



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NY/2018/045
UNDT/NY/2019/012
Judgment No.: UNDT/2020/059
Date: 24 April 2020
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

MIKSCH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Dorota Banaszewska, OSLA

Counsel for Respondent:
Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Security Officer at the S-3 level with the Security and Safety Service (“SSS”), Department of Safety and Security (“DSS”) in New York, contests the decision not to select him for the position of Security Sergeant (2 posts) at the S-4 level (Job Opening 86971) (“the post”).
2. On 31 March 2020, the case was assigned to the undersigned Judge.
3. For the reasons below, the Tribunal rejects the applications.

Facts

4. On 19 February 2018, the Applicant applied for the post. The Applicant was one of the nine rostered candidates released to the hiring manager.
5. By memorandum dated 1 March 2018, the Chief of SSS, DSS, advised the Executive Officer of DSS that in accordance with the DSS Gender Equality and Empowerment of Women Strategy, he recommended the selection of the only two female candidates remaining in the S-4 roster.
6. On 8 May 2018, the Applicant was informed that other candidates had been selected for the post from a roster of pre-approved candidates.
7. On 10 May 2018, the Applicant received a copy of the “Daily orders – Security and Safety Services, New York” issued by DSS whereby he became aware of the identity of the two successful candidates.
8. On 18 June 2018, the Applicant submitted in his management evaluation request that he was not given full and fair consideration for the post since the hiring manager for the post was previously involved in a retaliation against him.
9. On 5 October 2018, the Applicant received a response to his management evaluation request upholding the contested decision. The Applicant and the two

selected candidates were all on the roster. It was the head of office that made the selection from among the qualified candidates. The Administration made a selection decision as follows:

In deciding on the selection, the Administration took into account that, out of twenty-five Sergeant (S-4) positions within SSS, UNHQ, only three posts are occupied by females, with one presently on release to staff union duties. Thus, there are only two female supervisors with the rank of Sergeant at SSS, which leaves the mid-night shift (12pm-8am) and the day shift (3am- 4pm) without a female sergeant supervisor assigned. On this basis and in line with organizational priorities, and the organization wide gender-parity policy of the Secretary-General, it was decided to select two female candidates for the Post, in line with Section 9.4 of ST/AI/2010/3 Staff Selection System. Thus, the [Management Evaluation Unit (“MEU”)] considered that the Administration provided a legitimate rationale for the selection decision in question.

10. On 16 October 2018, the Applicant filed his first application (Case No. UNDT/NY/2018/045) with the United Nations Dispute Tribunal (“Dispute Tribunal”)

11. On 16 November 2018, the Respondent filed his reply stating that the application is not receivable because the Applicant advanced a different claim in the application than the claim raised in his management evaluation request.

12. On 4 December 2018, the Applicant submitted a second management evaluation request to contest the same decision on different grounds. The Applicant argued that the contested decision was tainted by gender bias as it was made based solely on gender considerations.

13. On 21 December 2018, pursuant to Order No. 236 (NY/2018), the Applicant filed a written submission to respond to the reply, including on the receivability issue.

14. On 31 December 2018, MEU informed the Applicant that it was closing his file as he already raised the same issue in his first management evaluation request and this issue was pending before the Dispute Tribunal.

15. On 14 February 2019, the Applicant filed his second application (Case No. UNDT/NY/2019/012).

16. On 18 March 2019, the Respondent filed his reply stating that the application is not receivable because the request for management evaluation was submitted late and the doctrine of *functus officio* precludes the Secretary-General from conducting a second management evaluation of the contested decision.

Consideration

Case management

17. The Applicant requests that his two applications be subject to consolidated proceedings for a more efficient or expeditious resolution of the proceedings. The Respondent opposes the Applicant's request on the ground that the receivability of both applications should be decided first as a preliminary matter.

18. Pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure, the Tribunal may issue any order or give any direction for the fair and expeditious disposal of the case and to do justice to the parties.

19. Since the Applicant contests the same decision in his two applications, for the fair and expeditious disposal of the cases, the Tribunal grants the request for consolidation.

20. Further, having reviewed the parties' submissions, the Tribunal considers that the cases are fully briefed and can be decided on the papers.

Receivability

21. In light of the Respondent's submissions on receivability, the Tribunal will review the receivability issue first.

22. The Tribunal will first deal with the receivability of the application in Case No. UNDT/NY/2019/012. In this case, the Tribunal agrees with the Respondent that this application is not receivable since his management evaluation request dated 4 December 2018 was not filed within 60 days from the notification of the contested decision on 8 May 2018. The Applicant submits that the second management evaluation was filed within 60 days from the date he received the response to the first management evaluation request. The Tribunal recalls that in *Kalashnik* 2016-UNAT-661, para. 29, the Appeals Tribunal found that the Administration's response to a management evaluation request is "an opportunity for the Administration to resolve a staff member's grievance without litigation – not a fresh decision".

