
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/009
Judgment No.: UNDT/2018/108
Date: 2 November 2018
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Bettina Gerber, UNOG

Introduction

1. The Applicant is a former Senior Protection Officer with the United Nations High Commissioner for Refugees (UNHCR).
2. In his application

Facts

10. The Applicant was initially appointed to UNHCR in November 2008 as a P-3 Legal Officer (Human Resources) in the Legal Affairs Service (LAS) in Geneva. After serving two years in that capacity, the Applicant was transferred to a position of a Senior Protection Officer in Sudan. While serving in that position, the Applicant accepted a six-month temporary assignment as a P-3 Legal Officer in Nairobi. The Applicant then took a two year leave of absence from July 2013 until June 2015.¹

11. Upon his return, the Applicant resumed service as a P-4 Senior Protection Officer in Rabat, Morocco.²

12. On 28 January 2015, the Principal Legal Adviser/Head, Legal Affairs Service (LAS), UNHCR, requested the UNHCR Budget Committee for an allocation of additional funds for the creation of a P-4 Senior Legal Officer, (Administration of Justice); a Legal Officer (P-3) post in Nairobi and an Executive Assistant (P3) post in Geneva as of 1 March 2015.³

13. In terms of the UNHCR recruitment system, at the times material to this application it was governed by the UNHCR Revised Policy and Procedures on Assignments (PPA), which foresaw the procedure as described below.

a. Managers provide the Division of Human Resources Management (DHRM) with the written operational context and the position profile requirements for the purposes of a matching exercise (para. 68(a) of the PPA). In the present case, LAS provided DHRM with the written operational context and the profile requirements on 30 April 2015.

b. UNHCR advertises vacancy announcements in bulk through bi-annual compendia of job openings issued in March and September of each year. If

¹ Annex 1 to the reply.

² *Ibid.*

Annex 2 to the reply.

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CMSS short-list internal applicants in accordance with the matching criteria, that is, the minimum requirements set out in the job description. External applicants are short-listed by the Talent Outreach and Acquisition Section (TOAS), DHRS (paras. 71, 86(3) and 79(a) of the PPA respectively). In the present case, APS/CMSS conducted the initial screening of internal job applicants to determine their eligibility. Three eligible internal candidates were shortlisted, including the Applicant, specifically, the minutes of the DHRM matching meeting of 2 September 2015 state:

The candidate meets the requirements for this position, as per operational context and/or Job Description.⁶

Moreover, TOAS short-listed four external applicants in accordance with para. 71 of the PPA.

e. Once the pre-selection has been carried out, DHRM presents the short-list to the manager of the vacant position (Hiring Manager) for his/her views on their suitability. The Hiring Manager is requested to provide his/her views to DHRM in writing (para. 68(e) of the PPA). DHRM is not bound by the Hiring Manager's views but must nevertheless take them into account when conducting the matching exercise.

f. With respect to the Applicant, the Hiring Manager concluded that he did not meet the minimum requirements for the job opening:

[The Applicant] joined UNHCR from IOM in November 2008 as a Legal Officer (Human Resources) in the Legal Affairs Service in Geneva at the P-3 level. In November 2010, he was assigned to the position of Senior Protection Officer in Kassala, Sudan. At the end of his assignment in Sudan, he was temporarily reassigned as Legal Officer with PSFR, Division of

⁶ Respondent's reply to Order No. 178 (NBI/2018) – Annex 1, DHRM Shortlisting Matrix of 2 September 2015, at page 7.

External Relations in Nairobi for a period of 6 months, following which he took SLWOP in July 2013. [...]

Felix does not meet these essential requirements. While he worked under my supervision on HR and administration of justice matters when he was assigned to LAS, the new UN internal justice system was introduced in July 2009 and Felix took up his position as Senior Protection Officer in Kassala in November 2010, 15 months thereafter. While Felix referred to previous experience in IOM, this is of limited relevance as it was prior to the introduction of the new UN justice system, and IOM parti[ci]pates in the ILO Administrative Tribunal system, not the UN system. Since leaving LAS Felix he has no longer been involved in UN internal justice matters. Having very limited exposure to the new justice system and not having worked in this field for several years and taking into consideration the operational context, he is not considered a suitable candidate for this expert position.⁷

- g. The other internal candidate (other than the Applicant) was evaluated by the Hiring Manager as follows:

