



Introduction

1. The Applicant is a Financial Policies and Procedures Specialist at the P-4 level in the Department of Management Services (“DMS”), in the United Nations Population Fund (“UNFPA”). Given that the Applicant has not been encumbering a specific post since 2006, whilst holding a permanent contract with the Organization, DMS attempted to put an end to this situation by creating a post with a job description which included th

previous appeals against non-promotion decisions as well as his non-selection for the P-5 post in 2011 due to the cancellation of the recruitment exercise.

6. On 3 August 2012, the Respondent filed his reply. The Respondent contended that the application is without merit and that the Applicant's claims relating to previous administrative decisions are time-barred and those relating to the decision of 5 January 2012 are not receivable.

Procedural background

7. The case was assigned to the undersigned judge on 1 April 2014.

8. A Case Management Discussion ("CMD") was held on 10 June 2014 to identify the claims and issues in this case. It was agreed that the Applicant's claim was limited to the above-mentioned three administrative decisions. The parties agreed that those claims were receivable.

9. Counsel for the Applicant confirmed that all other issues raised in the application were not separate causes of action for which a judicial determination was required, including issues relating to his non-selection to the P-5 post and the alleged retaliation. However, they constituted relevant background information enabling the Tribunal to make a determination on the claims and issues raised in the application, including whether the procedures adopted in relation to the claim identified in para. 3 conformed with due process requirements. The Applicant further confirmed that the allegation of DOS's bias against him was necessary contextual and background evidence relevant to the motivation behind the cancellation of the P-5 selection and the classification of the post at the P-4 level.

10. The Tribunal took note of all issues raised by the Applicant. Matters that were not directly relevant to the facts in issue were considered to the extent necessary in order to clarify and understand the context of the justiciable claims and the behavior and motivations of individuals involved, including the Applicant and

those senior to him in the hierarchy as well as their interactions with the chairman of the staff council in furtherance of the Applicant's interests.

11. Counsel for the Applicant asserted that there was a "corporate decision" that the Applicant was the preferred candidate and would have been appointed but for the intervention of DOS, which was, it is alleged, motivated by extraneous factors, possibly related to the Applicant's activities as a member of the staff council. The Applicant implied that he was subjected to retaliation because of his activities as a member of the staff council.

12. By Order No. 139 (NY/2014) of 11 June 2014, the parties were requested to provide further particulars in relation to the legal and factual issues arising in the case. The Applicant was specifically requested to provide particulars regarding the basis upon which he had reason to believe or, alternatively, had been informed that he was the preferred candidate for the P-5 post and that, but for the intervention of DOS, he would have been appointed.

13. The case was set down for a hearing on 6 and 7 July 2014. The parties filed their responses to Order No. 139 (NY/2014) comprising, in essence, a repetition of arguments previously put forward. The Tribunal observes that Counsel for the Applicant evaded compliance with that part of the Order requiring direct clarification in support of his contention that there was a "corporate decision to appoint [the Applicant]".

14. The Tribunal heard the following witnesses: the Applicant; Mr. Subhash Gupta (DMS Director); Mr. Andrew Saberton (Chief, Finance Branch in DMS) and Ms. Lise Lapointe (independent and external classifier, consultant to UNFPA).

Findings of fact and consideration

a. *The decision to classify the newly created post at the P-4 level*

15. There are two issues arising in relation to the classification of the post to which the Applicant was assigned, namely whether the classification procedure conformed with due process requirements and whether the subsequent decision to classify the post at the P-4 level was motivated by ill will against the Applicant or for any other extraneous considerations.

16. Paragraph 1 of UNFPA Policies and Procedures Manual (Policy on Personnel of UNFPA: Fixed Term and Continuing Appointments: Staffing) provides that:

No selection process should commence without an available, budgeted, classified and approved post. The post should be supported by an up-to-date post/job description, which describes the responsibilities and required competencies of the incumbent. *The post description is subject to classification under the applicable International Civil Service Commission (ICSC) standard* [emphasis added].

17. The Applicant joined UNFPA in 1994 and was promoted to the P-4 level in January 1994. The Applicant has been a member of the staff council since 2000.

18. On 4 June 2006, Mr. Subhash Gupta, DMS Director, granted the Applicant's request to continue working under the supervision of Ms. Diane Kepler the then Chief, Finance Branch. However, Mr. Gupta indicated via email to the Applicant that his position was to be financed as a "supernumerary position" within DMS. The Applicant was not encumbering any budgeted post.

19. During cross-examination by Counsel for the Applicant, Mr. Gupta explained that it was not his decision to transfer the Applicant to a "supernumerary position". He was told by the then Executive Director, Ms. Thoraya Obaid, that there were some serious personality issues in UNFPA Audits Branch where the Applicant was working. Mr. Gupta was asked to consider whether the Applicant "would be a fit for

the Division because he had to be moved out”. Mr. Gupta consulted the then Chief of Finance but there was a “very negative reaction from everyone about the fit of [the Applicant] in the Finance Branch because they were quite familiar with him”. However, the Executive Director was quite determined that it was the only solution to resolve the situation which, Mr. Gupta was told, was very difficult in Audits Branch as “they were not prepared to continue with [the Applicant]”. Mr. Gupta explained to management that there wa

almost a year, indications were given to [the chairperson of the staff council] and [the Applicant] not to be concerned since a solution for [his] situation would be imminent. The continued delay in finalizing a job description (I prepared a draft in May 2008) prevents [his] career advancement. It also reflects badly on the UNFPA staff management relations because it has become more and more difficult to respond to staff queries on questions why [he] still not encumber a classified position [*sic*]. [His] particular situation is the reasons why UNFPA staff do not offer to serve in the Staff Council.

...

23. On 3 March 2010, Mr. Hand responded that, in an effort to address the Applicant's concerns and given the significant need for staffing resources in the Finance Branch, especially in the area of financial policies and procedure, it has been agreed that Ms. Kepler would explore the possibility of creating a dedicated post for this area and provide a suitable job description.

24. Following this, the Applicant requested the latest copy of the job description so that he could replace the functions relating to the MRT project with responsibilities in the area of policy and procedure. Ms. Kepler complied with this request on 5 March 2010. The same day, the Applicant provided his comments to Ms. Kepler, indicating that the job description remained fairly similar to the previous one prepared for the MRT project.

25. Mr. Gutpa explained that there was a common understanding that the job description that was being prepared was to reflect the duties and responsibilities of a P-4 level post. The funding in the budget was for a P-4 level post.

26. In such circumstances, the Applicant could have been directly placed against this post since no competitive process would have been required. Mr. Gutpa further stated that the Applicant had been fully consulted about the level of the post.

27. On 25 March 2010, Ms. Kepler sent the revised job description to Mr. Hand. On 5 April 2010, Ms. Serina Choo, Chief of Recruitment and Staffing Branch, DHR, requested classification of that post from Ms. Lapointe.

28. Ms. Lapointe was an external and independent classifier working with UNFPA as a consultant. She classified positions in UNFPA using the International Civil Service Commission (ICSC) standards. She stated that she was not given any indication or recommendation as to the expected grade. She classified the post at the P-5 level on grounds that the reporting line and level of responsibilities warranted such classification.

29. Mr. Gutpa stated that he and Ms. Kepler were very surprised at the classification at the P-5 level. Mr. Gutpa explained that the chief of the division concerned is normally informed when the final classification of a post is inconsistent with the indications initially provided. He had not been consulted despite the fact that he and Ms. Kepler had clearly expressed the view, prior to its proposal to the Post Establishment Committee (“PEC”) on 24 May 2010, that the P-5 classification was inconsistent with the requirements of DMS since it would not have been in alignment with other posts in the overall structure. The incumbent of the newly created position classified as a P-5 would have to report to the then Chief of Finance who encumbered a post at the same level. It would have been inappropriate for a P-5 level staff to report to another P-5 level staff.

30. By memorandum dated 20 May 2010 to Mr. Hand, through Mr. Gutpa, Ms. Kepler requested that this position be submitted to PEC but stressed that this position should be at the P-4 level and not at the P-5 level. Ms. Kepler indicated that:

...we [she and Mr. Gutpa] believe that the appropriate classification is at the L-4 level. [...] there are presently two P5 and three P4 posts within the Finance Branch and the level and scope of responsibilities of the Financial Policies, Procedure and Controls Adviser post are consistent with those of the three existing P4 posts. The two P5 posts, which are the Chief, Budget Section and the Chief, Accounts Section, have significantly higher level responsibilities and, in addition, supervise a team of staff at the G and P levels.

31. However, the creation of the post at the P-5 level was subsequently proposed to the PEC despite strong objections from the line manager, Mr. Gutpa and the direct

supervisor, Ms. Kepler, on the grounds that such classification was being considered without seeking their views as persons with a direct and legitimate interest.

32. On 24 May 2010, the PEC comprising Ms. Purnima Mane (UNFPA Deputy Executive Director), Ms. Mari Simonen (UNFPA Deputy Executive Director, External Relations), Mr. Hand and Ms. Choo, recommended the establishment of the post at the P-5 level. This was subsequently approved on 2 June 2010 by the UNFPA Executive Director, Ms. Obaid.

33. Mr. Gutpa stated that his concerns remained unaddressed. He was not consulted when the result of the classification was inconsistent with DMS's need nor prior to the post being advertised in spite of his request to Mr. Hand that the matter of the level of the post be addressed before any progress was made on the selection.

34. On 26 July 2010, the post of Financial Policies, Procedures and Controls Adviser was advertised at the P-5 level and eight shortlisted candidates, including the Applicant, were interviewed by the selection panel in November 2010 ("Panel").

35. On 23 November 2010, following the interviews by the Panel and prior to a final decision being made on the selection, DOS received information suggesting that there were irregularities in the recruitment process. DOS considered that these

2. My understanding is that he is performing at least some of these duties already and has received positive PADs in this regard.
3. Stephan's interview ratings are good and his ratings on job knowledge and technical expertise are particularly high.
4. If an external candidate were to be placed on the post, Stephan's work functions would be significantly diminished.
5. Under the old system of justice, Stephan had already been awarded \$20,000 as compensation for the organization not having placed him in a suitable position in spite of the fact that he has a permanent contract. Under the new system (which is even more pro-employee), I fear that if an external candidate is placed and Stephan were to appeal, we would certainly lose the case given the above circumstances.

Hence, in your response to the selection, you may wish to acknowledge the Panel's recommendation but that due consideration should also be given to the internal candidates. This information would then be sent to the CRB for its comments and in turn to Thoraya for her decision (if this occurs in 2010). Given that it will be the ED making the final decision, and since I am about to depart on leave, I have taken the liberty of copying Thoraya and Mari with my views on this. The matter may (or may not) be complicated by the investigation that DOS is currently conducting into the recruitment for this post. I have not been able to speak to anyone in DOS and perhaps I shouldn't anyway, given that the recruitment procedure is still ongoing and that the CRB and ED have still to consider the matter.

In my absence on home leave, Serina can provide further information if necessary. She is ful. 2.103-13.305 be senRa.wntS305 8suinfoI

40. On 23 December 2010, Mr. Brasseur, DOS Director, requested that the recruitment procedure be suspended following allegations of irregularity, namely that the post had allegedly been earmarked for the Applicant.

41. On 29 February 2011, the Applicant was interviewed as a witness by DOS's investigators. On 2 March 2011, Mr. Gupta notified the Applicant that the selection process had been put on hold at the request of DOS.

42. On 3 March 2011, DOS completed its investigation and communicated its report to the newly appointed UNFPA Executive Director. The investigation report concluded that UNFPA Policies and standards of conduct expected of international civil servants had not been adhered to. The standards of transparency and fairness in business practices were compromised by acts which were not consistent with the proper discharge of responsibilities. DOS considered, on reviewing documents and statements provided, that there was evidence to prove an abuse of discretionary authority.

46. The new UNFPA Executive Director, Mr. Babatunde Osotimehin, took appropriate action to follow DOS's recommendation to re-evaluate the post in order to ensure that it met the Organization's needs.

47. After the cancellation of the selection procedure, Mr. Gupta asked the newly appointed Chief of Finance Branch, Mr. Saberton, to review the job description having due regard to actual business need. Mr. Gutpa stated that the Applicant had been consulted during this process.

48. Mr. Saberton explained that the job description needed to be re-drafted but was fairly similar to the previous job description classified at the P-5 level. However, according to him, if the job had remained at a P-5 level, the grade would have been too high for the functions actually being performed. According to Mr. Saberton, the position had always involved, to this day, the performance of duties and functions at the P-4 level.

49. On 9 November 2011, Mr. Saberton provided Ms. Choo with a revised description of the position of Financial Procedures and Compliance Officer for its establishment and classification.

50. On 10 and 11 November 2011, the job description was sent to two independent classifiers, including Ms. Lapointe, who both recommended that the post be classified at the P-4 level.

51. On 5 January 2012, the Applicant was notified that a post had been established at the P-4 level and that in order to remedy the fact that he did not encumber an established and classified post while holding a permanent appointment with UNFPA at P-4 level, he was assigned to this post, with effect from 16 January 2012. He was not required to compete for the post. On 6 January 2012, the Applicant was notified that due to his reassignment to a post at the P-4 level, his temporary assignment to perform functions at the P-5 level would cease as of that date and so would the payment of SPA to him. The Tribunal is satisfied that

the decision to cancel the selection procedure was properly motivated. There is no evidence in support of the allegation that such decision was biased against him or motivated by ill will.

52. Contrary to what the Applicant alleged, the Tribunal notes that, had the recruitment exercise been finalized, the Applicant could not fairly have been selected since he was performing, as Mr. Gupta explained, only some of the duties of the P-5 functions. Moreover the Panel rated him third with two external candidates rated higher than him. The score sheet of the Applicant indicates that he met about half of the competency definitions for the P-5 post. The fact that the Applicant was an internal candidate is not a guarantee that “priority consideration” would have led to his selection.

53. As stated in *Megerditchian* (2010-UNAT-088):

It should be emphasised 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.

54. Paragraph 3 of UNFPA Policies and Procedures Manual emphasized that subject to the requirements of staff regulation 4.4 and art. 101, para. 3 of the United Nations Charter, UNFPA will accord special consideration to internal applicants when filling vacancies. However, a staff member who may be very experienced and highly qualified does not have a right to be promoted although staff members do have a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper factors (*Andrysek* 2010-UNAT-070).

55. The investigation report of DOS shows that the allegations of impropriety were well-founded. Any suggestion of impropriety on the part of DOS is misconceived and the Applicant has not presented any evidence in support of such an allegation. There is no evidence that the cancellation of the recruitment exercise

was designed, as alleged by the Applicant, to downgrade the position so as to prevent his career advancement. Moreover, apart from his assertions during examination in chief, the Applicant failed to substantiate his allegations that he had been retaliated against because of his position on the staff council. On the contrary, there is clear evidence of an attempt by senior managers to appease the staff council (see *supra* para. 39).

56. DOS acted appropriately, in accordance with its mandate, to investigate the allegations of impropriety. Article 101 of the United Nations Charter places a clear duty and responsibility on the Administration to ensure that all staff, irrespective of their level or position, uphold the highest standards of integrity (staff regulation 1.1 and 1.2).

57. Above all, DOS had a duty to investigate any credible allegation of an attempt to subvert the independence and integrity of a selection exercise particularly one that involved senior staff who themselves have the duty and

against the Panel's recommendation. His refusal to do so upheld the highest standard of integrity expected from an international civil servant.

60. The Tribunal also notes with concern that genuine efforts to address the Applicant's contractual situation with UNFPA had been undermined by events surrounding both the initial classification of the post and the selection procedure. If

64. Mandatory reassignment is part of the Applicant's terms of employment. Whilst it may be preferable that such reassignment occurs with the full cooperation and agreement of the staff concerned, the placement on a supernumerary position over an extended period of time in spite of various unsuccessful efforts to address this situation warranted that the Administration uses the power conferred by the Staff Regulations and UNFPA Policies and Procedures Manual to exercise a discretion to resolve this situation in the most efficient manner.

65. The Tribunal does not minimize or underestimate the degree of disappointment of a staff member who, after 20 years at a P-4 level, would wish to benefit from career advancement and be promoted to a higher level. It is clear that the Applicant would not have accepted anything but a P-5 position. It is equally clear

a higher level in order to meet particular organizational needs for a period exceeding three months, SPA may exceptionally be granted.

69. The Applicant received payment of SPA backdated to April 2010. He did not suffer any financial prejudice in that respect. Having found that the decision to classify the post he encumbered at the P-4 level and to assign him to this post was not unlawful, the Tribunal considers that there is no merit in the Applicant's claim that SPA payment should not have been discontinued. In fact, there was no legal basis to justify the continuation of the payment of SPA at P-5 level when the Applicant was assigned to a P-4 level post.

Conclusion

70. The application is dismissed in its entirety.

71. The Tribunal is concerned at the huge volume of unnecessary as well as irrelevant material that has been filed by the Applicant thereby imposing an onerous burden on the Tribunal at the expense of other cases awaiting a judicial determination. There is a duty, on all concerned, to ensure that there is a structured and concise presentation of claims before the Tribunal.

72. Article 10.8 states that:

The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

73. The attention of the Secretary-General and the UNFPA Executive Director, Mr. Osotimehin, is drawn to the email string at para. 39, which indicates favouritism towards a particular candidate and a desire to appease the staff council neither of which are consistent with the standard of conduct expected of international civil servants.

