



Before: Judge Eleanor Donaldson Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

COKANASIGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. The Applicant, a staff member of the United Nations Development Program (“UNDP”), contests the decision not to select him for the position of Procurement Analyst (National Officer B level, “NOB”) in the UNDP Pacific Office in Fiji.

2. For the reasons explained below, the Tribunal rejects the Applicant’s case as he failed to establish that there was any shortcoming in the decision-making process leading to his non-selection.

Facts and procedural history

3. On 1 September 2008, the Applicant commenced employment with UNDP on a fixed-term appointment at the G-5 level in the UNDP Pacific Office in Fiji. On 1 September 2010, he was appointed Human Resources Analyst, NOB, in the same UNDP Office. His fixed-term appointment (“FTA”), expiring on 31 May 2023, was extended during the challenged selection process, and he separated from service on 31 August 2023.

4. In June 2022, the Regional Bureau for Asia and the Pacific (“RBAP”) commenced a strategic review of the UNDP Pacific Office in Fiji to align its structure with emerging development challenges and efficiently provide the support the region required. As a result of the review, the Strategic Review team made recommendations for changes to the organizational structure of and functions within the Office, which were approved by the Director, RBAP, in August 2022. New positions were created while others were reclassified or abolished, including the position the Applicant encumbered.

5. By letter of 27 February 2023, the Resident Representative *ad interim* (“RR”), UNDP Pacific Office in Fiji, informed the Applicant that a change management exercise was conducted in accordance with the “UNDP Strategic Review Note on the HR Process” and that he remained an “affected” staff member following the completion of the “non-competitive” position matching process. The RR further

informed the Applicant that he would need to compete in the forthcoming Job Fair to find alternative placement as an affected staff member.

6. The Applicant did not immediately accept that he should compete in the Job Fair. In his exchanges with the Administration, he asked whether he could instead be granted a termination package as he identified this as an option in the Strategic Review Note. Upon being informed that a termination package could not be applied to him since his FTA would shortly end in May 2023, the Applicant escalated his enquiries ultimately seeking the Ombudsman's intervention. Enquiries continued until near to the closing-off time for applications in the Job Fair when the Ombudsman confirmed the advice that the Applicant should apply for a position.

7. On 13 March 2023, the Applicant applied for a Procurement Analyst NOB position, one of the new vacant posts created because of the restructuring and to which affected staff members could apply.

8. On 5 June 2023, the Applicant was informed of the decision not to select him for the Procurement Analyst NOB position ("the contested decision").

9. On 11 July 2023, the Applicant requested management evaluation of his non-selection.

10. On 21 August 2023, the Applicant received the outcome of his request for management evaluation. The contested decision was upheld.

11. On 13 November 2023, the Applicant filed the present application.

12. On 12 December 2023, the Respondent filed his reply.

13. On 15 December 2023, the Applicant filed an additional submission in support of his application.

14. By Order No. 15 (GVA/2024) of 6 February 2024, the Tribunal instructed the Applicant to file his comments on the Respondent's reply by 7 March 2024. It also instructed the parties to explore an amicable settlement of the dispute and revert to the Tribunal in this respect by 14 March 2024.

15. On 28 February 2024, the Applicant filed his comments on the reply.
16. On 12 March 2024, the Respondent informed the Tribunal that the parties explored the possibility of an informal settlement but that the matter could not be resolved amicably.
17. By Order No. 103 (GVA/2024) of 4 September 2024, the Tribunal found that a hearing was not required in the present case and instructed the parties to file closing submissions by 19 September 2024, which they did.

Parties' submissions

18. The Applicant's principal contentions are:
 - a. The Administration did not exercise its duty of care properly. The Job Fair process did not comply with the Organizational Unit Restructuring policy, which was rolled out on 1 November 2022. The Administration used an outdated policy for the change review exercise instead of the "HR Workforce Management Policy", which deals with Organizational Restructuring;
 - b. He was not given full and fair consideration in the shortlisting process. His 14 years of experience in Human Resources ("HR") were not properly considered as they involve aspects of business administration, organizational management and public administration. It also covered "various duties including some engagement with procurement work over the years";
 - c. In addition to his HR experience, he acted as Operations Manager for many months. Therefore, he argues that he had more than two years of progressive experience in "procurement management, business administration, public administration, or other similar areas," as the vacancy required;

d. Contrary to what the Administration verbally informed him was the reason for his non-selection, he holds a CIPS2 Certificate. While he did not attach his CIPS2 certification to his application, he indicated on page three of his P11 form that he had obtained an “Introductory Certificate in Public Procurement”;

e. The recruitment process was tainted by discrimination and bias. Gender discrimination occurred as he was the only male in the candidate pool and was not selected. There was also discrimination, he claims, in that many persons who were not qualified were selected for other positions. The Applicant contends that bias against him due to his raising queries during the organizational change process motivated the non-selection decision; and

f. The Applicant requests that the contested decision be set aside and that he be paid an indemnity for his loss of employment with UNDP.

19. The Respondent’s principal contentions are:

a. The decision not to select the Applicant for the Procurement Analyst NOB position was proper. His candidacy was given full and fair consideration. The Applicant did not meet the minimum years of progressive experience required and, on that basis, was not qualified for the position;

b. The Applicant’s application to the position did not reflect that he had two years of progressive experience in any of the relevant areas as required. In his application, he identified that he had temporarily carried out the functions of an Operations Manager, which was considered relevant experience similar to procurement management. However, he had done so for only six months, well short of the minimum requirement of two years;

c. UNDP considered the Applicant’s full work experience as indicated in his cover letter and P11 form, which were part of his application;

d. The Applicant did not explain how his experience as an HR analyst should be considered relevant for a position that concerns procurement. Rather, in his cover letter, he only described his various HR roles with UNDP and highlighted that he was “well versed with performance management tools as [he has] been through three different systems during [his] 14 years in UNDP”. Given that this experience does not, on its face, appear to be relevant, it was reasonable for UNDP to determine that the Applicant did not meet the minimum years of required relevant experience;

e. Similarly, the Applicant’s candidacy did not reflect any demonstrated experience in the other procurement-related skills outlined in the vacancy announcement, like strategic sourcing or supplier management;

f. The Applicant did not include his CIPS level 2 certificate in his application or indicate that he had obtained such a certificate. UNDP could not consider information the Applicant did not provide as part of his application to the position. Regardless of whether he had obtained the certification, he did not meet the minimum years of progressive experience required;

g. The Applicant has not met his burden to show that the non-selection decision was flawed. He submits no evidence in support of his allegations of “discrimination” and “gender bias”; and

h. The Applicant is not entitled to any damages.

Consideration

Legal framework

20. Article 101.1 of the United Nations Charter and staff regulations 1.2(c) and 4.1, provide that the Secretary-General has broad discretion in matters of staff selection (see *Abbassi* 2011-UNAT-110, para. 24 and *Krioutchkov* 2022-UNAT-1248, para. 28).

21. When judicially reviewing administrative decisions regarding staff selections, 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 *Toson* 2022-UNAT-1249, para. 28).

22. The Appeals Tribunal has held that in said review process, “the Tribunal’s role is not to substitute its own decision for that of the Administration” (see, *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).

23. 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 decision-maker’s decision” (see *Sanwidi* para. 42).

24. In *Sanwidi*, para. 40, the Appeals Tribunal determined that

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. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

25. In staff selection cases, the Appeals Tribunal 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 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 *Verma*, para. 14).

26. 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 *Rolland* 2011-UNAT-122, para. 21 and *Verma*, para. 14).

Findings on whether the Applicant was given full and fair consideration

27. The vacancy announcement for the Procurement Analyst NOB position provided under “Experience, Knowledge, and Skills” as follows:

Minimum [two] years (with Master’s degree) or [four] years (with Bachelor’s degree) of progressive experience at the national and international level in procurement management, business administration, public administration or other similar area is required.

...

CIPS2 certification is a mandatory requirement.

Demonstrated experience in strategic sourcing concepts, principles, and methods, and ability to apply to strategic and/or practical situations.

Demonstrated experience to find, evaluate and engage suppliers of goods and services.

Demonstrated experience in supplier management concepts, principles and methods, and ability to apply to strategic and/or practical situations.

28. On a review of the Applicant's cover letter, P11 form, and all attachments to his application for the Procurement Analyst position (see annex R1 to the Respondent's reply), it is evident that the relevant qualifications required for the position were not adequately addressed.

29. In his filings before the Tribunal, the Applicant has underscored that his application to the position in the Job Fair was submitted on the last day. For that reason and because he was abroad on vacation, the circumstances were not ideal. The rushed approach may have accounted for omissions in the job application.

30. Although the Applicant's circumstances may understandably have impacted the effectiveness of the content of his application, that *per se* is not a basis for finding that his application should have received more favourable consideration. The Appeal Tribunal's jurisprudence cited above makes clear that the fairness and rationality of the Respondent's decision-making process in non-selection cases must be reviewed based on the information available when the decision was made.

31. As is the case in any competitive recruitment process, the Applicant, in seeking to be selected, was required to include all relevant information that would present his case for selection in the best light. The Respondent's uncontradicted position is that the Applicant failed to include in his application the information required to establish his qualifications in more than one respect.

32. Firstly, as recounted by the Applicant, he was told verbally that the reason for his non-selection was that he did not have CIPS level 2 certification. This qualification was a mandatory requirement. The fact that the Applicant referred on page three of his Personal History Form to having received an Introductory Certificate in Public Procurement is immaterial as he did not specify, in clear terms, that he had obtained the required CIPS level 2 certification.

33. Secondly, the Respondent's reason for not selecting the Applicant was that he presented no narrative in his application to prove that he had two years of progressive experience in procurement management. The six-month acting period as an Operations Manager was not sufficient. The Applicant did not include anything in his cover letter to advocate on his behalf that his Human Resources

experience was similar enough to procurement management, business administration, public administration, or other similar area.

34. Furthermore, the Applicant did not indicate anything in his cover letter to demonstrate that he had experience in procurement-related matters such as strategic sourcing concepts. Instead, the Applicant's cover letter highlighted his proficiency in Human Resources management-related skills, such as using performance management tools.

35. On the basis of the information provided by the Applicant, the Respondent's decision not to select him cannot be faulted as being unfair. The Applicant's suggestion in his submissions that the selection panel ought not to have relied only on his application but should have sought out managers with knowledge of his work over the years to supplement it with information about his procurement experience is unsupported by any authority.

36. On the contrary, it is clear from the Appeals Tribunal's jurisprudence that the presumption of regularity in the Respondent's selection process can be established by even minimally showing that full and fair consideration was given to the candidate. In the present case, the Respondent has established that full and fair consideration was given to the Applicant during the Job Fair process. The Applicant has failed to prove that the Respondent was required to conduct further research beyond the information submitted when he applied for the job if, on the face of it, he did not meet the required qualifications.

Findings on whether the correct procedure was followed

37. The implementation timeline of relevant regulatory frameworks determines the applicable procedure. The Applicant has presented no document contradicting the Respondent's case that the Organizational Unit Restructuring Policy ("OURP"), which the Applicant says should have been followed, only became effective on 1 November 2022. That was after the Director, RBAP, approved the organizational structure and function changes in August 2022. Thus, the new policy could not apply retroactively to the restructuring of the UNDP Pacific Office in Fiji and the Applicant's non-selection.

38. Moreover, the Applicant has merely contended that the wrong policy was applied. He has not specified how the process would have been fairer or how a different result would have been achieved by applying the newer policy.

39. The policy that the Respondent applied in the “UNDP Strategic Review Note on the HR Process UNDP Pacific Office in Fiji” included provisions for full and fair consideration of applicants during the Job Fair process. It clarified that the Job Fair “is the transparent competency-based assessment of candidates *where priority is given to the affected staff*, following the order of retention. **Affected staff** is staff whose positions are affected by the change process by being abolished or have materially changed” (emphasis in the original).

40. This prioritization was further explained as placing affected staff members on permanent appointments ahead of those on FTAs like the Applicant. Then, as between affected staff on FTAs, they would be prioritized for retention but only over equally qualified external candidates. This retention policy accords with staff rule 9.6(c). The policy was appropriately applied against the Applicant since he did not meet the qualifications. The Applicant’s contention that the Respondent’s decision applied an incorrect policy fails.

Findings on whether the applicable procedure was applied in a fair, transparent and non-discriminatory manner

41. The focus of the Applicant’s contentions as to discrimination and bias in his non-selection shifted in the extent of its scope from the time of his management evaluation request to his closing submission. The Tribunal has considered all aspects of the allegations of discrimination and bias. The finding reached is that the Applicant presented no relevant supporting evidence.

42. Regarding the allegation of gender discrimination, the Applicant sought to persuade the Tribunal that since he was the only male candidate and he was not selected, his non-selection was on that basis. However, he presented no evidence that the selected candidate failed, as he did, to prove that she was qualified for the position.

43. The Applicant presented some information about candidates for other positions who he viewed as unqualified but who had been selected. There was no probative relevance in the said information. The Applicant did not establish that those candidates failed, as he did, to demonstrate in their cover letters or personal history forms that they met the qualifications for the position they sought.

44. Finally, the Applicant contends that there was bias against him because he made many queries during the change management process. This is not supported by evidence.

45. In circumstances where the Applicant was required to rebut the presumption of regularity in the selection process with clear and convincing evidence, he has failed to do so.

Conclusion

46. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Eleanor Donaldson Honeywell
Dated this 27th day of September 2024

Entered in the Register on this 27th day of September 2024

(Signed)

René M. Vargas M., Registrar, Geneva