[Candidate] joined UNHCR in 2008 as an Associate Legal Officer in LAS based in Budapest at the P-2 level. Prior to that, he worked in the Legal Affairs Service from September 2006 to January 2008 as a consultant. In November 2010, he returned to the Legal Affairs Service in Geneva as Legal Officer, Human Resources and was appointed to the position in October 2011. He was promoted to the P-3 level in February 2014. This candidate participated in a number of emergency missions during this period, had a solid track record in LAS and works on a wide range of legal issues, with an emphasis on privileges and immunities, Human Resources

representing the Organization before the UNDT on an autonomous basis entailing significant reputational and financial risk to the Organization. He is therefore not considered as a suitable candidate for this expert P-4 position.⁸

h. Where the appointment of an external candidate is being considered, the external and internal applicants selected by the Hiring Manager are interviewed by a panel which comprises of at least three members, including the Hiring Manager or his/her designated representative, a designated representative of DHRM coordinated by APS and an expert in the same functional area (para. 71 of the PPA). Given that neither the Applicant nor the other internal candidate were deemed suitable by the Hiring Manager, only external candidates were invited for the interview.⁹ (It is not ascertainable from the documents on record as to what happened to the candidature of the third internal candidate; it is clear, however, that this candidature was not ever further considered).

i. In the present case the Interview Panel comprised of Frits Bontekoe, Principal Legal Adviser/LAS, Elizabeth Brown, Senior Legal Officer/LAS, Sandra Muller, Senior Legal Officer/LAS and Angelita Cecere, Head, Vacancy Management Unit, DHRM. It evaluated the four candidates and recommended one. The candidates' qualifications are summarised as follows:

i. External candidate one was a Canadian lawyer and was the joint Officer-in-Charge of the United Nations Office of Staff Legal Assistance (OSLA). Prior to joining OSLA, this candidate was employed by the Federal Department of Justice in Canada as Crown Counsel from 2004-2011, where he litigated before federal courts and administrative tribunals, specializing in immigration and refugee law issues. The candidate has a law degree, a diploma in Police Sciences, two masters degrees in administrative law and public international law

⁸ *Ibid.*, at pages 8 and 9.

⁹ Respondent's reply to Order No. 178 (NBI/2017), dated 6 November 2017, at para. 26.

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international law. He scored the second highest in the interview but was deemed ineligible because his fluency in French was insufficient.

iv. External candidate four was a Dutch Lawyer working as an Administrative Law Specialist in UNICEF in New York since 2012, responsible for the preparation of legal opinions on human resources legal issues, representing UNICEF in proceedings before the UNDT, counselling UNICEF senior management on human resources (administrative and disciplinary) matters, drafting human resources policies and liaising with the United Nation Office of Legal Affairs on proceedings before the UNAT. The candidate was previously on secondment to IAEA'S Office of Legal Affairs in Vienna, as Legal Officer where he prepared written pleadings before the ILOAT and between 2009 and 2012 he worked for the United Nations Office of Staff Legal Assistance (OSLA). In addition to his work experience with several United Nations agencies, including as legal officer at the United Nations Secretariat, he was employed as legal assistant at a private law office in The Hague. He holds two master's degrees in international law and arts, respectively. He scored the third highest in the interview but was deemed ineligible because his fluency in French was insufficient.¹⁰

j. Against this background, the Applicant qualifications were:

A Master's degree in International Law and German Bar exam; three years experience as an Associate Legal Officer with the International Organization for Migration (October 2005 to October 2008), one year experience as an Associate Protection Officer with UNHCR (September 2004 to September 2005), two years as a Legal Officer in UNHCR's Legal Affairs Section (November 2008 to November 2010), 23 months' experience as UNHCR Senior Protection Officer (November 2010 to

¹⁰ Respondent's reply to Order No. 178 (NBI/2018) – Annexes 1 and 4, DHRM Shortlisting Matrix of 2 September 2015 and the Interview Report.

High Commissioner who has the ultimate authority to appoint or assign staff members to vacancies in the professional category (paras. 101 (a) and 137 (a) of the PPA).

m. DHRM's recommendation was presented to the JRB during its meeting on 28 October 2015. In their final minutes dated 28 October 2015, JRB observed as follows regarding the recruitment process:

The JRB noted the [hiring] manager's comment that one internal candidate, [Applicant], does not have recent experience with the new UN internal justice system. While it was considered that this is a weak argument, it was noted that this requirement is nevertheless included in the job description and the operational context.

It was also noted that three external candidates have been interviewed who don't have French skills, while the internal candidate, [Applicant], had not been interviewed. Two JRB members wondered whether it would appear to be inconsistent of the Board not to insist that the internal candidate be interviewed as had been the case for the previous item (item 29).

DHRM explained that the two situations were not identical, as

a procedural flaw as the internal candidate was not interviewed.

out the SOA application by Order No. 369 (NBI/2015) on the grounds that the contested decision was no longer the subject of an ongoing management evaluation.

Applicant's case

18. The Applicant submits that the procedures applied were inherently arbitrary; moreover, internal competencies were breached as regards assessment of his eligibility. His right to a full and fair consideration was violated through wrong application of the criteria and using inappropriate criteria. He fulfilled all the eligibility requirements for the advertised position, both the essential and the desirable ones. His status as internal candidate was not respected, because as a perfectly suitable internal candidate, he should have at least been interviewed for the position.

19. This was due to the Hiring Manager acting with an ulterior motive. The position was created in Nairobi with a specific candidate in mind, the candidate that was subsequently recruited. Whereas he was eliminated from the selection process at an early stage of the selection process in order not to endanger the recruitment of this candidate.

20. Management evaluation procedures violated his right to due process. Moreover, following his request for management evaluation, several high-level officials in UNHCR subsequently conspired in order to defend the contested decision at all cost.

Specific arguments of the Applicant are as follows:

Arbitrariness and breach of competencies in the shortlisting for interviews procedure

21. The shortlisting procedure under para. 71 of the UNHCR PPA is arbitrary. It neither determines who takes the decision whether external candidates are considered nor on what criteria this decision is taken if there are suitable internal candidates. Without objective criteria against which this decision can be measured, there is a total

lack of objectivity and transparency. Paragraph 71 of the PPA is thus arbitrary and any decision based on it and leading to the exclusion of internal candidates is also arbitrary.

22. The DHRM exercises discretion when determining whether candidates fulfil the essential minimum criteria of the job description, including interpretation of certain criteria that require a qualitative review such as “relevant work experience” and “advanced court advocacy skills and substantive litigation experience”. Following the CMSS assessment of his suitability, neither the Hiring Manager nor the DHC were subsequently competent to assess whether he did not fulfil all of the minimum qualifications. It is only after CMSS establishes this general suitability of candidates that the Hiring Manager is asked to provide his/her views on the suitability of the candidates shortlisted by CMSS. The Hiring Manager, however, is not asked to establish whether or not a candidate is suitable, but he/she is meant to assess each candidate’s level of suitability and compare the candidates’ suitability with each other. The Hiring Manager of the position was therefore not competent to assess the general question whether the Applicant was a suitable candidate or not. He should have never been excluded from the selection process on the basis of this statement by the Hiring Manager.

23. Despite the fact that candidates were interviewed in accordance with para. 71 of the PPA, the panel’s role was only to provide its views on the suitability of the candidates. It is DHRM that was meant to match candidates against the position – regardless of whether internal or external candidates were considered. From the minutes of the matching meeting it is obvious that no matching took place. Instead of comparing the candidates using the criteria outlined in para. 79(a) of the PPA, DHRM simply took over the assessment of the Hiring Manager and the panel.

Fulfilment of eligibility requirements

24. The Hiring Manager’s assessment that he was not a suitable candidate is vague with regard to what concrete criteria he does not meet. She appears to put in doubt two essential minimum criteria, namely, a minimum 10 years (12 years for BA holders) of

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c. Candidate four does not fulfil the essential minimum criteria of a Bar exam or qualification to practice law in at least one jurisdiction. In addition, the candidate is not fluent in French.

d. It is questionable whether the selected candidate possessed the required minimum of seven years of progressively responsible professional experience.¹⁸

27. The fact that at least three out of the four external candidates that were interviewed did not fulfil all of the essential minimum qualifications and professional experience required for the position shows that the DHRM took a very broad interpretation of the minimum qualifications and professional experience when it shortlisted these candidates. The Hiring Manager was thus under an obligation to at least interview him together with the four external candidates in order to provide him with the fullest regard in the selection process as required by staff regulation 4.4 and para. 71 of the PPA.

