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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/075

Judgment No.: UNDT/2014/003

Date: 15 January 2014

Original: English

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**Before:** Judge Vinod Boolell  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko, Acting Registrar

ONANA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Steven Dietrich, ALS/OHRM

## **Introduction**

1. The Applicant joined the International Criminal Tribunal for Rwanda (ICTR) as a French Court Reporter at the FS-4 level in April 1999.
2. On 18 November 2010, he filed an Application before the United Nations Dispute Tribunal (UNDT) challenging a decision to separate him from service.
3. On 5 April 2011, the Applicant filed another Application before the Tribunal contending that: (a) he was not accorded priority as a suitable internal 15-day candidate for the post number AR-09-OTP-INT-002, Document Control Assistant; (b) he was not fully and fairly considered for the subject post; and (c) he was not informed of the results of the selection exercise.

## **Procedural history**

4. Following a series of extensions of appointment, the Applicant was informed on 26 June 2009 that his appointment would not be renewed beyond 30 September 2009 because some posts, including his, had been slated for abolition as part of the completion strategy of ICTR.
5. On 22 September 2009, the Applicant filed an Application with the Tribunal in Nairobi to suspend implementation of the decision not to renew his appointment. On 13 October 2009, the Tribunal ordered suspension of the decision not to renew the Applicant's appointment until his case was determined on the merits.

management evaluation.<sup>2</sup> Consequently, the Applicant was separated from service as of 30 April 2010.

**Application I**

7. On 13 November 2009, the Applicant filed an Application before the UNDT challenging the non-renewal decision (Application I).

8. On 30 July 2010, the Dispute Tribunal rejected the Applicant's challenge against the non-renewal of his fixed-term appointment and dismissed his Application.<sup>3</sup>

9. On 9 November 2010, the Applicant filed an appeal before UNAT against the UNDT decision of 30 July 2010.

10. On 8 July 2011, UNAT considered the Applicant's appeal dated 9 November 2010 time-barred and therefore not receivable and dismissed it in its entirety.<sup>4</sup>

**Application II**

11. On 18 November 2010, the Applicant filed an Application before the Tribunal challenging the decision to separate him, following the issuance of Judgment No. 2010-UNAT-008 by UNAT on 30 March 2010 (Application II).<sup>5</sup> The Applicant contended that the Respondent should have given him one month notice prior to his separation on 30 April 2010. Furthermore, he contended that he was not fully and fairly considered for the post AR-09-OTP-INT-002, Document Control Assistant, because he was not accorded priority consideration as a 15-day candidate in accordance with ST/AI/2006/3 (Staff selection system). Moreover, he was never informed of the selection results. Lastly, he argued that he should be reintegrated into ICTR and should be granted compensation.

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<sup>2</sup> 2010-UNAT-008.

<sup>3</sup> UNDT/2010/136.

<sup>4</sup> 2011-UNAT-157.

<sup>5</sup> The subject matter of this Application is being decided on in this judgment.

12. On 17 December 2010, the Respondent submitted that Application II was not receivable as the Applicant had already raised this claim in his appeal dated 09 November 2010 against the Tribunal's Judgment dated 30 July 2010.<sup>6</sup> Furthermore, he also raised this claim in his request for management evaluation of 25 October 2010.

### **Application III**

13. On 5 April 2011, the Applicant filed another Application before the Tribunal stating that: he was not accorded priority as a suitable internal 15-day candidate for the post AR-09-OTP-INT-002, Document Control Assistant; he was not fully and fairly considered for the subject post; and he was not informed of the selection exercise (Application III). Lastly, he argued that he should be reintegrated into the ICTR and should be granted compensation.<sup>7</sup>

14. On 6 May 2011, the Respondent replied that Application III was time-barred. Further, the Applicant was not found suitable for the posts, he was accorded full and fair consideration and he was informed of the outcome of the selection exercise. He suffered no harm as a result of being advised one month after the decision was taken. Accordingly, the Application should be rejected.

### **Application IV**

15. On 21 July 2011, the Applicant filed another Application before the Tribunal stating that his Counsel had not transmitted to him the UNDT Judgment dated 30 July



## **Considerations**

21. The preliminary issue that the Tribunal has to consider in the present matter is whether Applications II and III are receivable.

### *Receivability of Application II*

22. On 18 November 2010, the Applicant filed an Application before the Tribunal challenging the decision to separate him following the issuance of Judgment No.

26. UNAT held that the Applicant's appeal was not receivable as it had been filed after the then 45 day period<sup>8</sup> as provided for by article 7.1(c) of the UNAT Statute and dismissed it.<sup>9</sup> This is what UNAT stated:

[The Applicant's] contention that he did not receive the said UNDT Judgment [30 July 2010] or any notification from the UNDT Registry does not persuade this Tribunal, since it would be senseless to rely just on a formality to ignore [his] actual knowledge of the UNDT Judgment, as early as 2 August 2010. This Tribunal is of the view that [the Applicant's] right to due process of law was not violated.

[The Applicant] was in a position to prepare and file the appeal before the expiry date or to timely request an extension of the time limit, but he did not take any of the measures at his disposal.

In light of the foregoing, we consider the appeal time-barred and find no need to examine the merits of the present case.

27. Any litigant who wishes to appeal a decision has to comply with the procedural requirements of the appellate court. One of the important requirements is the deadline within which an appeal must be filed. An appellate court will not, as a rule, consider an appeal which is not filed timely. It is only in exceptional cases that a waiver of deadlines will be considered.

28. Once an appeal is considered not to be receivable, the judgment of the first instance court becomes final and the issues that have been determined in the first instance judgment are final and cannot be raised again as a result of the well-established principle of *res judicata*. In the present matter, UNAT held that the appeal against the UNDT judgment dated 30 July 2010 challenging the non-renewal decision was time barred. Thus, the issue of non-renewal has become final and cannot be canvassed again.



and fairly considered for the subject post and he was not informed of the selection exercise.

35. The Respondent raised the issue of receivability by contending that Application III was filed out of time. The Applicant was required to file his Application within 90 days of the due date for the response to his management evaluation request pursuant to article 8.1(d)(i)(b) of the UNDT Statute. He submitted his request for management evaluation on 25 October 2010 and the due date for the response of MEU was 8 December 2010 pursuant to staff rule 11.2(d). As such, the Application had to be filed on 8 March 2011 but was filed out of time. Therefore, the Application is not receivable.

36. According to the Applicant, his Application is receivable, for it was filed on 4 April 2011, which is 89 calendar days after the receipt of MEU's answer on 6 January 2011.

37. Pursuant to article 7.1(a) of the UNDT Rules of Procedure, applications should be submitted to the Tribunal within 90 calendar days of the applicant's receipt of the management evaluation.

38. This provision should be read together with article 8.1(d)(i)(a) of the Tribunal's Statute which, in relevant part states that, in cases where a management evaluation of the contested decision is required, an application shall be receivable if it is filed within 90 calendar days of the applicant's receipt of the response by management to his or her submission.

39. In the present matter, the Tribunal notes that the Applicant submitted his request for management evaluation on 25 October 2010. Although the due date for the response of MEU was 8 December 2010, the Applicant did not receive a response until 6 January 2011<sup>10</sup>. This is confirmed by the documentary evidence provided by the Applicant in response to Order No. 221 (NBI/2013) issued by the Tribunal on 3

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<sup>10</sup> The response was dated 4 January 2011.

October 2013. Subsequently and within the legal deadline, on 5 April 2011, he filed his Application with the UNDT, which was 90 calendar days later.

40. On the issue of computation of time for the filing of an Application when an MEU response falls outside the 45 days limit, the Tribunal has ruled that the Applicant cannot be penalized for MEU being dilatory in its obligations (*Mohammed UNDT/2013/100*).

41. In *Neault*<sup>11</sup>, UNAT decided that:

[...] it is both reasonable and practical for Article 8(1) of the Statute to provide for two different dates from which the limitations period commences to run. After all, the MEU response might partially or fully resolve the staff member's concerns and give the staff member a reason to reconsider the filing of an application challenging the administrative decision. When the management evaluation is received after the deadline of 45 calendar days but *before* the expiration of 90 days for seeking judicial review, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT. This affords the staff member an opportunity to fully consider the MEU response in deciding whether to proceed before the UNDT.

42. In the present matter, a new deadline started operating as from 6 January 2011. The Application was filed on 5 April 2011 and was therefore within the legal deadline. Application III is receivable.

#### Consolidation of the cases

43. The Tribunal notes that the Applicant raises the same issues in Applications II and III. Both the Statute and the Rules of Procedure of the UNDT are silent on the consolidation or joinder of cases. However, article 19 of the Rules of Procedure permits the Tribunal to make any order or give any direction for the fair and expeditious disposal of cases and article 36 empowers the Tribunal to deal with matters not expressly provided for in the Rules in furtherance of article 7 of the

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<sup>11</sup> 2013-UNAT-345



49. The Tribunal notes that the Applicant was a 15-day candidate who would have been entitled to priority in accordance with section 7.1 of ST/AI/2006/3. The documentary evidence shows that the Applicant was not considered prior to the 30-day candidates, for he was interviewed on 26 January 2010 along with three other 30-day candidates, two of them were interviewed before him and the third one was interviewed after him on that date.

50. According to the UNDT jurisprudence, priority consideration is to be accorded to eligible lateral candidates at the 15-day mark over candidates at the 30-day mark.

In case there is a suitable candidate among these 15-day mark candidates the Administration is precluded from considering 30-day mark candidates. As such, the administrative instruction establishes a “stair-system” in which 30-day mark candidates can only be considered if no suitable candidate can be identified among the 15-day mark candidates.<sup>13</sup>

It is only if “no suitable candidate can be identified at this stage”, namely the stage of considering the 15-day mark candidates, that the 30-day mark candidates are to be considered.<sup>14</sup>

51. The documentary evidence shows that the Applicant was found to be unsuitable for the position because he did not meet all of the required competencies. This is what the Interview Panel concluded:

The Panel found that while [the Applicant] has long experience at the ICTR as a court reporter, he did not have knowledge of documents control required in the Vacancy Announcement (...). The candidate was not familiar with litigation tools such as zylab and textmap (...). The Panel found during the interview that his current work involves a filing process and not documents control as required (...). The Panel was unanimous that this candidate lacked the required competencies and knowledge for the job advertised and does not recommend him for this position.

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<sup>13</sup> *Wu* UNDT/2009/084

<sup>14</sup> *Kasyanov* UNDT/2009/022

52. Pursuant to UNAT jurisprudence:

The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.<sup>15</sup>

53. On the argument that his candidacy should have been given priority consideration in accordance with the letter and spirit of the staff rules and guidelines, for the proper conduct of the staff selection process it is beyond dispute that the ultimate test lies in article 101.3 of the Charter of the Organization that reads:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis - possible.

54. Reference can also be made to what UNAT<sup>16</sup> has ruled in this regard:

It should be emphasized that “priority consideration” cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for. To hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under article 101 of the Charter.

55. The Tribunal concludes that since the Applicant was found unsuitable for the post, the failure to consider his application for the post prior to the 30-day candidates did not vitiate the outcome of the selection process. Accordingly, the Applicant did not suffer any adverse legal consequences as a result of the failure to consider his application prior to the 30-day candidates.

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<sup>15</sup> *Abassi* 2011-UNAT-110

<sup>16</sup> *Megerditchian* 2010-UNAT-088



particular selection exercise was tainted by procedural irregularities, it is for the Applicant to discharge the onus of proof. Allegations of bias and prejudice are easy to make and usually extremely difficult to prove because of the absence of affirmative evidence. Accordingly the Tribunal must be prepared to draw inferences from the primary facts. If the facts established do not reasonably point to the possibility of bias or prejudice that will normally be the end of the matter.<sup>17</sup>

61. In *Rolland* 2011-UNAT-122, UNAT held:

[T]hat the selection process conducted by an interview panel can be rescinded under rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection shall be upheld.

We also hold that there is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.

62. Applying the test above, the Tribunal is unable to say that the selection process was flawed or vitiated by any bias, discrimination or breach of any procedural rule. There is no evidence that the Administration did not act in accordance with the applicable rules in deciding not to select the Applicant for the posts since he did not possess the competencies required for them. Similarly, the "principle of preference" does not amount to an automatic right to be selected for another post in ICTR where a candidate does not meet the basic requirements or competencies for such a post.

63. Regarding the formal notification of the outcome of the selection process, the Tribunal notes that the Applicant submitted his Application for the position in 2009 when ST/AI/2006/3 was still in force. ST/AI/2006/3/Rev.1, in force in January 2010,

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<sup>17</sup> *Simmons* UNDT/2013/050

was abolished by ST/AI/2010/3 which entered into force on 22 April 2010 and therefore, should apply in the present matter. The selection process was finalized in July 2010 as mentioned in the MEU findings that reads:

The CRB-ICTR finalized its review and approved the interview panel's recommendation on 7 July 2010. The recommendations of the CRB were sent to the ICTR Registrar by way of memorandum dated 12 July 2010. The Registrar made the selection decision on 23 July 2010 and by way of letter dated 26 August 2010, the three selected candidates were advised of the same. At the end of September 2010, (...) [the Applicant was] verbally informed that the selection decision had been made.

64. Section 10.1 of ST/AI/2010/3 states that:

Other candidates convoked for assessments but not selected or placed on a roster shall be so informed by the hiring manager or the occupational group manager within 14 days after the selection decision is made in writing.

65. The Tribunal notes that the Registrar made the selection decision on 23 July 2010. Pursuant to section 10.1 of ST/AI/2010/3, the due date for notification to the Applicant would have been 6 August 2010. But the Applicant was verbally informed at the end of September 2010, which is much latter than what is prescribed by ST/AI/2010/3. It is obviously clear that the provision on notification was not followed in the case of the Applicant.

66. The Tribunal takes the view that in the light of the well-established principle

67. Where there is a breach of the rules that is not justified or explained, a staff member should be compensated. But in the present matter, the Tribunal is faced with the UNAT decisions where it was held that an individual who feels aggrieved by an alleged delay to notify him/her of a selection exercise is not entitled to any compensation by that very fact alone. The individual must also establish that he/she suffered some form of prejudice.<sup>19</sup>

68. In reviewing the documentary evidence, the Tribunal notes that the Applicant did not establish that, even if it were proved that there was an unreasonable delay on the part of the Administration to notify him of the outcome of the selection process, such delay had any impact on him, his circumstances or his entitlements or that he suffered any harm or significant adverse consequences which would be the ground for any award of compensation.<sup>20</sup> He is therefore not entitled to any compensation on that ground.

### **Decision**

69. In view of the foregoing, the Tribunal dismisses Applications II and III in their entirety.

*(Signed)*

Judge Vinod Boolell

Dated this 15<sup>th</sup> day of January 2014

Entered in the Register on this 15<sup>th</sup> day of January 2014

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi

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<sup>19</sup> See *Charles* 2013-UNAT-285

<sup>20</sup> See also *Sina* 2010-UNAT-094