UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2019/022
Judgment No.: UNDT/2020/201
Date: 4 December 2020
Original: English

Before: Judge Francis Belle

Registry: Geneva

Registrar: René M. Vargas M.

ALAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Nicole Wynn, ALD/OHR, UN Secretariat
Rosangela Adamo, ALD/OHR, UN Secretariat

Introduction

1. On 5 December 2018, the Applicant, a Logistics Operations Officer at the P-4 level in the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic ("MINUSCA"), filed an application to contest the decision not to select him for the position of Logistics Operations Officer at the P-4 level in the Office of Peacekeeping Strategic Partnership ("OPSP") ("the Post").

2. On 9 January 2019, the Respondent filed his reply. The Respondent submits that the application is without merit as the Applicant was fully and fairly considered for the position in accordance with ST/AI/2010/3 (Staff selection system).

Facts and procedural history

3. On 13 March 2017, the job opening for the Post was advertised, and the Applicant applied for the Post.

4. Following pre-screening by the Office of Human Resources Management ("OHRM"), a total of 416 applicants were released to the Hiring Manager for review. Among them, 24 applicants were from the roster.

5. The Hiring Manager first reviewed the roster candidates to determine if a candidate may be selected directly from the roster, and 11 roster candidates were invited for a written assessment, which was administered on 1 and 2 June 2017.

6. Due to an error in the pre-screening system, the Applicant, a roster candidate, was screened out. Subsequently, this error was rectified upon the Applicant's inquiry, and his job application was released for further consideration.

7. On 19 September 2017, the Applicant took a written assessment and received the score of 65.

8. Following the written assessment, four roster candidates, including the Applicant, were invited for an informal interview after receiving the passing score of 65. The Applicant was interviewed by telephone on 10 October 2017.

9. According to the Respondent, the Administration found that none of the four roster candidates was suitable for the Post, and then proceeded to review the rest of applications from non-rostered candidates.

10. Thereafter, 21 additional candidates were found to meet the minimum requirements of the Post and were subsequently invited to the same written assessment on 15 March 2018.

11. Four candidates who received the passing score of 80 were invited to a competency-based interview. The roster candidate who had received a score of 80 in the earlier written assessment was also invited to a competency-based interview.

12. On 4 June 2018, the final transmittal memo to the Central Review Body ("CRB") was submitted recommending five candidates.

13. The CRB endorsed the recommendation on 6 July 2018, and the Head of Department selected one of the recommended candidates.

14. On 17 July 2018, the Applicant was informed that the selection process for the Post was complete and that he had not been selected.

15. On 27 July 2018, the Applicant requested management evaluation of the contested decision.

16. By letter of 10 September 2018, the Under-Secretary-General for Management informed the Applicant that following consideration of this request for management evaluation, the Secretary-General had decided to uphold the contested decision.

17. On 5 December 2018, the Applicant filed the present application with the Nairobi Registry of the Dispute Tribunal.

18. On 9 January 2019, the Respondent filed his reply.

19. On 19 March 2019, the case was transferred to the Geneva Registry.

20. Following the Tribunal's case management, on 22-23 November 2020, the parties filed their respective closing submission.

Consideration

Standard of review and the issues of the case

21. 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).

22. As the Appeals Tribunal reiterated in *Lemonnier* 2017-UNAT-762 (see para. 32), citing *Rolland* 2011-UNAT-122, "the starting point for judicial review is a presumption that official acts have been regularly performed". The Appeals Tribunal held in *Rolland* that if the management is able to minimally show that an 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).

23. In *Finniss* UNDT/2012/200 (affirmed by 2014-UNAT-397), the Tribunal explained what a minimal showing is:

> 107. Administrative decisions must be capable of being demonstrated to be legal, rational, procedurally correct [citing *Sanwidi* 2010-UNAT-084] and based on well-founded facts. The Respondent will have made a minimal showing of regularity and will have met his evidentiary burden if he provides the Applicant and the Tribunal with information about the decision being challenged.
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> 108. This information should include the findings of fact material to the decision; the evidence on which the findings of fact were based; the reasons for the decision and all of the documentation in the possession and control of the decision maker which is relevant to the review of the decision.

24. The record shows that the Administration initially considered a direct selection of a candidate from the roster. The Administration claims that it found none of the four roster candidates who passed a written assessment suitable for the Post. Subsequently, the Administration proceeded with the selection process excluding the roster candidates including the Applicant, except one roster candidate who was invited to a competency-based interview.

25. Based on the parties' submissions, the issues of the present case can be defined as follows:

a. Was the initial assessment of roster candidates conducted properly?

b. Was the Applicant properly excluded from further selection process?

c. If the selection process was flawed, what remedies is the Applicant entitled to?

Initial assessment of roster candidates

26. A direct selection of a candidate from the roster is provided for under sec. 9.4 of ST/AI/2010/3, which stipulates 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".

27. With regard to assessment, sec. 7.5 of ST/AI/2010/3 provides that "[s]hortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres".

28. Section 7.6 of ST/AI/2010/3 provides that the hiring manager "shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and a selection decision by the head of the department/office".

29. The OHRM Guidelines for Selection of Roster Candidates further provide that hiring managers "are not required to interview roster applicants but are encouraged to do so in a less formal setting in order to establish a sense of the applicant's overall fit within the team/unit".

30. The Applicant raises several questions relating to the initial assessment process, which the Tribunal will review in turn.

31. First, the Applicant argues that it was inappropriate to administer a written assessment and a competency-based interview for a roster selection.

32. Under sec. 7.5 of ST/AI/2010/3, the Administration has broad discretion on how to assess shortlisted candidates. While the OHRM Guidelines encourage hiring managers to interview roster candidates in a less formal setting, that is not the only way to assess roster candidates. Therefore, the Tribunal finds that the administration of a written assessment and an informal interview for the purpose of a roster selection was lawful.

33. Second, the Applicant argues that he was improperly denied five working days' notice before taking a written assessment. The Respondent replies that ST/AI/2010/3 does not require such notice. Although the Manual for Hiring Managers suggests five days' notice, it is merely guidance and does not confer any entitlements and rights.

34. The Tribunal agrees with the Respondent. The Appeals Tribunal held in *Asariotis* 2015-UNAT-496 that "[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative issuances", and manuals at most provide guidance on the responsibilities of the hiring manager but "does not purport to vest a staff member with an entitlement" (see paras. 21-22). Therefore, there was no procedural breach when the Applicant was given a shorter notice for a written assessment.

35. Third, the Applicant argues that his response to a written assessment was unfairly graded when he was given zero points for drafting and accuracy on the basis that his responses were not his original writing. He quoted from and paraphrased the Secretary-General's reports extensively, which is perfectly legitimate and standard practice. There was no requirement that he only use his own language. He further used his own words in other parts of his response.

36. The Respondent replies that the Applicant's response was properly evaluated, and in any event, he suffered no harm as he received the passing score of 65 and was consequently invited for an informal interview.

37. In this regard, the Tribunal recalls that the Administration only has to make a minimal showing of regularity in relation to selection decisions. Having reviewed the parties' submissions on this issue, the Tribunal does not find any ground to interfere with the evaluation of the Applicant's written response as its evaluation was conducted within the Hiring Manager's margin of discretion.

38. Fourth, the Applicant argues that the fact that the Administration failed to provide any contemporaneous notes of the informal interview proves that standard practices and procedures were not followed. The Applicant questions how the Hiring Manager evaluated and determined that all four roster candidates were not suitable for selection without keeping notes.

39. During the proceedings of this case, noting that no documentation relating to an informal interview of the four roster candidates was found in the case file, by Order No. 107 (GVA/2020), the Tribunal directed the Respondent to submit supporting documentation. In response, the Respondent submitted that there are no contemporaneous notes for informal interviews, claiming that such notes are not required under the Staff Regulations and Rules or the OHRM Guidelines for Selection of Roster Candidates.

40. However, section 7.6 of ST/AI/2010/3 provides that the hiring manager "shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria". Therefore, there is a requirement to keep the record of the evaluation in accordance with ST/AI/2010/3.

41. Furthermore, the Administration should be able to minimally show that the applicant's candidature was given a full and fair consideration. In order to do so, as the Tribunals held in *Finniss*, the Administration should provide the Tribunal "with information about the decision being challenged", which "should include the findings of fact material to the decision; the evidence on which the findings of fact were based; the reasons for the decision and all of the documentation in the possession and control of the decision maker which is relevant to the review of the decision".

42. It is undisputed that the Applicant, as a roster candidate, was shortlisted and passed a written assessment. The Administration claims that he was found not suitable based on the outcome of his informal interview. In particular, the Respondent submitted in the reply that the Hiring Manager considered that the Applicant "did not

display effective verbal communication skills during the informal interview" and "the Applicant's answer to the technical question on how he would prepare for an OPSP review of a peacekeeping mission was not satisfactory" as "[h]is answer was too general and lacked specificity regarding the steps that he would take".

43. Even though the Respondent's submission on the outcome of the Applicant's informal interview is quite specific, he claims that no notes recording the outcome of informal interviews were kept. The Tribunal finds it troubling that the Hiring Manager failed to keep any records relating to an important step of the selection process in violation of sec. 7.6 of ST/AI/2010/3. It is even more disturbing since the first part of this selection process is not mentioned at all in a final transmittal memo to the CRB. In the memo to the CRB, the Hiring Manager did not disclose the fact that he informally interviewed the four roster candidates and found them not suitable for the Post and proceeded with the selection process excluding the roster candidates.

44. Having failed to produce the evidence on which the contested decision was based, namely the Applicant's alleged failure at his informal interview, which was also not disclosed to the CRB in violation of ST/AI/2010/3, the Tribunal finds that the Administration did not minimally show that the Applicant was given a full and fair consideration.

Exclusion of the Applicant from further selection process

45. After finding the four roster candidates not suitable for the Post, the Administration administered a written assessment to the remaining non-rostered candidates. The Administration then invited non-rostered candidates who received the passing score of 80, as well as one roster candidate who received the score of 80 from the earlier written assessment administered to roster candidates, to a competency-based interview. In this regard, the Applicant raises two issues.

46. The Applicant argues, first, that, while an informal interview can be used to confirm the selection of a roster candidate, an informal interview cannot be used to eliminate a short-listed candidate from further consideration. By unlawfully eliminating him from further consideration, the Hiring Manager denied him full and fair consideration.

47. Second, the Applicant states that it was unlawful for the Hiring Manager to increase the passing score for a written assessment from 65 percent to 80 percent in the middle of the selection exercise, which resulted in his exclusion from the competency-based interview.

48. The Tribunal finds that the Administration's decision to proceed with the second round of the selection process excluding roster candidates was unlawful. Once the Administration found roster candidates not suitable for the Post and decided not to proceed with a roster selection, the Administration had to conduct a regular selection process for all shortlisted candidates, including both roster and non-rostered candidates, in accordance with ST/AI/2010/3. Section 7.4 provides that the hiring manager "shall further evaluate *all* applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation" (emphasis added), and under sec. 7.5, such "shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening".

49. Furthermore, while the Respondent claims that all the roster candidates were excluded from further consideration, one roster candidate who received the score of 80 was invited to a competency-based interview in the second round but not the Applicant and the other two roster candidates who received the passing score of 65 in the first round. By doing so, the Administration in fact increased the passing score from 65 to 80 for roster candidates in the middle of the selection exercise.

50. When the Tribunal directed the Respondent to produce contemporaneous documentation regarding the decision(s) to set the passing scores at 65 and 80 percent, respectively (Order No. 107 (GVA/2020)), the Respondent replied that there is no such documentation.

51. This change of the passing score in the middle of the selection process without documenting its rationale violates the basic minimum standards that must apply when administering a written test, as endorsed by the Appeals Tribunal in *Chhikara* 2020-UNAT-1014, para. 18:

> a. Generally, while the Administration enjoys a broad discretion on how to administer a written test, it must nevertheless do so in a reasonable, just and transparent manner; otherwise, a job candidacy would not receive full and fair consideration;
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> b. As also stated in the Manual, any assessment must be undertaken on the basis of a "prescribed performance scale and response guide" and on a "predetermined passing grade". Accordingly, before a written test is administered, a proper and reasonable grading methodology must be adopted and shared with the graders;
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> c. If subsequent to the administration of the test, it becomes clear that mistakes were made in this methodology, or the written test turned out to be pointless in that no job candidates managed to pass it in accordance with the predetermined passing grade, then (a) a new written test must either be administered or (b) variations must be made to the assessment methodology that do not prejudice any specific job candidates (the reverse impact of "the no difference principle")[;]
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> d. Records of the grading must be developed that clearly describe how each job candidate was assessed, which would allow a third party, such as the [Dispute] Tribunal, to review and verify that the entire process was handled in a proper manner.

52. Instead of administering a written assessment on a passing score predetermined before the selection process began, the Hiring Manager abruptly changed it in the middle of the selection process. Moreover, this variation of the passing grade occurred after the identity of roster candidates and their scores became known to the Hiring

Manager. This variation specifically prejudiced three roster candidates including the Applicant who received the score of 65. Worse, the Administration failed to produce any record documenting the setting of the passing scores, the change of the passing score, and its reasons.

53. Accordingly, the Tribunal finds that the Administration unlawfully excluded the Applicant from a subsequent selection process and unlawfully changed the passing score of a written assessment.

54. In light of the above, the Tribunal finds that the Administration failed to show that the Applicant was afforded fair and full consideration in the selection exercise for the Post. The contested decision is therefore unlawful.

Relief

55. Article 10.5 of the Dispute Tribunal's Statute provides that the Tribunal may only order one or both of the following in its judgment:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
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> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Rescission and in-lieu compensation

56. As a remedy, the Applicant seeks rescission of the selection decision. In the alternative, the Applicant seeks an award of 24 months of base salary *in lieu* of rescission.

57. Under art. 10.5(a) of its Statute, the Tribunal has the statutory discretion to rescind the contested decision or order specific performance, but as the Appeals Tribunal stated, the rescission can be ordered only when a staff member would have had a significant chance for selection (see *Bofill* 2011-UNAT-174, para. 28, *Dualeh* 2011-UNAT-175, para. 19).

58. When applying for the Post, the Applicant was already serving as a Logistics Operations Officer at the P-4 level, and he was one of the four roster candidates who passed the written assessment and was invited to an informal interview. Moreover, if the passing score were not unlawfully changed in the middle of the selection process, he would have been one of the eight candidates invited to a competency-based interview.

59. Therefore, the Tribunal finds that the Applicant would have had a significant chance for selection and thus the Tribunal orders the rescission of the contested selection decision.

60. Since the contested decision concerns "appointment, promotion or termination", under art. 10.5(a) of the Statute, in ordering the rescission, the Tribunal must set an amount of compensation *in lieu* of rescission or specific performance, which needs to be supported by evidence. As stated by the Appeals Tribunal, *in lieu* compensation shall be the economic equivalent for the loss of a favourable administrative decision (see *Mihai* 2017-UNAT-724, para. 19, *Ashour* 2019-UNAT-899, para. 20).

61. Considering that the level of the Post was the same as that of the post the Applicant encumbered at the time he applied to it, and that the Applicant has not provided any evidence that he suffered any economic loss otherwise, no amount of *in lieu* compensation can be ordered.

Compensation for harm

62. In addition, in the application, the Applicant sought compensation for moral damages in the amount of 12 months of base salary on the ground that an unlawful decision caused him extreme stress and mental agony. In the closing submission, he amended his request to seek compensation in the amount of 24 months of base salary for the irreparable harm caused to his career. Specifically, the Applicant argues that a loss of career opportunity as a result of the unlawful decision caused irreparable harm to his career as it caused him "immense distress, humiliation and mental agony". The Applicant submits that since he was unable to bear this injustice, unfair treatment, discrimination and irreparable harm to his career, he took early retirement from the Organization more than seven months before his mandatory retirement date.

63. The Tribunal will first review the Applicant's claim for moral damages and then his claim for loss of career opportunity.

64. Under art. 10.5(b) of the Dispute Tribunal's Statute, compensation for harm should be supported by evidence, and the Appeals Tribunal held that it should be supported by three elements: the harm itself, an illegality, and a nexus between them. Also, the claimant bears the burden of proof to establish that the harm is directly caused by the Administration's illegal act (*Kebede* 2018-UNAT-874, paras. 20-21).

65. The Applicant claims that he suffered from "immense distress, humiliation and mental agony" but otherwise does not provide any supporting evidence. As the Appeals Tribunal held, "the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise)" (*Langue* 2018-UNAT-858, para. 18, citing *Kallon* 2017-UNAT-742). Therefore, the Applicant's claim for moral damages is rejected.

66. The Applicant also seeks compensation for "irreparable harm to [his] career" and "loss of a career opportunity". He submits that he took early retirement more than seven months prior to his mandatory retirement date as a result.

67. The Appeals Tribunal held that a loss of opportunity can be compensated but the harm should be directly caused by the contested decision, be supported by evidence, and may not be duplicative compensation (see, for example, *Mihai* 2017-UNAT-724, para. 21). In awarding compensation for a loss of opportunity, the Dispute Tribunal must take into account "other factors such as the staff member mitigating his or her loss, or taking up a better position, or earning [other] income" (*Dube* 2016-UNAT-674, para. 59).

68. The Tribunal understands the Applicant's disappointment and frustration for losing an opportunity to serve at a different position. However, this position was at the same level he had and he did not present any evidence to support his claim for any loss. The only evidence he presents is that he took early retirement due to the contested decision as he was unable to "bear this injustice, unfair treatment, discrimination, and irreparable harm to [his] career". However, any loss of income due to his early retirement is not directly caused by the contested decision as he decided to take early retirement out of his own volition.

69. Therefore, the Applicant's claim for compensation for harm is rejected.

Conclusion

70. In view of the foregoing, the Tribunal decides that:

a. The Applicant did not receive full and fair consideration and thus the rescission of the contested decision is ordered;

b. No amount of *in lieu* compensation is ordered; and

c. The Applicant's request for compensation for harm is rejected.

(*Signed*)
Judge Francis Belle
Dated this 4th day of December 2020

Entered in the Register on this 4th day of December 2020
(*Signed*)
René M. Vargas M., Registrar, Geneva