



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Ludovica Moro
Neha Dubey

Counsel for Respondent:

Bettina Gerber, UNOG
Adrien Meubus, UNOG

Introduction

1. The Applicant, a former staff member of the Office of the High Commissioner for Human Rights (“OHCHR”), filed an application on 14 February 2022 contesting the decision not to select him for a fixed-term position, at the P-5 level, of Senior Human Rights Officer and Coordinator of the Secretariat of OHCHR’s International Fact-Finding Mission (“FFM”) on Venezuela, based in Panama City.

2. On 21 March 2022, the Respondent filed his reply stating that the selection decision was a lawful exercise of the OCHCR High Commissioner’s discretion and requesting the Tribunal to reject the application in its entirety.

3. The Applicant had initially requested to have a hearing in this case but later withdrew the request. Both parties agreed that the Tribunal could adjudicate the case based on their written submissions.

Factual and procedural history

4. On 27 September 2019, the United Nations Human Rights Council (“HRC”), via its resolution 42/25, established the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela (“FFM”) for an initial period of one year. On 2 December 2019, the Applicant, a citizen of the United Kingdom, started a temporary appointment as Senior Human Rights Officer and Coordinator of the FFM Secretariat (“FFM Coordinator”), at the P-5 level, based in Panama City. His first reporting officer (“FRO”) was the Chief of Branch for the Americas, Europe and Central Asia, at the D-1 level, in OHCHR’s Field Operations and Technical Cooperation Division (“FOTCD”).

5. In September 2020, the FFM released its report and detailed findings regarding its mandate. In the Applicant’s performance appraisal for the reporting period from the start of his temporary appointment as FFM Coordinator through 30 September 2020, he was rated as “exceeds performance expectations”.

6. On 6 October 2020, the HRC voted to renew the FFM’s mandate for a two-year period through September 2022. In light of this mandate renewal, OHCHR decided to appoint FFM staff on fixed-term contracts rather than temporary appointments. Special arrangements were made to create new job openings and existing staff on temporary appointments, including the Applicant, were authorized to compete for the positions they had been encumbering.

7. The fixed-term position of Senior Human Rights Officer and FFM Coordinator (“the Post”) was advertised under Job Opening No. 20-HRI-OHCHR-146267-R-Panama City (“the Job Opening”) from 10 to 24 December 2020. Meanwhile, the Applicant’s temporary appointment, which was set to expire on 30 September 2020, was extended until 31 December 2020 and again until 31 July 2021, pending finalization of the recruitment process for a fixed-term appointment. The Applicant applied for the Post and was among the shortlisted candidates invited to a competency-based interview conducted on 13 January 2021. The assessment panel found the Applicant to be suitable for the position and recommended him for the Post. However, due to “an administrative issue”, as per an email he received from the Administration on 24 February 2021, the interview was conducted a second time on 5 March 2021 with a slightly altered panel. The Applicant’s FRO was the hiring manager for the recruitment.

8. In the recommendation memorandum dated 15 March 2021 addressed to the High Commissioner, OHCHR, the Applicant and two other male candidates—a Spanish national and a national of Switzerland—were identified as meeting the requirements for the Post and were recommended by the assessment panel. The memorandum also ranked the candidates by “order of preference”, with the Applicant listed as the hiring manager’s first choice and the Spanish national as the second choice. During its review of the recruitment process, the central review body raised a few questions, and after receiving clarification from OHCHR’s Human Resources Office, it endorsed the list of recommended candidates on 17 June 2021.

9. On 17 July 2021, the Applicant received a standard email notification from the *Inspira* recruitment platform informing him, in reference to his application for the Post, that he was being placed on a roster of pre-approved candidates for

potential consideration for future similar job openings. He understood this to mean he had not been selected for the Post, and on 15 September 2021, he sought management evaluation of the non-selection decision. He subsequently learnt that on 16 July 2021, the Spanish national who was also the second-ranked candidate (“the Selected Candidate”) had been offered and had accepted the Post. The Applicant made enquiries with OHCHR’s Human Resources Office and was advised that the Selected Candidate had been selected for the Post in the interest of geographical diversity at the P-5 level, among other reasons.

10. Meanwhile, the Applicant and the Selected Candidate had both also applied for a different temporary position with OHCHR, as a Senior Human Rights Officer and Country Representative, at the P-5 level, in La Paz, Bolivia (“the position in Bolivia”). The Applicant subsequently learnt that in early July 2021, the Selected Candidate had also been offered and had accepted this temporary position in Bolivia.

11. On 21 July 2021, the Applicant received notification of his selection for the temporary position in Bolivia after the Selected Candidate had rescinded his earlier acceptance of that position in favour of his acceptance of the Post of FFM Coordinator based in Panama City. The Applicant was instructed to confirm his availability for the position in Bolivia by 11:59 p.m., New York time, on 28 July 2021. The Applicant then engaged in negotiations with OHCHR’s Human Resources Office with a view to reaching an arrangement that would allow him to accept the temporary appointment in Bolivia but work remotely from Panama City since he was unable to relocate to Bolivia due to family reasons. On 28 July 2021, the Applicant attempted to accept the temporary position in Bolivia but apparently encountered technical difficulties. It remains unclear whether his acceptance was submitted in a timely manner.

12. Notwithstanding the fixed-term appointment of the Selected Candidate to the Post of FFM Coordinator, the Applicant’s temporary appointment as FFM Coordinator was extended by three months and 29 days, through 29 November 2021. This allowed him to attain 729 days in the position, the maximum allowable

for a temporary appointment. The Selected Candidate also accepted a temporary assignment as Senior Human Rights Officer in La Paz, Bolivia.

13. Upon further enquiry into his non-selection for the Post, the Applicant was “reliably informed” that senior OHCHR officials had warned the High Commissioner that it would be a mistake to adopt the hiring manager’s recommendation and select the Applicant because “serious allegations” had been levied against him. On 3 August, believing these allegations to constitute a malicious complaint and a form of harassment as defined in sections 1.3 and 1.4 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), the Applicant approached the Office of Internal Oversight Services (“OIOS”) and reported potential misconduct by the sources of these allegations. However, OIOS informed him on 2 November 2021 that it had determined that his report did not warrant investigation and the case was closed.

14. On 11 August 2021, the Chief of Human Resources at OHCHR notified the Applicant that OIOS had opened an investigation against him based on allegations of harassment and abuse of authority reported by a former FFM staff member.

15. From 23 to 29 November 2021, OHCHR advertised a temporary job opening for the post of Senior Human Rights Officer and Coordinator of the FFM, at the P-5 level, based in Panama City. The Applicant did not apply to this job opening.

16. Having reached 729 consecutive days of service on a temporary appointment—the maximum duration allowable under sec. 14 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments)—the Applicant was subject to a mandatory break-in-service on 29 November 2021. He then continued as FFM Coordinator on a one-month contract from 1 December 2021 until 31 December 2021 when he separated from the Organization upon expiration of the contract. He received a rating of “exceeds performance expectations” in his performance evaluation for the period from 1 October 2020 to 31 December 2021. The Applicant did not receive any further communication from OHCHR regarding the temporary position in Bolivia.

The parties' submissions

The Applicant

17. The Applicant contends that the Administration denied him full and fair consideration for the Post by basing its non-selection decision on improper factors. He asserts that he did not enjoy the presumption of innocence and that the Administration breached its obligation to treat him justly, fairly and transparently, and “compounded that breach by giving the Applicant a pretextual justification for his non-selection”.

18. The Applicant also maintains that although the interview panel ranked him as the first choice following both interviews, OHCHR instead selected the second-ranked candidate who “did not meet all four desirable criteria” set out in the Job Opening including “experience working in or on the subject of Venezuela”, and experience working in an investigative mechanism or an international tribunal.

19. According to the Applicant, OHCHR’s explanations about overall geographical representation in the Office were “manifestly irrational—and thus unlawful” since both the Applicant and the selected candidate were from the Western European and Other States Group (“WEOG”). Moreover, he contends that the Post in question is not governed by the system of geographical distribution, and that geographical diversity is assessed by entity and grade level rather than by the overall representation in the entity.

20. The Applicant adds that the decision not to select him “was based on the wholly illegitimate reason that an aggrieved former staff member had made allegations against [him]”, but since those allegations had not been investigated or disclosed to him, “the non-selection decision was an affront to due process and procedural fairness”. In his view, “the real reason for [his] non-selection is the improper and extraneous consideration that the unsubstantiated complaint against him might at some point yield allegations of misconduct”.

21. The Applicant also asserts that “but for the administration’s unlawful reliance on improper considerations”, his chance of selection for the post was “not

merely significant, but virtually certain”. Accordingly, he requests rescission of the selection decision and lump-sum compensation equivalent to two years’ net base pay, which is what he would have earned as FFM Coordinator on a fixed-term appointment. He also requests moral damages for harm to *dignitas* resulting from OHCHR’s actions.

