



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/006

Judgment No.: UNDT/2021/070

Date: 18 June 2021

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Katrina Waiters, UNFPA

Background

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”). At the time he filed the application, he was serving as Representative at the UNFPA Oman Country Office within the Arab States Regional Office (“ASRO”) at the P-5 level.
2. On 19 January 2020, he filed an application challenging what he describes as,
 - 1) Decisions to be considered for reassignment to another duty station in 2020 Rotation cycle, practically, effecting my non-selection for any post in rotation cycle of 2019 and,
 - 2) non-selection for 9 posts in Rotation 2019.¹ (“The contested decisions”).
3. The Respondent filed a reply on 19 February 2020 in which the receivability of the application was challenged.

Summary of the relevant facts

4. As an international staff member on a rotational post, the Applicant is a member of UNFPA’s Leadership Pool and regularly participates in an annual “Rotation exercise” in which both internal and external candidates express their interest in a variety of available posts up to a maximum of five.²
5. The candidates are interviewed by a Rotation Panel, assessed, and then potentially assigned to key international rotational posts, inclusive of country representatives, deputy country representatives and international operations managers. Such posts range in professional level from the P-3 level to the D-1 level. The Rotation Panel prepares a report of their recommendations for UNFPA’s Executive Director who makes all final decisions on rotation. A candidate is normally only eligible for selection or reassignment to rotational posts within the specific job type(s) for which

¹ Application, para. V.1

² Reply paras. 6 and 7 and annex R1.

he has been approved as ready.³

6. On 18 December 2018, UNFPA’s Division for Human Resources (“DHR”) distributed an email announcing the 2019 Rotation Exercise and invited candidates to submit applications.⁴

7. The Applicant applied for nine posts: seven Representative rotational posts and two posts of Chief.⁵ The posts he applied for were:

- a. Representative in the Country Office (“CO”) Uzbekistan;
- b. Representative in the CO Ukraine;
- c. Representative in the CO Brazil;
- d. Representative in the CO Yemen;
- e. Representative in the CO Palestine;
- f. Representative in the CO Nigeria;
- g. Representative in the CO Bolivia;
- h. Chief, Gender and Human Rights Branch in the Technical Division (“TD”) at UNFPA’s Headquarters (“HQ”); and
- i. Chief, Executive Board Branch in the Office of the Executive Director (“OED”) at UNFPA’s Headquarters.

He was unsuccessful in all the applications.⁶

8. On 26 September 2019, the Applicant received an email from the Director/DHR

³ Ibid., paras. 8 – 10 and annex R1.

⁴ Ibid., para. 11.

⁵ Application, para. 4 and annex 4.

⁶ Reply annexes 2-8.

informing him as follows regarding the rotation exercise:

... I am writing with regards to the next Rotation process. It has been brought to my attention that you have been exceptionally granted three rotation deferments in your current role as Representative for Oman, a 4-year duty station, which assignment took effect from 1 February, 2013.

Having exceeded your maximum duration in this duty station, I would like to advise that you will be considered for reassignment to another duty station in the 2020 Rotation cycle.⁷

9. On 18 October 2019, the Director/DHR circulated to all UNFPA staff members the list of staff movements that had occurred in UNFPA during the third quarter of 2019.⁸

10. On 6 November 2019, the Applicant sought management evaluation of the contested decisions.

11. On 4 December 2020, the Tribunal issued Judgment No. UNDT/2020/202 in which it concluded that:

a. The application was not receivable in relation to the Applicant's contentions regarding the 26 September 2019 email from the Director/DHR.

b. The application was receivable in relation to the Applicant's contention of the 18 October 2019 circular by which he became aware that he had not been selected to the following posts and for which he was within the statutory deadlines for requesting management evaluation:

- i. Representative in the CO Uzbekistan;
- ii. Representative in the CO Ukraine;
- iii. Representative in the CO Palestine;

⁷ Application, annex 2.

⁸ Ibid., annex 3.

- iv. Representative in the CO Nigeria;
- v. Representative in the CO Bolivia; and
- vi. Chief, Gender and Human Rights Branch in the TD at UNFPA's Headquarters ("HQ").

12. The Tribunal held a hearing on the merits of these claims from 26-29 April 2021 during which oral testimony was received from:

- a. Ms. Josephine Mbithi, Director/DHR;
- b. Mr. Arturo Pagan, Deputy Director/DHR;
- c. Ms. Giulia Vallese, Chair, 2019 Rotation Panel & Representative CO Afghanistan;
- d. Ms. Chidinma Ogbuehi, Human Resources Specialist, DHR/UNFPA;
- e. Mr. Harold Robinson, Regional Director, Latin and Central America Regional Office ("LACRO");
- f. Mr. Benoit Kalasa, Director, Technical Division; and
- g. Mr. Mabingue Ngom, Regional Director, West and Central Africa Regional Office.

