UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/085
Order No.: 289 (NY/2010)
Date: 29 October 2010
Original: English

**Before:** Judge Marilyn J. Kaman

**Registry:** New York

**Registrar:** Morten Albert Michelsen, Officer-in-Charge

APPLETON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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**ORDER**

**ON RECEIVABILITY**

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**Counsel for Applicant:**
George Irving

**Counsel for Respondent:**
Alan Gutman, ALS/OHRM, UN Secretariat
Steven Dietrich, ALS/OHRM, UN Secretariat

**Introduction**

1. On 30 July 2010 the Applicant filed an application with the UN Dispute Tribunal, challenging "the decision of the Secretary-General to reject [the Applicant's] nomination for the post of Director, Investigations Division, Officer of Internal Oversight Services … ".

2. On 30 August 2010 the Respondent filed a reply asking the Tribunal to find the application not receivable, on three main grounds:

a. it is time-barred (ratione temporis);

b. the Applicant has no standing as he was not a staff member at the time of the contested decision (ratione personae); and

c. no administrative decision has been taken (ratione materiae).

The Respondent's reply sought to reserve his right to respond to the merits of the case in the event the Tribunal considered the application receivable.

3. In accordance with the Tribunal's further orders, the Applicant filed a response on 24 September 2010, with the Respondent being granted leave to file a response to this submission by 11 October 2010, which he did.

**Facts**

4. The post of Director ("the Post"), Investigations Division, Officer of Internal Oversight Services ("ID/OIOS"), has been vacant since the former incumbent separated from service on 31 July 2006.

5. On 3 October 2006 the Applicant joined the Organization as the Deputy Director of the Procurement Task Force in OIOS ("PTF/OIOS") at the D-l level and was appointed Director of PTF/OIOS at the D-2 level on 6 April 2007.

submits that the panel interviewed four candidates, including two female candidates. On 19 June 2009, the USG/OIOS provided a record of evaluation of eight candidates, including the four candidates who had been previously interviewed and requested approval to appoint the Applicant as her only recommended candidate for the subject Post. This evaluation was forwarded to the SRG for its review in accordance with ST/SGB/2009/2.

15. On 18 February 2010, the SRG allegedly informed the Secretary-General that it was not in a position to make a recommendation on the case on the basis that "the USG/OIOS continued to recommend only one candidate", which was not "in line with the policy and practice for the filling of D-2 positions".

16. By letter dated 18 March 2010, the Applicant requested that he be informed of the outcome of the selection process. On 29 March 2010, the Applicant sought management evaluation of the decision not to select him for the Post. By letter dated 13 April 2010, OHRM informed the Applicant that the selection process remained ongoing, and that he would be informed once a decision had been made.

17. On 14 July 2010, the USG/OIOS' term of appointment expired and she separated from the Organization. At present the selection process under the Second VA has not been completed and the Post remains unfilled.

**Applicant's submissions**

18. The Applicant's principal contentions may be summarised as outlined below.

19. The Respondent makes a number of factual assertions without any proof, including relating to the gender of candidates in the First VA and conversations had by or with the USG/OIOS. There is no evidence the First VA was cancelled.

20. The Administration viewed the selection exercises under the First and Second VAs as one exercise; the terms "first/second selection exercises" (used by the Respondent) are an intentional misrepresentation. The Applicant was repeatedly

advised that the process was continuous and ongoing and that he need not re-apply for the readvertisement. The purpose of the re-circulation was, ostensibly, to obtain a wider pool of candidates, not to cancel the previous process. The initial application that was accepted was from a serving staff member. His re-submission was merely to reaffirm his interest and to avoid any clerical error.

21. What constitutes an administrative decision "will depend on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision" (stated in UN Appeals Tribunal Judgment *Andati-Amwayi* 2010-UNAT-058). The refusal to endorse his candidacy is a decision within the plain meaning of that term and directly and adversely affected the Applicant's career, leading to his separation from service. Further, a non-decision is an administrative decision subject to legal challenge: former UN Administrative Tribunal Judgment No. 818: *Paukert* (1997). The Respondent may not hide behind his own refusal to act. The Respondent believes that by withholding information, ignoring requests and refusing to take action, he can insulate himself from accountability. This becomes even more egregious when the Respondent later attempts to put a different spin on his actions to imply that no decision has been taken while keeping the Applicant and the programme manager waiting for over two years until the passage of time removes the obstacles to a predetermined outcome. This represents a violation of the basic duty of care of the Respondent to act fairly and in accordance with the rules he himself has established.

22. In relation to the time bar issue, the Applicant was never advised that there was any final outcome from the initial circulation of the First VA. The Applicant logically could not have contested the results of the First VA because that process and what followed subsequently were part of the same selection process. The Applicant was advised by the Administration (the OIOS Selection Panel) that the two rounds were connected, and that it was one recruitment exercise that was ongoing. He again participated and was again selected. He is not contesting the initial process; he is contesting the failure to act on the final selection made by the USG/OIOS.

