

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KOROTINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Secretariat in New York, contests the decision finding her ineligible for an appointment to a temporary position at the P-3 level based on the determination that, at the time of the selection process, she did not possess the necessary years of experience.

2. The Applicant submits, *inter alia*, that the selection process for the contested post was flawed and that, as a result of the contested decision, she was improperly denied promotion to the P-3 level, and that the failure to give full and fair consideration to her candidature demonstrated a pattern of arbitrariness against her. The Applicant seeks compensation for her pecuniary and non-pecuniary loss.

3. The Respondent submits that the present application is not receivable as the vacancy in question was never filled. The Respondent further submits that the applicable guidelines on the determination of eligibility were correctly applied in deciding that the Applicant could not be appointed at the P-3 level. In particular, the Respondent submits that candidates applying for P-3 level positions who have a Master's degree must have at least five years of experience post-Master's degree.

4. The parties agreed that this case would be decided on the papers.

Scope of the case

5. The main issue in this case is whether the determination that the Applicant was ineligible for a P-3 level appointment was lawful. Although the Applicant acknowledges that “the only decision this Tribunal is competent to examine, and thus the only decision that it will consider in the present judgment, is the ... decision not to select the Applicant for the P-3 [level] [temporary vacancy]” in the Peacekeeping Procurement Section of the Procurement Division, Department of Management, she also refers to a number of additional matters, including her non-selection for several

other P-3 level vacancies. Having reviewed these additional claims raised by the Applicant, the Tribunal finds that they are not receivable in this case as the only decision contested by the Applicant in her request for management evaluation was

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8. On 15 July 2009, the Applicant sent an email to the Office of Human Resources Management (“OHRM”), asking whether she could be considered for a P-3 level vacancy as a P-1 level candidate, “considering that [she is a] qualified candidate meeting all requirements of the [vacancy announcement] (Master’s degree, 5 years of related experience, etc.)”. In response, a Human Resources Officer from OHRM sent her an email on the same day stating that she “could be considered as a 60-day candidate for a P-3 post, subject to having the required years of experience for a P-3 post”.

9. The Applicant thereafter applied for several P-3 level posts, both regular and temporary. The present applicant concerns only one of these posts, that in the Peacekeeping Procurement Section.

10. The Applicant submits that, on 23 October 2009, she was verbally informed by the Chief of the Procurement Management Section (“PMS”), Procurement Division, Department of Management, that she would not be considered for P-3 level positions since sec. 5.2 of ST/AI/2006/3 (Staff selection system) prohibited consideration for promotion to posts more than one level higher than the staff member’s grade. The Applicant sought confirmation and clarification from the Chief of the Professional and Above Staffing Section (“PASS”) on the same day via email. She was informed by the Chief of PASS orally at a meeting three days later, on 26 October 2009, that while she was not eligible for regular P-3 level positions, she could be considered for temporary vacancy announcements at the P-3 level. The accuracy of the Applicant’s un rebutted recollection of that conversation is confirmed by her email exchange with the Chief of PASS on 11–13 November 2009 (see below).

11. On 28 October 2009, the Procurement Division, Department of Management, advertised a temporary vacancy position at the P-3 level in the Peacekeeping Procurement Section, which is the subject of the contested decision. The vacancy announcement required the following:

Experience: A minimum of five years of progressively responsible experience in procurement or administration in an international organization, of which at least two years should be directly related to firsthand procurement experience at the international level.

Education: Advanced university degree (Master's degree or equivalent) in Business Administration, Public Administration, Commerce, Engineering, Law or other related field. A first level university degree with a relevant combination of academic qualifications and experience may be accepted in lieu of the advanced university degree.

