



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/130

Judgment No.: UNDT/2010/095

Date: 18 May 2010

Original: English

Introduction

1. The applicant complains that she was denied full and fair consideration for promotion in relation to one of three P-5 positions of Senior Human Resources Officer for which she applied and was eligible. She says that the promotion review process was carried out in breach of the rules and regulations of the Organization. Having unsatisfactorily sought redress via the Assistant-Secretary-General for the Advancement of Women (ASG) on 12 December 2007 and the Office of the Ombudsman on 13 December 2007, on 20 August 2008 the applicant sought administrative review “in connection with [her] reverting to [her] permanent post in OHRM and [her] promotion from P-4 to P-5 level”. A negative response was received from the Administration on 6 October 2008. The applicant then commenced proceedings in the internal justice system which came to the Tribunal pursuant to the transitional provisions. Following interlocutory orders the application was heard on its merits on 30 March 2010.

Procedural note

2. The respondent’s right to appear whilst in disobedience of the Tribunal’s orders was withdrawn (see Bertucci Order No. 40 (NY/201010) and related Orders). Counsel on his behalf sought leave to appear and was permitted to present his case at the hearing of 30 March 2010 with his evidence being tendered on the *voir dire*. Since the earlier orders were under appeal (although this did not in my view justify continuing disobedience) I granted a stay of my order refusing appearance. In the interests of finally determining this matter which is in substance unrelated to those in which the disobedience remained current and noting the pending appeals of those Orders, I have reluctantly decided to allow the matter to proceed in full on its merits.

Facts

3. The applicant has had a long and disti

selection of candidates for these posts, no separate evaluation criteria were provided to the Central Review Body (CRB) to be

and geographical considerations had been taken into account in recommending the three successful candidates.

9. As it happened, one of the selected candidates had been acting as Officer-in-Charge of the Division almost two months before the advertisement of the position.

10. The Evaluation Documents showed that the applicant had been considered “good” in respect of the competencies of “Communication” and “Client Orientation”, “acceptable” in respect of “Professionalism”, “Managing Performance”, “Planning & Organization”, “marginal” in respect of “Team Work” and “Below Standard” in respect of “Leadership”. In his testimony, the Assistant Programme Manager stated that, in respect of the competencies where she did not rank well, the applicant had failed to provide a convincing elaboration on her ability to deal with complex issues. Two of the three ultimately recommended candidates had rankings of at least “good” in respect of each competency, with the third also being ranked “good” except for “Communication”ommun-formula resp T. 883001 Tw 12.305 0 Td(Tdates had table” respect own-)giveE

Organization had a responsibility to secure and provide her with continuity in her career development and to assign her to a suitable vacant post with the prospect of promotion to a level commensurate with her qualifications, experience and performance. Notwithstanding her extensive service as CCPO for over six years (over three at an SPA to the P-5 level) at two different missions, she was also not considered for the re-advertised TVA post, whereas she should have been.

- iv) Service of at least one year in a UN peacekeeping or other field operation was stated as highly desirable. Only two of the selected candidates met this requirement;
- v) The linguistic requirement was for knowledge of a second UN language, preferably French. None of the three selected candidates have knowledge of French;
- vi) Three male candidates now encumber the three positions of Senior Human Resources Officer, which does not comply with gender policy as stated in ST/SGB/237.
- vii) The Programme Manager established evaluation criteria that were inconsistent with the vacancy announcement, while failing to take account of extended exercise by the applicant of competencies at the senior level in mission service. Further, the evaluation criteria were not specified in a separate document as required by ST/AI/2006/3, section 4.4.
- viii)

long successful career”. Both of these failures denied the applicant the opportunity to adequately challenge the selection process.

17. Compensation is sought to put the applicant in the position she would have been had she been promoted to the P-5 level from 1 February 2008 until her retirement on 31 December 2008, including pension benefits, and compensation for anguish resulting from a denial of her dignity, career development and loss of job satisfaction and achievement of a senior level after thirty-three years of dedicated service.

