



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MOULANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Cristian Gimenez Corte

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is an Acquisition Planning Assistant at the FS-5 level, working with the United Nations Mission in South Sudan (“UNMISS”), based in Juba. He serves on a continuing appointment.¹

2. By an application filed on 23 December 2020, the Applicant is contesting a decision to not select him for the position of Requisitions Officer, advertised through Job Opening No. 136259 (“JO# 136259”).²

3. By the same application, the Applicant also challenges the decisions, (i) not to select him for the Temporary Job Opening No. 95616 FS-6 Requisitions Officer (“TJO# 95616”), (ii) to extend the temporary assignment of HH (anonymized for confidentiality), and (iii) to place HH on the roster of pre-approved candidates for FS-6 Requisitions Officer.³

4. The Respondent filed a reply on 28 January 2021.

5. By Order No. 185 (NBI/2021), the Tribunal directed the Applicant to file a response to the Respondent’s reply specifically on the issue of receivability. On 24 September 2021, the Applicant complied and filed the response. In his response, the Applicant clarified that the only decision he contests is “the decision not to select him for the position of Requisitions Officer for the Fixed Term Job Opening Number 136259”.

Facts

6. In January 2018, Generic Job Opening No. 88622 for the post of Requisitions Officer, FS-6 was advertised in Inspira for roster purposes (“GJO# 88622”).⁴ The

¹ Application, section I.

² Application, section V.

³ Application, section VIII.

⁴ Application, annex 3.

Applicant applied for the post on 6 January 2018.⁵

7. Pending the completion of the rostering exercise in relation to GJO# 88622, UNMISS advertised a temporary job opening for the position of Requisitions Officer TJO# 95616.⁶ The Applicant also applied for this position.⁷ On 11 July 2018, another candidate HH was selected for the position.⁸ HH was granted a temporary appointment initially until 3 November 2019 and it was subsequently extended until 2 November 2020.⁹

8. On 27 November 2019, the Applicant was invited for the interview of the GJO# 88622.¹⁰ On 21 January 2020, the Applicant and HH were placed on a roster of pre-approved candidates for the FS-6 Requisitions Officer post.¹¹

9. From 27 May 2020 to June 2020, Recruit from Roster JO# 136259 for the post of Requisitions Officer was issued in *Inspira*. The Applicant applied for the position on 3 June 2020.¹²

10. On 12 June 2020, the Human Resources Management Section (“HRMS”), UNMISS, released 16 applications to the hiring manager for review and further assessment. Out of the 16 candidates, the hiring manager recommended three, including the Applicant, to the Head of Mission (“HM”) for selection for the post.¹³ The hiring manager proposed HH as the most suitable candidate for the post on account of her excellent experience in acquisition planning and requisitioning and having led a team of requisitioners to successfully implement the Mission’s Demand Acquisition Plans for both the 2019 and 2020 periods.¹⁴

⁵ Application, annex 4.

⁶ Application, annex 5.

⁷ Application, annex 6.

⁸ Application, section VII, para. 6.

⁹ Reply, annex R/7.

¹⁰ Application, annexes 9 and 10.

¹¹ Reply, annex R/2.

¹² Application, section VII, para. 8.

¹³ Reply, annex R/3.

¹⁴ Ibid.

11. On 13 July 2020, the HM selected HH for the position and not the Applicant.¹⁵ On 5 August 2020, HRMS informed the Applicant that he had not been selected for the position.¹⁶

12. On 10 August 2020, the Applicant requested management evaluation of the contested decision.¹⁷ On 29 September 2020, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to uphold the contested decision.¹⁸

Receivability

Respondent's submissions

13. The Respondent submits that the Applicant's challenge of the selection of HH for TJO# 95616 is not receivable *ratione materiae*. At the latest, the Applicant was aware that HH had been selected for the TJO in November 2018 when she took up her functions in the same section and unit where the Applicant works. He was thus required to request a management evaluation within 60 days, or by 30 January 2019, which he did not do. He cannot contest HH's selection for the TJO two years later in the context of a completely different recruitment.

14. The claims relating to the extension of HH's temporary assignment and placing HH on the roster of pre-approved candidates for FS-6 Requisitions Officer are not receivable *ratione personae* and *ratione materiae*. The Applicant lacks the standing to contest administrative decisions that concern someone else. They do not affect his contractual rights or carry direct legal consequences for him. The two claims are also not receivable *ratione materiae* because the Applicant did not request management evaluation of either decision as required by staff rule 11.2(c).

¹⁵ Ibid.

¹⁶ Reply, annex R/5.

¹⁷ Application, annexes 17-17A.

¹⁸ Application, annex 18.

Applicant's submissions

15. The Applicant narrowed the scope of his application to exclude the claims against his non-selection for TJO# 95616 and GJO# 88622. He clarified that he is only contesting the decision to not select him for JO# 136259.

Considerations

16. The Tribunal notes that the scope of Applicant's application is now restricted to the decision to not select him for the position of Requisitions Officer JO# 136259 and to select another candidate instead.¹⁹ This settles the issue of receivability raised by the Respondent.

Merits

The Applicant's submissions

17. The Applicant contends that in not selecting him for JO# 136259, the Mission did not consider the qualifications and experience of HH, the geographic distribution of posts in the United Nations and the Applicant's internal candidacy. Rather, the Mission granted an overarching and predominant consideration to the gender balance criteria, even where there was already 50-50% gender balance in the Acquisitions and Requisitions Section.

18. The Applicant submits that HH was a less qualified candidate and she did not meet the basic criteria on technical training, and she did not have experience in logistics and in conflict and post conflict areas. The Mission also violated section 5.1 of ST/AI/2010/4/ Rev.1 (Temporary appointments) on the ground that HH held only a G-5, but not a G-6 or G-7-level position. She did not qualify to be selected for an FS-6 level position, which is equivalent to a P-3 level position.

19. The Applicant further contends that he was entitled to the position based on his

¹⁹ Applicant's response to Order No. 185 (NBI/2021), filed on 24 September 2021.

nationality and on the requirement to recruit staff on as wide a geographical basis as possible. Considering that Sri Lanka, his home country, is greatly underrepresented in the United Nations, is a troop and police-contributing country and in implementing the obligation to recruit staff on a “wide geographic basis”, he should have been selected. In addition, the Applicant maintains that as an internal candidate, with experience in field missions, he ought to have been selected for the post. HH who was selected has no field experience.

20. Finally, the Applicant avers that HH was not endorsed by a Central Review Body (“CRB”).

21. As remedies, the Applicant requests the Tribunal to:

- a. Rescind the contested decision;
- b. Award him compensation equal to the amount of money he would have earned had he been selected for the position;
- c. Award him compensation for the harm suffered as a consequence of his non-selection; and
- d. Refer the case to the Secretary-General for accountability against the Mission leadership.

Respondent’s submissions

22. The Respondent, relying on *Abbassi*²⁰, submits that the Appeals Tribunal has recognized the wide discretion vested in the Secretary-General in reaching decisions on staff selection.

23. The Applicant received full and fair consideration. He was found suitable for the position and recommended for selection. However, the Applicant was not found to be the most suitable candidate and there was only one position to fill.

²⁰ *Abbassi* 2011-UNAT-110, para. 24.

24. The hiring manager proposed HH for selection as the most suitable candidate since she received a rating of “exceeds the requirements” for the competencies of Planning and Organizing and Client Orientation, while the Applicant received the rating of “successfully meets the requirements” for the same competencies. Furthermore, the hiring manager took into account HH’s successful implementation of the Mission Demand Acquisition Plans for both 2019 and 2020, which is one of the position’s responsibilities. The HM’s decision to select HH based on the hiring manager’s recommendation, his independent review of the personal history profile (“PHP”) of the three recommended candidates, and the comparative analysis report (“CAR”), was reasonable. The record shows that the Applicant received full and fair consideration for the position as he was shortlisted, invited for the informal interview and recommended for the position. The Applicant has not rebutted the presumption of regularity through clear and convincing evidence.

25. The Respondent further submits that the Applicant has produced no evidence of bias or any procedural breach in the selection process. The Applicant’s allegation that HH as a GS-5 staff member holding a continuing appointment was not eligible to apply for the JO is meritless. Section 6.1 of the ST/AI/2010/3 (Staff selection system), provides that staff members in the General Service (“GS”) category holding a permanent, continuing or fixed-term appointment may apply for positions in the Field Service category at any level, “irrespective of the grade held in the General Service”. Accordingly, HH was eligible to apply for the position.

26. The Respondent also avers that contrary to the Applicant’s claim, the CRB endorsed the placement of HH on the roster for FS-6 Requisitions Officer. Both she and the Applicant were placed on the roster after successfully applying for the same GJO.

