



Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

APPLETON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Alan Gutman, ALS/OHRM, Secretariat

Introduction

1. The Applicant applied twice for the position of Director of Investigations, Office of Internal Oversight Services (“OIOS”) (“the Post”) at the D-2 level. The Post was first advertised in a vacancy announcement in 2008 and again in 2009. A selection panel set up by OIOS recommended him as the only qualified candidate for the Post in each instance. Neither of these recommendations was approved by the Special Review Group (“SRG”) and, as a result, no appointment was made to the Post. A third vacancy announcement was issued, for which the Applicant did not apply. The Applicant submits that he should have been selected for the Post.

Scope of the case

2.

6. In a jointly signed statement dated 7 February 2011, prepared pursuant to Order No. 305 (NY/2010) dated 16 November 2010, the parties agreed that the central issue in the present case is whether the Applicant's candidacy for the Post was given full and fair consideration. In Order No. 296 (2011) dated 14 December 2011, the Tribunal recorded that the parties had further agreed that the issue for determination of the Tribunal was:

Whether the decision of the Secretary-General not to accept the submission of the [then] Under-Secretary-General of the OIOS [Ms. Ms. Inga-Britt Ahlenius, ("USG/OIOS")] in February 2010 to approve the appointment of the Applicant to [the Post] was lawful.

7. In order to reach a decision on the main issues, the Tribunal has identified the following questions to be determined:

a. Whether the selection process for each of the vacancy announcements was properly conducted at the programme manager level by OIOS (the USG/OIOS);

b. Whether the SRG correctly exercised its authority when it decided not to endorse any of the USG/OIOS's recommendations of the selection of the Applicant;

c. Whether the Secretary-General acted appropriately when not making a selection decision and whether the Applicant was properly notified about the non-selection decision; and

d.

13. An interview panel was established by the USG/OIOS to identify candidates for recommendation for the Post. The panel comprised the USG/OIOS as the Chair and three other members. The panel reviewed the candidates based on the evaluation criteria set out in the vacancy announcement and invited four candidates, including the Applicant, to participate in a competency-based interview in October 2008. It found that only the Applicant met “all the qualifications and all the competencies required for the [Post]”.

14. By memorandum dated 18 November 2008, the USG/OIOS submitted the interview panel’s recommendation to the SRG in which she noted that none of the female applicants had met the criteria required for the post.

15. The Secretary of the SRG, namely the ASG/OHRM, responded to the USG/OIOS on 26 November 2008 as follows, copied to the USG for Management, Ms. Angela Kane:

Subject: D-2 Director, Investigations Division.

Dear [USG/OIOS],

The [SRG] reviewed your submission regarding the above vacancy this morning. The SRG noted that there was no indication of wide circulation of the vacancy including advertisement in professional external magazines. The SRG further noted that the four candidates interviewed were of the same nationality. The submission of one recommended candidate and no female candidates is not in line with the Secretary-General’s policy.

Consequently, the SRG did not endorse the recommendation and requests re-advertisement of the [P]ost. In view of the specialised nature of the functions, the SRG recommends wide advertisement when re-circulating the [P]ost, in order to attract a wider pool of candidates including suitably qualified female candidates.

16. The USG/OIOS replied on 26 November 2008 to the ASG/OHRM and the USG/DM clarifying the selection process, including that the Post had been advertised in *The Economist* and *Le Monde*. She asked the SRG to reconsider the case. The USG/OIOS explained that, “due to the fact that OIOS does not have sufficient staff at the D-2 level to constitute an appropriate OIOS Review Board, I have

followed the precedent set by my predecessor in submitting D-2 level personnel decision to the SRG for approval”.

17. By email dated 1 December 2008, the ASG/OHRM, in her capacity as Secretary of the SRG, responded to the USG/OIOS that she would circulate the additional information to the members of SRG for them to determine whether they wished to reconsider their position. On the same day, the USG/OIOS responded by email and reiterated her views.

18. The ASG/OHRM, as Secretary of the SRG, informed the USG/OIOS on 2 December 2008 that the consensus among the members of the SRG was that the reasons previously articulated for requesting a re-advertisement of the subject post remained valid and that the SRG recommended re-advertisement of the Post.

19. On 2 December 2008, the USG/OIOS addressed a Note to the Secretary-General copied to the Chef de Cabinet, submitting the Applicant as her selection and requesting his agreement for this appointment.

20. On 31 December 2008, the Applicant’s appointment with the United Nations expired and he separated from the Organization.

21. On 1 January 2009, the Secretary-General promulgated ST/SGB/2009/2 ([SRG]).

22. On 9 January 2009, the Wall Street Journal issued an article, “[United Nations] allows its Antifraud Task force to dissolve”, in which the Applicant was

30. By email dated 15 July 2009, the ASG/OHRM, as Secretary of the SRG, communicated the SRG's concerns to the USG/OIOS that, again, only one recommended candidate had been submitted for the Secretary-General's consideration and approval. The SRG requested that four candidates prescreened by OHRM be interviewed and that three names, including at least one female, be provided.

31. The USG/OIOS provided her response to the SRG's concerns in a note addressed to the Secretary-General dated 5 August 2009. This note included an evaluation of the additional candidates that the SRG had requested be interviewed by the panel. The USG/OIOS stated that OIOS had carried out its own evaluation of the additional candidates referred to above, and set out the reasons why they were not invited to participate in the interview. The USG/OIOS also reiterated her request that the Secretary-General approve the appointment of the Applicant to the Post. The Chef de Cabinet forwarded this document to the SRG.

32. The ASG/OHRM provided her comments on the USG/OIOS's note of

The USG/OIOS also addressed a note to the Secretary-General dated 25 September 2009, reiterating her request for his approval to appoint the Applicant as her recommended candidate.

34. On 18 February 2010, the SRG informed the Secretary-General that, in view of the fact that the USG/OIOS continued to recommend only one candidate, it was not in a position to make a recommendation on the case, noting that the SRG's request for a recommendation of three candidates had been unsuccessful.

35. By letter dated 18 March 2010, the Applicant asked to be informed of the outcome of the selection process. 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.

36. On 29 March 2010, the Applicant submitted a request for management evaluation of the decision not to endorse his nomination for the post.

37. On 14 July 2010, the USG/OIOS' appointment ended, and, on the same day, she submitted an end of assignment report to the Secretary-General.

38. On 20 July 2010, the Washington Post issued an article entitled "Departing

41. On 3 November 2010, a new vacancy announcement was issued for the Post, which requested all candidates who had

d. The Administration, particularly the Chef de Cabinet, acted in bad faith when public statements were made and which were reported in the press about the Applicant while the selection process was still ongoing. These statements damaged the Applicant's reputation;

e. The power of appointment of all staff in OIOS lies not with the Secretary-General but with the USG/OIOS. In her oral evidence, the USG/OIOS, referred to the operational independence of the OIOS, as set out in General Assembly resolution 48/218 B and ST/SGB/273, and argued that she was, in reality, the ultimate decision-maker as the Secretary-General had delegated his authority to appoint OIOS staff at the D-2 level to her;

f. As to compensation, the Applicant was without employment for the full year of 2009 until 19 May 2010. He was told by OIOS to continue to wait, discouraged from moving on, informed by OIOS that they were confident the impasse would be resolved, and informed by the Administration that the process was on-going. OIOS put all its hopes in the IAAC, and told the Applicant so. As a result, the Applicant suffered severe financial hardship, damage and loss. He was forced to liquidate his United Nations pension contribution in order to live. In 2010, the Applicant was appointed the Senior Legal Adviser and the Interim Director of Investigations at the Global Fund to Fight AIDS, Tuberculosis and Malaria ("the Global Fund"); a position which is close but not equal to the stature of the Post and with a comparable salary;

g. The Applicant suffered both personal and professional dislocation, was

e.

International Criminal Tribunal for the former Yugoslavia, and a senior prosecutor from the International Criminal Tribunal for Rwanda;

h. The hierarchy of internal legislation does not preclude the application of policies on geographical and gender balance. ST/SGB/2009/2 is not merely a recommendation from the Secretary-General and forms part of the legal framework of the Organization. There is no basis for the Applicant's claim that the criminal law doctrine related to *ex post* laws applies to the administrative legal framework of the Organization. It is the role of

k. The third stage of the recruitment exercise established that the recruitment process was ongoing, and the statement that it was ongoing was true and accurate. It established that recruitment policies and procedures are not detrimental to the operational independence of OIOS. It established that a USG/OIOS can, through reasonable measures, identify and recommend more than one suitable candidate, including one female candidate;

l. The Applicant's current salary exceeds both the salary of an Assistant Secretary-General and that of a staff member serving at the D-2 level. The Applicant neither testified to, nor put any evidence before the Tribunal that he was forced to liquidate his pension in order to live;

