



JUDGE MARY FAHERTY , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/089, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 26 June 2014 in the matter of Scheepers et al. v. Secretary-General of the United Nations .¹ The Secretary-General filed his appeal on 25 August 2014. On 26 August 2014, the Registry served the Secretary-General's appeal on Scheepers et al., four of whom were represented in the proceedings before the UNDT, and notified them that they had 60 days to file an answer. To date none of the members of Scheepers et al. have filed an answer.

Facts and Procedure

2. The five members of Scheepers et al., namely Mr. Wilhelmus Scheepers, Mr. Roren Aitcheson, Mr. Juan Toriano, Mr. At is Pauksens and Mr. Wojciech Sitarek, were Security Officers at the S-2 level with the Security and Safety Service (SSS) in the Department of Safety and Security (DSS). From 2009 to 2011, Scheepers et al. were all assigned to DSS' K-9 Unit where they held posts at the S-2 level.

3. On 4 June 2010, a staff representative in DSS sent an e-mail to the Chief of SSS on behalf of eight security officers in the K-9 Unit, including Scheepers et al., requesting that they be retroactively paid a special post allowance (SPA) at the S-3 level, and that the security officers' posts be classified.

4. On 9 July 2010, the Chief of SSS replied to the staff representative and indicated, inter alia, that the posts in question were not classified at the S-3 level and that the eight officers were not eligible for SPA while on temporary assignment to the K-9 Unit. The Chief of SSS also stated that a classification study would have to be conducted on a service-wide basis and not unit by unit.

5. Between June and October 2010, SSS consulte

9. The last day to apply to the S-3 level post on Inspira was 31 December 2010. Of all the members of Scheepers et al., Mr. Pauksens was the only officer to successfully submit his application for the S-3 level openings.³

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such, the requirement for service within SSS was not unreasonable. In any event, the UNDT exceeded its competence in ruling on this aspect of the five-year work experience requirement, given that Mr. Pauksens challenged that the requirement for five years was too high, not that the requirement limiting relevant experience to service in SSS was too restrictive.

18. Lastly, the UNDT had no factual basis to conclude that the decision was arbitrary given the Administration provided extensive evidence to the UNDT that it settled on the five-year requirement after consideration of the requirements of the service and extensive consultations with OHRM and staff representatives. As such, the decision to set a five-year requirement was not arbitrary.

19. The UNDT erred in concluding that the reference in the October 2010 memorandum to ST/IC/1993/66/Add.1, which only required two years of seniority for promotion from the S-2 to the S-3 level, rendered the five-year requirement arbitrary. As ST/IC/1993/66/Add.1 had been abolished, SSS had the discretion to modify the requirements for work experience following consultations with OHRM and the SSS' staff representatives.

20. As the UNDT exceeded its competence and made errors of law in its findings regarding the five-year requirement, its award of compensation to Mr. Pauksens on the basis of these findings was similarly flawed.

21. The Secretary-General requests that the Appeals Tribunal vacate the findings in the UNDT Judgment regarding the unlawfulness of the Administration's decision to impose a five-year work experience requirement for S-3 Senior Security Officers and its award of USD 6,000 as compensation to Mr. Pauksens in respect of his ineligibility for promotion. The

Mr. Pauksens also argued that the earlier version of the same instruction, ST/AI/2006/3 (Staff Selection System), had specifically stated that “eligibility requirements regarding time-in-grade and time-in-post that were formally in use shall no longer be applicable”. Mr. Pauksens maintained before the UNDT that the requirement for five years’ service for a promotion from S-2 to S-3 was inconsistent with ST/AI/2010/3 and was not introduced properly, in that it should have been promulgated through a formal administrative issuance.

23. As noted by the Dispute Tribunal, Section 5 of ST/AI/2006/3, which predated ST/AI/2010/3, and discussed “Eligibility Requirements”, provided:

Eligibility requirements regarding time-in-grade or time-in-post that were formerly in use shall no longer be applicable. However, experience, knowledge and institutional memory relevant to the functions must be considered as the personal contribution of the candidate to the achievement of the goals of the Organization and as such are an important element of the selection process.

24. As already stated, the statutory instrument which governed the staff selection system at the time of Mr. Pauksens’ application for Job Opening No. 16958 was ST/AI/2010/3, as argued by the Secretary-General before the Dispute Tribunal.

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(iii) erred in finding that the five year s' experience requirement was contrary to ST/AI/2010/3 and was required to be set out in a formally promulgated administrative issuance; and

(iv) exceeded its competence in impugning the decision on a ground not argued by Mr. Pauksens.

We will consider each of the arguments in turn.

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27. Job Opening No. 16958, which was posted on Inspira between 3 November 2010 and 31 December 2010 and for which Mr. Pauksens applied, stated, inter alia:

Work Experience

Five (5) years of experience [in] all areas of the security operation within the UN Security Service, including investigation, physical security, personal protection, strategic and operational planning, fire prevention and suppression, emergency medical and hazardous material response, video imaging badge systems, methods of instruction and related area.

28. With respect to the five years' experience requirement, the UNDT found as follows: ⁶

... [A]s part of the 2010–2011 promotion exercise, the discretion afforded under sec. 9.1 of ST/AI/2010/3 to establish a period of in-service eligibility of “normally ... at least one year” was apparently exercised in a way that resulted in the range of ~~6~~ to ~~4~~ years of work with SSS. The need for such a lengthy period of service within SSS has not been explained or substantiated to the Tribunal's satisfaction, and is well in excess of what could be considered reasonable, particularly when compared to the language of sec. 9.1, which refers to “one year”.

...

... [T]he Tribunal is not persuaded that the requirement of five years with SSS as a condition for consideration for promotion to the S-3 level was based on any proper considerations, if indeed such requirement could even have been agreed to between the staff representatives and managers, without proper consultation or promulgation. From the evidence available, it was an arbitrary number that was inconsistent with ST/IC/1993/66/Add.1 and was well in excess

“normal” period of “at least one year”, specified in sec. 9.1. No such comparable requirement of years of service (from five and up to eighteen years) with a particular office or department is reflected in the selection rules for any category of staff, including at the P or D level. There are, quite simply, no formally promulgated issuances in the Organization requiring, as a condition of promotion, that any category of staff be employed by the same section or department for such an extraordinary number of years.

... Apparently, an agreement was reached or around September 2010 between SSS management and staff representatives regarding the years of eligibility, as reflected in Mr. Schmidt’s email dated 30 September 2010. However, the Tribunal finds that the consultations held were improperly or [in]sufficiently informed on both sides. The Tribunal further finds that, in any event, these requirements are contrary to public policy. SSS staff representatives and management cannot agree to a policy that is not substantiated in any formally promulgated administrative issuances, is contrary to the Organization’s selection rules, and could result in an abuse of discretion, arbitrariness, and unlawfulness.

29. The Secretary-General argues that the UNDT’s reasoning was in error in that Section 9.1 of ST/AI/2010/3 clearly refers to a minimum period for post incumbency, namely the amount of time a staff member is normally required to remain in the same post before he or she is eligible to be appointed to another post. Thus, the Secretary-General contends that the period of post incumbency is different from the amount of work experience that may be required for a particular position.

30. Section 9.1 provides:

Staff members holding a permanent, continuing, probationary or fixed term appointment should normally serve in a position for at least one year before being eligible to be appointed to another position.

31. A plain reading of Section 9.1 of ST/AI/2010/3 supports the argument advanced by the Secretary-General. Thus, insofar as the UNDT regarded Section 9.1 as the barometer against which the designated period of five years’ experience for the purpose of acceding to a position at the S-3 level should be measured, it erred in law in so doing. It follows, given the plain meaning of Section 9.1, that the requirement of five years’ experience in SSS in order to be eligible to apply for an S-3 level position was not inconsistent with the provisions of ST/AI/2010/3, contrary to Mr. Pauksens’ argument before the UNDT. The Appeals Tribunal is of the view that the Dispute Tribunal effectively conflated the requirement for post incumbency as set out in Section 9.1 with the requisite years of experience required

for Job Opening No. 16958. We agree with the Secretary-General's argument that if the UNDT's reasoning were to be accepted, the Organization would be confined to requiring only one year experience for the purposes of promotion exercises, a situation which would be inconsistent with the requirement of Article 101(3) of the Charter to secure the highest standards of efficiency and competence when employing staff.

32. It is also noteworthy that the provisions of ST/AI/2006/3, which repealed the requirement for the number of years of necessary experience for promotion exercises initially prescribed by ST/IC/1993/66/Add.1, itself acknowledged that relevant "experience, knowledge and institutional memory" are, inter alia, "an important element of the selection process". While there is no parallel provision in ST/AI/2010/3, it cannot be the case that matters such as "experience, knowledge and institutional memory" can be deemed to have been rendered redundant by the lack of reference thereto in ST/AI/2010/3, particularly in light of the provisions of Article 101(3) of the Charter, quoted above, and Staff Regulation 4.4, which states that the "Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General".

33. More particularly, the Appeals Tribunal notes the provisions of Section 4.5 of ST/AI/2010/3, which provides:

promotions that were ongoing between management and SSS staff representatives in the period of June to September 2010. This engagement culminated in an agreement between management and the staff representatives on 30 September 2010.

36. An e-mail sent by Mr. Schmidt from DSS to Mr. Rosario, one of the SSS staff representatives, on 30 September 2010 with the subject “SSS promotion Exercise-Minimum Seniority in Grade” stated, inter alia, that the parties were able to “arriv[e] at an amicable and fair solution to the vexing problem of seniority in service”. The e-mail noted that “the result of this exercise has been well received amongst the staff representative’s constituencies”.

37. One of the “vexing” issues negotiated between management and SSS staff representatives was the number of years of work experience that was required for promotion to the S-3 level, management having initially proposed seven years with final agreement on five years after such proposal emanated from the SSS staff representatives. In view of the fact that SSS staff were advised by way of memorandum of the express work experience requirements on 8 October 2010, in advance of the publication of the job openings at different levels on Inspira on 3 November 2010, we are satisfied that objective evaluation criteria had been established by the time Mr. Pauksens applied for the S-3 level position.

38. In the present case, the UNDT in effect ruled that the five years’ experience requirement for promotion to S-3 was too high. In the to hTD .u.6(bas(seup5.5003 Tc2Tw [(e Tw [(repres)-5.5

39. In *H*, we stated:⁸

... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

40. In *A*, we also emphasised that⁹

... In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

circulars. ST/IC/1993/66/Add.1 provided the following requirements for minimum seniority with respect to security personnel:

Information circular

...

Subject: Placement and promotion

1. With reference to paragraph 7 of ST/IC/1993/66 of 2 December 1993 on placement and promotion, the present established requirements for minimum seniority in grade for the General Service and related categories in New York are as follows:

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47. The Secretary-General contends that since the abolition of ST/IC/1993/66/Add.1 the subsequent generic job profiles for vacancies, including those for SSS posts, included a requirement for experience. The thrust of the Secretary-General's argument appears to be that, having regard to Section 4.5 of ST/AI/2010/3, set out at paragraph 33 above, the work experience requirement was sufficiently clear from the Generic Job Profiles (GJPs) for Security Officers and K-9 handlers at the S-3 level. Section 4.6 of that statutory instrument states:

Each job opening shall indicate the date of

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the only staff in the category are security officers. The discretion inherent in the Secretary-General with regard to recruitment and promotion of staff capable of meeting the requirements of Article 101(3) of the Charter must be recognised, absent any procedural infringements or biased or discriminatory practices in such recruitment or promotions. We also accept that Staff Regulation 4.4 expressly states that the Secretary-General may limit eligibility to apply for posts to internal candidates.

56. For the reasons set out in this Judgment, the Secretary-General's appeal is allowed. The UNDT Judgment is vacated in part, namely to the extent that the Appeals Tribunal finds that it erred in law and in fact resulting in a manifestly unreasonable decision in finding that the requirement for an S-2 level staff member to serve five years within SSS in order to be eligible for a promotion to the S-3 level was contrary to ST/AI/2010/3, arbitrary, manifestly unreasonable and unlawful, and consequently awarded damages to Mr. Pauksens.

57. The balance of the UNDT Judgment was not appealed by either party and consequently remains undisturbed by this Tribunal's ruling.

Judgment

58. The appeal is allowed. The UNDT Judgment is vacated in relevant part, as is the consequent award of damages. The remainder of the UNDT Judgment is affirmed.

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2015-UNAT-556