13. The Applicant and Respondent filed their closing submissions on 20 and 21 May 2021 respectively.

Considerations

14. The standard of review adopted in the Appeals Tribunal jurisprudence mandates the following issues for consideration:

- a. Whether the procedure laid down in the staff regulations and rules was

followed;

- b. whether the staff member received full and fair consideration;⁹ and
- c. whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner.¹⁰

15. The Tribunal's role is not to substitute its decision for that of the Administration.¹¹

16. There is always a rebuttable presumption that official acts have been regularly performed. If the management can even minimally show that an appellant's candidature was given full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the appellant who must show through clear and convincing evidence that he/she was denied a fair chance of promotion or selection.¹²

(a) Whether the procedure as laid down in the [applicable rules] was followed.

17. The applicable policy in UNHCR for selection processes for positions in the international professional category at the P-1 to D-1 grade levels at the material time was the UNFPA's Policies and Procedures Manual ("PPM") which provides in relevant parts as follows:

Selection and rotation process for international rotational posts:

33. International rotational posts will normally be filled by the placement of candidates from UNFPA's Leadership Pool, a pre-assessed group of candidates who have been approved as ready to perform the functions of one or more types of rotational posts.

⁹ See for example in *Verma* 2018-UNAT-829, para. 13 citing to *Riecan* 2017-UNAT-802, para. 13; *Al-Mussader* 2017-UNAT-771, para. 15; *Kuchеров* 2016-UNAT-669, para. 27, citing *Niedermayr* 2015-UNAT-603, para. 21 and citations therein; *Ljungdell* 2012-UNAT-265, para. 30 and citations therein.

¹⁰ See for example *Loeber* 2018-UNAT-836, at para. 14.

¹¹ *Rolland* 2011-UNAT-122, paras. 20-21 and 26; see also *Niedermayr* 2015-UNAT-603, para. 23, and *Staedtler* 2015-UNAT-547, para. 27.

¹² *Verma* 2018-UNAT-829 citing *Rolland* 2011-UNAT-122, paras. 20-21 and 26; *Niedermayr* 2015-UNAT-603, para. 23, and *Staedtler* 2015-UNAT-547, para. 27.

34. The placement of candidates from UNFPA's Leadership Pool may occur as part of an annual rotation exercise. Placement of candidates from the Leadership Pool may also occur on an ad-hoc basis outside the annual rotation exercise ...

37. The mere inclusion of a candidate in the Leadership Pool shall not give rise to any expectancy, express or implied, legal or otherwise, on the part of the Leadership Pool candidate of selection or reassignment to a rotational post.

18. In line with the above provisions, the Respondent announced the 2019 Rotation Exercise and invited candidates to submit applications. In response to the announcement, the Applicant, a qualified leadership pool member applied for four representative positions (in Uzbekistan, Ukraine, Palestine and Bolivia) and two other positions, one in Nigeria and another at the UNFPA HQ. His candidature was duly considered for the four rotation positions, though he was later informed that he had not been successful.

19. For the position of Chief Gender and Human Rights, his application was received and processed in a similar manner as all other applications, but his candidature failed for lack of gender competence.

20. For the position of representative in Nigeria his candidature was again unsuccessful after he was ranked four out of five in an assessment based on four competencies.

21. The Tribunal finds that thus far, the applicable procedure was followed in the selection exercise with regard of all the six positions.

(b) Whether the Applicant was given full and fair consideration.

Legal framework

22. Paragraph 37 of UNFPA's PPM provides that the mere inclusion of a candidate in the Leadership Pool shall not give rise to any expectancy, express or implied, legal or otherwise, on the part of the Leadership Pool candidate of selection or reassignments

to a rotational post. It follows that only full and fair consideration and not selection is the Applicant's only entitlement in this matter.

23. The Applicant maintains that the selection exercise was tainted with bias, discrimination, retaliation and improper motive. His complaint is premised on the alleged involvement of his immediate supervisor in the assessment of his candidature for the six positions, yet the Ethics Unit had determined that there had been *prima facie* retaliation against him by that supervisor (the ASRO Regional Director). The Ethics Unit recommended to the Executive Director that specific protective measures be put in place, and that any decisions made by the ASRO Regional Director regarding the Applicant's employment had to be reviewed by the DHR office and the ASRO RD's supervisor (the Deputy Executive Director-Programs) as a protective measure against retaliation.

24. The Applicant maintains that the DHR did not put in place a mechanism to scrutinize the authenticity of his supervisor's feedback to the Rotation Panel to ensure that the negative comments which (he maintains) were furnished to the Rotation panels by his supervisor and which formed the basis for his failed candidature, were reviewed, scrutinized and verified.

25. The assertion that the Applicant's supervisor provided negative feedback to the Rotation Panels is based on the interpretation of arts. 17(g), 41 and 44(d) of the UNFPA PPM. Article 17(g) provides that;

The assessment process **may** (emphasis added) include (but is not necessarily limited to) a combination of some or all of the following:

“References / feedback from previous and current supervisors, both internal and external to UNFPA, in particular for external candidates...

Article 41 provides that,

DHR **may** (emphasis added) seek the views and comments of the directors concerned regarding staff members' preferences. Directors shall submit their comments within prescribed deadlines.

Article 44(d) provides that,

The Rotation Panel will: Consider the comments and the views submitted by directors;”

26. The Tribunal’s view is that the language of arts. 17 (g) and 42 does not support the Applicant’s assertion that the Applicant’s immediate supervisor gave feedback to the Rotation Panel about his preferences. That assertion is premised on a misunderstanding of the import of the provisions of the UNFPA PPM which are only meant to offer guidance to Rotation Panels about what may be considered during the assessment exercise. They do not mandatorily require that a candidate’s immediate supervisor provides feedback to the Rotation Panel.

27. Mr. Pagan, Ms. Mbithi and Ms. Vallese were clear that in the rotation selections, only the feedback of the Regional Directors of the regions to which the Applicant was seeking employment (Uzbekistan, Ukraine, Palestine and Bolivia) was sought.

28. Mr. Ngom and Mr. Kalasa were positive that for the posts of Chief Gender and Human Rights and of representative Nigeria, the Applicant’s supervisor did not give feedback.

29. Since the Applicant’s supervisor was the Regional Director for the region under which Palestine falls, he gave feedback with respect to the Applicant’s application for the position in Palestine.

30. The Tribunal finds that the Applicant’s supervisor did not participate in the selection process for the four Representative positions in Uzbekistan, Ukraine, Bolivia and Nigeria, and for the position of Chief Gender and Human Rights.

31. Turning to the selection process, for the positions of representative in Uzbekistan, Ukraine and Bolivia, Ms. Vallese who chaired the 2019 Rotation Panel testified that the selection was done by a Rotation Panel. The goal of the Rotation Panel is to select and match the best candidate in terms of fit, suitability and preference to the available posts. Further that the feedback of Regional Directors did not play a decisive role in the Rotation Panel’s deliberations and ultimate recommendations to the UNFPA

Executive Director, the final decision maker. She confirmed that the Rotation Panel is not required to review the candidate's Performance Appraisal and Development ("PAD") reports or the Strategic Information System ("SIS") as part of their overall assessments. Finally, that the Rotation Panel has discretion to make assessments based on the candidate's submitted materials and the interviews.

32. Her evidence was corroborated in material particulars by that of Mr. Pagan, that the integrity of the selection process is found in the members of the Rotation Panel which is comprised of experienced and highly qualified senior managers.

33. It is noteworthy that the Applicant doesn't dispute the fact that he lacked knowledge of the Spanish language which is an automatic disqualifying factor for the representative position in Bolivia.¹³

34. For the position of Chief Gender and Human Rights which was advertised outside the Rotation process, it is in evidence that the Applicant's curriculum vitae showed that he had no training and experience in gender matters which was a relevant competency for the position. The Applicant was not short listed as a result. Mr. Kalasa's testimony was that the Applicant's current supervisor's feedback was not solicited, since such feedback is only required for the candidate who reaches the last stage.

35. According to Mr. Ngom, the procedure that was adopted in the selection process for the position of representative Nigeria involved him setting up a panel which looked at the candidates' submissions. That Panel comprised of the Resident Coordinator Nigeria, the Regional Director for United Nations Oman and himself. The Applicant was ranked fourth out of the five candidates, based on the assessment of four competency areas of:

- a. Thinking analytically and strategically, communicating for impact and

¹³ Mr. Robinson and Mr. Pagan's testimonies.

achieving result.

b. The second segment was competency to developing and applying professional expertise, business acumen, leading, developing and empowering people, creating a culture of performance.

c. The third area was making decisions and exercising judgement.

d. The fourth segment was about providing a strategic focus, engaging internal and external partners and stakeholders.

