



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

LACKNER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Nicole Wynn, AAS/ALD/OHRM, UN Secretariat

Rosengala Adamo, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Judicial Affairs Officer with the United Nations Assistance Mission in Afghanistan (“UNAMA”), contests the decision to cancel job opening 74088 (Senior Judicial Affairs Officer) and his non selection for the subsequently advertised job opening 97210 (Senior Judicial Affairs Officer, hereinafter JO 97210).

2. For the reasons stated below, the Tribunal rejects the application.

Summary of relevant facts

3. JO 74088 was advertised on 17 February 2017. The Applicant, a rostered candidate, applied on 27 February 2017.

4. On 30 May 2017, four suitable rostered candidates, including the Applicant, and two non-rostered candidates were released to the Hiring Manager. The Hiring Manager ranked the Applicant as the fourth most suitable candidate out of the six.

5. On 27 September 2017, the Officer in Charge of the Office of Human Resources Management (“OiC/OHRM”) selected the candidate whom the Hiring Manager had ranked first. On 19 December 2019, the Applicant was notified that he had not been selected.

6. On 17 January 2017, the selected candidate declined her selection. The Assistant Secretary-General for Human Resources (“ASG/OHRM”) then selected another candidate who, in turn, declined the selection.

7. On 6 March 2018, the Security Council called for the implementation of the Secretary-General’s special report on the strategic review of UNAMA, which included the abolition of the Rule of Law Unit and its replacement with a smaller rule of law capacity within the Political Affairs Division to advise on normative issues, including anti-corruption.

8. On 9 March 2018, the Secretary-General submitted the 2018 UNAMA updated proposed budget, which included the proposal to abolish the Rule of Law Unit and its D-1 Chief position. In line with the budget proposal, the Special Representative of the Secretary-General of UNAMA (“SRSG”) cancelled JO 74088 on 27 May 2018 and decided to proceed with a recruitment from roster for a position tailored to the new rule of law mandate.

9. Consequently, JO 97210 was published on 4 June 2018. The Applicant applied on 8 June 2018. 11 candidates, including the Applicant, were released to the Hiring Manager, in this case, the Deputy Special Representative of the Secretary-General of UNAMA (“DSRSG”).

10. The Hiring Manager found the Applicant not to possess the required anti-corruption experience and did not recommend him for selection to the post of Chief of Mission Support of UNAMA. On 8 August 2018, the SRSG selected the candidate recommended by the Chief of Mission Support and the Applicant was notified of his non-selection on 22 August 2018.

Parties’ contentions

Cancellation of JO 74088

11. The Applicant argues, in sum, that after the selected candidates subsequently declined their selection for JO 74088, UNAMA was obligated to continue offering the position to the candidates in the order that they were ranked by the Hiring Manager. Instead, he argues that UNAMA elected to freeze the recruitment process, thereby depriving him of the opportunity to get selected.

12. The Respondent replies that the cancellation of JO 74088 is not a reviewable administrative decision because it does not have direct legal consequences for the Applicant’s terms of appointment.

13. Relying on *Ngokeng* 2014-UNAT-460, the Respondent claims that the cancellation of a job opening to which no candidate has been appointed constitutes a preliminary step in the selection process and therefore does not constitute a reviewable administrative decision. In the present case, the Respondent argues that

no candidate had been appointed for JO 74088 and, therefore, the cancellation of the job opening was a mere preliminary step in the recruitment exercise and did not have direct legal consequences for the Applicant.

14. On the merits, the Respondent argues that the cancellation of JO 74088 followed the restructuring of the rule of law function in the mission with an enhanced anti-corruption capacity.

15. The Respondent states that in the new structure, the Senior Judicial Affairs Officer serves as head of the rule of law capacity instead of deputy head under the former D-1 Chief, Rule of Law Unit, whose position was abolished. Therefore, pursuant to art. 101.3 of the Charter of the United Nations, it was necessary for UNAMA to align the terms of reference (“TOR”) of the job opening to the new mandate.

Non-selection for JO 97210

16. The Applicant contends that UNAMA informed him that the recruitment process was on hold and only notified him of the cancellation on 8 March 2018. The Applicant argues that the result of the delay was bias. He avers that UNAMA purposefully protracted the selection process until the preferred candidate for the new position got rostered in a separate recruitment process.

17. The Applicant argues that the candidate that was selected for JO 97210 was assigned to draft an anti-corruption report for UNAMA on a temporary contract under the direct supervision of the SRSG before JO 97210 was advertised. He claims that at a party, the DSRS Development publicly praised the report.

18. The Applicant further argues that JO 97210 was tailored to fit exactly the profile of the candidate that was eventually selected.

19. The Applicant also contends that the changes introduced in the mission’s mandate do not justify the change of the job’s TOR to such a detailed degree and that anti-corruption had been included in the rule of law agenda for several years.

20. The Applicant further argues that if the TOR of a job opening vary more than 30% from the generic job description, the selection cannot be done from roster but must follow the procedure of a post-specific job opening. He claims that JO 97210 deviates more than 30% from the generic job opening. Therefore, the Applicant argues that the issuance of JO 97210 did not comply with the handbook for recruiting managers.