m. The Applicant has not been denied a career with the United Nations. The Applicant voluntarily withdrew from the recruitment process. The Applicant could have been selected had he not withdrawn. The Applicant is free to apply for any advertised vacancy within the Organization. The Applicant was regularly updated on the status of the recruitment process by the USG/OIOS, and these updates included descriptions of her exchanges between the SRG, and with the office of the Secretary-General;

n. There is no legal or factual basis to award the Applicant moral damages;

o. There is no general bar to the Organization responding to media queries. The Organization is entitled to defend itself, respond to criticism, and express its opinion;

p. The Applicant's relocation to Geneva is unrelated to the contested decision, and cannot be compensated for as there is no connection between his claimed damages and the contested decision. The Applicant's decision to maintain two residencies, one Geneva, and one in New York, are for his own personal benefit, and unrelated to the contested decision;

- q. No duty to the Applicant was breached, and the Applicant's arguments with respect to mitigation of damages are meaningless.

Applicable law

Charter of the United Nations

46. Article 101.1 of the Charter states that United Nations staff shall be appointed by the Secretary-General under regulations established by the General Assembly. Pursuant to Article 101.3 the paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence, and integrity. It also stipulates that due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible, but makes no mention of gender concerns.

General Assembly resolution 48/218 B (Review of the efficiency of the administrative and financial functioning of the United Nations)

47. By its resolution 48/218 B, art. 4, the General Assembly established OIOS which is to be headed by a USG. Article 5(a) specifically emphasises that OIOS shall exercise "operational independence" under the Secretary-General in the conduct of its duties.

ST/SGB/273 (Establishment of OIOS)

48. The establishment of OIOS was implemented by ST/SGB/273 according to the mandate of General Assembly resolution 48/218 B. Article 2 reiterates that OIOS shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties. Under Chapter VII (Budget and personnel), the Secretary-General is required to take into account the need for ensuring the operational independence of OIOS (sec. 30). The USG of the OIOS shall, in accordance with the Staff Regulations and Rules, develop an appropriate office organisational structure (sec. 31). In keeping with the need for operational independence, the USG of the

OIOS shall exercise a degree of latitude and control over the personnel and resources of the Office consistent with the Staff Regulations and Rules (sec. 34). Article 35 states that with respect to the OIOS staff, the USG of the OIOS shall have the powers

ST/AI/2006/3

51. The provisions of ST/AI/2006/3 generally governed appointments up to the D-2 level; with the exception that the functions normally discharged by a central review body should be discharged by the SRG, and the selection decision should be made by the Secretary-General (sec. 3.1).

52. ST/AI/2006/3 described in detail how a selection process was to be undertaken. Following the preparation and review of the evaluation criteria, the issuance of the vacancy announcement and the evaluation of candidates, the programme manager was required to prepare a reasoned and documented record of the recommended candidate(s) against the applicable evaluation criteria to allow the central review bodies to assess the process (sec. 7.6). Section 7.7 provided that the programme manager should preferably transmit a list of qualified candidates, and not just one. The head of department/office was then to ensure that the Organization's human resources planning objective and targets, especially with regard to geography and gender, had been complied with and to provide a certification to that effect to the relevant central review body.

ST/SGB/2002/6

53. The central review bodies, as defined in ST/SGB/2002/6, were to consider whether (sec. 5.3):

a. The proposal made by the department/office was reasoned and objectively justifiable based on the pre-approved evaluation criteria and was accompanied by a certification that, in making the proposal, the head of department/office has taken into account the Organization's human resources planning objectives, especially with regard to geography and gender balance; and

b. The record indicated the existence of a mistake of fact, a mistake of law or procedure, prejudice or improper motive that could have prevented a

Consideration

The judicial review by the Tribunal in non-selection cases

56. The United Nations Appeals Tribunal in *Abbassi*2011-UNAT-110 held that when reviewing selection processes, the Di

vacancy announcement, including the evaluation criteria. Otherwise, the parties agree that the selection process at the programme manager level was conducted properly.

59. It is not clear from the facts, or the parties' submissions, how the evaluation

64. There is no absolute requirement in ST/AI/2006/3 about the number or type of candidates to be recommended, only that a list of qualified candidates is preferable (sec. 7.7)

65. In the Secretary-General's April 2008 memorandum on gender balance, he recognized that there would be exceptional cases in which a review panel would be unable to include at least one qualified woman in the slate. The Secretary-General required that an exceptional case be justified by "a written explanation highlighting the efforts made to do so."

