



Date: 10 November 2009

Original: English

Judge Nkemdilim Izuako

SECRETARY-GENERAL  
OF THE UNITED NATIONS

FINAL JUDGMENT

**Counsel for Applicant:**

David Andati-Amwayi

**Counsel for Respondent:**

Joerg Weich, Human Resources Management Services  
United Nations Office at Nairobi

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal

## **APPEARANCES/LEGAL REPRESENTATION**

1. The Applicant was represented in this application by Mr. David Andati-Amwayi.
2. The Respondent was represented by Mr. Joerg Weich of the Human Resources Management Services at the United Nations Office at Nairobi (UNON).

## **CASE BACKGROUND**

3. The Applicant joined the United Nations in May 1996, as a Security Guard at the General Service (GS) level 3. In October 2004, he was promoted to the level GS 5 as a Security Sergeant. The Appellant is currently on a fixed-term appointment which is due to expire on 30 June 2010.
4. On 19 December 2006, a vacancy announcement No. VA 06-SEC-UNON-412200-R-Nairobi for the position of GS 6 – Security Lieutenant, was advertised with a deadline for applications on 18 January 2007.
5. On 22 February 2007, another vacancy announcement No. VA 06-SEC-UNON-412367-R-Nairobi for the position of GS 7 – Security Inspector was published in Galaxy with a deadline for applications on 24 March 2007.
6. On 23 March 2007, the Chief of Security and Safety Services issued a memorandum entitled “Criteria for Promotion” providing guidelines for promotion to the GS-5, GS-6 and GS-7 positions.
7. On 27 April 2007, a meeting of supervisors and staff from the Department





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26. The Applicant seeks the following remedies:
- i. That the Tribunal order payment of salary to him at the rank of Security Lieutenant from 27 June 2008 at level G-6/II.
  - ii. An order that he be promoted to level GS-7 - Security Inspector for which he applied on 24 September 2008 under VA No. 08-SEC-UNON-419417 and paid salary at that level from 27 June 2008.

Alternatively, he asks for compensation in the sum of:

- i. 30, 000 USD for mental anguish and suffering;
- ii. KSH 396, 670, 512 for lost opportunities, including employment, education and social benefits and,
- iii. USD 15, 000 for moral damage.

#### **THE RESPONDENT'S CASE**

27. For their part, the Respondent states that due to a technical glitch the vacancy announcements for the posts of Security Lieutenant and Security Inspector did not show that there were two Security Inspectors posts and six Security Lieutenants posts to be filled. Five candidates were short-listed for the GS-7 post of Security Inspector and six for the GS-6 posts of Security Lieutenants.

28. The Human Resources Management Services (HRMS) of UNON followed the staff selection procedure as provided for under ST/AI/2002/4 and ST/AI/2006/3.

29. The Respondent denies that the Applicant's rights were injured and states that the Applicant could suffer no injury as he did not apply for any of the advertised positions. In support of their argument, the Respondent cites the decision in the case of *Andronov* by the United Nations Administrative Tribunal (UNAT) in Judgment No. 1157. In fact, it was the Respondent's submission that the application in itself is not receivable.

30. The decision to advertise the post was taken by the Administration with the intent to fill two positions at the Inspector level (GS-7) and six positions at the Lieutenant level (GS-6). This is evident from the *Galaxy* records and was communicated to the Security Staff, the Applicant, included on a number of occasions before the advertisement. It is therefore incorrect for the Applicant to claim that he had not applied because there was only one position advertised in both vacancy announcements.

31. The Applicant has not provided any evidence to show how the advertised vacancy announcements influenced his decision not to apply. Clearly, ST/AI/2006/3, Section 6.1 requires that if a staff member is interested in a position, then he/she must submit a written application for consideration.

32. With respect to the allegations of abuse of authority raised by the Applicant, the Director-General of UNON convened a panel to review the recruitment exercise. That panel concluded that there was no abuse of authority to either invalidate the process or to initiate a formal fact-finding investigation.

## **HEARING**

33. On 22 October 2009 this matter was heard. The Applicant gave oral testimony and was the sole witness for his case while the Respondent did not call any witnesses. Both parties thereafter made oral submissions in support of their cases.

## **PRELIMINARY ISSUES**

### ***Receivability***

34. One of the issues raised in the Respondent's reply is that of the receivability of this application. In other words, the Respondent challenges the jurisdiction of this Tribunal to entertain this application. The Respondent has submitted that since the Applicant did not apply for any of the vacant positions advertised, he is not individually affected and the manner of the publication of the vacancy announcements does not have any direct legal consequences for the

Applicant. There is therefore no administrative decision that the Applicant can contest in this regard.

35. This argument is in line with the reasoning in the case of *Andronov* in which the United Nations Administrative Tribunal (UNAT) defined an



*Discovery of Documents*

39. On 1 October 2009 Applicant's Counsel filed a Notice for discovery of documents which he would argue at the hearing. He sought the disclosure of the following documents:

- i) Investigation Report showing disclosure of the actual number of seven vacant GS-6 posts would not have made a difference in the total number of applicants;
- ii) Report showing that all eligible candidates who qualified for the seven vacant GS-6 posts did apply;
- iii) Report of the Panel that was constituted to review the "error of omission" in the offensive vacancy announcement;
- iv) Applicant's application in response to the advertised posts;
- v) Rules governing Convocation for pre-hearing meeting to be disclosed to the Applicant.

40. Disclosure in civil litigation is the process which enables the parties to discover and inspect documentary evidence relevant to the issues between them which is or has been in the control of the other party. Such evidence can be crucial in assisting a party to prove or resist a claim or to reveal the strength in the case of the party seeking discovery of the document. A party applying for disclosure of documents must serve on the other a concise list of the documents he seeks to inspect. A party may inspect a document mentioned in the statement of case or application before the Tribunal or in the reply to such application. Witness statements or the relevant reports of experts or Panels among others may also be inspected.

41. In this application out of all the documents requested for disclosure by the Applicant only one existed, that is, the report of the Panel constituted by the Director-General of UNON to look into the complaints made by the Applicant. There were no investigation reports as requested by the Applicant in (i) and (ii)

above. There were no applications submitted by the Applicant for the advertised positions of Security Lieutenant and Security Inspector. In fact, part of the case of the Applicant is that because the vacancy announcements for these positions were

among others. The Tribunal clearly has a duty to properly direct the parties as to what the real issues that form the substance of the application are and further direct them to focus on those issues while

personally named by the Applicant and said to be considered to be the blue-eyed officers of the Chief of DSS/ UNON.

49. This is a most serious allegation. The truthfulness of a claim such as this questions the integrity of not only the Respondent but of the entire institution of the United Nations and strikes at the foundation of a principal value on which the Organization is established and ought therefore to be viewed most seriously by the Tribunal.

50. The burden of proof is on the one making the allegation. No evidence of any sort was offered however by the Applicant in support.

51. The allegation of acts perpetrated by the managers of DSS/UNON and

such exercises and failed to follow them in this instance. According to him, the provisions of ST/AI/2006/3 have not been followed and the promotion exercise was actually a hand-picked one. Aside of address by Counsel and the contents of Applicant's pleadings, no evidence of corruption has been presented to the Tribunal. In other words, the Tribunal has not been shown how the Respondent used the position of trust for dishonest gain. I find the allegation of corruption therefore not proved.

55. Again in the Applicant's pleadings and oral address of his Counsel, the element of forgery is actively canvassed. According to the Applicant's Counsel, the person who makes a document with the intent to defraud or deceive is involved in forgery. He continued that documents tendered at his request by the Respondent on the promotion exercise are forgeries and that the vacancy announcements were forgeries also for not disclosing the total number of posts in the advertisement. He further contended that the re-advertisement of the vacancy announcements for the post of Security Inspector were used to deceive all putative candidates (including the Applicant) who applied or did not apply for the posts and that this amounted to forgery.

56. Forgery, which is a criminal offence, is the making of a false document with the intention that the maker or another shall use it to induce another party into accepting it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other persons prejudice. The standard of proof for forgery is proof beyond reasonable doubt. In the light of this, no any evidence of forgery has been tendered before the Tribunal nor has forgery been proved. No

58. Impunity was alleged by the Applicant in his pleadings but no evidence was offered on this point.

59. The Counsel for the Applicant submitted that the entire process starting with the vacancy announcement and leading up to the promotion exercise lacked transparency in the way the Applicant was treated. He added that it is a general practice of the United Nations that the Respondent should show the actual total number of posts that would be filled. No evidence was presented before the Tribunal on this. None of the staff rules cited required that vacancy announcements must carry the number of posts to be filled.

60. *Were the Applicant's protestations ignored?*







vacancy announcement fails to declare the actual total number of posts to be filled?

74. In his pleadings, the Applicant claims that the Respondent has thwarted every effort made by him in pursuit of this promotion exercise within the facts, the UN regulations, rules, administrative issuances , and the general principles of law and equity. No rules, regulations, administrative issuances and law have been shown to have been violated by the Respondent. In fact, it is a well-established

77. I find that the **decision** not to apply for an advertised post in his department for which he was qualified was entirely that of the Applicant. Every information, formal or informal, at the disposal of the Applicant in respect of the promotions in his department showed that there were many posts to be filled. Even his head of department gave that information. It was only the vacancy announcements that did not publish the number of posts to be filled. Yet, the Applicant decided that the contents of the vacancy announcements constituted

documents expunged from the records of the trial due to their source, he ought to come properly by way of an application on notice before judgment is given. In any event, it behoves Counsels appearing before the Tribunal to know the procedures for proper tendering of documentary evidence.

81. The documents that were improperly tendered by the Applicant have not been shown to be relevant to the application and have not been considered or their contents referred to in this judgment. They will however not be expunged from the records as there was no motion before the Tribunal for that purpose. Considering that these documents embody personal data of the persons mentioned therein, they will be sealed in an envelope and kept in the file for perusal or use by this Tribunal or a higher Tribunal if this is deemed imperative in the future.

***Decision.***

82. It is the finding of this Tribunal that:

- a. No rights of the Applicant were breached by the vacancy announcements, the subject-matter of this application;
- b. The various allegations of discrimination, favouritism, corruption, lack of transparency, forgery, gambling, impunity and abuse of authority have not been proved;
- c. This application fails and the Applicant is not entitled to any of the reliefs he seeks.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 16<sup>th</sup> day of November 2009

Entered in the Register on this 16<sup>th</sup> day of November 2009

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi