



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

RUSSO-GOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jameel Baasit, UNOPS

Introduction

1. On 5 February 2019, the Applicant, a former Project Manager at the United Nations Office of Project Services (“UNOPS”), filed an application in which he challenges “the decision of the Administration not to select him for the position of Business Development Specialist P3 and the position of Process Design Advisor P4”.
2. On 5 February 2019, the Registry acknowledged receipt of the application and instructed the Respondent to file a reply within the mandatory 30-day time limit set out in art. 10 of the Dispute Tribunal’s Rules of Procedure. This case was not assigned to a specified Judge.
3. On 7 March 2019, the Respondent duly filed his reply in which he claims that the application is without merit.
4. By Order No. 48 (NY/2019) dated 22 March 2019, the Duty Judge rejected the Applicant’s motion for interim measures.
5. On 1 April 2020, the case was assigned to the undersigned Judge.

Consideration

The Tribunal’s limited judicial review regarding a non-selection decision

6. It is trite law that the Dispute Tribunal’s judicial review is limited. In general, the Appeals Tribunal often refers to its judgment in *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as “the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate”. The Appeals Tribunal further held that “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[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".

7. Specifically regarding selection and promotion decisions, in light of the Administration's broad discretion in such matters, the Appeals Tribunal has held that these types of decisions are governed by the so-called "principle of regularity". This means that if the Respondent is able "to even minimally show that [an applicant's] candidature was given a full and fair consideration, then the presumption of law stands satisfied". To rebut this minimal showing, the applicant "must [then] show through clear and convincing evidence that [s/he] was denied a fair chance of promotion" in order to win the case (*Lemonnier* 2017-UNAT-762, para. 32).

8. In line herewith, the Appeals Tribunal stated in *Verma* 2018-UNAT-829 (affirmed in *Kinyanjui* 2019-UNAT-932) that, "In terms of the discretion vested in the Administration, under Article 101(1) of the United Nations Charter and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of the Appeals Tribunal has clarified that, in reviewing such decisions, 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. The Tribunals' role is not to substitute their decision for that of the Administration" (see para. 13).

9. In *Verma*, the Appeals Tribunal further held that, "Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion" (see para. 14).

10. To minimally show that an applicant's candidature was given a full and fair consideration, the Respondent must therefore typically, at minimum, be able to produce a contemporaneous written record to demonstrate that the candidature of the

applicant in question, as a matter of fact, received such consideration. Such written evidence can, for instance, include documentation for the established grading methodology, the applicable passing score, the actual grades given, any assessment report(s) and memoranda, and any other relevant material.

The scope of the case

11. The Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

12. The Applicant submits in the application that, “[t]he Administration is not compliant with *Timothy* 2018-UNAT-847 and UN jurisprudence to let [him] participate on a preferred or non-competitive basis in the mandatory order established by Staff Rule 9.6(e), without having to go through a competitive selection process”.

13. The Tribunal notes that staff rule 9.6(e) solely concerns the situation where a staff member is separated from service because her/his appointment is terminated and not where, as in the present case, it is not renewed. In line herewith, the Tribunal refers to the Appeals Tribunal in *Nouinou* 2019-UNAT-902, paras. 31 and 32.

14. The issues of the present case may therefore be defined as:

- a. Were the decisions not to select the Applicant for the respective positions as (i) Business Development Specialist and (ii) Process Design Advisor proper in light of the Tribunal’s limited judicial review?
- b. If not, what remedies are the Applicant entitled to?

The applied legal framework

15. The Tribunal notes that the parties have not produced the selection rules according to which any of the relevant selection exercises at UNOPS were conducted noting that the Tribunal is not in the possession thereof.

16. As the Respondent conducted the selection exercises, he is to produce these UNOPS rules.

The factual circumstances as presented by the parties

17. The Respondent states in his reply that he “does not accept the factual assertions in the Application, unless explicitly expressed in this Reply”. When presenting his version of the facts, the Respondent, however, nowhere explicitly accepts any of “the factual assertions” made by the Applicant although some appear to be reiterated or are evidently proved by the written record.

18. With due regard to judicial economy, statements such as that of the Respondent are not helpful for the Tribunal to determine the matters before it. To ensure a fair and expeditious disposal of the case and to do justice to the parties, the parties are therefore jointly to produce two separate lists of the facts that they agree on and of the facts that they disagree on.

Further evidence

19. The Tribunal observes that neither party has requested the production of any further evidence. Under art. 18.2 of the Dispute Tribunal’s Rules of Procedure, the Tribunal may, however, “order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings”.

20. The Applicant submits that with reference to some documentation apparently provided to him regarding the selection processes (some emails supposedly from the hiring managers, which are appended to the application), his grades cannot be verified as he states in the application that, “[t]he Administration didn’t provide any pieces of evidence (stamped time and proof of authentication) that [the Applicant’s] written assessment was not considered by the evaluation panel, there are no traceable pieces of evidence that for Business Development Specialist [the Applicant] was candidate ‘A’ and for Process Design Advisor [the Applicant] was candidate ‘F’”.

21. The Respondent has not provided any evidence in response to the Applicant’s specific submissions, but instead submits two packages of documents from each of the selection exercises, but neither sheds any further light on how the written tests were conducted or graded in reference to the Applicant’s case. The Respondent is therefore to submit all relevant documentation thereon, and in order to ensure confidentiality, can do so by redacting the names of any other candidates.

Closing statements

22. Subsequent to the parties’ submissions listed above, the Tribunal finds that the case is ready for adjudication on the papers on the present record. Consequently, the parties are thereafter to be ordered to file their written closing statements.

IT IS ORDERED THAT:

23. By **4:00 p.m. on Monday, 27 April 2020**, the Respondent is to file:

- a. The UNOPS rules according to which the relevant selection exercises were conducted;
- b. All relevant documentation as to how the respective written tests were conducted and graded in reference to the Applicant (names of other candidates can be redacted from the documents);

24. By **4:00 p.m. on Monday, 27 April 2020**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support an agreed fact, clear reference is to be made to the appropriate annex;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

25. By **4:00 p.m. on Monday, 11 May 2020**, the Applicant is to file his closing statement, which is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;

26. By **4:00 p.m. on Monday, 18 May 2020**, the Respondent is to file his closing statement responding to the Applicant's closing statement at a maximum length of five pages, using Times New Roman, font 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;

27. By **4:00 p.m. on Monday, 25 May 2020**, the Applicant is to file a statement of any final observations responding to the Respondent's closing statement. This statement of final observations by the Applicant must be a maximum of two pages, using Times New Roman, font 12 and 1.5 line spacing. It must be solely based on

previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage.

28. Unless otherwise ordered, on receipt of the last-mentioned statement or at the expiration of the provided time limit, the Tribunal will adjudicate on the matter and deliver Judgment based on the papers filed on record.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 3rd day of April 2020