



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/006

Judgment No.: UNDT/2016/183

Date: 11 October 2016

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

Introduction

1. On 15 February 2016, the Applicant, a former D-1 level permanent staff member of the United Nations Development Programme (“UNDP”), filed an application contesting the decision not to “award [him]” the position of Directorate Manager, Bureau of Programme and Policy Support (“BPPS”),

16. Thus, the DM post was advertised again on 1 April 2015, with a deadline for application of 15 April 2015. At the request of Mr. Martinez-Soliman, who was the hiring manager for the DM post, the vacancy was re-

Consideration

Applicable law

19. Staff rules 13.1(a) and (d) state:

Rule 13.1

Permanent appointment

(a) A staff member holding a permanent appointment as at 30 June 2009 or who is granted a permanent appointment under staff rules 13.3(e) or 13.4(b) shall retain the appointment until he or she separates from the Organization. Effective 1 July 2009, all permanent appointments shall be governed by the terms and conditions applicable to continuing appointments under the Staff Regulations and the Staff Rules, except as provided under the present rule.

...

(d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to

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staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through

83. Only candidates who fully meet the required qualifications for the position, as specified in the vacancy announcement, may be short-listed for the post.

84. ... The shortlist for interview should generally be comprised of a minimum of two and a maximum of four candidates. At least one woman should be included on the short-list. If no female candidate is included on the short-list, a waiver must be requested from the Director, OHR ...

22. UNDP's policy on "Recruitment & Selection Procedures—Remaining Vacancies from Structural Change Job Fairs" states in relevant parts:

While the Structural Change Job Fairs formally concluded on 3 October 2014, some positions advertised in the job fairs remain unfilled. This note articulates the selection processes to be followed in the recruitment of those remaining vacancies.

The recruitment strategy adopted for the selection of the remaining approved Structural Change Job Fair vacancies will conform to the principles contained within the UNDP Recruitment & Selection Framework, as follows:

1. Hiring units may advertise approved positions internally/externally with immediate effect;
2. For all positions at the P-5 level and above, hiring units may choose to conduct Competency-Based Interviews to assess candidates;
3. For positions at the P-4 level and below, candidates will be evaluated by Desk Reviews;
4. Should a Desk Review panel determine that an external applicant is the top-rated candidate for a position, the hiring unit must conduct a Competency-Based Interview with that proposed candidate before making any submission to a Compliance Review Body. ...

23. UNDP's People Realignment Policy and Processes states in relevant parts:

For the purposes of the structural change, the People Realignment Policy and Processes temporarily suspends related UNDP guidelines, frameworks and policies concerning

recruitment and separation unless specifically referred to in this document. All decisions and actions will be taken in accordance with the principles set forth in the People Realignment Policy and Processes.

3.3 Applying for positions

a. Eligible staff members may apply for up to three positions, either at the same time, or during subsequent rounds of the Job Fairs.

...

4. Interview Report / Desk Review Report and Recommendations

4.1 Once the interview or desk review process is concluded, a report will be prepared, signed by all panel members and submitted to the Bureau Director for review.

Scope of the case

24. In his application, the Applicant identified the contested decision as, specifically, the “[d]ecision not to award [him] the [DM] position,” of which he was notified in writing on 24 September 2015. Therefore, this case is not an appeal against the abolition of the Applicant’s post or the resultant decision to terminate his contract and separate him from service effective 31 July 2016. This case concerns the selection for the DM post, the main question being whether the Applicant was properly considered for it.

Compliance with the staff rules on retention of permanent staff

25. The Applicant submits that the DM post should not have been advertised globally, and that he should have been given the post on a priority basis as a permanent staff member on an abolished post. He further submits that, when the DM post became available again, UNDP should have established his suitability based on a desk review exercise, which would have found him suitable based on his excellent performance record, his experience in similar functions, his applicable skills, and his status as a permanent staff

have been found suitable when the DM post became available in 2015 had he been considered under the framework of staff rule 13.1(d) as a permanent staff member, without having to engage in a full competitive process with non-permanent candidates. However, and of utmost importance, is the reality that the Applicant lost a fair chance to be selected based on such a desk review.

31. The Respondent referred to various UNDP internal policies and guidelines, including its “Recruitment & Selection Procedures—Remaining Vacancies from Structural Job Fairs” policy, which provides at paras. 1 and 2 that “[h]iring units may advertise approved positions internally/externally” and that “[f]or all positions at the P-5 level and above, hiring units may choose to conduct Competency-Based Interviews to assess candidates.” However, these procedures are not aligned with—and are, in part, contrary to—staff rule 9.6(e) and 13.1(d). This becomes apparent when one refers to para. 4 of the same document, which states that “[s]hould a Desk Review panel determine that an external applicant is the top-rated candidate for a position, the hiring unit must conduct a Competency-Based Interview.” Staff rules 9.6(e) and 13.1(d) do not envisage a situation whereby permanent, continuing, or fixed-term staff members on abolished posts would be forced to compete with an external candidate for an available post. If a permanent staff member whose post has been abolished is suitable for an available post, she or he “shall be retained,” always bearing in mind that the order of retention gives permanent staff members priority over other categories of staff.

32. The purpose of a structural change exercise is to find alternative employment for staff affected by abolition of posts. This goal is consistent with the requirements of staff rule 13.1(d). However, if a permanent staff member remains without a post after the completion of a structural change exercise, UNDP still maintains its obligation under the Staff Rules to make good faith efforts to retain this staff member. UNDP was fully aware that the Applicant

November 2014, and the decision not to selection the Applicant for the DM post nine months later, in August 2015.

36. With respect to the second reason proposed by the Applicant for the alleged bias—as a reaction to his complaint as a member of the Compliance Review Board—the Respondent submits that the Applicant was interviewed on 27 August 2015, one day before he raised his objections in relation to a separate selection process as a Compliance Review Board member. Mr. Ruiz testified, and this evidence stands unrebutted, that the panel finalized its evaluation of the Applicant’s interview the same day he was interviewed. This undermines the Applicant’s claim of retaliation, since his complete interview evaluation, indeed, pre-dated his comments as a Compliance Review Board member, made on 28 August 2015.

37. At the hearing, both Mr. Martinez-Soliman, the hiring manager for the DM post, and Mr. Ruiz, one of the members of the interview panel, denied any improper influence or bias in the selection process. Mr. Martinez-Soliman testified that he considered the Applicant to be a strong candidate and was pleased that he had applied. Mr. Martinez-Soliman’s evidence was that, had the interview panel found the Applicant suitable and recommended him, he would have had no concerns as he considered him a good and reliable colleague and a strong contender for the DM post. Mr. Martinez-Soliman testified that he had asked to add additional candidates not because he considered them suitable or preferred any of them, but only because he deemed them as “plausible candidates,” and because UNDP wanted to see a broad pool of candidates, with at least one female candidate, as per UNDP’s standard policies. Mr. Martinez-Soliman testified that he did not have any preferred candidate in mind. His only guidance to the interview panel was to ask probing questions at the interview and to get the best candidate for the job, whoever it may be.

38. The Tribunal finds that there is insufficient evidence in this case to establish that the selection process was tainted by bias against the Applicant.

Relief

39. The Applicant seeks rescission of the contested decision with retroactive payment of salary or, alternatively, compensation in the amount of two years' net base salary plus all entitlements, as well as compensation for moral injury in the amount

appeals against termination of an appointment, if a finding of unlawfulness is made, the staff member's termination indemnity should be taken into account when assessing compensation (*Bowen* 2011-UNAT-183; *Cohen* 2011-UNAT-131). However, given that the Applicant did not dispute the abolition of his post and the resultant decision to terminate his appointment, the Tribunal will not take termination indemnity into account when determining compensation. As stated above, the scope of his application was limited to the decision not to select him for the DM post, of which he was notified on 24 September 2015. The subsequent termination of his appointment on 31 July 2016, approximately ten months after the conclusion of the contested selection process, is a stand-alone matter that the Applicant did not challenge before the Tribunal. Accordingly, the termination indemnity paid to the Applicant after 31 July 2016 should not be an element in determining appropriate relief.

43. As explained above, it is not the Tribunal's role to decide whether or not the Applicant should have been found suitable for the DM post. However, given all the circumstances, the Tribunal finds that, had the Applicant been afforded proper consideration for the DM post as a permanent staff member under the framework envisaged by staff rule 13.1(d), he would have had a fair chance of being found suitable. Although he was rejected for the same post a year earlier, he did acquire useful experience in 2014 and 2015, which likely would have made him a stronger candidate. The Tribunal assesses that his chance of success, had he been properly considered under the framework of staff rule 13.1(d), stood at fifty per cent.

44. There is no clarity as to the duration of the contract which the Applicant would have been placed on. Neither the vacancy published on

that the post continues to be in existence since July 2014, it follows that there is funding for it. As the Tribunal stated in *Fayek* UNDT/2010/113, in assessing compensation, certain assumptions can be made, but they must be reasonable. Normal contingencies and uncertainties that may intervene in the average working life include early retirement,

As explained above, given that the Applicant suffered no pecuniary loss until August 2016, his pecuniary loss pertains almost entirely to future earnings. Accordingly, the Tribunal will not award pre-judgment interest. However, the Tribunal shall order post-judgment rate as per *Warren* 2010-UNAT-059.

50. Accordingly, the Tribunal finds that the Applicant shall be paid seven months' net base salary as compensation for pecuniary loss.

Moral injury

51. In his application, the Applicant sought compensation for moral injury in the amount of three-month net base salary "for grave breaches of [his] staff rights and emotional distress." The Applicant referred the Tribunal to *Asariotis* 2013-UNAT-309. In *Asariotis*, the Appeals Tribunal outlined some principles of assessment of claims for moral damages, finding, however, in that particular case, that the Dispute Tribunal's award of damages in the amount of CHF15,000 was not warranted.

52. Having considered the evidence in this case and the jurisprudence of the Appeals Tribunal on issues of relief, the Tribunal f (ensation aw)NATount of