Respondent’s submissions

18. The respondent’s submissions may be summarised as follows:

a) The applicant did not have a right to be selected for any post; she had the right to apply for each post and to have her candidacy appropriately considered along with the other candidates. The selection record indicates that this was done. The candidacy of other candidates was considered to better fulfil the selection criteria than hers. The burden of proof should be on the applicant to prove otherwise.

b) The applicant should have been individually notified of the decision not to select her, but this is a courtesy and not a due process right. This notification was not done, but a general notification was posted on the Galaxy system immediately upon the completion of the selection process that the “vacancy has been filled”. The applicant had access to this information and it was sufficient to inform her of the status of her application. Furthermore, the failure to inform the applicant did not prejudice her in the enjoyment of any of her rights as a staff member, other than the right itself to be informed. Notwithstanding, the Tribunal should adopt an approach as in *Krioutchkov*, where it was found that only nominal damages applied.

c) The appointment of one of the candidates to act as Officer-in-Charge two months before the selection process is a decision made independently of any selection process and cannot properly be withheld for the reason that there is an ongoing selection process for a position.

d) The Evaluation Documents show that the applicant did not satisfy all of the criteria. The applicant's assessment of her qualifications and competencies relative to the other candidates is irrelevant.

e)

did have two languages and field experience and the third had field experience and significant language skill. The applicant's argument as to this matter fails.

24. I accept the argument of the respondent that the appointment of one of the candidates to act in a senior position was not a prejudgment of suitability in any relevant respect. It is obvious that administrative requirements cannot be placed on hold simply because one or more of the persons available and competent to undertake duties at a higher level happens also to be a candidate for promotion. One can imagine cases where such an appointment could be inappropriate but there is no evidence whatever in this case justifying such a suggestion, let alone conclusion.

25. So far as gender balance is concerned, it is not possible to assess this question by considering only the three positions to which the applicant refers. At all events, preference of an applicant on this basis depends upon her being otherwise suitable for appointment. The panel was of the view that the applicant was not suitable and hence, from her point of view, the issue did not arise.

26. I should state, more generally, that I have examined the Evaluation Documents. They appear to reflect a careful and comprehensive examination of the claims of the various applicants. I could detect no problematical analysis or conclusion that suggested to me that the process had gone awry or was anything other than proper.

27. In respect of notification, sec 9.5 of ST/AI/2006/3 provides that the applicant, as an interviewed candidate who was neither selected nor placed on the roster, should have been "so informed by the programme [man

notification does not arise until the successful candidate is actually selected for appointment. It is not clear from the evidence what that date was and how long afterwards the notice was placed in Galaxy. However, the complaint of the applicant that the delay prejudiced her rights to access in a timely way the internal justice system cannot be accepted. The circumstances here (even assuming some legal error) could not have justified, unless the circumstances were very exceptional, an order preventing the appointment in question, assuming that the applicant was informed that she was not recommended for appointment some time before the actual appointments took place. Such an order must have prejudiced the rights of the successful candidate and it is difficult – though not perhaps impossible – to think of circumstances in which such an order could properly be made. In such cases, the applicant who succeeds must almost invariably have to be satisfied with financial compensation together with, in some cases, other incidental remedial orders. However, there is here – as I have found – no legal error in the process and, accordingly, this argument does not need to be further considered.

28. The applicant suffered no loss or additional anxiety arising out of the inappropriate and discourteous way in which she became aware of her non-selection, but compliance with the specific obligations towards staff members in the appointment selection process is important and is one of a congeries of valuable rights of which it is a breach of contract to deprive a staff member. Accordingly, I award nominal damages USD500 in respect of this breach. This sum is to be paid on or before the expiration of 46 days from this date, with interest thereafter at eight percent per annum until payment.

Additional matter

29. The applicant gave evidence that she was scheduled to retire in November 2008, but her appointment was extended until December 2008. The VA by which a candidate was selected to replace her was advertised in March 2008, but no candidate had been selected. She testified that, due to this fact and that her Unit had a heavy

workload and a high staff turnover, she felt a responsibility to work on an unpaid basis in essentially the same role as she had worked pre-retirement for an additional three months after her retirement until March 2009, when a replacement was available to fill her position.

30. It strikes me as extraordinary that the loyalty of a staff member such as the applicant should be exploited by the Organization in this way, without any practical acknowledgment of her generosity. It is wrong in principle to take advantage of services for which the Organization is unwilling to pay yet whose work is thought to be necessary because of a lack of appropriate foresight of inevitable circumstances, (which need not be set out here). I am regrettably unable to make any orders in respect of this matter but, having now brought the issue to the attention (I hope) of senior officials, I can only trust that Organization will find it possible to do the decent thing and pay the applicant a gratuity for the work so generously provided and so ungratefully accepted.

Conclusion

31. Except for the nominal compensation ordered to be paid, the application is dismissed.

(Signed

Judge Michael Adams

Dated this 18th day of May 2010

Entered in the Register on this 18th day of May 2010

(Signed

Hafida Lahiouel, Registrar, New York