



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/023

Judgment No.: UNDT/2024/049

Date: 9 August 2024

Original: English

Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

OKETCH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Jérôme Blanchard, HRLU/UNOG

Camila Nkwenti, HRLU/UNOG

Introduction

1. The Applicant is a Humanitarian Affairs Officer, at the P-4 level, with the Office for the Coordination of Humanitarian Affairs (“OCHA”) based in New York. On 17 July 2023, he filed an application contesting his non-selection “for the position of Senior Humanitarian Affairs Officer/Head of OCHA Liaison Office to the African Union” at the P-5 level.

2. On 16 August 2023, the Respondent filed a reply urging the Tribunal to dismiss the application.

3. For the reasons set out below, the application is dismissed.

Facts

4. The Applicant joined the Organization on 13 May 2002 and over the years he has served in different roles and in various locations including Kenya, Uganda, Eritrea, Iraq, Jordan, and Ethiopia primarily with OCHA but also with the United Nations Office to the African Union (“UNOAU”), with a portfolio that would eventually cover 13 countries in the Horn of Africa and Great Lakes Region of Africa. He holds a continuing appointment and is currently based at United Nations Headquarters in New York. During his career he has served within the United Nations-African Union partnership and has contributed, among other things, to the formalization of the OCHA-African Union Commission partnership; the elaboration of the Enhanced Framework on the United Nations-African Union Partnership on Peace and Security; and the Peace and Security Framework of the United Nations and the Inter-Governmental Authority on Development.

5. From 2017 to 2020, the Applicant served in OCHA’s African Union Liaison Office (“AULO”) in Addis Ababa, Ethiopia, where he was charged with supporting the implementation of a decision to downsize the AULO following a change-management process. On 8 February 2018, he was designated Officer-in-Charge (“OIC”) of the

AULO and oversaw its downsizing as well as its re-orientation to a single-footprint entity within the UNOAU. On 11 February 2020, the Applicant was appointed as the OCHA Representative to the African Union in Addis Ababa.

6. On 1 January 2021, the Applicant was reassigned to the External Relations and Partnerships Section (“ERPS”) at OCHA Headquarters in New York. From there, he continued to serve as OCHA’s Non-Resident Representative to the African Union in addition to other functions.

7. At the African Union Humanitarian Summit and Pledging Conference in May 2022, OCHA informed the African Union that the AULO would be re-established in Addis Ababa and that a new Head of Office position would be created. On 14 October 2022, the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator (the “USG/HA-ERC”) updated the African Union Commission on the two-phased approach to re-establish the AULO in Addis Ababa. This entailed the immediate redeployment of the Applicant in his capacity as the OCHA Representative to the African Union, and the commencement of the recruitment of personnel with the intention of having the office operational by 1 January 2023.

8. On 5 November 2022, the Applicant was among the personnel redeployed to Addis Ababa as part of a “surge mission” to support the re-establishment of the AULO. This redeployment was initially planned to last until January 2023. The Applicant continued to serve as interim Head of the AULO throughout this period.

9. On 4 January 2023, OCHA advertised the position of Senior Humanitarian Affairs Officer and Head of Office (of the AULO), at the P-5 level, (the “Post”) with a closing date of 2 February 2023. The Post would be located in the Operations and Advocacy Division (“OAD”) and the selected candidate would work under the overall supervision of the Director of OAD.

10. The Applicant applied for the Post on 16 January 2023 and received an acknowledgement of his application.

11. A total of 151 candidates applied for the Post, including eight candidates who were rostered for the functional title and level of the Post.

12. Due to the urgent need to fill the Post, the hiring manager decided to first review all rostered candidates. During this process he identified the eight rostered candidates, including two who met all the requirements for the Post.

13. At a meeting with the Acting Director of OAD on 21 February 2023, the Applicant was informed that the hiring manager had decided to hire a rostered candidate for the P-5 Post. Since the Applicant was not on the roster, he would be excluded from consideration.

14. On 22 February 2023, the recruitment process through a roster review was finalized, resulting in the selection of a rostered candidate. This was followed by a notification on 23 February 2023 from the *Inspira* recruitment platform informing the Applicant that another candidate had been selected for the Post “from a roster of pre-approved candidates”.

15. On 10 April 2023, the selected candidate reported for duty and took up the Post of Senior Humanitarian Affairs Officer and Head of Office, following the successful handover of the functions by the Applicant.

16. The Applicant then approached the United Nations Ombudsman and Mediation Services for assistance in addressing his concerns and filed a request for management evaluation on 19 April 2023.