66. Therefore, although the Secretary-General clearly intended that the statements of policy in this memorandum should be taken seriously and that managers should be proactive in addressing the gender gap in senior appointment to the Secretariat staff, he did not impose an absolute requirement that the numbers of candidates and gender and geographical diversity criteria must be met on all occasions. The policy explicitly allows for exceptions. Where the preferred criteria cannot be met, the interview panel must satisfy the Secretary-General that those factors have been considered.

67. In each of the recommendations to the SRG, dated 18 November 2008 and 19 June 2009, the USG/OIOS stated that gender and geographical representation had been considered either "particularly" or "carefully". She gave a full report on these matters and explained why, in particular, no female candidates were recommended. The Tribunal finds that these explanations were in compliance with section 7.7 of ST/AI/2006/3 and in conformity with the Secretary-General's policy.

68. The Tribunal also notes that the mandatory rules in ST/AI/1999/9 concerning preferential treatment of women in selection processes only applies if the female candidate in question is found suitable for the job and her qualifications are substantially equal or superior to that of the male competitors. However, the interview panel did not find that any female candidates met either of these conditions.

69. The Tribunal finds that the statements by the SRG and the Chef de Cabinet that the selection process was not conducted “in line with the Secretary General’s policy” and that “basic procedures were disregarded” are not correct. The Secretary-General’s policy was not absolute. It allowed for a procedure in exceptional cases and the interview panel adhered to this procedure when it made its first recommendation. It is significant that the Officer-in-Charge for OHRM was on the interview panel, which unanimously reached its recommendation about the suitability of only one candidate.

70. Furthermore, pursuant to ST/AI/1999/9, the principal responsibility for identifying qualified female candidates falls on ORHM and not on the programme manager. Any criticism in this regard should therefore have been directed at OHRM and not the USG/OIOS.

71. In conclusion, firstly, the Tribunal finds that by advertising the vacancy announcement on Galaxy as well as in The Economist and Le Monde, the vacancy was given adequate wide international notification in order to attract candidates of both genders from a broad geographical spread. The SRG’s finding of the opposite was therefore factually wrong. Secondly, the recommendation of one candidate, namely the Applicant, was done with reference to the vacancy requirements and evaluation criteria. The recommendation was made in accordance with the relevant administrative instruction and the exceptions allowed for in the gender policy promulgated by the Secretary-General.

The second selection process

72. In the second vacancy round, the USG/OIOS did not forward her recommendation to the SRG, but sent it directly to the Secretary-General for his approval. The Chef de Cabinet then requested the SRG to review the recommendation before the Secretary-General would take any decision.

The SRG's recommendation not to endorse the USG/OIOS' recommendations of the Applicant

The involvement of the SRG in the selection processes

77. The SRG became involved in the selection process, initially at the request of the USG/OIOS. This was appropriate where

80. Such a review is not discriminatory. It is a requirement of the SRG pursuant to the Secretary-General's policies, particularly ST/SGB/2002/6. These policies do not mandate the selection of female candidates unless they meet the requirements for the vacant post and are substantially equal or superior to those of competing male candidates.

81. However, the Tribunal finds that the SRG acted unlawfully in its review of the recommendation of the Applicant by the USG/GIO. The advertisement for the position of a vacancy announced by the USG/GIO was advertised on Galaxy as well as in the Monitor for the Economist. Second, the role of the SRG in the second selection process

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after the USG/OIOS had evaluated these four candidates and found that none of them fitted the evaluation criteria, the SRG still did not find itself in a position to approve the USG/OIOS's recommendation of the Applicant as the only suitable candidate.

86. The reasons given by the SRG for rejecting the second recommendation were the same allegations of procedural mistakes by the programme manager it gave about the first vacancy, in particular that only one candidate had been recommended and that there was no female candidate. The evidence strongly suggests that the SRG rejected the second recommendation because it wanted at least one of the candidates suggested by OHRM to be on the list of recommended candidates before it would consider the recommendations.

87. Through the evidence of the ASG/OHRM, the Respondent maintained that the SRG was not interested in the merits of the Applicant's candidacy. She said that the SRG has no mandate to evaluate the qualifications of candidates. However, the evidence demonstrates that the SRG went to some lengths to compare the Applicant's credentials with those of other candidates. The Respondent went so far as to call an unsuccessful candidate for the vacancy as a witness at the oral hearing in an attempt to demonstrate that she would have met the evaluation criteria and should have been included on the recommended list. This suggests that the SRG had, in fact become involved in assessing the merits of the candidates' skills and competencies, a role reserved for the programme manager.

88. It appears to the Tribunal that in its responses the SRG was intent on finding reasons for the Secretary-General to avoid making a decision on the programme manager's recommendation. To this end, the SRG insisted on the rigid adherence to the gender policy that actually allowed for some flexibility, while at the same time advocating that the selection panel should have taken a more

candidates and, in the absence of any proven procedural irregularities in the selection process, finds that its decision not to endorse the recommendation of the Applicant as the only candidate for the Post was unlawful.

The Secretary-General not making and notifying the Applicant about the selection decision

The decision not to select the Applicant

90. It is the Respondent's case that the authority to make staff appointments in OIOS at the D-2 level and above rests with the Secretary-General. The disagreement between the Administration and the USG/OIOS about this point is central to this case. The impasse about where the authority lay contributed significantly to the lack of a selection decision, which ultimately led to the cancellation of the two vacancy announcements.

91. The authority to make staff appointments is governed in the first place by the United Nations Charter, the highest authority of the United Nations legal hierarchy. It vests the responsibility for staff appointments with the Secretary-General.

92. However, General Assembly resolution 48/218B that founded OIOS, acknowledged the need for delegation of "operational independence" to OIOS and its head, the USG of OIOS.

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99. The Tribunal finds that the referral of the selection recommendations to the SRG, pursuant to ST/AI/2006/3, meant that the Secretary-General, and not the USG/OIOS, became the ultimate decision-maker and was responsible for making the appointment for the Post.

100. Pursuant to ST/AI/2006/3, the head of department/office, or in this case the Secretary-General, is not compelled to make a selection decision based on the list of recommended candidates. The only relevant requirement is that the head of department/office is to give due regard to the recommendation of the central review body. In the absence of an endorsement of the recommendation of the programme manager by the SRG, the Tribunal finds that the Secretary-General did not act unlawfully when he did not select the Applicant recommended by the USG/OIOS.

Notification of the Applicant concerning his application

101. The Applicant submits that the Administration failed to notify him about him not being selected for the Post. Under ST/AI/2006/3, the programme manager is to notify a candidate if s/he was interviewed for the relevant post, but not selected or placed on a roster. ST/AI/2006/3 is silent about any obligation to notify candidates in circumstances where no selection has been made.

102. Apart from the Applicant's oral evidence to the Tribunal that the USG/OIOS provided him with "cursory sound bites" throughout the selection processes about the status of his candidature, including what was happening at the SRG stad(Pom)8(t-17TD.0- manJ-26.63 a

103. The Appeals Tribunal in **Bertucci** 2011-UNAT-121 confirmed that when exercising his discretion the Respondent, in addition to complying with the applicable law, has a duty to act in good faith to all staff members (see para 37):

The former Administrative Tribunal, other tribunals competent to rule

a. Both selection processes were conducted by OIOS in accordance with the relevant procedural requirements at the programme manager level. The suitability of all candidates was appropriately assessed against the evaluation criteria. The recommendation of only one suitable candidate, namely the Applicant, and the absence of suitable women candidates for the Post were adequately explained. While the submission of the second recommendation directly to the Secretary-General by th

member in the position he or she would have been in had the breach not occurred (see the Appeals Tribunal in *Mmata* 2010-UNAT-092 and *Iannelli* 2010-UNAT-093).

108. In *Antaki* 2010-UNAT-095, the Appeal Tribunal outlined the types of

121. The Tribunal observes that it is highly inappropriate for high-level United Nations officials to comment publicly on a pending selection process, and that it is particularly inappropriate to identify the candidates involved even in response to public questioning. Such comments open the administration to criticism for wrongful influence in the selection process and may potentially be very harmful and damaging to the process as well as to the candidates.

122. In this case, there is no evidence that the Applicant has applied for and been unsuccessful in other applications for any positions with the United Nations. Consequently, he is not entitled to compensation for the loss of opportunity of further employment with the United Nations. His success in obtaining a largely comparable high-level position with the Global Fund is testimony to his continuing employability. There is no evidence that his reputation suffered any harm from the publicity concerning the selection processes for the Post or that he has lost any prospects of a career with the United Nations.

123. However, it is abundantly clear to the Tribunal that the Applicant was the unwitting and blameless victim of an internal dispute between senior managers of the United Nations. His evidence and demeanor at the substantive hearing clearly demonstrated that he has been deeply distressed and frustrated by the lengthy, flawed and highly public selection proc

days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Coral Shaw

Dated this 14th day of August 2012

Entered in the Register on this 14th day of August 2012

(Signed)

Hafida Lahiouel, Registrar, New York