



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

KINYANJUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Ron Mponda

Counsel for Respondent:

Francisco Navarro, UNHCR

Elizabeth Brown, UNHCR

Introduction

1. On 6 August 2017, the Applicant, a staff member of the Office of the High Commissioner for Refugees (“UNHCR”), filed an application contesting the decision not to select him for position No. 10003235, Deputy Representative, Burundi (P-5).

Facts

2. The position was advertised on 9 September 2016 under job opening no. 12748 (“JO 12748”) in the UNHCR September 2016 Compendium. JO 12748 included a generic description of the requirements for the post without providing information concerning the operational context. This omission became an issue in the case.

3. On 14 October 2016, the Division of Human Resources Management (“DHRM”) shortlisted 11 candidates, including the Applicant. This list was sent to the then Representative, Burundi (“manager”), for his views. After considering the list, the manager nominated the Applicant as his preferred candidate.

4. On 7 November 2016, DHRM informed the manager that upon reviewing JO 12748 at a Final Recommendation Meeting it was noted that his comments on one candidate, R., did not appear to match the latter’s experience. DHRM requested the manager to once again review the candidates and to provide his revised views by 9 November 2016.

5. On 9 November 2016, the manager provided his revised views but did not change his recommendation that the Applicant was his preferred candidate. In relation to candidate R., he noted that the candidate was not proficient in French which he considered was required for the post, and that he was a national from a member state of the European Union, which would pose difficulties in dealing with the authorities in Burundi.

6. DHRM were not wholly satisfied with the manager’s comments and concluded that pending a discussion with him, JO 12748 was not ready to be

presented to the Joint Review Board (“JRB”) at its session on 16-18 November 2016 nor on 14-16 December 2016. The Applicant informed the Tribunal that when he became aware of the fact that the JO was not presented to the JRB he became suspicious as to the motives behind the omission to include the position for which he had been recommended as the preferred candidate.

7. During the week of 12 December 2016, the manager travelled to Geneva on mission. Since he was due to retire in 2017 he had a discussion with the Director of the Africa Bureau on staffing matters concerning UNHCR operations in Burundi. The manager also met the Chief, Assignments Management Section (formerly Assignments and Promotions Section) (“Chief, AMS”) and her supervisor. The Tribunal was informed that there was no written record of these discussions as none was taken. Both the manager and the Chief, AMS, confirmed that these discussions had taken place.

8. On 18 December 2016, the manager sent an email to DHRM requesting that the position of Deputy Representative, Burundi, be re-advertised to take into account the changed operational context. The Tribunal finds that the discussions that took place in Geneva caused the manager to review and to revise the requirements for the post thereby attracting a different range of candidates. His recommendation to re-advertise the post was accepted and acted upon by DHRM who decided, in the circumstances, not to consider the candidates who had applied in response to JO 12748.

9. On 13 January 2017, the position was re-advertised in Addendum 4 to the September 2016 Compendium under job opening no. 13446 (“JO 13446”), with a specific operational context.

10. The Applicant applied for JO 13446 and was shortlisted by DHRM, along with six other internal candidates.

11. On 7 March 2017, the manager provided his views on the candidates. On this occasion he did not recommend the Applicant, whom he found was “comparatively more junior than most of the other candidates having been promoted in 2014 to the P-4 level” and less experienced than his preferred candidate, A..

12. DHRM met on 10 March 2017 and recommended A. for the position.
13. The JRB met from 22 to 24 March 2017 and endorsed DHRM's recommendation that A. be appointed.
14. On 3 April 2017, the High Commissioner announced his decision to assign A. to the position.
15. On 28 May 2017, the Applicant requested management evaluation of the decision not to select him for JO 13446.
16. On 10 July 2017, the Deputy High Commissioner informed the Applicant that he had decided to uphold the contested decision.
17. On 6 August 2017, the Applicant filed his application before the Tribunal and, on 8 September 2017, the Respondent submitted his reply.
18. Following a case management discussion on 13 September 2018, the Tribunal held a hearing on the merits on 3 October 2018, and heard evidence from:
 - a. the Applicant;
 - b. the Chief, AMS; and
 - c. the manager.
19. The Tribunal had initially scheduled to hear the Director of the Africa Bureau as a witness. However, having heard the two other witnesses both parties agreed that it was no longer necessary to hear evidence from the Director of the Africa Bureau.

Parties' submissions

20. The Applicant's principal contentions are:
 - a. His candidacy for the position of Deputy Representative, Burundi, was not given full and fair consideration as the contested decision was vitiated by procedural flaws and motivated by extraneous factors;

- b. In particular, he was the preferred candidate when the position was first advertised but DHRM attempted to change the views of the Representative, Burundi, and then failed or deliberately omitted to put the presentation of JO 12748 to the JRB in its sessions in November and December 2016;
- c. When the position was re-advertised, pressure had been exerted on the manager to change his initial recommendation;
- d. He was subjected to an abuse of power, in violation of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). However no particulars were provided and this allegation was not seriously pursued at the hearing;
- e. The Applicant requests:
 - i. The High Commissioner to suspend the selection decision for the contested post;
 - ii. To be assigned to the contested post or, alternatively, to a similar P-5 position;
 - iii. To be paid retroactively a salary at the P-5 level and two years' net base salary for loss of opportunity; and
 - iv. To be awarded moral damages for the breach of his right to fair treatment, pain and suffering and harm to his professional reputation and career prospects.

21. The Respondent's principal contentions are:

a. DHRM did not pressurise the manager to change his recommendation for JO 12748 but simply drew his attention to the fact that the experience of R. had not been adequately appraised. In raising this matter they were acting properly in accordance with their role under sec. 79(a) of UNHCR's Revised Policy and Procedures on Assignments (UNHCR/HCP/2015/Rev.1) ("Policy"), thus ensuring that all candidates received full and fair consideration;

b. DHRM did not withhold JO 12748 from consideration by the JRB. DHRM, which is vested with the authority to make the final selection and recommendation to the High Commissioner, had obtained the manager's views but had not yet made its own assessment because they wished to have further discussion with the manager. However, following his mission to Geneva the manager requested that the post be re-advertised, thereby effectively withdrawing his previously stated views about the suitability of the candidates;

c. DHRM's decision to re-advertise the post, following a request by the manager, was consistent with sec. 70 of the Policy;

d. The Applicant's claims of abuse of authority are unsubstantiated;

e. The Applicant received full and fair consideration throughout the recruitment process. He was the preferred candidate for JO 12748 but in the exercise of his managerial discretion, the manager decided to revisit the operational context for the post, in light of the evolving situation in Burundi. He considered that the shortlisted candidates for JO 12748 did not meet the requirements in light of the revised operational context and decided to re-advertise the post. The Applicant's experience was accurately reflected and properly considered for JO 13446;

f. The Applicant did not adduce any evidence in support of his claim for moral damages;

g. Insofar as the Applicant requests suspension of the selection decision, it has already been implemented as the selected candidate took up the position on 1 July 2017; and

h. The Respondent requests that the application be dismissed in its entirety.

Consideration

Standard and scope of review

22. It is well established that, like the Secretary-General, the High Commissioner has broad discretion in matters of appointment and promotion. When reviewing such decisions, the Tribunal shall examine whether the procedure as laid down in the applicable rules was followed, and whether the staff member was given “fair and adequate consideration” (*Abbassi* 2011-UNAT-110; *Majbri* 2012-UNAT-200; *Ljungdell* 2012-UNAT-265).

23. When a staff member alleges that the contested decision was based on extraneous reasons, the burden of proving improper motives, such as abuse of authority, ... rests with the person making the allegation (*Nwuke* 2015-UNAT-506).

24. In accordance with sec. 10 of the Policy, positions are advertised in bulk. DHRM reviews all applications and shortlists candidates who meet the minimum requirements set out in the job opening (sec. 68(c) of the Policy). DHRM then shares the list of shortlisted candidates with the manager of the vacant position to seek his or her views with regard to each candidate (sec. 68(e)). DHRM then holds a matching session which shall be minuted (sec. 68(g)), following which it makes selection recommendations to the JRB (sec. 68(i)). The JRB reviews the process essentially to ascertain whether proper procedures were followed (sec. 97) and, if so, forwards the selection recommendation to the High Commissioner (sec. 101), who has the ultimate authority to appoint or assign staff members to positions in the professional category (secs 1, 121 and 122).

25. The Applicant’s case is that there were procedural errors in the consideration of his candidacy for the post of Deputy Representative, Burundi, since he was

recommended twice by the manager but DHRM failed to submit the matter for consideration by the JRB as required by the rules. In the meantime, it was decided to re-advertise the position so as to include a reference to the operational context. The Applicant applied for the re-advertised post but, on this occasion, the manager did not recommend him. The Applicant claims that DHRM abused its power in not presenting the matter to the JRB in November and December 2016 and sought to influence the manager to select another candidate by exerting pressure on the manager during his mission to Geneva.

26. Accordingly, the Tribunal will examine:

- a. Whether the alleged delay in the presentation of JO 12748 by DHRM to the JRB constituted a breach of the applicable Policy and procedures;
- b. Whether the decision to re-advertise the position to include an operational context was for *bona fide* reasons and complied with the Policy; and
- c. Whether, in all the circumstances, the Applicant's candidacy was given full and fair consideration.

27. Since these issues are interrelated, they will be addressed together.

Lawfulness of the contested decision

28. It is common ground that the manager first submitted his views in respect of the candidates for JO 12748 at some point before 7 November 2016 and then again on 9 November 2016. There is no record of a matching session held by DHRM to discuss the recommendation to be made in respect of this position until a decision was later made to re-advertise it. The matter was not presented to the JRB in its sessions in November 2016 and December 2016. Was this delay or deliberate omission due to legitimate considerations and in accordance with procedure or was it motivated by improper considerations?

29. The Tribunal notes that the explanations provided by the Respondent for the delay in presenting the matter for consideration by the JRB in the reply differ from

the evidence provided by the witnesses at the hearing. In the circumstances the Tribunal had to be alive to the possibility that unless there was an innocent explanation there may have been impermissible considerations at play.

30. In the reply, the Respondent stated that after the manager presented his views on 9 November 2016 on the shortlisted candidates, he went on mission to Geneva and discussed staffing matters with the Director of the Africa Bureau and, on 18 December 2016, he sent an email to DHRM requesting that the position be re-advertised to include a reference to the operational context.

31. At the hearing, the Chief, AMS, testified that upon review of the shortlisted candidates, DHRM considered that R. was the most suitable candidate as he was the only one who fully met the requirements and had previously served at the P-5 level successfully. Since DHRM felt that R. had not been given full and fair consideration they wrote to the manager to give him an opportunity to review his assessment. The manager provided his revised views on R., explaining why he did not consider him suitable for the position, namely because he was not fluent in French, he was a national of a European Union member state and had no experience in the region. DHRM considered that the reasons provided could not be taken into account as they did not reflect requirements expressed in the job opening, particularly given the fact that the said job opening did not contain any operational context. The Chief, AMS, stated that although DRHM could have gone ahead and recommended R. for the position, it decided to wait and discuss the matter further with the manager who was scheduled to be in Geneva in the week of 12 December 2016 and would be participating in the JRB session.

32. The Chief, AMS, met the manager in the week of 12 December 2016, together with her supervisor, to discuss the selection recommendation for JO 12748. She expressed DHRM's view that R. was the most suitable candidate, in addition to the fact R. was due to rotate so he was to be given priority in the assignment process. The manager maintained his view that R. was not a suitable candidate, in light of the fact that he was not fluent in French and that he was a national of a European Union member state so he would not have been acceptable to the government. The manager then decided to request that the position be re-advertised, to include an

operational context that would provide an opportunity to take into account these requirements that he considered were essential for the position. No notes or records were taken of this meeting.

