



Before: Judge Francis Belle

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge.

RAO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Jacqueline Lule, OSLA

Counsel for Respondent:

Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a P-5 Chief, Peacekeeping Evaluation Section, Office of Internal Oversight Services (“OIOS”), contests the decision not to consider her for the position of Chief of Service (D-1 level), Monitoring and Evaluation, Department of Management Strategy, Policy and Compliance, Business Transformation and Accountability Division (“DMSPC/BTAD”), advertised through job opening No. 127555 (“JO 127555”), hereinafter “the contested decision”.

Facts

2. On 22 January 2020, the Applicant applied for JO 127555.
3. On 16 March 2021, the Applicant was informed that her application was unsuccessful.
4. On 12 May 2021, the Applicant requested management evaluation of the contested decision.
5. On 16 June 2021, the Chef de Cabinet, Executive Office of the Secretary-General, decided to uphold the contested decision.
6. On 14 September 2021, the Applicant filed the instant application including a motion for production of evidence.
7. On 13 October 2021, the Respondent filed his reply.
8. By Order No. 73 (NY/2022) of 8 August 2022, the Tribunal rejected the Applicant’s motion for production of evidence and informed the parties that the matter would be decided on the papers.
9. On 18 August 2022, the Applicant and the Respondent filed their respective closing submissions.

Parties' submissions

10. The Applicant's principal contentions are:

a. The unlawfulness of the contested decision resides in the screening process. Despite all of the information provided in the Applicant's Personal History Profile ("PHP"), which established that she met all the minimum requirements for the JO, her application was erroneously screened out and she was denied full and fair consideration for the position;

b. The required criterion in question is "experience in leading large teams". The Applicant expressly described how she met this requirement throughout her application, namely, in the open-ended questions, in the employment history form and in the cover letter. However, the Applicant was erroneously screened out because the hiring manager interpreted the aforementioned requirement as experience in *supervising* at least 10 employees. However, *leading* is not equivalent to *supervising*. By creating an unlawful parallelism between the two terms, the hiring manager exceeded his discretion that resulted in an arbitrary and manifestly unreasonable decision;

c. The "plain meaning" principle of statutory interpretation is well-established in the internal justice system (*Scott* 2012-UNAT-225, *De Aguirre* 2016-UNAT-705). In *Mohamed* UNDT/2019/088, the Dispute Tribunal determined that the plain meaning principle applies with equal force to the requirements specified in vacancy announcements;

d. The Applicant does not contest the hiring manager's discretion to define the requirement of "experience in leading large teams" as experience leading teams of at least 10 employees. However, "the discretion to introduce criteria in the interests of operational requirements or efficiency is not unfettered and must be exercised lawfully, reasonably and fairly" (*Smith* 2017-UNAT-785, *Lemonnier* 2017-UNAT-762);

e. A hiring manager exceeds his discretion when he interprets and applies the material terms of a vacancy announcement in a manner that contravenes the plain meaning of those terms. Both JO 127555 and the relevant screening question in the application for the position require experience *leading* large teams. The Applicant answered the screening question exactly as it was asked, giving detailed examples of leading teams rather than of supervising individual employees. The hiring manager thus exceeded his authority, took a manifestly unreasonable and arbitrary decision, and denied the Applicant full and fair consideration by interpreting *leading* synonymously with *supervising*, and assessing that the Applicant's PHP did not clearly convey experience in supervising large teams;

f. It is no defence that the hiring manager may have unlawfully interpreted the material terms of the vacancy announcement and screening question with respect to all applicants. The Applicant is not alleging that the hiring manager engaged in disparate or discriminatory treatment. Her claim is simply that the hiring manager incorrectly interpreted and applied the requirements of the position as stated in JO 127555;

g. The Respondent over relies on the burden of proof and the presumption of regularity set out in *Rolland* 2011-UNAT-122. However, the general rule stated in this precedent is not applicable to the instant case, as it involved the non-selection of a shortlisted and interviewed candidate. The jurisprudence has evolved to give a different treatment to non-consideration cases, wherein a candidate is excluded from further consideration for not meeting the eligibility criteria, such as in the Applicant's case. The appropriate precedent to be considered is *Krioutchkov* 2020-UNAT-1066;

h. In addition, the presumption of regularity serves to reasonably limit the scope of judicial review, not to shield the Administration from an examination of its actions (*Ridha* UNDT/2021/059). The question of whether *leading* is synonymous with *supervising* is essentially a pure question of law, similar to a question of statutory interpretation, wherein the Administration enjoys no presumption that its interpretation is correct;

i. The Applicant had a significant chance of selection. Not only did she meet all of the JO's requirements, namely, education, experience, and language, but had her application not been erroneously screened out, the Applicant would have also benefited from the special provision under paragraph 3.4(b) of ST/AI/2020/5 (Temporary special measures for the achievement of gender parity); and

j. The Applicant is entitled to remedies for having been denied full and fair consideration of her application and for loss of opportunity.

11. The Respondent's principal contentions are:

a. The selection process was conducted in accordance with the relevant legal framework. Pursuant to sec. 7.1 of ST/AI/2010/3 (Staff selection system), the hiring manager reviewed the candidacies based on the information provided in each PHP. He then correctly concluded that the Applicant did not meet one of the minimum requirements for the position, which is why the Applicant was lawfully not considered further in the selection procedure;

b. One of the requirements for the position was "experience in leading large teams". The hiring manager reasonably defined this requirement as supervising at least 10 employees. That threshold reflected the operational context of the position and was applied consistently to all applicants to ensure equal treatment and fairness of the review and evaluation process. The hiring manager long-listed 27 applicants whose PHPs demonstrated that they supervised at least 10 individuals;

c. The Applicant did not meet the requirement for leading large teams. According to the Applicant's PHP, since 2016 she supervised a maximum of nine professional staff members and in her previous roles, that number ranged from zero to five;

d. The Applicant's response to the open-ended question relating to leading large teams did not establish that she met that requirement. The Applicant referred to project teams in the context of her role as a management consultant between 2002-2006. While the Applicant stated that she led a team between 4-5 staff distributed between four modules, the Applicant did not define her role vis-à-vis the four modules and other team members, did not outline the duration of the project and whether the implementation of the four modules was concurrent or successive. In addition, the Applicant's own description of her employment for that period did not specify that she led large teams either, as she indicated "0" for the number of supervisees for that period and role. Accordingly, the hiring manager found that the information provided by the Applicant did not clearly support her claim of having had the required experience;

e. It was the Applicant's responsibility to clearly specify relevant information in her job application as JO 127555 expressly stated that, "[t]he evaluation of applicants will be conducted on the basis of the information submitted in the application";

f. The Applicant has produced no clear and convincing evidence that she was "denied a fair chance of appointment";

g. There was no violation of ST/AI/2020/5. The temporary measures apply in cases where "women candidates meet the requirements for the job opening", which is not the case at hand; and

h. The contested decision was lawful and, accordingly, the Applicant is not entitled to any remedy.

Consideration

12. In reviewing administrative decisions regarding appointments and promotions, the Dispute Tribunal's role is limited to examining if the procedures set out in the Staff Regulations and Rules were followed and if the staff member was given fair and consideration (*Abbassi* 2011-UNAT-110, para. 23).

13. The Secretary-General has broad discretion in making decisions regarding promotions and appointments and, in reviewing such decisions, it is not the role of the Tribunal to substitute its own decision for that of the Administration (*Lemonnier* 2017-UNAT-762, para. 30-31).

14. The role of the Tribunal 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” (see *Ljungdell* 2012-UNAT-265, para. 30, *Lemonnier* 2017-UNAT-762, para. 31).

15. The Applicant’s primary submissions are that the Administration: (a) erred in law by interpreting the criterion of “experience in leading large teams” as synonymous to experience in “supervising” large teams, and (b) erred in fact by finding that the Applicant did not provide sufficient evidence of said experience.

16. The Tribunal will analyse both submissions separately in order to determine whether the Applicant was denied a full and fair consideration for the position.

Was there an error in law?

17. The Tribunal finds that the Administration erred in law in finding that the Applicant did not meet the requirement for consideration because she did not have experience in supervising at least 10 employees. It is accepted that the Administration has discretion in selection matters and as long as that discretion is exercised lawfully, the Tribunal should not interfere with it. Furthermore, such exercise of discretion is presumed to be lawful unless it is rebutted by clear evidence provided to the contrary demonstrating how the Administration may have erred.

18. The process of advertising and setting out the criteria for selection was done lawfully. The Applicant was able to read the vacancy notice and follow the requirements and the instructions for submitting the application for the post advertised.

19. There is no evidence of a perverse decision or an incorrect application of the law in general terms. However, there is evidence of an unjust process that failed to provide a fair chance to job applicants like the Applicant because it failed to specify that the hiring manager intended to apply a definition of large teams as meaning *supervising* a group of 10 or more persons.

20. This determination was not fair because it did not correspond to the wording used in JO 127555 and in the open-ended questions. Indeed, the number 10 appears to apply only to the number of persons the Applicant would have had to supervise directly and pays little attention to actual language used in the vacancy notice. The Tribunal therefore finds it necessary to delve into the specific words used in JO 127555 along with the language used generally in the notice, which would tend to convey the context in which the words in contention were to be interpreted.

21. In order to clarify the view being adopted by the Tribunal it is necessary to review some of the facts in detail. The posting title of the vacancy at issue in this matter is “Chief of Service, Monitoring and Evaluation, D1”.

22. The code title is described as “CHIEF OF SERVICE, MANAGEMENT AND PROGRAMME ANALYSIS”. The department to which the post is attached is described as “Department of Management Strategy, Policy and Compliance Business”. Under the rubric “Org. Setting And Reporting”, the following is stated:

This position is located in in the Monitoring and Evaluation Service, Business Transformation and Accountability Division (BTAD) of the Department of Management Strategy, Policy and Compliance (DMSPC). The Chief of Service reports to the Director of BTAD.

23. This paragraph makes it clear that the Applicant would be accountable to the Director of BTAD. The job opening then goes on to set out a lengthy list of responsibilities. Among those responsibilities the words used in the list that stand out and provide meaning are: “leads, advises, identifies, ensures, provides leadership, guides, formulates, implements, oversees, and coordinates among others.”

24. These words connote individual responsibility but also responsibility for acting in conjunction with others by way of offering advice, sharing lessons learned, and providing leadership. There is nothing in these words that restrict the number of persons with whom the Applicant, if successful, would have to interact. Neither is there anything that suggests it is merely an office-based scenario. Indeed, the list of responsibilities does not only apply to a specific office but also refers to the “Service” in which the successful candidate would foster teamwork and communication among staff in the Services and across organisational boundaries.

25. As for the open-ended questions for JO 127555, question No. 3 is of particular interest, namely, “Experience in leading large teams is required. Please explain how you meet this criterion using examples”. The Applicant responded:

I have been leading teams since 1993. As a management consultant from 2002-06, I led a number of large and small teams in carrying out large scale organization transformation projects both remotely as well as at client site. A notable example is the large team I led in the management of change of India’s largest telecommunications company in the areas of culture and people-related systems and processes, including leadership development and succession planning. This project had four modules with 4-5 staff on each module. The entire project was run on-site at the client’s location and had to be managed carefully, given the sensitive nature of work related to manpower planning and culture change. Since 2016, as Chief of Section in OIOS, I manage multiple teams conducting programme evaluations on a variety of topics ranging from SDGs to outer space affairs to criminal tribunals.

26. The above answer shows that the Applicant was led to believe she needed to explain how she has had experience in *leading* large teams, which she then explained by the same wording.

27. However, there was no reference either in JO 127555, in the open-ended question No. 3 or in any other open-ended question requiring the candidates to specify that they had experience supervising a number of employees, or that for the purpose of the vacancy, “experience in leading large teams” should include experience in supervising.

Was there an error of fact?

28. The Tribunal holds that when one looks at the context of JO 127555 and the language used throughout, the hiring manager did make an error of fact in interpreting it in the way he/she did. Indeed, if “teams” are regarded as groups that have benefited from the Applicant’s services and skills over time, some of them would have been large when it comes to evaluation and assessment and other aspects of the job. Even with two staff members and relying on modern technology the Applicant could be responsible for leading teams which were much larger than 10 persons. But if the meaning is restricted to immediate supervision and management then a different result could be arrived at. This ambiguity renders the job announcement ineffective.

29. This is yet another reason why JO 127555 should have been clear and specific by stating the requirement of *supervising* at least 10 employees, which as correctly put by the Applicant, is different than “leading”. Failing to make this clear appears to be arbitrary in the context of the overall work requirements of the job.

30. The question then is why JO 127555 was not specific in defining “large teams” as it was in setting out “[a] minimum of fifteen years of progressively responsible experience in management”? It is not far-fetched to argue that the context of the experience in large complex international organizations and with international and external clients fits in with “large teams” based on the context.

31. Given the context, the concept of “large teams” should have been clearly defined for the candidates rather than being conceptually restricted to the office environment as the Administration argues. Applying the legal framework to the discussion, one can reflect upon the arguments of both sides.

32. The Applicant relies on the literal meaning of terms. She states that the “plain meaning” principle of statutory interpretation is well-established in the internal justice system (*Scott* 2012-UNAT-225, para. 28, *De Aguirre* 2016-UNAT-705), which applies with equal force to the requirements specified in vacancy announcements (*Mohamed* UNDT/2019/088).

33. Alternately, the Respondent argues that the Applicant failed to clearly establish that she has led “large teams”. The Respondent did not attempt to rely on any principles of interpretation to establish that the Applicant had not responded positively to that requirement.

34. Based on the facts before the Tribunal, the Applicant addressed this issue in the open-ended question No. 3 where she outlined that she has led a project consisting of “four modules with 4-5 staff on each module”. She identified the project and did not explain why, how or how many employees she supervised on this project on a day-to-day basis or over any particular period of time.

35. The Respondent claims that the above-mentioned description was not sufficient to establish that the Applicant has led large teams. The Respondent reached this conclusion based on the definition of large teams provided by the Administration and the application of said definition to the job context.

36. However, only after the Applicant requested management evaluation of the decision did the Administration point out that this preliminary suitability screening was intended to mean that “experience in leading large teams” was in fact experience in directly supervising, and that the nature of supervision must have been outlined by the candidates along with the period of the said supervision.

37. While the information required from the point of view of the Respondent may be logical, it is only fair if it can be shown that it is the only conclusion a candidate could come to in assessing the requirements of JO 127555. The argument of the Applicant is based on the premise that it is not the only conclusion one can arrive at. It is also possible to conclude that there is a distinction between team leadership and direct supervision. It is also possible to have a situation where the lines are blurred. For instance, if a person claims to have directly supervised 1,500 people it would be interesting to find out how this could be done without intermediary supervision.

38. Hence, the requirement should have been specific in terms of the meaning that is being given to the word “lead” or “leadership”. One can lead 9 or 10 persons who in turn pass on the directives and ideas or thinking of the team’s leader to 100 other persons. In this context the team leader can claim to be leading 100 persons. But if the candidate is being asked to say how many people he or she directly supervised, the answer would be 9 or 10.

39. It follows that nothing in JO 127555 suggested to the job candidates that they needed to have had experience supervising large teams. The requirement criterion under question specifically requested “experience in leading large teams”, which, as put forth by the Applicant, is different from experience in “supervising large teams”.

40. The Tribunal recognizes the hiring manager’s authority and discretion to define the aforementioned requirement with a threshold that reflects the operational context of the position. Notwithstanding, this discretion cannot outweigh fairness and the candidates’ rights. When a job applicant is led to believe he or she only needs to explain how they have experience in “leading large teams”, it is not fair to demand afterwards that he or she had explained how they had experience in “supervising” large teams, where leading is not the same as supervising, especially in the United Nations system.

41. Hence, the core problem is not the numeric threshold created by the hiring manager. The problem is that the hiring manager changed the criterion from leading to supervising during the screening process and without giving job applicants a fair chance to demonstrate how they could have met this criterion. The hiring manager requested one thing yet expected another.

42. The conclusion then is that the approach taken is subject to blurred lines. The only just way to approach this is to define the terms specifically by describing exactly what one is looking for with words such as: “the post requires experience in supervising at least 10 persons”. A clearer definition such as this would better serve the purpose of recruiting the right person for the position.

Is the Applicant entitled to any remedies?

43. The Tribunal recalls that in the case of *Mohamed* UNDT/2019/088, it was decided that the Applicant in a selection case would have to establish not only a procedural error but that he/she would have had a realistic chance of being appointed to the post. Consequently, even though a procedural error was proved, the application to rescind the selection decision was rejected because it was reasoned that the Applicant would not have had a realistic chance of promotion.

44. The Tribunal considers that the crux of the matter is in the interpretation of the phrase “experience in leading large teams”. If the interpretation is that the selected person must have supervised a large team, that is one thing. The leadership of a large team is different since day-to-day supervision could be delegated to subordinate officers if the goal of the project, department or service is clearly relayed to the entire team. It is difficult to conceive of a large team where such delegation does not take place.

45. The Tribunal therefore finds that the Applicant should be entitled to a remedy of rescission of the selection decision along with compensation for loss of opportunity. Had the hiring manager used the plain meaning of “leading” in the screening process, it is fair to assume that the Applicant would have been long-listed for the next phase of the selection process, since the Respondent does not claim that the Applicant did not meet any other requirements in JO 127555. In addition, as a woman benefiting from temporary special measures to achieve gender equality in the Organization, especially at the D-1 level, she would have had a realistic chance of selection.

46. Having determined the case in the manner stated above, the Tribunal orders the rescission of the contested decision.

47. The Tribunal makes this decision not to question the judgment of the selection manager in the relevant process but to provide legal guidance to ensure that the process is fair. If the objective of the selection process is to ensure the highest standard of efficiency, competence, and integrity in accordance with the UN

Charter, the selection process should be fair and aim to eliminate presumptions that could produce unjust results.

48. The consideration process should therefore be repeated to permit the Applicant's candidacy to be considered fairly in the light of the varied meaning that can be given to the term "leading large teams" in the selection process. However, if this is no longer possible, the decision in relation to the Applicant should be rescinded and compensation paid to her for loss of opportunity.

Compensation for loss of opportunity

49. Pursuant to art. 10.5(a) of the Tribunal's Statute, the Dispute Tribunal may order:

(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 paragraph (b) of the present paragraph;

50. The Appeals Tribunal has instructed the Dispute Tribunal to follow a principled approach to determine compensation for loss of opportunity on a case-by-case basis (*Solanki* 2010-UNAT-044, para. 20). The jurisprudence also establishes that where the candidate pool is relatively small, and variation in the quality of candidates consequently reduced, compensation for loss of a "chance" of promotion may sometimes be made on a percentage basis, but where the chance is less than ten per cent, damages become too speculative and the Tribunal is in the best position to assess those damages (*Hastings* 2011-UNAT-109, para. 2).

51. The Tribunal agrees with the submission that the loss to the Applicant cannot be valued by how many individuals applied to JO 127555. A purely mathematical approach to calculating loss of opportunity, which would treat as indistinguishable the quality of the different candidates involved in the recruitment, would not reflect the Applicant's realistic chances of promotion and the harm resulting from the erroneous decision (*Nikolarakis* UNDT/2017/068, para. 61-62).

52. The Applicant was screened out from a pool of 113 candidates, but that does not mean that she had a 0.8 percent chance of selection. If the Applicant had not been screened out, the only certainty is that she lost the opportunity to compete against the 27 other candidates that were long-listed and, later, against the five that were invited for an interview. At earlier stages of the recruitment exercise, the pool of candidates and their variation in quality will be naturally bigger. It would thus be unfair to treat as mathematically identical the candidates of a large pool so early in the recruitment exercise.

53. Instead, a lump-sum compensation is appropriate to remediate the effect of the contested decision in denying the Applicant a significant chance of selection.

54. The very purpose of compensation is to place the staff member in the same position she or he would have been in had the Organization complied with its obligations (see, for instance, *Warren* 2010-UNAT-059, para. 10, *Iannelli* 2010-UNAT-093, para. 14).

55. Thus, following the jurisprudence of non-consideration cases, where a candidate is erroneously barred from competing and denied full and fair consideration for the position when she or he had a real chance of being selected, a lump-sum award for loss of opportunity is indeed the better approach to a fair disposal of justice (in line herewith, see *Lutta* UNDT/2010/097, para. 5.3, *affirmed Lutta* 2011-UNAT-117, para. 14, *Niedermayr* 2015-UNAT-603, para. 40).

56. Accordingly, the Tribunal decides to set the amount that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision to three months' net-base salary at the Applicant's current step and level.

Conclusion

57. In view of the foregoing, the Tribunal DECIDES:

- a. The contested decision is hereby rescinded;

- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant a lump-sum equivalent to 3 months of her net-base salary at the current level and step;
- c. The aforementioned compensation in lieu of rescission shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- d. All other claims are rejected.

(Signed)

Judge Francis Belle

Dated this 28th day of September 2022

Entered in the Register on this 28th day of September 2022

(Signed)

Morten Albert Michelsen, Officer-in-Charge, New York