The Respondent

22. According to the Respondent, the selection decision was a lawful exercise of the High Commissioner’s discretion to select a candidate from the recommended list. The Selected Candidate met the requirements for the Post, as well as the desirable criteria. The rationale behind the selection decision was to promote a qualified long-serving staff member holding a permanent appointment without adding another WEOG candidate to the pool of P-5 level staff members in OHCHR, which would have negatively affected the commitment to increase geographical diversity within the Office. Since the Applicant was on a temporary appointment, he was regarded as a candidate external to OHCHR, whereas the Selected Candidate held a permanent appointment and was treated as an internal candidate within OHCHR.

23. The Respondent further argues that while the hiring manager can make a recommendation, ultimately it is the head of entity who is accountable for the selection decision and is also responsible for setting targets in terms of gender parity and geographical representation, among other goals. In the Respondent’s view, there is no obligation on the part of the responsible official to select the first-ranked candidate since all candidates included in the list were deemed suitable to carry out the functions of the Post. He also notes that the High Commissioner has on several occasions decided not to select the first-ranked candidate.

24. According to the Respondent, in reaching the selection decision, the High Commissioner took several factors into consideration, including “the status of the selected candidate as a career staff [member] who had been serving in an acting role for several years, his qualifications and experience as well as the commitment

to geographical diversity”. He argues that it was within the High Commissioner’s discretion to consider all these factors in making the selection decision.

25. The Respondent also disputes the Applicant’s allegation that senior OHCHR officials had warned the High Commissioner that it would be a serious mistake to adopt the hiring manager’s recommendation and select the Applicant because serious allegations had been levied against him. The Respondent further asserts that he has no knowledge whether the Applicant had reported potential misconduct by the sources of these allegations to OIOS, or whether OIOS notified the Applicant that his report did not warrant an investigation. The Respondent stresses that whereas the High Commissioner approved the selection decision for the Post on 28 June 2021, it was only on 3 August 2021 that OHCHR was informed that a formal complaint had been lodged against the Applicant. The Respondent also affirms that OIOS did not refer the complaint to OHCHR for action and, therefore, this did not play any role in the selection decision.

26. Moreover, the Respondent states that although the Selected Candidate had previously accepted the offer of a temporary appointment in Bolivia, it was a lawful and reasonable decision for him to subsequently decline that offer in favour of the fixed-term appointment in Panama, which was a promotion for him. The Respondent also explains that the decision to immediately transfer the Selected Candidate to Bolivia on a temporary assignment was taken in view of the fact that someone was urgently needed on the ground in Bolivia, but the Applicant had expressed the desire to stay in Panama. Therefore, in view of achieving a good outcome for everyone, OHCHR had temporarily reassigned the Selected Candidate to Bolivia while extending the Applicant’s temporary appointment in Panama through 29 November 2021.

Considerations

Preliminary issue: anonymity

27. While this case primarily concerns a non-selection decision, it also raises unproven allegations of sexual misconduct. In this connection, the Tribunal notes

that transparency and accountability are overarching principles of the United Nations, and indeed their application promotes the reputation of the Organization. Any deviation from these principles can only be granted on an exceptional basis in light of compelling grounds.

28. The Tribunal recalls that art. 11.6 of its Statute stipulates that “[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal”. Article 26 of its Rules of Procedure also mandates the publication of the Tribunal’s judgments on its website but requires the protection of personal data. Moreover, the Appeals Tribunal has affirmed that “the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality” (*Buff* 2016-UNAT-639, para. 21). Nevertheless, a deviation from the principles of transparency and accountability is warranted if there are exceptional circumstances (see *Buff*, para. 23, and more recently, *AAE* 2023-UNAT-1332, at para. 155).

29. In the instant case, the Tribunal considers that since serious allegations that remain unproven are mentioned in the pleadings, there are compelling grounds to grant the Applicant’s request for anonymity. The reasons for anonymization are to protect the presumption of innocence of the Applicant and to avoid allegations made against him from being disclosed in the public domain, as no facts regarding these allegations have been established and the allegations were found to be unsubstantiated.

30. For these reasons, the Tribunal has decided to grant the Applicant’s request for anonymity.

Standard and scope of judicial review

31. The Tribunal recalls the basic principle on staff selection set out in art. 101.3 of the Charter of the United Nations and reflected in staff regulation 4.2:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

32. The Tribunal also notes that under sec. 9.2 of ST/AI/2010/3 (Staff selection), selection decisions for positions up to and including at the D-1 level are made by the head of department or office on the basis of proposals made by the responsible hiring managers and occupational group managers. The selection normally follows a finding by the relevant central review body that the candidates have been evaluated based on approved evaluation criteria and that applicable procedures have been followed.

33. It is well established that the Secretary-General has broad discretion in matters of staff selection. However, this discretion is not unfettered and is subject to judicial review. The Appeals Tribunal has held that when reviewing such staff selection decisions, the Tribunal shall consider: “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given full and fair consideration, and (3) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner” (see *Toson* 2022-UNAT-1249, para. 28).

34. The Appeals Tribunal has also stated that “[t]here is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the [applicant’s] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the [applicant] who must show through clear and convincing evidence that [he] was denied a fair chance of promotion” (see *Rolland* 2011-UNAT-122, para. 26, which has been affirmed in many subsequent cases, including *Niedermayr* 2015-UNAT-603, para. 23). The Tribunal has neither the power nor the ability to substitute its assessment for that of the Administration, barring a manifest error by the hiring manager (see, for instance, *Charles* UNDT/2012/021, para. 29, upheld in *Charles* 2013-UNAT-284).

35. The Tribunal further recalls the general principle that in selection decisions, the Administration is required to proceed with the appointment of successful candidates in accordance with the recruitment results. “However, [the Administration] can deviate from that rule for sound reasons, justifying its decision clearly and fully, i.e. on account of irregularities [that] occurred in the recruitment process or for reasons connected with the interests of the service, which are subject to judicial review” (see *Belsito* 2020-UNAT-1013, para. 40). In that connection, the Tribunal notes that “when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts” (see *Islam* 2011-UNAT-115, para. 29).

36. In accordance with the above standard, the Tribunal will therefore proceed to examine:

- a. whether the procedure as laid down in the Staff Regulations and Rules was followed;
- b. whether the staff member was given full and fair consideration; and
- c. whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner.

Whether the procedure as laid down in the Staff Regulations and Rules was followed

37. The applicable legal framework at the time of the recruitment exercise in question was ST/AI/2010/3, the Administrative Instruction on Staff selection system. It sets out, in secs. 9.2 and 9.3, the procedure to follow with respect to selection decisions:

9.2 The selection decision for positions up to and including at the D-1 level shall be made by the head of department/office on the basis of proposals made by the responsible hiring managers (for position-specific job openings) and occupational group managers (for generic job openings) when the central review body finds that the candidates have been evaluated on the basis of approved evaluation criteria and the applicable procedures have been followed. [...]

9.3 When recommending the selection of candidates for posts up to and including at the D-1 level, the hiring manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions. Prior to selection of an external candidate, that decision must be justified in writing to, and approved by, OHRM. [...]

38. The Applicant submits that the Selected Candidate, who was ranked second by the assessment panel, did not meet two of the “desirable” criteria, namely experience in a fact-finding mission, a commission of inquiry or an international criminal court; and experience working in or on Venezuela. Consequently, the Applicant concludes that the Selected Candidate “should not even have been shortlisted”. Additionally, the Applicant states that although neither the Selected Candidate nor the third-ranked candidate had ever previously held an appointment at the P-5 level (other than on Special Post Allowance), one of them is presented in the recommendation memorandum as a fully-fledged P-5 staff member while the professional grades of the other are omitted. This argument must be rejected since neither the assessment panel, nor the central review body, came to the same conclusion.

39. The record in this case shows that following the central review body’s finding that the candidates had been evaluated on the basis of approved evaluation criteria and that the applicable procedures had been followed, the High Commissioner, in her capacity as head of OHCHR, proceeded to select the candidate she considered to be best suited for the functions of FFM Coordinator. The High Commissioner could have selected any one of the three recommended candidates, when she exercised her discretion and made the selection. (See, for instance, *Elzarov* 2018-UNAT-893, para. 37.) She did not select the Applicant but, instead, selected another candidate, taking into account, *inter alia*, factors such as “the status of the selected candidate as a career staff [member] who had been serving in an acting role for several years, his qualifications and experience as well as the commitment to geographical diversity”.

40. Based on the evidence before it, the Tribunal finds that the High Commissioner followed the correct procedures laid out in the applicable legal framework for selection.

Whether the staff member was given full and fair consideration

41. The Applicant submits that he was denied full and fair consideration for the Post because the selection decision was based on improper factors. He asserts that he did not enjoy the presumption of innocence and that the Administration breached its obligation to treat him justly, fairly and transparently, and “compounded that breach by giving the Applicant a pretextual justification for his non-selection”. This assertion relies primarily on the claim that certain officials of OHCHR had advised the High Commissioner that it would be a mistake to recruit the Applicant to the Post because allegations of misconduct could soon be brought against him.

42. The evidence before the Tribunal contradicts this claim. According to the Applicant, the Chief of Human Resources at OHCHR confirmed that in October 2020, a former FFM staff member had raised concerns of possible misconduct by the Applicant. After that, in December 2020 the Applicant’s performance was evaluated as “exceeds performance expectations”. On 1 January 2021, his temporary appointment as FFM Coordinator was renewed. He was then allowed to compete for the fixed-term appointment as FFM Coordinator and was ranked in first place among the recommended candidates following both competency-based interviews. The recommendation memorandum identifying the Applicant as the first-ranked candidate was also submitted to the central review body for clearance. In addition, on 21 July 2021, the Applicant was notified of his selection as a Senior Human Rights Officer and Country Representative, at the P-5 level, in La Paz, Bolivia.

43. The Tribunal finds that it is unlikely that some or all of this would have happened had there been serious concerns among OHCHR senior officials about the Applicant’s conduct. The Chief of Human Resources did not mention the former FFM staff member’s concerns to the Applicant until he spoke to her after learning that another candidate had been selected for the Post in July 2021. Moreover, it was

only after the High Commissioner had made the selection decision that OIOS notified OHCHR and the Applicant that it had opened an investigation against him.

44. Accordingly, the Tribunal finds no evidence to support the claim that the High Commissioner's selection decision was in any way influenced by extraneous considerations such as the allegations of misconduct against the Applicant. The Tribunal also finds that the Applicant's candidacy was given full and fair consideration.

Whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner

45. The Respondent submits that the High Commissioner's rationale for selecting the second-ranked candidate rather than the Applicant, who was ranked first by both assessment panels, was her desire to promote a qualified, experienced and long-serving OHCHR staff member who was an internal candidate. The Respondent avers that the decision was also motivated by the High Commissioner's "commitment to geographical diversity".

46. With respect to this last justification, the Applicant points out that he (a national of the United Kingdom) and the Selected Candidate (a Spanish national) both belong to countries that are members of the Western European and Other States Group ("WEOG"). Therefore, selecting either of them would have exactly the same result in terms of improving geographical diversity within OHCHR. However, the Respondent explains that since the Selected Candidate held a permanent appointment, he was considered as an internal candidate for the recruitment and was already included in OHCHR's list of WEOG staff members. On the other hand, since the Applicant held a temporary appointment, he was considered as external to OHCHR and recruiting him to the Post would have increased OHCHR's number of WEOG staff members.

47. The Tribunal has reviewed the various relevant provisions related to geographical distribution in the staff selection system, including art. 101 of the Charter of the United Nations, staff regulation 4.2, staff rule 4.6, and ST/AI/2010/3.

None of these provisions contains any reference to the regional groupings such as WEOG. Rather, they all tend to refer to “nationality” as the basis for geographical distribution. In fact, even the Respondent’s own filing indicating the composition of the staff of OHCHR, lists the number of staff “by nationality, grade and sex” and not by region.

48. Nonetheless, the Tribunal finds that in this case, the High Commissioner’s decision to select someone other than the first-ranked candidate is not tainted by bias, prejudice or improper motive and takes relevant factors into consideration. The Tribunal recalls that, at the Applicant’s request, the Respondent was able to produce evidence showing that there had been other occasions when the High Commissioner had not selected the first-ranked candidate on the list of recommended candidates following an assessment process. In the case at hand, the Tribunal notes that although the High Commissioner deviated from the order of preference put forward by the hiring manager in the recommendation memorandum of 15 March 2021, it was for a legitimate and fully articulated reason, namely the need to promote a long-serving, qualified and experienced internal candidate in OHCHR.

49. In summary, the Tribunal finds that in this recruitment exercise, the proper procedures were followed, the Applicant’s candidacy was given full and fair consideration, the applicable regulations and rules were applied in a fair, transparent and non-discriminatory manner, and the OHCHR High Commissioner properly exercised her discretion in making the selection decision.

50. Having found that the selection decision was a lawful exercise of the High Commissioner’s discretion, the Tribunal finds no basis for awarding the Applicant the requested compensation and damages. In addition, the Tribunal notes that the Applicant could have mitigated his economic losses by accepting the offer of the temporary position in Bolivia in a timely manner. The Tribunal is thus unable to compensate the Applicant for his failure to take timely action.

Conclusion

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

(Signed)

Judge Joelle Adda

Dated this 9th day of October 2023

Entered in the Register on this 9th day of October 2023

(Signed)

Isaac Endeley, Registrar, New York