



Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

MAHMOOD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alister Cumming, UNICEF

Zarqaa Chohan, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”), contests the decision not to select her for the post of Health Specialist with UNICEF in Islamabad (“the contested post”) advertised as “Health Specialist (Child Health), NOC/FT, Islamabad # 104107/PAK18006 Req. 507440 (For Pakistan Nationals Only)”.

Facts and procedural history

2. The Applicant joined the UNICEF Pakistan Country Office (“PCO”) as a National Professional Officer (NO-A level) in 2011. Following brief separations in 2013 and 2014, she was appointed as a Health Officer (National Professional Officer, NO-B level) in 2014.

3. In 2017, the PCO restructured its operations as part of the process for developing the new PCO programme for 2018-2022, which resulted in the identification of new key priorities in the country’s health sector. As a result of the restructuring exercise, several posts were abolished, including the Applicant’s, and new posts were created, including the contested post, a National Professional Officer position, NO-C level, in the PCO’s Health Section.

4. By letter dated 5 April 2017, the Applicant was informed that the post she encumbered was one of the posts proposed for abolition as part of the Country Programme Management Plan (“CPMP”) for the PCO.

5. In May 2017, the PCO distributed to all staff members the recruitment strategy for new posts following the restructuring (“recruitment strategy”). PCO staff members whose posts were to be abolished were encouraged to apply for new posts. Lateral reassignment without competitive selection was an option, and where this was not possible, newly-approved posts would initially be advertised internally for 14 days.

6. By letter dated 28 July 2017, the Applicant was informed that as a result of the abolition of her post, her appointment would not be renewed upon its expiry on 31 December 2017. She was further informed that she would be separated from service unless she had been appointed to another post in the interim.

7. Because the contested post was at a higher level than the post the Applicant encumbered, lateral reassignment was not possible. The contested post was advertised internally from 2 to 15 August 2017. The Applicant and five other internal candidates applied for it. Out of the six internal candidates, five (three women and two men), including the Applicant, were shortlisted by the Human Resources Department.

8. Upon review of the five shortlisted candidates by the hiring manager, they were invited to a written assessment on 31 August 2017. Only three of them, including the Applicant, scored more than 50 per cent in the test and were invited to an interview.

9. The interviews took place on 22 September 2017 before an selection panel consisting of three UNICEF staff members. The panel unanimously found that none of the internal candidates were suitable for the position and recommended that the vacancy be advertised externally.

10. By email dated 26 September 2017, the Applicant was informed of the decision not to select her for the contested post.

11. By email dated 21 November 2017, the Applicant requested management evaluation of her non-selection to which she received a response dated 7 December 2017, upholding the decision.

12. On 31 December 2017, the Applicant was separated from service.

13. On 12 March 2018, the Applicant filed the present application, and on 26 April 2018, the Respondent filed his reply.

14. By Order No. 84 (GVA/2019) of 21 October 2019, the Tribunal *inter alia*, ordered the Respondent to provide further information concerning the selection process and granted the parties leave to file additional submissions on the merits of the case. The Tribunal also ordered the parties to express their views on whether the present case could be decided based on the documents on record without a hearing.

15. On 30 October 2019, the Respondent provided the requested information concerning the selection process and indicated that the case could be decided based on the documents on record. On the same day, the Applicant filed additional submissions concerning the merits of the case without expressing a view about her case being decided without a hearing.

16. By Order No. 100 (GVA/2019) of 20 November 2019, the Tribunal transmitted to the Applicant a redacted version of the results of the written assessment and the interview schedule produced by the Respondent upon the Tribunal's request.

17. On 25 November 2019, the Applicant filed her comments in relation to these documents.

Consideration

Receivability

18. The Respondent claims that the application is not receivable with respect to the decision to abolish the Applicant's post, owing to the Applicant's failure to request management evaluation.

19. The Tribunal does not find it necessary to address this issue as in her application the Applicant clearly confines her challenge to the decision to not select her for the contested post, which was the subject of a request for management evaluation. Consequently, the Tribunal finds that the application is receivable, and it will only review the challenge against said decision.

Merits of the application

20. The Tribunal notes that the Applicant's suitability for the post was considered in accordance with the applicable regulatory framework.

21. UNICEF's recruitment is primarily governed by its Administrative Instruction on Staff Selection (CF/AI/2016-005). In essence, candidates are short-listed by the "selection focal point" and the "hiring manager" "based on criteria reflected in the [vacancy announcement], such as required qualifications, skills, knowledge and experience for the type and level of appointment" (secs. 5.4 and 5.5).

22. In terms of the assessment of short-listed candidates, "normally at least three candidates should be assessed for the same vacancy and the assessment shall follow the same structure for each evaluated candidate" (sec. 5.6). A combination of evaluation methods and techniques "may be used (e.g. written tests, competency-based and/or technical interviews, presentations)" and "passing criteria of each assessment shall be assigned in advance" (sec. 5.7). The hiring manager establishes a "selection panel that includes members of both genders and from different geographic backgrounds to the extent possible to assist him/her in identifying the most qualified and suitable candidate(s), and a designated chair for the panel. Such panel should be composed of a minimum of three UNICEF or UN staff members, of which, one should be HR/operations staff member" (sec. 5.8).

23. The selection panel "shall give due consideration to internal candidates, especially those on abolished post[s] assessed as suitable". The selection panel shall also ensure that, in making the recommendation, "the panel has taken into account UNICEF's selection principles and goals in terms of diversity, such as gender parity and wide geographic distribution" (sec. 6.1). The chair of the selection panel "shall recommend a list of qualified, ranked candidates, based on the applicable evaluation criteria, and taking into account other panel members' views and all the application documents, assessment(s) results, performance appraisals and reference checks when appropriate". The hiring manager shall endorse the recommendation (sec. 6.2).

24. The final recommendation of the selection panel “shall be submitted to the appropriate [Central Review Board] for review of the selection process compliance” (sec. 6.3). In cases “where no suitable candidate can be identified in the course of the selection process, the selection panel should inform the selection focal point and provide supporting documentation” (sec. 6.5).

25. Furthermore, in the context of the restructuring process, the Administration issued a recruitment strategy, which is based on its above-mentioned Administrative Instruction on Staff Selection.

26. According to the recruitment strategy, the contested post (i.e., a “non-polio post”) was to be advertised internally for 14 calendar days to ensure priority consideration for staff members on abolished posts. Internal candidates were those candidates who were on a permanent, continuing or fixed-term appointments.

27. The recruitment strategy provides that all candidates, whether appointed through regular processes or lateral reassignments without competitive selection, are assessed in light of the following:

Assessment of candidates based on the qualifications, skills, knowledge, and experience for the type and level of the post as outlined in the job description.

For internal candidates, the latest two performance appraisals and where necessary, written reference checks from previous/current supervisors.

Due consideration given to internal candidates, particularly those on abolished post. Consideration also given to the organization’s commitment to achieving gender balance.

Consideration during selection given to current type of appointment (i.e. permanent, continuing, [fixed-term] and tenure.

28. The vacancy announcement for the contested post provided the following in terms of requirements:

Education

An advanced university degree in public health/nutrition, paediatric health, family health ... or other health related science is required.

Experience

A minimum of 5 years of professional experience in public health/nutrition planning and management and/or in relevant areas of maternal and neonatal health care, health emergency/humanitarian preparedness, at the international level some of which preferably in a developing country is required.

Relevant experience in health/nutrition program/project development and management in any UN system agency or organisation is an asset.

Language

Fluency in English is required. Knowledge of another official UN language or a local language is an asset.

29. The recruitment strategy also provides the following:

If there are [two] or more candidates who are long and short-listed by HR, the hiring manager, and technical chief[,] those candidates will move forward to testing/interviewing. If none of the candidates are successful in the recruitment process the post will be advertised externally.

30. The Tribunal finds that the selection process was conducted in accordance with the Administrative Instruction on Staff Selection and the recruitment strategy. In accordance with these rules, the Applicant was given priority consideration due to her status as a staff member on an abolished post and was shortlisted, tested and interviewed for the post as an internal candidate.

31. The post was advertised internally, and six internal candidates applied for the position. Out of these candidates, five, including the Applicant, were shortlisted; upon review of the five shortlisted candidates by the hiring manager, they were invited to a written assessment and some of them, the Applicant included, were also invited to an interview. The panel unanimously found that none of the internal candidates were suitable for the position and recommended that the vacancy be advertised externally.

32. Therefore, the Applicant was shortlisted because she met the minimum requirements of the post but she didn't demonstrate during the rest of the recruitment process to have the required skills.

33. The Applicant claims that her educational background, particularly her Master's degree in Public Health, her 14 years of professional experience in emergency and development related issues, and her excellent performance record were not adequately considered. The evidence on record rather shows that the Applicant's candidature was properly assessed based on the criteria in the vacancy announcement and that her advanced university degree, her experience and her fluency in English were properly considered in the selection process.

34. The Applicant also argues that the fact that her post was to be abolished was not taken into account. Contrary to this assertion, it results from the file that the fact that she was on an abolished post was also considered as indicated in the "special consideration" section of the selection panel report which provides that "[f]our staff members on abolished positions applied for the post. All were invited to the written test, two passed, but none was found suitable for the position". The Tribunal notes that the Applicant was one of the candidates on an abolished position that applied and was short-listed for the position as an internal candidate.

35. The Applicant also argues that she should have been selected for the post because she "scored the highest mark" in the written test. While it is true that the Applicant scored the highest mark in the test, namely 56 points, this does not necessarily mean that she should have been selected for the post.

36. The Applicant further alleges that she was pregnant at the time of the competition and that she was the victim of bias and discrimination by the selection panel. She also claims that the selection process was "pre-decided" because none of the staff members on abolished posts were selected.

37. On this issue, the Tribunal refers to the jurisprudence of the Appeals Tribunal that provides that "the burden of proving improper motivation lies with the staff member raising such claims" (See *Asaad* 2010-UNAT-021).

38. The Tribunal finds that the Applicant's allegations in this regard are unsubstantiated and that the Applicant has not provided any evidence apart from her own assertions, let alone facts or indices of bias, concerning her allegations of

bias and discrimination by the selection panel. Also, there is no evidence that the Applicant's pregnancy was a factor in the selection process.

39. Given that, according to the selection panel report, none of the candidates was selected because none was considered suitable for the post following a legitimate procedure based on a written test and competency-based interviews, the Tribunal cannot go further in the assessment of the lawfulness of the evaluation of the Applicant.

40. It is, indeed, well established that the Secretary-General has broad discretion in matters of appointment and promotions. When reviewing such decisions, the Tribunal shall examine "(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration" (*Abbassi* 2011-UNAT-110; *Majbri* 2012-UNAT-200; *Ljungdell* 2012-UNAT-265).

41. The Appeals Tribunal further ruled in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed. Accordingly, in a recruitment procedure, if the Administration minimally shows that a staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must then be able to show through clear and convincing evidence to have been denied a fair chance.

42. Finally, the Tribunal's power to review discretionary decisions was defined in *Sanwidi* 2010-UNAT-084 as follows:

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 Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

43. Considering the above, the Tribunal finds that the contested decision is lawful, and that the Applicant's candidature received fair and adequate consideration.

Conclusion

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

The application is dismissed.

(Signed)

Judge Francesco Buffa

Dated this 12th day of December 2019

Entered in the Register on this 12th day of December 2019

(Signed)

René M. Vargas M., Registrar, Geneva