36. In a bid to show that that the selection exercise was tainted with retaliation, bias, discrimination and improper motive, the Applicant points to the fact that the reasons which were given for his failed candidature for each position were vague and insufficient.

37. The Tribunal however accepts Ms. Mbithi's and Mr. Pagan's explanations that for each of those positions, since the Applicant was not ranked in the top two or three, there was no requirement that detailed explanations be written for him. The witnesses clarified that feedback and the recommendation of the Panel is stronger for successful candidates.

38. About the fact that the Panel's comments were brief, the Tribunal accepts as reasonable Ms. Mbithi's explanation that a manager is able to quickly look at a résumé and determine that a candidate has the requisite experience. Further, that the fact that a candidate is ranked, "does not fit" is sufficient, because the manager will have looked at several criteria and determined the right fit. The Tribunal finds these explanations sufficient and holds that the Panel's comments were not vague and insufficient under the circumstances.

39. The Tribunal also considered the fact that the thrust of the Applicants complaint is that management failed to recuse his supervisor from participating in the Rotation exercise, yet the Ethics Unit had found *prima facie* evidence of retaliation by his

supervisor against him.

40. The Rotation exercise for the representative positions in Uzbekistan, Ukraine and Palestine took place between 7 January 2019 and 15 February 2019. The position in Nigeria was advertised on 18 October 2018 and the selection decision was taken on 18 January 2019 the very day the Applicant was interviewed.

41. The Applicant made reference to a request for management evaluation which he alleges triggered retaliation from his Supervisor, but he did not attach it to his pleadings. The Tribunal therefore had only his complaint document which is dated 7 June 2019¹⁴ as the only evidence to guide it about when he might have filed the request for management evaluation. The Ethics Unit's determination and recommendation to management which he again asserts were not implemented was made on 30 August 2019.¹⁵

42. Going by the above dates, the fact that the Rotation exercise and selection decisions for the positions in Uzbekistan, Ukraine, Nigeria and Palestine and the relevant Ethics Units determination and recommendation preceded the occurrence of the retaliatory conduct renders this application moot. Even if the Applicant's supervisor had participated in the selection process, there would be no basis for impugning its integrity since the retaliatory conduct which the Applicant is complaining about, and the Ethics Unit's recommendation arose way after the selection process had ended. The Ethics Unit's recommendations could not be applied retrospectively.

43. The available evidence supports a finding as the Tribunal does, that for the Representative positions in Uzbekistan, Ukraine, Bolivia and Nigeria, and the Chief Gender and Human rights position at the HQ, the Applicant's candidature was given full and fair consideration.

44. With regard to the representative position in Palestine, the Applicant's complaint relates to comments that; "Applicant did not have the required experience

¹⁴ Application, Annex 5.

¹⁵ Ibid., Annex 6.

leading a humanitarian setting and did not do well with resource mobilization”, which contradict the assessment in his PADs, that he exceeded corporate targets for resource mobilization in two segments; resource mobilization for core and resource mobilization for non-core. For non-core, he exceeded the corporate target by 500%, and for core, he exceeded by 5,000% in the rotation year.

45. There is no evidence that the above comments were made by the Applicant’s Supervisor. What is clear is that the Applicant’s Supervisor made feedback to the Panel over the Applicant’s candidature for the position of Representative in Palestine which falls in his region.

46. The mere fact that the Applicant’s Supervisor participated in the selection process did not affect its integrity given that at that time the Ethics Unit had not made any adverse findings against him. The Applicant’s assertion that the Ethics Unit’s recommendations were neither implemented nor brought to the Interview Panel’s attention and that his Supervisor’s comments were not verified against UNFPA official records like the PAD and the SIS before the Panel presented their recommendations to the decision maker is without basis.

47. Ms. Ogbuehi’s evidence that she hardly sees candidates with good PAD assessments who are not matched is against the weight of evidence to the contrary. In this regard, the Tribunal accepted as logical Mr. Ngom’s evidence that it would only be necessary to look at the PADs where two candidates who are number one have an equal score. With respect to the Applicant’s failed candidature for the Nigeria position, his PADs were not looked at because he was ranked number four after a rigorous process. According to Mr. Ngom, several candidates may be excellent but the one who will make a good interview or responds well to the questions will be matched, meaning that the other candidates, though excellent will not be matched. It is also possible that a candidate may be excellent in one kind of setting but not good at all for another role. An excellent assessment in the PAD does not automatically translate into excellence for a competitive role.

48. Mr. Kalasa testified that the Applicant had never worked on gender matters and therefore lacked the relevant experience. As such he did not make the short list for the position of Chief, Gender and Human Rights Branch in the technical division, and so his PADs were not checked since only PADs for the candidate who makes it after the interviews are checked.

49. Mr. Robinson explained that the lack of Spanish language knowledge is an automatic disqualification in Bolivia, and that well-qualified applicants aren't selected on that account alone. The Applicant's disqualification was moreover done during the long listing process. He added that the strategic information system of UNFPA is not a source of information in assessing applicants, and that non-selection of applicants who achieved excellent performance documented by SIS and by PADs happens quite often.

50. The above views were echoed by Ms. Vallese who explained that a candidate with good PADs could go unmatched on account of many other factors, and that it is not always possible to match every single candidate.

51. The Tribunal accepts the above explanations and finds Ms. Ogbuehi's evidence that she hardly sees candidates with good PADs who are not matched illogical. The positions in issue were senior positions, and competition for them would invariably be amongst the best. This makes it more likely than not that most, if not all candidates would have excellent PADs, in which case the determining factors would logically go beyond the assessments in the PADs and the information in SIS.

52. About the inconsistency between the excellent assessment in the Applicant's official records and the poor assessment by the Rotation Panel, the Tribunal accepted Ms. Mbithi's testimony that the Panel deliberates and makes a decision based on what they think is the best placement for a particular location.

53. Ms. Mbithi and Mr. Pagan, in response to the question as to why, shortly after the Applicant filed this application he was selected for the position of representative in Libya (a country with a similar profile and presents the similar challenges as Palestine)

on the basis of the same competencies, experience and skills which had been found to be insufficient for the Palestine position, stated that the Panel deliberates and makes a decision based on what they think is the best placement for a particular location. She clarified that there might have been lesser competition for the Libya position for example. Further that the Panel and Peers who sat could have been different from those who processed the applications for the Palestine position. Mr. Pagan also explained that the profile in Libya is quite different and factors such as language are crucial in determining whether the applicant has a suitable profile. In this regard, Ms. Ogbuehi testified about what is referred to as a country profile, which means that there are specificities that are required for each country office. A country profile would indicate what is required in that specific country and the kind of candidate they would want for that post.

54. The available evidence satisfactorily explains the apparent inconsistencies between the assessment in the Applicant's PADs and his assessment during the process that led to his failed candidatures, and they don't support the assertion that he wasn't given full and fair consideration.

55. The Tribunal finds that the Applicant's Supervisor's participation in the selection process for the Palestine position did not affect the integrity of the selection process. Further that the Applicant was given full and fair consideration.

(c) Whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner.

56. The Applicant maintains that the involvement of his Supervisor in the selection process meant that the applicable Regulations and Rules were not applied in a fair, transparent and non-discriminatory manner.

57. According to Ms. Mbithi and Mr. Pagan, the mechanism the Respondent put in place to ensure that the Regulations and Rules are applied in a fair, transparent and non-discriminatory manner is to ensure that the Rotation Panel is independent. It was in evidence that the Panel, a group of peers who look at what an applicant has submitted

and what the Regional Directors have said, comprises of carefully selected persons who are held in high regard within the Organisation.

58. The Tribunal is cognizant of the fact that the burden of proving any allegations of ill motivation or extraneous factors rests with the Applicant¹⁶. There is evidence that the Applicant's candidature for six positions (in Uzbekistan, Ukraine, Bolivia, Nigeria, Palestine and for position of Chief Gender and Human Rights at the HQ) was given a full and fair consideration. The Applicant failed to discharge the evidentiary burden.

Conclusion

59. The Tribunal finds that for all five Rotation positions in Uzbekistan, Ukraine, Bolivia, Nigeria, Palestine and for the position of Chief Gender and Human Rights at the HQ the proper procedures were followed and all relevant material was taken into consideration by the Rotation and Interview Panels. There is no evidence that the Applicant did not receive full and fair consideration or that he was discriminated against.

Judgment

60. The application is dismissed.

(Signed)

Judge Margaret Tibulya

Dated this 18th day of June 2021

¹⁶ *Obdeijn* 2012-UNAT-201; *Jennings* 2011-UNAT-184; *Azzouni* 2010-UNAT-081 and *Asaad* 2010-UNAT-021.

Entered in the Register on this 18th day of June 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi