



Background

1. Between 1 March 1997 and 29 December 2000, the Applicant was engaged on various short term contracts by the United Nations. On 10 April 2001, she joined the Division of Conference Services at the United Nations Office at Nairobi (UNON), as a Chinese Translator at the P-3 level. On 1 June 2004, she was promoted to the post of Chinese Reviser at the P-4 level. The Applicant is contesting the decision not to select her for the position of Chinese Reviser, 08-CON-DGACM-418629-R-New York at the P-4 level (hereinafter referred to as “the post”).

Facts

2. On 18 September 2008, the post was advertised on Galaxy with a deadline for applications of 17 November 2008. On 18

5. On 12 February 2009, the Applicant addressed a letter to the Secretary-General requesting administrative review of the decision not to select her for the post. On 6 April 2009, the Acting Chief of the Administrative Law Unit, Office of Human Resource Management, informed her that the records indicate that the decision not to select her for the post was made in accordance with the provisions of the relevant rules and policy of the Organization. The Applicant was also advised that the letter constituted the administrative review of the decision not to select her for the post and that should she not be satisfied with the review, she could appeal it within one month pursuant to staff rule 111.2(a) (i) which was applicable at the time.

6. Thereafter on 5 May 2009, the Applicant filed a statement of appeal with the Nairobi Joint Appeals Board (JAB) to challenge the decision not to select her for the post. On 8 July 2009 and 30 July 2009, the applicant and the representative of the Secretary-General were informed that the matter had been transferred to the United Nations Dispute Tribunal, Nairobi Registry in accordance with ST/SGB/2009/11 – *Transitional Measures Related to the Introduction of the New System of Administration of Justice*.

7. On 13 October 2009, counsel for the Respondent filed a Motion for *extension of the time limit to file and serve a reply*, which reply was supposed to have been filed by 5 July 2009. The Registrar of the Nairobi UNDT on 19 October 2009 informed the Respondent's counsel that the Judge assigned to the case had perused the Motion and required further and better particulars. The further and better particulars were subsequently filed on 21 October 2009 and on 23 October 2009, the Tribunal granted the Motion for filing of a late reply and informed the parties that the reply was deemed to have been duly filed on that date. On 29 October 2009, the parties were notified of a status conference for 4 November which was aimed at ensuring the readiness of the case for hearing.

Issues

8. At the said status conference on 04 November 2009, counsel for the Respondent was absent but explained later that he had miscalculated the time difference between Nairobi and New York. Pleadings having been closed, the following issues for determination were formulated on the part of the Applicant:

(i) That there has been a breach of the UN selection procedures and criteria, specifically;

(a) There has been a violation of the Applicant's right to be considered at the 15-day mark.

(b) That the gender equality principle of the UN in the interview and selection process was not observed.

(ii) In considering the issues of breaches as outlined above, the proper construction to be placed on section 7 of ST/AI/2006/3 and the relevance of ST/AI/1999/9 to this case.

(iii) That the Applicant was discriminated against on the grounds of being from the Nairobi duty station rather than New York where the post is located.

(iv) That the failure to inform the Applicant of the selection process constituted a violation of her rights.

9. For the Respondent who sent in his list later, the issues were:

(i) That the Applicant was fully and fairly considered for the post she had applied for.

(ii) That the Applicant was accorded all priority due to her as a lateral move candidate.

(iii) That there was a competitive assessment conducted in accordance with the relevant provisions and practices of the Organization leading to the selection of a candidate other than the Applicant.

HEARING NOTICES

10. On 3 December 2009, the Registrar served hearing notices on the parties informing them that the matter had been set down for hearing on 18 December 2009 at 1600 hours Nairobi time.

HEARING

11. The Tribunal commenced hearing in this case at about 16.30 hours Nairobi time on 18 December after several attempts made to contact the Respondent's counsel and secure his attendance by audio conference had proved unsuccessful. The Applicant did not call any witnesses but her counsel made an oral address to the Tribunal.

12. On the issue that the Applicant's right 3808g/TT0 1 Tf-0.0004 Tc 0.2204 Tw 12 0 0 n3w6f7 1

13. Applicant's counsel submitted further that the Programme Manager acting for the Respondent has failed to produce whatever information she relied on to decide that the Applicant was not a suitable candidate at the 15-day mark. She has only produced the results of the interview at the 30-day mark in which the Applicant had been made to participate.

14. On the claim that the gender equality principle was not observed in the selection process, counsel argued that being a rostered candidate necessarily implies that the Applicant meets the standard for the advertised position. He continued that the Applicant's qualifications are at least equal or even superior to that of the male candidate who was selected at the 30-day mark. He then submitted that the gender equality principle should have then become operative and the Applicant ought to have been selected.

15. As to the allegation of discrimination on the grounds that the Applicant is from the Nairobi duty station rather than New York, counsel argued that it is a common phenomenon that candidates from duty stations other than New York are marked down in preference to candidates already serving in New York. He submitted that there is a pattern of excluding others and that Nairobi candidates are often excluded from taking up posts in New York as the former is a recognised hardship station with security challenges and high vacancy rates.

16. The Applicant's counsel also canvassed the issue of the failure of the Programme Manager to inform the Applicant of the outcome of the selection process in the instant post.

17. He referred to section 9.5 of ST/AI/2006/3 and argued that the Applicant's right to be informed of the outcome of the selection had been breached. He continued that had the Applicant been duly informed, she would have been in a better position at the earliest opportunity to consider other choices open to her. It is the Applicant's

contention that not being informed of the outcome of the selection process placed her under psychological pressure and resultant damage.

18. At the close of submissions by the Applicant, fresh efforts were made to contact counsel for the Respondent, Mr Stephen Margetts, who at the start of proceedings could not be located. Eventually, the phone was answered at the Administrative Law Unit (ALU) by Ms Susan Maddox. Ms Maddox advised the Tribunal that she would hold brief for Mr Margetts, asking only for a brief standing-down while she located the case file. The Tribunal granted the application to stand

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23. Counsel for the Respondent conceded that the Applicant has a right to be informed about the outcome of the selection process but submitted that no award ought to be made on this score as no proof of damage had been established.

Motion for Retrial

On 18 December 2009, Stephen Margetts, counsel for the Respondent, brought an application for the re-trial of this matter on the ground that the Respondent was not notified of the hearing dates..

~~24~~ According to counsel, a notice of hearing was sent both to him and the Administrative Law Unit (ALU) by the UNDT on 2 December 2009 but due to a technical defect, he did not receive the email although the ALU received it. An earlier email sent bl. no awardail sent bl Tf13882 6549.36 45933J4/TT0 1 Tf10.0292 0 0 1tt13882 6549.36

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Findings

36. I now come to review the documentary evidence, relevant legislation and the written and oral submissions of counsel on both sides. I will do so by posing questions which I consider critical to arriving at a just determination of the issues raised and argued and finding answers to them.

(i) **Was the Applicant, a lateral move candidate for the position to which she had applied, considered at the 15-day mark? Did a breach of the United Nations selection procedures occur in this regard? Were the Applicant's rights violated in the process of selecting a candidate?**

37. It is pertinent to examine at this

Professional category and above who do not have geographic status may be considered for vacancies at their level at the 15-day mark in respect of posts that are not subject to geographical distribution;

39. Additionally, in evaluating new candidates and roster candidates at the 15-day, 30-day or 60-day mark, section 7.4 states that the programme manager does so ***“on the basis of criteria pre-approved by the central review body.”***

40. It is clear from the foregoing that section 7.1 imposes the requirement that a programme manager must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark. Both parties are agreed that the Applicant was a 15-day mark candidate at all times material to this application. While the Applicant contends that her candidacy was not considered at the 15-day mark as required by the rules, the Respondent has submitted that it was.

41. According to paragraph 6 of the Respondent’s reply of 13 October 2009:

“upon receiving notification that the Applicant was listed for the position as a 15-day candidate, Ms Yanan Xu assessed the suitability of the Applicant for the post as required by paragraph 7.1 of ST/AI/2006/3. On the basis of previous assessments of the Applicant’s performance it was determined that she was not suitable for appointment at this first stage of assessment and that candidates eligible at the 30-day mark should also be considered.”

42. Further, at paragraph 11, the Respondent again states:

As set out at paragraph 6 above, the Programme Manager Ms Yanan Xu, in accordance with paragraph 7.1 determined that on the basis of information available to her, the Applicant was not a suitable candidate and proceeded to consider 30-day candidates.

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the Applicant's submissions alone, find is that this impropriety was caused by the fact that she was a staff member of the Nairobi duty station.

iv) Did the failure to inform the Applicant of her non-selection amount to a breach of any of the provisions of ST/AI/2006/3?

56. Both parties agree that the Applicant was not informed of the outcome of the selection exercise in which she was a candidate. The Respondent has conceded in

the *status quo ante* is restored or that the decision not to select the Applicant is quashed so that she is selected.

63. In the instant case, the latter would be inappropriate given the Tribunal's finding that the Applicant was not properly considered, whereas the former would significantly affect the incumbent. Additionally, Article 10(5)(a) makes it *mandatory* for the Tribunal to also set a compensatory amount which the Respondent may elect to pay as an alternative to rescission or specific performance.

64. In the present case, should the Tribunal decide to make orders pursuant to both Article 10(5)(a) *and* (b), as requested by the Applicant, the court would in effect be awarding the Applicant with two lots of compensation. The Tribunal does not find the facts of this case to warrant this.

65. The Tribunal has however found that the Applicant's rights were injured during the course of the selection process, which in my assessment warrants the payment of **six (6) months net base salary** at the level applicable at the time the decision not to select her was made.

