



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

RUSSO-GOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jameel Baasit, UNOPS

Introduction

1. On 5 February 2019, the Applicant, a former Project Manager at the United Nations Office of Project Services (“UNOPS”), filed this application in which he challenges the decisions not to select him for the positions of “Business Development Specialist” at the P-3 level and “Process Design Advisor” at the P-4 level.
2. On 7 March 2019, the Respondent duly filed his reply in which he claims that the application is without merit.
3. On 1 April 2020, the case was assigned to the undersigned Judge.
4. By Order No. 61 (NY/2020) dated 3 April 2020, the Tribunal ordered:
 - a. The Respondent to file, by 27 April 2020, the UNOPS rules according to which the relevant selection exercises were conducted, and all relevant documentation as to how the respective written tests were conducted and graded in reference to the Applicant;
 - b. The parties to file, by 27 April 2020, a jointly-signed statement providing consolidated lists of the agreed and disputed facts; and
 - c. The parties to file their closing statements in the following sequence: the Applicant (11 May 2020), the Respondent (18 May 2020), and the Applicant (25 May 2020).
5. The Tribunal further instructed the parties that, unless otherwise ordered, on receipt of the last-mentioned statement or at the expiration of the provided time limit, the Tribunal would adjudicate on the matter and deliver Judgment based on the papers filed on record.
6. The parties duly filed their submissions as per Order No. 61 (NY/2020).
7. For the reasons set out below, the application is rejected.

Facts

8. In response to Order No. 61 (NY/2020), the parties provided the following agreed upon facts:

... [The Applicant] served as a Project Manager at the P-3 level at the United Nations Office of Project Services (UNOPS). He has worked at UNOPS for approximately 2.5 years and is on a fixed-term appointment.

... On 29 June 2018, [the Applicant] was informed that his post would be abolished.

... On 1 August 2018, [the Applicant] signed an extension for the next six months.

... On 21 August 2018, [the Applicant] applied for the Business Development Specialist P3, multiple positions (VA/2018/B5011/16249) (“Business Development Specialist Position”) [reference to annex omitted].

... On 3 October 2018, [the Applicant] applied for the Process Design Advisor P4 position (VA/2018/B5011/16467) (“Process Design Advisor Position”) [reference to annex omitted].

... On 25 October 2018, [the Applicant] was informed during a meeting with the Senior Portfolio Manager, [name redacted, Ms. YS] and the Chief Enterprise Project Management Office, [name redacted, Ms. JF], about the possibility that the position that he was encumbering will cease to exist on 31 January 2019. ...

... On 6 November 2018, [the Applicant] received an email informing him that he was selected to take a written assessment on 9 November 2018 [reference to annex omitted].

... On 9 November 2018, [the Applicant] completed the written assessment.

... On 16 November 2018, [the Applicant] received an email informing him that he was selected to take the written assessment on 20 November 2018 [reference to annex omitted] ...

... On 20 November 2018, [the Applicant] completed the written assessment.

... On 28 November 2018, [the Applicant] received an email informing him that he did not pass the test and would not be considered further for the position [reference to annex omitted] ...

... On 11 December 2018, [the Applicant] received an email informing him that he did not pass the test and would not be considered further for the position [reference to annex omitted] ...

... On 22 January 2019, [the Applicant] received a letter formally informing him that his fixed term appointment would not be extended beyond 31 January 2019 [reference to annex omitted].

... On 24 January 2019, [the Applicant] raised a Management Evaluation Request [reference to annex omitted].

... On 30 January 2019, [the Applicant] received from [name redacted, Mr. KLT], Senior Legal Advisor, UNOPS a letter from the UNOPS General Counsel [name redacted, Mr. JP] regarding his request for management evaluation of 24 January 2019 [name redacted].

Consideration

The scope of the case

9. The Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

10. The Applicant submits in the application that, “[t]he Administration is not compliant with *Timothy* 2018-UNAT-847 and UN jurisprudence to let [him] participate on a preferred or non-competitive basis in the mandatory order established by Staff Rule 9.6(e), without having to go through a competitive selection process”.

11. The Tribunal notes that staff rule 9.6(e), which according to sec. 2.3.2 of UNOPS’s “Process & Quality Management System” dated 13 April 2020 also applies to UNOPS, solely concerns the situation where a staff member is separated from service because her/his appointment is terminated and not where, as in the present

case, it is not renewed. In line herewith, the Tribunal refers to the Appeals Tribunal in *Nouinou* 2019-UNAT-902, paras. 31 and 32.

12. In line with Order No. 61 (NY/2020), the issues in the present case may therefore be defined as:

- a. Were the decisions not to select the Applicant for the respective positions as (i) Business Development Specialist and (ii) Process Design Advisor proper in light of the Tribunal's limited judicial review?
- b. If not, what remedies is the Applicant entitled to?

The Tribunal's limited judicial review regarding a non-selection decision

13. It is trite law that the Dispute Tribunal's judicial review is limited. In general, the Appeals Tribunal often refers to its judgment in *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as "the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate". The Appeals Tribunal further held that "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision".

14. Specifically regarding selection and promotion decisions, in light of the Administration's broad discretion in such matters, the Appeals Tribunal has held that these types of decisions are governed by the so-called "principle of regularity". This means that if the Respondent is able "to even minimally show that [an applicant's] candidature was given a full and fair consideration, then the presumption of law stands satisfied". To rebut this minimal showing, the applicant "must [then] show through clear and convincing evidence that [s/he] was denied a fair chance of promotion" in order to win the case (*Lemonnier* 2017-UNAT-762, para. 32).

15. In line herewith, the Appeals Tribunal stated in *Verma* 2018-UNAT-829 (affirmed in *Kinyanjui* 2019-UNAT-932) that, “In terms of the discretion vested in the Administration, under Article 101(1) of the United Nations Charter and Staff Regulations 1.2(c) and 4.1, the Secretary-General 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 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” (see para. 13).

16. In *Verma*, the Appeals Tribunal further held that, “Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion” (see para. 14).

17. To minimally show that an applicant’s candidature was given a full and fair consideration, the Respondent must therefore typically, at a minimum, be able to produce a contemporaneous written record to demonstrate that the candidature of the applicant in question, as a matter of fact, received such consideration. Such written evidence can, for instance, include documentation for the established grading methodology, the applicable passing score, the actual grades given, any assessment report(s) and memoranda, and any other relevant material.

Were the relevant selection decisions proper?

18. The Applicant’s submissions may be summarized as follows:

- a. As the Applicant passed “the competency recruitment process for two roster positions with [] similar job requirements and location (New York, USA)”, UNOPS was obligated to follow the “Fill Vacancy Using Partner Rosters” process as per sec. 7.3.14 of the Process & Quality Management

System dated 13 April 2020. UNOPS “failed to assign the Applicant to a suitable position” similar to other UNOPS colleagues [names redacted] (double standard, Workers’ Rights)”;

b. The Applicant had “filed a case with [the Office of Internal Oversight Services]” after which “his manager and the UNOPS Administration started a retaliation campaign against him. (Freedom of Expression, Right to Equality)”;

c. Although the Respondent “stated that the Applicant[‘s] post was abolished”, another UNOPS staff member “without any qualification on project management [was assigned] to the Applicant’s post”, which is “with the [United Nations] Secretariat in [the Office of Information and Communications Technology] and the Applicant passed a competitive based interview”;

d. The Respondent “ignored/failed ... to submit traceable pieces of evidence” of which of the anonymous candidates the Applicant was. The Respondent “did not submit an evaluation matrix, and in absence of it all written tests”. The evaluation process “did not produce credible results, and the errors of evaluations [were] up to 150 [percent] between reviewers/‘experts’”, and it is “indubitable that applying this evaluation method the results were vicious ... and candidates [did not receive] fair and non-discriminatory considerations”;

e. The documentation submitted by the Respondent from each of the selection exercises sheds no “further light on how the written tests were conducted or graded in reference to the Applicant”, and he failed to submit the required documents in accordance with the “Process & Quality Management System” to minimally establish that the selections processes were appropriately conducted;

f. For both positions, “it is a very reasonable supposition that only the Applicant [held] all mandatory requested education and certifications/diplomas as per the Vacancy Announcement requirements”. The selected candidates “plagiarized up-to” 86 and 90 percent of their respective written test responses, and none of them were in need of a “new position”;

g. The handling of the selection processes indicates “clear[ly] that candidates [did not receive] fair consideration, were discriminated [against], and all relevant material [were not] taken into consideration”;

h. The Applicant was evidently “fully compliant with all requirements of Vacancy Announcement[s]” and he has shown “through clear and convincing evidence that he was denied a fair chance of promotion”. Proper procedures were not followed, and the Applicant’s “ground rights (such as double standard, fair consideration) were violated”;

i. Both selection decisions were “evidently made *ex post facto* for the purpose of the present proceedings and ... no evidence is on file [regarding] when it was actually taken”;

j. The written test for the post of “Business Development Specialist” was rather targeted at a “Project Manager” than a “Business Development Specialist”, which “works more in delivery, more technical and administrative”. The Applicant’s answers to the written test were between 75 and 90 percent “complete” and 100 percent “correct”;

k. Regarding the written test for the post of Process Design Advisor, the Respondent failed to provide “comments on how the Applicant’s written test was reviewed” and “[t]wo independent well internationally recognized reviewers noted the Applicant’s written test with a minimum of 88 scores”.

19. The Respondent, in essence, submits that the Applicant received a full and fair consideration as proven by the evidence on record.

The Business Development Specialist post

20. To minimally show that the Applicant received a full and fair consideration for the post, the Respondent submits in evidence:

- a. The Applicant's test response;
- b. An email of 13 November 2018 from a UNOPS Human Resources Officer to the two graders of the written test in which a point system is set out for each question and sub-question and the "passing threshold" is stated as 60 percent;
- c. An email of 11 December 2018 from one of the graders of the Applicant's written test to the UNOPS Human Resources Officer concerning the "[r]ational[e] for grading of Candidate A" (the Respondent submits that this anonymized candidate corresponds to the Applicant) in which was stated that, "I confirm the grading I submitted as the candidate demonstrated very little understanding of the supporting information and his answers were either quite generic or focused on the technical aspect of the problem. He was not a suitable candidate for this position and other candidates provide much stronger answers";
- d. Undated copies of the two graders' narrative comments as indicated directly, either electronically or with a regular pen, on the Applicant's response to the written test. The comments are generally critical of the Applicant's answers;
- e. An undated "grading table" according to which Candidate A received 59 out of 100 points from one grader and 25 points from the other grader [-] (the grader who also provided his rationale in the 11 December 2018 email), leading to a "total average" of 42 out of 100 points, and therefore below the passing threshold.

21. The Tribunal notes that the Applicant has not challenged that the test scores on which the graders' comments were noted were indeed his scores. While the Respondent has provided no documentation that the Applicant was, in fact, Candidate A, the negative narrative comments made by the graders on this test response convinces the Tribunal that the Respondent has credibly established that Candidate A did correspond to the Applicant because the grades given to him appropriately reflect these comments.

22. Albeit the evidence is sparse, the Tribunal therefore finds that the Respondent has produced adequate contemporaneous written documentation to minimally show that the Applicant received a full and fair consideration pursuant to *Lemonnier* and *Verma*.

23. Under *Lemonnier*, the onus is therefore on the Applicant to rebut this finding with clear and convincing evidence. Considering that the written test was properly conducted and had no appearance of being manifestly unreasonable, the Tribunal finds that Applicant has failed to do so, also noting that the contested non-selection decision was solely based on him failing this written test and that no evidence on record points to any ulterior motives. Furthermore, the Tribunal notes that unlike what the Applicant submits, sec. 7.3.14 of the Process & Quality Management System, which he does not challenge as the applicable legal framework, does not confer him any right to be recruited to the post even if he is a rostered candidate.

The Process Design Advisor post

24. The Respondent has submitted the following documents in evidence to minimally show that the Applicant received a full a fair consideration for the post:

- a. The Applicant's test response;
- b. An email of 20 November 2018 from the UNOPS Human Resources Officer to the two graders in which is indicated that the "passing threshold" is 65 out of 100 points;

- c. An email of 26 November 2018 from one grader in which “Candidate F”, which the Respondent submits corresponds to the Applicant in anonymized form, is indicated to have received a total of 50 points and therefore “fail”;
- d. An email from the other grader of 7 December 2018 in which Candidate F is indicated as having received 55 points;
- e. An undated copy of the Applicant’s written test on which a grader has electronically indicated the awarded scores, stating “Total Points Earned = 55” and next to each question the given points as: 11, 7, 13, 12 and 12, which amounts [to] 55 point[s] in total;
- f. An undated “grading table” in which Candidate F’s total average score is indicated as 52.5 points $((55 + 50)/2)$.

25. Also in this selection exercise, the evidence is limited. The Tribunal notes that although no documentation directly shows that the Applicant, in fact, corresponded to Candidate F, this can, however, be deduced from the copy of his test response, which he has not contested as being his. On this test response, the grader indicated that he received 55 points, which is the same score as indicated in the grading table next to Candidate F. In this regard, it makes no difference that Candidate A also received 55 points by one of the graders because this candidate also failed the written test with a total average of 48 points (if the Applicant was rather Candidate A, he would therefore also not have passed the test).

26. Accordingly, the Tribunal finds that the Respondent has demonstrated with a minimal showing that the Applicant received a full and fair consideration for the post in accordance with *Lemonnier* and *Verma*.

27. The Applicant is therefore required to rebut this finding by clear and convincing evidence as per *Lemonnier*, but no evidence on record corroborates any such finding. As the Applicant has furthermore not provided any evidence showing

that the selection process was somehow tainted by ulterior motives, the Tribunal therefore finds that he has also failed to substantiate his claim of illegality regarding this exercise.

Remedies

28. As the Tribunal finds no irregularities in the impugned selection exercises, the contested non-selection decisions are upheld. It is therefore not necessary for the Tribunal to examine the issue of remedies.

Conclusion

29. The application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 28th day of May 2020

Entered in the Register on this 28th day of May 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York