17. On 30 April 2023, the “surge mission” to Addis Ababa ended and the Applicant returned to his duties at OCHA’s External Relations and Partnerships Section in New York.

18. On 23 May 2023, the Under-Secretary-General for Management Strategy, Policy and Compliance decided to uphold the contested decision.

Parties' submissions

19. The Applicant's main submissions may be summarized as follows:
- a. While the Administration has the discretionary authority to make the contested decision, such "discretionary authority is not unfettered, even in matters of staff selection". The Dispute Tribunal is required to determine whether the contested decision was legal, rational, procedurally correct, and proportionate.
 - b. The Administration has "the duty to act fairly, justly and transparently in dealing with staff members". Where the Administration provides justification for its exercise of discretion, such justification must be supported by the facts. "The usual presumption of regularity is not absolute".
 - c. The jurisprudence of the Dispute Tribunal provides a general principle for application to all administrative acts: the universal obligation of both employee and employer to act in good faith towards each other includes acting rationally, fairly, honestly and in accordance with the obligation of due process.
 - d. The correct administrative instruction on staff selection applicable in this case is ST/AI/2010/3 Rev.1 (Staff selection system), issued on 1 July 2022. On reviewing this administrative instruction, "it is clear that recruit from roster job openings for generic jobs should be identified as such in advance". In the present case, however, it "remains unexplained" why the decision to advertise a job opening to all candidates on a competitive basis was "cancelled a short time later after the job opening had closed and the candidates were known and presumably assessed". ST/AI/2010/3 Rev.1 "does not provide for switching to another mode of selection at the final stages of the process". The hiring manager has, in effect, "eliminated the required competitive selection process and replaced it with his own candidate".

e. The job opening for this Post was position-specific; it was not advertised as a recruit-from-roster position; and the Administration had not argued at the time that there was any urgent need to fill the Post. The Applicant, who was serving as OCHA's Representative to the African Union, had been redeployed to Addis Ababa in November 2022 with a mandate to re-establish the Liaison Office there. No urgency has been demonstrated "given that the Applicant had been performing the functions of the post for years and was able to continue doing so". Thus, there were no additional financial implications as the costs for running the office were already budgeted.

f. Once the job opening was advertised and applications were received, "it was the duty of the Organization to ensure that the candidates received fair consideration". Yet, after only a few days, the list of applicants was put aside "in favour of a non-competitive appointment of a candidate favoured by the hiring manager, on the grounds that he was on a roster". The rationale given for the abrupt change in the selection process was that there was an urgent need to finalize the process, but this "*ex post facto* justification does not stand up to scrutiny".

g. Staff members are entitled to be given full and fair consideration, based on the information submitted in their application and according to the evaluation criteria of the published job opening. "The process does not envisage changing the requirements [...] in the middle of the exercise". This procedural and substantive irregularity "renders the decision manifestly unreasonable and unlawful".

h. The Tribunal should order the production of all correspondence and documentation relating to the filling of the Post including "records involving the decision on filling the post after the closing date of the job opening, and any contemporaneous justification for the final selection decision".

i. It is not disputed that the Applicant “performed the functions of the P-5 post for five years”. By carrying out higher-level functions without receiving any special post allowance, he was “being exploited and deprived of equal work for equal pay, in violation of basic employment norms”. While he did not have a right to preferential treatment in the selection process, he had a “reasonable expectation that his candidacy would receive fair consideration”. Given the lack of transparency by the decision-maker, the presence of bias can be inferred.

j. Finally, under the applicable legal framework, the Applicant was entitled to be placed in a different position since he was not appointed to the Post.

20. The Respondent’s main contentions may be summarized as follows:

a. The contested decision concerns a matter of staff selection, “an area where the Administration enjoys a broad degree of discretion”. Consequently, judicial review by the Dispute Tribunal should be limited to assessing whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner.

b. Further, “as per the principle of presumption of regularity, there is always a presumption that official acts have been regularly performed [...] and the burden to prove otherwise rests with the Applicant”. In the present case, the applicable rules were correctly applied, and the Applicant has failed to establish any irregularity or improper motive. The Applicant has failed to meet his burden to prove his allegation that the selection was discriminatory and influenced by extraneous considerations.

c. The plain wording of ST/AI/2010/3 Rev.1 (Staff selection system) “unambiguously bestows” on the hiring manager the discretion to select a candidate from the roster, and this has been “explicitly confirmed” by the jurisprudence of the Appeals Tribunal.

d. The requirement for a hiring manager to review all released applications “does not apply to roster selections” and “the previous administrative instruction on staff selection (ST/AI/2006/3) has been specifically amended in order to remove such requirement”.

e. Similarly, “there is no requirement under ST/AI/2010/3 Rev.1 or elsewhere that recruitments from the roster need to be identified as such in advance”. The requirement for a job opening to specify the roster purpose “only applies to generic job openings issued for the purpose of creating and maintaining rosters of candidates for immediate and anticipated job openings”.

f. “Further, while in the present case, it was important to complete the selection process as expeditiously as possible, roster recruitment is not limited to situations of urgency and the hiring manager is not required to provide any justification for such mode of selection”. The Head of Entity has the “discretionary authority to select a candidate from the roster and is not required to provide any justification for such decision”.

g. Moreover, the Applicant’s reference to a “non-competitive appointment is equally misplaced” since the rostered candidates have already undergone a competitive recruitment process” and have been pre-approved by a central review body for similar functions.

h. In the present case, “there was an urgent need” to fill the position following the decision by the USG/HA-ERC to re-establish the AULO in Addis Ababa and to have the office operational in a timely manner. “This high-level commitment logically required an expeditious completion of the recruitment process”.

i. Additionally, the Applicant’s argument that there was no urgency because he had already filled the functions of the Post for five years is incorrect “since the responsibilities associated with the new position were significantly broader than the responsibilities performed by the Applicant”. The creation of

the Post “did not constitute a reclassification of the position encumbered by the Applicant, who retained his position”. Consequently, the Administration had no obligation to identify another suitable position for the Applicant.

j. Under the United Nations recruitment rules and principles, “there is no room” for the Applicant to have had a “legitimate expectation of consideration for promotion”. Neither his performance documents nor the terms of reference for the “surge mission” suggested that his temporary responsibilities as OCHA Representative to the African Union would become permanent or would result in a promotion.

k. The Applicant cannot claim that he was deprived of his right to equal pay for equal work since he never submitted a request to be paid a special post allowance (“SPA”), and the duties outlined in his workplan clearly show that “he did not assume the full range of responsibilities associated with the higher position”. In any event, the issue of SPA is outside the scope of the present case.

l. Finally, the Applicant has failed to provide any reliable evidence of the harm he has allegedly suffered. Therefore, he is not entitled to receive any compensation.

Considerations

21. It is well established in the jurisprudence of the Appeals Tribunal that the Administration has broad discretion in matters of staff selection (see *Nikolarakis*, 2016-UNAT-652, para. 28; citing *Nwuke* 2015-UNAT-506, paras. 48-49). However, this discretion is not unfettered and is subject to judicial review. In reviewing such decisions, it is not the role of the Dispute Tribunal to substitute its own decision for that of the Administration. Rather, the Dispute Tribunal’s role is to examine “(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration” (*Lemonnier* 2017-UNAT-762, paras. 30-31. See also *Pinto*, 2018- UNAT-878; *Abbassi* 2011-UNAT-110, para. 23; *Majbri* 2012-UNAT-200, para. 35).

22. The role of the Dispute 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” (*Ljungdell* 2012-UNAT-265, para. 30).

23. In the application, the Applicant contests the “denial of full and fair consideration for the position of Senior Humanitarian Affairs Officer/Head of OCHA Liaison Office to the African Union”. He alleges that due to the Administration’s decision to switch the mode of recruitment and to select a rostered candidate for the job opening, he was excluded from consideration because he was not on the roster.

24. The available evidence, however, shows that this was not a case of cancellation of the competitive selection process as alleged by the Applicant. Rather, when the job opening was advertised, among the candidates who applied were eight rostered candidates, and one of them, who met all the requirements for the job opening, was selected. The Applicant was not rostered for the functional title and level of the Post.

25. The only issue for the Tribunal to resolve, therefore, is whether the decision to select a candidate from the roster after the job opening was advertised and the Applicant had applied, represents a failure by the Administration to afford the Applicant’s candidacy full and fair consideration.

26. That the job opening had been advertised with a view to subjecting it to a competitive selection process is not disputed. Also not denied is that the Administration later filled the Post with a candidate from the roster.

27. Citing sections 4.3, 7.2, 7.3, 7.4, 7.5, 7.6 and 9.6 of Administrative Instruction ST/AI/2010/3/Rev.1 (Staff selection system), the Applicant argues that recruit-from-roster processes for generic job openings should be identified as such in advance. Further, he argues that in this case, it was decided to advertise a job-specific opening and open it to all candidates on a competitive basis. To him, it is not clear why the decision to initiate a competitive selection process was taken and then cancelled a short time after the job opening had closed and the candidates were known and presumably assessed.

28. The Tribunal notes that this was a vacancy-specific and not a generic job opening. The fact that it was advertised and opened to all candidates on a competitive basis does not turn it into a generic job opening. Since it was a vacancy-specific job opening, sections 4.3, 7.2, 7.3, 7.4, 7.5, 7.6 and 9.6 of ST/AI/2010/3/Rev.1, on which the Applicant relies, are inapplicable.

29. The applicable rule is sec. 9.5 of ST/AI/2010/3/Rev.1, which provides as follows (emphasis added):

...

Section 9
Selection decision

...

9.5 Candidates for **vacancy-specific job** openings up to and including at the D-1 level included in a list endorsed by a central review body shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and higher categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time as the present administrative instruction is amended. **Candidates included in the roster may be selected by heads of entity for a subsequent job opening without reference to a central review body.**

...

30. The Appeals Tribunal has on occasion pronounced itself on the import of the above legal provision. According to the Appeals Tribunal, “[t]he plain wording of Section [9.5] makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position” (*Charles* 2014-UNAT-416, para. 28).

31. Crucially, the Appeals Tribunal also stated that there is no requirement in this provision for the head of department to first review all non-rostered candidates. If the head of department’s discretion is subject to such a requirement, then it would be essential for the instruction to provide as much. The Appeals Tribunal also noted that,

on the contrary, the previous version of this provision (sec. 9.4 of ST/AI/2006/3) was amended specifically to remove such a requirement (*Charles* para. 28).

32. Upon the Appeals Tribunal re-affirming its position in more recent judgments, the issue is considered settled. (See, for instance, *Skourikhine* 2014-UNAT-468; *Nwuke* 2015-UNAT-508; and *Nouinou* 2020-UNAT-981).

33. The foregoing jurisprudence nullifies the Applicant's argument that ST/AI/2010/3/Rev.1 does not provide for switching to another mode of selection at the final stages of the process. Moreover, the prevailing jurisprudence does not even require the decision-maker to provide any justification for roster recruitment, which renders the arguments relating to the urgency of the matter misplaced.

34. The jurisprudence cited by the Applicant is distinguishable from the present case in that, in the cases he has cited, the Tribunal either found evidence of retaliation (*Rockcliffe* 2022-UNAT-1207) or proof that the selection criteria which were applied differed from those in the job advertisement (*Neault* UNDT/2012/123, affirmed in *Neault* 2013-UNAT-345). In the present case, there is no proof that the selection decision was either discriminatory or influenced by extraneous considerations.

35. The assertion that the Applicant had a reasonable expectation that his candidacy would receive special consideration since he had performed the functions of the Post for five years is similarly misplaced. He does not seriously dispute the fact that the creation of the Head of Office position was not a reclassification of his position. Moreover, the newly created Post was at the P-5 level whereas the Applicant's position was at the P-4 level.

36. Crucially, the terms of reference for the surge mission in November 2022 clearly provided that the Applicant's redeployment was to last until January 2023 pending completion of the transition of the Liaison and Representation to the African Union portfolio from OCHA's Humanitarian Financing and Resource Mobilization Division ("HFRMD") to the Operations and Advocacy Division ("OAD"). There was therefore no basis for such an expectation.

37. Complaints relating to the Applicant's alleged deprivation of equal pay for equal work are outside the scope of the present application and will therefore not be considered here.

38. The Tribunal also recalls that in matters of staff selection and appointment, there is a presumption of regularity concerning the performance of official acts (see *Krioutchkov* 2021-UNAT-1103, para. 29; *Rolland* 2011-UNAT-122, para. 26). Accordingly, in a recruitment procedure, if the Administration can minimally show that a staff member's candidature was given full and fair consideration, the burden of proof shifts to the staff member, who must then show through clear and convincing evidence that he or she has been denied a fair chance of promotion (see *Flavio Mirella* 2023-UNAT-1334, para. 61).

39. In the present case, the Applicant has failed to establish through clear and convincing evidence that the selection process for the Post was tainted by any unlawful actions or that he suffered any harm as a result of the contested decision. Accordingly, his application stands to be dismissed and his claim for compensation must be rejected.

Conclusion

40. The Tribunal finds no irregularity affecting the contested decision. The application is therefore dismissed for lack of merit.

(Signed)

Judge Margaret Tibulya

Dated this 9th day of August 2024

Entered in the Register on this 9th day of August 2024

(Signed)

Isaac Endeley, Registrar, New York