



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

EVANS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Katya Melliush, OSLA

Counsel for Respondent:

Matthias Schuster, UNICEF

Esther Uwazie, UNICEF

Introduction

1. The Applicant, a former Policy Specialist at the P-4 level in the Data and Analytics Section with the United Nations Children’s Fund (“UNICEF”) in New York, contests the Administration’s decision not to select him for the post of Senior Statistics Specialist (Poverty and Gender) at the P-5 level in the Division of Data, Research and Policy (“DRP”) (“the post”).
2. For the reasons below, the Tribunal rejects the application.

Facts

3. On 4 March 2017, the Applicant applied for the post.
4. On 24 July 2017, the Applicant’s supervisor wrote to him, “Just to let you know that [the Department of Human Resources (“DHR”)] has objected to your recruitment to this post, because there are too many British in the Division and they would like to see some diversity. Sorry, I really tried but it seems there are many more forces than I could handle”.
5. Subsequently, the post was re-advertised in July-August 2017.
6. On 25 July 2017, the Applicant made an inquiry regarding the re-advertisement of the post, and the following day, a Human Resources Business Partner advised him that the post was re-advertised to “attract more qualified applicants and especially female applicants from Programme countries”.
7. A total of 175 applications were received, and DHR pre-screened 25 applicants who met the minimum requirements. The hiring office then shortlisted 12 applicants.
8. A written test was administered on 18-19 September 2017 for three candidates including the Applicant. The Applicant received the highest score, 64 percent, and the other two candidates received 61 percent and 44 percent, respectively.

9. On 6 October 2017, the same three candidates were interviewed in the following areas of functional competencies: “Applying Technical Expertise”, “Relating and Networking” as well as “Working with People”.

10. Following the interviews, the selection panel found one candidate suitable and the other two candidates not suitable, and this assessment was documented in the section titled “Assessment of candidates on final shortlist”.

11. The selection panel found the Applicant not suitable for the post since while he “has a high level of technical expertise grounded in a strong academic research background” and “has interface with key economic partners at global level”, he “demonstrated limited experience interacting with regional offices, country offices, and other UN agencies”. The selection panel also did not find the Applicant’s responses satisfactory relating to the competency of “Working with People”. The selection panel further noted that the Applicant’s “fields of expertise are comparatively narrow” and he lacked experience in gender and social inclusion.

12. For the candidate who was found suitable, the selection panel found that the candidate had “depth of technical knowledge and experience in gender, poverty and social inclusion”. The panel also noted that the candidate presented an example on persuading an external partner where there was disagreement. In response to the competency of “Working with People”, the panel found that the candidate “demonstrated a strong understanding of managing people and dealing with conflict” and “successfully led cross cutting teams and works well with people”.

13. In the following section titled “Gender and geographic diversity”, it was noted that the gender and geographic diversity principles were taken into account. The report noted that the recommended candidate is a male from a donor country, and his appointment is favourable for gender diversity, but it will not improve geographic diversity:

The current [] gender and geographic ratio in the DRP Division is 48% male and 52% female, 27% programme and 73% donor country nationals. While the appointment of a donor male is favourable for gender diversity, it will not improve geographic diversity. It should be noted that the post was readvertised twice to attract more programme nationals, however the most suitable candidate for this post was a staff member at the level of the post and with special consideration status due to participation in the 2017 rotation exercise. We recognize that diversity for P5 level in terms of donor vs programme country does not look good. This post is specialized and technical and we have been working on this recruitment since March this year to attract targeted suitable candidates.

14. In the final section titled “Rationale”, it was noted that the recommended candidate “demonstrated experience in gender, poverty and social inclusion working at regional and country level”. It continued that “[w]hile this [] recruitment will not contribute positively to diversity in DRP, it provides positive contribution to organization’s mobility policy allowing [] to rotate to NY and remain in UNICEF”.

15. The selection panel report, which documented the selection process and the recommendation, was endorsed by the panel members on 17 October 2017.

Consideration

16. It is well established that the Secretary-General has broad discretion in matters of staff selection. When reviewing such decisions, the Tribunal shall examine “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration” (*Abbassi* 2011-UNAT-110, para. 23). 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” (*Ljungdell* 2012-UNAT-265, para. 30).

17. 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” (see para. 32). 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 (*Rolland*, para. 26).

18. In the present case, the record shows that the Applicant was one of the three candidates who were invited to a written test and interview, and he received the highest score in the written test. However, as documented in the selection panel report, he was found not suitable for the post based on his interview responses, and another candidate was selected for the post.

19. The Applicant argues that he was the most qualified for the post, presenting his role as a Policy Specialist at the P-4 level for six years, his temporary filling of the contested post for eight months while recruitment was pending, and his highest written test score as evidence. He further submits that the reasoning and assessment given by the selection panel was superficial on the merits of his candidature.

20. However, the Tribunal’s role is not to substitute its decision for that of the Administration when it comes to the evaluation of job candidates. All that is required from the Administration is that it minimally shows that the Applicant’s candidature was given a full and fair consideration. The Tribunal finds that the record shows that the Administration made such a minimal showing.

21. The Applicant further argues that he was discriminated against based on his British nationality and his male gender. To support this claim, he refers to his supervisor’s email of 24 July 2017, in which she stated that DHR objected to his recruitment as there were too many British, as well as a Human Resources Business Partner’s email of 26 July 2017, in which he stated that the post was re-advertised to attract female applicants from Programme countries. According to the Applicant, these emails show that the recruitment was fundamentally tainted by bias and discrimination

and the decision was premeditated and the recruitment process was a sham, and, therefore, he was not given a full and fair consideration.

22. In response, the Respondent submits that while the initial feedback the Applicant received in July 2017 may have suggested diversity considerations, the ultimate selection decision was merit-based as the selection panel found the selected candidate to be most suitable for the post. The Respondent further submits that UNICEF is required and committed to recruiting staff on as wide geographical basis as possible and to achieving and maintaining gender balance at all levels under the applicable legal framework.

23. The Tribunal recalls that once the Respondent makes a minimal showing that the Applicant was given a full and fair consideration, which he did in this case, the burden of proof shifts and the Applicant must show through clear and convincing evidence that he was denied a fair chance of selection.

24. The Tribunal also notes that the applicable legal framework allows the consideration of gender and geographical diversity in the recruitment process. Staff regulation 4.2 provides that “Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible”. Staff regulation 4.3 provides that “selection of staff members shall be made without distinction as to race, sex or religion”.

25. UNICEF Executive Directive on staff selection (CF/EXD/2016-007) provides that, as selection principles, “UNICEF is committed to: (a) recruiting staff on as wide geographical basis as possible; (b) achieving and maintaining gender balance at all levels of the organization; (c) selecting staff members without any form of discrimination; such as but not limited to distinction as to race, sex, sexual orientation, religion or disabilities” (see sec. 1.1).

26. While the Applicant’s supervisor wrote in July 2017 that DHR objected to his recruitment due to his nationality, this email was sent to the Applicant right before the

re-advertisement of the post, and consequently, before the evaluation process began. A Human Resources Business Partner wrote in the email that the Administration wanted to attract “female applicants from Programme countries”, and it is explained in the selection panel report that the Administration tried to “attract targeted suitable candidates”. These goals to increase geographical and gender diversity in the recruitment process are in line with UNICEF’s selection principles set forth in the Executive Directive as well as staff regulation 4.2.

27. The Applicant presents the July 2017 communications as evidence of discrimination and/or bias, but the record does not show that discrimination or bias played a role in the subsequent selection process as alleged by the Applicant. Following these July 2017 emails, the Applicant was shortlisted and was one of the final three candidates who were invited to a written test and interview. The record shows that the Applicant was not selected based on the overall assessment of these three candidates, and his supervisor, who wrote an email to him in July 2017 and was on the selection panel, also endorsed the selection panel report which recommended the selection of another candidate.

28. Further, the selection panel report explicitly states that gender and geographic diversity principles were taken into account in the recruitment process, and yet the recommended candidate was selected despite the fact that his selection does not improve geographical diversity, noting that the post is specialized and technical.

29. In light of the foregoing, the Tribunal finds that the contested selection decision was lawful since the Administration minimally showed that the Applicant’s candidature was given a full and fair consideration and the Applicant failed to show through clear and convincing evidence that he was denied a fair chance of selection.

Conclusion

30. In light of the foregoing, the application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 17th day of March 2020

Entered in the Register on this 17th day of March 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York