
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/047

Judgment No.: UNDT/2022/120

Date: 8 November 2022

Original:

granted to me under ST/SGB/2019/2, I wish to notify you that the Chief of Office, D-1 post (# 30500493) which you are encumbering in the Geneva Office will be relocated to New York and will become the Secretary of the Pension Board, D-1 post heading the Pension Board Secretariat, effective 1 January 2020. You will report to the Chair of the Pension Board. I wish to reiterate that in accordance with the General Assembly Resolution A/74/263, paragraph 11, your reassignment will be a temporary arrangement, while the Succession Planning Committee of the Pension Board, in accordance with the relevant staff regulations and rules, makes a permanent selection decision. We hope this advance notification will allow ample time for you to consider and plan for your relocation to New York no later than 01 February 2020. Should you need to discuss a later relocation date, please do not hesitate to consult

2020 through 31 August 2021 (draft Terms of Reference attached).
During the one-year period you are encouraged to apply and compete
for any position [sic] you consider suitable. [...].

10. On 4 August 2020, the Applicant responded by email to the USG/DMSPC, and the ASG/OHR expressing his views with respect to his proposed assignment, and stating:

[...] I have been told by you both that if I take the above-

17. On 13 January 2022, the Applicant was reassigned to the post of Chief of Client Services (at the D-1 level) in the Pension Fund for New York City and County of New York. UNDT/NY/2020/047 reWT/F1 12 Tf1 0 0 1 477.55 570.65 Tm

18. On 15 February 2022, the Mediation Division informed the Tribunal that the parties were unable to resolve the case and therefore the case is referred back to the Tribunal.

19. On 22 and 29 July 2022, pursuant to Order No. 062 (NY/2022) dated 15 July 2022, the parties respectively filed further submissions, informing the Tribunal, *inter alia*, that the case may be decided on the papers. The Applicant requested leave to file additional documentation, which the Tribunal grants and has added those submissions to the case record.

Consideration

Issues of the case

20. Based on the parties' submissions, the Tribunal identifies the issues in this case as below:

al Was the 28 July 2020 decision not to select the Applicant for the D-1 level

position t

26. The record shows that the Applicant submitted his request for management evaluation of the 30 December 2019 decisions on 17 September 2020. The 60-day statutory deadline for requesting management evaluation of the two 30 December 2019

and (2) whether the staff member was given fair and adequate consideration” (*Abbassi* 2011-UNAT-110). The Appeals Tribunal has further held that the role of the Tribunals is “to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals’ role is not to substitute their decision for that of the Administration” (see, for instance, *Kinyanjui* 2019-UNAT-932).

32. As the Appeals Tribunal reiterated in *Lemonnier* 2017-UNAT-762, citing *Rolland* 2011-UNAT-122, “the starting point for judicial review is a presumption that official acts have been regularly performed”. The Appeals Tribunal held in *Rolland* that if the management is able to minimally show that the applicant’s candidature was given a full and fair consideration, the burden of proof shifts to the applicant who then must show through clear and convincing evidence that he or she was denied a fair chance of selection.

33. In *Verma* 2018-UNAT-829, the Appeals Tribunal further held that, “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 Dispute Tribunal shall uphold the selection/promotion”.

The parties’ contentions

34. The Applicant submits that the decision to not select him for the D-1 level post of Secretary of the Board of the Pension Fund was unlawful on the following grounds:

- a. Despite the Applicant's being considered by the acting CEO of the Pension Fund to be fully qualified, competent and suitable for the position of Secretary, the post was put up for external recruitment. Although he was recommended to the Succession Planning Committee as fully suitable for the position of Secretary of the Board and reassigned with his post to serve as temporary Secretary and moreover has been praised for his successful contribution in fulfilling that role *ad interim*, including the successful

completion of the Board's first ever virtual Board Session the selection process rejected his candidacy in preference for an external candidate;

b. It remains unexplained how an encumbered post could be re-designed and advertised as a vacancy with no written justification or notice;

c. By re-purposing the D-1 level post of Chief of Geneva Office to create a Secretary to the Board position, the D-1 level post was in effect abolished. With the decision to appoint an external candidate to the now permanent position of Secretary to the Board, the Applicant was denied the priority consideration to which he was entitled, as a permanent appointment holder;

d. It is unclear on what basis the Board decided to recommend an external candidate in violation of staff regulation 4.4. A decision was taken without consultation removing the Applicant from the Pension Fund entirely, placing him on temporary assistance funding and putting the burden on him to find a post. In addition to curtailing his rights under the Staff Rules, this demonstrates a degree of prejudice in not selecting him for the permanent post to which he applied and was suitable. Moreover, the Respondent has acted in a manner prejudicial to the Applicant in placing him in a position where, unexpectedly, in the latter part of his career, he is expected to compete for a senior position

39. The Tribunal notes that the decision to re-design and advertise the post was the result of the General Assembly resolution 74/263 dated December 2019. Resolution 74/263 approved the Pension Fund's budget proposal to restructure by redeploying the post financing the position of Chief of the Geneva Office (at the D-1 level) to the position of Secretary of the Board (at the D-1

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47. It follows that the Applicant had no right for priority consideration for the D-1 level position or to be offered the position without a competitive recruitment process. The jurisprudence cited by the Applicant on termination of appointment therefore does not support his claim.

48. The Applicant claims that an external candidate should not have been selected for the position of Secretary of the Board. The Tribunal finds no substantive submissions to support this claim. T

between the Applicant and Mr. J, who was providing a personal opinion without any context. Mr. J was not acting in his official capacity when sending this email to a personal account. In addition, Mr. J did not have authority to act officially on behalf of the Board. The personal opinion of a third party as to a selection process conducted by the Organization has no probative value. Nor does such personal opinion have any relevancy to the disputed issues in this case.

52. Lastly, the Applicant's allegations of an improper motive are without merit. The Applicant bears the burden of proving such allegations. He has presented no evidence to that effect.

53. Based on the above, the Tribunal finds that the Applicant was afforded full and fair consideration and the non-selection decision was lawful.

The 3 August 2020 decision to reassign the Applicant to a temporary position

Legal framework

54. Article 101.1 of the United Nations Charter stipulates that “[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly”. Regarding the Administration's authority to transfer or reassign staff

Fund's senior management team. The Applicant is therefore now working at the Pension Fund, which he indicated was his preference.

66. Based on the above, the Tribunal finds the assignment decision lawful.

Conclusion

67. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 8th day of November 2022

Entered in the Register on this 8th day of November 2022

(Signed)

Morten Michelsen, Officer-in-Charge, New York