



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KRISTENSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Nusrat Chagtai, AAS/ALD/OHR

Introduction

1. On 1 March 2018, the Applicant, a P-5 Senior Civil Affairs Officer/Field Coordinator with the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), filed an application contesting the decision not to place him on the roster of pre-approved candidates for D-1 Head of Office, Political Affairs (contested decision).

2. The reply was filed on 3 April 2018.

3. By Order No. 209 (NBI/2019) of 6 December 2019, the Tribunal, *inter alia*, ordered the Applicant to file submissions by 22 February 2020 to prove that his contractual rights were violated during the rostering/interview process. To date the Applicant, has not filed any further submissions nor has he provided the Tribunal with any reason for his failure to do so.

4. Pursuant to Order No. 209 (NBI/2019) the Respondent, on 27 December 2019, filed the assessment panel's complete comparative analysis report from the competency-based interview (R/5), the assessment panel's handwritten interview notes from the Applicant's competency - based interview (R/6) and names of the assessment panel members who interviewed the Applicant, all of whom served on fixed-term or continuing appointments at the D-1 or D-2 levels and had completed competency-based interview training.

5. For the reasons below, the Tribunal dismisses the application in its entirety.

Summary of the relevant facts

6. On 19 December 2016, the Department of Field Support (DFS), Field Personnel Division (FPD) advertised a generic job opening (GJO) 71792 for D-1 Head of Office, Political Affairs (Position) for rostering purposes.¹

¹ Reply, annex 2.

7. The Applicant applied for the GJO on 15 February 2017.²
8. FPD received and screened 761 job applications. Of these, FPD found 450 job applicants to meet the minimum requirements of the GJO. The Applicant and 41 other job applicants met the eligibility and suitability requirements of the GJO and were further assessed through a competency-based interview. The Applicant was interviewed on 10 July 2017. He did not pass the competency-based interview.³ He was informed of this decision on 7 September 2017.⁴
9. According to a comparative analysis report for GJO 71792⁵, the Applicant did not fully meet the requirements in the areas of accountability, professionalism and judgment/decision-making. To be recommended, an applicant had to fully satisfy all the requirements in the competence-based interview.⁶
10. Under the competencies of accountability, professionalism and judgment/decision-making, the GJO required applicants to meet the following criteria:

Accountability: Takes ownership of all responsibilities and honours commitments; delivers outputs for which one has responsibility within prescribed time, cost and quality standards; operates in compliance with organizational regulations and rules; supports subordinates, provides oversight and takes responsibility for delegated assignments; takes personal responsibility for his/her own shortcomings and those of the work unit, where applicable.

Professionalism: Extensive understanding of conflict and post-conflict contexts, with proven ability to work under pressure in austere, insecure environments while maintaining resilience, integrity, productivity and effectiveness. Demonstrated capacity and willingness to learn and apply United Nations Secretariat rules and regulations in a sub-national field context. Proven ability to work in a diverse environment, including with uniformed personnel. Shows pride in

² Application, section VII, para. 1.

³ Reply, annexes 3 and 4.

⁴ Application, annex 1.

⁵ Reply, annex 3.

⁶ Article 101.3 of the United Nations Charter and staff regulation 4.2.

work and in achievements; demonstrates professional competence and mastery of subject matter; is conscientious and efficient in meeting commitments, observing deadlines and achieving results; is motivated by professional rather than personal concerns; shows persistence when faced with difficult problems or challenges; remains calm in stressful situations. Takes responsibility for incorporating gender perspectives and ensuring the equal participation of women and men in all areas of work.

Judgment/Decision-making: Identifies the key issues in a complex situation, and comes to the heart of the problem quickly; gathers relevant information before making a decision; considers positive and negative impacts of decisions prior to making them; takes decisions with an eye to the impact on others and on the Organization; proposes a course of action or makes a recommendation based on all available information; checks assumptions against facts; determines the actions proposed will satisfy the expressed and underlying needs for the decision; makes tough decisions when necessary.

Since the Applicant was rated “partially satisfactory” or “Unsatisfactory” in these areas he was not recommended for GJO 71792.

11. On 13 October 2017, the Applicant sought management evaluation of the contested decision.⁷ The Management Evaluation Unit (MEU) concluded that the contested decision was made in accordance with the relevant rules and policies, and therefore upheld it.

Considerations

12. The Applicant challenges the decision not to recommend him for rostering after an alleged irregular competency-based interview. The Respondent had provided a sequence of processes that it followed from screening candidates, interviews and recommendation and argued that the Applicant’s candidacy was given full and fair consideration. The Applicant has failed to demonstrate through clear and convincing evidence that his candidacy was not given full and fair consideration.

⁷ Application, annex 4.

Applicable law

13. Under art. 101 of the Charter of the United Nations and staff regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. While the Tribunal's role is not to substitute its decision for that of the Administration, the Tribunal can intervene where the Administration failed in its duty to act fairly, justly and transparently in dealing with its staff members and failed to follow its own Regulations and Rules.⁸

14. The United Nations Appeals Tribunal (UNAT) jurisprudence has settled the law that in matters of staff selection a staff member has a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper motives like bias or discrimination.⁹

15. In that regard, there is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the Respondent is able to even minimally show that the Appellant's candidature was given full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the Appellant who must show through clear and convincing evidence that he or she was denied a fair chance of promotion.¹⁰

16. Therefore, in reviewing the Secretary-General's exercise of his discretionary authority in matters of staff selection and promotion, the UNDT is to consider, whether the staff member's candidacy was given full and fair consideration and whether the procedure set forth in the Staff Regulations and Rules was followed.¹¹

⁸ *Sarrouh* 2017-UNAT-784; *Brisson* 2013-UNAT-371, para. 16; *Obeijn* 2012-UNAT-201, para. 33; *Hersch* 2014-UNAT-433.

⁹ *Andrysek* 2010-UNAT-070, in *Charles* 2013-UNAT-286, para. 27; *Hersh* 2014-UNAT-433, para. 30; *Wang* 2014-UNAT-454, para. 41; *Luvai* 2014-UNAT-417, para. 32.

¹⁰ *Verma* 2018-UNAT-829; *Ngokeng* 2017-UNAT-747; *Rolland* 2011-UNAT-122; *Simmons* 2014-UNAT-425; *Zhao, Zhuang and Xie* 2015-UNAT-536; *Tintukasiri* -2015-UNAT-526, *Landgraf* 2014-UNAT-471.

¹¹ *Charles* 2012-UNAT-242.

17. Firstly, the Applicant challenges the failure by the Administration to provide him with the materials that formed the interview panel's basis for disqualifying him from selection. He avers that FPD/DFS rejected his request for documentation that could have illustrated why he allegedly failed the interview.¹² He requested the Tribunal to order the Respondent to release these materials to him.¹³

18. It is indeed the duty of the Administration to act fairly, justly and transparently in dealing with staff members. In *Lemmonier* 2017-UNAT-762, UNAT held that,

The role of the United Nations Dispute Tribunal is “to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner”.¹⁴

19. In the exercise of its case management powers under art.19 of its Rules of Procedure, as read with art.18 on admissibility of evidence, the Tribunal through Order No. 209 (NBI/2019) ordered the Respondent to furnish the Applicant with all relevant materials including hand-written notes of the interview panel's comments and observations during the interview and a comparative analysis report. These materials were made available to the Applicant for his scrutiny to decide whether his non-selection was unlawful. Therefore, the Applicant's request to have the interview materials disclosed was satisfied when the Respondent filed these materials on 27 December 2019.

20. In the absence of any submission from the Applicant that the notes and materials disclose a failure by the Respondent to act fairly, justly and transparently in his case, it is the Tribunal's view that the Administration demonstrated transparency in how it assessed the Applicant. The documentary evidence before the Tribunal shows that the Applicant was interviewed, notes were taken recording his responses and those notes were subsequently made available for the Applicant and all interested

¹² Application, para. 4.

¹³ Ibid., para. IX(2).

¹⁴ Paragraph 31, citing to *Ljungdell* 2012-UNAT-265 para. 30.

parties to see.

21. In addition to the interview documents, the Respondent disclosed the names of the interview panel members as requested by the Applicant. However, the Applicant did not adduce any evidence to show that any of the panel members held animosity against him such as to influence the negative result awarded to him.

22. The Tribunal may review whether in arriving at a decision, the Administration was motivated by bias, prejudice or improper motive. Further, the Tribunal is empowered to review an administrative decision and determine whether relevant matters have been ignored and irrelevant matters considered in making the decision affecting a staff member's terms of employment.¹⁵

23. It is, however, the staff member alleging, such as in this case, that his candidature for selection was not given full and fair consideration because the Administration did not act fairly, justly and transparently who bears the burden to prove the allegation. In cases of staff selection and promotion as is the issue in this application, the standard of proof placed on the Applicant is met by production of clear and convincing evidence that the decision is unlawful.¹⁶ It is not enough to make an allegation without substantiating it with clear and convincing evidence.

24. Just like in *Lemmonier*, the Tribunal finds that the Applicant has not adduced any evidence that satisfies his burden to show by clear and convincing evidence that the Administration's decision that he was unqualified for the position was unlawful or that the Administration did not give full and fair consideration to his candidacy.¹⁷

25. Secondly, the Applicant has argued that his previous scores in his performance appraisals should have been taken into account in his assessment for the GJO. In particular, the Applicant applies 'logic' to the scenario and wonders how he

¹⁵ *Kule Kongba* 2018-UNAT-849, paras. 26 and 27.

¹⁶ *Rolland* 2011-UNAT-122, reaffirmed in *Ibekwe* 2011-UNAT-179, para. 30; *Luvai* 2014-UNAT-417, para. 40; *Simmons* 2014-UNAT-425, para. 23; *Landgraf* 2014-UNAT-471, para. 28; *Dhanjee* 2015-UNAT-527, para. 30; *Zhuang, Zhao & Zie* 2015-UNAT-536, para. 48; *Staedtler* 2015-UNAT-547, para. 27; *Survo* 2015-UNAT-595, para. 68; *Niedermayr* 2015-UNAT-603, para. 23.

¹⁷ At para. 36.

could be assessed negatively for the same responses that he was previously scored highly by a different interview panel. In considering an almost similar situation, UNAT in *Nikolarakis* 2016-UNAT-652 held that,

the UNDT improperly relied on “logic” to insert a step into the assessment process that is not required under the staff selection system established under the Staff Regulations and Rules.

The UNDT clearly erred on a matter of law and exceeded its competence by deciding that the DSS/SSS management lacked discretion to require all candidates to pass the competency-based interview; and, by ruling that additional weight had to be given to Mr. Nikolarakis’ individual competency ratings in his performance evaluations even after he had failed the interview.¹⁸

26. It is clear from the jurisprudence that the Applicant’s argument that the Administration should have considered his previous scores in tests has no legal basis as this is not a standard provided for in ST/AI/2010/3 (Staff selection system).

27. The role of the UNDT is to interpret the Staff Regulations and Rules as they are without subtracting and/or adding any material no matter how logical this exercise may appear to a party to the proceedings because the law is not founded on logic but on set rules and regulations.

28. It is the finding of this Tribunal that the Respondent did not select the Applicant for GJO 71792 because he had failed a competency-based interview. To pass a competency-based interview is a lawful requirement envisioned by art. 101.3 of the United Nations Charter and set by the Staff Regulations and Rules that form an integral part of the Applicant’s terms of employment.

29. It is also the finding of this Tribunal that the Respondent complied with all the relevant statutory requirements in the selection process leading to the contested decision.

¹⁸ Paragraphs 30 and 31.

Judgment

30. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 4th day March 2020

Entered in the Register on this 4th day March 2020

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi