



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

HOSALI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Halil Goksan, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Deputy Director at the D-1 level in the News and Media Division (“NMD”) of the Department of Global Communications (“DGC”), is contesting her not being selected for the post of NMD Director at the D-2 level (“the Post”).
2. The Respondent contends that the application is without merit.
3. For the reason set out below, the application is rejected.

Facts

4. The Applicant, a woman from India, joined the United Nations in 1982 and was promoted to the D-1 level in 2014.
5. The Post was initially advertised in April 2021. The Applicant applied, undertook a written test and was interviewed for the post, but was subsequently informed that her candidacy had been unsuccessful.
6. On 12 January 2022, the Post was readvertised, and the Applicant applied for it on 22 February 2022. The Applicant undertook a video assessment for the Post administered by an external entity on 26 April 2022, and she was subsequently interviewed for the Post on 6 January 2023.
7. On 9 January 2023, the Applicant was informed by the Under-Secretary-General for Global Communications (“the USG”) that she had not been selected for the Post. Instead, according to the Applicant, a “white” (no further details were provided) man from the United Kingdom was selected, who had no previous work experience with the United Nations.

Consideration

Legal framework

8. 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 (in line herewith, see the Appeals Tribunal in, for instance, *Abbassi* 2011-UNAT-110, para. 24 and *Krioutchkov* 2022-UNAT-1248, para. 28).

9. When reviewing matters of staff selection, the Appeals Tribunal has held that the Tribunal shall 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” (see, for instance, *Toson* 2022-UNAT-1249, para. 28).

10. When judicially reviewing administrative decisions regarding staff selections, the Appeals Tribunal has held that “the Tribunal’s role is not to substitute its own decision for that of the Administration” (see, for instance, *Toson*, para. 27 and *Verma* 2018-UNAT-829, para. 13). Also, in reviewing “any selection decision the standard of review is one of rationality. The decision must be supported by the information before the decision-maker and the reasons given for it. The question to be asked is whether there is a rational and justifiable connection between the information available to the administrative decision-maker and the conclusion he or she eventually arrived at” (see, *Krioutchkov*, para. 28).

11. Generally, on the Dispute Tribunal’s judicial review, the Appeals Tribunal held in its seminal judgment *Sanwidi* 2010-UNAT-084 that “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker’s decision” (see para. 42). “When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been

ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” (see, para. 40).

12. In staff selection cases, the Appeals Tribunal’s has further provided that “there is a ‘presumption of regularity’ that official acts have been regularly performed. This presumption arises if the management can minimally show that the staff member’s candidature was given a full and fair consideration. Thereafter the burden of proof shifts to the staff member who must show through ‘clear and convincing evidence’ they have been denied a fair chance of promotion or selection” (see *Toson*, para. 29, and similarly, the Appeals Tribunal in many other judgments following *Rolland* 2011-UNAT-122).

13. More specifically, the Appeals Tribunal has held that, “A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case” (see, *Verma*, para. 14, and similarly in *Kinyanjui* 2019-UNAT-932, para. 15, affirmed in *Toson*, para. 27).

What were the applicable policies regarding gender, racial and geographical representation in the present case?

14. The Applicant submits that, “In recent times the Organisation has been moved to develop strategies and rules to combat structural inequality in terms of race and gender. This case addresses the extent to which these actions have the capacity to effect change. The Applicant works in an office with identifiable gender and geographical imbalance and a record of hiring from [the USG] exacerbating this problem. At the time of the decision the Applicant was the only D-1 [level] female staff member from the Global South out of a total of 17 Directors”.

15. The Applicant therefore contests the “decision to select an external white, male, [British] national to lead a division where the senior leadership is now ... two other [British men at the D-1 level] and her”. That decision was “taken in circumstances where the Applicant had been assessed suitable for the position in question and was among the recommended candidates”. In the reply, the Respondent “takes the position that any consideration that should have been given to gender or geographical balance in the recruitment was sufficiently nebulous as to be unenforceable”. Instead, according to the Applicant, gender and geography are “relevant considerations in recruitment, and a decision “failing to take into account relevant factors will be unlawful ... the greater the imbalance the more relevant the consideration”.

16. Specifically on the Applicant being a woman and this not being lawfully considered in the contested decision, her submissions may be summarized as follows:

a. The Respondent concretely contends that “gender mainstreaming rules are not applied to senior management positions and should not be”. Rather than arguing that the provisions in ST/AI/2020/5 (Temporary special measures for the achievement of gender parity) were “applied to the recruitment process the Respondent instead argues that these provisions do not apply to D-2 [level] recruitment processes”. It is “admitted, therefore, that the rules were not applied”;

b. The Respondent relies “on a carve out in paragraph 3.4 which expressly indicates that it only applies to ‘subparagraphs (a) through (c) below’. Even if it were “accepted this was a carve out for D-2 [level] recruitment it would apply only to 3.4 ‘subparagraphs (a) through (c) below’ and not to the entirety of the ST/AI/2020/5 rules”. By any reasonable reading. “the provision relied upon by the Respondent does not indicate the entirety of ST/AI/2020/5 was irrelevant to the contested recruitment”;

c. By contrast, the Applicant's case that "the rules required to be applied, relies on the contents of the [United Nations] Charter, the [General Assembly] resolutions enacted by the administrative instruction, the stated reasons for promulgation of the rules, the stated scope and further contents of the document" (references to footnotes omitted);

d. It is "clear from the facts and admitted in Respondent pleadings the measures were not applied. The failure to apply these measures will in of itself render recruitment unlawful";

e. The Applicant does "not ground [her] argument in the provisions of ST/AI/2010/3/Rev.1 [(Staff selection system)] as asserted by the Respondent". Nor does "she present an argument regarding what the legal framework ought to be". Instead, she "requests a coherent interpretation of the clear wording of ST/AI/2020/5 supported by the contents of that document and surrounding legal framework". She also "notes that her interpretation is coherent with the general objective unlike that of the Respondent who appears to argue gender balance is important right up to D-1 level but no further".

17. The Respondent, in essence, submits that ST/AI/2020/5 is not applicable to selection decision at the D-2 level.

18. The Tribunal notes that in ST/AI/2020/5, para. 3.4, it is stated

... Entities that have not reached gender parity ... shall apply the temporary special measures ... whenever the entity is selecting a candidate to fill a job opening from either a list of candidates endorsed by a central review body, a competitive examination roster or a list of rostered candidates who applied for a job opening:

19. Accordingly, ST/AI/2020/5 only applies to selection decision where the selection decision is made from either (a) "a list of candidates" that was "endorsed by a central review body" or (b) a competitive examination roster. None of these situations apply in this case. It is unchallenged that the contested selection decision was governed by ST/AI/2010/3/Rev.1 (Staff selection system), which in sec. 3.1

provides that “[t]he process leading to selection and appointment to the D-2 level shall be governed by the provisions of the present administrative instruction”. As per sec. 7.7 of ST/AI/2010/3/Rev.1, for a selection decision at the D-2 level like the one in the present case, the relevant review body is the “Senior Review Group”, and not “the appropriate central review body” in accordance with its sec. 7.5. Also, the selection decision was not made from a roster under ST/AI/2010/3/Rev.1.

20. The question is, however, if the provisions of ST/AI/2020/5 are applicable analogously (*mutadis mutandis*) to a selection process at the D-2 level. The Tribunal does not find this to be the case. Instead, the legislator made a deliberate and explicit effort to limit its application to selection decisions reviewed by “a central review body” and did not mention the Senior Review Group. In this regard, the Appeals Tribunal has stated that the Dispute Tribunal is not “a constitutional court” (see, for instance, *Lloret Alcañiz et al.* 2018-UNAT-840, para. 98) and therefore, cannot assess the reasonableness of the legislator’s choice in a situation like the present one.

21. The legal framework for assessing the lawfulness of the contested selection decision in terms of gender parity and geographical representation is therefore rather the general notions of equality and non-discrimination as pronounced in many international human rights and other resolutions and conventions. In the “Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels” of 24 September 2012 (A/RES/67/1), the General Assembly, in this regard, stated that (para. 2):

... We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.

22. Specifically on the equal rights and non-discrimination of women, the General Assembly stated that (para. 16):

.... We recognize the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law, and commit to using law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system, and recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination ... to secure their empowerment and full access to justice.

Were the relevant policies on gender, racial and geographical representation correctly applied?

23. On the combination of gender, racial and/or geographical concerns not having been observed in the contested decision, the Applicant's submissions may be summarized as follows:

a. The Respondent does "not dispute the information provided in the Application regarding the gender and geographical make up of [the Department of Global Communications] at the time of the decision. These show a "startling imbalance towards males in senior positions and an almost complete underrepresentation of females from the Global South, other than the Applicant";

b. Instead, the Respondent "quotes irrelevant statistics which accrued after the contested decision and thus did not apply to the considerations in that recruitment".

c. The Applicant was "found suitable for [the Post], she was to this extent successful in the recruitment and deemed capable of doing the job". At that point "the decision maker failed to apply existing rules and to give sufficient weight to the consideration of gender and race". This is "a legal argument regarding the weight applied to relevant factors in the process", but this is "only one element as to why the statistics are important";

d. The statistics provided by the Applicant, and not contested by the Respondent, indicate "a pattern on the part of [the USG] for recruitment of

[Western European and Others Group, “WEOG”] candidates. At the time of the contested decision “this was a 100% record of recruiting WEOG candidates and 67% record of recruiting males”.

e. This evidence is “relevant because it demonstrates bias either conscious or unconscious”. This is “why statistics advanced by the Respondent relating to different hiring decisions by different hiring managers are not relevant to the matter at issue”;

f. The Respondent claims “clear and convincing evidence of such bias is required”, but “such evidence of racial bias will never be available”. For the Tribunal to be “capable of addressing issues of racial justice it will be necessary to consider where this can be established from reasonable inference from the facts”. In an international organisation “drawing its personnel from all corners of the globe the pattern of recruitment at the time of the contested decision is clear evidence of bias”.

24. The Respondent, in essence, contends that all relevant policies were lawfully applied in the contested decision.

25. The Tribunal generally notes that, as relevant to the present case, no specific provision is made in ST/AI/2010/3/Rev.1 concerning preferential treatment, or the opposite, regarding candidates from certain regional groups of the United Nations, such as WEOG, or with reference to gender or racial background. On the other hand, art. 101.3 of the United Nations Charter provides that “[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible”.

26. Similarly, in the vacancy announcement for the Post, it was stated that, “Due regard will be paid to the importance of recruiting the staff on as wide a geographical basis as possible. The United Nations places no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs”. Also, it was stipulated that, “The United Nations Secretariat is committed to achieving 50/50 gender balance and geographical

diversity in its staff. Female candidates are strongly encouraged to apply for this position. For this position, applicants from the following Member States, which are unrepresented or underrepresented in the [United Nations] Secretariat as of 31 October 2021, are strongly encouraged to apply”. According to the vacancy announcement and the interoffice memorandum of 7 November 2022 from the USG to the Chairperson of the Senior Review Group regarding “Recommendation for filling of post of Director, D-2, News and Media Division, DGC”, neither the United Kingdom nor India are currently underrepresented in the Secretariat. No mention was made of WEOG, which was therefore not a valid criterion for the decisionmaker.

27. Whereas the figures and statistics on the gender and geographical balance at the D-1 and D-2 levels of the Department of Global Communications speak for themselves, the Tribunal finds that, as relevant to the present case, no legal provisions exist that, in and by themselves, prohibited the USG from recruiting a male from the United Kingdom instead of the Applicant based on their respective gender, racial and geographical backgrounds. Rather, it follows from the 7 November 2022 interoffice memorandum that the gender, nationality and geographic and regional background of the selected candidate and the Applicant were indeed considered along with their performance at the competency-based interview.

Was the interview panel’s assessment of the Applicant’s candidature tainted by bias against her or favoritism of the selected candidate?

28. The Applicant’s submissions may be summarized as follows (references to footnotes omitted):

- a. The “successful white [British] male candidate was marked as having 100% in the video presentation and a perfect score in interview by the exclusively WEOG panel”. This indicates “a complete absence of critical thinking regarding his inputs”. The fact that “the candidate was British and male was specifically referenced by the Panel as a positive for diversity”, despite “him taking over a division with two [British men at the D-1 level]

and the Applicant”. That the Applicant was “a female candidate from the Global South was not referenced”;

b. Assessment of the Applicant’s “answers contains unfair criticism by marking the Applicant down for using an example she was directed towards by the question”. However, “the all-WEOG Panel goes further by expressing suspicion regarding the Applicant’s motives which departs from an objective assessment of her response into demonstrating bias”. No positive comments were “made on her responses even as she was found to have met all the competencies and considered to be suitable for the post, a further indication of uneven treatment and bias in the interview process”;

c. The selected candidate’s “responses to various questions demonstrably did not respond to the specifics of what had been asked”. While the assessment of “an answer may be to an extent subjective the fact this did not disturb the assessment of his interview as perfect is evidence of a lack of critical assessment of his answers”. Notes from the panel “laud what the selected candidate ‘would’ do in the position something impossible to ascertain from an interview and well beyond the competency based framework”;

d. The “subjectivity of the assessment of the successful candidate’s interview is further underlined by the generalised value judgments made regarding his character throughout the interview notes, and even by valued judgments on his character made in notes on the Applicant’s interview”;

e. Contrastingly “the Panel chose to weaponise the Applicant’s [United Nations] experience against her even in circumstances [United Nations] experience was listed as a desirable component of the [vacancy announcement] and proceed to demeaning characterisations of her interview performance and blanket judgments about the appropriateness of hiring internally”. While United Nations experience was “listed as a desirable factor

the selected candidate's complete lack of such has been applied as an advantage". The "Panel's conclusion, notwithstanding these value judgments, was that the Applicant was suitable for the position and could have been recruited without issue".

29. The Respondent essentially contends that the contested decision fell within the discretionary authority of the Secretary-General as the decisionmaker.

30. The Tribunal notes that it follows from the records of the selection exercise, which the Respondent submitted in evidence following the Tribunal's Order No. 027 (NY/2024) dated 7 March 2024, that exactly the same question was posed to the selected candidate and the Applicant during the competency-based interviews. Also, the Applicant has not challenged that the candidates' answers and the interview panel's assessments were appropriately reflected in these records. (In comparison, see *Sobier* 2022-UNAT-1208, para. 25, in which the Appeals Tribunal found the opposite).

31. From the records, it follows that the interview panel, whose composition has not been challenged by the Applicant and which appears to have been lawfully assembled under secs. 1(b) and 7.7 of ST/AI/2010/3/Rev.1, found that the answers of the selected candidate during his interview fully satisfied all 36 applied indicators. In contrast, the interview panel found that the Applicant's answers only fully satisfied 25 of the same indicators whereas her other answers were assessed to have "partially" satisfied the remaining 11 indicators. The selected candidate therefore scored better than the Applicant in the competency-based interview according to the interview panel.

32. Regarding the specifics of the candidates' answers, the Tribunal notes that under the referenced jurisprudence, it is not for the Dispute Tribunal to review their substance, but only to ensure that the outcome of the selection exercise does not lead to an unreasonable and unfair result. This is not the case here. Also, even if lacking expertise in the relevant field of the Post, the Tribunal finds that nothing in the

written summaries of the candidates' answers and the interview panel's deliberations give credence to the Applicant's claim that the contested decision was, in any possible manner, tainted by ulterior motives such as discrimination, bias, or favoritism. Also, it follows from the "assessment report of the substantive video", which the Respondent appended to his reply, that the selected candidate scored 100 percent in the test as compared to the Applicant who only scored 93 percent.

Was the contested decision unlawful?

33. Based on the above, the Tribunal finds that, with reference to the notion of presumption of regularity, the Respondent has minimally demonstrated the lawfulness of the contested decision and the Applicant has failed to rebut this finding with clear and convincing evidence. Accordingly, it follows that relevant procedures were followed, the Applicant's candidature received a full and fair consideration, and relevant legal provisions were applied in a fair, transparent and non-discriminatory manner.

Conclusion

34. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 1st day of April 2024

Entered in the Register on this 1st day of April 2024

(Signed)

Isaac Endeley, Registrar, New York