



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

TAJIK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Yun Hwa Ko, UNFPA

Katrina Waiters, UNFPA

Introduction

1. By application filed on 14 July 2019, the Applicant, a former staff member of the United Nations Population Fund (“UNFPA”) in Peshawar, Pakistan contests the decision not to select her for the post of Humanitarian Analyst at the National Officer B (“NOB”) level (“the Post”) at the UNFPA Pakistan Country Office.
2. The Respondent filed his reply on 13 August 2019.
3. By Order No. 8 (GVA/2021) of 21 January 2021, the Tribunal informed the parties of its finding that the matter could be determined without holding a hearing and ordered them to file closing submissions, which they did on 31 January 2021.

Facts

4. On 20 June 2006, the Applicant began providing services to the UNFPA Pakistan Country Office on a service contract. On 15 July 2013, she was hired as a Programme Analyst at the NOB level on a fixed-term appointment.
5. On 13 August 2018, the Applicant was informed that pursuant to the Organization’s decision to realign the Pakistan Country Office with the new UNFPA Country Programme for Pakistan for the period between 2018 and 2022, and due to the necessities of service, the post she encumbered would be abolished on 31 December 2018.
6. On 5 September 2018, the Applicant requested management evaluation of:
 - a. The decision to abolish her post;
 - b. The consequential decision not to renew her fixed-term appointment beyond its expiration date of 31 December 2018; and
 - c. The decision not to match her to any new posts in the implementation of the Pakistan Country Office realignment.

7. By letter dated 17 October 2018, the Applicant was notified of the outcome of her request for management evaluation (“RME”) of 5 September 2018, which upheld the impugned decisions.

8. Consequently, the Applicant’s fixed-term appointment was not renewed following its expiration on 31 December 2018.

9. In November 2018, the Applicant applied to five positions, including the Post, which were advertised as part of the restructuring. She was invited to and participated in a technical oral assessment and a competency-based interview for all five positions.

10. According to the “Score Sheet for Short-listing” prepared by the UNFPA Pakistan Country Office in November 2018, the Applicant ranked 13th out of 78 candidates that were longlisted for the Post. Considering that the Applicant was an internal candidate, the Pakistan Country Office short-listed her over other candidates with higher scores. Five candidates including the Applicant were invited to an oral technical assessment and a competency-based interview.

11. On 23 November 2018, the Applicant was interviewed for the Post. The Applicant ranked 4th out of the five short-listed candidates with a score of 3.02 out of five points. The Interview Panel thus recommended the top two candidates for the Post in order of preference and did not recommend the Applicant.

12. On 21 January 2019, the Regional Compliance Review Board (“RCRB”) finalized the review of the selection process for the Post and concluded that it complied with the pre-approved selection criteria.

13. On 20 February 2019, the Pakistan Country Office re-advertised the Post after the two recommended candidates declined the offer. By then, the Applicant became aware that she had not been selected for any of the five positions that she had applied for.

14. On 13 March 2019, the Applicant filed an RME challenging her non-selection decision for the Post. Between 12 and 14 March 2019, she also filed another four separate RMEs challenging the other four non-selection decisions.

15. On 15 April 2019, the Applicant received the official letter of regret informing her of the non-selection decision for the Post.

16. By letter dated 16 April 2019, the Applicant was notified of the outcome of her five RMEs, which upheld all five non-selection decisions.

Parties' submissions

17. The Applicant's principal contentions are:

a. She deserves a positive selection decision based on her past long service, performance and for being an internal candidate who previously encumbered an abolished post; in particular, she was almost equally as competent for the Post as the selected candidate because her score was only 0.8 points lower;

b. The biased and prejudiced attitude of higher management resulted in her non-selection; she further alleges that in Pakistan, Senior Managers brief the recruitment committees before the recruiting process starts; and

c. Top Management failed to conduct an in-depth review of her RME of 13 March 2019, and its response to her RMEs of 5 September 2018, also affected the hiring of staff and facilitated the denial of her selection.

18. The Respondent's principal contentions are:

- a. The application should be dismissed in its entirety because the contested decision is lawful;
- b. The selection process complied with all relevant legal and policy provisions. In particular, the Organization followed proper procedures in a transparent and non-discriminatory manner and the RCRB confirmed such compliance and endorsed the selection process;
- c. The Applicant was given full and fair consideration, including special consideration as an internal candidate; and
- d. The Applicant provided no evidence of procedural irregularity, bias or other impropriety.

Consideration

Scope of Judicial Review

19. In the present case, the Tribunal finds that the application clearly defines the decision not to select the Applicant for the Post as the contested decision. The decision communicated to the Applicant on 13 August 2018 to abolish her position, and consequently, not to renew her appointment beyond 31 December 2018, as well as the decision not to match her to other posts, thus do not fall within the scope of judicial review of the present case. Accordingly, the Tribunal will limit the scope of its review to the non-selection decision for the Post.

20. It is well-established that the Secretary-General enjoys broad discretion in reaching a decision on staff selection. Accordingly, when reviewing such decisions, the role of the Tribunal is limited to examining "(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" (see *Abbassi* 2011-UNAT-110, para. 23; *Majbri* 2012-UNAT-200, para. 35 and *Ljungdell*, 2012-UNAT-265, para. 30).

21. In this respect, the Appeals Tribunal has adopted a presumption that official acts have been regularly performed (*Lemonnier* 2017-UNAT-762, para. 32; see also *Rolland* 2011-UNAT-122, para. 5). This means that “[i]f the management 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” (see *Lemonnier* and *Rolland*). To rebut this minimal showing, an applicant “must show through clear and convincing evidence that [s/he] was denied a fair chance of [selection]” in order to win the case (see *Lemonnier* and *Rolland*).

22. Having reviewed the submissions of the parties and the evidence on record, the Tribunal is of the view that the Applicant does not claim that the Respondent failed to follow the procedure as laid down in the Staff Regulations and Rules in relation to the contested decision. Instead, the Applicant argues that she should have been given priority consideration as an internal candidate on an abolished post, and that she was the victim of discrimination and bias from Senior Management of the Pakistan Country Office.

23. In light of the foregoing, the Tribunal defines the issues of the present case as follows:

- a. Whether the Applicant’s candidacy was given full and fair consideration; and
- b. Whether the Applicant has shown that she was denied a fair chance of selection.

Whether the Applicant’s candidacy was given full and fair consideration

24. The Applicant submits that she deserves a positive selection decision based on her past long service, performance and being an internal candidate on an abolished position. In this respect, she argues that the Respondent failed to conduct an in-depth review of her RME of 13 March 2019, where she asserted that her right to special consideration as an internal candidate under staff regulation 4.4 and the UNFPA Human Resources Policies and Procedures was violated.

25. The Respondent contends that the Applicant was given full and fair consideration, including special consideration as an internal candidate. He specifically argues that the Organization duly considered the Applicant's prior experience and service as an internal candidate and short-listed her over other candidates who scored higher than her on the longlist.

26. At this juncture, the Tribunal recalls that "the Administration's response to a request for management evaluation is not a reviewable decision" (see *Nwuke* 2016-UNAT-697, para. 20). This means that the Tribunal does not have jurisdiction to consider appeals against the Management Evaluation Unit's ("MEU") responses to the Applicant's RMEs contained in its letters of 17 October 2018 and 16 April 2019. Therefore, the Tribunal will not adjudicate the Applicant's arguments against the MEU's responses to her RMEs.

27. With respect to the Applicant's contention regarding special consideration as an internal candidate, the Tribunal recalls that art. 101(3) of the United Nations Charter provides that:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

28. Staff regulation 4.4 provides in its relevant part that:

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.

29. Section II of the UNFPA Policies and Procedures Manual, Policy on Personnel of UNFPA, Fixed Term and Continuing Appointments: Staffing ("UNFPA Staffing Policy") sets forth rules regarding its internal candidates, providing the following in its relevant part:

II. Internal applicants for vacant UNFPA posts:

(1) Right of internal applicants to special consideration: (footnote omitted)

...

3. Subject to [the] requirements [contained in art. 101(3) of the United Nations Charter and staff regulation 4.4], UNFPA will accord special consideration to internal applicants. This means that UNFPA shall especially consider whether the internal applicant has the requisite core and functional competencies for the post. Experience, knowledge and institutional memory relevant to the functions shall be considered as the personal contribution of the internal applicant to the achievement of the goals of UNFPA and, as such, are an important element of the process of consideration and selection.

30. This provision grants UNFPA's internal candidates the right to special consideration while emphasizing that this consideration must be subject to the provisions of art. 101(3) of the Charter, which establish securing the "highest standards of efficiency, competence and integrity" as the "paramount consideration" in the selection process. Likewise, paragraph 4 of the above quoted Section II of the UNFPA Staffing Policy explicitly curtails an internal candidate's right to special consideration by providing that "[s]election decisions are based on the consideration as to which applicant best meets the core and functional competencies required for the post in question".

31. In the present case, the evidence on record shows that the Respondent duly considered the Applicant's prior experience and service as an internal candidate on an abolished post. Although she ranked 13th out of 78 candidates who were longlisted for the Post, the Pakistan Country Office short-listed her over other candidates with higher scores. Moreover, the Applicant was treated equally to other interviewees during the interview process. Notably, all five short-listed candidates were invited to an oral technical assessment and a competency-based interview before the same Interview Panel. The Applicant was asked the same questions as the other interviewees and the Interview Panel considered both the strengths and weaknesses of her responses. Most importantly, in reviewing the selection process,

the RCRB duly considered that the Applicant was an internal candidate encumbering an abolished post, as shown in the RCRB's records.

32. However, the Applicant was not the one who “best [met] the core and functional competencies” required for the Post in accordance with the UNFPA Staffing Policy. This was confirmed by the assessment of the Interview Panel who was not convinced with the Applicant's performance during her interview and resulted in her ranking 4th out of the five short-listed candidates with a score of 3.02 out of five points. The selected candidate scored 3.88 points, followed by candidates who scored 3.54 and 3.39 points respectively.

33. Moreover, as clarified by the Tribunal in Judgments *Douaji* UNDT/2011/160 and *Survo* UNDT/2014/144, a promise of priority consideration shall be understood as “giving priority only over other equally qualified candidates”. Considering that the maximum rating given to candidates was five points and that the Applicant obtained 0.86 points less than the best candidate, thus ranking 4th, the Tribunal is not convinced by the Applicant's assertion that she “was almost equally competent for the [Post]”.

34. The Tribunal thus considers that the Respondent could not have selected the Applicant over the other three candidates who better met the core and functional competencies solely because the Applicant was an internal candidate encumbering an abolished post. To maintain otherwise would compromise “the highest standards of efficiency, competence and integrity” required in selecting staff under art. 101(3) of the Charter and the UNFPA Staffing Policy. In this connection, the Tribunal also recalls that “‘priority consideration’ cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for” (see *Verma* 2018-UNAT-829, para. 25; see also *Onana* 2015-UNAT-533, para. 46 and *Megerditchian* 2010-UNAT-088, para. 28).

35. In light of the foregoing, the Tribunal finds that the Respondent has been able to minimally show that the Applicant's candidature was given full and fair consideration, including special consideration as an internal candidate on an abolished post.

Whether the Applicant has shown that she was denied a fair chance of selection

36. The Tribunal recalls that once management makes a minimal showing that an applicant was given full and fair consideration, the burden of proof shifts to him/her to prove that he/she was denied a fair chance of selection. In this respect, an applicant must show through “clear and convincing evidence” that the procedure was violated, the members of the panel exhibited bias, irrelevant material was considered, or relevant material was ignored (see *Rolland* 2011-UNAT-122, para. 21).

37. In the present case, the Applicant argues that a biased and prejudiced attitude of higher management resulted in her non-selection. In this respect, the Applicant alleges that she was “subjected to personal disliking and targeting by the top management and [Pakistan Country Office] by manipulating the very basic policies and procedures to oust [her] at all costs.”

38. Noting that the Applicant’s argumentation is essentially grounded on alleged bias or discrimination against her, the Tribunal recalls that “[a]llegations of discrimination, improper motive and bias are very serious and ought to be substantiated with evidence” (see *Ross* 2019-UNAT-944, para. 25). However, the Applicant has not provided any evidence to show any bias on the part of the Interview Panel or the RCRB against her. She did not specify in her application the exact perpetrator of the bias but rather vaguely referred to “top management” or “higher management”. Thus, the Applicant has not discharged her burden of proof to demonstrate that she was a victim of bias or discrimination in the selection process.

39. Without prejudice to the fact that the Applicant bears the burden of persuasion on her allegation, the Tribunal notes that, based on the evidence on record, the Applicant shared different opinions on matters of transparency and inconsistencies with the former Representative of the UNFPA Pakistan Country Office during the restructuring process. Nevertheless, the former Representative was neither a member of the Interview Panel nor a member of the RCRB for the Post. The Applicant does not provide any evidence to support her assertion that in Pakistan, Senior Managers brief the recruitment committees before the recruitment process begins. Notably, the former Representative left the UNFPA Pakistan Country Office in November 2018 whereas the recruitment process continued at least until April 2019.

40. Having reviewed the submissions, the Tribunal is of the view that there is no evidence of bias or discrimination in the selection process for the Post. Nothing in the assessment of candidates for the Post suggests any bias or discrimination against the Applicant either. The Tribunal further observes that between 31 December 2018 and 21 January 2019, the RCRB reviewed the selection process for the Post and concluded, *inter alia*, that it “complied with the UNFPA staffing rules and regulations” and endorsed it, noting that “the credentials of [the selected candidate were] very impressive”.

41. The Tribunal further recalls that the presumption of regularity of non-selection decisions is not rebutted simply by casting doubt, and that it is incumbent on the Applicant to present clear and convincing evidence of any irregularity.

42. Accordingly, the Tribunal finds that the Applicant has failed to show that she was denied a fair chance during the selection process.

Conclusion

43. In view of the foregoing, the Tribunal DECIDES that the application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 10th day of February 2021

Entered in the Register on this 10th day of February 2021

(Signed)

René M. Vargas M., Registrar, Geneva