



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MOKLED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Budget and Finance Assistant at the GS-5/9 level, working with the United Nations Interim Force in Lebanon (“UNIFIL”) based in Naqoura.¹
2. By an application filed on 26 August 2019, the Applicant is contesting a decision not to select her for the position of Assistant Administrative Officer, National Professional Officer (“NPO”), in the Language Support Unit of UNIFIL.²
3. The Respondent filed a reply on 25 September 2019 in which it is argued that the contested decision was lawful.³
4. The Tribunal held a case management discussion on 24 September 2020 and, on 19 October 2020, a hearing was held on the merits. The parties filed their closing briefs on 28 October 2020.

Facts

5. Job Opening No. 101569 for the post of Assistant Administrative Officer, NOA was advertised in Inspira running from 30 August 2018 until 28 September 2018.⁴ The Applicant applied for the post.⁵
6. Thirty-one job applicants were shortlisted and invited to take the online written assessment on 31 October 2018, the Applicant among them.⁶ Four job applicants passed the written test. On 16 November 2018, the Applicant, as one of the four candidates, participated in a competency-based interview (“CBI”) before an assessment panel.⁷ Two job applicants, including the Applicant, passed the CBI.⁸ The

¹ Application, section I.

² Application, section V.

³ Reply, section A, para. 2.

⁴ Reply, R/3.

⁵ Application, annex 2.

⁶ Reply, R/4.

⁷ Reply, R/5.

⁸ Reply, R/6.

Applicant obtained the highest score for the competencies, specifically, “exceeds the requirements” ratings on Professionalism, Planning and Organizing and Client Orientation, whereas the other candidate received similar ratings except in the case of Planning and Organizing, for which she received “successfully meets the requirements”.⁹

7. The hiring manager for this recruitment was Mr. Luis Cesar Blanco, the Deputy Chief Service Delivery Management (“DCSDM”), UNIFIL. His superior at UNIFIL and the First Reporting Officer (“FRO”) was the Chief Service Delivery Management (“CSDM”), Mr. Goodwin.¹⁰ The hiring manager was a seconded military officer at UNIFIL and was not familiar with the United Nations recruitment process.¹¹ He is no longer with the Organization.¹²

8. On 3 December 2018, the hiring manager submitted the unranked list of the two recommended candidates, including the Applicant, to the Mission Review Panel (“MRP”) for review and endorsement.¹³ On 7 December 2018, the MRP endorsed both the candidates.¹⁴

9. Upon receipt of the endorsement by the MRP, the hiring manager drafted a memorandum to the Head of Mission, which he submitted to the Officer-in-Charge of the Human Resources Section (“OiC/HRS”) recommending the Applicant for appointment to the position based on the outcome of the interview. The Tribunal has no information whether that memorandum was signed or only submitted as a draft.¹⁵

10. Admittedly, sometime later, a discussion took place between the hiring manager and the CSDM. The CSDM advised the hiring manager that once the MRP endorsed the list of candidates, either the Applicant or the other recommended

⁹ Reply, R/6.

¹⁰ Mr. Blanco’s testimony, 19 October 2020.

¹¹ Ibid.

¹² Ibid.

¹³ Reply, R/7.

¹⁴ Reply, R/8.

¹⁵ Mr. Blanco’s testimony, 19 October 2020.

candidate could be selected for the position in consideration of the needs of the unit/section, the overall work experience, background information and performance evaluation.¹⁶

11. Subsequent to the discussion with CSDM, the hiring manager retracted the memorandum recommending the Applicant. On 23 January 2019, he filed another memorandum with HRS, in which he expressed his preference for the other candidate for selection.¹⁷ On the same day, the OiC/HRS also transmitted the matter to the Head of Mission and Force Commander (“HoM/FC”) for review and approval of the best recommended candidate.¹⁸

12. On 29 January 2019, the UNIFIL HoM/FC selected the other recommended candidate and not the Applicant.¹⁹

13. On 25 February 2019, the Applicant was informed by HRS, UNIFIL, that she had been placed on a roster for pre-approved candidates for potential consideration for upcoming UNIFIL job openings with similar functions at the same level.²⁰

14. On 24 April 2019, the Applicant requested management evaluation challenging the decision to place her on the roster of pre-approved candidates, rather than selecting her for the post.²¹ On 7 June 2019, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to uphold the contested decision.²²

Submissions

Applicant’s submissions

15. The Applicant’s case is presented in a three-pronged argument. First, that her candidacy for the post was not given due and adequate consideration, where critical

¹⁶ Mr. Goodwin’s testimony, 19 October 2020; Mr. Blanco’s testimony, 19 October 2020.