23. In Case No. UNDT/NY/2018/045, the Respondent submits that the application is not receivable since the Applicant raised a different claim than the one he raised in his management evaluation request. In particular, the Applicant claimed in his management evaluation request that the hiring manager was biased against him due to the hiring manager's prior involvement in a retaliatory action against him. In the application, the Applicant abandoned this claim and instead argued that the contested decision was tainted by gender bias. Therefore, the Respondent submits, the application is not receivable as the new claim was not subject to management evaluation.

24. In response, the Applicant submits that the Applicant could not have raised a gender bias claim before submitting his first management evaluation request since he only learned through the management evaluation process that the contested decision was based solely on gender considerations.

25. The Tribunal notes that the notification of the contested decision on 8 May 2018 only mentioned that the successful candidates were selected from the pre-approved roster. While the daily orders issued by DSS two days later revealed the identity of the two successful candidates (including gender), the Applicant only learned through the management evaluation process that gender played a decisive role in the contested decision. Therefore, the Tribunal agrees with the Applicant that

it was not possible to have raised a gender bias claim in his management evaluation request. In that sense, this case is distinguishable from *Alito* 2015-UNAT-540 where the applicant raised the allegations of past discrimination for the first time before the Dispute Tribunal, when the applicant could have raised such allegations in the management evaluation request.

26. Accordingly, the Tribunal finds that the application in Case No. UNDT/NY/2018/045 is receivable. The issue for the Tribunal is whether the contested decision is unlawful for being tainted by gender bias.

Whether the Applicant was given full and fair consideration

27. It is well established that the Secretary-General has broad discretion in matters of staff selection. 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, para. 23). The Appeals Tribunal has further held that the role of the Tribunals 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. The Tribunals’ role is not to substitute their decision for that of the Administration” (*Ljungdell* 2012-UNAT-265, para. 30).

28. As the Appeals Tribunal reiterated in *Lemonnier* 2017-UNAT-762, citing *Rolland* 2011-UNAT-122, that “the starting point for judicial review is a presumption that official acts have been regularly performed” (see para. 32). The Appeals Tribunal held in *Rolland* that if the management is able to minimally show that the applicant’s candidature was given a full and fair consideration, the burden of proof shifts to the applicant who then must show through clear and convincing evidence that he or she was denied a fair chance of selection (*Rolland*, para. 26).

29. In this case, DSS selected two female candidates from a roster of pre-approved candidates in accordance with sec. 9.4 of ST/AI/2010/3 (Staff selection

system), which provides that “[c]andidates included in the roster may be selected by the head of department/office for a subsequent job opening, without reference to a central review body”. DSS particularly selected female candidates according to the DSS Strategy on Gender Equality and the Empowerment of Women 2015-2019.

30. The Applicant claims that it is unlawful to select two candidates solely on gender considerations as there is no legal basis for making a decision on this ground. The Applicant submits that ST/AI/1999/9 (Special measures for the achievement of gender equality) only applies to the filling of posts at the professional level and above. The Applicant argues that there was no recruitment process in this case, such as a written exam or interview, and his credentials and experience were not compared with those of the two successful candidates to ascertain whether he was a more suitable candidate. Therefore, the Applicant submits that he was discriminated against on the basis of his male gender.

31. As the Appeals Tribunal stated in *Charles* 2014-UNAT-416, para. 28, “[t]he plain wording of Section 9.4 [of ST/AI/2010/3] makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position”.

32. Since rostered candidates are already fully reviewed and endorsed by a central review body, the Administration can select any of the candidates from a roster without a further evaluation process. The question is whether the head of department/office exercised his or her discretion appropriately when selecting a candidate from a roster.

33. The selection memorandum provides that DSS decided to select the only female candidates remaining in the S-4 roster in accordance with the DSS Strategy on Gender Equality and the Empowerment of Women 2015-2019. According to this departmental policy, the analysis of DSS staffing data indicated significant gender

disparities at senior management and the General Service/Security and Safety Service levels, and stated that DSS will develop the action plan which will address, among other things, “hiring procedures and decisions that are appropriately informed by gender balance targets” and “retention and promotion of female talent” (pages 10-11).

34. The Respondent also submits a comparative matrix which shows the performance records of nine rostered candidates and claims that their past performance was also considered in the selection. However, neither the selection memorandum nor the response to the Applicant’s management evaluation presents the performance records of the selected candidates as the basis for the selection decision. Therefore, the Tribunal considers that even if the performance records of the rostered candidates were considered, the record does not support the Respondent’s claim that this factor played a role in the selection decision.

35. The Tribunal finds that the Administration exercised its discretion appropriately by demonstrating that it considered gender parity in accordance with the departmental gender policy, which set the goal of “the retention and promotion of female talent”. The Applicant failed to show by clear and convincing evidence that he was denied a fair chance of selection.

36. Accordingly, the Tribunal finds that the contested selection decision is lawful as the Administration appropriately exercised its discretion in selecting the female candidates from a roster in accordance with the departmental gender policy.

Conclusion

37. In light of the foregoing, the Tribunal rejects the applications in Case Nos. UNDT/NY/2018/045 and UNDT/NY/2019/012.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 24th day of April 2020

Entered in the Register on this 24th day of April 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York