28. The Organizational context cannot establish additional requirements to the job description. The requirements for the position are outlined under “Essential minimum qualifications and professional experience required” in the job description. The additional requirement of “thorough understanding of the jurisprudence of the United Nations

with the old United Nations justice system and represented UNHCR in several cases in the old system when he was a Legal Officer (Human Resources) in UNHCR/LAS.

29. The DHC in her management evaluation gives a new interpretation of the requirement of 10 years of relevant work experience. Such retroactive re-interpretation of the word “relevant” by the DHC is arbitrary. In addition, this new and tight interpretation of “relevant” would have had to be applied to all candidates from the outset.

30. Contrary to what the Hiring Manager expressed in her views on his candidature, he possesses advanced court advocacy skills and substantive litigation experience obtained as an attorney in a law firm and/or as a legal officer in an international organization. Throughout his assignments in the legal offices of UNHCR and the International Organization for Migration (IOM), he represented the organizations in different tribunals. As a junior lawyer, he also worked as the representative of the prosecution in criminal court and regularly assisted a lawyer in civil cases.

31. The Hiring Manager stated that his experience with IOM is of limited relevance as it was prior to the introduction of the new United Nations justice system and IOM participates in the ILOAT system not the United Nations system. This does not consider that ILOAT’s jurisprudence forms part of the case law in the area of the law of international

United Nations justice system. The job description for the post did not mention such a requirement. As DHRM based its decision not to match him to the position on a wrong assumption, this vitiated the overall matching process.

Not been provided with fullest regard due to internal candidate

33. According to staff regulation 4.4 and para. 71 of the PPA, fullest regard shall be had to the requisite qualifications and experience of persons already in the service of the United Nations. “Fullest regard” means more than just “regard”. The Organization had to make an extra effort when examining his candidature but did the exact contrary. The Hiring Manager invented an additional criterion and the Organization subsequently excluded him from the selection process and did not even interview him.

34. UNHCR did not consider that he had a spouse and an 18 month old child who resided in Nairobi, the duty station of the position. According to para. 51 of the UNCHR PPA, the Organization is meant to give due consideration to his personal needs and provide him with opportunities to balance personal, professional and family life in the selection process but did not do so.

35. UNHCR did not take into consideration that his spouse worked for IOM in Nairobi. According to para. 81 of the UNHCR PPA, UNHCR was meant to assist them as a dual career couple in finding assignments in the same duty station.

Deliberate violation of due process in management evaluation procedure: acting in haste

36. The DHC decided on his request for management evaluation within three days. The aim of the quick management evaluation was thus to get rid of the SOA application pending before the Tribunal.

37. In her reply, the DHC also omitted parts of the Hiring Manager’s views. She only cited the Hiring Manager’s general statement that the candidate was required to have recent litigation experience. The DHC thus selectively used what supported her

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moral harm suffered.

45. The Applicant prays the Tribunal to award him the following reliefs:
- a. Rescission of the decision and his reinstatement as the principal remedy.
 - b. Alternatively, he seeks compensation in the amount of three years' net base salary and pension contributions.
 - c. Additional compensation for loss of opportunity for career advancement.
 - d. Additional compensation for non-pecuniary harm.
 - e. The Applicant seeks interest at the applicable US Prime Rate regarding the alternative compensation as of the moment each monthly salary and pension fund contribution would have been due and regarding all other compensation and costs as of the moment the judgement becomes executable. The Applicant also requests the attribution of an additional 5% added to the US Prime Rate until the date of payment if the compensation and costs are not paid within 60 days from the day of the judgment.
 - f. The Applicant also requests the Tribunal to refer any identified instances of possible misconduct to the Secretary General for accountability enforcement.

Respondent's case

The Applicant was given full and fair consideration

46. The selection process was conducted in accordance with para. 71 of the PPA. According to para. 71 of the Revised PPA, the Hiring manager has to present her views

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the vacancy externally may be considered in the aspect of efficiency and cost effectiveness of the recruitment process; the question of the right of individual internal candidates, however, does not arise.

Whether the applicable procedure was followed: whether competence norms were breached

select candidates for an interview that she or he may reject those whom he or she deems unsuitable, notwithstanding the positive result of the screening by the DHRM. These views of the hiring manager are not binding as to the minimal requirements question; they however, become *de facto* decisive as to whether the candidate is invited for an interview or eliminated from the further competition.

58. Further, the Tribunal disagrees with the Applicant's proposition that once DHRM determined the candidates' suitability in the initial screening exercise, this assessment would thenceforth be final and binding on the Organization, including in management evaluation by the Deputy High Commissioner. The Tribunal recalls that, absent a positive rule establishing otherwise, until the decision produces binding external relation (such as acceptance of an offer of appointment by the selected candidate) the administration is competent to reconsider and amend its own decision.²⁵ In particular, as concerns errors as to qualifications for an appointment, the Appeals Tribunal's jurisprudence took it even further in holding that an appointment of a candidate who does not meet the fundamental condition for an appointment is "invalid"²⁶. Given, moreover, that the DHRM assess the candidates only based on data contained in their applications, it becomes clear that

Whether the Applicant was given fair and adequate consideration: the application of the evaluation criteria

63. Even though the minutes of the DHRM final recommendation meeting of 14 October 2015²⁸ state as the reason for not matching the Applicant only that he had not had recent experience with the United Nations justice system, it is apparent from the full minutes

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of the pool from which the “most promising” are picked. In the present instance, for the interview purpose, the hiring manager had the authority to apply the 10 years of relevant experience requirement in a narrow manner, for example, to mean strictly experience in the administration of justice. The point is, however, whether she applied it consistently and not discriminatorily

Ulterior motive

73. The Tribunal recalls that the burden of proving any allegations of ill motivation or extraneous factors rests with the Applicant.³⁰ The Tribunal finds that the Applicant failed to provide any element leading it to conclude that the assessment was marred by an ulterior motive, including that the successful candidate had been upfront chosen. In the prevailing circumstances, most likely, the lack of fair consideration resulted from error of judgment.

Remedy

74. The Tribunal will now, therefore, consider what the legal effects of the bre*n2-5(73 q0.00000912 0

the person concerned alone, but requires “corroboration by independent evidence”. The Tribunal notes, nevertheless, that evidentiary matters have thus far been regulated on the statutory level³⁷, whereas jurisprudential developments do not afford sufficient notice to the addressees, especially given that the effect of the majority holding in *Kallon* on evidentiary requirements is not obvious.³⁸ As a practical matter, the main source of evidence for moral damage is always the person concerned, whereas the Applicant had no reason to secure “independent corroboration” at the time when he was filing his application. It would be, therefore, permissible to rely on the affidavit filed by the Applicant, which is “evidence” in the sense of art.5 b of the UNDT Statute, and the Tribunal’s own experience and knowledge of human psyche as to the occurrence of a moral damage such as would normally be suffered under the circumstances. The proposed live testimony from the Applicant would not have any additional import.

80. The Tribunal considers that being rejected without an interview causes stress and vexation, but also is a fact of life for staff members in the increasingly competitive working environment of the United Nations. While indeed improper criteria have been applied by the DHRM and JRB, this is not a breach of right of a fundamental nature, given that at the core of the Applicant’s rejection lay rather a subtle error in the assessment by the hiring manager. In the totality of the circumstances, the Tribunal finds, therefore, that the amount of USD4,000 and this Judgment constitutes a sufficient appropriate remedy for the moral harm.

Due process violations in the management evaluation procedure

81. The Applicant has alleged due process violations during the management evaluation process. Specifically, he raises that the DHC did not instantly provide him

³⁷ See art. 5(b) of the Statute of the UNDT, as amended by resolution 71/266 adopted on 23 December 2016, the Dispute Tribunal may award compensation “for harm, *supported by evidence*, which shall

with the documentation on the selection process; moreover, the Respondent whitened out extremely relevant passages from the minutes of the JRB.

82. The Applicant's submissions on this score fail for the following reasons: The UNDT Statute and Rules of Procedure do not grant it the power to review the procedure applied in the management evaluation. The management evaluation is not an adversarial dispute with an attendant package of due process rights. Unilateral review of documents is commonplace. Non-disclosure of essential documents is of course problematic when it

Conclusions

84. In the view of the foregoing, the Tribunal decides:
- a. The Respondent shall pay to the Applicant compensation for material damages connected to the loss of opportunity in the amount of USD5,000 and for moral damages in the amount of USD4,000;
 - b. The above amounts shall bear interest at the United States prime rate with effect from the date on which this Judgment becomes executable until payment of the said compensation. If the sum is not paid within 60 days from the date on which this Judgment becomes executable, an additional 5% shall be added to the United States prime rate until the date of payment; and
 - c. All other pleas are rejected.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 2nd day of November 2018

Entered in the Register on this this 2nd day of November 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi