



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/060  
UNDT/NY/2019/070  
Judgment No.: UNDT/2019/183  
Date: 19 December 2019  
Original: English

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**Before:** Judge Francis Belle

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

BELSITO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Mr. George G. Irving

**Counsel for Respondent:**

Ms. Melissa Bullen, UN Women

## **Introduction**

1. The Applicant, the former UN Women Country Representative in Albania, filed two separate applications related to the selection process for the D-1 level post of the UN Women Regional Director for Europe and Central Asia (“D-1 Post”). The two applications can be summarized as follows:

a. On 17 August 2017, the Applicant filed an application contesting the decision by the Executive Director of the UN Women to cancel the selection process for the D-1 Post, which the Applicant had applied for, and re-advertise the position;

b. On 28 November 2018, the Applicant filed his second application contesting the decision to not select him for the D-1 Post following completion of the second recruitment process.

## **Procedural history**

2. The Applicant’s cases were registered with the Dispute Tribunal’s Registry in Nairobi under Case Nos. UNDT/NBI/2017/075 and UNDT/NBI/2018/116, respectively. The cases were assigned to Judge Agnieszka Milart. By emails of 19 July 2019, the Nairobi Registry informed the parties that the cases were transferred to the New York Registry, pursuant to the Tribunal’s decision to rebalance the Registries’ caseload. The Applicant’s cases were registered under Case Nos. UNDT/NY/2019/070 and UNDT/NY/2019/060, respectively.

3. On 17 October 2019, the cases were assigned to the undersigned Judge.

4. On 12 November 2019, by Order No. 160 (NY/2019), the two cases were consolidated into a combined proceeding. In the Order, the Tribunal stated that, upon review of the parties’ submissions, the Tribunal considered that the matter may be

decided on the papers before it once the parties have filed their closing submissions. The Tribunal requested the parties to file a joint submission stating whether they agree for the case to be decided on the papers, or in the case the parties request a hearing, to provide justification for the request.

5. On 18 November 2019, the parties filed a joint submission in which the Applicant requested a hearing in order to hear testimony relevant to Case No. UNDT/NY/2019/070. The Applicant stated that he proposes to call the UN Women Regional Director for Latin America, the UN Women Regional Director for Asia/Pacific, and the Executive Director of UN Women as witnesses. The Applicant stated that he himself may be called as a witness in rebuttal to the foregoing testimonies. The Respondent submitted, *inter alia*, that he does not request hearing as he has put before the Tribunal all available facts and disclosed all available information to enable the Tribunal to reach a decision in this case.

6. On 20 November 2019, by Order No. 166 (NY/2019), the Applicant's request for a hearing in respect of the decision to cancel the first selection exercise was refused, principally because he failed to adequately identify how oral evidence would assist in clarifying or rebutting the narrow issue in contention over and above what is available on the record.

7. On 2 December 2019, the Applicant filed his closing submission. On 6 December 2019, the Respondent filed his closing submission.

## **Facts**

8. On 30 November 2012, the Applicant joined the UN Women Jordan Country Office as Representative at the P-5 level.

9. On 6 October 2016, the D-1 Post was advertised for the first time.

10. On 22 October 2016, the Applicant applied for the D-1 Post.

11. On 12 May 2017, following the administration of a written test and interviews, the selection panel, which included the Hiring Manager, recommended some candidates to the Senior Review Group. On 22 May 2017, the Senior Review Group submitted its recommendation endorsing the panel's recommendations to the Executive Director. The Applicant was one of the recommended candidates.

12. During May and June 2017, the Hiring Manager, who was also the Applicant's supervisor, shared some information regarding the selection process to the Applicant, which the Respondent contends was confidential. In particular, the Hiring Manager informed him that he had been recommended for the D-1 Post and that it was uncertain if the recommendation would be accepted by the Executive Director due to gender considerations.

13. On 12 June 2017, the Executive Director was made aware of the alleged breach of confidentiality.

14. On 14 June 2017, the Applicant requested the UN Women Office of Human Resources to provide information on the status of his candidature. On 15 June 2017, he was informed by the Office of Human Resources that they were not aware of any formal decision about the recruitment process for the D-1 Post.

15. On 19 June 2017, the Executive Director decided to cancel the first selection exercise.

16. On 6 July 2017, the Human Resources Section informed all candidates, including the Applicant, that the selection process for the D-1 Post had been cancelled and that the position would be re-advertised in a new recruitment process.

17. On 4 September 2017, the Applicant joined the UN Women Albania Country Office as Representative at the P-5 level.

18. On 13 October 2017, the D-1 Post was re-advertised in a second recruitment process.

19. On 29 October 2017, the Applicant applied for the D-1 Post.
20. On 19 December 2017, a vacancy for a temporary detail assignment for six months for the D-1 Post was issued. The Applicant's request for prior clearance to apply for the temporary position was refused on the grounds that he had only been in his post as the UN Women Representative in Albania for a period of four months, and he was needed there in a managerial capacity.
21. On 12 April 2018, following the administration of a written test and interviews, the panel recommended two candidates (one fully without reservations and one with reservations) to the Compliance Review Board who, on 31 May 2018, submitted its recommendation endorsing the panel's recommendations to the Executive Director. The Applicant was one of the recommended candidates.
22. On 5 July 2018, the Executive Director approved the Compliance Review Board's recommendation. The candidate who was recommended without reservations was offered the position, which she subsequently accepted.
23. On 20 July 2018, the Applicant was informed that he was not selected for the post.

### **Consideration**

#### *The issues of the present case*

24. The issues to be determined in the present case are as follows:
  - a. Whether the decision to cancel the first selection exercise for the D-1 Post was lawful?
  - b. Was the selection process for the D-1 Post tainted by extraneous factors?

c. Whether the Applicant's candidacy was given full and fair consideration in the second selection exercise?

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

*Whether the decision to cancel the first selection exercise was lawful?*

26. The Applicant submits that the first selection exercise was unlawfully cancelled on extraneous grounds of his gender. The Respondent submits that the decision to cancel the first selection exercise was lawfully taken as a result of an undisputed breach of confidentiality concerning the Applicant's own candidacy.

27. The Tribunal recalls that its scope of review is limited in matters of staff selection. The Administration has broad discretion in matters of staff selection. The jurisprudence of the Appeals Tribunal has clarified that, in reviewing such decisions, it is the role of the Tribunals to assess whether the applicable regulations and rules have been applied and whether a candidate has received full and fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration (*Sanwidi* 2010-UNAT-084; *Rolland* 2011-UNAT-122; *Aliko* 2015-UNAT-540; *Verma* 2018-UNAT-829). The Dispute Tribunal's role is not to substitute its decision for that of the Administration.

28. There is a presumption that official acts have been regularly performed in selection and promotion exercises (*Rolland* 2011-UNAT-122). If the management is able to even minimally show that the applicant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the applicant who can rebut the presumption of regularity by showing through clear and convincing evidence that he or she was denied a fair chance of selection (*Lemonnier* 2017-UNAT-762).

29. The Appeals Tribunal has stated that the Administration is not under an obligation to pursue a recruitment procedure once begun and that it is within the

discretionary authority of the Administration to terminate a recruitment procedure and/or to initiate a new one for sound reasons, such as on account of irregularities which occurred in the recruitment process (*Kinyanjui* 2019-UNAT-932).

30. Following a review of the record, the Tribunal is satisfied that the decision to cancel the first selection exercise was within the discretionary authority of the Administration. It is based on sound reasons, namely the undisputed fact that the Applicant's supervisor, who was also the Hiring Manager in the first selection exercise, disclosed confidential information to the Applicant in regard to the selection exercise prior to the completion of the selection process. In this regard, the Tribunal notes a series of text messages dated 6 May 2017, in which the Hiring Manager informed the Applicant that it is uncertain whether the recommendation of the Applicant will be accepted by the Executive Director due to gender considerations, but that she would advocate on his behalf. On 18 May 2017, before the Senior Review Group had submitted its recommendation to the Executive Director on 22 May 2017, the Applicant indicated in an email to the Hiring Manager that he had been recommended for the D-1 Post. He further stated in the email that he believed his candidacy would not be approved by the Executive Director.

31. The Tribunal finds that the above-noted exchanges represent a breach of confidentiality in the recruitment process. As a result, it was a reasonable exercise of discretion for the Executive Director to cancel the selection exercise and initiate a fresh recruitment process once she was informed of the breach of confidentiality.

32. While the evidence shows that the Executive Director decided to cancel the selection exercise on the grounds of breach of confidentiality, the Applicant claims that the decision was tainted by extraneous factors. The Tribunal will next address whether the decision was tainted by extraneous factors.

*Was the selection process for the D1-Post tainted by extraneous factors?*

33. The Applicant claims that the real reason for the cancelation was due to gender discrimination. In support of his claim, the Applicant states that the Hiring Manager informed him that Executive Director wanted to appoint a woman instead of him and therefore cancelled the selection process. The Tribunal finds that the information and views provided to the Applicant by the Hiring Manger, in breach of her duty of confidentiality, do not establish the existence of discrimination. On the contrary, the record demonstrates that the Hiring Manager advised him to not speculate on the Executive Director’s decision. The Tribunal notes that the Hiring Manager stated in her email on 18 May 2017 “[a]s I told you before please let’s not project the future until it comes. We do not know what will be the [Executive Director’s] decision if she will embrace or not the recommendation of the panel. The Executive Director has the prerogative to decline and this is her management decision. We are not there. [...]”. Although the Applicant attempts to characterize the Hiring Manager as a whistleblower, the Tribunal finds no indication that she ever claimed that she was acting in that capacity or that her personal views on the outcome of the recruitment process were based upon any concrete facts. It remains, contrary to what the Applicant claims, that no final selection decision regarding the D-1 Post was made by the Executive Director at this stage.

34. Moreover, the Tribunal notes the Applicant was invited to apply for the second recruitment exercise, which he did, and his candidacy was considered afresh. Following the assessment phase, the second selection panel recommended the Applicant to the Executive Director as one of the recommended candidates for the D-1 Post. The Tribunal finds that it follows that the Applicant not only suffered no prejudice from the cancelation decision but that his claims of discrimination are undermined by the subsequent recommendation of his candidacy in the second recruitment exercise.



35. In light of the above, the Tribunal finds that the Executive Director reasonably decided to cancel the selection exercise on the grounds of breach of confidentiality and the decision was not tainted by extraneous factors, bias or discrimination.

*Whether the Applicant's candidacy was given full and fair consideration in the second selection exercise?*

36. With respect to the second exercise, the Applicant claims that he was not given full and fair consideration for the D-1 post and that the decision not to select the Applicant was unduly influenced by extraneous factors, bias and gender discrimination.

37. The Respondent submits that the selection decision was lawful. The Respondent contends that the Applicant was given full and fair consideration, and that he was not selected simply because he was not the strongest candidate. The Respondent explains that the D-1 Post was re-advertised on 13 October 2017 with the same standard terms of reference for the Regional Directors and for the first selection process (bar the revised core values and competencies). In order to ensure the integrity of the new process, the Respondent decided that all participants - including the hiring manager, evaluators to mark the written test, panel members and Compliance Review Board members - should all be completely new to the process.

38. On 29 October 2017, the Applicant applied and on 25 January 2018, the Applicant was invited to take a written test, along with four other candidates. The written test was administered between 25 January and 1 February 2018 and scored anonymously by two evaluators. The top three candidates who passed the test, which included the Applicant, were invited for interviews with the selection panel. The panel rated and graded the candidates into one of three distinct categories: (i) (fully) recommended; (ii) recommended with reservations (with reservations explicitly noted); or (iii) not recommended. The recommended candidates who were considered suitable for the Post were then ranked in the order preferred by the panel based on the

categories in which the candidates belonged. Based on the interviews conducted, the panel recommended two of the three candidates as follows: (i) one candidate was fully recommended without reservations and ranked first; (ii) the Applicant was recommended with reservations and therefore ranked second.

39. The selection panel submitted documentation for review by the Compliance Review Board which identified the candidate ranked first as the primary candidate and the Applicant ranked second as the alternate. The Compliance Review Board decided on the endorsement of the candidate recommended by the panel through a recommendation submitted to the Executive Director. The Executive Director reviewed and approved the Compliance Review Board's recommendation to (a) offer the primary first ranked candidate the Post and (b) if the primary candidate declined, offer the D-1 Post to the alternate second ranked candidate, namely the Applicant. On 5 July 2018, the Executive Director approved the Compliance Review Board's recommendation. The primary candidate was offered the position which she subsequently accepted.

40. On review of the record, the Tribunal finds that the Applicant's candidacy was afforded a full and fair assessment. The record demonstrates that following a written test and an interview, the Applicant was recommended as a suitable candidate for the D-1 Post. He was ranked second in preference as he was recommended by the selection panel with reservations. The first ranked candidate was recommended without any reservations. The Applicant provides no submissions to contest the validity or substance of the panel's reservations (which were disclosed as part of the record) but maintains that the alleged pattern of discriminatory treatment against him continued through the second selection exercise and he was not selected because of his gender. On this issue, the Tribunal finds no basis for his claim. The Tribunal notes that, although preference may be given to address imbalances in gender and geographical distribution under the para. 1.3 of the UN Women Recruitment Selection Guidance dated 2 March 2017, gender and geographical distribution did not

play a role in the final selection in this case since only one candidate was fully recommended without reservations.

41. The Applicant contends that he was unlawfully prohibited from applying for the temporary detailed assignment for the D-1 Post and the refusal to release him for the temporary position is indicative of the influence of bias and discrimination. The Tribunal finds no merit in this claim, noting that he was provided with sound rationale for the decision to not release him for a temporary position, namely that he had only been in his post as the UN Women Representative in Albania for a period of four months, and he was needed there in a managerial capacity.

42. For the reasons noted above, the Tribunal finds that the Applicant's candidacy was given full and fair consideration in the second selection exercise.

### **Conclusion**

43. In light of the foregoing, the application is dismissed.

*(Signed)*

Judge Francis Belle

Dated this 19<sup>th</sup> day of December 2019

Entered in the Register on this 19<sup>th</sup> day of December 2019

*(Signed)*

For Nerea Suero Fontecha, Registrar, New York