



Before: Judge Rachel Sophie Sikwese

Registry: New York

Registrar: Isaac Endeley

KIRBY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Introduction

1. By application, the Applicant, now a Senior Reviser at the P-5 level in the English Verbatim Section, Meetings and Publishing Division, Department for General Assembly and Conference Management (“DGACM”), based in New York, contests the 31 May 2022 decision not to select her for the position of a Senior Reviser/Project Manager, at the P-5 level, in the English Translation and Editorial Service of the Documentation Division, DGACM (Job Opening ID: 170846) (the “Post”).
2. On 27 December 2022, the Respondent filed a reply submitting that the application has no merit as the Applicant received full and fair consideration for the Post.
3. For the reasons below, the Tribunal dismisses the application.

Facts and Procedure

4. The job opening for the Post was advertised on *Inspira* from 10 January 2022 to 3 March 2022.
5. The Applicant applied for the Post on 17 February 2022.
6. Following a preliminary assessment, the Office of Human Resources released six candidates who applied for the Post to the hiring manager for further evaluation. The Applicant, together with one other candidate (the “Selected Candidate”), both female, were placed on the short list and invited to a technical assessment.
7. The technical assessment was conducted on 7 April 2022, and both the Applicant and the Selected Candidate were successful. On the same day, 7 April 2022, the hiring manager invited the Applicant and the Selected Candidate to participate in competency-based interviews (“CBI”).

8. On 25 April 2022, the Applicant participated in a CBI, which was chaired by the Chief, Editing Section, English Translation and Editorial Service. The two other panel members were the Chief of Section, French Translation (from outside the New York duty station) and a Senior Reviser/Project Manager, Spanish. The CBI assessed the Applicant and the Selected Candidate against the competencies set out in the job opening: professionalism, teamwork, planning and organizing, vision, and building trust.

9. On 28 April 2022, after both CBIs were conducted, the hiring manager submitted a documented record of its evaluation of the Selected Candidate to the Central Review Board (“CRB”).

10. On 25 May 2022, the CRB endorsed the selection of the Selected Candidate for the Post.

11. On 1 June 2022, the Applicant was informed of her non-selection for the Post.

12. On 29 July 2022, the Applicant filed a request for a management evaluation contesting the decision of DGACM not to select her for the Post.

13. On 25 August 2022, the Applicant received a response to her management evaluation request upholding the contested decision.

14. On 23 November 2022, the Applicant filed her application with the Dispute Tribunal.

15. The Tribunal held a case management discussion (“CMD”) on 24 October 2023. At the CMD, the parties, *inter alia*, agreed that the case may be adjudicated on the papers.

16. Following the CMD, the Respondent filed his closing submissions on 1 November 2023. The Applicant filed her closing statement on 8 November 2023.

Consideration

Whether the Applicant was given full and fair consideration

17. Article 101.1 of the United Nations Charter and staff regulations 1.2(c) and 4.1, endow the Secretary-General with broad discretion in matters of staff selection.

18. When reviewing matters of staff selection, 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 full or adequate and fair consideration” (see, *Abbassi* 2011-UNAT-110). Acting fairly means that proper procedures were followed and the decision is not tainted by improper motives, which shall include bias and or discrimination. Further, the Administration shall not act in a capricious or arbitrary manner. The Tribunal shall interfere with a decision which it finds to be absurd or perverse (see, *Sanwidi* 2010-UNAT-084, confirmed in many subsequent cases, including in *Kinyanjui* 2019-UNAT-932).

19. The jurisprudence of the Appeals Tribunal further provides that, in reviewing the impugned decision, it is the role of the Tribunals 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, *Lemonnier* 2017-UNAT-762). The Tribunals’ role is not to substitute their decision for that of the Administration (see, *Krioutchkov* 2020-UNAT- 1066).

20. As the Appeals Tribunal reiterated in *Lemonnier*, 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 the applicant’s candidature was given 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.

21. The Applicant submits that she did not receive full and fair consideration for the Post as the selection panel was biased in its decision making. The Applicant states that the issue causing the panel's bias was the panel member's knowledge of the Applicant's work as staff representative in particular her involvement in 'contentious' discussions between management and the Staff Union representatives regarding staff welfare.

22. The Applicant states that firstly, she was fully qualified for the position, had nothing but positive performance evaluations and feedback regarding her project management work and had passed the technical assessment.

23. Secondly, the Applicant contends that comments from the CBI panel report show that the interviewers did indeed believe that the Applicant appeared to be "creating a divide between management and staff"—something that could be reasonably inferred from the Applicant's staff representative work, since she was engaged in contentious talks with management at the time, but that this had no relationship with or bearing on her project management work.

24. As an example, the Applicant states that on 23 September 2022, she and other staff representatives wrote to the Under-Secretary-General ("USG") for DGACM informing him that unless he would cancel a related decision, they would proceed, *inter alia*, with a vote of no confidence in DGACM senior management. The Applicant states that this shows the contentious nature of the talks in which she and other staff representatives for the translators in DGACM had been engaging with DGACM management. Tensions were high within the Documentation Division ("DD") in particular, as that is the Division in which the New York-based translators are located and is the Division that is pushing forward the unpopular management decisions, including to translation services in other duty stations. The Applicant states that these tensions were there before and after her non-selection, and the CBI panelists, as staff members themselves, were aware of them. The Applicant argues, therefore, that this proves that the panel members were not evaluating the Applicant's

answers based on her competencies for the Post in question but were biased because of their knowledge of the Applicant's work as a staff representative.

25. Thirdly, the Applicant complains that she was not rostered for future such positions. The Applicant contends that if a candidate does not perform as well as another candidate in the interview process, it does not follow that they are unsuited for similar positions in the future. She argues that by not rostering her for future such positions, the panel indicated that the Applicant was not qualified for future such positions. The Applicant states that this is further proof that the panel members were biased in their selection decision.

26. In response, the Respondent states that the contested decision was lawful as the Applicant received full and fair consideration for the Post. The Respondent submits that the Applicant and one other candidate were shortlisted for the Position after a preliminary assessment, out of a total of six candidates. The Applicant passed a technical assessment but was not successful in the CBI. The Respondent states that DGACM therefore lawfully selected the recommended candidate who had successfully passed the CBI and whom it considered to be most suitable for the Post.

27. The Respondent further submits that the Applicant has not met her burden of proving that the contested decision was tainted by extraneous considerations. The Respondent states that the Applicant has not established that she was discriminated against based on her status as staff union representative. The Respondent submits that Applicant's promotion, prior to the filing of the application, to a P-5 position within DGACM undermines her claim of bias on ground of her staff representation.

28. The Tribunal notes that the essence of the Applicant's contention is that her candidacy for the Post was not given full and fair consideration as the selection decision was marred by bias based on the Applicant's staff union representation.

29. Having reviewed the record, the Tribunal finds that the Applicant was afforded full and fair consideration for the position.

30. In arriving at this decision, the Tribunal notes that the Applicant's contention that she was fully qualified for the position, had nothing but positive performance evaluations and feedback regarding her project management work is not a relevant factor. The Tribunal notes that past positive performance evaluations and feedback are not in themselves indicative of a candidate's suitability for a position, otherwise there would be no need for CBIs. It is also not correct that passing the technical assessment entitles a candidate to a selection even after they do not perform as well in a CBI. This is the reason why the selection process has different screening stages meant to assess the candidates' suitability. In this regard, sec. 7.4 of ST/AI/2010/3/Rev.2 (Staff Selection System) provides clearly that shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening.

31. The Tribunal finds that the CBI panel acted within their reasonable discretion in assessing the job candidates. The Applicant was one of the two shortlisted candidates for the Post and was invited for a CBI. The Applicant did not pass the CBI. In particular, the record indicates that the Applicant failed to meet the requirements of three of the Post's competencies. The CBI panel rated the Applicant as "partially meets the requirements" for the competencies of teamwork, building trust, and vision. The Tribunal has reviewed the CBI panel's assessment and is satisfied that the ratings were arrived at in response to the Applicant's answers to each competency question. The CBI panel's conclusions with respect to each candidate were carefully documented and reasoned. The Tribunal finds no evidence that the CBI panel's assessment was based upon the Applicant's Staff Union representation. The Applicant's allegation that the panel's evaluation of her as "creating a divide between management and staff" does not amount to clear and convincing evidence that the CBI panel was biased in its assessment. She has not satisfied the Tribunal that there is a connection between this assessment and her Staff Union representation. Upon review of the panel's reasoned evaluation, it is clear that the Panel evaluated the answers the Applicant gave during the interview based on the

context of the questions. The Applicant's answers related to her professional duties as a project manager and not to the Applicant's Staff Union representation. The Applicant herself notes that she "successfully had not allowed her staff representative work to infringe on her project management work, including in her discussion of her project management work in the interview process". Therefore, there is no basis to infer that the CBI panel's assessment was tainted by bias based on the Applicant's Staff Union representation.

32. On the other hand, the CBI panel rated the Selected Candidate as either "exceeds the requirements" or "successfully meets the requirements" for each of the Post's competencies. The Tribunal therefore finds that the CBI panel was justified in not recommending the Applicant for the Post as she did not meet all competencies. It was a requirement to meet all competencies, since competence is one of the objective criteria in staff selection under art.101 of the United Nations Charter.

33. Based on the documented record and the recommendation of the hiring manager, as well as the CRB's endorsement, DGACM lawfully selected the candidate it considered as the best suited for the functions of the Post. In reaching the contested decision, DGACM considered that the Selected Candidate received higher ratings than the Applicant in connection with the competencies required for the Post while the Applicant was rated as not meeting all competencies.

34. The Applicant does not seriously dispute that she did not meet full requirements for the competencies of teamwork, building trust, and vision. She has not made any clear and convincing argument to challenge the CBI panel's assessment in these areas. The Tribunal finds that the Applicant's apprehension of bias is misplaced, Staff Union consultations with management ought not to be taken personally and indeed the Applicant has not adduced evidence to show that all the personnel involved along the different stages of the selection process colluded to target her merely for representing her constituents in contentious negotiations.

The Applicant's further claims of bias - Roster

35. The Applicant claims that the failure to roster her for the Post further supports her claim of bias. Her argument that she was entitled to be placed on the roster because she was shortlisted for the position is not supported by the legal framework. The Applicant did not meet all competencies for the Post and, thus, was not recommended. There was therefore no basis for placing her on the roster for the Post. Therefore, the Tribunal finds no merit to the claim.

36. The Applicant further claims that her subsequent selection for a different P-5 Senior Reviser position in the Department, but in another Division, shows that she is indeed qualified for such a position, and that the only reason the Applicant was not rostered for the Post was to dissuade her from continuing on in that Division, where she could have remained a staff representative for the translators, during a contentious time for staff/management relations within the translation services. The Applicant states that her subsequent selection for a P-5 Senior Reviser position in another Division is also a language position, in the Verbatim Reporting Service, but is not a position within the translation services, which is where the unpopular management policies are being implemented.

37. The Tribunal finds, again, no merit to the Applicant's contentions. Her selection for a different P-5 Senior Reviser position is not indicative of bias in the selection of the Post. Job candidates are evaluated based upon their applications, test performance and interview performance in each individual selection exercise. The fact that the Applicant passed the interview for a different job has no bearing on her performance at the job interview for the Post. Quite on the contrary, the Tribunal finds that the fact that the Applicant was promoted to a P-5 level within DGACM while she was a Staff Union representative undermines her arguments that the Organization disfavors promotions of Staff Union representatives. In this regard, the Tribunal notes that the chronology of the Applicant's promotion to a P-5 level post within DGACM does not support the Applicant's claim of bias. On 23 September

2022, in the context of ongoing staff-management consultations on the implementation of General Assembly Resolution 75/252 on workload standards for translation services, the Applicant and other staff representatives wrote to the USG-DGACM informing him that unless he would cancel a related decision, they would proceed to a vote of no confidence in DGACM senior management. On 28 September 2022, upon the recommendation of the Director of the Meetings and Publishing Division, the USG/DGACM approved the Applicant for selection and promotion to a P-5 level position within DGACM.

38. The Applicant's statement, that "selecting me for a P-5 [level post] in another Division is not indicative of a lack of bias on behalf of DGACM management but rather could be seen as an attempt by DGACM/DD management to indirectly limit the length of time in which I am able to represent my DD constituents in the ongoing dispute between staff and management", is speculative, and does not discharge her burden of proof. There is also no evidence to indicate that another staff member could not competently take over the Applicant's role of Staff Union representation in the ongoing discussions.

39. It is clear that the Applicant disagrees with the CBI panel's assessment of her performance. However, the Applicant's opinion does not rebut the findings of the panel. While it may be true that the Applicant has had positive performance evaluations for her prior positions within the Organization, her past performance does not guarantee her selection for the Post. As noted above, the Applicant failed to meet three of the competencies of the Post during her interview. The Tribunal finds no evidence to support the Applicant's view that her involvement with "contentious" discussions with DGACM management as a Staff Union representative has any bearing on the interview process for the Position.

40. Based on the above, the Tribunal finds that the Applicant failed to show by clear and convincing evidence that she was denied a fair chance of promotion. The contested decision is lawful as the Administration appropriately exercised its discretion in matters of staff selection.

Conclusion

41. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 8th day of December 2023

Entered in the Register on this 8th day of December 2023

(Signed)

Isaac Endeley, Registrar, New York