33. This account of events is generally consistent with the testimony of the manager that he met the Director of the Africa Bureau before the meeting with DHRM. He pointed to the need for a Deputy Representative to speak French and not to be from a European Union member state. Given his forthcoming retirement he expressed the view that a more senior Deputy Representative be appointed, bearing in mind the requirement to deal with the high number of returning refugees and the volatile and changing situation in Burundi at the time. The Director of the Africa Bureau recommended that the manager discuss the matter with DHRM, which he did and this resulted in an agreement to re-advertise the position.

34. Following these meetings, the manager submitted a formal request that the position be re-advertised and, on this occasion, he provided an operational context in the job opening. The operational context reflected, *inter alia*, the requirement for fluency in French, a notice that “[p]resently and given the very difficult relations between the European Union and the government, it may not be advisable for UNHCR to assign the most senior officer from the EU member states as government officials would generally impute the EU position on staff members” and a preference that the selected candidate should be a legally qualified senior staff member with proven experience in managing complex operations that would include emergencies and the provision of “durable solutions”.

35. The Tribunal notes that the views of DHRM in respect of the candidacies of R. and the Applicant for JO 12748 and the exchanges between DHRM, the manager and the Director of the Africa Bureau were not recorded in any manner and were not put forward by the Respondent in his reply. The only official record of the recruitment exercise for JO 12748 provided by DHRM is entitled “DHRM Shortlisting Matrix”, which provides the manager’s recommendation in favour of the Applicant and where he expressed the view that R. was not suitable for the position. The only remark by DHRM is dated 9 January 2017, and indicates that

“[f]ollowing e-mail of 19 December 2016 from [the manager], position to be re-advertised with updated operational context”.

36. This situation is unfortunate and provided ample scope for reasonable speculation on the part of the Applicant who knew that he had been recommended by the manager and then found out that DHRM had omitted to present its recommendation to the JRB. In the absence of any explanation for this omission or delay he inferred that it was for an impermissible reason.

37. The Tribunal finds that the lack of an audit trail in respect of the full recruitment process for JO 12748, to include the views of DHRM, is not compliant with the Policy, which clearly provides that all steps of the matching exercise by DHRM shall be minuted. In particular, sec. 68(g) of the Policy provides that: “[m]atching sessions shall take place, chaired by the Head of the Assignments and Career Management Service, involving the Chiefs of APS and CMSS, or their delegate alternate, and relevant DHRM staff as appropriate. All sessions shall be minuted.” Sec. 68(h) of the Policy further provides that “in the minutes of the matching, DHRM will document the deliberations of all considered applicants”. Sec. 68(i) also provides that “DHRM will consider the manager’s views, make the final selection and minute its recommendation.” Further, sec. 72 provides that “[m]inutes of the matching sessions shall record the process of the suitability assessment of all eligible applicants for a particular position resulting in a short list and a final selection by DHRM. The minutes shall contain any and all information on a staff member considered in the process”. Sec. 73 also provides that “[m]inutes of matching sessions concerning all cases will be signed by the Head of the Assignments and Career Management Service, or his/her delegated alternate, and submitted to the JRB together with other documents as specified in para. 104 prior to being transmitted to the High Commissioner”.

38. However, the question for the Tribunal to address is whether these procedural flaws rendered the contested decision unlawful in that it had the effect of disadvantaging the Applicant such that his candidature did not receive full and fair consideration in the selection exercise. In *Dualeh* 2011-UNAT-175 and *Bofill* 2011-UNAT-174, two cases involving non-promotion during the UNHCR

2008 promotions session, the Appeals Tribunal indicated that the correct approach where a procedural irregularity had been identified is to examine whether any such error of procedure was causally linked to the decision not to promote the applicants.

39. It is clear from the Policy that the authority to make selection recommendations to the JRB is vested in DHRM (sec. 68(i) of the Policy). Managers are consulted in the process and express their views on the candidates shortlisted by DHRM (sec. 68(e) of the Policy). These views, however, are not binding on DHRM. In this connection, sec. 68(i) provides that “DHRM will consider the manager’s views, make the final selection and minute its recommendation”. The manager who also sat as a member of the JRB confirmed that whilst DHRM is obliged to give proper weight and due consideration to the manager’s views and recommendations, they are not obliged to act as a rubber stamp but have the duty and responsibility of ensuring that proper procedures are followed and that the entire exercise is conducted fairly in accordance with the prescribed procedures.

40. Faced with a situation where it disagreed with the views expressed by the manager on the recommendation for the contested position, DHRM had discretion not to follow the manager’s recommendation and possibly a duty to do so if it was of the view that a candidate, in this case R., had not been fully and fairly considered. As amply explained by the Chief, AMS, instead of disregarding the manager’s view, DHRM decided to further discuss the matter with him during this upcoming visit to Geneva, in order to achieve consensus. Given that the manager will be the one working with the assigned staff member and is ultimately best placed to assess the precise requirements of the position, this practice adopted by DHRM is not unreasonable. There is no specific time line in the Policy for DHRM to present its recommendation to the JRB, hence the fact that JO 12748 was not presented in the JRB’s sessions of November or December 2016 does not constitute a procedural flaw, given that in this case the reason for not submitting the JO to the JRB was concern about candidate R. and the absence of an operational context in the JO which would explain and/or justify the manager’s recommendation. Whilst the latter considered that as the operational manager he was in a better position to assess the required competencies for the post he agreed that DHRM acted procedurally

correctly in questioning his recommendation by asking for an explanation as to why candidate R. was not recommended. Further, it was his decision to re-advertise the post with a revised operational context following the discussions he had with the Director of the Africa Bureau and others in Geneva.

41. The Tribunal finds that the Applicant's allegations of abuse of power arose from an understandable and reasonable suspicion but are not substantiated by the evidence heard by the Tribunal.

42. The addition of an operational context was also in line with the Policy, which provides in its sec. 68(a) that "[p]rior to issuance of the Compendium or Addendum, managers shall provide DHRM with the written operational context and position profile requirements for the purposes of the matching exercise". The Chief, AMS, further confirmed that it is always preferable to include an operational context, so as to tailor the job description to the specific elements of the position. Otherwise the job opening remains generic.

43. The question arising is why it was not included in the first place. In this connection, the Chief, AMS, testified that managers are encouraged to provide an operational context but not all of them take the time to do it. Given that no operational context was provided in the first place, the addition of one was welcomed by DHRM as it would properly address the specific requirements for the post. Accordingly, the Tribunal finds that the re-advertisement of the contested position including a description of the operational context does not constitute a procedural flaw and the explanations provided are sufficient to conclude that it was not prompted by an ulterior motive.

44. The Applicant was not recommended by the manager for the position that was re-advertised as JO 13446. The Applicant did not identify any procedural flaw or irregularity in respect of the consideration of his candidacy for the new position. Moreover, R. was not recommended either and another candidate was selected, thereby dispelling any suspicion that DHRM tried to pressurise the manager to select R..

45. Contemporaneous documents show that the manager considered that the Applicant was more junior than most of the other candidates since he had been promoted to the P-4 level in 2014 and that he needed to have gained more experience in the management of staff. The candidate whom he recommended on this occasion had served as head of national offices at least twice during the past two years. DHRM endorsed the views of the manager.

Summary

46. The Applicant has not demonstrated that he was subjected to a detriment by any procedural or substantive error in respect of JO 13446. The Tribunal finds that the Applicant's candidacy for JO 13446 was fully and fairly considered. However, the post was re-advertised under JO 12748 with an operational context for which the Applicant was no longer the candidate recommended by the manager, who preferred another candidate who was subsequently appointed.

Judgment

47. The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 25th day of October 2018

Entered in the Register on this 25th day of October 2018

(Signed)

René M. Vargas M., Registrar, Geneva