



Before: Judge Francis Belle

Registry: Geneva

Registrar: René M. Vargas M.

FARHADI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Marcos Zunino, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant contests his non-selection for the following vacancies with the International Trade Centre (“ITC”):

a. The fixed-term position of Senior Advisor, Trade for Sustainable Development, P-4, SIVC Section, (DEI/SIVC), advertised under vacancy number PVN/08/2017 (“fixed-term post”); and

b. The temporary position of Senior Programme Officer (50%), P-4, SIVC, advertised under vacancy number ITC/TVN/11/2018 (“temporary post”).

Facts

2. On 4 May 2009, the Applicant joined ITC under an 11-month short-term appointment as Programme Coordinator (L-5 level) of the Enhancing Arab Capacity for Trade programme (“EnACT”). Effective 1 July 2009, his appointment was converted to fixed-term as Programme Coordinator (P-5 level), EnACT.

3. As of 1 December 2012, the Applicant was laterally transferred to the position of Senior Adviser (P-5), Trade Finance for small and medium-sized enterprises (“SMEs”), Division of Business and Institution Support (“DBIS”), ITC.

4. In October 2014, the Applicant was informed that due to lack of funding, he would be transferred to a position at a lower grade, i.e., P-4, as Senior Programme Management Adviser, Women in Trade Programme, DBIS, ITC, which he accepted. This took effect on 1 January 2015.

5. By letter dated 28 April 2017, the Applicant was notified that his fixed-term contract, expiring on 30 June 2017, would not be renewed due to lack of funding. His appointment was extended several times for the purpose of exhausting his sick leave entitlements until 30 September 2018 date at which he separated from the Organization.

6. On 1 June 2017, the Applicant applied for the fixed-term post (see para. 1.a above). He was notified of his non-selection to this position on 16 July 2018.

7. On 19 April 2018, the Applicant applied for the temporary post (see para. 1.b above). He was notified of his non-selection to this position on 13 July 2018.

8. On 5 September 2018, the Applicant requested management evaluation of his non-selection decisions. In response to this request, the Under-Secretary-General for Management communicated to the Applicant, by letter dated 23 October 2018, the Secretary-General's decision to uphold the contested decisions.

9. On 21 January 2019, the Applicant filed his application before the Tribunal contesting his non-selection decisions.

10. The Respondent filed his reply on 25 February 2019.

Consideration

Standard of review

11. 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).

12. 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).

13. 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.

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.

Fixed-term post

14. The Applicant challenges his non-selection alleging that his qualifications were not properly considered, and that the selection process was tainted by bias against him.

15. Concerning the first allegation, the record shows that the hiring manager for the fixed-term post found the Applicant not eligible as he did not meet one of the required criteria for it, namely “[p]ractical experience in working in the area of sustainability standards”. Consequently, he was not invited to participate in the subsequent steps of the selection process.

16. The Applicant's lack of experience in sustainably standards was properly recorded in the respective electronic selection system and, moreover, was communicated to the Applicant by email of 16 July 2018 in response to his query about the status of the selection process.

17. The parties agree that the selection process for the fixed-term post is governed by ITC/EDB/2014/06 (ITC Staff Selection System), which provides that the hiring manager is to evaluate applicants based on a review of the documentation submitted (see sec. 7.4). In his closing submission, the Applicant disagreed with the above assessment, but the Tribunal does not find grounds therein to question the hiring manager's evaluation of the Applicant's qualifications against the vacancy announcement.

18. With respect to the second allegation, the Tribunal notes that the Applicant refers to personal bias from three staff members. Although one of them was a member of the assessment panel, none of them was involved in assessing the Applicant's eligibility, which was the sole reason for the Applicant not participating further in the recruitment process. The Tribunal finds that the Applicant's claim of bias against him is unfounded.

19. In view of the foregoing, the Tribunal is satisfied that it is minimally shown that the Applicant's candidature for the fixed-term post was fully and fairly considered. Consequently, the Tribunal finds that the contested decision was lawful.

Temporary post

20. The Applicant challenges his non-selections alleging bias, the absence of a genuine competitive selection process and procedural shortcomings in the selection process. For the reasons below, the Tribunal finds that the contested decision was lawful.

Allegation of bias

21. The Applicant puts forward that one assessment panel member, the hiring manager and the Director of the ITC Division where the advertised post was located (“the Director”) were biased against him. The Tribunal has considered the Applicant’s arguments and finds that his allegation of bias is not supported.

22. First, concerning the assessment panel member, i.e., the Applicant’s former Second Reporting Officer (“SRO”), the Applicant bases his claim of bias on the fact that his former SRO conducted a management review mission of a project that the Applicant was managing, which criticized his work and led to a change in the management structure of the programme. In this connection, which the Applicant argues is an “eviction from his post”, he entered as evidence his closing submission in another ongoing case (Case No. UNDT/GVA/2019/003), where, in summary, he claims that the mission in question was intended to remove him from the management of a project as part of a sequence of actions leading to the non-renewal of his appointment.

23. The Tribunal has examined the documents on file, in both cases, concerning the mission in question and finds no grounds to support the Applicant’s allegation. Suffice it to say that the record shows that the mission was properly conducted, and the Applicant has not proffered any evidence to the contrary or showing ulterior motive.

24. Second, with respect to the hiring manager, the Applicant’s conclusion of bias is based on his belief that the former, on the one hand, “seemingly did not seek further funding for [the project] that [he] was managing thus paving the way to the non-renewal of his [appointment]” and, on the other hand, she expressed that his request for management evaluation “contained a lot of inaccuracies”.

25. The Tribunal notes that the funding matter is an unsupported hypothetical statement put forward by the Applicant that falls far short from proving the existence of bias. As for the hiring manager’s feedback on the Applicant’s request for management evaluation, the Tribunal considers that the cited remark, which

constitutes a factual observation on the content of a request, does not amount to bias.

26. Finally, concerning the Director, the Applicant points out that he made the selection recommendation for the advertised post and bases his claim on bias on the Director describing the “Applicant’s work as ‘a dog’s breakfast’”.

27. The Tribunal notes that the role of the Director was merely to endorse the selection recommendation made by the hiring manager. As for the Director’s comment, the record in Case No. UNDT/GVA/2009/003 shows that it did not relate to the Applicant’s work but to the way in which he submitted an expense report following official travel. Although improper, the comment was very limited in scope and is not sufficient to support a claim of bias in the contested selection exercise.

Absence of genuine competitive process

28. In support of this claim, the Applicant advances that only two out of 29 candidates, namely him and the selected candidate, moved from the evaluation phase to the written test plus interview phase. He argues that such a small number of candidates gives the appearance of an intention to “pit” him against the selected candidate and to simplify the candidates’ comparison process to favour the selected candidate.

29. Administrative Instruction ITC/AI/2015/07 (Administration of temporary appointments) governs the selection process for the temporary post. There is no provision therein requiring having a specific number of candidates tested in writing and interviewed. The Tribunal finds that the number of candidates alone does not support the Applicant’s claim. On the contrary, the record of the case shows that there was a competitive process where the Applicant had the lowest score in the written test and did not pass the interview. The process and rationale of the assessment of the two candidates is fully documented and, furthermore, detailed feedback was provided to the Applicant upon his request.

Procedural shortcomings

30. The Applicant seeks to raise doubts about the lawfulness of the selection process by pointing out to the lack of an automated system to time the written test, the non-participation of Human Resources in the evaluation of the candidates and the inclusion of only staff members of the concerned ITC Division in the assessment panel. There is no legal anchor in ITC/AI/2015/07 for the Applicant's claims and the Tribunal finds no evidence of lack of transparency of or procedural irregularities in the selection process.

31. The Applicant also alleges that the subject matter of the written test was such as to favour the selected candidate. The Tribunal first notes that the record shows that the written test requested the candidates to prepare a project proposal "to support the greater participation of women in trade". Second, the Tribunal observes that the hiring manager's recommendation summarizing the selection process indicates that "both candidates have worked with women and trade previously". Given the general nature of the written test's subject matter and the candidates' professional experience, the Tribunal finds that the Applicant's claim is unsupported.

Conclusion

32. In view of the foregoing, the application is dismissed.

(Signed)

Judge Francis Belle

Dated this 23rd day of December 2020

Entered in the Register on this 23rd day of December 2020

(Signed)

René M. Vargas M., Registrar, Geneva