



Introduction

1. The Applicant is a staff member of the International Criminal Tribunal for Rwanda (“ICTR”) based in Arusha, Tanzania, and serves as a Reviser on a P-4 post on a fixed-term appointment.

2. On 5 December 2012, he filed the present Application contesting two administrative decisions outlined as follows:

a) The decision to suspend the selection process for the position of Chief of the Language Services Section at the ICTR as advertised in job opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) and to reject the Applicant’s application for the same so as to retain the incumbent beyond the retirement age.

b) The improper evaluation of his performance for the 2011/2012 performance cycle.

3. On 7 January 2013, the Respondent filed his substantive Reply which in addition refuted the receivability of this Application on primarily three grounds, namely:

a) The Application has been prematurely conceived as a final decision is still pending in respect of the contested selection process. The contested selection process is currently pending since a final administrative decision in respect of the said process has yet to be made that is capable of a challenge under the Statute of the Dispute Tribunal.

b) The comments on the Applicant’s performance document do not constitute an administrative decision within the meaning of article 2.1(a) of the Statute of the Dispute Tribunal.

c) The rejection of the Applicant’s application for the post and the suspension of the selection process do not carry any direct legal effects on the Applicant’s contract of employment.

Factual Background

4.

requested him to call on her on 19 April 2012 for discussions on his 2011-2012 performance cycle.

11. On 27 April 2012, Ms. Ndongo-Keller finalized her evaluation of the Applicant for the 2011/2012 performance cycle and rated him as having successfully met performance expectations. However, in her overall comments on

Job Opening No. 12-ADM-ICTR-21952-R-ARUSHA (O), to reject the Applicant's application for the same position and to extend the incumbent's contract beyond the stipulated retirement as well as the vacancy announcement used for the selections decision.

b) The second was the decision by the Applicant's FRO, Ms.

serious output problems and further indicated that on several occasions, the Applicant had failed to exhibit the expected Teamwork and Communication spirit as well as failed to effect a timely delivery of his work assignments, the latter being a shortcoming that she brought to the attention of the Applicant.

22. The Applicant's FRO and SRO both signed off on the first amendment to the 2011-2012 e-PAS report on 11 October 2012. The Applicant's SRO noted in his comments that he concurred with the FRO's evaluation.

23. Ms. Ndongo-Keller further amended her assessment of the Applicant's performance a second time in a Note for the File dated 11 October 2012. In that instance, her overall comments were that the Applicant has 'serious output problems' and she indicated that the Applicant had failed to deliver work assignments within prescribed time frames and included the need for the Applicant to improve on the same. The Applicant's performance rating in the second amended evaluation remained that of 'successfully meets performance expectations.'

24. The Applicant's FRO and SRO both signed off on the second amendment to the Applicant's 2011-2012 e-PAS report on 8 November 2012.

25. On 8 November 2012, Ms. Charity Kagwi-Ndungu, a legal officer in the Office of the Chief of the Division of Administrative Support Services Section wrote to the HR Help desk through an email in which she stated as follows:

- a) The original Note for the File as drafted by the Applicant's FRO following the Roll back of the 2011-2012 e-PAS had no comments on core competencies.
- b) The comments on core competencies were included on account of good faith efforts by Ms. Kagwi-Ndungu after seeking advice from the Chief of SDTU, Nairobi, who had recently concluded a training event at the ICTR on performance evaluation.
- c) MEU had rendered advice on 12 October 2012 indicating

d) Ms. Kagwi-Ndungu instructed HR to expunge the Note for the File as filed on 11 October 2012 and to submit instead the original note for the file which did not contain any comments on core competencies [and which was attached to the email to HR dated 8 November 2012].

Procedural Background

26. The Applicant filed a Motion for Extension of Time to file an Application dated 5 November 2012 on 6 November 2012 requesting an extension of 30 days within which to complete his application on the merits. The Tribunal granted the Applicant's Motion on 7 December 2012 and he accordingly filed his substantive Application on 5 December 2012, to which the Respondent filed a substantive Reply on 7 January 2013.

27. On 9 January 2013, the Tribunal directed the Applicant to file any comments on the Respondent's challenge to receivability no later than 1 February 2013.

28. On 10 January 2013, the Applicant moved the Tribunal for leave to file a comprehensive response to the Respondent's Reply. The motion was granted by the Tribunal on the same date and the Applicant was directed to file submissions specifically responding to matters of receivability as raised by the Respondent and a separate submission responding to the merits no later than 1 February 2013.

29. On 31 January 2013, the Applicant filed two separate comprehensive submissions on receivability and on the merits respectively.

30. On 1 February 2013, the Applicant filed a Motion for Production of Evidence for the Respondent to disclose evidence which he needs to establish his case.

Applicant's Case

31. The following contentions form the pillars of the Applicant's case:

a) The entire selection procedure revolving around the advertising of the post of Chief, LSS vide Job Opening No. 12-ADM-ICTR-21952-R-

f) The publication of the amended job opening on 24 August 2012 did not rescind the impugned Job Opening No.12-ADM-ICTR-21952-R-ARUSHA (O) as it related to a completely new job opening and did not cure the prejudice and injury caused to and suffered by the Applicant in respect of the first job opening.

g) The decision of the Hiring Manager to reject the Applicant's application in respect of Job Opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) and to suspend the selection process was improper and violated his right to a full and fair consideration of his application.

h) It is also the Applicant's case that the decision to reject his application and all other candidates' applications and to retain the incumbent, contrary to organizational rules on retention in service beyond the mandatory age of separation was improper and unlawful.

i) With respect to his performance evaluation by the FRO, the Applicant maintains that it was unfair and included false claims of a serious output problem and false allegations of teamwork and communication problems.

j) The Applicant submits that the dishonest, unfair and improper evaluation of his performance by the FRO was tantamount to abuse of authority which seriously damaged his professional reputation and violated his right to equal treatment and to a consistent and fair performance evaluation.

k) The Applicant contends that in light of his previous performance ratings, the last of which was the 2011-2012 cycle for which his overall rating was 'exceeds performance expectations', he could not in all likelihood have had an output problem as alleged by his supervisor.

l) The Applicant further maintains that his FRO's initial evaluation of the 2011-2012 cycle is invalidated by both its inconsistency with the

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q) The Applicant claims that it was unlawful for his FRO to

the Applicant's contract of employment because following the suspension of the selection process, the requirements for the job opening were revised to the Applicant's advantage.

e) The Respondent further submits that staff members do not have a right to a selection process being completed within any particular timeframe.

Considerations

Receivability as a Preliminary Issue before the Tribunal

33. As a point of departure, the Tribunal must definitively determine the Respondent's challenge to the admissibility of the present Application which is premised on three grounds, and which the Tribunal shall dispose of in turn:

- a) The Application has been prematurely conceived as a final decision is pending in respect of the contested selection process.
- b) The comments on the Applicant's performance document do not constitute a decision within the meaning of Article 2.1(a) of the Statute of the Dispute Tribunal.
- c) The rejection of the Applicant's application for the post and the suspension of the selection process do not carry any direct legal effects on the Applicant's contract of employment.

34. The applicable legal instrument in the current case is ST/AI/2010/3 (Staff selection system). This administrative instruction establishes the staff selection system, which integrates the recruitment, placement, promotion and mobility of staff. It serves the Tribunal's purpose to reproduce the pertinent provisions of ST/AI/2010/3:

7.1 Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

7.2 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager (for position-specific job openings) and the occupational group manager (for generic job openings), within and/or shortly after the deadline of the job opening, the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

7.3 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support has the authority to pre-screen individuals identified through an outreach strategy aiming for target groups in terms of gender, geography and/or specialized expertise within the deadline of the job opening. The applications of successful candidates will be released to the hiring

demonstrate an ability to interpret, there is nothing on the face of it to support the Respondent's contention that the second job opening was a continuation of a singular selection process which had been truncated.

38. In *Appleton*, Order No. 288(NY/2010), the Tribunal was confronted by a scenario where two Vacancy Announcements (VAs) had been published in respect of one post. The first VA was cancelled and a second VA was issued and described as a recirculation of the first VA rather than a completely new exercise. In addition, the second VA expressly advised candidates who had applied to the first VA that their right to be considered for the Post had not been subsumed by the cancellation of the first VA. On the plenitude of the evidence available in that case, the Tribunal concluded that the selection process was a singular ongoing one.

39. No such evidence exists in this case. Instead, the Respondent has made the helpful submission in its substantive Reply which enables the Court to take a short walk on what is essentially a short legal pier thus:

“The Applicant applied and was found eligible together with four other candidates. One of the requirements of the initial job opening was for the candidates to have a demonstrated ability to interpret. Following further screening, the acting Deputy Registrar as the hiring manager rejected the applications of all five applicants as none of them met the requirements of the post. The Applicant's application was rejected because he did not have a demonstrated ability to interpret.”

40. The Tribunal accordingly finds that an administrative decision capable of challenge under article 2.1 of the Statute of the Dispute Tribunal was made when the Administration rejected the Applicant's application in respect of the first job opening and purported to suspend it. The Tribunal concludes that there exist two

42. To address the Respondent's proposition, it is necessary to precisely

(Signed)

Judge Nkemdilim Izuako

Dated this 28 day of March 2013

Entered in the Register on this 28 day of March 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi Registry.