¹⁷ Ibid.; Reply, R/9.

¹⁸ Reply, R/10.

¹⁹ Reply, R/10.

²⁰ Application, annex 2.

²¹ Application, annex 3.

²² Application, annex 4.

element of the job description was ignored, and non-critical elements were given more emphasis. Second, that there was bias and pressure in the selection process. Third, the selection process took too long, since it exceeded 100 days from the date of the interview.

16. Regarding the first argument, the Applicant submits that the hiring manager ignored the scores given by the CBI panel members. The Applicant stresses that she received the highest score for the competencies; specifically, “exceeds the requirements” ratings on Professionalism, Planning and Organizing and Client Orientation, whereas the selected candidate received similar ratings except in the case of Planning and Organizing, for which she received “successfully meets the requirements”. Accordingly, the Applicant should have been the selected candidate. The panel members were not consulted on the final decision, which is not a proper process because the hiring manager should have reverted to CBI Panel members before he made his selection.

17. On the second prong, the Applicant submits that she is privy to the information that the initial selection memorandum came out with her name as the selected candidate, however, due to the pressure from the UNIFIL National Staff Union Executive Committee (“NSEC”), who are close friends with the selected candidate, the initial memorandum was changed in favour of the other candidate. She describes, though hearsay, that the matter caused an atmosphere of conspiracy at Human Resources.

18. On the third point, the Applicant contends that the selection process was delayed in bad faith as it took a period exceeding 100 days from the date of the interview. One of the reasons for the delay was for the Administration to benefit from her absence at work due to maternity leave that she took effective 24 December 2018.

19. On a related matter, the Applicant contends that the Administration breached the provisions of sec. 10 of ST/AI/2010/3 (Staff selection system). The section provides that candidates endorsed by the central review body (“CRB”) and placed on a roster

shall be informed of such placement within 14 days after the decision is made by the hiring manager or occupational group manager. In her case, the hiring manager recommended selection on 23 January 2019 and she was informed of the decision on 25 February 2019, which exceeds the 14 days limit, and is equal to 33 days.

20. The Applicant thus requests the Tribunal by way of remedies to:
- a. Rescind the contested decision and award her compensation for loss of career potential, professional dislocation, loss of earnings and pension benefits resulting from the improper non-selection. The calculation of the compensation be based on the difference between the NOA salary with corresponding steps that would have accrued and her present GS-5 step 9 salary effective the date of the selection process, which is equal to USD1,144.44 per month, effective 1 March 2019;
 - b. Award her compensation of the annual leave balance of 51.5 days that she had on 1 March 2019, since she was going to resign from the GS-5 level to be able to sign the NOA contract, and the leave balance would have been paid at that time; and
 - c. Award moral damages for the violation of the due process rights and emotional stress caused to her.

Respondent's submissions

21. The Respondent, relying on *Abassi*²³, submits that the Appeals Tribunal has recognized the wide discretion vested in the Secretary-General in reaching decisions on staff selection.

22. Regarding the Applicant's first argument, the Respondent maintains that the Applicant was, in fact, given full and fair consideration. She was found a suitable candidate for the position and recommended for selection, however, she was not found to be the most suitable one. There was only one position to fill and the HoM/FC had

²³ *Abassi* 2011-UNAT-110, para 24.

broad discretion to choose either of the two candidates recommended for selection. The Applicant had no right to be selected for the position. Rather, once the MRP endorsed the Applicant for selection, the Applicant's only right was to be rostered in accordance with section 7.4 of the UNIFIL guidelines for the selection of locally recruited staff members.

23. On the argument, that the hiring manager changed his initial recommendation for selection due to pressure from NSEC, the Respondent explains that the NSEC was not consulted regarding the selection. The hiring manager consulted with his FRO, the CSDM, before finalizing his recommendation. Moreover, the recommendation to the head of office or department does not constitute an administrative decision subject to appeal. The selection decision was made by the HoM.

24. As to the third Applicant's argument that the selection process exceeded 100 days and was thus delayed in bad faith or to benefit from her absence at work while on maternity leave; the Respondent denies that the recruitment process was delayed, as the set target for the Organization for the specific job opening was 130 working days from the time of the closing of the job opening to the selection decision. The recruitment process of the position in question, was completed within 104 working days. Hence, there was no delay.

25. In view of the foregoing, the Respondent requests the Tribunal to dismiss the application.

Considerations

Standard of review

26. The paramount consideration in the employment of United Nations staff is the necessity of securing the highest standards of efficiency, competence and integrity²⁴, and, for this purpose, competitive processes are to be applied.²⁵

27. Jurisprudence developed based on these rules underlines that the Secretary-General has broad discretion in matters of staff selection. This includes the choice of the best evaluation method to assess the job candidates' qualifications.²⁶ In its review of such matters, the role of the Dispute Tribunal is to review the impugned selection process to determine whether a candidate has received fair consideration in accordance with the applicable legal framework, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration.²⁷ The Dispute Tribunal will not substitute its own judgment for that of the Secretary-General.²⁸

28. The Appeals Tribunal further ruled in *Rolland*²⁹ that official acts are presumed to have been regularly performed. Accordingly, in a recruitment procedure, if the Administration is able to even minimally show that a staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must then be able to show through clear and convincing evidence to have been denied a fair chance.³⁰

Whether the applicable procedures were followed?

29. On the technical side, the selection process in question, being a recruitment for a National Professional Officer position, was not, strictly speaking, governed by

²⁴ Art. 101.3 of the Charter of the United Nations, staff regulation 4.2.

²⁵ Staff regulation 4.2.

²⁶ *Riecan* 2017-UNAT-802, para. 22.

²⁷ *Rolland* 2011-UNAT-122; *Aliko* 2015-UNAT-540; *Abbassi* 2011-UNAT-110; *Majbri* 2012-UNAT-200; *Ljungdell* 2012-UNAT-265.

²⁸ *Toure* 2016-UNAT-660; *Riecan* 2017-UNAT-802. See also: *Kucherov* 2016-UNAT-669; *Nikolarakis* 2016-UNAT-652; *Nwuke* 2015-UNAT-508; *Ljungdell* 2012-UNAT-265.

²⁹ *Rolland* 2011-UNAT-122.

³⁰ *Rolland*, *ibid.*, see also *Mohamed* 2020-UNAT-985; *Lemonnier* 2017-UNAT-762; *Ibekwe* 2011-UNAT-179; *Niedermayr* 2015-UNAT-603; *Survo*, 2015-UNAT-595; *Simmons* 2014-UNAT-425; *Zhuang, Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

ST/AI/2010/3³¹, but by the UNFIL Guidelines for the Selection of Locally-Recruited Staff Members (“Guidelines”) issued by the HoM.³² As stated in section 1.2 of the Guidelines, they embrace the basic principles expressed by ST/AI/2010/3 and ST/SGB/2011/7 (Central review bodies).

30. The Applicant’s contention is that the applicable procedures were breached because the score assigned to the candidates upon the CBI was binding on the outcome of the selection. As such, changing the hiring manager’s recommendation to the HoM required a prior agreement from the panel who conducted the CBI. This contention is incorrect.

31. As results from section 6.1 of the Guidelines, the assessment panel’s role consists of administering tests and the CBI, as appropriate, for the purpose of creating a list of candidates who fulfill the criteria required for appointment. On this basis, the hiring manager forwards an *unranked* list of recommended candidates for the endorsement by the MRP. Subsequently, pursuant to section 6.2 of the Guidelines, the MRP verifies if the evaluation criteria and the applicable procedures were followed. When the endorsement is granted, pursuant to section 6.2.8, the Chief Human Resources Officer forwards the case to the HoM with a recommendation to fill the vacancy *from among the list of recommended applicants*. Pursuant to section 7.2 of the Guidelines, the ultimate selection decision belongs to the HoM, who makes the choice, again, from the *unranked list* of recommended candidates, in consultation with the hiring manager.

32. From the above-cited rules it is obvious that the role of the panels in the recruitment process is to emerge a pool (list) of candidates all of whom are technically qualified for the position based on the pre-established criteria. Once this is ensured, the panels are *functus officio* and neither of them has the authority to decide who is to be selected. This is confirmed on several levels: the wide discretion exercised by the Secretary-General in staff selection and by the managers to whom this responsibility

³¹ ST/AI/2010/3, section 3.2 (i).

³² Reply, R/11.

has been delegated; the need to secure the highest standards of efficiency, competence and integrity which could be compromised if the selection decisions were to strictly abide by the score assigned by the assessment panel, which, to some extent, yields random results³³; and the technical rule that the lists submitted to the HoM are unranked. The Appeals Tribunal also confirmed that the mission “has the discretion to select any of the candidates on the recommended list, provided it did so reasonably and without bias”.³⁴ Further the Guidelines, section 7.3, mandate consulting the selection decision with the hiring manager alone. They do not require the hiring manager to follow the score attained in the assessment process nor to consult any of the panels prior to expressing his opinion.

33. To the extent the Applicant suggests that the withdrawing of the memorandum which had initially expressed the hiring manager’s preference for her appointment and changing the hiring manager’s recommendation was an irregularity, the Tribunal finds that it is not relevant for the cause. The memorandum remained an internal matter of the administration and has never conferred any legal claim on the part of the Applicant. The Applicant would have only acquired a claim to be appointed had an actual offer of appointment been made to her and she accepted it.

34. The Tribunal concludes that there was no breach of the applicable procedures. The administration acted in accordance with the Guidelines. The Guidelines as such, are not inconsistent with the higher-ranking acts on staff selection.

Whether the Applicant received full and fair consideration

35. The Applicant was clearly given a full and fair consideration as demonstrated by the fact that she advanced through the process until the final stage. That the recommendation, and ultimately the selection decision, weighed in the on-the-job experience and excellent performance evaluation of the other recommended candidate,

³³ As noted by this Tribunal, selection procedure is not exact science and success in an interview is also a question of luck. See *Niedermayr* 2015-UNAT-603, para.40; *Ross* UNDT/2019/005, para. 57; *Aktash* UNDT/2020/049, para. 27.

³⁴ See *Elzarov* 2018-UNAT-893.

including 16 months of acting as Officer-in-Charge of the Unit, is not unreasonable. The Applicant does not allege that her rival was not competent and unsuited; rather, her complaint is based on the contention that the ultimate selection decision by law should have followed the result of the assessment by the panel. As explained above, there is no support for this contention.

Was there bias or any improper considerations?

36. On the score of bias and improper consideration, the Tribunal agrees with the Respondent that the decision on selection is taken by the HoM, and not by the hiring manager. The Applicant stated expressly that she did not attribute ulterior motive to the HoM. The Tribunal takes it that what is being put forth as the factor invalidating the HoM's selection decision is the alleged ulterior motive on the part of persons responsible for making the recommendation to the HoM.

37. The Applicant's averment of ulterior motive is based on the fact that she had initially been recommended by the hiring manager, but subsequently the recommendation was changed. In this regard, the Tribunal accepts the explanation offered by the administration, that is, that the hiring manager, being a military officer on secondment and lacking experience in the United Nations recruitment processes, had erroneously considered himself bound by the score assigned by the assessment panel, but then changed his mind upon consultation with his more experienced superior officer, who advised that once the MRP endorsed the list of recommended candidates, either of them could be selected for the position. This was confirmed by the testimony of the hiring manager, who denied allegations that he had been pressured to withdraw his recommendation, as well as by the CSDM. Both witnesses denied having had any dealings with the staff union and affirmed that they only contemplated the relevance of overall experience, background and performance evaluation of the candidates. The Tribunal considers this version of events quite plausible under the circumstances and finds nothing sinister in it. Inasmuch as the Applicant must have suffered frustration because of the withdrawal of the first recommendation, the hiring manager acted within his purview. The Tribunal considers, moreover, that none of the witnesses had personal

interest in securing the position for either candidate: the CSDM because of operating four levels above the post in question in the hierarchy and the hiring manager because of his finite term with the Organization.

38. Further, for reasons stated by the Respondent, the Tribunal does not find any improper delay in the process. A couple of weeks inaction during the period between 7 December 2018 (endorsement of candidates by the MRP) and 23 January 2019 (submission of the hiring manager's recommendation to the HoM), is plausibly explained by the fact that the hiring manager, and possibly other persons involved on the administrative side, took leave during the holiday period.

39. In conclusion, the Tribunal finds that bias and ulterior motives have not been proven.

40. Absent illegality of the contested decision, the claim for rescission and any other remedy does not arise.

JUDGMENT

41. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 30th day October 2020

Entered in the Register on this 30th day of October 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi