



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/021

Judgment No.: UNDT/2014/042

Date: 15 April 2014

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

ALIKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Monika Bileris

Counsel for Respondent:
Kong Toh, UNOPS

Introduction and procedure

1. On 23 April 2013, the Applicant, then unrepresented, filed an application contesting several decisions made by the United Nations Office for Project Services (“UNOPS”) and the United Nations Development Programme (“UNDP”).

2. By Order No. 50 (GVA/2013) of 3 May 2013, the application was split into two separate cases, registered under Case Nos. UNDT/GVA/2013/021 and UNDT/GVA/2013/022, respectively, and served on the Respondent, who filed his reply on Case No. UNDT/GVA/2013/021 on 31 May 2013.

3. The Tribunal ordered that the case at hand—No. UNDT/GVA/2013/021—addresses exclusively the application against the decision not to select the Applicant for the position of Portfolio/Grants Manager, at the P-4 level, within the Switzerland Operations Centre (“SWOC”), UNOPS (the “disputed post”).

4. On 19 June 2013, the Applicant instructed counsel to represent him in this matter, and on the same date, Counsel for the Applicant filed a motion requesting leave to file a response to the Respondent’s reply, which was granted by Order No. 106 (GVA/2013) of 24 July 2013. Counsel for the Applicant filed a rejoinder to the Respondent’s reply on 19 September 2013.

5. On 26 September 2013, Counsel for the Respondent submitted a motion for leave to file comments regarding the Applicant’s rejoinder of 19 September 2013.

6. By Order No. 138 (GVA/2013) dated 1 October 2013, the Tribunal granted the Respondent’s motion to file comments on the Applicant’s rejoinder, by 14 October 2013. The Respondent filed his comments on 11 October 2013.

7. By Order No. 43 (GVA/2014) of 10 March 2014, the Tribunal convoked the parties to a hearing on Cases No. UNDT/GVA/2013/021 and UNDT/GVA/2013/022, which was conducted on 26 March 2014, with both Counsel for the Applicant and Counsel for the Respondent attending via videoconference.

Facts

8. The Applicant started employment at the SWOC, UNOPS, as Portfolio Manager of the Environment Portfolio, at the P-3 level, on 1 March 2009, in Geneva, Switzerland. In 2011, the then Director, SWOC, decided to assign the Applicant to the Water-Sanitation and Hygiene (“WASH”) portfolio within SWOC, whereas the Environment portfolio was assigned to the other Portfolio Manager, SWOC, equally at the P-3 level. The then Director, SWOC, subsequently left UNOPS in September 2011.

9. On 15 December 2010, a “Committee”, composed of the Executive Director, UNOPS, the Deputy Executive Director, UNOPS, and the Director, Outreach and Partnerships Group (“OPG”), endorsed the decision to assign, effective 1 January 2011, the Project Manager, Small Grants Program, North America Office (“NAO”), P-4 level, from New York to the OPG, UNOPS Headquarters in Copenhagen as Community Grants Advisor. This assignment was later extended, several times, until the end of 2012. The incumbent of the post of Community Grants Advisor was subsequently selected for the disputed post (the “selected” or “successful” candidate).

10. On 29 February 2012, an Investigator, Internal Audit and Investigation Group (“IAIG”), informed several UNOPS staff member, including the Applicant, that the IAIG had received a complaint regarding a contract with the Renaissance Mumbai Convention Center, and that it had decided to conduct an initial assessment in order to determine if it warranted an investigation.

11. The former Director, OPG, started his duty as new Director, SWOC, on 1 June 2012.

12. On 5 June 2012, the selected candidate, received delegation of authority for procurement and supply chain practice, as Project Manager, SWOC, Europe and the Middle East (“EMO”) Regional Office.

13. By email of 7 August 2012, the new Director, SWOC, informed the Applicant that the P-3 position he encumbered would be abolished effective

30 September 2012 and would be replaced by a new P-4 Portfolio/Grants Manager position; he encouraged the Applicant to apply to the latter. The other Portfolio Manager post, at the P-3 level, SWOC, was equally abolished.

14. On 8 August 2012, a P-4 post, Portfolio/Grants Manager, UNOPS, was advertised under vacancy No. VA/2012/B5108/987. The Applicant applied for the post and was invited to a written test and subsequently an interview on 18 September 2012. The Panel interviewed altogether five candidates. The selected candidate was ranked first, with a score of 88 points, whereas the Applicant was ranked fourth, with a score of 65 points. The “threshold to pass” had been set at 75 points.

15. On 5 October 2012, the Appointment and Selection Board, UNOPS, met, and reviewed the selection procedure of the disputed post. It requested clarification on whether a waiver had been approved to the selected candidate for applying earlier than the set standard of assignment period/time-in-post. The Director, Human Resources, subsequently waived the assignment duration for the selected candidate on 9 October 2012. The Board therefore recommended the appointment of the selected candidate to the disputed post. The minutes of the Board were signed by the Chair on 11 October 2012. The same day, the Deputy Executive Director, UNOPS, approved the Board’s recommendation to select the successful candidate to the disputed post.

16. On 13 October 2012, the Director, SWOC, notified the Applicant that he had not been selected for the post.

17. On 10 December 2012, the Applicant submitted a request for management evaluation of the decision not to select him for the disputed post, requesting that it be rescinded and that he be reinstated to his post of Portfolio Manager, P-3, SWOC, UNOPS. He received a negative response to his request for management evaluation on 24 January 2013, from the Executive Director, UNOPS.

18. The Applicant filed the present application on 23 April 2013.

Parties' submissions

19. The Applicant's principal contentions are:

a. Well before he took on his position, the Director, SWOC, abused his discretion and authority to prepare the ground and to position the selected candidate on a P-4 Portfolio Manager position at SWOC;

b. The successful candidate was transferred to a new position as Community Grants Advisor, in UNOPS Headquarters, in January 2011, to work at the newly created OPG, under the leadership of the Director, OPG, who subsequently became the Director, SWOC; the transfer of the selected candidate at his P-4 level, and the funding thereof, were approved by a Committee composed, *inter alia*, of the then Director, OPG;

c. When it was decided that the OPG, in its form at the time, should be abolished, the Director, OPG, was granted the position of Director, SWOC, without competition, by decision of the Executive Director, UNOPS; since there was no position available within SWOC at the P-4 level to place the incumbent of the Community Grants Advisor, OPG, it was decided to upgrade the Applicant's post to the P-4 level, to advertise the vacancy and select the successful candidate;

d. The new Director, SWOC, assumed his functions on 1 June 2012 and on 5 June 2012, the successful candidate was appointed as Project Manager, SWOC, and received delegation of authority "limited to [United Nations Framework Convention on Climate Change (UNFCCC)] Loan Project...under SWOC", although the upgraded P-4 post, as Portfolio/Grants Manager, SWOC, was only advertised in August 2012;

e. The UNFCCC loan project was allocated to SWOC merely to prepare the ground for the transfer of the successful candidate to SWOC;

f. As such, the decision to appoint the selected candidate to SWOC was ulterior to the formal restructuring process claimed by the Director, SWOC, and to the vacancy announcement and related recruitment process;

g. The terms of reference of the UNOPS Standard Portfolio Manager were reviewed to adjust them with the profile of the Community Grants Advisor, i.e. that of the selected candidate;

h. The members of the interview panel were selected so as to ensure the selection of the successful candidate, and for their conflict of interest with the Applicant; as such, the latter was denied his right to full and fair consideration;

i. One panel member was the Director, IAIG, who had a conflict of interest, since prior to the interview, IAIG had launched an investigation into issues falling within the Applicant's portfolio. While the case was eventually closed, the process was used to intimidate the Applicant and to leave the way to rumours and allegations about his role in the case under investigation; during the interview, the Director, IAIG, asked an inappropriate question relating to issues relevant to the ongoing investigation; the Respondent's argument that the Applicant was only a fact witness, and not the subject of the investigation, does not change the fact that the Director, IAIG, could not be completely neutral with respect to the Applicant in the selection process, since he was the Portfolio Manager for the incident that was being investigated;

j. The Director, IAIG, did not have the profile to sit as a technical expert in the interview panel, since he did not have the requisite understanding of what the post required;

k. Another member of the panel was the Programme Manager, Global Sanitation Fund ("GSF"), WSSCC; the Applicant, as Portfolio Manager, Water-Sanitation and Hygiene ("WASH"), SWOC, had, on many occasions, to reject unfounded requests emanating from the Programme Manager, GSF, WSSCC, and his team and inform UNOPS management of risks of breaches to UNOPS Rules and Regulations or breaches of UNOPS fiduciary duty; the participation of the Programme Manager, GSF, WSSCC, in the interview panel was therefore clearly a conflict of interest and disadvantaged the

Applicant; also, the selected candidate had been a member of the Panel who had selected the Programme Manager, GSF, WSSCC, in mid 2011;

l. The third panel member was the then Director, SWOC, who lacked objectivity, since he wanted to find a new job opportunity for the selected candidate, whose contract could no longer be extended beyond 31 December 2012;

m. The written test and interview were biased and the selected candidate had received early access to the test and interview questions, which is confirmed by the minutes of the Interview Panel, which stressed that it was convinced by his “studied approach to answering questions”; this can be verified in looking at the actual test and minutes and scoring table established during the interview; this in itself shows that he was denied a fair chance of selection;

n. The terms of reference of the selected candidate as Small Grants Advisor are incompatible with a project management role and his advisory responsibilities conflict clearly with the delegation of authority and basic principles of separation of roles and duties enforced by UNOPS;

o. The re-advertised post was almost the same as the P-3 post of the Applicant, which was abolished; the only responsibility added to it was related to grants, an area in which the successful candidate had experience;

p. The decision was at least in part the result of bias and ill-will of his superiors; he was subject to mobbing by the Europe and the Middle East (“EMO”) Regional Management and staff, as well as by the new Director, SWOC; unlike his Portfolio Manager colleague and others, he was not invited to important meetings and courses; he was precluded to directly communicate with the IAIG; the Director, SWOC, excluded him from important meetings with clients falling into the Applicant’s portfolio;

q. He received threatening messages from the EMO Regional Human Resources (“HR”) Specialist, who was not reprimanded by the EMO

Regional Director or EMO Deputy Regional Director, despite them being copied on these messages; the allegations made against him by the EMO Regional HR Specialist were never followed up;

r. Headquarters and the EMO Regional Office Management and staff created artificial obstacles to obstruct and impede the Applicant's work which finally impacted his performance;

s. These events, which were part of the process leading to his non-selection, constitute harassment, and led to a biased restructuring and recruitment process;

t. He submitted a request for an investigation into the harassment he was subjected to to the United Nations Office of Internal Oversight Services ("OIOS") and the United Nations Ethics Office, in 2013, which both advised him that he should submit his case to UNOPS, IAIG, or UNOPS Ethics Office; he did not follow this advice because of the evident conflict of interest; however, these events impacted on his non-selection and have to be taken into account.

20. The Respondent's principal contentions are:

a. The Applicant refers to some decisions which were not subject to management evaluation, and the application is not receivable in this respect;

b. If indeed there had been harassment, the Applicant should not have waited receipt of a negative response on his request for management evaluation to submit a complaint for harassment to OIOS and the UN Ethics Office;

c. The interview panel awarded the fourth-highest score to the Applicant (65 points), whereas the successful candidate got 88 points; the recommendation of the selected candidate by the interview panel was reviewed by the UNOPS Appointment and Selection Board ("ASB"), which recommended that the selected candidate be appointed for the post, and the Deputy Executive Director, UNOPS, subsequently approved his

appointment; the successful candidate assumed his functions in January 2013; the second-highest scoring candidate—who was not the Applicant—was recommended as alternate should the successful candidate not have accepted the appointment;

d. The Director, IAIG, did not have a conflict of interest and the Applicant was not the subject of an investigation, but rather a fact witness; the question asked by the Director, IAIG, was a verbatim from a UN interview manual hence not inappropriate; he had the relevant profile to sit on the Panel as a technical expert;

e. The Applicant did not substantiate his allegations against the Programme Manager, GSF, WSSCC, and he did not notify a UNOPS senior manager shortly after the interview that he considered the former's participation in the selection panel inappropriate; WSSCC is part of UNOPS and the Programme Manager, GSF, WSSCC, is a UNOPS staff member, hence there is no conflict of interest;

f. The Programme Manager, GSF, WSSCC, could not have a conflict of interest by the fact that the successful candidate had sat on the Panel which had recommended him, since the selection process for the disputed post could not potentially affect his own position;

g. Contrary to what was alleged by the Applicant, the decision to assign the UNFCCC project to SWOC was not taken by the Director, SWOC; the assignment of that project to SWOC was proposed by the Deputy Regional Director, EMO, upon a request by the Executive Director, UNOPS, to identify a business unit for the UNFCCC loan project which could not be assigned to the OPG;

h. The decision to assign the UNFCCC loan project to SWOC was unrelated to the post of the selected candidate; the latter, who had actually developed the project, had suggested that the project be assigned to another EMO unit in Copenhagen;

- i. Neither the Director, SWOC, nor the selected candidate were involved in the decision to assign the UNFCCC loan project to SWOC; when the UNFCCC loan project was assigned to SWOC, the successful candidate, remained in Copenhagen, as Community Grants Advisor, OPG, and was therefore not transferred to SWOC;
- j. The Applicant's P-3 post would have been abolished regardless of whether the UNFCCC loan project was assigned to SWOC or to any other unit;
- k. The allegations concerning the Director, SWOC, are unfounded, particularly because it is normal that a focal point be appointed for audit purposes; moreover, both the Applicant and the Director, SWOC, were on paternity leave in summer 2012 and, hence, their opportunities to meet were limited; the Director, SWOC, was free to organize meetings with clients, without including any Portfolio Manager;
- l. Since the post was reclassified to the P-4 level, it was necessary to advertise the post for competitive selection; the WASH portfolio did indeed require grants related expertise;
- m. With respect to the selection process *per se*, the Respondent made a minimal showing that the Applicant's candidature was given full and fair consideration, particularly since he was interviewed on the same day as the successful and three other candidates, and it was only after the answers of all candidates were assessed and scored that the candidate who scored highest was recommended for the post; the process was reviewed by the ASB, and the selection decision approved by the Deputy Executive Director, UNOPS;
- n. The Applicant has not met the burden of proof to show that he was denied a fair chance of selection;
- o. Allegations made against persons not involved in the selection process, such as the EMO Regional Director, are irrelevant;

- p. The application should be dismissed in its entirety.

Consideration

21. The Tribunal recalls the jurisprudence of the Appeals Tribunal in appointment and promotion matters, whereby 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 (*Rolland* 2011-UNAT-122; *Charles* 2013-UNAT-286). In *Rolland* 2011-UNAT-122, the Appeals Tribunal further held that there is a presumption that official tasks are regularly performed (cf. *Abu Jarbou* 2013-UNAT-292, quoting *Rolland*). Therefore, the Tribunal is bound to limit its considerations to the elements listed above, that is whether the Applicant's candidature was given full and fair consideration, whether the decision was taken without any bias against the Applicant, whether proper procedures were followed and whether all relevant material was taken into account.

22. The Applicant makes various procedural arguments questioning the selection decision, which the Tribunal will examine in turn.

23. First, the Applicant argues that the terms of reference of the vacancy announcement of the disputed post were tailor-made for the successful candidate. In this regard, the Tribunal notes that it is the prerogative of the Administration to determine the terms of a vacancy announcement, including with respect to responsibilities, competencies, education and other requirements. Except for cases of clear and evident abuse of this discretion, the views of individual candidates in this respect are irrelevant. In the case at hand, no such clear and evident abuse can be found. On the contrary, the documents on file show that the profile of the post as advertised in the vacancy announcement was justified by the actual activities performed at SWOC. Therefore, the Applicant's argument that the terms of the vacancy announcement itself were adjusted only to fit the successful candidate has no merits.

24. Second, the Tribunal looked into the Applicant's argument that three out of four members of the Interview Panel—namely the Director, IAIG, the Programme Manager, GSF, WSSCC, and the Director, SWOC—were biased against him.

25. The Applicant argues that the Director, SWOC, mobbed and avoided him, that he held meetings with clients falling under the Applicant's portfolio without inviting the Applicant, that he took decisions concerning the Applicant's team without consulting him and banned the Applicant from communicating with the Investigation Unit. Further, it is the Applicant's view that the Director, SWOC, showed favouritism for the selected candidate and that he prepared the latter's appointment well before the formal restructuring and recruitment process.

26. The Tribunal finds that none of the arguments advanced by the Applicant prove that the Director, SWOC, unduly influenced the actual selection process or how these issues are concretely linked to the actual selection decision. Also, it notes that the Applicant did not file, at the time of or before the selection procedure, any complaint against the Director, SWOC, which might have given weight to his claims. Further, as will be further developed below, the minutes of the Interview Panel do not lead to conclude that undue influence was exercised by the Director, SWOC, on the other Panel members in favour of or against one of the candidates. Finally, in view of the scope of judicial review as described above, any event prior to the selection process—e.g. restructuring, transfer of the selected candidate from NAO to OPG, delegation of authority—is immaterial to the considerations with respect to the regularity of the selection process itself and whether the Applicant was given full and fair consideration. The Applicant did not prove that the Director, SWOC, unduly influenced the selection decision to his detriment and for the reasons outlined above, the Tribunal cannot find that his acting as Chair of the Interview Panel and Hiring Manager in the selection procedure constitutes a procedural flaw.

27. The Applicant further argues that the Programme Manager, GSF, WSSCC, had a conflict of interest, because the Applicant had in the past rejected several times "unfounded requests" from him or from his team, and because the successful candidate had in 2011 sat on the interview panel to select the

Programme Manager, GSF, WSSCC, for his current post. The Tribunal notes that the Applicant did not show that prior to the interview he had formally or even informally complained about any “unfounded” requests the Programme Manager, GSF, WSSCC, would have made in violation of the rules and regulations which he had to reject; also, there is no evidence that during or just after the interview he informed UNOPS his reservations about the Programme Manager, GSF, WSSCC, being part of the Panel. The Tribunal does not find that the reasons advanced by the Applicant justify the conclusion that the Programme Manager, GSF, WSSCC, was biased or had a conflict of interest which would have precluded him from sitting on the Interview Panel. Rather, though not required by UNOPS Recruitment – Instruction and Procedures, the Tribunal finds it reasonable that a client representative with substantive knowledge of the subject matter was added to the Panel, *inter alia*, to assess the potential interaction of the candidates with clients. This is particularly so since the vacancy announcement stated under summary of key functions “partnership and client relations” and listed client orientation as one of the competencies required for the post; in addition, it contained various other references on how the incumbent of the post has to interact with and serve various clients. Therefore, and absent any material proof of bias, the Tribunal cannot find any grounds to conclude that the Programme Manager, GSF, WSSCC, was biased against the Applicant. This conclusion is further supported by the fact that the Applicant admitted that he and the Programme Manager, GSF, WSSCC, had a “cordial relationship”.

28. Moreover, the Tribunal does not find any merit to the Applicant’s claim that the Programme Manager, GSF, WSSCC, was biased in favour of the selected candidate, on the grounds that the latter had been a member of the interview Panel who had selected him as Programme Manager, GSF, WSSCC, and that this had an impact on the selection decision for the disputed post. The Tribunal stresses that this kind of situation can arise in any Administration and this fact alone cannot support the conclusion that the person sitting on such a Panel is not neutral and/or has to recuse her/himself, which, most importantly, is not provided for by the applicable rules. The Applicant’s argument in this respect must therefore equally fail.

29. Finally, the Applicant's argument that the Director, IAIG, had a conflict of interest in view of the then IAIG ongoing investigation into issues falling within the Applicant's portfolio, and that it was inappropriate for the Director, IAIG, to ask a question which could easily be related to the investigation, is also without merit. The Applicant was not the subject of the investigation but a mere fact witness; the question asked by the Director, IAIG, was one of those listed in the official UN interview guide and was asked in exactly the same terms to all the interviewed candidates. Concluding that the Director, IAIG, shall be precluded from sitting on each Panel to a post for which a fact witness of an IAIG investigation is a candidate has no legal basis. Indeed, nothing in the rules prevents the Director, IAIG, to sit on an interview panel on the grounds that one of the interviewed candidates has been heard as a fact witness in an ongoing investigation. The fact that he asked the Applicant and all other candidates a standard interview question, relating to the candidates' flexibility in the application of rules and regulations can by no means constitute evidence of any bias against the Applicant.

30. The Applicant further holds that the Director, IAIG, was not an expert under sec. 14.7.3(b)(i)(2) of the UNOPS Recruitment - Instructions and Procedures, which provides:

The interview panel will consist of at least three voting members: a Chair (who either is or represents the Hiring Manager), a Technical Expert (who has in-depth knowledge of the skills and expertise required for the vacant job function and preferably e.g. from outside the hiring unit or a staff member from another UN agency); and a Human Resources (HR) Representative (who will advise on UNOPS recruitment standards, practices and policies, and serve as a resource person on all related HR regulations and rules, as required).

31. The Tribunal notes that the Respondent argues that the Director, IAIG, was an expert for the purpose of the above-mentioned rule since many of the management responsibilities of his position were similar to that of the disputed post and both his and the disputed post have to deal with compliance of UNOPS Rules and Regulations and Policies. The Tribunal stresses that the Administration disposes of considerable discretion in determining who is an "expert" for the

purpose of this rule and considers that it can legitimately be argued that in view of the similarity of the management functions of the Director, IAIG, and those of the disputed post, the Director, IAIG, was an expert under the above-quoted rule. Moreover, and maybe more importantly, the Tribunal finds that there can be no doubt that the Programme Manager, GSF, WSSCC, though he was sitting on the Panel as a “client representative”—beyond what was required by the applicable rules—also fulfilled the criteria of a technical expert for the purpose of the above-referenced provision. Indeed, in view of the profile of GSF, WSSCC, and the interaction of the Programme Manager, GSF, WSSCC, with SWOC/WASH, he certainly had in-depth knowledge with respect to the skills and expertise required for the disputed post. This is also supported by the fact that it was in fact him, together with the Director, SWOC, who marked the written test which the Applicant, together with four other candidates, passed successfully. The Tribunal is therefore satisfied that sec. 14.7.3(b)(i)(2) of the UNOPS Recruitment - Instructions and Procedures was complied with.

32. An additional argument of the Applicant is that the selection process was biased because the successful candidate may have had early access to the test and interview questions. The Tribunal notes that the Applicant does not provide any evidence for this allegation, and stresses that the Applicant was one of the candidates who successfully passed the written test and who was invited to the interview on that ground, together with four other candidates. The minutes of the interview Panel noting the “studied approach” of the successful candidate to respond to questions clearly and exclusively refer to the interview, and not to the written test, which had been assessed independently and was the basis to invite candidates to the interview. Therefore, the Tribunal finds all documents related to the written test irrelevant regarding the outcome of the selection process.

33. Moreover, with respect to the interview itself, the Tribunal notes that the selected candidate was not the only one recommended for the post, but that, in case the selected candidate would not take on the post, the Panel also recommended a female candidate, who at the interview had a score (81 points) above the threshold previously determined by the Interview Panel, that is 75 out of 100 points. Out of the five interviewed candidates, three—including the

Applicant—scored under the passing threshold, with the Applicant ranking fourth out of five interviewed candidates, with 65 points, and the other two scoring 58 and 70 points, respectively. The successful candidate scored 88 points.

34. In view of the minutes of the Interview Panel showing that the Panel was unanimous with respect to the Applicant not obtaining at least the passing score of 75 points, the Tribunal's conclusion that the composition of the Panel was in accordance with the applicable rules and the Applicant's failure to prove any conflict of interest for any of the Panel members, the Tribunal concludes that the selection procedure was correctly followed, that the candidature of the Applicant was fully and fairly considered and that there was no bias or procedural flaw.

35. Finally, the Tribunal notes that the Applicant made various claims related to harassment he alleges he was subjected to by persons completely unrelated to the selection process. The Tribunal considers that the Applicant did not establish any proof of harassment against him, let alone how these allegations might have impacted on his non-selection for the disputed post.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 15th day of April 2014

Entered in the Register on this 15th day of April 2014

(Signed)

René M. Vargas M., Registrar, Geneva