12. On 9 November 2009, the Chief of PMS sent an email to the Applicant informing her that it was the Chief's understanding that the Applicant had been advised by OHRM that she was ineligible for consideration for any P-3 post, whether regular or temporary. As this was contrary to what the Chief of PASS had told the Applicant on 26 October 2009, the Applicant sought, on 11 November 2009, clarification from OHRM regarding this discrepancy. The Applicant stated that "[d]uring our meeting [on 26 October 2009] you informed me [the Applicant] that I am not eligible for permanent P-3, however, you see no problem of eligibility if I apply for [temporary vacancy] P-3".

13. The Chief of PASS replied two days later, on 13 November 2009. He stated

15. On 23 November 2009, after the Applicant was recommended for the position, the Chief of PMS emailed the Executive Office of the Department of Management, with a copy to the Applicant, enquiring whether the Applicant was eligible for the position as she had been recruited as a P-1 level staff member. Specifically, the email stated:

[The Applicant] has applied to a [temporary vacancy] for a P3 position in Peacekeeping Procurement Section. [The Applicant] started in [the Procurement Division] on 10 March 2008 at P-1 level. Her present appointment expires on 28 February 2010. She has previously been informed that she would not be eligible for a regular P3, as she cannot apply for a post two levels above her own grade (ST/A1/2006/3 [s]ection 5.2).

However, would she be eligible for this P3 [temporary vacancy]?

16. In response to the Chief's email, on 30 November 2009, the Chief and the Applicant were informed by email from the Executive Office, Department of Management, that the Applicant "[did] not, as yet, have the requisite experience for reappointment at the P-3 level". It is a matter of record, however, that the Applicant had been assured previously that her placement on P-1 would not be an issue for the purposes of consideration of the temporary P-3 vacancy and, in fact, her P-1 level was thereafter corrected retroactively to the P-2 level (see para. 46 below).

17. On 30 November 2009, the Applicant emailed the Executive Office, Department of Management, seeking clarification of her situation.

18. On 1 December 2009, the Executive Office, Department of Management, informed the Applicant by email that in determining whether staff members could be appointed to a position at the P-3 level, OHRM considers whether the staff member has five years of post-Master's degree experience, or seven years of post-bachelor's degree experience. The Applicant was referred to the Guidelines for determination of level and step on recruitment to the professional category and above ("Guidelines") (for more on the Guidelines, see paras. 29–33 below).

19. On 16 December 2009, OHRM sent an email to the Executive Office, Department of Management, stating that based on the review of the Applicant's work experience, OHRM had determined that her professional work experience started in April 2006, with her employment at Viland Trading House from April 2006 to November 2007. The email further stated that OHRM

cannot start counting her work experience after she obtained her Master's Degree in June 2005 as her work experience acquired while working at "Luxoptics Holding Company" from February 2004 to April 2006 is not considered to be at professional level.

Therefore, the total professional work experience of [the Applicant], as at 31 December 2009, will be 3 years and 9 months, which is short of the 5 years required for a P-3 position.

20. On 18 December 2009, the Executive Office informed the Applicant that, "since [her] total experience as of 31 December 2009 [was] 3 years and 9 months and that this period is less than the required 5 years for a P-3 position, [she was] not eligible for a P-3 position yet". She was also informed that based on OHRM's review of her case, she would be reappointed, with retroactive effect at the P-2 level from 15 September 2008.

21. The Respondent submits that the temporary vacancy in question was never filled "because there was no suitable candidate for the [temporary vacancy position]".

22. On 28 January 2010, the Applicant submitted a request for management evaluation of the decision finding her ineligible for the temporary P-3 level position. She was informed by letter dated 25 February 2010 that the Management Evaluation Unit had concluded that the contested decision was lawful. On 30 May 2010, the Applicant filed the present application.

Consideration

Receivability

23. In his submission filed on 9 August 2012, approximately two years after the filing of the Respondent's reply in this case, the Respondent submits that the decision regarding the Applicant's ineligibility for the P-3 level temporary vacancy was not a final decision as the temporary vacancy was never filled. Thus, according to the Respondent, the contested decision was preparatory and not capable of adversely affecting the Applicant's rights.

24. The language of art. 2.1(a) of the Dispute Tribunal's Statute is clear—the Tribunal is competent to hear and pass judgment on an application appealing “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

25. The Tribunal finds that the decision that the Applicant was ineligible signified the end of the process as far as she was concerned, and in fact the end of the entire selection process as she was the recommended candidate, and thus this decision cannot be described as merely preparatory. The fact that the particular vacancy was never filled does not necessarily mean that the Applicant lacks standing to claim that her rights were violated. It may very well be that the selection process was never finalized as a result of the very decision the Applicant seeks to challenge. The Respondent's submission on receivability in this respect lacks basis in law and defies logic.

26. Despite the growing jurisprudence and numerous cases of a similar nature having been found receivable, submissions on receivability which hold little or no merit, particularly with regard to what constitutes an appealable administrative decision, continue to be advanced in cases before the Tribunal. Parties must endeavour to make the necessary concessions and avoid arguments that require an uneconomic use of the Tribunal's time to adjudicate issues that are well settled.

Legal status of the Guidelines

29. The Respondent submits that the contested decision was in line with the Guidelines on the determination of eligibility.

30. The Guidelines were approved on 30 July 2004, although there is no information in the Guidelines or in the Respondent's submissions as to who drafted or approved them. The Guidelines were revised in 2009 and 2010—again, it is not known from the text of the Guidelines who authored and approved the revisions—to update references to amended administrative instructions (the exact dates when these revisions were made are not apparent from the document).

31. As the Tribunal stated in *Villamorán* UNDT/2011/126, at the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

32. Circulars, guidelines, manuals, and other similar documents may, in application of the Guidelines, be used by the Tribunal.

matters that may be dealt with by way of guidelines, manuals, and other similar documents, and legal provisions that *must* be introduced by properly promulgated administrative issuances (*Villamorán, Valimaki-Erk* UNDT/2012/004).

Whether it was lawful to disregard the Applicant's experience prior to June 2005 because it was acquired prior to her Master's degree

34. The Guidelines provide that candidates with a Master's degree who apply for P-3 level positions are to have at least five years of professional experience, but the Guidelines do not explicitly require that the relevant qualifying experience be acquired after the Master's degree. The Respondent submits, however, that it has been OHRM's practice and interpretation of the Guidelines that, in order to be appointed at the P-3 level, a prospective candidate who has a Master's degree must have gained five years' experience *after* receiving this degree. Specifically, para. 30

36. As the Dispute Tribunal stated in *Neault* UNDT/2012/123, the criteria to be used in evaluating candidates must be clearly stated in the vacancy announcement. Not having specified that the five years of experience had to be completed *after* the Master's degree, in the absence of properly promulgated issuances stating otherwise the Respondent was bound by the terms of the vacancy announcement, which did not include any such requirement (*Id.*).

37. Furthermore, it is a contractual right of every staff member to receive full and fair consideration for job openings to which they apply. Even if the Guidelines contained a provision that only experience obtained after a Master's degree shall be counted, the lawfulness of such provision would be questionable, as it would appear to be manifestly unreasonable and imposing unwarranted limitations on qualification requirements. Such a provision, if it were added to the Guidelines, may constitute an unfair restriction on eligibility of a group of staff members for appointment and promotion without proper basis in properly promulgated administrative issuances. It may be possible for a staff member to obtain relevant professional experience prior to obtaining a Master's degree. In the Tribunal's considered view, the currently unwritten practice of not counting the experience obtained prior to the Master's degree is not supported by any regulations, rules, or other properly promulgated administrative issuances forming part of the staff member's contract and lends itself to being arbitrary and manifestly unreasonable.

38. The Tribunal finds that the decision to disregard part of the Applicant's work experience because it was obtained prior to her Master's degree was not in accordance with the language of the temporary vacancy announcement and OHRM's own Guidelines and, furthermore, was not based on any properly promulgated administrative issuances. For reasons stated above, the Tribunal finds that the decision to disregard part of the Applicant's work experience because it was obtained prior to her Master's degree was unlawful.

Whether it was lawful to disregard the A

the Guidelines to such experience having to be equivalent to a certain professional level grade or general service level grade.

43. The Guidelines state on page 2 that the term “relevant” is understood “as *any* type of experience that would contribute to professional competencies/skills and that would prepare a candidate to perform the functions of the post” (emphasis added).

44. Thus, it follows from the wording of the Guidelines that “relevant professional experience” is generally any work experience after the first university degree that contributes to professional competencies/skills and prepares a candidate to performemce h

not an issue and would be corrected. The Tribunal takes note, in this regard, of the Respondent's reply of 1 July 2010 (see para. 29 of the reply), in which the Respondent *concedes*

apply to the temporary P-3 level vacancy, then having considered her for the post pursuant to such confirmations, and having short-listed, interviewed and recommended her as the only suitable candidate for the post, and then having included the Applicant on post-selection communications, the Respondent created an expectation that the Applicant was eligible and selected or highly likely to be selected.

50. In particular, the Tribunal notes that the Applicant was interviewed on 10 November 2009 and was recommended for the temporary vacancy on 16 November 2009. On 23 November 2009, she was among the recipients of the email from the Chief of PMS to the Executive Office of the Department of Management, in which the Chief sought confirmation of the Applicant's eligibility for the temporary P-3 level position as she had been recruited as a P-1 level staff member. In the Tribunal's considered view, it is reasonable to conclude that this email indicated to the Applicant, at that stage of the process, that she was either the selected candidate or highly likely to be; otherwise, there was simply no point in that email being sent, with a copy to her, after all selection procedures had been completed. Moreover, the email raised *only* the already settled issue of the Applicant's level (see emails of July, October, and November 2009), which was shortly thereafter corrected to the P-2 level, and was not intended to re-open the issue of the Applicant's work experience. At this stage of the process, it was simply too late for the Administration to revisit the matter.

51. Moreover, ST/AI/2006/3 envisages that a selection process goes through separate stages, of which the review of eligibility is one of the first. Specifically, sec. 7.5 states that interviews or written tests are to be conducted *after* the candidates have been "identified as meeting all or most of the requirements of the post". Therefore, in the circumstances of this case, and on the assurances given to the Applicant regarding her eligibility with respect to the temporary P-3 level vacancy, it was improper for the Administration to re-open the matter at that late stage, all the

more so since the decision to revisit the issue was based on OHRM practices that were contrary to the vacancy announcement and OHRM's own Guidelines.

52. The Tribunal notes the Respondent's denial that any conflicting information regarding her eligibility had been provided to the Applicant. The Respondent submits (see para. 29 of his reply) that the Applicant was eligible to apply for the temporary vacancy position at the P-3 level, but, if selected, she would only be entitled to be appointed at the P-3 level in June 2010; until such time she could, if selected, only be appointed at the P-2 level for the very same post. (It must be added here that this submission is in itself sufficient to find for the Applicant, as it constitutes an admission on the part of the Respondent that the Applicant was, in fact, eligible for the temporary P-3 level position.)

53. The Respondent's submission that the information provided to the Applicant was meant to be understood as allowing her appointment at the P-2 level, until such

assistance (“GTA”) funds that were initially assigned to the team where the temporary P-3 level vacancy was located were re-assigned at some point to a different team within the Procurement Division pending the recruitment of a P-2 staff member from the National Competitive Examination roster. The Respondent provided, on an *ex parte* basis, several documents in support of this contention.

