



Before: Judge Joelle Adda

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:
Jenny Kim, UNOPS

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 24 October 2019, the Applicant, a former staff member of the United Nations Office of Project Services (“UNOPS”), filed an application contesting the decisions not to select him for the following positions with UNOPS of (a) United Nations Technology Innovation Lab (“UNTIL”) Thematic Lead in Peace and Security, at the P-3 level; (b) UNTIL Thematic Lead in Circular Economy, at the P-3 level; (c) UNTIL Thematic Lead in Education, at the P-3 level; (d) UNTIL Thematic lead in Health, at the P-3 level; (e) UNTIL Lab Manager, at the P-5 level; (f) UNTIL Programme Management Officer, at the P-4 level and; (g) Senior ERP (abbreviation unknown) Change and Coordination Officer, at the P-5 level.
2. On 25 November 2019, the Respondent filed his reply stating that the application is partially non-receivable and, in any event, without merit.
3. For the reasons set out below, the application is rejected.

Consideration

Receivability

4. As the Respondent raises receivability challenges with respect the Applicant’s appeal of three of the seven contested administrative decisions (UNTIL Thematic Lead in Circular Economy; UNTIL Thematic Lead in Education and UNTIL Lab Manager), the Tribunal will address these claims first.

UNTIL Lab Manager

5. The Respondent contends that the application is not receivable with respect to the decision not to select the Applicant for the post of UNTIL Lab Manager because the Applicant failed to file his application with the Tribunal within the statutory deadline.

6. The Tribunal notes that, as the Respondent rightly points out, the Applicant requested management evaluation of the contested decision on 3 June 2019. The Applicant never received a response to his request. Article 8.1(i)(b) of the Dispute Tribunal's Statute provides that applications to the Dispute Tribunal shall be filed within 90 days of the expiry of the relevant response period for the management evaluation if no response to the request is provided. The response period for disputes arising from Headquarters is 30 days. In the absence of any evidence of ongoing mediation efforts or request for suspension of deadline to file an application, the Tribunal is satisfied that, having filed his application on 24 October 2019, the Applicant missed the statutory deadline.

7. The record further shows that the Applicant filed a second request for management evaluation of this contested decision on 8 September 2019. The Tribunal notes that a staff member is not entitled to file several requests for management evaluation with respect to an administrative decision. Also, filing a second request does not reset the clock for filing the application to the Dispute Tribunal (in line herewith, see, for instance, the Appeals Tribunal in *Wesslund* 2019-UNAT-959). In the absence of a response from the corresponding management evaluation office, the remedy available to the Applicant would have been to file a timely application before the Dispute Tribunal under art. 8.1 of its Statute.

8. In any event, given that the contested administrative decision was notified to the Applicant on 3 April 2019, the request for management evaluation of 8 September 2019 would have missed the 60-day deadline set in staff rule 11.2 (c) to request management evaluation.

9. In light of the foregoing, the application with respect to this contested decision is not receivable *ratione temporis*.

UNTIL Thematic Lead in Circular Economy and UNTIL Thematic Lead in Education

10. The Respondent claims that the application is not receivable with respect to the decisions not to select the Applicant for these two posts because the Applicant failed to request management evaluations of these decisions within the statutory deadline.

11. The Applicant argues the administrative decisions concerning the posts of UNTIL Thematic Lead in Circular Economy and UNTIL Thematic Lead in Education were comprised in the settlement negotiations between the Applicant and the Respondent that were still in progress in August 2019, therefore, the request for management evaluation for these two positions submitted on 8 September 2019 was timely.

12. The Respondent responded that, according to his records, any remaining settlement discussions with the Applicant failed in May 2019 at the latest. The Respondent provided email correspondence showing that indeed, the parties were unable to reach an agreement at that time. The Applicant then produced an email from the Office of the Ombudsman dated 5 August 2019 stating that in light of the fundamental disagreement between the two parties, the Office of the Ombudsman would inform the parties on the next day that the mediation is considered as failed.

13. Counsel for the Respondent responded that he has no recollection of any discussions with the Office of the Ombudsman after May 2019 and that the 5 August 2019 email produced by the Applicant is not copied to him or any other representative of UNOPS. He further requests that he be listed as counsel of record in Order no. 180 (NY/2020) of 9 November 2020 as his co-counsel was only following his instructions.

14. The Respondent further requests the Tribunal to seek clarification from the Office of the Ombudsman.

15. The Tribunal takes note of the statement of counsel for the Respondent. However, it is not the Tribunal's role to embark on an investigation concerning the status of the parties' settlement discussions. Given that these discussions are confidential in nature, it is the parties' responsibility to provide evidence of such talks where needed.

16. In the present case, the 5 August 2019 email clearly states that as far as the Office of the Ombudsman is concerned, the settlement discussions concerning the above-referred two selection processes failed on 5 August 2019. In the absence of any contradicting evidence, the Tribunal is unable to conclude that the appeal of these two decisions is not receivable and it will proceed to review them on the merits.

Merits

17. The Tribunal will next review the merits of the Applicant's challenges against his non-selection for the posts of (a) UNTIL Thematic Lead in Circular Economy; (b) UNTIL Thematic Lead in Education; (c) UNTIL Thematic Lead in Peace and Security; (d) UNTIL Thematic Lead in Health; (e) UNTIL Programme Management Officer and; (f) Senior ERP Change and Coordination Officer.

Applicable law

18. 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".

19. 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).

20. 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).

21. 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).

22. 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.

UNTIL Thematic Lead in Circular Economy

23. The Applicant claims that his candidature was outstanding and he satisfied all the requirements in the job description. The Respondent contends that the Applicant

was longlisted for this post but that on further review, his candidacy did not show that he possessed the desirable criteria of experience in circular economy.

24. The Tribunal notes that the vacancy announcement for this post lists the following among the criteria deemed desirable for this post: “A minimum of two years experience in establishing and implementing partnerships and communication strategies in the areas of Circular economy is desirable. A minimum of two years experience in planning, designing and facilitating promotion of innovative technology solutions in the areas of Circular economy is an advantage”.

25. Having reviewed the personal history form submitted by the Applicant for this post, the Tribunal finds no indication that the Applicant possessed the desired experience in the field of circular economy.

26. The Tribunal is therefore satisfied that the reasons provided by the Administration not to shortlist the Applicant are reasonable and supported by the evidence. The contested decision is therefore lawful.

UNTIL Thematic Lead in Education

27. The Applicant claims that his candidature was outstanding and he satisfied all the requirements in the job description. The Respondent contends that the Applicant was longlisted for this post but that on further review, his candidacy did not show that he possessed the desirable criteria of experience in education.

28. The Tribunal notes that the vacancy announcement for this post includes the following desirable criteria: “A minimum of two years experience in establishing and implementing partnerships and communication strategies in the areas of Education is desirable. A minimum of two years experience in planning, designing and facilitating promotion of innovative technology solutions in the areas of Education is an advantage”.

29. Having reviewed the personal history form submitted by the Applicant for this post, the Tribunal finds no indication that the Applicant possessed the desired experience in the field of education.

30. The Tribunal is therefore satisfied that the reasons provided by the Administration not to shortlist the Applicant are reasonable and supported by the evidence. The contested decision is therefore lawful.

UNTIL Thematic Lead in Peace and Security

31. The Applicant applied for this position on 28 December 2019 and was invited to take a written test. On 22 August 2019, the Applicant was notified of this non-selection for this post. The Applicant claims that “[a]lthough the test was good, he was not selected for an interview”.

32. The Respondent replies that the written assessment required a score of 42 out of 50 for a candidate to be advanced to the next phase of the selection process. As the Applicant only obtained a score of 38, he was not invited to participate in the ensuing interview.

33. The Respondent provided emails showing that the candidates for this position sat a written test consisting of three questions, each counting 20 points and the passing grade was determined to be 42 points. The contemporaneous documentation shows that the first grader scored the Applicant’s test with 10 points for question 1 and 12 points for questions 2 and 3, resulting in a total of 34 points. The second grader scored the Applicant’s test with 16 points for questions 1 and 2 and 10 points for question 3 resulting in a total of 42 points. In average, the Applicant’s score was 38 points. The Applicant did not obtain the minimum 42 points to pass the written test.

34. The evidence further shows that the passing scores and methodology were established ahead of the grading of the tests and the candidates’ responses were reviewed anonymously.

35. In light of this evidence, the Tribunal finds that the administration of the written test for this position was procedurally correct and that the Applicant failed the test. As the tests were graded anonymously, the Tribunal finds no evidence of ulterior motive.

36. Accordingly, the decision not to select the Applicant was lawful.

UNTIL Thematic Lead in Health

37. The Applicant claims that his candidature was outstanding and he satisfied all the requirements in the job description. The Respondent responds that the Applicant was not shortlisted for this post because the Administration found that while he held experience in programme management in technology, there was nothing in his application indicating that he had the experience in the area of health that was listed as “desirable” in the vacancy announcement.

38. The Tribunal notes that the vacancy announcement for this post includes the following desirable experience criteria, among others: a minimum of two years’ experience in establishing and implementing partnerships and communication strategies in the areas of health, and a minimum of two years’ experience in planning, designing and facilitating promotion of innovative technology solutions in the areas of health.

39. The personal history form submitted by the Applicant as his candidature for this post does not list any experience in the field of health.

40. The Tribunal is therefore satisfied that the reasons provided by the Administration not to shortlist the Applicant are reasonable and supported by the evidence. The contested decision is therefore lawful.

UNTIL Programme Management Officer

41. The Applicant claims that his candidature met all the requirements of the job description and that although his “written test was good”, he was not invited to participate further in the selection process.

42. The evidence shows that the Applicant was shortlisted to participate in the selection process for this post and invited to take a written assessment. The Respondent claims that the Applicant failed to obtain the passing score in this test and was therefore not invited to participate further in the selection process.

43. The evidence shows that the test consisted of two questions of 20 points each. The passing score was 30 points. One of the graders awarded the Applicant a score of 15 points in the first question and 14 in the second, totaling 29 points. The second reviewer awarded the Applicant 12 points in the first question and 16 in the second, totaling 28 points. In average, the Applicant obtained 28.5 points and therefore fell short of the passing score of 30 points.

44. The evidence further shows that the passing scores and methodology were established ahead of the grading of the tests and the candidates' responses were reviewed anonymously.

45. In light of this evidence, the Tribunal finds that the administration of the written test for this position was procedurally correct and that the Applicant failed the test. As the tests were graded anonymously, the Tribunal finds no evidence of ulterior motive.

46. Accordingly, the decision not to select the Applicant for this position was lawful.

ERP Change and Coordination Officer

47. The Applicant states that his candidature was outstanding and met all the requirements of the job description.

48. The Respondent claims that while the Applicant was longlisted in the selection process for this post, the Hiring Manager opted not to include him in the shortlist because he did not have as much relevant senior level experience as the other candidates. He argues that the Applicant's profile did not reflect that he had strategic senior leadership experience, considered critical as this position is at the P-5 level and

is primarily responsible for “provid[ing] strategic policy advice to the [Department of Field Support/Logistics Support Division] on a wide variety of issues”, “develop[ing] the benefit realization plan”, and “advising the senior management on whether the outputs and outcomes will lead to the realization of the benefits”.

49. The Respondent recalls that the Applicant was serving as Project Manager at the P-3 level at the time of his application for this post which is two levels higher. Of the five candidates shortlisted to participate further in the selection process two were holding P-5 level posts at the time of their applications and the other two were at the P-4 level. The Respondent submits that the fifth shortlisted candidate held extensive senior level experience at several “supra-national organizations”. All shortlisted candidates showed greater experience in strategic leadership at a senior level.

50. The Tribunal reviewed the vacancy announcement, the report of the recruitment process containing the personal history form of the five shortlisted candidates, and the Applicant’s personal history form. Based on this evidence, the Tribunal is of the view that the shortlisted candidates demonstrated significantly more experience in senior strategic leadership positions than the Applicant with several of them having lead offices or departments. The Tribunal is therefore persuaded that the decision not to shortlist the Applicant for this post was reasonable and supported by facts, and therefore, lawful.

Conclusion

51. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 17th day of November 2020

Entered in the Register on this 17th day of November 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York