UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/039/ JAB/2008/080 & UNDT/NY/2009/117

Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

RULING ON PRODUCTION OF DOCUMENTS

Counsel for applicant:
Francois Loriot

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. The applicant began service with the United Nations in August 1974. From 1993 to his retirement on 31 July 2008, he held a D-2 post as Director of a Division. His applications separately concern his non-selection for the post of Assistant Secretary-General (ASG) in the Department of Economic and Social Affairs (DESA) in 2007 and the decision to withhold USD13,829 of entitlements upon his retirement in 2008, pending the conclusion of disciplinary proceedings against him, which were instigated based on a report of the Office of Internal Oversight Services (OIOS). This ruling deals with the issue whether the documents concerning his consideration for the ASG post and ultimate non-selection should be produced to the Tribunal and, if so, the extent if any to which he should have access.

Facts and contentions

The doubts about this question arise from the way in which, on behalf of the Secretary-General, the Administrative Law Unit approached the facts, making at an early stage what is now said to be an untrue statement.

9. It seems to be self-evident that the documentary material sought will disclose whether or not the publicity was a material factor in the decision not to shortlist the applicant, and thus the decision of the Secretary-General not to appoint him. I can understand the concern of the respondent that, because of the need to prove a negative, it might need to disclose material which, for a number of good reasons, including the privacy of the persons involved, should be kept confidential. However, this concern can be addressed – as conventionally occurs in domestic jurisdictions – erstanurTdso695 0 uld be kpt

> treated can never be relevant, as such a decision is not one that is open to challenge. [emphases in original]

The first sentence of this astonishing submission is correct. It is the only sentence that is. Not surprisingly, no authority was cited. It also misstates the issue in the case. It is not a question of

time when the King asserted absolute power and the judges could be dismissed at the royal whim.

13. The position of the Secretary-General was made clear by the Charter itself in article 97: he is the *chief administrative officer* of the Organization. He is no doubt an important official but his office is not in any respect analogous to that of a Head of State. In respect of his functions, though he has a wide discretion, he is as subject to the rules, regulations and administrative issuances as any staff member and he is answerable to the Tribunal in respect of any administrative decision he makes affecting the employment of a staff member of any level. The Statute of the Tribunal makes this clear beyond argument. This is not to say, of course, that the Tribunal will exercise the discretion of the Secretary-General for him. But, to suggest that the Tribunal has no jurisdiction to determine whether a discretion which has been personally exercised by the Secretary-General has been lawfully exercised in respect of an administrative decision because his status is akin to that of a Head of State, is to attempt to fundamentally change the plain language of the Statute which creates the Tribunal and confers its jurisdiction, in which no distinction whatever is drawn between administrative decisions of the Secretary-General and administrative decisions made by other officials.

14. The administrative decisions of the Secretary-General, like those of any other decision-maker, must be made lawfully. At the most fundamental level, this means that his discretion, where it exists, must be exercised reasonably for the purpose for which it is conferred. Although usually stated as additional requirements, the following legal prerequisites are really instances which apply this fundamental rule: the decision must not be marred by extraneous or irrelevant considerations; it must take into account all significant relevant matters; it must not be affected by a mistake of significant fact or law; and it must not be such that no reasonable decision-maker would make it. (For convenience, I refer to these requirements as “the rules of propriety”.) I observe that, although these rules aise-ft fact o5 n9ant relevantTw 11.490 0 Td[(etxrersed

General (and all officials of the Organization) powers defined by legal instruments and administrative issuances that form part of the contract with the Organization's employees.

15. Counsel for the respondent urged on me the relevance of administrative law notions in determining the content of the contractual rights and obligations applicable to staff members of the United Nations. I have discussed this issue elsewhere (see *Wasserstrom* Order No. 19 (NY/2010)) and do not intend to repeat what I there said except to point out that the notions of administrative law were developed in the context of mediating between the State on the one hand and the subject on the other. In no sense whatever is a staff member a subject of the United Nations. The relations between State and subject are fundamentally different from the contractual relationship of employer and employee, in which – in law – each party is on the same level, with the rights of one reflected in the obligations of the other, and determined by a Tribunal in which the lowest grade General Service employee stands equal in every sense with the United Nations itself.

16. At all events, counsel for the respondent did not refer to any principle of administrative law that illuminates the present issue. Of course, questions of privileged communications often arise in administrative law cases, but they are not resolved by the application of administrative law principles, but by general principles which are applicable across the common law. I did not, by making a remark as an aside during argument suggesting the irrelevance of administrative law, intend to provoke a submission on the point although, of course, I am happy to receive anything that deals with a matter actually in issue.

17. I deal below with what I regard as the appropriate approach to the conditions of the contract of employment between the Organization and its staff members concerning issues which, elsewhere, attract the language of public policy. For the present it is enough to say that no right or obligation deriving from an employment contract with the United Nations can be affected by any notion of public policy. In

its character *as an employer* the United Nations is simply a corporation although, it may be, incorporated by international law and thus not accountable to any legal system but its own. The Tribunal is not concerned with the role of the United Nations in international affairs; it is concerned with the rather more humble question

19. The respondent does not seek to make the argument, at least at this point of the proceedings, that taking into account adverse but unjustified publicity reflecting unfairly on the reputation of the applicant as a significant factor tending against the applicant being considered as suitable for appointment was nevertheless lawful. (For obvious reasons, it is at least fairly arguable that it is, depending on the way it was done.) The respondent's argument is far more fundamental: whatever the Secretary-General took into account to reject the applicant's candidacy, however unreasonable, irrational or affected by immaterial prejudice is irrelevant, since the issue is not justiciable and he is politically but not judicially answerable for his decision. This argument is utterly and fundamentally wrong and must be firmly and unqualifiedly rejected.

20. Another basic problem with the respondent's submission is that it is conceded that the Secretary-General did not consider the applicant's candidacy, since his name was not on the shortlist of candidates recommended by the selection committee. If this be true, the crucial decision is whether the applicant was excluded from the shortlist by the selection committee for an irrelevant or extraneous reason. It does not seem to be submitted, as I understand it, that the selection committee is in the same position as that of a Head of State. Accordingly, the respondent seems to have taken the high ground upon an irrelevant mountain. Even so, because of the importance of the point, it was necessary to deal with it. I add, for completeness, that I do not think that a selection committee can be regarded, in any relevant sense, as akin to a Cabinet or that either the situation of the committee or officials of the EOSG advising the Secretary-General is analogous to a senior civil servant advising a Minister.

Confidentiality and immunity from disclosure

21. This is a more substantial point. The respondent puts the argument thus –

> 16. The Secretary-General and his close advisers must have the ability to engage in a candid interchange amongst themselves to fulfill their duties and to carry out decision-making without risking any potential chilling effect that may result from the fears of senior officials and the

23. In *Ali Khan* (1983) ILOAT 556 the complainant, who occupied a P4 post, unsuccessfully applied for a vacant P5 position and submitted an "internal" complaint to the Director-General which, it appeared, covered both his disappointment and a number of grievances concerning his career with the Organization. His complaint was rejected. He sought from the Tribunal an order for disclosure of: (a) the full text of the inquiry into his internal complaint, as well as any other relevant papers and the Director-General's decision; (b) the report of the selection board and all documents, submitted to it; (c) a statement of the reasons for his elimination; (d) the report or reports of the Administrative Committee to the Director-General and his decisions on them; (e) all reports of the juries in competitions which he had entered since 1964; and (f) the "secret file" maintained by the Office on the complainant.

24. The Tribunal found that, in relation to (a), no such document existed. In relation to (b), the Tribunal noted that the Organization had produced a report by the selection board, with all names other than the complainant's obliterated, which gave as the reason for his elimination "lack of actual socio-economic research experience" and stated –

> 4. … The complainant may not obtain any further explanation. In particular he has no right to know the identity of all the candidates who were eliminated, who may have good reason to wish to remain anonymous. Nor is he entitled to consult any record there may be of discussion by the selection board. Members of selection boards would not feel free to discuss candidates independently in future if they were at risk of having their personal views divulged.

Access to further information as to the reasons for the complainant's elimination was also denied upon the same basis.

25. Objection was also taken to production of the material in (d) upon the basis that it was confidential and added nothing to what the complainant already knew. However, production was ordered, as the Tribunal "[felt] bound to verify this contention", then having determined to decide whether it would be included in the dossier of the case. As to (e), the documents were found to be immaterial.

An item that forms part of the decision may not be withheld from the Tribunal's scrutiny. That holds good for the Joint Appeals Committee's report as well … There shall therefore be further submissions to complete the case records, the Union being required to

> 11 … [An] item that forms part of the proceedings that led to the impugned decision may not be withheld from scrutiny by the Tribunal. That holds good for any appellate body. So the Administration ought to have disclosed to the … Board the documents it required to enable it to take up the complainant's appeal properly.
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> 12 That rule applies equally to the views expressed by members of the ad hoc selection committee. Since there was a right of appeal against the selection based upon the committee's recommendation, both the regional and the headquarters Boards were entitled to review the reasons of the selection and for the recommendation so as to ascertain whether there had been some fatal flaw, such as an error of fact or law, personal prejudice or arbitrariness. The failure to disclose the views expressed by those who had made the recommendation frustrated the appeal proceedings.

33. Accordingly, the Tribunal concluded that there was no proper examination of the complainant's appeal by the regional or headquarters Boards and required them to take up the appeal anew in light of the full records of the ad hoc selection committee's proceedings.

34. No reference was made in *Der Hovespan, Morris (No.2)* and *Malhotra*

selection committee's report, but objected to disclosure to the complainant on the ground that the committee's records were privileged. In this respect, the Tribunal stated –

> 6. As a general rule, a complainant may not be entitled to consult any records that may have been made of discussions by a selection committee: members of such committees would not, feel free to discuss candidates independently in future if they felt at risk of having their own views divulged: see *Ali Khan*.
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> 7. The Tribunal is satisfied that the plea of privilege can be sustained. The documents which were before the Selection Committee and which referred to the complainant consisted of documents she had herself submitted. There were also reports on the interviews with her on 21 April 1994, and they are privileged for the reason set out in 6 above. The privilege that protects the Committee's actual deliberations must cover also interviews held in preparation for its meeting.

36. It seems clear that the thrust of these judgments is, at least, that the relevant material should be provided to the Tribunal, if not to the staff member. *Ali Khan* does not refer to this distinction but, as I think, cannot be regarded as contrary authority, having regard to its silence on the point. Moreover, if the rule stated in that case were absolute, it would effectively destroy the ability of a staff member to appeal a decision of appointment or promotion. More fundamentally, it would undermine the jurisdiction of the Tribunal to make determinations of the lawfulness of such decisions, which is an obviously important part of the work entrusted to it by the General Assembly.

37. There are three other relevant considerations. The first is that the administration of justice necessarily involves the ascertainment of the truth where to do so is necessary in the interests of a just outcome, and this means that all relevant information should be provided to the Tribunal unless the circumstances are truly exceptional and the Tribunal is unable to make adjustments to satisfy considerations of confidentiality or privacy. The second consideration is that a staff member must be entitled to a fair hearing and to present a case which brings to bear all the facts that favour, or might favour, the conclusion for which he or she contends. Although in

other jurisdictions these considerations might be described as "public policy", it is not necessary to base them on such a concept within the United Nations justice system. They are inherent in the system itself and necessarily implied by the creation of the jurisdiction of the Tribunal by its statute. Accordingly, they are part of the bundle of legal rights and obligations forming the contractual conditions of employment. This is both a necessary and sufficient basis for the application of these considerations by the Tribunal.

38. The third consideration is more directly concerned with the process of selection and deals with the knowledge of the members of the committee that their deliberations and reports might be disclosed to the Tribunal and, potentially, to staff members. Those deliberations and reports might contain critical, even harsh, references to candidates, which it could well be embarrassing to disclose and which the committee members would wish to be kept confidential, because it might be that, in the future, they have to deal with a staff member who is the subject of this criticism. This risk is very real where those members are chosen from within the Organization and sometimes within the very office in which candidates work and may be compounded where the selection of senior staff is concerned. It may readily be accepted that members might well feel inhibited from candidly expressing their opinions if they fear that they might be disclosed to the person affected and I accept without difficulty the contention that this inhibition is contrary to the good administration of the appointment and promotion process. Selection of staff members for posts is a difficult process, requiring exercise of good judgment and necessarily involving matters of impression. It is an inherent feature of using committees to make recommendations that the Organization has the benefit of shared judgment, so that a possibly unfair or mistaken impression from one member will be corrected or balanced by the impressions of the others, each bringing to the discussion the particular insights derived from their knowledge and experience.

39. It is obvious, therefore, that committee members must be free to discuss candidly the attributes, both positive and negative, of the candidates for selection, and

that confidentiality is therefore an essential part of the process. At the same time, it is also essential that the process not be marred by procedural or substantive errors and that staff members be entitled to a determination by an independent Tribunal of a complaint that the decision which affected them erred in these ways. Such a determination must depend upon the ascertainment of the relevant facts and, accordingly, of what was done by the committee, as well as the advice tendered to and relied on by the decision-maker. This is not to say that there are not significant advantages in the committee members appreciating that since, if litigation should ensue, their deliberations – at least so far as they have been recorded – will be seen at least by the Tribunal and possibly by the staff member affected. This will help to ensure that what is said is measured and reasonable and does not contradict or undermine the fundamental values of the Organization. If what is said is measured and reasonable no member need fear the risk of embarrassment from disclosure of the records to the Tribunal.

40. It follows that all such relevant material will always be required to be produced to the Tribunal, since such production does not breach any relevant confidentiality or privilege and the Tribunal, it goes without saying, will keep confidential all that material which, in its opinion, should remain so. It is a fundamental feature of the administration of justice that the decision as to what material is relevant and should be produced and what part of it, if any, should remain confidential, is for the Tribunal, and the Tribunal alone, to determine. It is not necessary for present purposes to identify the relevant principles applicable to the latter question. It is enough to say that it cannot be for the respondent to decide.

41. Hitherto, as I understand it, the Administration has invariably produced documents relevant to a selection, including those recording the deliberations of a selection committee, to a JAB considering a staff member's appeal against non-selection, where they were material, with irrelevant content excised. I assume that, if the JAB so requested, some or all of the excised material would al

particular (for the purposes of the present case), of establishing that irrelevant matters were not taken into account. The absence of evidence capable of satisfying this burden has obvious consequences for the outcome of the case and it matters not that it has not been produced because it is privileged.

44. Of course, only that part of the material which is relevant to the particular issue in the case needs to be disclosed to the applicant. It must be established at the outset that there is at least a reasonable possibility that the material sought is relevant to the issues in the case and capable of assisting the staff member. Where there is an issue about this, the material must first be produced to the Tribunal to be examined by the judge. If the judge finds that it irrelevant, or does not assist the applicant, access to the staff member should not be granted and only that part which does assist the applicant's case should be disclosed.

45. It is not altogether clear whether the respondent argues in this case that the privilege against production, formulated as an absolute rule against production even to the Tribunal, applies to all appointment or promotion cases or only those of ASG and USG. I am unable to see any difference in principle between the requirements of confidentiality in the ordinary case and those applying at the senior level. These officials are staff members and applicants for these posts are entitled to the same rights as all applicants for any post. Nor is there any difference in the obligation of the Organization and the Secretary-General to comply with the rules of propriety. There is nothing in the Charter, the regulations, the rules or any administrative issuance that suggests any such difference in legal obligations.

IT IS THEREFORE ORDERED THAT —

46. The respondent is to produce to the Tribunal by close of business Friday, 5 March 2010 the documents considered by the Selection Committee, the records of the deliberations of the Committee and any communication by it to the Secretary-General together with the documents prepared by officials in the EOSG relating to the appointment of the ASG/DESA.

47. I will then determine what parts, if any, should be disclosed to the applicant and under what conditions. Before granting access, if any, the respondent will be notified of those parts intended to be disclosed and invited to make a confidential submission giving particular reasons why, it is contended, access to an identified part should not be granted.

(*Signed*)

Judge Adams

Dated this 3rd day of March 2010