27. The Respondent maintains that the Applicant was not entitled to preferred consideration for the position. He was not the only internal candidate and would not have been entitled to a preference nevertheless. First, HH was also an internal candidate. She was a GS-5 staff member holding a continuing appointment. Second,

the General Assembly has expressly rejected preferences for internal candidates and requested the Secretary-General to promote opportunities for external candidates. Furthermore, the Dispute Tribunal has held that “a mere availability of suitable internal candidates does not bar the Organization’s seeking the best candidates available internally and externally”.

28. The Applicant also did not have a right to be selected due to his nationality. Staff regulation 4.2 provides that “due regard shall be paid to the importance of recruiting the staff on as wide geographical basis as possible”. The hiring manager considered the geographic distribution of staff in his recommendation; he found that Canada, HH’s country of nationality, and Sri Lanka, the Applicant’s country of nationality, were equally represented.²¹ Accordingly, due regard was given to geographic representation in the selection decision. Moreover, the recruitment for the position was not subject to geographic representation. The job opening did not include a special notice about recruitment from underrepresented countries.

29. The Respondent states further that unlike the Applicant’s allegation, the HM considered that the Applicant was a national of a troop and police-contributing country. In fact, all the three recommended candidates for the position were from troop and police-contributing countries, namely Canada and Sri Lanka. Accordingly, due consideration was given to candidates from troop and police-contributing countries in the selection decision.²²

30. The Respondent denies the Applicant’s claim that gender was considered over merit. HH was a more suitable candidate than the Applicant, as evidenced by the comparative analysis report and the selection memorandum.²³ Nevertheless, the hiring manager considered the gender distribution of staff in the section in line with the System Wide Strategy on Gender Parity, which establishes the Organization’s priority

²¹ Reply, annex R/8.

²² Reply, para. 31, Reply, annex R/9.

²³ Reply, annexes R/3 and R/4.

to achieve gender parity.²⁴

31. In view of the foregoing, the Respondent requests the Tribunal to dismiss the application.

Considerations

Standard of review

32. The paramount consideration in the employment of United Nations staff is the necessity of securing the highest standards of efficiency, competence and integrity²⁵, and, for this purpose, competitive processes are to be applied.²⁶

33. Jurisprudence developed based on these rules underlines that the Secretary-General has broad discretion in matters of staff selection. This includes the choice of the best evaluation method to assess the job candidates' qualifications.²⁷ In its review of such matters, the role of the Dispute Tribunal is to review the impugned selection process to determine whether a candidate has received fair consideration in accordance with the applicable legal framework, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration.²⁸ The Dispute Tribunal will not substitute its own judgment for that of the Secretary-General.²⁹

34. The Appeals Tribunal further ruled in *Rolland*³⁰ that official acts are presumed to have been regularly performed. Accordingly, in a recruitment procedure, if the Administration is able to even minimally show that a staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must

²⁴ Reply, annex R/10.

²⁵ Art. 101.3 of the Charter of the United Nations, staff regulation 4.2.

²⁶ Staff regulation 4.2.

²⁷ *Riecan* 2017-UNAT-802, para. 22.

²⁸ *Aliko* 2015-UNAT-540; *Rolland* 2011-UNAT-122; *Abassi* 2011-UNAT-110.

²⁹ *Toure* 2016-UNAT-660; *Riecan* 2017-UNAT-802. See also: *Kucherov* 2016-UNAT-669; *Nikolarakis* 2016-UNAT-652; *Nwuke* 2015-UNAT-508; *Ljungdell* 2012-UNAT-265.

³⁰ *Rolland* 2011-UNAT-122.

then be able to show through clear and convincing evidence to have been denied a fair chance.³¹

35. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Dispute Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and examine whether the decision is absurd or perverse. However, it is not the role of the Dispute Tribunal to consider the correctness of the Secretary-General's choice amongst the various courses of action open to him.³²

Whether the Applicant received full and fair consideration

36. The Tribunal has reviewed the record and concludes that proper procedures were followed during the selection exercise and that the Applicant received full and fair consideration for TJO# 136259. The Applicant has not rebutted the presumption of regularity through clear and convincing evidence. The reason for this conclusion is set out below.