21. The Applicant goes on to contend that the decisions to cancel JO 74088 and to readvertise under JO 97210 were not undertaken by the correct official because they were both conducted by the Chief of Staff of UNAMA. He further argues that the Management Evaluation Unit, in reviewing his request for management evaluation of both contested decisions stated that the “the sole responsibility for all recruitment steps was with the DSRSG Political”. The Applicant claims that this was not correct for the any steps taken in both decisions prior to 30 June 2018.

22. The Applicant finally argues that the contested decisions were made in order to exclude him in retaliation for having reported a security incident, which was not well received by the DSRSG Development.

23. The Respondent replies that the Applicant was given fair and full consideration. He denies that any preferential treatment was given to any of the candidates.

24. The Respondent contends that the decision to issue a “recruit from roster” job opening was in line with the standard method of recruitment in the field. Moreover, he contests the Applicant’s contention that the advertisement was delayed on purpose to favour the selected candidate. The Respondent explains that following the SRSR’s 3 May 2018 decision to cancel JO 74088, UNAMA’s Human Resources published JO 97210 on 4 June 2018. The brief period between the SRSR’s request and the date of the publication was due to the need to translate the job advertisement.

25. Further, the Respondent avers that since the new rule of law capacity was under the Political Affairs Division, the Hiring Manager for JO 97210 was the Acting DSRSG Political, not the DSRSG Development as the Applicant claims.

Consideration

26. In cases as the current one (where the contested decision(s) is(are) related to a recruitment and non-selection process) the scope of judicial review is two-fold: the Tribunal assesses a) whether the recruitment procedure followed the applicable rules and b) if the Applicant has been given full and fair consideration.

27. In the case at hand, the Tribunal has identified the following legal issues:

a. If the decision to cancel JO 74088 is receivable and, if so, whether said decision was lawful; and

b. Whether the Applicant's non-selection for the new position advertised under JO 97210 was a lawful exercise of administrative discretion and he was given full and fair consideration.

28. However, before entering into the merits, the Tribunal has first to address the issue of receivability of the first contested decision as raised by the Respondent in his Reply.

Receivability

29. In relation to the first decision, the Tribunal recalls that it relates to the cancellation of the first job opening, namely JO 74088.

30. In his submissions, the Respondent clarified the reasons for the cancellation of said JO. In fact, it appears that there was a first selected candidate who declined the offer, then a second one who also declined it and, subsequently, on 6 March 2018, a new strategy for UNAMA was implemented. As a consequence, there was a change in the TOR of UNAMA's rule of law component and of the post of Senior Rule of Law Officer.

31. According to the evidence on record, the SRSG decided to abolish a D-1 position (Chief, Rule of Law Unit) and merge its functions with a newly created P-5 post with a new set of responsibilities related to anti-corruption.

32. According to the Appeals Tribunal's decision in *Kawamleh* 2018-UNAT-818 (para. 14), when a selection process is cancelled, there is no administrative decision to contest as it does not fulfil the requirements established by the internal jurisprudence to be considered as such (see United Nations Administrative Tribunal Judgment No. 1157, *Andronov*, (2003)).

33. Moreover, in the case at hand, the Applicant cannot even claim that said cancellation had an impact on his employment status or contractual rights as he was not selected for said post.

34. The Tribunal finds that the cancellation of JO 74088 relates to specific organizational needs which, in principle, fall out of the scope of its judicial review and makes a challenge against such decision not receivable.

Non selection for JO 97210

35. The Tribunal will now turn to the analysis of the second contested decision, i.e., the Applicant's non selection for the P-5 post advertised after the cancellation of JO 74088.

36. The Tribunal recalls that the cancellation of JO 74088 was justified by the fact that a restructuring exercise was being implemented and new terms of reference had to be issued in conformity to said restructuring and UNAMA's mandate.

37. In his application, the Applicant argues that he had the skills for the job as he had been acting as OiC from 8 March 2018 to 22 September 2018. He also claims that the TOR of the post advertised under JO 97210 deviate from the previous ones more than 30 per cent and that the selected candidate was the one the Chief of Mission and Support preferred as she was previously acting as a Consultant.

38. After having carefully reviewed the documents on file, the Tribunal has not identified any grounds to rescind the decision not to appoint the Applicant to the P-5 position as he did not provide any evidence of procedural irregularities or bias against him.

39. On the contrary, the Tribunal understands that the selected candidate was selected from a pre-approved roster as it was deemed that she possessed experience in anti-corruption, which was essential for the new P-5 position. The evidence also shows that the Applicant, who was also considered as part of the roster, was deemed not to be suitable for the post as he lacked said experience.

40. Moreover, it is not within the scope of judicial review to question the choices made by the Hiring Manager when there is no evidence of bias or any procedural flaw in the recruitment process.

41. The Appeals Tribunal has adopted the principle of regularity by which 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” where after the applicant “must 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).

42. Having said the above, the Tribunal concludes that the application fails.

Conclusion

43. In view of the foregoing, the Tribunal DECIDES to reject the Application.

(Signed)

Judge Teresa Bravo

Dated this 18th day of September 2020

Entered in the Register on this 18th day of September 2020

(Signed)

René M. Vargas M., Registrar, Geneva