



UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.: UNDT/NY/2019/060/R1
UNDT/NY/2019/070/R1
Judgment No.: UNDT/2021/067
Date: 10 June 2021
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

BELSITO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Marcus Joyce, UN Women
Prue Smith, UN Women

Introduction

1. On 19 December 2019, the Dispute Tribunal issued Judgment No. UNDT/2019/183 whereby it dismissed the Applicant's challenge of the cancellation of the selection process for the post of UN Women Regional Director for Europe and Central Asia at the D-1 level ("the Post") and his non-selection for the subsequently readvertised Post.

2. On 26 June 2020, by judgment No. 2020-UNAT-1013, the Appeals Tribunal remanded Judgment No. UNDT/2019/183 to the Dispute Tribunal to rehear the case for the production of evidence, additional findings of fact and the issuance of a new judgment.

3. On 11-12 May 2021, following the indications of the Appeals Tribunal, the Tribunal held oral hearings to gather the testimony of several witnesses proposed by the parties, including the Applicant.

4. For the reasons stated below, the applications are rejected.

Relevant facts

5. On 6 October 2016, the Post was advertised for the first time.

6. On 22 October 2016, the Applicant applied for the Post.

7. On 12 May 2017, following the administration of a written test and interviews, the selection panel, which included the Hiring Manager, recommended some candidates to the Senior Review Group. On 22 May 2017, the Senior Review Group submitted its recommendation endorsing the panel's recommendations to the Executive Director. The Applicant was the first recommended candidate.

8. On 11 June 2017, the Applicant shared a draft request for management evaluation of the alleged decision not to select him to the Post to the Hiring Manager for her to comment (“the draft management evaluation request”). The email was also forwarded, on the same day, to the UN Women Deputy Executive Director.

9. On 19 June 2017, the Applicant filed his draft management evaluation request contesting “the decision rejecting his candidacy for the Post” (“first management evaluation request”).

10. On 6 July 2017, the Human Resources Section informed all candidates, including the Applicant, that the selection process for the Post had been cancelled and that the position would be re-advertised in a new recruitment process.

11. On 13 July 2017, the Applicant filed a second request for management evaluation contesting the cancellation of the selection process for the post (“second management evaluation request”).

12. On 18 July 2017, the Applicant was notified that his first management evaluation request was rejected as the selection for the Post had been cancelled.

13. On 11 August 2017, the Applicant was informed that his second management evaluation request was rejected.

14. On 4 September 2017, the Applicant joined the UN Women Albania Country Office as Representative at the P-5 level.

15. On 13 October 2017, the Post was re-advertised in a second recruitment process.

16. On 29 October 2017, the Applicant applied for the Post.

17. On 20 July 2018, the Applicant was informed that he was not selected for the Post.

Consideration

18. The Applicant challenges two separate administrative decisions: (a) the cancellation of the selection process for the Post (“first selection process”) and (b) his non-selection for the subsequently readvertised Post (“second selection process”). The Tribunal will review these challenges in turn.

Cancellation of the first selection process

19. The Applicant argues, in essence, that he did not receive full and fair consideration in the first selection process because the Executive Director had decided not to appoint him to the Post on account of his gender. He argues that the selection process had been completed before it was cancelled and that the cancellation was tainted by ulterior motives and intended to exclude him from selection.

20. The Respondent responds that the selection process was cancelled because it had been compromised after the Applicant indicated that confidential information pertaining to the process had been shared with him. The Respondent states that the cancellation occurred before the Executive Director made the selection decision.

21. Concerning the Administration’s ability to cancel an ongoing recruitment process, the Appeals Tribunal has stated that the Administration is not under an obligation to pursue a recruitment procedure once begun and that it is within its discretionary authority to terminate a recruitment procedure and/or to initiate a new one for sound reasons, such as on account of irregularities which occurred in the recruitment process (*Kinyanjui* 2019-UNAT-932).

22. Moreover, under the jurisprudence of the Appeals Tribunal, if an applicant claims that a decision is based on improper motives, except when the Administration refuses to disclose the reasons underlying the decision, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

23. The Applicant avers that there were no reasons given for the cancellation of the selection process for the Post in the cancellation notification.

24. The 6 July 2017 notification is indeed silent as to the reasons for the cancellation. However, the Tribunal notes that in 11 August 2017 management evaluation determination, the Administration informed the Applicant that the reason for the cancellation of the recruitment process was a breach of the confidentiality of that process. The Administration recalled that on 11 June 2017, the Applicant had shared with the Hiring Manager and the Deputy Executive Director his draft management evaluation request which he eventually submitted on 19 June 2017. This draft document indicated that the Applicant had had access to confidential information pertaining to the first selection process. After this information was transmitted to the Executive Director, she decided that the integrity of the selection process was compromised and that the process would be cancelled. The Executive Director had further decided to readvertise the Post.

25. The Applicant states that the evidence on record does not confirm or refute whether, by 11 June 2017, when he shared his draft management evaluation request, a selection decision had been made. He argues that “an implied decision [not to select the Applicant] can be clearly inferred from the communications [between the Hiring Manager and the Applicant] and confirmed by the subsequent cancellation”.

26. In the Applicant’s view, in the absence of candid testimony from the decision makers, it is necessary to rely on the documentary evidence at hand. He refers in particular to the text messages he exchanged with the Hiring Manager in May and June 2017.

27. The Applicant further refers to the Hiring Manager’s testimony admitting that she discussed the selection for the Post with the Executive Director during a mission in Ukraine and cites other text messages between the Applicant and the Hiring Manager in June 2017, in which, the Applicant avers, she informed him that he would not be

selected and she proposed instead a post in Palestine. The Applicant avers that the response to his second management evaluation request of 11 August 2017 admits that the Hiring Manager was the source of the confidential information concerning the selection process obtained by the Applicant.

28. The Respondent responds that the evidence shows that no selection decision had been made by the time the Applicant shared his draft management evaluation request and that it was within the Executive Director's discretionary power to cancel the selection exercise, precisely because its integrity was compromised.

29. The Tribunal heard the testimony concerning the decision to cancel the selection process for the post from three relevant witnesses: the Executive Director, the Hiring Manager and the then Acting Director of Human Resources. The Tribunal also heard testimony from the Applicant himself.

30. The Executive Director testified that she did not remember the reasons why the first selection process was cancelled or the details of any discussions she may have had about it with the Hiring Manager or other persons.

31. The Tribunal agrees with the Applicant that this testimony lacks credibility. While the Tribunal understands that, as head of entity, the Executive Director is responsible for multiple selections every year, it is hard to believe that she would not recall the circumstances surrounding the cancellation of the selection process for a D-1 level position, as there are only a few positions at this level in UN Women.

32. Moreover, the Tribunal regrets that, in preparation for her testimony, the Executive Director appeared to not even have attempted to refresh her memory of the events in dispute. The Tribunal recalls in this respect that not only is it the duty of every member of the United Nations personnel to cooperate with the Internal Justice System, but also it is particularly important for senior leaders of the Organization to lead by example in this regard.

33. The Tribunal also heard the testimony of the Hiring Manager. She testified that in principle, she would have discussed her preferences for the selection of the Post with the Executive Director but that she did not remember having done so in this case.

34. The witness was also asked about the text messages exchanged with the Applicant in May and June 2017 in which she appears to propose to organize a meeting with the Executive Director concerning the Applicant's participation in the selection process and she discusses the Applicant's appointment to a post in Palestine. The Hiring Manager stated that she did not remember the context in which these texts were exchanged.

35. The Tribunal also reviewed an email exchange between the Applicant and the Hiring Manager of 18 May 2017. The Applicant expressed his frustration with the selection process and pointed to what he considered a number of "violations from an [Human Resources] management perspective". The Hiring Manager responded: "As I told you before please let's not project the future until it comes. We don't know what will be the [Executive Director's] decision if she will embrace or not the recommendation of the [recruitment panel]. The [Executive Director] has the prerogative to decline and this is her management decision. We are not there".

36. As for the Executive Director's testimony, the Tribunal finds it difficult to believe that the Hiring Manager has no recollection of the details of her conversations with the Applicant or with the Executive Director concerning the selection process for the Post, particularly in view of the contemporary documentation.

37. The Applicant himself testified that the Hiring Manager called him on 12 June 2017 to notify the selection decision. He refers to an exchange of texts with the Hiring Manager in which she tells him "I explained all [purportedly to the Executive Director] and she feels you will be better in Palestine". In response, the Applicant writes that he will inform "[his] ambassador and the attorneys" and that he will share with the Hiring

Manager his draft request for management evaluation in which he will note the date of 12 June 2017 as the date in which he was notified of his non-selection for the Post.

38. The Tribunal notes that there is no written evidence that a selection decision was made on 11 June 2017, at the date the Applicant shared his draft management evaluation request for this alleged decision. Moreover, given that the selection decision was the exclusive responsibility of the Executive Director, any private and unofficial information passed from the Hiring Manager to the Applicant, while entirely inappropriate, cannot be construed as constitutive of a decision in this respect.

39. This conclusion is corroborated by the testimony from the then Acting Director of Human Resources. He stated that as the second highest-ranking officer in the Human Resources section at the time of the disputed events, he was involved in and had direct knowledge of the first selection process. The witness confirmed that the Executive Director had not made a decision on the selection process by the time the information of the breach of confidentiality was received on 12 June 2017. Once the Administration was made aware of this breach, the Executive Director had no choice but to cancel the selection process.

40. The Acting Director of Human Resources provided a detailed explanation of the timeline of the events in dispute. He stated that the recommendation for the selection had been sent to the Executive Director, via her Chief of Staff, on 27 May 2017. He confirmed that the Applicant and a female candidate were the two recommended candidates. However, on 12 June 2017, the Deputy Executive Director received a copy of the Applicant's draft request for management evaluation which was promptly brought to the attention of the Executive Director and resulted in the cancellation of the selection process.

41. The Tribunal finds the testimony of the Acting Director of Human Resources credible and consistent with the available documentary evidence. Throughout his testimony, he provided direct, coherent and precise information.

42. The Tribunal further finds that the totality of the evidence supports the Respondent's contention that the Executive Director had not reached a decision on the first selection process before the Applicant informed the Hiring Manager and the Deputy Executive Director that he was in possession of confidential information pertaining to the process. The Tribunal finds that the impact of this breach on the integrity of the process was of such caliber that it was entirely reasonable for the Executive Director to consider that she had no option but to cancel the process.

43. The Applicant further avers that the facts that there was no investigation of the breach of confidentiality and that no official was disciplined as a result are further evidence of ulterior motive.

44. The Tribunal agrees that it is shocking that no accountability was sought for such a serious breach of integrity and professionalism. Given how this potential wrongdoing affected the selection process for a senior post in UN Women, it posed a significant risk to the Organization's institutional reputation and should have been looked into.

45. This notwithstanding, given that the decision to cancel the post was based on supported facts, it fit within the discretionary power of the Administration. Therefore, any failure to seek accountability for the breach of confidentiality, while deeply regrettable, has no bearing on the legality of the cancellation decision.

46. The Applicant also refers to the fact that he was offered the post in Palestine when he had already been selected for the post of Country Representative in Albania, both while the first selection process was underway. The Applicant avers that the offer of the post in Palestine was meant as a "distraction" and eventually "dropped" after he contested his non-selection for the Post. The Applicant refers to the testimony provided by the then Regional Director for the Arab States.

47. The Tribunal first observes that it cannot pronounce on whether the withdrawal of the offer to appoint the Applicant to the post in Palestine was the result of a rightful

exercise of the Administration's discretionary power or not given that the Applicant has not appealed it.

48. Moreover, the Tribunal has determined that the reasons underlying the decision to cancel the first selection process were based on supported facts. Therefore, any decision to withdraw an offer of appointment elsewhere cannot be found to have any bearing on the legality of the cancellation decision.

49. Finally, the Tribunal notes that the cancellation decision was caused by the discovery of a breach in the integrity of the process which was disclosed by the Applicant himself. As the Acting Director of Human Resources testified, the Executive Director was not aware of the confidentiality breach until the Applicant shared his draft management evaluation request on 11 June 2017.

50. The Applicant argues that having been made aware of the "potential misconduct" of being discriminated as a candidate for the Post, he had no choice but to immediately inform Human Resources.

51. The Applicant was indeed entitled to submit a challenge against a non-selection decision based on the information received prior to the decision being finalized. However, in application of art. 2.1 of the Tribunal's Statute, he may only do so once an administrative decision, which the Applicant deems to be in violation of his contractual rights, has been finalized.

52. Moreover, the Applicant argues that his disclosure of a breach in the confidentiality of the selection process was used as an "excuse" to cancel the process. This argument lacks merit because it was the Applicant himself who unilaterally chose to share his draft management evaluation request before the first selection process was completed. As the Tribunal has already pointed out, in the face of this disclosure, it was reasonable for the Executive Director to cancel the process.

53. In light of the above findings, the Tribunal is satisfied that the decision to cancel the first selection process was lawful.

Non-selection for the subsequently re-advertised Post

54. The Applicant argues that he had “previously been denied fair consideration” in the first selection process and, therefore, the second selection process was “void *ab initio*”. During his testimony, the Applicant himself confirmed this to be his only ground of appeal against the subsequent selection process.

55. As the Tribunal has found that the cancellation of the first selection process was lawful, the Applicant’s appeal against the second selection process also fails.

56. The Tribunal notes that the Applicant also argues that the Deputy Executive Director, who was involved in the cancellation of the first selection process, had a conflict of interest in participating in the second selection process and was biased against the Applicant.

57. The Respondent replies that the Applicant was not denied fair and full consideration in the first selection process and states that the individuals involved in the second process had no prior involvement in the original cancelled process.

58. The Tribunal notes that during the first selection process, the Deputy Executive Director forwarded the Applicant’s email attaching the draft management evaluation request to the Human Resources section. However, there is no evidence of his involvement in the decision to cancel the first selection process which was, in any case, lawful. The Tribunal therefore cannot find a conflict of interest in his participation in the second selection process.

Conclusion

59. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 10th day of June 2021

Entered in the Register on this 10th day of June 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York