37. The record shows that the Applicant was shortlisted and invited for the informal interview. The Applicant, HH and a third candidate were subsequently recommended by the hiring manager to the HM for selection.³³ However, the hiring manager proposed HH for selection as the most suitable candidate because she received a higher rating for the competencies of Planning and Organizing and Client Orientation than did the Applicant.³⁴ The hiring manager also took into account HH's successful implementation of the Mission Demand Acquisition Plans for both 2019 and 2020, which is one of the position's responsibilities.³⁵ The selected candidate was more

³¹ *Rolland*, *ibid.*, see also *Mohamed* 2020-UNAT-985; *Lemonnier* 2017-UNAT-762; *Ibekwe* 2011-UNAT-179; *Niedermayr* 2015-UNAT-603; *Survo*, 2015-UNAT-595; *Simmons* 2014-UNAT-425; *Zhuang, Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

³² *Toure* 2016-UNAT-660, para. 30.

³³ Reply, annexes R/3 and R/4.

³⁴ Reply, annex R/4.

³⁵ *Ibid.*

suitable than the Applicant, as evidenced by the comparative analysis report and the selection memorandum.³⁶

38. The Tribunal notes that in making the selection decision, the HM had broad discretion to choose any one of the three candidates recommended by the hiring manager.³⁷ The Applicant did not have a right to be selected.

Absence of bias or procedural breach

39. In impugning the selection decision, the Applicant asserts that the administration failed to take the following into consideration: HH was a less qualified candidate because she did not meet the basic criteria on technical training, did not have the requisite experience, had not been CRB endorsed and as a G-5 level staff member, did not qualify under section 5.1 of ST/AI/2010/4/Rev.1 for an FS-6 level position; he is from Sri Lanka, an underrepresented troop and police-contributing country; and his internal candidacy and field mission experience. He submits that the administration erroneously relied on the gender balance criteria, although the Acquisitions and Requisitions Section already has an equal gender balance ratio.

40. The Applicant has produced no evidence of bias or any procedural breach in the selection process.

41. Paragraph 37 above highlights HH's experience that qualified her for selection over the Applicant. It is also clear from section 6.1 of ST/AI/2010/3, which is the applicable administrative instruction and not ST/AI/2010/4/Rev.1 as argued by the Applicant, that HH was eligible to apply for the position because she was a GS staff member with a continuing appointment. As such, she was eligible to apply for positions in the Field Service category at any level, "irrespective of the grade held in the General Service".

³⁶ Reply, annexes R/3 and R/4.

³⁷ *Elzarov* 2018-UNAT-893.

42. The Tribunal notes that both the Applicant and HH were placed on the roster on 21 January 2020 after successfully competing for GJO# 88622.³⁸ Hence, the Applicant's assertion that HH lacked CRB endorsement is without merit.

43. The Applicant was not entitled to preferred consideration for the position because he was not the only internal candidate. HH, as a GS-5 staff member holding a continuing appointment, was also an internal candidate.

44. Further, the Applicant did not have a right to be selected due to his nationality. The Tribunal is satisfied that due regard was given to geographic representation in the selection decision. In his consideration of geographic distribution, the hiring manager found that HH's country of nationality, and the Applicant's country of nationality, were equally represented.³⁹ Moreover, as pointed out by the Respondent, the recruitment for the position was not subject to geographic representation. Accordingly, the JO did not include a special notice about recruitment from underrepresented countries.⁴⁰

45. The Tribunal is also satisfied that due consideration was given to candidates from troop and police-contributing countries in the selection decision. Both HH and the Applicant were from troop and police-contributing countries, i.e., Canada and Sri Lanka.⁴¹

46. Section 1.8 (a) of ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality) provides that vacancies at the professional level are to be filled by a female candidate when: (i) she meets the requirements of the post; and (ii) her qualifications are substantially equal or superior to those of the competing male candidates. After applying section 1.8(a) of ST/AI/1999/9 to the facts of this case, this Tribunal finds no reason to question the decision of the HM to select a female candidate to fill the vacancy.

³⁸ Ibid.

³⁹ Reply, annex R/8.

⁴⁰ Application, annex 11.

⁴¹ Reply, annex R/9.

47. Absent illegality of the contested decision, the Tribunal need not entertain the compensation request. Equally, the Tribunal sees no basis for referring the mission leadership to the Secretary-General for accountability under art. 10 of the UNDT Statute as requested by the Applicant.

JUDGMENT

48. The application is dismissed.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 5th day of October 2021

Entered in the Register on this 5th day of October 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi