

Case No.: UNDT/NY/2009/087/ JAB/2009/052 Judgment No.UNDT/2009/030

Date: 7 October 2009

Original: English

## Introduction

- 1. The Applicant applied to the Secretaryr@eal for an exceptin to be made to administrative instruction ST/AI/2006/3 tolorwher to apply for a D-2 position that was more than one level higher than Re5 personal grade. At the time of the application she was receiving a D-1 spepiast allowance (SPA) as she was working in the acting position for which she wished to apply. The application for an exception was refused by the Assistant Secretaryr@eal for Human Resource Management (ASG). The Applicant sought an administrative review which upheld the original decision. She then appealed to the Joint Appeals Board (JAB).
- 2. On 1 July 2009 the case was transferine the JAB to the United Nations Dispute Tribunal for hearing and decisior Counsel for both parties advised the Tribunal that they did not wish to call any evidence other than that submitted in writing to the JAB but asked for an opportunity make submissions to the Tribunal. These submissions were made by way of a vi

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## The facts

- 4. The parties agreed on a statement facts which forms the basis of the following outline of the material facts:
- 5. The Applicant has been a staff member of the UN since 1978 and has been working in the Advisory Committee on Andnistrative and Budgetary Questions (ACABQ) Secretariat since 1999. In 2000 she was promoted to the P-5 level as senior administrative management officer. In July 2006 the Applicant applied for the vacant position of executive secretary, a post at the D-2 level. At that time ST/AI/2002/4 was in force. This administrate instruction did not impose eligibility restrictions on staff memberapplying two levels above in own. The Applicant participated in a competency-basieterview but was not selected.
- 6. On 1 January 2007, ST/Al/2006/3 came inforce replacing ST/Al/2002/4. Section 5.2 of ST/Al/2006/3 provints that staff members shabt be eligible to be considered for a position more than one letwigher than their personal grade. It was introduced following a consultative proseisetween staff and management which culminated in a recommendation frontine Staff Management Coordination Committee. The Respondent contends, it involves not seriously disputed by the Applicant, that the change was made to reflect a legitimate management concern about the gravity of concerns and from the staff who had been by passed for promotion by staff junior to term in grade and experience.
- 7. On 1 September 2008 when the then Executive Secretary separated from employment pursuant to an agreed termination the Applicant was named acting Executive Secretary and was granted a SPMetaD-1 level as she was and continues to be employed on the P-5 level. A new implant has been select and is soon to take up the new position.
- 8. On 13 January 2009 the vacant D-2 post of Executive Secretary was announced and a month later the Applicantite to the Secretary-General requesting that an exception be made section 5.2 of ST/AI/2006/3 tenable her to apply for

the D-2 post. In this letter she set out full reasons why she should be considered for the position notwithstandint it would be a promotin to a post more than one grade higher than her personal grade. These reasons included:

- a. Her long experience and increassi responsibility in the ACABQ Secretariat.
- b. She had been receiving a SPAthat D-1 level since September 2008 when she was named acting Executive Secretary.

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another aid to interpretatin. However in a number of ommon law jurisdictions reliance on that dichotomy to estisable the meaning has been found to be inappropriate. In R v Soneji and Anothe House of Lords conducted a detailed review of how the distinction had been attempth in a number of jurisdictions, including Canada, Australia and New Zealandt summed up the position in this way:

"Having reviewed the issue in some detail I am in respectful agreement with the Australian Highourt that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as heldattorney General's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the questione the Parliament can fairly be taken to have intended total invalidity."

- 18. To establish the meaning and intentiorina UN provision the relevant context is the hierarchy of the UN's internal legisish. This is headedly the Charter of the UN followed by resolutions of the General Assembly, staff regulation and rules, Secretary-General bulletins and that ministrative instructions.
- 19. Article 101.3 of the Charter provides:

"The paramount consideration in ethemployment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiety, competence and integrity."

20. The Secretary-General is required by phheamble of the staff rules to provide and enforce staff rules which are consist

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Issue b. Was the decision not to allo an exception unlawful in this case?

- 27. A decision maker exercising powers commed by rules and regulations is obliged to turn his or her mind to the factowhich are relevant to the decision to be made. In the present case there are therefold:
  - a. Can an exception such as that sought by the Applicant be made?
  - b. If so, what are the circumstances der which a legitimate exception may be made?
  - c. Does the Applicant's case meet those circumstances?
- 28. The question of whether the AGS madle waful decision is one of fact. Did she properly turn her mind to these matters?
- 29. In the Applicant's initial application of 11 February 2009 for the Respondent to make an exception in her case, skeplieitly requested such exception to be considered by stating:

"Dear Mr Secretary-General,

This is to request that, in respect my application for the position of Executive Secretary of ACABQ, an desption be made to the provision of paragraph 5.2 of the administrative inst

current staff regulations and rules **imding** ST/AI/2006/3 we are not permitted to grant exceptions to the prohibition set dot paragraph 5.2'indicates that she addressed the first step. The  $secon \mathbf{p}$ , site his submission, was addressed in the words "to date no such exception has been made."

- 32. The Applicant argued that the words used show that the ASG did not consider the second step. It is thepplicant's case that once the ASG decided that section 5.2 did not permit her to make an exception streeped at that point and did not consider whether the Applicant had made auctase for an exception or not.
- 33. If the only evidence of the decision were the ASG's later of 25 March 2009 the question of whether she had in mindtan exception could be possible under staff rule 112.2(b) would be finely balanced. She does not refer to rule 112.2(b) but the reference to no exceptions having becaude in the past could possibly be construed as an oblique reference to processibility of an exception being granted. However I find that the correspondence which ceded that letter shows that without a doubt the decision made and adhered throughout the process leading to the ASG's formal reply was that the wording section 5.2 did not allow any exceptions and therefore the Application case for an exception or and would not be considered.
- 34. The first response of 16 March 2009 shiet case could not be considered because of the wording of section 5.2. The next response of 17 March 2009 cited only ST/AI/2006/3. It made no reference to staff rule 112.2(b) or any possibility of an exception.
- 35. Read together with these two answers I find that the formal response of 25 March 2009 is a reiteration and reinforcement of the unequivocal decision that had been made earlier. This decision wast thection 5.2 did not permit exceptions and therefore no exception would be made.that light, the words "to date no exception has been made" read as a further justification for the decision that no exception could be made.

36. I find that the ASG considered thatethe could never be an exception to the prohibition in section 5.2 and therefore did not