Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

JAMES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Steven Dietrich, ALU/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. In August 2008, the applicant, a G-6 employee of the United Nations, appealed to the Joint Appeals Board (JAB) against a decision that he should not be appointed to a P-3 position for which he had been selected after an interview. The decision not to appoint the applicant to the P-3 post was, in turn, influenced by the administration's decision to add some limitations to his existing contract.

2. The applicant has applied for the restrictions placed on his conditions of service to be removed and for an order that the administration implement the decision to appoint him to the P-3 post in question. The applicant also seeks financial compensation for suffering and stress.

3. In July 2009 his case was transferred to the United Nations Dispute Tribunal for decision. Both parties to this case have agreed for it to be heard and decided by the Tribunal without further evidence or submissions other than those provided to the JAB.

The issues

4. The issues before the Tribunal in this case are:

   a. Was the applicant eligible for appointment from general to professional level?

   b. Was the imposition of limitations on the applicant's existing contract of employment lawful?

   c. Was the applicant treated fairly and reasonably in respect of his job application?

Facts

5. The applicant was initially employed by the United Nations on a short-term appointment in 1992 as an administrative clerk at G-4 level. His employment was

extended until December 2002, by which time he

> as a means to further support and encourage staff mobility.
>
> In light of the reasons provided in your e-mail message, an amended offer corresponding to the level and steps you held in UNOPS in 2001 is being prepared for your signature."

12. The following year, in February 2008, while still in his G-6 position, the applicant applied for and was selected by OCHA for a temporary vacancy as a P-3 level Programme/Finance Officer. The Chief of Human Resources Section of OCHA wrote to OHRM advising of the selection and asking for OHRM to assist in the reassignment of the applicant from DPA to OCHA.

13. On 11 April 2008, OHRM sent an email to OCHA, stating:

> "As you know, OHRM approved, on an exceptional basis, the appointment of [the applicant] to DPA at the G-6 level.
>
> Due to an oversight, the restrictions on [the applicant's] appointment were not included on the original I-slip dated 8 June 2007. The appointment was initially for a three-month period only.
>
> The corrected I-slip is now attached."

14. The corrected I-slip added two restrictions to the applicant's original appointment in June 2007:

> "Appointment strictly limited to this post," and
>
> "No extension beyond eleven months without OHRM approval and required break-in-service"

15. OHRM then responded to OCHA's request for the applicant's assignment. It noted in an email dated 15 April 2008 that the applicant's appointment t6(v)1ts2.1 request 6Tc 0.-0628

email ended:

> "Through [a] copy of this email . . . I am withdrawing OHRM's memorandum of 9 April 2008 to DPA seeking the latter's consideration of [the applicant's] release to OCHA."

16. When the applicant was informed of the decision he sought administrative review of the decision. This was unsuccessful. The review found that the decision not to consider him eligible for the post in question was made in accordance with the rules of the Organization. The applicant then filed his appeal with the JAB.

Applicant's submissions

17. The applicant alleges that:

a. The Assistant Secretary-General's decision of 8 June 2007 effectively restored the applicant's status as a staff member with the entitlements and benefits previously afforded to him as a staff member with sixteen years of work in the United Nations and without the limitations subsequently imposed by OHRM. Further, the applicant should have been considered as internal candidate for the purposes of the vacancy in question.

b. OHRM violated his due process rights by issuing an amendment to his conditions of service and placing restrictions on his mobility. OHRM discriminated against him by knowingly allowing the Chief of the General Service Staff Section of OHRM to disregard the exception granted by the Assistant Secretary-General.

c. The 11 April 2008 changes to the Applicant's I-slip were contrary to the Assistant Secretary-General's decision of 8 June 2007.

d. OHRM's reluctance to accord the applicant the status he enjoyed (as a G-6 step VIII staff member) before leaving for Geneva stemmed from his extended absence from New York—this, in turn, was a violation of

administrative instruction on employment of spouses (ST/AI/273), which aims to encourage mobility.

Respondent's submissions

18. The respondent contends that:

a. Because the applicant did not go through the staff selection system in June 2007, he should have been considered as an external candidate when applying for posts in the United Nations. Under Staff Rule 104.11, internal candidates are staff members recruited under Rules 104.14 and 104.15. Because he was external candidate in the general service category, under Staff Rule 104.15 he was not eligible to apply for a post in the professional category.

b. Although OHRM issued an I-slip after the applicant's selection in February 2008, the applicant could not have been unaware that his appointment was temporary in nature and limited to service in DPA as he had not been formally recruited through the staff selection system.

c. In any case, OHRM determined that the applicant was not suitable for the post as he lacked the necessary experience and qualifications.

d. On 15 May 2008, OHRM officials had met with the applicant to explain his appointment status and to apologise for the inadvertent administrative error of omitting employment restrictions in his letter of appointment with DPA.

Issue 2: The limitations on the applicant's contract

23. While the applicant asks the Tribunal to characterize the administration's imposition of limitations on his contract as discriminatory behaviour, it is in fact a breach of his contractual rights. It is a fundamental principle of contract law that a contract may not be varied without the consent of both parties.

24. In this case the administration sought unilaterally to impose limitations on the original contract of employment under which the applicant had been appointed a year earlier. The timing of the letter advising him of these changes was two days after OHRM received OCHA's recommendation. This invites the obvious inference that the limitations were imposed to bolster OHRM's reasons for refusing the appointment and to that extent the applicant's belief that he had been discriminated against is not entirely without foundation.

25. The limitations may also have been contrary to the position taken at the time of his appointment that the exceptional nature of his employment should not make him ineligible to apply for other posts. The record presented to the Tribunal does not make it clear whether any limitations were intended to apply at that time but certainly the applicant was not advised of any such limitations and accepted the unconditional contract as then offered.

26. On the basis of the information provided to the applicant by OHRM (including the 8 June 2007 email sent on behalf of the Assistant Secretary-General), the applicant had reasonable grounds to believe that there were no limitations on his appointment. The respondent's argument that the applicant must have been aware that there were some limitations imposed on his contract is simply not supported by the evidence.

27. I conclude that the applicant's conditions of employment—without the limitations that the administration attempted to impose in April 2008—had been agreed between him and the United Nations in 2007 and were binding on both parties.

Issue 3: Were the actions of the Organization fair and reasonable?

28. It is a universal obligation of both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process.

29. I find that some of these elements were lacking in the behaviour of the administration towards the applicant.

30. If OCHA had given the applicant a clear explanation of Staff Rule 104.15 and its implications for his prospects of success at the time he applied for the P-3 post, this should have been enough to either dissuade him from applying for the position or to encourage him to sit for the required competitive examination. However, the administration did not do this. This may well have been an oversight or out of a misguided desire to assist the applicant but, as a result, the applicant went through the entire selection process not knowing that he had no chance of success. He was interviewed, OHCA made a decision that he was the most suitable candidate, and he was recommended for appointment. Understandably, he fully expected to be appointed to the post for which he had successfully applied. He had been given a false and unrealistic expectation by the administration which had not been open with him. In this regard the administration was in breach of its obligation of fairness to the applicant.

31. While OHRP d.0011 TTw -18.875 9 -a.r2(sio)1(out the6(ere thjet.)t]TJ0)]TJ theende we admpli

position. In its letter to him OCHA referred to an administrative instruction without quoting it or citing the correct staff rules relied on to justify the decision. Given that he was being told that he could not be appointed to a position that he had just been selected for, this was an unfair way of conveying what must have been surprising and upsetting news that was not of his making.

39. The outcome for the applicant was not only disappointment at not getting the position he had incorrectly been led to believe he was going to be appointed to but also the reigniting of his anxiety about retaining his existing level and step of employment. He saw the limitations OHRM attempted to impose on his employment as undermining the exceptions which he had fought so hard to obtain a year earlier. At that time, he had argued successfully for the proper consideration of his circumstances under the Guidelines set out in the Administrative Instruction on the Employment of Spouses (ST/AI/273, dated 4 March 1980).

40. I find that the applicant was subjected to unnecessary and avoidable stress and anxiety by the manner in which his application for a P-3 position was handled and by the subsequent response to his selection by OHRM. OHRM's apology to him was in part an acknowledgment of this but was limited to an admission of the initial mistake on its part and was not adequate in addressing the wrong done to the applicant.

41. As Staff Rule 104.5 meant that he had virtually no chance of being appointed to the position he had applied for, the applicant suffered no loss of chance and is not entitled to compensation for the failure to be appointed or to an order that the administration implement OCHA's recommendation to appoint him to the P-3 post in question. However, I find that the applicant is entitled to compensation for the distress caused by the Organization, amounting to three months of his salary at G-6 step VIII level based on salary rates at the date of judgment.

Conclusion

42. The Secretary-General is ordered to remove the limitations imposed on the applicant's 12 June 2007 Contract of Employment in the memorandum dated 11

April 2008 with effect from 11 April 2008.

43. The Secretary-General is ordered to pay the applicant the equivalent of three