



Before: Judge Francis Belle

Registry: New York

Registrar: Nerea Suero Fontecha

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Marisa Maclellan, UNHCR

Introduction

1. On 22 December 2016, the Applicant, a former staff member in the United Nations High Commissioner for Refugees (“UNHCR”) at the P-4 level, filed an application in which he contests “[t]he decision to appoint another candidate to the position of Senior Legal Officer, [P-4 level], Brussels [“the Post”]”. The case was registered with the Dispute Tribunal’s Registry in Nairobi under Case No. UNDT/NBI/2016/091 and assigned to Judge Izuako.

2. After undertaking various case management steps, holding a hearing on 18 July 2017 and the parties filing their closing statements, Judge Izuako’s term with the Dispute Tribunal ended on 10 July 2019.

3. By email of 19 July 2019, the Nairobi Registry informed the parties that, “to balance the Tribunal’s case load, the ... Registry in Nairobi has been directed to transfer this case, which was on Judge Izuako’s docket, to the ... Registry in New York with immediate effect”.

4. On 17 October 2019, the case was assigned to the undersigned Judge.

5. By Order No. 149 (NY/2019) dated 28 October 2019, the Tribunal delineated the issues of the case on a preliminary basis and, based thereon and the limited scope of its judicial review, rejected a motion of 1 October 2019 from the Applicant for production of further evidence and information. The Tribunal also ordered transcripts of 18 July 2017 hearing to be produced and the Respondent to submit a copy of the job opening for the Post.

6. By Order No. 159 (NY/2019) dated 12 November 2019, the Tribunal noted that the Respondent had filed the relevant job opening on 31 October 2019 and that hearing transcript[s] were made available on 11 November 2019. As the Tribunal therefore found that the case record was fully informed and that the case was ready for adjudication, the parties were ordered to file their closing statements in sequential

order: the Applicant (26 November 2019), the Respondent (3 December 2019) and the Applicant (10 December 2019). The Tribunal also noted that the closing statements were solely to be based on previously filed pleadings and evidence, and that no new pleadings or evidence were allowed at this stage. The parties filed their closing statement in compliance with the time limits.

Facts

7. At an unknown date, the job opening for the Post was advertised. In this job opening, under the heading “organizational context”, was provided as follows regarding the role and functions of the Post:

The Senior Legal Officer [“SLO”] is Head of the Protection or Legal Unit either at Headquarters ... or Sub-Office ... The incumbent has direct supervisory responsibility for protection and legal staff He/she provides functional protection oversight to information management and programme staff and supervises protection standards, the provision of legal and policy advice, operational procedures and practices in protection delivery at the country level. The incumbent also acts as an advisor to senior management in designing a comprehensive protection strategy and represents the organization to authorities, UN sister agencies, partners and other stakeholders on protection doctrine and policy.

The Senior Legal Officer is normally a member of the Office senior management team and is relied upon by the Office to plan, lead and coordinate quality timely and effective protection responses to the needs of populations of concern ... Another important element of the SLO’s function is to ensure that persons of concern are involved with the Office in making decisions that affect them ... To achieve this, the incumbent will need to build and maintain effective interfaces with communities of concern authorities, protections and assistance partners as well as a broader network of stakeholders who can contribute to enhancing protection.

8. Under the heading, “desirable qualifications & competencies”, was, *inter alia*, listed “Teamwork & Collaboration”.

9. UNHCR then assessed the job candidates’ suitability for the Post in a “Shortlisting Matrix” of June 2016. It follows that the manager shortlisted the

Applicant for the position, but that his candidature was eventually rejected, particularly with reference to his performance at the interview, at which the panel considered that he did not demonstrate the required team work and emotional intelligence skills:

[The Applicant] was one of 4 candidates selected for interview and testing. He has experience of work with UNHCR at Headquarters and in Africa and has experience of work in Europe prior to joining UNHCR. His work experience with UNHCR has included the provision of legal advice demonstrating transferrable skills. The interview conducted focused on the relevance of professional experience and academic background for the post, knowledge, and skills (legal analysis, networking and team-working skills). At interview, he responded to the questions put to him in a broadly satisfactory manner, showing an overall understanding of the challenges and issues facing UNHCR in Europe. For some questions though, he often required more prompting. In terms of the required skills, in relation to team-working, his answers were very [“]self-focused[“] and he didn[’]t demonstrate the emotional intelligence or experience required for the post. A written test was conducted. The text of two short EU laws was provided two days in advance in order to test legal analysis skills rather than knowledge. On the day of the test, the candidate had one hour to read a short scenario and respond to a question by applying the laws shared earlier. [The Applicant] was able to identify the key legal issues in a very brief way, however, he did not provide any legal analysis reasoning for his conclusions. His written test was the weakest of the 4 candidates tested. In light of the above, the interview panel decided that [the Applicant] should not be recommended for the post.

...

10. The Department of Human Resources Management (“DHRM”) in its “Final Recommendation Meeting Minutes” endorsed the panel’s findings:

[The Applicant], P4, holds a Master of International Law. He has been serving as Senior Protection Officer in Morocco since July 2015. Prior to this he served as Legal Officer in Nairobi, Kenya from 2013-2015; Senior Protection Officer in Sudan from 2010-2012; and joined UNHCR as Legal Officer (Human Resources) with LAS [unknown abbreviation] in Geneva where he served from 2008-2010. He was promoted to the P4 level in 2015. It was noted that he is an ex-staff member and is eligible to apply to internally advertised positions. Following review of his factsheet and motivation letter, the manager

invited him to sit the written test on which he scored 17/30, and was invited for an interview. In light of the test and interview results, the panel did not find him suitable for this position.

11. From the “Final Recommendation Meeting Minutes”, it further follows that among the two job candidates who were ultimately recommended for the Post, one candidate, although not the successful one, was already serving at the P-4 level.

12. The Joint Review Board (“JRB”) subsequently endorsed DHRM’s final recommendation regarding the selected candidate as per its “final minutes” of 19 to 30 June 2016.

Consideration

Issues of the present case

13. 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 has 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).

14. Based on the parties’ submissions and the evidence on record, the substantive issues of the present case are defined as follows:

a. To assess the job candidates’ suitability for the position, was UNHCR’s administration of the interviews and a written test proper?

b. With reference to the assessment matrix as quoted above and the judgment of the Appeals Tribunal in para. 48 of *Ross* 2019-UNAT-926, were any of the alleged irregularities in the assessment process of “such a nature that, had [they] not occurred, [the Applicant] would have had a foreseeable and significant chance for [selection]”, including with regard to alleged procedural flaws and extraneous motives?

- c. In case the contested decision is found unlawful, what remedies are the Applicant entitled to?

Limitation to the judicial review and the principle of regularity

15. It is trite law that the Dispute Tribunal's judicial review is limited. In this regard, reference is often made by the Appeals Tribunal to *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as that "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".

16. 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).

Was UNHCR's administration of the interviews and a written test proper?

17. The Applicant submits that the Respondent has not demonstrated with a minimal showing that the Applicant's candidature for the Post received a full and fair consideration.

18. The Applicant argues that whereas the UNHCR's Revised Policy and Procedures on Assignment of 9 September 2015, UNHCR/HCP/2015/2/Rev.1 ("the Policy") does not foresee interviews and tests to be held, this was, nevertheless, done.

Candidates are rather meant to be compared and matched to positions by DHRM on the basis of the information contained in their fact-sheets, and the hiring manager is not meant to play a central role in the matching procedure when internal candidates are rotated between positions. This is why interviews and tests conducted by the hiring manager are not foreseen in the policy. Interviews and tests are only to be held for expert positions and externally advertised positions, where the manager's opinions play a more important role.

19. The Applicant contends that the documentation on the selection process shows that the process was carried out by the wrong decision-maker and by using the wrong criteria. The DHRM did not correctly exercise its discretion and failed to conduct a matching exercise in accordance with paras. 68 to 82 of the Policy—the manager instead circumvented the matching exercise using her own criteria. Under para. 68 of the Policy, DHRM was meant to match candidates to positions and the manager is only to assist in this process by providing his/her views on a candidature. DHRM is meant to be the key decision-maker in the process and the hiring manager is to only assist in the process by providing her/his views. In the present case, the manager took over the entire process and DHRM only reviewed the selection process, as admitted by the Respondent in his first closing statement of 11 September 2017. This detrimentally impacted the process as the wrong entity carried out the selection process and the criteria meant to be used for the matching exercise were ignored entirely. In particular, the key criteria to be used in the matching—grade, competencies and performance— were not given the necessary weight by the manager but were trumped by the interview and test results.

