



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/007/
JAB/2007/058
Judgment No.: UNDT/2010/081
Date: 5 May 2010
Original: English

Before: Judge Adams
Registry: New York
Registrar: Hafida Lahiouel

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Salim Shaikh

Counsel for respondent:

Tamara Shockley, UNICEF

Introduction

1. The applicant joined the United Nations Children's Fund (UNICEF) on 1 December 1994 as a Telecommunications Clerk at the GS-4 level. In October 1995 she was promoted to the GS-5 level and her functional title was changed to Senior Administrative Clerk. She served in this position until December 2000, after which time she separated from UNICEF. In September 2001, she rejoined UNICEF and was appointed to the post of Finance Assistant at the GS-5 level with UNICEF Islamabad, Pakistan Office.

2. The applicant appeals the decision conveyed to her by email of 12 December 2006 whereby she was not selected for the post of Senior Project Assistant (GS-7), Islamabad.

3. The Local Selection Advisory Panel (SAP) recommended a candidate other than the applicant to the subsequent Local Appointment and Placement Committee (APC). The APC recommended the applicant instead. The Head of Office selected the candidate recommended by the SAP.

4. The applicant argues that the decision of the Head of Office went beyond the discretionary authority of the respondent and that she was not given full and fair consideration for the position.

Facts

5. It is not disputed that the SAP was appointed in accordance with the UNICEF Human Resources Manual (the Manual), which provides that the Head of Office is to appoint one of the three members, subject to various specified conditions. Members of the APC are appointed by the Head of Office, subject to the criteria stated in the Manual. Again, it appears undisputed that the APC here was appropriately appointed. The applicant was among eight short-listed candidates for the post of Senior Project Assistant. She was interviewed on 22 November 2006. The only part

of the minutes of the SAP that were tendered comprised the details of the post, a brief description of the number of candidates, a list of the relevant competencies, a brief narrative discussion of the attributes of the applicant and the successful candidate and their overall scores. (The only records able to be found were the minutes of the SAP and APC, redacted versions of which were tendered.) The SAP considered the following competencies: academic qualifications; relevant work experience; technical knowledge; language skills; and other skills and attributes. The brief discussion of the applicant contained in the minutes noted, amongst other things, that –

“during the interview, it became apparent that her knowledge and skills of program was not up to the standard required for the position and a number of questions put to her received very general and broad responses”.

Once this judgment was made (assuming it was fairly reached) even a favourable assessment would not have changed the outcome. The tendered material does not contain the individual scores for the various competencies, so it is not possible for me to assess the extent to which, in the Panel’s view, she fell short of the required standard in the competency identified in the narrative as inadequate. The applicant’s overall score was 120 out of a possible 200. That the panel concluded that the applicant was not qualified for appointment, as distinct from simply not being the best candidate, is evident from its final recommendation that, if the recommended candidate were unable to accept the post, it should be re-advertised.

6. The SAP recommended a male candidate on a temporary fixed-term appointment (TFT) who had scored the highest in the test and the interview (158 out of 200), and submitted its recommendation to the APC. The APC, however, by a majority of six to four, recommended appointment of the applicant. So far as their recommendation went it appears that the majority relied principally on the considerations that the applicant was female and an internal candidate with eighteen years of UN experience, whilst the minority, it appears, gave priority to the SAP’s judgment that the recommended candidate obtained the highest marks both in the test and interview and demonstrated the requisite technical knowledge and skills.

7. The Head of Office did not agree with the APC's recommendation and selected the candidate recommended by the SAP. By letter of 9 December 2006 he gave the following reasons for his decision –

I choose not to agree with the APC recommendation in one case, IMIS No. 47111 (Sr. project assistant Islamabad) for the following reasons:

The minutes of the SAP meeting of 22 November suggest that while the APC's recommended candidate has commendable qualities; another candidate still scores far better on the tests and interviews. I agree with APC's consideration that it is important to promote female candidates for senior positions. This concern is traditionally factored into the point scores with an automatic ten point bonus to support gender balances in the workplace. But even so, the other candidate comes out with a significantly higher score at 158 to 120 (or 130).

In connection with this appointment and as a general frame of reference, the section 4.2 of the UN Staff Regulations states that:

“The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity”

I cannot see we would follow the above unless we select the recommended choice from the SAP for this position, [name of appointee]. He is clearly much better qualified for the position according to the minutes from the SAP meeting.

...

8. On 12 December 2006 the applicant was informed that another candidate had been selected.

Applicant's submissions

9. The questions asked at the interview were crafted to favour the successful applicant and disadvantage the applicant. The respondent did not give fair consideration to the applicant's almost eighteen years of UN experience and higher academic qualifications and unfairly favoured the less-experienced appointee. The appointee did not qualify for the mandatory requirements of seven years' experience and he was not even eligible for short-listing. The successful candidate had failed at

least four times between 2003 and 2006 to obtain appointment to other similar positions and this shows that he should not have been recommended for appointment.

10. The role of the Head of Office, as supervisor of two out of three members of the SAP, vitiates the fairness, honesty and impartiality of the decision by the respondent.

11. The SAP is not a statutory body and is considered subordinate to the APC. SAP recommendations cannot override those of the APC. The respondent therefore grossly erred in favouring the recommendations of the SAP. Furthermore, the APC is permanent, in contrast to the SAP, which is appointed on an *ad hoc* basis, whenever a vacancy arises. Its members are not as experienced and their assessment should not be preferred to that made by APC members. The respondent exceeded his discretionary authority, violating art 101.3 of the Charter of the UN, staff regulations 4.2 and 4.4 and former staff rule 104.14(a)(ii) by appointing a TFT staff member instead of the applicant.

12. The gender equality special measures as envisaged in ST/AI/412 were not honoured and, given that at the GS-6 level, there were nine males and only one female and that at the GS-7 level, there were ten males and only one female, it was the opportune time for the Administration to reduce this gender imbalance.

Respondent's submissions

13. The Executive Director has the discretionary authority to appraise the qualifications and performance of staff members for selection to a post.

14. The applicant received full and fair consideration for the post and was not the highest scorer at interview, even if she were allocated an extra ten points as a female, internal candidate, as noted by the Head of Office. The Head of Office had the authority to make his own decision.

15. The appropriate selection and appointment procedures were followed, including the SAP being constituted in accordance with established procedures.

16. There is no evidence of any bias at any stage in the process.

Legal instruments

17. Article 101.3 of the UN Charter provides –

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

18. Staff regulation 4.2 provides –

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

19. Staff regulation 4.4 provides –

Subject to the provisions Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations ...

20. Staff rule 104.14(a)(ii) provides –

Subject to the criteria of Article 101, paragraph 3, of the Charter and to the provisions of staff regulations 4.2 and 4.4, the Appointment and Promotion Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat and staff members in other international organizations.

21. The Manual provides –

Local Selection Advisory Panels (SAPs)

4.5.28 General

With a view to providing increased efficiency in the appointment process and ensure suitable selection, while at the same time preserving the safeguards inherent in the APC system, SAPs are used as part of the appointment and placement process. Each time there is a vacant post, an SAP is formed to review the short-listed candidates.

4.5.29 Purpose

The purpose of the Local SAP is to make recommendations to the appropriate APC for further review and recommendation in respect of:

- a) initial appointments of new GS staff members to support budget or project posts;
- b) appointments of GS staff members to support budget or project posts, graded at the same level as their own; *and*
- c) appointments of GS staff member to support budget or project posts graded at a higher level than their own (these appointments are potentially regarded as involving a promotion).

22. Annex 4.F to the Manual provides –

Terms of Reference

Local Selection Advisory Panel (Local SAP)

Composition

1. Each SAP is composed of three members:
 - a) the Human Resources/Operations Officer representing the Human Resources/Operations Section/Unit;
 - b) the supervisor or his/her nominee; and
 - c) a member of the APC.

...

3. No APC member may be called to participate in a SAP if:
 - a) the level of the post being reviewed is higher than that of the APC member;
 - b) he/she is the first or second reporting officer of the vacant post being reviewed; *and/or*
 - c) he/she is encumbering or has recently vacated the post being reviewed.

23. The Manual provides –

Local Appointment and Placement Committee (APC)

4.5.31 General

Local APCs are advisory bodies established by the Executive Director under the provision of the UN Staff Rule 104.14.

24. Annex 4.G to the Manual provides –

Terms of Reference

Local Appointment and Placement Committee (APC)

Composition

Number of Members

1. Depending on the size of the office, the Local APC should have from four to 12 members. Staff members under both the 100 and 200 Series of the UN Staff Rules are eligible for membership.

...

3. All members are appointed by the Head of Office, after appropriate consultation with the Human Resources/Operations Officer and the Local Staff Association (LSA). Alternates may also be chosen to replace members. If the Local APC so decides, alternates may attend all meetings. However, they may vote only if they are representing an absent APC member.

Selection

4. Members appointed do not represent any entity outside the Local APC and serve in their own individual capacity.

5. In selecting members, consideration is given, to the extent possible, to:
- a) UNICEF experience (preferably staff members with at least two years experience);
 - b) Representation from all categories of staff;
 - c) Capacity for team-work;
 - d) Availability to fulfill the APC's work;
 - e) Balanced distribution between men and women;
 - f) Balanced distribution between the various organization sections/units or occupational groups; *and*
 - g) Sense of objectivity, sound judgment, integrity and discretion.

...

29. The minutes and recommendations are transmitted to the Head of Office for:

- a) his/her decision regarding GS staff. The Head of Office may:
 - i) approve the Local APC's recommendation;
 - ii) return the case to the APC for a further review giving his/her reasons; *or*
 - iii) choose not to agree with the APC's recommendation, make his/her decision and inform the Local APC of his/her decision;

...

Discussion

25. I have not set out in detail the evidence, such as it is, of the successful candidate's educational and work experience qualifications. The essential problem with the applicant's contentions in this regard is that, as appears from the SAP minutes, even if the successful candidate had not qualified, this would not have

resulted in a recommendation favouring the applicant. Upon this hypothesis, if no recommendation were made by the SAP except for re-advertisement, it is not clear whether the APC would even have been convened. Even if it were, is it not possible to predict with sufficient probability what the APC would have done with such a report. I would not be prepared to infer from the narrow majority in favour of the applicant that there would have been a similar outcome.

26. The applicant also relies on what appear to be previously unsuccessful applications of the successful candidate for somewhat similar positions as demonstrating that he could not have been qualified for the position in issue here. This is such an obvious *non sequitur* that it does not require detailed discussion. Overall, there can be no doubt that the members of the SAP and the APC were fully able to appraise the qualifications and experience of the successful candidate and there is nothing in the matters raised by the applicant that suggests that they did not do so with an adequate understanding both of what he had actually achieved in respect of these competencies and the requirements of the post. It is significant, I think, that the majority of the APC who favoured the applicant did not suggest that the successful candidate did not have the qualifications for appointment or was less qualified than the applicant in those respects. Indeed, their reliance on her sex and experience strongly suggests that they accepted the view of the SAP that the successful candidate was more qualified in respect of the specified competencies than the applicant. I am certainly not in a position, and the evidentiary material before me at all events is not adequate to permit me, to conclude that the conclusions of the SAP and APC on these matters were unjustified.

27. So far as allegations of bias are concerned, the mere fact that the Head of Office considered that the successful candidates sufficiently satisfied the prerequisites for consideration for the post does not justify the inference that he was or might have been biased in his favour when he ultimately came to consider the recommendations of the SAP and the APC. Nor is there any merit in the contention that the members of the SAP should be presumed to have been biased because they were, in one way or

another, his subordinates. First, this would be a criticism able to be made of virtually any SAP convened in accordance with the Manual; secondly, it assumes that the Head of Office was biased himself in favour of the successful applicant and conveyed that preference to the panel members, as to which there is no evidence; thirdly, the members of the APC were selected by him but a majority of them, it appears, disagreed with what is hypothesised to be his prejudice in favour of the successful candidate. Lastly, in this respect, there is no evidence of the questions asked of the candidates, either in the written test or the interview. The applicant could have given this evidence had she wished, but did not do so. It is unfortunate that the respondent was not in a position to produce this material but the applicant has not sought (I think rightly) to make any point about this. The submission that the questions were crafted with anything else in mind than enabling a fair evaluation to be made of the candidates must be rejected.

28. On the question of whether the Head of Office acted within his authority in making the decision not to appoint the applicant, which effectively overrode the recommendation of the APC, Annex 4G, para. 28(a)(iii) as set out above specifically gives the authority to the Head of Office to make this decision. The applicant argued that the SAP is not a statutory body, should be considered subordinate to the APC and that its members are less experienced, and that therefore the Head of Office erred in favouring the recommendation of the SAP. The Manual clearly envisages that the Head of Office may make a decision contrary to a recommendation of the APC. The mere designation of the decision of an APC as a recommendation demonstrates that it cannot be binding. Certainly, the recommendations of the SAP are made to the APC, which then makes recommendations to the Head of Office. However, although the relationship between the SAP and the APC is sequential, it is not hierarchical. The Manual makes it clear that both bodies have their particular functions in a process which is designed to ensure adequate and proper consideration is given to the candidates and the best appointee is selected, with due regard being paid to the policy interests of the Organization such as gender balance. Given their make-up, one would naturally expect that the SAP and APC would consider the candidates from a

different perspective but this does not suggest or imply that the judgment of one is superior to the judgment of the other. The SAP has the undoubted advantage, in one sense, of actually conducting the interviews and administering the written tests. It is difficult to convey by a score and a brief narrative the range of information that is communicated by these means and, in this respect, it behooves a body such as the APC to pay significant deference to the assessments of the interviewing body based on information gathered in that way. It seems to me that it should be inferred that the majority of the APC assumed that the length of the applicant's service was sufficient to show that she had the necessary technical expertise to undertake the duties of the position despite the conclusion of the SAP to the contrary, but the lack of any discussion of this apparent difference of opinion suggests that the its conclusion in this regard was rather weak. There was good reason for the Head of Office to be doubtful about the persuasiveness of the majority's view in light of the SAP's report.

29. The Manual envisages that the Head of Office will give serious consideration to the analysis and recommendations of both the SAP and the APC and, at all events, this is what common sense also suggests. In this case, he was undoubtedly in a position to sensibly assess the contradictory recommendations and the reasons for them and had a duty to do so. The inconsistent recommendations were both capable of acceptance; both were reasonable (if not equally so, as I have explained); the difference lay, as I see it, essentially in the different weighting given to the various relevant policy considerations. The Head of Office did not dismiss the issue of gender imbalance as irrelevant. There is no explanation for allowing ten points additional to a female candidate but I assume that it is an attempt to acknowledge the rule that, where the evaluations of candidates' competencies are substantially the same, such matters as gender equality can be placed in the scales to determine the appropriate appointee and a ten point difference answers the requirement of substantial similarity. I am somewhat skeptical about the appropriateness of approach – it gives apparent precision in respect of a matter that cannot in reality be arithmetically measured – but in this case the applicant would have needed thirty-nine more points to have overtaken the successful candidate. More significantly, such an

imbalance can only be corrected by the appointment of otherwise qualified candidates: the rule could not justify appointment of an inadequately qualified person in light of the overreaching requirements of competence. If the opinions of the SAP and, ultimately, the Head of Office were conscientious, the applicant was not a candidate whose appointment could be used to correct a gender imbalance although it appears that this was a very real problem in the Islamabad operations of UNICEF.

30. It follows from the structure which I have described above that the recommendations of neither the APC nor the SAP have any primacy of importance or persuasion. The responsibility for making the appointment is entrusted to the Head of Office. He is not bound to accept the recommendation of one over the other, which is the logical consequence of accepting the applicant's contentions about the matter. He is bound to exercise his independent judgment after giving careful consideration to the recommendations made to him, explaining (as he did) why he preferred one rather than the other. Though brief, his reasons for accepting the recommendation of the SAP are adequate to justify his conclusion.

31. Finally, as to whether the eventual appointee should have been considered for the position because he was a staff member on a TFT contract, the respondent tendered without objection a statement from the Chief of Operations in UNICEF Pakistan which states –

[The appointee] was working on a Temporary Fixed-Term (TFT) contract at the time of interview. UNICEF Policy and Procedures Manual, *Chapter 6 clause 6.2.6(a)*, states:

“TFTs are considered UNICEF staff members and their conditions of service are governed by the UN Staff Regulations and Rules;”

TFT are considered as staff members and therefore by virtue of that status are considered for internal positions. [The appointee] did not need any special approval from the Representative or OIC. For the purpose of transparency in the recruitment process, approval may have been sought from the Representative or OIC.

...

The contention of the applicant that, as a TFT employee, the successful candidate should not have been considered for appointment or, if considered, should have yielded to the applicant, is based upon a mistaken assumption.

Conclusion

32. I find that the respondent acted within its authority and based on a selection process which complied with the contractual entitlements of the applicant. It is unfortunate that the applicant, as staff member with long experience with the Organization, was not successful on this occasion, but the decision not to appoint her was lawful.

33. The application is dismissed.

(Signed)

Judge Michael Adams

Dated this 5th day of May 2010

Entered in the Register on this 5th day of May 2010

(Signed)

Hafida Lahiouel, Registrar, New York