failure to decide is an administrative decision. The Respondent's attempt to apply the reasoning in *Planas* UNDT/2009/086 is unsuccessful, as that case's outcome was based on the fact that the Applicant had not applied for a specific post – here it is unchallenged that the Applicant has.

Order

44. The Tribunal finds that the Applicant validly challenges an administrative decision within the meaning of art. 2.1(a) of its Statute, being the decision not to select him for the Post.

45. The parties are directed to appear before the Tribunal on 9 November 2010 for the purposes of a case management conference.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 29th day of October 2010