23. The Respondent also tries to evade responsibility by suggesting, with no proof, that the programme manager, the USG/OIOS, informed the Applicant of his status and that the Galaxy listing indicated that "the vacancy had been cancelled". A vacancy cannot be cancelled; only a VA can be cancelled. But even that has little

make a recommendation to the Secretary-General is not an administrative decision within the meaning of Article 2 of the Statute. The fact that no decision had been taken was conveyed to the Applicant on 13 April 2010 when OHRM informed him that no decision had been made. As articulated by the Dispute Tribunal in the case of *Planas* UNDT/2009/086 (affirmed in *Planas* 2010-UNAT-049), "[o]nly if the Applicant contested the outcome of the se

Failing to follow the specified rules of procedure could, in some circumstances, prohibit the Respondent from a further reply. In this instance, the Tribunal will allow the Respondent to make further submissions after this finding of receivability, but the parties should note this Order as confirmation of the proper procedure, and the potential consequences of failing to adhere to it.

*Administrative decision challenged*

33.

Applicant was not selected following the second interview process and given the time lapse since the conclusion of that process.

*Objection to receivability ratione personae*

36. While it is true that there was a cancellation of the First VA and then the issuance of the Second VA, it is not accurate to consider these exercises as entirely separate or distinct events in the current context. The Post and its functions as advertised under each VA were the same. It is not suggested that the content or wording of the VAs was substantively different; rather, the Respondent says that the Second VA was issued merely to attempt to

38. The Respondent's argument that there was a separate VA number in the Second VA is indicative only of the fact that the Respondent chose to provide it another number for administrative purposes; in substance, it was the same VA, in his own words, "recirculated". Neither is it determinative that the Applicant "reapplied" to the second VA when he was not required to; his diligence in seeking to protect his rights should not be cast as his waiver of them.

39. Even if the Tribunal were to accept the Respondent's argument that the Applicant was time-barred from challenging the cancellation of the First VA as a discrete administrative decision (which, as discussed below, it does not), the Applicant's present challenge would still be accepted as receivable. This is because, on the basis of the reasoning outlined in the preceding paragraphs, the Tribunal finds that in respect of the Applicant's individual candidacy for the Post, the selection process was a singular ongoing one and his right to be considered as a candidate under the First VA – i.e. while he was a staff member – accrued at the time he was advised that he did not need to reapply for the new VA. On this basis, the case is different to those cited by the Respondent (above: *Basenko, Roberts* and *Gabaldon*) and the Respondent's argument that the ongoing selection (as he refers to it – the Second Selection Process) was unrelated to the Applicant's terms of employment at the time he was a staff member, is incorrect. On the contrary, there is a direct nexus between the Applicant's application for the Post at the time he was a staff member and the ongoing consideration of his candidacy, even once he had separated.

*Objection to receivability ratione temporis*

40. The Tribunal notes that the Respondent has not raised *ratione temporis* objections in relation to the request for a review of the ongoing selection process, but only the challenging of the cancellation of the First VA. Although it is difficult to ascribe a date to the decision, the Applicant enquired on 18 March 2010 as to the selection process' outcome, noting that he w

day. As stated by the UN Appeals Tribunal in *Schook* 2010-UNAT-013, time limits can only be enforced against a written decision. The Applicant's request for management evaluation of the decision not to select him could only be made in response to the written communication of such a decision, which was not provided until he sought confirmation by way of his letter of 18 March 2010. His seeking of management evaluation in relation to the response to this letter (whether considered as the actual response, or the failure to respond) was within time. For completeness, the Tribunal notes that even if the Tribunal had held the Applicant was not able to challenge the selection process under the Second VA as he was not a staff member at the time, his challenge of the cancellation of the First VA would be found to have been within time, as the Respondent did not ever notify him in writing of the cancellation of the First VA. The fact that there was an edit to the internet version of the First VA showing the word "cancelled" does not satisfy the requirement for written notice.

*Objection to receivability ratione materiae*

41. Having identified the decision challenged, finding it within time for challenge, and that the required nexus exists with the Applicant's contract of employment, it is necessary to turn to the Respondent's other *ratione materiae* objection: that the

individual application incorrect, but in any event, the Tribunal in this case has noted how the decision at issue specifically affects the Applicant and his appointment. The Tribunal also reiterates that if the Organization's action causes a breach of a staff member's terms of appointment, it should not matter whether the breach affected one or several staff members, as the Statute of the Tribunal does not draw such a distinction (discussed by this Tribunal in *Jaen* UNDT/2010/165 (para. 22 – 23)).

42. Finally, the Respondent argues that neither the Secretary-General nor the SRG have taken a decision on the Post, as the SRG has been unable to make a recommendation due to the relevant procedures not being followed. Pursuant to sec. 3.1 of ST/AI/2006/3 (in force at the time of the commencement of the selection process):

> The process leading to appointment or promotion to the D-2 level shall be governed by the provisions of the present instruction, except that the functions normally discharged by a central review body shall be discharged by the Senior Review Group, prior to selection by the Secretary-General.

Pursuant to sec. 9.1 of the same instruction:

> The selection shall be made by the official having authority to make the decision on behalf of the Secretary-General when the central review body finds that the evaluation criteria were improperly applied and/or that the applicable procedures were not followed.

43. By analogy, the Secretary-General is able to make a decision (or for one to be made on his behalf), absent the SRG's recommendation. He has not, and this failure to decide is an administrative decision. The Respondent's attempt to apply the reasoning in *Planas* UNDT/2009/086 is unsuccessful, as that case's outcome was based on the fact that the Applicant had not applied for a specific post – here it is unchallenged that the Applicant has.

**Order**

44. The Tribunal finds that the Applicant validly challenges an administrative decision within the meaning of art. 2.1(a) of its Statute, being the decision not to select him for the Post.

45. The parties are directed to appear before the Tribunal on 9 November 2010 for the purposes of a case management conference.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 29th day of October 2010