



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2020/029
Judgment No.: UNDT/2021/034
Date: 8 April 2021
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

KHAN

v.

SECRETARY-GENERAL

JUDGMENT

Counsel for Applicant:

Marcos Zunino, OSLA

Counsel for Respondent:

Nicole Wynn, ALD/OHR, UN Secretariat

Maureen Munyolo, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, an Administrative Assistant at the GL-5 level in the Supply Chain Management and Service Delivery Section (“SCSD”) of the United Nations Military Observer Group in India and Pakistan (“UNMOGIP”) in Islamabad, contests the Administration’s decision not to select her for the position of Property Control and Inventory Assistant at the GL-6 level located in SCSD, UNMOGIP (“the Post”).

Facts

2. On 17 September 2019, the Applicant applied for the Post.
3. Following the initial screening, 12 out of 82 applicants were released to the Hiring Manager, the Chief of SCSD.
4. On 19 November 2019, the Applicant, along with 11 job applicants, took part in a written assessment.
5. Four job applicants, including the Applicant, passed the written assessment, and the Applicant was invited to a competency-based interview to be held on 6 December 2019.
6. On 6 December 2019, the Chief of Mission Support (“CMS”) called the Chief of SCSD and the Chief Human Resources Officer (“CHRO”) into a meeting. The CMS requested to cancel the competency-based interviews because he believed that there was a perceived conflict of interest on the part of the Chief of SCSD. The CMS requested that the Chief of SCSD be recused from further recruitment activities to avoid allegations that could be made in the future. As a result, the Chief of the Field Technology Section (“FTS”) chaired the competency-based interviews.
7. On the same day, the Applicant was notified that her interview had been rescheduled for 10 December 2019.

8. On 10 December 2019, the Applicant took part in a competency-based interview.

9. At the conclusion of the interviews, the interview panel submitted a record of its evaluation of the job applicants to the Mission Review Panel, who in turn endorsed the selection process on 18 February 2020.

10. By memorandum dated 24 February 2020, the CHRO submitted a list of the two recommended candidates to the CMS, one of whom was the Applicant.

11. By memorandum dated 28 February 2020, the CMS informed the CHRO that, after careful consideration, he had decided to select a recommended candidate other than the Applicant based on the following:

a. Gender would not play a factor in the selection as both candidates were internal and therefore the selection of a female candidate would not have any impact on the entity's gender balance;

b. Consideration was given to seniority and career advancement as the selected candidate joined the Mission in September 2007 and had since been at the same level while the Applicant joined the Mission in July 2010 and was moved to a higher level (GS-5) in 2014;

c. The Post requires someone with analytical mind and writing skills. Knowing both candidates and acknowledging that both of them are good, overall the CMS opined that the selected candidate had an edge over the Applicant; and

d. Although the Applicant had been holding the portfolio linked to the Post since the incumbent left for assignment in another peacekeeping mission, it was noted that the Post requires to have a good background of accounting in terms of asset management with regard to capitalization and depreciation of assets as well as the International Public Sector Accounting Standards ("IPSAS"). The selected candidate possesses good knowledge in all these areas and the selected candidate has in the past been handling assets and inventory through the Finance process. In

addition, the selected candidate has great knowledge and understanding of Umoja processes which is an important requirement of managing assets and inventory.

12. On 19 March 2020, the Applicant submitted a request for a management evaluation of the contested selection decision.

13. On 27 March 2020, the Applicant was informed that she was not selected for the Post and she was being placed on a roster of pre-approved candidates.

14. On 2 May 2020, by management evaluation, the contested decision was upheld.

15. On 25 June 2020, the Applicant filed the present application.

16. On 9 March 2021, pursuant to Order No. 57 (GVA/2021), the parties filed their respective closing submission.

17. On 24 March 2021, the Respondent submitted leave to file a supplementary closing submission. The Tribunal granted it by Order No. 74 (GVA/2021).

18. On 31 March 2021, pursuant to Order No. 74 (GVA/2021), the Applicant filed a response to the Respondent's supplementary closing submission.

Consideration

Applicable legal framework

19. 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).

20. As the Appeals Tribunal reiterated in *Lemonnier* 2017-UNAT-762 (see para. 32), citing *Rolland* 2011-UNAT-122, “the starting point for judicial review is a presumption that official acts have been regularly performed”. The Appeals Tribunal held in *Rolland* that if the management is able to minimally show that an applicant’s candidature was given 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).

21. In *Finniss* UNDT/2012/200 (affirmed by *Finniss* 2014-UNAT-397), the Tribunal explained what a minimal showing is:

107. Administrative decisions must be capable of being demonstrated to be legal, rational, procedurally correct [citing *Sanwidi* 2010-UNAT-084] and based on well-founded facts. The Respondent will have made a minimal showing of regularity and will have met his evidentiary burden if he provides the Applicant and the Tribunal with information about the decision being challenged.

108. This information should include the findings of fact material to the decision; the evidence on which the findings of fact were based; the reasons for the decision and all of the documentation in the possession and control of the decision maker which is relevant to the review of the decision.

22. In this case, a question was raised as to which legal framework is applicable to the contested decision. The Applicant relied on provisions contained in ST/AI/2010/3 (Staff selection system), to which the Respondent responds that ST/AI/2010/3 is not applicable in this case and the contested decision is governed by staff regulations 4.1 and 4.2 and the Guidelines for the Selection of Locally Recruited Staff Members in the United Nations Peacekeeping Operations and Special Political Missions (“Guidelines”).

23. The Tribunal agrees with the Respondent that ST/AI/2010/3 is not applicable in this case. Section 3.2(h) of ST/AI/2010/3 explicitly states that it shall not apply to “[a]ppointment and selection of staff in the General Service category in peacekeeping

operations and special political missions”, and the contested decision is a matter concerning selection of staff in the General Service category in peacekeeping operations.

24. The Guidelines provide that they were “established for the selection of locally-recruited staff in the General Service and National Professional Officer categories in UN peacekeeping operations and special political missions and other entities supported by [the Department of Field Support (“DFS”)]” and “consistent with the basic principles of the Staff Selection System, as contained in Administrative instruction ST/AI/2010/3 and Secretary-General’s Bulletin ST/SGB/2011/7 on Central Review Bodies”. The Guidelines were published by DFS on 5 July 2016.

25. Therefore, the Tribunal considers that the Guidelines constitute the legal framework applicable in this case and will review it accordingly.

Merits

26. The Applicant argues that she was not given full and fair consideration in the contested selection on three grounds:

- a. The CMS, who had no authority to ask the hiring manager to recuse himself, unlawfully removed the hiring manager from the interview panel on the basis of a perceived conflict of interest when there was no conflict of interest;
- b. In making the selection decision among the two recommended candidates, the CMS unlawfully failed to consult with the hiring manager and took into account irrelevant matters and did not take into account relevant matters; and
- c. The CMS exhibited bias against the Applicant by a series of actions he took in the contested decision.

27. The Tribunal will consider the Applicant’s arguments in turn.

The removal of the hiring manager from the interview panel

28. First, the Applicant submits that the hiring manager was removed from the interview panel on the basis that one of the candidates, the Applicant, was working under his supervision which the CMS considered to be a perceived conflict of interest. The Applicant argues that this action was unlawful because (1) the CMS had no authority to ask the hiring manager to recuse himself, and (2) there was no conflict of interest warranting the recusal. Thus, the Applicant argues, the removal of the hiring manager from the selection process constituted a procedural irregularity that rendered the contested decision unlawful.

29. In response, the Respondent argues that the Applicant had no right to the continued participation of the hiring manager, the Chief of SCSD, in the selection process, who recused himself because there were reasonable grounds to question his impartiality. Further, the Respondent argues that the recusal of the Chief of SCSD did not negatively impact the Applicant's chance of selection as she was recommended for the position.

30. The Tribunal observes that while the Guidelines provide the roles and responsibilities of the hiring manager, they do not provide who the hiring manager should be and do not prohibit the replacement of the hiring manager. Therefore, the replacement of the hiring manager in itself does not violate any provision of the Guidelines and, instead, it falls within the Administration's broad discretion in matters of staff selection.

31. The Applicant argues that the decision to replace the hiring manager was unlawful because the mere fact that the Chief of SCSD was her direct supervisor does not constitute an actual or perceived conflict of interest.

32. In this regard, the Respondent submitted in the reply that the CMS proposed to the hiring manager to recuse himself because (1) the CMS received a complaint alleging that the Applicant had discouraged another staff member from applying for

the contested position since she had been promised the contested position; and (2) the hiring manager decided to lower the predetermined passing score of the written test from 60 per cent to 50 per cent to the benefit of the Applicant.

33. However, when the Tribunal ordered the Respondent to submit supporting documentation, the Respondent advised the Tribunal that there were no documents in support of his claims.

34. The Tribunal finds it unfortunate that the Respondent made a submission that questioned the impartiality of the Chief of SCSD without any supporting evidence. Given the lack of any evidence to support the Respondent's claim that there were serious reasons to question the Chief of SCSD's impartiality, the Tribunal doubts that there is sufficient evidence to conclude that the replacement of the hiring manager was a reasonable exercise of discretion.

35. Moreover, as the Applicant points out, the selection documentation does not provide for the replacement of a hiring manager in the middle of the selection process due to a perceived conflict of interest. As such, whether the replacement of the hiring manager complied with the applicable procedures was never reviewed by the Mission Review Panel who is tasked to determine whether the applicable procedures were followed under the Guidelines.

36. However, despite this alleged procedural irregularity, the Applicant was successful in a competency-based interview and in fact was one of the two recommended candidates for the Post.

37. As the Appeals Tribunal held in *Faust* 2017-UNAT-778, to find that an applicant's right to full and fair consideration was violated, an applicant needs to show that an alleged procedural irregularity led to a contested non-selection decision. In other words, the alleged procedural irregularity must have been "determinant on the outcome of the present selection process" (see *Faust*, paras. 27-30).

38. In this case, however, despite an alleged procedural irregularity, the Applicant successfully passed a competency-based interview and was recommended for the Post. Therefore, the Tribunal finds that the Applicant failed to show that the removal of the Chief of SCSD from the interview panel affected her right to full and fair consideration.

Making the selection decision among the two recommended candidates

39. Second, the Applicant argues that in making the selection decision among the two recommended candidates, the CMS unlawfully failed to consult with the hiring manager. Further, the Applicant argues that the CMS failed to consider the Applicant's gender which is a relevant matter and took into account irrelevant matters by considering the seniority and career advancement of the two candidates.

40. In response, the Respondent submits that since the Chief of SCSD had recused himself as the hiring manager, it would have been inappropriate for the CMS to consult with the Chief of SCSD given the concerns about the potential conflict of interest. The Respondent further submits that, in any event, the failure to consult with the Chief of SCSD did not result in an irregularity that would otherwise vitiate the selection process. Regarding the Applicant's claim that her gender was not considered properly in the selection decision, the Respondent submits that there was no requirement to consider gender parity under the applicable legal framework.

41. The Guidelines provide that the "Head of Mission will select the candidate he/she considers to be best suited for the functions, in consultation with the Hiring Manager concerned". The Administration does not dispute the fact that the hiring manager, either the Chief of SCSD or the hiring manager who replaced the Chief of SCSD, was not consulted in making the selection decision.

42. However, the Applicant fails to explain how the failure to consult with the hiring manager adversely affected her right to full and fair consideration. As stated above, it is not enough to claim that there was a procedural irregularity; the applicant needs to

show an alleged procedural irregularity was determinant on the outcome of the contested decision, which the Applicant has failed to show.

43. Regarding the Applicant's claim that the CMS failed to consider her gender in the selection decision in an appropriate manner, the Tribunal notes that the applicable law is ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality). As the Respondent points out, ST/AI/1999/9 only applies to "the filling of all vacant posts in the Professional category and above" (sec. 1.2) and "temporary assignments in the Professional category and above and in the General Service and related categories" (sec. 2.1). Since the contested selection decision concerns the appointment in the General Service categories that are not temporary assignments, ST/AI/1999/9 does not apply.

44. Therefore, the Administration's failure to consider the Applicant's gender in the selection decision did not violate the Applicant's right to full and fair consideration.

45. The Applicant also claims that the Administration considered irrelevant matters in making the selection decision, namely the seniority and career advancement of the two candidates, and thus the contested decision is unlawful.

46. The Tribunal notes that the CMS wrote, "[c]onsideration was given to seniority and career advancement as [the selected candidate] joined the Mission in September, 2007 and has since been at the same level while [the Applicant] joined the Mission in July, 2010 and was moved to a higher level of G-5 in 2014".

47. Staff regulation 4.2 provides that "[t]he 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".

48. The Guidelines also reiterate that "[t]he paramount consideration in the selection of staff members shall be the necessity of securing the highest standards of efficiency, competence and integrity" (para. 37). In addition, the Head of Mission can take into

account “the human resources objectives and targets as set out in the human resources scorecard” and give consideration to “staff members who are victims of malicious acts or natural disasters” and staff members who were “affected by abolition of positions or workforce reduction in a Secretariat entity” (para. 39).

49. In light of the applicable law, it is clear that there is no legal basis to consider the fact that the selected candidate joined the Mission earlier than the Applicant and that the selected candidate had been at the same level since 2010 to warrant giving priority consideration to the selected candidate to the detriment of the Applicant.

50. While the Secretary-General enjoys broad discretion in matters of staff selection, when judging the validity of the Secretary-General’s exercise of discretion in administrative matters, “[t]he Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered” (*Sanwidi*, para. 40).

51. The Tribunal finds that by considering the seniority and career advancement of the two candidates in the selection decision to the detriment of the Applicant, which are irrelevant matters in the selection decision, the Applicant’s right to full and fair consideration was violated.

Bias of the CMS

52. The Applicant also submits that the contested decision was tainted by ulterior motives since the actions of the CMS throughout the selection process strongly suggest his bias against the Applicant. The Applicant argues that the Tribunal should draw an inference of bias based on all the actions of the CMS which she considered to be procedurally irregular.

53. Under the jurisprudence of the Appeals Tribunal, if an applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

54. The Applicant did not present any evidence to show that the CMS was biased against her. Instead, she urges the Tribunal to draw an inference of bias based on the CMS's actions. However, considering that the burden of proving any improper motives rests with the Applicant, the Tribunal finds that the Applicant failed to meet such burden.

55. In conclusion, since the Administration considered irrelevant matters in the contested selection decision that had a detrimental effect on the Applicant's candidacy, the Tribunal finds that the Administration failed to show that the Applicant was afforded full and fair consideration in the selection exercise for the Post. The contested decision is therefore unlawful.

Relief

56. Article 10.5 of the Dispute Tribunal's Statute provides that the Tribunal may only order one or both of the following in its judgment:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

57. As a remedy, the Applicant seeks rescission of the selection decision. In the alternative, the Applicant seeks compensation for loss of opportunity.

58. Under art. 10.5(a) of its Statute, the Tribunal has the statutory discretion to rescind the contested decision or order specific performance, but as the Appeals Tribunal stated, the rescission can be ordered only when a staff member would have

had a significant chance for selection (see *Bofill* 2011-UNAT-174, para. 28, *Dualeh* 2011-UNAT-175, para. 19).

59. As one of the two recommended candidates, the Applicant clearly had a significant chance for selection. Therefore, the Tribunal orders the rescission of the contested selection decision.

60. Since the contested decision concerns “appointment, promotion or termination”, under art. 10.5(a) of the Statute, in ordering the rescission the Tribunal must set an amount of compensation *in lieu* of rescission or specific performance, which needs to be supported by evidence. As stated by the Appeals Tribunal, *in lieu* compensation shall be the economic equivalent for the loss of a favourable administrative decision (see *Mihai* 2017-UNAT-724, para. 19, *Ashour* 2019-UNAT-899, para. 20).

61. Since the Applicant was among two recommended candidates, she had a 50 per cent chance of selection for the Post. As the Applicant served on a fixed-term appointment, her income loss is to be determined as 50 per cent of the difference between her net base salary at the GS-5 level at the time of the contested decision and the net base salary she would have obtained at the GS-6 level for two years, since fixed-term appointments are regularly granted for such a period (see, for instance, *Hastings* 2011-UNAT-2019 and *Krioutchkov* 2016-UNAT-691).

Conclusion

62. In view of the foregoing, the Tribunal decides that:

- a. The Applicant did not receive full and fair consideration and thus the rescission of the contested decision is ordered;

- b. Alternatively, should the Organization opt to pay compensation in lieu of rescission, its amount is set at the equivalent of 50 per cent of the difference between the Applicant's net base salary at the GS-5 level and the net base salary she would have obtained at the GS-6 level for two years as *in-lieu* compensation; and
- c. 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 compensation. 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 8th day of April 2021

Entered in the Register on this 8th day of April 2021

(Signed)

René M. Vargas M., Registrar, Geneva