20. The Applicant contends that the Respondent failed to explain why and how a non-shortlisted candidate at the P-3 level was interviewed, tested and subsequently appointed over five suitable P-4 level candidates. In addition, the Respondent failed to show that the successful P-3 level candidate fulfilled all of the required essential minimum qualifications. The Applicant would have had high chances to be matched to the position because he would have scored strongly on grade, competencies and

performance. Through the allegedly flawed selection process, the results of the interviews and written test overrode all other criteria and led to the selection of a P-3 level candidate over six suitable P-4 level candidates, who were not given any preference in violation of paras. 68(h), 75 and 79A of the Policy. Instead, the manager placed all candidates on the same level and their performance in the interviews and written test then decided the outcome of the process. This led to a significantly different outcome than a matching exercise would have had. Had the matching been handled correctly by DHRM, the Applicant would have had high chances to be matched to the position because he would have scored high points on grade, competencies and performance.

21. The Applicant contends that the successful candidate was considered even though this person had not been shortlisted—DHRM only did so with the P-4 level candidates. The hiring manager, nevertheless, considered the successful candidate, who was at the P-3 level together with the candidates shortlisted by DHRM, and this person was therefore inappropriately added to the selection process. The Respondent has given no explanation for why the successful candidate was considered despite not having been shortlisted by DHRM when there were six suitable candidates at the P-4 level. According to para. 68(h) of the Policy, P-3 level job applicants are only meant to be considered if no applicant at the grade level is matched to a position. The manager considered that, at least, three P-4 level candidates were suitable as she decided to interview them—these three candidates therefore could have been matched to the position. It was therefore unlawful to even consider a P-3 level candidate. This constitutes a serious breach and clearly indicates that the manager wanted to hire the successful candidate from the outset.

22. The Applicant submits that finding that he “did not demonstrate the emotional intelligence required for the [P]ost” was improper as a person’s emotional intelligence cannot be assessed in a 30 minutes telephone interview. The Applicant’s past performance appraisals demonstrate otherwise. When he was working in Sudan, emotional intelligence was very important when working with government

counterparts. Two different supervisors, respectively, stated in their performance appraisals on “Values, Core Competencies, and Managerial Competencies”, *inter alia*, that the Applicant “built excellent relationships with counterparts in the government despite the complex political environment in Eastern Sudan” and “demonstrated high professionalism in his work and integrity during interactions with supervisees, colleagues, government, operational and implementing partners”. The Applicant has also been promoted to the P-4 level only one year before as one of the few candidates with only the minimum amount of seniority at the P-3 level. This could not have occurred had the Respondent had any doubts with regard to the Applicant’s emotional intelligence, which the Applicant possesses without doubt.

23. The Applicant submits that should the Tribunal find that the written test was lawful, then it was not conducted fairly. English native speakers had a significant advantage due to the complexity and length of the written test and, along with job applicants working in the Brussels office with experience in the subject matter, they were easily identifiable—the written test was therefore not appropriately blind-marked.

24. The Applicant contends that the panel failed to mention that French was to be tested and that it was a desirable qualification. During the interview, one question was asked in French, as the Applicant also confirmed under oath during his testimony at the hearing. As the successful candidate probably only possesses limited French skills, which could have showed during the interview, the manager and the panel omitted to mention that one question was asked in French in their report to DHRM. This should have been reflected therein and indicates that the hiring manager and the panel were biased in favor of the successful candidate from the outset. The successful candidate also did not possess the required working knowledge of another United Nations language and has not passed the United Nations proficiency test in other languages than English. If he had passed the proficiency test in a second United Nations language, he would have been entitled to a language increment and his grade would have been listed as “P3A” in UNHCR’s documentation.

25. The Respondent, in essence, submits that whereas the Respondent has minimally showed that the decision to reject the Applicant's candidature was correct, the Applicant has failed to show by clear and convincing evidence that he was not given full and fair consideration.

26. The Tribunal notes that under art. 101.3 of the United Nations Charter, "the paramount consideration in the employment of the staff ... shall be the necessity of securing the highest standards of efficiency, competence, and integrity (see similarly staff regulation 4.3). In line herewith, in order to assess a job candidate's suitability for a position, the Appeals Tribunal has held that the Administration has a certain degree of latitude in deciding on how to do so (see, for instance, *Nikolarakis* 2016-UNAT-652, *Kucherov* 2016-UNAT-669 and *Riecan* 2017-UNAT-802).

27. The Tribunal observes that the parties agree that the selection process is governed by the Policy. In this regard, the Tribunal observes that sec. 2 of the Policy provides that "[t]his Policy applies to selection processes for positions in the international professional category at the P-1 to D-1 grade levels that are advertised under regular Compendia or Addenda thereto, or as Fast Track vacancies" and is therefore also applicable to the present case.

28. The Tribunal further notes that nowhere in the Policy is using interviews or written test to appraise the competencies and/or qualification of job candidates prohibited or even as much as discouraged. Rather, interviews are mandatory when "the appointment of an external candidate is being considered" as it is stated that in such circumstances "the applicants (external and internal) selected by the manager will be interviewed" (emphasis added). It is further stated that a "[w]ritten test may be required" (see sec. 71). The Respondent submits that since the Applicant at the time was considered an external candidate, interviews were also required for the selection process for the Post.

29. The Tribunal finds that no matter what the Applicant's status was at the time of the selection process, the fact that the UNHCR policies make no specific

stipulations about whether skills, competencies and qualifications of job candidates can be tested through interviews and written tests does not mean that such methods cannot be used to assess their suitability for a specific post. This is the only logical conclusion with reference to art. 101.3 of the United Nations Charter and staff regulation 4.3 and the requirement that the highest standards of efficiency, competence, and integrity should be secured—indeed it would appear very difficult, if not impossible to assess skills such as teamwork and emotional intelligence only on the basis of a job application. Or, as stated in the Policy, sec. 79A, “The operational context related to the particular position should be taken into account. The managers’ specific position profile requirements shall be given due consideration”.

30. In this regard, the Tribunal notes that as the Applicant submits, under the sec. 79 A of the Policy, which outlines the “Matching Criteria and Annotation of Assignments”, candidates at the same level as the position are indeed to receive “preference” compared to those at a level below as, “Preference will be given to staff members at the grade of the position, including those who have been promoted subject to an assignment at the relevant grade”. While nothing further is provided as to how this preferential status is to be implemented, the Tribunal observes that any such priority treatment would only be pertinent insofar as both candidates at the same and the lower level as the post are actually found suitable—if any job candidate at the same level is found unsuitable, it makes no sense to grant her/him any further preference. In a specific selection process, for consistency purposes and for practical reasons, the Tribunal can also understand that all potential job candidates at different levels are tested and interviewed at the same time as this allows the same panel members to appraise and compare them all. According to the “Shortlisting Matrix”, this was also what occurred in the present case and, unlike what the Applicant argues, the Tribunal finds no irregularity therein.

31. Nevertheless, regarding the decision-maker, the Tribunal notes that the Applicant makes no specific submissions as to what irregularity occurred, but simply implies that it was the manager who improperly decided to reject his candidature.

From the “Shortlisting Matrix” and the JRB’s “final minutes”, however, follows, as submitted by the Respondent, that, “The manager was not the decision maker. She made her recommendation, which was reviewed and endorsed by DHRM and the JRB”. The Tribunal adds that it follows from the comments of the manager and DHRM in the “Shortlisting Matrix” that a panel, and not just the manager, found that he was not suitable for the Post. The Tribunal therefore finds that the Respondent has minimally showed that the decision-maker was the correct one as per the relevant provisions of the Policy, in particular secs. 65 to 79A.

32. As for the criteria by which the Applicant’s candidature was rejected, the DHRM referred to the panel’s findings on his performance at the interview and written test. The manager stated in this regard that, “In terms of the required skills, in relation to team-working, his answers were very [“]self-focused[“] and he didn[?]t demonstrate the emotional intelligence or experience required for the post”. In light of the job opening, in particular the stipulations made under the headings, “organization context” and “desirable qualification & competencies”, the Tribunal finds that the decisive criteria, namely particularly teamwork and emotional intelligence, would seem very reasonable.

33. The Tribunal therefore finds that by a minimal showing, the Respondent has demonstrated that the Applicant’s candidature was given full and fair consideration, noting that, as per *Sanwidi* and *Lemonnier*, it is not for the Tribunal to replace the decision-maker in her/his substantive assessment of the qualifications of a job candidate against the job profile. When studying the background for role of the Senior Legal Officer, the Tribunal observes UNHCR’s decision to reject the Applicant’s candidature for the Post would not seem to be manifestly wrong, arbitrary or otherwise unreasonable. It is therefore clear that the Respondent has demonstrated that in the process he assessed

- a. the Applicant’s grade level;

- b. the information regarding the Applicant included in the “Shortlisting Matrix” and the fact sheet;
- c. the Applicant’s competencies, skills and qualifications and job experience; and
- d. applied the Policy to the Applicant’s job application for the Post.

33. Under the principle of regularity, it is therefore for the Applicant to demonstrate with clear and convincing evidence that he was denied a fair chance of being selected for the Post. In this regard, the Tribunal observes that according to *Ibrahim 2017-UNAT-776*, “[c]lear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable” (para. 44).

34. In the present case, as follows from the above, the Tribunal finds that the evidence on record does not demonstrate that it is highly probable that he was improperly denied a fair chance for selection; rather, it shows that his candidature was fully and fairly considered. The Tribunal further finds that in accordance with the Policy and the jurisprudence of the Appeals Tribunal (for instance, *Nikolarakis*, *Kucherov* and *Riecan*), none of the other circumstances, which the Applicant otherwise submits would render the selection process unlawful, changes this finding. This includes: the simultaneous testing of candidates at the P-3 and P-4 levels, how the interviews were conducted, the testing and records of the job candidates’ language skills, and the content and difficulty of the written test.

35. Accordingly, the Tribunal finds that the Applicant’s candidature for the Post was properly given a full and fair consideration.

Did the Applicant have a foreseeable and significant chance for selection in light of any irregularities?

36. The Tribunal earlier stated that there was no irregularity found in the selection process and determined that the use of a written test and interview were proper as part of the of the process.

37. However, since the Applicant submits that had the alleged irregularities in the selection process not occurred, he would have had a substantial chance to be selected and appointed to the position the Tribunal finds it necessary to address this issue.

38. In particular, the Applicant mentions a job candidate, who got recommended but did not get selected (indeed, in the Applicant's closing statement, a name is stated, but the Tribunal does not have access to this information). The Tribunal now states that it cannot enter into the assessment of another candidate without adequate information and further that the attributes of this candidate is irrelevant other than to lead to the conclusion that the Applicant would not have been selected for the position in any event. But all of this calls upon the Tribunal to speculate and substitute its view for that of the administration.

39. The Tribunal agrees with the Respondent, who essentially contends that no procedural or substantive irregularities occurred in the selection process.

40. In any event, since the Applicant was found unsuitable for the Post based on a process which included assessment of grade, performance, and relevant competencies and skills and applying the UNHCR selection policy to the Applicant's job application, the Tribunal finds that he would never have had any foreseeable and significant chance for selection. The Tribunal finds, furthermore, that even if the successful candidate had been inappropriately selected due to previously having served at the P-3 level, the other recommended candidate at the P-4 level, to whom the Applicant makes reference, would have been selected for the Post. Consequently, even in this scenario, the Tribunal finds that the Applicant has not been able to substantiate his case.

Remedies

41. In light of the above, no remedies would be available to him.

Conclusion

42. In light of the above, the application is rejected on the merits.

(Signed)

Judge Francis Belle

Dated this 18th day of December 2019

Entered in the Register on this 18th day of December 2019

(Signed)

For Nerea Suero Fontecha, Registrar, New York