



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

HAYASHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Simon Buettner, UNOG

Introduction

1. By application filed on 7 January 2013, the Applicant, an Economic Affairs Officer (P-4) at the Trade Negotiations and Commercial Diplomacy Branch (“TNCDB”), Division of International Trade in Goods and Services and Commodities (“DITC”), United Nations Conference on Trade and Development (“UNCTAD”), contests the decision not to recommend her for a P-5 post of Senior Economic Affairs Officer, UNCTAD, Vacancy Announcement (“VA”) No. 10-ECO-UNCTAD-15853-R-GENEVA (“the contested post”).

Facts

2. The contested post was advertised in *Inspira* on 24 November 2010, and the Applicant applied for it on 20 January 2011. The VA mentioned that the post was located at TNCDB, DITC, UNCTAD, and listed the following competencies: “professionalism”, “communication”, “planning and organizing”, “managing performance” and “leadership”. In total, 36 applications were submitted by the responsible Human Resources Officer to the Hiring Manager (“HM”), the Head, TNCDB, DITC, UNCTAD; six applicants withdrew their application during the recruitment process.

3. Upon assessment by the HM, six candidates were initially shortlisted and invited for a competency-based interview, including the Applicant, who was interviewed on 12 October 2011 by a panel of three members (“the Assessment Panel”), which included the HM. Following the interview, the Assessment Panel concluded that the Applicant did not meet all the requirements for the post. It found that while she fully met two of the five required competencies, she only partially met three of them, to wit, “professionalism”, “leadership” and “managing performance” and thus did not recommend her for the position. Only one candidate was deemed to meet all the requirements of the post and was thus recommended; her name was transmitted by memorandum of 21 December 2011 to the Central Review Board (“CRB”) by the Director, DITC, UNCTAD, through

the Human Resources Management Services (“HRMS”) of both UNCTAD and UNOG.

4. On 1 February 2012, the recommendation for filling the post was transmitted to the Secretary-General of UNCTAD. On 3 February 2012, he selected the recommended candidate “subject to the review of the Central Review Bodies”.

5. Following its meetings of 22 February 2012 and 28 March 2012 at which it had reviewed the case, the CRB requested clarifications from the HM on the assessment of several candidates, including the successful candidate, respectively on 28 February 2012 and 3 April 2012. However, none of the specific clarifications the CRB sought from the HM related to the Applicant’s candidature.

6. Following receipt of the clarifications, the CRB endorsed the recommendation presented to it, and on 22 June 2012, its approval was submitted to the Secretary-General of UNCTAD, noting that he could proceed with the final selection, which he did.

7. By e-mail of 29 June 2012, the HM informed the Applicant of the decision to select another candidate for the contested post and, implicitly, that she was not included in the roster of pre-approved candidates for similar functions.

8. On 24 August 2012, the Applicant requested administrative review of the decision to select another candidate for the contested post.

9. By letter of 9 October 2012 from the Under-Secretary-General for Management, communicated to the Applicant by e-mail of 11 October 2012, the latter was informed that the contested decision was upheld.

10. On 7 January 2013, the Applicant submitted her application to the Tribunal. In her submission, she requested that the Respondent provide documents regarding the selection process.

11. On 8 January 2013, the application was served on the Respondent and on 7 February 2013, he submitted his reply, along with five annexes filed *under seal*.

Counsel for the Respondent later confirmed to the Registry that it had been his intention to file the five annexes on an *ex parte* basis.

12. On 25 March 2013, the Applicant filed a submission entitled “Request to order the production of evidence”, which also contained her comments to the Respondent’s reply.

13. On 27 March 2013, the Respondent asked for leave to comment on the Applicant’s submission of 25 March 2013, which was granted by Order No. 37 (GVA/2013) of 4 April 2013.

14. On 2 May 2013, the Respondent filed his comments, along with the list of questions asked to the candidates during the interviews, and a statement by the Assessment Panel commenting on the Applicant’s submission of 25 March 2013.

15. By Order No. 145 (GVA/2013) of 2 October 2013, the Tribunal ordered that the Applicant be granted access to the five *ex parte* annexes, with annexes 2, 5 and 7 being shared with her in a redacted form. At the same time, the Applicant was given the opportunity to file comments to the annexes by 16 October 2013.

16. On 16 October 2013, in a submission entitled “Request to order the production of evidence”, the Applicant filed her comments on the *ex parte* annexes which had been shared with her as well as on the Respondent’s submission of 2 May 2013; she also requested further production of documents relating to the selection process.

17. On 4 November 2013, pursuant to Order No. 159 (GVA/2013) of 21 October 2013, the Respondent filed his comments to the Applicant’s submission of 16 October 2013.

18. By Order No. 193 (GVA/2013) of 12 December 2013, the Tribunal ordered the Respondent to submit, on an *ex parte* basis, all notes, reports or any other written records made by the members of the Assessment Panel during the selection process, in particular during the interview, pertaining to the Applicant and to the selected candidate.

19. On 20 December 2013, the Respondent filed the requested documents as annexes 1 to 9, and by Order No. 197 (GVA/2013) of 24 December 2013, the Tribunal ordered that the Applicant be granted access to the Respondent's reply of 20 December 2013, to the notes that were taken during her own interview, *i.e.* annexes 1, 3, 5, and to the transcript of those notes, *i.e.* annexes 7 to 9. The Tribunal further decided that the Applicant could submit comments on these documents by 7 January 2014.

20. On 26 December 2013, the Applicant filed a motion for extension of time to file her comments until 7 February 2014. By Order No. 201 (GVA/2013) of 31 December 2013, the Tribunal granted her an extension but only until 21 January 2014, which she complied with.

21. By Order No. 19 (GVA/2014) of 28 January 2014, the Tribunal convoked the parties to a hearing on the merits of the case on 18 February 2014; the hearing was held in conjunction with the hearing for Case No. UNDT/GVA/2012/094 which relates to the same selection procedure and was attended by the parties.

22. By motion filed on 10 March 2014, the Applicant requested the Tribunal to order the production of a letter allegedly received by the Secretary-General of UNCTAD in relation to the application of the selected candidate, and to "re-open the hearing to allow [her] to call a witness" to testify on this issue.

Parties' submissions

23. The Applicant's principal contentions are:

a. The Assessment Panel wrongly concluded that she only partially met the competencies of professionalism, managing performance, and leadership. Her long record of service within TNCDB, DITC, UNCTAD, and her highly-rated performance evaluations, many of them having been completed by the HM herself, are in clear contradiction with the assessment received;

b. Her right to a full and fair consideration for the contested post was infringed: she was not even recommended for the post, which came as a

shock to her in view of the fact that there was a close match between the job description as listed in the VA and her qualifications. She was considered as only partially meeting the competency of “professionalism” despite her long service at UNCTAD;

c. The assessment of the second competency—“managing performance”—which the Assessment Panel deemed she also only partially met, is in contradiction with her PHP and did not take into account her previous experience; the same is true for the third competency—“leadership”;

d. The whole selection process was flawed because the decision to recommend another candidate “had already been made” from the beginning and, hence, her candidacy “was not really being seriously considered”; everything was made to “build-up a case against her” and the HM delegated to another member of the Assessment Panel the task to write negative comments about her performance at the interview;

e. The comparative analysis report of her interview “contains substantial misrepresentations and inaccuracies in characterizing [her] responses to questions asked during the interview”; in short, “there is a sharp divergence between what [she] [knows] she talked about and what the Panel has reported”. The questions were not asked in full as stated, the Panel did not ask her follow-up questions, and she was even asked a question that was not on the list, nevertheless her correct answer to it was not taken into account. The notes that were taken by the Panel members do not present a fair and accurate summary of what she said during the interview, and a designated note-taker should have been appointed for a post of such a level. All the process seems in fact to have been done in a way to favour the successful candidate and to apply a double standard;

f. The successful candidate does not meet the requirements of the post: she was a staff member of the Trade and Environment Branch, DITC, and worked “in fields like the environment and organic agriculture products, and

her publications [were] generally unrelated to the work to be performed by the position”;

g. The CRB raised doubts as to the regularity of the selection process, and asked the HM for explanations why another candidate with a positive evaluation record was considered as only partially meeting some of the post requirements; her own case is similar, as her past record of more than 25 years of experience and positive evaluations in “precisely the substantive policy areas to be covered by the post” was obviously not taken into account;

h. She requests moral and material damages as compensation for the breach of her right to full and fair consideration for promotion, for the loss of a “potentially final” chance for “career advancement after thirty years of service to the UN”, and for the “significant blows to [her] mental and physical health”. She asks to be placed on the roster of candidates pre-approved for similar functions.

24. The Respondent’s principal contentions are:

a. The selection process was “correctly carried out”, and the decision not to recommend the Applicant for the post “was lawful”;

b. The jurisprudence of the former United Nations Administrative Tribunal, confirmed by both the Dispute and Appeals Tribunal, established that the Secretary-General has broad discretion in making decisions regarding promotions and appointments, and in reviewing such decisions, it is not the role of the Dispute or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of a selection process. A candidate’s qualifications, experience, performance reports and seniority are appraised freely by the Secretary-General and cannot be considered as giving rise to any expectancy of promotion;

c. In the present case, it was demonstrated that the Applicant’s candidature was given full and fair consideration and all proper procedures

were followed. The Assessment Panel's evaluation of the competencies the Applicant was deemed not to fully meet was justified and based on objective grounds; it is not the Tribunal's role to substitute the scores awarded by a panel of reviewers who examined the candidates during the assessment;

d. Regarding the Applicant's contention that the Assessment Panel's evaluation seems in contradiction with her latest e-PAS report, rated "outstanding", the Tribunal already held that the "conclusions of an assessment panel concerning an applicant's competencies may differ from the e-PAS evaluations of this candidate" (*Abbassi* UNDT/2010/086). The "purpose of the interview was for the panel to form an independent objective opinion of the applicant's candidacy", and "the Applicant's argument that her e-PAS show that she meets the requirements of the competenc[y] 'professionalism' has no merit";

e. The selected candidate meets all the requirements set forth in the VA for the contested post: she obtained a Ph.D. in economics in 1993 and has been working on trade issues in UNCTAD for over 17 years, including 12 years in the Division on International Trade. Following the interview, she was "overall rated to successfully meet the requirements set out for the position"; indeed, she was deemed to have demonstrated "ability to proactively develop strategies to accomplish objectives and has experience in coordinating teams and steering committees and managing performance of a large number of consultants, demonstrating good supervisory skills";

f. The report of the Assessment Panel shows that the questions asked during the interview, contrary to the Applicant's assertions, were adequate to determine the suitability of a candidate for the post; furthermore, with regard to the Applicant's contention that the Assessment Panel misrepresented her answers to the questions asked, what she "outlined in her submission is not a substantiation of alleged 'misrepresentations', but at best a display of possible misunderstandings". "[I]t is impossible to reconstruct word by word what was said during the interview or to retrace potential

misunderstandings”, but in any event such misunderstandings, if they occur, do not constitute “bias for or against any candidate”. Furthermore, “it is the candidate’s responsibility to request clarification of unclear questions posed by the Assessment Panel and to convey his or her answers in a clear and concise manner during an interview”. There is no discrepancy between the notes taken by the Panel members with regard to the evaluation of her interview, and there was no obligation to have one designated note-taker;

g. As confirmed by the jurisprudence (*Sefraoui* UNDT/2009/095), “[t]he interview process is not a robotic exercise in which each staff member must necessarily be asked identical questions without any regard to their background and answers provided by them”; a “reasonable degree of flexibility during interviews is permitted, provided that all candidates are given full and fair consideration”;

h. The CRB “did not request further specific clarifications with regard to the Applicant’s case but was satisfied that her candidature had been evaluated on the basis of the pre-approved evaluation criteria and that the applicable procedure had been followed”;

i. Based on *Lex* UNDT/2011/177, a decision of non-recommendation is not contestable because it is a preliminary decision, only the decision of non-selection can be challenged; the Respondent rightly interpreted the present application along this jurisprudence and responded accordingly;

j. The application should be rejected as unfounded.

Consideration

Scope of the application

25. At the outset, the Tribunal notes that in her request for management evaluation of 24 August 2012, the Applicant indicated that she challenged the decision to select another candidate for the contested post, whereas in her application before the Tribunal, she identified the contested decision as the decision not to recommend her for the contested post, thus preventing her from

being included in the roster of pre-selected candidates for similar vacancies. At a later stage in the proceedings, the Applicant expressly noted that she was not requesting the rescission of the decision to select the successful candidate. For his part, in his submissions, the Respondent focused on the decision not to select the Applicant for the post, referring to *Lex* UNDT/2011/177, in which the Tribunal considered that a selection decision is merely a confirmation of the non-recommendation decision and hence could be perceived as “being impliedly contested in the application”.

26. The Tribunal recalls what the Appeals Tribunal held in *Massabni* 2012-UNAT-238:

2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties’ contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties’ submissions.

3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

27. Based on the above, the Tribunal considers that the decision challenged by the Applicant is the decision not to select her for the contested post, which was communicated to her by e-mail of 29 June 2012 and which includes the decision not to recommend her for the post and not to include her on the roster of pre-approved candidates for similar vacancies.

Legality of the contested decision

28. Having defined the scope of the present application, the Tribunal turns to the Applicant’s main argument, which is that the comparative assessment report, as based on the contemporaneous notes taken by the members of the Assessment Panel, is not a true reflection of her interview. The Applicant considers that the

decision not to recommend her for selection is therefore procedurally flawed and tainted by extraneous motives or bias against her.

29. The Tribunal recalls that pursuant to established jurisprudence of the Appeals Tribunal, “the Secretary-General has a broad discretion in matters of promotion and it is not the function of [the Appeals] Tribunal, or the UNDT, in the absence of evidence of bias, discriminatory practices or *mala fides* to substitute its judgment for that of the competent decision-maker” (*Bofill* 2013-UNAT-383 and jurisprudence quoted therein). In reviewing administrative decisions regarding appointments and promotions, the Tribunal examines: “(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” (*Majbri* 2012-UNAT-200, *Abbassi* 2011-UNAT-110). A selection “should be upheld when candidates have received full and fair consideration, when discrimination and bias are absent, when proper procedures have been followed, and when all relevant material has been taken into consideration” (*Charles* 2013-UNAT-286, quoting *Rolland* 2011-UNAT-122).

30. Furthermore, in *Rolland* 2011-UNAT-122, the Appeals Tribunal stated:

There is always a presumption that official acts have been regularly performed. This is called the presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

31. Applying the above-mentioned principles to the present case, the Tribunal is unable to conclude, based on the record before it and the evidence adduced by the Applicant, that the selection process for the contested post was flawed or vitiated by any bias, discrimination or breach of any procedural rule.

32. At the outset, the Tribunal notes that all applicable procedures were complied with in the instant case: the selection process for the contested post was governed by administrative instruction ST/AI/2010/3 (Staff selection system), and

its sec. 7 (Pre-screening and assessment) provides the pertinent procedures for the short listing and assessment of candidates, as follows:

7.1 Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

7.2 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager (for position-specific job openings) and occupational group manager (for generic job openings), within and/or shortly after the deadline of the job opening, the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

...

7.4 The hiring or occupational group manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

7.5 Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres.

7.6 For each job opening, the hiring manager or occupational group manager, as appropriate, shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and a selection decision by the head of the department/office.

7.7 For position-specific job openings, up to and including the D-1 level, the hiring manager or occupational group manager shall transmit his/her proposal for one candidate or, preferably, a list of qualified, unranked candidates, including normally at least one female candidate, to the appropriate central review body through OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support. OHRM, the local human resources office or the Field Personnel Division shall ensure that, in making the proposal, the hiring manager or occupational group manager has complied with the process.

33. In accordance with these rules, following release of the pre-screened applications to the HM, the latter reviewed the candidates and shortlisted six of them, including the Applicant, for a competency-based interview. Following the interviews, the Assessment Panel was of the view that the Applicant did not fully meet the requirements of the post, in particular the competencies of “professionalism”, “leadership” and “managing performance”. A comparative analysis report was prepared in *Inspira* documenting the assessment of all interviewees. The recommendation of the successful candidate was forwarded to the CRB, which endorsed the recommendation after receipt of further clarifications and after an additional internal male candidate had been interviewed.

34. As regards the allegations raised by the Applicant with respect to the accuracy of the notes taken during her interview by the Panel members, the Tribunal notes as a preliminary issue that no provision exists that would ask for an independent note-taker.

35. Regarding the content of the notes taken by the three panel members, the Tribunal emphasizes that in fact, all these notes echo similar answers given by the Applicant; the Tribunal considers that this is a clear indication that they reflect the interview as it indeed happened and the answers that were in fact provided by the Applicant. Similarly, the Tribunal also has no doubt that the list of questions, which was attached to the Respondent’s comments of 2 May 2013, contains the actual questions asked during the interviews. The assertions to the contrary, made by the Applicant, are unfounded and not corroborated by any evidence.

36. Moreover, as regards the evaluation of the Applicant’s candidacy as such, it was well within the discretionary power of the Assessment Panel to deem that she did not demonstrate during the interview that she fully met the competencies required for the post, and it is certainly not for the Tribunal to enter into the consideration of the merits of such an assessment. Notwithstanding the Applicant’s understandable frustration as to the result of the selection exercise and her evaluation, the Tribunal is of the view that the file before it does not contain any indication of bias, discrimination or other prejudice that might have flawed the assessment. The Applicant’s recollection of the content of the interview which

she alleges is at variance with the content of the notes taken by the three Panel members, is obviously not sufficient proof of bias, and it is not possible for a Tribunal to base its judgment on mere assertions not supported by any other evidence. Although the Applicant is of the view that she met all competencies required for the post due to her past experience and current work, the Assessment Panel on the basis of the interview had a different opinion as recorded in the comparative assessment report. As stated in Judgment *Lex* UNDT/2013/056, “[a]ssessment of the Applicant’s suitability is a matter upon which reasonable minds could reasonably differ and such a difference does not lead to the conclusion that one or the other was in error”. Contrary to the Applicant’s assertion, the record before the Tribunal does not allow it to draw the conclusion that the selection process was tailor-made to result in her non-selection, or, as she stated, that a case was “built-up against her”.

37. In view of its conclusion that the decision not to select the Applicant by not even recommending her for the post following the interview, was legal, the Tribunal refrains from further consideration of her contentions pertaining to the qualifications of the successful candidate and, hence, rejects her motion for production of further evidence and testimony by a witness. Indeed, as in Judgment *De Saint Robert* 2012-UNAT-259, in the instant proceedings such contentions would be of no avail to the Applicant’s own case, as she had no real chance for promotion since she was not considered meeting all the requirements for the contested post.

Conclusion

38. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed in its entirety.

(Signed)

Judge Thomas Laker

Dated this 13th day of March 2014

Entered in the Register on this 13th day of March 2014

(Signed)

René M. Vargas M., Registrar, Geneva