



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

RUSSO-GOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jameel Baasit, UNOPS

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

Introduction

1. On 6 May 2019, the Applicant, a former Project Manager at the United Nations Office of Project Services (“UNOPS”), filed this application in which he challenges “the decision of the Administration not to select him for the position of ERP/SAP [assumedly, a particular type of enterprise resource planning computer software] Project Manager - VA/2018/B5011/16266”.

2. On 6 June 2019, the Respondent duly filed his reply in which he claims that the application is without merit.

3. On 1 April 2020, the case was assigned to the undersigned Judge.

4. By Order No. 64 (NY/2020) dated 6 April 2020, the Tribunal defined the issues of the present case on a preliminary basis and ordered:

a. The Respondent to file, by 28 April 2020 (i) the UNOPS rules according to which the relevant selection exercises were conducted, (ii) the management evaluation response, and (iii) all relevant information and documentation as to how the decision for not shortlisting the Applicant was made;

b. The parties to file, by 28 April 2020, a jointly-signed statement providing consolidated lists of the agreed and disputed facts; and

c. The parties to file their closing statements in the following sequence: Applicant (12 May 2020), Respondent (19 May 2020), and Applicant (22 May 2020).

5. The Tribunal further instructed the parties that, unless otherwise ordered, on receipt of the last-mentioned statement or at the expiration of the provided time limit,

the Tribunal would adjudicate on the matter and deliver Judgment based on the papers filed on record.

6. The parties duly filed their submissions as per Order No. 64 (NY/2020).

7. For the reasons set out below, the application is granted in part.

Facts

8. In response to Order No. 64 (NY/2020), the parties provided the following agreed upon facts:

... [The Applicant] served as a Project Manager at the P-3 level at the United Nations Office of Project Services (UNOPS). He has worked at UNOPS for approximately 2.5 years and was on a fixed-term appointment.

... On 29 June 2018, [the Applicant] was informed that his post would be abolished.

... On 1 August 2018, [the Applicant] signed an extension for the next six months [reference to annex omitted].

... On 21 August 2018, [the Applicant] applied for the ERP/SAP Project Manager—VA/2018/B5011/16266 [reference to annex omitted].

... On 25 October 2018 at 11:00 AM - 11:30 AM, [the Applicant] held a meeting with [name redacted, Ms. JF], Chief Enterprise Project Management Office (ePMO) and [name redacted, Ms. YS], Sr. Portfolio Manager UNOPS/UNDG/ECR and he was informed that, based on budget restriction, his post will be abolished. [The Applicant] requested to receive, as per contract “Director of UNOPS will give 30 days’ written notice”, a letter of written notice. On the same day at 12:10 p.m. EST, [Ms. YS] called [the Applicant], and she confirmed that a written notification from the Director of UNOPS would be sent within two months in advance in case that the decision will not be changed.

... On 22 January 2019, [the Applicant] received a letter formally informing him that his fixed term appointment would not be extended beyond 31 January 2019 [reference to annex omitted].

... On 28 March 2019, [the Applicant] received an email informing him that he was not selected for an interview for the

ERP/SAP Project Manager-VA/2018/B5011/16266 position [reference to annex is omitted].

... On 03 April 2019, [the Applicant had submitted] a Management Evaluation Request [reference to annex omitted].

Consideration

The Applicant's filing of the application before receiving the management evaluation response

9. In the reply, the Respondent indicates that the Applicant filed the application before he received the management evaluation response, but essentially states that he is, nevertheless, ready to proceed with the case on the merits since the Applicant would otherwise just file another application with the Tribunal:

The Respondent wishes to note that the Application was filed at a time when the outcome of the management evaluation was still not due. In particular, the Application was filed when mediation was still ongoing. Indeed, the Applicant had been informed on 3 April 2019 "... since discussions are ongoing with the Ombudsman's Office, we at UNOPS would prefer to let these discussions be completed before finalizing our review of your requests." However, since the Applicant would most likely file another [Dispute Tribunal] application if this case is dismissed on the foregoing ground, the Respondent is prepared to proceed with this case.

10. The Tribunal notes that art. 8.1 of the Dispute Tribunal's Statute sets out the deadlines for when the Applicant—at the latest—must file his application:

... An application shall be receivable if:

(d) The application is filed within the following deadlines:

...

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

11. Nothing is, however, provided as to when—at the earliest—the Applicant can file the application. The risk of filing the application before the receipt of the management evaluation response is that if the remedy requested by the Applicant is granted in this response, the application becomes moot. The Tribunal notes that the application to this Tribunal was filed on 6 May 2019 and that the Applicant’s management evaluation request was dated 3 April 2019.

12. The 30-day period for the Respondent to complete the management evaluation under art. 8.1(d)(1)(b) of the Dispute Tribunal’s Statute and staff rule 11.2(d) had therefore expired at the time of the submission of the application. Also, there is no evidence: (a) that this deadline had been “extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General” in accordance with staff rule 11.2(d), or (b) that the Applicant had, at a minimum, been advised that a management evaluation response would be forthcoming although delayed.

13. Despite being ordered to file the management evaluation response in Order No. 64 (NY/2020), the Respondent did not do so. Instead, in his 28 April 2020 submission, the Respondent explains that the Respondent and the Applicant “had engaged in alternative discussions on this matter”, but that “much to the Respondent’s surprise, while discussions were ongoing, the Applicant filed the application for this matter” and that “there was no opportunity to complete [a management evaluation response] as the Applicant jumped ahead with these proceedings”. The Respondent has provided no evidence of any such informal negotiations.

14. Based on the above, the Tribunal is therefore left with no other option than finding that the Respondent actually never provided a response to the Applicant's request for management evaluation. Accordingly, the Tribunal finds that with the lack of a management evaluation, the impugned administrative decision stands as is and that the application is therefore not moot or filed prematurely.

The scope of the case

15. The Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

16. The Applicant submits in the application that, “[t]he Administration is not compliant with *Timothy* 2018-UNAT-847 and UN jurisprudence to let [him] participate on a preferred or non-competitive basis in the mandatory order established by Staff Rule 9.6(e), without having to go through a competitive selection process”.

17. The Tribunal notes that staff rule 9.6(e), which according to sec. 2.3.2 of UNOPS's “Process & Quality Management System” dated 13 April 2020 also applies to UNOPS, solely concerns the situation where a staff member is separated from service because her/his appointment is terminated and not where, as in the present case, it is not renewed. In line herewith, the Tribunal refers to the Appeals Tribunal in *Nouinou* 2019-UNAT-902, paras. 31 and 32.

18. In line with Order No. 64 (NY/2020), the issues in the present case may therefore be defined as:

- a. Was the decision not to select the Applicant for the position as Project Manager proper in light of the Tribunal's limited judicial review?

- b. If not, what remedies are the Applicant entitled to?

The Tribunal's limited judicial review regarding a non-selection decision

19. It is trite law that the Dispute Tribunal's judicial review is limited. In general, the Appeals Tribunal often refers to its judgment in *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as "the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate". The Appeals Tribunal further held that "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision".

20. Specifically regarding selection and promotion decisions, in light of the Administration's broad discretion in such matters, the Appeals Tribunal has held that these types of decisions are governed by the so-called "principle of regularity". This means that if the Respondent is able "to even minimally show that [an applicant's] candidature was given a full and fair consideration, then the presumption of law stands satisfied". To rebut this minimal showing, the applicant "must [then] show through clear and convincing evidence that [s/he] was denied a fair chance of promotion" in order to win the case (*Lemonnier* 2017-UNAT-762, para. 32).

21. In line herewith, the Appeals Tribunal stated in *Verma* 2018-UNAT-829 (affirmed in *Kinyanjui* 2019-UNAT-932) that, "In terms of the discretion vested in the Administration, under Article 101(1) of the United Nations Charter and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of the Appeals Tribunal has clarified that, in reviewing such decisions, it is the role of the Tribunals 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 para. 13).

22. In *Verma*, 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" (see para. 14).

23. To minimally show that an applicant's candidature was given a full and fair consideration, the Respondent must therefore typically, at a minimum, be able to produce a contemporaneous written record to demonstrate that the candidature of the applicant in question, as a matter of fact, received such consideration.

Was the selection decision proper?

24. The Applicant's submissions, as relevant to the present Judgment, are essentially that the Respondent has failed to "minimally show" that the Applicant's candidature was given a full and fair consideration by producing a contemporaneous written record, that the "role" of the author of an email of 6 June 2019 (see more below) "is not clear", and that the Applicant was "fully compliant with all requirements of Vacancy Announcement".

25. The Respondent's submissions, as relevant for the present Judgment, may be summarized as follows:

- a. "As with all vacancy announcements, UNOPS is faced with the often difficult and tedious task of reviewing hundreds of potential candidates. Filtering the best possible candidates out from the pool of applicants is always done with the best interests of the organization in mind. The [human resources ("HR")] personnel responsible for reviewing candidates have a duty to identify the best possible candidates as it will ensure that the selected

individual is the one that is best able to meet their job functions and perform as required”;

b. “[T]he vacancy announcement was for ‘ERP (Enterprise Resource Planning)/SAP Project Manager’, and the requirements set out in the vacancy announcement included “General knowledge of Enterprise Resource Planning, Material Master Data systems, Service Level Agreement, Release and Change Management processes and [information technology (“IT”)] Quality models is required”;

c. Four candidates were shortlisted for the relevant post based on their applications, and the “HR team responsible for short-listing candidates determined that the Applicant was not as qualified as the four shortlisted candidates”, or “[p]ut another way, the four short-listed candidates were better qualified than the Applicant. This is demonstrated by the job profiles of the shortlisted candidates, and “[e]ach of the short-listed candidates made the effort to specifically demonstrate how their profiles clearly met the qualifications required to execute the functions of an ERP/SAP Project Manager”. “In stark contrast, the Applicant’s [work] profile ... contains no information showing substantive ERP experience”.

d. With reference to *Lemonnier*, “the Administration was entitled to rely on what the Applicant submitted in support of his application, and was not required to speculate whether the Applicant might have experience beyond what he described”.

e. A “closer look” at the Applicant’s profile “reveals that even though the Applicant does have IT experience, the information provided reflects that of a generalist and that [t]here is no specific focus or area of expertise that would directly align with the vacancy announcement in question. Specifically: [a] A search for the word “SAP” in the Applicant’s [work] profile produces

zero results. (In the Applicant's cover letter, the Applicant merely copied-and-pasted the above quoted requirement of the [vacancy announcement] "Enterprise Resource Planning, Material Master Data systems, Service Level Agreement, Release and Change Management processes and IT Quality models is required") and added the words "Excellent knowledge of" before that.) [b]. There are only three references to "ERP" in the Applicant's [work] profile. Of the three, there is no specific explanation as to what sort of ERP related work was performed. In fact, the Applicant's references to "ERP" show that ERP was merely an incidental part of his work. ... [c] As some UN personnel use the term "UMOJA" to refer to ERP[reference to footnote omitted]: for completeness ... the Applicant's [work] profile contains only one generic reference to "UMOJA", i.e. : "Coordinate the Business Continuity Exercises for applications such as: UMOJA, EarthMed, UniteDocs, Unite Identity, UniteDocs, UniteConnection, iNeeds, etc." The Applicant failed to provide information as to what specifically he worked on in connection with UMOJA. [B]ased on the Applicant's [work] profile he does not even meet the requirements as set out in the [vacancy announcement]. (A cover letter is not sufficient to represent the qualifications of a candidate if their [work] profile does not match the representations made.) [referring to *Abdellaoui* 2019-UNAT-928].

f. Although the explanation provided in the email of 6 June 2019 (see further below) was written "*ex post facto*, it does provide insight into understanding why the Applicant was not short-listed ... [T]his information should still be taken under [consideration] in connection with information contained in the [work] profiles of those who were shortlisted against that of the Applicant. There is no requirement in [UNOPS's "Process & Quality Management System"] that would require the Respondent to have provided any justification why his candidature was not short-listed".

26. The Tribunal observes that albeit UNOPS's "Process & Quality Management System" might not require a contemporaneous written record to be made of a decision not to shortlist a job candidate, such requirement, as a matter of access to justice, is inherently embedded in the Dispute Tribunal's Statute, art. 2.1(a) granting a staff member a right to challenge an appealable administrative decision. In line herewith, the Tribunal refers to the Appeals Tribunal's consistent jurisprudence that a timely reason for a non-renewal of a fixed-term or temporary appointment must be provided even though such appointment expires automatically at the end of its term, although failure to comply therewith does not by itself render the decision unlawful (see, for instance, *Obdeijn* 2012-UNAT-201 and *Abdeljalil* 2019-UNAT-960).

27. To minimally show that the Applicant received a full and fair consideration for the post, the Respondent submits in evidence:

a. An email of 6 June 2019 from a "Lead, Solution Design and Delivery (UMOJA UE2-SCM)", working in UMOJA Coordination Services at the Department of Operational Support to a UNOPS Senior Portfolio Manager, who then forwarded the email to Counsel for the Respondent on the same date (6 June 2019). In this email, the "Lead" (the Tribunal is unaware of this title, but since this is how the person refers to himself, it will refer to him in this way) explains why "we could not shortlist" the Applicant's profile, although it is not clear who "we" are or what the Lead's role was in the selection process:

i. The main reason provided for not shortlisting the Applicant was his lack of "enterprise resource planning" ("ERP") experience. The Lead states that although the Applicant indicated UMOJA as a "major achievement", no evidence was found therefor in the Applicant's profile and from his "personal experience", the Lead was not aware of this. The Applicant stated in his profile that he had "13 years of ERP experience", but no, or inadequate, explanation was made on

“how those 13 years were achieved and what role [the Applicant] played with respect to ERP”.

- ii. The Lead further found that there was a “general lack of continuity and the description of duties tying back to [the vacancy announcement]” in the Applicant’s profile.
 - iii. The Lead concluded that the Applicant’s profile is “better suited for systems analyst / systems project management job as oppose[d] to the profiles our portfolio is seeking for more substantive business knowledge in enterprise resource planning”.
- b. A list of the profiles of the candidates who, unlike the Applicant, were shortlisted.

28. The Tribunal notes that the application in the present case was filed on 6 May 2019 and the email from the Lead was sent one month later (6 June 2019) with Counsel for the Respondent as the final recipient. Evidently, the email was therefore not prepared as part of the review of the Applicant’s job application (not even at the stage of management evaluation process); rather, it was produced for the sole purpose of the present judicial proceedings. It is therefore not contemporaneous with the decision not to shortlist the Applicant for the relevant post, which was taken sometime before 28 March 2019, and therefore does not serve as a written record of the impugned decision, but only as an *ex post facto* explanation.

29. Also, the Lead’s role in the decision on not shortlisting the Applicant has not in any possible manner been explained and/or corroborated by evidence: no information whatsoever is available on who this person is other than he refers to himself in his email as “Lead, Solution Design and Delivery (UMOJA UE2-SCM)” and that he works in the UMOJA Coordination Services at the Department of Operational Support, which is part of the United Nations Secretariat. In this regard, it

is noted that the relevant post, which this case concerns, is with UNOPS and not the Secretariat—although the former Department of Field Support is mentioned in the vacancy announcement as a “partner” for the post, UNOPS is an entirely different United Nations entity. As the email was prepared by someone whose involvement in the contested decision is unclear and the actual decisionmaker is unknown, the reasons and justifications stated therein cannot be regarded as properly established.

30. The Tribunal further observes that the profiles of the candidates who were shortlisted for the post only show why these candidates were possibly suitable for the post and provide nothing as to why the Applicant was not, which is the basic substantive question of the present case. In the closing statement and the 6 June 2019 email, the Respondent admits that in the job application, the Applicant had stated that he possessed all the required work experiences for the post, but only now in the context of the judicial proceedings, argues that these experiences were inadequate or not appropriately substantiated. This is simply too little, too late and therefore unconvincing.

31. With reference to the Appeals Tribunal’s consistent jurisprudence, the Tribunal further finds that the irregularities detected in the selection process were of such gravity—not keeping any written record of the contested administrative decision, an undefined decisionmaker, and flawed reasons and justifications—that they cannot be regarded as minor procedural or substantive errors that did not impact the outcome of the non-selection decision (see, for instance, *Bofill* 2011-UNAT-174 and *Ross* 2019-UNAT-926). The Tribunal rather finds these irregularities were of “such ... nature that, had [they] not occurred, the staff member would have had a foreseeable and significant chance for [selection]” (see *Ross*, para. 48).

32. Accordingly, the Tribunal finds that the Respondent has not been able to minimally show that the Applicant’s candidature for the post was fully and fairly considered.

Remedies

33. The Applicant submits that he was “harmed in continuing his career with the United Nations system, and his pension plan and benefits were stopped”. Also, “[t]he injustice [and] behavior of UNOPS harmed [his] morale” and he “was frustrated, inconvenienced, and disoriented by the sudden loss of another opportunity”.

34. The Respondent fails to make any submissions on the issue of remedies even though the Tribunal explicitly set this out in Order No. 64 (NY/2020).

35. The Tribunal notes that in accordance with art. 10.5(b) of the Dispute Tribunal’s Statute, subject to evidence, the Tribunal may award pecuniary as well as non-pecuniary damages (see, for instance, *Antaki* 2010-UNAT-095, para. 21).

36. Regarding the Applicant’s pecuniary damage, as the Respondent has failed to demonstrate with a minimal showing that the Applicant was given a full and fair consideration when excluding him from taking the written test, his actual economic loss must be defined in light thereof. Often this is described as a loss of a chance (see, for instance, *Andersson* 2013-UNAT-379, para. 13). The Appeals Tribunal in its jurisprudence has stated that no exact formula exists for how to quantify such a loss, but an approach that has been accepted is to determine it as a percentage based on the remaining candidates in the process (see, for instance, *Hastings* 2011-UNAT-109, *Lutta* 2011-UNAT-117, and *Asariotis* 2015-UNAT-496).

37. In the present case, it follows that four other candidates had been shortlisted for the written test for the relevant post. Had the Applicant joined this field of candidates, his chance of getting selected could therefore be determined as 20 percent (one out of five). In lack of any further information on the length of the possible fixed-term appointment, the Tribunal sets this as one year.

38. Consequently, the Tribunal finds that the Applicant is to be awarded 20 percent of the net-base salary that he would have obtained had he been selected for

the post, including by having his pension adjusted accordingly. Considering that this compensation is set on a hypothetical basis, the Tribunal does not find it necessary to offset any actual income that the Applicant obtained in the period after his non-selection or require him to prove how he mitigated his loss.

39. As for non-pecuniary damages, the Applicant submits that his exclusion from the selection process caused him moral harm. As evidence, he submits a medical statement in which was stated that the Applicant suffered from “separation anxiety characterized by anxiety related to job loss separation and retaliation” (unofficial translation from Romanian), which started from 2 February 2019, which was still ongoing at the end of the “time frame” of 3 October 2019.

40. The Tribunal notes that the Appeals Tribunal in *Kebede* 2018-UNAT-874 held that “[i]t is universally accepted that compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both”, that [i]f one of these three elements is not established, compensation cannot be awarded, and that “the harm be shown to be directly caused by the administrative decision in question” (see para. 20).

41. In the present case, the illegality was that UNOPS was not capable of minimally showing that the Applicant had been given a full and fair consideration for the relevant post. The moral damage described in the medical record, however, related to “separation anxiety”, which would indicate his moral injuries were, rather, related to the Applicant’s separation from the Organization than the detected irregularities in the selection process. The Applicant has therefore not been able to show the required causality between the illegality and the suffered harm.

Conclusion

42. The application is granted in part:

a. The Applicant is to be paid 20 percent of the net-base salary he would have obtained had he been selected for the relevant post, including by having his pension adjusted accordingly;

b. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 28th day of May 2020

Entered in the Register on this 28th day of May 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York