55. At the time of the events and based on contemporaneous records, the only reason for the failure to complete the contested selection exercise was the finding of the Applicant’s ineligibility following her recommendation for the post. In the Tribunal’s considered view, the additional reason proffered by the Respondent for the first time in the final submission appears to be an after-thought as it is not supported by any contemporaneous documents from the relevant period of October to December 2009. The records provided by the Respondent in support of this new reason concern primarily the events that transpired after it became apparent that the P-3 level temporary vacancy would remain vacant due to the determination that the Applicant was ineligible. In the Tribunal’s considered view, the records in this case, including the documents provided by the Respondent on 2 October 2012, demonstrate that, had the Applicant’s eligibility not been revisited after the Applicant was recommended for recruitment, arrangements would have been made within the Procurement Division to accommodate her appointment.

Observation on the standards of the International Civil Service Commission

56. The Applicant submits that the evaluation criteria in this case were not applied in accordance with the standards of the International Civil Service Commission (“ICSC”). The Respondent submits that the ICSC standards concern classification, not selection processes, which are distinct from each other, and that the ICSC standards are not relevant to determining the eligibility of a given staff member or individual for a regular post or temporary position at a particular level, but rather apply to the classification of budgeted posts.

57. Indeed, classification of posts and selection of staff members for appointment are two distinct processes (see, e.g., *Gehr* UNDT/2011/178). As this case did not concern the classification of the contested post, and in view of the findings above, the Tribunal does not need to examine the claims regarding the ICSC standards, although it has taken due note of the parties' submissions on that issue.

Relief

Pecuniary loss

58. On the evidence before it, the Tribunal finds that, if not for the unlawful contested decision, the Applicant would have been appointed to the contested post.

59. The Applicant submits that, as a result of the contested decision, upon the expiry of her contract at the end of February 2010, she and her spouse had to leave New York and return to Kiev, Ukraine. On 1 March 2010, the Applicant joined the United Nations Development Programme ("UNDP") Country Office in Kiev as a National Officer at the P-2 level. She worked with UNDP until 24 January 2011. She subsequently moved to New York and has been working at the United Nations Children's Fund ("UNICEF") since February 2011 at the P-3 level.

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(*Fayek* UNDT/2010/194). These calculations were not challenged

and was not challenged by the Applicant.
Applicant's Din

the P-2 level, with effect from 15 September 2008, and that, in any event, neither her initial level nor any other selection exercises were challenged by her formally through the management evaluation process and before this Tribunal.

65. In these circumstances, the Tribunal finds that the Applicant's claims for compensation for non-pecuniary harm stand to be rejected.

Other relief sought

66. The Applicant requested, in her submission of 26 July 2012, to refer this case to the Secretary-General so that he c

for the Respondent to review these matters as they concern such an important area as selection of staff.

Conclusion

69. The Tribunal finds that the decision to revisit the issue of eligibility and to disregard part of the Applicant's work experience because it was obtained prior to her Master's degree was unlawful. The Tribunal also finds that the decision to disregard, in its entirety, the Applicant's experience between February 2004 and April 2006 because it was deemed by OHRM to be equivalent to the G-5 or G-6 level, was unlawful. Accordingly, the determination that the Applicant was ineligible for the P-3 level temporary appointment was unlawful. The Tribunal further finds in the particular circumstances of this case that, through representations made to the Applicant prior to and during the selection process, the Respondent created an expectation, in line with the standard selection procedures, that the Applicant was eligible and would be selected for the post. The Tribunal finds it appropriate to award the Applicant the amount of USD8,496.76, with retroactive interest, as compensation for the pecuniary loss suffered.

70. It must be reiterated that it is not the role of the Tribunal to instruct management on how to calculate the experience of candidates applying for positions in the United Nations, nor to set the qualifying criteria. It is not the Tribunal's role to substitute its own decision for that of the decision-maker in substantive determinations of eligibility, nor has the Tribunal done so in this case. Rather, the present Judgment is based on the Tribunal's findings regarding the Administration's own initial determination and further assurances given to the Applicant that she was in fact eligible for the temporary P-3 level position, which determination was belatedly and improperly revisited by OHRM in applying its unwritten internal practices that find no support in properly promulgated issuances, the vacancy announcement, or even OHRM's own Guidelines.

Orders

71.